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first part of clause 16 is not covered by section 132. His view merely is that as the cases considered in the second part of the clause are called cases for compensation and not for arrears of revenue; and as section 132 deals only with cases of arrears of revenue and not with cases of compensation, therefore, the case before the learned Additional Judicial Commissioner should be held to fall under section 129 as it was not otherwise provided for. I know no authority for the proposition placed before me by the learned counsel that an arrear of revenue in this section means only an arrear due to the Government. An arrear of revenue, as I understand the words, means an arrear not from the point of view of the Government but from the point of view of the person who ought to have paid it. The defendant in this case is in arrear, although the amount due by him has been actually paid by the plaintiff. In my opinion, therefore, this is merely a suit for arrear of revenue and it must be held to be governed by section 132 of the Oudh Rent Act and the suit is therefore within time. There is no other ground of appeal pressed before me, and I dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

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October, 13.

ZUBER AHMAD KHAN AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* L. DEBI DAYAL, (PLAINTIFF) AND ANOTHER (DEFENDANT-RESPONDENTS).*

Transfer of Property Act (IV of 1882), section 53—Waqf alal-aulad, executed for preservation of property for benefit of minor sons—Debts existing at the time of execution of waqf *paid off—*Waqf *not proved to be executed with intent to defeat or delay creditors—Subsequent creditors, whether can attack the* waqf.

Section 53 of the Transfer of Property Act is based on the provisions of the two English statutes—13 Elizabeth c.

*First Civil Appeal No. 86 of 1929, against the decree of Pandit Kishun Lal Kaul, Additional Subordinate Judge of Fyzabad, dated the 4th of July, 1929.

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5 and 27 Elizabeth c. 4. These statutes as well as the provisions in section 53 of the Transfer of Property Act are intended to protect the existing as well as subsequent creditors, against fraudulent conveyances. If a person makes a transfer with a view to defraud creditors to whom he might be indebted at a future time, the transfer is liable to be impeached by them just as much as a transfer made with intent to defraud existing creditors. The crucial question is of intention to defraud the creditors. *In re. Killcher* (1), referred to.

Where a deed of *waqf* was obviously executed for the preservation of the property, for the benefit of the minor sons and for its protection against the attacks of the executant's brother and all the debts existing at the time of the execution of the *waqf* were paid off, a subsequent creditor whose debt came into existence after the execution of the deed of *waqf* and who failed to prove that the deed of *waqf* was executed with the intent to defeat or delay creditors cannot challenge it.

Mr. *M. Wasim*, for the appellants.

Mr. *Haider Husain*, for the respondents.

HASAN, C. J., and SRIVASTAVA, J. :—The facts of the case have been sufficiently stated in our order of remand dated the 21st of March, 1930. It is not, therefore, necessary to repeat them. The issues we had remitted to the lower court are as follows :—

(1) Was the debt due to Lala Mahabir Prasad under the decree, dated the 23rd of April, 1923, exhibit 22, paid up before the institution of the present suit?

(2) Was the balance of Anjuman Ara's dower debt amounting to Rs. 36,000 subsisting at the date of the institution of the suit?

(3) Was the deed of *waqf*, exhibit A1, executed with the approval and consent of Anjuman Ara?

The findings returned by the learned Subordinate Judge as regards the first two issues are that the debt due to Lala Mahabir Prasad under the decree, dated the 23rd of April, 1923, was paid up before the institution

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of the present suit and that the balance of Anjuman Ara's dower debt was not subsisting at the date of the institution of the suit. As regards the third issue it has been found that the deed of *waqf*, exhibit A1, was executed with the approval and consent of Anjuman Ara. The learned counsel for the plaintiff-respondent has not addressed any arguments against these findings. They must, therefore, be accepted as correct.

Hasan, C. J. and Srivastava, J.

The position as it emerges from the facts as they are now admitted or proved is that Ahmad Ullah Khan defendant No. 3 was possessed of considerable property. In 1922 while there was some litigation pending between Ahmad Ullah Khan and his brother, he fell ill, and during this illness he, on the 14th if June, 1922, with the approval and consent of his wife Anjuman Ara, executed a *waqf alal-aulad* in favour of his two minor sons, Zahir Ahmad Khan and Ashfaq Ahmad Khan, defendants-appellants, in respect of his zamindari property valued at Rs. 84,000. On the same date he executed a deed of gift of certain other zamindari property valued at Rs. 15,000 in favour of his wife in lieu of Rs. 15,000 out of Rs. 51,000 due by him to his wife on account of her dower debt. After making these two dispositions the only immoveable property left with Ahmad Ullah Khan consisted of two groves. At the time of the execution of the deed of *waqf*, Ahmad Ullah Khan stood indebted to two persons, namely, one Lala Mahabir Prasad to the extent of Rs. 2,725 and to his wife in respect of her dower debt abovementioned. Lala Mahabir Prasad obtained a simple money decree in respect of his debt against Ahmad Ullah Khan on the 23rd of April, 1923. This decree was paid up by means of a mortgage deed executed jointly by Ahmad Ullah Khan and his wife on the 23rd of July, 1923. Four or five days after the execution of the deed of gift, dated the 14th of June, 1922, the illness of Ahmad Ullah Khan took a serious turn and Anjuman Ara then relinquished the balance of her dower debt in favour of her

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husband. On the 11th of February, 1924, Ahmad Ullah Khan executed a pro-note in favour of Lala Debi Dayal, plaintiff, for Rs. 1,976-6-6. He obtained a decree on foot of this pro-note on the 20th of April, 1926, and tried to enforce payment of this decree by attachment and sale of the property which formed the subject matter of the *waqf*. On an objection raised by defendants Nos. 1 and 2 the aforesaid property was released from attachment by the execution court. The plaintiff, therefore, on the 1st of May, 1928, instituted the present suit for a declaration that the deed of *waqf* had been executed fraudulently in order to defeat and delay the creditors and that the property forming subject of the *waqf* was liable to attachment and sale in execution of his decree.

The learned counsel for the defendants appellants contends that the plaintiff as a subsequent creditor has no right to challenge the *waqf* as all the creditors whose debts existed at the time of the execution of the deed of *waqf* had been paid off before the suit and that in any case section 53 of the Transfer of Property Act has no application to the case inasmuch as the deed of *waqf* is not a transfer within the meaning of the Transfer of Property Act. We are of opinion that this appeal must succeed. Section 53 of the Transfer of Property Act is based on the provisions of the two English statutes—13 Elizabeth c. 5 and 27 Elizabeth c. 4. These statutes as well as the provisions in section 53 of the Transfer of Property Act are intended to protect the existing as well as subsequent creditors, against fraudulent conveyances. If a person makes a transfer with a view to defraud creditors to whom he might be indebted at a future time, the transfer is liable to be impeached by them just as much as a transfer made with intent to defraud existing creditors. But it is not the plaintiff's case that Ahmad Ullah executed the deed of *waqf* in question with the express intent to defeat or delay persons to whom he might become indebted in future. His case merely is that at the time of the execution of the

said deed Ahmad Ullah Khan stood considerably indebted to several persons, that as a result of the transfers made by him he was not left with sufficient property to meet his existing debts and that the transaction was thus a fraud upon his creditors and was as such liable to be set aside not only at the instance of his existing creditors but also at the instance of a subsequent creditor like the plaintiff. The question therefore arises whether in the circumstances set forth above, the transaction can be held to be fraudulent when all the existing creditors have been paid off before the institution of the present suit. The law applicable to the case is thus stated in Kerr on Fraud and Mistake, 5th edition at page 218:—

> "The provisions of the statute 13 Elizabeth c. 5 are not confined to existing creditors but extend to subsequent creditors whose debts had not been contracted at the date of the settlement, but the principle will not operate in favour of subsequent creditors, unless it can be shown either that the settlor made the settlement with the express intent to "delay, hinder or defraud" persons who might become creditors or that after the settlement the settlor had not sufficient means or reasonable expectation of being able to pay his then existing debts, or at least there are debts unsatisfied which were due at the date of the settlement."

Similarly the law has been stated in May on Fraudulent and Voluntary Dispositions of Property, 3rd edition at page 40 in the following terms:—

> "Where a voluntary conveyance has been made by a person "indebted", any creditor who became such after the date of its execution (as well as any one of the original creditors) can maintain an action to have the

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settlement set aside under the statute, so long as any debt, due at the date of the settlement, remains unpaid at the time of the commencement of the action.

In re. Killeher (1), it was held that in the absence of any express intention to defraud, a voluntary deed cannot be set aside at the instance of a creditor whose debt comes into existence after its date, if all creditors existing at the date of the debt have been paid off.

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It seems, therefore, clear that the crucial question is one of intention to defraud the creditors. The fact that all the creditors existing at the date of the deed have subsequently been paid off, even though it may not be conclusive, affords very strong evidence negativing the intention to defraud. The learned counsel for the plaintiff respondent has not been able to refer us to any circumstances which might discount the value of the fact that all the debts existing at the time of the execution of the *waqf* were paid up before the institution of the suit. The very fact that the husband and wife both joined in paying off Lala Mahabir Prasad seems to afford strong evidence of their good faith. It is also to be noted that apart from the dower debt which was relinquished only a few days after the transaction, the amount of Ahmad Ullah Khan's indebtedness was very small. Unfortunately there is no evidence before us to show the value of the groves which were left undisposed of. They might well have been sufficient to meet the small debt of Mahabir Prasad. In any case the debt was actually paid off by Ahmad Ullah Khan and his wife. The *waqf* in question was obviously executed for the preservation of the property, for the benefit of the minor sons and for its protection against the attacks of Ahmad Ullah's brother. Taking all these circumstances into consideration, we have no hesitation in coming to the conclusion that the plaintiff has failed to prove

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that the deed of *waqf* was executed with the intent to defeat or delay the creditors. In this view of the case it is not necessary for us to express any opinion as regards the question whether the deed of *waqf* is or is not a transfer within the meaning of the Transfer of Property Act.

For the reasons given above, we allow the appeal, set aside the decision of the lower court and dismiss the plaintiff's suit with costs. No arguments were addressed in support of the cross-objections. They are accordingly dismissed. No order as to costs in respect of them.

Appeal allowed.

APPELLATE CIVIL.

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October, 14.

Before Mr. Justice Muhammad Raza and Mr. Justice A. G. P. Pullan.

KHALIQ BUX AND OTHERS (DEFENDANTS-APPELLANTS) *v.* MAHABIR PRASAD (PLAINTIFF) AND OTHERS (DEFENDANTS-RESPONDENTS).*

Muhammadan law—Gift—Gift by a Muhammadan parent in favour of a minor child, essential elements of—Delivery of possession, whether necessary—Second appeal—Finding of fact—Legal effect of a proved fact, whether a question of law.

Held, that it is true that the findings of fact must be accepted in second appeal, but the proper legal effect of a proved fact is essentially a question of law. *Nafar Chandra Pal* v. *Shakur* (1), followed. *Wali Mohammad* v. *Mohammad Bakhsh* (2), referred to.

Held further, that in the case of a gift by a parent to a minor child no acceptance is necessary; the gift is completed by the contract, and it makes no difference whether the subject of the gift is in the father's hand or in that of depositary. Nor is transmutation of possession necessary, for the possession of the parent is tantamount to that of the child.

*Second Civil Appeal No. 3 of 1930, against the decree of Pandit Shyam Manohar Nath Shargha, Additional District Judge of Lucknow, dated the 9th of September, 1929, reversing the decree of M. Humayun Mirza, Subordinate Judge of Lucknow, dated the 8th of August, 1928.

(1) (1918) L.R., 45 I.A., 183, (2) (1929) L.R., 57 I.A., 86.