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was issued in pursuance of the power conferred by section 320 of the Code of Civil Procedure upon the Local Government to declare that throughout the North-Western Provinces the execution of all decrees for the recovery of money in cases in which the Civil Court has ordered any ancestral land or interest in such land to be sold shall be transferred to the Collector. Paragraph 1, which has been relied upon, runs in the following terms :— "Every Civil Court on passing orders for the sale of any land in pursuance or execution of a decree shall ascertain from the judgment-debtor whether it is ancestral land as above defined, and after hearing any objection made by the decree-holder shall, if satisfied that the land or any portion of it is ancestral land, deal with the decree affecting it as directed in these rules." We are asked to hold that under this provision where land directed to be sold comprises any ancestral land, the Court is bound to transfer the decree for execution in respect of all the property affected by the decree to the Collector for execution. We think this is not the true meaning of the provision in question. The true interpretation of the rule is, as we think, that if the Civil Court is satisfied that the land, which is ordered to be sold, or any portion of it is ancestral land, it shall deal with the decree affecting the land so far as it is ancestral land as directed in the rules, that is, it shall transfer the decree for execution to the Collector so far as regards ancestral land only. We therefore think that there is no substance in this appeal and dismiss it with costs.

Appeal dismissed.

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April 25.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

MUHAMMAD AHSAN AND OTHERS (DEFENDANTS) *v.* UMARDARAZ AND OTHERS (PLAINTIFFS) AND MUSAMMAT KANIZ ZOHRA AND OTHERS (DEFENDANTS).*

Waqf—Muhammadan Law—Testamentary waqf—Validity—Power of cancellation reserved—Condition as to birth of issue in lifetime of testator—Waqf of income—Postponement to life interest of widow—Inheritance on death of widow with life interest.

Held that a waqf created by a Shia by his will is not invalid on the ground that it is not absolute and unconditional merely because it contains clauses cancelling the will if any child should be born to the testator in his life-time and reserving to the testator power to cancel or modify any of the conditions of the will. *Baqar Ali Khan* v. *Anjuman Ara Begam* (1), referred to.

Held further, that the waqf was not invalid because the testator directed that, after the death of his widow, to whom he gave a life interest, the *income* of the property should be devoted to the purposes of waqf, where it was clear from other terms of the will that the *corpus* also was to be devoted to the purposes of the waqf.

Held further, that the fact that the property did not at once on the testator's death pass to the trustees of the endowment, their enjoyment being postponed to a life interest of the widow for maintenance, did not invalidate the waqf. *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (2), referred to. *Baqar Ali Khan* v. *Anjuman Ara Begam* (1), discussed.

Held further, that the plaintiffs' fathers having predeceased the widow of their uncle, the testator, to whom a life estate had been given by the will, then if the waqf was invalid and if the inheritance consequently opened upon the death of the widow, still the surviving brother who was alive at the death of the widow would succeed to the exclusion of the plaintiffs, his deceased brothers' children. *Mussamut Humeeda* v. *Mussamut Buldun and the Government* (3), and *Abdul Wahid Khan* v. *Nuran Bibi* (4) referred to.

THE facts are as follows:—

Mansab Ali Khan died in August, 1878, leaving a will, dated June 18th, 1878. By that will he created a waqf of certain property and as to other property declared that his widow should have a life interest and that afterwards the income of it should be devoted to the purposes of the waqf.

The eighth paragraph of the will provided that if any child was born to the testator in his life-time the conditions laid down in the will should cease to remain in force. The twelfth

* First Appeal No. 183 of 1903, from a decree of H. David, Subordinate Judge of Meerut, dated the 30th of June, 1903.

(1) (1902) I. L. R., 25 All., 236.
(2) (1889) I. L. R., 17 Calc., 498.
(3) (1872) 17 W. R., 525.
(4) (1885) I. L. R., 11 Calc., 597.

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paragraph reserved to the testator during his life-time the power of cancelling or modifying the terms of the will.

On Mansab Ali Khan's death his widow came into possession of the property which had been left to her for life.

Bakshish Ali and Qadir Ali, brothers of her husband, predeceased her, but another brother, Wilayat, survived her and got possession.

This was a suit by the children of the deceased brothers, Bakshish Ali and Qadir Ali, against the children of the surviving brother, Wilayat, since dead, for a share of the property. The Court of first instance decreed the claim.

Three of the defendants appealed, the main grounds argued being that there was a valid waqf and that in any case the plaintiffs were not entitled as heirs of Mansab Ali Khan.

Mr. *Karamat Husain*, for the appellants.

Pandit *Moti Lal Nehru* and Dr. *Satish Chandra Banerji*, for the respondents.

KNOX and AIKMAN, JJ.—This appeal arises out of a suit brought by the five plaintiffs respondents, who are nephews and nieces of one Mansab Ali Khan, to recover their shares in certain property which at one time belonged to Mansab Ali Khan. The defendants, as will be seen in the genealogical table printed at page 13 of the paper-book, are the sons and daughters of Wilayat, brother of Mansab Ali Khan. The plaintiffs have obtained a decree from the Court below, and against that decree the present appeal has been filed by three out of the defendants. The other defendants, who have not appealed, were made respondents. On the 18th of June, 1878, Mansab Ali Khan executed a will, which is printed at page 4 of the appellant's book in the connected First Appeal No. 46 of 1904. By this will he created a waqf of the greater portion of his property for certain religious and charitable objects. In paragraph 3 of the will he declares that he has set aside certain other property for the maintenance of his wife, Musammat Mohib-un-nissa. The will provides that she is to remain in possession of the property during her life for her maintenance, but is not to have any power to alienate the property by sale or mortgage, and that after her death the income of the property is to be applied to

the purposes of the endowment according to the conditions set forth in paragraph 1 of the will. It is in this latter property that the plaintiffs claim a share in the present suit. There are eight grounds set out in the memorandum of appeal, but all of them are not supported. The three pleas which were urged by the learned advocate for the appellants were, first, that by the will of Mansab Ali a valid *waqf* was created of the property left to Musammat Mohib-un-nissa for her maintenance and that the decision of the lower Court to the contrary is erroneous; secondly, that the plaintiffs are not entitled to claim the proprety as heirs of Mansab Ali Khan; thirdly, that the suit is barred by limitation. The plea as to limitation was very faintly urged, and we are of opinion that there is nothing in it. We proceed to consider the first plea. Mansab Ali Khan was a Muhammadan belonging to the Shia sect. It has now been settled by a decision of their Lordships of the Privy Council in *Baqar Ali Khan* v. *Anjuman Ara Begam* (1), overruling the Full Bench decision of this Court in *Agha Ali Khan* v. *Altaf Hasan Khan* (2) that Shias can create a valid *waqf* by will. For the plaintiffs it is contended that admitting that a Shia can create a valid waqf by will, no valid waqf was created by the instrument under consideration with regard to the property in suit. In support of this contention reference is made to paragraphs 8 and 12 of the will. The first of these paragraphs provides that if any child is born to the testator during his life-time the conditions laid down in the will shall cease to remain in force. By paragraph 12 the testator reserves to himself the power during his life-time of cancelling or modifying any of the conditions in the will. It is argued that as under Muhammadan law a *waqf* must be absolute and unconditional, the insertion of the above conditions in the will renders nugatory the waqf of the property in suit. We are unable to sustain this contention. It having been held by the Privy Council that a valid testamentary waqf can be created, the reservation by the testator of a right to alter the will is nothing more than the setting out of a right which every testator possesses. In our judgment this will not render the waqf invalid. The

(1) (1902) I. L. R., 25 All., 236. (2) (1892) I. L. R., 14 All., 429.

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fact remains that the testator died without issue and in any way having altered this will. The mere insertion of a provision as to what will happen if a child should be born to the testator or the reservation of a right to change his mind will not, in our opinion, having regard to the principles laid down in the Privy Council's judgment cited above, affect the validity of the waqf.

The next ground on which it is contended that the waqf is invalid is that the testator directs that after his wife's death the income of the property is to be applied to the purposes of the endowment. Reliance is placed on certain texts cited in Shama Charan Sarkar's Tagore Law Lectures, 1874, at page 465 and particularly to a sentence in the Mafati, namely, the "waqf of a profit is not also valid by reason of non-stability." In our opinion this contention also fails. As we read the texts they are directed against endowments of incorporeal rights or of things which perish in the using. Here the testator, although he only mentions the income of the property as the endowment, does not assign the *corpus* to anyone else, and it is clear from the reference to the provisions of paragraph I of the will that he intended that the property in suit was to be treated exactly as the property mentioned in paragraph I, with regard to which it is admitted a valid waqf has been created. The third ground on which the validity of the waqf is assailed is that the property in suit did not at once, on the testator's death, pass to the trustees of the endowment, their enjoyment of it being postponed until the death of the widow, to whom the property was assigned during her life-time for purposes of maintenance. In our opinion this plea also fails. It is true that the passing of the property to the endowment was made to depend on the occurrence of a future event, namely, the widow's death, but that event was not a problematical event; it was one which was sure to happen sooner or later. The bequest does not turn on a mere contingency. Supposing the testator had assigned all the property to the trustees with a direction to them to make over the income or a portion of it to the widow during her life-time, that would in our opinion be a perfectly valid waqf. In support of this view we may refer to the decision of the Privy Council in *Muhomed Ahsanulla*

Chowdhry v. *Amarchand Kundu* (1), where it was held by their Lordships of the Privy Council that the making of a provision for the grantor's family out of the property dedicated to religious or charitable objects may be consistent with the property being constituted waqf. It is true that the parties to that case were Sunnis, but we see no reason why the same principle should not apply in the case of Shias. For the respondents reliance was placed on a passage to be found at page 253 in the judgment in the case of *Baqar Ali Khan* v. *Anjuman Ara Begam* (2):—"If a waqf may be made by a will speaking from the death there is no condition and no reservation in a case like the present." We cannot put upon this isolated expression "speaking from the death" the meaning contended for, and hold that because the widow's life estate was interposed the waqf was for that reason invalid. As pointed out by the learned advocate for the appellants in his able argument, *tanjiz*, *i.e.* the immediate operation of the transaction absolute and unconditional, which is indispensable in the case of a waqf made by a man in his life, has and can have no application to a testamentary waqf. It is on the grounds set forth above that the validity of the waqf has been assailed, and in our opinion none of those grounds is good. We therefore hold that the Court below was wrong in deciding that the property claimed by the plaintiff was not the subject of a valid waqf. It is admitted that our decision on this point is fatal to the plaintiff's case, and is sufficient for the disposal of the appeal. But in view of the possibility of the case going further, we may shortly express our opinion on the second plea urged. The fathers of the plaintiffs, it is admitted, pre-deceased Mohib-un-nissa, while the father of the defendants survived her. Consequently if there was no waqf of the property and of the inheritance opened upon the death of Mohib-un-nissa, Wilayat who survived her would succeed to it to the exclusion of the plaintiffs, his brothers' children. If, on the other hand, the fathers of the plaintiffs had a vested interest in the property which passed to the plaintiffs on the death of their fathers during Mohib-un-nissa's life-time, the plaintiffs would be entitled to a share in the property. In our opinion, having regard to what was said by

(1) (1889) I. L. R., 17 Calc., 498. (2) (1902) I. L. R., 25 All., 236.

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their Lordships of the Privy Council in *Mussamut Humeeda* v. *Mussamut Buldun and the Government* (1), and in *Abdul Wahid Khan* v. *Nuran Bibi* (2), the latter position cannot be maintained. For the reasons set forth above we allow the appeal, and, setting aside the decree of the lower Court, dismiss the plaintiffs' suit with costs in both Courts.

Appeal decreed.

1906
April 30.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

GOKUL DAS AND OTHERS (PLAINTIFFS) v. DEBI PRASAD AND OTHERS (DEFENDANTS).*

Mortgage—Redemption—Sub-mortgage—Sub-mortgagees impleaded—No specific prayer to redeem sub-mortgage.

The plaintiffs had purchased the equity of redemption of all the mortgaged property, part of which had been sub-mortgaged.

Held that, having made the sub-mortgagees parties, they were entitled to redeem the whole mortgage, although they might not have specifically sought to redeem the sub-mortgage; that the proper course was to ascertain what sum was due to the sub-mortgagees and to direct payment of that amount to the sub-mortgagees out of the amount payable for redemption of the whole mortgage. *Narayan Vithal Maval* v. *Ganoji* (3), followed.

THE facts are as follows:—

The plaintiffs were (1) Raja Seth Gokul Das, (2) Rai Bahadur Ballabh Das, (3) Seth Jiwan Das.

The defendants were (1) Debi Prasad, (2) Durga Prasad, (3) Gajadhar Prasad, minor under the guardianship of Debi Prasad, his father, (4) Gaya Prasad, minor, under the guardianship of Durga Prasad, his father, (5) Sukhdeo, (6) Balmakund, (7) Sita Ram, (8) Bindeshri, (9) Tapeshri, minors, under the guardianship of Sita Ram, their uncle, (10) Amarjit Singh, (11) Rai Seth Chandmal and (12) Mannu Lal.

Two persons, Mewa Lal and Amrit Lal owned the entire 16 annas of mauza Chapor Kalan *asli* with the *dakhili* villages. On 7th June, 1860, Mewa Lal and Dirgaj Singh, son of Amrit Lal, mortgaged the whole of the above property to Kishan Prasad and Behari Lal for Rs. 7,500, for ten years, the

* First Appeal No. 146 of 1904, from a decree of Rai Shankar Lal, Subordinate Judge of Mirzapur, dated the 16th April, 1904.

(1) (1872) 17 W. R., 525. (2) (1885) I. L. R., 11 Calc., 597.
(3) (1891) I. L. R., 15 Bom., 692.