

Karimannessa Bibi Vs. Hamedulla Alias Raja and ors.

Karimannessa Bibi Vs. Hamedulla Alias Raja and ors.

SooperKanoon Citation : sooperkanoon.com/876079

Court : Kolkata

Decided On : May-15-1925

Reported in : 90Ind.Cas.218

Judge : Hugh Walmsley and ;Mukerji, JJ.

Appellant : Karimannessa Bibi

Respondent : Hamedulla Alias Raja and ors.

Judgement :

Walmsley, J.

1. This appeal is directed against a decision of the President of the Calcutta Improvement Trust Tribunal in a dispute about the apportionment of some compensation money.
2. Premises No. 32, Durga Road have been acquired by the Trust. The Collector's valuation has not been accepted by those who appear to be the owners, and before making the valuation the President has decided the principles on which the compensation when it is fixed will be apportioned.
3. The former owner was Muhammad Tayeb; he had a wife named Sarifannessa; he died in November 1895, leaving a widow, five sons and three daughters. The claimant No. 4 is the appellant, and she is one of the daughters. Her claim as to

the share that would ordinarily be hers is resisted on the ground that Muhammad Tayeb made a waqf of the property a few months before his death. The question, therefore, that the President had decide was whether the waqf was (sic) not. He held that it was valid, and it is against that decision that the appeal is directed.

4. The first ground on which the appellant assails the waqf is that it offends against the doctrine of mushaa. The reason for this assertion is two-fold. First, it is said that the wife Sarifannessa was owner of a portion, and secondly, that one Azimannessa also had a share in the property covered by the waqf. Neither of these assertions can be supported. Sarifannessa's plot of land was not an undivided share, but specific land with Tayeb's land forming the boundary on one side. It may be an open question whether the husband or the wife is the owner of the portion standing in Sarifannessa's name, but for my present purpose it is enough to point (sic) that the premises are divided into spec plots. As for Azimannessa's portion, her name appears with that of the lady who sold to Sarifannessa, and with that of a third person in Billon's Register of 1893. In 1911 she asked for the holding to be sub-divided, and for permission to redeem, her share of the rent. This was done without any objection. The circumstances indicate that the sub-division consisted of recognizing her possession of a specific plot, and not of carving out from an undivided whole a plot equivalent to her interest. Further if the areas are considered, it appears that there were specific plots with ascertained areas, together amounting approximately to the area of the whole. I, therefore, agree with the learned President's finding that the doctrine of mushaa does not render the waqf invalid.

5. The second objection to the waqf is that it is really a disposition for the benefit of the grantor's family. The question is whether there is a substantial dedication of the property to charitable uses. The income from the property is not large, and a very considerable part of it must be spent for the benefit of members of the grantor's family. There are, however, specific sums to be paid for the maintenance of worship in a mosque established by the waqifs father, and directions are also given for using the income for the benefit of the travellers and students. The terms of the disposition are such that without scrupulous honesty on the part of the mutwalli little if any thing is likely to be left for the student and the traveller, but

there may be a little and in the ordinary, course of nature there should be more. I think the instrument lies very near the border line, and my own inclination would be to hold against its validity, but in deference to the opinion expressed by Greaves, J., in another suit, an opinion which is, of course, not binding but is entitled to consideration, and to the view taken by my learned brother on this, Bench. I have come to the conclusion that I ought to regard the waqf as valid, so far as this objection is concerned.

6. The third objection is based upon the difficult doctrine of marz-ul-maut, or death bed illness. In Sir Roland Wilson's Book on Anglo-Muhammadan Law this doctrine is set out as follows: 'A gift made in (sic) sickness is so far regarded as a request that it cannot operate on more than a third of the testator's nett assets unless with the consent of all the heirs, nor in favour of one heir without the consent of all the others. Explanation I-A gift is said to have been made in mortal sickness, only if it was at the time, and seemed to the donor himself highly probable that the malady would soon and fatally, and if in fact it did so end. The donor's state of mind, which is the real ground of the rule, may be, but it is not necessarily, to be presumed from the gravity of the symptoms. On the other hand no evidence of actual apprehensions of death will suffice in the absence of external indicia of danger, chief among which is inability to attend to ordinary avocations.' There have been numerous decisions on the subject since those words were first written but I think that they set out the doctrine correctly.

7. The facts which appear to be proved in the present case are that Muhammad Tayeb then a very old man, was attacked by paralysis of the lower limbs in February 1895: he at once became a helpless invalid, permanently confined to his bed; he could not perform the ordinary offices of nature without assistance, and, more important, he could not leave his bed for religious exercises. He continued in this state until he died in the following November. The waqfnama which we are considering was executed in March.

8. The fact that Muhammad Tayeb was ill or at any rate bed-ridden for nine months, has given scope for the suggestion that the saving principle established for those who suffer from a malady of long continuance will make this waqf valid

Sir Roland Wilson, quoting from Baillie's Digest, has this note 'The lame, the paralytic, the consumptive, and a person having a withered or a palsied hand, when the malady is of long continuance, and there is no immediate apprehension of death, may make gifts of the whole of their property,' and adds, 'The Hedaya fixes the period of long continuance at one year, but this is not taken as a hard and fast rule.' In this case it is argued that the illness lasted for nine months, and that is almost a year, and, therefore, under this principle, Muhammad Tayeb was competent to make a gift of the whole of his property.

9. I do not think it is necessary to consider whether this rule is to be construed elastically or not, for the reason that I have no doubt that in March 1895 Muhammad Tayeb was expecting to die very soon. Not only was the immediate apprehension present to his own mind: there was also external signs which those about him would naturally interpret as indicating that death was at hand. It is true that as a fact he lingered for seven or eight months, and that no fresh illness supervened, and, therefore, it may be said that his own fears and his relatives', 'expectations were mistaken, and that the malady did not soon end in death. It was from that malady, however, that Tayeb died: he never got any better, and from February to November there was never a time when the malady became a mere disability; throughout it threatened an early end, and at the last it did prove fatal without any fresh illness supervening. I think, therefore, that the months of lingering before actual death do not take the case out of the doctrine. My conclusion, therefore, is that the waqf is valid only to the extent of one-third of the waqif's assets.

10. The appellant succeeds in part and the President is directed to ascertain the compensation when determined in accordance with this view.

11. The appellant will be entitled to recover her costs from the contesting respondents in both Courts: hearing-fee in this Court is fixed at three gold mohurs.

Mukerji, J.

12. The only question that has been raised in this appeal is as to the validity of the waqf executed by one Muhammad Tayeb in respect of certain properties, one of

which, namely. Premises No. 32, Durga Road comprising an area of 1 bigha 13 cottas 7 chattaks 25 square feet, has been acquired under the Land; Acquisition Act. The validity of the waqf is questioned upon three grounds: First, that the waqf offends against the doctrine of mushaa as the premises in question were the joint property of Muhammad Tayeb and his wife Sarifannessa and also because one Azimannessa was a co-sharer in the holdings of which the said premises formed a part; second, that the waqf is illusory and contains directions which are vague and incapable of execution; and third, that the waqf is invalid under the law of marz-ul-mout.

13. As regards the first of these grounds what appears upon the evidence is this. The premises aforesaid are comprised within revenue holding No. 318. This holding consists of two distinct plots of lands carved out of old holdings Nos. 64, 64-A, 66, 66-A and 67. The total area of all, these holdings was more or less 2 bighas 8 cottas 9 chattaks. By a kobala Ex. G. dated the 20th March, 1889, Sarifannessa Bibi, wife of Muhammad Tayeb, purchased a plot of land 10 cottas in area, and it was recited in the document that previously her husband had acquired by several purchases 1 bigha 5 cottas 14 chattaks of land, and in the Schedule to the document this land was stated as forming one of the boundaries on the East. On the 20th March, 1895 Muhammad Tayeb executed a waqfnama in respect of various properties, including the aforesaid lands which were purchased by him as well as that purchased by his wife. The plots of land being distinct; neither Muhammad Tayeb nor Sarifannessa Bibi can be said to have had an undivided share in the lands in respect of which the waqf was made. As regards Azimannessa, all that appears upon the Evidence is that in Billon's Register of 1893-94 one Azeman Bibi and one Meher Bibi and two others were recorded as tenants in respect of the aforesaid holdings. Meher Bibi sold the 10 cottas of land to Sarifannessa in 1889, Azimannessa applied in 1911 for sub-division of the holdings and for redemption of the holding to be allotted to her, and the said application was granted. The holding allotted to her appears from the order-sheet in that case to have consisted of an area of less than 5 cottas. The total area of the lands of the above-mentioned old holdings as stated in the kobala Ex. G was 2 bighas 8 cottas 9 chattaks, of which according to Billon's Register the portion in which Aziman Bibi was a joint tenant with Meher Bibi and others was 1 bigha 19

cottas and 6 1/2 chattaka. The purchases by Muhammad Tayeb and Sarifannessa did not extend to the whole of the said 1 bigha 19 cottas and 6 1/2 chhattaks but only to 1 bigha 15 cottas 14 chattaks as stated in Ex. G. The evidence of Khoda Bux, witness No. 2, for the claimant No. 4, was that Aziman had 3 1/2 cottas of land, in the holdings, and this seems to be the quantity left to her after the purchases made by Mohammad Tayeb and Sarifannessa. There is nothing to show that the land of Azimannessa was not a separate plot of land such as Meher's was, and it has been proved that she was a co-sharer the premises covered by the waqf. The doctrine of mushaa, therefore, has no application to the case.

14. The second ground may be disposed of in a few words. The object set out in the waqfnama was to make arrangements and provisions for the due performance of religious services in the mosque which had been erected by the father of Muhammad Tayeb at No. '26, Collinga Bazar Street. The inalienability of the properties and the usual limitations and restrictions as to the powers of the mutwalli to deal with the waqf properties were laid down. It was provided that if any land or building included in the waqf estate were acquired by the Government for public purposes, the compensation money would be utilized for purchasing some other property for the purposes of the waqf. In para. 6 directions were given for the yearly repair of the mosque, and the daily lighting thereof, and for arranging for the five prayers that are to be held daily, and also the jumma prayer, the azan and namaz, and the Id and Bakhr-id prayers, and for the employment of khatib and moazan, the distribution of iftari during ramzan, the reading of tarabi prayer by a hafez, and for providing for such accessories as are ordinarily necessary for the purpose. The remuneration of the hafez was fixed at Rs. 25 a year, the khatib was to get Rs. 2 per month and his food, and the moazan. Re. 1 a month and his food. (sic) actions were given for the maintenance (sic) and the entertainment of travellers and mendicants. Provision was also made for the accommodation and maintenance of a sister of the waqif and her daughter, and also the daughters of the waqif in certain circumstances. The five sons were appointed mutwallis, each for a year, and it was directed that the mutwalli in office will get his food and a salary of Rs. 5 and shall be bound to provide for the food of the four future mutwallis, The other directions need not be referred to. The income of the property

was small, being about Rs. 100 or Rs. 125; and though a substantial part of it, under the directions contained in the waqfnama would go to the relations of the waqif, it is manifest that the primary object of the endowment was to support a mosque,' to (sic) arrangement for the performance of (sic) services therein, to carry on works of charity connected therewith, to feed travellers and to educate poor students. The provisions made for the relations can hardly be said to be such from which it may be deduced that the main purpose of the settlement was the aggrandisement of a private family. The directions given to the future mutwallis left a good deal of discretion in them as to how the work was to be carried on, but it was stated that they were to keep to the standard followed by the waqif. The directions, therefore, cannot be said to have been vague or unascertainable, and the waqf must be taken to have been a valid one. It is perhaps true that the waqf has been administered by the mutwallis in a manner not altogether satisfactory and some of them appear to have dealt with the properties as if they were proprietors. Malfeasance or misfeasance on the part of the mutwallis, however, cannot invalidate a waqf which at its creation was a valid one.

15. The third ground raises one of the difficult questions, which the Muhammadan Law abounds in, namely, as to whether the waqf was invalid under the law of marz-ul-mout. The law of marz-ul-mout is not the same amongst all the schools; and moreover the reason of the rule as well as its essentials have been differently enunciated by different jurists. Lawyers who may be said to belong to the orthodox school expound the doctrine on the basis of certain principles, modern jurists seek to rest the law upon what they consider to be more in consonance with rational ideas, and judicial decisions have served to break the rigidity, of it in no small measure, by interpreting it in a broad and liberal spirit.

16. A reference to the translations of some of the texts relating to this branch of the law, which are to be found in books of undoubted authority or have been relied upon in judicial decisions may not be unprofitable. In some cases the translations do not agree, and in others it is not easy to appreciate the exact meaning, the passages being darkened by parenthesis or obscured by the translator's gloss. In the case of Labbi Beebee v. Bibbun Beebee 6 N.W.P.H.C.R. 159, the following texts were referred to:

17. Futawa-i-Alumgiri, Vol. 4, Ch. XI: 'Now they speak of the definitions of fatal disease. What has been adopted in futwas is that a disease from which death may probably result is a fatal disease, irrespective of whether the patient keeps to his bed or not' (page 552). 'He who is affected with paralysis, partial or total, and he who has lost the use of any limb, or is effected with phthisis, and the disease is prolonged, and there is no fear of death, may make a gift of his whole property.' (page 562).

18. Futawa-i-Fusul-Amadi: '--Thej have, explained prolongation to mean one year, so that if the disposition has been made after one year from the attack of the malady it is like a disposition made in the enjoyment of health.' (page 414 M.S.)

19. Futawa-i-Alumgiri, Vol. I, Book of Divorce, page 640: 'Our learned Doctors have explained the duration of sickness to be of one year, so that if the same sickness lasts for one year the acts of the sick person after one year would have the same effect as if he had done then in a state of health.' There is no reason to suppose that the law of marz-ul-mout is not the same in regard to talaq as it is in the case of waqf.

20. Futawa-i-Shami, Vol. II, page 521: 'If the sickness becomes old, that is to say, if one year elapses from its commencement, and no increase or decrease occurs in it, the sick person shall be deemed a healthy person, but if the sickness increases, whether before or after one year, and during the continuance of such increase the person dies of the same, he shall be deemed a sick person.' Other futwas also to the same effect appear to have been produced before the Court. Another translation of the passage last quoted will be found in the case of Fatima Bibee v. Ahmad Baksh 31 C. 319 at pp. 225, 326 and runs in these words: 'If the disease becomes old in this way, that it extends beyond a year, and no increase occurs within that (period), then he (the sick person) is (to be deemed) in health, but if he dies in a state of increase, whether the increase takes place before the year's prolongation of it, he is (to be deemed to be) sick.'

21. A passage from Jamai ul-Rumcoz was also produced before the Court which, while admitting that some authorities doubt the prescription of the period of one year, gave, as supported by the better opinion, the rule that 'gifts by paralytics are

valid if the sickness lasts for a long time, so that a year elapses from the time when it first commenced.'

22. Mr. Ameer Ali in his book on Muhammadan Law, Vol. I, page 56, quotes with approval the observations of Radd-ul-Mukhtar and says: 'It is not merely the fact that the disease is ordinarily fatal that requires consideration but the effect it is likely to have on the mind of the sufferer, which is the chief determining element. A malady of such a nature is called Marz-ul-mout or the illness of death. But where a person has suffered from an illness for a long time so that it has become, as it were, 'a part of his constitution,' or where the progress of the disease is so imperceptible as to cause no apprehension to, him, it does not come within the definition of Marz-ul-mout.'

23. At page 57 is quoted the following passage from the Durr-ul-mukhtar: 'The gift of a person suffering from paralysis, palsy and phthisis, is invalid as to the whole when the disease has lasted over a year, and there is no fear of death from it, but if it has not extended for a year and there is no fear of death (on his part) the gift will take 'effect in respect of the third.' The learned author states that the reason is there is said to be that if a person suffers from a malady which is ordinarily mortal for over a year, it ceases to have any appreciable influence on his mind as it has become a part of his nature.

24. At page 58, Futawa Kazi Khan is quoted in support of the proposition that 'one struck with paralysis, phthisis or palsy is accounted sick whilst the disease is increase; but when the illness has (sic) a long time and is not becoming worse, the sufferer is as one in health' Then the following passage of the text is quoted, 'some lawyers have laid down that if a disease, however mortal, lasts for over a year, it should not be regarded as such, because the man becomes so accustomed to it as to lose all apprehension as to his own condition.'

25. At page 59, Durr-ul-Mukhtar is quoted where it says on the authority of the bazazia, that 'when a person is in imminent fear of death whether from disease or any other cause, so that in the case of an illness the man is so broken or weakened by it as to be incapacitated from conducting his ordinary avocations outside his house, for example, a Faki (Jurist) from going to the mosque, a

tradesman to his (sic) a woman from attending to her (sic) cupations' it is marz-ul-mout and also on the authority of the mujtaba, that 'where the illness has become so severe as to make it permissible for the sufferer to offer his prayer without standing up (Lit: in a sitting posture) it must be regarded as an illness of death.'

26. The above doctrine, however, is different from that of Futawa-i-Alumgiri which was accepted in the case of *Fatima Bibi v. Ahmad Baksh* 31 C. 319 at pp. 225, 326 and where the proposition was laid down in these words: 'A death illness is one which it is highly probable will end fatally whether the sick person has taken to his bed or not; or whether in the case of a man, it disables him from rising up for necessary avocations out of the house or not, such as for instance, when he is a Faki or lawyer, from going to the musjid or place of worship, and when he is a merchant from going to his shop or whether in the case of a woman it does or does not disable her from necessary avocation within doors. But the illness is to be considered death-illness when a man cannot pray standing.' This extract with the exception of the last sentence seems to be the translation of a passage from the *Futawa-i-Alumgiri*.

27. Mr. Tyabji in his *Principles of Muhammadan Law* quotes Baillie's Digest, Vol. I, 543, Grady's Edition of Hamilton's Hedaya 684, in support of the proposition that 'pains of child birth are considered by the Muslim authors as prima facie a Direth illness whereas lameness, gout, of slysis, consumption or withered or palsied hand, after they have continued for a long time arid have no immediate danger of death do not constitute death illness.'

28. It is not very easy to reconcile this mass of conflicting dicta which, as they stand, present numerous points of diversity. Some jurists contend that every command of the sharah was characterised by its illut or reason or principle which is a mental idea and its subub or the cause or the way leading to it, which has an external and physical existence, and that one must adopt the subub in order to reach the obligation which the illut creates. According to them the reason of the rule is that when all hope of life is lost and there is every fear of likelihood of death taking place the right of the heirs to the property is created (sic) in the same manner as it is created (sic) the death of the owner who ceases by death to have

any need for property. Hence it is, they say, that the law has set out in detail the manifestations, indications and signs, and these should be adhered to, whatever might be the doctor's opinion as to the character of the disease. According to them the limit of one year is conclusive and lays down a hard and fast rule which is to be preferred to a doubtful one depending upon such an uncertain thing as a mental condition like fear. Some others' contend that in the case of a disease like paralysis, gout, consumption, etc., a year was required to ascertain whether the illness was a death illness or not; that if the same illness continued uninterruptedly and death takes place on account of it within a year, the illness is a death illness and a gift made within the year is invalid; but if the illness is a lingering one and death does not take place before the end of the year reckoned from the time it commenced, the illness during the year or subsequent to it is not to be considered as death illness; and any gift made within or after the year is valid. According to some, a subjective apprehension on the part of the patient himself is hardly of any importance because though the reason or motive underlying the law is that illness weakens a man's physical and mental powers and he is, therefore, likely to act under such circumstances to the detriment of his spiritual interest by disappointing his heirs in their just expectations, according to the principles of Muhammadan Jurisprudence that has not to be proved as a fact in each particular case, but the law itself lays down hard and fast rules and criteria by which the validity of a sick person's act has to be determined. The efforts of modern jurists have been directed towards removing the conflict, and judicial decisions have tended to disentangle this mass of complications and lay down some principles which may be of easy application.

29. In the case of Labbi Beebee v. Beebun Beebee 6 N.W.P.H.C.R. 159, Pearson and Turner, JJ., relying upon the authority of certain passages in Futawa-i-Alumgiri, Futawa-i-Funul-i-Amadi, and Futawa-i-Shami, quoted above, held that under the Muhammadan Law the term marz-ul-mout is applicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person, afflicted with the disease an apprehension of death that a person labouring under such a disease cannot make a valid gift of the whole of his property until a year has elapsed from the time he was attacked by it. Some of the texts referred to in that case dealt with paralysis

'partial or total,' characterized it as 'a fatal disease' and laid down the doctrine that when the sickness becomes old, that is to say, if one year elapsed from its commencement and no increase or decrease occurs and the same sickness continues, the sick person should be deemed a healthy person, and a disposition made after a year from the attack of the malady was to be treated as a disposition made in the enjoyment of health. In that case the learned Judges overruled the contention that in the case of disease like paralysis, etc., a year was required to ascertain whether the illness was a death illness or not, that if the same illness continued uninterruptedly and death took place on account of it with a year, the illness was a death-illness, and a gift made within the year was invalid, but if the illness was a lingering illness and death did not take place before the end of one year reckoned from the time it commenced, the illness during the year or subsequent to it, was not considered a death illness, and any gift made within or after the year was valid. They went on to observe: 'The Muhammadan Law, as it would seem, in order to guard against acts done by a person afflicted with a disease which may disturb his calm judgment, has provided that the person afflicted with the disease shall be deemed incompetent to pronounce a divorce, or make a gift of his property until after the expiration of a year from the date on which he was attacked with the disease.' This decision was followed in the case of *Muhammad Gulshere Khan v. Mariam Begum* 3 A. 731; A.W.N. (1881) 48 : 2 Ind, Dec. (N.S.) 407 and the principle was laid down in these words: 'According to the Muhammadan Law a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, i.e., has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death.' The doctrine as the validity of the gift when the disease has lasted over a year is considered not to have been correctly appreciated in these decisions (Ameer Ali's Muhammadan Law, Vol. I, page 57, Footnote). In the case of *Hassarat Bibi v. Golam Jaffar* 3 C.W.N. 57 Ameer Ali and Pratt, JJ. observed as follows: --'A careful study of the principles enunciated in the most authoritative Hanafi works would show that in determining whether the donation of a person suffering from a mortal illness comes within the doctrine applicable to marz-ul-mout gifts, several questions have to be considered, viz., (1) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death? (2) Was the

disease of such a nature or character as to induce in the person suffering, the belief that death would be caused thereby, or to engender in him the apprehension of death? (3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create on the mind of the sufferer an apprehension of death? (4) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady? The limit of one year mentioned in the law books does not, in our opinion, lay down any hard and fast rule regarding the character of the illness; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of mortal illness.' In the case of *Fatima Bibi v. Ahmad Baksh* 31 C. 319 at pp. 225, 326, it was laid down (Rampini and Pargiter, JJ.) that ordinarily a malady should be considered to be of long continuance, if it has lasted a year, but agreeing with the observations made in the case of *Hassarat Bibi v. Gulam Jajfar* 3 C.W.N. 57 it was held the limit of one year does not constitute a hard and fast rule and that it may mean a period of about a year. In this case it was laid down that the texts mentioned three matters: (i) illness, (ii) expectation of a fatal issue, and (iii) certain physical incapacities which indicate the degree of illness, and the following observations appear in the judgment: 'The learned Vakil for the defendants contends that the meaning of this is that, if the first and third exist then the second must necessarily be presumed, namely, that there is an expectation of death. The learned Vakil for the plaintiff contends, on the other hand, that there is no such necessary presumption that the matters of the third class are only evidence, and that the Court must decide from that and the other evidence whether the second actually exists, the (sic) whether there is expectation of death. The latter appears to us to be the correct view: for the passage from *Futawa-i-Alumgiri* distinctly states twice that the definition of death illness is illness in which death is highly probable, whether the incapacities mentioned exist or not. These incapacities, therefore, are not infallible signs of death-illness.... At the time when this law was laid down, little medical knowledge existed. It was necessary, therefore, to decide when an illness was a death-illness; and that could only be done by simple rules dealing with certain symptoms which all persons could notice and comprehend. Yet it appears from these passages that even while the lawyers suggested that

certain physical incapacities indicated dangerous illness, they did not lay down positively that these incapacities are conclusive...for it was no part of their definition of death-illness, whether the incapacities mentioned existed or not. It is only with regard to the extreme case, where a man cannot stand up to perform the primary and simple obligation of saying his prayers, that they declared the illness should be deemed a death-illness. 'The learned Judges upon the evidence held that there was nothing in the symptoms of the patient which should necessarily have excited in him an apprehension of death. This case was carried in appeal to the Privy Council and the Judicial Committee in *Fatima-Bibi v. Ahmed Baksh* 35 C. 271 : 10 Bom. L.R. 50 : 7 C.L.J. 122 : 12 C.W.N. 214 : 18 M.L.J. 6 : 3 M.L.T. 110 : 14 Bur. L.R. 268 : 35 I.A. 67 (P.C.) dismissed the appeal, holding that the test which was treated as decisive on the point of the validity of the gift, namely, whether the deed, of gift was executed by the donor under apprehension of death, was the right question in the case. The case of *Ibrahim Golam Ariff v. Saiboo* 35 C. 1 : 4 A.L.J. 572 : 11 C.W.N. 973 : 9 Bur. L.R. 872 : 17 M.L.J. 408 : 6 C.L.J. 695 : 2 M.L.T. 479 : 4 L.B.R. 154 : 34 I.A. 167 (P.C.) went up to the Privy Council from a judgment of Chitty, J., then a Judge of the Burma Chief Court, which had been affirmed on appeal by Thirkell White, C.J., and Bigge, J. In that case the Courts appear to have proceeded upon the test which they considered to be the crucial test in the case, namely, whether there was an apprehension of death in the mind of the donor at the time of the execution of the deed of gift which formed the subject-matter of that case, and concurrently found that question in the negative. Their Lordships of the Judicial Committee on those findings refused to interfere holding that 'the law applicable was not in controversy; the invalidity (sic) arises where the gift is made under pressure of sense of imminence of death.'

30. These cases must be taken to have set at rest the controversy relating to the rigidity of the one year rule. In view of these cases it is also impossible to contend any longer that the subjective apprehension of death in the mind of the donor as distinguished from the apprehension caused in the mind of others, does not count in the law of *marz-ul-mout*. The existence of this subjective element as an ingredient in the law of *marz-ul-mout*, doubted by Woodroffe, J., in the case of *Kulsom Bibee v. Golam Hossein Cassim Ariff* 10 C.W.N. 449 and Sir Abdur Rahim in his *Principles of Muhammadan Jurisprudence*, page 256 says that it is not a test

at all in such matters.

31. The law of marz-ul-mout was considered in the case of Sdrabai v. Rabiabai 30 B. 537 : 8 Bom. L.R. 35 in which Batchelor, J., laid down that 'In order to establish marz-ul-mout there must be present at least three conditions.: (1) Proximate danger of death, so that there is, as it is phrased, a preponderance (ghaliba) of khauf or apprehension, that is, that at the given time death must be more probable than life, (2) there must be some degree of subjective apprehension of death in the mind of the sick person, and (3) there must be some external indicia, chief amongst which would be the inability to attend to ordinary avocations.' These principles were adopted in a later decision of the same Court, Rashid v. Sherbanoo 31 B. 264 : 9 Bom. L.R. 252.

32. In view of the decisions of the Judicial Committee referred to above it may perhaps be doubted as to whether the third condition mentioned in the Bombay cases is really a sine qua non.

33. As regards the investigation into the nature of the illness in the present case we are to some extent relieved by reason of the fact that the malady that Mahammad Tayeb was suffering from was a specific one, and was definitely diagnosed as paralysis of the lower limbs. There is hardly any divergence amongst the witnesses as to the chief characteristics and features of the illness, except perhaps as to minor details as regards which very little preference may be given to one witness more than to another, in view of the fact that the evidence of each witness is coloured by his or her conception of what would or would not constitute marz-ul-mout, The evidence, or such of it as may be safely taken to be reliable points to the first attack of the illness having come in the month of February 1895. The waqfnama was executed, as I have said, on the 20th March, 1895, It was presented for registration on the 21st March 1895, and actually registered on the 23rd.--Muhammad Tayeb died in February, 1895. There is no reliable evidence, one way or the other as to whether the intensity of the affliction went on the increase or whether it varied at any time during the period he suffered from it. The trend of the evidence is to the effect that from the first attack medicines began to be administered and he was kept on liquid diet. The lower limbs having been

paralyzed he would always remain on bed and had to be helped or raised to a sitting posture. On the other hand, we have it that he was taken on a chair into a palanquin on which he was carried to the Office of the Registrar where he personally admitted the execution of the document. There is, therefore, no reason to hold that his brain was affected about the time that the document was executed or at any time; and the evidence of the witnesses who want to make out that his mental faculties had been in any way impaired cannot possibly be believed. The evidence relating to the part that he took in connection with the preparation of the drafts for the waqfnama and the instructions that he gave in connection with the transaction clearly show that he was in full possession of all his faculties. There was nothing suggestive of senile decay, and he was fairly well with all his powers, but for the paralysis of the lower limbs, for the ripe old age of 94 or 95 that he is said to have been of at the time. These findings are substantially the same at which the learned President has arrived on the evidence in the case, and with his findings in this respect I entirely agree.

34. The question, however, is not what the testamentary capacity of Muhammad Tayeb was at the time the document was executed, but to quote the words of the Judicial Committee in the case of *Fatima Bibi v. Ahmed Buksh* 35 C. 271 : 10 Bom. L.R. 50 : 7 C.L.J. 122 : 12 C.W.N. 214 : 18 M.L.J. 6 : 3 M.L.T. 110 : 14 Bur. L.R. 268 : 35 I.A. 67 (P.C.) 'Whether the deed was executed under an apprehension of death,' or in other words of their Lordships as used in the case of *Ibrahim, Golam Ariff v. Saiboo* 35 C. 1 : 4 A.L.J. 572 : 11 C.W.N. 973 : 9 Bur. L.R. 872 : 17 M.L.J. 408 : 6 C.L.J. 695 : 2 M.L.T. 479 : 4 L.B.R. 154 : 34 I.A. 167 (P.C.) whether the waqf was made 'under pressure of a sense of imminence of death.' The possession of one's senses and mental faculties is no index of this apprehension; in fact the proportion of the one to the other would, if anything, vary in the inverse ratio. We have the fact that from the day that he was struck by the disease he was kept in liquid diet, the fact that he was an old man of 94 or 95, the fact that there was nothing before him suggesting that the disease had taken a favourable turn, the fact that the illness continued till the 21st March 1895 on which date the document was executed and the fact that steps were taken the very next day to get the document registered, these facts to my mind suggest unmistakeably that Muhammad Tayeb apprehended that he would not survive the

illness and that his end was approaching. Apart from the texts to which I have already referred, the one thing which was held in the case of *Hassarat Bibi v. Golam Jaffar* 3 C.W.N. 57, as likely to create in the mind of Muhammad Tayeb an apprehension of death, and which dictum was approved in the case of *Fatima Bibee v. Ahmed Baksh* 31 C. 319 at pp. 225, 326 exists in the present case. It has been found by the learned President and rightly so upon the evidence, and in fact that finding has not been challenged before us, that Muhammad Tayeb from the time that the disease came upon him was unable to stand up for prayer. There is a rational foundation for the rule as to why this inability is regarded in Muhammadan Law as creating such apprehension. It is only in a case of utter and absolute disability that one would say his prayers without standing, and when one finds this disability attending him during prayers, it is bound to fill his mind with an apprehension that the end is not far off. At the date of execution of the deed the disease* was a little over a month old, and in no sense had continued for a sufficient length of time so as to be a part of his nature. I think all the circumstances point to his having apprehended at the time he executed the deed that it was highly probable that the malady would soon end fatally. At that point of time there was a preponderance of apprehension that death was more probable than life though he lingered on for (sic) or eight months more and then expired. The waqf, in my opinion, was made under a sense of impending death which he feared was coming on as a result of the illness he was suffering from. The learned President has relied upon a passage in Baillie's Digest, page 543, which runs thus: 'The lame, the paralytic, the consumptive, when the malady was of long continuance and there is immediate apprehension of death may make gifts of the whole of the property.' In my opinion the facts indicate that the apprehension of death was immediate, and that the deed was executed under an apprehension that death was imminent in the sense that there was nothing to stand 'between the illness and the death, or, in other words, that the latter would follow inevitably as a necessary result of the former and at no distant date. More than that is not necessary under the law of marz-ul-mout.

35. There is on the record a judgment of my learned brother Greaves, J., dealing with the question of the validity of this waqf. That judgment is, undoubtedly, entitled to every respect but as the learned President has held it cannot operate as

res judicata in the present case. It may also be remarked that Greaves, J., was able to find upon the evidence that was before him, that Muhammad Tayeb suffered for more than a year from his illness before his death, a finding which the evidence before us does not support.

36. For the above reasons I am unable to agree in the view taken by the learned president on the question of the validity of the waqf. I am of opinion that the waqf was invalid except to the extent of a third of the properties covered by it, which belonged to the waqf.

37. The appeal will be allowed and apportionment of the compensation in respect of the premises, when it is made, will be made on the basis indicated above.

38. The appellant will be entitled to her costs from the contesting respondents both in this Court and of the Court below.

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