APPELLATE CIVIL.

Before Chatterjea and Panton JJ.

SERAJUDDIN HALDAR

v.

ISAB HALDAR.*

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April 15.

Mahomedan Law—Heba—Heba-bil-ewaz, failure of proof of—Heba, validity of, as alternative claim—Evidence Act (I of 1872) s. 92.

In the plaint a deed of gift was referred to as *heba-bil-ewaz* (or gift for consideration) in one part, and in another as a simple *heba* (or gift): the question whether the transaction could be treated as a simple gift was raised in the Court of first instance at the hearing.

Held, that 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.

Jidda Jan Bibi v. *Sheikh Baktar* (1) distinguished.

SECOND APPEAL by Serajuddin Haldar, the plaintiff.

One Pochai Haldar had two sons by his first wife and one son, Enatali, by his second wife. Pochai lived with his second wife and son Enatali, while the two sons by his first wife lived separately. Enatali died during the lifetime of his father, leaving his mother, his widow and a son, Serajuddin, who was a minor. Hence Serajuddin would not inherit any property from his grandfather according to Mahomedan Law. Under the circumstances Pochai executed a *heba-bil-ewaz* in favour of his minor grandson with respect to

* Appeal from Appellate Decree No. 2791 of 1919, against the decree of B. K. Basu, Additional District Judge of Dacca, dated July 12, 1919, reversing the decree of Upendra Kumar Kar, Munsif of Munshigunge, dated Sep. 13, 1918.

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a one-third share of his own share in the homestead land, a hut and a plot of *nal* land on the receipt of a Koran, a prayer mat and a rosary. This property was in the possession of Pochai during his lifetime and also in the possession of Serajuddin until dispossessed by his two uncles. Hence this suit by Serajuddin. The trial Court decided in his favour; but the Court of Appeal set aside that decree on the ground that the deed could not be operative as a *heba-bil-ewaz* for no evidence had been adduced regarding passing of consideration, nor could it be operative as a simple *heba*, which was the alternative claim of the plaintiff because a simple *heba* was something quite different from a *heba-bil-ewaz*.

Babu Prasanta Bhusan Gupta, for the appellant. A clear assumption has been made in *Rahim Jan Bibi* v. *Iman Jan* (1), that a deed of *heba-bil-ewaz* may also be operative as a simple *heba* if the formalities for it are proved. Besides, the present case is distinguishable from *Jidda Jan Bibi* v. *Sheikh Baktar* (2) inasmuch as this was the case of the plaintiff from the very outset. The plaint states the case in that way: an issue was framed accordingly and the Court of first instance discussed that point in the judgment.

Again *heba-bil-ewaz* means a gift with a return. It consists of two acts of gift, an original gift by the original donor to the original donee and then another gift by the original donee to the original donor. Both these gifts in the case of *heba-bil-ewaz* are supposed to be spontaneous and are gifts pure and simple. After both the gifts have been accepted by the mutual parties, the original gift is called *heba-bil-ewaz* or a gift with a return. And according to Mahomedan law the principles applicable to a simple *heba*

(1) (1911) 17 C. L. J. 173. (2) (1919) 24 C. W. N. 926.

or gift are applicable to the *ewaz* or return in a transaction called *heba-bil-ewaz*. A *heba-bil-ewaz* differs from a *heba* inasmuch as *heba* is revocable in certain circumstances, while a *heba-bil-ewaz* is not at all revocable by the donor. It is for this reason that Mahomedans under certain circumstances execute deeds of *heba-bil-ewaz* in preference to deeds of simple *heba*.

The intention of making a gift also is quite clear from the deed itself. In any case the plaintiff should have been given an opportunity to adduce evidence as to the passing of consideration as he prayed for at the appellate stage when that question arose.

Babu Basanta Kumar Basu, for the respondent. A *heba-bil-ewaz* is quite different from a simple *heba* as the incidents governing the two are very different. In the case of a *heba-bil-ewaz* delivery of possession need not take place, while in the case of a simple *heba* it must. The case of *Jidda Jan Bibi* v. *Sheikh Baktar* (1) stands on all fours with the present case. Again the present case cannot be judged from the point of view of the general principles of the law applicable to gift or sale. For *heba* and *heba-bil-ewaz* are peculiar forms of transaction governed by Mahomedan law and accompanied by special sorts of formalities prescribed by it.

I rely on *Rahim Buksh* v. *Muhammad Hasan* (2).

Babu Prasanta Bhusan Gupta, in reply. At any rate the case should be sent back on remand for a finding as to delivery of possession and intention of the donor to make a gift.

Cur. adv. vult.

CHATTERJEA AND PANTON JJ. The property in dispute in the suit out of which this appeal arises

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belonged to one Pochai Haldar, the paternal grand father 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.

The consideration recited in the document was a Koran, rosary and a prayer mat; but no evidence was adduced that any such consideration passed.

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 Mahomedan 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.

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.

There is no doubt that under the Mahomedan 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. *Muhamad Hasan*(1), 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).

We do not think, however, that the learned Judge in the Court below is right in saying that if the

(1) (1888) I. L. R. 11 All. 1.

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 *Rahim Jan Bibi* v. *Iman Jan*(1) 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.

It is contended by the learned pleader for the respondent 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 Musajee Mookerdum* v. *Hafiz Boo* (2) 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 be 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 the sum 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 *Musammat Hanif-un-nissa* v. *Chaudhurain Musammat Faiz-un-nissa* (3), 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

(1) (1911) 17 C. L. J. 173. (2) (1906) 10 C. W. N. 570, 580.
(3) (1911) 15 C. W. N. 521.

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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.

The Court of Appeal below and the learned pleader for the respondent have relied upon the case of *Jidda Jan Bibi* v. *Sheikh Baktar* (1). 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."

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-bil-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.

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

Costs will abide the result.

G. S. *Appeal allowed; case remanded.*

(1) (1919) 24 C. W. N. 926.