CALCUTTA HIGH COURT

Nawab Jan

Vs

Safiur Rahman

(Lancelot Sanderson, C.J. A Mookerjee, J.)

18.01.1917

JUDGMENT

Lancelot Sanderson, C.J.

1. This is an appeal against the judgment of Greaves, J., and on the hearing of the appeal the arguments have bpen mainly addressed to the question whether the learned Judge's conclusion as to the validity and effect of the two deeds, dated 20th January 1906 and 27th January 1906, are correct. (The latter deed is referred to in the judgment of the learned Judge as being dated the 28th January 1906).

2. These documents were executed in the form of heba-bil-ewaz or "gift in exchange" and each deed contained a recital that Abdul Sutter had received two pieces of gold coin by way of consideration from the donees; the learned Judge, however, has found that there was no evidence of any consideration passing at the time of the execution of the deeds, but on the contrary the first defendant himself had in fact stated in his evidence that nothing was paid at the time of the execution of the deeds by his father.

3. Consequently these deeds must, in my judgment, be treated as having been made without consideration and merely as hebas.

4. The deeds being treated as hebas, it would be necessary for the donees to take possession of the subjects of the gifts in order to make the gifts valid.

5. The learned Judge has found that there was, after the deeds were executed, delivery of possession of the properties, to which they refer, to the first defendant so far as relates to the properties given to him, and also so far as relates to the properties given to Amatunnessa, delivery of possession to her, and he further says that this was proved by the evidence of the first defendant.

6. The evidence on this point is contained at pages 149 and 150 of the paper-book as follows:-

Q, After the deeds were executed and registered, what happened to the properties?
A. The persona to whom they were given came into possession of them.

Q. With regard to the properties given to you, did you do anything after possession was given to you?
A Yes.
Q. What?

A. I had my name substituted in respect of them in the Municipality as also in the Coliectorate, and I also used to get the tenants to sign the counterfoils of receipts for moneys paid by them.
* * * * * *

Q. In consequence of your application your name was registered?

A. Yes, I also filed the deed of gift along with my application in the Coliectorate.
* * * * * *

Q. With regard to the properties given to them, do you know what happened to, these properties?

A. Those given to Amatunnessa were taken possesion of by her.

7. I think there is enough to justify the learned Judge's finding, especially in view of the fast that the above-mentioned statements in the evidence of the first defendant do not seem to have been challenged by cross-examination.

8. It was, however, argued on behalf of the appellants that even if there was possession of the property included in the heba of the 20th January 1906. the deed was not valid by reason of the gift being one of undivided property, which was capable of partition, to adult and minor sons.

9. This argument was founded on the objection of 'confusion' which was said to apply to such acase, viz., that in the case of the deed of 20th January 1906, the donor being the father, and, therefore, the guardian of his minor son, would take seisin of the minor's share at the time of the gift and thus confusion would be created.

10. This objection, according to the later authorities, could be avoided by the adoption of a device which is referred to in the books, vie., that the entire property should be consigned to the adult, and then a gift of it made to both. So that apparently, according to Muhammadan Law, there is nothing to prevent a gift of undivided property by a father to an adult and minor son, provided that the proper form or device is used for the gift. Further, it has been laid down by the Judicial Committee of the Privy Council in *Muhammad Mumtaz Ahmad v. Zubaida Jan*[1] that the doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules.

11. The principle of the objection already referred to seems to be that when a person makes a gift to an adult and an infant who is in the donor's guardianship, the donor is assumed to take seisin of the minor's share, whereas the gift in favour of the adult requires acceptance, and thus

confusion is occasioned.

12. In this case the gift was contained in a formal document, duly executed and registered, in which it was stated that the adult son, Safiur Rahman, was the guardian of Abdul Rahman, the minor son; and I think the intention of the donor was that the adult son should act in respect of these properties for his miner son. Under such circumstances, I do not think that the confusion hereinbefore referred to would be created, inasmuch as the adult son and not the father would take seisin of the minor's share at the time of the gift: in any event, in view of the opinion expressed by the Judicial Committee of the Privy Council, I do not propose to extend the doctrine by applying it to the facts of this case

13. Then it was argued (1) that the father did not in fact appoint the elder son as guardian to take possession, and (2) that he could not divest himself of his guardianship and appoint the elder son as guardian even if he intended so to do.

14. As regards the first of these two points, it is true that there is no express provision in the deed authorising the elder son to take possession as guardian for the minor son. This is not surprising, when one remembers that the deed was intended to be a "heba-bil-ewaz," and not a mere "heba," and consequently the donor purported by the deed, in exchange for the consideration there mentioned, to put the two sons in possession. On the other hand, I think it is clear that the father, being advanced in age and not expecting to live much longer, intended to divest himself of all interest in the property and to appoint the elder son guardian of the minor, and to do whatever was necessary in respect of these properties on behalf of the minor son, and, if taking possession was necessary, that would be included within the authority conferred upon the elder son as guardian.

15. As regards the second of the above mentioned points, it was urged that the father could not divest himself of the right and duty of guardianship over his minor son, and consequently the appointment of his elder son as guardian being invalid and ineffective, the gift contained in the deed was also invalid.

16. No authority was produced, in answer to our request, for the proposition that by Muhammadan Law, a father cannot divest himself of his guardianship of a minor son in a proper case and by appointing a proper person.

17. The father is no doubt the natural guardian of the minor son, but, under the circumstances which existed in the present case, viz., that the father was advanced in years, and did not expect to live long, and desiring to prevent ill-feeling and disputes amongst his children and wives, he wished to make a disposition of his property, I do not think there is any good reason why he should not delegate his guardianship by appointing his elder son the guardian of his minor son, and, in the absence of any authority to the contrary, in my judgment it was competent for him so to do.

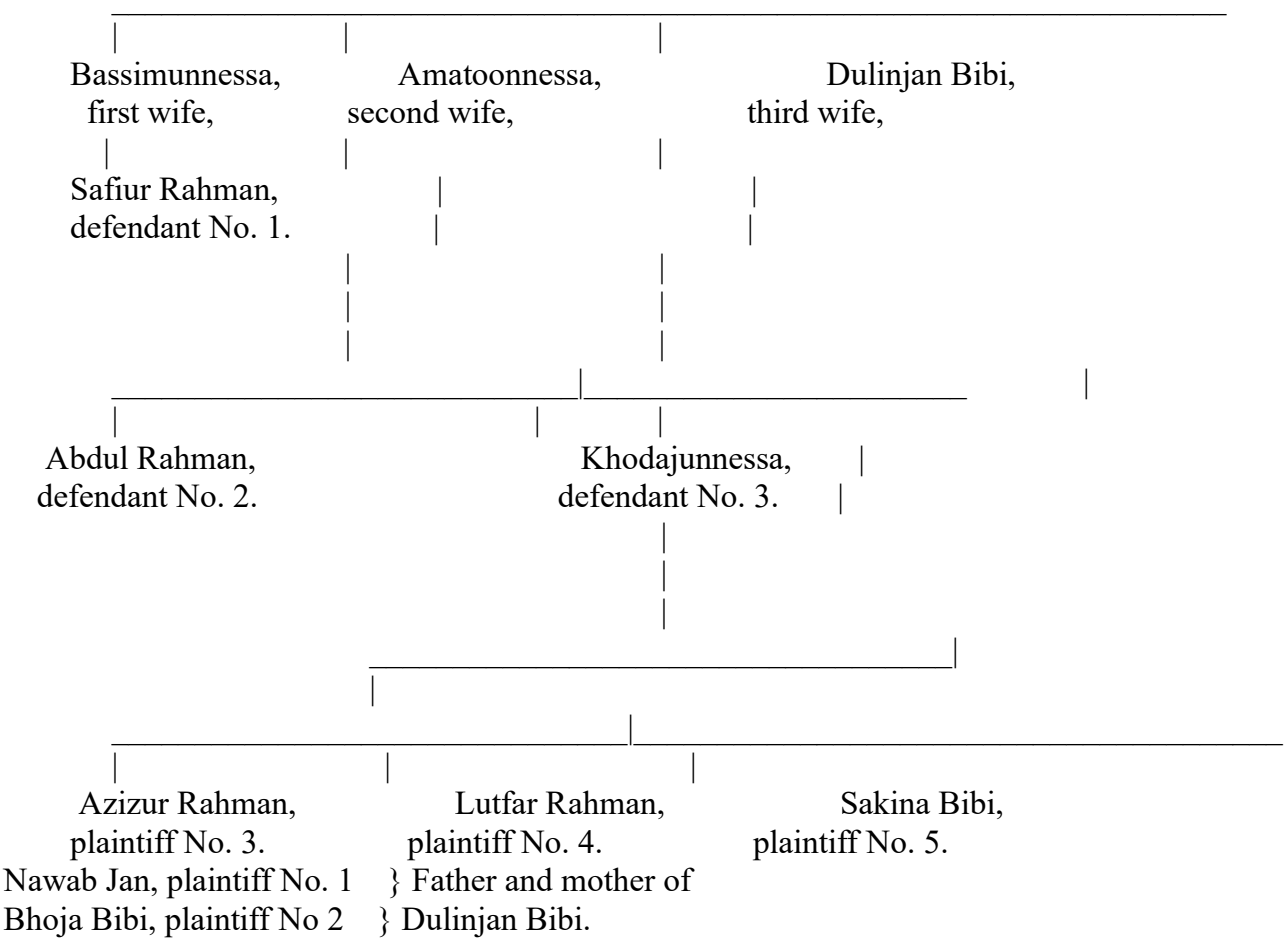
18. The considerations above mentioned apply, mutatis mutandis, to the second deed dated the 27th January 1906 whereby Abdul Sutter appointed his wife Amatoonnessa Bibi guardian of his infant daughter Khodajunnessa: in the case of this deed also, for the reasons above mentioned, I think it was competent to Abdul Sutter to delegate his guardianship by appointing his wife guardian of his infant daughter and to make a valid gift of the properties therein mentioned in

favour of Amatoonnessa and his infant daughter.

19. For these reasons, in my judgment, this appeal should be dismissed with costs.

20. This is an appal by the plaintiffs in a suit for declaration of title to property alleged to have been left by one Abdul Suttar, a Sunni Muhammadan who died on the 15th July 1907. Abdul Suttar had three wives, Basimunnessa, Amatoonnessa and Dulinjan, by each of whom he had children. The first wife predeceased him and the third wife who survived him died before the institution of this suit. The plaintiffs are the legal representatives of the third wife, and his children by her. They are admittedly entitled to a half-share of whatever forms part of the estate left by Abdul Suttar. The defendants are his children by the first and second wives. The relationship of the parties will appear from the following genealogical table;-

Abdul Suttar, died, 15th July 1907.



Nawab Jan, plaintiff No. 1 } Father and mother of
Bhoja Bibi, plaintiff No 2 } Dulinjan Bibi.

21. The controversy between the parties centres round two documents executed by Abdul Suttar on the 20th January 1906 and the 27th January 1906 respectively and registered on the 6th February 1906. By these instruments Abdul Suttar transferred a considerable portion of his estate, the earlier in favour of the two sons by the first two wives; the latter in favour of the second wife and her daughter. The documents on the face of them purport to be hibas-bil-ewaz,

that is, gifts for consideration, namely, two gold mohurs in each case. Mr. Justice Greaves has found that, as transpires from the evidence of the first defendant, the son pf the first wife, no consideration in reality passed at the times of the execution of the documents or at any subsequent period. Consequently the deeds must be treated as hibas and not hibas-bil-ewaz. It is well-settled that the burden of proof lies on the person in whose favour a heba-bil-ewaz is executed to establish that the consideration was paid as described in the instrument, and there is no room for the application of the doctrine recognised by the Judicial Committee and by this Court in the cases of *Chowdry Deby (sic) v. Chowdry Dowlut Sing*[2] *Rajah Sahib Perhlad Sein v. Baboo Budhoo Sing*[3] *Ali Khan Bahadur v. Indar Parshad*[4] *and Fulli Bibi v. Bassirudi Midha*[5] *that where the executant of a document denies receipt of the consideration recited in a bond, the burden lies upon him to establish that the recital is incorrect in fact [Khajooroonissa v. Rowshan Jehan*[6] *Chaudhri Mehdi Hasan v. Muhammad Hasan*[7] *Rahim an Bibi v. Imanjan Bibi*[8] *T*he true position thus is that to establish the validity of the gifts covered by these two instruments, it is incumbent on the defendants to prove strict compliance with the requisites deemed essential for the validity of a gift under the Muhammadan Law. This brings us to the crucial point in the case. The earlier gift, as already stated, was in favour of the two sons by the first two wives, of whom one was an infant. The later gift was in favour of the second wife and her infant daughter. Mr. Justice Greaves has found that possession was as a matter of fact delivered to the adult donee in each instance, and the evidence supports this conclusion; indeed, there is no evidence to rebut the testimony of the first defendant on this point. Now, as concisely stated in the Hedaya, gifts are rendered valid by tender, acceptance and seisin. The plaintiffs contend with reference to this exposition of the law, that the gifts were invalid on two grounds, first, that as there was, in each instance, a gift in favour of an adult and an infant, there was mushaa or confusion; and secondly, that there was no valid acceptance of the gift on behalf of the infants concerned, by persons legally competent to act in that behalf.\

22. As regards the first objection which is sought to be supported by reference to the decision of *Nizam-ud-din v. Zabeda Bibi*[8] adversely commented on by Ameer Ali in his Muhammadan Law, Vol. I, page 101, it is sufficient to observe that as pointed out by the Judicial Committee in *Muhammad Mumtaz Ahmad v. Zubaida Jan*[10] the doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules. In a later case [Ibrahim *Goolam Ariff v. Saiboo*[11]*],* the Judicial Committee refused to extend the doctrine to forms of property unknown in archaic times. The principle itself rests on two reasons; namely, first, seisin in case of gifts is expressly ordained; a complete seisin is impracticable with respect to an indefinite part of divisible things, as it is impossible to make seisin of the thing given with something that is not given; and secondly, if the, gift of part of a divisible thing without separation were lawful, it must necessarily follow that a thing is incumbent upon the giver which he has not engaged for, namely, a division which may possibly be injurious to him. These reasons obviously cease to be applicable when possession as a matter of fact has been delivered, and for this reason the Judicial Committee has held that whether a gift of undivided property is valid or not under Muhammadan Law, possession given and taken under such gift effectually transfers the property. This view is in harmony with the well-established rule explained by this Court in Mariam Bibi v. S.M. Ibrahim Original Side Appeal No. 55 of 1915

that the objection on the ground of mushaa when a gift is made to an adult and an infant may be evaded by a simple device described in the Fatawa-i-Alamgiri; namely, that "he (the father) should deliver possession of the house to the adult son and then make a gift of it to both of them" [Fatawa-i-Alamgiri, Vol. IV, page 549; see also the Bazazia quoted by Ameer Ali in his Muhammadan Law, Vol. I, page 105, 4th Edition]. The gift in the present case cannot consequently be deemed invalid on the, ground of mushaa.

23. As regards the second objection, the contention of the appellant is that the father was the guardian of the infant sons, that he was incompetent to divest himself of his obligations as guardian, that he could not appoint his major son in the one instance and his wife in the other to act as guardian for the purpose of acceptance of the gift on behalf of the respective infants, and that consequently there has been no valid acceptance of the gift in law. No authority has been brought t'6 our notice in support of this ingenious argument and I cannot discover any principle in Muhammadan jurisprudence wherefrom it derives the semblance of support. It is indisputable that where a gift is made by a father to his infant son, no change of possession is necessary; the principle is that the declaration of gift is deemed to change the possession by the father on his own account into possession as guardian on his son's account, and the law is the same in every other case where the donee is a minor in lawful custody of the donor: *Ameeroonmssa Khatoon v. Abadoonissa Khatoon*[11] *Fatima Bibee v. Ahmad Bahsh* [12]If in such circumstances, the donor, with a view to avoid the difficulty created by the doctrine of mushoa, nominates an adult relation as guardian of the infant for the purpose of acceptance of the gift, it is difficult to appreciate why his action should be deemed as beyond his authority. On the other hand, there are texts which point to this conclusion that such a course is not contrary to any established principle of Muhammadan Law. Thus Baillie in his Digest of Muhammadan Law, Vol. 1, Book VIII, Chapter V, 1875, page 539, observes: "The donee, when competent to take possession, has the right to take it. When he is a minor, or insane, the right to take possession for him belongs to his guardian, who is first his father, then his father's executor, then his grandfather, then his executor, and next the Judge, and person appointed by him. It is alike whether the minor be in the family of any of these persons or not. If the father or his executor, or paternal grandfather or his executor, be absent at a precluding distance, possession may be taken for a minor by any person under whose power he may happen to be. And with regard to others besides the father and grandfather, such as the brother, paternal uncle, mother, and other relatives, they have all, on a favourable construction, the power to take possession of a gift for a minor when he is in their family." The view I take receives support from the following texts mentioned by Dr. Abdullah al-Mamun Suhrawardy in his learned lectures on Moslem Legal Institutions:

I When the father makes a gift of something in favour of his infant son, the infant becomes its owner by virtue of the contract.
(Quduri, Vol. II, page 10, Ed. Delhi.) II The gift of a father in favour of his infant child is completed by the contract. (Fatawa-i-Alamgiri, Vol. IV, page 546, Ed. Cal.) III It is stated by Al-Hakim: where a father makes a gift of a house in favour of two of his sons, one of whom is an adult and the other a minor, and the adult son takes possession of it, the gift is void and this is the correct view. For, the gift in favour of the infant becomes completed by the very act of making the gift, as the possession by the father stands in the stead of his (infant's) possession, and the gift in favour of the adult son stands in need of acceptance. Thus, the gift in favour of the infant precedes and mushaa is occasioned. The device is that he should deliver the house to the adult son and then make a gift of it to both of them.

(Fatdwa-i-Alamgiri, Vol. IV, page 549, Ed. Cal.) IV If the infant is in the custody of the grandfather or the brother or the mother or the paternal uncle and a gift is made in favour of the infant and taken possession of by the person in charge of the infant while the father is present, there is difference of opinion among the jurists with respect to it: some jurists are of opinion that it is not valid, and the correct view is that it is valid.
Fatawa-i-Qazikhan, Vol. IV, page 289, Ed. Luoknow.) V Contrary to the case of the mother and of those other than her (mother) maintaining her (minor girl) because the right of taking delivery of possession does not belong to them except after the death of the father or his absence at a precluding distance according to the correct view.
(Hedayah, Vol. VII, page 495, Ed. Cairo.) VI Al-Kifayah (Vol. VII, page 496, Ed. Cairo,) the famous commentary on the Hedayah re-produces Text IV.

VII The Shaykh-al-Islam Khwahir Zadah states in his Mabsut: there are some amongst our jurists who hold that the husband, the stranger, the father, the grandfather and the brother are all equal and they are of opinion that their taking delivery of possession is valid when the infant is in their charge even though the father is present.
(Nataij-al-Afkar, supplement to the Fath-al-Quadir, the celebrated commentary on Hedayah, Vol. VII, page 496, Ed. Cairo.) VIII The author does not mean to restrict the rule to the mother and the stranger, but means that every relation excepting the father, the grandfather and their executors is like the mother. The gift becomes complete by their taking possession if the infant is in their charge, otherwise not.
(Bahr-al-Raiq, Vol. VII, page 314, Ed. Cairo.) IX It is also stated with respect to the grandfather, that he cannot have the right to take possession on behalf of the minor, if the father is alive and no distinction has been indicated between the case where the minor is in his (grandfather's) charge and where he (the minor) is not. The obvious meaning of what he (author) has laid down without any restriction, leads to the necessary conclusion that it (the grandfather's taking possession on behalf of the minor) is not valid.

(Fatawa-i-Alamgiri, Vol, IV, p. 548, Ed. Cal.) X.

The Fatawa-i-Alamgiri reproduces here the extract from the Fatawa-i-Qazikhan quoted above (Text IV) and proceeds as follows: Thus it is laid down in the Fatawa i-Qazikhan. "And the fatwa is giving according to this opinion:" Thus it is laid down in the Fatawa Sughra.
(Fatawa-i-Alamgiri, Vol. IV, p. 548, Ed. Cal.) XI.
The gift in favour of a child by one. who has its guardianship generally is completed by the contract.
(Tanwir-al-Absar, Vol. IV, p. 512, Ed. Cairo.) XII.
"One...guardianship generally:" i.e., every one who maintains it, has charge of it. Thus the brother and the paternal uncle in the absence of the father are included provided that the child is in their charge.
(Durr-al-Mukhtar, Vol. IV, p. 512, Ed. Cairo.) XIII.
It is laid down in the Barjindi:--There is difference of opinion, where possession has been taken by one, who has it (the child) in his charge when the father is present. It is said, it is not valid: and the correct opinion is that it is valid.
(Radd-al-Muhtar, Vol. IV, p. 513, Ed. Cairo.) XIV.
The author of the Hindiya (the Fatawa-i-Alamgiri) citesthe Khaniyah (Fatawa-i-Qazikhan) to the effect that "it is valid" and the Fatawa Sughra to the effect that the fatwa is given according to

this opinion." (See Text X above).
(A1-Tahtawi, Vol. III, p. 398, Ed. Cairo.)

24. I hold accordingly that in each of the two instances before us, there was a valid tender, a valid acceptance and a valid transference of seisin and that the legality of the transaction cannot be successfully impeached. On these grounds I agree that the decree of Mr. Justice Greaves must be affirmed and this appeal dismissed with costs.

Cases Referred.

116 I.A. 205 at p. 215 : 11 A. 460 : 5 Sar. P.C.J. 433 : 6 Ind. Dec. (N.S.) 721
23 M.I.A. 347 at p. 354 : 6 W.R (P.C.) 55 : 1 Suth. P.C.J. 161 : 1 Sar. P.C.J. 288 : 18 E.R. 531
32 B.L.R. (P.C.) : 111 at p. 122 : 12 M.I.A. 275 : 12 W.R. 6 (P.C.) : 2 Suth. P.C.J. 225 : 2 Sar. P.C.J. 429 : 20 E.R. 343
423 C. 950 (P.C) : 23 I.A. 92 : 7 Sar. P.C.J. 63 : 12 Ind. Dec. (N.S.) 631
54 B.L.R. 54 (F.B.) : 12 W.R. 25 (F.B)
63 I.A. 29 : 2 C. 184 : 26 W.R. 36 : 1 Ind. Dec. (N.S.) 412
728 A. 439 : 4 C. 39 : 4 C.L.J. 295 : 10 C.W.N. 706 : 3 A.L.J. 405 : 8 Bom. L.R. 387 : 9 O.C. 196 : 33 I.A. 68 : 1 M.L.T. 163
815 Ind. Cas. 698 : 17 C.L.J. 173
96 N.W.P.H.C.R. 338
1016 I.A. 205 at p. 215 : 11 A. 460 : 5 Sar. P.C.J. 433 : 6 Ind. Dec. (N.S.) 721
1134 I.A. 167 : 35 C. 1 (P.C) : 4 A.L.J. 572 : 11 C.W.N. 973 : 9 Bom. L.R. 872 : 17 M.L.J. 408 : 6 C.L.J. 695 : 2 M.L.T. 479 : 4 L.B.R. 1542 I.A. 67 : 15 B.L.R. (P.C.) 67 : 23 W.R. 208 : 3 Sar. P.C.J. 423
1231 C. 319