*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheikh Muhammad Mumtaz Ahmad and others* v. *Zubaida Jan and others, from the High Court of Judicature for the North-Western Provinces of Bengal; delivered 6th July* 1889.

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Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

The Appellants, who were Plaintiffs in the suit, claim as purchasers of three fourths of a share in an estate to which they alleged that Mahomed Usman had succeeded by descent from Himayat Fatma. The first two Appellants claimed as direct purchasers from Usman, and the third as a sub-purchaser.

The estate originally belonged to Chaudri Hafiz Hussain, who died in 1865 without leaving male issue. After his death his widow Himayat Fatma and his daughter Zahur Fatma, by an award made with their mutual consent, obtained proprietary possession of the property in equal shares, and Chaudri Ahmad Hussain, husband of Zahur Fatma, was entrusted with the management.

The Plaintiffs in their plaint (paragraph 4) alleged that upon the death of Himayat Fatma in the beginning of 1882 Mahomed Usman became her heir, and that according to the distribution

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of shares under the Mahomedan law Usman got 229 out of 390 sihams, and the heirs of Zahur, who died in December 1879 in her mother's lifetime, got 161 sihams; that out of his right Usman sold three fourths, amounting to 171¾ sihams, to the Plaintiffs Mumtaz Ahmad and Firasat Hussain and Sahib Ali Khan for Rs. 10,000 on the 16th December 1882, and received the consideration money and got the deed registered; and that on the 3rd May 1883 Sahib Ali Khan sold his interest to the Appellant Sheikh Irshad Hussain under a sale deed. They charged that the daughters, the grandson, and the son-in-law of Ahmad Hussain had entered into a collusion with Usman, and interfered with their possession, and prayed that they might be put into possession of the claimed property, being 171¾ out of 390 sihams of the property detailed in the plaint, by proving the sale deeds of the 16th December 1882 and 3rd May 1883 and setting aside the proceedings of the Revenue Court. They alleged that their cause of action accrued on the 4th January 1882, the date of the death of Himayat Fatma, and they valued their claim at Rs. 10,000, the amount of consideration.

Usman was made a *pro formâ* Defendant.

The case of the first six Defendants, Respondents, was that the sale deed by Usman had been obtained by fraud without the payment or receipt of the consideration money only for the purpose of carrying on litigation, and further that Usman had no right to the property inasmuch as Himayat Fatma had executed a deed of gift of her share to her daughter Zahur Fatma under which the latter had obtained possession.

Usman in his written statement (para. 3, page 9) said, "The Plaintiffs obtained the sale "deed from the Defendant by fraud. They got "him to acknowledge before the Sub-Registrar

" the receipt of Rs. 7,500 without paying the " same to him, and the Rs. 2,500 which they " had paid to him was taken back by them after " registration on the pretence that they would use " it in meeting the costs of suit," and in para. 5 he stated that " Sahib Ali Khan, who is brother " of Defendant's wife, has, for fear of losing the " good opinion of the brotherhood, sold his share " for Rs. 100 to Irshad Hussein."

The important issues of fact were,—

1st. Was the consideration for the sale by Usman paid, and was the sum of Rs. 2,500 paid at the time of registration taken back or not?

2nd. Did the deed of gift in favour of Zahur Fatma become null and void, and was possession held in accordance therewith?

4th. Did Usman inherit the estate of Himayat Fatma, or had she no right left to her at the time of her death?

The Subordinate Judge of Mainpuri before whom the case was tried in the first instance found upon the first issue that the Rs. 7,500 were not paid, but that the Rs. 2,500 paid at the time of registration were not taken back. Upon the second issue, he found that the deed of gift in favour of Zahur Fatma was a fictitious document and was null and void. He said in the first place the gift was made in respect of an undivided property. The detail of the properties given at the foot of the plaint shows that some of them are joint. Such a gift is invalid under the Mahomedan law. Secondly, according to Mahomedan law the delivery of actual possession is necessary. But in the present case the donor was in possession of all the properties, and the donee died before she could obtain possession of them. He then gave his reasons for considering that Himayat Fatma continued in possession. Record, p. 196.

The result was that, the Subordinate Judge considering that only one fourth part of the alleged consideration for the sale by Usman had been paid gave a decree for the Plaintiffs for one fourth of the property claimed in the plaint.

From that decision the Plaintiffs appealed to the High Court, for amongst others the following reasons :—

1st. Because the finding of the Lower Court that Rs. 7,500 out of the consideration was not paid by the Plaintiffs was against the weight of the evidence.

4th. Because it being shown that the deed of sale was delivered to the Plaintiffs, and that a portion of the consideration had been paid by the Appellants, the whole claim ought to have been decreed.

The first six Defendants appealed to the High Court, for amongst others the following reasons :—

1st. Because the Lower Court has erred in holding that the deed of gift, dated the 12th February 1879, was not valid, under the Muhammadan law, by reason of "*musha*."

2nd. Because the Subordinate Judge's finding, that the gift in question was not followed by delivery of possession in favour of the donee, is against the weight of evidence, which proves that the gift was duly carried out on behalf of the donor while the donee was alive, and that the gift took full effect with the consent and free will of Himayat Fatma, the donor.

3rd. Because it is established by sufficient evidence that the donor, on the demise of the donee, in confirmation of the gift, caused Ahmad Hussain, the husband of the donee, to be placed in possession of the

whole of the property previously conveyed by gift to Mussammat Zahur Fatma, the deceased donee.

4th. Because the finding of the Lower Court against the validity of mutation of names, subsequently effected in favour of the husband of the deceased donee, is not correct; while the remarks made by the Subordinate Judge, as to the absence of the formalities of a proper transfer, are not well founded.

6th. Because the payment of 2,500 rupees, being a portion of the consideration money of the sale deed set up by the Respondents, is not proved by the evidence on the record, and the finding of the Court below to the contrary is not correct.

Upon the appeal of the Plaintiffs the High Court held that the Plaintiffs' statement that the Rs. 7,500 were paid to Usman was false, and that the Defendants' statement that the Rs. 2,500 were returned was also false. They gave their reasons for disbelieving the payment of the Rs. 7,500, but they did not examine the evidence as to the return of the Rs. 2,500, notwithstanding the Defendants' sixth ground of appeal, in which they said that the payment of the Rs. 2,500 was not proved by the evidence on the record; nor did they give any reason for the conclusion at which they arrived that the Defendants' statement as to the return of that amount was false. Even as to the non-payment of the Rs. 7,500, they very much modify their opinion in a subsequent part of the judgment of the Chief Justice, wherein he says, "It appears "to me that we cannot in this Court say that the "Subordinate Judge who tried the question of "fact decided it wrongly. It is not necessary "for us to say whether, supposing the case to "have come before us in the first instance, we

" should have arrived at the same conclusion; it " is sufficient to say that we do not feel called " upon to interfere with the decision he has " passed." Mr. Justice Tyrrell concurred with the Chief Justice, and the appeal was dismissed with costs. Here then was a decision which, unless reversed by Her Majesty in Council, would be conclusive in any future proceeding between the parties to the suit, including Usman and the purchasers, as to the non-payment of the Rs. 7,500, and the non-return of the Rs. 2,500. Their Lordships are now called upon to reverse the decision, and they are obliged to deal with the question, at least as to the non-return of the Rs. 2,500, without having the benefit of the reasons of the High Court with reference to it. This is unsatisfactory, and at variance with the rule of Her Majesty in Council, which requires the reasons of the Judges to be transmitted to the Judicial Committee.

The judgment of the High Court upon the appeal by the first six Defendants is still more unsatisfactory. The second issue was the most important one as regards them, for the denial of the validity of the deed of gift of the 12th February 1879 from Himayat to her daughter, and of possession being taken in accordance therewith, went to the very root of their title. That issue was found against them as regards both law and fact by the Subordinate Judge. Their first four grounds of appeal to the High Court were directed to the findings of the First Court upon the second issue, and they were fairly entitled to an expression of the High Court's opinion with reference to those four grounds of appeal. Yet the High Court, in their judgment upon that appeal, have left the findings of the First Court upon the second issue wholly unnoticed, and, without awarding to the Defendants the costs of their appeal, have dismissed the suit upon a

mere subsidiary point not taken by the Defendants in their grounds of appeal, viz., the Plaintiffs' failure to establish their right to stand in the place of Usman by reason of the non-payment of the Rs. 7,500. To use the words of the Chief Justice, the High Court decided the case upon that ground only, and decided nothing as to the merits, notwithstanding the opinion expressed by the Chief Justice that future litigation is likely to arise between the parties, a misfortune much more likely to be promoted than averted by abstaining from deciding the case upon the merits. Their Lordships therefore consider it to be their duty to determine the issue as to the Defendants' title, as well as upon that which raises the subsidiary point as to the Plaintiffs' right to stand in the place of Usman. They see no reason for the fear entertained by the Chief Justice, that if the High Court had decided the case upon the merits, and given judgment upon all the points raised by the grounds of appeal, complications could have ensued which would make it uncertain what their decision was, and create difficulties in connection with the point of *res judicata*.

Their Lordships will now proceed to express their opinion upon the four principal issues raised in the case.

First, as to the non-payment of the Rs. 7,500, they concur entirely with the Subordinate Judge. It is very improbable that the purchasers would have paid Rs. 7,500 to Usman without taking any receipt or acknowledgment from him beyond the mere statement in the sale deed that the Rs. 10,000 had been paid, especially as the deed itself would not have been admissible in evidence of the fact before registration. The evidence of the witnesses who were called to prove that the money was at the place named and there counted and paid to Usman was contradictory and very

unsatisfactory. Even admitting that Rs. 7,500 were carried to the place named by the witnesses and there counted and ostensibly made over to Usman, a story which their Lordships do not believe, there is no reliable evidence as to where or from whom the money was collected, whence it was brought, or whither and by whom it was carried away after the alleged payment of it to Usman. Whatever weight the admission made by Usman before the Sub-Registrar as to the receipt of the Rs. 7,500 might have had against himself, it was of no weight as against the other Defendants. Neither of the Plaintiffs ventured to give evidence, nor did Usman appear as a witness. It might have been some corroboration of the fact of the purchase by the Plaintiffs for Rs. 10,000 if it had been proved that Rs. 4,000 were *bonâ fide* paid by the Plaintiff Irshad Hussain to Sahib Ali Khan for the one fourth share of the property which the latter had purchased from Usman. But there was nothing of the sort. No proof was given of any payment made by Irshad Hussain except the payment of Rs. 100 in the presence of the Sub-Registrar, notwithstanding the written statement made by Usman that only Rs. 100 were paid. The admission in the deed of sale to Irshad Hussain of the receipt of the whole of the alleged purchase money of Rs. 4,000 is subject to the same remarks as those already made as to the admission by Usman of the receipt of the Rs. 7,500 and Rs. 2,500.

As to the non-return of the Rs. 2,500, their Lordships cannot concur with the Subordinate Judge. He gives no sufficient reason for disbelieving the evidence of Fazlul Rahman (Record, page 190). All he says upon that subject is, "He" (meaning Usman) "has examined only "one witness, Fazlul Rahman, but what reliance "can be placed on him, and how can it be be-

" lieved that the Defendant took the money at " the time of registration, and afterwards returned " it ?" It is not very clear that the money, although the Sub-Registrar was led to believe that Usman had received it in his presence ,ever actually passed out of the control of those who brought it. Usman might, no doubt, have led the Sub-Registrar to suppose that the Rs. 2,500 which are said to have been there counted were placed under his control, notwithstanding a secret arrangement that the money should remain under the control of and be carried away by those who brought it. This is not very incredible when Usman's acknowledgment as to the receipt of the Rs. 7,500 is disbelieved. No explanation is given why Rs. 2,500, and 2,500 only, of the Rs. 10,000 stated in the deed as the consideration should be actually paid when Usman made a false statement as to the Rs. 7,500.

Fazlul Rahman, whom their Lordships see no reason to disbelieve, says :—" I know Muham- " mad Usman and Mumtaz Ahmad. Muham- " mad Usman did not get the consideration " money of the sale deed from Mumtaz Ahmad " and others, in whose favour he executed it. I " know this because I went with Sahib Ali Khan, " my uncle, at the time of registration. When " I went to the tehsil I saw Badulla, the servant " of Sahib Ali Khan, and Nunhey Khan, the " servant of Ali Ahmad, carrying the money in " bags. I heard that there were Rs. 2,500. " Mumtaz Ahmad and Sahib Ali Khan went " inside, in presence of the Registrar. I heard " the sound of the money being counted. After " registration Muhammad Usman, Sahib Ali " Khan, and Mumtaz Ahmad came away. The " money was with the same persons who carried " it to the tehsil. These persons first took the " money to the tehsil treasurer, and asked him to

"receive it on account of revenue due from "Sahib Ali Khan and Ali Ahmad. I was present "at that time. The treasurer said that the "treasury was closed that day, and the money "could not be received. These persons then "went with the money to the house of Firasat "Hussain, and Sahib Ali Khan and I came to "the house of Muhammad Haji, where we had "put up. The servant of Firasat Hussain came "at 10 o'clock on the following day, and asked "to have the money deposited in the tehsil. "Sahib Ali Khan and I both came to the house "of Firasat Hussain, and stayed there for a "short time. Sahib Ali Khan, Mumtaz Ahmad, "and I then went to the tehsil, the money being "carried by the same persons. Some was "received on account of revenue due from Sahib "Ali Khan, and some on account of revenue due "from Ali Ahmad. Mumtaz Ahmad is the "brother of Ali Ahmad."

As to the second issue. The Subordinate Judge has found that the deed of gift of the 12th February 1879 was a fictitious document and was null and void. It is not very clear whether he meant by the word fictitious that the deed was executed without the knowledge or consent of Himayat Fatma. That question is scarcely raised by the issue "Did the deed of gift become "null and void, and was possession held in ac- "cordance therewith?" The finding of the Subordinate Judge on the third issue seems to assume that the deed was executed. Be this as it may, however, their Lordships see no reason to distrust the report of the Commissioner who was deputed by the Sub-Registrar to examine the old lady, and to whom she admitted the execution. That report was dated the 22nd of February 1879, it was believed by the Sub-Registrar, and upon the strength of it the deed was registered on that day. Record, 146.

The Subordinate Judge held that the deed was void as being a gift of undivided property. He adds, that some of the properties are joint, and that such a gift is invalid under the Mahomedan law. Upon this point their Lordships would have been glad to have the opinion of the High Court. In their opinion the gift and possession taken under it transferred the property of Himayat to her daughter.

The opinion of the Subordinate Judge, who was a Mahomedan, must be taken in connection with his finding that the donee died before she could obtain possession; but, for the reasons given hereafter, their Lordships consider that that finding was erroneous.

The doctrine relating to gifts of mushaá was considered by this Committee in the case of Ameeroonissa *v.* Abedoonnissa, 23 Weekly Reporter, P. C. Cases, 208, and by the High Court in Calcutta, in Mullick Abdool Guffoor *v.* Muleka and others, Law Reports, 10 Calcutta, 1112. The facts of those cases differ from the present, but they throw light upon the doctrine.

It is unnecessary for their Lordships to express an opinion as to whether the gift in question was invalid or not, for it appears that even if invalid possession given and taken under it transferred the property.

The authorities relating to gifts of mushaá have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority, but the authorities referred to show that possession taken under an invalid gift of mushaá transfers the property according to the doctrines of both the Shiah and Soonee schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of mushaá is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules.

In the course of his judgment the Subordinate Judge cursorily remarks that Himayat was an old lady, and was not in the proper enjoyment of her senses.

There is nothing in the evidence to show that the latter portion of that assertion was well founded, nor was there any issue upon the subject, nor anything in the report of the Commissioner who examined her as to the execution of the deed, or in the statements of the relations who identified her, to raise an inference that she did not understand the nature and effect of the deed. There was nothing in the deed of a complicated nature or which required the exercise of any great mental powers to comprehend the meaning of it. The disposition was a probable one. The old lady and her daughter and granddaughters were living together, both mother and daughter were ill, and had been suffering from an epidemic. Usman, the mother's brother, was one of her heirs, and the daughter on the death of the mother would not have inherited any portion of the property, nor could the mother have devised the property to her by will. The property was small. Nothing could be more natural than that the mother should desire that in the event of her death her daughter and granddaughters, if they should survive her, should continue in the same moderate degree of comfort which they had enjoyed in her lifetime.

The lady had merely proprietary, not actual, possession of the greater portion of the property, that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and that the donee was to have complete

control of every kind in respect thereof. Ahmad Hussain, the daughter's husband, was the general manager of both mother and daughter, and would doubtless take care that the deed of gift should be carried into effect. Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual. If possession were once taken and the deed of gift took effect no subsequent change of possession would invalidate it.

On the 24th April 1879 Himayat Fatma by special power of attorney appointed Sheik Himayat Ali as her general agent to present and verify a petition for mutation of names, and on the 28th a petition was accordingly presented on her behalf by Himayat Ali, by which, after reciting the deed of gift and that Zahur Fatma had been put into proprietary possession of the property, she prayed that after expunging her name from the Collectorate papers the name of Zahur Fatma the daughter might be entered therein. The usual proceedings were adopted, and on the 5th June 1879 a perwana was issued by the Assistant Collector to the tehsildar, by which he was requested amongst other things to have the petition proclaimed and to cause an inquiry as to possession to be made. This was done, and on the 27th July the village patwari reported that Himayat Fatma had made a deed of gift of her own rights to her daughter Zahur, and that the latter had obtained possession of the same in the place of Himayat Fatma, her mother. On the 28th July the tehsildar reported that he had caused the notification to be proclaimed, and that it was evident from the report of the patwari that Zahur Fatma had obtained possession of the property specified in the gift in the place of Himayat Fatma.

Notwithstanding the proclamation neither

Usman nor any other person raised any objection to the mutation, and accordingly on the 4th February 1880 an order for the mutation of names was granted.

Zahur Fatma died on the 3rd of December 1879, and Himayat Fatma, her mother, on the 4th January 1882. The order for mutation was consequently after the death of Zahur. Mutation of names in the Collector's office was not actually necessary to complete the transfer of possession under the deed of gift. But the order for mutation is important as showing that no objection was made to the mutation, and that the report of the patwari made during the lifetime of Zahur as to the execution of the deed of gift and of the transfer of possession under it which had been adopted by the tahsildar was also adopted and acted upon by the Deputy Collector.

Their Lordships have no doubt that upon the evidence, and especially in the absence of any objection by Usman in the lifetime of Zahur, the Subordinate Judge ought to have found the second issue in favour of the Defendants, and their Lordships do so now.

The reasons of the Subordinate Judge in support of his finding that the donee died before she obtained possession are weak and unavailing. First he relies upon five decrees in suits brought in the name of Himayat Fatma for rent which accrued after the date of the deed of gift, and also upon one payment of revenue made in her name on the 26th November 1879, but the suits were commenced and the revenue paid before the mutation of names in the Collector's office at a time when actions for rent and payment of revenue would in all probability be brought and made in the name of the person entered as the proprietor in the Collector's book. A similar remark applies to the order of the Assistant

Collector in January 1880, in which he speaks of Himayat Fatma as the person in possession. This order, it should be remarked, was made after the reports of the patwari and of the tehsildar that Zahur was in possession, but before they had been adopted by the Assistant Collector and the order for mutation made. Then the Subordinate Judge makes a point of Himayat's continuing to occupy one of the pakka houses intended for females included in the deed of gift, as if the daughter after she had obtained possession under the deed of gift would, in order to complete her title, have turned her mother out of the premises altogether, and have refused to allow her to continue to occupy the house in which she had previously lived at a time when one moiety belonged to herself and the other to her daughter. Such an argument is as futile as the following one, wherein he says, "The revenue "receipt is filed as No. 128, and the order as "No. 136, with the record. At the first page "of the deed of gift, the last pakka house in- "tended for females is entered as occupied by "the donor, who, having made a gift of it, "continued to occupy it herself. How can such "a gift be valid? A very strong reason to "believe the gift to be false is that, if Zahur "Fatma had become the absolute owner and "acquired possession under the gift, two things "must needs have happened after her death, "namely, in the first place, her husband, Ahmad "Hussain, would not have taken any proceeding "tending to set aside the gift, because his object "to acquire the property had been obtained. "Some of the property would devolve on him, "and some on his daughters, and a sixth share "only would go to the mother. So he would "have contented himself to take steps to "acquire only that one sixth share, and would "not have troubled himself about the rest. But

" he did not do so. He took steps to acquire " the whole property."

As though a fraudulent attempt on the part of Ahmad Hussain to acquire the whole property for himself instead of only a portion of it was a strong argument in the face of all the other evidence to prove that the deed of gift was false and had no existence at all. It is unnecessary to refer to the other arguments of the Subordinate Judge in support of his finding on the second issue. They are utterly valueless.

That Ahmad Hussain was not the honest man that the Subordinate Judge treats him to have been, who would have contented himself to take steps to acquire the sixth share which went to the mother, and would not have troubled himself about the rest, is shown by the Plaintiffs' (Appellants') own case, for it is there said, " Ahmad Hussain, alleging a " parole gift, without date, from Himayat Fatma " to himself, applied seven days after his wife's " death, *i.e.*, on the 10th December 1879, for the " transfer of possession in a number of villages " from Himayat to him in accordance with that " alleged gift, and at the same time he applied, " in fraud of his own daughters, for the transfer " to him, as heir of his deceased wife, of her " share, and obtained various collusive and false " reports from kanungoes and other native " local officers, and an order, dated the 19th " November 1880, for the registration of his " own name in respect of the entire estates of " Himayat and of Zahur. It is sufficient to " say here, of those proceedings, that the first " Court has found, and there is now, as is sub- " mitted, no question remaining, that the claims " of Ahmad Hussain to the properties now in " suit were unfounded and 'improper.'"

The Appellants rely on Ahmad Hussain's having, from Himayat's death to the time of his

own death, remained in possession under an order of the 10th November 1880 for mutation of names, and of the first four Defendants, his daughters, having, upon his death, applied for mutation of names to themselves as his heirs; but this argument does not assist the Plaintiffs' case, for the order of the 19th November was obtained with the assent of the daughters of Zahur, and subject to the following proviso. In their petition of the 4th February 1880, speaking of their father Chaudri Ahmad Hussain, they say, "Hussaini Jan and Hajira Jan having filed "a petition in the tehsil of Eta for the entry of "their names instead of that of their mother "Zahur Fatma, and having included therein our "names also, we submit that we and the objectors "are five own sisters, and are the heirs and "proprietors of the property of our deceased "mother, and with our consent our father "Ahmad Hussain continues, as usual, in pos-"session of the villages, and he too is an heir "of the deceased, with right of inheritance to "her property. The said Chaudhri and we are "joint, and possession by him is our possession. "We therefore have no objection to his name "being, during his life, entered instead of ours; "but with this proviso that such arrangement "be now made that our shares be saved from "other claimants, and that we do not thereby "ever lose our rights; and he must, during his "lifetime, provide for us properly. We ac-"cordingly submit that, with the above proviso, "the name of Chaudhri Ahmad Hussain be "entered instead of ours."

Upon the whole their Lordships will humbly advise Her Majesty to reverse the decree of the Subordinate Judge and both the decrees of the High Court, to order the Plaintiffs to pay to all the Defendants, except the representatives of Mahomed Usman, who is dead, their costs in the

Courts below, that a finding be entered for the Defendants on the first issue that the amount of the consideration was not paid, and that the Rs. 2,500 were taken back; and upon the second issue, that the deed of gift in favour of Zahur Fatma was executed with the authority of Himayat Fatma, that possession was taken under it, and held in accordance therewith, and that the possession taken under the deed transferred the property; and that upon those findings a decree be given for the Defendants, and that it is unnecessary to record any finding upon the other issues.

The Appellants must pay the costs of the appeal to Her Majesty in Council.