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controversy in India, by the decision of the Privy Council in the case of *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1), where the Privy Council pointed out, in construing section 211 of the old Code, which in this respect does not differ from the section quoted above of the present Code, that "its obvious effect was to provide that a simple decree for mesne profits should carry interest on them." It is true that at the same time there is discretion in the court to penalize a party by disallowing such interest. Their Lordships explain this in the same judgment by saying : " mesne profits are in the nature of damages which the court may mould according to the justice of the case." But the question in this appeal, as in the case decided by the Privy Council, is :—" What is the effect of a decree which grants mesne profits and says nothing about interest," which is what this decree does here. The court below, possibly inadequately instructed, followed the single Judge case of *Abdul Ghafur* v. *Raja Ram* (2) and appeared not to be aware of the two-Judge case of *Narpat Singh* v. *Har Gayan* (3), which would have drawn its attention to the Privy Council decision referred to. But having regard to the cases decided subsequently, the decision in the case of *Abdul Ghafur* v. *Raja Ram* (2) must be taken to have been overruled. The appeal must be allowed and execution directed to take place for the interest at 6 per cent. due by law. The case will go back to the lower court with this direction. The appellant must have his costs.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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April, 18.

MOHAN LAL AND ANOTHER (PLAINTIFFS) *v.* MAHMUD HUSAIN AND OTHERS (DEFENDANTS).*

Muhammadan law—Hiba-bil-ewaz—Passing of consideration necessary to validate gift.

In the case of the transaction which is known to the Muhammadan law as *hiba-bil-ewaz*, actual payment of the consideration must be proved and the *bonâ fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must also be proved. *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (4) followed.

* Second Appeal No. 421 of 1918, from a decree of H. E. Holme, District Judge of Bareilly, dated the 15th of March, 1918, modifying a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 31st of October, 1917.

(1) (1900) I. L. R., 27 Calc., 951 (967).
(2) (1900) I. L. R., 22 All., 262.
(3) (1903) I. L. R., 25 All., 275.
(4) (1906) I. L. R., 28 All., 439.

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THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor* and Dr. *Surendra Nath Sen*, for the appellants.

Maulvi *Iqbal Ahmad* and Maulvi *Mukhtar Ahmad*, for the respondents.

PIGGOTT and WALSH, JJ.—This is a second appeal on the part of two plaintiffs whose claim for possession of certain house property in the town of Bareilly has been dismissed by both the courts below.

The plaintiffs claim the property under a deed of sale of the year 1916 executed by two persons, Abdul Latif and Abdul Hafiz. Their case is that the said vendors obtained the property by inheritance from their mother Zohra Bibi, who, again, obtained the property by gift from her mother, Musammat Sakina Bibi. The deed of gift in question is dated the 2nd of June, 1900, and was executed, not by Sakina Bibi herself, but by one Saiyid Ali Husain acting as her special attorney. The plaintiffs having been put to proof of their title, a number of issues were framed, and, as a matter of fact, both parties pressed upon the courts below alternative and inconsistent pleadings to an extent which has served to cloud the plain issues in the case and to introduce elements of confusion which have led to the delay and trouble we have found in determining the appeal. When it was first argued before us, we decided that it was not expedient that we should proceed further without obtaining clear findings upon certain questions of fact. The findings on the issues remitted by us are substantially in favour of the plaintiffs appellants, so far as they go; but as the case has been finally argued out after the return of the remand findings, we have come to the conclusion that the appeal cannot succeed.

The first question is whether Musammat Zohra Bibi held a good title to this property under the deed of gift of the 2nd of June, 1900. We may pass over a number of questions which were raised in this connection and concentrate upon what is really the essential point in the case. The deed of the 2nd of June, 1900, is unquestionably what is known in the Muhammadan law as a *hiba-bil-ewaz*, or a gift for consideration. The authority of the special attorney who executed the same most definitely was to convey this house property in Bareilly to Musammat Zohra Bibi as a gift, but for a consi-

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deration, that consideration being the surrender by Zohra Bibi of certain rights. It is not important to consider what those rights precisely were. The deed itself upon its wording carries out the intention expressed in the power of attorney, that is to say, it purports to convey the house property in return for the surrender of Musammat Zohra Bibi's rights. Their Lordships of the Privy Council, in the case of *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1), have clearly laid down the law upon this point. A conveyance by way of gift as between Muhammadans may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter, actual payment of the consideration must be proved and the *bonâ fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must also be proved. The learned District Judge has found that there is no evidence that Musammat Zohra Bibi relinquished anything, or surrendered any rights, or, in short, returned any consideration for the conveyance in her favour purporting to be effected by this document. In view of this finding it seems scarcely necessary for us to go into the alternative question whether it is proved that possession passed, except in so far as that alternative question is involved in certain further pleas taken on behalf of the appellants. In the courts below much reliance was placed by the plaintiffs upon the contention that they and their predecessors in title had perfected a good title by adverse possession against Sakina Bibi and her heirs for twelve years and more from the date of the deed of gift. As a matter of fact, in the month of June, 1900, the property was in the possession of certain lessees and remained in the possession of those lessees until the year 1913. There is no evidence that those lessees ever paid rent to Musammat Zohra Bibi. They appear to have paid rent to Muhammad Ehsan, son of Sakina Bibi and, therefore, brother of Zohra Bibi. It is claimed on his behalf that he received that rent as owner; while the case for the appellants, when sifted out thoroughly, will be found to rest upon the contention that Muhammad Ehsan received this rent as agent for Zohra Bibi. It seems sufficient to say that there is no real foundation for this plea, either in the findings of the courts below, or in

(1) (1906) I. L. R., 28 All., 439 (448).

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such evidence as has been brought to our notice.

The other point taken is that the heirs of Sakina Bibi are in some way or other estopped from denying, either the validity of the transfer in Zohra Bibi's favour, or the fact of her possession. The plea is based in substance upon certain words used in the judgment of the lower appellate court which are quoted in the first paragraph of the memorandum of appeal before us. Undoubtedly the expression so quoted, taken by itself, lends some colour to the appellants' contention, although it may be noted that the expression used, namely, that the " family " had allowed the sons of Zohra Bibi to hold the property in suit as exclusive owners, is a dangerously vague one. Apart from this, however, the judgment of the learned District Judge requires to be fairly considered as a whole. When so considered, it seems clear enough that the lower appellate court intended to find, what it has found in express words in a later paragraph of the judgment, namely, that possession never passed to Zohra Bibi and that the evidence for the plaintiffs failed to prove anything more than that in the year 1913 the sons of Zohra Bibi had somehow come to be in effective possession of the house to this extent that they executed a fresh lease in favour of another tenant and managed to put their tenant into possession. This finding is not sufficient to support either the general plea of estoppel in the form in which it is taken in the memorandum of appeal, or any more explicit plea based upon the wording of section 41 of the Transfer of Property Act, No. IV of 1882.

For these reasons we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Ryves and Mr. Justice Stuart.

BISHESHAR NATH (PLAINTIFF) *v.* KUNDAN AND OTHERS (DEFENDANTS).* 1922 *April*, 21.

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 139—Landlord and tenant—Tenant holding over after expiration of lease—Suit for ejectment—Limitation.

On the expiration of his lease a tenant for a term of years remained in possession of the demised premises but ceased to pay rent to the landlord. More than twelve years after the expiry of the lease the landlord brought a suit to eject his former tenant.

* Second Appeal No. 1096 of 1920, from a decree of Murari Lal, Additional Judge of Moradabad, dated the 7th of June, 1920, reversing a decree of Mohsin Ali Khan, Munsif of Nagina, dated the 22nd of January, 1920.