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might be standing and that it would be more equitable to ask them to leave at the end of the Fasli year." He considered that matter and thought that there was no fatal defect in the notice. In my opinion the finding of the learned District Judge on the question of notice is a finding of fact.

DAS, J.

I would, therefore, allow this appeal, set aside the judgment and the decree passed by the Court below and remand the case to the lower appellate Court with instruction that it should remit the case to the Court of first instance so that that Court may determine the issues which have not yet been determined. Costs will abide the result.

ROSS, J.—I agree.

PRIVY COUNCIL.

J. C.*
1928.

March, 8.

HITENDRA SINGH

v.

MAHARAJA OF DARBHANGA.

Hindu Law—Transfer to Wife—Wife's power to alienate —Gift for consideration—Mithila Law—Hiba-bil-ewaz—Mahomedan Law—Transfer of Property Act (IV of 1882) section 8.

A Hindu governed by the Mithila executed a document which stated that he had made a hiba-bil-ewaz (gift for consideration) of certain immovable property together with all zamindari rights to his wife on receiving from her Rs. 41,530, and that she was to hold the property from generation to generation, without demand by him, his heirs and representatives against her, her heirs and representatives. The Rs. 41,530 was paid, and was applied to discharge an execution upon the property.

Held, that having regard to the terms of the document the wife took an absolute interest with power to alienate.

*Present: Lord Phillimore, Lord Blanesburgh and Mr. Ameer Ali.

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Under Muhammadan law a hiba-bil-ewaz is treated as a sale and not as a gift. The limitations imposed under the Mithila on the estate of a wife in respect of a gift from her husband do not apply to a transfer for consideration.

Surajmani v. *Rabi Nath Ojha* (1) and *Ramachandra Rao* v. *Ramachandra Rao* (2), applied.

Decree of the High Court affirmed(3).

Appeal (no. 86 of 1926) from a decree of the High Court (February 16, 1925) affirming a decree of the District Judge of Darbhanga.

The suit was instituted by the appellants in 1918 against the respondents to recover certain immovable property. By a document executed in 1876, the terms of which fully appear from the present judgment, the appellants' father, a Mithila Brahman, had purported to make a hiba-bil-ewaz of the property with all zamindari rights to the appellants' mother on receiving from her Rs. 41,532. In 1890 the appellants' father and mother had jointly mortgaged the property to the then Maharaja of Darbhanga to secure Rs. 1,88,963 and interest due under a bond. A decree for sale having been made on the mortgage in 1897, the Maharaja, with the leave of the Court, purchased the property; a decree confirming the sale was affirmed by the High Court. The appellants' mother, Anuragin Bahuasin, died in 1904.

By their plaint the appellants alleged that their mother became owner under the hiba-bil-ewaz of 1876, and that she had been induced to execute the mortgage by the undue influence and misrepresentation of her husband. The respondent by his written statement pleaded that the Bahuasin was merely a benamidar for her husband and that the mortgage and sale were binding. He pleaded further that the suit was barred by limitation and under section 47 of the Code of Civil Procedure, but it became unnecessary to deal with these pleas in the present appeal.

(1) (1907) I. L. R. 30 All. 84; L. R. 35 I. A. 17.
(2) (1922) I. L. R. 45 Mad. 320; L. R. 49 I. A. 129.
(3) (1925) I. L. R. 4 Pat. 510.

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The District Judge, to whom the suit was remanded for trial held that the hiba-bil-ewaz was not a benami transaction, though it had not been proved that the money paid was the Bahuasin's own money. He was of opinion that under the terms of the document she took an absolute estate with power to alienate, and that if she had not that power, her husband's consent validated the alienation.

On appeal to the High Court the learned Judges were both of opinion that the hiba-bil-ewaz was not a benami transaction, but differed as to its effect. Das J, discussed the Mithila law at length and held that the property became the saudayica stridhan of the Bahuasin, and that she was not entitled to dispose of it to the prejudice of her heirs who were admittedly the plaintiffs. He was further of opinion that the disposition could not be validated by her husband's consent. He saw no reason to doubt that the money was paid by the Bahuasin, but considered that having regard to the value of the property, which brought in over Rs. 30,000 per annum, the transaction was substantially a gift. Foster J, held that having regard to the terms of the document the Bahuasin took an absolute interest with power to alienate. He did not differ from the view that the money was in fact paid by the Bahuasin and he considered use of the form of a hiba-bil-ewaz indicated that it was intended that the incidents of a sale should attach.

In consequence of the difference of opinion the appeal was referred under section 98 of the Code of Civil Procedure to Dawson Miller, C.J. The learned Chief Justice agreed with the view of Foster J, that having regard to the terms of the document and decisions of the Privy Council, an absolute and alienable estate was transferred.

1928 Jan. 24, 25, 26. *Sir George Lowndes K.C.* and *G.D. McNair* for the appellants. The parties to the transaction of 1876 were governed by the Mithila law under which the power of a wife over immoveable

property given to her by her husband is more restricted than under the Mitakshara. The Vivada Chintamani and the Ratnakara—which are of the highest authority in the Mithila school: *Bhugwandeen Doobey* v. *Myna Baee* (1) show that the wife takes such property as her saudayica stridhan, and that she has no power of alienation unless it is expressly given at the time of the gift. The document of 1876 should be construed with reference to the Mithila law, and in the light of the law as it was known at that date: *Mahomed Shumsool* v. *Shewkram* (2), *Radha Prosad Mullick* v. *Ranimoni Dassi* (3). Apart from the law of the Mithila, the accepted view in 1876 was that a wife had no power to alienate immovable property the gift of her husband unless that power was expressly given: *Bhujanga Rau v. Ramayamma* (4), *Nunnu Meah* v. *Krishnasawmi* (5). Though that view was modified by the decision of the Board in *Surajmani* v. *Rabi Nath Ojha* (6), explained in *Ramachandra Rao* v. *Ramchandra Rao* (7), those decisions do not apply for the above reasons. Even if they do, the language of the document in this case was not of sufficient amplitude to give a power to alienate. In each of the documents which the Board has held carried an absolute interest the word "malik" was used; that is not the case here. *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (8), which was a Mithila case, is distinguishable also on the ground that the document was a will. As the appellants contended in the lower Court that the money was actually paid by the wife, they cannot now contend to the contrary; but nevertheless the transaction is to be regarded as a gift. The Mahomedan term hiba-bil-ewaz was used with that express intention. Even if

(1) (1867) 11 Moo. I. A. 487, 508.
(2) (1874) L. R. 2, I. A. 7.
(3) (1908) I. L. R. 35 Cal. 896; L. R. 35, I. A. 119.
(4) (1884) I. L. R. 7 Mad. 387.
(5) (1890) I. L. R. 14 Mad. 274.
(6) (1907) I. L. R. 30 All. 84; L. R. 35, I. A. 17.
(7) (1922) I. L. R. 45 Mad. 320; L. R. 49 I. A. 129.
(8) (1921) I. L. R. 1 Pat. 305; L. R. 49 I. A. 25.

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sometimes a hiba-bil-ewaz is to be regarded as of the nature of a sale, that cannot be the case here as the Rs. 41,530 paid was little more than the yearly value. Properly a hiba-bil-ewaz is classed as a gift. Hamilton's Hedaya, ch. 30, s. 1; Wilson's Digest, par 300; *Rahim Baksh* v. *Muhammad Hasan* (1).

Upjohn K. C. and *Dube* for respondent no. 1 were not called on.

March 8. The judgment of their Lordships was delivered by—

MR. AMEER ALI.—Their Lordships do not consider it necessary to call upon the respondents in this case, as the question for determination lies within a small compass and they have no doubt on the answer. The facts which have given rise to this litigation are fully stated in the judgments of the Courts in India; but a short résumé is necessary to elucidate how the question has arisen in this case.

It appears that one Durga Dutt Singh, who owned 7½ annas share of the village of Laheri which he held under a babuana grant in the district of Darbhanga, found himself considerably involved in debt in 1876; and his property was threatened with sale in execution of decrees against him. In order to pay off the debt which amounted to over Rs. 41,000, he professed to transfer to his wife Anurgin Bahuasin the property in suit for a consideration of Rs. 41,000. The transaction between husband and wife is, in these proceedings, called a hiba-bil-ewaz, and the question for determination turns upon the construction of this document.

The debt for which the transfer was ostensibly executed was discharged with the money Durga Dutt Singh obtained under it. Their Lordships purposely use the word "ostensibly" in order to leave their decision until later in the course of the judgment.

(1) (1888) I. L. R. 11 All. 1.

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On the 15th December, 1890, Durga Dutt Singh and his wife, the Bahuasin, executed a deed of mortgage to the Maharaja of Darbhanga, now represented by the defendant, in order to satisfy certain decrees which were in execution against them; and as security for the principal and interest mentioned in the bond, they hypothecated the same share in Taluka Laheri. This mortgage deed was signed by the second plaintiff on behalf of his mother Anurgin Bahuasin and was attested by the plaintiffs one and three.

On the 5th April, 1897, the Maharaja of Darbhanga obtained a decree for the sale of the mortgage-properties against both Durga Dutt Singh and his wife. In execution of the above decree the mortgage-properties were put up for sale on the 21st of May, 1902, and purchased by the decree-holder with the permission of the Court. The application for setting aside the sale was preferred by both Durga Dutt Singh and his wife, and various grounds were alleged. Whilst this application was pending in Court the Bahuasin died (on the 1st February, 1904), and the plaintiffs' appellants were substituted in her place.

The Subordinate Judge of Muzaffarpur, within whose jurisdiction the village in suit lay, on the 20th June, 1904, overruled the objections and confirmed the sale. His decision was affirmed on Appeal by the High Court of Calcutta on the 16th June, 1906.

The present appellants had in the interval brought a suit on the 23rd February, 1906, against the defendant in the Court of the Subordinate Judge of Muzaffarpur, making Durga Dutt Singh, their father, a defendant in the suit. Various allegations were put forward in the plaint; but no ground as is now made that the Bahuasin, the plaintiffs' mother, had not a transferable estate under the deed of gift of 1876, was put forward. The appellants did not proceed with the case; they applied to the Court for

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permission to withdraw it on certain grounds, to which Their Lordships do not consider it necessary to refer.

In spite of the objections of the defendant the Court allowed it to be withdrawn with liberty to bring a fresh suit. This order is dated 16th March, 1907.

The plaintiffs took no action in respect of the property or the transaction under which it was purported to be transferred to the lady by Durga Dutt Singh, until 1918. The present suit was brought on the 24th July of that year in the Court of the Subordinate Judge of Darbhanga.

In their plaint they allege that their mother, the Bahuasin was the owner of 7 annas and odd shares in Taluka Laheri under the terms of the document of the 17th April, 1876, executed by their father; that the latter owed a sum of nearly two lakhs of rupees to the Maharaja of Darbhanga, and that his wife was in no respect responsible for the debt, and that "Durga Dutt Singh, taking advantage of his position of authority and influence over his wife, mortgaged the property," and that "she was induced to become a party thereunder by a misrepresentation that the husband's debts were binding on the wife."

The Subordinate Judge framed a number of issues relating to the title of the plaintiffs, and without trying the facts he held on the legal objections of the defendants that the suit was not maintainable. He accordingly dismissed the action. The case came up on appeal to the High Court of Patna, and the learned Judges being of opinion that it was necessary that the facts should be tried set aside the order of the Subordinate Judge and remanded the case for a trial on its merits.

The Subordinate Judge then took evidence and gave judgment. He held that the transfer by the husband to the wife in 1876 was a *bona-fide* and not

a nominal or illusory transaction He held further that Durga Dutt Singh made over possession of the property to his wife in pursuance of the hiba-bil-ewaz.

One point arose in the argument before the Subordinate Judge in connection with the transfer of 1876, which it is admitted had never been previously raised in any proceeding. It related, in fact, to the point which their Lordships have to decide now, namely, whether under the hiba-bil-ewaz, the mother of the plaintiffs, took an absolute title which entitled her to alienate the property conveyed to her. It was contended by the plaintiffs in the course of the argument that she had no right to mortgage the property in 1890. This view has been accepted by Das, J, one of the learned Judges before whom the appeal came for hearing after the remand. Das, J, held that as Durga Dutt was a Mithila Brahmin governed by the Mithila law, the gift that he made to his wife did not convey to her an absolute title giving her the power of alienation and that therefore the transaction was ineffective. Foster J, has taken a different view. On account of this difference of opinion the case went before the Chief Justice Sir Dawson Miller who has agreed with Foster, J., and has held that on a proper construction of the document of 1876, full rights were conveyed to the Bahuasin by Durga Dutt Singh, and she had an absolute title in the property. He agreed with Foster, J., and accordingly dismissed the suit.

The hiba-bil-ewaz of April 17th, 1876, begins with describing Durga Dutt Singh as the absolute proprietor of 7 annas 8 gandas of the property. It then recites that there was a decree against Durga Dutt for Rs. 41,000 odd. It was under execution in the Court of the District Judge. The debtor further states in the hiba-bil-ewaz that he was unable to procure money for the payment of the decretal amount, and then the document proceeds as follows :—

" As a sale (of the property) will entail loss of the said two Milkiat properties on sale, belonging to me, the executant, I, of my own free-will and accord, have out of the said two mauzas on sale made a gift for consideration (kiba-bil-ewaz) of 7 annas 8¼ gandas share, etc.,

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together with fruit-bearing and non-fruit bearing trees, Ahars, Pokhars, reservoirs, tanks, Pucca and Kucha wells, Sair, Salt Sairs, occupied and unoccupied houses of tenants, all Zamindari rights, which I have in my possession up to this time, without participation of anyone, to my wife Musammat Anuragin Bahuasin on receiving from her Rs. 41,532 as. 6 p. 8 k. 16 m. 16 in cash and having paid therewith the decretal amount due to the said decree-holder got the properties released from sale and put the said Musammat in possession of the gift properties. The said Musammat should have and hold possession of the gift properties and enjoy the produce thereof generation after generation, and I, the executant and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties or the consideration thereof as against the said Musammat, her heirs and representatives. Should I, the executant, my heirs and representatives make any claim or put forward any demand in respect of the gift properties or the consideration thereof the same shall be deemed null and void."

Their Lordships have no doubt that it was not a gift pure and simple. Upon the findings of fact arrived at by the Courts in India the transfer was for consideration. The consideration was not illusory; it was substantial. Under the Muhammadan law a transfer by way of a hiba-bil-ewaz is treated as a sale and not as a gift. The limitation on alienation imposed by the Mithila law in the case of a gift by husband to wife, applies exclusively to pure and simple gifts, and not to a gift for consideration such as in the present case. It is unnecessary in this view to refer to the decisions cited on behalf of the appellants. It may be desirable, however, to draw attention to section 8 of the Transfer of Property Act (IV of 1882), which declares as follows—

> "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof."

In *Surajmani* v. *Rabi Nath Ojha* (1) the question turned on the word "malik" used in the transfer to the donee. This Board held that full rights of ownership were transferred to the donee in that case.

Lord Buckmaster in *Ramachandra Rao* v. *Ramachandra Rao* (2), broadly laid down the principle as follows:—"Their Lordships do not, therefore,

(1) (1907) I. L. R. 30 All. 84; L. R. 35 I. A. 17.
(2) (1922) I. L. R. 45 Mad. 320, L. R. 49 I. A. 129.

propose to embark upon the consideration of what the effect of the deed of gift in favour of Thulja Boyee might be correctly determined to be, but as some misapprehension appears to exist as to the effect of certain decisions of the Board, and notably *Surajmani* v. *Rabi Nath Ojha*(1), their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the rights of a Hindu widow. In the case referred to, when originally heard before the High Court, it had been stated that under the Hindu law in the case of a gift of immovable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did not more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration."

In this view of the case it is unnecessary to discuss whether the suit was barred under the Statute of Limitation, or whether it was maintainable having regard to the fact that the cancellation of the documents was not asked for in the plaint. Assuming that the plaintiffs are right in their contention, that the suit is not barred, nor are they precluded from claiming the property in suit, their Lordships are clearly of opinion that the terms of the transfer conveyed to the transferee full rights of ownership. As they understand the Mithila law a simple and pure gift by the husband to the wife does not convey to her absolute ownership. She takes it only for her life without any right of alienation unless power of alienation is expressly conferred on her. In this case it is clear that all the rights of ownership are actually conveyed to the wife. Their Lordships have no doubt either in principle or upon precedent that the Bahuasin took the property in full right of ownership.

(1) (1907) I. L. R. 30 All. 84; L. R. 35 I. A. 17.

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That being their Lordships' opinion, the appeal fails and they will humbly recommend to His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Watkins* and *Hunter*.

Solicitors for respondent no. 1: *Pugh & Co.*

APPELLATE CIVIL.

Before Das and Ross, JJ.

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March, 12.

BEAS SINGH

v.

BALDEO PATHAK.*

Estates Partition Act, 1897, (*Act V of* 1897) *sections* 27, 29 *and* 119—*court, inherent power of, to add parties to appeal —suit instituted more than four months after proceeding under section* 29— *decree, nature of—section* 27—*Collector, jurisdiction of—previous private partition, Civil Court, power of to decide—extent of jurisdiction—acts of Collector performed in exercise of statutory powers—Civil court, interference by—"parent estate", meaning of.*

Apart from statutory provision there is an inherent power in the court to add parties to an appeal.

Pulin Behari Roy v. *Mahendra Chandra Ghosal*(1) followed.

A decree of the Civil Court made in a suit instituted more than four months after the Collector had recorded a proceeding under section 29, Estates Partition Act, 1897, must conform to the provisions of section 27.

Therefore a decree setting aside a Collectorate partition on the ground of a previous private partition passed in a suit institued more than four months after a proceeding had been recorded under section 29, is illegal. The Collector has full jurisdiction to make a partition and to decide all objections

* Appeal from Appellate Decree no. 1265 of 1925, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 29th of May, 1925, confirming a decision of Babu N. B. Chatterji, Subordinate Judge of Gaya, dated the 29th of November, 1924.

(1) (1922) 34 Cal. L. J. 405.