

applicable to the taluqa, as there is no evidence to prove a custom to the contrary. The judgment of the Court of Appeal, dissenting from that of the Single Judge, of the Chief Court of Oudh, must, therefore, be affirmed. Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed with costs to be paid to the respondent the Deputy Commissioner as representing the elder son, Raja Mustapha Ali Khan, the owner of the Utraula estate.

Solicitors for the appellants: *Nehra & Co.*

Solicitor for the Deputy Commissioner (1st respondent): *The Solicitor, India Office.*

Solicitor for the Deputy Commissioner (3rd respondent): *Hy. S. L. Polak & Co.*

Solicitor for the 2nd respondent—*Barrow, Rogers and Nevill.*

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ARA  
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DEPUTY  
COMMISSIONER,  
GONDA,  
IN CHARGE  
OF THE  
UTRAULA  
ESTATE

P. C.

## APPELATE CIVIL

Before Mr. Justice Bisheshwar Nath Srisvastava, Chief Judge,  
and Mr. Justice G. H. Thomas

BANSIDHAR AND ANOTHER (PLAINTIFFS-APPELLANTS) v. MUSA-SAMMAT NAWAB JAHAN BEGAM AND OTHERS (DEFENDANTS-RESPONDENTS)\*

1937  
October, 8

*Transfer of Property Act (IV of 1882), section 53—"Transfer which defeats or delays creditor", meaning of—Preference of one creditor to another, whether means a fraudulent transfer—Debtor executing deed of gift in favour of his wife for her dower debt—Gift, whether offends against provisions of section 53, Transfer of Property Act—Oudh Laws Act (XVIII of 1876), section 5—Mahomedan wife with respect to her dower debt, whether a creditor.*

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors for the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor, and leave another unpaid. Where

\*Second Civil Appeal No. 338 of 1935, against the decree of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 8th of July, 1935, upholding the decree of Pandit Brij Kishan Topa, Civil Judge of Malihabad at Lucknow, dated the 22nd of December, 1933.

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it is found that the transfer impeached is made for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor, was a loser by payment being made to the preferred creditor. A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases, and prefer any creditor he chooses.

Where, therefore, a debtor executes a deed of gift in favour of his wife in lieu of her dower debt and it is found that the dower debt had not been paid up and remained due at the time of the execution of the deed of gift in question and that the amount fixed for dower was Rs.40,000 and the property forming the subject of the gift was worth about Rs.8,000 and the transfer is genuine and it is not possible to say that the debtor retained any benefit for himself, it is a case merely of one creditor being preferred to another and the transfer impugned did not offend against the provisions of section 53 of the Transfer of Property Act.

It is no doubt true that if there is any dispute regarding the amount of dower debt payable by the husband or his representatives which has to be determined by a court of law, the court is required under section 5 of the Oudh Laws Act to fix the amount of dower payable with due regard to the various considerations laid down in the section. But this does not by any means imply that the position of the wife is not that of a creditor. The fact that in a particular case the amount of the debt payable by the debtor has to be ascertained by the court cannot take the case out of the category of a debt or the person from whom the debt is payable out of the category of a debtor. *Musahar Sahu v. Hakim Lal* (1), and *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (2), relied on.

Mr. D. K. Seth, for the appellants.

Mr. Nazir Uddin, for the respondents.

SRIVASTAVA, C.J. and THOMAS, J.:—This is a second appeal by the plaintiffs arising out of a suit under section 53 of the Transfer of Property Act for a declaration that certain transfers made by defendant 2 in favour of his wife, defendant 1, were fraudulent and fictitious and had been made only in order to defraud the creditors.

(1) (1915) I.L.R., 43 Cal., 521.

(2) (1916) I.L.R., 44 Cal., 362.

The facts of the case which are not disputed are that on the 22nd and the 25th of January, 1932, defendant 2 executed two deeds of gift in favour of his wife in lieu of dower debt. The plaintiff No. 1, Bansi Dhar, who is one of the creditors of the husband, instituted a suit on the 25th of January, 1932, on the basis of a promissory note for Rs.822, dated the 26th of January, 1929. This suit was decreed on the 26th of August, 1932. The same plaintiff instituted another suit on the 20th of June, 1932, on the basis of another promissory note for Rs.2,184, dated the 12th of June, 1929. This suit was also decreed on the 23rd of December, 1932. The plaintiff No. 2 was impleaded as another creditor of defendant No. 2, but there is no evidence on the record to show the extent of his debt. The learned District Judge has held that besides the property forming subject of the gift the defendant No. 2 was possessed of other property worth about Rs.1,600, which has been attached by plaintiff No. 1. He has further found that the dower debt of defendant 1 had not been paid up and remained due at the time of the execution of the deeds of gift in question. There is also evidence which has been believed by the lower appellate court showing that the amount fixed for dower was Rs.40,000 and that the property forming subject of the two deeds of gift was worth about Rs.8,000. Taking all these facts and circumstances into consideration the lower appellate court has held that there was nothing to suggest that there was any bad faith on the part of defendant No. 1 except the mere fact that she was the wife of defendant No. 2.

In *Musahar Sahu v. Lala Hakim Lal* (1), it was held by their Lordships of the Privy Council that the transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors for the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor, and leave

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another unpaid. Where it was found that the transfer impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it followed that no ground for impeaching it lay in the fact that the plaintiff who also was a creditor, was a loser by payment being made to the preferred creditor there being in the case no question of bankruptcy. Similarly in *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (1), it was held that the preferring of one creditor to another by the judgment-debtor did not make the transfer a fraudulent one. A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases, and prefer any creditor he chooses. In the present case it is quite clear from the findings of the lower appellate court that the transfers in question are genuine and that it is not possible to say that the defendant No. 2 has retained any benefit for himself or that the object of the transfer was to remove the property from the creditors for the benefit of the debtor. It is therefore a case merely of one creditor being preferred to another. We are therefore of opinion that the courts below were right in holding that the transfers impugned by the plaintiffs did not offend against the provisions of section 53 of the Transfer of Property Act. It has, however, been contended that the position of a dower debt in the province of Oudh is a peculiar one inasmuch as under section 5 of the Oudh Laws Act the amount of dower payable to the wife has to be fixed by the court with due regard to various circumstances. It was further argued that in the circumstances the amount of dower debt being a variable quantity the position of the wife was different from that of an ordinary creditor and the principle laid down by their Lordships of the Judicial Committee in the cases cited above had no application to this case. We regret we cannot accede to the argument. It is no doubt true that if there is any dispute

(1) (1916) I.L.R., 44 Cal., 662.

regarding the amount of dower debt payable by the husband or his representatives which has to be determined by a court of law, the court is required under section 5 of the Oudh Laws Act to fix the amount of dower payable with due regard to the various considerations laid down in the section. But this does not by any means imply that the position of the wife is not that of a creditor. The fact that in a particular case the amount of the debt payable by the debtor has to be ascertained by the court cannot take the case out of the category of a debt or the person from whom the debt is payable out of the category of a debtor. We are therefore of opinion that the argument has no substance.

We accordingly uphold the decree of the lower appellate court, and dismiss the appeal with costs.

*Appeal dismissed.*

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## MISCELLANEOUS CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge  
and Mr. Justice W. Y. Madeley*

1937  
October, 22

BABU HARI SHANKAR VAKIL (RECEIVER-APPELLANT) v.  
MENDI LAL AND ANOTHER (RESPONDENTS)\*

*Civil Procedure Code (Act V of 1908), order XLI, rule 20—Provincial Insolvency Act (V of 1920), section 53—Appeal by receiver in insolvency against order dismissing his application for cancellation of a sale-deed by insolvent—Transferee not impleaded before expiry of limitation—Transferee, if could be impleaded after expiry of limitation for appeal.*

Where a receiver in insolvency prefers an appeal against an order of the District Judge, dismissing his application under section 53 of the Provincial Insolvency Act for cancellation of a sale-deed executed by the insolvent, without impleading the transferee who is a necessary party, and an application is made to implead him after the limitation for appeal had expired the transferee cannot be impleaded as a respondent under order

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\*Miscellaneous Appeal No. 22 of 1935, against the order of Raghubar Dayal, Esq., 1 c.s., District Judge of Unao, dated the 24th of January, 1935.

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*Srivastava,  
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