

**In Re: Mohideen Sahib**

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**SooperKanoon Citation :** [sooperkanoon.com/792186](http://sooperkanoon.com/792186)

**Court :** Chennai

**Decided On :** Nov-21-1956

**Reported in :** AIR1957Mad436

**Judge :** Rajamannar, C.J. and ;Panchapakesa Ayyar, J.

**Acts :** Muhammadan Law; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 17

**Appeal No. :** Letters Patent Appeal No. 83 of 1956

**Appellant :** In Re: Mohideen Sahib

**Advocate for Def. :** Chetty and ;Shetty, Adv.

**Advocate for Pet/Ap. :** P.C. Parthasarathy Iyengar, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

Rajamannar C.J.

1. Two points were raised by Mr. Parthasarathi Aiyangar, learned counsel for the appellant in this case. One is that the learned Judge Basheer Ahmed Sayeed J., erred in law in holding that the gift by the second defendant to the plaintiff of his share in the suit property was valid. The contention was that as the donee was entitled only to an undivided share, the gift was invalid because of the doctrine of

musha, under the Muhammadan law. As the learned Judge observed, the prevailing view is that a gift of an undivided share which is capable of division is not void.

Learned counsel for the appellant did not dispute this but argued that such a division could be made only by the donor himself and relied on the decision of the Lahore High Court in *Said Hassan v. Shah Hussain*, AIR 1947 Lah 272 (A). That decision has obviously no application to the facts of the present case because there it was possible for the donor to have made a division himself and deliver the share which was the subject matter of the gift. In the case before us the facts are entirely different. The donor has made a gift of his entire interest to the plaintiff. That interest was a share in a property. It will not be possible for the second defendant to voluntarily effect a division and then deliver his share to the plaintiff.

2. In our opinion, if the gift is otherwise valid, in a case like this, there can be no impediment to the Court directing a partition between the donee in the right of the donor and the other sharer, the first defendant in this case. It certainly can-not be denied that the 2nd defendant himself could have filed a suit for partition against the first defendant. No authority has been cited before us for the position that the Court could not pass a decree for partition at the instance of a donee of an undivided share against the person entitled to the remaining share.

3. The next point raised was that the suit should not have been converted into a suit for partition. It is true that the plaint proceeded on the footing that there was separate enjoyment of the property in two equal halves by the second defendant and his deceased brother. The learned Judge was prepared to hold that there was a valid arrangement between the two sharers that the property should be enjoyed in two equal halves and that they also enjoyed the property thus. In these circumstances we think it is a highly technical objection to say that the plaintiff cannot be given any relief in this suit where she has prayed for a declaration of ownership of the northern half of the plaint property and for possession of the same as against the first defendant. The learned Judge has made it clear that he has permitted an amendment of the plaint to induce a specific prayer for partition by metes and bounds. We think that this direction is in the interests of justice on

the facts of this case.

4. We see no reason to interfere with this direction. The appeal is dismissed.

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