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acquired the share of their father Mauladad Khan, which was also liable for the mortgage debt. It further appears that the plaintiffs had purchased at auction another part of the mortgaged property. So that it is manifest that the mortgage did not subsist as one indivisible mortgage, but each of the persons liable was only liable to the extent of his or her proportionate share of the debt. It was for this reason that the plaintiffs in the suit of 1894, claimed from each heir a proportionate part only of the mortgage debt and sought to bring to sale the share of that heir only for the realization of that part. This was the claim which was decreed, and therefore we must hold that the decree was in effect a separate decree against each of the heirs for the proportionate liability of that heir. That being so, Rashid-un-nissa's share was, according to that decree, liable for her proportionate share of the mortgage debt. By the decree of the Privy Council obtained by her that decree having been set aside, the plaintiffs are entitled to recover from her the portion of the mortgage debt for which she is liable.

It is next urged that the court below ought to have given credit to the appellant for any amount which Abdul Majid may have paid in excess of his quota of liability. This contention is, in our opinion, untenable, and the view taken by the court below in regard to it, is correct.

We, accordingly, dismiss the appeal with costs. We extend the time for payment of the mortgage money for a period of six months from this date.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji,*

LALI JAN (DEFENDANT) v. MUHAMMAD SHAFI KHAN (PLAINTIFF).\*

*Muhammadian law—Hanafi law—Gift—Construction of document—Condition in derogation of the grant invalid.*

A deed of gift of certain property provided as follows:—

'My son Naki Khan, will remain owner (*malik*) of the remaining two-thirds and of the said two-thirds Naki Khan will remain full and absolute owner of one-third (*malik kamal o katai*), and he shall have the powers of an owner with respect to it, and Naki Khan will be owner (*malik*) of the other third also, and his name will be entered in the khewat, but the income of it is given for the

\* Appeal No. 144 of 1911 under section 10 of the Letters Patent,

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maintenance of my minor grandson, Muhammad Shafi Khan, son of Muhammad Taqi Khan, deceased. According to law, Naki Khan is guardian of Shafi Khan, he must give the income of that one-third for the maintenance of the minor and Naki Khan will not have the power of transfer over that one-third during the life of the minor.'

*Held*, on a construction of the deed, that the condition against alienation was invalid; but the condition as to the payment of one-third of the income to Muhammad Shafi Khan was valid and attached to the property in the hands of a transferee who was found to have notice thereof. *Nawab Umjad Ally Khan v. Mussumat Mohumdes Begum* (1) followed.

This was an appeal under section 10 of the Letters Patent from a judgement of CHAMBER, J. The facts of the case are fully stated in the judgement under appeal, which was as follows :—

“Musammam Tamanna Begam executed a *tamliknama* whereby she made one-third of certain property *waqf* and provided as follows with regard to the remaining two-thirds :—

‘My son, Naki Khan, will remain owner (*malik*) of the remaining two-thirds, and of the said two-thirds Naki Khan will remain full and absolute owner of one-third (*malik kamil o katai*), and he shall have the powers of an owner with respect to it, and Naki Khan will be owner (*malik*) of the other third also, and his name will be entered in the *khawat*, but the income of it is given for the maintenance of my minor grandson, Muhammad Shafi Khan, son of Muhammad Taqi Khan, deceased. According to law, Naki Khan is guardian of Shafi Khan, he must give the income of that one-third for the maintenance of the minor and Naki Khan will not have the power of transfer over that one-third during the life of the minor.’

“Soon after Naki Khan sold the whole two-thirds of the property to the respondents Lali Jan, who is said to be a prostitute. In the present suit the appellant, Shafi Khan, suing by his next friend, prays for possession of one-third of the property and for cancellation of the deed of sale in favour of the respondent. The defence is that the whole two-thirds of the property were given to Naki Khan and under the Muhammadan law the conditions that he should not have power to transfer portion of the property and should make over the profits of that portion to Shafi Khan, are invalid and must be disregarded.

“The Munsif held that Shafi Khan was entitled to the profits of one-third of the property but not to possession of that share and passed a decree accordingly.

“Both parties appealed, and the District Judge held that all the conditions regarding one-third of the property were void, and that the respondent was not bound to make over the profits of that share to the appellant. Accordingly he dismissed the appeal of Shafi Khan, allowed the appeal of Lali Jan, and dismissed the suit of Shafi Khan with costs. Shafi Khan has appealed to this Court. S. A. No. 1119 is his appeal against the decree passed on his appeal to the District Court. S. A. No. 1120 is his appeal against the decree passed on the respondent's appeal to that court.

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"It is in the first place contended that the *tambitnama* gives one-third of the property to Shafi Khan out and out. If this view is correct, the appellant must succeed. I think, however, that it is impossible to construe the *tambitnama* as giving Shafi Khan one-third of the property out and out. It is possible to construe the deed as giving him one-third for life and to regard the provision that it shall stand in the name of his uncle as an arrangement for the management of the property. But it appears to me that according to the correct construction of the deed. Naki Khan takes the whole two-thirds out and out and the intention was to bind him to allow Shafi Khan to have the profits of one-third for his life. The question is whether such a condition is permitted by the Muhammadan law. The parties are *Sunnis*. According to the Hanafi Law any derogation from the completeness of a gift is null, and if the intention to give to the donee the entire subject-matter be clear, subsequent conditions derogating from or limiting the extent of the right are null and void. In other words, according to the Hanafi law, the gift is valid and the condition is void. (Ameer Ali on Muhammadan law, vol. I, p. 77). According to the same authority if a man was to give a piece of land to another on the condition that he should give to him the whole produce of the land in perpetuity the condition would be bad, but it is otherwise with a gift by A to B without any restriction on the power of disposition but subject to the condition that B should pay periodically to A a part of the usufruct of the property, both the gift and the condition would be valid, and if B should alienate the property, the assignee would take it subject to the condition. In these cases, says the learned author, the reason is obvious, for the reservation of an interest by the donor for himself or for himself and his heirs, does not interfere with the right of property vesting in the transfer by the act of transfer. For these propositions he cites the case of *Nawab Umjad Ally Khan v. Mohumdee Begum* (1) and the *Nawadir*, an authority which I have been unable to consult. SIR ROLAND WILSON (p. 334) states the law in the same way, but doubts the correctness of the decision in the case just cited. That was, however, a decision of their Lordships of the Privy Council, and it is binding upon me if it applies to the present case. The parties to that case were Shi'ahs, but the decision does not purport to rest upon any peculiarity of the Shia law. According to it, the condition that the donee, Naki Ali Khan, shall pay the usufruct of part of the property to his nephew is valid.

"The condition that Naki Ali Khan shall not alienate the property seems to be invalid. The respondent contends that she is not bound by the condition regarding the payment of the usufruct to the appellant because she is a purchaser for value and the property is not charged with the payment of the usufruct to the appellant. I cannot accept this contention. She must have had notice of the condition, for it was contained in the deed under which Naki Ali Khan acquired title to the property. She holds the property on the same terms on which Naki Ali Khan held it.

"For the above reasons I dismiss S. A. No. 1119 with costs, and I allow S. A. No. 1120 with costs here and in the lower appellate court and restore the decree of the court of first instance."

The defendant alone filed an appeal under section 10 of the Letters Patent.

Mr. *Abdul Raoof*, for the appellant :—

The view taken by the learned Judge is wrong. The condition attached to the gift under the Muhammadan law is invalid. The view taken by the learned Judge is correct under the Shia school of Muhammadan law, but not under the Sunni school. The parties in the present case are Sunnis. The ruling laid down by their Lordships in *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum* (1) does not apply, as the parties there were Shias. Mr. Ameer Ali's view is not in keeping with the orthodox school of Muhammadan law and should not be given effect to. He modernizes the Muhammadan law, which may be good, but it is not the law as it is understood in India. SIR ROLAND WILSON has criticised the ruling in 11 Moore's Indian Appeals.

Pandit *Mohan Lal Sandal*, for respondent :—

The case in 11 Moore's Indian Appeals is not based upon any peculiarity of Shia law. Though the parties in that case were Shias, their Lordships referred to the Hedaya, which is an authority under the Sunni School of Muhammadan Law. See Ameer Ali's Mahomedan Law, vol. I, pp. 77, 78, 85 and 86; Hedaya, p. 483; Abdul Rahman's Institutes of Musalman Law, Art. 439, pp. 250 and 442; *Kasim Husain v. Sharif-un-nissa* (2).

Mr. *Abdul Raoof* was heard in reply.

RICHARDS, C. J., and BANERJI, J.—The facts of the case and the questions of law which arise in it are fully dealt with in his judgement by our learned brother. In our opinion the conclusion at which he arrived is supported by the decision of their Lordships of the Privy Council in *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum* (1). That was no doubt a case between Shias, but the rule of law was considered as applying equally to Shias and Sunnis. This has been shown by Mr. Ameer Ali on page 86 of Vol. I of his well-known work on Muhammadan law. We dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1867) 11 Moo. L. A., 517.

(2) (1868) I. L. R., 5 All., 286.

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