
(1946) 02 BOM CK 0016
In the Bombay High Court

Jaitunbi Fatrubhai

APPELLANT

Vs

Fatrubhai Kasambhai and Others

RESPONDENT

Date of Decision : 27-02-1946

Acts Referred:

Transfer of Property Act, 1882 — Section 129, 54

Citation : AIR 1948 Bom 114

Hon'ble Judges : Lokur, J

Bench : Division Bench

Judgement

Lokur, J.—The suit out of which this appeal arises was filed by the plaintiff for a declaration that she was the owner of survey No. 347 at Deolali, and that its sale by her husband, defendant 1, to defendant 2 was not binding on her, and for the recovery Of its possession from the defendants. When defendant 1 married the plaintiff in 1935, he agreed to pay her Rs. 2500 as mahr, and in lieu of the mahr he made a gift of survey No. 347 to her at the time of the marriage. In spite of the gift, defendant 1 sold the land to defendant 2 for us. 1600 on 4-4.1938, and hence the plaintiff had to file this suit. Defendant 1 did not contest the suit, but defendant 2 did not admit the alleged gift to the plaintiff and claimed that he was its full owner under the sale deed passed to him by defendant 1. In proof of the gift, the plaintiff relied upon the entry made in the Kazi's book at Bombay at the time of her marriage with defendant 1. That entry says:

Certified... that marriage was celebrated by the gift of a piece of land at Deolali, Ahmednagar District, in lieu of mahr of Rs. 2500.

2. The learned trial Judge raised various issues at Ex. 51, the first issue being:

Whether the plaintiff proves that suit Survey No. 347 was given to her in mahr by defendant 1 on 4-4-1935 as alleged and that she was put into possession on that date.

3. On the date of hearing, the plaintiff applied for time to have a witness examined on commission in Bombay, and below that application, Ex. 59, the

learned Judge ordered the following preliminary issue of law to be argued out first, before recording any evidence:

Would a statement at marriage that the said land is given to wife and she is put in possession be sufficient to constitute her full owner? What is the importance of possession in such a case?

4. After hearing arguments on this issue, he held that the statement was not sufficient to constitute the plaintiff owner of the land, that she had acquired no title to it and that her possession was of no importance. The plaintiff's suit was, therefore, dismissed, and in appeal the learned District Judge confirmed the decree, holding that the so-called gift was really a sale, and could not be valid without a registered document. In this second appeal it is urged on behalf of the plaintiff-appellant that the gift was a *hiba-bil-iwaz*, and did not require a registered document since Section 129, T.P. Act, exempted it from the provisions of that Act.

5. A *hiba-bil-iwaz*, as distinguished from a *hiba* or simple gift, is a gift for a consideration, and there is a sharp conflict of judicial opinion as to whether in India it is not in reality a sale, possessing all the incidents of a contract of sale. In *Sarifuddin Mahomed v. Mohiuddin* Rule 1927 Cal. 808 and *Fateh Ali v. Mahomed Bakhah* AIR 1928 Lah. 516 on which the Courts below have relied, the High Courts of Calcutta and Lahore have held that a transaction of this character is nothing but a sale, so that where the property gifted is immovable property of the value of Rs. 100 or more, the gift must be effected by a registered instrument as required by Section 54, T.P. Act. In *Gopal Das v. Mt. Sakina Bibi* 23 AIR 1936 Lah. 307 it was taken for granted, nor was it disputed, that a gift by the husband, of landed property in lieu of dower in favour of his wife, was tantamount to a sale, and the only question debated was whether the necessity for the registration of the deed of gift depended on the amount of the dower settled (which, in that case, was less than Rs. 100) or on the value of the land gifted. The same view was taken by the Allahabad High Court in *Mt. Saiful Bibi Vs. Abdul Aziz Khan* and Another referred in the judgments of the Courts below. In that case Sulaunan C.J. and Banerji J. held that the transfer of immovable property made in consideration of a part of an existing dower-debt was a sale. Either differing from or distinguishing all these cases, *Niamut Ullah and Rachhpal Singh JJ.* held in *Mt. Kulsum Bibi Vs. Shiam Sunder Lal and Another*, that "an oral gift by a Mahomedan in favour of his wife in lieu of her dower-debt was *hiba-bil-iwaz*, which was pure gift and not sale, and did not require a registered instrument." The same learned Judges, after a further discussion of the law on the subject, came to the same conclusion in *Mt. Kulsum Bibi Vs. Shiam Sunder Lal and Another*, . There is no decision of this Court directly in point on this subject, though Beaman J. in an erudite judgment in *Moosa Adam Patel v. Ismail Moosa* ("10) 12 Bom. L.R. 169 has observed that *hiba-bil-iwaz* or gift for consideration resembles, but does not correspond exactly in all its conditions, incidents and consequences, with a sale, and that while a sale presupposes some

proportion between the consideration paid and the thing received, in hiba-bil-iwaz, the consideration is utterly inadequate. With all respect, I do not wish to express any opinion as to how far this view is correct, since it is not necessary to do so in this case.

6. In all the cases cited above, iwaz (a consideration in exchange) for the hiba was a dower-debt. In the present case the dower had not yet become a debt when the gift of the land was made by defendant 1 to the plaintiff. The entry in the Kazi's register shows that the marriage was celebrated by the gift of the land "in lieu of mahr of Rs. 2500." That means that defendant 1 intended to give a mahr of Rs. 2500 to the plaintiff, but instead he made a gift of a land to her as mahr. It cannot be said that she made a gift of Rs. 2500 to him as iwaz (an exchange) for the gift of the land. Mahr may be a sum of money or other property, and if property is given as mahr, it does not mean that the property is sold for the consideration of the marriage. As observed by Tek Chand J. in *Fatima Bibi v. Lall Din* AIR 1937 Lah. 345

Under Muhamniadan law, dower is not the exchange or consideration [as understood in technical sense in the Contract Act] given by the man to woman for entering into the contract, but an effect of the contract imposed by the law on the husband or a token of respect for its subject the woman (Bailie's Digest Vol. I, page 91.)

7. Hence it would not be correct to say that the plaintiff's giving herself away in marriage to defendant 1 was the payment of consideration or iwaz on her part. The gift of the land to her cannot, therefore, be either a hiba-bil-iwaz, or a sale, but a hiba (gift) pure and simple. In *Fatima Bibi v. Lall Din* AIR 1937 Lah. 345. Mahmood J. pointed out the distinction between the assignment of property to a wife as her dower in which case it would not be a sale but a gift, and the transfer of property to a wife in payment of a certain amount of dower, in which case it would be a sale within the meaning of Section 54, T.P. Act. The same view was taken by a Bench of the Calcutta High Court in *Abbas Ali v. Karim Baksh* ('09) 4 I.C. 466 and by Dalai J. in *Ali Hasan Vs. Mt. Rashidan and Another*. It cannot be argued from these rulings that if the dower is fixed at a certain definite sum of money, as in the present case, the transfer of property as dower amounts to sale of that property for that amount. It only means that the bride was to receive mahr amounting to Rs. 2500, either in cash or in land, and it would have become a debt after the marriage. But defendant 1 chose to give the mahr in kind by making a gift of immovable property of that value. In my opinion, when at the time of the marriage a land is assigned by the bridegroom to the bride in lieu of mahr, the assignment is a simple gift (hiba), and neither a sale nor a hiba-bil-iwaz. No writing is necessary for the validity of such a gift, since Section 129, T.P. Act, exempts a gift by a Mahomedan from the provisions of that Act, but such a gift is subject to the doctrine of Mushaa, and the gift would not be complete and valid without delivery of such possession as the subject of the gift is susceptible of.

8. The learned District Judge has observed in his judgment that there is no evidence to show that the plaintiff was given possession of the property. But that question was not gone into by the trial Court, and the suit was disposed of on the preliminary finding that the transfer amounted to a sale and was void for want of a registered instrument. As it is now held that the transfer amounts to a gift, the issue regarding the delivery of possession and the validity of the gift has to be decided.

9. I allow the appeal, set aside the decrees of the Courts below, and remand the suit to the trial Court for being proceeded with and disposed of according to law in the light of this judgment. The trial Court should frame further necessary issues, and all the parties will be at liberty to adduce further evidence. The costs in this Court and in the lower appellate Court will be costs in the suit.