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give the references, but we entirely approve the point of view of the tribunals who tried those cases. We, therefore, think this is a conviction which should be set aside and that the learned Magistrate should have considered the case as one properly falling within section 95 of the Indian Penal Code and should have dismissed it.

We, therefore, set aside the conviction, and order that the fine of Rs. 10, which we are told has been paid, should be refunded.

Conviction set aside.

APPELLATE CIVIL

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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March, 2.

RAM DHAN AND OTHERS (PLAINTIFFS) *v.* PRAYAG NARAIN AND OTHERS (DEFENDANTS)*.

Hindu law—Religious endowment—Requirements for the completion of a valid gift—Registered deed alone not sufficient without delivery of possession.

The mere execution of a deed of endowment is not sufficient under the Hindu law to create a valid endowment, but to complete the gift there must be a transfer of the apparent evidences of ownership from the donor to the donee. *Dajai Dabee* v. *Mothura Nath Chattopadhya* (1), *Kalidas Mullick* v. *Kanhaya Lal Pundit* (2) and *Watson and Co.* v. *Ramchund Dutt* (3) referred to.

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

Mr. *Nihal Chand* and Dr. *S. M. Sulaiman*, for the appellants.

Mr. *B. E. O'Conor*, Babu *Lalit Mohan Banerji*, Munshi *Girdhari Lal Agarwala* and Munshi *Panna Lal*, for the respondents.

MEARS, C. J., and BANERJI, J. :—This appeal arises in a suit for possession of a village called Itaura in the district of Agra and for mesne profits. This village originally belonged to one Rao Joti Prasad, who was a man of great affluence in the district

* First Appeal No. 184 of 1918 from a decree of Kauleshar Nath Rai, Subordinate Judge of Agra, dated the 28th of January, 1918.

(1) (1883) I. L. R., 9 Calc., 854. (2) (1884) I. L. R., 11 Calc., 121.
(3) (1890) I. L. R., 18 Calc., 10.

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of Agra and owned considerable property. Rao Joti Prasad in his life-time caused the name of his son Bishambhar Nath to be entered in the revenue papers in respect of the village of Itaura in 1866. In the year 1869 he executed a deed of gift of the property in favour of Bishambhar Nath. Rao Joti Prasad died in 1870 and after his death some disputes arose between Bishambhar Nath and his brother Amar Nath, the two surviving sons of Rao Joti Prasad. These disputes led to the execution of documents, to reference to arbitration, and finally in the year 1881 Bishambhar Nath was recognized as the owner of this village and his name continued to be recorded as such. In 1882 he made a mortgage of the village in question as well as of other property in favour of the Maharaja of Bharatpur. The Maharaja obtained a decree on the basis of the mortgage on the 7th of January, 1886, against Kannu Dei, the widow of Bishambhar Nath, who had in the mean time died. This decree ordered the sale of all the mortgaged properties, one of which was, as stated above, the village of Itaura. In execution of the decree the village was sold by auction on the 21st of August, 1905, and the present defendants became the purchasers and they have been in possession since the date of their purchase. After the lapse of nearly twelve years from the date of their purchase, that is, on the 26th of May, 1917, the present suit was instituted to oust them from the property of which they have been in possession for this length of time. The plaintiffs allege that Rao Joti Prasad, on the 13th of July, 1863, made an endowment of the village for the maintenance of *sadabart* for the support of the poor and the indigent, that the property is thus endowed property, and that it could not be sold in execution of a decree under a mortgage made by Bishambhar Nath The plaintiffs claim to be trustees of the endowed property under an appointment made in that behalf by the District Judge of Agra.

In the court below the genuineness of the document of the 13th of July, 1863, which was registered on the 11th of August of that year, was disputed, but the learned Subordinate Judge found that the document was genuine and there is no controversy before us on that point. The argument before us has proceeded

on the assumption that the document was executed by Rao Joti Prasad on the date mentioned in it.

The learned Subordinate Judge was of opinion that the document only indicated an intention to make an endowment and did not in fact create an endowment, and holding that the property continued in the ownership and possession of Rao Joti Prasad and his son Bishambhar Nath, dismissed the plaintiffs' suit.

We find it somewhat difficult to accept the view of the learned Subordinate Judge that there was merely an intention to make an endowment. The terms of the document which is printed on page 20 of the appellant's book, show that Joti Prasad did purport to make a present endowment of the village for the purposes mentioned above and directed that his two sons Bishambhar Nath and Amar Nath should receive the profits of the property and use them for the maintenance of the *sadabart*. It is contended that the mere execution of the document was sufficient to create a valid endowment. No doubt if a completed and valid endowment was made by the owner that would put it out of his power to revoke it. This is not disputed on behalf of the respondents, but what is urged on their behalf is that there was no completed endowment in the present case.

On behalf of the appellants it was contended by Mr. *Nihal Chand* that the execution and registration of a deed of endowment was sufficient to create a completed irrevocable endowment and to transfer the property to the trust for which the document was executed. It must be borne in mind that this document was executed long before the enactment of the Transfer of Property Act, and, therefore, the provisions of section 123 of that Act would have no application to the present case. We are unable to agree with Mr. *Nihal Chand's* contention that under the law as it existed before the enactment of the Transfer of Property Act mere execution and registration of a document was sufficient to create a trust. In our opinion the law on the subject is aptly and correctly stated by Mr. Mayne in his well known work on Hindu Law and Usage, 8th Edn., page 513, section 378, in the following terms :—" To complete a gift there must be a transfer of the apparent evidences of ownership from the donor to the

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donee." This proposition is supported by cases which are referred to in Mr. Mayne's book. A large number of cases have also been cited to us on behalf of the respondents, but we need only refer to a few of them.

In *Dagai Dabee* v. *Mothura Nath Chattopadhya* (1) the Court said:—"No case, however, has gone the length, so far as we are aware, of saying that a gift by a Hindu unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or by permitting the donee to receive rents, or other like act, is in itself a valid transaction, even though the deed of gift be registered."

In *Kalidas Mullick* v. *Kanhaya Lal Pundit* (2) their Lordships of the Privy Council at page 132 of the report refer to a case decided by the Bombay High Court with approval. The principle of that case is similar to that enunciated above.

In *Watson & Co.* v. *Ramchund Dutt* (3) their Lordships express a similar opinion and refer to the fact of possession not having been delivered as a circumstance which indicated that the gift had not been completed. Their Lordships further held that unless it was the intention of the maker of the endowment to divest himself of the property, the deed of endowment would have no effect.

Let us see whether in the present case Rao Joti Prasad intended to make a complete transfer of the property for the maintenance of an endowment and whether he divested himself of the ownership of it. According to one of the witnesses the circumstance which induced him to execute the document was that he was struck by paralysis and his wife induced him to make some charity in order that he might recover—this induced Joti Prasad to execute the document of the 13th of July, 1863. We find, however, that he had applied for the entry of his name in the revenue papers in place of Din Dayal, the deceased son of Damodar Das, one of his sons who had predeceased him. During the pendency of these proceedings for mutation of names, he acquired a further share in the village and on the 31st of August, 1863, he obtained an order from the Revenue Court for the entry

(1) (1883) I. L. R., 9 Calc., 854. (2) (1884) I. L. R., 11 Calc., 121 (3) (1890) I. L. R., 18 Calc., 10.

of his name as proprietor of the village. His name continued to be entered as proprietor until 1866, when by an application to the Revenue Court he caused the name of his son Bishambhar Nath to be entered as proprietor. Had Rao Joti Prasad intended to divest himself of the property and to vest it in trustees for the benefit of the charity, one would have expected that in the course of mutation proceedings which were pending at the time when the document of the 13th of July, 1863, was executed, he would have applied to the Revenue Court to enter the name of Bishambhar Nath and Amar Nath as trustees of the endowment which he wished to create. So far from his doing so he got his own name entered in the revenue papers as stated above. In the year 1866 he had the name of Bishambhar Nath alone recorded in the revenue registers in respect of this village and in 1869 he executed in favour of Bishambhar Nath a deed of gift in respect of this village in which he stated that he had given the village to Bishambhar Nath in 1865 for his personal expenses. It thus appears that during his life-time Rao Joti Prasad never intended that the deed of endowment executed by him in 1863 should take effect. As was remarked in the course of the argument, it seems that there was only a temporary intention to make an endowment of the property, but that intention does not appear to have at any time been carried into effect. After the death of Joti Prasad his two sons Bishambhar Nath and Amar Nath dealt with this property as part of the estate of Rao Joti Prasad and when they entered into deeds of agreement or referred disputes to arbitration, they treated this property as part of the general estate and not as property which had passed out of the estate by reason of a valid endowment. Furthermore, there is no satisfactory evidence to prove that the income from this village was devoted to purposes of charity.

We were referred to a report made by a commissioner appointed to examine certain account books in previous litigation to which the present parties were no parties. The actual account books were not produced in the present case nor do they appear to have been produced in the previous suit. A report was submitted from which it appears that between the years 1883 and 1898 something like Rs. 16,000 were spent in maintaining a

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sadabart or *chattar* at Agra. But there is no evidence to prove that this expenditure was incurred out of the income of the village of Itaura. It cannot, therefore, be said that the income of the village was devoted to the maintenance of the charity to which a reference was made in the document of 1863. Since the date of the document Rao Joti Prasad, as we have stated above, treated the property as if it was his own private property. As already stated, he in 1866 caused the name of his son Bishambhar Nath to be entered as owner of this property. In 1869 he executed a deed of gift by which he bestowed this property on Bishambhar Nath. In 1881 Bishambhar Nath and his brother dealt with the property as their private property and not as endowed property; and in 1882 Bishambhar Nath mortgaged it as the owner of it. There is nothing to show that the income of the property was devoted to the purposes of the endowment and that it was ever treated as endowed property which did not form part of the estate of Joti Prasad or of Bishambhar Nath. In these circumstances we think that the plaintiff has failed to prove that a completed and valid endowment was made by Rao Joti Prasad and that the property has not been acquired by the defendants by virtue of their auction purchase.

In the view we have taken above, it is unnecessary to enter into the question of limitation or into the question of *res judicata* with which the court below has dealt.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1921
March, 2.

MUHAMMAD ISMAIL AND ANOTHER (PLAINTIFFS) *v.* MUHAMMAD ISHAQ AND OTHERS (DEFENDANTS) *

Muhammadan law—Waqf—Will—Construction of document.

A Muhammadan lady by her will devised certain property to her two brothers enjoining them to sell the same and with the proceeds erect a mosque. The will, however, provided further that if the devisees preferred to keep the property themselves, they could do so if they devoted the value of the property (given in the will at Rs. 2,500) to the construction of a mosque. *Held* on a construction of the will that the waqf created thereby was a waqf

* First Appeal No. 259 of 1918 from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 25th of March, 1918.