APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

1922, January 6.

MADAM PILLAI (SECOND DEFENDANT), APPELLANT,

v.

BADRAKALI AMMAL AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Transfer of Property Act (IV of 1882) ss. 9, 54, 118, 123—Land more than hundred rupees in value—Transfer by husband to wife for enjoyment during her lifetime in discharge of future maintenance, whether required to be in writing.

A transfer of land by a husband to his wife to be enjoyed by her during her lifetime in discharge of future maintenance is not a gift or sale and may be made without writing.

SECOND APPEAL against the decree of U. GOVINDAN NAYAR, Acting Subordinate Judge of Tuticorin, in A. S. No. 33 of 1919 preferred against the decree of A. VERGHESE, District Munsif of Tuticorin, in O.S. No. 114 of 1918.

Plaintiff, the first wife of the first defendant, sued for a declaration that the sale of the suit lands to second defendant by first defendant was invalid on the ground that the first defendant had made an oral transfer of the lands in her favour in discharge of her claim for future maintenance.

The Second Appeal came on for hearing before OLDFIELD and RAMESAM, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The second defendant, here appellant, relies on a sale-deed of the suit land from first defendant. Plaintiff, the first wife of first defendant, has obtained a declaration that the sale to second defendant is invalid, so far

* Second Appeal No. 522 of 1920.

as it affects her right to enjoy the land during her life, on a finding by the lower Courts that she is doing so under an oral transfer of that right by first defendant with a condition against alienation by him during her enjoyment. The finding that this transfer was made is one of fact and we must accept it. The Second Appeal has been argued on the ground that under the Transfer of Property Act an oral transfer of this kind is ineffective. The decision of the lower Appellate Court has been supported on the grounds that, even if the oral transfer is ineffective, plaintiff has prescribed for a right to possession by her adverse holding for about seventeen years and that, second defendant's sale having to his knowledge been intended to defeat plaintiff's maintenance right, that right must under section 39 of the Transfer of Property Act be enforced against him by keeping her in possession.

Neither of the considerations relied on by plaintiff affords an immediate ground of decision. For the lower Appellate Court has found only that she had possession on the date of her plaint, not that she had it for the previous period necessary for prescription; and a remand for proper consideration of the plea of prescription would be necessary. The argument from section 39 assumes that her right to maintenance can be identified with her right to the enjoyment of the suit land, whereas the validity of the transfer to her of that land in lieu of maintenance is the point in dispute.

We have therefore to decide whether this oral transfer of land, admittedly of over Rs. 100 value, is valid. The questions raised are of general importance and, as we are referring the matter, we attempt no further discussion or citation of authorities than is sufficient to indicate its difficulty. In argument before us neither party has contended that the transfer to

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plaintiff is a lease; and the suggestions that it is a gift or a family settlement or compromise can be dismissed shortly, the former because her abandonment of her right to claim maintenance is a consideration within the meaning of section 2 (*d*) of the Indian Contract Act, the latter because the arrangement is not put forward as an acknowledgment of existing rights or otherwise than as a creation of new ones. Second defendant argues that the transfer is a sale or exchange, which under sections 54 and 118 of the Transfer of Property Act can be made only in writing; plaintiff, that it can be made without writing under section 9 because the case is not one in which a writing is expressly required.

One obstacle to the application of either section 54 or 118 is that in the present case the transfer is on the one side of the right to enjoy only for the transferee's life and this may be inconsistent with the references to transfer of ownership in the former and of ownership of a thing in the latter. For in the absence of definitions of "ownership" and of "a thing" it is a question whether the transfer of less than an absolute and permanent right is contemplated by either section. We have been shown no authority on this point or on the kindred objection to the application of section 118 to the consideration proceeding in the present case from the transferee, that the abandonment of a right to maintenance is not the ownership of a thing. Further it can hardly be said that the abandonment of a right against a person is a transfer to him of that right; and, if it could be, a right to future maintenance is, it has been held, not a thing which can be the subject of transfer or assignment [*Narbadabai* v. *Mahadeo Narayan*(1) and *Palikandy Mammad* v. *Krishnan Nair*(2)]. The difficulty in connexion with section 54

(1) (1881) I.L.R., 5 Bom., 99. (2) (1917) I.L.R., 40 Mad., 302.

is that a price, or promise of a price, is essential and that plaintiff's abandonment of her right to future maintenance, which has never been assessed or valued is not a price or the promise of one because a price must, according to authority [*Queen-Empress* v. *Appavu*(1), and *Volkart Brothers* v. *Vettivelu Nadan*(2)] be money. We have been asked to disregard this with reference to the judgment of SADASIVA AYYAR, J., in *Ariyaputhira* v. *Muthukomaraswami*(3), and his dictum that

"If two persons mentally fix the value of the exchanged things in current coin and then exchange them as of equal value, they might be held to effect sales and to pay prices (the word 'not' being apparently interpolated in the Report) and not merely to effect an exchange."

It is possible that this was not enunciated as a general principle, but only with reference to cases such as that before the learned Judge, in which the data for the mental process he assumed, in the shape of information as to completed transactions, were available. But the supposition of such a process can hardly be made in cases of the kind now in question, in which the calculation of the amount depends on an estimate of an unascertained periodical liability for an uncertain time, and we have to assume not only a mental fixing of the total due by each party, but some sort of sympathetic agreement between them on the same figure, in the absence of which there could be no contract.

In the circumstances we refer for the opinion of the Full Bench the question whether a transfer of land of the value of more than Rs. 100 by a husband to his wife to be enjoyed by the latter during her lifetime in discharge of her claim to future maintenance can be made without writing.

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(1) (1886) I.L.R., 9 Mad., 141. (2) (1888) I.L.R., 11 Mad., 459.
(3) (1914) I.L.R., 37 Mad., 423.

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ON THIS REFERENCE—

K. V. Krishnaswami Ayyar and *T.R. Venkatarama Sastri* for appellant.—I contend that such a transfer requires writing. It is a gift and as such requires writing and registration. The other side contends it is a family settlement or compromise. So long as husband is living the wife has no claim to separate maintenance.

[C.J.—She has an inchoate right to maintenance and is entitled to maintenance after his death.]

Reference made to *Ariyaputhira* v. *Muthukomaraswami*(1), *Sm. Rajlukhy Dabee* v. *Bhootnath Mookerjee*(2).

B. Sitarama Rao and *A. Swaminatha Ayyar* for the respondent.

SCHWABE, C.J.

SCHWABE, C.J.—The question referred to us in this case is "whether a transfer of land of the value of more than Rs. 100 by a husband to his wife to be enjoyed by the latter during her life-time in discharge of her claim to future maintenance can be made without writing."

It was argued first that such an agreement was a gift, because it was said that such a bargain was illegal and, therefore, without consideration : but it had to be admitted that, if the bargain was to receive the land in discharge of the claim to future maintenance, there was nothing illegal at all ; and it is not necessary to say anything further on the subject of gift. By the transfer of Property Act, section 9 "A transfer of property may be made without writing in every case in which a writing is not expressly required by law" and, therefore, one has to look at the rest of the Act to see whether writing has been expressly required by law for such a transaction as this. Apart from the question of gift, the only sections which it is claimed could apply are sections 54 and 118. Section 54 relates to sales, a sale being defined

(1) (1914) I.L.R., 37 Mad., 423. (2) (1900) 4 C.W.N., 488, 489.

"as a transfer of ownership in exchange for price paid or promised." In this case one has to consider whether there was a price paid or promised by the transferee. Now "price" has a well defined meaning. It means money, but not necessarily money handed over in current coin at the time but includes money which might be already due, or might be payable in the future. I think the law is well expressed in the commentaries on the Transfer of Property Act by Shephard and Brown, page 175. "'Price' includes money only, for if the thing given in exchange for land consists of goods and not money, there is no sale but an exchange. A transfer not made in exchange for a money consideration, e.g., a transfer made in pursuance of a compromise of a family dispute, would not be a sale, and might be altogether outside the provisions of the Act." There being, in my view, no price paid or promised in this case, the transaction was not a sale. We are referred on this point to *Ariyaputhira* v. *Muthukomaraswami*(1) and to certain observations of SADASIVA AYYAR, J., therein, in which apparently he would extend "price" so as to cover all cases where articles are exchanged, one against the other, provided that the parties went through the mental process of fixing in their own minds the value of the articles to be exchanged. I must say that I think that that was going beyond anything that one can find in the Act. It seems to me that those observations were quite unnecessary for the decision which was arrived at in that case, and I confess that I cannot agree that the mental process gone through of valuing in one's mind the different articles to be exchanged can possibly turn an exchange transaction into a sale.

(1) (1914) I.L.R., 37 Mad., 423.

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The remaining section is section 118 which deals with "exchanges." By that section "Exchange" is defined as follows: "where two persons mutully transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an Exchange." In this transaction the husband transfers the land or the right to use the land during her lifetime to the wife and the wife gives up her right to future maintenance. It seems to me that there are two reasons why this transaction cannot be an exchange within that definition. First of all, the husband does not transfer the ownership of the land, and secondly, the wife does not transfer the ownership of anything. She does not purport to transfer anything to her husband, nor had she anything, within the meaning of that section, which she could transfer.

On these grounds the answer to the question referred to us is in the affirmative.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I agree. When we are construing a word like "price," we are dealing with a word which is by its inherent nature a likely subject of controversy, and I turned out of curiosity to the Oxford English Dictionary and found this quotation from Adam Smith's Wealth of Nations—1776: "The real price of everything, what everything really costs to the man who wants to acquire it, is the toil and trouble of acquiring it. Labour was the first price, the original purchase money that was paid for all things." But it seems to me that the answer is to be found in what I said during the course of the argument, that a trained English lawyer would never use the word "price," unless it be to connote something other than the perfectly familiar phrase "valuable consideration," which would naturally occur to his mind; and it seems to me that the whole of Mr.

Krishnaswami Ayyar's ingenious argument comes to this : that we are to construe price as meaning the familiar term "valuable consideration." I think that the word "price" was put into the section to connote something different and something more limited, that is, money.

COUTTS TROTTER, J.

KUMARASWAMI SASTRI, J.—I agree with my Lord and would only add that even if the transaction is treated as a settlement of family disputes, there is nothing in Hindu Law requiring it to be in writing. Partition can under Hindu Law be made without any document, and a settlement cannot be in a worse position.

KUMARASWAMI SASTRI, J.

It is argued that the transaction must be viewed as a gift of immoveable property, as under Hindu Law an agreement by a husband to provide for the future maintenance of his wife is invalid; and there being no legal and valid consideration for the transfer, it is in effect a gift. I see nothing illegal in Hindu Law for a husband to make provision for the future maintenance of his wife. It is very often a very proper thing to do. Even assuming that the agreement to provide for future maintenance is invalid under Hindu Law, the transaction will not amount to a gift. It will be invalid not for want of writing and registration but because it is incompetent for the parties to enter into the transaction because of the personal law by which they are governed.

M.H.H.