CALCUTTA HIGH COURT

Syed Mohiuddin Ahmed

Vs

Sofia Khatun

(R.C. Mitter, J.)

31.05.1940

JUDGMENT

R.C. Mitter, J.

1. Obedul Gani and Mohamed Abul Fazel purported to create a wakfalal-aulad by an instrument, Ex. A (II. 10). The properties included in the said deed are the properties described in sch. ka and 11 annas odd gundas share of the properties described in sch. kha of the plaint. On 20th June 1918 another wakf-alal-aulad was created by the instrument Ex. A-1 (II. 28) by five persons Sofia Khatun, Syed Mohamed Hossein Ali, Mohamed Obedul Gani, Hosseini Khatum and Ojihannessa Khatun. It comprised the remaining share of the properties of sch. kha of the plaint. The relationship of the parties who created the aforesaid two wakfs and of the parties to this litigation would appear from the following genealogical tree: Akhilenessa = MOHAMED FAZEL alias MUCHI MIA = Rahatannessa | |----------| Ali Nazir (dead) Hosseni Khatun = Abdul Samad (deft. 4) | |----------|----------|----------|----------|----------| Rokeya Khatun Deft. 5 = Obedul Md. Abul Fazel Md. Ismall Moazzuam Ojhanessa Fatema Gani = Golsabba =Sydenessa (deft.3) (dead) | =Mir Afzal Ali (deft. 5) | Syed Hossein (deft. 8) | | |----------| | Syed Hossin All Sofia Khatun |----------|----------| =Asiranessa (plff. 3) (plff. 1) Roshanara (deft. 1) Jamila (deft. 2) son | =Syed Mohiuddin Abdur Rahim dead Syed Nazeb All (plff. 2) (deft. 6) (deft. 7)

2. The suit was brought by Sofia Khatun, Syed Hossein Ali and Syed Nazeb Ali for a declaration that the aforesaid two wakfs are invalid in law. The learned Subordinate Judge adjudged them to be invalid and gave She plaintiffs the declaration they asked for. Defendants 6 and 7 have preferred this appeal. In the appeal, the following questions only were raised : (1) Whether the two wakfs in view of their terms are invalid. (2) Whether the question of the validity of wakfs is res judicata and (3) whether the suit is barred by limitation. No other point was canvassed before us. In considering the first question the two wakfs must be dealt with separately for the terms thereof differ from one another in material particulars though both of them purport to be wakf-alal-aulad. The mate-rial terms of the wakf created on 5th June 1891, (Ex. A-II10) are;
(a) the mutawalli was to get a yearly salary of Rs. 36; (b) the yearly allowance (under the incorrect designation of salary) of Rs. 180 - was payable to Obedul Gani Rs. 180 - to Abul Fazel Rs. 20 - to Ali Nazar Rs. 15 - to Fatema Rs. 15 - to Ojihannessa Rs. 15 - to Hosseni Khatun and Rs. 20 - to Fazlar Rahman Total Rs. 445

3. On the death of the abovementioned persons the allowances payable to them were to be paid to their respective heirs in succession according to the law of inheritance; (Para.
4.)(c) The mutwalli was required to spend Rs. 50 a year towards pious acts in connexion with Id-ul-Fitr, Id-ul-Zoha, Muharram, Fateha-dwaz-daham and Shab-e-barat. Over and above he was required to make gifts to afflicted and needy persons, but no sum was specified for those purposes. (Para. 6.) The purposes mentioned in this paragraph are stated to be the principal objects of the wakf, but that statement cannot by itself make the wakf a valid one if its substantial effect is otherwise, (d) The deed further provides that if any person to whom an allowance was payable became a renegade or acted against social customs or was guilty of an act that may be regarded as dishonorable to the family he would lose his allowance, which would then be applied to objects mentioned in para. 6. (Para. 5.)(e) If any person to whom an allowance was payable died heir-less then also his allowance was to be applied to the objects mentioned in para. 6. If the income of the wakf properties increased, the allowances payable and the sums authorized to be spent on the objects mentioned in para. 6 were to be increased. (Para. 15.) If the income decreased then the allowances were to be reduced but not the sum of Rs. 50 allocated towards the pious acts in connexion with the five festivals e.g., Id-ul-Fitr. etc. (Para. 14.) In the residential house, which was included in the wakf the mutwallis were given the right of residence. Right of residence was also given to Obedul Gani and Mohamed Abul Fazel and to their sons and grandsons etc. and to none else. The mutwallis were given a discretion to let it out and to apply the rent for the benefit of the poor and for pious acts. (Para. 16.) The mutwalli was enjoined to render accounts (nikash) to persons connected with the wakf at the end of every year and thereby to "show that the principal objects of the wakf mentioned in para. 6 had been fulfilled by him satisfactorily."

4. It is established on the evidence, and the fact is also not challenged before us, that the annual net income of the dedicated properties amount to Rs. 1800. That was certainly the income in year 1925, (Ex. 1 II 115) and there is no indication in the evidence that the income has since decreased. We have no definite evidence as to what was the income in 1891 when the wakf was made, but from the extent of the properties it is tolerably certain that the net income was much more than Rs. 500 a year, possibly not below the figure of Rupees 1800. Out of this amount Rs. 445 was payable as allowances to the members of the family of the wakfs, Rs. 50 was earmarked for specific charities and Rs. 36 as the mutwalli's salary. The mutwalli had therefore a discretion to spend the residue about Rs. 1300 a year, for the relief of the afflicted and the needy. If there had been an express direction on the mutwalli to spend the whole or a substantial part of the residue of the income on those objects, there could not have been any doubt about the validity of wakf, apart from the provisions of the Wakf Validating Act of 1913. The concurrent gift to charity would have been very substantial, more than two-thirds of the total income. From that fact the inference would have been that the properties have been substantially dedicated to charity. The learned advocate for the respondent however contends that as no obligation had been imposed on the mutwalli to spend the residue of the income on these objects, but only a discretionary power was conferred on him and as he could not be held liable for breach of trust if he did not spend a single pice out of the residue for the relief of the afflicted and the needy the concurrent gift to charity was only to the extent of Rs. 50 a year and the rest is illusory and consequently the wakf is invalid under the Muslim law as interpreted by the Judicial Committee of the Privy Council, and the Wakf Validating Act of 1913 does not validate it as the ultimate gift to charity is more remote than has been allowed under the said Act.

5. For supporting his argument that the concurrent gift to charity is illusory on the ground that the mutwalli was under no obligation but only had a discretion in the matter he relies upon some observations made at pp. 1170-1172 in Masuda Khatun v. mahommad Ebrahim . That case left undecided the question, as to whether the principle laid down in *Morice v. Bishop of Durham*[1] was applicable to wakfs. The question in that case, which was the case of a wakf to which the provision of the Wakf Validating Act, 1913 applied, was whether there was an ultimate gift to the poor or to other permanent objects recognized by the Muslim law as pious, religious or charitable. By the wakf deed the mutwalli was directed to pay the premium of a life policy specified in schedule Gha and to pay life allowances to named persons specified in the items of schedule Uma except item 1. Charitable objects of a permanent nature were specified in schedule Ga and in item 1 schedule Uma. The payments required to be made on the heads of schedule Gha and the other items of schedule Uma except item 1 were to cease in course of time which would not be long. The wakif directed the mutwalli to spend the same thereafter either in making improvements, or in repairing the walls of a private tomb or on the objects mentioned in schedule Ga. It was argued that the said option prevented a trust of the same in favor of the objects mentioned in schedule Ga.

6. This contention was sought to be supported on the principle laid down in Morice v. Bishop of Durham (1804) 10 Yes 552. On the construction of the deed, the learned Judges held that in effect an unfettered discretion had not been conferred on the mutwalli to spend these moneys for all time to come either on the improvement of the wakf estate or on the walls of the private tomb, and that there was an overriding trust in favour of the charitable objects mentioned in schedule Ga. The wakf was accordingly held to be valid. The wakf deed we have before us makes the position clear. Para. 7 requires the mutwalli to give yearly accounts and to satisfy persons connected with the wakf when giving yearly accounts that the "principal object of the wakf mentioned in para. 6 had been satisfactorily fulfilled." That indicates that he had no unfettered discretion to divert the residue of the income to non-charitable purposes, and that he could be compelled to apply it to charitable objects mentioned in para. 6. The residue of the income was accordingly not under the absolute and uncontrolled discretion of the mutwalli. This distinguishes the wakf from the wakf under consideration in *Mujibunessa v. Abdul Rahim*[2] There is in the case before us an effective trust of the residue of the income in favour of the needy and the afflicted and as that residue is a substantial amount, we must hold that the properties had been substantially dedicated to pious and charitable purposes. This wakf Ex. A is accordingly valid. It is to be noted that this decision is based on the Mussulman law as interpreted in *Mahomed Ashanulla v. Amar Chand*[3] and *Abul Fata v. Rasamaya* [4] and as it stood before the passing of the Wakf Validating Act, 1913 and that it is not necessary to invoke the provisions of that Act for the purpose of establishing the validity of this wakf.

7. The wakf Ex. A-l created on 20th June 1918 follows in broad outlines the terms of the wakf (Ex. A) of 1891 but there is an important difference. Para. 6 is of more limited scope than para. 6 of Ex. A. The mutwalli is required to make gifts out of the wakf properties to the afflicted and to those unable to earn but only to the extent of Rs. 15 a year. The total allowances (under the incorrect designation of salary) payable is Rs. 152, i.e. Rs. 50 to Mohamed Hossein Ali, Rs. 55 to Sofia Khatun and Rs. 47 to Rokeya Khatun. These allowances were not limited to them for their lives but were made payable to their heirs in succession after their deaths. There is in this wakf no indication, like that in the other wakf, that the residue of the income was to be distributed amongst the poor and afflicted. The concurrent gift to charity was accordingly insignificant.

Apart from the provisions of the Wakf Validating Act of 1913, this wakf would not have been valid under the law as interpreted in tha case mentioned above. We will have therefore to consider whether it is valid by reason of the Wakf Validating Act of 1913, which applies to it. For considering this question the interpretation of paras. 4 and 9 of the wakf is of prime importance. Para. 4 provides for the payment of annual allowances (under the incorrect designation of salary) to the three persons mentioned above, namely Mohamed Hossein Ali, Sofia Khatun and Rokeya Khatun. It further provides that the said allowances were to be paid "to their heirs also according to the law of inheritance." The vernacular words used in this paragraph would according to context mean that the allowances were to be made not only to the immediate heirs of those three persons but to their heirs in succession. Para. 9 is in these terms: If any of the persons for whom annual salaries (allowances) are fixed die childless, their salaries shall be included in the wakf estate and shall be spent towards the pious acts mentioned in para. 6 if the persons enjoying salaries die childless, that is to say, without leaving heirs.

8. In our judgment the wakifs used the word "childless" as synonymous with the word "heirless" in this paragraph and the intention was to make an ultimate gift' to the poor and the afflicted on the failure of all the heirs, how low so ever, not only on the extinction of the line of descendants of the wakifs or of their family but on the extinction of a much wider group of persons, for the body of heirs would include even the distant kindred, most of whom would not be descendants how low so ever of the wakifs and could not be regarded as members of their family. In order that a wakf by way of family settlement may be valid under the Wakf Validating Act of 1913 an ultimate benefit must be expressly or impliedly reserved for the poor or any other purpose of a permanent character recognised by the Mussalman law as religious, pious or charitable. This is the proviso to Section 3. We cannot accept the contention of the learned advocate for the appellant that as the Mahomedan jurists considered the maintenance of one's family as a pious purpose the Legislature by using the phrase "any other purpose recognised by Mussalman law as pious" meant to validate all wakfs by way of family settlement irrespective of the fact whether there was any ultimate benefit reserved either for the poor, or for religious and charitable purposes. In our judgment whatever may be the notions of pious acts of Mahomedan jurists the Legislature clearly meant that maintenance and support of the family, children or descendants of the wakif is not to be regarded as coming within the phrase "other purpose recognised by Mussalman law as pious" used in the proviso to Section 3, for maintenance of these persons or class of, persons is expressly mentioned in the body of that Section.

9. The Judicial Committee gave an authoritative interpretation on the subject before that Act was passed and that interpretation was that (a) a dedication substantially for the maintenance of the family or descendants of the wakif was not a pious purpose which would support a wakf and (b) if the benefit is reserved for the poor or for other pious, religious and charitable purpose to take effect after the extinction of the line of descendants or the family of wakif, such gift is too remote and so illusory. The view of the Judicial Committee last mentioned has not, in our judgment, been completely done away with, but has only been restricted in operation. This is the effect of Section 4, which has defined the degree of the remoteness which is permissible. If the ultimate gift to the poor or to pious, religious and charitable purposes be postponed till after the extinction of the family, children or descendants of the wakif, the wakf would be valid although the ultimate gift to such purposes is remote. If such an ultimate gift is more remote, that is, if it is to take effect on the extinction of a more extended group of persons as for instance heirs how low so ever of the wakif, the dedication by way of wakf substantially for the maintenance of the wakifs

family, children and descendants would not be valid under the Wakf Validating Act. As in the wakf Ex. A1, the ultimate gift to the poor and the afflicted is more remote than what is allowed under Section 4 we must hold this wakf to be invalid in law. We do not also accept the contention of the learned advocate for the appellant to the effect that Section 2 Shariat Act (26 of 1937), has restored in its complete form the Mussalman law of wakf as expounded in Tagore Law Lectures of 1884 delivered by the Rt. Hon'ble Mr. Ameer Ali. Before the passing of the Shariat Act Section 37, Bengal, Agra and Assam Civil Courts Act (12 of 1887) provided for the application of Mussalman law to questions of succession, inheritance, marriage and religious usage and institutions only and left all other matters to be decided according to equity and good conscience. No doubt, other branches of Mussalman law were applied to other subjects but only under the head of equity and good conscience. The Acts and Regulations in force in the presidency towns and in other provinces were similarly worded. The effect of Section 2, Shariat Act, is to make the Mussalman law expressly applicable to subjects which under the terms of previous Acts and Regulations had to be decided on principles of equity and good conscience. That this was the object of Section 2 is made clear by the repeal of parts of the earlier Acts and Regulations mentioned in Section 6.

10. The decision of the Judicial Committee in *Mahomed Ashanulla v. Amar Chand*[5] *and Abul Fata v. Rasamaya (1895) 22 Cal. 619(supra)* referred to above are expressly decisions interpreting what was held to be the Mussalman law on the subject, and in our view there is nothing in the Shariat Act to affect those decisions. Only the Wakf Validating Act 1913, has affected these decisions to the extent indicated by us in the earlier part of our judgment. Section 2 of that Act excludes the operation of custom and usage where it applies, and may possibly have effect on previous decisions (if any) not expressly based on Mussalman law, if based on some rule of equity and good conscience opposed to Shariat Law but can have no effect in regard to decisions which expressly interpret Mussalman law so as to substitute for them the views of Muslim jurists on the same points. The questions of res judicata and limitation assume importance so far as second wakf (Ex. A1) is concerned. We do not see any substance in the point of res judicata. The validity of this wakf was not directly and substantially in issue in any suit before a Court competent to try this suit. In four suits (Ex. 11 and Ex. K series) the question was discussed. All these suits were before the Munsif. They were either suits for rent, or for ejectment of tenants or suits under Section 140, Bengal Tenancy Act. The question was whether the right to claim the reliefs was in the mutwalli or not. The question of the validity of the wakf was in issue but the question was decided in all the cases by Munsifs who would have had no jurisdiction to try this suit.

11. The wakf was created on 20th June 1918. The present suit which is a declaratory suit, was brought on 28th March 1934. Article 120, Limitation Act, is applicable. If the plaintiffs' title has not been extinguished by adverse possession, they would be entitled to bring a suit for declaration and their suit would be in time if brought within six years of the denial of their title. We have it in evidence that as long as Obedul Gani lived there were no disputes or differences. Only after the death of Obedul Gani which occurred on 17th May 1928, i.e. within six years of the suit disputes arose, some members of the family asserting that this wakf and the other one were invalid and so the properties were secular and others that the wakfs were valid and that the persons falling within the first class had no personal rights. The suit is therefore within time provided that the rights of the plaintiffs have not been extinguished by adverse possession. The evidence establishes the fact that the person appointed as mutwalli was in possession as mutwalli.

The question is whether his possession would be adverse if the wakf is invalid in law. This question has been answered in the negative by the Judicial Committee of the Privy Council in Maulavi Saiyid Muhammad Munwar Ali v. Razia Bibi (1905) 27 All. 320 and by the Division Bench of this Court in Rukeya Banu v. Nazira Banu . If the wakf is valid no question of adverse possession on the part of the mutwalli arises, for he is then in possession lawfully, as manager of the endowment. If the wakf is invalid the possession of a mutwalli, on the supposition that it is valid, is still the possession of a manager not his own possession in his personal right. His possession was in the case where the wakf was invalid, the possession for the rightful owner, not the possession of a wrong, doer. We accordingly hold that the suit is not barred by limitation. The result is that the appeal is allowed in part. The wakf created by Ex. A on 5th June 1891 is declared to be valid but the other wakf created by Ex. A-1 on 20th June 1918 is declared to be invalid. As the success is divided the parties to bear their respective costs throughout.

Cases Referred.

1(1804) 10 Ves. 552
2(1901) 23 All. 233
3(1890) 17 Cal. 498
4(1895) 22 Cal. 619
5(1890) 17 Cal. 498