APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

RAM CHARAN LAW

v.

FATIMA BEGAM.*

1915

Feb. 3.

Mahomedan law—Wakf—Constitution of wakf by deed of trust—Objects charitable and religious—Validity of wakf.

Where with the object of dedicating a house to the service of the Imams, Hassan and Hussain, and for other religious purposes, the settlor had conveyed the house to his grand-daughter and his grand-son on trust for the proper observance of the objects mentioned in the deed :—

Held, that there was a valid wakf.

Delroos Banoo Begum v *Ashgur Ally Khan* (1) discussed.

Phul Chand v. *Akbar Yar Khan* (2), *Biba Jan* v. *Kalb Husain* (3), *Mazhar Husain Khan* v. *Abdul Hadi Khan* (4) referred to.

APPEAL by the plaintiff, Ram Charan Law, from the judgment of Imam J.

This appeal arose out of an action brought by the plaintiff, which raised the question of the validity or otherwise of a deed dated the 15th July 1864 purporting to be a deed of wakf. The material facts are fully set out in the judgment of Imam J. which was as follows :—

IMAM J. In this suit the plaintiff seeks declaration of his title to, and possession over a half share in premises No. 63, Dhurrumtolla Street, in the town of Calcutta and a consequent partition of the said premises. The facts material to this case are shortly these : One Prince Syeduddin, a Mahomedan of the Sunni sect, owned and possessed several valuable properties in Calcutta, one amongst them being the premises of which a half share is in suit. He conveyed the said premises to his grand-daughter Sahebzadi Fatima Begam and his grand-son Fiazuddin under a deed of waqf dated

* Appeal from Original Civil, No. 56 of 1914, in suit No. 422 of 1911

(1) (1875) 15 B. L. R. 167.
(2) (1896) I. L. R. 19 All. 211.
(3) (1908) I. L. R. 31 All. 136.
(4) (1911) I. L. R. 33 All. 400.

1915

RAM CHARAN LAW v. FATIMA BEGAM.

the 15th day of July 1864, the purpose of the dedication being stated in the deed to be "service of Imam Hussain and Hassan and for religious purposes" in the manner mentioned in the deed. The direction to Fatima Begam and Fiazuddin and to their successors in the trust under the endowment is to apply the rents and profits of the premises after defraying the cost of collection and repairs "to the due and proper observance of the annual Mahomedan festival of the Mohorrum."

On the 20th September 1907, Fatima Begam mortgaged a half share of the premises to the plaintiff for the consideration of Rs. 16,000 advanced to her by the latter. The debt not having been repaid the plaintiff sued Fatima Begam on the mortgage and obtaining a mortgage decree purchased the half share of the premises at the execution sale. Before the sale Nurul Huq, a son of Fatima Begam, addressed a letter through his attorney to the Registrar of this Court requesting him to notify to the intending purchasers at the sale Nurul Huq's protest that the property was a waqf and that Fatima Begam had not a saleable interest. The plaintiff having failed to secure possession of the half share purchased by him has instituted this suit against Fatima Begam, Nurul Huq her son and the other defendants who are the descendants of Fiazuddin. The suit, however, has been contested by the defendants other than Fatima Begam and Nurul Huq. The plaintiff's contention is that the deed of the 15th August 1864 though on its face purporting to dedicate the property as waqf to religious uses was in effect a deed of gift, the donor having adopted the device of a waqf in order to preserve the property for the benefit of the donees. The contesting defendants assert the validity of the alleged waqf and deny the plaintiff's title to a moiety of the premises. There is only one issue that is material to the decision of this case, namely, whether the deed of the 15th July 1864 is valid and operative as a deed of waqf. For the plaintiff two objections are taken to the deed (i) that the object of the waqf is not valid under the Mahomedan Law, (ii) that the conveyance was in reality a gift; dedicating the property "in the way of God" not being the intention of the donor. It is contended for the plaintiff that in the deed there is no indication that a general benefit was intended to be conferred on the Mahomedan public and a reference has been made to the case of *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan* (1) in support of the proposition that the observance of the Mohorrum by a Mahomedan is a matter essentially of a private character. I cannot accede to the proposition in the general way it has been put. If the observance of the Mohurrum entails the feeding of the poor and distribution of alms to the needy, as it undoubtedly does, the dedication of the property to such use constituted the service of man and the good of humanity, though to a limited

(1) (1875) 15 B. L. R. 167.

section. Apart from the help to the poor and the needy, the commemoration of the historic events of Karbala keeping alive as it does some of the best tradition of Islam is to my mind as good a purpose as the followers of a faith can have. I see in it the visualisation of the grandest examples of courage and endurance and all that is heroic in man from the pages of Islamic history and I think it would be wrong to exclude it from objects valid for waqf. In the case of *Delroos Banoo Begum* v. *Nawab Ashgur Ally Khan* (1), the decision rested on considerations that do not affect the present case. The Imambara in that case was a part of the private dwelling house of the Begam; in the present instance there is not the maintenance of the Imambara attached to a private house that is the purpose of the waqf, but it is the keeping up of the Mohurrum as an institution with all its moral effect on the general Mahomedan public. The contention that Prince Syeduddin adopted the device of a waqf and in effect made a gift is not borne out by any of the circumstances of the case. The value of the premises, half of which is in suit, was admitted to be Rs. 14,300 only in 1864. The Prince about that time made certain dispositions of his other properties of the value of more than Rs. 58,000 in favour of Fatima Begam and Fiazuddin and the deeds relating to these properties do not show that he adopted any device to preserve them for his grand children for all times. Had it been his intention to tie up the properties for their benefit by a device, we should have had a waqf of all the properties and not merely of the premises in suit. I hold that the deed of the 15th July 1864 is valid and operative as a deed of waqf. In this view, Fatima Begam had not a saleable interest in the property and the plaintiff by his purchase obtained no title to it. The suit is, therefore, dismissed with costs on scale No. 2, including reserved costs, if any.

The plaintiff appealed.

Mr. B. Chakarvarti (with him *Mr. B. K. Lahiri* and *Mr. N. Ghattak*), for the appellant, contended that although the deed of the 15th July 1864 purported to dedicate the property as wakf to religious uses, it was in effect a deed of gift. The device of a wakf had been adopted in order to preserve the property for the benefit of the donees and was invalid. Moreover, the disposition did not constitute a wakf: see *Delroos Banoo Begum* v. *Ashgur Ally Khan*(1).

Mr. A. Rasul (with him *Mr. Z. Ali* and *Mr. Ashraf*

(1) (1875) 15 B. L. R. 167.

1915

RAM CHARAN LAW v. FATIMA BEGAM.

Ali), for the respondents. The case of *Delroos Banoo Begum* v. *Ashgur Ally Khan*(1) has no application. There is no objection to the creation of a wakf by a deed of trust: see *Bishen Chand Basawat* v. *Nadir Hossein* (2). He also referred to, among others, the cases of *Phul Chand* v. *Akbar Yar Khan* (3), *Biba Jan* v. *Kalb Husain*(4), and *Mazhar Husain Khan* v. *Abdul Hadi Khan* (5).

Cur. adv. vult.

JENKINS C.J. The question involved in this appeal is whether a Mahomedan lady, Shahebzadi Fatima Begam, had a saleable interest in a moiety of premises known as No. 63, Dhurrumtollah Street which the plaintiff claims to have bought in execution of a mortgage decree in Suit No. 527 of 1908.

The suit has been dismissed by Imam J., and from his judgment the plaintiff has appealed.

The decision of this suit depends upon whether or not this property has been validly dedicated as wakf or not. If it has, then the suit must fail.

The dedication is said to have been effected by a document of the 16th July 1864. It is in the form of an English Indenture and is expressed to be a conveyance to Fatima Begam and Fyezuddin, their heirs representatives and assigns, of the entirety of the premises now in suit, upon trust that they the said Fatima Begam and Fyezuddin their heirs or representatives or other trustees or trustee for the time being should from time to time demise the said hereditaments and premises to such persons or person on such terms and at such rent as they should think fit, and should from time to time appoint such person or persons to act as sircars

(1) (1875) 15 B. L. R. 167.
(2) (1887) I .L. R. 15 Calc. 329.
(3) (1896) I. L R. 19 All. 211.
(4) (1908) I. L. R. 31 All. 136.
(5) (1911) I. L. R. 33 All. 406.

or a sircar in the collection of the said rents as they should think fit with full power to discharge such sircars or sircar and to appoint others or another in his place and should apply the rents and profits of the said hereditaments and premises first in payment of the expenses of the collections of the said rents and profits and of the management of the salary of the said sircars or sircar and otherwise and of the execution of the trust and next in payment of the expenses of the repairs of the said hereditaments and premises and should apply the surplus of the said rents and profits after making the payments aforesaid in the due and proper observance of the annual Mahomedan festivals of the Mohorrum.

Fatima Begam is the defendant of that name. Fyezuddin is dead, and the other defendants are his representatives.

On the 20th of September 1907, Fatima Begam executed a document by which there was expressed to be mortgaged to the plaintiff the half share now in suit, it being recited that she was absolutely seized and possessed of or otherwise well entitled to that half share.

It was on the basis of this mortgage that the decree was passed, in execution of which the plaintiff claims to have purchased this half share.

Fatima Begam has appeared in the suit and put in a written statement alleging the wakf character of the property. She has, however, taken no part in the discussion before Imam J. or this Court. The other defendants have appeared and contested the plaintiff's claim contending that the property is wakf, or that at any rate what they describe as their moiety is unaffected by the mortgage and consequent sale. It is unnecessary to discuss any technical defect there may be in the form of the suit; the substantial question is

1915

RAM CHARAN LAW v. FATIMA BEGAM.

JENKINS C.J.

whether there has been a valid dedication or not, and it is on these lines that the case has been fought before us.

The plaintiff has urged many objections to the validity of the wakf.

The first point made is that the gift was to Fatima Begam and Fyezuddin on a condition, and that is inoperative because the Mahomedan law does not permit a condition to be attached to a gift. The recital to the deed, however, makes clear the executant's purpose, for it runs in these terms, "whereas the said Prince Mahommed Syeduddin is seized of or entitled to the hereditaments and premises hereinafter described for an absolute estate of inheritance and he is desirous of dedicating the same to the service of Imam Hassan and Imam Hussein and for religious purposes in the manner hereinafter mentioned."

The object of the gift is plain, and the introduction of trustees is merely the employment of machinery whereby the gift is carried into effect. The trustees are not donees, and it would be far too narrow a view to hold that the gift is vitiated by a condition. Mr. Chakravarti would go the length of contending that all gifts through the instrumentality of trusts are bad. It would be difficult to reconcile that view with the language of the High Court and the Privy Council in *Bishen Chand Basawat* v. *Nadir Hossein*(1).

In my opinion this objection fails, and I hold that the provision in favour of the due and proper observance of the annual Mahomedan festival is not invalidated by the introduction of trustees as part of the machinery for carrying it into effect.

But then it is contended that the disposition does not constitute a wakf, and Mr. Chakravarti has relied on the decision of *Delroos Banoo Begum* v. *Nawab*

(1) (1887) I. L. R. 15 Calc. 329.

Syud Ashçur Ally Khan (1) as conclusive in his favour. But this argument appears to me to rest on a misreading of the judgments of the High Court and the Privy Council in that case.

The defendant there dedicated the whole of her property in perpetuity and provided that the income derived from the endowment, after the payment of the Government revenue, should be divided into twenty-eight parts, fifteen parts whereof should be applied to the expense of the *fatiha* of Mahomed and the Imams, as well as to those of the first ten days of the Mohorrum and all the holidays, and the repairs of the Imambara and the tombs; seven parts should be received by the amlhas and servants, whose names should be inserted at the foot of the document in question or any other document bearing the defendant's seal and signature and which the said servants might have in their possession, some from generation to generation, and the others as long as they retain service; and the remaining six parts should be received by the mutawalis, *i.e.*, the defendant and her co-mutawali.

The plaintiffs as members of the Mahomedan community sued the defendant as the mutawali of the endowment for her removal from that office on the ground of misfeasance with the wakf estate. Leave to institute the suit was obtained under Act XX of 1863.

It was objected that there was no jurisdiction to grant leave, as the alleged endowment did not come within the scope of the Act, that there was no intention of creating an absolute wakf, and that the defendant was not aware of the contents and legal effect of the deed at the time of its execution. The other defences need not be noticed. In the Court of first instance the plaintiff's suit was decreed. In the High

(1) (1875) 15 B. L. R. 167.

1915

RAM CHARAN LAW v. FATIMA BEGAM.

JENKINS C.J.

Court this decree was reversed and the suit was dismissed on the ground that the appropriation was not of a public character and that Act XX of 1863 did not apply to it. It followed that the Judge had no authority to give the plaintiff leave to sue and that his decition was *ultra vires*.

But while the learned Judges determined that there had been no grant of land for public purposes within the meaning of the Act read in the light of Regulation XIX of 1810, they by no means decided that the dedication did not constitute a wakf. On the contrary the Court agreed in thinking that so far as words went it was a wakf which would have bound the appropriator, but held in view of the dedicator's position as an illiterate and prejudiced woman with no professional assistance, that the dedication was not binding.

This is made abundantly clear by the concluding words of the judgment where it is said,—"As to the objections raised by the defendant that the wakf was indefinite and void, I think it enough to say that it, in my judgment, fully answered all the requirements of the Imameea Law, and that if it had been really and knowingly executed it would have bound Delroos Banoo Begum without the power of revocation.

The case was taken on appeal to the Privy Council [see *Ashgar Ali* v. *Delroos Banoo Begum* (1)] and the judgment was affirmed on ground that the dedicator was not bound by the deed, as the precautions required in the case of *pardahnashin* executants were not observed.

There is, however, no trace of any suggestion that, apart from this, a wakf was not legally constituted; rather does the judgment indicate that its validity, apart from the executant's incapacity, was questioned.

(1) (1877) I. L. R. 3 Calc. 324.

1915

RAM CHARAN LAW v. FATIMA BEGAM.

JENKINS C.J.

I, therefore, see nothing in this case that tells against the validity of the endowment now in question, and, if anything, it is an authority in its favour.

And in support of the view that a wakf was legally constituted, reference may be made to *Phul Chand* v. *Akbar Yar Khan* (1), *Biba Jan* v. *Kalb Husain* (2), *Mazhar Husain Khan* v. *Abdul Hadi Khan* (3).

Nor do I think that it is made out that the deed of the 15th July 1864 was a colourable transaction; indeed, the plaintiff cannot well contend that it was fictitious or had no operation, for his suit is one for partition, and it is only by virtue of this deed that any of the defendants acquired any interest in the property that would support a suit for partition. Equally futile is any argument which depends on the contention that the earlier release is open to attack.

The result then is that, in my opinion, a valid wakf was legally constituted and that the employment of trustees for the purpose of carrying it into effect in no way prejudiced the dedication.

I therefore hold that the suit was rightly dismissed, and that this appeal too must be dismissed with costs.

WOODROFFE J. I agree.

Appeal dismissed.

Attorney for the appellant: *N. C. Mandal.*

Attorneys for the respondents: *Alum & Nan; Hari Pada Dutt.*

(1) (1896) I. L. R. 19 All. 211. (2) (1908) I. L. R. 31 All. 136.
(3) (1911) I. L. R. 33 All. 400.

W. M. C.