APPELLATE CIVIL.

Before Henderson and Sen JJ

MAHAMMAD ALI

v.

DINESH CHANDRA RAY CHAUDHURI.*

1940

April 5, 8, 9, 22.

Mahomedan Law—Wâkf—*Creation of* wâkf *provided in contract under which a person acquires property—Contract, if void for uncertainty—Transfer of such property other than by way of* wâkf, *if a "voluntary transfer"—Indian Contract Act (IX of 1872), s. 29—Provincial Insolvency Act (V of 1920), s. 53.*

A contract, under which a person obtains a property by undertaking to create a suitable *wâkf* after he gets it, is not void for uncertainty, as the term *wâkf* has a definite legal meaning, although there are many kinds of *wâkfs*. He is, therefore, bound to create a *wâkf* with respect to the property, and, if nothing more is said in the contract, the undertaking means that the person has contracted to create such a *wâkf* as to him seems suitable or best, and will have to specify the objects of the *wâkf* with reasonable certainty, or the *wâkf* will be void for uncertainty.

Until such a person makes a valid *wâkf* in terms of the contract, his creditors have the right to have recourse to this property to the extent of his interest therein, annulling any transfer made not in accordance with the contract and falling within the mischief of s. 53 of the Provincial Insolvency Act.

APPEAL FROM ORIGINAL ORDER preferred by the *mutâwâlli*.

The facts of the case and the arguments in the appeal are sufficiently stated in the judgment.

Atul Chandra Gupta and *Subodh Chandra Sen* for the appellant.

Phani Bhusan Brahma, *Rajendra Chandra Guha*, *Bama Prasanna Sen Gupta*, *Abul Quasem* (No. II), and *Amiya Ranjan Roy Chowdhury* for the respondents.

Cur. adv. vult.

*Appeal from Original Order, No. 201 of 1939, against the order of M. H. B. Lethbridge, District Judge of 24-*Parganás*, dated May 29, 1939.

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SEN J. This appeal arises out of an application made by the Official Receiver of 24-*Parganâs* under s. 53 of the Provincial Insolvency Act for the setting aside of a transfer made by Altaf Ali, an insolvent, on the ground that it was a voluntary transfer made without consideration and not in good faith. The deed of transfer purports to be a *wâkfnâmâ* executed by Altaf Ali on August 27, 1934, just one day before he applied for insolvency. The deed is Ex. F.

For a proper appreciation of the different points urged it will be necessary to state the following facts. The property transferred together with other property belonged to Nawab Bahadur Nawab Ali Chaudhuri. In 1911, Nawab Bahadur Nawab Ali Chaudhuri settled all his property under the Bengal Settled Estates Act (Bengal III of 1904), by which he became the first life-tenant, Altaf Ali the second life-tenant, and Mahammad Ali, Altaf Ali's eldest son, the third life-tenant. In 1927, the Nawab wanted to revoke this settlement and to make a *wâkf* of this property and, on September 24, 1927 he applied under s. 24 of the aforesaid Act for a revocation of the settlement. Altaf Ali opposed this application. Sir Provash Chandra Mitter, a friend of the family, intervened and the dispute between father and son was settled on certain terms. These terms were recorded in a document, which is dated October 20, 1928, and which is described in the heading thus:—

> Memorandum of points of settlement arrived at between the Hon'ble Nawab Bahadur Saiyid Nawab Ali Chaudhuri Khan Bahadur, C. I. E., and Nawabzada Saiyid Altaf Ali, in connection with the application of the Nawab Bahadur to the Government of Bengal for permission for revocation of the settlement of certain properties of his settled estates and of other differences and disputes between the parties.

The document is referred to in the learned Judge's judgment as Ex. E. On October 29, 1928, a joint petition was filed by father and son by which both parties stated that they had come to terms and that they desired that the settlement under the Bengal Estates Settlement Act should be cancelled. They made the memorandum, Ex. E, a part of this petition.

It will now be necessary to say something about the terms of compromise between Nawab Bahadur Nawab Ali Chaudhuri and his son, which were recorded in the memorandum of October 20, 1928. The terms substantially were these: The Nawab Bahadur proposed to execute a *wâkf* of all his properties, except a certain portion approximating roughly one-third. Regarding this one-third, the Nawab Bahadur would remain in possession thereof during his life-time, but without any power "to sell, "transfer, encumber, deteriorate or damage it in any "way". On the death of the Nawab Bahadur, Altaf Ali would take possession of part of this one-third immediately and of the remaining part after three years. The Nawab Bahadur also agreed to set apart an income of Rs. 500 out of his estate for specific charities the administration of which would be entrusted to Altaf Ali.

Then comes a term which is embodied in paragraph 8 of the memorandum. As this is a most important provision, regarding the interpretation of which there has been a great deal of discussion I consider that it should be set out *verbatim*. Paragraph 8 runs thus:—

> Nawabzada Altaf Ali agrees to make a suitable *wâkf* of the interest allotted to him herein.

The memorandum goes on to state that the parties agreed that there should be an application filed before the Government asking for the cancellation of the settlement under the Bengal Settled Estates Act and that, within one month of the date of the memorandum, the parties, their heirs, executors and administrators would execute necessary documents to give effect to the compromise arrived at. If any party failed to do this, the other would have the right to enforce the terms of the agreement through Court. The last paragraph of the memorandum states that the compromise has been arrived at on the mediation of Sir Provash Chandra Mitter and that if any

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difficulty or difference arose in regard to the drafting of the documents or in regard to any points not provided for in the memorandum the matter would be referred to him and his decision on the matter would be final.

On November 13, 1928, the Government of Bengal gave effect to the joint application of the Nawab Bahadur and Altaf Ali and cancelled the settlement of the properties of the Nawab Bahadur made under the Bengal Settled Estates Act.

On April 5, 1929, the Nawab Bahadur executed a *wâkfnâmâ* with respect to two-thirds of his property, leaving out the portion allotted by the compromise to Altaf Ali. In this document, which is Ex. D, there is a recital of the history of the family and property of the Nawab Bahadur.

Mention is made in the *wâkfnâmâ* of the compromise between the Nawab Bahadur and his son with respect to the application for the setting aside of the settlement under the Bengal Settled Estates Act and the terms of the compromise are set out in paragraph 7 of the deed. These terms are in the main the same as those contained in the memorandum of points (Ex. E), but they are given in greater detail. The nature of *wâkf*, which Altaf Ali agreed to create, is described as a—

Wâkf Alâl Aulâd for the purposes of making proper provision for the maintenance of himself (Altaf Ali) and of all his children after his death.

[*Vide* paragraph 7 (*ka*) of the *wâkfnâmâ*, Ex. D.] Again in paragraph 7 (*jha*) of the *wâkfnâmâ*, Ex. D, the kind of *wâkf* which Altaf Ali is to create is described in these words:—

I have agreed to give properties to Sriman Syed Faizal Bari Md. Altaful Ali Chaudhuri for enjoyment and possession by him till his death, on executing a *wâkf-âlâl-âulâd*, and after his death for enjoyment by his heirs according to the share as provided by Mahomedan law; but in the notes of memo. it has not been stated through mistake who shall be the *mutâwâlli* after his death.

There is a further statement in this paragraph that Altaf Ali should be the first *mutâwâlli* and after

him any one of his sons as he may appoint. The Nawab Bahadur states in this document that a draft agreement of the terms of the compromise had been sent to Altaf Ali for his signature and complains that Altaf Ali had raised certain objections and refused to sign it. He says that thereafter Sir Provash Chandra Mitter, after considering the objections of Altaf Ali, made alterations in the draft and sent it to Altaf Ali, but that he had not yet signed it. The Nawab Bahadur goes on to say that there had been great delay already and that he was executing his *wâkf* deed, in accordance with the terms of the agreement, without waiting any further.

On April 16, 1929, a few days after executing this deed, the Nawab Bahadur died. On August 5, 1929, his heirs other than Altaf Ali executed releases in favour of Altaf Ali with respect to the one-third share allotted to him.

Nothing further appears to have been done to carry out the terms of the compromise by Altaf Ali till August 26, 1934, when he executed the deed Ex. F, which purports to be a deed of *wâkf-âlâl-âulâd*, appointing his son Mahammad Ali *mutâwâlli*. On the next day, Altaf Ali applied to be adjudicated insolvent and he was so adjudicated on April 8, 1935. Thereafter the Official Receiver applied under s. 53 of the Provincial Insolvency Act for the setting aside of the *wâkf*. The application was opposed by Altaf Ali, his wife, the Commissioner of *Wâkfs* and the *mutâwâlli* Mahammad Ali. The learned District Judge has annulled the *wâkf* and the *mutâwâlli* Mahammad Ali appeals.

I do not propose to deal with every point taken before the learned District Judge and disposed of by him, but shall confine myself to those arguments which have been persisted in in this Court.

Mr. Brahma, appearing for the Official Receiver, contended that the memorandum of the points of compromise operated as a will and that Altaf Ali got

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the property which is the subject matter of these proceedings by way of bequest. He then argues that, under the Mahomedan law, a conditional bequest takes effect free from the condition and that Altaf Ali got the property free from any obligation to create a *wâkf*. The disposition by Altaf Ali was, therefore, a voluntary disposition and, as it was without consideration and not in good faith, it should be set aside under s. 53 of the Provincial Insolvency Act. This contention has found favour with the learned District Judge, who has held that the memorandum of agreement was a will.

Mr. Gupta for the appellant contends that it is impossible to treat this memorandum as a will, as it contained terms which were irrevocable and as there is nothing in the terms to suggest that the Nawab Bahadur was making a will.

The reasons which induced the learned Judge to hold that the memorandum is a will appear to me to be quite inadequate and erroneous. He says that, in determining this question, the intention of the party executing the document must be considered and that no one was likely to know that intention better than Altaf Ali, the son of the Nawab Bahadur. He then points out that in the document Ex. F, by which Altaf Ali purports to create a *wâkf*, he recites that the property was "bequeathed" to him. Next the learned Judge says that the dispositions made in the memorandum were revocable as the terms were vague. On these grounds he holds that the memorandum is a will.

In my opinion, the learned Judge has gone quite wrong both in his method of approach and in his conclusions.

A very obvious fact which the learned Judge has failed to notice is that the memorandum, Ex. E, is not a document executed by Nawab Bahadur Nawab Ali alone but by Nawab Bahadur Nawab Ali and Altaf Ali. It is difficult to conceive of a will being

executed jointly by the testator and legatee. Next, if the document be treated as having been executed by Nawab Bahadur Nawab Ali alone, his intention must be deduced from the language of the document itself. It is entirely wrong for a Court to interpret a document in a particular way, because some one taking under the document chooses to put that interpretation upon it. Altaf Ali's interpretation of the document is entirely irrelevant. The intention of a party to a document must be deduced from the document itself by giving the words therein their ordinary natural meaning. I have set out how the document describes itself in the earlier part of this judgment. It is merely a record of the points of a compromise arrived at between Altaf Ali and his father, the Nawab Bahadur. There are no words in the document which can by any straining of language be interpreted as words denoting a bequest. A will takes effect after the death of the testator. In this case the document took effect during the life-time of Nawab Bahadur Nawab Ali. The settlement under the Bengal Settled Estates Act was to be revoked at once and this was done. The Nawab Bahadur was to make a *wâkf* of about 2/3 of his property during his life-time and this was done. Next, a will under the Mahomedan law is revocable, except a will whereby a slave is emancipated. I find it difficult to understand how the learned Judge could hold that the terms of this document were revocable. He says that some of the terms were vague and unenforceable and concludes from this that the terms were revocable. I do not think that the terms are vague, but, even if they were vague, I would point out that the question whether a contract can be enforced or not is quite a different one from the question whether a disposition is revocable. By this memorandum both parties bound themselves to do certain things and pursuant to the agreement the Nawab Bahadur did certain things and Altaf Ali allowed the settlement under the Bengal Settled Estates Act to be revoked. The terms were, in my opinion, irrevocable. I hold,

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therefore, that the memorandum was not a will and that Altaf Ali did not get the property under any will. If Altaf Ali got the property under a will, then, no doubt, under the Mahomedan law, he would take it free from any condition, but, as the memorandum is not a will, this argument fails.

Mr. Brahma next argued that, if Altaf Ali did not get the property under a will, he got it by way of gift and that a condition attached to a gift being invalid under the Mahomedan law he got it absolutely. Mr. Gupta contends that there was no gift at all and that Altaf Ali got the property under a contract and was bound by the terms of the contract. I agree with the view of Mr. Gupta. It cannot be said that the memorandum of the agreement between the Nawab Bahadur and Altaf Ali is a deed of gift. The memorandum evidences not a gift but a contract between the parties, for which there was consideration given by both parties. It is hardly necessary to consider the Mahomedan law regarding gifts, as Altaf Ali took not under a deed of gift but under a contract by which he undertook to withdraw his opposition to the Nawab Bahadur's application for revocation in return for certain benefits. I might say incidentally, however, that in no view can it be said that there was a valid gift of the property to Altaf Ali. Under the Mahomedan law, a gift *in futuro* is void. Immediate possession is essential for a gift. Here the Nawab Bahadur retains possession during his life-time and Altaf Ali is to take after his death. Such a gift is void under the Mahomedan law. This was decided in the case of *Yusuf Ali* v. *Collector of Tippera* (1).

The transaction should be interpreted by reference to its terms and not by having recourse to ingenious fictions. The transaction between the parties broadly speaking was this. Altaf Ali would withdraw his objection to the application of the Nawab Bahadur

(1) (1882) I. L. R. 9 Cal. 138.

for revocation if he was allotted roughly one-third of the property. The Nawab Bahadur agreed to this provided Altaf Ali did not take possession of the property till after the Nawab Bahadur's death and provided Altaf Ali undertook to execute a suitable *wâkf* when he got the property. Altaf Ali accepted these terms. It is argued by Mr. Gupta that Altaf Ali, having agreed to these terms, was bound thereby to create a *wâkf* with respect to these properties and that the *wâkf* created by him, not being a voluntary transfer, it could not be set aside under s. 53 of the Provincial Insolvency Act, as that section applied only to voluntary transfers. Mr. Brahma's answer to this argument is two-fold. He says that if the transaction recorded in the memorandum, Ex. E. is interpreted as being an agreement, it cannot be enforced as the terms "suitable *wâkf*" is too vague, therefore Altaf Ali when he got the property could not be compelled to execute a *wâkf*. That being so, the *wâkf* was a voluntary one and liable to be set aside. The next branch of his argument is that by the document, Ex. F, Altaf Ali has not created a *wâkf* at all, as there is no ultimate gift to a religious or charitable purpose; it is not such a transfer as was contemplated by the agreement and, therefore, it is liable to be set aside as a voluntary transfer made without consideration and in bad faith.

I am not inclined to accept the first branch of Mr. Brahma's argument. True, there are many kinds of *wâkfs*, but the term *wâkf* has a definite legal meaning; it cannot be said that an undertaking to create a *wâkf* is void for uncertainty. If nothing more is said, the undertaking means that the person has contracted to create such a *wâkf* as to him seems suitable or best. He is, however, not free to dispose of the property in any way he likes: the disposition must be by way of a valid *wâkf*. True, when he makes the *wâkf* he will have to specify the objects of the *wâkf* with reasonable certainty or the *wâkf* will be void for uncertainty; but the contract to make a

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wâkf would not be invalid, because the terms of the proposed *wâkf* are not mentioned in the contract. I hold, therefore, that the contract of which the notes are recorded in the memorandum Ex. E is a valid and enforceable contract binding on Altaf Ali and had he created a valid *wâkf* in terms of the contract. I am of opinion that it could not be annulled.

The next branch of Mr. Brahma's argument creates difficulties in the way of the appellant. He says that the *wâkf* is invalid, as there is no ultimate gift for a religious, pious or charitable purpose. An examination of the terms of the deed Ex. F executed by Altaf Ali which he describes as a *wâkfnâmâ* shows that there is no ultimate gift to a religious, pious or charitable purpose. By this deed Altaf Ali provides for the payment of certain trivial sums payable annually to the *imâm* of the Bogra Jumma Masjid, to a High School, a Girl's School and a Madrasa. He also awards two gold medals. The rest of the income is divided among the members of his family and on their deaths among their eldest male issue. He then states that if any of the beneficiaries die without male issue the income would "revert to the "*wâkf* estate and will be appropriated by the "*mutâwâlli*". Now the *Wâkf* Validating Act VI of 1913 states that it is lawful for a Musalman to create a *wâkf* for the maintenance and support wholly or partially of his family children or descendants or if he is a Hanafi Musalman for his own maintenance and support during his life-time provided that the ultimate benefit in such case is expressly or impliedly reserved for the poor or for any other purposes recognised by the Musalman law as a religious, pious or charitable purpose of a permanent nature. This is s. 3 of the said Act. The present disposition is for the maintenance of the *wâkif's* family, but there is no ultimate gift for a religious, pious or charitable purpose. A *wâkf* has, therefore, not been created by Altaf Ali. In this connection I would refer to the

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case of *Tahiruddin Ahmad* v. *Masihuddin Ahmad* (1), where it was held in the case of a disposition like the present one that an ultimate gift for religious, pious or charitable purposes was essential for its validity as a *wâkf* and that the intention to make such a gift cannot be inferred from the mere use of the word "*wâkf*". Mr. Gupta for the appellant admits very frankly that a valid *wâkf* has not been created by Altaf Ali, but he argues that this does not matter. He contends that the receiver has nothing to do with the validity of the *wâkf* and that it is for the *mutâwâlli* or the beneficiaries to compel Altaf Ali to make a valid *wâkf*. I am unable to accept this view. Altaf Ali is the owner of the property by virtue of the contract with the Nawab Bahadur Nawab Ali Chaudhuri and the subsequent releases executed by the Nawab Bahadur's heirs, with this limitation that he is bound to make a valid *wâkf* with respect to this property in terms of the contract. Indeed if he be not the owner he could not under the Mahomedan law make a *wâkf* of the property, as under that law the property dedicated by way of *wâkf* must belong to the *wâkif* at the time of dedication. This view is expressed by Sir Dinshah Mulla in his treatise on Mahomedan Law relying on a passage at p. 562, Vol. I of Baillies' Digest of Mahomedan Law. That being so, until Altaf Ali makes a valid *wâkf* in terms of the contract, his creditors have the right to have recourse to this property to the extent of his interest therein. If Altaf Ali makes a transfer which is not in accordance with his contract it cannot be said that the transfer is one which he is compelled to make, it would be a voluntary transfer and, if it fell within the mischief of s. 53 of the Provincial Insolvency Act in other respects, it would be liable to be annulled. Only such a transfer is protected as Altaf Ali is bound to make in terms of his contract with his father. For instance, a gift by Altaf Ali to a friend within two years of his application for insolvency would be liable

(1) (1933) 1 L. R. 60 Cal. 901.

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to annulment on an application under s. 53 of the Provincial Insolvency Act.

In the present case Altaf Ali has not made a valid *wâkf* of the property; the transfer is, therefore, not in terms of his contract and must be treated as a voluntary transfer. That it is without consideration and not *bona fide* is quite apparent from the admitted circumstances and indeed this is not seriously challenged. The *wâkf* was created a day before the application for insolvency; although under the terms of the contract Altaf Ali could retain considerable benefits out of the property he divests himself of all rights therein and confers them almost wholly on his wife and children. The transaction is clearly *mala fide* and is liable to be annulled under s. 53 of the Provincial Insolvency Act.

I express no opinion whether the other terms of the deed Ex. F, which is described erroneously as a *wâkfnâmâ*, are in accordance with the terms of the compromise. It is not necessary to decide that now, as the transfer is not a *wâkf* at all.

The order of the learned District Judge is maintained, but for reasons other than those on which his decision is based. The receiver shall take immediate possession of the property, but he shall not sell the property. He will be entitled to appropriate the income therefrom for distribution among the creditors. The respondents shall give up possession to the receiver forthwith. The appeal is dismissed.

There will be no order for costs.

HENDERSON J. I agree and have little to add.

The receiver's application, though under s. 53 of the Insolvency Act, raises a question under s. 4, probably in anticipation of the objection which the appellant would almost certainly make.

The appellant could not even pretend that the insolvent received any consideration for the deed.

Furthermore, inasmuch as it was executed on the day preceding the application for insolvency and reserved nothing for the executant, it could not be said that it was executed in good faith. It would, therefore, be impossible for the appellant to resist the receiver's application if the deed was a voluntary one.

The contention of the appellant is that the insolvent was legally bound to execute a *wâkf* and that he had no interest in the property which could pass to the receiver. This is the substantial question which has been contested between the parties.

In support of his case, the receiver attempted to show that the property passed to the insolvent either by a will or on intestacy. I agree with what has been said by my learned brother on that aspect of the case. The points of agreement between the insolvent and his father are contained in the memorandum which was attached to the petition to his Excellency the Governor-in-Council. As a result of the agreement, the insolvent withdrew his opposition and the Governor-in-Council sanctioned the revocation of the settlement. It is, therefore, perfectly idle to contend that the agreement was not acted upon. When the settlement was revoked, the Nawab Bahadur did not obtain the property in its original state, but subject to the terms of the agreement; for example, it would not have been open to him to transfer or mortgage the property.

In the second place, the receiver contends that, even if he is not entitled to sell the property, he is entitled to be put into possession, the deed executed by the insolvent not being a *wâkf* within the terms of the agreement. On this branch of the case, Mr. Gupta contended that that was not a matter in which the receiver could intervene at all. The insolvent was legally bound to execute a valid *wâkf* and, if there was any defect in the deed actually executed, that was not the business of the receiver. His proper

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course would be to take steps to eject the appellant as a trespasser. In my judgment that is putting the case far too high. The deed is certainly not *wâkf*: but that will not make it a void deed. It is a deed by which an interest has been conveyed by the insolvent to the appellant and, until it is set aside, the appellant could not possibly be called a trespasser.

Appeal dismissed.

A. A