1920

BHUP SINGH v. CHEDDA SINGH.

BY THE COURT.—The appeal is allowed, the decree of the court below is varied and a decree is made in favour of the plaintiffs for the sale of 14/192 share in Hasanpur Ladauki, in addition to the property ordered by the court below to be sold. The appellants will have their costs of this appeal.

The defendants of the 4th party are allowed six months from this date for payment of the mortgage money.

Appeal allowed.

PRIVY COUNCIL.

MUHAMMAD RUSTAM ALI KHAN AND OTHERS (DEFENDANTS) *v.* MUSHTAQ HUSAIN AND OTHERS (PLAINTIFFS).

P.C.*
1920
May, 3, 4.
June, 18.

[On appeal from the High Court of Judicature at Allahabad.]

Waqfnama—Grantor changing proprietary possession to that of a mutawalli —Appointment of trustees without transfer of ownership—Possession as managers and superintendents to protect waqf property—Injunction by Deputy Commissioner in respect of property out of his jurisdiction—Disqualification of registering officer as having "interest" in objects of endowed property but who has acted in good faith—Defect in procedure—Punjab Court of Wards Act (Punjab Act II of 1903), *sections* 11 *and* 12—*Registration Act (III of* 1877), *sections* 17, 87, *and rule* 174 *of rules made under section* 69.

A Muhammadan landholder, with property partly in Karnal and partly in Muzaffarnagar, on the 25th of August, 1908, executed a waqfnama, or deed of charitable trust, dedicating specific property to religious purposes. The terms of the deed were "I was the lawful owner of the property. I had power in every way to transfer the same. By virtue of the said power I divested myself of the connection of ownership and proprietary possession thereof and placed it in the proprietary possession of God, and changed my temporary possession known as proprietary possession into that of a mutawalli (superintendent)." The grantor resided at Karnal in the Punjab, but finding that the Deputy Commissioner was about to place him and his property under the Court of Wards he went to Muzaffarnagar out of the jurisdiction of the Deputy Commissioner of Karnal, who on the 30th of August, 1908, under sections 11 and 12 of the Court of Wards Act 1903, issued an injunction restraining him from executing any deed of alienation of his property. The waqfnama was notwithstanding, on the 1st of September, 1908, registered by the Sub-Registrar of Muzaffarnagar. On the 9th of November, 1908, the grantor executed a further document appointing trustees to be superintendents after his death of the charity to which his property had been dedicated under the deed of the 25th of August, 1908. The grantor died on the 26th of December, 1908, and on the 8th

* *Present*:—Lord BUCKMASTER, Lord DUNEDIN, Sir JOHN EDGE and Mr. AMEER ALI.

1920

MUHAMMAD RUSTAM ALI KHAN v. MUSHTAQ HUSAIN.

of July, 1912, the respondents, who were the trustees, brought a suit against the appellants, the grantor's heirs, who had obtained entry of their names in the Revenue Register, as defendants, alleging that the deceased had duly dedicated his property to the charity and claiming to be the parties named to execute the trust.

Held that the waqfnama, inasmuch as it did not purport to transfer to the trustees named in it the ownership of the waqf property but made them merely mutawallis or superintendents for its management and protection, did not require registration under the Registration Act, III of 1877.

The injunction issued by the Deputy Commissioner of Karnal under sections 11 and 12 of the Punjab Court of Wards Act (Punjab Act II of 1903) in respect of property which together with the grantor was at the date of issue not within his jurisdiction, was held to be invalid and inoperative.

The Sub-Registrar who, being a trustee of one of the objects of the waqfnama entitled to the benefit of the trust, had registered the deed, but in so doing had acted in good faith, though "personally connected with and interested in the document" within the meaning of rule 174 of the rules made under section 69 of the Registration Act, III of 1877, was held by his action not to have invalidated its registration as it was a defect in the procedure which section 87 of the Act was intended to remedy.

APPEAL 18 of 1918 from a judgment and decree (3rd April, 1916,) of the High Court at Allahabad which affirmed a judgment and decree (23rd December, 1913,) of the court of the Subordinate Judge of Meerut.

The respondents brought the present suit against the appellants to have it established that the field and house property mentioned in the lists annexed to the plaint was a "waqf" property, from which the defendants should be dispossessed, and into possession of which the plaintiff should be put as "mutawallis"; and that the mesne profits (stated to be Rs. 81,034-9) and Rs. 4,715-6-11, the amount of income from the endowed property might be awarded to the plaintiffs and for other relief.

The original defendants were the two step-brothers of Nawab Rukn-ud-daula Muhammad Azmat Khan, who was the owner of a large estate situate partly in the Punjab, and partly in the Muzaffarnagar district of the North-Western Provinces, including the properties in suit. Appellant 2, Nawab Muhammad Umardaraz Ali Khan, is one of such step-brothers, and the substituted appellants are the heirs of the original appellant 1, (since deceased) Nawab Bahadur Muhammad Rustam Ali Khan. The appellants are the persons claiming to be the heirs of the Nawab Azmat Khan, who died on the 26th of December, 1908.

The original plaintiffs were the trustees of the properties in suit which were comprised in a "waqf" (deed of endowment), dated the 25th of August, 1908, they having been nominated or appointed trustees, or "mutawallis" by a deed called a "trusteenama," dated the 9th of November, 1908. The respondents are the present trustees or "mutawallis" of the properties claimed.

The terms of the deed of "waqf", so far as they are material, are stated in the judgment of the Judicial Committee.

By the "trusteenama", dated the 9th of November, 1908, the Nawab Azmat Ali Khan appointed certain persons named therein, (including respondents 3 and 4) trustees or mutawallis of the waqf on his death or in case he should be incapacitated, and formulated rules for the good management of the property, and of its income and expenditure, and under rule 18 appointed respondent 4, Qazi Muhammad Yakub, to be his colleague as mutawalli and fixed his remuneration.

The defendants denied the plaintiffs' claim. They pleaded that the Nawab was a person of weak and unsound mind, and under the domination of his servants; that he did not execute the waqfnama of the 25th of August, 1908, or the trusteenama of the 9th of November, 1908; that if he did execute the waqfnama, it was a fictitious transaction done with the object of preventing the Deputy Commissioner of Karnal from placing the Nawab's properties under the superintendence of the Court of Wards; that the Nawab treated the properties in question as his own private properties up to the date of his death; and that under the principles of Muhammadan law as expounded by Imam Muhammad of the Sunni school the waqf in question was invalid, and that in any case the waqfnama was void and inoperative, because it was registered on the 1st of September, 1908, after the prohibitory injunction, dated the 30th of August, 1908, issued by the Deputy Commissioner of Karnal.

The Subordinate Judge found all the material issues in favour of the plaintiffs. He held that the Nawab executed the waqfnama, and validly appointed the plaintiffs trustees to execute the trust, and that the waqf was not invalid or inoperative for the reasons put forward by the defendants. He further found that the prohibitory injunction issued by the Deputy Commissioner

1920

MUHAMMAD RUSTAM ALI KHAN v. MUSHTAQ HUSAIN.

of Karnal was not effective because there was no suit pending in the Court of the Deputy Commissioner of Karnal at the time when the injunction was issued, and also because the Deputy Commissioner had no authority to issue an injunction to any person outside the Punjab. In the result he held that the defendants had no right to succeed to the properties in suit, and made decree in favour of the plaintiffs.

On appeal by the defendants to the High Court (Sir PRAMADA CHARAN BANERJI and TUDBALL, JJ.) the Court held that the trusteenama did not require registration; it did not purport to transfer the property to other persons; that the action taken by the Deputy Commissioner of Karnal under the Punjab Court of Wards Act, was *ultra vires* and of no effect under the circumstances; that under the Muhammadan law delivery of possession was not necessary to make a 'waqf' operative or binding, and that the deceased Nawab had appointed himself mutawalli of the endowed properties and held them as such till his death. It was not invalid because he had appointed himself mutawalli. "The real fact is that the practice of the waqif appointing himself the first mutawalli is common all over British India. No one has ever thought of questioning the validity thereof since the decision in *Doed Jan Bibi* v. *Abdullah Barber* (1). Where the waqf is a genuine transaction and has been put into force we can safely say that its validity has never been challenged (at least since 1845) in British India on the ground that the waqif had appointed himself the first mutawalli."

The High Court concluded its judgment as follows:—"To sum up briefly, we hold that the waqf in dispute was a genuine transaction, created by the Nawab with good intent and not for the purpose of spiting his heirs; that the Nawab had for years desired to create the "waqf," and that the action of the Deputy Commissioner only caused him to act promptly so that he might carry out his desire while still legally able to do so. We hold that he acted of his own free will and accord, and not under the undue influence of anybody; that he fully understood what he was doing and that he was in full possession of his mental faculties when he on the 25th of August, 1908, executed the deed of waqf and had

(1) (1845) Fulton, 345.

it registered on the 1st of September, 1908; that he, having appointed himself the "mutawalli" or superintendent, at once took steps to secure mutation of names, and to proclaim to the world that he held not as owner, but as mutawalli; that he separated the accounts of the "waqf" property and that the income such as it was prior to his death was not spent on any improper objects but on the costs of management and the payment of the Government demand; that he duly executed the "trusteenama" of the 9th of November, 1908, of his own free will and accord and while in possession of his mental faculties, and with a full understanding of what he was doing and of its effect; that he was under no legal disability; that there is no legal flaw in either of the two documents, and that the "waqf" is valid and binding on the heirs, the present appellants."

The judgment of the Subordinate Judge was consequently affirmed.

On this appeal—

De Gruyther, K. C., and *B. Dube*, for the appellants, contended that the respondents had no right to sue as the document under which they have been appointed was invalid in law for want of due registration. The Sub-Registrar had no power to register the deed creating the endowment owing to his being a trustee of the Aligarh College, and therefore possessing an "interest" in, or "connection with," property which was one of the special objects of the "waqf." Reference was made to rule 174 of the rules made under section 69 of the Registration Act (III of 1877). The registration was therefore invalid. This was, it was submitted, (though it was not denied that the Sub-Registrar had acted in good faith) not a defect intended to be remedied by section 87 of the Act as a mere defect of procedure, but an act done with out jurisdiction. Registration also was not duly made, because there was, at the time it was made, an injunction issued by the Deputy Commissioner of Karnal prohibiting the Nawab from alienating the property. The trusteenama required registration under section 17 of the Registration Act, 1877, to effect the transfer to the trustees.

A. M. Dunne, K. C., and *W. L. Richards* for the respondents, contended that on the findings of fact by both Courts below

1920

MUHAMMAD RUSTAM ALI KHAN v. MUSHTAQ HUSAIN.

which were in their favour there were no grounds for declaring the "waqf" invalid in its inception and completion. It has been duly registered and acted upon and the injunction issued by the Deputy Commissioner of Karnal was without jurisdiction, invalid, and of no legal effect. The deed was effective to pass the property to the grantor and his nominees, but only as mutawallis or superintendents, and not as trustees in the full English meaning of that term. They did not become owners of the property under the deed; but they were mutawallis for the purposes of the endowment; registration of the "trusteenama" was unnecessary to make it binding.

De Gruyther, K. C., replied.

1920, June 18th.—The judgment of their Lordships was delivered by Lord BUCKMASTER:—

On the 25th of August, 1908, Nawab Azmat Ali Khan executed a waqfnama, or deed of charitable trust, dedicating specific property, of the stated value of Rs. 20,000, for religious purposes. The said Nawab Azmat Ali Khan resided at Karnal in the Punjab, and early in August of 1908 the Deputy Commissioner of Karnal intimated that he thought it expedient to place the Nawab and his property under the Court of Wards. The Nawab thereupon moved—it is alleged he was taken by his servants, but this is no longer material—to the district of Muzaffarnagar, beyond the jurisdiction of the Deputy Commissioner of Karnal. But the Deputy Commissioner proceeded to act under the Court of Wards Act, and in purported pursuance of the powers thereby conferred he issued an injunction on the 30th of August, 1908, restraining the Nawab or any authorized agent from executing any deed of alienation until the further order of the Court. Notwithstanding this direction the waqfnama was, on the 1st of September, 1908, registered before the Sub-Registrar of Muzaffarnagar. On the 9th of November, 1908, the said Nawab executed a further document purporting to appoint trustees of the charity to which his property had been dedicated under the deed of the 25th of August.

The Nawab died on the 26th of December, 1908, and the appellants, who were his step-brothers, claimed, in competition with the trustees for the charity and his widows, to inherit the estate, and applied for mutation of names, which was ordered

in their favour on the 11th of May, 1909, the Collector stating that the parties claiming under the deed of gift, and the widows, who claimed under a deed of sale, could sue in the Civil Courts.

On the 8th of July, 1912, the respondents, who were the trustees, accordingly instituted the proceedings out of which this appeal has arisen, alleging that the deceased had duly dedicated his property to the charity and claiming that they were the parties named to execute the trust.

This claim gave rise to a series of controversies with which it is unnecessary for their Lordships to deal, for, apart from three questions of law, the other disputes depended upon the determination of questions of fact which have been decided adversely to the defendants in both the Courts. The Subordinate Judge delivered judgment in favour of the plaintiffs (the respondents) and the learned Judges of the High Court affirmed his judgment. From the judgment of the High Court this appeal has been brought.

The three questions of law which alone arise for present determination are these:—

Was the action of the Deputy Commissioner of Karnal sufficient to prevent registration?

Was the Sub-Registrar disqualified from registering the deed by reason of his possessing an interest in the property? and

Did the "trusteenama" (the document of the 9th of November, 1908) require registration under the Registration Act of 1877?

There are several weighty objections urged against the appellants upon the first point. First, it is argued that the Deputy Commissioner had no power to issue any injunction under sections 11 and 12 of the Punjab Court of Wards Act, 1903, and secondly, that, even if he had such power, it must have been limited to persons and property within his jurisdiction. It is unnecessary to decide the first of these arguments, as their Lordships are clearly of opinion that, even assuming his authority would have extended to making such an order had the property been within his jurisdiction, the fact that at the time when the order was made both the Nawab and the property were outside that area deprived the order which he issued of any authority.

1920

MUHAMMAD RUSTAM ALI KHAN v. MUSHTAQ HUSAIN.

The next point depends upon the allegation that the Sub-Registrar was interested in the property registered because he was a trustee of Aligarh College, which was one of the objects entitled to the benefit of the trust. There is no allegation made against the good faith of the Sub-Registrar. It is admitted that he acted faithfully and honestly in the discharge of his duties, but it is said that nonetheless, by virtue of rule 174 of the rules made under Section 69 of the Indian Registration Act, he was incompetent to register the waqfnama, being in the words of the rule "personally or otherwise connected with or interested" in the document. Although his interest was remote, their Lordships are prepared, for the purposes of this appeal, and without giving any definite decision upon the meaning of the rule, to accept the view that this interest did bring him within the meaning of the provision. It would, however, be obvious that, if such a rule stood without any modification in the case of honest and independent action, the validity of registration might again and again be impugned, with unfortunate consequences. The framers of the Statute, under which the rules were made, have, however, foreseen and prevented such an unfortunate contingency, for by section 87 it is provided that:

> "Nothing done in good faith pursuant to this or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure."

It is contended that the disability created by rule 174 cannot be regarded as a mere question of procedure, but their Lordships do not accept this view. The registration by the Sub-Registrar is obviously the essence of the proceedings in effecting registration. If the Sub-Registrar were disqualified the Registrar would be entitled to act, and the fact that the Sub-Registrar, overlooking his own interest, or regarding it as an interest which created no disqualification, in perfect good faith effected the registration himself, is, in their Lordships' opinion, intended by the rules to be a step in the procedure, for it is under the actual heading "Procedure" that the rule is found.

The final question is one that at first sight appears to present more difficulty. It is argued that the "trusteenama" must have dealt with an interest in immovable property, for otherwise the trustees could have no right to maintain the suit; and such

an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the assumption that the trustees of the waqfnama in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The waqfnama itself does not purport to assign property to trustees. The words of the document are these :—

"I was the lawful owner of the said property. I was partly in actual possession thereof, and partly in legal possession thereof, that is, I was in possession through my servants, 'mustajirs' (farmers or lessees), tenants and cultivators. I had power in every way to transfer the same. By virtue of the said power, I divested myself of the connection of ownership and proprietary possession thereof, and placed it into the proprietary possession of Him who is the real owner, that is God, the owner of the universe, and changed my temporary possession known as proprietary possession into that of a 'mutawalli' (superintendent). With effect from this day, the said property no longer belongs to me: nor am I any longer in proprietary possession thereof. It belongs to God, and is a 'sadka' (alms) for His creatures. I am in possession thereof as a superintendent, that is, as a trustee for those who are according to the objects of the said 'waqf,' entitled to be, in any way, benefited thereby. The said property can neither be sold nor mortgaged, nor transferred in any other way. Neither I nor anyone through me can exercise any proprietary power in respect thereof. It cannot be inherited by anyone on my death, nor can anyone enter into possession thereof by right of inheritance from me. I have reserved for myself the right of superintendence and protection of the said property which I possess under the Muhammadan law. I shall remain to be myself the superintendent thereof during my life-time or so long as I wish to be so. After that one who shall be appointed by me, shall be the superintendent. I shall be at liberty to appoint, during my life-time, anyone whom I like, as a superintendent jointly with me or in my place. I am at liberty to remove him whenever I like and again appoint and remove him so long as he is not appointed a superintendent under the last will. Such person shall continue to remain the superintendent after my death, until he is duly removed under the provisions of the said will or according to the law for the time being in force. The said superintendent or I or any other person, acting as a superintendent of the 'waqf' property, shall have all such powers of managing and protecting the said property as are possessed by an owner of property or were possessed by me before the 'waqf,' provided that the said persons (superintendents) shall have no right to claim ownership therein or do anything which may be inconsistent with the objects of the 'waqf,' or to sell, mortgage or transfer it in any other way."

1920

MUHAMMAD RUSTAM ALI KHAN v. MUSHTAQ HUSAIN.

If analogies be sought between people holding similar interests over here and the trustees who would take charge of the property under that deed, the trustees would be more closely allied to receivers and managers appointed over property in this country than to trustees in whom the property is absolutely vested. A receiver and manager by virtue of his appointment has no estate in the property he is called upon to control; he possesses powers over it but not an interest in it, and the appointment of others in his place would by itself effect no transfer of ownership. The same thing is, in their Lordships' opinion, true of the trustees under this deed. They are, as the deed itself states, superintendents of the property. The further use of the term "trustee" is apt to mislead until this distinction is borne in mind. They are trustees in the general sense that every man is a trustee to whom is entrusted the duty of managing and controlling property that belongs to another, but the deed by which the Nawab appointed the trustees in this case did not and did not purport to transfer to them the ownership of the property, and it is, therefore, in their Lordships' opinion, outside the provisions of the Statute and registration was unnecessary.

For these reasons their Lordships are of opinion that the judgment of the High Court was right upon all points, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

J. V. W.

Appeal dismissed.

Solicitors for the appellants: *Barrow, Rogers and Nevill.*

Solicitor for the respondents: *Douglas Grant.*