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The expression in the sub-section which must govern this clause is "have any remedy against the property of the insolvent in respect of the debt". The present appeal is not an appeal of that nature. All that the appellant asks is that a declaratory decree should be set aside. That declaratory decree was that certain property was not attachable under the decree of the appellant. The effect of the appeal being allowed would be a declaratory decree that the property was attachable under the decree of the appellant. That, we consider, would not be a remedy against the property of the insolvent within the meaning of section 28. No doubt, if the appellant having obtained a decree on appeal from this Court proceeded to apply for execution, then he would be met with the bar of section 28(2), but that section does not bar the present appeal.

The next point which was urged was the second objection that the official receiver should represent the estate of the insolvent Shib Singh as a respondent. We consider that this objection is sound and, as the learned counsel for the appellant has undertaken to apply today to make the official receiver a party, we adjourn this appeal for a sufficient period for the official receiver to be brought on the record. Costs will abide the result of the appeal.

*Before Justice Sir Shah Muhammad Sulaiman and
Mr. Justice Young.*

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ANANDI DEVI (PLAINTIFF) v. MOHAN LAL AND OTHERS
(DEFENDANTS).*

*Transfer of Property Act (IV of 1882), section 122—Gift—
Acceptance may be either express or implied—No
presumption of acceptance—Knowledge and possession
evidencing acceptance.*

Acceptance of a gift, required by section 122 of the Transfer of Property Act, may be either express or implied.

*First Appeal No. 101 of 1928, from a decree of Farid-ud-din Ahmad Khan, Subordinate Judge of Mainpuri, dated the 8th of December, 1927.

There is no presumption in favour of acceptance of a gift, as there is in English law, and operating immediately upon the gift, whether the gift is known or unknown to the donee. Such a presumption is negated by the provision in section 122 that if the donee dies before acceptance the gift is void.

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Where there was a gift of zamindari property by a husband to his wife, and the circumstances indicated that the wife had knowledge of the gift, there was mutation in her favour, and she had actual or constructive possession through her husband, it was held that these circumstances amounted to proof of acceptance of the gift.

Dr. K. N. Katju and Mr. Baleshwari Prasad,
for the appellant.

Mr. N. P. Asthana, for the respondents.

SULAIMAN and YOUNG, JJ.:—This is a first appeal from the judgment of the Subordinate Judge of Mainpuri. The plaintiff brought an action for possession of a 20 biswas zamindari share in mahal Mohan Lal, mauza Birsinghpur, pargana Karauli. The plaintiff's case was that her father, Mohan Lal, had by a deed of gift dated the 7th of June, 1919, given this property to his wife, Mst. Kapuri; that in 1921 Mst. Kapuri died, and she (the plaintiff) and her sister then became the heirs to their mother's *stridhan*; that in 1924, by two sale deeds dated the 19th of January and the 14th of April, Mohan Lal, her father, having repented of the gift to his wife, and in fraud of his own daughters, sold the property to the other defendants in the case. The plaintiff prayed for a decree for possession.

The defendants admitted the gift, but said that the gift was fictitious and was never acted upon, that Mst. Kapuri had never accepted the gift and that it was, therefore, void.

The learned Judge has found that the gift was a real gift intended to be acted upon, but that the wife never having accepted the gift, it was void as against subsequent vendees. He, therefore, dismissed the suit, and the plaintiff appeals.

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We accept the findings of the learned Judge as regards the value to be attached to the oral evidence called on behalf of the plaintiff, and his finding that an express acceptance by Mst. Kapuri has not been proved. The learned Judge, however, merely finds acceptance not proved because he disbelieves the actual case set up by the plaintiff as regards express acceptance. He never directed his mind to the vital question as to whether there was proof of acceptance within the meaning of section 3 of the Evidence Act. It has been argued here by counsel for the respondents that the only acceptance under section 122 of the Transfer of Property Act contemplated by that section is an express acceptance. We, however, do not find anything in the section to limit acceptance to an express acceptance, and we must take it that acceptance may be either express or implied. As the learned Judge has not considered the question of an implied acceptance based upon circumstantial evidence at all, we must consider it. It has been argued by counsel for the appellant that the law in India based upon section 122 of the Transfer of Property Act is similar to the common law of England with regard to acceptance. There is no doubt that in England the law is that acceptance of a gift will be presumed, unless dissent is shown. That would mean that, in this case, it would be for the defendants to prove that Mst. Kapuri had dissented from the gift. Lord Halsbury in his *Laws of England* (Volume 15, page 418) says: "Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified, even though he is not aware of the gift; and this is equally so, although the gift be of an onerous nature, or of what is called an onerous trust". This rule of law has been applied to India by a single Judge of the Patna High Court in the case of *Muhammad Abdul Nayeem v. Jhontā*

Mahton (1). We, however, are not prepared to go so far. If section 122 stopped short at saying that the gift must be accepted by or on behalf of the donee, as it would be natural for any person to accept a non-onerous gift we might be prepared to hold that the English law applied in India. However, a difficulty is put in the way of such a construction of the section by the fact that the section proceeds to enact that if the donee dies before acceptance, the gift is void. Such an enactment makes it, in our view, impossible to hold that there is a presumption of acceptance operating immediately upon the gift, whether known or unknown to the donee. There is no difficulty, however, in reading into the section that the acceptance may either be express or implied.

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We shall look at the evidence in order to see whether it is possible to hold in this case that there is an implied acceptance.

The defendants' own case was that Mohan Lal intended to go upon a pilgrimage and wished to make some provision for his wife in case some accident might befall him, and that therefore he executed the deed of gift. This story is set out both in the deed of gift itself and in the sale deed executed by Mohan Lal in favour of the defendants vendees. We take the story of the defendants itself. The husband and wife were living together apparently, according to the story, on friendly terms. The fact that the husband intended to go upon a pilgrimage must have been known to the wife and must have been the subject of conversation between them. The intention of the husband to provide for his wife during his absence, and the precautions he intended to take in case of his death while on the pilgrimage, must in all probability equally have been the subject of discussion between the husband and wife. The question of what the husband intended to do must have been disclosed by

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him, in all probability, to his wife, and we think it can be assumed, in view of the subsequent conduct of the husband, that the wife assented to the proposal of the husband. It is to be noted in this connection that it is nowhere suggested in the pleadings or in the deed of gift that the wife was ignorant of the deed of gift. Further, the deed of gift was witnessed by four witnesses, two of them actually resident in the village of Karauli itself. There must have been publicity of the deed of gift, and we think that apart from what we have said above, knowledge of the deed of gift must, in all probability, have come to the wife. The husband proceeded immediately to apply for mutation. In the ordinary course proclamation was made in the village of the intended change of names. This, therefore, must have been known to the inhabitants of the village, and again we think that knowledge of this must, in all probability, have come to the wife. A few days later Mohan Lal filed the deed of gift itself in the revenue court. He did everything he could possibly do to put his wife in possession of the property. The revenue court itself in its order dated the 21st July, 1919, says: "Notice was issued. The time allowed under the notice has expired. No objection has been taken. From the statement of the patwari the transfer of share and possession are proved. The application is within time. The property of Mohan Lal has devolved upon Mst. Kapuri Kunwar by means of a gift". It is to be noted that the revenue court says that possession was proved. Actual or constructive possession is undoubtedly proof of acceptance, and in zamindari property, and especially in a case concerning husband and wife, mutation means delivery of possession, and the acts of the husband after mutation are acts on behalf of his wife: See the case of *Ma Mi v. Kallander Ammal* (1). We note this specially because the learned Judge

has been greatly influenced in the decision to which he has come by the fact that after the mutation the husband performed various acts which the learned Judge thought proved the contention of the defendants that there never had been a real transfer of the property or that the deed of gift was not intended to be operative. Further, when Mst. Kapuri died in 1921, Mohan Lal proceeded to get his name recorded in the revenue papers by mutation proceedings. The papers record that mutation was obtained by way of inheritance, that is, inheritance from his wife Mst. Kapuri. If the contention of the defendants was correct, there would, of course, have been no necessity for this entry in the revenue papers. The plaintiff and her sister at that time were very young and minors, and Mohan Lal was the guardian, at any rate, of one of them. They were not in a position to protest against or dispute the acts of their father.

All these facts amount, in our view, to very strong circumstantial evidence of acceptance by the donee, Mst. Kapuri, of the gift, and we hold accordingly that acceptance has been proved by the plaintiff within the meaning of section 3 of the Evidence Act.

* * * * *

The appeal is, therefore, allowed with costs, and the claim decreed.

REVISIONAL CIVIL.

Before Mr. Justice Boys.

REOTI PRASAD (PLAINTIFF) *v.* KUNJI LAL
(DEFENDANT).*

Civil Procedure Code, order XX, rule 11—Instalment decree—Discretion of court—Amount of instalment and future interest.

Where the court directs a decree to be paid by instalments, the amount of the instalments and the period for their payment is a matter for the discretion of the court; but it is a discretion which is to be exercised within bounds and

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