APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mosely.

1939

Mar. 21.

DAW EIN AND OTHERS

v.

DAW CHAN THA AND OTHERS.*

Mahomedan law—Wakf—Creation of wakf by oral declaration and dedication—Wakf created by deed—Necessity for registration—Burma Laws Act, s. 13—Registration Act, ss. 17, 49—Wakf invalid ab initio—*Suit for share of rents and profits as co-heirs—Limitation Act, s. 10, art. 120.*

A wakf is not a gift but a religious trust, and by virtue of s. 13 of the Burma Laws Act the law applicable is the Mahomedan law. That law lays down that a wakf may be made by oral declaration and dedication, and makes no mention of writings. But if the wakf is made by deed, the statute law of Burma comes into operation and sections 17 (*1*) and 49 of the Registration Act require the deed to be registered to render it effective and admissible in evidence.

Ma E Khin v. *Maung Sein*, I.L.R. 2 Ran. 495 ; *Muhammad Rustam Ali* v. *Mushtaq Husain*, I.L.R. 42 All. 609, referred to.

In the case of a wakf the transferee is the deity, not the *mutwalli* who is merely a manager. A trustee-nama (deed of appointment of *mutwallis*) does not require registration, but a *wakfnama* in writing does.

Muhammad Rustam v. *Mushtaq Husain*, I.L.R. 42 All. 609 (P.C.) ; *Vidya Varuthi* v. *Balusami Ayyar*, I.L.R. 44 Mad. 831 (P.C.), referred to.

Where a wakf is found to be invalid *ab initio* and the Court has to determine the claim of the parties as co-heirs to the rents and profits of the land s. 10 of the Limitation Act does not apply, and the suit must be brought within the period prescribed by art. 120.

Madar Sahib v. *Kader Moideen*, I.L.R. 39 Mad. 54 ; *Mahomed Riasat Ali* v. *Hasain Bann*, I.L.R. 21 Cal. 157 ; *Runchordas* v. *Parvatibai*, I.L.R. 23 Bom. 725 (P.C.) ; *Robert Watson & Co., Ltd.* v. *Ram Chand*, I.L.R. 23 Cal. 799 ; *Umardaraz Ali Khan* v. *Wilayat Ali*, I.L.R. 19 All. 169, referred to.

Ze Ya and *Beecheno* for the appellants.

P. K. Basu for the 1st respondent.

E Maung for the 5th respondent. Respondents 2, 3, 4 absent.

MOSELY, J.—The plaintiff Daw Chan Tha, the widow of U Pe, a Zerbadi Mohamedan who died in 1926, sued

* Civil 1st Appeals Nos. 111 and 126 of 1938 from the judgment of the District Court of Maubin in Civil Reg. Suit No. 6 of 1937.

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for a declaration that a Wakf which she and U Pe's two brothers, his other heirs, executed in 1926 had failed, and also for her share of the property comprised in that Wakf, that is to say her share of part of her inheritance, and for the net rents and profits of the property from 1926 up to recovery of possession. The suit was filed in 1937.

The other two parties to the deeds of Wakf were U Pe's brothers ; U Hpaw who died in 1929 and U Po Kyaw who died in 1931.

The suit was greatly complicated because it was wrongly treated as an administration suit. There was an allegation that U Po Kyaw became a Buddhist in 1927 and questions regarding succession to his property were gone into which were quite foreign to this suit.

The first set of defendants were U Hpaw's widow Daw Ein and her children, and those of another deceased wife of U Hpaw, U On Pe, Ma Thein Nyun, U Chit Pe, Ma Sein Yin and U Ba Kyin (defendants Nos. 1 to 6). These, except Ma Thein Nyun, are the appellants in Civil First Appeal No. 111 of 1938. Another set of defendants are the two daughters of Po Kyaw's widow, Ma On Khet, who died in 1937, namely Ma Aye Khin and Ma Aye Hla (defendants Nos. 7 and 8) who are the appellants in Civil First Appeal No. 126 of 1938.

These two appeals are being decided in this judgment.

The ninth defendant, Ma Than Kyi, was added on the request of defendants Nos. 7 and 8. She claims to be the child of a third wife of U Hpaw, Ma Ohn Kin (D.W. 12 here). An issue was framed and decided as to her status. It was necessary to decide that question as, if she is the legitimate daughter of U Hpaw, she is interested in affirming or denying the validity of the wakf in suit.

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[His Lordship set out the details of the Wakf. The plaint averred that the intended religious trust had failed owing to the death of U Phaw and U Po Kyaw before the agreement creating the trust was acted on in any way, and because of the uncertainty of the purpose and the contingent nature of the trust and on non-fulfilment of its conditions and for other reasons. U Hpaw's widow and children except Ma Thein Nyun in their written statement pleaded that the trust was not invalid and had not failed. They pleaded that the claim to "mesne profits" beyond three years was time-barred. U Po Kyaw's daughters and Ma Than Kyi supported the plaintiff's case and added that U Po Kyaw had become a Buddhist in 1927 and made that a ground for assailing the wakf. His Lordship remarked that it was no ground. The issues were set out.]

On the evidence adduced on all these issues it was found *inter alia* that over Rs. 1,000 was said by the defendants Nos. 1, 2 and 6 to have been spent on feeding the poor and on repairing a mosque and road, but that these were objects of the trust set out in exhibit C and not that set out in exhibit B, and therefore the fund of the wakf as set out in exhibit B had not been utilized. This I imagine is clearly wrong because exhibit B would allow expenditure on any objects of charity even if they were the objects more particularly designated in exhibit C. But this question seems to be immaterial.

The main finding of the trial Court was that the wakf failed altogether and was invalid because the deeds of wakf were not registered. This objection had not been taken in the written statements or particularized in the issues but was raised in argument at the Bar. That, however, cannot affect the decision of the legal question, for the case of both the plaintiff and

defendants Nos. 1 to 6 throughout was that the wakf was created by these deeds.

A wakf of course can be created by an oral declaration and dedication. That is undisputed law. I need only refer to *Ma E Khin and others* v. *Maung Sein and others* (1). But where the wakf is made by deed sections 17 (*1*) (*b*) and 49 of the Registration Act come into operation. Section 17 (*1*) (*b*) demands the registration of non-testamentary instruments which purport to operate, to create, or *extinguish* any interest of the value of one hundred rupees and upwards in immovable property. Section 49 declares that no document required by section 17 to be registered shall affect any immovable property comprised therein unless it has been registered, and exception is made in section 49 to cases of part performance lying under section 53A of the Transfer of Property Act. But that section can have no operation here as it deals with cases where the transferee has, in part performance of the contract, taken possession of the property.

In the case of a wakf the transferee is the deity, not the *mutwalli* who is merely a manager, *vide Vidya Varuthi Thirtha* (*Plaintiff*) v. *Balusami Ayyar and others* (*Defendants*) (2), a decision of their Lordships of the Privy Council. In *Muhammad Rustam Ali Khan and others* v. *Mushtaq Husain and others* (3) another decision of their Lordships of the Privy Council, it was assumed throughout that a *wakfnama* or deed of wakf must be registered. The learned author of Mulla's commentary on the Registration Act [see Third Edition, section 17 (*1*) (*b*) at page 58] has given the correct interpretation of this ruling. Unfortunately the headnote of the case in the Indian Law Reports and also in XLVII Indian Appeals page 224 has given the

(1) (1924) I.L.R. 2 Ran. 495. (2) (1921) I.L.R. 44 Mad. 831, 840, P.C.
(3) (1920) I.L.R. 42 All. 609.

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opposite effect to that intended, and says that a *wakfnama* does not require registration. It was the "trustee-nama" or deed of appointment of *mutwallis* which did not require registration (see pages 615 and 618 *ibid*). As was said in *Varuthi Thirtha* (1) when a wakf is made the right of the wakif is extinguished and the ownership is transferred to the Almighty. I do not refer here to the effect of sections 123 and 129 of the Transfer of Property Act, as a wakf is not a gift but a religious trust, and the law concerned is by virtue of section 13 of the Burma Laws Act the Mohamedan Law. That law makes no mention of writings. It merely lays down that a wakf may be made by oral declaration and dedication. Therefore although a wakf can be made orally, the law applicable to a wakf made in writing must be the statute law of India, and the Registration Act must be enforced.

The learned District Judge in the judgment went on to come to two other findings, that U Po Kyaw did not apostatize and that his nephews were entitled to a share in his estate along with his daughters. In that event the learned Judge should have gone on to fix the fractional share to which the nephews were entitled, for the purpose of the preliminary decree.

In my opinion, however, this question should not have been decided in this suit. This suit was not brought as an administration suit and administration was not asked for by the plaintiff. It was not alleged that there were any debts due by the estate, or that it was necessary for the Court to administer the estate, and in fact the Court took no steps to administer the estate. It is only where it is necessary that the estate should be administered by the Court that the Court may make payment of the liabilities of the estate, and all persons who would be entitled to be paid may come

(1) (1921) I.L.R. 44 Mad. 831, P.C.

in under the preliminary decree and make their claims against the estate, *vide* the provisions of Order 20, Rule 13.

All that the Court had to do in the present case was to decide, if it found the wakf invalid, whether the plaintiff was entitled to what she claimed. The Court had not to determine whether Po Kyaw's nephews, that is U Hpaw's sons, were heirs to U Po Kyaw's estate. As I have said they were already admittedly entitled to come on the record and dispute the plaintiff's claim as the legal representative of U Hpaw. On the District Court coming to a finding that the wakf was invalid it should only have granted the plaintiff's claim and passed a preliminary decree accordingly and for accounts of rents and profits. Further embarrassment in the present case is caused by the fact that U Po Kyaw left a separate estate and the decision on the validity of this wakf and on the share of U Po Kyaw and his heirs under the wakf estate would determine and be *res judicata* in any proceedings as between the heirs under U Po Kyaw's separate estate. The decision that U Hpaw's sons are heirs to U Po Kyaw's estate cannot be allowed to stand, and I note that U Zeya, the advocate for U Hpaw's widow and children, the appellants in Civil First Appeal No. 111 of 1938, agrees to this finding. In any event it would have had to be set aside, and this will be ordered accordingly.

As regards Ma Than Kyi the case is different. As I have said she had to be admitted into the record for the purpose of admitting or denying the validity of the wakf and for that purpose her status had to be determined.

The trial Court found that she had proved that she was the legitimate daughter of U Hpaw. Two reasons are given: The first is that the heirs of U Hpaw admitted that in accordance with exhibit A, Ma Than Kyi as

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a niece of U Pe received her share of his estate some Rs. 5,400. The other reason is that she had all along been living with U Po Kyaw and his family.

[His Lordship held that Ma Than Kyi's legitimacy was proved.]

The learned Judge allowed the plaintiff a quarter share in the property as claimed and to "an equal" share that is to say a quarter share in the rents and profits from the date of U Pe's death to the date of decree.

The decree I note orders that the defendants would be given their respective shares under Mohamedan law, though it never went on to define their shares as should have been done, and ordered a Commissioner to partition the plaintiff's share and to take an account of the rents and profits.

Had the trust been a valid one U On Pe and U Ba Kyin would admittedly have been trustees *de son tort*, but it cannot be gainsaid that once the trust has been declared invalid *ab initio* section 10 of the Limitation Act can have no application at all. This was laid down in *Runchordas Vandravandas and others* v. *Parvatibai and others* (1) by their Lordships of the Privy Council. The earliest decision on the subject is *Kherodemoney Dossee* v. *Doorgamoney Dossee and others* (2) followed in *Hemangini Dasi* v. *Nobin Chand Ghose and others* (3) and in addition I will only refer to *Mathuradas Damodardas and another* v. *Vandrawandas Sunderji and another* (4) and *Mahomed Ibrahim Bin Haji Goolam Saheb Londay* v. *Abdul Latiff Haji Mahomed Ibrahim Jitayker and others* (5). The order therefore directing an account of profits for eleven years prior to the suit cannot be upheld.

(1) (1899) I.L.R. 23 Bom. 725, P.C.
(2) (1878) I.L.R. 4 Cal. 455, 466.
(3) (1882) I.L.R. 8 Cal. 788.
(4) (1906) I.L.R. 31 Bom. 222.
(5) (1912) I.L.R. 37 Bom. 447.

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It is argued for the appellants in Civil First Appeal No. 111 of 1938 that Article 109 applies but this is clearly wrong. The profits in question are not mesne profits at all, that is to say not profits wrongly received by the defendants. They are the rents and profits of land to which both the plaintiff and defendants as co-heirs have a claim, and the article applicable is Article 120 *vide Mahomed Riasat Ali* v. *Hasain Banu* (1) a decision of their Lordships of the Privy Council, *Robert Watson & Co., Ltd.* v. *Ram Chand Dutt and others* (2), *Umardaraz Ali Khan and others* v. *Wilayat Ali Khan and another* (3) and *Madar Sahib and another* v. *Kader Moideen Sahib and six others* (4).

The preliminary decree of the trial Court therefore will be altered to one declaring that the plaintiff is entitled to a quarter share of the properties described in schedule A, and to a quarter share of the rents and profits derived from them from six years prior to the date of suit (29th October 1937), to the date of the decree of the trial Court, and a Commissioner will be appointed to partition the plaintiff's share and to take accounts of what part of the property comes into the hands of the defendants etc. and an account of rents and profits from that that will have come into the hands of any of the defendants from six years before the date of institution of the suit until decree.

As to costs it was ordered that the plaintiff was entitled to proportionate costs payable out of the estate, and those costs in the trial Court will be maintained. As to the costs of appeal, the appellants in Civil First Appeal No. 111 of 1938 have been about a quarter successful, and will therefore pay half the respondents' costs of this appeal. As regards the costs of Civil First Appeal No. 126 of 1938 the appellants have been

(1) (1893) I.L.R. 21 Cal. 157, P.C.
(2) (1896) I.L.R. 23 Cal. 799.
(3) (1896) I.L.R. 19 All. 169.
(4) (1914) I.L.R. 39 Mad. 54.

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successful but the trouble that befell them was largely due to themselves, and it will be ordered that the parties do bear their own costs of this appeal.

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MYA BU, J.—I concur.