

Tajju Khan Vs. Mazhar Khan

Tajju Khan Vs. Mazhar Khan

SooperKanoon Citation : sooperkanoon.com/469607

Court : Allahabad

Decided On : Nov-09-1949

Reported in : AIR1952All614

Judge : Kidwai, J.

Acts : Muhammadan Law

Appeal No. : Second Appeal No. 368 of 1944

Appellant : Tajju Khan

Respondent : Mazhar Khan

Advocate for Def. : Naimullah, Adv.

Advocate for Pet/Ap. : Hyder Husain, Adv.

Disposition : Appeal dismissed

Judgement :

Kidwai, J.

1. On 25-1-1941, Tajju Khan, plff. executed a deed of gift in favour of Mazhar Khan, deft. who is his own brother & delivered possession of the property to the donee. Subsequently plff. instituted the suit out of which this appeal arises to obtain possession of the gifted property by, among other things, revocation of the

deed of gift. The deft, pleaded that the gift was not revocable. The trial Court accepted the plff's, claim & decreed the suit. On appeal, the learned Civil Judge of Fyzabad held that the parties were within the prohibited degrees of relationship & that, consequently, the gift could not be revoked. He accordingly allowed the appeal & dismissed; the suit. The plff. has now come up in second appeal.

2. The only contention pressed by Mr. Hyder Husain, for the appellant, was that the donor & the donee being both of the same sex could not be said to be related within the prohibited degrees & that, therefore, the gift was revocable. The only case relating to this point which was placed before me was that of Ghulam Mohammad v. Din Mohammad A. I. R. (23) 1936 Pesh 208 in which a Bench composing the Judicial Commissioner & the Additional Judicial Commissioner held that there was no impediment to the revocation of a gift made by a person to his sister's son. The question was, however, not discussed & proceeded on the basis of a passage of Mulla's Muhammadan Law, which is ambiguous--the ambiguity not being noticed by the learned Additional Judicial Commissioner who pronounced the judgment. Moreover, no notice is taken of an illustration given by Mulla which militates against the decision. Mr. Hyder Husain, therefore, placed before me modern text books as well as the original authorities of Muslim Jurists.

3. In Hamilton's translation of the *Hidaya* vide Edn. 2 by Grady, p. 487--it is stated :

'If a person make a gift of anything to his relation within the prohibited degrees, it is not lawful for him to resume it, because the prophet has said ; 'when a gift is made to a prohibited relation, it must not be resumed--& also because the object of the gift is an increase in the ties of affinity, which is thereby obtained.'

The following passage occurs in Baillies Digest of Muhammadan Law 'Book VIII, Chap. IV'.

'Gifts are of several kinds, some being to relations within the prohibited degrees, some to strangers, some to relatives who are not within the prohibited degrees, & some to person who are prohibited but are not relatives. All may be revoked before delivery to the donee, whether he were present or absent at the time of the gift, & whether he were permitted to take possession or not. But after delivery, the

donor has no right of revocation, when the gift is to a relation within the prohibited degrees'

(As will presently appear this is but a translation of the relevant passage of the Fatwa Alamgiri).

4. Later on, in the same chapter, the following passage occurs :

'Relationship within the prohibited degrees prevents the revocation of a gift, whether the relation be a Mooslim or an infidel, & there is consequently, no revocation of gifts to fathers & mothers, how high so ever, or children, how low so ever; the children of sons & the children of daughters being in this respect alike. In the same manner there is no revocation of gifts to brothers & sisters, & paternal uncles & aunts. But where the prohibition is for some other cause than consanguinity it does not prevent revocation; as in the case of fathers & mothers, or brothers & sisters by fosterage, & of mothers of wives, step sons, & the wives of sons, & husbands of daughters who are prohibited by affinity.'

5. The Durr-ul-Mukhtar, in the chapter relating to the revocation of gifts, states that gift may not be revoked if any one of seven reasons exists. Among the seven reasons is relationship (quarabat). It is stated :

('So, if he makes a gift to one who is related to him by descent within the prohibited degrees of relationship, even though he may be a subject (zimmi) or a foreigner, who has been given refuge, there is no revocation.')

6. The same view is expressed in the Fatwa Alamgiri, Kitab-ul-Hibba; Chap. V, in which it is stated :

(He has no right to revoke after delivery of possession to a relation within the prohibited degrees & for the rest he has the right of revocation even after delivery of possession but, after delivery of possession, the donor cannot act unilaterally in revoking but he is dependant upon the order of the Qazi or on Consent.)

7. Mulla in his Principles of Muhammadan Law says that one of the grounds on which a gift may not be revoked is that the 'donee is related to the donor within the

prohibited degrees.' Similarly, in Tyabijia Commentry, it is stated 'Under the Hanafi Law gifts in favour of relations within the prohibited degrees are irrevocable.' Amir Ali also says--See Muhammadan Law, Vol. I, p 153 :

'Relationship of blood within the prohibited degrees is a bar to revocation, without any distinction as to the creed of the donor or the donee.'

MacNaghten in his 'Principles' is silent on the point. Saxena in his 'Muslim Law as administered in British India says, at pp. 503 & 504 :

'The following are the circumstances under which a gift is not revocable :

1. Under the Sunni Law, where the parties bear the relationship of blood within the prohibited degrees' Then he proceeds to deal with prohibition by marriage & ends up by saying 'the sex of the parties will make no difference as regards revocability.'

8. Mr. Hyder Husain contended that all these authorities except that last, prohibit revocation only if the parties are related within the prohibited degrees, that is to say, are so related that marriage between them is not allowed by the Islamic law. He contends that the Arabic words are (.....), which literally mean, 'related by blood & forbidden in marriage.' Consequently, since no question of marriage arises between persons of the same sex, there is no prohibition of revocation when the donor & the donee belong to the same sex.

9. If the literal meaning of the words quoted is alone considered then no doubt the contention of Mr. Hyder Husain would prevail but the context in which the words are used shows that they are not used in their literal sense: they are used compendiously to describe the degree of relationship which should be such as to exclude the legality of marriage between the two where such a marriage is physically possible. Instead of reciting the numerous degrees of relationship, one phrase is used which would cover them all. No difficulty in understanding the real significance could arise on the Arabic texts because, in that language, the form of verb as used is different if the subject of that verb is a male from what it would be if the subject is a female. Thus, the form of the verb used shows that a gift by a male

is being dealt with--& of course the same rule will apply to females, since the law is not different for males & females--& it mentions a gift to the brother as being irrevocable.

10. The whole position is made clear by the illustrations of the principle given by the various authorities to which a reference has already been made.

11. Following the text of the Durr-ul-Mukhtar which has already been quoted, there is what is known as a 'ramification.' This is as follows :

(A man makes a gift to his brother & a stranger of something which is undivided & gives possession of it. There may be a recovery so far as the stranger is concerned because there is no impediment.)

12. The same chapter of the Fatawa-i-Alamgiri relating to the revocation of gifts, after stating the principle in the words which have already been quoted, proceeds to elucidate the prohibition & gives certain examples, one of which is stated as follows :

(It is said if a foreigner (male) came to our country as a permitted visitor & he has a brother in our country who is a muslim, & either of them makes a gift of something to the other, then that gift cannot be revoked.)

In his 'Principles & Precedents of Muhammadan Law', although MacNaghten does not say anything about the degree of relationship between the donor & the donee which makes gifts irrevocable, but among the precedents, which he gives, is the following :

'Case XIV.'

'Q.--A person died, leaving as his heirs, two widows & a daughter. A few years after his death, both the widows made over by gift to the daughter, all their right & title to the property left by the husband. She (the donee) executed an agreement in favour of her mother, engaging to provide her during her lifetime with food & raiment &, after her death, to perform her funeral ceremony & obsequies. The donors caused the rents of the estate to be paid to the donee, who, afterwards,

before the death of her step-mother, disposed of the landed property so acquired by gift to the deft., & he, four months after the death of the donor (who died before her step-mother), took possession of all her property by virtue of gift. It is proved by the testimony of witnesses, that the donee is a son of the donor's uncle, does not appear. Now the mother of the first donee (that is to say one of the widows who survives) wishes to revoke the gift which she made in favour of her daughter. Under these circumstances, is she, according to Muhammadan Law, competent to resume the gift, & to recover the estate from the possession of the second donee or not ?

R.The donor is not entitled to revoke the gift which she made in favour of her daughter, because, in this case there are two obstacles to resumption; first: the death of the donee . . . &, secondly, relation within the prohibited degrees; as is stated in the *Hidaya*,--'if a person makes a gift of anything to his relation within the prohibited degrees, it is lawful for him to resume it...'

13. Mulla gives as an illustration of an irrevocable gift 'a gift by an uncle to his sister's son,' & Amir Ali, in a footnote, practically quotes the passage from the *Fatawaii Alamgiri* to which I have already referred.

14. Thus on these authorities it must be held that a gift by one person to another who is so closely related that a marriage between the two, if it could physically take place, (i. e. if the two belonged to opposite sexes), would be illegal, cannot be revoked.

15. The result is that this appeal fails & is dismissed with costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com