Ghulam Abbas vs Mt. Razia Begum And Ors. on 25 October, 1950

Equivalent citations: AIR1951ALL86, AIR 1951 ALLAHABAD 86

JUDGMENT

P.L. Bhargava, J.

1. Nawab Chunnan and Nawab Kallan were real brothers. The former had two sons, Nawab Amjad Ali Khan and Wilayat Ali alias Wilayat Husain and the latter had a son named Mubarak Husain. Amjad Ali Khan was married to Mt. Razia Begam, the plaintiff-respondent, who instituted the suit, which has given rise to this appeal, to obtain a declaration that she was the owner in possession of house No. 42/13, situate in Mohalla Chah-meh-man In the city of Banaras, and that Sheikh Ghulam Abbas (defendant-appellant) had acquired no title thereto by purchase at an auction-sale in execution of a decree against Amjad Ali Khan, who had no interest therein. Amjad Ali Khan, who was arrayed as a defendant in the suit, died during the pendency of the suit; and Razia Begam and Wilayat Husain now appear on the record as his legal representatives.

2. Nawab Amjad Ali Khan was the owner of two adjoining houses, bearing Nos. 15/60 and 15/61, situate in mohalla Chahmehman in Banaras. On 12-7-1919, he sold house No. 15/60 (new No. 42/12) to the appellant, Ghulam Abbas. The other house No. 15/61, at some time or the other, was given two numbers, No 15/61A (new No. 42/13) and No. 15/61 (new No. 42/14). It is said that there is an Imambara in the house and that portion of the house bears old No. 15/61, corresponding to new No. 42/14. As already stated, the plaintiff sought declaration in respect of house bearing new No. 42/13, which corresponds to old No. 15/61.

3. According to Sheikh Ghulam Abbas appellant's contention Amjad Ali Khan started Borrowing money in the year 1914, when he executed a mortgage in favour of certain persons. Then he sold one of his houses to the appellant. Thereafter, he executed another mortgage in 1925 and one more mortgage in 1927; and in order to pay off these mortgages, he executed a mortgage in favour of the appellant, on 27-7-1929, hypothecating the entire house No. 15/61. The money due on the last mortgage not having been paid, suit No. 32 of 1936 was instituted by the appellant in the Court of Civil Judge of Banaras. A preliminary decree was made on 28-5-1936; and it was made absolute on 6-2-1937. That is the decree in execution whereof the house in dispute was sold and purchased by the appellant.

4. After the sale in his favour the appellant, Sheikh Ghulam Abbas, wanted to take possession over the house in dispute. Mubarak Husain objected to the delivery of possession over that portion of the house, which is said to be the Imambara, bearing No. 15/61 (new No. 42/14). He instituted suit No. 149 of 1938 in the Court of Civil Judge, Banaras; but we do not know what happened in that suit,

and the fact is also not material for purposes of this appeal. Razia. Begam filed an application under Order 21, Rule 100, Civil P. C., objecting to the delivery of possession in favour of Ghulam Abbas on the ground that she was in possession of house No. 15/61A (new No. 42/13) in her own right, under an oral gift in lieu of Rs. 2500, part of her dower, which amounted to Rs. 15,000. The gift was said to have been made on 23-6-1926. The application having been dismissed, she instituted the suit for declaration of her title.

5. Sheikh Ghulam Abbas contested the suit. He denied the alleged gift and contended that, even if such a gift was ever made, it was void and ineffectual because such a gift for consideration amounted to a sale, which could only be made by means of a registered document.

6. The Courts below have held, that the transfer set-up by Razia Begam was, in fact, made by Amjad Ali Khan and it was a gift and not a sale, and as such it could be made orally. The suit was decreed by the trial Court; and the decree was affirmed by the lower appellate Court. Sheikh Ghulam Abbas has now preferred this appeal.

7. The appeal came up for hearing before a Division Bench; and the main question argued on behalf of the appellant was that a transfer of immoveable property of the value of more than Rs. 100, made by a Muslim husband to his wife by way of oral gift in lieu of her dower debt, which also exceeds Rs. 100, was not valid in law and did not pass title to the wife. The learned Judges constituting the Bench were of opinion that obviously the transfer was not a gift (hiba) pure and simple but it was a hiba-bil-ewaz; and that a hiba-bil-ewaz was a sale and not a gift pure and simple. The cases of this Court cited before the Bench showed divergence of opinion on the question under consideration. The view expressed in Fida Ali v. Muzaffar Ali, 5 ALL. 65 : (1882 A.W.N. 175); Rahim Baksh v. Muhammad Hasan, 11 ALL. 1 : (1888 A. W. N. 266) and Saiful Bibi v. Abdul Aziz Khan, 1931 A. L. J. 951 : (A. I. R. (19) 1932 ALL. 596) was that such a transfer amounted to a sale; while in two later decisions in Mt. Kulsum Bibi v. Shiam Sunder Lal, A.I.R. (23) 1936 ALL. 600 : (1936 A.L.J. 1027) and Mt. Kulsum Bibi v. Bashir Ahmad, A. I. R. (24) 1937 ALL. 25 : (I. L. R. (1937) ALL. 285) a contrary view was taken. Consequently, the following question has been referred to a Full Bench:

> "Whether an oral transfer of immovable property worth more than Rs. 100 can be made by a Muslim husband to his wife by way of gift in lieu of dower debt which also exceeds Rs. 100? Is such a transaction a gift or a combination of gifts such as can be made orally, or is it a sale which can be effected by means of a registered instrument only ?"

8. In the present case, the Courts below have found, as a fact, that the amount of dower settled at the time of Amjad Ali Khan's marriage with Razia Begam was Rs. 15,000; and that the house in dispute was transferred orally by the husband to the wife in lieu of Rs. 2500, out of the said amount of dower, which was still outstanding at the time of transfer.

9. The question which now arises for consideration in the appeal is whether such a transfer is a gift (hiba), pure and simple, which could be made orally under the Mahommedan Law, or a combination of such gifts, or a gift for consideration (hiba-bil-ewaz) of the nature contemplated by the

Mahommedan Law, which amounts to a "sale" as defined in Section 54, T. P. Act, 1882. If the transfer is a gift of the nature contemplated by the Mahommedan Law, unaffected by the provisions of the Transfer of Property Act, the parties being Muslims, it will be governed by the rules of the Mahommedan Law.

10. The gifts under the Mahommedan Law may be classified under three heads :

> "(1) A hiba, pure and simple ;
>
> (2) A hiba-bil-ewaz (a grant or gift for a consideration) which is more in the nature of an exchange than a gift; and (3) A hiba ba-shart-ul-ewaz, or a grant made on the condition that the donee or transferee should pay to the donor at some future time or periodically some determinate thing in return for the grant." (Syed Ameer Ali's Mahommedan Law, Vol. I, p. 34, 4th Edn., 1912).

11. In Durr-ul-Mukhtar, a hiba, or gift, pure and simple, is defined as "the transfer of the right of property in the substance?-(tamlik-ul-ain) by one person to another without consideration (ewaz) but the absence of consideration is not a condition in it."

12. Syed Ameer Ali, in his commentary on Mahommedan Law, at p. 40, has amplified the definition in these terms :

> "In other words a hiba is a voluntary gift without consideration of property or the substance of a thing by one person to another so as constitute the donee, the proprietor of the subject-matter of the gift. It requires for its validity three conditions: (a) a manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly; and (e) the taking possession of the subject matter of the gift by the donee either actually or constructively."

13. Admittedly, the transfer in the presents case was made bil-ewaz-den-mehr (in lieu of dower); consequently, it cannot be regarded as a voluntary gift without consideration, such as has been defined above. It has, however, been argued on behalf of the plaintiff-respondent that the transfer is a combination of gifts, viz., a gift of immoveable property by the husband in favour of his wife and another gift of dower-debt by the wife to the husband, either of" which could be made orally.

14. It is, however, not possible to treat the transaction as a combination of gifts. Obviously, it was a single transaction--a transfer of property by the husband in favour of the wife in consideration of the latter relinquishing an ascertained amount--Rs. 2500 to be exact -- out of the amount of dower-debt due to her. As owner of the property, the husband was entitled to transfer, and admittedly transferred, the same to his wife. Such a transfer in whole or in part satisfaction of a debt is recognised by law and is not uncommon. The transfer as well as the liquidation of dower debt to the extent of Rs. 2,500 took place simultaneously in one and the same transaction; the two things were so inter-connected that one could not stand without the other. Consequently, the argument that the husband made a gift of property and the wife made a gift of a portion of dower-debt is unsound. The

transfer in question is, therefore, not a combination of gifts.

15. Under the Mahommedan Law, writing is not essential to the validity of a gift, either of movable property or of immovable property, which is complete and valid on proof of a declaration of gift by the donor, an acceptance of the gift, express or implied, by or on behalf of the donee, and delivery of possession over the subject of the gift by the donor to the donee ; but whether a gift for considerations (hiba-bil-ewaz) can be made orally depends upon the answer to the question whether it does or does not amount to a sale, as defined in Section 54, T. P. Act.

16. The transfer in the present case not being a hiba or gift pure and simple or a combination of such gifts, it has to be determined whether it is a hiba-bil-ewaz, a grant or gift for consideration, recognised by the Mahommedan Law, and also whether it amounts to a "sale" within the meaning of the term as defined in Section 54, T. P. Act. Syed Ameer Ali has, in his commentary on Mahommedan Law, at p. 158, thus explained ewaz or consideration and the hiba-bil-ewaz or gifts for consideration in the earlier and modern times :

> "According to the original conception, which in itself was a development of the earlier rules, 'ewaz' or consideration was of two kinds ; one which was subsequent to the contract (of gift), the other which was conditioned in it. (Fatwai Alamgiri, Vol. 4, p. 549). In other words, in the first case the consideration was delivered to the donor after his gift, and the transaction was treated as a case of mutual gift. There was no stipulation regarding the giving of ewaz, but the moment it was received by the donor his right of revocation dropped.
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> This evidently was the earliest form of a gift for a consideration. The hiba-bil-ewaz of later times is clearly a development of this kind of gift.
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> In the other kind, the consideration was expressly stipulated in the contract, and when once it was received the transaction acquired the legal character of a sale. The modern hiba-ba-shart-ul-ewaz has unquestionably sprung from the above."

17. At p. 162, the learned author has further observed :

> "In air these cases the consideration is not a part of the contract. And the rules stated above do not, therefore, apply to what in modern times is called a hiba-bil-ewaz, which is a transaction of quite a different nature, and partakes to a certain extent of the second kind of ewaz mentioned in the Fatwai Alamgiri, viz., where it is stipulated in the contract. In tins kind of hiba-bil-ewaz the consideration directly opposed to the object of the gift both being in esse; there is no suggestion of one being subsequent to the contract. The grant and the consideration are parts of one transaction. A hiba-bil-ewaz, therefore, is a sale in all its legal incidents. In sale, mutual seisin is not requisite to render the contract valid and the terms in which a contract of this kind is entered into imply, 'that the articles opposed to each other are present,' and that there is no danger of either party suffering from the other's fraud. 'I have given you

> this for that' implies that the consideration is present, and that the person will take care to receive it before parting with his property, and the law therefore annexes to it the quality of a sale both with regard to the condition and the effect."

18. The distinction between the earliest and the modern form of hiba-bil-ewaz is important and has to be borne in mind in considering the nature of the transfer before us. The distinction has also been clearly brought out in Baillie's Digest of Mahommedan Law, (Edn. 2, p. 122) :

> " Hiba-bil-Iwaz means, literally, gift for an exchange; and it is of two kinds, according as the Iwaz, or exchange, is, or is not, stipulated for at the time of the gift. In both kinds there are two distinct acts ; first, the original gift, and second, the Iwaz, or exchange, But in the Hiba-bil-Iwaz of India, there is only one act--the Iwaz, or exchange, being involved in the contract of gift as its direct consideration. 'And all are agreed that if a person should say, 'I have given this to thee for so much,' it would be a sale; for the definition of sale is an exchange of property for property, and the exchange may be effected by the word 'give,' as well as by the 'sell.' The transaction which; goes by the name of Hiba-bil-Iwaz is, therefore, in reality not a proper Hiba-bil-Iwaz of either kind, but a sale, and has all the incidents of the latter contract. Accordingly, possession is not required to complete the transfer of it, though absolutely necessary in gift, and, what is of great importance in India, an undivided share in property capable of division may be lawfully 1 transferred by it, though that cannot be done by either of the forms of the true Hiba-bil-Iwaz."

19. In the case before us, the consideration was expressly stipulated in .the contract,--the grant and the consideration are admittedly parts of one and the same transaction. The husband transferred his property--and purported to do so by way of gift--for a consideration of Rs. 2,500, part of the dower-debt-due from the husband to the wife, the transferee. The transfer was not made in consideration of any earlier gift or consideration. Consequently, it was not hiba-bil-ewaz recognised by the Mahommedan law in its early and undeveloped form; but it is hiba-bil-ewaz of modern times having "the legal character of a sale"--"hiba-bil-ewaz ..... a sale in all its legal incidents."

20. "Sale," as defined in Section 54, T. P. Act, "is a-transfer of ownership in exchange for a price paid or promised or part-paid and part-promised." It is true that in some cases the word "price" has been interpreted to mean "money;" but in Saiful Bibi v. Abdul Aziz Khan, 1931 A. L. J. 951 : (133 I. C. 901) it has been held that "a transfer of property in lieu of an existing debt in cash would be a transfer for a price so as to bring it within Section 54, T. P. Act."

The use of the word "price" instead of "money" in the section signifies that the word is wide enough to include any amount which can be definitely ascertained and worked out in terms of money, such as outstanding debts. An owner of property may transfer the same in lieu of outstanding debts--and there is no legal bar against his doing so. Although debts are not "money" in the ordinary sense of the term, yet they can be worked out in terms of "money." The dower is a debt--it has been so regarded even under the Mahommedan law; consequently, if the amount of dower is ascertained and the transfer is made in lieu thereof the transfer would be for a price. The transfer in question

which is a hiba-bil-ewaz, under the Mahommedan law, having all the legal incidents of a sale, falls within the purview of Section 54, T. P. Act.

21. It follows, therefore, that the transfer in the present case is a hiba-bil-ewaz, a gift for consideration, having all the legal characteristics of a sale; and, inasmuch as the provisions of Section 54, T. P. Act, apply even to a sale transaction between Muslims, the transfer must be deemed to be a sale within the meaning of the said section.

22. Now, I will discuss the case-law, bearing on the point under consideration : The earliest decision of this Court, to which reference has been made on behalf of the appellant is the one reported in Fida Ali v. Muzaffar Ali, 5 ALL. 65 : (1882 A. W. N. 175). In that case a Mahommedan husband had transferred certain property to his wife in consideration of a certain sum which was due by him to her as dower and it was held that such a transfer amounted to a "sale" within the meaning of the Mahommedan law of pre-emption and gave rise to the right of pre-emption. Mahmood J., observed in that case :

> "Dower under the Muhammadan law is regarded as a debt due by the husband to the wife.
>
> It is an equally well-recognised rule of that law that transfer of property by the debtor to the creditor in payment of the debt constitutes sale, and the rule is wide enough to include transfer of property by the husband to the wife in payment of her ascertained dower. In the present case the deed of sale clearly states the amount of dower and the part thereof in payment of which the sale took place ....."

23. On behalf of the respondent, the case was sought to be distinguished on the ground that there was a written instrument; but a question was raised therein 'whether it was a sale and the question was answered in the affirmative. The principle laid down in that case is based upon a rule of Muhammedan law, and is of general application.

24. The next case of this Court cited before us, on behalf of the appellant, is to be found in Rahim Bakhsh v. Muhammad Hasan, 11 ALL. 1 : (1888 A. W. N. 266), where a deed of gift was executed in consideration of natural love and affection and the services rendered. The deed was said to be a hiba-bil-ewaz; but it was held that it could not be treated as such, unless it was shown that the consideration for which that transaction took place was a previous gift passing from the donee to the donor. The passage from Baillie's Digest, which has been quoted above, was quoted in support of the view taken in that case.

25. Another decision of this Court relied upon by the appellant is reported in Saiful Bibi v. Abdul Aziz Khan, 1931 A. L. J. 951: (A. I. R. (19) 1932 ALL. 596). In that case Sulaiman A. C. J. (as he then was) and Banerji J. in their judgment observed :

> "A transfer of property in lieu of an existing debt in cash would be a transfer for a price paid so as to bring it within Section 54, T. P. Act.

> If a question were to arise under the Mohamedan law we would have to look to what is meant by a hiba-bil-ewaz under that law. The question in this case however is under the Agra Pre-emption Act. Section 4(10) provides that a sale in the Pre-emption Act means a sale as defined in the Transfer of Property Act. In this way the Agra Pre-emption Act incorporates the definition of 'sale' as given in Section 54 of the latter Act, but the other provisions of that Act are not incorporated. All that we have to see here is whether the transfer of immovable property made in consideration of a part of an existing dower debt is a sale within the meaning of that definition. It has been held that a dower debt is a debt like every other debt, and therefore a transfer in lieu of it must be a sale as defined in that section."

26. On behalf of the appellant our attention has been invited to another decision of this Court in Ali Hasan v. Mt. Rashidan, A. I. R. (18) 1931 ALL. 237 : (124 I. C. 756) where a distinction was drawn between assignment of property by a Mohamedan to his wife as her dower, which was not a sale, and a transfer of property to the wife in payment of a certain amount of dower, which was considered a sale within the meaning of Section 54, T. P. Act.

27. Before dealing with the two cases of this Court in which a contrary view was expressed, I may refer to the cases of other High Courts which support the view taken in the cases cited above.

28. There is a single Judge decision of the late Avadh Chief Court in Mohammad Zaki Khan v. Munnu Sahu, A. I. R. (12) 1925 Oudh. 407: (28 O. C. 227) where it was held that a transfer of property in lieu of some money, whether the money is paid in cash or by the extinction of a dower debt, is a transaction of "sale" within the definition of the term in Section 54, T. P. Act, which is applicable to a transaction between Mahomedans.

29. A similar view was expressed in Mt. Asalat Fatima v. Shambhu Dayal, 11 I. C. 928 : (14 O. C. 214). There it was held that a transaction by a Mahomedan of immovable property of the value of over Rs. 100 in favour of his wife in lieu of dower was a sale and could not be recognised unless made by a registered instrument.

30. The view of the Calcutta High Court on this point is to be found in Abbas Ali v. Karim Baksh, 13 C. W. N. 160: (4 I. C. 466), Saburannessa v. Sabdul Sheikh, 38 C.W.N. 747 : (A.I.R. (21) 1934 Cal. 693) and Esahuq Chowdhry v. Abedunnessa Bibi, 42 Cal. 361 : (A.I.R. (2). 1915 Cal. 785). In Abbas Ali Shikdar's case (13 C. W. N. 160 : 4 I. C. 466) it was held that a gift of immovable property made in consideration of a dower debt of Rs. 49 and on account of the right of inheritance was not a proper hiba-bil-ewaz, at all but a sale within the meaning of Section 54, T. P. Act. In Saburannessa's case (38 C. W. N. 747 : A. I. R. (21) 1934 Cal. 693) a gift of immovable property in lieu of dower was held to be a sale and not a gift. In Esahuq chowdhry's case (42 Cal. 361 : A. I. R. (2) 1915 Cal. 785) it was held that the provisions of the Mahomedan law applicable to gifts, made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of dower debt, which was really of the nature of a sale.

31. In Mohammad Usman Khan v. Amir Main, A. I. R. (36) 1949 Pat. 237: (26 Pat. 561) the Patna High Court has held that an oral gift of immovable property by a Mahomedan in favour of his wife in lieu of dower debt is not a true hiba-bil-ewaz but a sale.

32. A similar view has been expressed by the Lahore High Court in Gopaldas v. Sakina Bibi, 16 Lah. 177 : (A. I. R. (23) 1936 Lah. 307) and by the Nagpur High Court in Zainab Bi v. Jamal Khan, I. L. R. (1949) Nag. 426: (1949 N..L. J. 480).

33. The two decisions of this Court in which a contrary view was taken, and to which reference has been made in support of the decisions of the Courts below, are reported in Mt. Kulsum Bibi v. Shiam Sunder Lal, A. I. R. (23) 1936 ALL. 600 : (1936 A. L. J. 1027) and Mt. Kulsum Bibi v. Bashir Ahmad, A. I. R. (24) 1937 ALL. 25 : (I.L.R. (1937) ALL. 285). In these oases one and the same transaction came up for consideration before the same learned Judges.

34. The facts of the first case briefly stated are these : On 26-8-1925, 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, Kulsum Bibi, and some other persons were brought on the record as his legal representatives. In execution of the aforesaid decree, some house property situate in Jhansi was attached. Kulsum Bibi filed objections against the attachment. She alleged that on 1-2-1930, her husband, Habib Baksh, 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 Kulsum Bibi; but they were established by the evidence produced in the case. The trial Court, however, held that the gift set-up by Kulaum Bibi being a transfer of immovable property of the value of more than Rs. 100 in lieu of her dower debt, which was due to her from her husband, could not be held to be a gift and amounted to a sale as defined in Section 54, T. P. Act, and as there was no transfer in writing by a registered deed it was not provable and was not valid. This view of the trial Court was challenged in appeal before this Court.

35. The judgment delivered by Rachhpal Singh J., in the above case, was to a large extent influenced by the decision of their Lordships of the Privy Council in Kamar-un-nissa Bibi v. Hussaini Bibi, 3 ALL. 266, which was given prior to the passing of the Transfer of Property Act. In that case, it was alleged, a Muslim had made an oral gift of an estate to his wife in consideration of dower amounting to Rs. 51,000; and two issues were raised, firstly, whether the Muslim had made a gift and in pursuance thereof transferred possession over the estate to his wife, and, secondly, whether the gift was made in satisfaction of the dower debt. The trial Court found that there was no dower due and that possession was not transferred over the estate to the wife under any gift. On appeal the High Court did not decide the question of the existence of dower debt, but held that possession over the estate had, in fact, been transferred to the wife. On further appeal, their Lordships of the Privy Council also laid stress on the change of possession over the estate, subject of the alleged gift, and, upon a consideration of the entire evidence on the record, their Lordships upheld the finding of the High Court. In this connection, the following observations of their Lordships are relevant:

> "But if the possession was changed in conformity with the terms of the gift, that change of possession would be sufficient to support it, even without consideration."

Their Lordships did not decide whether the gift under consideration was hiba-bil-ewaz or sale, they seem to have regarded it as a hiba, or gift pure and simple. The question whether an oral gift in lieu of dower could or could not be made without a written and registered document did not arise in that case as it was decided before the Transfer of Property Act came into force.

Rachhpal Singh, J.

36. realized that the "precise legal position" of a gift for consideration "must lie midway between gift properly so-called and sale," but proceeded to observe :

> "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'.... When however, the gift is made for a stipulated consideration, it is a 'hiba-ba-shart-ul-ewaz'."

37. With due deference, I would like to point out that a Tuba-bil-ewaz is not the same thing as a hiba, or gift pure and simple; and it is also different from a hiba-ba-shart-ul-ewaz. A gift for a "stipulated consideration," which means the "stipulation" forms part of the transaction itself, is a hiba-bil-ewaz and not a hiba-ba-shart-ul-ewaz.

38. Another reason given by Rachhpal Singh J., in support of his view was that under the Mahommedan Law a husband was competent to make an oral gift of immoveable property in favour of his wife in lieu of her dower and if all the requisites of a valid gift under that law, namely, a declaration of gift by the donor; the acceptance of the gift, express or implied, by or on behalf of the donee; and delivery of possession of the subject of the gift by the donor to the donee, were proved, it must be upheld as a gift, even if it fails as a sale. A Muslim husband may be competent to make an oral gift of immoveable property in favour of his wife in lieu of her dower; but the question will still arise whether the transfer is or is not a sale within the meaning of Section 54, T. P. Act, which applies even to transactions between Muslims. If such a transfer amounts to a sale in order to be operative and enforceable in law, it must be made in the manner provided in the said section. This aspect of the matter was evidently not put before the learned Judge.

Niamatullah, J.

39. upheld the oral gift, on the following ground :

> " . . . . 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 Mahomedan 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."

40. With due respect, I am unable to follow the reasoning. I have already shown above that a 'hiba-bil-ewaz' is a single transaction having all the characteristics of a sale, and it cannot be split-up into two distinct gifts. In the transaction, to repeat the words of Syed Ameer Ali, "the consideration is directly opposed to the object of the gift, both being in ease; there is no suggestion of one being subsequent to the contract. The grant and the consideration are parts of one transaction."

41. The decision in the second case of Kulsum Bibi, (A.I.R. (24) 1937 ALL. 25 : I.L.R. (1937) ALL. 285) proceeds on the same reasoning. In that case, the same learned Judges discussed the passage in Baillie's Mohammedan Law, Vol. I, at p. 122, which has already been quoted in an earlier portion of this judgment, and observed :

> "We do not think that, according to Baillie, if a transaction called 'hiba-bil-iwaz' has all the attributes of a true 'hiba-bil-ewaz' known to the Mahomedan law, lit should not be treated as such in India but should for all purposes be taken to be either a sale or an exchange. In our view, if a transaction can be shown to possess all the attributes of a true 'hiba-bil-iwaz' there is no reason why it should not be recognized as such in British India. Where delivery of possession has taken place and the transaction is not affected by the doctrine of 'musha', the party relying, on it is entitled to have it upheld, even though both the gifts were made by word of mouth. The Transfer of Property Act does not apply to a gift by a Mahommedan. There is no other law which makes a registered instrument necessary for effecting a gift. We see no reason why two Muslims cannot, by an oral transaction, transfer to each other two properties, each in exchange of the other. Properly analysed, each makes a gift of his property to the other."

42. A transfer may have all the attributes of a true 'hiba-bil-iwaz' known to Mahommedan law, and it may also be treated as such; but if it falls within the purview of Section 54, T. P. Act, and is not effected in the manner provided therein, it will be inoperative and ineffectual in law. The delivery of possession under such a, transfer will also be ineffectual as against the real owner of the property.

43. If there is a transfer for consideration and the consideration is such which can be considered price within the meaning of Section 54 of the Act, the transfer would fall within the purview of the said section. Under Section 129, T. P. Act, the rules of Mahommedan law are not affected by the provisions relating to gifts in that Act; but there is nothing in the Act which exempts transactions in

the nature of a sale-from the operation of Section 54 of the Act. The obvious reason why two Muslims cannot by an oral, transaction transfer to each other two properties in exchange for a price is that, such, a transaction would be governed by the provisions of Section 54, T. P. Act, which also govern sale transactions between Muslims.

44. The view taken in both the cases of Kulsum Bibi is neither in consonance with the view expressed by this Court in earlier decisions and by other Courts in India in the cases cited above; nor is it consistent with the principles-of Mahommedan law to which reference has been made in an earlier portion of this judgment. Consequently, it must be dissented from and overruled.

45. In passing, I may also notice certain decisions of the Avadh Court, in which it was held that a hiba-bil-iwaz was not a sale within the meaning of Section 9, Oudh Laws Act (XVIII [18] of 1876). Under Section 9 of that Act the right of pre-emption is given in respect of "the property to be sold or foreclosed". The Avadh cases are reported in Ram Prasad v. Rahat Bibi, 18 O. C. 367 : (A.I.R. (3) 1916 Oudh 273); Bashir Ahmad v. Mt. Zubaida Khatun, A. I. R. (13) 1926 Oudh 186 : (1 Luck. 83) and Talib Ali v. Kaniz Fatima Begum, A. I. R. (14) 1927 Oudh 204 : (2 Luck. 575). These cases need not detain us long because Ram Prasad's case, 18 O. C. 367 : (A. I. R. (3) 1916 Oudh 273) was followed in Bashir Ahmad's case A. I. R. (13) 1926 Oudh 186 : (1 Luck. 83) and the cases of Bashir Ahmad, (A.I.R. (13) 1926 Oudh 186 : 1 Luck. 83) and Talib Ali, (A. I. R. (14) 1927 Oudh 204 : 2 Luck. 575) were both dissented from by this Court in Saiful Bibi v. Abdul Aziz Khan, 1931 A. L. J. 951 : (A. I. R. (19) 1932 ALL. 596).

46. The transfer in the present case must, therefore, be held to be a sale within the meaning of Section 54, T. P. Act, which could only be effected by means of a registered instrument. Consequently, my answer to the question referred to the Full Bench is as follows: An oral transfer of immovable property worth more than Rs. 100 cannot be made by a Muslim husband to his wife by way of gift in lieu of dower-debt which also exceeds Rs. 100. Such a transaction is neither a gift nor a combination of gifts which can be made orally; it is a sale which can be effected by means of a registered instrument only.

Agarwala, J.

47. I agree.

Harish Chandra, J.

48. I agree.

49. By the Court- -- The question referred to the Full Bench is answered as follows : An oral transfer of immovable property worth more than Rs. 100 cannot be validly made by a Muslim husband to his wife by way of gift in lieu of dower-debt which also exceeds Rs. 100. Such a transaction is neither a gift nor a combination of gifts which can be made orally; it is a sale which can be effected by means of a registered instrument only.

50. Let the papers be laid before the Bench concerned.