PRIVY COUNCIL.

P.C.*
1924

Jan. 28

MUHAMMAD RAZA (PLAINTIFF)

v.

YADGAR HUSSAIN AND OTHERS (DEFENDANTS)

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

Mahomedan Law—Wakf—Grant for imambara—Construction—Conditional grant not wakf.

In 1840 the Hindu ruler of Nagpur granted villages to a Mahomedan subject, the royal physician, "as *mokasa* for the imambara of Pir Hussein for ever", the *mokasa* to be continued "from year to year and from generation to generation." In 1867 the Chief Commissioner ordered that "the villages may remain revenue free as long as the imambara is in existence, on this condition that the income arising from the *muafi* is properly spent and a report submitted to Government for sanction." In 1916 the appellant sued other descendants of the grantee alleging that the villages were wakf and claiming a declaration that he was entitled to be recorded as the full 16 annas *mokasdar* and *mutawalli*.

Held, that, whether the document of 1840 or the order of 1867 was considered, the grant was not a wakf but a personal grant subject to a condition, and that the claim accordingly failed.

Judgment appealed from affirmed.

APPEAL (No. 54 of 1922) from a decree of the Court of the Judicial Commissioner (January 10, 1920) reversing a decree of the Additional District Judge of Nagpur (December 18, 1918).

The suit was brought by the appellant against the respondents claiming by his plaint a decree under s. 83 of the Central Provinces Land Revenue Act to cancel entries in the record of rights showing the

* *Present*: LORD SHAW, LORD CARSON, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

respondents as co-sharers with him in three villages, and to substitute his name as the full 16 annas *mokasdar* and *mutawalli* thereof.

The facts appear from the judgment of the Judicial Committee. The District Judge held that the grant created a religious charitable trust for the imambara, that the wakf had been recognised by the British Government, and that the nature of the grant could not be altered by the settlement orders of 1867 whereby both sons of the grantee had been recorded as owners. He found further that Bunyad Hussain had appointed the appellant to succeed him as *mutawalli*, and that he had authority to do so. He accordingly made a decree as prayed.

On appeal the decision was reversed and the suit dismissed. The learned Judges were of opinion that no wakf was created and that the grant was a personal grant with a condition attached. They did not think it probable that a Hindu ruler could create a wakf in the sense of Mahomedan law, and were of opinion that the evidence showed that the grant had not been regarded or treated as having created one. They therefore held that the plaintiff could not maintain his claim as *mutawalli*.

De Gruyther, K. C., and *Abdul Majid*, for the appellant. The grant being for the perpetual support of an object recognised in Mussalman law as a religious object is a valid wakf; it is not material that the word "wakf" is not expressly used: *Pirun* v. *Abdul Karim* (1), *Jewun Doss Sahu* v. *Kubeeroodd-een* (2), followed in *Muhammad Hamid* v. *Mian Mahmad* (3), Ameer Ali's Muhammadan Law, 4th

Nov. 20.

(1) (1891) I. L. R. 19 Calc. 201, 216.

(2) (1840) 2 Moo. I. A. 390, 396, 421.

(3) (1923) L. R. 50 I. A. 92.

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Edn., Vol. I, pages 194, 216, Wilson's Anglo-Muhammadan Law, 3rd Edn., paragraphs 317, 322. The property has been treated as a wakf, in that the income has been applied to the maintenance of the imambara. The religious creed of the donor is not material in considering the validity of the wakf: Sastri's Hindu Law, 4th Edn., p. 480. It is true that Madras Act, VI of 1913, refers to wakfs made by "persons of the Mahomedan faith", but that does not affect the question; the Act is merely an enabling Act for Mahomedans. There is nothing to prevent the property being administered according to Mahomedan law. The appellant was *mutawalli*, having been appointed by his father. When the founder of a wakf does not provide for the succession of *mutawallis*, each *mutawalli* can nominate his successor.

The respondents did not appear.

The judgment of their Lordships was delivered by

Jan. 28. LORD SHAW. This is an appeal from a decree of the Court of the Judicial Commissioner of the Central Provinces, dated 10th January 1920, reversing a decree of the Court of the Additional District Judge of Nagpur, dated 18th December 1918. The case was argued before the Board *ex parte*.

The point of the appeal as presented was whether in the year 1840 Raja Raghoji Bhonsla, a Hindu ruler, created a wakf of three villages, namely, Gorewara, Sonkham and Nankapar, to Hakim Yadgar Hussain, the royal physician. The document so said to create a wakf is as follows:—

"From

"Raghoji Bhonsla, Sena Shaheb Subha.

"The village of Mouza Gorewada in this *pergana* is given as *mokasa in* "*the Arabic year* $\frac{1}{1}\frac{2}{3}\frac{4}{5}\frac{1}{6}$ (*Fasli year* 1250) to Hakim Yadgar Hussein for the "imambara of Pir Hussein, with all income of land revenue, Pandhari

"extra income, *Kalali* and mango groves, for ever from the commencement "of the current year. It is assessed to a rental of Rs. 401-12-0. You may "therefore continue the *mokasa* from year to year and generation to "generation. Don't expect a fresh Sanad every year. Keep a copy "of this Sanad and return the original to the grantee *dated 16th* "*Jamadilawal.*"

16th July, 1840.

The argument is that this grant constituted a wakf for the imambara of Pir Hussein. It was maintained that the use of the words "for ever"—manifestly applicable to the income of land revenue, etc.—together with the further use of the words "you may therefore continue the *mokasa* from year to year and generation to generation," signifies the creation of a wakf, although a wakf was not stated by name, nor is there any nomination of the grantee as *mutawalli* The case was supported in argument by various decisions, the leading one of which is *Jewan Doss Sahoo v. Kubeer-ood-deen* (1). It can hardly be denied that according to the Mahomedan law it is not necessary in order to constitute a wakf that the term "wakf" be used, "if from the general nature of the grant itself that tenure can be inferred."

This state of the law makes the present case one of difficulty on the facts and history elicited in these proceedings. In all such cases the actings or statements of the grantee or his successor may be relevantly taken into account as to their interpretation of the original grant: while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things are not conclusive, but are circumstances worthy of consideration. The following narrative is accordingly given:—

The grantee Yadgar Hussain continued in possession of the temple until 1850, when he died. The

(1) (1840) 2 Moo. I. A. 390.

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mokasa village was then resumed. On 15th May, 1852, a grant was continued in name of his son Hakim Bunyad Hussain.

In the view of the Board what happened in 1867 and the two preceding years, as aftermentioned, is important. It appears from the proceedings that on 25th February a revenue case was tried, and three orders, one applicable to each village, were signed by Mr. Ross, the Settlement Officer. They were headed :—

Claim to Proprietary right in Mouza Sonkham, late Purganah Katol, Thuseelee Nagpur,

and it was narrated :—

"This village has been held in *mokasa* tenure since 1840 A.D. and the "*mokasdar* has all along held it in his own management as appears from "the entries in the old record as follow :—

1234 Fs. to 1236 Amrun Gond.
1237 „ 1241 „
1242 „ Prubalad Poree.
1243 „ 1260 Hukeem Yadgar Hussain.
1261 „ 1263 *mokasa* „
1264 „ „ „
1265 „ 1267 *mokasa* Meer Hussain Imambara through Hukeemjee.
1268 „ 1270 Peer Husain through Boonyad Husain.
1271 „ Meer Boonyad Husain.

"Yadgar Hussain was the grantee and was succeeded by his son Boonyad Hussain. The female members of the family have laid claim to share, but they have no title. Boonyad Hussain has a younger brother named Thoofeyl Husain.

"Proprietary right in Mouza Sonkham is hereby conferred on Boonyad Hussain and Thoofeyl Husain.

On the 4th May of the same year (1867), however, an order was passed by the Settlement Officer of Nagpur, Mr. Ross. in these terms :—

"Claim by Boonyad Hussain to hold in Mokasa the village of Sonkham. This village together with the villages of Gorewara, and Nonkapar were granted by Takeed (issued in 1840 A.D.) to Yadgar Hussain, Hakim (physician to the Royal Family) for expenses of the Imambara of

Peer Hussain (Husan and Hussain) at Nagpur. The grant was made in perpetuity and inclusive of Abkaree, Pandhree, Sayer and demands of every other kind. The revised *jama* of these villages has been fixed, respectively, at Rs. 300, 500 and 120. Yadgar Hussain died in 1261 Fasli (1851 A D.) and the grant was continued by a Takeed dated 24th Rajab of that year to his son Boonyad Hussain.

"The expenses of the Imambara are defrayed by the holder during the Mohurram and Ramjan festivals. I recommend that the grant be continued while its object is maintained."

While on the 19th May the Chief Commissioner passed an order, the terms of which are of great importance. They are as follows:—

"The Mouza of Gorewara may remain revenue free as long as the imambara is in existence, on this condition that the income arising from the *muafi* is properly spent and a report submitted to Government for sanction."

The three orders, one applicable to each village, are in the same terms.

It appears to their Lordships difficult to predicate that these transactions of 1867 establish that a wakf with Yadgar Hussain as its *mutawalli* is established as having been instituted or continued as such.

If a statement made by Hakim Boonyad Hussain in the Court of the Settlement Officer on the 27th October 1865, be referred to, their difficulty grows greater. He is asked the question "Have you got a co-sharer?" to which the answer is "There is no co-sharer. My real younger brother Syed Tufail Hussain has got an equal share. We both live together." And in a further stage in his evidence he declares "I myself and my brother are in possession."

From a consideration of these documents and the evidence it appears to the Board to be fairly plain that Boonyad Hussain's own position was not that of an exclusive claim to the mutwalliship of this property and endowment as a wakf, but an allegation of joint ownership and possession with his brother, subject, it may be, to respecting the conditions of the grant.

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Hakim Boonyad Hussain died on 3rd April, 1913, and the recent settlement known as Mr. Dyer's settlement was made. From the papers it appears that a careful examination of the history of the property and its ownership and possession was then made. The decision of the Settlement Officer was to enter the defendant No. 1's name with other defendants 2 and 4 as co-sharers along with the plaintiff of the remaining 8 annas share. This administrative action was also of course quite inconsistent with the idea of a wakf having been constituted or there being any right in the deceased to have nominated his successor as mutawalli.

Their Lordships have carefully considered all the relevant documents and evidence in this case and they are of opinion that the judgment reached by the Judicial Commissioner is correct.

There are one or two matters, however, which the Board wishes to make clear. In the first place, in their Lordships' judgment the nature of the grant in this case, whether that term be applied to the document issuing from the Raja in 1840 or to the orders and records issuing from the Settlement Offices in 1867, was not a wakf but was a grant *sub conditione*. That condition was two-fold. In the first place the expenses of the temple should be defrayed from the revenue. The grant was for that purpose expressly, namely, "that the income arising from the *muafi* is properly spent," and, secondly, that a report was to be submitted to the Government for sanction, or to use the language of the Chief Commissioner's order of 10th July, 1867, with regard to Sonkham :—"The village of Mouza Sonkham may remain revenue free for ever on this condition that the object for which it was given *muafi* should be properly maintained and the Imambara be kept in good repairs and a report submitted to Government for sanction."

In the next place the Board desires to make it clear that the interests of the Imambara are paramount and that no administration by the persons claiming either under the title of grantee, or of mutawalli or of manager could be legally sanctioned which was in violation or betrayal of the interest of the Imambara as safeguarded by the imposition of the condition which attached throughout to the grant.

The rights which would emerge or the course of procedure which would have to be followed in the event of such mal-administration are not before the Board. The sole question arising is that defined by the plaint itself and is to the following effect :—"That a decree be passed under section 83 of the Central Provinces Land Revenue Act for setting aside the decisions of the Settlement Officer and cancelling the entries showing defendant No. I's name as an 8 annas co-sharer and those of defendants 2 to 4 as co-sharers along with plaintiff of the remaining 8 annas share in the record of rights and other papers relating to the new settlement of the mouzas :—

1. Gorewara
2. Sonkham

} More fully described in the schedule herewith attached and by substituting the name of plaintiff alone, as the full 16 annas *mokasdar* and mutawalli of the said villages."

The true point of the proceeding is that the plaintiff in the present case, Muhammad Raza, desires these entries to be deleted by substituting his name alone "as the full 16 annas *mokasdar* and mutawalli." His averment is that he, "in pursuance of the wishes of his father succeeded him in the office of mutawalli of the aforesaid Imambara, and has since been managing the aforesaid wakf property exclusively in his own sole and exclusive right as such mutawalli and is in possession of the same in that capacity."

His object of course cannot be accomplished unless he can establish his position as mutawalli, and that

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position cannot be established unless the grant *sub conditione* as before described can be considered to be a wakf. An additional negative destinction must be made. The Board makes no pronouncement whatsoever on a question mooted, namely, whether a grant by a Hindu to a Mahomedan community was incompetent of the foundation of a wakf. The grant in the present instance has been dealt with on its own terms and conditions and the issue has been settled against it being the constitution of a wakf. Further questions mooted only confuse that issue.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The petition for further documents will also be dismissed.

The appellant will pay to the first respondent such costs as he has incurred.

Solicitors for the appellant: *Francis & Harker.*

A. M. T.

APPELLATE CIVIL.

Before Newbould and B. B. Ghose JJ.

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Dec. 4.

BRAJA DAS ROY

v.

BANKIM CHANDRA BHUIA.*

Landlord and Tenant—Presumption as to fixity of rent, if applicable—Bengal Tanancy Act (VIII of 1885), ss. 50 (2), 102 (b), 111A, 115.

Where the record of rights declared a tenancy to be a *kaimi* tenure but not *mokarari* and no proceedings were taken to correct it: —

* Appeal from Appellate Decree, No. 364 of 1922, against the decree of M. Yusuf, District Judge of Midnapore, dated Sep. 27th, 1921, modifying the decree of Moulvi Hasibuddin Ahmed, Munsif of that place, dated July 31, 1920.