APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

PHUL BEE BEE AND OTHERS
v.
R.M.P. CHETTIAR FIRM AND OTHERS.*

1935
Jan. 10.

Mahomedan law—Waqf—Ultimate benefit under waqf—Gift—Conditions of a valid gift—Life interest and remainder over– Gift in praesenti*—Delivery of possession to donee—Directions for insurance and repairs.*

With the twofold object of providing for (1) a mosque and a madrassa, and (2) ultimately benefiting his two sons and their families a Mahomedan donor executed a deed in respect of his property. As regards the property set apart for the benefit of the sons and their families the Court construed the terms of the deed to mean that during the life-time of the donor both the legal and beneficial interest therein was to remain in the donor who would retain possession of his property so long as he lived; that after his death his sons would be entitled as trustees to the legal estate in the property and also to the usufruct thereof for life, and that after the death of the two sons their wives and children would take an absolute interest in this property in such proportions as the two sons during their life-time should appoint or in default of appointment in equal shares.

The appellants contended that there was a valid waqf created in respect of this property, or in the alternative that it was a valid gift under Mahomedan law.

Held, that (1) there was no valid waqf of the property set apart for the families, as there was no ultimate benefit reserved for the poor or for any purpose recognized by the Mahomedan law as a religious, pious or charitable purpose of a permanent character; (2) assuming that the deed created a life interest in the sons with the ultimate remainder for the benefit of their wives and families respectively it was not a complete gift, and therefore invalid as a gift under the Mahomedan law; (3) it was not a gift *in praesenti* as the property was not given and taken by the two sons as trustees or as donees either actually or constructively during the life-time of the donor; (4) the donor was not the trustee for the donees, and the property cannot be said to be delivered to him on behalf of the donees. The donor remained in possession of the property, and was entitled to the usufruct of the profits and gains accruing therefrom during his life-time. It is of the essence of a valid gift under Mahomedan law that the donee should take possession of the subject-matter of the gift, either actually or constructively, during the life-time of the donor.

Mohammad Abdul Gani v. *Fakir Jahan Begum*, 49 I.A. 195—*referred to.*

* Civil First Appeal No. 55 of 1934 from the judgment of this Court on the Original Side in Civil Regular No. 2 of 1933.

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(5) a direction in the deed that the trustees must insure and repair all the buildings described in the deed lays a personal obligation upon them to do so, but it does not thereby turn all the buildings into waqf property.

Ray for the appellants.

Clark for the respondents.

PAGE, C.J.—Notwithstanding the extremely careful and exhaustive argument presented on behalf of the appellants, in my opinion, this appeal fails.

It appears that the title deeds of certain immovable property were deposited by the 1st and 5th defendants in 1929 with the plaintiffs by way of equitable mortgage, and by a deed of conveyance of the 4th December 1931 the 1st and 5th defendants purported to convey to the plaintiffs the property in suit at a valuation of Rs. 27,000 in part satisfaction of the debt. Notwithstanding the fact that the 1st and 5th defendants have deliberately purported to dispose of their interest in this property to the plaintiffs, they now contend that they had no authority to alienate the property in dispute by reason of the terms of a deed of the 23rd of November 1926. A decree was passed in favour of the plaintiffs at the trial. Hence the present appeal.

It is obvious that the appellants have no merits, and it is satisfactory that in my opinion they have no case either. The appeal turns upon the construction of the deed of the 23rd of November 1926, and in this connection I shall refer to certain observations by Sir John Edge, delivering the judgment of the Judicial Committee, in *Mohammad Abdul Gani* v. *Fakir Jahan Begum and others* (1):

"Owing to the fact that there is in India no uniform or accurate system of conveyancing, and to the fact that deeds

(1) (1921) 49 I.A. 195, 207.

and wills are, in India, as a rule most inartistically drawn up, frequently by persons not possessed of legal knowledge, it is often difficult to ascertain with certainty what was precisely intended by the document."

Now, the deed of 23rd November 1926 by no stretch of imagination could be regarded as artistically drawn; indeed, in more respects than one its terms are not consistent. But it is necessary for the Court to ascertain the intention of the executants of this deed, and it is quite clear, to my mind, that the object of Haji Shaik Namdar Hussain Sarkar was twofold: (1) to make provision for a mosque and a madrassa, and (2) to make provision for his two sons, who had helped him in acquiring his fortune in business, and their families. For the first object the donor set aside certain property of which he was possessed so that it should become waqf for the benefit of the musjid and the madrassa, and for the second object which he had in view he set aside the rest of the property set out in a schedule to the deed for the purpose of ultimately benefiting his two sons and their families. Indeed, he expressly stated that such was his intention in the deed as follows:

"Whereas it is now his desire to make provision for the musjid at Zigon and also the madrassa at the same place, and otherwise make provision for his sons and their descendants and make a declaration of wakf regarding the same musjid and madrassa of certain property set out in the said schedule and make a declaration of settlement for his sons and descendants of the remaining property mentioned therein."

In the operative part of the deed the donor purported thereby to convey to the trustees, who were his two sons, the property set out in the

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schedule to the deed subject to certain directions and conditions thereinafter set out. Under the first condition it is provided that during the life-time of the donor he shall remain in possession of the trust property, and by the second condition it is provided that during his life-time he shall be "the sole trustee of the trust fund and he shall have power to deal with the rents and profits thereof in such way as he may deem reasonable and expedient."

Now, we are not concerned, and I desire to express no opinion, as to the meaning and effect of the provisions of the deed in so far as they relate to the land which the donor purported to dedicate as waqf for the benefit of the musjid and the madrassa, because the parcels of property in dispute are part of "the remaining properties described in the said schedule."

I am satisfied, however, upon a consideration of the terms of the deed that the object and effect of the provisions relating to the remaining properties was that during the life-time of the donor both the legal and beneficial interest therein, or in other words both the dominion and the usufruct thereof, should remain in the donor who would retain possession of this property so long as he lived; that after his death his sons should be entitled as trustees to the legal estate in this property and also to the usufruct thereof for life, and that after the death of the two sons their wives and children should take an absolute interest in this property in such proportions as the two sons during their life-time should appoint, or in default of appointment in equal shares.

The learned advocate for the appellants contended that, reading the deed of the 23rd November 1923

as a whole, it constituted a valid waqf of "the remaining property" by reason of the Mussalman Waqf Validating Acts of 1913 and 1930. In my opinion, however, no valid waqf within these Acts was created by the deed under consideration, because "the ultimate benefit of the subject-matter of the deed was not 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 question, therefore, arises whether the material provisions of this deed are otherwise valid under the Mahommedan law. The learned advocate for the appellants contended that, assuming that the terms of the deed did not create a waqf so far as "the remaining properties described in the said schedule" were concerned, under the deed a valid gift of a life interest in such property in favour of the sons was created. It is unnecessary for the purpose of disposing of this appeal to decide whether under the Mahommedan law it is competent for a donor to make a gift of a life interest in property, because upon the footing that the effect of the terms of this deed was that a life interest in the sons with the ultimate remainder for the benefit of their wives and families respectively was created, in my opinion, the gift was not a complete gift, and therefore was invalid as a gift under the Mahommedan law. If it is urged that there was a gift *in praesenti* by reason of the fact that upon a true construction of the deed the property in dispute was thereunder conveyed to the sons as trustees for the benefit of themselves and their families, the gift fails by reason of the fact that possession of the said property was not given and taken by the two sons as trustees or as donees either actually or constructively

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during the life-time of the donor [*Mohammad Abdul Gani* v. *Fakir Jahan Begum and others* (1)]. On the other hand if it is contended that there was delivery of possession by the donor to the trustee upon the footing that the donor himself was made the sole trustee under the terms of the deed, in my opinion, the answer is that having regard to the terms of this document in which the donor retained during his life-time both the legal and equitable interest created under the deed, remained in possession of the property, and was entitled to the usufruct of the profits and gains accruing therefrom during his life-time, there was no transfer of possession to or on behalf of the donees within the principles of the Mahommedan law; which in its wisdom lays down that in order that there should be no room for doubt as to whether a gift had been effectuated or not it is of the essence of a valid gift save in exceptional circumstances that there should be *inter alia* the taking of possession of the subject-matter of the gift by the donee either actually or constructively during the life-time of the donor, who must transfer possession of the subject-matter of the gift to the donee or to some person on behalf of the donee.

Lastly, it was contended on behalf of the appellants that the effect of the provisions of the deed relating to "the remaining properties described in the schedule" was to create a family settlement valid in law. I do not find it easy to understand the ground upon which this contention is based. But, to my mind, it is clear that this was not a document brought into being for the purpose of settling a family dispute or effecting some compro-

(1) (1921) 49 I.A. 195.

mise or settlement of family claims. The object and intention of the donor was to make a gift, which would operate *in futuro*, of certain of his property for the benefit of his two sons and their respective families. It was a gift, and the document purported to create a gift to such persons and nothing else. As I have said effect must be given to the deed according to the construction which the Court puts upon it construed as a whole and in a reasonable manner. The learned advocate for the appellants contended that inasmuch is in clause 8 of the deed it is provided that "the trustees must insure and repair all the building described in the said schedule", the effect of these words was to make the whole of the property subject to the deed waqf property, because it was charged with the obligation of insuring and repairing "all the building described in the said schedule." I do not so read clause 8 of the deed. It seems to me that the direction therein contained amounted to this, that the trustees were to insure and maintain the buildings set out in the schedule; but, although a personal obligation was imposed upon them so to do, there is no charge upon the properties in the said schedule for the purpose aforesaid.

For these reasons, in my opinion, the appeal fails and must be dismissed with costs. We assess the costs of the respondents at 17 gold mohurs a day.

MYA BU, J.—I agree.