

1908

HAKIM  
SINGH  
v.  
RAM SINGH.

*Oudh Behari Lal v. Nageshar Lal* (1) and also by the Madras High Court in *Malikarjunadu Setti v. Lingamurti Pantulu* (2) that applications for an order absolute are applications for the execution of the decree under section 88. We are of opinion that the learned Judge was right in holding that the Court was precluded by the last paragraph of section 258 of the Code of Civil Procedure from recognising the alleged payment out of Court. If the view taken by the Calcutta High Court were adopted, it seems to us that the execution of a decree might be delayed by repeated pleas of payment out of Court, and that the Court might have to try what would really be a series of different suits arising out of the original decree. We dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Aikman.*

MOHIB-ULLAH (OBJECTOR) v. ABDUL KHALIK AND OTHERS  
(DECREE-HOLDERS).\*

*Muhammadan law—Gift—Hiba bil mushaa—Possession.*

*Held* that what is known to Muhammadan law as a *hiba bil mushaa*, or gift of an undivided joint property, is a valid gift if the donee obtains possession. *Muhammad Muntaz Ahmad v. Zubaida Jan* (3) referred to.

In this case the holders of a decree against one Wali Muhammad attached in execution thereof a certain house as belonging to their judgment-debtor. This house had belonged to Ghazi the father of Wali Muhammad. By a deed of gift executed on the 6th of April, 1906, Ghazi gave the house to his daughters-in-law Musammât Haliman and Musammât Ayesha in equal shares. Ayesha died, and her interest in the house devolved upon her son Mohib-ullah. Haliman and Mohib-ullah objected to the attachment of the house by the decree-holders. The Court of first instance (Munsif of Allahabad) disallowed Haliman's objection, but sustained that of Mohib-ullah upon the ground that Ayesha had taken possession of her share of the house. The decree-holders appealed, and the lower appellate Court

\* Second Appeal No. 982 of 1907, from a decree of Udit Narain Singh, Officiating Subordinate Judge of Allahabad, dated the 9th of July 1907, reversing a decree of Mohan Lal, Munsif of Allahabad, dated the 21st of November 1906.

(1) (1890) I. L. R., 13 All., 278. (2) (1902) I. L. R., 25 Mad., 244.

(3) (1889) I. L. R., 11 All., 460.

(Subordinate Judge) reversed the decision of the Munsif, holding that the gift, so far as it concerned Ayesha also, was invalid. Mohib-ullah appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid* and *Babu Durga Charan Banerji*, for the respondents.

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AIKMAN, J.—The respondents attached a house as belonging to their judgment-debtor, Wali Muhammad, against whom they had obtained a decree. The house had belonged to Ghazi the father of Wali Muhammad. It is proved that Ghazi by a deed of gift executed on the 6th of April 1906, gave the house in equal shares to his daughters-in-law Musammat Haliman and Musammat Ayesha. Ayesha is dead, and the appellant Mohib-ullah is her son and heir. Musammat Haliman and Mohib-ullah objected to the attachment. Haliman's objection as to her half was overruled by the Munsif on the ground that at the time of the gift she was on a pilgrimage to Mecca and so did not get possession of the property. The learned Munsif found that Ayesha had got possession of her half share and sustained the objection of Mohib-ullah. On appeal by the decree-holders the learned Subordinate Judge found that the gift in favour of Ayesha was invalid according to Muhammadan law and overruled Mohib-ullah's objection. Mohib-ullah comes here in second appeal. The learned Subordinate Judge does not dissent from the finding that Ayesha got possession of her half, but he says that "the delivery of possession to Musammat Ayesha of the one moiety gifted away to her did not confer any right on her." The learned vakil for the appellant relies on what was said by their Lordships of the Privy Council in the case *Muhammad Mumtaz Ahmad v. Zubaida Jan* (1) at pages 474 and 475 of their judgment. Their Lordships, referring to the authorities cited by Syed Ameer Ali in his Tagore Lectures of 1884, say:—"The authorities show that possession taken under an invalid gift of *mushaa* transfers the property according to the doctrines of both Shia and Sunni Schools." They add:—"The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within

(1) (1889) I. L. R., 11 All., 460.

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the strictest rules." At page 42, Vol. I, of Ameer Ali's Muhammadan Law, 3rd edition, the author remarks:—"A *hiba bil mushaa* or gift of an undivided joint property, is not void, but only invalid, and possession remedies the defect." He goes on to cite various authorities in support of this view. The learned advocate for the respondents refers to the cases cited on page 434 of Macnaghten's Principles of Muhammadan Law and also to the opinion expressed by that author in paragraph 6, Chapter 5, page 50. It is not easy to reconcile all the authorities, but having regard to the findings of the Courts below that Ayesha did get possession of her half, and to the passage cited from the judgment of the Privy Council, I am of opinion that the appeal must succeed. I accordingly set aside the order of the Court below and restore the order of the Court of first instance. The appellant will have his costs here and in the Court below.

*Appeal decreed.*

1908  
April 2.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkill.*

PHUL CHAND AND ANOTHER (DEFENDANTS) v. CHAND MAL, (PLAINTIFF). \*  
*Civil Procedure Code, section 266—Execution of decree—Attachment—Mortgage—Right of mortgagor in respect of mortgage money promised but not paid.*

Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance: he cannot sue for specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under section 266 of the Code of Civil Procedure. *The South African Territories Company, Limited v. Wallington* (1) referred to.

THE facts of this case are as follows. On the 18th of April 1903 one Sheo Ram and another executed two mortgages in favour of the defendants Phul Chand and Gulab Chand to secure the principal sums of Rs. 1,000 and Rs. 6,000 respectively. It has been found that only Rs. 2,135-11 were paid by the mortgagees and that the remainder is unpaid. Some creditors of the

\* First Appeal No. 198 of 1906, from a decree of Parmatha Nath Banerji, Subordinate Judge of Jhansi, dated the 28th of May 1906.