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In regard to the cross-objection filed by Gopal Das, we do not consider that the learned Subordinate Judge exercised his discretion improperly or unwisely in refusing to allow Gopal Das his costs as against the Oudh Commercial Bank. The suit had failed only on the point of limitation, and although it had failed, there was something to be said for the view that there was no reason why the Bank should be asked to pay the costs of Gopal Das. If the matter had come before us as *res integra* we might have taken a different view. On the other hand, we might not have taken a different view. But this is not an occasion on which we should feel disposed to interfere with the discretion of the learned Subordinate Judge who tried the case carefully and well. We, therefore, dismiss the cross-objection also with costs.

Stuart, C. J., and Raza, J.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Gokaran Nath Misra.

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March, 22.

MUSAMMAT WAHIBUNNISA (PLAINTIFF-APPELLANT) *v.* MUSHAF HUSAIN AND OTHERS (DEFENDANTS-RESPONDENTS).*

Deed of settlement, interpretation of—Tamliknama—*Deed of settlement by father in favour of male issue and providing devolution of interest of any son dying childless on his surviving brothers, right of other heirs of deceased to succeed—Interpretation of documents, rules of—Muhammadan law—Shia law—Life estate, creation of, among Shias.*

Where a father, in order to settle his property upon his male issue and to make such arrangement for the other members of his family as might prevent future disputes, executed

* First Civil Appeal No. 60 of 1924, against the decree of Gopindra Bhushan Chatterji, Subordinate Judge of Rae Bareli, dated the 30th of May, 1924.

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a deed of settlement (*tamliknama*), and by means of it settled his property in equal shares upon his three sons and allowed maintenance to the other members and one of the terms was that if any of his sons, upon whom the property had been settled, died without leaving any male issue, then his one-third share would devolve upon the surviving brothers and their children and no heir of the deceased was to inherit the property left by him, *held*, that the correct interpretation to be put upon the deed of settlement is that the property was given to the three sons by the executant with a gift over in favour of the surviving sons in case any one of them died issueless. One of the sons having died and the contingency contemplated having occurred his share in the property cannot go to his heirs other than the surviving brothers as provided in the deed of settlement. To allow the plaintiff, the mother of the deceased, to take a share by inheritance in the property left by her son would be to go against the very intention of the executant of the deed of settlement [*Sreemutty Soorjeemoney Dossey* v. *Dinobundoo Mullick* (1) and *Tarokessur Roy* v. *Soshi Shikhuressur Roy* (2), followed.]

It is unsafe to interpret the provisions of a deed piecemeal and to rely upon them for the purpose of determining the rights conferred on a particular individual mentioned therein. In order to put a correct interpretation on a deed it must be looked to as a whole. It would be unsafe to ignore certain express provisions in the deed and merely to rely upon the rest. Such an interpretation has never found favour with the Judges in this country, nor has it been regarded as a correct rule of interpretation by their Lordships of the Privy Council.

Held further, that among Shia Muhammadans according to Shia law the creation of a life-estate is perfectly valid and it was, therefore, perfectly legitimate on the part of a Shia Muhammadan to provide in the deed of settlement that in case of one of his sons dying without leaving any male issue the property left by the deceased was to go to his surviving brothers. [*Siraj Husain* v. *Mushaf Husain* (3), and *Bahoo Begam* v. *Mir Abad Ali* (4), relied upon.]

(1) (1861) 9 M.I.A., 123.
(2) (1883) I.L.R., 9 Calc., 952.
(3) (1921) 24 O.C., 321: 9 O.L. J., 149.
(4) (1908) 32 Bom., 172.

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MUSAMMAT WAHIBUN-NISA v. MUSHAF HUSAIN.

Messrs. *K. P. Misra*, *Radha Krishna* and *Ali Zaheer*, for the appellant.

Messrs. *Ali Muhammad*, *S. M. Ahmad*, *Zahur Ahmad* and *Makund Bihari Lal*, for the respondents.

Misra, J.

MISRA, J. :—This is a plaintiff's appeal in a suit brought by her for recovery of a share in the property left by her son, one Syed Murtaza, which she alleged she was entitled to. The facts shortly stated are :

The plaintiff is the wife of one Syed Mushaf Husain, who is defendant No. 1 in the case. Defendants Nos. 2 and 3, Syed Raziuddin and Syed Abbas Husain, respectively, are her sons from defendant No. 1. There was a third son, named Syed Murtaza, who died on the 18th of April, 1910. Mushaf Husain executed a deed of settlement (*tamliknama*), dated the 30th of March, 1906, under which he settled his property in equal shares upon his three sons, defendants Nos. 2 and 3, and the abovenamed Syed Murtaza, since deceased. Under the terms of that deed various sums were allotted for maintenance of the daughter, wife and mother of the executant, defendant No. 1. One of the conditions embodied in the deed was to the effect that if any of his sons upon whom the property has been settled died without leaving any male issue, his one-third share would devolve upon the surviving brothers, and in no case other heirs of the deceased would be entitled to that property. After the execution of the deed, mutation of names was effected in favour of the three sons of defendant No. 1 in equal shares. One of the sons, Syed Murtaza, died as stated above on the 18th of April, 1910, and in respect of his one third share the names of his other two brothers were brought on the record. The plaintiff claims her legal share in that one-third share left by

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her deceased son, Syed Murtaza. Defendants Nos. 4 to 36 were impleaded, being transferees of different portions of the property in suit from defendant No. 1.

Defendant No. 1, the husband of the plaintiff and father of defendants Nos. 2 and 3, did not contest the suit and the proceedings were held *ex parte* against him. Defendants Nos. 2 and 3 and the transferees-defendants contested the suit. The main plea taken by them in defence was that on a proper interpretation of the deed of settlement (*tamliknama*) the interest conferred upon Syed Murtaza was merely a life-estate, or in any case an estate which came to an end on his death because he died issueless. The contention was that whatever interest was conferred on him it did not pass by inheritance after his death to his mother, the plaintiff. The transferees also contended that, under section 41 of the Transfer of Property Act (IV of 1882), they being *bonâ fide* transferees for value, were protected and that the plaintiff's suit could not be maintained against them. It is not necessary for purposes of this appeal to enumerate other pleas raised in defence, because we are not in any way concerned with them in appeal.

The two main points round which the contest centred were :—

(1) Whether the rights conferred upon Syed Murtaza under the terms of the deed of settlement, dated the 30th of March, 1906, could be inherited by the plaintiff, Syed Murtaza having died issueless?

(2) Whether the transferees-defendants were protected under section 41 of the Transfer of Property Act, as mentioned above?

The learned Subordinate Judge of Rae Bareli, who tried the case, came to the conclusion that the rights

conferred under the deed of settlement on Syed Murtaza came to an end on his death because he died issueless, that the said rights had passed on by survivorship to his other two brothers, defendants Nos. 2 and 3, and that the plaintiff did not inherit anything. He held that the transferees-defendants who had taken transfers of portions of the property in suit were not protected under section 41 of the Transfer of Property Act.

The plaintiff has now come up to this Court in appeal, and the point argued on her behalf was that under the terms of the deed, if properly interpreted, an absolute estate had been conferred upon each of the three sons, including Syed Murtaza, the deceased, and any condition laid down in respect of the succession of the said property contrary to the Muhammadan law, was void and inoperative.

On behalf of the transferees-defendants the finding of the learned Subordinate Judge in regard to section 41 of the Transfer of Property Act (IV of 1882) was challenged. The result of this was that both the points mentioned above were discussed at length in appeal. I now proceed to decide the appeal.

As to the first point, it may be stated at the very outset that the decision of the point depends on the proper interpretation of the terms of the deed of settlement. In order that we might be able to place a correct interpretation on the said deed it is necessary that we should briefly state the provisions contained therein. In the preamble the executant (defendant No. 1) stated that at the time of the execution of the deed there were in existence his wife, Musammat Wahibunnisa, three minor sons named Syed Murtaza, Syed Raziuddin (defendant No. 2) and Syed Abbas Husain

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(defendant No. 3) and one daughter, Musammat Zakia Begam, and that with a view that his family affairs may be settled and future dispute and disunion may be avoided, it was necessary for him that he should execute a deed of settlement. The property consisting of three entire villages, namely, Kotra Bahadurganj, Malikpur and Mustafabad, all situate in the district of Rae Bareli, was then declared by him to be the property of the abovenamed three minor sons in equal shares (*bahissa masavi malik muaziat mazkur ka qarar dekar*). As the three sons were minors at the time of the execution of the deed of settlement, the executant, their father, was to remain superintendent and manager of the property without power of alienation, and if he died before all the three sons had attained majority, the one who attained majority was to act as the superintendent and manager of the shares of his minor brothers without having any power of transfer. On becoming major, each son in whose favour the settlement had been made was competent to exercise his proprietary rights (*bad balug harek mumlik lahu ikhtiyar malikana ke nifaz ka majaz hoga*). Just after this came the important clause to the effect that if, God forbid, any son died childless, his share was to devolve on his surviving brothers and their children and no other heir of the deceased was to inherit the property left by him. Then provision was made for the maintenance of her daughter, Musammat Zakia Begam, by giving her an annual *guzara* (maintenance) of Rs. 360 in cash and declaring the said maintenance to be a charge on certain lands situate in village Kotra Bahadurganj. The said lady was to get this maintenance for her lifetime without power of transfer and after her death it was to devolve on her male issue with the same restriction. A provision was also made for the

maintenance of the executant and his wife by providing that a sum of Rs. 720 was to be paid to them annually on this account out of the income of the said villages. If the wife died during the lifetime of the executant, he was to receive the entire sum, and if he predeceased his wife, then she was to receive Rs. 200 annually for her lifetime, the remaining Rs. 520 was to devolve on his sons or their descendants. Lastly, a provision was made for the maintenance of Musammat Wahibunnisa, the mother of the executant, by giving her an annual maintenance of Rs. 400. It was stated in the deed that no heirs of the executant were to claim by right of inheritance any right in the property covered by the deed of settlement in contravention of the provisions contained therein. It was further stated in the deed that in each of the three villages settled by means of the deed every right of any sort whatsoever was to be considered to have been included in the deed and that the executant was to possess no right of ownership either in whole or in part of those villages, except the maintenance fixed (*aur tarikh tamlik haza se bajuz guzara muqarra pane ke aur koi milkiat minmuqir ki kul ya kisi juzw mawazeat mazkur men baqi na rahegi*).

On behalf of the plaintiff-appellant it was strenuously contended, as stated above, that full proprietary rights had been conferred upon the three sons and the provision contained in the deed regarding the devolution of the interest of any of his sons dying childless on his surviving brothers was legally void and inoperative. Several authorities bearing on this point in general law as well as especially Muhammadan law were cited to show that where absolute estate had been conferred on a person under a particular deed of grant, any condition incorporated

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in that deed curtailing his right of transfer was inoperative.

At the outset I might state that we do not dispute the proposition of law in support of which various authorities were quoted. The real point for determination in my opinion, however, is to find out what was the interest conferred upon each of the minor sons under the deed of settlement which we have before us.

We must remember that the deed which we have to interpret is not a deed of gift pure and simple giving the property to one person absolutely. It is a deed of settlement executed by the father to settle his property upon his male issue and also to provide for the maintenance of himself, his wife, his daughter and his mother, in short, to make such arrangements for the members of his family and for those whom he was morally bound to support, as might prevent future disputes. In a deed of this nature I am of opinion that it would be unsafe to interpret its provisions piecemeal and to rely upon them for the purpose of determining the rights conferred on a particular individual mentioned therein. In order to put a correct interpretation on a deed it must be looked to as a whole. It would be unsafe to ignore certain express provisions in the deed and merely to rely upon the rest. Such an interpretation has never found favour with the Judges in this country, nor has it been regarded as a correct rule of interpretation by their Lordships of the Privy Council. In *Sreemutty Soorjeemoney Dossey* v. *Dinobundoo Mullick* (1) a similar case went to their Lordships of the Privy Council in appeal from the decree of the High Court at Calcutta and they had to interpret a will executed by one Bustomdoss Mullick, a Hindu inhabitant of the city of Calcutta, who by means of his will had

(1) (1861) 9 M.I.A., 123.

left his property to his five sons making them complete owners thereof and further providing that should any of his said five sons die not leaving any male issue, in that event neither his widow nor his daughter nor his daughter's sons were to get any share in the property of the deceased, but the property was to go to such of his sons and sons' sons as might survive the deceased. The clause laying down this condition was clause (II) of the will. One of the sons of the testator died leaving his widow but no male issue, and the question arose whether the share of the deceased son was to go to his widow in accordance with the provisions of Hindu law, or whether it was to go to the surviving brothers of the deceased as was pdovided in the will. Sir BARNES PEACOCK, who then presided in the Calcutta High Court, decided against the widow and said that the real question was to see what was the intention of the testator. He observed that the clause in the will giving all the property, movable and immovable, to the five sons was to be read along with the subsequent clause laying down how that property was to devolve in case of any of his sons dying without leaving any male issue. In his opinion the absolute gift in the first clause of the will was defeated by the provision in the subsequent clause (II). Lord Justice KNIGHT BRUCE in delivering the judgment of their Lordships of the Privy Council said that there was nothing against the general principles of Hindu law in allowing a testator to give his property whether by way of remainder, or by way of executory bequest, upon an event which was to happen, if at all, immediately on the close of a life in being, and that there would be great general inconvenience and public mischief in denying such a power. He then declared that, in thhe opinion of their Lordships according to the true meaning of the will, the property was given over upon an event which was

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to take place, if at all, immediately on the close of a life in being at the time when the will was made, and seeing that that event had happened the property was to go to the person or persons indicated in the will.

Misra, J.

The learned Subordinate Judge who tried the present case was of opinion that the above case fully applied to the facts of the present case, and I am in entire agreement with him in this view. In my opinion the correct interpretation to be put upon the deed of settlement, which we have to interpret in this case, is that the property was given to the three sons by the executant with a gift over in favour of the surviving sons in case any one of them died issueless. Syed Murtaza was one of the sons upon whom one-third share was settled with the condition just mentioned. The contingency contemplated by the executant has happened and his share in the property cannot now go to heirs other than his surviving brothers as provided in the deed of settlement. In a subsequent case in *Tarokessur Roy* v. *Soshi Shikhuressur Roy* (1) a similar view was again taken by their Lordships of the Privy Council. In this case a testator by his will gave to three sons of his brother a certain estate "for payment of the expenses of their pious act" and also provided that the said three nephews were to hold possession of the property in equal shares and were to pay the Government revenue into the Collectorate, and that if any died without leaving a male child, then his share was to devolve on the surviving nephews and their male descendants and not on other heirs. In interpreting the will their Lordships said that they could not construe the gift as conferring an absolute estate independently of the words prescribing the course of succession. They declared that, in their opinion, to ignore the words prescribing the course of succession as laid down in the will would be, in effect,

(1) (1883) I.L.R., 9 Calc., 952.

to make a new will for the testator and one which, so far from carrying his intention into effect, would be in direct opposition to his intention. It might be similarly said that in the present case to allow the plaintiff to take a share by inheritance in the property left by her son, Syed Murtaza, would be to go against the very intention of the executant of the deed of settlement, dated the 30th of March, 1906.

During the course of arguments it was contended on behalf of the appellant that to interpret the deed of settlement in the manner in which we have interpreted it was to confer what would practically be a life estate under the Muhammadan law. The argument was that creation of such a life-estate was invalid under the said law. I do not agree with that wide proposition. We are dealing with a case of Shia Muhammadans, and whatever may be said regarding the validity of creation of such a life-estate among the Sunnis, about which we express no opinion, it is clear that among Shias according to Shia law the creation of a life-estate is perfectly valid.

This question only recently came up in appeal in the late Court of the Judicial Commissioner of Oudh and it was exhaustively discussed by our learned brother, Mr. Justice WAZIR HASAN (then A.J.C.), and after referring to the original authorities he came to th conclusion that under the Shia law the creation of a life-estate and the gift of a deferred estate, which would amount to a vested remainder in English law, was clearly permissible and such a power could be exercised by a Shia Muhammadan in respect of immovable property of any character whatsoever (vide *Siraj Husain* v. *Mushaf Husain* (1). The decision of Sir LAWRENCE JENKINS, C.J., and Justice HEATON in *Bahoo Begam* v. *Mir Abad Ali* (2), was approved of

(1) (1921) 24 O.C., 321=9 O.L. J., 149. (2) (1908) 32 Bom., 172.

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and followed in that case by our learned brother. It would serve no useful purpose on my part to discuss the question at length over again, and I would content myself with saying that I entirely agree with the view taken in that case. In my opinion, therefore, it was perfectly legitimate on the part of defendant No. 1 to provide in the deed of settlement that in case of one of his sons dying without leaving any male issue the property left by the deceased was to go to his surviving brothers.

Misra, J.

On this view of the case the appeal fails; and it is not necessary for us to decide the second point raised by the defendants-transferees.

The appeal, therefore, fails and is dismissed with costs.

STUART, C. J. :—I concur.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Mohammad Raza.

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March, 30.

ALLAHABAD BANK, LTD., FYZABAD (DEFENDANT-APPELLANT) *v.* TH. SHEO BAKHSH SINGH (PLAINTIFF-RESPONDENT).*

Principal and agent, rights and liabilities of—Indian Contract Act—Agent making a mistake, whether entitled to rectify it—Agent's liability to indemnify the principal.

The plaintiff held 54 preference shares of Rs. 100 each in the Alliance Bank of Simla, Ltd. He sent the scrip to the Fyzabad branch of the Allahabad Bank with directions to sell them for him at Rs. 83 or upwards. That branch sent the scrip and transmitted the directions to their Head office at Calcutta. The Head office by mistake sold the

* First Civil Appeal No. 31 of 1925, against the decree of E. M. Nanavutty, I.C.S., District Judge of Fyzabad, dated the 9th of December, 1924.