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as a gift, as is contended by learned counsel for the appellants, the defect of contingency is validated by the provisions of sub-section (7) of section 38 of the Insurance Act, which lays down: "Notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life of the policyholder, and an assignment in favour of the survivor or survivors of a number of persons, shall be valid."

The words "any law or custom" are wide enough to cover the Muhammadan law in the present case. The gift, therefore, is not invalid on account of the proviso "that in the event of my said wife predeceasing me, this assignment shall become null and void, as if it had not been made."

We, therefore, hold that the assignment was valid. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs.

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

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ZAMIR AHMAD (PLAINTIFF) v. QAMAR-UN-NISSA AND OTHERS (DEFENDANTS)*

Muhammadan law—Wakf—Wakf by a person involved in debt—Validity—Voidable by creditors if purpose was to defeat or defraud them—Subsequent arrangement among the heirs touching the wakf property—Effect—Transfer of Property Act (IV of 1882), sections 2(d), 53.

A wakf created by a Muhammadan who is involved in debt is not *ipso facto* void under the Muhammadan law; it is only voidable, at the instance of the creditors, if it is executed for the purpose of defeating or defrauding them. Section 53 of the Transfer of Property Act applies to wakfs by Muhammadans.

The validity of a wakf cannot be affected by a subsequent arrangement by the heirs of the wakif by which the wakif's estate including the wakf property is parcelled out amongst

*First Appeal No. 513 of 1934, from a decree of V. R. Mehta, Civil Judge of Pilibhit, dated the 7th of December, 1933.

them. If the wakf is a valid wakf the wakf property cannot be touched by the heirs, and its provisions are not nullified or modified by the subsequent agreement of the heirs of the wakif.

Messrs. *P. L. Banerji* and *M. A. Aziz*, for the appellant.

Messrs. *Mushtaq Ahmad*, *S. M. Husain*, *Mansur Alam* and *Waheed Ahmad Khan*, for the respondents.

THOM, C.J., and GANGA NATH, J.:—This is a plaintiff's appeal arising out of a suit in which the plaintiff prayed for the following reliefs:

“(a) That it may be established that the document known as the *wakfnama*, dated the 20th of July, 1929, executed by Shaikh Fazal Ahmad is null and void and illegal and that the plaintiff is entitled to and is the owner of a three-eighth share in the property specified below, and also it may be established that the parties are bound by the agreement, dated the 6th of November, 1931, and registered on the 11th of January, 1932, and on the 2nd of March, 1932, and that the plaintiff may be awarded possession over a three-eighth share of the property specified below, and that defendants Nos. 1 and 2 may be dispossessed therefrom; and if the right and possession of defendant No. 11 is proved, in that case possession may be awarded on dispossession of defendant No. 11.

“(b) That a decree may be passed awarding Rs.1,125 as mesne profits on account of the plaintiff's share for three years from 1337 Fasli up to 1339 Fasli at the rate of Rs.375 per annum, in respect of the zamindari property in mauza Amkhera specified below, as against defendants Nos. 1 and 2; and if the right of possession and ownership of defendant No. 11 is proved, in that case it may be awarded as against defendant No. 11.”

The wakf deed referred to in relief (a) was executed on the 20th July, 1929, by one Fazal Ahmad. The agreement referred to in relief (a) was executed by the heirs of Fazal Ahmad.

The plaintiff is a cousin of Fazal Ahmad's. Defendants Nos. 1 and 2 are Fazal Ahmad's widows. Defendants Nos. 3 to 10 are the husband and the children of Mst. Jilani the daughter of Fazal Ahmad.

It is not in dispute that by right of inheritance the plaintiff appellant is entitled to a three-eighth share in the estate of Fazal Ahmad.

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The main question for decision in this appeal is as to the validity of the aforesaid wakf deed. Upon a consideration of the evidence the learned Civil Judge has held that the deed is valid. In appeal it was contended that inasmuch as the deed had been executed by Fazal Ahmad when he was financially embarrassed the deed must be held to be invalid. There is no doubt that Fazal Ahmad was in financial difficulties in 1929 when he executed the wakf deed; his entire immovable property with the exception of the wakf property was mortgaged. Furthermore Fazal Ahmad had contracted a number of personal debts. His biggest creditor was one Ram Sarup and on the 17th July, 1929, Ram Sarup brought a suit (No. 16 of 1929) to recover the sum of Rs.23,660 due upon an unsecured bond. On the 18th July, 1929, an application was made for an injunction restraining Fazal Ahmad from alienating his property. On the 19th July, 1929, the summons in Ram Sarup's suit was served upon Fazal Ahmad. On the 20th July, 1929, Fazal Ahmad executed a deed of wakf which the plaintiff in the present suit maintains is invalid.

Ex facie the wakf deed is a validly executed deed. Application for mutation was not made immediately after execution. On the 29th October, 1929, Fazal Ahmad did apply for mutation. He died, however, on the 29th November, 1929, before mutation was effected. Mutation, it appears, was not effected until the 21st March, 1930.

In addition to the debt of Rs.23,660 further sums were due to Ram Chander and to Sri Ram, and, as already observed, apart from the wakf property Fazal Ahmad's entire immovable property was mortgaged.

Learned counsel for the appellant contended that in these circumstances the wakf deed was void. No provision in the deed, it was pointed out, was made by Fazal Ahmad for his daughter Mst. Jilani. Further it

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was pointed out that the deed made no provision for the payment of the executant's personal debts. These facts, learned counsel maintained, clearly established that Fazal Ahmad had no real intention of creating a wakf and that therefore the deed of the 20th July, 1929, was a fictitious document. We are unable to sustain this contention.

Firstly we would observe that it is not accurate to say that no provision has been made in the wakf deed by the executant for his daughter. There is provision in the deed for his children. It is true that there is no specific provision for the payment of the executant's personal debts, but as will be seen hereafter the claims of Fazal Ahmad's debtors were eventually satisfied. It is true that no application for mutation was made by the executant until three months after the deed was executed, but we do not consider this a matter of any importance. The fact is that an application for mutation was made and further it is to be observed that under the wakf deed Fazal Ahmad himself was the first mutwalli. In these circumstances it was unnecessary to apply for mutation. In this connection we would refer to the decision in *Alimunnisa Bibi v. Mohammad Abdur Rahman* (1). Shortly put, therefore, the real question in this appeal is as to whether a Muhammadan who is in embarrassed circumstances can make a wakf of his property. It was contended by the appellant that a Muhammadan who had not paid his debts could not validly make an endowment of his property. It was urged that section 53 of the Transfer of Property Act did not apply to Muhammadans and it followed therefore that a wakf deed executed for the purpose of defeating or defrauding creditors was *ipso facto* void. We are unable to sustain this contention. Learned counsel for the appellant was unable to point to any authority in support of the proposition. The question was considered in the case of *Bismillah Begam v. Tahsin*

(1)[1938] A.L.J. 727.

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Ali Khan (1). In the course of his judgment SULAIMAN, J., referred to the various authorities on the law of Muhammadan wakfs. These authorities are also referred to by Mr. Ameer Ali in his work on Muhammadan Law, volume I, page 207. After reviewing the authorities the learned author observes at page 211: "It follows from this the wakf of a person involved in debt is not *ipso facto* void, it is only voidable if he acts fraudulently to defeat his creditors." That this is the law we have no doubt and we know of no authority for the proposition that a wakf created by a Muhammadan who is financially embarrassed is a void transaction.

It was further contended for the appellant that a Muhammadan who makes a wakf of his property is in an entirely different position from an ordinary debtor who by transfer puts his property beyond reach of his creditors. It was urged that the fact that it was clear in the present case that Fazal Ahmad was endeavouring to save his property from his creditors was proof that there was no real intention on his part to create a wakf at all. We are unable to agree with this argument. The desire to put his property beyond the reach of his creditors may have been Fazal Ahmad's motive for the execution of the wakf deed. This motive may be an improper motive. But the impropriety of the motive is no indication of a lack of intention to create the wakf; indeed it is proof of the intention. We hold, therefore, upon a consideration of the evidence and the authorities that the wakf deed executed by Fazal Ahmad on the 20th July, 1929, is not void. It may be that the deed is voidable at the instance of the creditors whose claims have been defeated. It is a matter of admission, however, in the present case that the claims of Fazal Ahmad's creditors have all been satisfied. Be that as it may, the creditors do not challenge the deed. The deed is challenged in the present suit by one of Fazal Ahmad's heirs.

Reference is made in the first prayer of the plaint to a deed of agreement executed by Fazal Ahmad's heirs on the 20th July, 1929. Under this agreement the heirs of Fazal Ahmad agreed that the wakf property should be sold and the proceeds divided. They further agreed that the dowers due to the widows of Fazal Ahmad should be reduced from Rs.15,000 each to Rs.10,000 each and that these dowers should be paid by sale of the wakf property. The agreement concludes with this provision: "Lastly, as regards the suit which has been filed by the second party in the Subordinate Judge's court, Bareilly, in respect of the wakf property, the second party shall no longer prosecute that case, but shall give up that claim." The second party were the widows of Fazal Ahmad; they had filed a suit against Ram Sarup for a declaration that the property in suit which had been attached by Ram Sarup was wakf property. Ram Sarup had obtained a decree against the estate of Fazal Ahmad and had put it into execution against the wakf property. The widows of Fazal Ahmad had filed objections in the execution proceedings. These objections had been dismissed and accordingly the widows had filed a suit under order XXI, rule 63 of the Code of Civil Procedure. In the aforementioned agreement with the other heirs of Fazal Ahmad the widows had bound themselves not to prosecute this suit and to give up their claim. They maintained in the present suit that they had never intended to agree to any such condition and that they did not understand that they had agreed to any such condition. There is a finding in favour of the widows upon this point upon which no argument has been addressed to us in appeal. The condition, however, was not complied with because the suit by Ram Sarup was disposed of on a compromise, under which the claim of the widows was in fact decreed. It was contended for the appellant that this constituted a breach of the agreement into which the widows had entered and that therefore they could not found upon the de-

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deed in Ram Sarup's case. This matter, however, is not of importance. In the disposal of the appeal the main question for decision is as to the validity of the wakf deed. If the wakf deed is valid it is clear that the plaintiff is not entitled to a general decree against the defendants including the widows of Fazal Ahmad, that the agreement dated 6th November, 1931, is binding upon the parties. We are satisfied that the validity of the wakf deed cannot be affected by a subsequent arrangement by the heirs of the wakif by which the wakif's estate including the wakf property is parcelled out amongst them. If the wakf is a valid wakf the wakf property cannot be touched by the heirs. The creditors of the wakif no doubt have a right to have the wakf set aside if they can show that it was executed with the intention of defeating or delaying their claims. The creditors of Fazal Ahmad, however, have not challenged the wakf deed. The wakf therefore is a valid wakf. Its provisions are not nullified or modified by the subsequent agreement of the heirs of the wakif.

In disposing of this appeal we make no pronouncement as to what may be the legal effect, if any, of the agreement of the heirs dated 6th November, 1931. In our judgment, however, the plaintiff has failed in the present suit to justify his claim for a declaration that this agreement is binding upon the parties.

Upon the finding that the wakf deed is a valid deed the appeal must fail. In the result the appeal is dismissed with costs.