APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston.

1902. *September 12.*

JOITARAM RAMKRISHNA (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMKRISHNA NANDLAL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Gift—Donor not in possession—Donee not placed in possession—Gift of an undivided share—Stranger to the gift disputing its validity—Adverse possession—Limitation—Misjoinder of parties—Plaintiff's discretion as to addition of parties—Practice—Procedure.

The plaintiff's father and uncles were members of a joint Hindu family, but in 1870 they separated and partitioned the family property with the exception of certain land, which was kept joint and was applied to the maintenance of their mother during her lifetime. It remained in the possession of the plaintiff's father, who was the eldest of the family. The mother died in 1877, but the land still remained joint and continued in the possession of the plaintiff's father. On 15th November, 1877, the plaintiff's uncles M. and J. by a registered deed gave to their nephew, the plaintiff, their undivided shares in this land. They were not, as already stated, in possession and they did not deliver possession of their shares to the plaintiff or to any one on his behalf. The plaintiff's father (their co-sharer) was in possession and he continued in possession after the gift was made. The plaintiff was at that time, and until 1892, a minor and lived with his father as a member of a joint family. On the 1st January, 1887, his father mortgaged the whole of the land to the second defendant, who at once entered into possession. Subsequently the land subject to this mortgage was sold in execution of a decree against the plaintiff's father and was purchased by one Kirpashankar Ranchhor. In 1892 the plaintiff attained his majority and on the 2nd January, 1899, he filed this suit against his father (defendant 1) and his father's mortgagee (defendant 2) to recover the land which had been given to him on the 15th November, 1877. Kirpashankar was not made a party to this suit. The lower Court rejected the plaintiff's claim on the ground that the gift to the plaintiff by M. and J. of their undivided shares of land not in their possession, and of which the plaintiff was not put into possession, was invalid. They also held that Kirpashankar should have been a party and that the plaintiff's claim was barred by limitation inasmuch as the mortgagee had held adverse possession since 1st January, 1887, *i.e.*, more than twelve years. On appeal to the High Court,

Held, (reversing the decree of the lower Court) that—

(1) The gift to the plaintiff in 1877 was valid. The donors, in relinquishing their claim to their undivided shares, had done all that was practically necessary, and by the registered deed of gift had done all that they could do,

* Second Appeal No. 563 of 1901.

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and the possession of the father was practically the only mode in which the plaintiff, who was then an infant, could accept or exercise possession. The donors never objected and made no attempt to revoke their gift. No division was necessary, as the whole of the land was in the possession of the plaintiff's father.

(2) The fact that the shares were undivided did not render the gift invalid. This was not a gift by members of an undivided family to an outsider as in *Vrandavandas* v. *Yamunabai.*(1) It was a gift by persons who were not members of an undivided family (the plaintiff's uncles having previously separated from his father) to the plaintiff, a member of another coparcenary. No consent was necessary to validate the alienation, nor was there any one who did or could object.

(3) The plaintiff's claim was not barred by limitation. The property did not pass to the mortgagee until 1st January, 1887, and this suit, instituted on 3rd January, 1899, allowance being made for the vacation, was therefore in time.

(4) The auction-purchaser was not a necessary party. The plaintiff was not bound to sue every possible claimant to the land. If he chooses to leave the question that might arise between him and the auction-purchaser to future settlement, he did it at his own risk. He was *dominus litis.*

SECOND appeal from the decision of S. L. Batchelor, District Judge of Ahmedabad, confirming the decree passed by Ráo Sáheb Atmaram Jamnadas Kaji, Subordinate Judge of Umreth.

Suit to recover possession of land.

The land in suit originally belonged to one Nandlal, who had four sons, viz., Ramkrishna, Jethalal, Mayaram and Chhaganlal. The eldest son Ramkrishna had one son, Joitaram (the plaintiff).

On the 2nd June, 1870, the property left by Nandlal on his death was divided by his said four sons, except the land in dispute and some other property which was kept joint and was applied to the maintenance of their mother during her lifetime, but it was agreed that after her death it should be divided equally among them, and her funeral expenses were to be defrayed by them in equal shares. Ramkrishna, the eldest brother, remained in possession of this undivided property.

The mother died in 1877. The said property was not divided after her death. By a deed of gift dated the 15th November, 1877, Mayaram and Jethalal made over their shares of the undivided property to their nephew Joitaram (the plaintiff), the son

(1) (1875) 12 Bom. H. C. 229.

of Ramkrishna (defendant 1). At the date of gift Ramkrishna (defendant 1) was still in possession and enjoyment of the said property, and he continued in such possession subsequently to the said gift. Joitaram, his son (the plaintiff), was then a minor and was living with his father as a member of a joint Hindu family.

On the 1st January, 1887, Ramkrishna (defendant 1) mortgaged the land in dispute to the second defendant, who at once entered into possession and enjoyment thereof.

Subsequently in execution of a decree against Ramkrishna (defendant 1) the said land was sold subject to the said mortgage, and was purchased by one Kirpashankar Ranchhor.

The present suit, which was filed within twelve years from 1st January, 1887, (the date of the mortgage) was brought by the plaintiff Joitaram, who attained his majority in 1892, against his father Ramkrishna (defendant 1) and his (Ramkrishna's) mortgagee (defendant 2) to recover the property given to him as above stated on the 15th November, 1877, by his uncles Mayaram and Jethalal.

As the Courts were closed for the Christmas vacation the suit was not filed until the 2nd January, 1899.

Defendant 1 admitted plaintiff's claim.

Defendant 2 (the mortgagee) contended that the gift relied upon by plaintiff was invalid, as neither the plaintiff nor his grantors ever had possession of the land. The land was in possession and enjoyment of Ramkrishna (defendant 1), who mortgaged it to him for valuable consideration. He further submitted that the auction-purchaser Kirpashankar Ranchhor was a necessary party to the suit.

The Subordinate Judge held that the gift to plaintiff was not valid; that the donors were not in possession of the property given; that Ramkrishna (defendant 1) was competent to mortgage the land; that the suit was time-barred; that the auction-purchaser was a necessary party, and the suit was therefore bad for misjoinder. In his judgment he said:

Gift of the property of which the donors themselves were not in possession and the possession of which was not and could not be given to the donee is invalid. Gift of an undivided share is also invalid, the plaintiff being not a member of the family...... The plaintiff and defendant 1 are a son and a father.

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They admittedly live together, the defendant 1 being manager of the family ...... The defendant 1 pays the land assessment and enjoys it at least since 1883. Thus, apart from the question of invalidity or otherwise of the gift, plaintiff's claim is clearly time-barred. He silently allowed the mortgagees to believe that his father was absolute owner to deal with, and on the faith of such a belief the mortgagee was induced to advance money, which he could not be deprived of by the collusion of the father and son ...... The purchaser is, of course, a proper and necessary party. See I. L. R. 16 Bom. 608.

On appeal this decree was confirmed by the District Judge.

The plaintiff preferred a second appeal to the High Court.

L. A. Shah for the appellant (plaintiff):—The lower Courts have erred in holding that the suit is bad for non-joinder of parties. The auction-purchaser is not a necessary party as he is not in possession, and by this suit the plaintiff seeks to recover his property from the mortgagee in possession. If necessary, the plaintiff should now be allowed to make the auction-purchaser a party.

The lower Courts were wrong in holding that the gift was invalid. The donors did all they could under the circumstances to convey their share by the deed of gift to the plaintiff. Delivery of possession is not essential to the validity of the gift. As the gift was to a member of the family to which the other coparceners did not object, it was not invalid. The gift of an undivided share would be invalid only if it were made to a *stranger* without the consent of the other coparceners. Again, the mortgagee (defendant No. 2) must be deemed to have notice of the registered deed of gift, and he cannot object to the validity of the gift. The objection could only be raised, if at all, by the donors and not by a third party. See *Balmakund* v. *Bhagwandas* (1); *Lakshimoni Dasi* v. *Nittyananda Day* (2); *Kalidas Mullick* v. *Kanhaya Lal Pundit* (3); Mayne's Hindu Law, 6th Edition, section 377; *Vasudev* v. *Narayan* (4); *Vrandavandas* v. *Yamunabai*. (5)

As regards the question of limitation, the suit is within twelve years from the date of the mortgage to defendant 2. The possession of Ramkrishna (defendant 1) was in no way

(1) (1894) 16 All. 185.
(2) (1892) 20 Cal. 464.
(3) (1884) 11 Cal. 121.
(4) (1882) 7 Bom. 131.
(5) (1875) 12 Bom. H. C. 229.

adverse to plaintiff, who was living with his father Ramkrishna (defendant 1), and who was admittedly a minor up to 1892.

G. K. Parekh for respondent (defendant 2):—The auction-purchaser is a necessary party, being interested in the property, the subject-matter of the litigation.

The lower Appellate Court has found that Ramkrishna (defendant 1) has been in adverse possession of the land for more than twelve years. This being a finding of fact, it must be accepted as final in second appeal.

The gift is not valid, as there was no delivery of possession, which is necessary to constitute a valid gift. There is no evidence of the delivery of the deed of gift to the plaintiff. It is also invalid as being the gift of an undivided share by a coparcener. No steps seem to have been taken by the donors to complete the gift.

BATTY, J.:—In this case the plaintiff seeks to recover possession of a certain portion of land which originally formed part of the joint ancestral property of his father (the defendant No. 1) and his father's brothers. In 1870 plaintiff's father and the brothers of plaintiff's father separated in interest, but the field of which the land in suit forms part was provisionally assigned for the maintenance of their mother, and therefore was not at the time partitioned. Subsequently, after the death of the mother, the plaintiff's uncles executed, as to their unpartitioned share in that field, a document in favour of the plaintiff, then an infant, purporting to be a deed of gift. The document is Exhibit 17. It is dated 15th November, 1877, and was duly registered. According to its provisions the plaintiff's mother was to be the guardian of the plaintiff for the purposes of that property. It is not alleged that the plaintiff's uncles ever themselves enjoyed personally possession of the land in question, or delivered possession thereof to the plaintiff orto any one on his behalf. The plaintiff's father who was in possession remained in possession, paid the assessment and apparently had undisturbed management. In 1885 the plaintiff's father executed a mortgage, which included the property in suit. This mortgage was without possession.

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On 1st January, 1887, the mortgage of 1885 was redeemed by moneys obtained from defendant No. 2, advanced on a mortgage with possession of the same land.

The plaintiff attained majority in 1892 and instituted the present suit on 2nd January, 1899, making his father a party thereto as well as defendant 2, the mortgagee before mentioned.

It appears that a third person not joined in this suit had bought the right, title and interest of the defendant No. 1 in the property in question at an auction-sale, and the lower Courts held that this auction-purchaser was a necessary party to the suit.

The main grounds of the defence were, however, that the gift was invalid both because it was unaccompanied with possession and because it purported to be the gift of an undivided share, and that more than twelve years of adverse possession barred the plaintiff's claim to disturb the mortgage in which it was suggested he had acquiesced.

The leading cases on the question whether delivery of possession is necessary to the validity of a gift by a Hindu donor appear to be the Privy Council cases *Kalidas Mullick* v. *Kanhaya Lal Pundit* (1) (followed in *Ugarchand* v. *Madapa* (2)) and *Nawab Ibrahim Ali Khan* v. *Ummatul Zohra*.(3) The first-mentioned of these corrected the error in *Kachu Byaji* v. *Kachoba Vithoba* (4) that delivery of possession was indispensable to the validity of a sale under Hindu law. Their Lordships pointed out that the error appears to have arisen from a misconception as to what had been decided in *Harjiwan Anandram* v. *Naran Haribhai*, (5) the real point in which was that the alleged donor had reserved his *jus disponendi*, had denied the fact of the gift and had continuously received the rent for the subject-matter. These last-mentioned circumstances were emphasised as differentiating that case from one in which the donor had done all she could to complete the gift, was a party to the suit and admitted the gift to be complete.(6) Their Lordships also pointed out, as contributing to the error, the misleading nature of the head-note

(1) (1884) 11 Cal. 121 s.c. L. R. 11 I. A. 218.

(2) (1885) 9 Bom. 324.

(3) (1896) 19 All. 267 s.c. L. R. 24 I. A. 1.

(4) (1873) 10 Bom. H. C. 491.

(5) (1867) 4 Bom. H. C. 31.

(6) (1884) 11 Cal. at p. 132.

in *Girdhar Parjaram* v. *Daji Dulabhram*[1] as to what was the essential ground of decision in that case. The judgment in *Kalidas Mullick* v. *Kanhay Lal*[2] further distinguishes between cases of contracts on the face of them purporting to be for performance in future, as in the cases of *Rajah Saheb Perhlad Sein* v. *Baboo Budhoo Singh*[3] and *Rani Bhobosoondri* v. *Issurchunder Dutt*[4] on the one hand, and cases where under the terms of a gift the donor is entitled to possession on the other, and with reference to the last-mentioned cases observed that there is no reason why a gift or contract of sale, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give the donee or purchaser *a right to obtain* possession.

The contention having been raised that the completion of a gift by possession was required on the analogy of the feudal rule as to investiture and livery of seizin, their Lordships preferred the analogy found in cases relating to voluntary contracts or transfers, where if the donor has done all that he could do to perfect his contemplated gift, he cannot be compelled to do more. With this may be compared the rulings in *Standing* v. *Bowring*[5] and cognate cases.

As to the contention that the deed of gift was utterly invalid because the donor was out of possession and no possession was ever given to the donee, it was observed "that the dispute was not between the donee and the donor, or a person claiming under her" (I. L. R. 11 Cal. 132). Thus the effect of the decision in *Kalidas Mullick's case* is to recognize that, as between a donee and a stranger, a gift may be valid though at the time the donor may have been out of possession and though the donee may never have obtained possession, provided that the donor had done all the donor could to complete the gift.

The other Privy Council case of *Nawab Ibrahim* v. *Ummatul Zohra*[6] seems to establish the converse, *viz.*, that when the alleged donor has not done all he could to complete the gift, but

(1) (1870) 7 Bom. H. C. 4.
(2) (1884) 11 Cal. 121 s.c. L. R. 11 I. A. 218.
(3) (1869) 12 M. I. A. 275 at p. 306.
(4) (1872) 11 Ben. L. R. 36.
(5) (1886) 31 Ch. D. 282.
(6) (1896) 19 All. 267.

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has made a reservation of the *jus disponendi*, the alleged gift is unsustainable. The essential to the validity of a gift seems to be, therefore, that the donor should have done all he could to complete the gift.

It may be noted that the case of *Vasudeo Bhat* v. *Narayan Daji Damle*(1) was decided two years before that of *Kalidas Mullick*,(2) and so far as it is inconsistent therewith, is overruled thereby.

The case of *Ugarchand* v. *Madapa*,(3) decided shortly after *Kalidas Mullick's case*, applied its principles to a *kararnama*, where the person who executed it was not in possession, and declared the Full Bench decision in *Bai Suraj* v. *Dalpatram Dayashanker*(4) overruled.

The Allahabad High Court, in *Man Bhari* v. *Naunidhi*(5) followed in *Balmakund* v. *Bhagwandas*,(6) seems to have held that the validity of the gift was dependent on, or at least established by, the delivery of the deed of gift. But the first of these was decided before *Kalidas Mullick's case*, and the second does not refer to it. In *Man Bhari* v. *Naunidhi*, the fact that the donor had relinquished the subject of the gift, so far as he could, was apparently regarded as the most important circumstance in the case. The case *Lakshimoni Dasi* v. *Nittyananda Day*(7) was one in which the alleged donor had executed a duly registered deed of gift, but four years after sold a portion for consideration and later another portion. The Calcutta High Court in that case, citing the decision in *Dharmodas Das* v. *Nistarni Dasi*(8) as correct in cases to which section 123 of the Transfer of Property Act applies, appears to have held that acceptance on the part of the donee was essential to the validity of a gift. The judgment in *Lakshimoni Dasi's case* makes, however, but the most cursory reference to *Kalidas Mullick's case*, which, it may be noted, nowhere refers to acceptance by the donee as essential. But as in *Lakshimoni Dasi's case* the alleged donor had never given

(1) (1882) 7 Bom. 131.
(2) (1884) 11 Cal. 121 s.c. L. R. 11 I. A. 218.
(3) (1885) 9 Bom. 324.
(4) (1880) 6 Bom. 380.
(5) (1881) 4 All. 40.
(6) (1894) 16 All. 185.
(7) (1892) 20 Cal. 469.
(8) (1887) 14 Cal. 446.

possession and the alleged donee had never made any objection to the subsequent vendor's possession, it is possible to regard that case as not inconsistent with the principle in *Nawab Ibrahim Ali Khan* v. *Umamatul Zohra*,[1] and as regarding the alleged gift as incomplete, on the ground that though a document was executed, the alleged donor never intended to give effect to it and did not do all he might in order to give effect to it, and that the alleged donee having apparently acquiesced in his subsequent dealings with the property, it was fully understood that the mere execution of the document was not all that the donor would have done if he had wanted to perfect his gift. In *Meherali* v. *Tajudin* [2] the decision of the Privy Council in *Kalidas Mullick* v. *Kanhya Lal*[3] was referred to, but deemed inapplicable to a case governed by Mahomedan law and this Court's ruling in *Mohinudin* v. *Manchershah*[4] was therefore followed, though in the same year the Privy Council case, *Mahomed Buksh Khan* v. *Hosseini Bibi*,[5] applied the principle of *Kalidas Mullick's case* to Mahomedan law.

The following cases may be noted as instances in which the ruling in *Kalidas Mullick* has been followed: *Lallubhai* v. *Keso*[6]; *Shankar* v. *Visaji*[7]; *Ramchandra* v. *Mhasu*[8]; and in one of them, *Lallubhai* v. *Keso*, registration was regarded as capable of supplying want of possession. In *Rajaram* v. *Ganesh*[9] it seems to have been regarded as a matter so far beyond dispute as to dispense with the need for citing authorities, that where a donor takes all the steps in his power to give effect to it, a gift is complete and he cannot revoke it. And in Mayne's Hindu Law[10] it is stated that when the resistance to the donor's attempts to give full effect to the donation arises from a third person, the fact that possession has not been given is no answer to a suit by the donee against the obstructing party. And though it is further stated by Mayne [11] that there must be a transfer of the apparent evidences of ownership from the donor to the donee, it is also stated to be sufficient if the change of

(1) (1896) 19 All. 267.
(2) (1888) 13 Bom. 156.
(3) (1884) 11 Cal. 121 s.c. L. R. 11 I. A. 218.
(4) (1882) 6 Bom. 650.
(5) (1888) L.R. 15 I.A. 81, s.c. 15 Cal. 684.
(6) (1886) P. J. p. 33.
(7) (1884) P. J. p. 35.
(8) (1888) P. J. p. 14.
(9) (1898) 23 Bom. 131.
(10) 6th Edn., p. 485, sec. 377.
(11) Hindu Law, p. 485, sec. 378.

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possession is such as the nature of the case admits of, and as instances are cited the delivery to the donee of the deed of gift, the possession of the donor in trust for a donee incapable of taking possession as being a minor, &c.

In the present case the donors never appear to have assumed actual personal possession after the death of their mother for whose benefit the land had been kept joint, and the lower Appellate Court appears to have held that actual possession remained throughout with the father of the plaintiff. There was, therefore, no apparent reservation of any kind on the part of the donors. In relinquishing their own claims they did all that was practically necessary and by their registered deed of gift all that they could. It is objected that the mother of the donee was mentioned in that document as his guardian, but it is hardly to be conceived that the father of the donee could be regarded as setting up a possession adverse to his infant son or that the donors in assenting to his continuance in possession understood it to be adverse either to themselves or to the child. The possession of the father having manifestly originated in a mutual understanding, which recognized the title of the owners, could not without some overt act become adverse to them or to their disposing power: *Dadoba* v. *Krishna* (1); and the possession of the father was practically the only mode in which the infant son could accept or exercise possession. The donors never objected and made no attempt to revoke their gift. No division was necessary, as the entirety of the land in question was with the plaintiff's father.

It has been suggested by the lower Appellate Court that the gift was invalid as being the gift of an undivided share, and *Vrandavandas Ramdas* v. *Yamunabai* (2) was cited as authority. But that was a case of alienation by a member of an undivided family to an outsider, whereas in the present case the gift is by persons who were not members of an undivided family (the uncles of the plaintiff having previously separated from his father) to the plaintiff, a member of another coparcenary. No consent was necessary to validate the alienation, nor was there

(1) (1879) 7 Bom. 34.

(2) (1875) 12 Bom. H. C. 229.

any one who did or could object. The parties being Hindus, the question that arose in *Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan* [1] cannot arise here. On these grounds the gift appears unimpeachable.

Then it seems to have been held that the plaintiff is estopped from denying his father's title, because he allowed the mortgagee in 1887 to believe that his father was the sole owner and to advance money in that belief. Now, as the plaintiff admittedly only attained his majority in 1892, he was but a lad of thirteen in 1887 and cannot be reasonably regarded as having stood by and looked on in such manner as to estop him from questioning the transaction now. The property never passed from the possession of the father as on behalf of his son till the date of Exhibit 18—1st January, 1887. And this suit, instituted on 3rd January, 1899, allowance being made for the Christmas holidays, was therefore within time. The suit therefore does not appear to be time-barred. It is true that it seems somewhat of a hardship that defendant having advanced money to the father should be deprived by the son on the point of acquiring a statutory title. But the son has not been shown to have been to blame and is not liable to lose his title for his father's acts. What other liabilities there may arise out of the transaction it is not necessary to discuss here. The plaintiff's pleader states that he has nothing to urge against an equitable order that the son should recover subject to payment of the proportionate amount of the loan by which he and his father have benefited.

As to the last point, viz., that the auction-purchaser was a necessary party, it seems sufficient to observe that the plaintiff must be left to exercise his own discretion as to joinder of a defendant whose title is not necessarily involved in that of any other party to the suit. The plaintiff is *dominus litis*: *Rajaram Bhagwat* v. *Jibai*.[2] If he chooses to leave the question that may arise between himself and the auction-purchaser to future settlement, he does so at his own risk. He is not bound to sue every possible adverse claimant in this suit, if none of the parties claim through the auction-purchaser, and for the purposes of this suit it is not necessary to establish title against him.

(1) (1889) L. R. 10 I. A. 205. (2) (1884) 9 Bom. 151, 155.

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Much has been said as to the effect of Exhibits 51, 52 and 53 in this case, as judgments not *inter partes* and therefore inadmissible. This, under recent decisions, seems hardly to be a sustainable contention. But the judgments in question seem to add little to what appears from the record in this case, except that they contain a finding of fact that the mortgagee (defendant 2) in this case had actual notice of the deed of gift. It is unnecessary to have recourse to this, however, even for this purpose, for the defendant No. 2 does not appear to have raised the contention that he was a purchaser without notice, nor does it appear that such a contention, if defendant 2 had set it up, could have prevailed. The defendant 2 preferred to impugn the plaintiff's title on the ground of an alleged defect, which if established would at most have shown that the donors were entitled, and though it is contended that in such case their title would have been time-barred, it would have been difficult to conceive how the possession of defendant 1 could have been adverse to them at a date earlier than that at which it could have become adverse to the plaintiff. So far as they could they completed the gift, the terms of which they embodied in the registered deed, and they have never attempted any reservation or revocation in their own favour, and a stranger cannot challenge its validity as against the donee.

The decree of the lower Appellate Court must be reversed; the appellant appears, however, to be entitled only to the share of his uncles in the entire field, and the decree must, therefore, be limited to one awarding him one-fourth share of the field to be ascertained in execution. Possession to be given to plaintiff on his paying into Court within six months from this date one-fourth of the amount due on Exhibit 18. The defendant 1 to bear his own costs and defendant 2 to pay plaintiff's costs and bear his own throughout.

Decree reversed.