APPELLATE CIVIL

Before Mr. Justice Thom and Mr. Justice Rachhpal Singh

KHALIL-UD-DIN (PLAINTIFF) *v.* SRI RAM (DEFENDANT) AND OTHERS* 1933 *October* 6

Muhammadan law—Wakf by Hanafi Mussalman—Direction that the provisions of the wakf should not be enforceable until certain debts of the donor were paid off—Whether wakf invalid as a contingent wakf—Mussalman Wakf Validating Act (VI of 1913), section 3(b).

A deed of wakf, executed by a Hanafi Mussalman, declared that the ownership of the wakf property shall immediately pass from the donor and be henceforth vested in God for charitable purposes; it then contained a direction that until the payment of certain debts of the donor specified in the deed "*koi karrawai wakf ki qabil ijra na hogi*" (no proceedings under the wakf would be enforceable). In execution of a decree obtained on one of the specified debts the wakf property was attached and sought to be sold, and the question was whether the wakf was invalid as being a contingent wakf, so that the property was saleable in execution. *Held* that the wakf was valid. Section 3, clause (*b*), of the Mussalman Wakf Validating Act made it quite clear that a Hanafi Mussalman could make a valid wakf directing that his personal debts should be paid out of the income of the dedicated property before the income was applied for the purpose specified in the wakf. Where the ownership in the property immediately passes from the donor and the dedication is complete, the existence of such a direction does not make the wakf a contingent wakf.

The real test for deciding whether a particular wakf deed is or is not invalid as being a contingent wakf is to see whether the dedication was complete at the time when it was made and not dependent on any contingent event which might or might not happen, and even the mere interposition of an intermediate estate limited in duration would be no reason for saying that the religious appropriation would fail altogether.

Mr. *M. A. Aziz*, for the appellant.

Messrs. *G. Agarwala*, *G. S. Pathak* and *K. N. Agarwala*, for the respondents.

*Second Appeal No. 695 of 1932, from a decree of Girish Prasad Mathur, Subordinate Judge of Pilibhit, dated the 23rd of April, 1932, reversing a decree of Babu Ram Verma, Munsif of Pilibhit, dated the 21st of December, 1931.

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THOM and RACHHPAL SINGH, JJ.:—This is a plaintiff's second appeal arising out of a declaratory suit.

One Jamiluddin, who was a brother of Khalil-ud-din the plaintiff appellant, had dealings in sugarcane juice with Sri Ram, defendant No. 1. After the death of Jamiluddin a suit was instituted by Sri Ram to recover a sum of money due from him (Jamiluddin). Jamil uddin had died and the suit was instituted against his heirs, Khalil-ud-din and two others, and was decreed. It appears that on the 11th of August, 1922, Jamiluddin had made a wakf of some of his properties. Sri Ram, in execution of his decree, attached those properties. Khalil-ud-din, in his capacity as a mutwalli of the alleged wakf properties, objected to the attachment on the ground that they were wakf and could not be attached. These objections were thrown out and so Khalil-ud-din instituted a suit, which has given rise to this appeal, to obtain a declaration that the property in suit was wakf and could not be attached and sold in execution of a decree passed in the suit of Sri Ram. The first court decreed the suit. The defendant No. 1 filed an appeal against the said decree. The lower appellate court reversed the decision of the first court and dismissed the suit. The plaintiff has come up in second appeal to this Court.

Both the courts below found it proved that in 1922 Jamiluddin had executed a deed of wakf. This finding has not been challenged in second appeal. The contesting defendant had taken a plea to the effect that the deed had been executed by Jamiluddin with a view to defraud his creditors, and was therefore void under the provisions of section 53 of the Transfer of Property Act. But this point has been rightly decided against him by both the courts. The only plea taken in appeal is that the deed set up by the plaintiff created a "contingent" wakf which was not valid according to Muhammadan law. This is the only question for consideration before us.

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A perusal of the terms of the deed of wakf goes to show that it was a valid wakf. In the beginning of the deed the executant recites that "he desires to make a wakf for charitable purposes (*sawab*)." For that purpose he sets apart 5 out of 10 biswa zamindari and declares that he has made a wakf of it and has divested himself of all of his proprietary rights, which are henceforth vested in God for charitable purposes. He appoints himself mutwalli of the wakf property and directs that after him, in case of failure of his having any sons, his brother Khalil-ud-din would be the mutwalli. He mentions further that there are certain debts due by him and that till the payment of those debts, specified in the deed, no proceedings under the wakf would be enforceable. The words used by him are, "*ta adai qarza mufassila zael zimma mere ke koi karrawai wakf ki qabil ijra na hogi. Zar qarza jo ijrai karrawai wakf se pahle ada hoga* . . . (details of debts)." The learned Judge of the lower appellate court has found that the debt due to Sri Ram defendant is specified in the deed of wakf. This is a finding which is conclusive in second appeal and we have therefore no hesitation in holding that the debt due to Sri Ram defendant is covered by this deed of wakf. The wakf created by Jamiluddin is what is known in Muhammadan law as *wakf-alul-aulad*, and it is perfectly valid under the provisions of the Mussalman Wakf Validating Act of 1913. [The judgment then quoted sections 3 and 4 of the Act.]

According to Muhammadan law a contingent wakf is not valid. The dedication should be complete and should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. The question which we have to consider is whether in the case before us it can be said that the wakf is a contingent one. On a consideration of the terms of the deed before us we are of opinion that it cannot be said that it is a contingent wakf. As pointed out by the learned Subordinate Judge in his appellate judgment, it is mentioned in the deed that the owner-

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ship in the wakf property shall immediately pass from the donor. The learned Subordinate Judge does not say that the wakf is invalid because it is dependent on some contingency, but he thinks that until the debts are paid the wakf does not come into operation and therefore the wakf property can be sold. We find ourselves unable to agree with the view taken by him. It appears to us that a wakf would be valid even if there be a stipulation in the deed that the income of the wakf property would first go towards the payment of the debts due from the wakif. It is open, in our opinion, to a Muhammadan (the executant of the wakf was a Hanafi in this case) to execute a wakf making provisions that out of the income of the wakf property his debts shall be paid first. A wakf does not become invalid merely because in the deed there is a direction that the debts of the wakif are to be paid out of the rents and profits of the wakf. In *Luchmiput Singh* v. *Amir Alum* (1), it was held by a Bench of two learned Judges of the Calcutta High Court that where a wakf deed contained a provision that in the first place certain debts should be paid and then provided that the property should be applied towards the religious and charitable purposes etc. the wakf was valid. In *Jinjira Khatun* v. *Mohammad Fakirulla Mia* (2) it was held that under section 3(*b*) of the Wakf Validating Act it is lawful for a person professing the Mussalman faith to create a wakf for the payment of his debts out of the rents and profits of the property dedicated, provided that the ultimate benefit is reserved for defined religious and charitable purposes. In *Pathukutti* v. *Avathalakutti* (3), MUTTUSAMI AYYAR, J., made the following observations: "The instrument being a wakfnama, the further question arises whether it is valid, and I am of opinion that it is not. The dedication should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. Baillie, at page 556, gives an

(1) (1882) I.L.R., 9 Cal., 176. (2) (1921) I.L.R., 49 Cal., 477.
(3) (1889) I.L.R., 13 Mad., 66.

illustration, observing that if one were to say 'my mansion is a charity appropriated to the poor if my son arrives', and the son should arrive, the mansion does not still become wakf. He adds that if one should say 'my land is charity if such a one pleases', and if the person referred to should indicate his pleasure, still the wakf would be void. *I take the reason to be that at the time of settlement there was no absolute or complete appropriation in the sense that no proprietary interest was reserved and that the property was effectually constituted to be charity property.* I do not desire to be understood as saying *that the interposition of an intermediate estate limited in duration would invalidate the creation of a wakf,* provided that there was *an out and out appropriation at the time of the settlement.* In that case, the appropriation to religious use would only be deferred so long as the interposed estate continued and there would be no reason for saying that the religious appropriation might fail altogether."

Thus it will be seen that the real test for deciding as to whether or no a particular wakf deed was good would be to see whether the dedication was complete at the time when it was made and not dependent on any contingent event which may or may not happen, and the mere interposition of an estate would be no reason for saying that the religious appropriation would fail altogether. Under the Muhammadan law a person can devote his property in wakf and yet reserve to himself and to his descendants in a very undefined manner the usufruct of the property. In such a case the wakf is not necessarily invalidated by reason of the postponement of the wakf to a life enjoyment by the donor. A donor may give his property in wakf, that is to say, appropriate and dedicate the corpus of it to the service of God while reserving to himself a life interest in the usufruct. If in a valid wakf it is open to a Muhammadan to enjoy the usufruct for his life, there is no reason why a stipulation that his personal debts should be paid out of the property

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before the income is applied for religious and charitable purposes should not be valid. Section 3, clause (*b*), of the Mussalman Wakf Validating Act (Act VI of 1913) makes the point perfectly clear. It runs thus: "It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes: (*a*) . . . (*b*) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated: Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character." The learned counsel for the respondents relied on a ruling of this Court in *Syeda Bibi* v. *Mughal Jan* (1). The facts of that case were different. There the maker of the wakf deed stated in the deed that it would be ineffectual till the registration of the deed. It is also to be borne in mind that the case related to Shia Muhammadans and not to Hanafis. In view of the clear provisions of the Mussalman Wakf Validating Act contained in section 3, clause (*b*), the ruling is not applicable to the case of a Hanafi Mussalman. Mulla in his Principles of Muhammadan Law, 10th edition, page 139, says that where a Hanafi Muhammadan executes a deed of wakf by which he directs his debts to be paid out of the rents and profits of the wakf property it is a valid wakf.

For the reasons given above we are clearly of opinion that a wakf by a Hanafi Muhammadan containing a provision that his debts be paid out of the rents and profits of the wakf property is perfectly valid in view of the provisions contained in section 3, clause (*b*), of the Mussalman Wakf Validating Act of 1913. It is clear that Jamiluddin was a very honest man, and was

(1) (1902) I.L.R., 24 All., 231.

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anxious that before the terms of the wakf were given effect to, the personal debts due by him should be paid off. It is equally clear that his brother, the plaintiff appellant, is not honest because he made no attempt whatsoever to carry out the wishes of his deceased brother in respect of the payment of his debts. The granting of a relief by declaration is discretionary and it is open to us to grant the declaration asked for subject to conditions consistent with the terms of the deed of wakf. We do not see any reason in equity why the plaintiff mutwalli should not carry out the wishes of the wakif as expressed in the deed of wakf that his debts should be paid off first.

For the reasons given above we allow the appeal, set aside the decree of the lower appellate court, and give the plaintiff a decree declaring that the property in suit is not liable to be attached and sold in execution of the decree obtained by the defendant No. 1 in suit No. 99 of 1924; but we further declare that the income of the property in suit is liable for the payment of the debt to the defendant No. 1, and this income can be attached in execution of the decree of the defendant No. 1 against the plaintiff and others, and it is not open to the appellant to spend the income on any of the other objects mentioned in the deed of wakf till the debt due to the defendant No. 1 has been fully paid off. As regards the costs we are of opinion that it is a fit case in which the parties should bear their own costs in all the courts, and we order accordingly.

REVISIONAL CRIMINAL

Before Mr. Justice Bennet

EMPEROR *v.* BANSGOPAL*

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Criminal Procedure Code, sections 367, 369, 419—*Appeal filed without copy of judgment—Order rejecting the appeal does not amount to a judgment—Such order can be altered or reviewed.*

*Criminal Revision No. 581 of 1933, from an order of I. M. Kidwai, Sessions Judge of Cawnpore, dated the 12th of July, 1933.