which have come before us are worded precisely alike. This *wajib-ul-arz* in question was anterior to the issue of the rules to settlement officers of 1875. We accordingly, holding the views we do, dismiss this appeal with costs.

Appeal dismissed.

1891
May 15

Before Sir John Edge, Knight, Chief Justice, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

ANGAN LAL (DEFENDANT), *v.* MUHAMMAD HUSAIN AND OTHERS (PLAINTIFFS.)*

Construction of document—Deed—Sale-deed or deed of gift.

A deed which purported on the face of it to be a deed of sale contained a recital that the consideration had been received by the vendor and returned as a gift to the vendee. The words used were—"Hath * * * nawasi apne ki bai katai karke zar-i-samaan tamâm wo kamâl wasul pakar bakhsh diya aur hiba kardiya."

The deed was stamped as a sale-deed and was duly registered, but no possession was given under it, and there was apparently no evidence external to the deed that any consideration had passed between the parties.

Held by EDGE, C. J., and TYRRELL and KNOX, J.J., that in the absence of any evidence external to the deed itself of the intention of the parties, the deed in question must be taken to be a deed of sale.

per MAHMOOD, J., *contra*.—The lower appellate Court having found that no consideration had passed, the deed must be considered as a deed of gift, though wearing the appearance of a sale-deed, and, possession not having been given, under Muhammadan Law the gift was invalid.

The facts of this case sufficiently appear from the judgments of of Edge, C. J., and Mahmood, J.

Mr. T. *Conlan* and the Hon'ble Mr. *Spankie*, for the appellant.

The respondents were not represented.

MAHMOOD, J.—This is an appeal preferred from the judgment of the late Mr. Justice Brodhurst as to the interpretation of a deed to which reference will be made by me presently.

The case out of which the appeal arises was a second appeal, and it came before my brother Straight and the late Mr. Justice Brodhurst, and they dissented in opinion and the decree passed by Mr. Justice Brodhurst was that the appeal should stand dismissed.

* Appeal No. 26 of 1889 under section 10 of the Letters Patent.

1891

ANGAN LAL v. MUHAMMAD HUSAIN.

The judgment of my brother Straight was that the appeal stand decreed and the plaintiff's claim should also stand decreed.

This is the state of things under which this appeal has been preferred as an appeal under s. 10 of the Letters Patent. What I have to consider is, whether the appeal should or should not prevail, and, in doing so, it is important to state the facts which require consideration for the purpose of deciding the point of law which arises in the case. Those facts are these :—

On the 3rd June 1878, Musammat Wilaiti Begam executed a document in favor of her daughter's daughter, Ilahi Begam, purporting to be a deed of sale in lieu of Rs. 700, and that document was duly registered. Matters stood thus when, on the 1st August 1884, Ilahi Begam, the vendee of the deed of the 3rd June 1878, executed a document purporting to be a deed of sale in favor of Angan Lal, present plaintiff-appellant, for a sum of Rs. 1,000, and this document was also registered. This happened as any other documents of this description may be executed, and naturally, as too often occurs in India, such documents are questioned as to their validity.

The plaintiff came into Court claiming possession of property which he alleged that he had purchased from Ilahi Begam under the sale-deed of the 1st August 1884, that it is to say, such rights as she, Ilahi Begam, possessed under the earlier deed of 3rd June 1878.

The suit was resisted upon the ground of a total denial of title in the plaintiff, either under the deed of the 3rd June 1878, or the deed of the 1st August 1884, and it is clear that under these circumstances it was for the plaintiff to prove, and not for the defendants to disprove, that the plaintiff had full title under either of those deeds.

Now this being so, it is important in the first place to consider the terms of the deed of the 3rd June 1878. The document need not be read fully, though it is necessary before I interpret it to say that I have read the whole of it. It is necessary also to cite some

1891

ANGAN LAL v. MUHAMMAD HUSAIN.

parts of the document upon which Mr. *Coulan* has relied. The words of the document are these :—

هاتهه نواسي اپني گے بيع قطعي کر کے زر ثمن تمام و کمال وصول پاکر بخش ديا اور هبه کر ديا اور شی مبيعه مذکوره کو اپنے قبضه سے نکالکر بيچ قبضه مشتريه مذکوره ديديا اور مشتريه مذکوره شی مبيعه مذکوره پر مثل ذات مجيهه بائع قابض اور دخيل هووے بعد وقت بيع سے شی مذکوره ميں کچهه حق و حصه مجهه بائع باقي نهيں رها اب مجهکو اور ميرے ورثاء کو صحت اِس بيعنامه و بخشش زر ثمن ميں کچهه قيام عذر و اطراف نهيں هی اور نه هوگا لهذا يهه چند باتيں بطور بيعنامه و بخشش زر ثمن کے لکهه دي هی که سند هو اور وقت حاجت کے کام آويں فقط تحرير ۳ جون سنه ۱۸۷۸ع*

Now these words are words of which the meaning requires specific determination, because, indeed, if they mean that the document was a deed of sale, then, undoubtedly, the conclusion is right that Angan Lal is entitled to his decree.

Reading these words as I have done, they leave no doubt in my mind that it was not a deed of sale, though it was a pretended deed of sale, as apparent from the deed itself ; and it was, as has been held by the Courts below and by Mr. Justice Brodhurst in this Court, simply a deed of gift. It is therefore important to consider whether or not there should have been delivery of possession under the deed.

Now upon this point there has been some doubt as to whether or not the Muhammadan law applies to such a case. A Full Bench of this Court has decided the question in the affirmative in cases of pre-emption (*Musammat Chandu* v. *Hakim Alimuddin*) (1), the same principle has been applied also to questions of gift (*Nizamuddin* v. *Zabeda Bibi*) (2), and so far as the interpretation of the document now in question is concerned, the Muhammadan law is the law which governs the adjudication of the case ; not only because this may be required by section 37 of the Civil Courts Act (XII of 1887), but also, because, even if there is no specific statute law, I think it has been held by their Lordships of the Privy Council that in such cases respecting transactions between

(1) N.-W. P. H. C. Rep., 1874, p. 28. (2) 6 N.-W. P. H. C. Rep., 338.

1891

ANGAN LAL v. MUHAMMAD HUSAIN.

Muhammadans it is only administering the rules of justice, equity and good conscience to bear in mind what rules that law requires.

This being so, I have in the first place to determine whether the deed, as I have read it, is a deed of sale or a deed of gift. Mr. *Conlan* has referred us to the case *Rahim Bakhsh* v. *Muhammad Hasan* (1); the learned counsel has argued with much ability that the judgment does in some parts of it give color to the contention which is necessary for his case. The matter, however, is clear from the judgment in that case that, before a deed can be interpreted to be a deed of gift, or *Hiba-bil-aiwaz* or a deed of sale, it must be known what the conditions were under which the deed was executed, what its terms were, and what the consideration was upon which the contractual relation created by the engagement was established. So considered, the ruling does not support the learned counsel. The question then is, is the deed of the 3rd June 1878 a deed of gift or not? I have no hesitation in holding that when property is conveyed by what is merely called a gift, but is in exchange of property which is taken in consideration, that consideration being of a pecuniary character, the transaction is one called *Hiba-bil-aiwaz*, which stands upon the same footing as sale under the Muhammadan law. Equally am I certain that when there is only a pretension of such a state of things having occurred, and there is no proof that such things did occur, and when the document itself shows that such things did not occur, the transaction is neither a *Hiba-bil-aiwaz* nor a sale.

This, I understand, is what the learned Judge of the first Court held. Also I understand this interpretation of the deed was upheld by the lower appellate Court. I also understand that Mr. Justice Brodhurst, dealing with the findings of the Court below, held, to use his own words:—

"Whatever the intention of Musammat Wilaiti Begam in executing the deed may have been, I am quite satisfied, from her never having caused mutation of names in the Government records nor transferred possession up to the present time, that she had no

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

intention to relinquish possession of the property during her lifetime. Considering the near relationship that existed between the alleged vendor and vendee, the fact that the whole of the consideration money is said to have been immediately returned by the vendor to the vendee, and the other circumstances that have been above referred to, I think the learned Subordinate Judge has correctly found that the deed of the 3rd June 1878 is in reality nothing more than a deed of gift, and that it is void owing to possession not having been given."

In this finding I entirely concur. Upon a full consideration of the deed, and also upon the judgments which have been delivered in the Courts below, my own view is that the finding is one which must be accepted by us in second appeal, because it is finding of fact, not so far as the question of the interpretation of the deed is concerned, but certainly so far as the non-delivery of possession under the deed of the 3rd June 1878 is concerned. In saying so, the Privy Council ruling in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1) is helpful to explain how far Courts in second appeal can interfere with findings of fact. I suppose after this finding it will not be denied that no possession whatever was given by the so-called vendor to the so-called vendee under the deed of the 3rd June 1878 up to the date of the suit, which was the 12th January 1886, for this is a finding which cannot be questioned in second appeal. I have no doubt that the deed is not a deed of sale, because though it pretends to be a deed of sale, it contains in itself a statement that the consideration for such sale had been gifted away or relinquished or excused. This being so, I cannot hold it to be other than a simple deed of gift, as the Courts below have held, and, holding so, possession was absolutely necessary under the Muhammadan law which governs such a case. And it follows that the doctrine of notice applicable to *bonâ fide* transfers for value has no application to this case, there being no possession or ostensible ownership in the donee under whom the plaintiff claims.

(1) I. L. R. 18 Calc. 23.

1891

ANGAN LAL v. MUHAMMAD HUSAIN.

As to the necessity for possession for completing the right under a simple gift, the Legislature has had to consider this position in defining the meaning of gift in s. 122 of the Transfer of Property Act (IV of 1882); but while making this definition and, indeed, when framing the whole of the Act, they were careful, and for good reasons, to frame s. 129, which runs as follows:—

"Nothing in this chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by s. 123, any rule of Hindu or Buddhist law."

In the present case the findings of both the Courts below are, and the deed itself stated, that there was no passing of consideration and that there was no evidence to show that such consideration had passed. I think Mr. Justice Brodhurst was right in holding upon these findings that it was simply a deed of gift or *Hiba* under the Muhammadan law, and not a *Hiba-bil-aiwaz*, that is to say a contract which approximates a contract of sale.

This is an appeal under the Letters Patent, and I think, therefore, after what I have said, that this appeal should stand dismissed, but that, as no one appears for the respondents, no order as to costs is necessary.

EDGE, C. J.—This appeal has arisen out of a suit which was brought by the plaintiff against one Wilaiti Begam, her granddaughter, Ilahi Begam, and certain other persons, and in that suit the plaintiff claimed possession and a decree to eject the defendants. The plaintiff alleged his title to be by a purchase for valuable consideration under a deed of the 1st August 1884 from Ilahi Begam, and under a deed of sale of the 3rd June 1878 made by Wilaiti Begam in favor of Ilahi Begam. The plaintiff's title was denied by Wilaiti Begam. The other defendants did not dispute his title. It has been found by the Courts below that the plaintiff paid the Rs. 1,000 consideration of the sale-deed for the sale of the property to him by the deed of the 1st August 1884. It has been found also that the alleged consideration, Rs. 700, mentioned in the deed of the 3rd June 1878, was not paid; and it has also been found

that possession had never been given by Wilaiti Begam to Ilahi Begam, or anyone representing Ilahi Begam. The Courts below came to this conclusion and found that the deed of the 3rd June 1878 was not in fact a deed of sale but was a deed of gift, and on these findings the first Court dismissed the plaintiff's suit and the second Court dismissed his appeal. The appeal in this Court came on to be heard before my brother Straight and the late Mr. Justice Brodhurst. Mr. Justice Brodhurst accepting the finding that no possession had been given, and that no consideration had passed under the deed of the 3rd June 1878, and misinterpreting some passages in the judgment of one of the Courts below, which he read as a finding that the sale of the 1st August 1884 was collusive and fraudulent, delivered judgment dismissing the appeal. My brother Straight, on the other hand, held that the question of fraud and collusion did not arise in the case, as indeed it did not; and that there was no evidence to show that the consideration for the deed of the 3rd June 1878 had not been paid. He came consequently to the conclusion that the appeal to this Court should be allowed. Under the circumstance of this difference of opinion the appeal to this Court stood dismissed.

This appeal has been brought under s. 10 of the Letters Patent. In order to clear the ground, I may say that no one suggests that the finding of fact that possession never was given under the deed of the 3rd June 1878 should or could be questioned in second appeal. No one disputes the fact that, if the document of the 3rd June 1878 was a deed of gift, the Muhammadan law would apply, and, there having been no possession, the gift would fail. But the point which has been argued before us is simply this. It is contended, and, I think, rightly, that a finding of fact where there is absolutely no evidence to support it can be questioned in second appeal, because it is then a question of law. It is beyond doubt in this case that there has been no evidence given on the one side or the other to show either that the consideration mentioned in the deed of the 3rd June 1878 was paid or that it was not paid, beyond the evidence which the deed affords on the face of it. In this

1891

ANGAN LAL v. MUHAMMAD HUSAIN.

light we have to construe to the best of our ability the deed in question; and on this part of the case I may say that I speak with very considerable diffidence, knowing little or nothing of the vernacular, and sitting beside my brother Mahmood, who is a master of his own language. However, I have to give my opinion for what it may be worth. Now there is one thing that is quite clear, that the deed professes to be on the face of it a sale-deed. It bears the stamp which was required for a sale-deed, in respect of such consideration as was mentioned in it. The stamp would have been insufficient if the deed had been a deed of gift. This is only a slight indication to my mind as to what the parties intended the deed in question to be. Then we come to the actual words of the deed. In express terms it states that the consideration had been received. This is beyond doubt. But, following these words, are the words which have raised a doubt in this case. My brother Mahmood kindly placed before me two different dictionaries as authority, and in each of those dictionaries I find that the words *bakhsh dena* bear the meaning 'to give, to grant, or to forgive.' There are other words which follow them and which bear the meaning, so far as I can ascertain from the dictionaries, of granting or conferring. Then the question is, do the words to which I have referred mean, read with the context, that the consideration was foregone, in the sense that it had never been received, or is the meaning, whether it represents the truth or not, that the consideration had been received and had been given back or returned. Beyond the wording of the deed there is no evidence as to what the transaction was. It appears to me, forming the best judgment I can, that whether the parties were in fact carrying out a transaction of sale or a transaction of gift, the passage read as a whole is evidence that a sale at a fixed price was made and the consideration having been paid was returned to the vendee. That is my interpretation of the particular document. One may suspect, looking at the document, that it may have been in truth merely a transaction of gift. On the other hand, against such an impression being well-founded, there is the stamp, and there is the fact which has been found by the Courts below, that Wilaiti Begam executed two almost precisely similar documents at about the same

time in favor of other members of the family, and that those members of her family made use of them as sale-deeds and sold the property to others. In this case it appears to me that the onus of proving that there was no consideration paid for the deed of the 3rd June 1878, and that it was a deed of gift and not a deed of sale, was upon Wilaiti Begam. It is quite true, as my brother Mahmood has said, that a plaintiff coming into Court in a suit for ejectment is bound to prove his title, but in this case as part of the proof of title against the only person who disputed it the plaintiff put in evidence the deed which had been executed by Wilaiti Begam on the 3rd June 1878, and which on the face of it, truthfully or not, stated most distinctly that she had received the Rs. 700 as consideration. It was, in my judgment, under these circumstances for Wilaiti Begam to show that the statement in the deed under her hand was incorrect and that no consideration had ever been paid, and until she established that by evidence, I think a Court of law was bound on the document to find, as against her, that the consideration had passed, she having stated the fact in the deed under her own hand. There is only one other matter to which I need refer, and it is this. Undoubtedly in cases where we may apply the rules of justice, equity and good conscience, we are bound to apply them, and if it be the fact that the deed is ambiguous on the face of it, and that it may be considered by one person as a deed of gift and by another as a regular deed of sale, in my opinion, according to justice, equity and good conscience, we should hold against the person who executed the deed that it was a deed of sale, and so protect the interests of the innocent purchaser who treated the deed as a deed of sale, and, acting upon it as such, paid Rs. 1,000 consideration for the transfer of the property to him. For these reasons I would allow the appeal and decree the plaintiff's suit for possessions with costs in all the Courts.

TYRRELL, J.—I entirely agree with everything that has fallen from that learned Chief Justice, and I would only add a few words on the terms of the deed in question. Looking to the phraseology of the deed, I am of opinion that my brother Straight was right in

1891

ANGAN LAL v. MUHAMMAD HUSAIN.

regarding it as a sale-deed. The terms seem to me to indicate explicitly that Musammat Wilaiti Begam made an absolute sale of certain property for Rs. 700 to Ilahi Begam, and, "having received the sale consideration in full," granted that money to her vendee. She further stated in the deed that "I, the vendor, have no share or right in the sold property since the time of the sale. Now I and my heirs neither have nor shall have any objection to the validity of the sale and of the gift of the sale consideration. Therefore I have executed these few words by way of a deed of sale and gift of sale consideration." The vernacular runs as follows :—

"Hath * * * nawasi apneki bai katai karke zar-i-samman tamâm wa kamâl wasul pakar bakhsh diya aur hiba kardiya." Again, "lihaza yih chand batain bataur bainamah wa bakhshish zar-i-samman ki likhh din," and again, "Sihat is bainamah wa bakhshish zar-i-samman men * * *."

The first sentence avers that the "sale was complete or absolute (bai katai); that the price had passed (wasul pakar), and was afterwards given and presented to the vendee." It was suggested that "bakhsh" in this passage should be read in its secondary sense of "excused or forgiven;" but here it is coupled with the words "aur hiba kardiya," which can only mean "I have given," and I must therefore interpret these word "Bakhsh diya" as also meaning "I have given." The second phrase distinctly defines the deed as an instrument of double import, first, of sale to the vendee, and secondly, of gift to her of the consideration money; and the third paragraph binds the vendor not to question this "sale-deed" and "gift of the price." After execution, this instrument was registered as a sale-deed, and I find that, while it contains all the constituents of a "sale" as defined in sec. 54 of the Transfer of Property Act, it does not fall under the definition of a gift as given in s. 122 of the same Act. It is, of course, true that s. 129 of the Act forbids me to apply any of the sections 122 to 128 so as to affect any rule of Muhammadan law; but I am not using s. 122 for any such purpose, but as a guide only to the proper definition of a gift, and I look similarly to s. 54 for that of a sale, there being no limitation to latter section such as is found in s. 129 in regard to gift. The

1891

ANGAN LAL v. MUHAMMAD HUSAIN.

deed in my judgment is in terms and effect a deed of sale, and I have no materials for forming an opinion whether any, or what, occult meaning or design may underlie these terms. I therefore concur in the order of the learned Chief Justice.

KNOX, J.—I entirely concur with all that has been said by the learned Chief Justice with reference to the interpretation that should be put upon the document and upon the consequences which should follow from that interpretation. I need not allude to the language in which the document is couched, because it has been given in full by my brother Tyrrell, and I agree with him in the interpretation which he has placed upon the words of the document. Whatever may have been the real nature of the transaction, I am of opinion that it was intended by the executants of the document that it should bear to the world the face of a deed of sale and not that of a deed of gift. It was, under the law then current and directing what stamp such deed should bear, stamped as a deed of sale and not as a deed of gift. It was registered, and it seems to me that any person who sought to know under what liabilities the property stood, or to ascertain who was entitled to it, would have had no means of knowing the nature of the transaction except from the deed now before us, and, on this ground, as well as on the grounds already stated, I think it would most inexpedient to put upon it any interpretation other than that of a deed of sale. I therefore concur in the order which the learned Chief Justice and my brother Tyrrell propose to pass in the case.

Appeal decreed.

FULL BENCH.

1889
November 4.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

JANGU AND OTHERS (DEFENDANTS) *v.* AHMAD ULLAH AND OTHERS (PLAINTIFFS).*

Muhammadan law—Public mosque—Right of all Muhammadans without distinction of sect to use such mosque for the purposes of worship—Right to say "ámín" loudly during worship.

Where a mosque is a public mosque open to the use of all Muhammadans without distinction of sect, a Muhammadan who, in the *bond fide* exercise of his religious