## APPELLATE CIVIL.

*Before Hilton and Din Mohammad JJ.*

1934

*June 18.*

MUHAMMAD SAID AND OTHERS (PLAINTIFFS) Appellants

*versus*

*MST.* SAKINA BEGUM AND OTHERS (DEFENDANTS) Respondents.

**Civil Appeal No. 314 of 1929**

*Muhammadan Law*—Waqf—*created by registered deed*—*Transfer of physical possession — whether necessary and whether* Waqf *can be invalidated by mere inaction or subsequent declaration of* waqif—*Mussalman Waqf Validating Act, VI of 1913 : whether excludes principles of Muhammadan Law.*

*Held,* that in case of a *waqf* created by a registered deed, a transfer of physical possession is not necessary, where the founder of the *waqf* is also the first *Mutwalli,* and that consequently the *waqf* is complete when the *waqfnama* is executed and registered.

Mulla's Principles of Muhammadan Law, 10th Edition, para. 151, referred to. Case law discussed.

*Held also,* that the *waqf* once made cannot be invalidated by the subsequent inaction of the *waqif* nor by his mere assertion in any subsequent document that he had not acted upon the *waqfnama* since its registration.

*Mussammat Saliman* v. *Hakim Makhdum Bux* (1), and *Zainuddin Hossain* v. *Muhammad Abdul Rahim* (2), followed.

*Held, further,* that the principles of Muhammadan Law are not excluded from application merely because the *waqf* has been made under Act VI of 1913.

*Umar Bakhsh* v. *Commissioner of Income-tax, Punjab* (3), and *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* (4), distinguished.

*First Appeal from the decree of* Chaudhri *Kanwar Singh, Subordinate Judge, 1st Class, Lahore, dated 1st March, 1929, dismissing the plaintiffs' suit.*

(1) (1929) 116 I. C. 277. (3) 1931 A. I. R. (Lah.) 578.
(2) (1932) 140 I. C. 799. (4) (1895) I. L. R. 22 Cal. 619 (P.C.)

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MOHAMMAD MONIR and S. K. AHMAD, for Appellants.

MOHAMMAD AMIN KHAN and KISHORI LAL MEHR, for Respondents.

HILTON J.—On 18th July, 1922, Muhammad Abdullah registered a document by which he made a perpetual *waqf* of his land and house property in favour of himself for his life-time and of his descendants. The deed provided that he should be the *Mutwalli* during his life-time and that one of his heirs should be appointed so after his death. The *Mutwalli* was to have no powers of alienation. One-fourth of the income was to be spent on promoting religious education and charitable purposes. The dedication purported to be made in accordance with Act VI of 1913 and the deed further stated that the *waqif* had removed his proprietary possession from over the aforesaid *waqf* property from the date of the document's execution and had taken possession of the said property and also its management into his own hands as *Mutwalli*.

On 16th April, 1923, Muhammad Abdullah sold a house to one Nathu for Rupees 3,500 by a deed, Exhibit D.W.1, stating therein that the house was free from all charges, such as '*waqf-al-aulad*.' Whether this house had been included in the *waqf-nama* of 18th July, 1922, is a matter on which the parties to this litigation differ, but this particular house is not in dispute here.

On 12th April, 1924, Muhammad Abdullah died. He left three sons by his wife, *Mussammat* Zinat Bibi, and these four persons are plaintiffs in this litigation. He had also another wife, and two sons by her, who pre-deceased him. The daughter of one of these sons

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is *Mussammat* Salima and the widow of the other son is the first defendant *Mussammat* Sakina.

On 12th November, 1926, *Mussammat* Sakina mortgaged the house in dispute to the second and third defendants. The plaintiffs have sued for possession of this house on the allegation that it was part of the property dedicated by Muhammad Abdullah. The suit has been dismissed and the plaintiffs appeal.

The trial Judge gave findings that Muhammad Abdullah had never acted upon the *waqf*, that he cancelled it during his life-time and was competent to do so, that by a custom in the family of the parties a widow of a pre-deceased son succeeds along with the brothers of her husband, and that plaintiffs were estopped from suing by having earlier repudiated the *waqfnama* of Muhammad Abdullah. These findings led to the dismissal of the suit.

It was also found by the trial Court that the plaintiffs as persons interested in the *waqf* had a right to sue, that no divorce of *Mussammat* Zinat Bibi by Muhammad Abdullah had been proved, that nothing was proved to have been spent by *Mussammat* Sakina on the house in dispute and that it had not been proved to have been allotted to her in a partition before the date of the *waqf*.

The points which have been argued before us in appeal are:—

(1) Whether Muhammad Abdullah acted on the *waqf*.

(2) Whether he cancelled it.

(3) Whether he could cancel it.

(4) Whether it was complete even if not acted upon.

(5) Whether the plaintiffs are estopped from suing.

(6) Whether the plaintiffs have a *locus standi* to sue and to what relief they are entitled.

As already stated the *waqf* was made by a registered deed and the *waqif* wrote therein that he had removed his proprietary possession from the *waqf* property and taken possession of it as *Mutwalli*. He did not, however, have any mutation of names effected of the agricultural land and nine months later he sold a house which may possibly have been a part of the *waqf* property. He also wrote in a document, D/Z (the correct date of the material portion of this document is a date subsequent to the sale of the house in April 1923) that " I as *Mutwalli* have given up acting upon the *waqfnama* in favour of my descendants and have not acted upon the same since the date of its registration."

He never however made any cancellation of the *waqf* by way of a registered deed.

On the above facts I would hold that Muhammad Abdullah never formally cancelled the *waqf* and that he may possibly not have acted upon it any further than by his formal registration of the deed of *waqf* and the formal transfer of possession to himself as *Mutwalli* which is recorded in that deed.

The weight of authority is however clear that, for Mohammadans who follow the *Hanafi* tenets, a mere declaration even without transfer of possession is sufficient to effect a *waqf* and that subsequent inaction by the trustee, though it may be a breach of the trust, cannot invalidate the *waqf*. This doctrine follows the view of Abu Yusaf that a *waqf inter vivos* is completed by a mere declaration of endowment by

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the owner. [See *Ma E Khin* v. *Maung Sein* (1), *Muhammad Hamid Ullah Khan* v. *Muhammad Majid Ullah Khan* (2), *Muhammad Ibrahim* v. *Bibi Mariam* (3), *Husseinbhai Cassimbhai* v. *Advocate-General of Bombay* (4), *Mussammat Latafatunnissa* v. *Mst. Shahanbann Begum* (5), *Syed Zainuddin Hossain* v. *Maulvi Muhammad Abdur Rahim* (6) and *Mahabir Prasad* v. *Syed Mustafa Hussain* (7), also para. 151 of Mulla's Principles of Mohammadan Law, 10th Edition].

The opposite view which was that of Muhammad, that a *waqf* is not complete unless, besides a declaration, possession of the endowed property is delivered to the *Mutwalli*, was adopted by the Allahabad High Court in *Muhammad Azizuddin Ahmad Khan* v. *The Legal Remembrancer* (8), but in subsequent pronouncements of that High Court it has been held that where the founder of the *waqf* is also the first *Mutwalli*, no transfer of physical possession is necessary nor is a transfer of names necessary [see *Abdul Jalil Khan* v. *Obedullah Khan* (9) and *Mst.Saliman* v. *Hakim Makhdum Bux* (10)].

For the purposes of the present case I would accept the view that a transfer of physical possession was not necessary where the founder of the *waqf* was also the first *Mutwalli* and that consequently the *waqf* was complete when the *waqfnama* was executed and registered and I would also hold, following *Mst. Saliman* v. *Hakim Makhdum Bux* (10) and *Syed Zainuddin Hossain* v. *Maulvi Muhammad Abdur*

(1) (1924) I. L. R. 2 Rang. 495.
(2) 92 P. R. 1917.
(3) (1929) I. L. R. 8 Pat. 484.
(4) (1920) 57 I. C. 991.
(5) (1332) 139 I. C. 292.
(6) (1932) 140 I. C. 799.
(7) (1933) 141 I. C. 501.
(8) (1893) I. L. R. 15 All. 321.
(9) (1921) I. L. R. 43 All 416.
(10) (1929) 116 I. C. 277

*Rahim* (1), that the *waqf* once made could not be invalidated by the subsequent inaction of Muhammad Abdullah nor by his mere assertion in the document D/Z that he had not acted upon the *waqfnama* since its registration.

Counsel for respondent-defendant also argued that the *waqf* was made under Act VI of 1913 and that the principles of Mohammadan Law are excluded from application on that account. He relied upon *Umar Bakhsh* v. *Commissioner of Income Tax, Punjab* (2) and *Abul Fatta Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* (3), but the latter authority concerned a gift which was held not to constitute a *waqf* because the period when it was to take effect was so remote that the gift was illusory. There is no such state of affairs here, as clauses (6) and (7) of the *waqfnama* show that the allocation of one quarter of the income to charitable purposes was to take effect at once. The authority *Umar Bakhsh* v. *Commissioner of Income Tax, Punjab* (2) merely expressed the view that the Act of 1913 had not declared the *Mussalman* Law to be other than had been laid down in *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* (3). This does not help the defendant-respondent in any way.

It was then argued that the lower Court has found that a custom exists in the family of Muhammad Abdullah by which the widow of a predeceased son succeeds along with the brother of her husband and that no dedication by *waqf* can be allowed to turn the course of succession, regard being had to section 5 of Act VI of 1913. Regarding this argument it is

(1) (1932) 140 I. C. 799. (2) 1931 A. I. R. (Lah.) 578.
(3) (1895) I. L. R. 22 Cal. 619 (P.C.).

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only necessary to say that it was not set up in the Court below and that the aforesaid custom could only apply in the case of ancestral property left by Muhammad Abdullah, whereas the house in dispute has not been proved by defendants, on whom the *onus* would lie, to be ancestral.

On the question of estoppel, it was contended that the plaintiffs had, after Muhammad Abdullah's death, acquiesced in the mutation of the agricultural land in their own names instead of insisting that it should be mutated as *waqf* property. At the mutation of the Manewal land (Ex. C.W.1/5) the plaintiffs were not recorded as being present and no representation is recorded as having been made by them of any sort. At the mutation of the Nurpur land (Ex. C.W.1/1) a *lambardar* is recorded as identifying them but there is no record of what they said. Thus, at most, silence or acquiescence has been proved against them but there is nothing to indicate that such silence on their part induced the defendants in any way to do what they would not otherwise have done and estoppel is not therefore established.

It was also argued that the failure of the plaintiffs to object to the sale by Muhammad Abdullah of a house in 1923 estops them. But it may be that they can still contest that sale and in any case that was a different house and it has not been made clear how the failure of plaintiffs to challenge that sale was a factor which induced the first defendant to mortgage the house now in suit. Thus the defendants' plea of estoppel has no force.

The trial Judge had found this point of estoppel for the defendant mainly on the strength of certain letters written by some of the plaintiffs to Muhammad Abdullah before the *waqfnama* was executed by him,

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but the fact that they protested against his intention before he actually carried it out cannot in any manner estop them from relying upon the *waqf* once it was made.

There remains the question of the form of relief to which the plaintiffs are entitled. All four of the plaintiffs are beneficiaries under the *waqfnama*, and one of them, Muhammad Said, was stated by plaintiffs' counsel before the issues to be the *Mutwalli*, a fact which was not formally denied by the defendants nor put in issue and which for the purposes of this suit must therefore be taken as admitted. The defendant *Mussammat* Sakina, if an heir of Muhammad Abdullah under the Customary Law, may also be entitled to an interest as beneficiary under the *waqfnama*, but this particular question was not directly raised or decided in the Court below. The mortgage of the disputed house, however, was definitely stated by *Mussammat* Sakina in her pleas to have been with possession to the mortgagee-defendants. The relief asked for by the plaintiffs was for possession of the house and a declaration that the mortgage is void. Their cause of action was clearly the mortgage and all they are entitled to therefore is a decree for possession in favour of the plaintiff Muhammad Said as *Mutwalli* on behalf of the *waqf*, against the mortgagee defendants 2 and 3, and a declaration binding upon all the parties to the suit that the mortgage of 12th November, 1926, is void. I would, therefore, accept the appeal by granting a decree in the above terms, but having regard to the circumstances of the case would order the parties to bear their own costs throughout.

DIN MOHAMMAD J.—I agree.

DIN MOHAMMAD J

*P. S.*

*Appeal accepted.*