Punjab Wakf Board

Vs

Shakur Masih

Civil Appeal No. 8225 of 1996

(K. Ramaswamy, G. B. Pattanaik JJ)

01.10.1996

ORDER

1. This appeal by special leave arises from the judgment of the learned Single Judge of the High Court of Himachal Pradesh, Shimla made on 16-3-1994 in RSA No. 97 1993.

2. The admitted facts are that Najaf Khan was the owner of the properties, namely, houses and shops situated in Jutog. He had executed a will on 29-8-1949 bequeathing all his properties to his son's mother-in-law, namely, Smt Musamat Kariman. He added a note to the will dated 29-9-1949 stating thus :

> "After the death of Musamat Kariman, my entire property would become wakf and the income from that would be spent for the maintenance of the Mosque at Jutog. Nobody shall have the right either to mortgage or sell these properties."

3. The appellant filed the suit for declaration that it is a wakf property and the respondent has no manner of right whatsoever. All the courts below have concurrently held that the wakf has not been created by Najaf Khan and, therefore, the will is void and the wakf thereby has not been created. The question is whether the view taken by the courts below including the High Court is correct in law ?

4. In Chapter XII of the Principles of Mohamedan Law, 19th Edn. edited by M. Hidayatullah, former Chief Justice of this Court, it is stated that a wakf means permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable. Under Section 174, the dedication must be permanent. Under Section 176, the subject of wakf must belong to the wakif, namely, the property dedicated by way of wakf must belong to the wakif (dedicator) at the time of dedication. Under Section 191, contingent wakf is not valid. It is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency. Where the deed of wakf provides that the ultimate gift to charity is to take effect only if a certain person dies without leaving any issue, the rule of contingency under the Mohamedan law would affect such disposition, and the position in that respect is not altered by anything in the Mussalman Wakf Validating Act, 1913. That Act undoubtedly authorises a postponement of the ultimate gift to charity, which would not have been valid under the original law, but it does not abrogate the rule of contingency under the Mohamedan law.

5. In the will, the testator has stated as under :

> "I am writing this will for the reasons that I have become old and I do not know

> when I would die. I have neither any child and nor any legal heir, the only person who has served me, is my late son Gohar Khan's mother-in-law and she is still serving me, and she also has no legal heir. She does not have any property, for the income of which she may be able to maintain herself after my death. Since this lady Musamat Kariman has served me devotedly and has been looking after my houses and shops which are situated at Jutog and I therefore, execute this will, written by me in my own handwriting and attested by the executive officer of the Jutog Cantt. and also signed by the witnesses. Whatever moveable and immovable properties I have, she will own and possess these properties. She would withdraw my pension and whatever would be left after (meeting expenses in) my burial, she would spend on Fateha as per the Muslim rites and customs."

6. A reading of it would indicate that the testator's only son died during his lifetime. He left behind his mother-in-law, namely, Smt Musamat Kariman who was living with the testator. She also had no other issue. She was looking after him and the properties. Therefore, he had executed the will and bequeathed the moveable and immovable properties to her in those words. "She will own and posses these properties. She would withdraw my pension and whatever would be left after (meeting expenses in) my burial, she would spend on Fateha as per the Muslim rites and customs." Thus, he had given the properties by way of absolute disposition to her. The question arises whether the contingent wakf created in the note would be valid in law and a valid wakf has been created thereunder ? It has been held by the Privy Council in Amjad Khan v. Ashraf Khan [AIR 1929 PC 149 : 33 CWN 753 : 56 IA 213] followed by other decisions in Rasoolbibi v. Yusuf Ajam Piperdi [AIR 1933 Bom 324 : 35 Bom LR 643 : 57 Bom 737]; Bai Saroobai v. Hussein Somji [AIR 1936 Bom 330 : 38 Bom LR 903] and Mehraj Begam v. Din Mohd. [AIR 1937 Lah 669 : 39 PLR 279] that in Mohamedan law, if a bequest is made by way of will in future or subject to the contingency, the condition is void. In Section 191 of the Mulla's Principles of Mohamedan Law it is stated that it is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency. It would thus be clear that a disposition by way of will given in future or subject to the contingency or conditional one is void under the Mohamedan law. A bequest creating a wakf contingent upon the lifetime of Musamat Kariman is invalid and, therefore, the contingent wakf is not valid wakf as per Section 191 of the principles of Mohamedan law referred to hereinbefore. It would thus be seen that view taken by the High Court is not vitiated by any error of law warranting interference.

7. The appeal is accordingly dismissed. No costs.