APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge, and Mr. Justice Ziaul Hasan

SHEIKH BHULAI (DEFENDANT-APPELLANT) *v.* MUSAMMAT RUQQAN AND OTHERS (PLAINTIFFS-RESPONDENTS)* 1936 *October* 16

Muhammadan Law—Waqf—Muafi register—Entry as muafi for taziadari purposes—Muafi recorded in name of three brothers in equal shares—Settlement decree providing for assessment of land revenue, etc., on muafi land—Khewats making on mention of waqf—Co-sharers dealing with property as personal property—Property, if waqf—Transfer of Property Act (IV of 1882), section 41, applicability of.

In all cases of muafi the actings or statements of the grantee or his successor may be relevantly taken into account as to their interpretation of the original grant; while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things are not conclusive, but are circumstances worthy of consideration.

Where the muafi register shows that the land in suit was recorded in the names of three brothers in equal shares and it was provided that it will last till the life of the last holder and the settlement court decree provided that on the death of the eldest brother and his co-sharers, the muafi will be assessed with land revenue, sewai and haq-i-taluqdari and the khewats recorded the names of the co-sharers as proprietors and there was no mention of any waqf in them and the co-sharers have been dealing with the property as their personal property, the waqf cannot be held to be proved. *Muhammad Raza* v. *Yadgar Husain* (1), and *Shah Muhammad Naim Ata* v. *Muhammad Shamsuddin* (2), distinguished.

Where, if the defendant, while taking a simple mortgage of the property, had taken a little care to ascertain the real facts, he could not have failed to discover that the would-be mortgagors had two sisters who were entitled under the law to share the property with them, the defendant cannot be protected by section 41 of the Transfer of Property Act so far as the legal shares of the sisters are concerned.

*Second Civil Appeal No. 328 of 1934, against the decree of Babu Gauri Shankar Varma, Additional Civil Judge of Gonda, dated the 19th of September, 1934, modifying the decree of Babu Badri Prasad Tandon, Munsif of Tarabganj at Gonda, dated the 30th of January, 1934.

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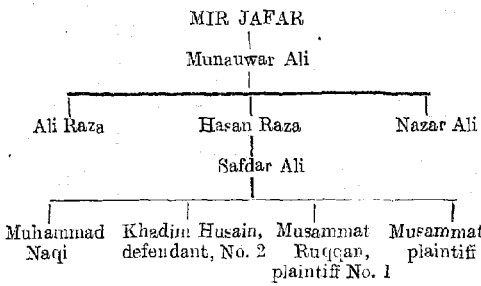
Messrs. *M. Wasim* and *Ali Hasan,* for the appellant.

Mr. *Ali Zaheer,* for the respondents.

SRIVASTAVA, C.J. and ZIAUL HASAN, J.:—These three appeals against two decrees of the learned Civil Judge of Gonda, one of which has been brought by the plaintiffs and the other two by defendant No. 1, arise out of a suit brought by Musammat Ruqqan and Musammat Zohra, plaintiffs, for possession of 5 annas 4 pies shares in mohals Jham Singh and taluqdari of village Nagwa, district Gonda.

The following pedigree will make the facts clear:



It appears that Mir Jafar held some muafi in the village of Nagwa in the time of Nawab Asafuddaula of Oudh. In 1862 this muafi was recorded in the names of the three sons of Manauwar Ali, namely, Ali Raza, Hasan Raza and Nazar Ali, in shares of 5 annas 4 pies each (*vide* extract from the register of muafis, exhibit 1). In 1873 the settlement court also passed a decree in favour of Ali Raza and the heirs of Hasan Raza and Nazar Ali in the same proportion (*vide* exhibit A-16). In 1891 Safdar Ali, son of Hasan Raza, mortgaged with possession his entire 5 annas 4 pies share to one Raghubar Tewari (exhibit A-12). In 1904 Musammat Umra, widow of Raghubar Tewari, obtained a foreclosure decree against Muhammad Naqi and Khadim Husain, sons of Safdar Ali, on the basis of the mortgage and the defendants to the suit were allowed time to redeem the property on payment of Rs.906-4 (*vide* exhibits A-13

and A-14). The two sons of Safdar Ali in order to raise money for redemption of the property executed two usufructuary mortgages (exhibits A-2 and A-3) for Rs.1,000 and Rs.50 respectively, in favour of one Sukhram Das on the 10th of February, 1905. The amount fixed by the foreclosure decree was deposited by Sukhram Das and he continued in possession of the property till 1921 when Muhammad Naqi and Khadim Husain made a simple mortgage of the property in favour of Shaikh Bhulai, defendant No. 1. The latter redeemed the mortgages in favour of Sukhram Das. Subsequently Shaikh Bhulai obtained a decree for sale (exhibit A-7) on his mortgage and putting the property to sale in execution of his decree purchased it himself.

The plaintiffs' case was that the property was waqf, having been endowed by Nawab Asafuddaula for purposes of *taziadari*, and that therefore it could not be validly transferred by their brothers, Muhammad Naqi and Khadim Husain. On these allegations they sued for possession of the entire 5 annas 4 pies share and in the alternative prayed for possession of half of that share as heirs of their father Safdar Ali and their brother Muhammad Naqi.

The suit was contested by defendant No. 1 alone who denied that the property was waqf and pleaded the bar of limitation and of section 41 of the Transfer of Property Act.

The trial court, the learned Munsif of Tarabganj, held that the property was waqf and gave the plaintiffs a decree for one-third of the 5 annas 4 pies share on condition of payment by them to defendant No. 1 of a sum of Rs.350, one-third of the amount paid to redeem Safdar Ali's mortgage. Both the parties appealed against this decree and the learned Additional Civil Judge who heard the appeal concurred in the trial court's finding that the property was waqf but gave the

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plaintiffs a decree for the entire 5 annas 4 pies conditional on their payment within four months of Rs.1,050 to defendant No. 1. Both the courts purported to pass their decrees in favour of the plaintiffs in their representative capacity as members of the Shia public. As both the parties had appealed against the trial court's decree and the lower appellate court passed two decrees, Shaikh Bhulai has filed two appeals (Nos. 328 and 329 of 1934) The third appeal No. 379 of 1934 has been brought by the plaintiffs.

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The appeals were heard together and this judgment will govern all of them. The first question before us is whether or not the property in dispute is waqf property. Upon a careful consideration of the evidence before us, we are unable to concur with the findings of the courts below that the property is waqf. Only two documents have been relied on by the learned counsel for the plaintiffs in support of the allegation about waqf. The first is a *shuqqa* or letter (exhibit P. W. 1/1) bearing date 10th of Ziqad 1231 H. purporting to have been addressed by one Syed Muhammad Hadi Ali Khan Rizvi to a certain Syed Makhdum Bakhsh in which it is stated that 108 bighas of land in village Nagwa, pargana Nawabganj, has been held by Syed Jafar Ali from the time of Nawab Asafuddaula. It may be noted that the words "for the purposes of *taziadari*" do not appear to relate in this letter to the 108 bighas of land but to "Rs.14 annually out of the revenue income of pargana Nawabganj". This "*shuqqa*" is in our opinion totally inadequate to prove that the Nagwa land was made waqf. The extract from the register of muafis referred to above makes mention of a sanad of 1195 A. H. bearing the seal of Nawab Asafuddaula but no such sanad has been produced in this case. The other document relied on by the plaintiffs is this extract from the muafi register (exhibit 1). This, as already mentioned, shows that 57 bighas (32 acres) of land in village Nagwa were recorded

in the names of Ali Raza, Hasan Raza and Nazar Ali, brothers, in equal shares. No doubt one of the columns of this register shows that the muafi was created for purposes of *taziadari* but this does not necessarily imply that the land was made waqf especially when the muafi was recorded in the names of the three brothers in equal shares and it was provided that it will last till the life of the last holder. The settlement court decree of the 22nd of May, 1873 (exhibit A-16 already referred to), on the other hand, shows that the muafi was recorded in the names of Ali Raza and the sons of Hasan Raza and Nazar Ali according to their shares and it was clearly provided that on the death of Ali Raza and his co-sharers, the muafi will be assessed with Rs.40 land revenue, Re.1 sewai and Rs.2-8 haq-i-taluqdari. Similarly, the various khewats filed by the defendant record the names of the co-sharers as proprietors and there is no mention of any waqf in any of them. There is also evidence that the co-sharers have been dealing with the property as their personal property. The facts of the present case are very similar to those of *Muhammad Raza* v. *Yadgar Husain* (1). In that case the Ruler of Nagpur granted some villages in 1840 to his Muslim physician "as *mohasa* for the *imambara* of Pir Hussein for ever" and the *mohasa* was to continue "from year to year and from generation to generation". In 1867 the Chief Commissioner ordered that the villages may remain revenue-free as long as the *imambara* is in existence on this condition that the income arising from the muafi is properly spent and a report submitted to Government for sanction. It was held that whether the document of 1840 or the order of 1867 was considered, the grant was not a waqf but a personal grant subject to a condition. Their Lordships say—

> "In all such cases the actings or statements of the grantee or his successor may be relevantly taken into

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account as to their interpretation of the original grant; while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things are not conclusive, but are circumstances worthy of consideration."

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In that case also after the death of Yadgar Hussain the muafi was recorded in the names of his sons, Bunyad Hussain and Khurshed Hussain and referring to Bunyad Hussain's sfatement that his younger brother Tufail Hussain had got an equal share and was in possession along with him, their Lordships remarked—

> "It appears to the Board to be fairly plain that Bunyad Hussain's own position was not that of an exclusive claim to the mutawalliship of this property and endowment as a waqf, but an allegation of joint ownership and possession with his brother, subject, it may be, to respecting the conditions of the grant."

In our opinion the decision of their Lordships of the Privy Council in the case of *Muhammad Raza* v. *Yadgar Hussain* (1) is fully applicable to the facts of the present case. In fact, the claim of the property being waqf in the present case is even weaker than it was in the case before their Lordships of the Judicial Committee. In that case there was an institution like an *imambara* in existence in respect of which the villages claimed were alleged to have been made waqf while in the present case there is no such institution.

The learned counsel for the plaintiffs relied on *Shah Muhammad Naim Ata* v. *Muhammad Shamshuddin* (2) but in that case the court held the property to be waqf on a consideration of the history of the property and of the result of an inquiry made by the British Government in 1862. The court referred to the history of the property contained in the District Gazetteer and quoted extensively from it, the very first sentence of which was as follows:

> "One of the largest estates not held by taluqdars is the Salon waqf or endowment, representing an old religious

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grant made by Aurangzeb and increased at various times by different sovereigns up to the days of Asafuddaula."

At page 121 of the report the learned Judges say—

"It will thus appear that the institution is a very old one and the Kings of Delhi had given property including the two villages in suit as waqf for the upkeep of the buildings and the school at Salon."

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In the present case, however, there is nothing in the history of the property in dispute to lead us to the conclusion that the property was made waqf by Nawab Asafuddaula as claimed by the plaintiffs. We therefore decide this point in favour of defendant No. 1 and against the plaintiffs.

The next point is whether the claim of the plaintiffs is barred by section 41 of the Transfer of Property Act. It may be mentioned that the plea of defendant No. 1 that daughters in the family of Mir Jafar are excluded from inheritance by custom was repelled by the trial court and the plea was not further pressed by defendant No. 1. We agree with the trial court that if defendant No. 1, while taking a simple mortgage of the property from Muhammad Naqi and Khadim Husain, had taken a little care to ascertain the real facts, he could not have failed to discover that the would-be mortgagors had two sisters who were entitled under the law to share the property with them. We are therefore of opinion that defendant No. 1 cannot be protected by section 41 of the Transfer of Property Act so far as the legal shares of plaintiffs are concerned.

The plea of limitation was not seriously pressed and in view of the fact that Muhammad Naqi and Khadim Husain were co-sharers of the plaintiffs, we cannot hold that the plaintiffs' suit was barred by time.

Now remains the question—what is the share of the plaintiffs in the property in dispute and whether they should get a decree subject to any condition or absolutely. The plaintiffs as daughters of Safdar Ali are

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entitled to a one-third share in Safdar Ali's property, the remaining two-thirds being the shares of his sons Muhammad Naqi and Khadim Husain. On Muhammad Naqi's death his one-third share devolved on his brother Khadim Husain and his sisters, the present plaintiffs, so that out of Muhammad Naqi's inheritance the plaintiffs got one-half, that is to say, one-half of one-third or one-sixth. One-sixth added to one-third, the original share of the plaintiffs, makes one-half. In the trial court it was incorrectly admitted by the pleader for the plaintiffs that the shares of Muhammad Naqi's widow would reduce the plaintiff's share out of Muhammad Naqi's inheritance to one-eighth only but as it is admitted that Muhammad Naqi, who was a Shia, died issueless, his widow could not get a share in his immovable property. Ordinarily therefore the plaintiffs would be entitled to one-half of the property in dispute but as Muhammad Naqi's share has already been sold and purchased by defendant No. 1 in execution of his decree on the mortgage made by Muhammad Naqi and Khadim Husain, the plaintiffs cannot get anything out of that share now. The plaintiffs therefore are entitled to a decree for a one-third share only and as a sum of Rs.1,050 was paid by defendant No. 1 to redeem the mortgage made by Safdar Ali, the plaintiffs are liable to pay a proportionate share of that amount before they can be entitled to possession of their one-third share.

The result therefore is that we dismiss the appeal of the plaintiffs and partly allow the appeals of defendant No. 1. The decree of the lower appellate court is set aside and that of the court of first instance restored. We order each party to bear his or her own costs in this Court and in the lower appellate court also.

Appeal partly allowed.