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March 17.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

SALIQ-UN-NISSA (PLAINTIFF) *v.* MATI AHMAD AND OTHERS (DEFENDANTS).*

Muhammadan law—Shias—Waqf—*Words necessary to constitute a valid* waqf.

Held that according to the Muhammadan law applicable to the Shia sect the use of the word "*waqf*" to create a valid *waqf* is not essential, but other words purporting to effect a transfer may, when read together with surrounding circumstances, be sufficient to create a valid *waqf*.

THE plaintiff in the suit out of which this appeal arose claimed possession of certain zamindari property and a portion of a house under the following circumstances. The property claimed had been in his life-time the property of the father of one Musammat Razia Khatun. The plaintiff alleged that upon the death of Razia Khatun, which occurred in September, 1895, one-half of the property in question descended to Momin Ali, the husband of the plaintiff, and also of Razia Khatun, and the other half to two aunts of the said Razia Khatun, The plaintiff set up a title under a sale deed executed in her favour by Momin Ali in October, 1895. The suit was resisted by one of the defendants, Mati Ahmad, who was in possession of the property as *mutawalli* under a deed, which he alleged to be a deed of *waqf*, executed in the year 1894, by Musammat Razia Khatun. A translation of this deed is set forth in the judgment of the High Court. The Court of first instance (Munsif of West Budaon), dismissed the suit. The plaintiff appealed, and her appeal was dismissed by the lower appellate Court (Subordinate Judge of Shahjahanpur). From this decree the plaintiff appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Karamat Husain*, for the respondents.

BLAIR and BANERJI, JJ.—One question, and one only, is raised in this appeal. The appellant denies that a certain document executed by the deceased Musammat Razia Khatun did, under the circumstances, establish or create a valid *waqf*

* Second Appeal No. 18 of 1901, from a decree of Babu Sheo Prasad, Officiating Subordinate Judge of Shahjahanpur, dated the 20th of August, 1900, confirming a decree of Babu Deoki Nandan Lal, Munsif of West Budaun, dated the 6th of March, 1900.

within the meaning of the Muhammadan law as applied to the Shia sect. The document in question has been translated for our perusal, and the substantial accuracy of the translation has not been impugned. The document is in the following terms:—

"By a will Maulvi Muhammad Aziz Ali, deceased, father of me, the executant, set apart during his life-time one-third of the entire property owned and possessed by him, which was in existence at that time, for the expenses of the mourning of Imam Husain (may he remain in peace!), and appointed his sister's son, Mati Ahmad, son of Maulvi Muhammad Kamal Ahmad, sect Shaikh, resident of Badaun, as manager and superintendent. Out of the entire estate of my deceased father about a half devolved on me, and now there remain a 2½ biswa zamindari (share) in mauza Mongra, pargana Azmabad, tahsil Dataganj, seven *sihams* out of the entire assumed 15 *sihams*, dwelling-house and *diwan-khana*, situate in mohalla Kucha Shaikh Sad Ali, deceased, bounded as below, forming part of the estate of my aforesaid deceased father, which are at present in possession of me, the executant, and are worth Rs. 2,000, and this 2½ biswa share aforesaid is one-third of my aforesaid half share, and according to the will of (my) deceased father, I have been up to this day using (the income) thereof in meeting the religious expenses, *i.e.* the expenses of the mourning of the aforesaid Janab Saiyedush-shuhada (may he remain in peace!) and with the advice of Mati Ahmad. Now I wish to execute a document in respect of this. In order that the said (will) may always be acted upon, I, the executant, in accordance with the will of (my) deceased father shall, during my lifetime, be the manager acting with the advice of Mati Ahmad aforesaid. Mati Ahmad or his representative, or I, shall have no sort of power to make a transfer. After me Mati Ahmad and his legal representatives shall be the *maliks* (owners) and managers according to the aforesaid will. The manager shall have power to spend in any way he may think proper the profits (remaining) after deducting the necessary expenses thereon for religious purposes, *i.e.* the mourning of the aforesaid Janab (Imam Husain), and to use the house for purposes of mourning meetings and his residence. I

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shall have no objection to nor deviate from this. I shall have mutation of names effected in the revenue department."

After prolonged consideration of the authorities brought before us by Mr. *Mujtaba*, and also by Maulvi *Karamat Husain*, the point to which Mr. *Mujtaba* finally confined himself was this. He contended that a transfer must be by express words, even though the nature of the transaction might be gathered from the surrounding circumstances; and he contended that no such express words of transfer were to be found in the document in question. To the position which he took up, it seems to us that he was inevitably driven by the authorities cited. We have had laid before us a passage from Jami-ul-Shattat, Book on *Waqf*, page 163, Teheran edition. We have also had passages translated from Jawahir-ul-Kalam, Book on *Waqf*, Teheran edition, folio 560, and also from Masalik, Book on *Waqfs*. In our opinion the drift of those authorities is, in spite of difference of expressions, identical. It seems to be settled law that the use of the word "*waqf*" to create a valid *waqf* is not essential; but other words purporting to effect a transfer may, when read together with surrounding circumstances, be sufficient to create a valid *waqf*. That has been accepted by Mr. Baillie in his well-known book on Moohummudan Law, Imameea Code, page 211 and succeeding pages. It has also been accepted and, one might fairly say, amplified by Mr. Justice Ameer Ali in his book on Muhammadan Law, Vol. I, p. 390. The result is that what is really essential for the creation of a *waqf* is that the words of transfer should be direct, express and explicit. Now in this case, although every expression used points to a total expropriation of herself, by the maker of the document in question, though the purpose to which the income of the property is to be appropriated is quite manifest, and though the maker of the document describes herself as taking under its provisions nothing, but simply the position of a manager of the property without power of alienation, it is contended that in the *tamliknama* in question there are no express words of transfer so as to validate this document as creating a *waqf* under the Shia law. The executant appears to have been under a mistaken impression that her predecessor in title had made a

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will, under which, had it been legal, a *waqf* would have been constituted. It has been found that nothing amounting to a will had been made, but that it was his desire that his property should be used for the purposes of a *waqf*, and it is not denied that such a use of the property did take place. The executant of the deed in question, in our opinion, though using no express words of transfer, expresses with abundant clearness her intention to perpetuate the state of things existing in relation to the property in the hands of her predecessor. It is recited in the document that that predecessor had set apart a certain portion of his property for purposes which she desired should still be served out of the profits of the same property. In our opinion that is a sufficient expression of her desire to transfer absolutely, beyond recall and without power of alienation, every proprietary interest which she had in this property. Our view upon that matter is reinforced by the fact that she speaks of herself as intending to occupy towards that property the position merely of a manager. Under these circumstances we are of opinion that the document in question does create a valid *waqf* under the Shia law, and that this appeal should be, as it is, dismissed with costs.

Appeal dismissed.

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March 19.

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

BHAGWAN DAS (DEFENDANT) *v.* MOHAN LAL (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—*Assignment of mortgagee rights by mortgagee in possession—Sale to stranger who before suit brought becomes a co-sharer.*

Held that the assignment of mortgagee rights in a share in a village by a co-sharer mortgagee in possession to a stranger is not a transfer of any part of the mortgagee's "*haqqiyat*" in the village, and will not give rise to any right of the nature of pre-emption in the absence of express provisions relative to mortgagees in the village *wajib-ul-arz*. *Nand Lal* v. *Bansi* (1) referred to.

Held also that if a stranger purchases a share in a village in respect of which a right of pre-emption subsists in favour of co-sharers, but subsequently to such purchase, and before any suit for pre-emption is brought in respect of such share, becomes himself, apart altogether from the purchase

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* First Appeal No. 294 of 1900 from a decree of Munshi Raj Nath Prasad, Subordinate Judge of Agra, dated the 19th of September, 1900.

(1) (1897) I. L. R., 20 All., 19.