PRIVY COUNCIL

Amjad Khan

Vs.

Ashraf Khan

Privy Council Appeal No. 125 of 1926
(Lords Shaw Atkin and Sir Lancelot Sanderson. JJ.)

26.2.1929

JUDGMENT

SIR LANCELOT SANDERSON J.

1. This is an appeal by *Amjad Khan*, son of *Salar Khan*, who was the original plaintiff in the suit, against two decrees of the Court of the Judicial Commissioner of Oudh, dated 15th December 1924. The suit was brought by Salar Khan to recover possession of certain properties specified in the plaint, and mesne profits. The title of *Amjad Khan,* hereinafter called the plaintiff, to two specific plots purchased by Mt. Waziran has been declared by both the Courts in India, and no question with regard to these plots arises in this appeal. The dispute relates to proprietary shares in eleven villages. The shares belonged to one *Ghulam Murtaza Khan.*

2. It was alleged on behalf of the plaintiff that *Ghulam Murtaza Khan* made a gift of the said shares to his wife Mt. Waziran, by a registered deed dated 17th January 1905, and put her in possession of the property, which was the subject of the gift ; that *Ghulam Murtaza Khan* died on 6th February 1906, and his wife died on 18th November 1909, leaving her brother Salar Khan, the father of the appellant, her sole heir ; and that on the death of Salar Khan the plaintiff appellant became entitled to the property in question. The first two defendants are the nephews of Ghulam Murtaza Khan, who, it was alleged, took possession of the properties in suit on the death of Mt. Waziran ; the other defendants are transferees from the first two defendants.

3. The learned Subordinate Judge, who tried the suit, came to the conclusion that the above-mentioned deed of 17th January 1905, was in the nature of a family settlement, that *Ghulam Murtaza Khan* gave to his wife one-third of the property absolutely and a life-estate only in two-thirds of the property which on his death was to revert to his

heirs ; and he made a decree accordingly. The plaintiff appealed to the Court of the Judicial Commissioner of Oudh. The defendants Ashraf Khan, Basharat Khan and Nisar Ali Khan also filed an appeal. The two appeals were heard at the same time. The learned Judicial Commissioners, though differing as to the reasons, agreed as to the conclusion, and directed on 15th December 1924, that the plaintiffs' appeal should be dismissed, that the defendants' appeal should be allowed and that the plaintiffs' suit should be dismissed except in respect of plots 397 and 618, which should be shown as having been decreed to the plaintiff. The two last mentioned plots are those as to which no dispute arises in this appeal.

4. On 18th January 1894, *Ghulam Murtaza Khan* made a will, and on the same day executed what was called an agreement, by which he made a declaration that he would remain in possession of the properties comprised in the will as long as he lived, but that he should not have power to alienate the same. On 17th January 1905, *Ghulam Murtaza Khan* executed the deed, on which the decision of this case depends. The terms thereof are as follows :

> "I am Ghulam Murtaza Khan, son of Sarfaraz Khan, caste Bhatti, resident and Zamindar of Muhi-ud-dinpur, hamlet of village Jamoli, pargana Mawai Maholara, tahsil Ram Sanehighat, district Bara Banki.
> "Whereas I am cosharer of the following shares in the village comprised in Taluqa Mawai, in the above pargana and district, at present valued at Rs. 15,000. Whereas I am in possession and occupation of the same and whereas in respect of the same I have already executed a will and an agreement dated 18th January 1894, but as I want to avoid any difficulty to my wife in obtaining possession over the willed property after me, I, therefore, by means of this document, have made a gift without consideration of my entire property detailed below with all external and internal rights and without the exception of any right or part, to my wife Mt. Waziran, resident of Muhi-ud-dinpur hamlet of village Jamoli, in the above parganat and district subject to the condition that, out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs. 5,000 with power to make at her pleasure any sort of alienation like mortgage sale or gift in respect thereof and that, as to the rest, worth Rs. 10,000, she shall not possess any power of alienation but she shall remain in possession thereof for lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals, viz., Ashraf Khan, Basharat Khan and their heirs, in equal shares, and those heirs of mine

shall become owners with full proprietary powers, and the own heirs of the donee lady shall not inherit the same and the donee and my aforesaid heirs have accordingly agreed and consented to this. I have put the lady donee in possession of the property gifted to her, and therefore from to-day I have ceased to possess any right or claim in respect of the gifted property, and my wife, Mt. Waziran, from today became owner and possessor of the aforesaid property in accordance with the terms, of this deed. As to shares worth Rs. 5,000, gifted to the said lady, she has power to choose the same from any village she likes, or if she likes, she can take shares worth Rs. 5,000 from all the villages.

"Wherefore these few presents by way of a deed of gift have been executed, and got registered with the consent of the reversioner's, viz., Ashraf Khan and Basharat Khan, so that it serves as an authority and be of use in time of need."

5. An issue was raised in the trial Court whether *Ghulam Murtaza Khan* was a Hanafi Mussulman or whether he belonged to the Shia sect. The learned Subordinate Judge held that *Ghulam Murtaza Khan* was a Hanafi Mussulman and did not belong to the Shia sect. It appears from the judgment of Mr. Ashworth, one of the learned Judicial Commissioners who heard the appeal, that the decision of the learned Subordinate Judge on this issue had been impugned in one of the grounds of appeal presented by the defendants, but that the ground had not been pressed, and the appeal was decided upon the basis that the Mahomedan law applicable was the Hanafi law and not the Shia law.

6. In order therefore to constitute a valid gift inter vivos under the Mahomedan law applicable to this case, three conditions are necessary :

(1) Manifestation of the wish to give on the part of the donor.

(2) The acceptance of the donee, either impliedly or expressly.

(3) The taking possession of the subject-matter of the gift by the donee, either actually or constructively : see *Mohammad Abdul Ghani v. Fakir Jahan Begam*

7. The main argument on the hearing of the appeal related to the question of what was the subject-matter of the gift by Ghulam Murtaza Khan. This depends upon the construction of the deed of 17th January 1905.

8. It was argued on behalf of the plaintiff appellant that by the deed *Ghulam Murtaza Khan* transferred the corpus of the property therein specified to his wife without any reservation, but subject to certain conditions of enjoyment ; that if the said conditions were inconsistent with the transfer of an absolute interest in the property, the Mahomedan Law applicable to this case would give effect to the transfer, and would

not give effect to the conditions ; and that the deed coupled with possession given to the donee constituted a good and valid gift of all the property comprised in the deed. On the other hand it was argued on behalf of the defendant respondents that by the deed Mt. Waziran acquired merely a life-interest in the property comprised therein, that such interest ceased on her death in 1909, and that inasmuch as the plaintiff's only claim to the property was as heir of Mt. Waziran, he had no title thereto.

9. The principle on which the plaintiff relied was that where it is clear that the intention of the donor is to make a gift to the donee of the corpus of the property comprised in the gift, and there is a condition attached that the donee should take a limited interest or should take it for life, under the Hanafi law the condition would be void and there would be a complete and absolute gift of the property : in other words it was argued that if a gift of tangible property is made subject to a condition inconsistent with full ownership on the part of the donee of the thing given, the gift is valid, but the condition void : see Wilson's Digest of Anglo-Mahomedan Law (Edn. 1908), para, 313. Among other authorities reliance was placed by the learned counsel for the plaintiff appellant upon *Mt Humeeda v. Mt. Budlun and the Government* for the purpose of showing that the creation of a life-estate by means of a gift inter vivos does not seem to be consistent with Mahomedan usage.

10. It was held by the Judicial Committee that there ought to be very clear proof of so unusual a transaction and that in that case there was no such proof. It should be noted that the facts of the cited case differ materially from the case now under consideration, inasmuch as in the present case there is before the Board the formal deed of gift, upon the true construction of which the decision must depend.

11. Other authorities were referred to during the course of the argument, but in their Lordships' opinion it is not necessary to refer to them in detail, for the reason that the above-mentioned principles were not disputed by the learned counsel for the defendant-respondents : their case was based on the argument that the subject-matter of the gift in the deed of 17th January 1905, was a life-interest only in the property and that it was not a gift to the wife of an absolute interest in the property with an inconsistent condition.

12. The material question then is what is the true construction of the deed. The intention of the donor is to be ascertained by reading the terms of the deed as a whole, and giving to them the natural meaning of the language used. Their Lordships, basing their decision on the terms of the deed, are of opinion that the conclusion arrived at by

the learned Judicial Commissioner, Mr. Wazir Hasan, on this part of the case is correct, and that Mt. Waziran acquired merely a life-interest in the property under the deed of 17th January 1905, together with a power of alienation over one-third of the property.

13. The donor by the terms of the deed purported to make a gift without consideration to his wife of the entire property detailed there in : he divided the property into two parts, one-third and two-thirds, with a view to giving his wife a power to alienate the one-third of the property or any part thereof by way of mortgage, sale or gift. The words used in connexion with the power of alienation point to the donor contemplating a possible alienation by his wife during her lifetime of the one-third or part thereof. It was further provided that after the death of the donee "the entire property gifted away by this document" should revert to the donor's collaterals named) therein. It is to be noted that the provision as to reversion is not limited to the two-thirds over which the wife was to have no power of alienation, but it related to the "entire property gifted away by this document." The "entire property" was to revert to the collaterals, but it would, of course, be subject to any mortgage, sale or gift which the wife had power to make during her lifetime in respect of the one-third part of the property mentioned in the deed.

14. Reading the deed of 17th January 1905, as a whole and giving effect to all the terms thereof, their Lordships are of opinion that it does afford clear proof that the donor intended to make and did make a gift to his wife of a life-interest only in the entire property comprised in the deed together with the above-mentioned power of alienation in respect of one-third of the property.

15. It was, however, further argued on behalf of the plaintiff that under the Mahomedan law, which is applicable to this case, a transfer of a life-estate could not be made by means of a gift : in other words, it was argued that under the said law there could not be a transfer of any interest in property by way of gift inter vivos except an absolute interest.

16. In their Lordships' opinion, it is not necessary to express any opinion on the last mentioned argument, because in view of the construction of the deed which their Lordships have adopted, the plaintiff appellant is on the horns of a dilemma. If the interest acquired by Mt. Waziran was of a life estate only and if such an interest can be acquired under the Mahomedan law, by way of a gift, that interest came to an end on the death of Mt. Waziran, and the plaintiff claiming as her heir has no title to the

property. On the other hand if, as argued on behalf of the plaintiff, under the Hanafi law such a limited interest as a life-estate could not be transferred to Mt. Waziran by way of gift inter vivos, then Mt. Waziran acquired no interest in the property under the deed of 17th January 1905, and the plaintiff, claiming as her heir, can have no title to the property.

17. For the above-mentioned reasons their Lordships are of opinion that the plaintiff-appellant has no title to the property which is now in dispute in this appeal. In view of this conclusion, it is not necessary for their Lordships to consider any of the other points raised in the appeal, as, for instance, the question whether there was delivery of possession as to which the learned Judicial Commissioners came to different conclusions. Their Lordships therefore will humbly advise His Majesty that this appeal should be dismissed with costs.

18. Upon a further application by the appellants on a point raised in reason 11 of their ease, their Lordships do not think it necessary to add anything to the judgment. The point was made on an application for review in the appellate Court, and it was held that it was not open to the appellants. Their Lordships see no reason for differing from the appellate Court's decision in this respect.

Appeal dismissed.

Cases Referred.

AIR 1922 PC 281 : 44 All. 301 : 25 O. C. 95 : 49 I. A. 195 (P.C.).

[1872] 17 W. R. 525 (P. C.)