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the authority of the ruling in *Sadabart Pershad Sahu's* case was binding on the lower Court, and it rightly refused to recognise the alienation.

It would be still more difficult to give effect to it now that the defendant No. 1 who was the vendor is dead, and his interest in the property has thus become extinguished. Even if the lower Court had a discretion in the matter, we cannot say that as a matter of law it was bound to exercise it.

The appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice McDonell and Mr. Justice Field.

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JUGATMONI CHOWDRANI (PLAINTIFF) *v.* ROMJANI BIBEE AND OTHERS (DEFENDANTS.)*

Wuqf, Essentials of—Increase in value of wuqf properties how appropriated.

Where by a *sunnud* a gift was made of the then income of certain villages with a specification that one-third of it was for the defrayal of the expenses of the servants of a mosque and *fursh* and light, &c., one-third for the expenses of a *mudrassa*, and the remaining one-third for the maintenance allowance of the *mutwulli*, *Held*, that the gift complied with the four essential conditions necessary to create a valid *wuqf* according to Mahomedan Law. *Held*, also, that in the absence of any express direction as to what was to be done with any surplus profits of the dedicated property, the reasonable presumption is that the improved value of the dedicated property, or any excess of profit over and above the amount stated in the *sunnud*, was intended by the grantor to be devoted to the same purpose for which the amount, which was the actual value of the property at the time of the gift, was expressly assigned.

IN this suit one Jugatmoni Chowdrani sued for possession of certain villages. She based her claim upon a *dur-mokurruri* lease granted by one Azizunnissa Bibi, who, it was alleged, had obtained a *maurusi* lease of the property from one Jaffir Ali. The defendants, among other things, contended that Jaffir Ali held possession only as *mutwulli*, and had no proprietary right to the villages, and that it was not competent to him to grant a permanent lease thereof. They relied upon two old *sunnuds* which provided that "Mouzah Adoni, &c., * * * * * *

* Appeal from Original Decree No. 225 of 1881, against the decree of Baboo Girish Chunder Chowdhry, Rai Bahadur, Subordinate Judge of Rajshahye, dated 20th of June 1881.

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bearing a jumma of Rs. 1,080, are fixed and confirmed as *mudud-mash bafurzandan* in favour of the *mutwulli*, and the other servants of the said mosque; that the said mouzah, &c., &c., should be given over to their possession *bafurzandan*, so that they may enjoy the proceeds of the aforesaid mouzahs and defray the expense of *fursh*, lighting, &c., and ever be employed in prayers for eternal and perpetual wealth." There was then a memorandum or endorsement to the effect that mouzah Adoni, appertaining to pergunnah Luskerpore, of which the annual income of Rs. 1,080 should be divided into three portions, one-third or Rs. 360 per annum for the defrayal of the expenses of the servants of the mosque and *fursh* and light, &c., one-third or Rs. 360 per annum for the expenses of a *mudrassa*, and the remaining one-third or Rs. 360 for the maintenance of the *mutwulli*. The Subordinate Judge dismissed the suit, but held, relying on *Futtoo Bibee* v. *Bhurat Lal Bhukut* (1) and *Basoo Dhul* v. *Kishen Chunder Geer Gossain* (2), that the properties were not *wuqf*, but merely heritable estates burdened with a trust. On appeal to the High Court an objection was taken to the judgment of the Court of first instance, under s. 561 of the Code of Civil Procedure, and the pleader for the respondents supported the decree upon the question of *wuqf*, which had been decided against them in the lower Court.

Mr. *Pugh*, Baboo *Kishori Mohun Roy*, Baboo *Sharda Churn Mitter* and Baboo *Kishori Lal Sircar* for the appellants.

Mr. *C. Gregory* and Baboo *Rajendra Nath Bose* for the respondents.

The judgment of the High Court was delivered by

McDONELL, J.—Mr. Gregory, who appears on behalf of the respondent, has contended that under s. 561 of the Code of Civil Procedure, he is to support the decree of the Court below upon the question of *wuqf*, which was decided against him in the lower Court. We think that this contention is sound; and we proceed accordingly to deal with the question of *wuqf*. The first grant is to be found at page 50 and following pages of the paper-book, and it is dated

(1) 10 W. R., 299. (2) 13 W. R., 200.

so far back as the year 1756. It recites that a firman is issued to the effect that mouzah Adoni, &c., appertaining to taluk pergunnah Luskerpore, &c., Sirkar Baruugabad, in the province of Bengal, which yields a sum of Rs. 1,080, be fixed (granted) *bafurzandan* as detailed in lieu of Rs. 3 per day for the expenses of *fursh*, lighting, and servants of the mosque, and *mudrassa* erected by Dost Mahomed Khan in Lalbagh, pergunnah Asadnugur, Sirkar Oodnir as *mudad-mash* of the *mutwulli* Bedar Ali and other servants of the aforesaid mosque. It then directs that the authorities, *amlas* and others do give over the said mouzah in their appropriation *bafurzándan*, without any change or alteration, and that they should raise no objections as to *malwajhat* and other items of expenditure, and should not demand a fresh *sunnud* every year. There is then a memorandum, or endorsement to the effect that mouzah Adoni, appertaining to pergunnah *Luskerpore* and so forth, of which the annual income is Rs. 1,080 in lieu of Rs. 3 per day for the defrayal of certain expenses as aforesaid, has been granted; and attached to this document there is a specification of the manner in which the sum of Rs. 3 per day is to be spent. This sum is divided into three portions, one-third or Rs. 360 per annum is for the defrayal of the expenses of the servants of the mosque and *fursh* and light, &c., &c., one-third or Rs. 360 for the expenses of a *mudrassa* at one rupee per day, and the remaining one-third or Rs. 360 for the maintenance allowance of Bedar Ali, son of Dost Mahomed Khan. These three portions make up the total of Rs. 1,080 and the nett jama of the villages granted is shown to amount to the same sum.

The second grant is dated 14 years later, 1770 A. D., and it recites that the first grantee, Bedar Ali, who had been adopted by Dost Mahomed, having been found incompetent to discharge the duties of *mutwulli*, had been turned out of the house, and the said Dost Mahomed Khan has applied for a *sunnud* in his own name. The new grant is then made to Sheik Fukeerulla, nephew of Dost Mahomed Khan, and the document concludes as follows :—

"For this purpose mouzah Adoni, &c., appertaining to the said pergunnah, &c., bearing a jumma of 86,500 *damao*, which are equivalent to Rs. 1,080, are fixed and confirmed as *mudud-mash*

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bafurzandan in favour of Sheik Fukeerulla, the *mutwulli*, and other servants of the said mosque. It is that the said mouzah, &c., should be given over to their possession *bafurzandan* without in any way raising objections, so that they may enjoy the proceeds of the aforesaid mouzahs and defray the expenses of *furah*, lighting, &c., and ever be employed in prayers for eternal and perpetual wealth." Then follows an account similar to the account of the manner in which the proceeds are to be spent, set out in the first instrument and to which I have already referred.

The first question with which we shall deal is, whether this instrument is one which creates a *wuqf* valid according to Mahomedan law. Let us see what are the essentials of such a grant. In the first place, the appropriator must destine its ultimate application to objects not liable to become extinct; secondly, it is a condition that the appropriation be at once complete; thirdly, that there be no stipulation in the *wuqf* for a sale of the property and expenditure of the price on the appropriator's necessities; and fourthly, perpetuity is a necessary condition. We think that this grant fulfils all these four essentials. Then it is provided by the Mahomedan law that if a man appropriate his land for the benefit of a *musjid* and to provide for its repairs and necessaries, such as oil, &c., this is valid appropriation. Looking at the instruments of grant in this case it appears to us that there was a valid appropriation. But then arises the question what was appropriated. It has been contended by the learned counsel for the appellant that all that was the subject of appropriation was the annual sum of Rs. 1,080; and that all the surplus profits of the villages over and above this annual sum must be taken to have been given to Fakeerulla and his heirs who are related to Dost Mahomed Khan, who obtained the grant and erected the mosque. We have considered this argument, and it appears to us that what was appropriated was not the annual sum of Rs. 1,080, but the whole of the villages. We think that the specification contained in the two instruments was merely intended to indicate the proportions in which the money was to be expended on the different objects of the appropriation. It is

true that the grantor does not seem to have contemplated an increase in the value of the property. Certainly he has made no express provision for any surplus profits that such increase or an improved value of the property might yield over and above the annual sum of Rs. 1,080: nevertheless, looking at the express terms of the grant, it appears to us, as I have already said, that the whole of the annual profits of the villages was the subject of appropriation. We think that in dealing with the surplus profits we must decide that those profits are to be appropriated in the same proportion to the objects for which the sum of Rs. 1,080, which was at that time the annual profit of the villages, was expressly appropriated. In putting a construction upon this grant of the Mahomedan Government, we may refer, by way of illustration, to the case of *jagirs*, which were grants of land to those retainers of the Mahomedan Government who were still in service. They were assignments, not of the land, but of the revenue, and were made as an appendage to the dignity of *mansub*, a kind of nobility conferred for life. These *jagirs* were of two kinds, conditional and unconditional. Conditional *jagirs* were granted generally to the principal servants of the Emperor, in order to meet the expenses of a particular office, and these were held only so long as the office was retained. Unconditional *jagirs* were independent of any office, and were personal grants for the maintenance of a dignity. These grants were for life only. If the lands produced more than the *mansubdar's* allowance, which was always fixed, he was bound to account for the surplus. Now it is a matter of history that these *jagirs*, which were at the time grants for life only, have become hereditary, and that the *taufir* or excess over and above the allowance fixed in the grant, instead of being accounted for and made over to the Government, has become the property of the *jagirdar*, and his descendants; in other words that all surplus, over and above the specific money amount of the grant, has followed the same object, and destination as this specific amount.

A *tonkha* or Mahomedan assignment to revenue was in all probability something of the same kind. There is nothing before us to show that there was in this case any express direction as

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to what was to be done with any surplus profits over and above Rs. 1,080; but we think that, looking at the express terms of the second grant, dated 1770, with the light which is to be obtained from similar grants made by the Mahomedan Government, the reasonable presumption is that the improved value or any excess over and above Rs. 1,080 was intended by the grantor to be devoted, or has come to be regarded by the grantee as devoted to the same purpose for which the amount of Rs. 1,080, which was in 1770 the actual value of the property, was expressly assigned. In this view of the case we come to the conclusion that the whole property is *wuqf*; and, therefore, it was not competent to Jaffir Ali to alienate it. It may be well to say that the *dur-mokurruri* lease granted by defendant No. 4 and the *mokurruri* lease which was obtained from Jaffir Ali, though in the form of leases, are really alienations of the greater portion of the beneficial interest in the property. We are, therefore, of opinion that the decree of the Court below must be upheld, although upon a different ground to that upon which that Court has proceeded. This appeal must in consequence be dismissed with costs.

Appeal dismissed.

Before Mr. Justice McDonell and Mr. Justice Field.

1884 *February* 21.

FAKARUDDIN MAHOMED AHSAN (PETITIONER) *v.* THE OFFICIAL TRUSTEE OF BENGAL (OPPOSITE PARTY.)*

Civil Procedure Code (Act XIV of 1882), *ss.* 244 *and* 647—*Execution proceedings—Review.*

Where a judgment-debtor, pending the execution proceedings was granted permission to examine the state of the accounts, but failed to do so, and then made a fresh application to the Court for the same purpose after the execution proceedings had been struck off, and the decree declared to be satisfied: *Held*, that the question must be determined with reference to the provisions of s. 647 of the Civil Procedure Code, and the only course open to the judgment-debtor would have been to apply for a review of the order which declared the decree to be satisfied and struck off the execution proceedings.

Held, also, that the words, "the following questions shall be determined by order of the Court executing the decree," of s. 244 of the Code of Civil

* Appeal from Original Order No. 877 of 1883, against the order of F. McLaughlin, Esq., Judge of Pubna, dated the 27th of August 1883.