

(1921) 04 CAL CK 0018
In the Calcutta High Court

Serajuddin Haldar

APPELLANT

Vs

Isab Haldar

RESPONDENT

Date of Decision : 15-04-1921

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : AIR 1922 Cal 258 : 70 Ind. Cas. 203

Hon'ble Judges : Panton, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. The property in dispute in the suit, out of which this appeal arises, belonged to one Pochai Haldar, the paternal grandfather of the plaintiff. The father of the plaintiff predeceased Pochai and the latter executed a heba-bil-ewaz in favour of the plaintiff, but the defendants, who are the other sons of Pochai, dispossessed the plaintiff, Thereupon this suit was instituted for recovery of possession of the property after establishing his right thereto.
2. The consideration recited in the document was a Koran, rosary and prayer mat, but no evidence was adduced that any such consideration passed.
3. The learned Munsif held that, although the document could not take effect as a heba-bil-ewaz, it could be treated as a simple gift or heba and as the plaintiff was a minor under the guardianship of his grandfather, the donor, no acceptance by or transfer of possession to the minor was possible or necessary under the Muhammadan Law, a declaration of the intention to give being quite sufficient in such a case for a valid gift. The suit was accordingly decreed so far as the disputed property was concerned.
4. On appeal the lower Appellate Court held that the document, purporting to be a heba-bil-ewaz, could not be treated as a simple gift without consideration.
5. There is no doubt that, under the Muhammadan Law, there is a distinction between a heba (a simple gift) and a heba-bil-ewaz. Mr. Justice Mahmood pointed out in the case of Rahim Bakhsh v. Muhammad Hasan 11 A. 1 :

(1888)A.W.N. 266 : 13 Ind. Jur. 152 : 6 Ind. Dec. (N.S.) 429 (P.C.) that a heba-bil ewaz is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other; Such incidents of a heba-bil ewaz differ no doubt from those of a heba (a gift pure and simple).

6. We do not think, however, that the learned Judge in the Court below is right in saying that, if the document fails as a heba-bil-ewaz, it cannot take effect as a heba in the present case, even if it satisfies the conditions of a deed of gift. In the case of Rahimjan Bibi v. Imanjan Bibi 15 Ind. Cas. 698 : 17 C.L.J. 173 where the person claiming under a heba-bil-ewaz did not adduce any evidence to show the passing of consideration, the learned Judges remanded the case for consideration of the question; first, whether the passing of consideration was proved; and, secondly, whether there was delivery either of any title-deeds or property to the donee upon the evidence to be adduced by the parties.

7. It is contended by the learned Pleader for the respondents that a deed of sale cannot be treated as a deed of gift because the document recites a consideration. But in the case of Ismail Mussajee Mookerdum v. Hafiz Boo 10 C.W.N. 570 : 3 A.L.J. 353 : 3 C.L.J. 484 : 8 Bom. L.R. 379 : 16 M.L.J. 166 : 1 M.L.T. 137 : 33 C. 773 : 33 I.A. 86 (P.C.) notwithstanding that a transaction purported to be a sale and a price was mentioned in the conveyance, it was held by the Judicial Committee on the evidence to a gift and not a sale, the question being regarded as purely one of intention. Sir Arthur Wilson (at page 580) observed as follows: "The fact that a sum of Rs. 10,000 is mentioned as the price; a sum which according to the evidence, was far short of the actual value of the property, and the fact that factum is stated to have been paid in advance, whereas in fact it was not paid at all are strong evidence to show that the transaction was not a sale but a gift, with an imaginary consideration inserted, in a manner common in such transactions in India." In a later case Hanif-un-nisa v. Faiz-un-nisa 11 Ind. Cas. 398 : 15 C.W.N. 521 : 8 A.L.J. 373 : 13 C.L.J. 510 : 13 Bom. L.R. 391 : 10 M.L.T. 23 : 33 A. 340 : (1911) 2 M.W.N. 370 : 21 M.L.J. 1126 : 8 I.A. 85 (P.C.) the Judicial Committee reversed a decision of the Allahabad High Court which held that the defendants were precluded by the provisions of Section 92 of the Indian Evidence Act (I of 1872) from giving parol evidence for the purpose of showing that a deed of sale was in reality intended by the executant to be a deed of gift, and the case was remanded to the High Court to be dealt with on the evidence.

8. The Court of Appeal below and the learned Pleader for the respondent have relied upon the case of Jidda Jan Bibi v. Sheikh Baktar 53 Ind. Cas. 420 : 24 C.W.N. 926; The learned Judges in that case held that the document could not be treated as a heba at that stage of the case. Huda, J. observed: "In this case the defendant explicitly relied upon the document as a gift for a consideration which has incidents very different, from those of a simple gift."

9. In this case the question whether the transaction could be treated as a simple

gift appears from the judgment to have been raised in the Court of first instance at the hearing of the case. In the plaint the document was referred to as heba-bij-ewaz in one part and in another part it was referred to as a heba. We think, in all these circumstances, that the case should go back in order to give the plaintiff an opportunity of adducing evidence to show that there was consideration for the heba-bil-ewaz. No evidence is necessary in the present case upon the question of delivery of possession. Even if the document is not valid as a heba-bil-ewaz, the Court will consider whether it can be treated as a simple gift, having regard to the intention of the donor.

10. The case is accordingly remanded to the lower Appellate Court for disposal according to law.

11. Costs will abide the result.