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GOMA MAHAD PATIL v. GOKALDAS KHIMJI AND TAPIDAS KHIMJI.

We may mention that the cases of *Khema* v. *Degumiya*(1) and *Tamizuddin* v. *Nyantulla*(2) do not conflict with our views, as those cases substantially rest upon the fact that in them one moiety of the undivided property, the whole of which was attached, belonging to the execution-debtor, and in such cases the whole of the property may be attached, although only the undivided moiety belonging to the execution-debtor may be sold.(3)

Decrees reversed.

(1) Civil Reference, No. 28 of 1872, unreported.

(2) Reng. L. R., Appx., 73.

(3) 4 Com. Dig. by Hammond, Tit, Execution, c. 4, p. 233 *et ibi* note *e*, and the authorities there cited.

APPELLATE CIVIL.

(20)

Before Mr. Justice West and Mr. Justice Pinhey.

1879
November 21.

PHATE SAHEB BIBI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DAMODAR PREMJI (ORIGINAL DEFENDANT), RESPONDENT.*

Mahomedan Law—Wakf—Mutawalli—Right to sue.

A Mahomedan of the Shafi sect by a deed of settlement executed in 1838, called a *wakfnama*, settled moieties of his estate on his two wives, their daughters, and the descendants of the donees in each line so long as it should subsist, with cross remainders, on the extinction of either line, to the representative of the other, with final remainders, on the extinction of both, to the heirs of the settlor. The settlor constituted himself the *nazar* or *mutawalli* (superintendent or trustee) of the estate during his life, and nominated *A* and *B* to act as much after his death with the consent of his wives. In 1840 the settlor died; *A* died in 1865; *B* survived. The wives and daughters of the settlor also died.

The representatives of one of the settlor's daughters sued the defendant to recover a part of the estate, which had been sold to him by the Civil Court, as the property of another of the daughters, on the ground that the estate on the death of that daughter passed as *wakf* to her surviving sister:

Held that supposing the *wakf* to have been validly created, the right to bring the suit belonged (according to Mahomedan law) not to the heirs or descedants of the settlor, but to the *mutawallis* (superintendents) jointly. On the death of one of the *mutawallis*, a successor to him should have been appointed in the first place by the settlor, and failing him by his executor, if he had appointed any; otherwise by the Court on the application of the parties beneficially interested in the estate.

Quære— Whether a *wakf* could be created for the purpose merely of confering a perpetual and inalienable estate on a particular family without any ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries,

*Second Appeal, No. 279 of 1878.

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PHATESAHEB BIBI AND OTHERS v. DAMODAR PREMJI.

THIS was a second appeal against the decree of H. Batty, Assistant Judge at Thana, reversing the decree of the Subordinate Judge of Panvel.

One Kamirudin, a Mahomedan belonging to the Shafi sect, executed in 1838 a *wakfnàma*, whereby he settled one moiety of his property situated in the village of Chinge Utarad, in the district of Thana, on his wife Amina and her daughters Phate Saheb Bibi and Masa Bibi, and the other moiety upon his second wife Ayesha and her daughters Taira and Sara Bibi. Under the provisions of the *wakfnáma* the property was to go to the descendants of the donees in each line so long as it should subsist, with cross remainders, on the extinction of either line, to the representatives of the other, and a final remainder, on extinction of both lines, to the heirs of the settlor. Subsequently to the death of Ayesha and Sara Bibi, one moiety, while in Taira's possession, was put up by the Civil Court to auction in execution of a decree, and purchased by the defendant Damodar Premji. Taira subsequently died, and the plaintiff, alleging that under the terms of the *wakfnama* Taira's moiety reverted to the plaintiff as heir of Phate Saheb Bibi, sued the defendant to recover possession of it from him.

The defendant denied all knowledge of the execution of the *wakfnama*, and alleged that the plaintiff had no right to maintain the suit, even supposing it to have been genuine and validly executed; for, by the *wakfnama*, Kamirudin constituted himself *mutawalli* (superintendent) during his life-time, and declared that, after his death, Mahamad Abdala and Mahamad Husen should act as *mutawallis* with the consent of his wives. Of the settlor's family the plaintiff was the sole surviving member, and one of the *mutawallis* was also dead. He contended that, under the Mahomedan law, the right to bring the suit belonged to the *mutawallis* and not to the heirs or representatives of the settlor.

The defendant also contended that the *wakfnama*, being in favour exclusively of the settlor's family, was invalid.

The Subordinate Judge found the *wakfnama* proved, that it was valid, and that the suit could be maintained by the plaintiff and accordingly he made a decree in her favour.

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The Assistant Judge agreed with the Court of first instance as to the genuineness of the *wakfnama*, but disagreeing on the other two points rejected the plaintiffs' claim.

Nanabhai Haridas (Government Pleader), with him *Manekshah Jehangirshah*, for the appellants.

Shantaram Narayan for the respondent.

WEST, J.—Thedeed of settlement, called by the settlor himself, Karimudin valad Mahamed, a *wakfnama*, which is in question in this suit, was executed in 1838. It purports to settle, with certain exceptions, moieties of the settlor's estate on his wives Amina and Ayesha; on the daughters of the former, Phate Saheb Bibi and Masa Bibi; and on the daughters of the latter, Taira and Sara Bibi, and the descendants of these donees in each line so long as it shall subsist, with cross remainders, on the extinction of either line, to the representatives of the other, and a final remainder, on the extinction of both lines, to the heirs of the settlor. The settlor constituted himself *nazir* or *mutawalli* of the estate during his life, and after his death declared Mahamad Abdalla and Mahamad Husen invested with powers as *nazirs* and *mutawallis*, which powers were to be executed with the assent of his wives. There was no further constitution of a trustee. Karimudin himself died about 1840; Mahamad Abdalla twelve or thirteen years ago. Mahamad Husen survives. The *maulvi*, examined as a skilled witness, quotes the Anvari Safai, and puts, in an extract (exhibit 66) to the effect that when two persons are constituted *mutawallis*, one without the other is unable to execute the trust, or rather, perhaps, to exercise the superintendence for which the two were appointed. According to the English law, a bare authority committed to several persons is determined by the death of one of them,(1) but if coupled with an interest it passes to the survivors. In *Bell* v. *Holtby*(2) Malins, V. C., ruled that when under Stat. 3 and 4 W. IV, c. 74, s. 32, a testator had appointed two persons to be protectors of a settlement, and one of them died, survivor could act alone.

(1) Lewin on Trusts, p. 212; St. Leonards on Powers, pp. 143, 146.

(2) L. R. 15 Eq. Ca. 178.

The learned Vice-Chancellor thought that the case was not one of a mere naked power, nor yet one like that of a power attached to the office of executor. He was partly guided in the construction that he put upon the statute by the suvivorship recognized in the case of testamentary guardians, and by considerations of convenience which might also apply in cases such as the present one. But the so-called *mutawallis* in this case were to act in consultation with the widows of the settlor. It may, perhaps, be gathered from this provision that Karimudin had not such confidence even in the two superintendents together as to leave them quite unfettered; and if he did not confide in the two together, much less, it may be suggested, would he confer on unqualified power of management on the survivor of his two nominees. The provision, however, may merely have been a mark of respect to his wives, and it ceased to operate on their death. The opinion of the *maulvi* supported, as we have above stated, has not been met by any counter-statement of the law as obtaining amongst the Shafi sect to which the beneficiaries in this case belong, nor have the pleaders on either side been able to refer us to any case in which the question of the survival of a joint *mutawallishíp* has been considered by the Courts. A superintendent, however, may bequeath his office to another person (1) "in the same way as an executor may commit his to another." This seems to imply that the office is not regarded as a purely personal delegation which entirely fails if the person or one of several persons delegated dies. The passage cited by the *maulvi* only goes so far as to say that when two persons are named, one cannot act alone. It does not refer expressly to the case of the death of one of the two, and the inference which the *maulvi* draws is, that nothing can legally be done until the person deceased has been replaced by another properly appointed. The appointment of a substitute *mutawalli* belongs, in the first place, to the appropriator or settlor.(2) Failing him it belongs to his executor. If he have died without naming an executor, the appointment rests with the Judge. The Judge is bound, if he can find a fit person of the appropriator's

(1) Baillie Digest M. L.594; *Moohummud Salik* v. *Moohummud Ali*, 1 S.D.A. Rep. 17.

(2) Baillie, 593, and the case above cited.

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house, to name such person ; but this does not deprive the Judge of his discertion, or enable any one to assume the office of *mutawalli* without appointment. There is no reason why these rules should not apply equally to one of two joint *mutawallis* as to a single one. The office of superintendent in the interval between the death of a *co-mutáwalli* and the appointment of one in his stead, is not extinguished but in abeyance. The parties interested, therefore, as beneficiaries are not entitled themselves to assume the superintendence of the *wakf*, and in the exercise of that function to maintain suits for its protection. They must apply to the Court to fill the vacant office, and when this has been done, the joint *mutáwallis* must exercise their own judgment as to the step to be taken.

Assuming, then, that the *wakf* in this case was validly created, it was not competent to the heirs of Karimudin to bring the present suit. The property is not by the Mahomedan law regarded as theirs, but as dedicated to the deity, though for their temporal benefit, and as subject to the management for secular purposes of the *mutáwallis* for the time being. Whether a *wakf* could, indeed, be created for the purpose merely of conferring a perpetual and an inalienable estate on a particular family, without any ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries, appears to be a question of some nicety, as to one element, at least, of which the Mahomedan doctors have differed; but, waving that question in favour of the plaintiffs, the consequence follows that, as *wakf*, the property must be controlled and its interests guarded, not by the heirs of the original appropriator but by *mutáwallis*.

This seems to have been substantially the conclusion at which the Assistant Judge arrived, and we must confirm his decree with costs.

Decree affirmed.