KERALA HIGH COURT

Hon'ble Justice V. R. Krishna Iyer, J.

Assan Rawther v. Ammu Umma

Citation(s) : 1971 KHC 150 : 1971 KLT 684 : 1971 KLJ 659 : ILR 1971 (2) Ker. 236 : 1971 KLR 416 : AIR 1972 Ker. 27

JUDGMENT

1. One Makku Rowther died at the grand old age of 91 leaving behind properties and disputes, the one the inevitable sequel to the other, for, property often alienate brothers and sisters into plaintiffs and defendants. The death of Makku Rowther was the signal for a scramble for his properties, the .plaintiff, one of his daughters, claiming a share and the sons, defendants 1 to 3, together with the only other daughter, the 4th defendant, resisting it setting up gifts to each one of them of some property or the other. If the story of the gifts were true, the plaintiff'ssuit has to fail and so the primary question that falls for decision before me and was considered by the courts below is the truth and validity of the gifts put forward in the written statements.

2. The defendants have a straight case of oral gift, but a second line of defence also has been taken up by them in that they have urged that the oral gift failing, they have a deed, Ext. B1, which operates as a gift although styled an agreement. Ext. B1 is an unregistered instrument and the point has been mooted that, being unregistered, it is inadmissible in evidence to speak to a gift on account of the embargo contained in S.17(1) (a) and S.49 of the Indian Registration Act. An interesting argument has been addressed that, Muslim law notwithstanding, all gifts by Mahomedans must comply with the legal requirements prescribed by the general law applicable to all citizens in the country contained in the Transfer of Property Act. S.129 of the Transfer of Property Act is either violative of Art.14 and 15 of the Constitution and therefore void under Art.13 or must be so construed as to make it constitutional, in which case secular gifts like Ext. B1 cannot claim the benefit of exemption. After some argument, counsel for the respondent virtually gave up the plea of ultra vires and urged that while S.129 was good, it bad to receive a restricted construction for itssurvival. Thus, two legal issues of some intricacy and depth arise. The first bears upon the effect of the Registration Act on the rules of

Muslim law regarding gifts and the second demands a study of the impact of Part III of the Constitution on the true meaning of the words in S.129 of the Transfer of Property Act exemptingthe rules of Muslim law from the operation of the Chapter on 'Gifts' in that Act. I shall, at the outset, deal with the rather pedestrian ground raised regarding the truth of the oral gift which has been negatived by the courts below concurrently, and proceed to see if there is substance in the two legal questions argued at some length before me.

3. On the evidence, a reappreciation on my part at the second appeal level is neither proper nor legal. The courts below have applied the rules of Mahomedan law applicable to hiba. The three essentials of a gift under Muslim law are:
(1) A declaration of gift by the donor,
(2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the done to the extent the interest conveyed is susceptible of. (Paranthetically, I may mention the guess that under old Arab conditions these three elements were the equivalent of a registered deed). Examining the case from these points of view, the Trial Court felt that there was neither declaration by the donor, acceptance bythe donee nor delivery of possession, while the lower appellate court dismissed the case of gift on the ground that even the first requisite of a declaration had not been made out. Counsel for the appellant rightly states that declaration, in this context, is not a ritual but a reality. It need not be a formal statement but may be made out by conduct. He is supported by Tyabji on Muslim Law where the learned author states:
'Even when the declaration and acceptance are not expression in words, so long as the intention is evidenced by conduct, it would be sufficient."

However, on the evidence, I am unable to discern any conduct sufficient to manifest the wish to give on the part of the donor. At the most, the documentarymaterial is ambiguous and I am not, therefore, inclined to depart from the findingsconcurrently rendered on this question. It follows that the oral hiba pleaded by theappellant must fail. Even otherwise, the factual finding is not available to becanvassed. Of course, counsel for the appellant insisted that gross errors in theappreciation of the evidence vitiate the holding. Granting this criticism to be wellfounded, I must remind myself and counsel about the finality applicable in such situations.

4. Two minds are better than one and three may improve upon two but then we must halt at two, for practical reasons. Not that affirmation in first appeal invests the finding with infallibility but that in this imperfect world the smaller chances of error even beyond

the second tier and the expense and delay of escalated litigation justify closing the door when the first two judges concur in the factual conclusion at separate levels. Miscarriage of justice takes many forms, even too many notches of the appellate ladder. Legal issues are a thing apart.

5. At this stage, a consideration of Ext. B1 becomes necessary, both regarding its admissibility in evidence and its genuineness, because while the appellants have alternatively sought to support their case of gift on the strength of this document, the respondents have successfully repelled it in the courts below as inadmissible being unregistered. Neither court has gone into the question of its genuineness, though. This unregistered document, labelled an agreement but signed only by the deceased, reads In its various clauses, as an allotment of items, including the plaint schedule properties, to the various defendants, reserving a life interest in the usufructs of those set apart to the 2nd defendant. The respondent quarrels with this document as a concoction brought about by conveniently pressing into service an available old stamp paper of the face value of Rs. 2. I shall refer to the veracity of Ext. B1 later, but I mention here that the courts below have not investigated this aspect of the case but have confined themselves to the obligatory registrability of the deed and its in admissibility on account of non registration.

6. What is called an agreement turns out to be a unilateral declaration and this provokes suspicion. What is more, gifts are recited in it to the various defendants as if they were made by Ext Bl itself, as distinguished from a mere record of an anterior oral gift. If one is faithful to the language used in Ext. B1, one cannot treat it as a mere recapitulation or repository of a past transfer by way of gift. I must, therefore, proceed to deal with this deed, as it purports to be, and then ascertain whether it is inoperative and inadmissible. The relevant provisions of law relied upon by counsel for the respondent in this connection are S.17 and 49 of the Indian Registration Act. S.123 of the Transfer of Property Act lays down how a gift may be made and insists that it must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. But S.129 of that Act expressly excludes the application of that Chapter to Muslim gifts:

"Nothing in this Chapter……hall be deemed to affect any rule of.
Mahomedan law."

The argument, therefore, runs that if the rules of Mahomedan law bearing on giftsprovide for making one without resort to registration, S.123 is out of the way thanks to S.129, Assuming that, for this reason, the need for a registered deed asprescribed by the Transfer

of Property Act is obviated, what is the impact of S.17 of the Registration Act on compulsory registration of Muslim gift.deeds? S.49 putsan embargo on the reception, as evidence, of any deed affecting immovable property unless it has been registered, provided it is required to be registered by S.17. (The Transfer of Property Act may be kept out for reasons already explained). Thus, if Ext. B1 is registrable under S.17, it becomes impotent to effectuate a gift and has also to be shut out as a piece of evidence. The crucial question, therefore, is whether a deed of gift executed by a Muslim is hit by S.17. For this part of the argument, I am assuming that (he three requisites of a valid Muslim gift, of declaration, acceptance and vesting of possession have been complied with.

7. S.17(1) of the Indian Registration Act enumerates the documents which shall be registered and includes therein "instruments of gift of immovable property". Counsel for the respondent, supporting the view taken by the courts below, cited the rulings reported in Maula Buksh v. Hafiz-ud-Din (AIR 1926 Lahore 372) , Sunkesula Chinna Budde Saheb v. Raja Subbamma (1954 (2) MLJ 113), Jannat Bai v. Firm Janee Khusalji Jethaji(ILR 1960 Raj. 1470) and Inspector General of Registration and Stamps v. Tayyaba Begum (AIR 1962 AP 199, F.B.). He also relied upon the textbooks on Muslim law and Mulla's Commentaries on theRegistration Act. Shadi Lal C. J held in the Lahore case that f he document which was a Muslim deed of gift could not be received in evidence for want of registration. Nor could the terms of the instrument be proved by oral evidence. The main point considered, however, was whether a mosque was a juristicperson. Really no discussion of the point under S.17 is found. Mr. Justice Uma maheswaram held in 1954 (2) MLJ 113 that the document his Lordship was considering was, in substance, a gift deed by a Muslim and was inadmissible in evidence for want of registration. The reasoning adopted may be given in the words of the learned Judge:

"So, it (the gift deed) really effected an immediate transfer of. ownership and wasnot a record of a past gift made according to rules of Mahomedan law. The document, therefore, falls directly under the terms of S.17 (i) (a) and is inadmissible in evidence under S.49 of the Registration Act."

A single Judge of the Rajasthan High Court took the same view, but dismissed a ruling of the Calcutta High Court reported in Nasib Ali v. Wajed Ali (AIR 1927 Cal. 197), which held a contrary view, as obiter observations. The learned Judge held that a Muslim gift was governed by S.17 (1) of the Registration Act although his Lordship pointed out that the document dealt with in that case "is not strictly speaking a gift deed". Thus, the observations of his Lordship may, in a sense, beregarded as obiter. A Full Bench of the

Andhra Pradesh High Court in AIR 1962 A.P. 199 also set the seal of its authority on this view but did not refer to the Calcutta decision. According to their Lordships, if the idea was merely to reduce to writing what had already happened, a registered instrument may not be necessary, but a Muslim gift deed falls within the sweep of S.17 if it was intendedby the instrument to convey a property. Chandra Reddy, C. J. observed that S.129 relieved a Mahomedan from executing a registered instrument in making a gift if he conformed to the rules of Mahomedan law, but it does not prevent a Mahomedan from effecting a transfer in the manner contemplated by S.123 and where he does execute a transfer deed, the question of registrability turns on intention:

> "*The main test to be applied in these cases is whether the parties regarded the instrument to be a receptacle and appropriate evidence of the transaction. Was it intended to constitute the gift or was to it serve as a record of a past event. If it is a mere memorandum of the things already transacted and did not embody the gift, no registered document is necessary."*

8. I regret my inability to agree with the reasoning in these decisions. In the context of S.17, a document is the same as an instrument and to draw nice distinctions between the two only serves to baffle, not to illumine. Mulla says: "The words 'document' and 'instrument' are used interchangeably in the Act". An instrument of gift is one whereby a gift is made. Where in law a gift cannot be effected by a registered deed as such, it cannot be an instrument of gift. The legal position is well settled. A Muslim gift may be valid even without a registered deed and may be invalid even with a registered deed. Registration being irrelevant to its legal force, a deed setting out a Muslim gift cannot be regarded as constitutive of the gift and is not compulsorily registrable. Against this argument counsel invoked the authority of the Andhra Pradesh Full Bench. One may respect the ruling but still reject the reasoning. The Calcutta Full Bench in AIR 1927 Cal. 197 has discussed the issue from the angle I have presented. The logic of the law matters more than the judicial numbers behind a view. The Calcutta Bench argued:

"The essential? of a gift under the Mahomedan law are.....A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validiate a gift; and if a gift is made bya written instrument without delivery of possession it is invalid in law.That being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence ..... Under S.17 of the Registration Act an instrument of gift must be registered. By the expression 'instrument of gift of immovable property I understand an instrument or deed which creates, makes or completes the gift there by transferring the ownership of the property.The present document does not affect

immovable property. It does not transfer an immovable property from the donor to the donee which only affords evidence of the fact that the donor has observed the formalities under the Mahomedan law in making the gift ... I am prepared to go so far as to hold that a document like the present one is not compulsorily registrable under the Registration Act, or the Registration Act does not apply to a so-called deed of gift executed by a Mahomedan." These observations of Suhrawardy J. have my respectful concurrence. So confining myself to this contention for the nonce, I am inclined to hold that Ext.BI is admissible notwithstanding S.17 and 49 of the Indian Registration Act. This conclusion, however, is little premature if I may anticipate my opinion on the operation of S.129 of the Transfer of Property Act expressed later in this judgment. Indeed, in the light of my interpretation of
S.129 Ext. B1 needs to be registered. For the present I indicate my conclusion, if the law of gifts for Muslims were not to be governed by S.129.

9. The question of credibility follows close upon the heels of admissibility. So, then, is Ext. B1 an honest deed or a posthumous creation? There is considerable force in respondent's criticism of spuriousness but there has been bo finding by either court, as stated earlier, about the genuineness of this deed. Very much depends on the identity of the signature on it with that of the deceased and the attendant circumstances of its alleged birth. A further question arises as to whether there is sufficient pleading to support the case of gift as resting on Ext. B1. There is reference to it in the notices exchanged antecedent to the suit. There is also mention of it in the-written statement. What is more, the parties have gone to trial and,have led evidence on this document and the Courts have considered the case of a gift based on it. In this background, it may be too technical to decline consideration of the plea of the appellants that Ext. B1 constitutes a gift by Makku Rowther. No surprise nor prejudice; and indeed there is some reference to it in the pleadings and actual consideration of it by the courts below enough to warrant a disposal on merits of the defence based on Ext. B1. AIR 1956 SC 593 lends support to this view.

10. If there was an earlier oral gift why Ext. B1? The two cases militate against each other and the penalty a party pays for raising inconsistent pleas is judicial scepticism about both. Why style a gift an agreement? This deepens scepticism into active suspicion. And when it is remembered that the donor was a near-nonagenerian, a paralytic surrounded by the beneficiaries under the alleged gift cum-partition, suspicion darkens into distrust and the point is clinched by the

circumstance that no one son has dared to swsear to the actual execution by the late Rowther. That is the end of Ext. B1.

11. Counsel have argued at great length the remaining issue of the semantic shade of the word 'gift' in S.129 of the Transfer of Property Act in the perspective of the Constitution. Out of regard to the learned advocates and the importance of the question discussed, I shall deal with the point. May be a constitutional issue should not be decided unless necessary for the case but here the disputerevolves round the scope of S.129 rather than its vires and has a bearing on the decision of the appeal. The section reads:

"Nothing in this Chapter ..... shall be deemed to affect any rule of Muhammadan law."

S. 123 lays down the manner in which a gift has to be effected and prescribes theneed for a registered instrument signed by the donor and attested by at least two witnesses if the subject matter is immovable property. If these statutory prescriptions apply to Ext. B I, obviously it fails for non compliance. Counsel for the appellant naturally seeks sanctuary in S.129 while counsel for the respondentfirst challenged the vires of the exemption itself because it is discriminatory on theground of religion hut later limited his submission to a construction of the provision tuned to the fundamental rights in Part III. In particular, he relies upon Art.14 and 15 (1) and argues that to avoid the lethal operation of Art.13 arestricted meaning has to be attributed to the word 'gift'. It is absolutely plain that equality before the law and the equal protection of the laws enshrined in Art.14 and the non discrimination against any citizen on grounds solely of religion promised in Art.15, have been prima facie deviated from in S.129 which declares that the provisions of the Transfer cf Property Act relating to gifts will not affect a class identified by its religion. Absolute equality is a human impossibility and so; the practical sense of the law has evolved the principle of reasonable classification. Equality means that among equals the law should be equal and notthat unequals should be treated equally, as that will lead to Procrustean injustice. This spells in the State the power to classify on the basis of rational distinctions relevant to the particular subject dealt with, so that what might appear to be superficially discriminatory may prove, in substance, to be practical equity. Such classification may be religion-oriented. The crucial tests of a valid classification are (1) an intelligible basis for segregation and (2) such basis having an intelligentnexus with the object of the law challenged.

12. Mere appeal to religion is never enough. For, religion, in a democratic republic, is no amulet, the wearing of which by a statute will inhibit invalidation of any and every discriminatory law. But where a religion, around which practices and institutions have grown differentiating it from other denominations, becomes the active foundation of real classification of persons and transactions, it may legitimately and legally wash away the apparent vice of discrimination. Theuneasy conscience of the equality article is satisfied once the concession to classification is subjected, to the twin tests set out above.

13. What then is the differentia here? Religion, of course. It is true that Hindus and Muslims and men of other faiths in the pluralist society of India have understandable differences in their social ethos. The oneness of Allah and Eswara has not inhibited, over the centuries of co-existence, the diversity of faiths and religious life among their respective followers. Law, being a social instrument charged with realism, accepts this spectral nature of the Indian community and deals with people, in some circumstances, on the basis of their religion. The next step is the need to find a nexus between the religious differentia and the purposes of the Act. Constitutional commonsense, therefore, queries what Islam has to do with attestation and registration. Chapter VII of the Transfer of Property Act has, as one of its purposes, laid down the form and the manner of effecting a transfer by way of gift. Registration is insisted on so that there may be public notice and permanent record about what affects immovable property. This will protect potential buyers from the donor and the donee and eliminate possible uncertainty of the terms of a gift. Registration is so familiar a process in this country for Muslims and others alike that the Transfer of Property Act in S.3 imputes constructive notice of a transaction relating to immovable property required to be registered by law from the date of registration. Mulla explains:

"The real purpose of registration is to secure that every person dealing with property, where such dealings require registration, may rely with confidence uponthe statements contained in the register as a full and complete account of alltransactions by which his title may be affected unless indeed he has actual noticeof some unregistered transaction which may be valid apart from registration." Similarly, attestation also helps to make for certainty of the transaction, itssolemnity, the avoidance of disputes and the possibility of easy proof. If these bethe objects of the section the religious basis of the grouping must havereasonable relation to these objects. At the first flush it strikes me that unless arecognisable allergy to attestation in the Muslim way of life or an Islamic

repugnance to registration as a religious reaction can be made out, the insistenceon these formalities by S.123 cannot be avoided any more by Muslims than by Hindus or Budhists on a religious plea; for the constitutional foundation for a permissible classification by religion would otherwise be absent. Indeed, the very insistence on delivery of possession is, I have a hunch, visible evidence of those days which a registered deed supplies now.

14. Learned counsel for the appellant, familiar with the relevant religious lore, agreed that there is no reference anywhere in the verses of the Quran to a hiba. Nor do the hadiz which also have religious import, being the great Prophet's sayings, advert to gifts except as acts of love and goodwill. The Hedaya (See Hamilton, 2nd Edition at page 482) states "Deeds of gifts are lawful; because the Prophet has said, "Send ye presents to each other for the increase of your love," which implies the legality of gifts, as by presents is meant "gifts". Even the traditions and the opinions of doctors or divines do no object to documentation of gifts or their being recorded before a public officer While Imams have evolved the three ingredients of declaration, acceptance and and vesting of possession underthe then conditions, there is no hint anywhere of any taboo on a Musalman reducing a gift to writing to get it attested or to get it registered by any public authority. It is significant to notice that before the Amending Act of 1929 even Hindus and Budhists bad been exempted by S.129 except from S.123. But they were omitted from the exemption provision by Act XX of 1929, the reasons for it being thus stated by the Special Committee' "..... The provisions of Chapter VII relating to gifts are based on general principles and do not conflict with the rules of Hindu or Budhist law ..... We propose to omit the reference to Hindu and Budhist law." I amunable to see any conflict with the rules of Muslim law either except, may bewhere religious or charitable gifts are made. They are only supplementary, notderogatory to the Mahomedan law of gifts. To sum up, communities cannot, in myopinion, be classified for purposes of documentation, attestation and registrationof purely secular gifts, with constitutional justification, on grounds of religion in theextreme acceptation of the word, without serious risk of terminological inexactitude.

15. The position may be basically different in the case of wakfs, trusts and gifts of a religious or pious or charitable nature like Sadaqahs. Indian humanity is not secular enough to obliterate religious sentiment. Art.25 protects the right to

religious practice and Art.15 does not proscribe religious grouping altogether. So much so, gifts prompted by piety or possessed of a sacred savour may be classified on a religious differentia; not so, purely secular transfers. A gift by a Muslim paramour to a heathen mistress cannot claim immunity from S.123 on godly grounds! To hold that any gift, be it of the most mundane and profane category or not, is absolved from the reasonable prescriptions of S.123 of the Act by the mere incantation of a particular religion is to make a shambles of Art.14 and 15 (1) and a simulacrum of Art.44. The old laws must be tuned up to the new law of the Constitution and the spirit of the times. Religious and charitabletransfers stand on a different footing.

16. The Shariat Act, 1937 (Act 26 of 1937) provides for the application of the Personal Law in regard to various matters like marriage, succession, dower, guardianship, gifts, trust and trust properties and Wakfs. Counsel for the appellant cited this enactment in support of his proposition that in all controversies relating to gifts the rule of decision shall be the Muslim Personal law. I do not think that the application of Muslim Personal Law to gifts precludes the application of other laws which do not run counter to the rules of Muslim law. For instance, the gift tax may be levied from a Musalman although the rules of Muslim law do not provide for such levy. Therefore, the need for a document, its attestation and registration are not necessarily inhibited by S.2 of Act 26 of 1937. Moreover, the expression 'gifts' in S.2 along with trusts and trust properties and wakfs takes colour from the society of these words. I am inclined to think that the amplitude of the expression 'gift' in the Transfer of Property Act (S.129) must be so read down as to restrict it to transactions and presents with a religious or charitable motivation or purpose.

17. Whatever might have been the content of the word 'gift' in S.129 when it was originally enacted, its meaning has to be gathered today in the constitutional perspective of Art.14, 15, 25 and 44. As years go on, meanings of words change and the changing circumstances illuminate the new import of that meaning. In gathering the new meaning, courts will remember that a Judge is not a variety of impersonal calculating machine who merely supplies the letter of the law. When interpreting the provisions of law, susceptible to different meanings, a Judge has to pay due regard, though to a limited extent, "to the policies which he believes to represent the sober second thought of the community that framed it and are suited to its inarticulate needs."

18. Judicial salvage of a statutory provision by limiting the semantic sweep of the expressions used and tailoring it to the constitutional requirements, if that is possible without a re-writing of the provision is a sound practice honoured and adopted by eminent Judges. It is well accepted that that mode of construction of an Act which uses

wide words as will bring it within constitutional limits should be preferred. The leading case on the subject in India is the one reported ia In re Hindu Women's Rights to Property Act (AIR 1941 F.C. 72). The enactment there impugned used the word 'property' which could embrace agricultural and non agricultural property although the Legislature which enacted the law could not have legislated on agricultural property. The argument that the expression 'property' included every type of property and the statute out-ran the power of theCentral Legislature was met by Sir Maurice Gwyer, Chief Justice, thus:

"No doubt if the Act does affect agricultural land in the Governors' Provinces, itwas beyond the competence of the Legislature to enact it; and whether or not itdoes so must depend upon the meaning which is to be given to the word'property' in the Act. If that word necessarily and inevitably comprises all forms ofproperty, including agricultural land, then clearly the Act went beyond the powersof the Legislature; but when a Legislature with limited and restricted powersmakes use of a word of such wide and general import, the presumption mustsurely be that it is using it with reference to that kind of property with respect towhich it is competent to legislate and to no other. The question is thus one ofconstruction, and unless the Act is to be regarded as wholly meaningless andineffective, the Court is bound to construe the word 'property' as referring only tothose forms of property with respect to which the Legislature which enacted theAct was competent to legislate; that is to say, property other than agricultural land."

In a Bombay ease (The State of Bombay v. Henan Santilal Alreja AIR 1952 Bom. 16) a similar point arose, the controversy being whether the words "any purpose"would include "purposes of the Union" making the Act ultra vires of the State Legislature. Chagla C. J. disposed of the contention thus: "..... There is a very important principle which must be borne in mind in construing a statute .....

If possible, a construction should be placed upon a statute which would put it within the limits of the competence of the legislature rather than outside those limits." Again, in a Kerala decision (reported in Neelikkandy Kunhammad Haji v. The Agricultural Income Tax Officer, ILR 1960 Ker. 822) M. S. Menon, J. (as he then was) adopted the same canon of construction and held that the Agricultural

Income tax Act, 1950, when it defined "agricultural income", must be deemed to have used those words with the implicit limitation implide by the words of the Constitution (Article 366(1)) by importation of the additional words "and is either assessed to land-revenue in the taxable territories" specified in S.2(l)(a) of the Indian Income Tax Act, 1922. Again, in Corporation of Calicut v. jothi Timber Mart(1965) KLT 1142 the same court adopted the same approach following the leadof Gwyer, Chief Justice, and limited the words used in S.126 of the Calicut City Municipal Act, 1961, to fit into the strait jacket of Entry 52 in List II cf the VIIth Schedule to the Constitution. M. S. Menon, Chief Justice, there referred to the observations of Brougham L. C. in Langston y. hangston:
"that when two modes of reading are possible, 'where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect(for it is a rule of common sense) that you should rather lean towards that construction which preserves, than towards that which destroys."
In Patroni's case, Rt. Rev, A. M. Patroni v. Kesavan (1964 KLT 791, Para.17 F.B.) the Kerala High Court desisted from striking down R.44 of Chapter XIV-A ofthe Kerala Education Rules, 1959 by reading into the word 'ordinarily theconstitutional limitation implied in Art.30 (1). The Supreme Court in DiamondSugar Mills Ltd. State of Uttar Pradesh (AIR 1951 S. C. 652) had a similarsituation to deal with and Rajagopala Ayyengar J. chose the line of constructionabove sketched when construing the expression "local area" in the U. P.Sugarcane Cess Act, 1956, although the majority judgment proceeded on aslightly different basis. Again, the Supreme Court, as late as AIR.. 1970 S. C. 264(Jothi Timber Mart v. The Corporation of Calicut) approved of the principle ofinterpretation I have elaborated above relying upon AIR 1941 F.C. 72. The Court observed:
"When the power of the Legislature with limited authority is exercised in respectof a subject matter, but words of wide and general imort are used, it mayreasonably be presumed that the Legislature was using the words in regard tothat activity in respect of which it is competent to legislate and to no other, andthat the Legislature did not intend to transgress the limits imposed by the Constitution."
Their Lordships approved of the manner of const ruction adopted by the Kerala High Court in the Calicut City Municipal case. Indeed, it was an appeal from that writ appeal judgment.

19. Although the various decisions I have referred to relate to the competence of

the Legislature, I see no difference in principle when the restriction is enjoined byPart III. To save the life of a legislation a limited judicial surgery, sometimes plastic surgery, is permissible. It is, therefore, right, as a matter of construction, to limit the scope of the expression 'gift' in S.129 of the Act to that category of gifts which has a religious import or charitable motivation. Sadaqahs, for instance, come under this category. There may be gifts for pious purposes or to pious persons made by a Muslim for securing spiritual benefit, falling into well recognised categories familiar in his religion such as a gift to a person who is required to recite the Quran for the good of the donor's family. Purely secular giftscannot get the protection of S.129 if that provision is read down to vindicate a reasonable classification.
The Transfer of Property Act is a pre-Constitution statute and the expression 'gift' in S.129 may, perhaps, save all manner of gifts made prior to the Constitution, the truncated meaning for the word 'gift' being assigned only because of Art.14 and 15 (1).

20. One of the seminal and, may be, radical ideas our founding fathers dearly held was the making of a secular society in India and, surely, a sine qua non for such a social structure is that God and Caesar remain each in his domain. I am indirectly fortified in may conclusion by the knowledge that Islamic law, all over the Middle East and even Pakisthan, is giving way to reforms of a secular inspiration (Vide the article on Modern Trends in Islam: Legal Reform and Modernisation in the Middle East by J.N.D. Anderson (The International and Comparative Law Quarterly Volume 20, Part I, 4th Series, page 1). The dyke of orthodoxy has been breached by the modern trends and codes of family law; and no theory of judicial lockjaw has forbidden the courts from strengthening the tides of change, the integration and modernisatian of personal laws. Hindus, Muslim orother, under the heavy impact of the law of our Constitution is too real a factor for change to be rejected, if I may say so sotto voce. The present case is an instancein point.

21. No substantial question of the interpretation of the Constitution arises here as the various facets of Art.14 have been fully settled by the Supreme Court. I am clear that S.129 of the Transfer of Property Act is valid as read down in the lightof Part III of the Constitution. Counsel for the respondent is right In his submission that Order XXVII-A of the Civil Procedure Code is not attracted in a mere case of construction of a section in an Act. The ratio of AIR 1960 S.C. 356

also inclines me to this view.

22. In this view, the only question would be whether Ext. B1 is tinged with sacredness in its terms and object or is purely secular in its operation and import. The end result of classifying gifts in the manner I have suggested meets the mandate of Art.44 of a secular symbiosis of many religions which will run in separate streams in matters religious but will flow along the mainstream in matters non religious. To a limited extent, the law of gifts becomes common for allcitizens of India in keeping with the directive principles.

23. Before parting with this topic, I must refer to two decisions cited at the bar by counsel for the appellant in support of his contention that S.129 of the Act was altogether immune to any invasion by Art.14 or 15 (1) and even 13. A direct Division Bench decision of the Patna High Court reported in Bibi Maniran v. Mohammed Ishaque (AIR 1963 Patna 229) and another Bench decision of the Bombay High Court which considerably fortifies the plea of the counsel, were discussed at some length. id the Bombay case, the learned Judges went to the extent of laying down that personal law is not included in the expression "laws in force" used in Art.13 (1). With great respect, I demur to the proposition and to thereasoning adopted in reaching this result. Personal law so-called is law by virtue of the sanction of the sovereign behind it and is, for that very reason, enforceable through court. Not Manu nor Muhammed but the monarch for the time makes 'personal law' enforceable. Art.13 (I) gives an inclusive and not exhaustive definition. And I respectfully venture the opinion that Hindu and Mohomedan laws are applied in courts because of old regulations and Acts charging the courts withthe duly to administer the personal laws and not because the ancient law-givers obligate the courts to enforce the texts. Of course, the Shariat Act also has made the Sharia applicable to Muslims in matters of family law, gifts, wakfs etc.

24. Chitaley on the Constitution of India has made a critical reference to this aspect of the decision excluding personal law from Art.13 (1). However, the learned Judges proceeded to decide the case on the footing that Art.13 (1) applied. Very rightly, if I may say so with great deference, the Bench found a reasonable classification of Hindus and Muslims and others and further found that it was perfectly open to the State to embark upon legislation for one community or to introduce social reform by stages community wise. Their Lordships were dealing with Bombay Prevention of Hindu Bigamous Marriages Act (XXV of 1946) and it is impossible to bold a different view from what their Lordships have held that the basis of the classification adopted by the Legislature had rational relationto the object of the statute.

25. The Patna High Court, ia Bibi Maniran v. Mohammad Ishaque (AIR 1962 Patna 229), decided the identical point raised here. The court justified legislative classification on grounds of religion, relying on the Supreme Court ruling in Moti Das v. S. P. Sahi (AIR 1959 S.C. 942). The Supreme Court upheld the Bihar Hindu Religious Trusts Act which dealt differently with the trusts of Hindus and Jains and exempted Sikhs from the operation of the Act on the ground that in the essentials of faith and religious practices there were divergences among them sufficient to justify legislative classification of their respective religious trusts. There are serious differences between Muslims and others all right. The Patna Bench argues from this premise: " and
therefore, the rules of Mahomedan law regarding gift are based on reasonable classification and the provision of S.129 of the Transfer of Property Act exempting Mahomedans from certain provisions of that Act is not hit by Art.14 of theConstitution." It is really a case of non sequitur. To hold that religion can form thebasis of classification is one thing; to use it to validate discriminatory laws on subjects or for objects unrelated to religious mores is another. The learned Judges conveniently assume the precise point that needs to be established, for, it is a little obscure how in the nature of the bulk of secular gifts Muslims and Hindus are not similarly situated, particularly regarding attestation and registration. The irrelevance of the basis to the statutory object will be evident if we apply it to Parsi sales and Muslim mortgages and label it religious grouping!. The classificatory predicate is religion. Good. But in constitutional technology it must be geared to the propeller, the object or purpose of the impugned law. On the other hand, if we narrow down the scope of S.129 of the Act by reading down the ambit of 'gift' to confine it to all manner of religious and charitable gifts, the dual elements of reasonable classification will be fulfilled. The oddity of any larger area of exemption is heightened when we remember that gifts by Muslims even to non muslims are covered by S.129, read without the limitation suggested; and a variety of gifts with pepper-corn consideration are regarded as hiba bil iwaz or sales and require attestation and registration. Our Civil law may thus be reduced to a set of totems contrary to the approach sketched by Art.44. The conclusion that I reach about the construction of S.129 of the Act, against the backdrop of Article' 44 and inseminated by Art.14 and 15(1), is that such gifts as are non secular will be exempt from the operation of Chapter VII of the Transfer of Property Act, but no other. Ext. B1 is a plain secular gift by father to children and cannot claim exemption from compliance with S.123 of the Transfer or Property Act. The logical culmination of this discussion is that the plaintiff's suit for partition must be decreed. I affirm the decree granted by the courts below and there is no dispute regarding the shares. The view that I take may, to a little extent, update the law of gifts by eliminating an exception which is out of tune with Art.44 and the secular

basis of modern India. May be, one has occasionally to pay hamage to Lord Atkin who exhorted in a different context.

"*When these ghosts of the past stand in the path of justice clanking theirmediaeval chains, the proper course for the judge is to pass through them undeterred"*

26. Two minor matters fall far consideration in the concluding stages of this appeal. The defendants had put forward a plea that the deceased Makku Rawther had made provision for the plaintiff by making over to her and her son. Pwl, a property acquired by him with his own funds under Ext. A3 in which he builta house, again with his resources, and that the defendants were provided for under Ext. B1. Now that Ext. B1 and the case of oral gift fail and a partition has been decreed, it is worthwhile considering whether the property alleged to have been acquired by the deceased is the name of the plaintiff and her son as per Ext. A3 of 1954 should also be divided lest she have the best of both the worlds. It has been found by the Trial Court that the residential house of the plaintiff acquired under Ext. A3 was purchased with the funds of Makku Rawther. The evidence on this aspect of the case has been considered in detail by the court which saw the witnesses and chose to believe D. Ws. 6 and 7. Having heard counsel on the evidence relating to this item, I am satisfied that this finding of the Trial Court is correct. Obviously, the money needed to purchase the item and to build a house thereon could not have been but that of the deceased father. The plaintiff, a young widow burdened with children, had no means of her own. pw. 1,her son, got a petty job 2 or 3 years prior to Ext. A3 and the small salary he got was consumed by his own needs, as he himself has deposed. The conclusion is that Ext. A3 property was an asset of Makku Rawther.

27. Counsel for the respondent states that there has been no specific case asking for division of this item set up by the defendants. I think that is correct. There is also another difficulty in the way of the appellants claiming partition of this item. The son of the plaintiff in whose name also Ext. A3 stands is not a partyto the present suit. However, a fresh suit for partition of this small item should beavoided, if possible, so that multiplicity of litigation may be eliminated. I, therefore,direct the Trial Court to permit pw. 1 being impleaded and the written statementsof the defendants amended so as to include a demand for division of Ext. A3property, if a motion is made for these reliefs within two months from today. If pw.1, when made a party is able to adduce any further evidence tilting the scalesagainst the deceased Rawther's ownership of Ext. A3 property, it will be open tothe court to come to its own conclusion. It might look a little odd that there shouldbe divergent findings in the same suit in regard to different parties on the samesubject. I think it, therefore, proper to leave the matter of the ownership of Ext. A3property open for the court of first instance to decide afresh. The view expressed

by me is only provisional, on the available evidence. Of course, the circumstancethat the consideration proceeded from Makku Rawther is almost a telling factor infavour of the defendants, subject to other probative material that may be brought up.

28. The Trial Court has held that the defendants were in possession of thevarious items of property covered by the suit. Documentary evidence adduced bythe defendants supports this view. If at all, the lower appellate court has indicatedits inclination to agree with this conclusion, although not clearly. I am, therefore,of the view that the defendants except the 2nd defendant must be held to havebeen in possession since 1960 in the manner claimed by them. Not that this willcreate rights in their favour, but I direct that as a matter of equity, the court, whenpassing the final decree, will have due regard to the possession of the respectiveparties in making allotments and will reserve improvements made by each in his favour.

29. Subject to these minor directions, I dismiss the appeal with costs.