
(1923) 03 PAT CK 0010
In the Patna High Court

Mt. Bibi Kaniz Zainab and Others

APPELLANT

Vs

Syed Mobarak Hossain and Others

RESPONDENT

Date of Decision : 19-03-1923

Acts Referred:

Bengal Tenancy Act, 1885 — Section 189, 3(2)
Evidence Act, 1872 — Section 32(3)

Citation : AIR 1924 Patna 284

Hon'ble Judges : Das, J;Adami, J

Bench : Full Bench

Judgement

Das, J.—The object of the litigation which has culminated in this appeal, was to obtain a declaration that certain wakfnamas executed by Mt. Asmatunnissa, dated the 15th February, 1882, and the 7th December, 1897, respectively, and a certain deed of management, dated the 17th July, 1907, are "invalid, void and ineffectual" and that they "have never been acted upon and are purely nominal." The properties in dispute admittedly belonged to Mt. Asmatunnissa and it is the case of plaintiff No. 1 that as the sole heiress of Mt. Asmatunnissa she succeeded to the properties on the death of Mt. Asmatunnissa which took place on the 17th July, 1910. She alleges that certain "persons (whom she names in the plaint) got up" these deeds with the object of depriving the plaintiff of her inheritance and that, in doing so, they took advantage of the fact that Mt. Asmatunnissa was an illiterate pardanashin lady, but that the endowment was nominal one, and that the wakfnamas were never acted upon, and that the possession of Bibi Asmatunnissa as proprietress over the properties continued till her death, and that, in the circumstances, plaintiff No. 1 became entitled to succeed to the properties as the sole heiress of Bibi Asmatunnissa. Plaintiffs Nos. 2 and 3 are the assignees for value of an 8 annas interest of the plaintiff No. 1 in the properties in dispute and the question arose in the Court below whether the plaintiffs Nos. 2 and 3 were bona fide purchasers as they alleged to be or whether their alleged purchase was made "for the purpose of spoliation and with a view to foment unjust and improper litigation and whether, in the

circumstances, their purchase was "void as being opposed to public policy." That question has been answered by the learned Subordinate Judge in favour of the plaintiffs and no question has been raised before us as to the correctness of the decision of the learned Subordinate Judge on this point.

2. It will be convenient to dispose of a point which was argued with complete success on behalf of the respondents in the Court below. One of the issues framed by the Court below on the pleadings of the parties ran as follows:--Are the plaintiffs entitled to sue for any relief without seeking to set aside the deeds of endowment, dated the 15th February, 1882, and 7th December, 1897, and the deed of appointment of mutwalli, dated the 17th July, 1907, and is their claim barred by three years' limitation? The learned Subordinate Judge has answered the question raised in this issue, in favour of the defendants. In other words, he has come to the conclusion that the plaintiff's suit is barred by limitation under Article 91 of the Limitation Act. The learned Counsel for the respondent has not attempted to support the decision of the learned Subordinate Judge on this point, and, in my opinion, there cannot be the slightest doubt that Article 91 has no application to the facts of this case. Article 91 applies to a suit to cancel or set aside an instrument not otherwise provided for. It has no application to a suit for possession and a declaration that an instrument, under which the defendant claims, is void. In the present suit the plaintiffs do not seek to have the instruments executed by Bibi Asmatunnissa set aside. Their case is that those instruments are void and that the Court should declare that they are void. I quite agree that if the instrument is voidable and not void ab initio, and is executed by the plaintiff or by his predecessor, the plaintiff cannot elude the operation of Article 91 by suing as for a declaration; but in determining whether the plaintiff is attempting to elude the operation of Article 91, it is necessary to consider the plaintiff's case as to the instruments. Now, there can be no doubt that, according to the plaintiffs, these instruments are not voidable, but void ab initio. They make the definite case that the instruments were nominal and were not acted upon during the life-time of Mt. Asmatunnissa as the proprietress over the properties continued until her death. In my opinion it is impossible to hold that Article 91 applies to the facts of this case.

3. I now come to the question whether the plaintiff No. 1 has established her title to the properties in dispute assuming that her case as to the wakfnamas is true. The following pedigree will explain the case of the plaintiff as to the relationship between her and Mt. Asmatunnissa:

Bibi Sonia | ----- | | Fazalunmssa Asmatunnissa |
----- | ----- | | | Nawabunnissa,
Azizanniaea, Ameerunnissa, Married died without died, 17th July, Asrat Ali issue
1910, married | Kazi Maham- ----- mad Ali (he | predeceased
----- his wife) | | Sakat Hossain, Kaniz Zainab, | died in the
life plaintiff, | time of Asmat- Ata Hossein, unnissa. (predeceased his parents).

4. It will be noticed that she claims to be the daughter of Nawabunnissa who,

according to her, was the daughter of Fazalunnissa and a sister of Mt. Asmatunnissa. If she is right in her contention, that she is the daughter of Nawabunnissa and that Nawabunnissa was the sister of Asmatunnissa then it must follow that, in the events which have happened, she is the sole heiress of Mt. Asmatunnissa. The case of the defendants on the question of relationship is set out in paragraphs 5 and 7 of their written statement. Paragraph 5 runs as follows:

That this fact is not at all true that the plaintiff No. 1 is the daughter of Mt. Asmatunnissa's sister. The said plaintiff is never the heiress of Mt. Asmatunnissa.

5. In paragraph 7 the defendants make the definite case that "Mt. Asmatunnissa had no sister of her own named Mt. Nawabunnissa." In my opinion there is no denial in the written statement that the plaintiff No. 1 is the daughter of Mt. Nawabunnissa. It is, of course, denied that the plaintiff is the heiress of Mt. Asmatunnissa but that denial is based upon the case of the defendants that "Mt. Asmatunnissa had no sister of her own named Mt. Nawabunnissa." It is a denial by implication; and if the facts upon which the implication is sought to be raised are found against the defendants, the implication cannot be raised. In their evidence, however, the defendants have contested the claim of the plaintiff that she is the daughter of Mt. Nawabunnissa. Their case in their evidence is that Mt. Nawabunnissa was not the daughter of Fazalunnissa but a daughter of Ameerunnissa and that the plaintiff is the daughter of one Asrat Ali, not by Mt. Nawabunnissa but by her co-wife Bibi Aman. It is admitted by the defendants that Mt. Nawabunnissa was a wife of Asrat Ali. It is also admitted that the plaintiff is the daughter of Asrat Ali; but it is contended that the plaintiff is the daughter of Asrat Ali not by Mt. Nawabunnissa but by Bibi Aman.

6. In my opinion, the defendants in their written statement have not attempted to answer the point of substance as to the relationship between plaintiff No. 1 and Bibi Asmatunnissa alleged in the plaint, but have denied the relationship evasively. If it were known to them that Nawabunnissa was not the daughter of Fazalunnissa but the daughter of Ameerunnissa, they should have said so definitely in their written statement. If it were known to them that the plaintiff was the daughter of Asrat Ali by Bibi Aman and not by Mt. Nawabunnissa, they should have said so definitely in the written statement. Not having said so, it was not open to them to adduce evidence to the effect that the plaintiff was the daughter of Asrat Ali by Bibi Aman. As it is admitted that Nawabunnissa, was the daughter of Amirunnissa it must follow that the plaintiff is the heiress of Asmatunnissa, provided we assume that the plaintiff is the daughter of Nawabunnissa. It makes no difference so far as the heirship is concerned whether the plaintiff is the sister's daughter or a cousin's daughter. In either case she is entitled to succeed to the properties of Asmatunnisa assuming that she is the daughter of Nawabunnissa and assuming that her case as to the wakfnama is true. But as the parties have gone into evidence, I shall deal with that evidence and shall base my decision on the evidence and not on the

pleadings.

7. [His Lordship after discussing the oral and documentary evidence proceeded:]

8. The first question that arises for our consideration is, whether these documents were properly admitted in evidence by the learned Subordinate Judge. They are undoubtedly ancient documents and were admitted as such by the Court below. The plaintiff produced these documents in the course of her evidence on commission. Her evidence is that she got the documents from Mamtaz Hussain, her step-brother, and that they were in her custody until she made them over to her husband for being filed in Court. We have to consider whether the plaintiff has proved proper custody of these documents. Now, Ex. 3 was a document executed by Asrat Ali in favour of his wife Nawabunnissa and certain other persons and Ex. 2 was a document executed by Nawabunnissa in favour of the plaintiff. It is not unreasonable to suppose that these documents would remain with Asrat Ali and that on his death they would pass to Mamtaz, his son. The plaintiff swears that Mamtaz Hussain made over these documents to her and that they were all along in her custody until she made them over to her husband, Enayet Ali, who in his turn made them over to the plaintiffs Nos. 2 and 3 for being filed in Court. This was her evidence on commission, and on the documents being tendered, they were objected to on the grounds, first, that the witness being illiterate could not possibly identify the documents, and, secondly, that continuous custody of the documents to the time of their being filed in Court, was not proved. Now, the Commissioner for taking evidence had, of course, no power to decide on the admissibility of the documents and it was necessary, therefore, for the defendants to object to the admissibility of the documents in Court if they had any objection to their being taken in evidence. The record, however, shows that these documents were marked by the learned Subordinate Judge without any objection. It is now urged before us that Enayet Ali should have been called to prove that he received these identical documents from the plaintiff and that he made them over to plaintiffs Nos. 2 and 3. The argument is not without force; but it is to be remembered that the defendants did not object to the documents being marked as Exhibits in Court. Had they put forward their objection in Court it would have been open to the plaintiff to call Enayet Ali as a witness. We are informed that Enayet Ali is now dead and it is impossible for the plaintiff to call him now. In my opinion, the objection being to the mode of proof and not to the relevancy of the documents, it is impossible for us to reject the documents at this stage on the ground that the plaintiff did not examine Enayet Ali as a witness on her behalf. The question of the mode of proof is a question of procedure and is capable of being waived by a party. Since the question of the admissibility of these documents was not raised before the learned Subordinate Judge by the defendants, we must assume that they waived their objection to the mode of proof adopted by the plaintiff. I hold that it is not open to the defendants now to raise the question of the proper proof of these documents.

9. The next question is, whether these documents are genuine. The learned Subordinate Judge has come to the conclusion that they are suspicious and that they ought not to be relied upon. I will deal with all the grounds urged by the learned Subordinate Judge for holding that they are suspicious documents. I will first deal with Ex. 3 which is the earlier document. The learned Subordinate Judge says that the document is not a registered one, but it must be remembered that, it was executed on the 22nd November, 1851, when, it was not obligatory on the parties to register their documents. The document bears a stamp of 1851 and the endorsement of the stamp-vendor is as follows:--"Sold this stamp to Saiyid Asrat Ali, Pleader of the Court, for writing a deed of sale at Rs. 4". It would be difficult for the plaintiff to procure a stamp of 1851, and the document as a whole has the appearance of being a very old document. It would be plainly impossible for us to hold that a document must necessarily be a suspicious document because it does not happen to be a registered document. To take such a view would be to hold that a document of 1851 should have been registered although the law did not require those documents to be registered. The argument is a speculative one and I cannot attach any value to it. The next ground urged by the learned Subordinate Judge is that it is not shown why Asrat Ali should have sold this property to Nawabunnissa and others. It is somewhat unreasonable to call upon the plaintiff in 1916 for proof as to the necessity of a transaction which took place in 1851. It is then urged by the learned Subordinate Judge that the signature of Asrat Ali in Ex 3 does not tally with his signature in Ex. 4 which is accepted by him as a genuine document. I have myself examined the two signatures and I am not prepared to base my conclusion as to the genuineness of the document on my personal observation of the signatures. It is always unsafe to hold that a document is a forgery on the personal inspection of the document by the Court. No expert witnesses were examined on the point and no witnesses were called by the defendants to prove that the signature purporting to be the signature of Asrat Ali in Ex. 3 was not in fact the signature of Asrat Ali.

10. On the question whether Nawabunnissa is the daughter of Fazalunnissa, there cannot be, in my opinion, the slightest doubt that she was the daughter of Fazalunnissa. The plaintiff is, as I have already said, supported by one of the defendant's witnesses who is a competent witness, on the point. As to the other point, namely, whether the plaintiff is the daughter of Nawabunnissa, the evidence, taken as a whole is in her favour. In my opinion the plaintiff has established that she is entitled to the properties left by Bibi Asmatunnissa if she can establish her case as to the wakfnamas executed by Bibi Asmatunnissa.

11. I now come to the question whether the wakfnamas executed by Mt. Asmatunnissa are valid and operative documents. The first wakfnama was executed on the 15th February, 1882. It appears that there was a mosque and an Imambara already in existence which had been constructed by her father-in-law. By the wakfnama of the 15th February, 1882, she dedicated the properties specified in the wakfnama for maintaining the mosque and Imambara which were

already in existence, for the support of fakirs and travellers and for "the annual Fatuha and Urs" of herself and her husband. She declared that she was making "wakf absolutely of the properties mentioned below in the name of God without any condition valid or invalid" and that from that day neither she nor her heirs and representatives would have "any personal connection with or any rights in future to the endowed property." She appointed herself the mutwalli of the endowed properties for life and fixed her salary at Rs. 125 per month. She provided that the income of the wakf property, after the payment of Government revenue, other Government demands and collection expenses, should be "applied to the expenses of the mosque and Imambaras" and directed that the account of the income and the expenses should be kept in the Khankah and should be signed and sealed daily by the mutwalli for the mosque for the time being. She appointed the two surviving brothers of her husband to succeed her as the mutwalli of the endowment, one as the mutwalli of the mosque and the other as the mutwalli of the Imambara, and gave them power to appoint their successors from amongst their male issue and provided that, in default of such appointment, their male issue should have the power to choose the mutwallis from amongst themselves. Lastly, she directed that, out of the income of the wakf property, Shaikh Imam Ali, senior, and Shaikh Imam Ali, junior, should each receive Rs. 10 per month generation after generation without any condition of service.

12. By the second wakfnama, which she executed on the 7th December, 1897, and which she described as the supplementary deed of wakf, she dedicated all her remaining properties to the purposes mentioned in the first wakfnama and gave up her salary of Rs. 125 per month, but stipulated that all her expenses should be sent to bar wherever she might direct her manager to send the same. By this document, she appointed Shaikh Imam Ali, senior, as the manager of the endowment on a salary of Rs. 5 per month and gave him extensive powers of management, as she contemplated visiting Mecca and other sacred places, She provided that Imam Ali should continue to be the manager of the endowment after her death and modified the terms of the earlier wakfnama, the effect of which was to place the mutwallis, after her death, more or less, under the control of the manager.

13. The last deed executed by Mt. Asmatunnissa on the 17th July, 1907, is hardly a deed of wakf; it is in reality a deed laying down the scheme of management of wakf properties after her death. It appears that the mutwallis nominated by her to succeed her on her death were both dead, and by this document, she nominated Mobarak Hussain, defendant No. 1, to succeed her as the mutwalli of the mosque, and Bibi Sagheri Begum, defendant No. 2, to succeed her as the mutwalli of the Imambara. Mobarak Hossain is the son of Latiff Hussain whom she had nominated to succeed her as the mutwalli of the mosque. Bibi Sagheri Begum is the daughter's daughter of Walayat Hossain whom she had nominated to succeed her as the mutwalli of the Imambara, As Imam Ali, on account of his old age, had become incapable of looking after the wakf properties, she removed him from his office as manager, and appointed Karamatf Hussain, defendant No.

4, as the manager of the wakf on salary of Rs. 10 per month. She also appointed defendant No. 3 Syed Nawab, the husband of Sagheri Begam, and Bajab Ali, defendant No. 6, as sub-managers, Syed Nawab on a salary of Rs. 10 per month and Bajab Ali on a salary of Rs. 4 per month. She specified the salaries payable to the servants of the wakf estate and directed that the salaries specified by her should be paid to them and to their heirs generation after generation provided they performed their duties. There is a schedule at the foot of the deed which gives "the details of salary payable to the servants attached to wakf estate." The "servants" mentioned are Mobarak Hussain (son of her husband's brother Lutf Hussain), Sagheri Begum (granddaughter of her husband's brother Walayat Hussain). Bibi Azizunnissa (her sister), Karamat Hussain (son of her husband's brother Walayat Hussain). Syed Nawab (husband of Sagheri Begam) Rajab Ali (her servant) Manuk (son of her husband's brother Walayat Hussain) and Munshi Imam Ali (her Muktear and confidential adviser).

14. Mr. Susil Madhab Mullick, on behalf of the appellants, has argued before us, first, that the wakfs are invalid and inoperative inasmuch as they were never acted upon and Bibi Asmatunnissa never parted with her possession as full proprietress; secondly, that the wakfs are illusory and were not intended to be acted upon and that the whole object was to divert the source of succession under the Muhammadan Law and to keep the properties in her husband's family, and thirdly, that the documents were not read and explained to Bibi Asmatunnissa and that she did not have any independent advice in connection with the execution of these documents. The first point urged before us by Mr. Mullick raises the question whether the wakf is a valid wakf, the second point, whether the wakf is a real wakf, and the third point, whether the Court would enforce it having regard to the fact that Bibi Asmatunnissa was an illiterate purdah lady wholly incapable of understanding the nature of the instruments which she executed.

15. I will first consider the question whether the wakf is a valid and an operative wakf. The parties are Shias, and, according to Mr. Ameer Ali, there are four essential requisites on which depends the validity of the wakf: (1) that it must be perpetual, (2) it must not be contingent, (3) that possession must be given of the thing dedicated, or, more properly, the properties should cease to be the properties of the donor, and (4) that the right of the donor should be entirely divested therefrom. It is, however, recognized in Shia law that it is lawful for the wakif to constitute himself or herself the mutwalli, and that, in such a case a formal change of possession is out of the question, and that all that is required is, not actual delivery of possession, but change in the character of possession. "It is in this sense," says Mr. Ameer Ali, "that the Mafatih declares that, if the wakif continue to exercise his right over the wakf property and make no change in the character of his possession, the wakf will not take effect"-(Ameer Ali's Muhammadan Law, 4th. Ed., Vol. I, 499.)

16. It is contended on behalf of the appellants that, in order to defeat their legal

title the defendants must establish the validity of the wakf and that, as a necessary consequence, they must establish that there was a change in the character of possession of Bibi Asmatunnissa, who constituted herself the first mutwalli under the wakf. It is argued that, not only is there no evidence that Bibi Asmatunnissa changed the character of her possession, but that the evidence is conclusive that she continued to hold possession as full proprietress and not as a mutwalli. Mr. Sultan Ahmad on behalf of the respondents, agrees that in order to complete the wakf, there must be change in the character of possession; but he maintains that the wakfnama must itself decide whether there is a change in the character of possession. According to him, the issue must be decided on a construction of the wakfnama, and not by reference to extrinsic evidence, and he argues further that, if we are at liberty to go into evidence, that evidence would support his case that subsequent to the wakfnama, Bibi Asmatunnissa held possession not as proprietress, but as a mutwalli.

17. As reference has been made to the English cases, it is necessary to consider how far the English cases are likely to help us in the solution of the problem. Now, in England, transmutation of possession is not an essential pre-requisite to the constitution of a trust. Provided that the trust was, in the first instance, perfectly created, the trust will be supported, whether there was transmutation of possession or not. But, in order to determine whether the trust was, in the first instance, perfectly created, the "Court has to consider whether the settlor contemplated some further act for the purpose of giving it completion. If, for instance, the settlor contemplated making over possession of the trust property to a trustee for the purpose of completing the transaction, the trust will not be regarded as having been perfectly created until possession is actually made over to the proposed trustee. But, if the settlor proposed to convert himself into a trustee, then the trust is perfectly created and will be enforced as soon as the settlor has executed an express declaration of trust, intended to be final and binding on him.

18. It will be noticed that the Shia law differs from the English Law on the question of the completion of the trust, though they agree in this that where the trust was in the first instance perfectly created, the Court will enforce it and will not enter into the question whether the trust was acted upon. In England, transmutation of possession is not, whereas in Shia law it is, an essential pre-requisite to the creation of a trust. In England, if the settlor proposes to convert himself into a trustee, then the trust is perfectly created as soon as the settlor has executed an express declaration of trust, intended to be final and binding on him. In Shia law, the wakif must still show that he has changed the character of his possession, I am of opinion, therefore, that the English cases cannot help us in the solution of the problem whether the wakf was, in the present case, perfectly created.

19. Nor do I agree with the argument that the document must itself decide whether there was a change in the character of possession. In my opinion,

transmutation of possession, or, (which is the same thing) change in the character of possession, is essentially a matter of evidence, and can only be decided on the evidence in the case. The argument assumed that whenever a wakif constitutes himself a mutwalli of the endowment, there is, by virtue of such constitution, a transmutation of possession, for there is, or can be, no other indication in the wakfnama that there is a change in the character of possession. To take such a view is to ignore the distinction between change of ownership and change of possession both of which must have taken place before & wakf can be said to be perfectly created. All that the wakfnama in the present case does show is that the wakif has divested herself of all proprietary interest in the property endowed and constituted herself a mutwalli of the endowment. Such a declaration satisfies requisite Ho. 4 given in Mr. Ameer Ali's book. There is still requisite No. 3 to be satisfied before the wakf is complete; and there is no indication in the wakfnama that it has been satisfied, unless we regard her appointment as a mutwalli as leading to the inference that there was a transmutation of possession. Even assuming that Mr. Sultan Ahmad is right in his contention that the document itself must decide the question whether there has been a transmutation of possession, I do not think that the document throws any clear light on the point; and we must, therefore, go into the evidence to see whether, after the execution of the wakfnama, Bibi Asmatunnissa held possession as the mutwalli of the endowment.

20. Mr. Susil Madhab Mullick strongly relies upon the fact that Bibi Asmatunnissa did not, at any time after the execution of the wakfnama, apply for mutation of her name in the Land Registration Department as the mutwalli of the endowment. In support of his contention, Mr. Mullick refers us to Ex. 15 series which establish that, in respect of the properties which are now in dispute she stood recorded in the Land Registration Department as the proprietress up to the time of her death. In order to set the argument advanced before us, it is necessary for us to consider some of the provisions of the Land Registration Act (Bengal Act VII of 1876). It will be useful to remember, first, that the Act makes a distinction between a proprietor and a manager. "Proprietor" means a person in possession "of an estate as owner thereof." The term "manager" includes every person in charge of an estate on behalf of a religious or charitable foundation. See Section 3(8) and Section 3(6). It follows, therefore, that after the execution of the wakfnama if the transaction was at all perfected, Bibi Asmatunnissa ceased to be a proprietor and became vested with the character of "manager" within the meaning of the terms as used in the Land Registration Act. Section 42 provides that "every person assuming charge after such commencement," that is to say, after the commencement of the Land Registration Act, "of any estate or revenue-free property, or of any interest therein as manager, shall within six months from the date of such...assumption of charge, make application in the manner hereinafter provided to the Collector of the District on the general register of which such estate or property is borne,...for registration of his name and of the character and extent of his interest as such...manager." The provision

is mandatory, and it was, in my opinion, the duty of Bibi Asmatunnissa to apply for registration of her name as mutwalli of the endowment, if, indeed, she had changed the character of her possession. Section 65 provides the penalty for omitting to comply with the Act and declares that a person omitting to make such application within the prescribed time, shall be liable to such fine as the Collector may think fit to impose, not exceeding one hundred rupees for such omission. Section 78 provides that no person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by the Act to cause his name to be registered, unless the name of such claimant shall have been registered under the Act.

21. The learned Counsel for the respondents does not contest the proposition that it was the duty of the mutwalli to have her name registered in the Land Registration Department as such mutwalli; but he contends that the endowment cannot lose its title to the properties in question, because the mutwalli failed to have her name registered as such mutwalli, and that where the Act provides a penalty for such omission on the part of the mutwalli, it would be a strong thing to say that there is no title in the endowment, because there was such an omission on the part of the mutwalli. The argument, in my opinion, begs the whole question which is in debate before us. If it be assumed, for the purpose of the decision, that there was transmutation of possession, and that the wakf was perfected, then the issue is decided, and the case is at an end. But, in order to determine the issue, it is relevant to enquire into the transaction whether there were acts and transactions consistent with the case of the defendants that there was change in the character of possession of Bibi Asmatunnissa.

22. I ought to mention that, with reference to one property, Bibi Asmatunnissa was registered as mutwalli of the endowment. On the 17th March, 1888, Walayat Hussain sold 1-anna 51-piea out of the entire 16-annas Mauza Murtuzza Chak to Bibi Asmatunnissa; and on such purchase being made Bibi Asmatunnissa was registered in the Land Registration Department as mutwalli of the endowment not only in respect of the purchased share of the Mousa, but also in respect of the other shares which she has in the Mouza. But with reference to this transaction, there is this to be said that we have not the application before us, and we do not know who actually made the application to the Collector. On the other hand, Walayat Hussain, the vendor of the property, was the husband's brother of Mt. Asmatunnissa and was nominated by her to succeed her as the mutwalli of the imambara and was, therefore, deeply interested in the question of the wahfnama. I am unable to look upon the single instance of transmutation of name as establishing that there was transmutation of possession.

23. The appellants next rely upon the finally published Records-of-Eight showing that Bibi Asmatunnissa was recorded, in respect of the disputed properties, as proprietress and not as a mutwalli.

24. The Cadastral Survey under Chap. X of the Bengal Tenancy Act was

concluded in 1907, and the Records-of-Right were finally published on the 17th September, 1907. Exhibit 16 series are the finally published Records-of-Right, and they completely support the argument of Mr. Mullick, Mr. Sultan Ahmed, on behalf of the respondents, accepts the facts upon which the argument is founded, but disputes the validity of the argument. He refers us to the definition of "prpprietor" in Section 3 (2) of the Bengal Tenancy Act as meaning "a person owning, whether in trust or for his own benefit, an estate or part of an estate" and he contends that, though a mutwalli, Bibi Asmatunnissa was a proprietress within the meaning of the term as used in the Bengal Tenancy Aot, and that she could not be recorded as anything but a proprietress in the finally published Records-of-Rights. The argument, as founded upon the Bengal Tenancy Act, is entitled to weight but we have to read Chap. X of the Bengal Tenancy Act together with the Rules made by the Local Government u/s 189 of the Bengal Tenancy Act, for the purpose of regulating the procedure to be followed by Revenue Officers in the discharge of any duty imposed upon them by or under the Act and prescribing the forms to be used by them. Rule 48 in Part II of the Survey and Settlement Manual, 1900. provides, that "the proprietary khewat shall show the character and extent of proprietary interests." In my opinion, there is no doubt whatever that she would Jhave been recorded as mulwalh of the endowment if it were known to the Survey Authorities that she was in possession of the properties as a trustee; and not for her own benefit. The proceedings in connection with the preparation of the Records-of-Rights are conducted with great publicity and with notice to the persons whose interests are intended to be affected by the entry in the Records-of-Rights. If, indeed, the trust had been perfected at any time during the Cadastral Survey operations, it was the duty of Bibi Asmatunnissa to acquaint the Survey Authorities with the fact that she was in possession of this estate, not for her own benefit, but as a trustee, so that the character of her proprietary interest could be shown in the proprietary kheioat.

25. The next series of documents upon which the appellants rely are the rent-receipts (Ex. 6 series) and the pottah (Ex. 10 series) granted by Bibi Asmatunnissa in her capacity as proprietress and Zemindar. Mr. Sultan Ahmad's argument in reply is again founded upon the definition of the term "proprietor" in the Bengal Tenancy Act, and he contends that her description of herself as proprietress does not decide the question whether or not she was holding possession as mutwalli. The argument is not without force: but it is a significant fact that not one document has been produced executed by Bibi Asmatunnissa and bearing her seal in which she describes herself as a mutivalh although many documents have been produced by the defendants executed by third parties in favour of Bibi Asmatunnissa in which she is described as a mutwalli. I refer to this for the purpose of showing that, though under the Bengal Tenancy Act, and for the purpose of the Bengal Tenancy Act a proprietor includes a trustee, there is a distinction in fact between the two, a distinction which is observed in actual practice and in acts and transactions affecting property. The definition in the

Bengal Tenancy Act establishes no more than this that, wherever the term "proprietor" is used in the Bengal Tenancy Act, it may mean, according to the context, either a person owning an estate for his own benefit, or a person owning an estate as a trustee. But it was not the object of the Bengal Tenancy Act to sweep away the distinction between a proprietor and a trustee and the documents executed by Bibi Asmatunnissa bearing her seal in which she describes herself as proprietress have a special significance when we are considering the question whether there was transfer of possession from herself as owner to herself as mutwalli.

26. In this connection, it will be useful to consider one of the pattas executed by Bibi Asmatunnissa. This patta is Ex. A, dated the 27th November, 1898, in favour of Shaikh Mahbub. This document was produced by the defendants and was intended to show that the patta was granted by Bibi Asmatunnissa in her capacity as a mutwalli. When the document was actually tendered in evidence, it was discovered that the word "mutwalli" had been struck out in the original, and in its place the word "malika" had been substituted. It was suggested by the defendants that the document had been tampered with while in the custody of the Court. The plaintiffs thereupon called for a certified copy of the document and the certified copy showed that Bibi Asmatunnissa described herself as a proprietress and not as a mutwalli. I think that the original document is of great value in determining the question whether the wakf was perfected. What obviously happened was, that the document describing her as a mutwalli was placed before her for execution and she objected to being described as a mutwalli. Thereupon, the word "mutwalli" was struck out and the word "proprietress" was substituted in its place. On no other hypothesis is it possible to explain the fact that in the original the word "mutwalli" is struck out and the word "proprietress" substituted.

27. Finally, Mr. Susil Madhab Mullick draws our attention to the fact that the account-books of the estate have been deliberately suppressed by the defendants. They produced the account-books of 1882 1885, 1899, 1907 and 1908 and suggested to the learned Subordinate Judge that the account-books other than those produced by them were either lost or destroyed. The learned Subordinate Judge very properly declined to accept; the explanation which was offered by the defendants and in regard to the account-books which were actually filed by the defendants, the learned Subordinate Judge says as follows:--"The appearance of these books, the freshness of the ink and papers convince one of their unreliable nature " The finding of the learned Subordinate Judge on this point is not challenged before us by the respondents; and we must accordingly assume that the account-books have been deliberately suppressed by the respondents. Now, the proper presumption arising from the suppression of these account-books is that, if produced, they would be unfavourable to the defendants who withheld them, Mr. Sultan Ahmad contends before us that all that we can presume from the suppression of the account-books is that the accounts have not been properly kept and that there have been breaches of trust on the

part of the mutwalli. I am unable to accept this contention as well-founded. The question whether there were breaches of trust on the part of the mutwalli was not in issue in the case, and we cannot assume that the books of account were suppressed in order to conceal the breaches of the trust of the mutwalli. What "was in issue was whether there was transmutation of possession in fact, and whether the wakfnamas were acted upon. The account-books would show whether there was a transmutation of possession in fact, that is to say, whether the accounts stood in the name of the mutwalli or of the proprietress. They would show whether the income of the estate was credited to the wakf or to the proprietress and they would also show whether a salary of Rs. 125 a month was being paid to the mutwalh or whether the whole income was being credited to Bibi Asmatunnissa as proprietress of the estate. In my opinion, the suppression of the account-books is almost decisive of the question. The plaintiffs gave notice to the defendants in their plaint that they would contend that "the possession of Mt. Asmatunnissa as proprietress continued over the moveable and Immovable properties till her death." The defendants had complete notice of the case of the plaintiffs, and it was their clear duty to produce those account-books which undoubtedly would have an important bearing on the question at issue.

28. It was contended by Mr. Sultan Ahmad that the suppression of the account-books is after all not of much importance since there is a clear admission made by the witness examined on behalf of the plaintiffs that the wakfnama was acted upon. There is no doubt, as the plaintiff's witnesses have admitted, that "majlis has all along been held in the Imambara from the first to the 12th day of Muharram every year," that "Mehdi procession is taken out after majlis from the courtyard of the Imambara on the 7th day of the Muharram "that the procession goes round the town in pomp and thereafter returns to the Murtaza Masjid" that "the gentries of the town all along took part and still take part in the said majlis and procession "that the ladies of the gentries of the town also come to Asmatunnissa's house to pay respect to the Mehdi when it is taken inside the house" that "on the 7th day malida is distributed to the persons who attend there either outside or inside the house," that "sarbati and jelahee were and still are distributed during the ten days," that "on the 12th day Phulpan is observed" that "Urs ceremony of Kazi Muhammad Hussain is observed in the said Imambara," that "on such occasion Koran Sheriff is recited and Fateha ceremony is gone through," that "bread and meat are cooked and distributed to the Koor on the Urs ceremony day," that "those who attend the ceremony are also offered bread and meat." But the question is not whether there were acts which any pious Muhammadan lady would perform, but whether the wakf was at all constituted. If on a consideration of the evidence, the conclusion is reached that the wakf was perfected, it would be wholly irrelevant to consider whether the wakf was acted upon; for the evidence tending to show that the wakf was not acted upon would only be evidence of breach of trust on the part of the mutwalli. The evidence upon which the respondents rely does not in any way establish that the wakf was completed. The acts to which the plaintiff's witnesses speak and upon which Mr.

Sultan Ahmad relies as establishing that the wakf was not only perfected, but was actually acted upon are such as any pious Muhammadan lady of the Shia sect in good circumstances would do of her own accord; and the evidence is conclusive that all these different ceremonies used to take place regularly before the first wakfnama was executed. The account-books would be valuable evidence on the point, and I cannot pass by the suppression of these account books as lightly as the learned Subordinate Judge has done.

29. Mr. Sultan Ahmed relies upon certain transactions as showing that Asmatunnissstt in certain transactions acted as the mutwalli of the endowment. Of the numerous transactions upon which Mr. Sultan Ahmed relies the only series that press me are the suite which Asmatunnissa brought as mutwalli of the endowment as against a tenant. The certified copies of the decrees which have been produced are Ex. V series and they show that Mt. Asmatunnissa as mutwalli of the endowment recovered certain rent-decrees against certain tenants. These are the only documents which support the case of the defendants. The other documents upon which Mr. Sultan Ahmed relies do not really touch the question at issue. They undoubtedly show that various persons treated her as a mutwalli of the endowment, but Asmatunnissa was not a party to these documents and it is impossible to regard them as assertions made by her as to her title as mutivalli of the endowment. These documents are Ex. Q, a kobala, in her favour, dated the 20th December, 1883; Ex. K, a kobala in her favour, dated the 17th March, 1888; Ex. H, a kobala in her favour in 1891 and Ex. J series, certain kabuliyats executed by tenants in her favour as mutwalli of the endowment. They are no doubt evidence in the case, but they are not sufficient, in any opinion, to turn the scale in favour of the defendants.

30. In coming to the conclusion that the wakf was not perfected, I have been impressed by the facts, first, that Asmatunnissa did not apply for registration of her name in the Land Registration Department as mutwalli of the endowment; secondly, that she did invite the Survey Authorities to record her as the mutivalli of the endowment; thirdly, that she did not collect the rent due to her as the mutwalli of the endowment: and fourthly, that the defendants have suppressed the account-books which would be the most valuable evidence to show in what capacity she held possession of the properties in dispute. In *Hamid Ali v. Mujawar Husain Khan* (1902) 24 All. 257 one of the questions which the Allahabad High Court had to consider was whether, notwithstanding his paper declaration to that effect, the settlor did really obtain that seisin as mutwalli which the Shia law requires, Burkitt, J., in answering the question in the negative, made the following pregnant observations:--"It may also be strongly doubted whether there was in this case that strict seisin by the mutwalli which the Shia Law requires. The settlor did, no doubt, draw up the paper wakfnama in which he says that thenceforth he holds, the property as mutwalli. But he did nothing more except to register the paper. He in no way changed the outward appearance of the title by which he remained in possession. If he had been sincere in his-desire to divest himself of his proprietary title, he would have at

once applied to the Revenue Authorities to have his name no longer recorded in public registers as owner of the dedicated property, and instead to have a new entry made recording him as mutwalli. This he did not...do" and the learned Judge concluded as follows:--"On the above facts I am unable to say that the settlor, notwithstanding his paper declaration to that effect, did really obtain the seisin as mutwalli which the Shia law requires." In my opinion, the plaintiffs have established that Asmatunnissa did not change the character of her possession and that, accordingly, the wakfnama was not perfected. That being so, the subject-matter of the wakf was her inheritance to which plaintiff No. 1 is entitled to succeed under the Mubammadan Law.

31. My finding on this point is sufficient for the disposal of the appeal; but as the case is likely to be carried to the Judicial Committee, it is just as well that I should express my opinion on the two other points which have been argued before us by Mr. Susil Madhab Mullick. Mr. Mullick contends before us that the wakfs are illusory and were not intended to be acted upon and that the whole object was to divert the course of succession under the Mubammadan Law and to keep the properties in Bibi Asmatunnissa's husband's family. In my opinion, the question has not been raised in the form in which it has been put by Mr. Mullick before us. It has, indeed, been suggested in the plaint that possession all along remained with Asmatunnissa and that the wakfs were never acted upon; but when we are dealing with the question whether the wakfs were illusory, the question is not whether the wakfs were or were not acted upon, but whether it was intended that they should or should not be acted upon. It is not suggested anywhere in the plaint that it was not intended by Asmatunnissa that the wakfs should be acted upon. We are then left to decide the question on the wakfnamas as they stand. Now, it cannot be contended for a single moment that the wakfnamas as they stand do not constitute a dedication of the properties to charitable or religious uses. That being so, it is impossible to hold, on a construction of the wakfnamas, that the wakfs are illusory and that they were not intended to be acted.

32. The last point urged is that the documents were not read and explained to Bibi Asmatunnissa and that she did not have any independent advice in connection with the execution of these documents. The learned Subordinate Judge has given good reasons for deciding this issue in favour of the defendants and I am not prepared to hold that his conclusion is erroneous. I do not propose to discuss all the evidence bearing on this point; it is sufficient for me to refer to a document of great value, bearing on this point. It appears that Asmatunnissa was examined on her behalf in a suit which was instituted by Shaikh Kudrat Ali against her. Her deposition in that case is Ex. S. and it establishes, in my opinion, beyond doubt or controversy that Asmatunnissa was aware of the fact that she had executed three wakfnamas one after another. If, as contended by Mr. Mullick, Ex. S. was not properly admitted in evidence. In my opinion it was properly admitted u/s 32(3) of the Evidence Act. In the course of her evidence she said as follows:--"I have executed three wakfnamas. In the first

wakfnama the sum of Rs. 10 was fixed as the pay of Imam Ali and after his death to his sons if they be competent to do the work." There is no doubt, in my opinion, that she was well aware of the fact that she had executed these wakfnamas She even remembered that by the first wakfnama the sum of Rs. 10 was fixed as the pay of Imam Ali which is undoubtedly correct. Her evidence read as a whole shows that she is a shrewd and clever woman and it is improbable that she should have signed these documents without understanding what they were.

33. Although my finding on the second and third points urged by Mr. Mullick are against him, still as, in my view, the wakf was not perfected, the plaintiffs are entitled to a decree for possession of the properties in dispute. I would allow the appeal, set aside the judgment and the decree passed by the Court below and give the plaintiffs a decree for possession of the properties set out in Schedule I of the plaint. The plaintiffs are also entitled to a decree for mesne profits and for costs both in this Court and in the Court below.

34. In conclusion, I should like to draw the attention of the trial Court to a matter which, in my opinion, constitutes a reproach on the administration of justice in this country. The plaintiff, an aged lady of 62, was examined on commission, and her cross-examination lasted for 31 days, and covers 63 printed pages in the paper-book. The cross examination of the other witnesses examined on commission is correspondingly long. There is an idea that Pleaders cross-examining witnesses on commission may take a liberty which would not for a moment be permitted in Court. But, in my opinion, the Courts can and ought to exercise some sort of control in these matters. The Commissioner appointed by the Court has complete power to stop proceedings and to take the direction of the Court whenever it appears to him that the Pleader cross-examining a witness is abusing his position and exceeding the limits of propriety; and, in my opinion, the Court, in appointing a Commissioner, should in each case give him instructions so as to make it clear to him that he is not so powerless as it is imagined, and that he should exercise his power and stop the proceedings for the purpose of taking the direction of the Court whenever he should think that it is necessary to do so.

Adami, J.

35. I agree.