Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court, dated the 25th of May, 1928, should be set aside, that the decree of the Subordinate Judge, dated the 21st of May, 1925, should be varied by inserting the words "or of her husband" after the words "adopted son of the plaintiff" and should otherwise be affirmed, and that the appellant should have the costs of this appeal and her costs in the High Court.

Solicitors for appellant: *Douglas Grant* and *Dold*.

Solicitor for respondent: *R. S. Nehra*.

SAHU HAR PRASAD AND OTHERS (DEFENDANTS) *v.* FAZAL AHMAD (PLAINTIFF) AND OTHERS

*J. C.** 1933 *January*, 13

[On appeal from the High Court at Allahabad]

Muhammadan law—Wakf—Construction of wakfnama—Whether interest in property dedicated—Intention—Transfer of Property Act (IV of 1882), *section* 8.

On August 29, 1912, a Sunni Muhammadan, who died a few days later, executed a deed by which he purported to sell two villages to his mother for Rs.2 lakhs; the deed stated that she had paid Rs.10,000 and that she was to apply the balance of the price to charitable purposes. By a wakfnama, executed by the vendee on June 23, 1913, she stated the terms of the sale and declared that she therefore made a wakf of the villages, subject to a charge in her favour for Rs.25,000, being the Rs.10,000 paid and Rs.15,000 already spent, and she appointed as mutwallis herself and, after her death, the respondents. A decree made in 1917 declared that the sale was invalid, and that the villages were divisible among the heirs of the vendor, his mother being entitled to a one-third share. She sold that share to the appellants. After her death one of the mutwallis claimed that the one-third share was wakf property and the sale invalid.

Held, that the claim failed because looking at the transaction as a whole the intention of the wakif was to dedicate

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**Present*: Lord THANKERTON, Lord WRIGHT, Sir GEORGE LOWNDES, and Sir DINSHAH MULLA.

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only what she thought had been entrusted to her by her son for that purpose. Even if section 8 of the Transfer of Property Act, 1882, had any application to the case, it was excluded by the intention.

Judgment of the High Court, [1929] A. L. J., 620, reversed.

APPEAL (No. 55 of 1930) from a decree of the High Court (March 19, 1929) reversing a decree of the Subordinate Judge of Pilibhit (July 6, 1925).

Respondent No. 1, as one of the mutwallis under a wakfnama executed on June 26, 1913, by Rahim Bibi (then deceased) sued for a declaration that a one-third share in two villages was property dedicated by the deed, and that a sale thereof to the appellants by Rahim Bibi consequently was invalid. The defendants were the appellants, the heirs of Rahim Bibi, also the other mutwallis who were joined as *pro forma* defendants.

The facts are stated in the judgment of the Judicial Committee.

The trial Judge dismissed the suit. The learned Judges who heard an appeal having differed in opinion, there was a reference to a Full Bench. As the result of the opinion of the Full Bench (KENDALL and MUKERJI, JJ.; NIAMAT-ULLAH, J., dissenting) the appeal was allowed, and a decree was made as prayed by the plaintiff. The views of the learned Judges appear shortly from the present judgment. The hearing by the Full Bench is reported at [1929] A. L. J., 620.

1932. December, 2, 5. *Dunne, K.C.*, and *Wallach*, for the appellants: The terms of the deed show that the intention of Rahim Bibi was to carry out the instructions in the sale deed and was not to deal with any interest which she had apart therefrom. The sale deed being invalid the wakfnama was inoperative. The High Court judgment was based upon section 8 of the Transfer of Property Act, 1882. But having regard to the definition of "transfer" in section 5, and to *Muhammad Rustam Ali* v. *Mushtaq Husain* (1), the Act did not apply. In any case the intention necessarily implied excluded the section. Further, the wakfnama was invalid in that Rahim Bibi was *pardanashin* and it was not shown that she appreciated the effect of

(1) (1920) I.L.R., 42 All., 609; L.R., 47 I.A., 224.

its terms: *Farid-un-nissa* v. *Mukhtar Ahmad* (1), *Tara Kumari* v. *Chandra Mauleshwar Prasad Singh* (2).

Their Lordships did not require argument as to the last point, in the absence of any issue framed as to it, or consideration of it in India.

DeGruyther, *K. C.*, and *Abdul Majid*, for the respondents: Mutation of names having taken place under the wakfnama the wakf was complete and irrevocable: Wilson's Anglo-Muhammadan Law, para. 320. Rahim Bibi therefore was incompetent to sell the property or any interest in it. The operative words in the deed covered the third interest which Rahim Bibi took as heir. The effect of the operative words is not to be cut down by the recitals: Elphinstone, Norton and Clark, Interpretation of Deeds, Ch. 10, rule 36, and cases there cited. There was a transfer by Rahim Bibi to herself as mutwalli, and accordingly section 8 of the Transfer of Property Act applied, but in any case the section is a rule of construction generally applicable. The deed stated plainly the property conveyed and thus excluded speculation as to the intention: *Bijraj Nopani* v. *Pura Sundary Dasee* (3), *Gangabai* v. *Sonabai* (4).

Dunne, *K.C.*, replied.

1933. January, 13. The judgment of their Lordships was delivered by Sir DINSHAH MULLA :—

This is an appeal from a judgment and decree dated the 19th of March, 1929, of the High Court of Judicature at Allahabad, which reversed a judgment and decree of the court of the Subordinate Judge of Pilibhit dated the 6th of July, 1925.

The question involved in the appeal is as to the effect of a wakfnama executed by a Muhammadan *pardanashin* lady under the following circumstances :—

On the 29th of August, 1912, Manzur Ahmad, a Sunni Muhammadan governed by the Hanafi law, executed a document purporting to be a sale of two villages, one

(1) (1925) I.L.R., 47 All., 703; L.R., 52 I.A., 342.

(2) (1931) I.L.R., 11 Pat., 227; L.R., 58 I.A., 450.

(3) (1914) I.L.R., 42 Cal., 56; L.R., 41 I.A., 189.

(4) (1915) I.L.R., 40 Bom., 69.

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situated in Pilibhit District and the other in Bareilly District, in favour of his mother Rahim Bibi for a consideration of Rs.2,00,000. It was recited in the deed that Rs.10,000 had been paid by Rahim Bibi. As to the balance of Rs.1,90,000, it was stated in the deed that it was left with Rahim Bibi "with instructions that she should spend it at her discretion in charitable purposes for the eternal benefit of my (i.e. Manzur Ahmad's) soul".

Manzur Ahmad died on the 2nd of September, 1912, leaving him surviving as his heirs according to Muhammadan law two widows, his mother Rahim Bibi, and a paternal uncle, Fazal Ahmad. On his death the widows became entitled between them to one-fourth of his estate, the mother to one-third, and the uncle as a residuary to the remaining five-twelfths.

On the 23rd of June, 1913, Rahim Bibi executed a wakfnama of the villages transferred to her by the sale deed, by which she constituted herself the first mutwalli, and appointed Fazal Ahmad, who is respondent No. 1 on this appeal, and three others, who are respondents Nos. 3 to 5, as mutwallis after her death. It was recited in the deed that she had already spent Rs.15,000 in charity, and a charge was created by the deed on the income of the wakf property for the payment of Rs.25,000. The material part of the wakfnama is as follows:—

"My son Manzur Ahmad, deceased, sold the zamindari property in Bhitaura Kalan and Amkhara mentioned below to me for Rs.2,00,000, took Rs.10,000, a portion of the consideration money, from me and left the remaining amount of Rs.1,90,000 with me as an amount dedicated for religious purposes and authorised me to spend the same. Out of the said amount Rs.15,000 has been spent up to this time. Instead of spending the amount of consideration after which the charity shall come to an end, it is more beneficial to make a 'wakf' of the said property and utilize the income therefrom in charitable deeds as it will be a continual gift and permanent charity. I, therefore, while in a sound state of body and mind and of my

own accord withdraw my possession from the entire 20 biswas 'asli' zamindari property in the village of Bhitaura Kalan, pargana and district Pilibhit, and the entire 20 biswas 'asli' zamindari property, together with the cultivated lands in mauza Amkhera, pargana Richha, tahsil Baheri, district Bareilly, together with all the rights appertaining thereto and make a 'wakf' of the same in the name of the Almighty."

After the death of Manzur Ahmad, litigation ensued between the heirs, the result of which was that the sale of the villages was, in December, 1917, held to be void, as being, under the cloak of a sale, in reality a deathbed gift in fraud of the heirs.

The effect of this decision was that Rahim Bibi took nothing by the sale deed, but was entitled, as an heir, to one-third of the villages. This one-third was sold by her on the 20th of June, 1918, to appellant No. 1 and the father of appellants Nos. 2—6.

The question for decision in the appeal is whether this was a good sale, or whether the one-third share of Rahim Bibi had already been validly disposed of by the wakf-nama.

Rahim Bibi died on the 15th of August, 1921, leaving her surviving as her heirs respondents Nos. 2 and 3.

On the 9th of September, 1924, Fazal Ahmad instituted the suit, out of which the present appeal arises, in the court of the Subordinate Judge of Pilibhit as one of the succeeding mutwallis against the appellants and the heirs of Rahim Bibi and the other mutwallis for a declaration that the wakf was valid to the extent of the one-third share of Rahim Bibi in the two villages which she had acquired by inheritance from Manzur Ahmad, and that the sale to the appellants, being a sale of wakf property, was void, and for other reliefs.

The appellants alone contested the plaintiff's claim. They denied that the wakf was valid to the extent of the one-third share of Rahim Bibi, and pleaded that Rahim Bibi did not intend to create a wakf of what she inherited as an heir of Manzur Ahmad.

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The Subordinate Judge held that there was nothing in the deed to indicate that Rahim Bibi intended to create a wakf of two-thirds as a vendee from Manzur Ahmad and of the remaining one-third as his heir, and passed a decree dismissing the suit.

From that decree Fazal Ahmad appealed to the High Court at Allahabad. The appeal was heard by KENDALL and NIAMAT-ULLAH, JJ., who delivered separate judgments. KENDALL, J., was of opinion that section 8 of the Transfer of Property Act was decisive of the case. That section provides that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof." The learned Judge considered that what was transferred by the deed of wakf was "the zamindari property in the two villages", and not the interest which Rahim Bibi had acquired under the sale deed, and that although the wakfnama could not operate on two-thirds of the property, it operated on the one-third which Rahim Bibi owned at that date as an heir of Manzur Ahmad. On the other hand, NIAMAT-ULLAH, J., was of opinion that all that was intended to pass by the wakfnama was what Rahim Bibi believed she had purchased from her son, and that the wakf did not attach to what she acquired as her son's heir. The learned Judge added that Rahim Bibi was a *pardanashin* lady, and that it was for those who set up the wakfnama to show that the consequences that would follow if the sale deed were set aside were fully explained to her.

The learned Judges, assuming apparently that they differed only on a question of law, and that the case fell under the proviso to section 98 of the Code of Civil Procedure, referred the following question to a larger Bench: "Whether the deed of wakf, dated the 23rd of June, 1913, assuming it to be otherwise valid, operates on the one-third share of Musammat Rahim Bibi in villages Bhitaura

Kalan and Amkhera, or whether it is confined to such estate as she was believed to possess in them under the sale-deed dated the 29th of August, 1912."

In their Lordships' opinion it is at least doubtful whether this procedure was correct, as the difference of opinion seems also to have covered the question raised by NIAMAT-ULLAH, J., as to the necessity for a fuller explanation of the effect of the wakfnama to Rahim Bibi, and this was not submitted to the new Bench.

The appeal, however, on the question so formulated, was heard by a Bench of three Judges consisting of the two referring Judges and MUKERJI, J. MUKERJI, J., agreed with the opinion of KENDALL, J. NIAMAT-ULLAH, J., adhered to the view which he had previously expressed. The answer of the majority of the Judges was that the wakf attached to the one-third share of Rahim Bibi in the two villages. The result was that the appeal was allowed, and a decree was passed for the plaintiff on the 19th of March, 1929. It is from that decree that the present appeal has been brought to His Majesty in Council.

The sole question for determination on the appeal is whether the wakf attached to the one-third share in the villages which Rahim Bibi acquired as heir of her son, Manzur Ahmad.

In their Lordships' opinion the sale by Manzur Ahmad and the execution of the wakfnama must be regarded as integral parts of one transaction, and the sale being held to be void, the wakfnama falls with it. The sale deed imposed upon Rahim Bibi an obligation to spend Rs.1,90,000, the balance of the purchase price, in charity, and the terms of the wakfnama leave no doubt that she executed the latter document in fulfilment of that obligation, and that she had no intention of making any contribution to the wakf from her own property. The wakfnama begins with a recital of the

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instructions contained in the sale deed, and after stating that Rs.15,000 had already been spent by her in charity, it proceeds to say "I, *therefore*, withdraw my possession from the entire . . . property and make a wakf of the same in the name of the Almighty." That she had no intention of settling anything of her own is also clear from the reservation of Rs.25,000 which she had paid as a charge upon the villages to be repaid to her out of the income. The scheme was, no doubt, as was held in the former proceedings between the parties, a mere device to evade the Muhammadan law, but there is nothing to suggest any intention on the part of Rahim Bibi to do more than to carry this scheme into effect.

Their Lordships are therefore of opinion that the conclusions come to upon this question by the Subordinate Judge and NIAMAT-ULLAH, J., are correct. They think it at least doubtful whether section 8 of the Transfer of Property Act has any application in the present case, but in any event they are of opinion that in order to ascertain the intention of the lady in executing the wakfnama, the whole transaction must be looked at, and upon this they think that her intention to settle only what she thought had been entrusted to her by her son is clear.

Having regard to the conclusion to which their Lordships have come upon the effect of the wakfnama it is unnecessary to deal with the question raised as to the position of Rahim Bibi as a *pardanashin* lady, upon which no issue was raised or tried in the lower court.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated the 19th of March, 1929, should be set aside, and the decree of the Subordinate Judge, dated the 6th of July, 1925, restored. The respondents must pay the costs of the appellants in the High Court and before this Board.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Francis and Harker.*