

ILLAHI SHAMSUDDIN NADAF

A

v.

SOU. JAITUNBI NADAF

JULY 14, 1994

[KULDIP SINGH AND R.M. SAHAI, JJ.]

B

Mahomedan Law—Inheritance—House Property—Heirs daughter and grandson in possession of house property—Mutation of property in their names—Oral Gift—Validity—Both heirs declared as owners of portions of house which are in their respective possession.

C

Constitution of India 1950—Art. 142—Oral Gift by a Mahomedan lady—Intention of donee to be honoured in order to do complete justice.

R was the owner of the house in dispute. She died on 07.06.1975. J is her daughter and S is the grandson from another daughter who died near about 1933-34. J instituted a suit for a declaration and possession to the effect that she, "being a sharer" (Class I Heir) under the Mahomedan Law, was entitled to inherit the house in dispute to the exclusion of the grandson who was a "distant kindred" (Class III heir). The Trial Court dismissed the suit. The appellate court reversed it and declared the suit. The High Court upheld the same. Hence this appeal.

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Allowing the appeal, this court

HELD : 1.1. R gave her property to her daughter and the grandson (through another daughter) in her life time by dividing the house into two parts and giving possession of the respective parts to the two heirs. An oral gift is perfectly valid under Mahomedan Law. The declaration as well as acceptance of the gift may be oral whatever may be the nature of the property gifted. The intention on the part of R to give the property to the two heirs is obvious by the fact that she divided the house into two portions and gave actual possession to both of them. The appellant and the respondent are living in their respective portions for the last more than 40 years. The mutation of the property is in their names. [600-H, 601-A-B]

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1.2. In order to do complete justice between the parties, the intention of R has to be honoured and, as such, the appellant and the respondent

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A shall be the owners of the portions of the house which are in their respective possession. [601-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6102 of 1990.

B From the Judgment and Order dated 27.7.90 of the Bombay High Court in S.A. No. 317 of 1990.

V.N. Ganpule, Mrs. Sadhana Ramchandran and Ms. S.B. Rastogi for the Appellant.

C A.M. Khanwilkar for the Respondent.

The Judgment of the Court was delivered by

D **KULDIP SINGH, J.** Rajubai was the owner of the house in dispute. Jaitunbi, respondent in the appeal herein, is her daughter. Shamsuddin, the appellant, is the grandson of Rajubai from another daughter Mehamunisa who died near about 1933-34. Rajubai died on June 7, 1975. Jaitunbi instituted a suit for a declaration and possession to the effect that she, "being a sharer" (class I heir) under the the Mahomedan Law, was entitled to inherit the house in dispute to the exclusion of the respondent who was a "distant kindred" (class III heir). The trial court dismissed the suit. The lower appellate court reversed the judgment of the trial court and decreed the suit. The High Court dismissed the second appeal *in limine*. This appeal by shamsuddin is against the judgment and decree of the lower appellate court as upheld by the High Court.

F The lower appellate court reversed the finding of the trial court on the question of inheritance on the following reasoning :-

G " The persual of the said classification of heirs makes it ample clear that the original plaintiff/the appellant is the only Class I heir of the said Smt. Rajubai Dadu Pinjare. It further makes it crystal clear that the original defendant/the respondent is a class III heir of the said Smt. Rajubai Pinjare. Once this position is accepted as correct as per the principle of Mahomedan law then I am required to see as to how the allocation of shares takes place. In this respect the commentary at page 253 as mentioned in the above mentioned H books, makes it ample clear that the heirs of class I and Class II

are to inherit together the estate of a deceased Mahomedan. It further makes it ample clear that if Class I and Class II heirs are in existence then the Class III heirs of a deceased Mahomedan are wholly excluded. If this Principle is taken into consideration then it has to be said in the instant case that the original defendant/the respondent has no *locus standi* to inherit the suit property belonging to the said Smt. Rajubai Pinjare."

Learned counsel for the respondent has further assisted us on the subject of inheritance under the Mahomedan Law. According to him, the respondent being the daughter and only Class I heir, she is entitled to one-half of the property as her fixed share. He further contended that there is a provision under the Mahomedan law of inheritance called "the return". The effect of this principle is that where there are no "residuaries" (Class II heirs), the surplus of the shares of the "sharers" (Class I heir) reverts to them. The precise contention of the learned counsel was that the respondent being the only "sharer" and there being no "residuaries" the other one-half share would also revert back to her and, as such, she is entitled to inherit whole of the property left by Rajubai. There is plausibility in the argument but the view we propose to take in this case, it is not necessary for us to go into the same.

We may examine the dispute between the parties from another angle. The house in dispute consists of the ground floor and the first floor. It was pleaded in the written statement filed by the appellant before the trial court that after the death of his mother in the year 1933-34, he was brought up by Rajubai as her son. He further pleaded that about 30 years back the first floor of the house was given to Jaitunbi and the ground floor was given to him. According to him, the respondent along with her five sons have throughout been residing on the first floor and the appellant on the ground floor. The electric connections and the water meters of both the portions of the house are separate. The lower appellate court noticed these facts in the following words:—

"He submitted that as the said Smt. Rajubai Pinjare was not having a son, she had brought up the original defendant/the respondent as her son. It has been alleged that he was looking after the said Smt. Rajubai Pinjare and the property till her death. He further submitted that he is residing in the entire ground floor of the said

A house. He further submitted that the original plaintiff/the appellant is residing on the first floor of the said house along with her 5 sons. It has been further alleged by him that during the life time of the said Smt. Rajubai Pinjare, she had given the first floor of the suit house to the original plaintiff/the respondent. He has further
 B alleged that since that time they are enjoying the suit property accordingly. Thus he alleged that the suit of the original plaintiff/the appellant is false and as such it deserves to be dismissed with costs."

C After the death of Rajubai, the City Survey Officer, by his Order dated December 11, 1975 entered the names of the appellant and respondent both as holders of the property in dispute. The mutation was done in favour of the two parties in respect of the portions of the house under their possession. The appeal filed by Jaitunbi against the order of the City Survey Officer was dismissed by the Sub Divisional Officer, Kolhapur by his order
 D dated July 7, 1980 with the following observations :—

E "Therefore in a summary inquiry the city survey officer was justified in passing this order when the respondent was proved to be the son of Rajubai's daughter and was also in possession with separate electric Meters standing in the name of both appellant and respondent. The appellant may yet get her right under the Mahomedan Law established in the Civil Court."

F The above mentioned facts pleaded by the appellant in the written statement have not been controverted by the respondent. In the rejoinder dated January 8, 1991 filed by the appellant in this Court he has mentioned his age as about 56 years which shows that he was born some time in the year 1934-35. That was the precise time when his mother Mehamunisa died. There is, thus, inherent truth in the averment of the appellant that he was brought up by his maternal grandmother like a son. It is evident that about
 G 30 years before the filing of the suit Rajubai gave the first floor of the suit house to the respondent and the ground floor to the appellant. They have been separately and to the exclusion of each other enjoying this property for over 40 years. It is, thus, obvious from the fact of this case that Rajubai gave her property to her daughter and the grandson in her life time by dividing the house into two parts and giving possession of the respective
 H parts to the two heirs. An oral gift is perfectly valid under Mahomedan

law. The declaration as well as acceptance of the gift may be oral whatever may be the nature of the property gifted. The intention on the part of Rajubai to give the property to the two heirs is obvious by the fact that she divided the house into two portions and gave actual possession to both of them. The appellant and the respondent are both living in their respective portions for the last more than 40 years. The mutation of the property is in their respective names. A
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We are of the view that in order to do complete justice between the parties, the intention of Rajubai has to be honoured and, as such, we declare and hold that the appellant and the respondent shall be the owners of the portions of the house which are in their respective possession. C

We allow the appeal, set aside the judgments and decrees of the courts below and dismiss the suit filed by the respondent-plaintiff. No costs.

A.G.

Appeal allowed.