prevents the punishing authority from taking that fact into consideration during the second stage of the enquiry, for essentially it relates more to the domain of punishment rather than to that of guilt. But what is essential is that the Government servant shall be given a reasonable opportunity to know that fact and meet the same.

In the present case the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary, the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, a comparison of paragraphs 3 and 4 of the order of dismissal shows that but for the previous record of the Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendations of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the respondent from service. This notice clearly contravened the provisions of Art. 311(2) of the Constitution as interpreted by Courts.

This order will not preclude the Government from holding the second stage of the enquiry afresh and in accordance with law.

In the result the appeal is dismissed with costs.

Appeal dismissed.

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VALIA PEEDIKAKKANDI KUTHEESSA UMMA AND OTHERS

v.

PATHAKKALAN NARAVANATH KUMHAMU AND OTHERS

(A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.)

Mahammadan Law—Gift—Validity of gift by husband to his minor wife accepted on her behalf by her mother.

One Mammotty was married to Seinaba and he made a gift

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of his properties including immovable property to Seinaba by a registered deed. Mammotty died without an issue more than two years after the execution of the gift deed. Later on, Seinaba also died without leaving an issue. At the time of gift, Seinaba was fifteen years and nine months old. Mammotty was ill for a long time and was in hospital. He was discharged uncured a month before the execution of the gift deed and he remained in his mother-in-law's house afterwards.

After the death of Seinaba, the present suit was brought by Kunhamu, an elder brother of Mammotty, for partition and possession of 6/16 share of the property which he claimed as an heir under Muhammadan law, challenging the gift as invalid. Kunhamu's contention was that when succession opened out on the death of Mammotty, his widow was entitled to one-fourth share and the remaining three-fourth share was divisible between him and his two sisters. These shares were unaffected by the invalid gift in favour of Seinaba and accepted on her behalf by her mother. The contention of Kunhamu was accepted by all the three courts below which held that a gift by the husband to his minor wife to be valid must be accepted on her behalf by a legal guardian of her property under Muhammadan law *i.e.* by the father or his executor or by grand-father or his executor. As the mother of Seinaba was not the legal guardian of the property of Seinaba, the gift was void. The appellant came to this Court by special leave.

Held, that under Muhammadan law a gift by a husband to his minor wife of immovable property accepted on her behalf by her mother is valid if none of the guardians of the property of the minor is available provided there is a clear and manifest intention to make the gift and the husband divests himself of the ownership and possession of the property.

Held further, on facts the above conditions were satisfied in this case.

Mohammad Sadiq Ali Khan v. *Fakir Jahan* (1932) L.R. 59 I.A. 1, *Nabi Sab* v. *Papiah and Ors.* A.I.R. 1915 Mad. 972, *Nawab Jan* v. *Safiur Rahman,* A.I.R. 1918 Cal. 786, *Munni Bai* v. *Abdul Gani,* A.I.R. 1959 M.P. 225, *Mt. Fatma* v. *Mt. Autun,* A.I.R. 1944 Sind. 195, *Mst. Azizi* v. *Sona Mir,* A.I.R. 1962 J. & K. 4, *Mammad & Ors.* v. *Kunhali & Ors.,* 1962 K.L.J. 351, *Md. Abdul Ghani* v. *Mt. Fakhr Jahan* (1962) 49 I.A. 195, *Suna Mia* v. *S. A. S. Pillai,* (1932) 11 Rang. 109 and *Musa Miya* v. *Kadar Bux,* I.L.R. 62 Bom. 316, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 513 of 1961.

Appeal by special leave from the judgment and order dated June 23, 1960, of the Kerala High Court in Second Appeal No. 103 of 1957.

S. T. Desai and *V. A. Seyid Muhmmad,* for the appellants.

Sardar Bahadur, for the respondents.

August 23, 1963. The Judgment of the Court was delivered by

HIDAYATULLAH J.—This appeal by special leave by defendants Nos. 1 to 3 raises an important question under the Muhammadan Law, which may be stated thus :

> "Is a gift by a husband to his minor wife and accepted on her behalf by her mother valid?"

It has been held by the High Court and the courts below that in Muhammadan Law such a gift is invalid. The facts leading up to this question may now be stated.

One Mammotty was married to Seinaba and he made a gift of his properties including immovable property to Seinaba on April 7, 1944 by a registered deed. Mammotty died on May 3, 1946 without an issue. Seinaba also died soon afterwards on February 25, 1947, without leaving an issue. At the time of the gift Seinaba was 15 years 9 months old. It appears that Mammotty was ill for a long time and was in hospital and he was discharged uncured a month before the execution of the gift deed and remained in his mother-in law's house afterwards. There are conflicting versions about the nature of the disease and a plea was taken in the case that the gift was made in contemplation of death and was voidable. This plea need not detain us because the trial Judge and the first Appellate Judge did not accept it.

After the death of Seinaba, the present suit was brought by Kunhamu an elder brother of Mammotty for partition and possession of a 6/16 share of the property which he claimed as an heir under the Muhammadan Law, challenging the gift as invalid. To the suit he joined his two sisters as defendants who he submitted were entitled to a 3/16 share each. He also submitted that the first three defendants (the appellants) were entitled to the remaining 4/16 share as heirs of Seinaba. In other words, Kunhamu's contention was that when succession opened out on the death of Mammotty, his widow Seinaba was entitled to the enhanced share of 1/4 as there was no issue, and the remaining 3/4 was divisible between

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Kunhamu and his two sisters, Kunhamu getting twice as much as each sister. These shares according to him were unaffected by the invalid gift in favour of Seinaba and accepted on her behalf by her mother. This contention has been accepted and it has been held in this case in all the three courts that a gift by the husband to his minor wife to be valid must be accepted on her behalf by a legal guardian of her property under the Muhammadan Law, that is to say, by the father or his executor or by the grand-father or his executor. As Katheesumma the mother of Seinaba was not a legal guardian of the property of Seinaba it was contended by the plaintiff that the gift was void. It was admitted on behalf of the plaintiff that Mammotty could have himself taken over possession of the property as the guardian of his minor wife ; but it was submitted that such was not the gift actually made. These contentions raise the question which we have set out earlier in this Judgment.

Mr. S. T. Desai on behalf of the appellants contends that neither express acceptance nor transfer of possession is necessary for the completion of a gift, when the donor is himself the guardian or the *de-facto* guardian or 'quasi-guardian' provided there is a real and *bona fide* intention on the donor's part to transfer the ownership of the subject matter of the gift to the donee, and that even a change in the mode of enjoyment is sufficient evidence of such an intention. He further contends that no delivery of possession is necessary in a gift by a husband to his minor wife provided such an intention as above described is clearly manifested. According to him, the law is satisfied without an apparent change of possession and will presume that the subsequent holding of the property was on behalf of the minor wife. Lastly he submits that in any view of the matter when a husband makes a gift to a minor wife and there is no legal guardian of property in existence, the gift can be completed by delivery of the property to and acceptance by any person in whose control the minor is at the time. If there is no such person one can be chosen and appointed by the donor to whom possession can be made over to manifest the intention of departing from the property gifted. Mr. Desai seeks to justify these submissions on authority as well as by de-

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ductions from analogous principles of Muhammadan Law relating to gifts to minors which are upheld though accepted by persons other than the four categories of legal guardian. The other side contends that there is no rule of Muhammadan Law which permits such acceptance and that the decision of the High Court is right.

A gift (*Hiba*) is the conferring of a right of property in something specific without an exchange (*ewaz*). The word *Hiba* literally means the donation of a thing from which the donee may derive a benefit. The transfer must be immediate and complete (*tamlik-ul-'ain*) for the most essential ingredient of *Hiba* is the declaration "I have given". Since Muhammadan Law views the law of gifts as a part of the law of contract there must be a tender (*ijab*) and an acceptance (*qabul*) and delivery of possession (*qabza*). There is, however, no consideration and this fact coupled with the necessity to transfer possession immediately distinguishes gifts from sales.

In the present case there is a declaration and a tender by the donor Mammotty and as the gift is by a registered deed no question in this behalf can arise. In so far as Mammotty was concerned there was delivery of possession and the deed also records this fact. Possession was not delivered to Seinaba but to her mother, the first appellant, and she accepted the gift on behalf of Seinaba. Mammotty could have made a declaration of gift and taken possession on behalf of his wife who had attained puberty and had lived with him, for after the celebration of marriage a husband can receive a gift in respect of minor wife even though her father be living; (Durrul-Mukhtar, Vol. 3 p. 104 and Fatawa-i-Alamgiri Vol. 5 pp. 239-240 original text quoted at p. 455 of Institutes of Mussalman Law by Nawab Abdur Rehman). But Mammotty did not complete his gift in this way. His gift included immovable properties and it was accepted by the mother who took over possession on behalf of her minor daughter. A gift to a minor is completed ordinarily by the acceptance of the guardian of the property of the minor *Wilayat-ul-Mal*. A mother can exercise guardianship of the person of a minor daughter (*Hizanat*) till the girl attains puberty after which the guardianship of the person is that of the father if the girl is un-

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married and that of the husband if she is married and has gone to her husband. Even under the Guardian and Wards Act, the husband is the guardian of the person after marriage of a girl unless he is considered unfit. The mother was thus not the guardian of the person of Seinaba.

Seinaba's mother was also not a guardian of the property of Seinaba. Mahammadan Law makes a distinction between guardian of the person, guardian of the property and guardian for the purpose of marriage (*Wilayat-ul-Nikah*) in the case of minor females. Guardians of the property are father and grandfather but they include also executors (*Wasi*) of these two and even executors of the executors and finally the Kazi and the Kazi's executor. None of these were in existence except perhaps the Civil Court which has taken the place of the Kazi.

Now Muhammadan Law of gifts attaches great importance to possession or seisin of the property gifted (*Kabz-ul-Kamil*) especially of immovable property. The *Hedaya* says that seisin in the case of gifts is expressly ordained and Baillie (Dig. p. 508) quoting from the Inayah refers to a *Hadis* of the Prophet—"a gift is not valid unless possessed". In the Hedaya it is stated—"Gifts are rendered valid by tender, acceptance and seisin" (p. 482) and in the *Vikayah* "gifts are perfected by complete seisin" (Macnaghten 202).

The question is whether possession can be given to the wife's mother when the gift is from the husband to his minor wife and when the minor's father and father's father are not alive and there is no executor of the one or the other. Is it absolutely necessary that possession of the property must be given to a guardian specially to be appointed by the Civil Court? The parties are Hanafis. No direct instance from the authoritative books on Hanafi law can be cited but there is no text prohibiting the giving of possession to the mother. On the other hand there are other instances from which a deduction by analogy (*Rai fi 'l qiyas*) can be made. The Hanafi law as given in the Kafaya recognises the legality of certain gifts which custom (*'urf*) has accepted. This is because in deciding questions which are not covered by precedent Hanafi jurisprudence attaches importance to decisions

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based on *istehsan* (liberal construction; lit. producing symmetry) and *istislah* (public policy). The Prophet himself approved of Mu'izz (a Governor of a province who was newly appointed) who said that in the absence of guidance from the Koran and Hadis he would deduce a rule by the exercise of reason. But to be able to say that a new rule exists and has always existed there should be no rule against it and it must flow naturally from other established rules and must be based on justice, equity and good conscience and should not be *haram* (forbidden) or *Makruh* (reprobated). It is on these principles that the *Mujtahidis* and *Muftis* have allowed certain gifts to stand even though possession of the property was not handed over to one of the stated guardians of the property of the minor. We shall now refer to some of these cases.

The rules on the subject may first be recapitulated. It is only actual or constructive possession that completes the gift and registration does not cure the defect nor is a bare declaration in the deed that possession was given to a minor of any avail without the intervention of the guardian of the property unless the minor has reached the years of discretion. If the property is with the donor he must depart from it and the donee must enter upon possession. The strict view was that the donor must not leave behind even a straw belonging to him to show his ownership and possession. Exceptions to these strict rules which are well recognised are gifts by the wife to the husband and by the father to his minor child (Macnaghten page 51 principles 8 & 9). Later it was held that where the donor and donee reside together an overt act only is necessary and this rule applies between husband and wife. In *Mohammad Sadiq Ali Khan* v. *Fakhr Jahan*(1), it was held that even mutation of names is not necessary if the deed declares that possession is delivered and the deed is handed to the wife. A similar extension took place in cases of gifts by a guardian to his minor ward (Wilson Digest of Anglo-Muhammadan Law 6th Edn. p. 328). In the case of a gift to an orphan minor the rule was relaxed in this way:

"If a fatherless child be under charge of his mother,

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> and she take possession of a gift made to him, it is valid .... The same rule also holds with respect to a stranger who has charge of the orphan." Hedaya p. 484. See also Baillie p. 539 (Lahore Edn.)

In the case of the absence of the guardian (*Gheebut-i-Moonqutaa*) the commentators agree that in a gift by the mother her possession after gift does not render it invalid. Thus also brother and paternal uncle in the absence of the father are included in the list of persons who can take possession on behalf of a minor who is in their charge: *Durrul Mukhtar* Vol. 4 p. 512 (Cairo Edn.). In Radd-ul-Mukhtar it is said:

> "It is laid down in the Barjindi: There is a 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." (Vol. 4, C.513 Cairo Edn.)

In the Bahr-al-Raiq Vol. 7 p. 314 (Edn. Cairo)

> "The rule is not restricted to mother and stranger but means that every relation excepting the father, the grand-father and their executors is like the mother. The gift becomes complete by their taking possession if the infant is in their charge otherwise not."

In Fatawai Kazikhan Vol. 4, p. 289 (Lucknow Edn.), the passage quoted above from Radd-ul-Mukhtar is to be found and the same passage is also to be found in Fatawai Alamgiri Vol. 4 p. 548 Cairo Edn. All these passages can be seen in the lectures on Moslem Legal Institutions by Dr. Abdullah al-Mamun Suhrawardy. The rule about possession is relaxed in certain circumstances of which the following passage from the *Hedaya* p. 484 mentions some:

> "It is lawful for a husband to take possession of any thing given to his wife, being an infant, provided she has been sent from her father's house to his; and this although the father be present, because he is held, by implication, to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not held to have resigned the management of her concerns. It is also otherwise

with respect to a mother or any others having charge of her; because they are not entitled to possess themselves of a gift in her behalf, unless the father be dead, or absent, and his place of residence unknown; for their power is in virtue of necessity, and not from any supposed authority; and this necessity cannot exist whilst the father is present."

Macnaghten quotes the same rule at p. 225 and at page 230 is given a list of other writers who have subscribed to these liberal views.

The above views have also been incorporated in their text books by the modern writers on Muhammadan Law. (See Mulla's Principles of Mahomedan Law 14th Edn. pp. 139, 142, 144 and 146, Tyabji's Muhammadan Law 3rd Edn. pp. 430-435, ss. 397-400, Amir Ali's Mahommedan Law Vol. 1, pp. 130-131).

The principles have further been applied in some decisions of the High Courts in India. In *Nabi Sab* v. *Papiah and ors.*(1) it was held that gift did not necessarily fail merely because possession was not handed over to the minor's father or guardian and the donor could nominate a person to accept the gift on behalf of the minor. It was pointed out that the Muhammadan law if gifts, though strict, could not be taken to be made up of unmeaning technicalities. A similar view was expressed in *Nawab Jan* v. *Safiur Rehman*(2). These cases were followed recently in *Munni Bai and anr.* v. *Abdul Gani*(3), where it was held that when a document embodying the intention of the donor was delivered to the minor possessing discretion and accepted by her it amounted to acceptance of gift. It was further pointed out that all that was needed was that the donor must evince an immediate and *bona fide* intention to make the gift and to complete it by some significant overt act. See also *Mt. Fatma* v. *Mt. Autun*(4), *Mst. Azizi and anr.* v. *Sona Mir*(5) and *Mammad & ors.* v. *Kunhali & ors.*(6).

(1) A.I.R. (1915) Mad. 972.
(2) A.I.R. (1918) Cal. 786.
(3) A.I.R. (1959) M.P. 225.
(4) A.I.R. (1944) Sind 195.
(5) A.I.R. (1962) J. & K. 4.
(6) 1962 K.L.J. 351.

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In *Md. Abdul Ghani* v. *Mt. Fakhr Jahan*(1), it was held by the Judicial Committee as follows:

> "In considering what is the Mohammaden Law on the subject of gift *intervivos* their Lordships have to bear in mind that when the old and admittedly authoritative texts of Mohammedan law were promulgated there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land, or any zamindari estates large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Mohammedan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift."

Later in *Mahamad Sadiq Ali Khan* v. *Fakhr Jahan Begum*(2), it was held by the Privy Council that at least between husband and wife Muhammadan law did not require an actual vacation by the husband and an actual taking possession by the wife. In the opinion of the Judicial Committee the declaration made by the husband followed by the handing over of the deed was sufficient to establish the transfer of possession.

These cases show that the strict rule of Muhammadan law about giving possession to one of the stated guardians of the property of the minor is not a condition of its validity in certain cases. One such case is gift by the husband to his wife, and another, where there is gift to a minor who has no guardian of the property in existence. In such cases the gift through the mother is a valid gift. The respondents relied upon two cases reported in *Suna Mia* v. *S. A. S. Pillai*(3) where gift to a minor through the mother was considered invalid and *Musa Miya and*

(1) (1922) 49 I.A. 195 at 209.
(2) (1932) 59 I.A. I.
(3) (1932) 11 Rang. 109.

anr. v. *Kadar Bux*(1), where a gift by a grandfather to his minor grandsons when the father was alive, without delivery of possession to the father, was held to be invalid. Both these cases involve gifts in favour of minors whose fathers were alive and competent. They are distinguishable from those cases in which there is no guardian of the property to accept the gift and the minor is within the care either of the mother or of other near relative or even a stranger. In such cases the benefit to the minor and the completion of the gift for his benefit is the sole consideration. As we have shown above there is good authority for these propositions in the ancient and modern books of Muhammadan law and in decided cases of undoubted authority.

In our Judgment the gift in the present case was a valid gift. Mammotty was living at the time of the gift in the house of his mother-in-law and was probably a very sick person though not in *marzulmaut*. His minor wife who had attained discretion was capable under Muhammadan law to acept the gift, was living at her mother's house and in her care where the husband was also residing. The intention to make the gift was clear and manifest because it was made by a deed which was registered and handed over by Mammotty to his mother-in-law and accepted by her on behalf of the minor. There can be no question that there was a complete intention to divest ownership on the part of Mammotty and to transfer the property to the donee. If Mammotty had handed over the deed to his wife, the gift would have been complete under Muhammadan law and it seems impossible to hold that by handing over the deed to his mother-in law, in whose charge his wife was during his illness and afterwards Mammotty did not complete the gift. In our opinion both on texts and authorities such a gift must be accepted as valid and complete. The appeal therefore succeeds. The Judgment of the High Court and of the Courts below are set aside and the suit of the Plaintiff is ordered to be dismissed with costs throughout.

Appeal allowed.

(1) I.L.R. 52 Bom. 316 P.C.