

Judge discharged. The records will be returned to him to enable him to take such further steps, if any, as the parties interested may desire him to adopt in accordance with the principles explained above.

G. S.

*Appeal dismissed:**Rule absolute.*

1914
MONJAN
BIBI
r.
DISTRICT
JUDGE,
BIRBHUM.

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

ESAHAQ CHOWDHRY

v.

ABEDUNNESSA BIBI.*

1914
June 9.

Mahomedan Law—Gift made in lieu of dower—Nature of such gift.

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 a dower-debt which is really of the nature of a sale.

Ghulam Mustafa v. Hurmat (1) followed.

Abbas Ali v. Karim Bahsh (2) and *Bibi Janbi v. Hazraih Saib* (3) referred to.

SECOND Appeal by Esahaq Chowdhry and another, the plaintiffs.

This appeal arose out of a suit brought by the plaintiffs for a declaration that the *kabala* set up by the defendant No. 1 was collusive and invalid and not binding upon them. One Chowdhry Ubaidul Huq, being entitled to and in possession of certain

* Appeal from Appellate Decree, No. 3951 of 1912, against the decree of Bejoy Gopal Bose, Subordinate Judge of Burdwan, dated Sep. 23, 1912, affirming the decree of Achinta Nath Mitra, Munsif of Burdwan, dated Jan. 17, 1911.

(1) (1880) I. L. R. 2 All. 854.

(2) (1908) 13 C. W. N. 160.

(3) (1910) 21 Mad. L. J. 958.

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properties, died on the 10th of Jaistha 1316 leaving him surviving his widow, the defendant No. 1, two daughters, defendants Nos. 2 and 3, and 2 brothers, plaintiffs Nos. 1 and 2, as his heirs. The plaintiffs, being entitled to 3-anna, 6-ganda, 2-kara, 2-kranti share of the properties left by their brother, Ubaidul Huq, attempted to enter into the possession of the same but were resisted by the defendant No. 1 on the allegation that her husband had before his death transferred all his properties to her in liquidation of her dower-debt. Hence the suit by the plaintiffs to recover possession of the legal share after declaration that the *kabala* propounded by the defendant No. 1 was fraudulent and as such it was not binding upon the plaintiffs. The defendant No. 1 pleaded, amongst other defences, that the alleged *kabala* was a *bona fide* document for consideration. The defendants Nos. 2 and 3 filed a written statement supporting the case set up by the defendant No. 1.

The Court of first instance dismissed the suit with costs. Then the plaintiffs appealed to the Subordinate Judge of Burdwan who also dismissed the appeal with costs. Hence this second appeal.

Babu Dwarka Nath Chuckerbutty (with him *Babu Bipin Bihari Ghose* and *Babu Pyari Mohan Chatterjee*), for the appellants, contended that the rules of Mahomedan Law, respecting death-bed gifts, were applicable to sales effected on death-bed. In support of this contention he relied upon Case XII, p. 177 of Macnaghten's Mahomedan Law.

Dr. Rashbehari Ghose (with him *Babu Prabodh Chandra Datta*), for the respondents, submitted that rules relating to death-bed gifts had no application whatever to sales effected on death-bed. When once a sale was effected, provided it was not tainted with fraud

or collusion, the sale was good and binding. It could not be impeached on any other ground. Here the finding is clear that the sale was a real transaction and hence no other question can arise: *Ghulam Mustafa v. Hurmat* (1), *Abbas Ali v. Karim Baksh* (2), *Bibi Janbi v. Hazarath Saib* (3).

Babu Dwarka Nath Chuckerbutty, in reply.

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FLETCHER J. This is an appeal from a judgment of the learned Subordinate Judge, Second Court, of Burdwan, dated the 23rd September 1912, affirming the decision of the Munsif. The suit was brought by the plaintiffs for a declaration that the *kabala* set up by the defendant No. 1 was collusive and invalid and not binding upon them. The question that we have got to decide lies within a narrow compass. The defendant No. 1 is the widow of a Mahomedan gentleman. This Mahomedan gentleman had agreed to pay a certain sum as dower to the said defendant. The dower was deferred dower; but it is the common case—and so found by the learned Subordinate Judge—that a portion of the dower was outstanding at the date of the execution of the *kabala* in question. The deceased gentleman executed a conveyance of this property to the defendant in satisfaction of her dower-debt. A question has been raised before us, whether the principles of the Mahomedan Law, with reference to the death-bed illness which apply to gifts apply also to a sale when the sale is for dower-debt. The matter is not *res integra*. The very matter has already been dealt with in the Allahabad High Court, see *Ghulam Mustafa v. Hurmat* (1) where the learned Judges held that the provisions of the Mahomedan Law applicable to gifts made by persons

(1) (1880) I. L. R. 2 All. 854. (2) (1908) 13 C. W. N. 160.

(3) (1910) 21 Mad. L. J. 958.

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labouring under a fatal disease do not apply to a so-called gift made in lieu of the dower-debt which is really of the nature of a sale. That case is exactly on all fours with the present, and it has been followed and approved of both by this Court and the Madras High Court: see *Abbas Ali v. Karim Baksh* (1), *Bibi Janbi v. Hazarath Saib* (2). We are of opinion that the decision in the case of *Ghulam Mustafa v. Hurmat* (3) is correct, and we think we ought to follow the same. It does not seem to us from a perusal of the books that have been handed up to us in the course of the argument, that the principles relating to a gift apply to a transaction such as the one that is now before us. In our opinion, the learned Judge of the lower Appellate Court came to a correct conclusion. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON J. I agree. Case XII, p. 177 of Macnaghten's Mahomedan Law, appears to be distinguishable from the present case, inasmuch as it is not stated there that the sale was in consideration of a dower-debt.

S. K. B.

Appeal dismissed.

(1) (1908) 13 C. W. N. 160.

(2) (1910) 21 Mad. L. J. 958.

(3) (1880) I. L. R. 2 All. 854.