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widows cannot, of their own free will, alienate property except for special legal necessities. This was so decided in the case of *Sheoratan Rai* v. *Mohri* (1). We consider that the decision in that case was perfectly correct and governs the present case, and we must therefore allow the appeal, and pass an order under the provisions of section 32 of the Land Acquisition Act, directing that the compensation money awarded shall be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or if such purchases cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit, and we direct that the payment of interest, rent or other proceeds of any such investment be made to the respondents as the persons for the time being entitled to the land. The appeal is allowed with costs.

Appeal decreed.

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December 21.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ABU SAYID KHAN (DEFENDANT) v. BAKAR ALI AND ANOTHER (PLAINTIFFS).*

Muhammadan law—Waqf—Waqf of money held to be valid.

Held, that according to the Muhammadan law a waqf of movable property may be validly constituted. *Fatima Bibee* v. *Ariff Ismailjee Bham* (2) dissented from.

IN the suit out of which this appeal arose, the plaintiff claimed, as heir to one Fakhr-ud-din, deceased, first, a declaration that he was such heir; and secondly, a declaration that a document called a deed of endowment, dated the 10th of March, 1892, and registered on the 11th of March, 1892, was null and void, and had no effect as against the plaintiff. After the filing of the plaint, one Abu Sayid Khan, the mutawalli of the endowed property, was added as a defendant, the suit having been originally brought against Ahmadi Begam, the widow of Fakhr-ud-din alone. At a subsequent date, the original plaintiff having died, the names of his two sons, Bakar Ali and Muzaffar Ali, were substituted in the plaint, and the plaint was amended

* First Appeal No. 276 of 1898 from a decree of Babu Bepin Behari Mukerji, Additional Subordinate Judge of Cawnpore, dated the 30th June 1898.

(1) Weekly Notes, 1899, p. 96. (2) (1881) 9 C. L. R., 66.

by the addition of a prayer for a further declaration that "the appointment of Abu Sayid Khan as a mutawalli being totally null and void, he has no right to the property in dispute." There were other reliefs claimed, but these are not material for the purposes of this report.

The Court of first instance (Subordinate Judge of Cawnpore) decreed the plaintiff's claim in part. It found that the plaintiffs were not the only heirs of Fakhr-ud-din, but that the property of Fakhr-ud-din, which was not subject of a valid waqf, was inherited by the plaintiffs along with Ahmadi Begam. As to the waqf, it found that the claim was not maintainable, so far as the immovable property therein included was concerned, but that, inasmuch as movable property could not, under the Muhammadan law, be made the subject of a waqf, the waqf so far was invalid, and the plaintiffs were entitled to it with Ahmadi Begam.

The defendant, Abu Sayid Khan, the mutawalli, appealed to the High Court against that part of the decree which declared the waqf-namah, so far as it related to the movable property dealt with thereby, to be invalid.

Mr. *Karamat Husain* and Maulvi *Gulam Mujtaba*, for the appellant.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondent.

BANERJI and AIKMAN, JJ.—This is the appeal of the defendant in the suit which gave rise to first appeal No. 187 of 1898, decided by us to-day. The only question which we have to consider in this appeal is, whether a waqf of movable property is valid under the Muhammadan law. The appropriator Fakhr-ud-din included in the deed of waqf executed by him a sum of Rs. 11,000, which he had deposited with a firm in Cawnpore. The deed contains the following provisions in regard to the disposal of the said sum:—"Rs. 5,000, out of the endowed sum of Rs. 11,000, will be spent in constructing a mosque with shops at a proper place. The income of the shops will, according to the opinion of the mutawalli (Superintendent), be applied towards the expenses of the said mosque, *i. e.*, on account of Imam (one who leads at prayer) and Muazzin (one who calls for

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prayer), &c., and the mutawalli will construct a pacca well where it is required. The remaining amount out of the endowed sum of Rs. 11,000 and also the money which may remain after defraying all the aforesaid expenses out (of the income) of the endowed property through the good management of the mutawalli (Superintendent) shall all of it be kept in safe custody; and, it having been accumulated, shall be applied in purchasing proper immovable property, which shall be added to the endowed property. This practice will always continue. The profits of the newly purchased property, as well as the property itself, shall be regarded as endowed property, and shall be applied in charitable and pious purposes recognized by the Muhammadan law as mentioned above. The mutawalli (Superintendent) shall also pay (money) to the Hajis (pilgrims) out of this very income according to his own opinion."

It was contended on behalf of the plaintiffs that a waqf of such property is wholly void, and this contention has found favour in the Court below. The learned Subordinate Judge, while pointing out that the opinion of the Muhammadan lawyers on this point was not unanimous, followed a ruling of the Calcutta High Court, *Fatima Bibee* v. *Ariff Ismailjee Bham* (1). That ruling, no doubt, supports the conclusion arrived at by the learned Subordinate Judge, and, as far as we have been able to ascertain, it is the only reported case on the question which we have to determine.

The case referred to was one in which shares in two companies at Rangoon had been made the subject of waqf. It was contended that such an endowment was invalid according to Muhammadan law. Wilson, J., in disposing of the plea, made the following observations:—"Property of this nature is modern in origin, and the old text can only be applied by way of analogy. But there does not seem to me much difficulty in arriving at a conclusion. Land, according to all the authorities, may be appropriated. And the power has been, it is universally agreed, extended to certain other kinds of property, though the exact degree of the extension is a matter in difference among the authorities. But it is agreed that it does not apply to such things

(1) (1881) 9 C. L. R., 66.

as perish in the using, under which head money appears to be included. And if money cannot be appropriated, it seems to me clear that the possibility of receiving money hereafter in the form of dividends cannot be." He therefore held the *waqf* to be invalid. The correctness of this ruling has been questioned by Mr. Justice Ameer Ali, in his work on Muhammadan law, p. 271, 2nd edition, where he remarks, after setting forth the authorities of Muhammadan law on the subject, that these authorities were evidently not pointed out to the learned Judge who decided the case of *Fatima Bibee* v. *Ariff Ismailjee Bham*. The learned counsel on both sides have addressed to us very able and erudite arguments, and have brought to our attention a number of authorities of Muhammadan law in addition to those referred to in Mr. Justice Ameer Ali's book. We have carefully considered those authorities. The conflict between them is bewildering. Some assert that such an endowment as the present is absolutely void; others, that it is valid when customary; and others again—and these are in the majority—that it is valid without any restriction. Not only is there a conflict between different jurists, but we find different and irreconcilable opinions attributed to the same jurists by different commentators. On page 267 of his Digest of Anglo-Muhammadan Law, Sir Roland Wilson observes:—"Authorities are conflicting as to money * * *, but the better opinion seems to be that it can be appropriated." After a long and careful consideration of the texts we have arrived at the same conclusion. Under the Muhammadan law, perpetuity is a necessary condition of a valid waqf: in other words, such things as perish in the using (to use Mr. Justice Wilson's expression), cannot be appropriated. Some of the Muhammadan authorities were of opinion that a condition of perpetuity could not attach to money, and that consequently money could not form the subject of a valid waqf. Others again, such as Zafar, held that no such objection could be offered to a waqf of money. We quote the following passage from Fatwa Qazi Khan, which is pronounced by Morley to be a work of equal authority with the Hidaya:—"It is related from Zafar that if a man should make a waqf of *dirhams* it would be lawful. On being questioned how that could be, he

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replied that the *dirhams* could be given in *Muzarihat* (partnership in which one partner supplies capital, and the other labour), and the usufruct thereof be devoted to the purposes of the waqf." (Fatwa Qazi Khan, Volume IV, p. 309). The same appears to have been the opinion of Zuhri, as will appear from the following extract from the book Umdat-ul-Kari, a commentary on Sahib-ul-Bukhari by Allama Aini, Volume VI, p. 516:—"Zuhri was asked whether a man who, having dedicated a thousand *dinars* in the way of God, made them over to his slave, a tradesman, for investment in some trade, and who made the usufruct thereof a *sadaka* (charity) to the poor, and to the relatives, could lawfully eat anything out of the usufruct of the said thousand *(dinars)*, even if the usufruct had not been given in charity to the poor, he replied that he could not eat anything out of it." The author of Durri-Mukhtar was also of the same opinion, as the following extract shows:—"And, as is also valid the waqf (appropriation) of every 'movable' designedly made, 'in which it is customary' among the people 'like spades and axes', but also *dirhams* and *dinars*. I say that an order was, on the other hand, issued to the Qazis (Judges) to give orders for it, *i. e.*, for the waqf of *dirhams* and *dinars*, as is mentioned in the *maruzat* of Mufti Abu Sand."

Different views are attributed to Imam Muhammad. According to some he held that the waqf of movable was valid where such endowment was customary, but according to the Mujtaba he held it valid without any restriction. The opinion of Abu Yusuf, as well as of the author of the Hidaya, was against such an appropriation.

The decision of the question is not by any means free from difficulty; but we are of opinion that the preponderance of authority is in favour of the view that such an endowment is good, and this view is reconcilable with the principle that perpetuity is a necessary condition of a valid waqf. This is the only question which we have to consider in this appeal.

For the reasons set forth we allow the appeal, and varying the decree of the Court below, we dismiss the suit with costs here and in the Court below.

Appeal decreed.