APPELLATE CIVIL

1934
November, 20

Before Mr. Justice Bennet and Mr. Justice Bajpai

AFZAL HUSAIN (PLAINTIFF) *v.* CHHEDI LAL AND OTHERS (DEFENDANTS)*

Muhammadan law—Waqf—Shia law—Transfer of waqf property by mutwalli—Usufructuary mortgage for paying off existing encumbrances on the waqf property—Sanction of court not obtained—Sanction may be accorded retrospectively—Evidence Act (I of 1872), section 115—Estoppel—Mutwalli denying validity of his own deed of mortgage of the waqf property.

Under the Shia law a mutwalli may, with the sanction of the court, execute a usufructuary mortgage of waqf property; but if previous sanction of the court has not been obtained the mortgage is not necessarily void *ab initio* and the requisite sanction can subsequently be given by the court with retrospective effect; such sanction will be given if it appears that the transaction was one intended to benefit and preserve the waqf property, e.g. to discharge pre-existing encumbrances on the basis of which the property might be brought to sale.

A distinction must be drawn, however, between those cases where the income or usufruct alone of the waqf property is pledged and those cases where there is a sale, or a mortgage which might end in a decree for sale, of the corpus of the property.

Where, several years after executing the usufructuary mortgage, the mutwalli who had himself executed it brought a suit impugning its validity, and it was found that the document had been acted upon by transfer of possession and receipt of money and had been acquiesced in by the plaintiff for this period, it was *held*, also, that apart from the question of competence of the plaintiff to execute the usufructuary mortgage, he was estopped by the provisions of section 115 of the Evidence Act from questioning the validity thereof.

Quaere, whether such a usufructuary mortgage is valid only during the lifetime of the mutwalli who executed it.

Messrs. *S. Zafar Mehdi* and *S. Hyder Mehdi*, for the appellant.

Dr. *K. N. Katju* and Mr. *M. N. Kaul*, for the respondents.

*First Appeal No. 495 of 1929, from a decree of Maheshwar Prasad, Subordinate Judge of Allahabad, dated the 17th of May, 1929.

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BENNET and BAJPAI, JJ.:—This is a first appeal brought by one Chaudhri Saiyed Afzal Husain, the sole plaintiff and continued after his death by his son, Chaudhri Saiyed Iqbal Husain, who was defendant No. 2. The contesting respondent is Chhedi Lal, defendant No. 1. The plaint sets out that the plaintiff, Afzal Husain, was the owner in possession of the property in the list attached to the plaint and that on the 18th January, 1919, he executed a waqf "*alal aulad*", that is waqf for his descendants, of the property, dividing the property into two portions. One village mauza Samorai and certain houses and groves were dedicated for religious and charitable purposes. The plaint does not mention further in regard to the other waqf property; but the deed of waqf shows that the 26 remaining villages were created a waqf for the benefit of the family of the plaintiff and he was made the first mutwalli, with defendant No. 2 to succeed him. When the family should become extinct, there was a gift over for religious and charitable purposes. The waqf property is referred to in the plaint as list A. Paragraph 2 of the plaint sets out that at the time of the execution of the waqfnama one of the villages dedicated, mauza Ajora Buzurg, was hypothecated in lieu of Rs.5,000 to one Sheo Pal Brahman under a mortgage deed, dated the 15th April, 1916. Paragraph 3 states that in order to pay off the aforesaid amount and other amounts which were due by the plaintiff, the plaintiff desired to mortgage with possession the villages mentioned below to Chhedi Lal and that a mortgage deed was executed in the shape of a deed called a supurdnama on the 20th March, 1924. It is to be noted that although the language of the plaint is rather loose, only the 26 villages dedicated to the family use formed the subject of the supurdnama. Paragraph 4 of the plaint sets out the following items and we understand the paragraph to indicate that the defendant No. 1 was to pay off these items. [Details of the items are here omitted; they included the Rs.5,000 due to Sheo

Pal Brahman and Rs.10,212 due on *zar-i-peshgi* leases and on decrees.] Paragraph 5 states that the defendant No. 1 did not pay any of these items. * * * * Paragraph No. 7 is a somewhat cryptic paragraph but apparently it states that the "supurdnama" was executed in order to save the property from being sold by auction and that a dispute took place in regard to possession. * * * * Paragraph 10 sets out that the "supurdnama" is invalid and null and void and as defendant No. 1 did not pay any amount thereunder, he is not entitled to remain in possession. * * * * The relief asked for was: (*a*) It may be declared that the document, dated 20th March, 1924, is utterly invalid and null and void, and that the plaintiff is in lawful possession of the property given in list B [mentioning 12, out of the 26, villages in respect of which mutation of names had not been effected in favour of defendant No. 1] as a mutwalli; (*b*) The plaintiff may be put into possession of the property entered in list C [the remaining 14 villages which had been mutated to defendant No. 1] by dispossession of defendant No. 1.

Now it will be noted that no allegations are made in the plaint as to why the "supurdnama" is invalid and null and void. These defects in the plaint are remedied by arguments of counsel for the appellant so far as it is possible.

* * * *

Several issues were framed, of which the following are important for the decision of the appeal:

(1) Is the plaintiff estopped from impeaching the validity of the deed of 20th March, 1924, executed by himself in favour of Chhedi Lal, defendant No. 1?

(3) If an estoppel does not bar a plea of the invalidity of the deed of 20th March, 1924, was the plaintiff competent validly to execute the said deed in spite of the previous deed of 18th January, 1919?

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The learned Subordinate Judge has held on issue No. 1 that the plaintiff is estopped from impeaching the validity of the "supurdnama". On issue No. 3 he found that the plaintiff was competent to execute the "supurdnama". * * * * The suit was, therefore, dismissed by the lower court. The plaintiff has appealed.

[After discussing the question of the validity of the waqf the Court held that the waqf was not fictitious or fraudulent, and that the waqfnama was a valid document.]

We now come to the question of the validity or otherwise of the supurdnama of the 20th March, 1924. As already observed, the plaint does not give any ground on which the plaintiff asks that this document should be declared invalid and null and void. * * * * When we come to the grounds of appeal we find the allegation in the eighth ground: "Because the deed of supurdnama being not within the competence of the mutwalli the court below should have in any case passed a decree for possession subject to the payment of any sum if found due to the respondent." This ground gives the basis on which the appeal has been argued in regard to the validity of the supurdnama. The questions therefore are:

(1) Whether the mutwalli was competent to execute the supurdnama.

* * * *

We now turn to the main issue of this appeal, that is, whether the mutwalli was competent to execute the supurdnama.

Learned counsel for the respondent based his case on the competence of the mutwalli, on certain text books of Muhammadan law and certain rulings. In Tyabji's Principles of Muhammadan Law, second edition, page 555, it is laid down in regard to Shias, paragraph 464(2): "According to Shia law the beneficiaries under a waqf may validly make a lease of the waqf property or other-

wise transfer or alienate it for the period during which they are entitled to the benefit of the waqf, but so that such lease or transfer or alienation does not prejudice the rights of any succeeding beneficiaries."

The plaintiff was admittedly a Shia. For the respondent the contention is that under the Shia law a mutwalli is entitled to transfer the usufruct of the property although he is not entitled to transfer the ownership of the property by sale or by mortgage which might end in a decree for sale. Considerable argument was made in regard to the supurdnama in question and in part of the case for respondent it is argued that the supurdnama is something different from a usufructuary mortgage, that it was a kind of agreement by which defendant No. 1 was to manage the property during the absence of the plaintiff. We consider that the document cannot be regarded as a contract of management. The provisions in the document are that possession is to be taken from Rabi 1331 Fasli by defendant No. 1 and that he is to pay certain sums of money and to retain possession until those sums of money are paid back to him. We consider that these conditions make the document a usufructuary mortgage within the definition of the Transfer of Property Act. The question therefore is whether a mutwalli who is a Shia may execute a usufructuary mortgage, and whether in such a case the transaction will be valid during the lifetime of the executant. It is to be noted that although the plaintiff is now dead, his son, defendant No. 2, who is appellant, was his successor as mutwalli according to the deed of waqf, and this son was also an executant of the supurdnama in question. The supurdnama begins: "We, Chaudhri Saiyed Afzal Husain, mutwalli of the waqf, and Chaudhri Saiyed Iqbal Husain, subsequent mutwalli" execute the document. The distinction which was drawn in Tyabji between a transfer for the period during which the mutwalli was entitled to the

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benefit of the waqf and a transfer or alienation which would prejudice the rights of succeeding beneficiaries has not been so carefully drawn in other text books. We find in Ameer Ali's Muhammadan Law, volume I, fourth edition (1912), page 470, a statement: "The mutwalli is not entitled under any circumstances to create any incumbrance by way of mortgage upon the waqf property without the sanction of the Kazi, nor can the beneficiaries hypothecate the waqf property." The distinction is not drawn between a transfer of the income and a transfer of the property. In Mulla's Principles of Muhammadan Law, 10th edition of 1933, on page 151 it is stated that a mutwalli has no power without the permission of the court to mortgage, sell or exchange waqf property or any part thereof, unless he is expressly empowered by the deed of waqf to do so. Mulla goes on to state that it has been held in *Nimai Chand Addya* v. *Golam Hossein* (1) that a mortgage of waqf property, though made without the previous sanction of the court, may be retrospectively confirmed by the court and that the mortgage without the previous leave of the court is not void *ab initio*. In this ruling there was a full consideration of the texts of Muhammadan law in original. The case arose where there was a waqf and certain costs of partition were incurred and the Collector fixed a date for sale of the estate for these costs. The mutwalli made a mortgage of a portion of the waqf estate and of his own property to raise money to avert the impending sale. The mortgage therefore was created under grave necessity of an urgent nature. Sanction was not given for the mortgage. On pages 191 and 192 the court drew a distinction between those cases where the income alone is pledged and those cases where there was a sale of the property by the mutwalli. The court held on page 189: "It is but rational to hold that the approval of the Cadi was deemed requisite, primarily with a view

(1) (1909) I.L.R., 37 Cal., 179.

to make sure that the loan was necessary, and in this view approval, antecedent or subsequent, ought to be equally effectual. Tested in the light of these principles, it is clear that in the case before us the mortgage ought to be treated as a valid charge upon the waqf properties." On page 191 it was stated: "It is sufficient for us to observe that judicial pronouncements of the highest authority are to be found in the reports in support of the view that not the corpus but the income alone can be pledged under such circumstances." In *Shailendra Nath Palit* v. *Hade Kaza Mane* (1), which was also a case which related to Shias, there was a further consideration of this question, and it was held that a mutwalli differs from a shebait or a mahant and has no power without the permission of the court to mortgage, sell or exchange waqf property unless he is expressly authorised by the deed of waqf to do so. Reference was made with approval to *Nimai Chand Addya* v. *Golam Hossein* (2) where it was held that a mortgage made by a mutwalli without the previous sanction of the court is not void if made for a justifying necessity and may be retrospectively confirmed by the court. In *Amrutlal Kalidas* v. *Shaik Hussein* (3) it was held in regard to a mortgage of waqf property that the plaintiff acquired no right under his mortgage which would extend beyond the lifetime of his mortgagors. This also supports the case for the respondent.

For the appellant reference was made to *Askari Husain* v. *Chunni Lal* (4), where it was held that the District Judge takes the place of the Kazi to sanction transfers of waqf property. Reference was also made to *Abdur Rahim* v. *Narayan Das Aurora* (5). In the ruling we find on page 337: "Their Lordships are of opinion that, for an advance of money, otherwise than to satisfy the legitimate needs and purposes of the waqf,

(1) (1931) I.L.R., 59 Cal., 586. (2) (1909) I.L.R., 37 Cal., 179
(3) (1887) I.L.R., 11 Bom., 492. (4) [1930] A.L.J., 205.
(5) (1922) I.L.R., 50 Cal., 329.

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no part of the property held in waqf is chargeable either by the settlor or by the court." Under this dictum the question would arise whether the purpose was one which was for the legitimate needs of the waqf. Learned counsel also relied on *Hamiduddin Ali Shah* v. *Court of Wards, Nanpara* (1), a ruling of the court of the Judicial Commissioner in Oudh. That ruling dealt with the case of a simple mortgage and not of a usufructuary mortgage, and it was held that such a mortgage would be invalid without previous sanction.

On a review of all these rulings we are of the opinion that the distinction drawn in *Nimai Chand Addya* v. *Golam Hossein* (2) is a distinction which we should follow and that in the present case the validity of the mortgage depends on whether we consider that the usufructuary mortgage was one which should have been sanctioned by the District Judge if an application had been made to him previous to the execution of this supurdnama. Now the plaint sets forth the circumstances under which the supurdnama was executed. The plaint admits that it was executed in order to pay off the amount due to Sheo Pal under the mortgage deed which he held over the property which was waqf. That mortgage deed was a simple mortgage and it was open to Sheo Pal to bring a suit for sale of the property if he was not paid. In paragraph 4 of the plaint three *zar-i-peshgi* leases are set out, all of parts of the mortgaged property, which the mutwalli desired should be paid off. That paragraph also mentions three decrees for profits which were held by co-sharers against the mutwalli. It is clear that the encumbrances were on the mortgaged property and were encumbrances which it was in the interest of that property to liquidate. The transaction therefore was clearly one intended to preserve the waqf property. Under these circumstances we have no doubt that a District Judge would have acted correctly in giving

(1) (1913) 18 Indian Cases, 319. (2) (1909) I.L.R., 37 Cal., 179 (193).

sanction for the supurdnama. Another point to be noted is that compound interest on the mortgage deed of Sheo Pal was accumulating. By the usufructuary mortgage in question the accumulation of interest under the simple mortgage and the decrees was prevented and the transaction would therefore have been beneficial to the dedicated property. We consider therefore that the transaction was one which should have received sanction.

For the appellant the argument is advanced that the respondent No. 1 did not actually pay off any of these previous charges. We consider however that the question we have to examine is what was the state of affairs at the time when sanction would have been the subject of an application. The subsequent conduct of the parties would not have been known then to the District Judge and therefore could not have influenced him. Further we are of opinion, from the evidence on the record, that the failure of defendant No. 1 to pay the previous debts mentioned in this document is a failure which arises from the action of the plaintiff himself. In the plaint the plaintiff himself admits that he continued in possession of the property and prevented defendant No. 1 from obtaining possession or making collections. * * * * Under these circumstances it could not be expected that the supurdnama bound the defendant to supply further large sums from his own pocket for the purpose of paying off the previous debts. * * * * We are satisfied therefore that the supurdnama has not been shown to be invalid.

We now proceed to deal with the question of estoppel of the plaintiff. The lower court has held that the plaintiff was estopped from denying the validity of the supurdnama. That estoppel is claimed under the general law of estoppel in section 115 of the Evidence Act which provides that when one person has by his declaration, act, or omission intentionally caused or

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permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. In the supurdnama the recital states that the plaintiff is mutwalli of the waqf and that his son is the subsequent mutwalli and that they execute the supurdnama transferring possession to defendant No. 1 of the villages in question. That document amounts to a representation that the plaintiff as mutwalli was competent to make that transfer. The document was acted upon and possession was transferred and sums of money were received by the plaintiff under this document. The receipt of the sums of money was admitted. It was not for a number of years afterwards that the plaintiff brought the present suit on the 11th May, 1928. For that period the plaintiff acquiesced in the supurdnama. He has now come forward and the argument advanced on his behalf is that he was not competent as mutwalli to execute the supurdnama. Clearly the case comes within the language of section 115 of the Evidence Act. The argument of learned counsel for appellant was that because the plaintiff was, under the Muhammadan law, not competent to execute this supurdnama, therefore the provisions of section 115 of the Evidence Act would not apply to him. In our view this proposition of law is incorrect as it is enunciated, and also because we consider that the plaintiff can validly execute the supurdnama under the provisions of the Muhammadan law provided sanction is given, and we consider that the sanction can be retrospectively applied by this Court.

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For these reasons we dismiss this first appeal with costs.