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date of breach, and the plaintiff is entitled in addition to interest on Rs. 500 from the 24th September 1904 until the 15th June 1906 and the costs and expenses he was put to owing to the breach. There must be an inquiry into the damages.

Attorneys for the plaintiff:—*Messrs. Malvi, Hiralal, Mody and Ranchhoddas.*

Attorneys for the defendant:—*Messrs. Ardeshir, Hormasji Dinsha & Co.* and *Messrs. Hiralal & Co.*

B. N. L.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Heaton.

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September 27

BANOO BEGUM AND OTHERS, APPELLANTS AND OPPONENTS, *v.* MIR ABED ALI AND OTHERS,* RESPONDENTS AND APPLICANTS; AND MIR ABED ALI AND OTHERS, APPELLANTS AND APPLICANTS, *v.* MIR AUN ALI AND OTHERS,* RESPONDENTS AND OPPONENTS.

Mahomedan law—Creation of vested remainder by a Mahomedan—Spes successionis—*Creation of life-interest amongst Shias allowed.*

It is possible for a Mahomedan to create a definite interest like what would be called in English law a vested remainder, and such a remainder, though liable to be displaced, is not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that could be attached and sold.

Umes Chunder Sircar v. *Mussummat Zahoor Fatima* (1) followed.

Amongst Shias the creation of a life-interest is allowed, and it appears according to Shia authorities that during the period of the life-interest the deferred interest can be dealt with by way of sale, gift, and otherwise, provided that there is no interference with the particular estate, and it would seem to follow that the purchaser or donee could deal with the interest so acquired by him.

APPEAL from the judgment of Russell, J.

* Original Suit No. 565 of 1891. Appeals Nos. 1479 and 1484.

(1) (1890) L. R. 17 I. A. 201.

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The material facts in this case are set out in the judgment of Jenkins, C. J.

Strangman and *Mirza*, for appellants in Appeal No. 1479 and for respondents Nos. 2 to 4 in Appeal No. 1484.

Robertson, for appellants in Appeal No. 1484 and for respondents Nos. 1 to 5 in Appeal No. 1479.

JENKINS, C. J.:—These appeals arise out of proceedings in execution of a decree, passed by consent on the 22nd December 1891, whereby it was directed (amongst other things) as follows:—

"And this Court doth further order that the land and dwelling-house situate at Bhendy Bazar or Parel Road in Bombay bearing Ward No. 8099, Street Nos. 558, 60, 62, 64 and 123 and Collector of Land Revenue old No 720, new No. 7892 and old Survey No. 1174 and new Survey No. 7539 be held and enjoyed by the second plaintiff for her life, and from and after her death that the same be sold by public auction and the net proceeds thereof be divided among the six sons of the first plaintiff, Khan Bahadur Mir Akbar Ali, and their heirs in equal shares after setting aside a sum of rupees three thousand out of the said sale-proceeds for the death ceremonies of the plaintiffs and also for the Mobarum ceremonies, and that this sum shall be dealt with in accordance with any directions in that behalf that may be given by the second plaintiff by a writing under her hand or by her will and that the said second plaintiff do keep the said property in proper repair during her life and do pay all outstandings therefor."

The first plaintiff was Abkar Ali, the second plaintiff was his wife Umda Begum, and the six sons of the first plaintiff Abdul Ali, Abed Ali, Afzal Ali, Asgar Ali, Fatteh Ali and Zoolficar Ali and his daughter Bibijan were the defendants. Akbar Ali died in April 1894. On the 11th January 1898 Afzal Ali and Asgar Ali purported to transfer to Abdul Ali all their right, title, interest and share under the decree in the premises at Bhendy Bazar Street and also their one-third part or share in the moneys to arise from the sale.

In 1899 Afzal Ali died. On the 17th of June 1903 a transfer was expressed to be made by Fatteh Ali and Zoolficar Ali in favour of Abdul Ali of his right, title, interest and share in the property and the proceeds of sale.

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On the 2nd December 1903 Umda Begum died. On the 27th of March 1905 Abed Ali purported to transfer in the same terms his interest and share in the Bhendy Bazar property and the proceeds of sale.

Then, on the 14th of June 1905, Abdul Ali died. Each transfer was for valuable consideration, and in each instrument of transfer there was a covenant for further assurance.

On the 24th of February 1906 Asgar Ali, Fatteh Ali and Zoolficar Ali notwithstanding the transfer by them gave notice of an application for sale of the Bhendy Bazar property and for distribution of the net sale proceeds amongst the sons of Akbar Ali and their heirs in equal shares as provided in the decree.

The application was resisted by those claiming under Abdul Ali on the ground that the applicants by reason of the several transfers had no interest in the decree entitling them to ask for its execution. No objection has been taken to the procedure adopted and the only question raised has been whether the transfers were operative.

They have been attacked on two grounds: first, it has been said that the interests they purported to pass were not capable of transfer, and, secondly, that each transfer was invalidated by reason of section 257A of the Civil Procedure Code.

The only ground on which it was claimed that the interests were incapable of transfer was that they came within clause (*a*) of section 6 of the Transfer of Property Act, and it was not suggested that there was any rule of Mahomedan law more favourable to the applicant's contention. That clause is in these terms: "The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred." What therefore we have to consider is whether the interests and shares expressed to be transferred come within these words. Manifestly the transfer by Abed Ali does not come within the words, for Umda Begum was dead at its date and Abed Ali's interest had thus vested in possession.

But at the date of the other two transfers she was alive, and Afzal Ali did not even survive her. Therefore, it is argued, the transferors had not at the date of these two transfers anything more than a possibility within the meaning of clause (*a*) of section 6.

This contention rests on the view that the Mahomedan law does not recognize a vested remainder, and in support of this we have been referred to *Abdul Wahid Khan* v. *Mussumat Nuran Bibi*.[1]. But the actual point there decided was as to the construction to be placed on the documents evidencing a compromise, though no doubt their Lordships were influenced in coming to their decision by the consideration that it appeared to them to be opposed to Mahomedan law to hold that the compromise created a vested interest similar to a vested remainder under the English law, for such an estate, they said, did not seem to be recognized by the Mahomedan law. In estimating the applicability of this decision to the present case it must be borne in mind that the parties were Sunnis and that their rights were governed by the Hanafee law.

In arriving at their conclusion their Lordships cited a previous decision of the Privy Council in *Mussamut Humeeda* v. *Mussamut Budhun*[2]. There the High Court of Calcutta had held that the effect of the transaction under discussion was that a Mahomedan son had created in his mother's favour a life-interest in the property in suit. As to this their Lordships of the Privy Council said: "Upon what grounds then ought it to be held that what the son gave up, he gave up for only the life of his mother retaining the legal reversion in himself? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction." And then their Lordships go on to say that they are of opinion that the expressions used taken in connection with the rest of the evidence are too weak to prove a transaction so improbable among Mahomedans as an alienation by the son for the life only of his mother.

(1) (1885) L. R. 12 I. A. 91. (2) (1872) 17 W. R. 525 (Civ. Rul.).

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It is true that their Lordships do not affirm the validity of such a transaction but they certainly do not discard it as impossible.

And this brings me to *Umes Chunder Sircar* v. *Mussummat Zahoor Fatima*[1]. There a Mahomedan granted property in mokurruri to his second wife with the condition that if she should die childless it should go to his two sons by another wife. The second wife had no child. While the grantor was still alive a decree-holder attached the interest of one of the sons and after the grantor's death the right, title and interest of the judgment-debtor was sold. One of the questions discussed and determined by their Lordships was as to whether the purchaser took anything. It was decided that he did.

Their Lordships said:

"The sale took place, and the certificate was granted on the 22nd of September, 1879, and it is there certified that the decree-holder has been declared as the purchaser of the judgment-debtor's right in 1 anna out of 16 annas which were mortgaged, and so forth, and by another certificate there is a similar declaration as to the 7 annas. So that it is quite clear that the intention was to attach and to sell whatever right and interest the judgment-debtor Farzund had in the 8 annas of the property. The question is, what interest had he as regards these 17 dams? That depends upon the construction of the deed of the 26th of January, 1871. In that deed there may be some obscurity as to the exact interest that the children of Sultan Ali and his wife Amani Begum were to take, but as applied to the events that have happened there is no obscurity about it. Sultan Ali, the then owner of 1 anna and 14 dams, grants that share in mokurruri farm to his wife Amani Begum on this condition, that if she has a child by him the grant shall be taken as a perpetual mokurruri. Whether descendible to children or taken by children in remainder does not matter now (the deed is rather obscure on that point), but it is to go to the child of Sultan Ali and Amani Begum in perpetual inheritance. In case of no child being born, then it is only to be a life mokurruri, and after the death of Amani Begum, the property is to come to the possession of the settler's two sons, Farzund and Farhut. There is to be paid the Government revenue on the share of the estate, and one rupee to the settlef. At the time of the attachment Sultan Ali was still living, and, at all events, in contemplation of law there might be a child to take; but the deed confers upon the sons Farzund and Farhut a definite interest, like what we should call in English law a vested remainder; only that it was liable to be displaced by the event of there being a son of Sultan Ali by Amani

(1) (1890) L. R. 17 I. A. 201.

Begum. Between the attachment and the sale—very soon after the attachment—Sultan Ali died, and then the contingency, such as it was, was entirely put an end to. It is quite true the parties might not know whether Amani Begum was with child by Sultan Ali or not, but the fact was determined at that time, and there was no longer any contingency in the eye of the law. It does not, in their Lordships' view, very much signify whether Sultan Ali was alive or dead at the time of the sale, but they wish to guard themselves against being supposed to concur in an argument that was presented at the Bar, to the effect that if between the time of attachment and the time of sale events should happen which would have the effect of accelerating or enlarging the interest of the judgment-debtor as it stood at the time of attachment, that augmented interest would not pass by the sale which purports to convey all that the judgment-debtor has at the time. But taking the case most strongly against the plaintiff, supposing that he could get nothing but that, which was capable of attachment, and was actually attached on the 14th of April, 1879, their Lordships hold that, this interest in remainder is a property which was capable of being attached, and which was intended to be attached. It is said that by section 266 this property was not liable to attachment, because it is there provided that 'The following particulars shall not be liable in attachment' and among them is, 'an expectancy in succession, by survivorship or other merely contingent or possible right or interest.' It seems to their Lordships that in all probability the High Court, who held that the 17 dams were not attached, must have had this section in their view, though they do not refer to it because they treat the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him. But that is not the case, excepting as regards the one rupee, which for this purpose may be thrown out of consideration altogether. Except as regards that one rupee they inherited nothing from him. He had in his life-time parted with the whole property, either to Amani Begum, his wife, and her children by him, or to his two sons. That interest given to the two sons appears to their Lordships not to fall within the description of an expectancy or of a merely contingent or possible right or interest. Their Lordships therefore hold that as regards the 17 dams the plaintiff has the priority, and that the decree of the High Court is erroneous to that extent[1]."

This case than affirms the possibility of the creation by a Mahomedan of "a definite interest like what we should call in English law a vested remainder," and that such a remainder though liable to be displaced was not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that could be attached and sold.

(1) (1890) L. R. 17 I. A. 201 at pp. 208, 209.

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Now here we have to do with Shias and not with Sunnis, and where they are concerned the creation of a life-interest is allowed. This is well recognised, and it is supported by Exhibits Nos. 4 to 9* which are extracts from Mahomedan law books, translated for the purpose of this case.

* EXHIBIT No. 4

(Translation of an extract in Arabic from an un-numbered page of Fazkiratal Fukaha, a Mahomedan Law-Book of the Shias Vol. II, Chapter on Wakf).

* * * *

If A gives away his house to B by way of a Sukna, Umra or Rukba by fixing a period, the house does not go out of his (A's) ownership and it is lawful for (him) the owner to sell the house and in that case the Sukna and (? or) Umra does not become null and void—nay the Sakin (person enjoying Sukna) is entitled to the right of residence, which is already made over to him; consequently, if the purchaser was aware of the fact, he has no option to annul the contract but if he was not aware, it is optional for him to cancel the sale or to confirm it at the full price with a view to derive (some other) benefit from the property.

EXHIBIT No. 5.

(Translation of two extracts in Arabic from Hadaik-un-Nadirah, a Mahomedan Law-Book of the Shias, Vol. V, page 514).

* * *
* * *

It is well known among the As-hab (Jurists) that Sukna (right of residence), Umra (life-interest) and Rukba (giving away a property for a fixed period or on condition that the same should ultimately revert to the survivor) do not become null and void by sale

* * *
* * *

Since you have known that sale is lawful in the (abovementioned) case (of Sukna or Umra), if the profit of the property which is sold is already taken away (by the person enjoying the Sukna or Umra), the purchaser if he be aware of the fact, has no option (to put an end to the contract) because of his having gone in for a thing the profit of which has already been taken away. It is therefore obligatory on him to wait till the expiration of the period or (termination of) the life-interest, after which the profit will revert (to him). But it is lawful for him, pending the period and during the life-interest, to derive benefit out of the property by sale, gift, emancipation and such other acts as do not interfere with that particular interest (of Sukna or Umra).

EXHIBIT No. 6.

(Translation of an extract in Arabic from an un-numbered page of Kifayatul, Ahkam, a Mahomedan Law-Book of the Shias, Section on Sukna, etc.)

* * *

The genuineness of these texts has not been questioned, nor has any authority been cited in opposition to them.

And whatever can be given away as Wakf (*i. e.*, an endowment) is lawful to be given away as Umra or Rukba.

* * * *

It (the contract of Sukna, etc, does not become null and void by sale—nay the fulfilment of what is stipulated is obligatory and the purchaser should wait till the expiration of the period or (termination of) the life-interest, after which the profit reverts to him . . . . According to the said Sahiha (correct tradition) but before that such acts as do not interfere with the interest (of the person enjoying Sukna, etc.) like sale, gift, emancipation, etc., are lawful for him.

* * * *

EXHIBIT No. 7.

(Translation of an extract of a Persian Law-Book of the Shia Sect called Sigh Ukud of Sheik Moortiza.)

"And if the owner sells the house during the period, the right of residence is not thereby rendered null and void, but the purchaser will not be the owner of its profit during the time the residence lasts."

EXHIBIT No. 8.

[Translation of an extract in Persian from Jame-i-Abbasi, a Mahomedan Law-Book of the Shias, Section on Sukna (right of residence) and Umra (a life-grant or a life-interest), page 142.)

Section 3 on Sukna and Umra :—

If a person says to another "Reside in this house so long as you are alive," then there are three conditions necessary for the same. First, proposal such as, "I have given you room in such and such a house" "I have given you a life-interest " (in such and such an estate) or "I have given you such and such a thing for such and such a time" and such other expressions as may be in keeping with the above. Secondly :—Acceptance. Thirdly :—Possession. And if the act of causing one to reside in a house is made contingent on his (the grantor's) own life or to that of the resident or if the time is fixed, (the contract) becomes binding by his (the resident's) taking possession (of the house) and the same reverts to the owner after the death of any of them as stipulated. Hence, if one says "you are to reside in this house so long as you are living," the same reverts to the owner on the death of the resident. And as to this case, if the owner dies, it shall not be lawful for the heirs of the owner to eject the resident. And if one says "Reside in this house till the time of my death," then the resident should vacate the same on the death of the owner. But if the resident dies before the owner, it shall not be lawful for the owner to eject the heirs of the resident during his own life-time. If the contract is not made contingent on death, he can eject the resident whenever he likes. And whatever is lawful to be given in Wakf is also lawful to be given in Sukna and Umra. And (the contract of) Sukna or Umra thereof does not become null and void by the sale of the house. And if the Sukna is absolute, the resident himself and his family (only) are to live in the same,

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The extract, Exhibit 5, is interesting as expressly affirming the proposition that during the period of the life-interest the deferred interest can be dealt with by way of sale, gift and otherwise, provided that there is so interference with the particular estate, and it would seem to follow that the purchaser or donee could deal with the interest so acquired by him.

Therefore what weighed with their Lordships of the Privy Council in *Mussamut Humeeda's* case and *Abdul Wahid Khan's* case has no application, for it would not be correct to extend to Shias the proposition that the creation of a life-estate did not seem to be consistent with Mahomedan usage.

How then is the decree of the 22nd December 1891 to be construed? It appear to me clear that Umda Begum was intended to take, and in fact did take, no more than a life-interest.

Then did the six sons take only the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature? I think not. I think from the words used, and having regard to the fact that the parties were Shias, that it was intended that the six sons should take vested interests capable of transfer and that the words are apt for that purpose.

The decision in *Umesh Chandra Sircar's* case affirms the legality of such an interest, and we have here the further circumstance that these interests were created by a decree binding on those now before us and actually sought to be executed by those who contend that such an interest could not be created.

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but if the same (*i.e.*, Sukna) is stipulated for other people besides them, it is lawful for them (to live there).

EXHIBIT No. 9.

[Translation of an extract from Javahirul Kalam, an Arabic Commentary on the Sharaya-ut-Islama Law-Book of the Shia Mohammadans, Chapter on Sukna (right of residence), page 619.]

* * *

And (the underlined is the text of the original) if one says "I have given this house to you and to your descendants by way of Umra, the same is Umra (life-grant or life-interest). The same, *i.e.*, Umra shall therefore continue to be binding so long as the descendants may be existing and on their extinction, the profit shall revert to the owner. But as regards the house itself, the same remains the property of the owner.

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Therefore I hold that Abdul Ali acquired the shares that were expressed to be transferred to him.

The objection that section 257A of the Civil Procedure Code stands in the way of those who claim under Abdul Ali is in my opinion unsound. The transactions clearly do not come within the words of the section. We must therefore vary the order of Russell J. so far as it determines that any of the transfers were inoperative.

The respondents 2, 3 and 4 in appeal 1484 must get their costs of that appeal from the appellants. In appeal 1479 the appellants must get their costs from the respondents.

Order varied.

Attorneys for appellants in Appeal No. 1484 and for respondents Nos. 1 to 5 in Appeal No. 1479:—*Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for appellants in Appeal No. 1479 and for respondents Nos. 2 to 4 in Appeal No. 1484: *Messrs. Mirza and Mirza.*

B. N. L.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

JAMSETJI MANEKJI KOTVAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI DAYAL (ORIGINAL DEFENDANT 1), RESPONDENT.*

1907. *November* 28.

Civil Procedure Code (Act XIV of 1882), sections 232, 244, 372 and 647—Decree for an injunction to protect land—Sale of the land—Subsequent suit by the purchaser for an injunction—Execution of the former decree cannot lie.

A obtained an injunction against B restraining him from obstructing A in the exercise of his right of way to his (A's) land over B's land. A subsequently sold his land to C. B similarly obstructed C. C then brought a suit against B for an injunction in terms similar to that formerly obtained by A. B contended that C's remedy, if any, was by way of execution of the decree obtained by A.

* Appeal from order No. 18 of 1906.