APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty.

MUHAMMAD AYUB KHAN (DEFENDANT-APPELLANT) *v.* MUSAMMAT GAUHAR BEGAM (PLAINTIFF-RESPONDENT).* 1932 *March* 8.

Muhammadan Law—Marz-ul-maut—*Essentials of* marz-ul-maut—*Executant in serious condition, apprehending imminence of death—Deed, if executed during* marz-ul-maut—Waqf *executed during* marz-ul-maut, *if operates only on one-third of property.*

An essential condition of marz-ul-mut is that the person suffering from it must be under a preponderance of apprehension of death, or, in other words, there must be the subjective feeling in the mind of the patient that he is not going to recover. This fact is to be proved like any other fact. The statements, if any, made by the patient giving expression to his apprehensions, would constitute valuable evidence but, apart from such statements, the fact can be proved in other ways. The nature of the illness and condition of the patient constitute external indicia which can afford valuable evidence on the point.

Where, therefore, it is proved that the condition of the executant of a deed of *waqf* on the date of execution was serious, that he was and must have been under an apprehension of the imminence of death, it must be held that the deed was executed during *marz-ul-maut*. *Hassarat Bibi* v. *Golam Jaffar* (1), *Ibrahim Goolam Ariff* v. *Saiboo* (2), *Fatima Bibi* v. *Sheikh Ahmad Bakhsh* (3), *Karimanissa Bibi* v. *Hamedulla* (4), and *Rashid-ud-din Khan* v. *Nazir-ud-din* (5), referred to.

Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the appellant.

Messrs. *Muhammad Ayub*, *Muhammad Husain* and *Piarey Lal Varma*, for the respondent.

SRIVASTAVA and NANAVUTTY, JJ. :—This is a defendant's appeal against the judgment and decree dated

*First Civil Appeal No. 2 of 1931, against the decree of Dr. Chaudhri Abdul Azim Siddiqi, Additional Subordinate Judge of Lucknow, dated the 23rd of September, 1930.

(1) (1898) 3 O.W.N., 57. (2) (1907) L.R., 34 I.A., 167.
(3) (1907) L.R., 35, I.A., 67. (4) (1925) 30 C.W.N., 129.
(5) (1929) A.I.R., Lah., 721.

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the 23rd of September, 1930, of the Additional Subordinate Judge of Lucknow. It arises out of a suit based on inheritance.

One Muhammad Ismail Khan, a Muhammadan of the Hanafi faith, who owned certain zemindari properties, died issueless on the 13th of August, 1929. He left a sister, Musammat Gauhar Begam, plaintiff, and a brother, Muhammad Ayub Khan, defendant, surviving him. The plaintiff claimed a decree for a one-third share in the zemindari properties left by the deceased Muhammad Ismail Khan.

The defendant resisted the claim, on the ground that on the 6th of August, 1929, just a week before his death, Muhammad Ismail Khan had executed a deed of *waqf alalaulad* in respect of his entire properties. The deed provided that Muhammad Ismail Khan himself was to be the first trustee and after him his brother, Ayub Khan, defendant, and his male heirs were to be the trustees of the property. He also pleaded that according to a family custom, sisters were excluded from inheritance in competition with the brothers.

The plaintiff denied the genuineness of the deed of *waqf* and challenged it on several grounds, only one of which is material for the purpose of this appeal, namely, that it was executed during *marz-ul-maut*. She also denied the alleged custom about the exclusion of sisters from inheritance.

The learned Subordinate Judge held the custom of exclusion of sisters in the presence of brothers not proved. As regards the deed of *waqf*, he held that it was genuine but was executed during *marz-ul-maut*. All the other grounds set up by the plaintiff against the validity of the deed of *waqf* were decided against the plaintiff. As a result of the finding that the deed of *waqf* was executed during *marz-ul-maut*, the learned Subordinate Judge held that it was good only to the extent of one-third of the property, and that the remaining two-thirds was available for division

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between the parties according to their shares in the inheritance. He accordingly decreed the plaintiff's claim for a one-third share out of two-thirds in the immoveable property left by Muhammad Ismail Khan.

Thus the only question raised by the defendant-appellant is as regards the correctness of the lower court's finding on the question of the deed of *waqf* having been executed during *marz-ul-maut*. Whatever obscurity or difference in regard to the interpretation of the principles governing the law of *marz-ul-maut* might have existed amongst Muhammadan jurists, the law on the subject has now been sufficiently settled by a number of judicial decisions.

Srivastava, and Nanavutty, JJ.

In *Hassarat Bibi* v. *Golam Jaffar* (1) a Bench of the Calcutta High Court consisting of AMEER ALI and PRATT, JJ., observed as follows:—

> "A careful study of the principles enunciated in the most authoritative Hanafi works would show that in determining whether the donation of a person suffering from a mortal illness comes within the doctrine applicable to *marz-ul-maut* gifts, several questions have to be considered, viz. (1) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death? (2) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender in him the apprehension of death? (3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create on the mind of the sufferer an apprehension of death? (4) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or

(1) (1898) 3 C.W.N., 57.

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to accustom the sufferer to the malady? The limit of one year mentioned in the law books does not, in our opinion, lay down any hard and fast rule regarding the character of the illness; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of a mortal illness."

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In *Ibrahim Goolam Ariff* v. *Saiboo* (1) where certain deeds of gift were attacked on the ground of their having been executed during *marz-ul-maut*, their Lordships of the Judicial Committee remarked as follows :—

> "The law applicable is not in controversy; the invalidity alleged arises where the gift is made under pressure of the sense of the imminence of death.
>
> The difficulty is in applying this to the subtle and conjectural problem of the mental condition of the testator in each case."

Again *Fatima Bibi* v. *Sheikh Ahmad Bakhsh* (2) their Lordships of the Judicial Committee held that where the issue is raised as to the invalidity of a gift under the Muhammadan law of *Marz-ul-mant*, a right test is whether the deed of gift was executed by the donor under apprehension of death. In *Karimanissa Bibi* v. *Hamedulla* (3), Mr. Justice MUKERJI after an elaborate discussion of the original texts and the decided cases held that the crucial test as settled by the authorities was whether there was an apprehension of death in the mind of the donor. He further observed that the possession of one's senses and faculties was no index of this apprehension. In *Rashid-ud-din Khan* v. *Nazir-ud-din* (4), Mr. Justice AGHA HAIDAR held that the crux in all these cases is to find out the state of the mind of the deceased in order to ascertain

(1) (1907) L.R., 34, I.A., 167.
(2) (1907) L.R., 35, I.A., 67.
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whether there was such a preponderance of apprehension of death at the time of the execution of the deed in question that death seemed to him more probable than life.

Thus the law seems to be clear that an essential condition of *marz-ul-maut* is that the person suffering from it must be under a preponderance of apprehension of death, or, in other words, there must be the subjective feeling in the mind of the patient that he is not going to recover. This fact is, in our opinion, to be proved like any other fact. The statements, if any, made by the patient giving expression to his apprehensions, would no doubt constitute valuable evidence but, apart from such statements, the fact can, in our opinion, be proved in other ways. For instance the nature of the illness and the condition of the patient constitute external indicia which can afford valuable evidence on the point.

Srivastava, and Nanavutty, JJ.

Next we have to examine the evidence in the light of the law as stated above. Our task has been considerably lightened by the careful and well balanced manner in which the question has been dealt with by the learned Subordinate Judge. It is admitted that the deceased Muhammad Ismail was seventy years old at the time of his death. It is in evidence and is not disputed that he had led a life of profligacy. Even at the time of his death he had a prostitute as his mistress and had been living in her house. It is the defendant's own case that for twelve or thirteen months preceding his death, he had been ill but we are satisfied that the particular malady which resulted in his death commenced only a few months before his death. This malady has been described by Dr. Raghunandan Lal, P. W. 2, the only medical man examined in the case as stricture of the oesophagus (narrowing of the food pipe). When the ailment grew more serious and he began to feel difficulty not only in swallowing solid food but also in drinking liquids, he was brought to Lucknow for treatment. On the 23rd of July, that is

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about two weeks before the execution of the deed of *waqf*, Dr. Raghunandan Lal took a skiagram of his throat. His evidence shows that the patient could not drink properly even a thin emulsion of cyto barium which the Doctor had given him to swallow. Dr. Raghunandan Lal has deposed that a person who cannot swallow even such a liquid, if not treated properly, would die of sheer starvation in the course of time. Nawab Muhammad Ali Khan, D. W. 3. has deposed that Muhammad Ismail had given up taking any food and that for this reason he was naturally very weak. He has also stated that he signed the deed of *waqf* (exhibit A1) lying in bed. The learned counsel for the defendant-appellant placed before us the entire evidence led by the parties. We agree with the learned Subordinate Judge that the witnesses for the plaintiff have in some respects tried to exaggerate the condition of Muhammad Ismail Khan. We have equally little doubt that the witnesses for the defendant have tried to minimize the ailment.

P. W. 1, Jalil Ahmad Khan, who is equally related to the parties, deposed that Ismail Khan told him that he despaired of his life. Similarly, P. W. 7, Muhammad Yakub Khan, who pays a Government Revenue of Rs.500 who saw Muhammad Ismail Khan about the end of July, 1929, has also stated that the deceased told him that he had no hope of surviving. In view of the circumstances stated above we see no reason to disbelieve these statements.

Musammat Maqsoodan, the mistress of Muhammad Ismail Khan, came to Lucknow in the end of July, 1929. She says that she found him in a precarious condition of life. He was mostly unconscious. Her statement receives material corroboration from a postcard which she wrote to her son on the 4th of August, 1929, two days before the execution of the deed of *waqf* In this postcard she had stated: "The condition of Muhammad Ismail is very precarious. May God be

merciful." No reason has been suggested to us for her making this statement falsely or to give unnecessary alarm to her son at the time when she wrote this post-card. The manner in which Muhammad Ismail has scribbled his signatures on the deed of *waqf* is also very significant. It shows that his hand must have been greatly shaking and he was quite unable even to write his name.

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We do not consider it necessary to discuss the evidence of each witness. The evidence was read to us at length by the counsel for the appellant. After making every allowance for exaggeration, the conclusion reached by us as a result of the examination of the entire evidence is that the condition of Muhammad Ismail Khan continued to grow worse day by day since he was brought to Lucknow, that he was practically starving, had given up even taking medicines and had grown very weak.

P. W. 4, Dawar Ali, is the Sub-Registrar who was called to register the deed of *waqf* on the 12th of August, 1929. When he reached the house, he found that Muhammad Ismail was not in his senses and therefore refused to register the deed. It is true that this statement relates to the condition of Muhammad Ismail Khan a week after the execution of the deed of *waqf* but the defendant Ayub Khan in his statement as D. W. 2 has stated as follows :—

> "I do not remember how many times in the week from 6th to 13th August did he suffer in the same way in which he was suffering on the 12th of August when the registration was refused. He was in the same condition on 9th, 10th, 11th and 12th August, with the only difference that on the 12th August he was still weaker. On 6th, 7th and 8th too his condition was the same as on 12th with the only difference that on the 12th he was feeling still weaker."

Thus having given our careful consideration to all the evidence and circumstances of the case, we find no

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difficulty in agreeing with the learned Subordinate Judge that the condition of Muhammad Ismail on the date of the execution of the deed of *waqf* was serious, that he was and must have been under an apprehension of the imminence of death. We must therefore uphold his finding that the deed in suit was executed during *marz-ul-maut*.

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The plaintiff-respondent has filed cross-objections impugning the findings given against her. The only point urged in support of the cross-objections by the learned counsel for the plaintiff was that the learned Subordinate Judge having held that the *waqf* deed was executed during *marz-ul-maut* and therefore could take effect only as a will, was wrong in holding that it was enforceable with regard to one-third of the property. His argument is that the deed in question being in favour of the defendant who was an heir of Muhammad Ismail under the Muhammadan law ought to be held wholly invalid. This is a new plea which was not raised in the lower court but even on the merits we think that the contention has no force. The deed of *waqf* only appoints the defendant as a *mutawalli* after himself. The fact that the defendant as a trustee will be in a position to derive certain benefits does not make it a disposition of property in his favour. We must accordingly overrule the contention.

The result therefore is that we uphold the decision of the lower court and dismiss the appeal and the cross-objections with costs.

Appeal dismissed.