ALLAHABAD HIGH COURT

Mt. Kulsum Bibi

Vs

Shiam Sunder Lal

(Rachhpal Singh, J.)

24.03.1936

JUDGMENT

Rachhpal Singh, J.

1. This is a First Appeal arising out of an order passed in execution proceedings. The facts of the case can briefly be stated as follows: On 26th August 1925, the decree-holder obtained a decree for Rs. 22,518, against one Habib Baksh and others. After the death of Habib Baksh the names of his widow Mt. Kulsum Bibi and some other persons were brought on record as his legal representatives. In execution of the aforesaid decree, some house property situate in Jhansi was attached. Mt. Kulsum Bibi, the widow of Habib Baksh, filed objections against the attachment. She alleged that on the first of February 1930' her husband Habib had made an oral gift under which the property in question was gifted to her in lieu of her dower, which amounted to a sum of Rs. 21,000, and that therefore the same was not liable to attachment. The decree-holder denied the allegations of Mt. Kulsum Bibi. The learned Subordinate Judge dismissed the objections of Mt. Kulsum Bibi on 28th February 1931. Against that order, Mt. Kulsum Bibi preferred an appeal which came up for hearing before a Bench consisting of my learned brother Niamatullah, J. and myself. We came to the conclusion that there had been no proper enquiry into the matter in controversy between the parties and we therefore remanded the case to the Court below to hear the parties again and then give findings on the following issues:

Issue 1. Did Habib Baksh make an oral gift in respect of the house in question in favour of Mt. Kulsum Bibi, in lieu of her dower, as alleged by her and whether the same was valid and provable?
Issue 2. If the first issue is found in-affirmative, then was the gift made with a view to defraud his creditors?

2. The learned Subordinate Judge has submitted his findings. He has held that no gift was made and further that, even if it be established that a gift was made, then it was not valid firstly because it has been made with a view to defeat, delay and defraud the donor's creditors and secondly

because such a transfer could only be made under a registered instrument. The first point to be considered in this case is as to what was the amount of the dower due to Mt. Kulsum Bibi. The objector Mt. Kulsum Bibi had pleaded that her dower was Rs. 21,000 while the decree-holder's case was that it was Rs. 1,100. The learned Subordinate Judge recorded a finding in favour of Mt. Kulsum Bibi and held that her dower was Rs. 21,000 and that it had not been paid. This finding has not been challenged before us and I have no hesitation in accepting it as correct. The next question for consideration is whether Habib Baksh, made an oral gift of the property in question to Mt. Kulsum Bibi, in lieu of her dower. The learned Subordinate Judge held that this point was not established. In my opinion, the view taken by the learned Subordinate Judge appears to be entirely wrong and therefore cannot be sustained. A number of witnesses were examined who deposed that Habib Baksh had made an oral gift of the property in question, in favour of Mt. Kulsum Bibi. It further appears that a letter was sent by Habib Baksh to the Cantonment Authorities, intimating to them that he had made a gift of the property in question to his wife, Mt. Kulsum Bibi. It appears that in the course of her statement before the learned Subordinate Judge, Mt. Kulsum Bibi stated that the transaction was in writing and she further stated that the said writing was with her and that it had been signed by the witnesses. The learned Subordinate Judge has drawn an inference from this statement that there was a written gift which had been executed by Habib Baksh, which has been withheld and therefore oral evidence to prove its contents was not admissible, under Section 92, Evidence Act.

3. I find myself unable to agree with this view of the learned Subordinate Judge that Mt. Kulsum Bibi is keeping with her any written gift or that any written gift was executed by Habib Baksh. In a case of this description, when we have to consider the credibility or otherwise of the statement of a pardanashin lady, it is altogether unsafe to place reliance on an isolated passage of this description. Her whole statement has to be read, and if we do so there can be no doubt that what the lady said was that a gift of the property in suit had been made to her and that some kind of writing was also drawn up. From her statement it appears that she was sitting in one room while her husband and the witnesses were sitting in the other room. So very little importance can be attached to her statement when she says that the writing was signed by the witnesses. The learned Subordinate Judge omitted to take into consideration another statement made by the lady in her statement, where she stated in reference to the writing referred to above that she had filed the same in Court. This clearly shows that her statement, that a written document had been pre-pared, refer, to the letter which has been produced in Court. We further find that later on, at another place, in her statement, she was asked whether the witnesses signed the writing in her presence and she stated that she did not remember. On a reading of the entire evidence on the statement made by Mt. Kulsum Bibi, I have not the least doubt in my mind that an oral gift of the property in question was made to her and that there was no deed of gift which had been withheld by her. The evidence produced in the case further proves beyond all reasonable doubt that since the gift in her favour she has been in possession of the property in question and has been realizing its rents from various tenants.

4. The next question for consideration is whether the gift was made by Habib Baksh with a view to defeat, delay and defraud his creditors. On this point also, I am of opinion, that the view taken by the learned Subordinate Judge is not correct. He has found that the dower of the objector, Mt. Kulsum Bibi, amounted to Rs. 21,000. The evidence of Mt. Kulsum Bibi shows that it was prompt. The position of Mt. Kulsum Bibi was that of one of the creditors. Habib Baksh was indebted to several persons. It would appear that he was anxious to pay the debt due to his wife. That was a very natural desire on his part. It is not a case where a debtor makes a fictitious transfer of his property to defeat or delay the claims of other creditors. Here there was a genuine debt and if Habib Baksh gave preference to the debt due to his wife over the debts due to other person3, there was nothing objectionable in the course adopted by him. The law on the subject is quite clear. Their Lordships of the Privy Council, in Musahar Sahu v. Hakim Lal 1915 43 Cal 521, made the following observations:As a matter of law, their Lordships think it clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.... So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lias in the fact hat the plaintiff, who also was a creditor, was a loser by payment being made to the preferred creditor.

5. In my opinion therefore it must be held that the gift made to Mt. Kulsum Bibi was not made by Habib Baksh with a view to defeat or delay the claims of his other creditors. Now we come to another point in the case which has been very strongly pressed before us. The learned Subordinate Judge has held that the gift set up by Mt. Kulsum Bibi being a transfer of immoveable property of the value of more than Rs. 100 in lieu of her dower-debt which was due to her from her husband, cannot be held to be a gift and amounts to a sale as defined in Section 54, T.P. Act, and as there was no transfer in writing by a registered deed, it is not provable and is not valid. I proceed to consider this question. It is well settled that under the Mohammadan Law, a gift of immoveable properties can be made verbally without recourse to a written and registered document. In *Kamar-un-nissa Bibi v. Hussaini Bibi*[1] their Lordships of the Privy Council held that that an oral gift of this nature was valid. See on this point Tyabji's Mohammadan Law Edn. 2, p. 372; Ameer Ali's Mahommadan Law, Vol. 1, para. 125, Edn. 10; Mulla's Mahommadan Law, Edn. 10, p. 112, para. 125.

6. It is conceded that a gift made under the rule of Mohammadan Law, would not be affected by the provisions of the Transfer of Property Act. The contention however is that only those gifts which are voluntary and without consideration are excepted from the operation of the rules relating to gifts as defined by the provisions of Section 122, T.P. Act. It was contended that if a gift is made for consideration, then it amounts to a 'Hiba-bil-ewaz' which stands exactly on the same footing as a sale as defined by Section 54, T.P. Act. Learned Counsel for the respondents relied on several cases in support of his contention. One of them is *Fida Ali v. Muzaflar Ali*[2] The

question for consideration in that case was whether a transfer made by a husband in favour of his wife gave rise to a right of pre-emption. The case can be easily distinguished from the one before us because there the husband had executed a sale deed conveying certain properties to his wife in lieu of her dower. Therefore that case has no application to the case before us. The next case cited by learned Counsel for respondents is *Nathu v. Shadi*[3] This was also a case of sale by the husband. *Ali Hasan v. Mt. Rashijan*[4] certainly does not support the contention raised by learned Counsel for the respondents. In that case a learned Judge of this Court held that assignment of property by a Mohammadan to his wife as her dower was not a sale though a transfer of property to the wife in payment of the dower would be a sale within the meaning of Section 54, T.P. Act. The next case cited was Abbas *Ali Shikdar v. Karim Baksh Shikdar*[5]

7. The terms of the deed of conveyance in connexion with that case cannot be ascertained from the judgment and therefore it is not possible to find out whether it was a case relating to a sale or a pure gift. The last case on the point on which reliance was placed on behalf of the respondent is *Sarifuddin Mahammad v. Mohiuddin Mahammad*[6] It was held in that case that the transaction falsely termed in India 'Hiba-bil-ewaz' is not governed by the Mohammadan Law of 'hiba' but is amenable to the general law in India relating to contracts and the transfer of property, and the gift in that case embodies a transaction of sale and not of gift. Most of the cases on the point are discussed in this judgment by the learned Judges who decided the case. It appears to me however that the case is clearly distinguishable from the one before us because of the terms of the deed on which the decision of that case depended. Having regard to the terms of the deed, the learned Judge came to the conclusion that it was a sale deed and not a deed of 'hiba.' It will thus be seen that most of the cases on which reliance has been placed on behalf of the respondents are cases in which the only question which the Court had to decide was whether a sale of property made by a Mohammadan in favour of his wife in consideration of her dower-debt, gave rise to a right of pre-emption. In the case before us no such question arises. All that we have to decide is whether an oral gift made by a husband to his wife in lieu of her dower is valid or not.

8. A gift with consideraten or return is called a 'Hiba-bil-ewaz' in Mohammadan Law. This is technically speaking a gift and not a sale though its precise legal position must lie mid-way between gift properly so called and sale. A 'Hiba-bil-ewaz' is a gift pure and simple. The donor gives something to the donee without any consideration whatsoever. If the donor, however, impelled by generosity or fellow-feeling, makes a return or 'ewaz' as a consideration or 'badal' of the gift and that 'ewaz' however valueless it might be, is accepted by the donor, the transaction becomes a 'hiba-bil-ewaz' and it lies no longer in the power of the donor to revoke the gift. When however the gift is made for a stipulated consideration, it is a 'hiba-ba-shart-ul-ewaz.' Mulla, in his Mahomedan law, at p. 129 makes the following observations:The main distinction between hiba-bil-ewaz as defined by the older jurists and hiba-ba-shart-ul-iwaz is that in the former the iwaz proceeds voluntarily from the donee of the gift, while in the latter it is expressly stipulated for between the parties. The former bears the character of a gift throughout and does not partake of the character of a sale either in its inception or completion, while as regards the latter, it is a gift in the first stage, but it partakes of the character of a sale after possession has been taken by

the donee of the thing given and by the donor of the iwaz, so that the transaction, when completed, is exposed to shaffaa or preemption, and either party may return the thing delivered to him for a defect. These two incidents, namely, the right of pre-emption and the right to return a thing for a defect, are two of the incidents of the contract of sale in the Mahomedan law....

9. It is clear to me, as pointed out by Mulla in his Mahomedan law, that according to the older jurists, an oral gift by a Mahomedan in favour of his wife in lieu of her dower debt was not a sale even after the completion of the transaction. If in order to get over the doctrine of Musha, the Muslim lawyers in India introduced a device that in certain cases delivery of possession was not necessary because the gift amounted to a sale, it does not follow that an oral gift by a Mahomedan in favour of his wife in lieu of her dower, amounts to a sale. I am decidedly of opinion that an oral gift of this description was certainly valid according to Mahomedan law and the device introduced by Muslim lawyers, referred to above, does not affect such a gift. We have a clear pronouncement of the highest Judicial Tribunal in Kamar-un-nissa Bibi v. Hussaini Bibi (1881) 3 All 266(Supra) that an oral gift by a Mahomedan to his wife in lieu of her dower is perfectly valid and that authority is binding upon us. I am aware of no case and none has been cited, before us in which it may have been held that an oral gift by a Mahomedan in favour of his wife in lieu of her dower was not valid as it was in the nature of a sale and, therefore, such a transaction could only be made under a registered instrument. Most of the cases relied on by the respondent before us, were cases in which the Courts were considering the effect of certain instruments in writing and therefore they ought to be distinguished from the case before us. It is clear to me that there is a well established rule of Mahomedan law, under which a husband is competent to make an oral gift of immoveable property in favour of his wife, in lieu of her dower and the rule has the sanction of the highest Judicial tribunal. If the contentions of the respondent were accepted, then a Mahomedan would not be able to make an oral gift in favour of his wife in lieu of her dower, which would be against the well-recognized and well settled rule of Mahomedan law. In my opinion, the above mentioned rule of Mahomedan law, still holds good in spite of the passing of the Transfer of Property Act of 1882.

10. It was argued before us that according, to the provision of Section 122, T.P. Act, 'gift' is transfer of property made voluntarily and without consideration, and therefore the words in Section 129 "that nothing in this chapter shall be deemed to affect any rule of Mahomedan law," refer only to gifts made voluntarily and without consideration and do not govern hiba-bil-ewaz' which are gifts with consideration and are in the nature of sales. I find myself unable to agree with this proposition. Section 129, T.P. Act, does not say that gifts, as defined under Section 122, by Mahomedans will not be affected by Oh. (7) of that Act. On the other hand Section 129 enacts that "nothing in this chapter will affect any rule of Mahomedan law." Now, in my opinion, there is a well-established rule of Mahomedan law, that a husband can make a valid oral gift in favour of his wife in lieu of her dower. I see no reason for excluding such a gift from the provisions of Ch. 7, T.P. Act. The Courts in deciding as to Whether or not a particular transaction is a gift according to Mahomedan law, would look not to the provisions of Section 122, T.P. Act, but to

the rule of Mahomedan law, on the point: Musa Miya Kader, In re 1928 52 Bom 316. That is to say, that they will consider whether the transaction is a valid gift according to Mahomedan law, and if it is so, then, it will be treated as a gift, the provision of Section 122, T.P. Act notwithstanding. For the reasons given above, I hold that the oral gift, made by Habib Baksh, in favour of his wife in lieu of her dower, is valid in accordance with the rule of Mahomedan law and that the provisions of Ch. 7, T.P. Act, do not touch it. According to my view, a transaction of this nature, which is valid according to the rule of Mahomedan law, is saved from the operation of the provisions of Oh. 7, T.P. Act, relating to gifts under Section 129 of that Act.

11. Even if it be assumed for the sake of argument that the transaction was in the nature of a sale, the appellant must, nevertheless, succeed. A transaction may have two characters. It may evidence a gift as well as a sale. If it fails as a sale, it may, nevertheless, be held to be a good gift provided that all conditions necessary for making a valid gift, are there. In Karam Ilahi v. Sharfuddin 1916 38 All 212 it was held that if there was a valid gift it will be upheld if the donor had executed a deed, which could not be given effect to for want of registration and was therefore invalid according to the provisions of the Transfer of Property Act of 1882. The reason for this rule is that according to the Mahomedan law, an oral gift is complete as soon as a declaration of gift by the donor, acceptance by the donee and delivery of possession is given by the donor to the donee. When these essential conditions are complied with, the gift becomes perfectly valid and if a written deed is executed afterwards, the deed may not be admissible in evidence for want of registration; but the oral gift would be valid notwithstanding. In *Nasib Ali v. Munshi Wajed Ali*[7] Suhrawardy, J. made the following observations:The position under the Mahomedan law is this: that a gift in order to be valid must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to 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. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming, so it is sometimes thought prudent to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence. The law with regard to the gift being complete by declaration and delivery of possession is so clear that in a case before their Lordships of the Judicial Committee, Kamar-un-nissa Bibi v. Hussaini Bibi (1881) 3 All 266(Supra), where a gift was said to have been made in lieu of dower, their Lordships held that the requisite forms having been observed it was not necessary to enquire whether there was any consideration for the gift or whether there was any dower due. The case in *Karam Ilahi v. Sharfuddin*[8] is similar in principle to the present case. There also a deed relating to the gift was executed. The learned Judge held that if the gift was valid under the Mahomedan law, it was nonetheless valid because there was a deed of a gift which owing to some defect was invalid under Section 123, T.P. Act, and could not be used in evidence.

12. I think that according to the rule of Mahomedan law, the gift in question before us was perfectly valid. It may fail as a sale because no written deed was executed, but it must be upheld

because the transaction also amounted to a valid gift. There is another aspect of the case which I would like to mention. In the case before us the lady is in possession of the property which has been given to her by her husband in lieu of her dower. Her right to hold the property has never been disputed by her husband or his other heirs. I therefore think that she is entitled to remain in possession till her dower-debt is paid. A creditor of her husband could only oust her if he could show that the transaction was fraudulent and was made with a view to defeat or delay his creditors. This point however has been found against him. Mt. Kulsum Bibi, having obtained the possession under an oral gift by her husband, would be entitled to retain possession, even if the transaction failed as a gift, so long as the dower due to her was not paid. For the reasons given above, I allow this appeal and reverse the decision of the learned Subordinate Judge and allow the objections of Mt. Kulsum Bibi against the attachment of the property in question with costs in both the Courts.

Niamat Ullah, J.

13. I agree with my learned brother in holding that the dower of Mt. Kulsum Bibi, stipulated at the time of her marriage with Habib Bakhsh, was Rs. 21,000. The lower Court has also found in her favour. It is not clear from the judgment of the learned Subordinate Judge whether the oral gift, set up by the appellant, was held not to have been proved. In commenting upon the evidence of witnesses, he has expressed himself adversely; but his conclusions seem to be based on the ground that the gift, being in lieu of the dower debt amounting to Rs. 21,000, should be considered to all intents and purposes, a sale and therefore a registered instrument was necessary. Accordingly he holds that no evidence can be given in proof of the oral gift, having regard to the provisions of Section 92, Evidence Act.

14. The gift is mentioned in a document addressed to the cantonment authorities by Habib Baksh intimating that he had made gift of the property now in dispute to his wife Kulsum Bibi. The property consists of certain buildings within the cantonment limits, and a register is maintained by the cantonment authorities in which the names of owners are recorded. Whatever may be said as regards the intention of Habib Bakhsh in making the gift in view of his embarrassed financial position, it cannot be doubted that he made the gift relied on by the appellant. The learned Subordinate Judge has laid stress on the fact that Mt. Kulsum Bibi had stated in her evidence that a document evidencing the gift was executed. The learned Judge thinks that oral evidence relating to the gift is not, for that reason, admissible. Mt. Kulsum Bibi obviously refers to the letter sent to the cantonment authorities, and did not mean that a formal deed of gift had been executed. No doubt the evidence of witnesses examined by the appellant in proof of the gift is open to criticism; and if corroboration from genuine documentary evidence had not been forthcoming, it would have been difficult to find that the gift has been established. There is no reason to disbelieve the evidence of witnesses who say that a gift was made by Habib Baksh, when we find the same fact stated in a contemporaneous document, which was given effect to by the cantonment authorities. For these reasons I find myself in agreement with my learned brother

in holding that the oral gift, relied on by the appellant has been established, and that the donor (Habib Baksh) gave such possession as the nature of the gifted property admitted of.

15. The important question to decide in this case is whether the gift though valid, is provable by oral evidence. Under Section 92, Evidence Act, no transaction which the law requires to be reduced to writing can be proved, except by the production and proof of the written instrument required by law. In the present case the contention is that the gift made by Habib Baksh to his wife in lieu of her dower, amounting to Rs. 21,000, was a sale which under Section 54, T.P. Act, ought to be made by a registered instrument. Numerous cases are cited to show that in pre-emption cases such a transaction has been recognized to be a sale. I am of opinion that those oases are no safe guide for the determination of the question arising in this case. Where a person is legally entitled to pre-empt a transaction which fulfils all the requirements of a sale, he is entitled to have it treated as a sale. In the present case, the appellant relies upon the transaction in question as hiba-bil-ewaz;' and if it can be treated as a gift, there is no reason why it should not be so treated, provided all the requirements of the law relating to gifts are fulfilled. Where a husband makes a verbal gift of a certain property to his wife, who in her turn relinquishes her dower, the transaction is made up of two distinct gifts. On the one hand, the husband makes a gift of his property to his wife. On the other hand, the wife makes a gift of her dower-debt to her husband. If the transaction be viewed as embodying two distinct gifts, the requirements of Mohammedan law relating to gifts, such as delivery of possession, must be made out. In the present case, Habib Baksh made a gift to his wife, and delivered possession. Such a gift can be made orally and the law does not require that it should be reduced to writing. Similarly relinquishment of a claim to dower can be made orally and no writing is necessary. For these reasons I hold that the oral gift by Habib Baksh and relinquishment by Mt. Kulsum Bibi are not excluded by Section 92, Evidence Act.

16. The last question is whether the gift is invalid, having been made to defeat or delay the creditors of Habib Baksh. Mt. Kulsum Bibi was herself a creditor. It is fettled law that dower-debt ranks with other debts. It has been found that Mt. Kulsum Bibi's dower was prompt. There is no doubt that Habib Baksh's intention was to defeat his creditors other than his wife, but this amounts to no more than giving preference to one creditor over the others. Where the effect of a transfer is to defeat not all but some only of the creditors, Section 53, T.P. Act, has no application. This is borne out by *Musahar Sahu v. Hakim Lal*[9] in which their Lordships observe:As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.

17. There is no evidence to suggest that the property transferred by Habib Baksh to his wife was of much greater value than Rs. 21,000, due to her as dower. If there had been great disparity between the value of the property and the dower-debt, different considerations might have arisen.

In that case the difference between the value of the property and the dower-debt would represent a free gift to the wife, and not payment to a favoured creditor in satisfaction of his or her debt. Similarly, if any benefit had been reserved for the husband, it could not be considered to be a transfer for satisfaction of debt due to the donee. As already stated the present case is free from these complications, and the appellant is entitled to have the transfer in her favor being upheld. I agree with my learned brother in the order he proposes to pass.

18. For the reasons given we allow this appeal, reverse the decision of the Court below and allow the objection of Mt. Kulsum Bibi against the attachment of the property in question with costs in both the Courts.

Cases Referred.

1(1881) 3 All 266
2(1883) 5 All 65
31915 37 All 522
41931 All 237
5(1909) 13 CWN 160
61927 54 Cal 754
71927 44 CLJ 490
81916 38 All 212
91915 43 Cal 521