

KERALA HIGH COURT

Mammad

Vs.

Kunhali

S.A. No. 516 of 1958 from A.S. 457 of 1952

(M.S. Menon, Ag. C.J and Mr. T.K. Joseph, J.)

24.11.1961

JUDGMENT

M.S. Menon, Ag. C.J.

1. The only question for determination in this second appeal is whether Ext. A1, a deed of gift by a Muhammadan father to his minor daughter dated 1-4-1937, spells a valid gift as held by the courts below. It is settled law that the three essential constituents of an effective gift under the Muhammadan law are declaration, acceptance and possession. In other words, a gift becomes complete under that system of law only on the donor making a declaration of gift, the donee accepting the gift and the donor transferring the possession of the subject of the gift to the donee without consideration.

2. The Fatawa Alamgiri contains special rules relating to gifts to minors. One of those rules is that a gift by a father to his minor child is complete by the contract. Ordinarily the contract would mean both the declaration and the acceptance; but as pointed out in Tyabji's Muhammadan Law, 3rd Edition, Page 430, "in this connection presumably it means the mere declaration."

3. Tyabji's treatise goes on to point out--page 434--that neither express acceptance nor transfer of possession is necessary for the completion of a gift where the donee is a minor, the donor is the donee's father, the subject of gift is in the possession of the donor, or of some person holding it on the donor's behalf, and there is a real and bona fide intention on the donor's part to transfer without consideration the ownership of the subject of the gift to the donee. A perusal of Ext. A1 which was executed and presented for registration by the father leaves no room for doubt that it satisfies the conditions of declaration and acceptance, both being by the donor himself, the first as the owner of the properties and the second as the guardian of his minor daughter.

4. The only controversy as is clear from the order of reference by Velu Pillai J., is as regards the

passing of possession. The order of reference states the dispute as follows:

"The gift is impeached, because on the statement in Ext. A1 and on the allegation in the plaint, delivery of possession was made to the husband of the minor, and this is not valid.

There is no doubt that the reason for saying that no transfer of possession is required in the case of a gift by a father to his minor child is what is indicated by the Privy Counsel in 2 Indian Appeals 87:

"Where there is, on the part of a father or other guardian, a real and bona fide intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

5. The subsequent holding of the property in this case was not by the father himself; but by the husband of the donee to whom the possession was transferred. The question, therefore, is whether such a transfer of possession--as distinguished from a continuance of possession by the donor himself as the guardian of the minor donee--is sufficient to satisfy the requirements of the Muhammadan law.

6. We take the view that neither the fact that possession was not retained by the donor as the guardian of his minor daughter but was handed over to her husband to be held on her behalf nor the fact that the husband was described as the "guardian" of the minor in Ext. A1 has any material impact on the validity of the gift. In A. I. R. 1915 Mad 972--Tyabji J. said:

"A gift to a minor which in all essentials has been completed, cannot fail merely because the person who has taken charge of the subject of gift on behalf of the minor is not his father. This would be contrary to all principle and authority.;

and:

"The donor can give possession to a third person on behalf of any donee. If any authority were needed for these propositions, it may be found in the 11th chapter of the book on Hiba in the Fatawa Alamgiri. A person accepting possession in such circumstance would, in the majority of cases, occupy a position not distinguishable from that of a trustee on behalf of the donee.

7. In concurring with the Judgment of Tyabji J., Ayling J. said :

"The validity of the gift under Mahomedan Law is a more difficult question regarding which, even if I saw reason to disagree with him, I should do so with extreme diffidence; and that he saw no reason to differ. Our sentiments are the same.

8. The second appeal fails and is hereby dismissed with costs.
Dismissed