(1933) 08 BOM CK 0027

Bombay High Court

Case No: Second Appeal No. 520 of 1930

Ebrahim Alibhai Akuji		APPELLANT
	Vs	
Bai Asi		RESPONDENT

Date of Decision: Aug. 9, 1933

Citation: AIR 1934 Bom 21 : (1933) 35 BOMLR 1148 : (1934) ILR (Bom) 254

Hon'ble Judges: Tyabji, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Tyabji, J.

The question in this appeal refers to the effect of a gift purported to be made by one Abraham Wajir Mahomed. He died leaving a widow, Ashi (defendant No. 1), and two daughters, Hurt and Mulak. Prior to 1896, the deceased had purported to make a gift of several lands to his daughters. He called the tenants at the time, and directed them to pay the rents to the two daughters, which they did. Subsequently, on March 7, 1896, he executed two deeds, Exhibits 225 and 226.

2. The gift has been contested in this Court on the ground that it is invalid in its inception because of the doctrine of musha'', and that in any case there has been no such special possession or transfer as, it is alleged, the law requires when a gift is made jointly to two donees.

3. Reliance is placed in the first instance upon Musammat Bibi Bilkis v. Sheikh Wahid Ali ILR (1927) Pat. 118 That case is entirely different. There the donor, Turab Ali, purported to make a gift in favour of his two sons, and two grandsons by a pre-deceased son. A third of the property was to be taken by each son, and a third by the grandsons. But the donor is stated, in the judgment to have remained in possession of the property, and administered it during his lifetime. The decision did not turn upon there having been an attempt to make a gift of musha.'' It was not held that being such an attempt, it must fail. The decision turned upon there having

been no transfer of possession. The principle to be followed in deciding such cases is laid down at p. 123 of the report.

...the validity of a gift of ''musha'' must be tested in the same way as of any other gift: there must be as complete a transfer of the possession of the subject of gift as the circumstances permit; and the donee is not entitled to claim anything to be done in his favour that the donor has not done : the Courts are inclined to uphold a gift of musha,'' i. e., of an undivided part of property, except where the omission to separate the portion of the property which is the subject of gift from the rest of it, is taken as an indication that there has been, in effect, an incomplete transfer, which the donor would have completed by partition, had he intended bo complete the gift.

4. I respectfully adopt this exposition as laying down the law correctly. "Analogy is rather to be found," said Lord Macnaghten, "in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more": Mahomed Buksh Khan v. Hosseini Bibi (1888) L.R. 15 I.A. 81, 95, citing (1884) ILR 11 121 (Privy Council)

5. In the case before me the donor left nothing undone, that he would have done if he had intended to complete the gift. The tenants were called, and asked to pay the rents to the donees. The rents were actually paid to the donees. The donor after the date of the gift did not in any way take the benefit of the subject of the gift. The benefit was taken solely by the donees. There was as complete a transfer of possession as can be conceived. The donor did not retain any control over the property. The donees had it wholly. Each donee had a right to a definite share of the rent: see on this Mussumat Ameeroonnissa v. Mussamut Abedoonnissa Khatoon (1875) 23 W.R. 208

6. The decision of the question would have been rendered beyond question or cavil, had the learned Judges considered the essential point as, I think, with all respect, it must be considered, In all cases in which the question is raised whether a gift governed by Muhammadan law has been completed, the most satisfactory method of dealing with the question is to direct attention to the conduct of the donor and the donee after the time when the gift is said to have been completed. If, after that time the alleged donor continues to take the benefit of the subject of the gift-whether it consists of reaping the harvest, of the recovery of the rents or profits, or actual occupation, or of such other benefit, whatever it be, as can accrue to the owner from the ownership of the particular subject of gift,-then the possession of the subject of the gift has not been transferred. If the donee is permitted, directly or indirectly to receive the benefit, then the possession is transferred. If this simple rule, which has been enunciated in previous decisions, were followed, much difficulty would be removed from the issues relating to the completion of gifts : Allah Rakha v. Ali Muhammad ILR (1928) Lah. 567 and the cases there cited.

7. There was a second argument placed before me, to the effect that "A gift of property, which is capable of division, to two or more persons without dividing it is invalid; but it may be rendered valid if separate possession is taken by each donee of the portion of the property given to him," citing Sir Dinshah Mulla''s Mahomedan Law, 10th Ed., p. 121, Section 135. The argument involves two propositions. First, that a valid gift cannot be made to two or more persons (jointly) of property which is capable of division, Secondly, that such a gift though originally invalid may be rendered valid if-and apparently only if-separate possession (by which is presumably meant possession of separate portions of the subject of the gift) is taken by the donees severally. This would imply that the property is divided off; it is not clear whether the donees may divide of their own accord or the donor must do so.

8. I cannot accept this argument. The authority of the Fatawa Alamgiri and Hidaya is directly against it. In Baillie''s Moohummudan Law, 2nd edition, at p. 524, it is stated:-

The gift of a mooshaa in property that admits of partition, to two men or to a group, is valid according to the two disciples, find invalid according to Aboo Huneefa. But it is not void; so that it avails to the establishment of property by possession.

"Confusion on both sides in property susceptible of partition prevents the legality of gift, according to them all; and when the confusion is only on the side of the donee, it prevents the legality of the gift, according to Aboo Huneefa, though it has not that effect in the opinion of the disciples." Bail. I. 524, 525.

The Hidaya is to the same effect. See Grady''s edition of Hamilton''s translation, p. 485. Later it is stated that the opinion of the two disciples is to be preferred to that of Abu Hanifa.

9. If this is taken in conjunction with the trend of decisions in India, and the decisions in Muhammad Mumtaz Ahmad v. Zubaida Jan ILR (1889) All. 460 Ibrahim Goolam Ariff v. Saiboo ILR (1907) Cal. 1 Bachoo Hurkisondas v. Mankorebai (1907) L.R. 34 IndAp 107 9 Bom. L.R. 646 (to which I shall refer again), Ebrahimbhai v. Fulbai ILR (1902) Bom. 577 4 Bom. L.R. 180 and Mullick Abdool Guffoor v. Muleka ILR (1884) Cal. 1112 there is no doubt in my mind as to the necessity for following (in preference to the opinion of Abu Hanifa) the opinion of the two disciples; that a gift to two or more donees jointly is valid, notwithstanding that the donor has not divided the shares of the donees, nor given separate possession: and this without falling back either upon the principle that when the two disciples are agreed, then their opinion is generally followed in preference to that of Abu Hanifa; or on the other rule that where there is a difference of opinion amongst the authorities, the Court has the power to select that one which is most in consonance with justice.

10. This last rule is stated in the Alamgiri with direct reference to musha'': "When the judge has given his decree for the validity of a wukf of mooshaa, his decree is operative, as in all matters on which there is a difference of opinion": Bail. I, 573. In

Fakir Nynar Muhamed Rowther v. Kandasawmy Kulathu Vandan ILR (1911) Mad. 120 Mr. Justice Abdur Rahim refers to this rule, and suggests that a rule more in consonance with substantial justice may be sought not only within the fold of the particular school of Sunni law, but even from one of the other three schools. The rule has been thus stated in the Taqbat-ul Hanafia:-

When Abu Hanifa is on one side, and Abu Yusuf and Muhammad on the other, the mufti is at liberty, if he chooses, to follow the opinion of the latter two. But if the one or the other is of the same opinion as Abu Hanifa, the mufti is obliged to prefer that opinion, unless jurists of authority have declared their opinion to the contrary.

This is translated in Journ. As., 4th Series, Volume 15; and is also referred to in Morley''s Digest, Volume I, p. 262; and is in accordance with the rule in the civil law, Justin., I, 2, 8, 203.

11. In Macnaghten''s Moohummudan law, paragraph at page 50, the law is stated (with all respect) incorrectly, in view of what I have stated from the Fatawa Alamgiri and Hidaya and the decisinos of the Privy Council. But even in Macnaghten the reason of the rule is thus stated: "delivery of the gift cannot in that case be made without including something which forms no part of the gift." This indicates that possibly the learned author had not present to his mind the distinction between two kinds of musha''-between the confusion being on both sides and confusion being only on the side of the donee. The first case is where the donor gives an undivided part of something and retains the undivided residue to himself. In that ease as he retains an undefined share, the subject of gift is itself indefinite : and this implies that nothing is transferred to the donee: the ratio being that if anything had been transferred it would have been definite. The second case is where the entire subject of gift is given away to several donees : but the share of each, though declared, is not divided off, In this case there is nothing to prevent the transfer taking place.

12. Again, at p. 201 of Macnaghten''s Moohnmmudan Law, an extraordinary decision is reported: that even where the donees come to a division of property which has been jointly given to them by the donor, if the division is made sometime after the gift, the gift is not valid:-

It appears, in this case, that the property given was divided by the donees with the consent of the donor, two or three months subsequent to the date of the deed of transfer. Such a proceeding is not legal. To render it valid, it was essential that the delivery and the division should have been simultaneous.

13. This is contrary to all principle: a gift may be completed after the declaration and acceptance: in that case it takes effect when the completion of the gift has been made : Bail. I, 520, 521, 524, 526-27, II, 207 (second); Ma Mi v. Kallandar Ammal (No. 1) (1926) L.R. 54 IndAp 23 29 Bom. L.R. 772 Muhammad Mumtaz Ahmad v. Jubaida Jan ILR (1889) All. 460 (1879) L.R. 6 I.A. 196 (Privy Council) Anwari Begam v. Nizam-ud-din Shah ILR (1898) All. 165 Jabedanessa Bibi v. Nazibal Islam Molla (1910)

15 C.W.N. 328 and Danoo Darjee v. Momatajoddi (1909) 17 C.L.J. 85 In the case in Macnaghten, the only correct inference to make was that a declaration of the gift had been repeated (if any was needed) at the time when the donees with the consent of the donor separated their shares in the gift.

14. Ibrahim, Goolam Ariff v. Saiboo shows that the law laid down in Macnaghten is overruled. Their Lordships did not apply the rule of musha'' though the subject of gift was musha'' in both the aspects that I mentioned a little earlier, or as Baillie puts it, "there was confusion on both sides." In Mahomed Buksh Khan v. Hosseini Bibi it was held that one of three sharers may give his share to either of the other two. In Rujabai v. Ismail Ahmed (1870) 7 B.H.C. 31 Sargent J. (as he then was) had arrived at a similar conclusion. He held that in regard to a gift by an English deed to three persons as joint tenants the objection cannot prevail, on the ground that the gift was to be interpreted as a gift of the whole house to each donee. The Privy Council decisions had not been then given, otherwise he would have found it unnecessary to make the distinction.

15. But I do not, by referring to these authorities, mean to indicate that there is the least doubt in my mind that a gift may be validly made at the present day in India to two donees, not with standing the fact that the two donees are to hold the property as tenants in common. I am emphatically of opinion that whether the shares given to the donees be equal or unequal, once the donor has parted with complete possession in favour of the donees, the donees become the transferees of the property, and the gift is complete. They may, if they so choose, continue to hold the property unpartitioned, or they may come to partition. If the donor had partitioned the property and given it to them in two definite shares, they could have agreed amongst themselves to hold the property as tenants in common; and there could not have been any question raised as regards the validity of the gift.

16. The appeal is dismissed with costs.