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which is a judicial determination. There may have been some irregularities preceding it, but what we have really to remember is that, if the decree is in accordance with the award no appeal lies except in so far as the decree is in excess of, or not in accordance with, the award. There was an award, and no plea has been argued before us that the decree was in excess of, or was not in accordance with, the award. The preliminary objection taken prevails, and this appeal is dismissed with costs.

*Appeal dismissed.*

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1902

*January* 24.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

SYEDA BIBI AND ANOTHER (PLAINTIFFS) *v.* MUGHAL JAN AND OTHERS (DEFENDANTS).*

*Muhammadan law—Shias—Waqf—Invalid waqf—Condition suspending operation of waqf-namah—Condition that waqf-namah should not take effect until registration.*

According to the Shia law it is one of the essential conditions precedent to the validity of a waqf that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even when it is certain to occur, such as the beginning of the next month, or the occurrence of the death of the waqf.

Hence where a Muhammadan of the Shia sect executed a waqf-namah in which it was provided that "this deed of waqf shall come into force from the date of its registration, no one shall be at liberty to take any objection, etc.," it was *held* that this condition was repugnant to the doctrine of the Shia law and the waqf was invalid. *Agha Ali Khan* v. *Altaf Husain Khan* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *Abdul Raoof* and *Karamat Husain*, for the appellants.

Mr. *W. M. Colvin*, the Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Jaunpur in a suit brought by the plaintiff for the recovery of the property of the late Syed Hasan Ali by right of inheritance, and for a declaration that a

* First Appeal No. 300 of 1898 from a decree of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Jaunpur, dated the 8th September 1898.

(1) (1892) I. L. R., 14 All., 429.

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waqf-namah of the 27th of August, 1886, was invalid, and ineffectual according to Shia law.

Syed Hasan Ali, who belonged to the Shia sect of Muhammadans, on the 27th of August, 1886, executed the deed which has given rise to this litigation. In it, after a recital of the uncertainty of life, the executant, "with a view to earn merit in the next world and to benefit the persons mentioned in this document," made a perpetual waqf "for charitable purposes, and to benefit the persons mentioned" in the document according to the Muhammadan law of the Imamia sect of the whole of his movable and immovable property, with the exception of some small portions of property which he specified, subject to the conditions and details which follow.

The deed then provides in paragraph 1 that from the date of its execution his wife, the defendant Mughal Jan, shall be mutawalli, and that after her death certain members of the family expressly mentioned, and after them the eldest member of the family from generation to generation should be mutawallis. In paragraph 2 there is a declaration that Mughal Jan shall receive during her life the profits of the properties, after deducting the expenses mentioned in paragraphs 3, 4, 5, 6, 7 and 8, and other expenses connected with the management, &c., of the waqf properties, and (3) that after her Syed Aulad Husain, Syed Sarfaraz Husain and Syed Asghar Husain, his nephews, shall receive the profits after deduction of expenses, and that when any of these persons or their male descendants how low so ever, are no longer in existence, the entire profits from the endowed property shall be spent in good deeds and proper charities. Then in paragraphs 3, 4, 5, and 8, provision is made for defraying out of the income of the property the following expenses, *viz.*—

(1) The expenses of majlis as the appropriator used to do.
(2) The expenses of a mosque situate near his house.
(3) The expense of constructing a well.
(4) The feeding of travellers.
(5) The expenses upon his death of holding majlis, recitation of Quran and feeding poor persons.

In paragraph 11 is the following important direction, namely:—"This deed of waqf shall come into force from the date of

its registration; no one shall be at liberty to take any objection, &c." Part of the property of Syed Hasan Ali consisted of mortgage securities, which are not the proper subject-matter of a waqf. The Subordinate Judge held that, save and except in respect of the mortgage securities, the property was validly dedicated and created a waqf, and he dismissed the claim of the plaintiffs save in regard to the mortgaged property. Hence this appeal. Three grounds of objection to the deed have been pressed in argument before us on behalf of the appellants. First, it is said that the waqf is illusory, that the object of it was merely to benefit the widow and the nephews of the waqif, and the male descendants of the nephews for all time, and that it was only after the extinction of male descendants of the nephews that any substantial portion of the property was made available for good deeds and charities; secondly, it was contended that according to Shia law, acceptance of the waqf by the beneficiary must be proved by substantive evidence, that acceptance cannot be a matter of inference merely, and that substantive evidence of the fact was not adduced; and thirdly, it is said that the direction in the deed that the waqf shall only come into force from the date of registration of the deed is fatal to the validity of it, inasmuch as under the Shia law, the operation of a waqf cannot be suspended or made to depend upon some future event. From the view which we hold as regards this last question, it is unnecessary for us to determine the earlier questions which have been discussed.

Amongst the conditions which relate to a valid waqf is the condition "that it must be entirely taken out of the waqif or appropriator himself, so that if the appropriation is restricted to a particular time or made dependent on some quality of future occurrence, it is void" (Baillie's Imamia law, page 218). Quoting from Mafateh, Mr. Shama Churun Sircar in the annotations to his Tagore Lectures of 1874, writes at page 471 as follows:—"Without difference of opinion waqf should be made at once; it cannot be made to depend on the occurrence of an event (in future) unless the same be quite certain and positive." And again at page 472 of the same Lectures, he gives the following illustration of the rule:—"If one should say 'I have appropriated when the beginning of the month should come, or if Zayid will

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arrive, the appropriation would not be valid.'" In this he refers to Sharaya-ul-Islam, pp. 236 and 237.

Mr. Justice Mahmood elaborately reviewed the various texts on this subject in his judgment in the case of *Agha Ali Khan* v. *Altaf Hasan Khan* (1), and, amongst other quotations, gives at p. 466 an extract from the Sharah Lamah Damishkia, which is as follows:—"Besides above mentioned matters *tanjiz* is one of its (waqf's) conditions. Therefore if he (the waqif) has suspended it upon any contingency or quality it is void, except in cases when the contingency already exists, and the waqif (appropriator) is aware of its existence, such as his saying 'I have made this waqf if to-day is Friday,' such as is the rule in regard to other contracts." The learned Judge then observes that "it is clear from these texts that the doctrine of *tanjiz*, which is unanimously approved by the highest authorities of the Shia law, requires as one of the essential conditions precedent to the validity of a waqf that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even when it is certain to occur, such as the beginning of the next month or the occurrence of the death of the waqif, *i.e.* the appropriator."

In the present case the appropriator made the waqf to depend upon the happening of a future event, that is, upon the registration of the waqf-namah. One of the conditions of the instrument was that it should only come into force on the date of its registration, that is, that it should have no force or validity unless and until the document was registered. As a matter of fact, the registration was not effected until a week after the execution of the deed had elapsed, so that for one week the operation of the waqf was suspended. There was no obligation on the part of the executant to have the deed registered at all; if he had chosen not to register it during his lifetime, the dedication would have remained incomplete, and the waqf-namah been suspended or left in abeyance. It has been argued by Mr. *Conlan* on behalf of the respondents that there was no suspension of the waqf created by the deed, that the direction that the deed should come into force from the date of its registration was only declaratory

(1) (1892) I. L. R., 14 All., 429.

of the law, inasmuch as the deed could not take effect before registration by reason of the provision of the Registration Act that no document shall affect any immovable property unless it has been registered (section 49, Indian Registration Act). There are two answers to this argument. In the first place, this statement is not strictly accurate, inasmuch as the waqf-namah purports to deal with movable as well as immovable property, and as regards movable property it would operate as from its date without registration. In the second place, as regards immovable property the deed, when registered, would operate from the time from which it would have commenced to operate if no registration had been required, and not from the time of registration (section 47, Registration Act). So that, but for the condition that the deed should only come into force on the date of registration, it would on registration operate as from the day of its execution.

There being this precise direction by the waqif that the endowment is to become effectual only on the happening of an uncertain event, there is nothing in the Registration Act which would make it to operate from the date of execution. If there had been no such direction by the waqif, then according to the Registration Act the deed on registration would have effect from the date of its execution; but such is not the case when, as here, an executant fixes a time from which the deed is to come into force.

But it is further argued that the condition contained in paragraph 11 is repugnant to the direction contained in paragraph 1, namely, the direction that from the date of the execution of the deed Mughal Jan shall be mutawalli of the endowed property, and that there being a repugnancy in the two paragraphs, the first in the case of a deed must prevail. We do not think that there is any such repugnancy as renders it necessary for us to apply the rule of construction which is relied on. The executant by the deed no doubt declares that Mughal Jan shall be the mutawalli from the date of execution, that is, her appointment as such dates from execution; but by the subsequent provision in paragraph 11, her powers and duties are suspended so as to spring into existence only upon registration. Her appointment nominally made on the day of execution, is in effect post-dated by the subsequent direction in the deed.

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Reading the deed then in its entirety, it appears to us to be manifest that the executants intended that the deed should take effect and operate only in case and when it was registered.

For these reasons we think that the alleged waqf is invalid, and not binding on the plaintiffs. We therefore allow the appeal, set aside the decree of the Lower Court, so far as the claim of the plaintiffs was partly dismissed, and we declare that the deed of the 27th of August, 1886, in the pleadings mentioned, was ineffectual to create a valid waqf of the property of the late Syed Hasan Ali, and in modification of the decree of the lower Court we give a decree as claimed with future mesne profits and also costs in both Courts.

*Appeal decreed.*

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1902

*January* 30.

*Before Mr. Justice Knox and Mr. Justice Blair.*

HANUMAN PRASAD AND ANOTHER (APPLICANTS) *v.* BHAGWATI PRASAD AND ANOTHER (OPPOSITE PARTIES).*

*Civil Procedure Code, section* 596—*Appeal to His Majesty in Council—Decree involving indirectly some question respecting property of the value of ten thousand rupees or upwards.*

When, as in section 596 of the Code of Civil Procedure, it is laid down that in order that an appeal may lie to His Majesty in Council the decree to be appealed from must involve, directly or indirectly, some claim or question to, or respecting property of ten thousand rupees in value or upwards, the reference is to suits in existence. It is not enough that the question decided by such decree is a question of title which may possibly affect the title of persons who are not parties to the decree to property not the subject-matter of the suit in which the decree was passed, and concerning the title to which property there is no litigation pending. *Radha Krishn Das* v. *Rai Krishn Chand* (1), *Banarsi Prasad* v. *Kashi Krishna Narain* (2), *Moofti Mohummud Ubdoollah* v. *Baboo Mootechund* (3), and *Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai* (4), referred to.

THIS was an application presented by the respondents in First Appeal No. 48 of 1898, asking for leave to appeal to His Majesty in Council. The suit out of which the appeal in question arose was brought by the present applicants for the recovery of the village of Kot Kamarhya as next reversioners to the estate of

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* Privy Council Appeal No. 1 of 1901.

(1) (1901) I. L. R., 23 All., 415.
(2) (1901) I. L. R., 23 All., 227.
(3) (1837) 1 Moo., I. A., 363.
(4) (1860) 7 Moo., I. A., 548.