Mullick Abdool Guffoor and Another Vs Muleka and Others

Court: Calcutta High Court

Date of Decision: July 22, 1884

Citation: (1884) ILR (Cal) 1112

Hon'ble Judges: Richard Garth, C.J; Beverley, J

Bench: Division Bench

Judgement

Richard Garth, C.J.
The main question in the case is the validity of this deed of gift. There is no douht that but for this deed the plaintiff''s

would be the heirs of Kaniz Fatima, at least to the main portion of the property. But they deny the validity of the deed on several grounds:

(1st) That Kaniz Fatima never executed it; (2nd) that if she did she was not of sound mind when she did so; and (3rd) that the deed is invalid by

the rules of Mahomedan law.

2. The Judge in the Court below has found entirely in favour of the defendants. He considers, that the execution both of the ikrarnama, and of the

deed of gift has been clearly proved, and that there is no legal objection to the validity of the deed of gift. He also finds, that the mocurrari to

Babbun was a permanent lease, and he has dismissed the plaintiff''s suit with costs.

3. In this Court, the main contention has been with reference to the validity of the deed of gift, and we may say at once, that we have not the least

doubt as regards the execution of this deed, or as to Kaniz Fatima being perfectly well aware of what she was doing when she executed it.

4. We think this appears very clearly from the plaintiff''s own evidence.

5. It is no doubt very natural for the plaintiffs, who are not in good circumstances, to struggle hard against an alienation of so large an inheritance,

but on the other hand, we cannot fail to see that the probabilities are greatly in favour of the gift, because it was only likely that Kaniz Fatima, who

had lived with Muleka (her daughter-in-law), and Irshad Hossein on terms of affection and intimacy for many years, should do all she could to

secure to them her wealth, instead of allowing it to descend to distant relations, of whom she knew little or nothing.

6. The question therefore in this Court, so far as this deed is concerned, has been, whether having regard to the subject-matter of the gift, and the

fact of there having been no actual partition made of it at the time when the deed was executed, as between the two donees, the transaction is valid

in law as against the plaintiff''s.

7. This question has been argued before us at some length, and we are much indebted to the learned Counsel on both sides for the pains which

they have taken to refer us to all the authorities upon the subject. But having heard the matter fully argued, we are satisfied that the gift is valid, and

that the conclusion at which the lower Court arrived is just.

8. The property which is the subject of the gift consists of several zamindaries, and shares in zamindaries, let out to tenants and ryots, as such

estates usually are; a good many lakheraj properties also let out to tenants; several malikana rights of some value, and a variety of house property

in Patna, and elsewhere, consisting of houses, sheds, roads, gardens, etc.

9. There is no satisfactory evidence as to how this latter property was occupied or utilized at the time when the gift was made.

10. The arguments on the part of the plaintiffs resolve themselves into three main points:

(1st) That by Mahomedan law a gift cannot be made of lands which are not in the possession of the donor, nor of incorporeal properties, such as

rents, malikana rights, and the like; (2nd) that an undivided share of a house or a zamindari cannot be made the subject of a gift; and (3rd) that a

gift to two persons without previous division and separation is invalid.

11. In dealing with these points we must not forget that the Mahomedan law, to which our attention has been directed in works of very ancient

authority, was promulgated many centuries ago in Bagdad, and other Mahomedan countries, under a very different state of laws and society from

that which now prevails in India; and that although we do our best here in suits between Mahomedans to follow the rules of Mahomedan law, it is

often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arose between the

great expounders of the Mahomedan law ordinarily current in India, namely, Abu Haniffa and his two disciples.

12. We must endeavour, so far as we can, to ascertain the true principles upon which that law was founded, and to administer it with a due regard

to the rules of equity, and good conscience, as well as to the laws, and the state of society and circumstances which now prevail in this country.

13. Having premised thus far, we think that the first of the above points, although it has occupied some time in argument, may be very readily

disposed of. In fact, it appears to us to have been already settled.

14. We have been referred to several authorities, and, amongst others, to Dorrul Mokhtar, Book on Gift, p. 635, which lays down that no gift can

be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus when land is in the possession of a usurper

(or wrongdoer), or of a lessee or mortgagee, it cannot be given away; because in these cases the donor has not possession of the thing which he

purports to give.

15. But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have

relation to cases where the donor professes to give away the possessory interest in the land itself, and not merely a reversionary right in it. Of

course, an actual seisin or possession cannot be transferred, except by him who has it for the time being.

16. It is possible, too, that these texts may be explained by what we are informed was the law in Bagdad in early times with reference to land let on

lease; we are told that an ijara lease, which in this country means generally a farming lease of ryoti holdings, meant, according to the law of

Bagdad, a lease of the land itself or its usufruct; and that the owner of land having made such a lease, could not by law transfer his reversionary

interest, so as to give the transferee a right to receive the rent from the ijaradar. (See Futawa Alumgiri, vol. III, Book on Gifts, p. 521.)

17. Whether this is the real meaning of the authorities may be doubtful; but it is certain, that such a state of the law in this country would render the

transfer by gift of a zamindari and other landlord"s interest simply impossible: lands here are almost always let out on leases of some kind, and

there are often four or five different grades of tenants between the zamindar and the occupying ryot. What is usually called possession in this

country, is not actual or khas possession, but the receipt of the rents and profits; and if lands let on lease could not be made the subject of a gift,

many thousands of gifts, which have been made over and over again of zamindari properties would be invalidated. If we were disposed to agree

with this novel view of Mahomedan law, (which we are not), we think we should be doing a great wrong to the Mahomedan community, by

placing them under disabilities with regard to the transfer of property, which they have never hitherto experienced in this country. Such a view of

the law is quite inconsistent with several cases decided by the Suddur Dew any Adawlut (under the advice of the Kazis), and also by this Court

(see 1 Select Reports, 5, 12, and 115 note; 1 Bombay High Court Reports, 157, 16 W.R. 88, and 12 W.R. 498); and it is directly opposed to

the case of Amirunnessa v. Abedoonissa 23 W.R. 208 decided by their Lordships of the Privy Council.

18. In that case a gift of large zamindaries was held to be valid, although it is clear that they consisted, as such estates generally do, of tenures and

interests of all kinds; no objection was then taken to the gift upon the ground that has been urged before us here, and indeed, so far as it appears,

that point has now been taken for the first time.

19. Similarly, as regards the malikana rights, we are not aware of any reason, why rights of this description should not be made the subject of a

gift, in the same way as rents or orther incorporeal property of that nature. We have already decided that reversionary interests, carrying with them

the right to receive rents, may be thus transferred; and it is clear that debts and Government notes and other choses in action, which give the parties

entitled to them the right to receive money from the Government or third persons, may be made the subject of a gift.

20. A malikana right, is the right to receive from the Government a sum of money, which represents the malik''s share of the profits of a

revenuepaying estate, when, from his declining to pay the revenue assessed by the Government, or from any other cause, his estate is taken into the

khas possession of Government, or transferred to some other person, who is willing to pay the rate assessed. There is nothing in principle, so far as

we can see, to distinguish a malikana right from a right to receive rents, or the dividends payable upon Government paper.

21. The second and third points contended for by the plaintiffs, have reference to the doctrine of mooshaa under the Mahomedan law. It is urged:

(1) that a gift of an undivided share in any property is invalid because of mooshaa, or confusion, on the part of the donor; and (2) that a gift of

property to two donees without first separating and dividing their shares is bad, because of confusion on the part of the donees.

22. But it must be borne in mind that this rule applies only to those subjects of gift, which are capable of partition. See the Hedaya, vol. III, Book

on Gift, p. 293, where the rule laid down is to the effect that--""a gift is not valid of what admits of division unless separated and divided."" See also

Bailee''s Mahomedan Law, 2nd Ed., p. 520; Futawa Alumgiri, Book on Gift, p. 521; Macnaghten s Mahomedan Law, p. 201.

23. The rule, therefore, applies only to gifts of such property as is capable of division; whereas reversionary interests, or malikana, or other choses

in action, are not capable of division.

24. It is said that one main reason for this rule, which applies only to gifts, and not to sales, is to protect a man''s heirs against gifts made in

defeasance of their rights. We were referred to certain texts which apparently favoured that view, and it is also probable that another reason for the

rule was to protect creditors against fraudulent gifts made by debtors, it being a well-known test of the bona fides of a gift, whether possession of

the thing given has passed to the donee.

25. It has been urged upon us very strongly, that according to this rule of mooshaa, the gift, which was made to the defendants in this case, is

wholly void, because, the gift being of lands, no partition of such lands was made; and even supposing the gift to be valid, as regards the zamindari

properties which were let out on lease, it would still be invalid as regards the house property, gardens, sheds, etc., which are not shown to have

been let out on lease, and which were capable therefore of actual partition.

26. We think, however, that this objection is not well founded, as regards any part of the property in question.

27. As regards the zamindaries, the estate of the donor, as we have seen, was an interest in reversion, and the property which was transferred by

the gift of these zamindaries was merely that sort of estate which entitled the donees to receive the rents and profits. We find from the evidence of

the defendants, (which was so clear upon this point that the Judge in the Court below desired to hear no more than that of the first two witnesses),

that during Kaniz Fatima''s lifetime she and Muleka were in separate collection of the rents, and that immediately upon the gift being made, the

possession was transferred, in the only way in which it could be transferred, to the two donees.

28. The Mussumat dismissed all her servants, and from that time the tehsildars were employed and paid by the donees, and collected the rents for

them. An equal division was made between them of the rents collected; and, as regards part of the property, it appears that, from the year 1281,

the collections were made separately.

29. It is said, however, that as regards the house property no division of it has been proved, and that, for aught that appears, that property might

have been in the khas possession of the Mussumat; but no point was made of this in the Court below. No issue was framed for the purpose of

raising it, nor was there any evidence given on the part of the plaintiff, nor any cross-examination of the defendant''s witnesses with reference to

that point; no distinction appears to have been made (either in the Court below, or even in the grounds of appeal to this Court), between the

different kinds of property; and the strong probability is, that the house property which belonged to the Mussumat was let out in lease in the same

way as her other properties.

30. We think, therefore, that we ought not to allow an objection of this kind to prevail, or even to be raised, at this stage of the case founded

merely upon a conjectural distinction between these two classes of property; and even if we thought otherwise, we certainly should not give effect

to such an objection without sending the case back to the Court below, to have the true state of things ascertained.

31. Upon the whole, therefore, as regards the deed of gift, we are of opinion that it effectually transferred to the donees the properties which were

detailed in the schedule to that deed.

32. It now only remains to deal with mouzah Morari which, as we have seen, was granted under a mocurrari lease to Mussumat Babbun by Nazir

Ibrahim Ali.

33. The plaintiffs admit in their plaint that Mussumat Babbun executed a dur-mocurrari lease of this mouzah, on the 22nd of September 1873, to

the defendant No. 6, Moulvie Fuzul Hossein, and that, in that durmocurrari, she stated the lease to be a perpetual and heritable one; whereas, the

plaintiff"s case is that it was only for her life, and that as upon her death, on the 25th of October 1875, the mouzah reverted to Ibrahim Ali"s heirs,

the plaintiffs are entitled, as two of his heirs, to a share in that mouzah.

34. On the other hand, the defendant No. 6, alleges that the mocurrari granted to Babbun was a permanent and heritable one; and he has filed and

produced the mocurrari lease itself, which he says was given to him by Babbun at the time when he obtained his dur-mocurrari.

35. The Court below has also found against the plaintiffs upon this point; and the only difficulty we have had upon this part of the case arises from

the somewhat loose way in which the mocurrari lease has been proved in the Court below.

36. It appears from the petition of the defendant No. 6, dated the 20th of September 1881, that he filed this mocurrari lease in Court; and that it

was duly registered.

37. The deed appears to have been admitted by the Court below, and no objection has been taken in the grounds of appeal that it was improperly

admitted. It has been sent up here with the record; and it has been produced and examined before us in this Court.

38. It is argued by the plaintiffs that this is not the real deed which was granted to Babbun; and they say that the real deed was one for life only, but

they have given no proof of this.

39. It is, of course, an admitted fact on both sides that there was a mocurrari deed of some kind duly executed by Ibrahim Ali to Babbun.

40. The deed, which is now in evidence was duly filed and produced at the trial by the defendant No. 6, as being the deed given to him at the time

when he obtained his dur-mocurrari.

41. The Judge has found this to be the deed which was granted by Ibrahim Ali to Babbun; and there is no doubt that this deed does confer a

permanent and heritable mocurrari.

42. We see no reason to believe that the finding of the learned Judge is otherwise than correct. If he made a mistake at all, it was in receiving the

deed in evidence without examining Fuzul Hossein, who appears to have been in Court, or requiring some further or other proof of its identity.

43. But there is no point of this kind taken in the grounds of appeal; and, if we considered that there was any weight in the objections now made

by the appellants, we should certainly not give effect to them, without sending the case back to the Court below to examine Fuzul Hossein and his

witnesses; because the Judge thought his case so clear as to this deed, that he told him it was unnecessary to call any witnesses.

44. We therefore decide the case on all points against the appellants.

45. The only remaining question is as to the costs.

46. We find that in the Court below the defendants Burkut and Zukiran were allowed their full costs, and that Ali Hossein, who was a pleader, and

who apparently had nothing to do with the case, was also allowed a separate set of coats.

47. The ground on which Ali Hossein was allowed these costs, was that he was said to have made an arrangement with the plaintiffs by which the

plaintiffs were enabled to carry on the suit; and part of the arrangement was, that in the event of the plaintiffs succeeding, Ali Hossein should be

entitled to a share in the property.

48. Under these circumstances, the plaintiff desired that Ali Hossein should be made a defendant. But Ali Hossein himself disclaimed having

anything to do with the arrangement, or having any share in property.

49. Why, under these circumstances, he should have been allowed such a large sum for costs we cannot understand, nor do we understand why

Burkut and Zukiran (who were merely made defendants, because their names were said to have been used in making the arrangement, instead of

that of Ali Hossein) were also allowed their full costs, because their interests, if they had any, were precisely the same as those of Ali Hossein, and

any contention which they might have raised, must have been in the same interest as that of Ali Hossein.

50. We think that the only sum which ought reasonably to have been allowed to them would merely be one for their first appearance in Court;

instead of the fee therefore which has been allowed by the Court below, we allow only Rs. 100 to Ali Hossein, and alike sum to the other two

plaintiffs [defendants?.]

51. As regards the costs of the principal defendant, we think that the defendant No. 6, whose contention was of an entirely different character from

that of the others, should have his costs of the appeal proportionate to the value of his dur-mocurrari, and that the other defendants should get their

costs upon the balance.