

BOMBAY HIGH COURT

Bai Saroobai

Vs

Hussein Somji

(John Beaumont, Kt., C.J. Rangnekar and Divatia, J.)

23.03.1936

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal from a decision of Mr. Justice B. J. Wadia given on an originating summons. The summons raised first the question whether on the true construction of a deed of settlement dated November 10, 1930, made by one Fatmabai, the plaintiff has become absolutely entitled to the property at Kambekar Street mentioned in the plaint herein from and after the death of the settlor. The learned Judge answered that question in the negative. The other questions are merely consequential. Mr. Taraporewala for the appellant desired to amend the question by asking who were entitled, and in what shares and for what interests, to the property referred to in the question. I think that we shall have to enlarge the question to some extent, because, if respondent No. 1, who is the trustee of the settlement, is merely told that the plaintiff has not become absolutely entitled to the property, he is left in doubt as to whom he ought to pay over the rents and profits. I think, therefore, we shall have to amend the question by adding the words " and if not what interest in the property does the plaintiff take " ?

2. The settlement in question is in the English form, and is made by a woman named Fatmabai, who is party of the first part, the party of the other part being respondent No. 1 as trustee, and the settlor conveys to him two properties, one in Khetwadi Back Road, and the other, the property referred to in the question, in Kambekar Street, both of them in the town and island of Bombay. The trusts are to pay to the settlor during her life such moneys as she shall require out of the rents and profits, and subject thereto, to pay the rents and profits to the plaintiff and Ba Khatubai, who are the daughters of the settlor, and after the death of the settlor, the trustee is to pay to Bai Khatubai during her life the rents and profits of the property in the first schedule, which was that in Khetwadi Back Road, and then come the material words :-

And the Trustee shall pay to the said Bai Saroobai during her life the net rents and profits derived

from the property described in the Second Schedule hereto. Then the scheme of the settlement is that after the death of the respective daughters, the house in which she had a life interest is to be held in trust for her sons in equal shares, and in default of sons, for her daughters, and then either the plaintiff or the other daughter of the settlor dies without issue, there is a gift over of the share of the one so dying in favour of the other daughter and her issue. So that the settlement is of a type very common under English law. But the parties here are Sunni Mahomedans, and the question is what interest the plaintiff takes under this settlement in accordance with the law applicable to Sunni Mahomedans. The learned Judge held that the plaintiff did not take technically a life estate, but that she became entitled to the usufruct of the property, and he relies on the distinction which exists under the old texts dealing with this matter between a gift of the property to one for life, and a gift of the fruit of the property. Some of the illustrations in the texts refer to the gift of the person of a slave to one person and the gift of the services of the slave to another, and point out that both those gifts may be good. But whether distinctions of that kind can be applied to modern classes of property, I feel myself some doubt. I think it is very difficult to say that, under this settlement by which the plaintiff is given during her life the net rents and profits of the house in question, she is not given the right to the house for life. If the house were empty and the plaintiff desired to occupy it, I think myself it would be difficult to say that she was not entitled to do so, and my own view is that as a matter of construction of the settlement the plaintiff gets a life interest in the house, though I agree with the learned Judge that if all that she gets is the usufruct, the gift is perfectly valid. Now the question which has really been argued is whether, assuming that the plaintiff was given a life interest in the house, that gift will take effect according to its terms. It is argued by the plaintiff in the first place that under Sunni Mahomedan law a gift of a life interest becomes automatically enlarged into a gift of the corpus of the property. Alternatively it is said that if that is not so, then a gift of a life interest by Sunni Mahomedan law is wholly void. The question as to the effect of a gift of what purports to be a life interest under Sunni Mahomedan law came before this Court in the case of *Rasoolbibi v. Yusuf*, and I expressed my own views on the question in that case; and as I remain of the same opinion as when I heard that case, it is not necessary for me to state my reasons again in full. It is undoubtedly the fact that it was generally considered that under Sunni Mahomedan law a gift of a life interest in property did confer an absolute estate in the corpus the rule being based on a passage in the *Hedaya* to the effect that where there is a gift followed by a condition repugnant to the gift, the gift remains, and the condition is rejected. By way of illustration' of the rule a commentator had put the case of a gift for life, which, he said, was really an absolute gift subject to a repugnant condition, and therefore the gift for life became an absolute gift. As I pointed out in the case to which I have referred, the illustration does not seem really to be an apt one, and the rule itself does not appear to involve the enlargement of what is in terms a life interest into an absolute interest. However, the real question which arises in this case, and which arose in

Rasoolbibi's case, is whether the Privy Council decision in *Amjad Khan v. Ashraf Khan*¹ has altered the rule as generally understood. The view I took in Rasoolbibi's case was that the decision of the Privy Council had so altered the rule and having read the case again, more than once, I remain of the same opinion. It seems to me that the Privy Council unquestionably dealt with the case as one of gift. They nowhere in their judgments suggest that it was a case of a grant under a contract, although in the Judicial Commissioner's Court one of the learned Judges had suggested that possibly the grant of the life interest might be upheld on that ground. The Privy Council treat the case purely as one of gift, and they hold that on the construction of the document before them, what was intended to be created was a life interest and nothing more, and on that construction they hold that the grantee, through whom the appellant claimed, did not acquire an absolute interest. That seems to me to be the actual decision at which the Privy Council arrived, and if on the construction of the settlement before us we come to the conclusion that what is granted is a life interest (and it is much easier to reach that conclusion in the present case than it was in the case before the Privy Council), but nevertheless we hold that, by the operation of the rule, of Mahomedan law, that life interest is enlarged into an absolute interest, it appears to me that we shall be going directly contrary to this decision of the Privy Council. It is said that the Privy Council cannot have intended to overrule Indian cases, including decisions of this High Court, without referring to them. But all the decisions were cited. The Privy Council had before them a most elaborate judgment of the Mahomedan member of the Judicial Commissioner's Court, and the decision of the Privy Council is expressed in clear, although guarded, language. And if the decision is inconsistent with previous decisions of Indian High Courts, it seems to me that those previous decisions are necessarily overruled by implication.

3. On the second question, viz., whether a life interest, if not enlarged into an absolute interest, is void, Amjad Khan's case leaves the matter open. The Board point out that if the life interest is bad, then the appellant takes nothing. If, on the other hand, the life interest is good, then it had come to an end, and again the appellant must fail. So that it was not necessary in that case to decide whether the life interest which they held was purported to be created by the document in question was a valid interest. But we have been referred to no case in which it has been held that a life interest under Sunni Mahomedan law is bad, and the case on which Mr. Taraporewala mainly relied, *Mussamut Humeeda v. Mussamut Budlun*² seems to me to be an authority against him, because in that case the Privy Council were discussing what was the actual arrangement made, one view being that a life interest had been created, and the other view being that an absolute interest had been created, and the Privy Council say that as the creation of a life interest is not in accordance with ordinary Mahomedan usage, the person urging the creation of such an interest must prove his case strictly; but it is not suggested that according to Mahomedan law such an interest cannot be created. In my opinion, therefore, the learned Judge was right in

answering the question raised by declaring that the plaintiff does not take an absolute interest in the property at Kambekar Street, but I think that we ought to add to that a declaration that the plaintiff takes an interest in the rents and profits of the property in Kambekar Street during her life. The question as to who will be entitled to the house on her death is a question which cannot be raised at the present time. Mahomedan law does not recognise vested remainders, and the question who will be entitled to the house on the death of the plaintiff is one which can only be raised when that event occurs.

Rangnekar, J.

4. The originating summons, out of which this appeal arises, raises an important question under the Mahomedan law. The material facts are, that one Fatmabai, widow of Elias Haji Abdul Rahim, died in August, 1932. Prior to her death she executed a deed of settlement on November 10, 1930, by which she conveyed a property situated at Khetwadi to a trustee, defendant No. 1 here, in trust for her daughter Khatizabai, and another property situated at Kambekar Street for her other daughter Saroobai, plaintiff, upon the terms and conditions mentioned in the deed. The principal condition was that the trustee was to pay to the settlor out of the net rents and profits such sums of money as may be required by her for her maintenance and her personal requirements during her lifetime, after defraying the municipal and other taxes, rates and assessments and providing for the carrying out of the repairs to the properties. If any balance remained in the trustee's hand, the same was to be invested and held subject to the trusts created by the deed. Subject to this provision, the trustee was to hold the net rents and profits, or the balance thereof, to pay the same to the two daughters in equal shares as tenants-in-common, and upon the death of the settlor to pay to Khatizabai the net rents and profits from the Khetwadi property, and to pay to the plaintiff the net rents and profits from the Kambekar Street property. Upon the death of the survivor of the settlor and Khatizabai or Saroobai the trustee was to hold the properties upon trust for their son or sons. Clause 9 provided that in the event of the settlor requiring any moneys, the trustee was at liberty to raise the same by a mortgage or charge upon both the properties. On these facts the present originating summons was taken out by Saroobai, the appellant. It is admitted that, on the execution of the deed, the trustee was put in possession of the properties. All the parties interested in the two properties, including Khatizabai, were joined as parties to the summons. The parties are Sunni Cutchi Memons, and it is common ground that they are subject to the Hanafi. school of Mahomedan law, and that the deed of settlement has to be construed according to the principles of that law.

5. The questions raised before the learned Judge were : Whether on a true construction of the deed, the plaintiff has become absolutely entitled to the property at Kambekar Street; and whether defendant No. 1, the trustee, should be ordered to convey the said property to the

plaintiff and put her in possession thereof? The learned Judge held that there was a gift of the usufruct of the properties in favour of the daughters, but assuming there was a gift of a life estate, the gift was good; and it is from this judgment that the present appeal is taken.

6. It is contended before us, first, that the gift is not a gift of usufruct, but if it is, the gift is void, and there will be a resulting trust in favour of the settlor's heirs. In that case, the succession would admittedly be governed by the rules of Hindu law, and the properties will go to the sisters in equal shares as tenants-in-common. The next contention is, that it was a gift of a life estate, and as a life estate is not known to Mahomedan law, or is inconsistent with it, the gift operates absolutely in favour of the donees.

7. Before dealing with these contentions, I shall first refer to another contention taken by the learned counsel on behalf of the appellant. He relies on Clause 9 of the deed of settlement, and contends that the donor has reserved an interest in the property for her benefit, and that being so, the gift fails altogether, and a resulting trust must ensue. Under the Mahomedan law, it is no doubt essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift. But the clause, in my opinion, does not show that this condition is not complied with. All that the clause provides is, that in the event of the settlor requiring any moneys, the trustee may, if he likes, mortgage or charge the properties for the benefit of the donor. There is nothing in the trust deed, as a whole, which shows that the trustee would be bound to mortgage or charge the properties or to sell them for the benefit of the settlor, and I think the deed read as a whole clearly shows that the settlor had completely divested herself of the ownership of the properties on the execution of the deed, and admittedly she had put the trustee in possession.

8. The question then is, what is the nature of interest taken by the appellant in the property at Kambekar Street? Under the Mahomedan law, a gift may be made through the medium of a trust. The same conditions are necessary for the validity of such a gift as those for a gift to the donee direct with this difference that the gift should be accepted by the trustees, and possession also should be delivered to the trustees. Another principle of Mahomedan law is :A gift cannot be made of anything to be performed in futuro, nor can it be made to take effect at any future period whether definite or indefinite. (See Mulla's Mahomedan Law, 10th Edition, p. 121, Section 136.) The learned author then at page 122 observes as follows :The rule set forth in this section is based on the principle that the object the gift must be in existence at the time of the gift. The distinction is made clear by the learned author in these words :Where property is transferred by way of gift, and the donor does not reserve dominion over the corpus of the property nor any share of dominion over the corpus, but stipulates simply for and obtains a right to the recurring income during his life, the gift and the stipulation are both valid. Such a stipulation is not void, as it

does not provide for a return of any part of the corpus as in Section 138 ill. (b) and (c). The stipulation may also be enforced as an agreement raising trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated." (Mulla's Mahomedan Law, 10th Edition, p. 123, Section 139 This distinction is supported by the observations of their Lordships of the Privy Council in *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*³

9. The clause which calls for construction in the present case is in these terms :-Upon the death of the Settlor the Trustee shall pay to the said Bai Khati bai during her life the net rents and profits derived from the property describe in the First Schedule hereto and the Trustee shall pay to the said Bai Saroob during her life the net rents and profits derived from the property described the Second Schedule hereto.As a matter of construction, I am unable to hold that there was a gift c the usufruct merely in this case. I cannot see any distinction between giving a property to A for life, and giving him the rents and profits for h absolute benefit during his lifetime. In my opinion, the gift in this case is of a life estate. But if it is a gift of usufruct, then I have no dout that as such it would be entirely contrary to the principles of Mahomeda law. If so, I have no doubt there would be a resulting trust in favour c the settlor's heirs, who in this case would undoubtedly be the two sisters. This brings me to the real question which has been argued at length this case. The question is, whether under the Hanafi school of Mahomeda law it is open to a "Mahomedan to create a life estate, and if he purport to create a life estate, whether the result would not be to make the done the absolute owner of the property granted to him. The same question arose before us in *Rasoolbibi v. Yusuj* . In that case it was held by the trying Judge, Mr. Justice Mirza, upon a review of the material texts am the cases from the very earliest times beginning with the case of *Mussamu Humeeda v. Mussamut Budlun (1872) 17 W.R. 525(Supra)*, that according to the Hanafi school of Mahomedan law there cannot be a gift of a life estate as such, and if a Mahomedan purports to make such a gift, " the gift is valid and the condition is void ", so that the result is that the donee would take an absolute interest in the property, the subject-matter of the gift. The learned Judge, however thought that the decisions including those of the Privy Council clearly laying down these principles were overruled by the decision of their Lordships ii *Amjad Khan v. Ashrat Khan (1929) L.R. 56 I.A. 213 : S.C. 31 Bom. L.R. 809(Supra)*. In appeal the question was exhaustively argued, and I came to the conclusion that there was nothing in the judgment of their Lordships which in any way showed that their Lordships were overruling a long train of decisions, not only of the Courts in this country but of the Privy Council itself. Since then, and during the course of the discussion in this case, I have carefully considered that judgment more than once, and I see no reason to depart from the opinion which I expressed in *Rasoolbibi's* case that *Amjad Khan v. Ashraf Khan* did not overrule the earlier decisions. I do not propose to discuss the view, which has been pressed upon us by the learned counsel for the appellant, that the decision in *Amjad Khan's* case is also capable of being understood on the

footing that it was a case of a family settlement, though I am not prepared to say that there is no force in the argument advanced by the learned counsel. I am content to take the judgment as it stands; and, in my opinion, the judgment proceeded on the terms of the document before their Lordships, one of which was that all the persons interested in the property, namely, the heirs of the donor, were consenting parties to the arrangement which the donor had made. I find support for this view in the judgment of one of the Judicial Commissioners from which the appeal was taken to the Privy Council. What he said as to this part of the case I have set out in my judgment in *Rasoolbibi's* case, and I do not propose to refer to it here. I may, however, refer to the argument which seems to have found favour with the learned Judge, and repeated before us by the learned counsel on behalf of the respondents.

10. It is said that all that was said by the Privy Council in the case of *Mussamut Humeeda v. Mussamut Budhun* (1872) 17 W.R. 52(Supra)5 was that the grant of a life estate was inconsistent with Mahomedan usages. As far as I can see, there is nothing in the report of the case to show that any one contended that the effect of the arrangement between the parties there (mother and son) was to give the mother a life estate and that the life interest was consistent with Mahomedan usages. The simple question was, whether, under the arrangement, the mother took a life estate or an absolute estate. Their Lordships directed their attention to this question and observed that a life estate was inconsistent with Mahomedan usages and unknown to Mahomedan law. It is true that the Privy Council further observed that there ought to be very clear proof transaction so unusual and so improbable amongst Mahomedans. This latter observation, however, loses its force when it is remembered that under the statute then applicable (21 George III, c. 70), it was provided that in the case of Mahomedans "their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party shall be determined, in the case of the Muhammadans, by the laws and usages of Muhammadans and, in the case of Gentoos, by the laws and usages of Gentoos". It may be, as Mr. Justice Mirza said in *Rasoolbibi v. Yusuf*, that the statement of their Lordships was in the nature of an obiter dictum. It is important to note, however, that Humeeda's case was understood in several decisions including those of the Privy-Council as laying down the principle that the creation or grant of a life estate among Sunnii Mahomedans is inconsistent with Mahomedan law. There is nothing surprising in this, for thus runs the *Hedayah*, vol. iii. p. 309:-An amree or life-grant is lawful to the grantee during his life, and descends to his heirs. The question is not whether this law is wise or foolish, nor it is a question of the policy of the law, or whether it is repugnant to modern usages. The only question is, what is the law? That I get from a series of decisions, some of which are those of the Privy Council itself. I have to administer that law. I am bound by those decisions and bound by the texts on which they are based. In this connection I would like to quote the words of that venerable Judge, Sir William Jones, at whose instance the statute above referred to as well as the

subsequent Regulation IV of 1793, Section XV, by which the Mahomedan law was to be applied to Mahomedans, came to be enacted. In his letter to the Government of India he observed: Nothing could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could any thing be wiser than by a legislative act, to assure the Hindu and Mussalman subjects of Great Britain, that the private laws, which they severally hold sacred, and violation of which they would have thought the most grievous oppression, should not be suppressed by a new system, of which they could have no knowledge and which they must have considered as imposed on them by a spirit of rigour and intolerance." [Vide footnote at p. 72 of Sircar's Mahomedan Law-Tagore Law Lectures, (1873), Vol. I.]

11. Even in Amjad Khan's case, the decision in Mussamat Humeeda's case was cited and distinguished as being inapplicable to the facts.

12. I am further supported in the conclusion to which I came in Rasoolbibi's case by the discussion which took place in the course of the arguments in *Syed Mohammad Raza v. Mussamat Abbas Bandi Bibi*⁴ To appreciate the importance of this discussion, it is necessary to bear in mind that according to the law applicable to Shias a life estate as such can be created and vested remainders are also recognized This was pointed out in *Banoo Begum v. Mir Abed Ali*⁵ by Sir Lawrence Jenkins. In this respect the Shias rely on certain texts of their own.

13. *Syed Mohammad Raza v. Musammad Abbas Bandi Bibi* was a Shia case. Sir Lancelot Sanderson, who delivered the judgment of the Privy Council in Amjad Khan's case, was a member of the Board. In the course of discussion Amjad Khan's case was cited. It was argued that the creation of a life estate is void under Mahomedan law, and when one was attempted to be created the donee would take absolutely. Then the cases which are referred to in Rasoolbibi's case were cited. Sir George Lowndes then observed (p. 777) :On this point, the Shia law, by which the parties here are governed, differs from the Sunni law. Then, later, counsel referred to *Umes Chunder Sircar v. Musammad Zahoor Fatima*⁶ and argued that that was a case of a hiba-bil-ewaz. Lord Tomlin questioned (p. 777) :Does the rule of Muhammadan law as to conditions, etc., apply only to gifts ?The counsel said :Yes. Then Lord Tomlin observed :Then clearly the rule cannot apply here. It was a compromise for consideration. Then at p. 778 Sir George Lowndes observed :It is a very well-known doctrine of Muhammadan law that there is no such thing as an estate for life. Then counsel relied on Amjad Khan's case. Lord Tomlin observed as follows (p. 778) :If on the true construction of the compromise, the lady took only a life-estate, then if Shia law is to be applied, you are out of Court. Jenkins C. J.'s judgment in Banoo Begum's case clearly points to a distinction between the Sunni and the Shia law, and is supported by the authority of the texts he cites.

14. These observations of some of the members of the Board, I venture to think, support the view I took of the decision in Amjad Khan's case in Rasoolbibis case, and I still remain unconvinced that the decision in the former case overruled the long train of decisions of the Privy Council itself.

15. For these reasons, I would answer the question in the affirmative, Divatia, J.

16. The question in this case is what interest the plaintiff, who is a Sunni Mahomedan, takes under a trust deed. The provision about her is that the trustee shall pay her during her life the net rents and profits derived from a certain house. Her case is that she takes an absolute interest in the property under this clause on the ground that under the Sunni Mahomedan law, a life interest is enlarged into an absolute interest, and that in the alternative if the life interest is not so enlarged, it is void and the property falls into the residuary estate of the settlor. The learned Judge has held that what is given to the plaintiff is only the usufruct or the income of the property during her life-time and no more, i.e., neither a life estate nor an absolute estate in the property itself.

17. The main argument urged on behalf of the plaintiff-appellant is that what is given to her being a life estate in the property, it enlarges itself into an absolute estate as, under the Sunnj law, the enjoyment for life only is a condition which must be disregarded as repugnant to the grant which must prevail as an absolute one. The first question is whether the grant to the plaintiff is one of usufruct only in the property during her life-time and whether as such it is valid. There is no doubt to my mind that under the Sunni law, a valid gift confined to the usufruct of a property for a limited period) could be made and that such a gift is not bad on the ground of being in futuro. It is open to a donor to carve out the usufruct of the property gifted to another person and to reserve the enjoyment of that usufruct either for himself during his life-time or to grant it to another person for his life. In such a case the gift of the usufruct as well as that of the corpus are both valid: *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*⁷ *Mohammad Abdul Ghani v. Fakhr Jahan Begam*⁸ *Tava-kalbhai v. Imatijaj Begam*⁹ *Lali Jan v. Muhammad Shaft Khan (1912) I.L.R. 34 All. 478(Supra)*, and *Mumtaz-un-nissa v. Tufail Ahmad*¹⁰ read with *In the Matter of the Petition of Khalil Ahmad*¹¹. The plaintiff's case, however, is that the gift of the income of the property during life is gift of a life-estate in the property itself. This contention seems to be based on the analogy of the principle embodied in Section 172 of the Indian Succession Act which says: Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principle as well as the interest shall belong to the legatee. And illustration (iii) says: A bequeaths to B the rents of his lands at X. B is entitled to the lands. The argument is that just as bequest of income carries with it the bequest of the property itself, so the grant of income of a

property for life carries with it the grant of the property itself for life and creates a life-estate in it. In the first place this section which embodies a rule of construction of wills under the English law does not apply to Mahomedans : see Section 58 of the Act. The Mahomedan law has its own provisions about gifts limited to the usufruct of the property, one form of which is ' ariat' under which a person acquires only a right to the profits of a property for a limited period. Secondly, even assuming that the section applies to the case of a Mahomedan, the present case does not, in my opinion, fall under that section because the trust deed does afford an indication of an intention that the enjoyment of the grant in the plaintiff's favour was to be of limited duration. The gift is made through the medium of a trust deed which is couched in language used in English forms of conveyancing, but that would not necessarily attract the application of technical rules of English law. Read as a whole, the trust deed indicates, to my mind, the intention of the settlor that the plaintiff should have only a life interest in the net income of the property, and that being a valid gift, I agree with the learned Judge that the plaintiff does not get an absolute interest in the property.

18. Assuming the intention is to give the plaintiff a life-estate in the property, I am of opinion that such estate does not enlarge itself into an absolute estate. It is true that for a long time it had been considered to be the Sunni law that the creation of a life-estate was prohibited and that it being regarded as a condition repugnant to the law, the grantee takes an absolute estate, though it may defeat the intention of the grantor. There are observations to that effect in *Nizamudin Gulam v. Abdul Gafur*¹² and *Abdoola v. Mahomed*¹³. These observations seem to be based upon an old decision of the Privy Council in *Mussamut Humeeda v. Mussamut Budlun (1872) 17 W.R. 525(supra)*, and a passage from the Hedaya, but they seem to me to be too slender a foundation for raising the structure of the subsequent case-law upon them. In *Mussamut Humeeda's* case their Lordships observe that (p. 527) :The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. That does not necessarily imply that a life-estate was absolutely prohibited under the Mahomedan law. The Hedaya says that an Amree or life-grant was " nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition." The condition implied is that the subject-matter of the gift is to be returned on the donee's death. But a gift subject to such implied or express condition does not seem to me to be the only method of creating a life-estate. What was regarded in ancient times as possible only by imposing a condition could also be done by putting a limitation so as to carry out the intention of the grantor. At any rate the contention that the intended life-estate enlarges itself into an absolute estate, seems to be untenable now after the recent decision of the Privy Council in *Amjad Khan v. Ashraj Khan*. There a life-estate was intended to be created by a deed and it was expressly contended on behalf of the donee's heir that the deed constituted a valid gift of an absolute

interest in the property as under the Hanafi law the condition that the donee should take the property for life would be void and there would be a complete and absolute gift of the property. That contention was negated and the judgment proceeded on the basis that the donor intended to make a gift of a life-interest only, and that if a life-interest could be acquired under, the Mahomedan law, that interest came to an end on the death of the donee with the result that the plaintiff claiming as her heir had no title to the property, and that in the alternative if a life-estate could not be acquired, even then the donee and therefore the plaintiff took nothing. If the donee took an absolute interest, the plaintiff could have acquired title to the property as her heir and his appeal would have succeeded. That point therefore did arise for decision. But in spite of the plaintiff's arguments to that effect in both the Courts and in spite of the elaborate discussion of that point in the judgments of the two learned Judges in the lower Court, the Privy Council negated his contention about the acquisition of an absolute interest and proceeded to consider whether he would get anything on the basis of the creation of a life-estate. This decision therefore has, in my opinion, the effect of overruling all previous cases which hold that the grant of a life-estate has the effect of creating an absolute interest in the property which can pass on to the heirs of the donee.

19. It is true that in that decision the question that under the Hanafi law a life-estate could not be created and that there could not be a transfer of any interest by way of gift except an absolute interest was kept open. But I do not think either the texts or the authorities go so far as to hold that the creation of a life-estate is so repugnant to Mahomedan law that it would be absolutely invalid. If a life-interest in the usufruct of the property is valid under that law as I have shown above, one fails to see why a gift conferring the enjoyment of a property by a donee limited during his life should be regarded as absolutely prohibited and therefore void. In the absence of a clear and unambiguous prohibition, I am reluctant to hold that a life-estate could never be granted.

20. For these reasons, I am of the opinion that the plaintiff has not become absolutely entitled to the property but is entitled to the net rents and profits derived therefrom during her lifetime.

21. We vary the learned Judge's judgment by declaring that on the true construction of the settlement the plaintiff has not become absolutely entitled to the property at Kambekar Street in Bombay mentioned in the plaint, but is entitled to the net rents and profits derived from such property during her lifetime. Otherwise the appeal to be dismissed. Costs of all parties of the appeal to come out of the trust estate, those of defendant No. 1 being as between attorney and client.

Cases Referred.

1(1929) L.R. 56 I. A. 213 : S.C. 31 Bom. L.R. 809
2(1872) 17 W.R. 525
3(1867) 11 M. I. A. 517
4(1932) 36 C.W.N. 774 : S.C. 34 Bom. L.R. 1048
5(1907) I.L.R. 32 Bom. 172 : S.C. 9 Bom. L.R. 1152
6(1890) L.R. 17 I.A. 201
7(1867) 11 M.I.A. 517, 548
8(1922) L.R. 49 I.A. 195 : S.C. 24 Bom. L.R. 1268
9(1916) I.L.R. 41 Bom. 372 : S.C. 19 Bom L.R. 97
10(1905) I.L.R. 28 All. 264
11(1908) I.L.R. 30 All. 309
12(1888) I.L.R. 13 Bom. 264
13(1905) 7 Bom. L.R. 306