ORIGINAL CIVIL.

Before Mr Justice Chari.

1927

Feb. 18.

MIRZA HASHIM MISHKEE
v.
AGA ABDUL HOOSAIN BINDANEE.*

Shiah Mahomedan Law—Gift or trust of vested remainder in favour of unborn donee invalid—Private trust not same as wakf.

A Shiah Mahomedan lady executed a trust deed the effect of which was to make a gift through a trustee of the income of all her properties, after the settlor's death to her husband if he should survive her, and if he did not, to her children and after their death to their children with a gift of the proceeds of the corpus to those children when the youngest attained the age of 18 years.

Held, that a Shiah can create a life interest and a vested interest to take effect after the expiry of a life interest but he cannot create such a vested remainder in favour of persons unborn at the time of the settlement. The legal incidents applicable to " wakfs " are not applicable to grants of limited interests under a private settlement. A settlement through a trustee is nothing more than a gift to the beneficiary through another person and must conform to all the rules relating to a gift; and therefore a trustee cannot be an agent of an unborn person for the acceptance of the gift. Plaintiff who was born after the date of the settlement in suit could not therefore claim as a beneficiary under the trust.

Ahmed Gulam Mahomed Sadiq v. *Mahomed Cassim Makda and others*, 7 B.L.T. 142; *P.M.P.A.N. Annamalay Chetty* v. *Shaik Mahomed Ismail*, 7 B.L.T. 75; *Sheraj Hussain* v. *Musoof Hussain*, 240 C. 32—followed.

Bance Begum v. *Mir Abed Ali*, 32 Bom. 172; *Sadik Hussain* v. *Hashim Ally*, 38 All. 627—*referred to.*

Ameer Ali's Mahomedan Law, 4th edition; *Bailie's Digest of Moohummudan Law*; *Tyabji's Mahomedan Law*, 2nd edition—*referred to.*

Hay—for Plaintiff.

Burjorjee—for Defendant.

CHARI, J.—This is a suit instituted by the plaintiff who claims to be a beneficiary under a deed of settlement executed by one Sakeena Khanum, praying the Court to remove the trustee and to appoint new

* Civil Regular Suit No. 41 of 1925.

trustees in his place and for certain other reliefs in respect of the trust property. The defence raised is that no trust was created or intended to be created, that the trust is invalid and that the plaintiff has no right to maintain the suit. I raised a number of issues of which 1 (*a*), 1 (*b*) and 1 (*c*) are as follows :— Is the plaintiff a beneficiary under the deed dated the 6th December 1904 ? Is he entitled to maintain the suit ? Can Sakeena Khanum create an estate of the kind created by the deed ? I shall deal with the issue 1 (*c*) first since if this is answered in the negative, it follows that the plaintiff though he may be a beneficiary, is such under an invalid deed of settlement and cannot therefore maintain the suit. The first point to consider is the law applicable. Under section 13 (1) of the Burma Laws Act, the Mahommedan Law where the parties are Mahomedans is made applicable in certain cases and "gift" is not one of them. The second clause to that section directs the Courts of Rangoon to deal with and determine questions in accordance with the law for the time being administered by the Original Side of the High Court at Fort William. By the Letters Patent of the Rangoon High Court the Original Side of the Rangoon High Court administers the law which had been administered in the Original Side of the Chief Court of Lower Burma. The Calcutta High Court in its Original Side had always held that the validity of a gift by a Mahomedan must be considered on the principles of Mahomedan Law, *P.M.P.A.N. Annamalay Chetty* v. *Shaik Mahomed Ismail* (1) and *Ahmed Gulam Mahomed Sadiq* v. *Mahomed Cassim Makda and others* (2). The parties in this case are Shiah Mahomedans and the case must be

(1) VII B.L. Law Times 75. (2) VII Burma Law Times 142.

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considered on the principles of their law. Before considering whether the trust deed is under that law valid or not, I shall give a brief statement of the effect of that deed.

It is admitted that all the properties comprised in the trust deed originally belonged to Hajee Mirza Hashim Mishkee, the husband of Sakeena Khanum. He transferred the properties by a number of gifts to his wife. The validity of these gifts is not now in question. On the 6th December 1904 Sakeena Khanum purported to execute a trust deed or deed of settlement. She starts by saying that she wants to make some provision for her husband, children and their child or children and therefore makes the settlement of property. By clause (1) of the deed she transfers the property to the intended trustee who is the first defendant in the suit. Clause (2) of the deed gives the trustee power to sell any property and re-invest the money in purchase of new or other immoveable freehold property subject to the condition that during the lifetime of Sakeena Khanum her consent in writing should be taken and after her death the consent in writing of Hajee Mirza Hashim Mishkee, and after the death of both of them, then at the discretion of the trustee himself. The third clause provides that out of the nett proceeds of the property the trustee should retain fifteen per cent. as commission for himself and pay the whole of the balance to Sakeena Khanum during her lifetime. After her death the whole of the balance is to be paid to Hajee Mirza Hashim Mishkee if he should survive her. When both are dead clauses (4) and (5) provide that the income should be held by the trustee in trust for Mirza Cassim Mishkee and Khatiza Bibi the son and daughter of Sakeena Khanum. Twenty-five per cent.

of the income is to be accumulated and the balance in the ratio of two-fourths and one-fourth is to be paid to Mirza Cassim Mishkee and Khatiza Bibi for their use. After the death of both of them the income is to be divided among their issue according to the doctrines and tenets of the Shiah Imameeah Law. Two points will be noticed here first the trust does not make any provision as to what is to happen to the share of the income payable to Mirza Cassim Mishkee and Khatiza Bibi, if one of them should die, during the continuance of the life of the survivor. The trust is also ambiguous in dividing the proceeds among the issue according to the doctrines and tenets of Shiah Immeeah Law since it is not clear whether the children take according to the share which would have been taken by their parents, *i.e.*, *per stirpes* or whether they take *per capita* but in accordance with the spirit of Mahomedan Law, the males taking twice the share of the female. After the youngest of the childern of Mirza Cassim Mishkee and Khatiza Bibi attain eighteen years the property is to be sold and the amount realised is to be divided among the child or children of Mirza Cassim Mishkee and Khatiza Bibi according to doctrines and tenets of the Shiah Law. Here again there is the same ambiguity as before. It will be noticed that the effect of this deed is to make a gift through a trustee of the income of all the properties, after the settlor's death to her husband if he should survive her, if he does not, to her children, and after their death to their children with a gift of the proceeds of the corpus to those children when the youngest attains the age of eighteen years.

It now remains to consider whether this settlement is valid according to the Shiah Law. It is settled that a Shiah can creat a life interest. *Banu*

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Begum v. *Mir Abed Ali* (3). In that case the original texts are cited. They refer to limited interests in house property, but the passage in Bailie's Digest at page 276 which is a translation of a passage in the Shiraya, shows, as is pointed out by Mr. Justice Wazuruddin, Additional Judicial Commissioner of Oudh in a judgment to which I shall refer later, that the power of a Shiah to creat a limited interest is not restricted to any particular kind of property. Assuming therefore that a Shiah can creat a life interest and a vested interest to take effect after the expiry of a life interest the question still remains whether he could create such a vested remainder in favour of unborn persons. There are two judgments (I.L.R. 36 Bom. 240 and I.L.R. 37 Bom. 447) where Mr. Justice Beaman discusses the powers of a Shiah Mahomedan to create limited interests and life estates. These rulings have been criticised by the learned advocate for the plaintiff who maintains that the question did not really arise in those cases and however instructive they may be as an excursus they have no binding authority. I do not propose to base my decision on any dictum contained in those very interesting judgments. The learned advocate for the plaintiff relies upon two passages, one in *Tyabji's* Mahomedan Law, 2nd edition, section 449, page 516 and another in *Ameer Ali's* Mahomedan Law, 4th edition, Volume I, pages 62 and 142. Both the passages are really based upon the texts from which *Bailie* in his Mahomedan Law draws his deductions, and we are thus, fortunately, in a position to see how far the conclusions of these learned Mahomedan lawyers, is supported by the original texts. These texts do not deal with or contemplate the creation

(3) (1918) 32 Bom. 172.

of a vested interest after a life estate in favour of unborn persons. In view of the fact that the learned advocate for the plaintiff bases his whole argument on these passages and relies strongly on the fact that the authors are themselves Mahomedan gentlemen learned in the law, I shall deal with the argument at somewhat greater length than I would otherwise have done. In doing so, I shall confine my criticism to the passage in Mr. Tyabji's book, as all my remarks will equally apply to that in Mr. Ameer Ali's book. In section 446 of his book the learned author (Mr. Tyabji) begins the exposition of the Shiah Law relating to limited interests, and in section 447 he treats of three kinds of such interest. Then in section 448 the learned author discusses the vesting of their rights in the donees. This section is not based on any direct text bearing on the point, but on the analogy of the possession required for the completion of a "wakf." He cites in his Commentary an important passage from Baillie, II, 214, about unborn persons in connection with a wakf. I shall deal with this later. Then comes section 449 which deals directly with the question now before me for decision. "The grantee of a limited interest must be in existence at the time when the grant is made; he must be competent to own property and must be distinctly indicated; provided that where a succession of limited interest is created by the same grant, the grantee of the first interest alone need be in existence at the time of the grant and if the succeeding grantees come into existence when their respective interests open out, the grants to them are valid." Where does the the learned writer get his proviso from? In the notes to the section he says: "Neither creating a perpetuity nor giving remainders to unborn persons seemed to them (the Shiah lawyers) to be objections

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invalidating settlements. This it is submitted will appear from the authorities that are cited below." When we turn to see what the authorities are, we find it is a passage from Ameer Ali, I, 112. That passage is as follows: "A grant may be made to A for life and then to B absolutely or a grant may be made to A for life and then to A's children absolutely. There is some difference of opinion as to whether only children living at the time of the grant will take the remainder absolutely or any children born to A after the grant, will take also. The approved opinion seems to be that all the children will take whether living at the time of the grant or born afterwards." A careful study, however, shows that there is no real authority for this proposition. It seems to proceed on the assumption, a fallacious assumption, that the legal incidents applicable to "wakfs" are also applicable to grants of limited interests. The texts merely lay down that any property which can be the subject of a "wakf" can also be the subject of a grant of limited interest (see Bailie's Digest 227 and Exhibits 6 and 8 in *Banoo Begum*'s case). There is no suggestion anywhere in these texts that the gift of an estate after a limited interest or a life estate is in any way peculiar or an exception to which the fundamental conception of a gift as being a contract (acquired) in which the consensus of two minds is necessary, is inapplicable. It is in the highest degree unlikely that the expounders of the law did not realise the fundamental difference between a "wakf" in which after the initial seizin when the "wakf" becomes perfected, the dedicated property becomes the property of the Almighty needing no further acceptance or seizin and a private donation in which each donee whether immediate or ultimate, must fulfil the requirements of the law and accept the gift, either expressly or impliedly and directly or through another. More-

over a " wakf " is intended to be a settlement of property in perpetuity, whereas a gift of property after the termination of a life estate is not. The former must necessarily, some time or other, become operative in favour of unborn persons, whereas the latter need not. I am therefore of opinion that the passages relied on by the plaintiff are not based on authoritative texts and are opposed to the fundamental conceptions of Mahomedan Law.

The point is not without authority. It directly arose for decision in a Shiah case in Oudh [*Sheraj Hussain* v. *Musoof Hussain* (1)]. The learned Judicial Commissioner of Oudh, himself a learned Muslim, discusses the law. He first draws attention to the case of *Sadik Hussain* v. *Hashim Ally* (2), which is authority for the proposition that a settlement through a trustee is nothing more than a gift to the beneficiary through another person and must conform to all the rules relating to a gift. The learned Judicial Commissioner then draws attention to the passage in Bailie's Digest at page 203 which shows that a gift according to Shiah Law is a contract between the parties which therefore requires the consensus of minds with reference to the contract. There must be a proposal to make the gift and there must be an acceptance of the gift. The learned Judicial Commissioner then says : " It follows that the absence of acceptance and the presence of contingency or futurity must be found in a case where a gift is made in favour of a person who has not come into existence." He held that the deed of settlement made in favour of a person not born on the date when the settlement was made was invalid. The only difference between that case and the case before me is possibly the interposition of the

(1) 24 Oudh Cases 32, (1921) 65 Indian Cases 132.
(2) (1916) 38 All. 627.

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trustee. In my opinion the interposition of such a trustee cannot have any effect on the validity of the deed. A trustee may accept a gift on behalf of existing persons on an authority expressed or implied. But can he accept, a gift on behalf of persons not in existence at the time of the settlement and who may never come into existence at all? In my opinion he cannot. The only ground on which a gift through a trustee can be validated is on the assumption that a trustee is in a sense an agent of the donee for the acceptance of the gift and no one can be the agent of a non-existing person. I am therefore of opinion that the reasoning in the Oudh case is applicable to this case and that the deed of settlement in favour of a person who was not in existence at the time is void and that the plaintiff who was born long after the deed cannot claim under it. He is therefore not a beneficiary under the deed and is not entitled to maintain the suit. It is accordingly dismissed. As the defendants, by the execution of the deed, and by leaving it unrevoked and uncancelled, were directly instrumental in creating a not unreasonable belief that the minor plaintiff has a valid claim, they have no one but themselves to blame for the litigation. I therefore direct that each party should bear his or her own costs.