KERALA HIGH COURT

Justice V. R. Krishna Iyer

K. P. KHADER v. K. K. P. KUNHAMINA AND OTHERS

Citation(s): 1970 KHC 41 : 1970 KLT 237 : 1970 KLJ 91

JUDGMENT

1. Counsel arguing for admission of his second appeal has placed me under an embarrassing obligation to him because at my instance he has worked up the point raised with assiduity and academic flavour and argued it in the spirit of amicus curiae, knowing full well that this very forensic proficiency would boomerang on his client's prospects in the appeal.

2. The survival value of the doctrine of *musha* in the Muslim Law as applied in India is the subject mooted in the second appeal. The courts below have declined to disturb the efficacy of the gift but counsel has chosen to challenge its validity, again, here on the ground that it is one in favour of a plurality of donees of undivided shares in property which is capable of division. The facts are admitted but the question is whether Ex. 1 will fail in law because the parties are Muslims who must pay the penalty of invalidation of their gifts which are *musha*, although their brothers in other religions in India or elsewhere in the world are free from any such curious trammel.

3. Every time an odd and dated rule of personal law is upheld in an Indian court the thought comes up that the integration of the Indian people on the legal front is being held back to some extent by the failure of courts to free the present law from the archaic rules of the many personal laws which, like ghosts with their clanking chains, stand in the path of unification of laws, and the failure of the legislatures to evolve a complete common civil code for our secular society in fulfilment of the mandate in Art.44 of the Constitution. After hearing counsel at great length I am satisfied that the doctrine of *musha* is more a museum piece rather than an active principle of Muslim Law in India and its application is so encumbered with exceptions or, may be, embroidered by refinements that what survives as extant law is as difficult to decipher as the moth eaten pages of a hoary book handed

over to a modern man. Indian Courts have been unwilling to abrogate the rule but equally reluctant to apply it.

4. Mulla, in his Principles of Mahomedan Law, (16th Edition), has stated that "Agift of an undivided share (mushaa) in property which is capable of division is irregular (fasid), but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated". In para 160, at page 153, the learned author itemises a string of exceptions to the doctrine based upon rulings of courts. There is a cynical reference, in a brief paragraph to the "*Device to get over doctrine of mushaa*" suggested by the High Court of Allahabad by masking it as a sale and later putting an end to the pretence by releasing the debt. Hanafi lawyers were themselves astute to avoid the doctrine says Tyabji in his book on Muslim Law (p. 359, 4th Edn). The Madras High Court had once gone to the extent of declaring the doctrine to be opposed to justice, equity and good conscience, and not applicable at all in Madras (Vide ILR 24 Madras 513, obiter by Benson J.) In Tyabji's view "*The Courts are inclined to uphold a gift of musha i.e. of an undivided part of property, except where the omission to separate the portion of the property which is the subject of gift from the rest of it, is taken as an indication that there has been, in effect, an incomplete transfer, which would have completed by partition, had he intended to complete the gift*". If certainty and rationality, in the light of social realities, is an attribute of law (which regulates property relations of the citizens of India, Muslim or non Muslim) the sooner the doctrine of *musha* is declared as 'unlaw' the better for the progress of society. Indeed, many decisions have suggested this view although they have not expressed so explicitly or categorically. It is comforting to notice that under Shafii and Shiite law the gift of musha is valid.

5. The Judicial Committee of the Privy Council observed as early ILR as XI Allahabad 460 that "*The doctrine relating to the invalidity of gifts of musha is wholly un adapted to a progressive state of society, and ought to be confined within the strictest rules*". In ILR 35 Calcutta 1 their Lordships of the Privy Council quoted with approval these observations about musha and excluded its application "*to shares, companies and freehold property in a great commercial town*". In AIR 1934 Bombay 21 Tyabji J. went into the original texts of the Muslim Law with the exhaustiveness of a researcher, if I may say so with great respect, and pointed out how Abu Haneefa alone took the view supporting *musha* while Abu Yusuf and Muhammed held a contrary opinion and where there was a difference of opinion amongst the authorities the court had the power to select that one which was most in consonance with justice. This latter rule has been thus stated in the *Taqbatul Hanafia*:

"*When Abu Hanifa is on one side, and Abu Yusuf and Muhammed on the other, the mufti is at liberty, if he chooses, to follow the opinion of the latter two. But if the one or the other is of the same opinion as Abu Hanifa, the mufti is obliged to prefer that opinion, unless jurists of authority have declared their opinion to the contrary." The learned Judge expressed himself strongly against the doctrine of musha and observed* "..... there is the least doubt in my mind that a gift may be validly made at the present day in India to two donees, notwithstanding the fact that the two donees are to hold the property as tenants in common. I am emphatically of opinion that whether the shares given to the donees be equal or unequal, once the donor has parted with complete possession in favour of the donees, the donees become the transferees of the property, & the gift is complete". In AIR 1948 Bom. 61 a Division Bench of that Court, while not repudiating the doctrine altogether, noticed that ".... the Courts are always reluctant to enforce it, and in most cases we imagine that it would not be necessary to enforce it, assuming that the rigidity of the rule as stated in Mulla's Mahomedan Law is not accepted." A Division Bench of the Madras High Court in AIR 1960 Mad. 447 declined to apply the rule by arguing that the reason for the rule being based on possible confusion the rule could not apply where no confusion of rights could arise. The court went to the extent of stating that even if musha applied in some limited cases, a stranger cannot invoke the rule. Balakrishna Aiyar J. quoted with approval the following observations of Din Mohammad J. in AIR 1936 Lah. 92:

"It will be manifest from the above that the original rigidity of the rule of Musha has been considerably relaxed in its application to British India and in almost all cases, which have come up before the courts here as well as before the Privy Council, an effort has been made to adapt the rule to its new environments and so to interpret it as to make it consistent with the principles of justice, equity and good conscience. The courts in this country have given effect rather to the spirit of the rule than to its letter and have upheld gifts in all cases in which the intention to give on the Part of the donor had been expressed in most unequivocal terms, and had further been attended by all honest efforts on his part to complete the gift by divesting himself of the control over the property in such a manner as would clearly imply his divestiture in the eye of the law of the land. The raison d'etre of this rule was the avoidance of gifts that were vague, indefinite or incomplete, and the only test that should be applied in such cases is whether the gift in question is open to any of these objections; or in other words, whether the donor has still reserved to himself a loophole of escape or not. If this is not so and if the donor has done all that the law of the land requires to be done to separate himself from the property, a gift of Musha will be as valid as that of property which can be physically handed over to the donee."

6. AIR 1962 Jammu & Kashmir 4 and a host of other cases have declined to apply the doctrine on some ground or other. Of course, here and there, one comes across a stray ruling (vide the obiter observations in AIR 1933 Rangoon 155 and the dicta in AIR 1947 Lahore 272 and in 21 TLR 223 at 227) where the doctrine of musha is treated as still alive. It may well be that musha has not been legislatively killed but, certainly, it has been judicially scotched and to recognise its vires at all is to introduce an element of uncertainty and obscurity in and to impart an antediluvian touch to our law.

7. In the present times, the conditions under which the doctrine prevailed nolonger hold good. Concreteness and visible change were insisted upon by the Muslim doctors of law to avoid confusion in the matters of rights and enjoyment. Those simple days are gone and in the sophisticated thinking of modern communities there is no likelihood of confusion if an undivided interest is made over to another. Intangible and incorporeal rights are dealt with facilely by modern jurisprudence and therefore the principle of public policy which prompted the doctrine of musha is obsolete now. Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. *Cessante ratione legis cessat ipsa lex*, says the Latin maxim. May be, in the present case, I need not hold that the doctrine is dead but, being moribund, in our municipal courts that rule can be virtually removed from the armoury of a desperate Muslim donor (and his heirs) who wants to attack his own gift but has no rational ground to do so. No other point of substance has been urged and I dismiss the second appeal in limine.