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we are of opinion that the two properties which the learned Subordinate Judge holds to be ancestral properties have not been proved to be so. They must be considered to be the self-acquired property of Gobardhan Singh, mortgagor.

Stuart, C. J. and Srivastava, J.

The learned counsel for the appellants does not dispute the correctness of the findings of the learned Subordinate Judge in respect of the three other properties being the self-acquired property of Gobardhan Singh. The result therefore is that the entire mortgaged property must be held to be the self-acquired property of the mortgagor. It follows that the defendants have no right to question the validity of any part of the consideration of the mortgage deed and the deeds of further charge executed by their father. The appeal must therefore fail on this ground and it is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice A. G. P. Pullan.

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SADIQ ALI (PLAINTIFF-APPELLANT) *v.* MUSAMMAT AMIRAN (DEFENDANT-RESPONDENT).*

Muhammadan Law—Marz-ul-maut—*Gift during* marz-ul-maut *by husband to his wife in satisfaction of dower debt, validity of.*

When a gift is made during *marz-ul-maut* by a husband to his wife in satisfaction of his legal obligation to pay the dower debt it cannot be treated as ambulatory or testamentary for the simple reason that had the husband not discharged his legal obligation by means of the gift his estate in the hands of heirs would be liable to satisfy the same obligation. If, therefore, the nature of that gift is such that it cannot be treated for the purposes of the distribution of the assets on inheritance as a bequest it follows that it is a gift not subject

*Second Civil Appeal No. 59 of 1929, against the decree of Babu Gokul Prasad, Subordinate Judge of Sitapur, dated the 7th of November, 1928, confirming the decree of P. Kaul, Munsif Sitapur, dated the 23rd of May, 1928.

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to the doctrine of *marz-ul-maut*. A wife is a relation within the prohibited degrees and therefore a gift simple or *bilewaz* in her favour is irrevocable.

The general proposition of Muhammadan Law is that a gift, simple or *bilewaz*, is subject to the doctrine of *marz-ul-maut* and the effect of that doctrine is that the gift *inter vivos* acquires for all practical purposes the character of a testamentary disposition and being a testamentary disposition in its nature and incidents it follows that a gift in *marz-ul-maut* can be revoked. The converse proposition that where the gift is not revokable it cannot be treated as a bequest is equally true and a gift of this latter description, therefore, is not subject to the doctrine of *marz-ul-maut*.

Eshaq Chwdhry v. *Abedunnessa Bibi* (1), dissented from. *Bashir Ahmad* v. *Musammat Zubaida Khatun* (2) and *Talib Ali* v. *Kaniz Fatima Begam* (3), referred to.

Mr. *Naziruddin*, for the appellant.

Messrs. *Ali Mohammad* and *Ishwari Prasad*, for the respondent.

HASAN and PULLAN, JJ. :—This is the plaintiff's appeal from the decree of the Subordinate Judge of Sitapur, dated the 7th of November, 1928, affirming the decree of the Munsif of the same place, dated the 23rd of May, 1928.

One Ahmad Ali made a gift of all his property in favour of the defendant, Musammat Amiran. The gift was evidenced by a deed, dated the 17th of August, 1927. Ahmad Ali died on the 5th of September, 1927. The plaintiff, Sadiq Ali, is Ahmad Ali's uncle and claims title to the gifted property on the ground of inheritance.

The deed recognises the defendant as a lawfully wedded wife of Ahmad Ali and purports to make the gift in consideration of the dower of Rs. 500 due from the donor. The value of the subject-matter of the gift is also stated in the deed approximately Rs. 1,000.

The plaintiff challenged the validity of the gift on various grounds but only one of such grounds now survives.

(1) (1914) I.L.R., 42 Calc., 361. (2) (1925) I.L.R., 1 Luck., 83.

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and constitutes the sole point of argument in this appeal. The lower courts are agreed that the defendant was the married wife of Ahmad Ali and they are further agreed that the gift was made by Ahmad Ali during *marz-ul-maut*. The attack by the plaintiff on the gift in question is based on the last-mentioned finding. It was argued in the courts below and the argument is repeated before us that the gift having been made during *marz-ul-maut* operates in law as a bequest and being in favour of an heir is wholly void under the Hanafi Muhammadan law. The question for decision therefore is as to whether the gift of the 17th of August, 1927, is subject to the doctrine of *marz-ul-maut*. The courts below have answered this question in the negative and the main ground on which the answer rests is that the gift being for consideration is virtually a sale and the decision of the Calcutta High Court in the case of *Esahaq Chowdhry* v. *Abedunnessa Bibi* (1), is cited in support of the view taken.

We are far from affirming broadly the proposition that all transactions known in Muhammadan law as *hiba-bil-ewaz* are or can be treated as transactions of sale. That the two transactions may bear close analogy in their results is not a sufficient ground in our opinion for holding that they are convertible terms. One of us had occasion to consider this matter at some length in the case of *Bashir Ahmad* v. *Musammat Zubaida Khatun* (2) and again in *Talib Ali* v. *Kaniz Fatima Begam* (3).

We are of opinion that the decree under appeal should be upheld but on a different ground. The general proposition of Muhammadan law is that a gift, simple or *bil-ewaz*, is subject to the doctrine of *marz-ul-maut* and the effect of that doctrine is that the gift *inter vivos* acquires for all practical purposes the character of a testamentary disposition, though technically it is not a "legacy". Chapter 8th, Book 8th, Baillie's Digest of Muhammadan law, Volume I.

(1) (1914) I.L.R., 42 Calc., 361. (2) (1925) I.L.R., 1 Luck. 88.
(3) (1927) 4 O.W.N., 400.

In the Baillie's Digest referred to above several illustrations of cases are given where a gift made during *marz-ul-maut* is placed on the footing of a bequest. These illustrations, it is significant to note, are all cases of revocable gifts and there is not one single case of an irrevocable gift. Being a testamentary disposition in its nature and incidents, it follows that a gift in *marz-ul-maut* can be revoked and we think that the converse proposition that where the gift is not revocable it cannot be treated as a bequest is equally true. A gift of the latter description therefore is not subject to the doctrine of *marz-ul-maut*.

In this case it must be held that the gift by Ahmad Ali to his wife, the defendant, cannot be placed on the footing of a bequest. Such a gift "cannot be retracted because the object of the gift is an improvement of affection (in the same manner as in the case of presents to relations) and as the object is obtained, the gift cannot be retracted." Hamilton's Hedaya by Grady page 446. "The increase of affection excited in the wife by the gift is supposed, by the law, to be a return which she pays for it, and which consequently deprives the donor of the power of retraction."—See the foot-note in Hamilton's Hedaya by Grady, page 486.

When therefore there is a gift *bil-ewaz* by a husband in favour of his wife the consideration underlying it is not merely the material value of the thing received by him in exchange but also the personal element of the improvement of affection and love which naturally does not exist in a disposition to take effect after the death of the husband. Further when a gift is made during *marz-ul-maut* by a husband to his wife in satisfaction of his legal obligation to pay the dower debt as in the present case, such a gift cannot be treated as ambulatory or testamentary for the simple reason that had the husband not discharged his legal obligation by means of the gift his estate in the hands of his heirs would be liable to satisfy the same obligation. If therefore the nature of this particular

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gift is such that it cannot be treated for the purposes of the distribution of the assets on inheritance as a bequest it follows according to our judgment that it is a gift not subject to the doctrine of *marz-ul-maut*. It may be added that a wife is a relation within the prohibited degrees and therefore a gift simple or *bil-ewaz* in her favour is irrevocable.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

1929
September,
10.

Before Mr. Justice Wazir Hasan.

MAHABIR SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* CHITTA SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

Limitation Act (IX of 1908), Article 142—Suit for possession by reason of discontinuance of possession—Title of plaintiff proved but his possession within 12 years not proved—Defendant's adverse possession for 12 years not proved—Plaintiff whether entitled to get decree for possession.

Held, that in cases falling under section 142 of the Indian Limitation Act the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an enquiry into the question of adverse possession is irrelevant.

Where the plaintiff brought a suit for recovery of possession of a house by reason of the discontinuance of possession caused by the defendant and the finding of the court was in favour of the plaintiff on the question of title *held*, that the case fell under Article 142 of the Limitation Act and the plaintiff cannot get a decree unless he proves possession within 12 years regardless of the fact that the defendant had failed to prove that he had completed his title by adverse possession.

*Second Civil Appeal No. 93 of 1929, against the decree of Babu Mahabir Prasad, Additional Subordinate Judge of Lucknow, dated the 30th of November, 1928, upholding the decree of Saiyid Yaqub Ali Razvi Munsif, dated the 21st of May, 1928, dismissing the plaintiffs' claim.