SUPREME COURT OF INDIA

Mohammed Khasim

Vs

Mohammed Dastagir and Others

Appeal (Civil) 3023-3024 of 2000; C.A. Nos.3025-3026/2000

(Dr. Ar. Lakshmanan and Altamas Kabir, JJ)

15.12.2006

JUDGMENT

ALTAMAS KABIR, J.

One Mohammed Imam Saheb owned various immovable properties in Malleswaram in Bangalore. He had three wives, namely, Ghouse Bee, Hafiza Bi and Zeenath Bee. Mohd. Imam Saheb had one son and two daughters by his first wife- Ghouse Bee since deceased, namely, Mohd. Dastagir, Rahamat Bee and Maimoon Bee. He also had three daughters and one son by his second wife, Hafiza Bi, since deceased, namely, Fathima Bee, Mahaboob Bee, Kathija Bee and Mohammed Khasim. Through Zeenath Bee, his third wife, Mohd. Imam Saheb had two sons, namely, Anwar and Nazeer. From the materials on record, it appears that besides owning several immovable properties, Mohd. Imam Saheb also owned a cloth business for which he had obtained a licence in the name of Mohd. Dastagir, his son by his first wife. On 18th August, 1958, Mohd. Dastagir executed an unregistered Release Deed in favour of Mohd. Imam Saheb, acknowledging the fact that all the properties, including the cloth business, belonged to Mohd. Imam Saheb and that on receipt of a sum of Rs.5, 000/- he had voluntarily released and relinquished all his rights and title over the properties belonging to Mohd. Imam Saheb, including the shop.

After execution of the said Deed of Release, Mohd. Imam Saheb executed a Deed of Trust on 29th February, 1960, in respect of his various properties both movable and immovable. The said deed has also been referred to as a Hiba. The trust deed indicates that during his lifetime, Mohd. Imam Saheb

would act as trustee in-management along with his second wife, Hafiza Bi, and in the event of death of either of them, the survivor would continue to be the trustee and manage the trust properties according to the terms of the trust deed. It was also stipulated that since the wives and children of Mohd. Imam Saheb were under his protection, he would be free to enjoy the properties according to his will and desire and that he would also have the liberty to alienate the trust properties and to purchase fresh properties for the benefit of the trust. Whatever properties were acquired in future were also to be included with the trust properties. The trust deed further provided that on the death of the executant and his second wife, Hafiza Bi, his son, Mohd. Khasim alias Jani Sab, would become the trustee and would manage the properties in accordance with the terms of trust deed.

Apart from providing for the management of the trust properties, Mohd. Imam Saheb also stipulated that certain charitable works, which were recognized by Islam to have religious connotations, were to be performed. One of the religious ceremonies to be performed was to adorn with flowers and sandal paste the tomb of the executant and the holy Quran was to be recited every year during the month of Barvi Shareef from the date of the first moon till the 11th day of the moon and on the day of Milad-Un-Nabi large number of people were to be provided with food.

Similar directions have been given for recital of the Quran during various other periods of the year when also food was to be provided to large numbers of people. Provision was also made for the trustee to arrange for good marriages for the daughters of the family. It was also made clear that except for the executant himself, none of the other trustees would have the power to alienate the trust properties. The management of the textile shop was left to Mohd. Khasim after the death of the executant. The executant also made provision for his daughters and a statement was made in the trust deed that the Will which the executant had executed on 9th January, 1959 was also being cancelled by virtue of the trust deed.

After Mohd. Imam Saheb's death, his son Mohd. Dastagir, by his first wife, brought a suit for partition and separate possession, being Original Suit No.273/1972, subsequently renumbered as Original Suit No.381/1980, in the Court of the Vth Additional City Civil Judge at Bangalore City against all the surviving heirs of Mohd. Imam Saheb. The case made out by him was that the Release Deed which had been executed by him on 18th August, 1958, in favour of Mohd. Imam Saheb was not binding on him as the said deed had been executed by the plaintiff only in deference to his father's wishes. According to the plaintiff, the said deed was nothing but a sham document and was not acted upon and was, in any event, not valid under Mohammedan Law. It was also pleaded that the plaintiff had been informed by his father that if he executed the Release Deed, Hafiza Bi, second wife of Mohd. Imam Saheb, would also return certain properties which had been given to her and her children by Mohd. Imam Saheb. It was the further case of the plaintiff that after execution of the Release Deed, Mohd. Imam Saheb re- possessed certain properties from Hafiza Bi by way of oral gift.

The suit was contested by defendant Nos. 3, 4, 5 , 7, 8, 9 and 10 by filing separate written statements. The written statement filed by defendant Nos. 3 & 7 were rejected since they had already adopted the written statement filed by the other defendants. Defendant Nos. 1, 2, and 6 did not choose to contest the suit and remained ex-parte. In her written statement, the 4th defendant took the stand that in view of the Release Deed executed by the plaintiff on 18th August, 1958, he was

not entitled to any share in the suit properties apart from the two sites and house in Srirampuram.

The 5th defendant also resisted the suit by relying on the Release Deed executed by the plaintiff and claimed that the plaintiff had no right in the immovable properties.

The 7th defendant Mohd. Khasim, took the defence that his late father had created a trust by virtue of the Trust deed dated 29th February, 1960 and had appointed the 7th defendant as a trustee for the purpose of performing various religious rites coupled with the condition that the properties were not to be alienated. It was contended that the Trust deed was in effect a Wakfnama and that late Mohd. Imam Saheb had created a Wakf-al-al-Aulad and consequently the properties which formed the subject-matter of the said document were not liable to be partitioned. The 7th defendant also took the stand that by execution of the Deed of Release, the plaintiff was estopped from maintaining the suit and from claiming any share in the properties in question.

As many as 19 issues were framed by the trial court, of which issue nos. 1, 2, 13, 14 and 15 appear to be relevant for the purposes of these appeals. The learned trial Judge after an elaborate discussion with regard to issue nos. 13 and 14 ultimately came to the conclusion that by virtue of the Trust deed, a copy of which had been exhibited as Ex.D-7, a Wakf- al-al-Aulad had been created and consequently the properties set out as item Nos. 1 to 3 in the schedule to the plaint were not partible and could not form the subject-matter of any partition. Issue Nos. 13 and 14 were, therefore, answered in the affirmative in favour of defendant Nos. 3 and 7 and against the plaintiff and defendant Nos.4 and 8 to 10. However, the trial Judge was of the view that the remaining properties were partible, but the plaintiff was not entitled to any share therein. The 5th defendant was declared to be entitled to a 1/11th undivided share in all the immovable properties. Similarly, the 8th defendant was also declared to be entitled to a 1/11th share while defendant Nos. 9 and 10 were declared to be entitled to an undivided 7/44th share each in the suit properties. Pursuant to the said findings of the trial Judge, a preliminary decree for partition and separate possession was drawn up on 13th October, 1986.

Four appeals, being RFA Nos. 562/87, 823/87, 196/90 and 561/87, were filed against the aforesaid judgment. RFA 562/87 was filed by Zeenat Bee and her two sons, who were defendant Nos. 8, 9 and 10 in the suit. RFA 561/87 was filed by the plaintiff Mohd. Dastagir. RFA 823/87 was filed by Smt. Fathima Bee and Mehaboob Bee, who were defendant Nos. 4 and 5 in the suit and RFA No.196/90 was filed by Mohd. Khasim, who was defendant No.7 in the suit.

The four appeals were taken up for hearing together by a learned Single Judge of the Karnataka High Court and were disposed of by a common judgment dated 5th October, 1998. By the said judgment, the appeal preferred by the plaintiff was allowed. The appeals preferred by the defendant Nos. 4 and 5 and defendant Nos. 8 to 10 in respect of issue Nos. 13 and 14 were allowed. Consequently, the appeal preferred by Mohd. Khasim was dismissed. While deciding the aforesaid appeals, the High Court took a view which was completely different from the views expressed by the trial Judge with regard to the interpretation of the Deed of Release and the Trust Deed executed by Mohd. Imam Saheb. After holding that the Trust Deed had not been acted upon at all, the High Court came to the conclusion that on a construction of the documents in question, the final irresistible inference was that neither had any valid trust nor valid wakf been created in the eye of

law so as to deprive the plaintiff from getting a share in the property left by his father. The High Court ultimately concluded that both the Release Deed and the Trust Deed were invalid and the heirs of Mohd. Imam Saheb were all entitled to their respective shares in the properties of late Mohd. Imam Saheb.

Civil Appeal Nos. 3023-3024/2000 have been filed by defendant No.7 Mohd. Khasim against the decision in RFAs No. 196/90 and RFA No. 561/87 and Civil Appeal Nos. 3025- 3026/2000 have been filed against the same judgment in disposing of RFA No. 824/87 and RFA No. 562/87.

Appearing on behalf of Mohd. Khasim, the appellant in all these four appeals, Dr. Nafis Ahmed Siddiqui, learned advocate, submitted that the High Court had erred in coming to a finding that neither the Release Deed nor the Trust Deed had been acted upon and that the estate of Mohd. Imam Saheb was, therefore, open to partition amongst his heirs. Dr. Siddiqui submitted that there was sufficient material on record to show that after the execution of the Release Deed, Mohd. Imam Saheb recovered certain properties from his second wife, Hafiza Bi. He also urged that the reasons given by the learned Single Judge of the High Court in arriving at the conclusion that the Trust Deed had also not been acted upon, were wholly erroneous and without any substance. Moreover, the trial court had also committed an error in holding that only some of the properties were wakf properties which should vest in the 1st defendant while the other properties were to be partitioned. According to Dr. Siddiqui, the trial court ought to have held that the entire suit properties were trust properties and/or comprised a Wakf- al-al-Aulad.

It was submitted that the Appeal Court completely misconstrued and/or misunderstood the principles governing the creation of wakfs and trusts in coming to the conclusion that the Trust Deed had to be rejected into to. It was also submitted that although it was nobody's case that that the Trust Deed was in effect a Will, the Appeal Court arrived at an extraneous finding that if the same was to be construed as a Will, it could not operate on more than 1/3 of the net assets for the benefit of a wakf which might have been created thereby. Dr. Siddiqui pointed out that the error in the thought process of the High Court would be glaringly evident from its finding that once the trial court found that the Trust Deed was neither a gift nor a Will simpliciter, but came nearest to being a non-testamentary wakf, there was no question of such a wakf and there was no question of it coming into force from the date of its creation.

Dr. Siddiqui, on the other hand, contended that the recitals in the Trust Deed itself would indicate the nature of the document. It was urged that although the expressions used in the document (Ext.D-7) seemed to indicate that late Mohd. Imam Saheb had created a trust of his properties, the use for which the trust properties and the usufructs were to be utilized made it clear that Mohd. Imam Saheb's real intention was to create a wakf. Dr. Siddiqui urged that the Mohammedan Law recognized the formation of private wakfs for the benefit of the dedicator (wakif) and his family members, which among Mohammedans is considered to be a pious act. Dr. Siddiqui submitted that all doubts relating to the creation of such wakfs were put at rest by the enactment of the Mussalman Wakf Validating Act, 1913. Dr. Siddiqui also urged that under the Indian Trusts Act, 1882, there is provision for making a simple trust in the English form, but there is no concept of family settlement as provided under the Mohammedan Law for the creation of private wakfs generally known as Wakfs-al-al-Aulad.

Dr. Siddiqui pointed out that each of the duties entrusted to the trustees who were to come into the management of the properties after the death of Mohd. Imam Saheb, were recognized by Mohammedans to be pious and charitable and also religious in nature which gave the document the distinct flavour of a Wakf-al-al Aulad , which fact had been correctly noticed by the trial court in respect of the properties included in the Trust Deed and/or Wakf-nama . Where the trial court had gone wrong was in arriving at the conclusion that properties subsequently acquired by the estate of Mohd. Imam Saheb did not form part of the dedicated properties and were, therefore, partible.

Since the principle of law being sought to be urged by Dr. Siddiqui regarding the creation of a Wakf-al-al-Aulad is well established, there is no need to refer to the various decisions cited by him in that regard.

It was next contended that mere declaration of an intention to create a Wakf is sufficient to create such a Wakf and it was not necessary that possession was required to be delivered as in the case of a gift. It was also urged that from the contents of a document if it could be made out that the executant had wanted to create a Wakf-al-al-Aulad, though not mentioned in express terms, an inference in favour of the creation of a Wakf could be drawn. In support of such submission, reference was made to a decision of this Court in the case of Garib Das and Ors. vs. Munshi Abdul Hamid and Ors., reported in . Reference was also made to various other decisions of different High Courts which explain the same principle.

On the question of Ext.D-21, which was an unregistered document said to have been executed on 10th April, 1963 cancelling the Trust Deed dated 29th February, 1960, it was urged that the trial court had rightly chosen not to rely on the same since cancellation of a registered document could only be done by virtue of another registered document. Dr. Siddiqui concluded on the note that if it is accepted that by virtue of the Deed of Trust, a Wakf-al-al-Aulad, was in effect created, then the properties comprising the said Wakf were not partible and the suit was liable to be dismissed and the judgment and decree of the High Court in its entirety and that of the trial court partly, were liable to be set aside and the suit was liable to be dismissed.

Mr. Mushtaq Ahmad, learned advocate, who appeared for some of the respondents did not dispute the different propositions of law urged by Dr. Siddiqui, but contended that they could not be applied to the facts of the instant case. He urged that in order to constitute a Wakf, the properties dedicated must vest in God and even if the intention was to create a Wakf-al-al-Aulad, the ultimate benefit must also vest in God. Mr. Ahmad submitted that in the instant case there is no express dedication of the Wakf properties in God and in the absence of such a provision, it could not be presumed that the executant had intended to create a Wakf and not a simple English Trust as indicated from the document itself. It was also submitted that there is no legal bar in the creation of a trust for the objects indicated in the Deed of Trust (Ext.D-7), though it could be contended that they are also the lawful objects of a Wakf-al-al-Aulad or even a Public Wakf. However, according to Mr. Ahmad the Trust Deed had not been acted upon, as had been rightly found by the High Court, inasmuch as, the executant had reserved to himself the power to alienate the properties forming the subject- matter of the Trust Deed. Furthermore, neither the executant nor his descendants had ever asserted that the properties in question constitute a trust. It was urged that Mohd. Imam Saheb died intestate on 7th

August, 1969 leaving behind the suit properties, both movable and immovable, which he had acquired during his lifetime and after his death the same had been jointly owned and possessed by the plaintiff and the defendants as his heirs. Since the parties had been unable to arrive at an amicable settlement, in respect of their respective shares in the suit properties, the plaintiff was compelled to file a suit for partition and separate possession of his 2/13 share therein. It was urged that the Release Deed dated 18th August, 1958 was not binding on the plaintiff since it had been executed only to satisfy the wishes of Mohd. Imam Saheb. It was nothing but a sham document, not acted upon and it did not bind the plaintiff nor did it take away the plaintiff's right to inherit the suit properties.

Interestingly, apart from defendant No.7 (Mohd. Khasim), all the other heirs of Mohd. Imam Saheb supported the plaintiff and none of them supported the claim of defendant No.7 that the executant had intended to create a Wakf-al-al-Aulad or even a Trust. In support of his submissions that the executant of the Release Deed did not prevent the plaintiff from demanding a share in the estate of Mohd. Imam Saheb, reliance was placed on a decision of this Court in the case of Gulam Abbas vs. Haji Kayyam Ali and Ors., , in which it was inter-alia observed that the renunciation of a supposed right based upon an expectancy, could not, by any test found there, be considered prohibited. The binding force in future of such a renunciation would, even according to strict Muslim jurisprudence, depend upon the attendant circumstances and the whole course of conduct of which it forms a part.

As will be evident from what has been set out hereinabove, the outcome of these appeals will depend on an interpretation of the document executed by Mohd. Imam Saheb on 29th February, 1960 and styled as a "Deed of Trust". As noticed hereinbefore, the trial court had held that the said document purported to create a Wakf al-al-Aulad in respect of the properties indicated therein and that the said properties could not form the subject-matter of a partition suit. However, the trial court went on to hold that the other properties forming part of the estate of Mohd. Imam Saheb were his secular properties and were, therefore, partible amongst his heirs. The High Court reversed the said decision of the trial court as far as the finding regarding the creation of a wakf is concerned. The High Court, on a construction of the said Deed, held that neither had a wakf been created nor a valid trust and that both the Release Deed and the Trust Deed were invalid and the properties of Mohd. Imam Saheb were capable of being partitioned amongst his heirs.

On a perusal of the Release Deed dated 18th August, 1958 executed by Mohd. Dastagir, the plaintiff in the suit, and the Deed of Trust dated 29th February, 1960 executed by Mohd. Imam Saheb, we are unable to agree with the findings both of the trial court as well as the High Court for the reasons hereinafter following.

A plain reading of the document dated 29th February, 1960 indicates that Mohd. Imam Saheb had intended that his properties, both movable and immovable, should remain in- tact for the objects indicated in the Deed. It is also clear from the recitals in the Deed that he did not want his estate to be alienated by any of the trustees who would be in management, by reserving the power of alienation only to himself and that too for buying other properties which were to vest in the Trust. The objects for which the income from the properties were to be expended are mostly of a pious and religious nature. According to Mohammedan jurists, the term 'Wakf' literally means dedication or as noted by Mulla in his "Principles of Mohammedan Law", the permanent dedication by a person

professing the Mussalman faith of any property for any purpose recognized by Mussalman law as religious, pious or charitable. The desire of Mohd. Imam Saheb to tie up the properties so that they would not be dissipated and the objects on which the usufructs of the properties were to be spent, most certainly appears to have influenced the thinking of the trial court in holding that Mohd. Imam Saheb had wanted to create a wakf. The said reasoning was not accepted by the High Court. However, the High Court also went wrong in holding that a valid trust had not also been created by the document of 29th February, 1960. In fact, while we agree with the High Court on the first count, we are unable to agree with the High Court on the second count. In other words, we agree with the High Court's finding that no wakf had been created by the aforesaid document but at the same time we are also of the view that it was Mohd. Imam Saheb's intention to create a valid trust.

As urged both by Dr. Siddiqui and Mr. Mushtaq Ahmad, in order to constitute a wakf, there must be a permanent dedication of the properties in question in favour of God Almighty and while the objects of the wakf may initially be for the benefit of the wakif's family and other descendants, the ultimate beneficiary had to be God. Neither of the two above conditions are fulfilled by the document dated 29th February, 1960. The other important test is the nature of inalienability of the properties forming the nucleus of the wakf. Once a wakf is created, the title of the wakif in the dedicated property is extinguished and vests in God. The wakif is entitled to reserve power to alienate any portion of the wakf properties, but for the benefit of the wakif. In the instant case, the executant had reserved to himself the power to alienate the trust properties, but one of the conditions stipulated in the deed was that his two minor daughters were to be given immovable properties worth Rs.8, 000/-. A further direction was given by the executant that after his death his daughters, Mymoona Bi and Fathima Bi, were each to be given a share of the immovable properties of the value of Rs.8, 000/- on condition that they would not be entitled to the said immovable properties if they had no male issues. A specific direction was given that the properties given to Fathima Bi or Asha Bi would also revert to the Trust if they had no male issues.

The aforesaid directions run contrary to the concept of wakf and the more appropriate view appears to be that the executant intended to create a simple English Trust. Although, in order to create a valid wakf it is not necessary to use the term 'wakf' in the document in question, except for providing for the performance of certain religious ceremonies, pious and charitable duties, there is no mention that the dedicator had ever intended that the properties forming the subject-matter of the trust should constitute a wakf. The executant appears to have deliberately used the expression "trustee" and not "Mutwalli" which would have ended the controversy that has now arisen. The law is quite clear that there is no bar to a Mohammedan creating a simple English Trust. It is not always necessary that in order to make a settlement of his properties, a Mohammedan has always to create a wakf. In fact, the said view has been expressed in a Division Bench decision of the Madras High Court in Kassimiah Charities Rajagiri vs. Secretary, Madras State Wakf Board, 1964 AIR(Mad) 18. In the said case, while confronted with a similar question, the Division Bench observed that a Muslim can endow properties to charities either by adopting his favourite mode of creating a wakf or by endowing property conforming to the law of Trusts. The question whether a particular endowment amounts to a wakf under the Mohammedan Law or to a Trust as recognized by modern jurisprudence, will have to be decided primarily on a true construction of the document establishing the charity. However, it has also been stated in the said decision that vesting of a power of alienation by way of exchange or sale under the document creating wakf is not inconsistent with the document constituting a wakf under the Muslim Law. A dedication to a wakf will not, therefore, cease to be such merely because a power is reserved in the Mutwalli to exchange the wakf lands with other

lands or to sell them and purchase other lands so that the lands so taken in exchange or by purchase, might become the subject of the wakf.

In the present case, the power of alienation has been reserved only to the founder of the trust and all the other trustees have been prohibited from doing so. Accordingly, the observations made in the aforesaid decision regarding the power of alienation reserved to Mutwalli does not really help the case of the appellant who is interested in establishing that the properties were wakf properties.

In our view, in the face of the recitals contained in the document of 29th February, 1960, there was no material for the High Court to observe that after taking all the documents together, the final irresistible inference is that there was no valid trust nor a valid wakf in the eye of law. Such a finding is completely contrary to the document itself and has to be set aside.

As far as the Deed of Release is concerned, the same loses much of its significance once it is established that the properties forming the subject-matter of the document dated 29th February, 1960 comprises a trust. The properties in question, therefore vests in the trustees for the time being in management of the same and are not partible amongst the heirs of late Mohd. Imam Saheb.

The Trust Deed also makes it clear that all properties acquired in future must be considered to be part of the trust properties and hence the trial court erred in holding that except for the properties mentioned in the Trust Deed, the other properties of Mohd. Imam Saheb were secular in nature.

Consequently, both the judgments and decrees of the trial court as well as that of the High Court are liable to be set aside. The appeals preferred against the common judgment dated 5th October, 1998 passed by the Karnataka High Court in the four appeals preferred against the judgment and decree of the trial court are dismissed and the suit filed by Mohd. Dastagir, respondent No.1 herein is dismissed.

Having regard to the peculiar facts involved, the parties will all bear their own costs.