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Present: Garvin and Lyall Grant JJ.

ABDUL RAHIM *v.* HAMIDU LEBBE *et al.*

244—D. C. Matara, 1,298.

Muslim law—Donation of property by father to minor son—Delivery of possession.

Under the Muslim law a gift by a father to his minor child of property in the parent's possession is complete on his declaration that a gift has been made.

IN this action the plaintiff sued for a declaration of title to a share of certain lands, which formed the subject-matter of a deed of gift, executed by the first and second defendants in favour of their two minor daughters, Mukulath Natchia and Mumina Natchia. The plaintiff married Makulath Natchia on February 20, 1917, and she died on November 28, 1917. The plaintiff claimed, as the heir of his deceased wife, a half share of the interest conveyed to her by the deed of gift. The defendants pleaded that no title passed under the deed as there had been no delivery of possession of the lands to the donees. The learned District Judge held in favour of the plaintiff.

Hayley (with *Keuneman*), for defendants, appellants.—All the parties to this action are Muhammadans, and the Muhammadan law will apply. Three things are necessary, as held by *Affefudeen v. Periatamby,*[1] to constitute a valid deed of gift, viz., declaration of intention to gift, acceptance, and seizin by donee. In the present case no delivery of possession was made to the donees.

Under the Muhammadan law a deed of gift by a father to his son can be revoked (*vide Cader v. Pitcha* [2]).

[1] *(1911) 14 N. L. R. 295.* [2] *(1916) 19 N. L. R. 246.*

Counsel also cited *Mohamadu v. Marikar.*[1]

Drieberg, K.C. (with *Soertsz*), for plaintiff, respondent.—The declaration of the intention to gift is clear from the language of the instrument and the fact that it was also registered by the father. There has been acceptance because the donees too signed the deed.

Possession as required by law has been in the donees. *Ameer Ali, Vol. 1, at pages 172 and 173,* speaks of the possession of the parent as being tantamount to possession by the child. *Tyabji (1913) at pages 307 and 308* goes further than parent and child and speaks of the possession of the *de facto* guardian as a possession by the child.

Wilson 354: A gift can be revoked only upon an application to Court.

Cur. adv. vult.

March 23, 1926. GARVIN J.—

In this case the claim of the plaintiff depends upon the validity of a deed of gift bearing No. 23,310 and dated November 9, 1915. This deed was executed by the first and second defendants in favour of their two minor daughters, Mukulath Natchia and Mumina Natchia. The plaintiff married Mukulath Natchia on February 20, 1917. She died on November 28, 1917. The plaintiff claims to be entitled, as heir of his deceased wife to a half share of the interest conveyed to her by this deed in the seven lands described in the plaint. The defendants in their answer admitted the execution of the deed, but pleaded that no title passed as there had been no delivery of possession of the subjects of the gift to the donees. All the parties concerned in the issues which arise in this case are Muhammadans.

It is now well settled law that any question touching the validity of a gift between Muhammadans must be decided with reference to the Muhammadan law. It is essential to the validity of such a gift that there should be a declaration by a donor of his intention to made a gift, acceptance of the gift by the donee, and seisin by the donee of the subject of the gift (*vide Affefudeen v. Periatamby (supra)*).

In this instance the declaration of an intention to give is amply manifested by the deed by which the defendants in making the gift stated that it was made by way of an absolute and irrevocable gift, and manifested their intention that the properties which formed the subject of the gift were to be held by the donees absolutely and for ever " from the date of the deed." If further evidence of an intention to make a gift is necessary, it is to be found in the circumstance that the deed was registered by or at the instance of the plaintiff. It is admitted that the donors did not vacate the premises and thereafter place the donees in possession. But it is contended that in the case of gifts by parents of property in their possession to

[1] *(1919) 21 N. L. R. 84.*

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their minor children neither acceptance nor the transfer of possession is necessary. The gift, it is said, is complete and effective when the contract is made. In point of fact Mukulath Natchia and Mumina Natchia have accepted this gift. A formal acceptance by these donees is incorporated in the deed, which is signed by the donors as well as by the donees.

Writing of gifts to minors by their parents, Ameer Ali in his work *on Muhammadan Law at page 123, Vol. I.*, says: "The gift is completed by the contract, and it makes no difference whether the subject of the gift is in the hands of the father or in that of a depositary (on behalf of a father). When a father makes a gift of something to his infant son, the infant, by virtue of the gift, becomes proprietor of the same, provided the thing given be at the time in the possession either of the father or of any person who stands in the position of a trustee for the father, because the possession of the father is tantamount to the possession of the infant by virtue of the gift, and the possession of the trustee is equivalent to that of the father." The same author at page 173 says: "A gift by a person *in loco parentis* to a child in his custody is completed by the simple declaration; in such cases no transfer is necessary; if a father make a gift of something to his infant son, the infant in virtue of the gift becomes proprietor of the same," and the same proposition will be found repeated lower down in the same page.

In the case of *Fatima Bibee v. Ahmad Baksh*,[1] in the course of the judgment of Rampini and Pargiter JJ. at page 330, there appears the following passage: "But delivery was not necessary; for according to Muhammadan law no actual delivery of possession is necessary where a parent makes a gift to his son who is a minor. The gift is completed by the deed, an if the parent retains possession his possession is equivalent to possession by the minor son."

Tyabji, in his *Principles of Muhammadan Law at page 307*, states the same rule in the following words: "Where the father or grandfather (or any other person entitled to be the guardian of the property) of a minor or person of unsound mind makes a declaration of gift in favour of the said minor or person of unsound mind, and the subject of the said gift is in the possession of the said father or grandfather (or other guardian) or of some person on his behalf, there the gift is complete without any transfer of the possession of the subject of the gift: the declaration of gift having in law the effect of transforming the possession of the donor on his own behalf into possession on behalf of the donee as the guardian of the property of the donee."

Now, the first defendant states that he executed this deed of gift and another deed by which he disposed of the remainder of his landed property to his sons. He says they were executed by

[1] *(1903) I. L. R. 31 Cal. 319.*

him shortly before he entered hospital to undergo a surgical operation by way of settling his affairs against the possible contingency of his death, but that in doing so he had no intention to part with the possession of his properties, and that the deeds were to be contingent on his death. No objection appears to have been taken to this evidence, which is wholly inconsistent with the exactly opposite intention clearly manifested in the language of the deed. Presumably it was thought to be admissible for the purpose of showing that his subsequent possession of these lands was not possession on behalf of the donees, but for himself and in his own interests.

In the case of a gift by a father to his minor child of property in his possession, is it merely a rebuttable presumption that the subsequent possession by the father is a possession on behalf of the minor, or is the gift complete on the declaration of the father that he has made a gift wholly irrespective of acceptance or transfer of possession? In all the passages quoted above the indication is that a gift by a father to his minor child of property in the possession of the parent is complete upon the declaration of the father that he has made the gift. It is quite clear that acceptance is not necessary (*vide Tyabji, p. 307*). But there is a passage in Tyabji's work in section 402, at page 309, which creates some difficulty. Speaking generally of the proof of possession he says: " The onus lies on the person claiming to be the donee to prove that possession has been given to him *Exception.*—Where the intention of a father to make a gift to his minor child is proved, the onus lies on the father to show that the subsequent possession of the property by him was not on behalf of the minor."

For this proposition he relies upon three Indian cases, one of which is the case of *Fatima Bibee v. Ahmad Baksh*, already referred to. This case seems to be an authority for the direct contrary, for the Judges, as I have observed earlier, say that " delivery was not necessary." The reports of the other two cases referred to are unfortunately not available.

The deed in question contains a clear declaration that a gift has been made. " A gift by a father to his infant child is completed by the (mere) *'akd* (declaration or contract) whether the property be in his own hands or in the hands of a depositary." ***Ameer Ali***, *Vol. I., p. 67*. The note on this passage makes the position even clearer. " The father's declaration that he has given a thing to his infant child forms the contract, for no assent is required from the donee." The weight of authority is decisively in favour of the view that under the Muhammadan law, in the case of a gift by a father to his minor child of property in his possession, the gift is complete on his declaration that a gift has been made. Thereafter his possession is the possession of the donees.

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In this case there is a clear declaration of an intention to give and as clear a declaration that the gift has been made to be held by the donees from the date of the deed. The contract was therefore complete.

For these reasons I would dismiss this appeal, and direct judgment to be entered for the plaintiff in terms of the prayer of his plaint, with costs in both Courts.

LYALL GRANT J.—I agree.

Appeal dismissed.