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dead and not properly represented, should see that they were properly represented. It seems to us, therefore, that the whole theory of abatement is inapplicable to revision applications."

Radha Krishna, J.

My attention was drawn to Article 177 of the Indian Limitation Act but that article has no application on the view that I have expressed above. Assuming that the present application is subject to the law of limitation, then in my opinion the residuary Article of Limitation, i.e. Article 181, would apply to the case, but in view of the facts in the present case it is not necessary to express any definite opinion on this point.

I, therefore, hold that Order XXII of the Code of Civil Procedure is not applicable to an application for substitution of the name of a legal representative in place of a deceased party in a revision application. I order acting under section 151, Civil Procedure Code, that the name of Mst. Mangala Devi be substituted in place of the deceased Seth Pearey Lal, opposite-party, as prayed. The applicant will get costs of this application from Mst. Mangala Devi.

Applcation allowed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan, and Mr. Justice Radha Krishna Srivastava

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HAIDAR HUSAIN (OBJECTOR-APPELLANT) *v.* L. SUDAMA PRASAD (DECREE-HOLDER-RESPONDENT)*

Mohammedan Law—Waqf—Use of the word "waqf", whether necessary to constitute a waqf—Dedication of property to the ownership of God, whether an essential condition in a waqf.

It is a settled rule of Mohammedan Law that to create a waqf it is not necessary to use the word "waqf". If the intention to make a waqf is apparent or can be inferred from the general tenor of the deed, or from the conduct of the donor, or from the nature of the object in favour of which the grant is made, or from surrounding circumstances at large, it will

*Execution of Decree Appeal No. 21 of 1937, against the order of Mr. Shiva Charan, Civil Judge of Unao, dated the 19th December, 1936.

constitute a valid and binding waqf, though the word "waqf" might not have been used. *Shah Mohammad Naim Ata* v. *Mohammad Shamshuddin* (1), *Mohammad Wazir Khan and others* v. *Muhammad Husain* (2), and *Mahomed Raza* v. *Syed Yadgar Husain and others* (3), relied on.

An express dedication of the property to the ownership of God is not an essential condition of a waqf. *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir and others* (4), relied on.

Mr. *Mohammad Ayub,* for the appellant.

Messrs. *Ram Bharosey Lal* and *Kashi Prasad Srivastava,* for the respondent.

ZIAUL HASAN and RADHA KRISHNA, JJ.:—This execution of decree appeal against an order of the Civil Judge of Unao, dated the 19th December, 1936, arises out of an objection brought by the widow of the judgment-debtor on the allegation that the property sought to be attached and sold is waqf property and, therefore, not liable to attachment and sale.

The decree in question was obtained by the respondent decree-holder against one Merajuddin on the 3rd April, 1933. Merajuddin died on the 23rd May, 1935. The present application for execution was made against his widow, Mst. Matin-un-nissa. on the 21st October, 1935, by which the property situate in village Bhanpur was sought to be attached. The learned Civil Judge dismissed the objection of Mst. Matin-un-nissa and held that the alleged wakf was not made out. Hence this appeal by the judgment-debtor.

Mst. Matin-un-nissa died during the pendency of the appeal and the present appellant, who is sister's son of Merajuddin, was substituted in her place.

The property in question is alleged to be waqf on the basis of two documents, namely, Ex. A-3, which is a will, dated the 2nd January, 1905, executed by Merajuddin's maternal grandmother, Mst. Najm-un-nissa, in favour of her daughter, Mst. Amat-uz-Zahra,

(1) (1926) I.L.R., 2 Luck., 109. (2) (1929) A.I.R., Oudh, 65.
(3) (1924) P.C., 109. (4) (1931) A.L.R., Patna, 33.

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and the second is a will, Ex. 1, dated the 13th December, 1922, executed by Mst. Amat-uz-Zahra. We have carefully considered both these documents, and though we cannot accept the objector's contention that Ex. A-3 creates a waqf, Ex. 1 undoubtedly appears to us to have been intended to make the property waqf. The main objects of Ex. A-3 appear no doubt to have been certain religious and charitable purposes, but at the same time it clearly says that the testatrix had made the legatee (Mst. Amat-uz-Zahra) the "owner in possession" of the property. In view of this we cannot hold that Ex. A-3 creates a waqf.

In the will of Mst. Amat-uz-Zahra, Ex. 1, the word "waqf" is not used, but at the same time the entire tenor of the document clearly shows that what was really intended by Mst. Amat-uz-Zahra was a wakf. She says:

> "It is incumbent on me that I should make arrangements for the performance of the duties cast upon me by my mother, Mst. Najm-un-nissa, by her will, dated the 2nd January, 1905, the fulfilment of which I have always regarded as incumbent on me . . . . The entire property of Nawab Mohammad Ekram Ullah Khan, movable and immovable, such as houses, *kothi*, groves, lands, situate in the qasba of Kakori and village Bhanpur, which were in reality in my possession as *amanat*, shall be retained in the possession of my son, Mohammad Merajuddin, in the same manner after my death . . . . My son, Molvi Mohammad Merajuddin, shall also have no right to sell, mortgage or gift the property, nor shall he have such a right in the property as should be detrimental to the property or cause hindrance in the fulfilment of the charitable objects mentioned in the Will of my mother, Mst. Najm-un-nissa . . . . The profit of the said property will not be applied to any object other than those charitable objects for which it has been reserved . . . ."

Towards the end of the document it is clearly said that Molvi Merajuddin will be in possession of the property "as a mutawalli". Our reading of the document, therefore, is that it creates a valid waqf. It is a settled rule of the Mohammedan Law that to create a waqf it is not necessary to use the word "waqf". Ameer Ali in

his treatise on Mohammadan Law, Volume I, Chapter VIII, says:

> "Where a dedication is intended the law will give effect to it, in whatever language it may be expressed or in whatever terms the wish may be formulated"

and again:

> "But when the intention to make a waqf is apparent, or can be inferred from the general tenor of the deed or from the conduct of the donor, or from the nature of the object in favour of which the grant is made, or from surrounding circumstances at large, it will constitute a valid and binding waqf, though the word 'waqf' might not have been used."

In the case of *Shah Mohammad Naim Ata* v. *Mohammad Shamshuddin* (1), it was held that "in order to constitute a waqf it is not necessary to use the word 'waqf'. So long as it appears that the intention of the donor was to set apart specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or a series of objects recognized as pious by the Mahommedan Law, it amounts to a valid and binding dedication". In the present case there can be no doubt that the objects for which provision was made in the will, Ex. 1, are the proper objects for a waqf under the Mohammedan Law.

In the case of *Mohammad Wazir Khan and others* v. *Muhammad Husain* (2) also it is held that "it is not necessary, in order to constitute a waqf, that the term 'waqf' be used, if from the general nature of the grant itself, that tenure can be inferred". This rule of Mohammedan Law was also recognized by their Lordships of the Judicial Committee in the case of *Mahomed Raza* v. *Syed Yadgar Husain and others* (3). Therefore from the mere absence of the word "waqf" in the will, Ex. 1, it cannot be contended that no waqf was really intended.

It was also contended on behalf of the respondent and the learned Judge of the court below has also stated in his judgment that in the will, Ex. 1, there is

(1) (1926) I.L.R., 2 Luck., 109. (2) (1929) A.I.R., Oudh, p. 65.
(3) (1924) P.C., 109.

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no express dedication of the property to the ownership of God; but that too is not, in our opinion, an essential condition of a waqf. This view is supported by the decision of a Bench of the Patna High Court in *Syed Shah Mohammad Kazim* v. *Syed Abi Saghir and others* (1), in which it was held that "the dedicator need not use the word 'waqf' at all or may not formally transfer the properties to the ownership of God".

Turning now to the circumstances of the case we find that the property in question has all along since 1905 been treated by the members of the family as waqf property. Mst. Amat-uz-Zahra in her will, Ex. 1, herself declares that she has been carrying on the purposes for which the property was dedicated by her mother, Najm-un-nissa. There is also the evidence of the patwari to the effect that Mst. Amat-uz-Zahra and Merajuddin's names were entered in the *khewat* not as proprietors but as *mutawallis,* and it is in evidence that Merajuddin used to file accounts of the income and expenditure in the court of the District Judge. From all these it is clear that the property has been continuously treated as waqf property since 1905. We may observe that the decree in favour of the respondent was passed only in 1933, but the property in question had been made waqf and treated as such long before that.

One of the pleas raised by the respondent was that the property, which is alleged to have been made waqf, was not described with certainty in the two wills referred to above; but besides the fact that the village Bhanpur, a share of which is in question in the present appeal, is specifically mentioned in the will, Ex. 1, we are of opinion that there is no defect of uncertainty about the property dealt with by that will. The will clearly relates to all property, movable and immovable, left by Nawab Ekram Ullah Khan, besides mentioning the village Bhanpur in particular, and as it is not impossible or even difficult to ascertain what property was left by

(1) (1931) A.I.R., Patna, p. 33.

Nawab Ekram Ullah Khan, the waqf cannot fail on ground of uncertainty.

The learned counsel for the respondent also argued that a waqf can only be made by a person who is the absolute proprietor of a certain property but that Mst. Amat-uz-Zahra did not believe herself to be the proprietor of the property devised by her by the will, Ex. 1. We have already held that she became the owner of the property by virtue of Mst. Najm-un-nissa's will, Ex. A-3, and we do not think that because Mst. Amat-uz-Zahra was under the belief that she was only a *mutawalli* of the property, as she believed that the property had already been made waqf by her mother, it cannot be held that she was incompetent to make the property waqf on her own account. What is to be seen is whether or not she had power of disposition over the property; and this she certainly had by the will of her mother. The learned counsel for the respondent has not been able to substantiate his argument with any authority.

Lastly it was argued that though it was a fact that out of the three children of Mst. Najm-un-nissa, her son Hasan Yawar Khan had predeceased her, there was nothing to show that the second daughter, Mst. Saeed-un-nissa, did not survive Mst. Najm-un-nissa, so that the legacy in favour of her daughter, Mst. Amat-uz-Zahra, could not be valid under the Mohammedan Law in its entirety. We have not been referred to any evidence on the record about Mst. Saeed-un-nissa, and it is not possible to hold that she was living at the time of Mst. Najm-un-nissa's death. It may be that she also predeceased Mst. Najm-un-nissa or that, if she survived her, she consented to the will of Mst. Najm-un-nissa after her death. Any how there is nothing on the record to lead us to doubt the capability of Mst. Najm-un-nissa to dispose of the whole of her property by will, and as Mst. Amat-uz-Zahra appears to have been in possession of the entire property from after Najm-un-nissa's death

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up to her own death, there is no reason to doubt the validity of the waqf made by Mst. Amat-uz-Zahra.

For the reasons given above we are of opinion that the objection must be allowed. The appeal is, therefore, decreed with costs, the order of the lower court set aside and the respondent's application for execution dismissed.

Appeal allowed.

REVISIONAL CIVIL

Before Mr. Justice A. H. deB. Hamilton and Mr. Justice Radha Krishna Srivastava

1939
September,

JAGESHAR PRASAD AND OTHERS (DEFENDANTS-APPLICANTS) *v.* LAL NARSINGH PRATAP BAHADUR SINGH (PLAINTIFF-OPPOSITE-PARTY)*

Oudh Rent Act (XXII of 1886), sections 32-B and 108(2)—Suit for determination of rent under section 32-B joined with suit for arrears of rent under section 108(2)—Appeal, whether lies to revenue court or to District Judge.

Where a plaintiff sues for determination of rent under section 32-B (1) and for arrears of rent under clause (2) of section 108, of the Oudh Rent Act, an appeal would lie to an appellate revenue court and not to the District Judge. *Thakur Mohammad Umar* v. *Mst. Nasira* (1), applied; *Kalka* v. *Ram Suchit* (2), dissented from; *Sarfaraz Singh* v. *Deputy Commissioner, Manager, Court of Wards, Ajodhia, district Gonda,* (3), and *Ram Bahadur Singh* v. *Dharam Raj Singh* (4), distinguished.

Mr. *D. K. Seth,* for the applicants.

Mr. *M. Wasim,* for the opposite-party.

HAMILTON and RADHA KRISHNA, JJ.:—This appeal has been filed by defendants as an appeal under Order XLIII, rule 1 of the Code of Civil Procedure. It is, however, an appeal against an appellate decision of the District Judge of Rae Bareli under the Oudh Rent Act and therefore if an appeal lay to this Court it would be

*Section 115 Application No. 134 of 1939, for revision of the order of M. Bashir Ahmad, Esq., I.C.S., District Judge of Rae Bareli, dated the 21st September 1937.

(1) (1939) I.L.R., 14 Luck., 698. (2) (1925) 2 O.W.N., 499.
(3) (1929) I.L.R., 4 Luck., 517. (4) (1928) 5 O.W.N., 1126.