Before Mr. Justice Rachhpal Singh and Mr. Justice Ismail

1938
December, 9

NOSH ALI AND OTHERS (PLAINTIFFS) *v.* SHAMS-UN-NISSA BIBI AND ANOTHER (DEFENDANTS)*

Muhammadan law—Wakf—Wakif must have proprietary rights—Widow in possession of husband's estate in lieu of dower debt—Wakf of such property invalid—Wakf of dower debt invalid—Wakf of money, validity of.

Upon the death of a Muhammadan his widow inherited one-fourth of his estate but took possession of the entire estate in lieu of her dower debt. She made a wakf of the entire estate. A clause in the deed of wakf stated that "In case any of the residuaries brought a suit for possession over the three-fourths share of the property on payment of the proportionate amount of dower, the mutwalli will include the amount so realised in the wakf estate and will spend the money on the objects of the wakf." The widow appointed herself as the first mutwalli and nominated a person as the mutwalli after her death. There was no transfer by the widow of her right to receive the unpaid dower. After the widow's death the plaintiffs as residuaries entitled to succeed to the three-fourths estate sued for possession of the same against the second mutwalli:

Held, that under the Muhammadan law a valid wakf cannot be made unless the wakif is the owner of the property dedicated and has permanent control over it; therefore, a Muhammadan widow who is in possession of her husband's estate in lieu of dower cannot make a valid wakf of such estate.

Held, also, that a wakf of money may be valid, but a distinction has to be drawn between cases where the money is invested or directed to be invested in Government securities or immovable property and the income is to be applied to the objects of the wakf, and cases where there is no such investment or direction and the corpus of the money is to be spent on the objects of the wakf. In the latter class of cases the property dedicated cannot be said to be of a reasonably permanent character, as required by Muhammadan law for a valid wakf. The present case was one of this kind and therefore the wakf of the dower money was invalid. Further, the recovery of the dower debt was problematical, depending on whether the residuaries chose to pay it or not, and a dedication of such property was invalid under the Muhammadan law.

*Second Appeal No. 998 of 1935, from a decree of Shiva Harakh Lal, Additional Civil Judge of Azamgarh, dated the 16th of January, 1935, modifying a decree of Anand Behari Lal, City Munsif of Azamgarh, dated the 27th of April, 1934.

Held, further, that the wakf being invalid the possession of the mutwalli was unlawful, and the mutwalli not being an heir or transferee of the widow as regards her dower, the residuaries were entitled to possession of the three-fourths estate without payment of the dower.

Dr. *M. Wali-ullah,* for the appellants.

Mr. *Shah Jamil Alam,* for the respondents.

RACHHPAL SINGH and ISMAIL, JJ.:—This is a plaintiffs' appeal arising out of a suit brought for the recovery of possession over three-fourths of the property owned by one Sheikh Nasru. Sheikh Nasru died in July, 1932, and his widow Mst. Fahima Bibi assumed possession of the entire property left by Sheikh Nasru in lieu of her dower. Mst. Fahima under a deed dated the 25th July, 1932, dedicated the entire property as wakf for charitable purposes and appointed herself as mutwalli for life and on her death defendant No. 1 was nominated to succeed her as mutwalli. The plaintiffs came to court on the allegations that they were entitled to succeed to three-fourths share in the property left by Sheikh Nasru as residuaries; that Mst. Fahima had no right to dedicate their share as wakf; that the wakf was illegal and opposed to Muhammadan law and that the dower debt was only Rs.101 and not Rs.2,000. The plaintiffs accordingly prayed for a decree for possession. It appears that Mst. Fahima died soon after the execution of the deed of wakf and the defendant No. 1 succeeded in having her name recorded in village papers as mutwalli in succession to Mst. Fahima. The suit was contested by the defendant No. 1 who pleaded *inter alia* that the wakf was valid and operative and that the correct amount of dower debt was Rs.2,000. The trial court held that the amount of dower debt was only Rs.101 as alleged by the plaintiffs and decreed the suit for possession over the property in suit on payment of Rs.75-12-0. The lower appellate court modified the decree of the trial court

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and decreed the suit on payment of Rs.1,500, holding that the correct amount of dower was Rs.2,000. The plaintiffs have preferred an appeal from the decree of the court below.

In second appeal the finding of the court below on the amount of dower must be accepted as conclusive. The main point argued by learned counsel for the appellants is that the wakf of the property in dispute is bad in law. The contention of learned counsel is that it was not open to Mst. Fahima to dedicate the property as wakf because she was not the full proprietor of the same. This question does not appear to have been argued before the court below, but as the validity of the wakf was challenged in the written statement we have allowed counsel to address us on this point.

Before considering the legal aspect of the question we proceed to examine the form of dedication. In the deed Mst. Fahima stated that she had inherited one-fourth of the property left by her husband as heir, that she was in possession of the remaining three-fourths in lieu of dower debt, and that she dedicated the entire property as wakf in the name of God Almighty for charitable purposes. In paragraph 6 of the deed she stated: "In case any of the residuaries brought a suit for possession over the three-fourths share of the property on payment of the proportionate amount of dower the mutwalli will include the amount so realised in the wakf estate and will spend the money on the objects of the wakf." In paragraph 2 the mutwalli is directed to spend the income of the wakf estate on the requirements of Juma mosque of the town of Nizamabad and other religious purposes. Paragraph 4 directs that the mutwalli will not be permitted to transfer or otherwise encumber the dedicated property.

It cannot be disputed that the right of a Muhammadan widow who has entered into possession of her husband's

property peacefully and without force or fraud in lieu of her dower debt is heritable so as to entitle her heirs to remain in possession until the debt is satisfied. It has been held in numerous cases that a widow may transfer her right to possession if she also assigns her right to receive the unpaid dower. If the right to receive the dower and the right to remain in possession are transferred to the same person, he cannot be ousted by the heirs of the husband until the dower debt is paid off; see *Ali Bakhsh* v. *Allahdad Khan* (1) and Amir *Hasan Khan* v. *Muhammad Nazir Husain* (2). Learned counsel for the appellants, however, contends that a Muhammadan widow is not allowed to dedicate a property of which she acquires possession in lieu of dower. Under the Muhammadan law the property dedicated must be of a reasonably permanent character and the wakif may make arrangements that the use of and income accruing from the specified property shall be permanently devoted to specified objects. Above all the wakif must be the owner of the property. Unless the wakif is the owner of the dedicated property he has no permanent control over that property and a dedication thereof will be invalid under Muhammadan law. The Right Hon'ble Ameer Ali in his book on Muhammadan Law, Volume I, page 266, edition 4, says: "But the wakf of a building on land belonging to another of which the dedicator is in possession as bailee or lessee is not valid."

In a recent Full Bench case, *Musammat Rahiman* v. *Musammat Baqridan* (3), it was held that a valid wakf cannot be made in respect of the rights of a usufructuary mortgagee in an immovable property. We have no hesitation in holding that Mst. Fahima had no right to dedicate the property of which she was in possession in lieu of dower.

(1) (1910) I.L.R. 32 All 551. (2) (1932) I.L.R. 54 All. 499.
(3) (1935) I.L.R. 11 Luck. 735.

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The next question to be determined is whether a decree for possession in favour of the plaintiffs can be passed without payment of the proportionate dower debt. The decision of this question will depend on the decision of the further question whether dedication of money is recognized by Muhammadan law. This question is by no means free from difficulty. There is great conflict of judicial opinion on this point. BANERJI and AIKMAN, JJ., in *Abu Sayid Khan* v. *Bakar Ali* (1) had to consider a more or less similar question. After considering various authorities the learned Judges observed: "The learned counsel on both sides have addressed to us very able and erudite arguments and have brought to our attention a number of authorities of Muhammadan law in addition to those referred to in Mr. Ameer Ali's book. We have carefully considered those authorities. The conflict between them is bewildering. Some assert that such an endowment as the present is absolutely void; others, that it is valid when customary; and others again—and these are in the majority—that it is valid without any restriction. Not only is there a conflict between different jurists, but we find different and irreconcilable opinions attributed to the same jurists by different commentators." In the abovementioned case the appropriator Fakhruddin included in the deed of wakf executed by him a sum of Rs.11,000 which he had deposited with a firm in Cawnpore. In the deed he made provisions in regard to the disposal of the said sum. Rs.5,000 out of the endowed sum of Rs.11,000 was to be spent in constructing a mosque with shops at a proper place. The income of the shops was to be applied towards the expenses of the said mosque and the mutwalli was directed to construct a pucca well at a suitable place. The remaining amount out of the endowed sum of Rs.11,000, also the money which remained after defraying

(1) (1901) I.L.R. 24 All. 190.

all the aforesaid expenses out of the income of the endowed property was to be kept in safe custody and the accumulation was to be applied in purchasing immovable property which was to be added to the endowed property. The learned Judges held that the wakf of money was valid. *Prima facie* this ruling is against the contention of learned counsel for the appellants. A comparison of the directions contained in the deeds of wakf will however, reveal the distinguishing features. In the present case in the deed of wakf no direction is given for the investment of the fund; on the other hand, it is clearly stated that the corpus is to be spent on the objects of the wakf, which means that in due course the entire capital will be exhausted and no portion of the dower money will be left in the hands of the mutwalli. In paragraph 318, sub-clause (3), of Wilson's Anglo-Muhammadan Law it is stated: "Other movable articles, not necessarily consumed in the using, where the dedication of such things is sanctioned by custom." Sub-clause (4) says: "As to money, and consequently as to shares in Joint Stock Companies and other modern forms of investment, the High Courts of Calcutta and Allahabad have given conflicting opinions." These conclusions are based on an examination of authorities of the two High Courts mentioned above and in particular on a discussion in Ameer Ali's Muhammadan Law, Vol. I. Edn. 1892, pp. 202—7, which ends thus: "From these principles it will be seen that under the Hanafi law the wakf of Government securities, shares in companies, debentures, and other stock, is perfectly lawful and valid. The doubt, which one or two of the ancient Hanafi doctors had expressed as to the validity of the wakf of certain kinds of movable property in contradistinction to certain other things, was the outcome of primitive and archaic conditions of society, and was founded on the notion that as perpetuity was essential to the validity of wakfs it could hardly be secured by the dedication of movable things generally.

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But as the Mussalman communities progressed in material civilization and commerce developed, it came to be recognized universally that the wakf of everything which forms the subject of business transactions, or which it is customary in any particular locality to do so, is valid." It will be observed that investment in Government securities and shares in companies, etc. is a common form of investment recognized in the present times. Such investments yield regular income which can be expended on the maintenance of the objects of the wakf. If, on the other hand, a sum of money itself is dedicated and it is to be spent on the maintenance of the objects of the wakf, it will be exhausted before long and it cannot be said that the property dedicated is of a reasonably permanent character as required by law; see Wilson's Muhammadan Law, paragraph 318. The position might have been different if the appropriator had directed the money to be invested in immovable property or in Government securities, etc.

There is another aspect of the question which affects the validity of the wakf. The dower debt was no doubt due to the lady but it was at the option of the residuaries to pay that sum or not. It was not tangible property available to Mst. Fahima and she certainly had no control over it. The recovery of that sum was problemetical and any dedication of such property could not be recognized under the accepted principles of Muhammadan law. In *Kadir Ibrahim Rowther* v. *Mahomed Rahumadulla* (1) it was held that dedication of a decree was invalid. This principle will apply with greater force to the present case. In our judgment the rule of law laid down in *Abu Sayid Khan* v. *Bakar Ali* (2) mentioned above is not applicable to the present case at all.

It is conceded by the parties that the mutwalli is not one of the heirs of Mst. Fahima and therefore is not

(1) (1909) I.L.R. 33 Mad. 118. (2) (1901) I.L.R. 24 All. 190.

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entitled to claim the payment of dower debt as a condition precedent to the delivery of possession of property in dispute. In the present case we are not called upon to decide whether the dower debt is recoverable by the heirs or not. Unless we hold that the dedication of the dower money is a valid wakf the mutwalli will not be entitled to claim payment of the same. We have already held that the wakf of the three-fourths share left by Sheikh Nasru was illegal. In the circumstances, in our opinion, the plaintiffs can recover possession of the same without paying the proportionate amount of dower debt to the mutwalli.

For the reasons given above we allow the appeal, modify the decree of the court below and direct that the plaintiffs' suit for possession over three-fourths of the property left by Sheikh Nasru be decreed. The appellants will be entitled to their costs from the contesting defendant throughout.

Before Mr. Justice Bennet and Mr. Justice Verma

KAMLA PRASAD PANDEY (DEFENDANT) *v.* HASAN ALI KHAN (PLAINTIFF)*

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Evidence Act (I of 1872), sections 92 proviso (1), 93—Promissory note—Rate of interest entered as Rs.2 per month—"Per cent" omitted—Admissibility of oral evidence to prove that "per cent" was intended—Previous promissory notes between parties—Specific Relief Act (I of 1877), section 31—Usurious Loans Act (X of 1918), section 3—Rate of interest on promissory note.

A promissory note for Rs.875 was executed on a printed form in Hindi; the clause relating to interest was printed as follows: *"Sud wo sud dar sud upar asal har shashmahi ke aj ki tarikh se ta roz wasul kul mutalba ke basharah . . . mahwar"*, and the blank space was filled in by writing *"do rupiya"*. In the suit upon the promissory note the plaintiff contended that the interest agreed upon was two *per cent* per

*Second Appeal No. 536 of 1935, from a decree of Niaz Ahmad, Additional Civil Judge of Basti, dated the 20th of December, 1934, modifying a decree of Mohan Shanker Saxena, Additional Munsif of Basti, dated the 15th of February, 1934.