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an order has been passed under section 203 of the Code of Criminal Procedure it is not necessary for the District Magistrate to give an opportunity to the accused of showing cause why orders should not be passed against him under section 436. This proviso of section 436 applies only to cases where the accused person has been discharged and not to cases where orders have been passed under section 203 of the Code of Criminal Procedure and the distinction is clearly drawn in the revised section. If authority is necessary I would refer to the decision of the Allahabad High Court in the case of *Emperor* v. *Gajraj Singh* (1).

Pullan, J.

The application is dismissed.

Application dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Wazir Hasan.

CHAUDHRI TALIB ALI (PLAINTIFF-APPELLANT) v. MUSAMMAT KANIZ FATIMA BEGAM AND ANOTHER (DEFENDANTS-RESPONDENTS).*

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Pre-emption—Muhammadan law—Dower—Hiba-bil-ewaz—*Transfer of property by a Muhammadan husband in consideration of the wife releasing him from his liability for dower is a gift for consideration or* hiba-bil-ewaz—*Construction of documents, rule of—Styling a document as sale or will, whether precludes the court from holding otherwise—Transfer of Property Act (IV of* 1882) *section 54—"Sale", definition of—"Price" meaning of.*

Where the consideration for the transfer of ownership in certain immovable property is the release of the transferor from a part of his liability for the dower debt, the true nature

* First Civil Appeal No. 67 of 1926, against the decree of Syed Ali Hamid, Subordinate Judge of Bara Banki, dated the 15th of March, 1926, dismissing the plaintiff's claim.

(1) (1925) I.L.R., 47 All., 752.

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of the transaction is that of a gift for consideration or *hiba-bil-ewaz* and it is not subject to a claim for pre-emption. [*Ranee Khujooroonissa* v. *Musammat Roushun Jehan* (1), *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (2), and *Bashir Ahmad* v. *Musammat Zubaida Khatun* (3), followed.]

The fact that a deed is styled "a sale-deed" and the word of transfer used is "sale" cannot preclude a court from holding that on a proper construction of the deed as a whole it does not in essence evidence a transaction of sale. *Tirugnanapal* v. *Ponnammai* (4), relied upon.

"Price" in the definition of "sale" in section 54 of the Transfer of Property Act means money only; so if the thing given in exchange consists of anything other than money, the transaction is not one of sale but of an exchange.

Messrs. *A. P. Sen*, *Niamatullah* and *Haider Husain*, for the appellant.

Messrs. *Bisheshwar Nath Srivastava* and *Har Dhian Chandra*, for the respondents.

STUART, C. J., and HASAN, J.:—This is the plaintiff's appeal from the decree of the Subordinate Judge of Bara Banki, dated the 15th of March, 1926.

The facts are as follows:—

Musammat Kaniz Fatima Begam, defendant No. 1, is the wife of Sheikh Muhammad Yusuf Husain Khan, defendant No. 2, in the suit out of which this appeal arises. On the 25th of March, 1924, Yusuf Husain Khan executed what purports to be a deed of sale in favour of his wife Kaniz Fatima Begam in respect of 4 annas under-proprietary share in Kasba Kursi in the district of Bara Banki. The plaintiff, Chaudhri Talib Ali, is a co-sharer in the tenure in which the share conveyed by the deed of the 25th of March, 1924, is situate. He claims to exercise the right of pre-emption in respect of the transfer of the 25th of March, 1924.

(1) (1876) L.R. 3 I.A., 291. (2) (1906) L.R., 33 I.A., 68.
(3) (1926) I.L.R., 1 Luck., 83. (4) (1921) 25 C.W.N., 511.

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There were several defences to this suit but for the purposes of this appeal only one need be mentioned. This defence arises out of the allegations made in paragraphs 8 and 9 of the written statement of the two defendants. The allegations do not bring out the point for decision in full relief but this led to no difficulty. The substance of the plea in defence is that the real nature of the transfer evidenced by the deed of the 25th of March, 1924, is a gift of the 4 annas share by the husband in favour of his wife in lieu of Rs. 50,000, a portion of her dower debt, and consequently the claim for pre-emption is not maintainable in respect of the transfer. The trial Court has given effect to this plea in defence, as also to some other pleas and dismissed the suit.

At the hearing of the appeal the learned Counsel for the appellant frankly stated that in the event of our upholding the decision of the trial Court on the question just now mentioned he did not desire to challenge the findings of that Court on other issues. No arguments were, therefore, heard on those issues.

The deed of the 25th of March, 1924, is christened as a sale-deed and the words of transfer used are :—

> " the declarant has made an absolute sale of that very 4 annas share . . . in consideration of Rs. 50,000 . . . to Musammat Kaniz Fatima Begam."

The fact that the deed of the 25th of March, 1924, is styled " sale-deed " and the further fact that the word employed for the purpose of transfer is " sale " cannot, however, preclude us from ascertaining the true nature of the transaction and to hold on a proper construction of the deed as a whole that it does not in essence evidence a transaction of sale.

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In deciding the question as to whether a certain document which in some places styled itself a will, was of a testamentary character or a transfer *inter vivos* Lord MOULTON in the case of *Tirugnanapal* v. *Ponnammai* (1) said: "But calling a document a will does not make it so, and in their Lordships' opinion it is not of a testamentary character in any respect, and that if it has any legal effect whatever, it is of the nature of a transaction *inter vivos*." The question is, therefore, one of pure construction.

The consideration for the transfer of the 4 annas share is stated to be a sum of Rs. 50,000 and this sum is further stated to be a portion of the total amount of the dower debt of seven lakhs due from the transferor to the transferee. The deed further declares that to the extent of Rs. 50,000, forming the consideration of the transfer, the dower debt of seven lakhs is reduced. The position, therefore, is this; on the date of the transfer Kaniz Fatima Begam had a subsisting claim or a legal right to her dower debt to the extent of seven lakhs against her husband, and the husband was under a corresponding legal obligation to satisfy it. The effect of the transfer was the satisfaction of the wife's claim for dower debt to the extent of Rs. 50,000 and a corresponding release of the husband from the obligation to pay. This being the true nature of the transaction it is not a sale. Sale is defined in section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised or part paid and part promised." Obviously "price" in this definition means money only; so if the thing given in exchange consists of anything other than money the transaction is not one of sale but of an exchange. In that sense there is no price paid or promised or part paid and

(1) (1921) 25 C.W.N., 511.

part promised by the transferee in consideration of the transfer of ownership in the 4 annas share. The consideration is the release of the transferor from a part of his liability in respect of the dower debt. The initial contract of dower consisted of a bare promise on the part of the husband to pay the dower agreed upon. This is not a case in which a purchaser buys any property in consideration of the money which he had advanced to the vendor as a loan or otherwise previous to the purchase. In the present case no money passed nor will it pass at any stage between the husband and the wife. The promise of the husband to pay dower created only the right in the wife to recover it.

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The true nature of the transaction is, therefore, a gift for consideration. This form of gift is well understood in Muhammadan law as *hiba-bil-ewaz* and has repeatedly been recognized as such by their Lordships of the Judicial Committee in the cases of *Ranee Khujooroonissa* v. *Musammat Roushun Jehan* (1) and *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (2).

The question as to whether a gift of immovable property in consideration of a part or whole of dower debt is subject to a claim for pre-emption was discussed and decided in the negative by a Bench of this Court, to which one of us was a party, in the case of *Bashir Ahmad* v. *Musammat Zubaida Khatun* (3). It will serve no useful purpose to repeat here the grounds of the decision in that case but we adopt those grounds for our decision in this case. We accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) (1876) L.R., 3 I.A., 291. (2) (1906) L.R., 33 I.A., 68.
(3) (1926) I.L.R., 1 Luck., 83.