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property, in execution of which the house was sold to plaintiff on the 20th July, 1883, for Rs. 27.

It has been contended before us that the plaintiff can rely on the first mortgage to Khando passed on 4th October, 1864, on the ground that it must be deemed to have been kept alive by Khando when Narayan passed the second mortgage of 1882, and that the plaintiff thus acquired a title paramount to that of defendant in the eastern half purchased by him in 1868. The question in such cases doubtless depends on the intention of the parties to be gathered from all the circumstances—*Goluknath v. Lalla* (1), which was followed by this Court in *Dullabhdas v. Lakshmandas* (2). Here, however, a decree had been obtained on the mortgage of 1864, and all rights under that mortgage had become merged in the decree. Satisfaction of the decree was certified to the Court, and entered up, when the second mortgage of 1882 was passed; and the fact that the debt secured by the second mortgage is the balance of the old debt, is the only circumstance from which an intention to keep alive the decree could be inferred.

We agree with the Subordinate Judge that this circumstance alone is not sufficient, and that there are no rights under the old mortgage which the plaintiff can now assert as against defendant in possession. We must, therefore, confirm the decree with costs.

Decree confirmed.

13 B. 352=13 Ind. Jur. 423.

[352] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Scott.

EMNABAI AND OTHERS (*Original Plaintiffs*), *Appellants v. HAJIRABAI* (*Original Defendant*), *Respondent*.^{*}
[30th November and 7th December, 1888.]

Mahomedan law—Hiba, or deed of gift—Gift by husband to wife—Possession—Continued receipt of rents by husband—Husband, manager for wife—Gift of "mooshaa" or undivided part—Subsequent partition.

In 1871 H. G., a Mahomedan, executed a formal *hiba*, or deed of gift, to his wife, the defendant, of a house belonging to himself, but let out to tenants, and duly registered the deed. In 1876-77 he caused the house to be transferred into the name of his wife in the municipal and *fazandari* books. After the execution of the deed of gift, and down to the time of his death in 1884, H. G. continued to collect the rents as before, and they were entered in his books and drawn upon for family purposes in the same manner as they had always been. In 1881-82 H. G. had an account of the rents of the house prepared in his wife's name from 1871-72 up to date.

Held, that the above circumstances afforded sufficient evidence of possession having been given to the defendant, either in 1871 or 1876, to satisfy the requirements of Mahomedan law. H. G. being the husband of the defendant, would naturally continue to collect the rents as her manager, even when he regarded himself as having parted with the ownership to his wife, which the above-mentioned circumstances sufficiently showed that he did.

In 1883 H. G. executed a second *hiba*, duly registered, to the defendant, of an undivided moiety of the house in which he and the defendant resided, and to which H. G. and his brother were entitled in equal shares. No partition had been made between H. G. and his brother when H. G. died.

^{*} Suit No. 525 of 1886; Appeal No. 607.

(1) 3 C. 307.

(2) 10 B. 88.

Held, that the gift was invalid, as being a gift of a "mooshaa", or undivided part, in a thing susceptible of partition.

Quære—whether, if there had been partition subsequently to the deed, that would or would not have operated to validate the gift.

[R., 22 B. 489 (492); 26 B. 577; 29 B. 306=6 Bom. L. R. 975 (978); 33 C. 518=13 C. L. J. 492=15 C.W.N. 541=9 Ind. Cas. 635.]

APPEAL from a decree made by BAYLEY, J.

The plaintiffs were the three daughters of one Haji Gazi Ahmed who died in 1884. The defendant was his widow. The plaintiffs and the defendant were his heirs and next-of-kin according to Mahomedan law.

The present suit was brought for the administration of the estate of the said Haji Gazi Ahmed, all of which estate (the plaintiffs alleged) had been taken possession of by the defendant. [353] They stated in their plaint that the moveable property amounted in value to about Rs. 36,000, and that the immoveable property consisted of a house and land in Ballu Sarung Street, and of one equal moiety of and in a house and land situate in Syed Abdul Rahman Street in Bombay. The plaintiffs claimed their shares in the said properties.

The defendant alleged that her deceased husband only left moveable property of the value of about Rs. 300, and that she had always been willing to pay the plaintiffs their share thereof. As to the immoveable property, she stated that the house in Ballu Sarung Street had been in her possession since the 25th March, 1871, on which day her deceased husband executed a deed of gift of the same to her. The other immoveable property, *viz*, the moiety of the house and land in Syed Abdul Rahman Street, she alleged, had been given to her by her husband by a deed of gift dated the 30th May, 1883.

The plaintiffs prayed for a declaration that the said alleged deeds of gift might be declared null and void as against them as heirs of the said Haji Gazi Ahmed, and that the same might be set aside.

The case was heard in March, 1888, by Bayley, J., who passed a decree declaring that both the deeds of gift were valid and referred the suit to the Commissioner to take accounts of the moveable property.

The plaintiffs appealed.

Tyabji and *Inverarity*, for appellants.—They cited Macnaghten, pp. 50, 51; 8 and 9; *Ibid.*, Case V, p. 200.

Kirkpatrick and *Russell*, for respondent.—They cited *Amina Bibi v. Khatija Bibi* (1); *H. H. Azim Unnissa Begum v. Dale* (2); *Nawab Umjad Ally Khan v. Mohumdee Begum* (3); *Ameeroonnissa Khatoon v. Abadoonnissa Khatoon* (4); *Jiwan Bakhsh v. Imtiaz Begum* (5).

JUDGMENT.

[354] SARGENT, C. J.—The question in this case is as to the validity of two deeds of gift executed by the deceased Haji Gazi Ahmed in favour of his widow, the defendant Hajirabai, on the 25th March, 1871, and 30th May, 1883.

The deceased died on the 13th March, 1884. The first deed of gift relates to a house which, at the time of the gift and up to the death of the donor, was occupied by tenants, and its validity is impugned on the ground that the widow was not put into possession as required by

(1) 1 B.H.C.R. 157.

(3) 10 W.R.P.C. 25=11 M.I.A. 517.

(5) 2 A. 93.

(2) 6 M.H.C.R. 455 (463).

(4) 15 B.L.R. 67=2 I.A. 87.

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Mahomedan law. It is not in dispute that, after this execution of the deed of gift, Haji Gazi continued to collect the rents as before, and that they were entered in his books and drawn upon for family purposes in the same manner as they had always been. But in 1876 the house was transferred into the name of the wife in the municipal books; and in 1877 the *fazandari* bill was made out in her name. Lastly, in 1881-82 Haji Gazi had an account of the rents of the first house prepared in the name of Hajirabai from 1871-72 up-to-date. Much reliance was placed by the plaintiffs on the circumstance that the donor had continued to collect the rents as before; but this circumstance in the case of gift from a husband to a wife may be accounted for by the husband (as the person upon whom the task would naturally devolve) collecting the rents as his wife's manager; and slight evidence to show that such was the case may well, in our opinion, be accepted as sufficient, in a case, like the present, of a formal instrument of gift accompanied by registration. In *Amina Bibi v. Khatija Bibi* (1), where the gift consisted of a house, in which the parties lived, and a "chal" adjoining the house let to tenants; Sir M. Sausse, C.J., says: "In my opinion, the relation of husband and wife, and his legal right to reside with her and to manage her property, rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hiba*, and in the husband generally receiving the rents of the 'chal' annexed to that house." In that case Sir M. Sausse considered that the declaration in the *hiba* itself, the delivery of which was [355] testified to by witnesses, that possession was thereby given of the house and "chal," and evidence of the husband having stated on one occasion that he was collecting the rents on account of the wife, were deemed sufficient proof that the husband was acting as manager in respect of the *chal*.

In the present case we have a formal instrument of gift duly registered, and the transfers in 1876 and 1877 by Haji Gazi of the house in the municipal and *fazandari* books into the name of his wife afford a satisfactory indication that Haji Gazi regarded his wife as the owner, there being no reason, under the circumstances, for referring the entry of her name as occupant to any other title; from which it may be inferred that he regarded himself as collecting the rents as her manager. Whether this state of things commenced at once after the gift, or only in 1876, is immaterial, as there is no reason to suppose that what occurred in 1876 was not done with Gazi's consent—a fact which derives corroboration from Haji Gazi, in 1881-82, treating the rents as belonging to his wife and directing an account of them to be taken. We think, therefore, that the validity of the gift of 25th March, 1871, is satisfactorily established.

As to the second *hiba*, the subject of which was an undivided moiety of a house in which Haji Gazi and his wife resided, and to which Haji Gazi and his brother were entitled in equal shares; it was objected that it was invalid as being a gift of a "mooshaa" or undivided part, in a thing susceptible of partition. The rule of Mahomedan law is stated thus in the *Hydaya*, Vol. III, p. 293: "That seisin in cases of gift is expressly ordained, and consequently a complete seisin is a necessary condition; but a complete seisin is impracticable with respect to an indefinite part of divisible things, as it is impossible, in such, to make seisin of the thing given without its conjunction with something that is not given; and that is a defective seisin." And again the *Shurhi Viqaya*: "A gift of

part of a thing which is capable of division is not valid, unless such part be divided off, so that seisin may be definite and not include anything else." In *Ameeroonissa Khatoon v. Abadoonissa Khatoon* (1) it [356] was held by the Privy Council that "shares in *zamindaris*, from the special legislation relating to them and before any partition of the land, were definite estates capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and, therefore, not falling within the principle and reason of the law relating to *musha*." In *Jiwan Bahsh v. Imtiaz Begam* (2), in which the last case was referred to, the Allahabad High Court held that a defined share in a landed estate was a separate estate, and not open to the objection which attaches under Mahomedan law to the gift of joint and undivided property. The landed estates in that case were *zamindari* villages, and the Court said their view was sanctioned by the rulings of the Privy Council—referring, we presume, to the decision of the Privy Council we have already mentioned, as there is none of them, that we are aware of, in which the rule is discussed. In *Kasim Husain v. Sharif-un-nissa* (3) the donor's gift was of the one-twelfth share in a "*muafi*" estate, and the Court supported the gift on the ground that a gift of a "specific share is not open to objection under Mahomedan law"—meaning, we apprehend, a share recognized as a separate estate capable of distinct enjoyment. In the Tagore Lectures for 1884 the author refers to these decisions as only applicable to the large landed estates in the North-West of India. The above decisions do not, therefore, touch the present question, *viz.*, whether a gift by the donor of his undivided share in a house, or ordinary lands, not forming part of estates as they are found in Northern India, is open to objection under Mahomedan law. It was said that the rule did not apply, unless the donor retained some share of the property. This objection was taken in *Ameeroonissa Khatoon v. Abadoonissa Khatoon* (1) already referred to, but not decided by the Privy Council, as it was not necessary, in their view of that case, to consider it. In Case VIII of Macnaghten's Precedents of Gifts it is assumed that a gift by one of several co-sharers of his share to a stranger is invalid. Alluding to the widow's gift to the donee, the answer at the bottom of p. 204 continues: "A gift even of her own portion (as one of the heirs) is invalid, that being [357] undefined and not admitting of legal seisin." Again, in the note to Case X, p. 208 the author, after alluding to the supervenient indefiniteness arising from the discovery that the donor was not the sole proprietor, says: "It would have been otherwise had the right of a third person been recognized to exist at the time of the gift, which would in that case have been null and void *ab initio*." However in *Ameena Bibee v. Zeifa Bibee* (4) it was held, on the authority of Case XIII of Macnaghten's Precedents of Mahomedan Law, that one of two sharers in lands and houses can give over his share to the other co-sharer even before division: and this ruling was extended by the Privy Council, in *Mahomed Bahsh v. Hosseni Bibi* (5), to the case of the gift by one of three co-sharers (and, therefore, of any number of co-sharers) of his share to one of the others, on the ground that not to do so would, in their Lordships' opinion, be refining on a refinement amounting almost to a *reductio ad absurdum*. In the present case the object of the gift is an undivided moiety of a house which had admittedly not been partitioned, and the donee is not.

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(1) 15 B.L.R. 67=2 I.A. 87 (106).

(2) 2 A. 93.

(3) 5 A. 285 (287).

(4) 3 W. R. C. R. 37.

(5) 15 C. 701.

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a co-sharer, but a third person. The case, therefore, is not governed by any of the above judicial decisions, and falls within the rule as interpreted by the cases in Macnaghten's Precedents, and which we think this Court ought to follow. Whether such a gift is void, or only invalid, as to which there would appear to be some difference of opinion between Mahomedan lawyers, is not a question which arises in this case, as there had been no partition, and defendant had not been put into possession of any specific portion of the house as her husband's share before her husband's death.

We must, therefore, vary the decree by declaring that the deed of gift of 30th May, 1883, is invalid; and by directing that the parties do pay their own costs of the suit and also of this appeal.

Decree varied.

Attorneys for the appellants:—Messrs. *Tyabji and Dayabhai.*
Attorneys for the respondent.—Messrs. *Chalk, Walker, and Smetham.*

13 B. 358.

[358] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley

GANGAVISHNU SHRIKISONDAS (*Plaintiff*), Respondent v. MORESHVAR BAPUJI HEGISHTE AND OTHERS (*Defendants*), Appellants.*
[12th March, 1889.]

Copyright—Annotated edition of an ancient religious work—Originality—Colourable imitation—Injunction—Damages—Account—Act XX of 1847, s. 12.

The plaintiff, a bookseller, in 1884 brought out a new and annotated edition of a certain well-known Sanskrit work on religious observances entitled "Vrtraj," having for that purpose obtained the assistance of Pandits, who re-cast and re-arranged the work, introduced various passages from other old Sanskrit books on the same subject, and added foot-notes. In 1885 the plaintiff registered the copyright of this work. In 1886 the defendant printed and published an edition of the same work, the text of which was identical with that of the plaintiff's work, which moreover contained the same additional passages, and the same foot-notes, at the same places, with many slight differences.

Held, that the plaintiff's work was such a new arrangement of old matter as to be an original work and entitled to protection, and that as the defendants had not gone to independent sources for their material, but had pirated the plaintiff's work, they must be restrained by injunction.

Held, also, that an account of the net profits made by the defendants by the sale of the plaintiff's book could be ordered notwithstanding the provisions of s. 12 of Act XX of 1847, as the result of the account would be to give to the plaintiff what he could have claimed as damages under that section.

ACTION for alleged infringement of copyright.

The plaintiff stated that some time prior to 1884 he resolved to publish a new and improved edition of an old religious Sanskrit work, entitled "Vrtraj," on religious observances, and with that object secured the assistance of two well-known Pandits who prepared the new edition, recasting and re-arranging the old materials, and adding valuable foot-notes. The work occupied the Pandits for two years, and was published in 1884. It was registered under Act XXV of 1867 in May, 1885.

* Suit No. 158 of 1887 ; Appeal No. 611.