(1933) 10 AHC CK 0018

Allahabad High Court

Case No: None

Khalil Uddin		APPELLANT
	Vs	
Sir Ram and Others		RESPONDENT

Date of Decision: Oct. 6, 1933

Hon'ble Judges: Rachhpal Singh, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Rachhpal Singh, J.

This is plaintiff''s Second appeal out of a declaratory suit. One Jamiluddin, who was a brother of Khaliluddin, the plaintiff-appellant, had dealings in sugarcane juice with Sri Sam, defendant 1. After the death of Jamiluddin a suit was'' instituted by Sri Earn, defendant 1, to recover a sum of money due from him (Jamiluddin). Jamiluddin had died and the suit was instituted against his heirs Khaliluddin and two others and was decreed. It appears that on the 11th of August 1922, Jamiluddin had made a waqf of some of his properties. Sri Bam in execution of his decree attached those properties. Khaliluddin, plaintiff, in his capacity as a mutwalli of the alleged waqf properties objected to the attachment on the ground that they were waqf and could not be attached. These objections wera thrown out and so Khaliluddin instituted a suit, which has given rise to this appeal, to obtain a declaration that the property in suit was waqf and could not be attached and sold in execution of a decree passed in the suit of Sri Earn. The first court decreed the suit. Defendant 1 filed an appeal against the said decree. The lower appellate Court reversed the decision of the first Court and dismissed the suit. The plaintiff has come up in second appeal to this Court.

2. Both the Courts below found it proved that in 1922 Jamiluddin had executed a deed of waqf. This finding has not been challenged in second appeal. The contesting defendant had taken a plea to the affect that the deed had been executed by Jamiluddin with a view to defraud his creditor, and was therefore void under the provisions of Section 53, T.P. Act. But this point has been rightly decided against him

by both the Courts. The only plea taken in appeal is that the deed set up by the plaintiff created a "contingent" waqf which was not valid according to Mahomedan Law. This is the only question for consideration before us. A perusal of. the terms of the deed of waqf goes to show that it was a valid waqf. In the beginning of the deed the executant recites that "ho desires to make a waqf for charitable purposes (sawab)." For that purpose he sets apart 5 out of his 10 biswa zamindari and declares that he has made a waqf of It and has divested himself of all of his proprietary rights which are henceforth vested in God for charitable purposes. lie appoints himself mutwalli of the waqf property and directs that after him, in case of failure of his having any son, his brother Khaliluddin would be the mufcwalli. He mentions further that there are certain debts due by him and that till the payment of those debts specified in the deed, No. proceedings under the waqf would be enforceable. The words used by him are ,

tadai qarza muff assila sail zimma meray kay hri harrawai loakf hi qabili ijrana hogi, sari arzajo ijrai karrawai wakf say pahlay add hoga.

3. The learned Judge of the lower appellate Court has found that the debt due to Sri Earn, defendant, is specified in the deed of waqf. This is a finding which is conclusive in second appeal and we have therefore no hesitation in holding that the debt due to Sri Earn, defendant, is covered by this deed of waqf. The waqf created by Jamiluddin is, what is known in Mahomedan Law as, waqf alal aulad, and it is perfectly valid under the provisions of the Mussalman Waqf Validating Act of 1913. That Act lays down that it is lawful for a person professing the Mussalman faith to create a waqf which in all other respects is in accordance with the provisions of the Mussalman Law, for the following among other purposes : - (a) for the maintenance and sapport wholly or partially of his family, children or descendants, and (b) where the person creating a waqf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated. Provided that the ultimate benefit is in such case3 expressly or impliedly reserved for the poor or for any other purposes recognized by the Mussalman law as religious, pious or charitable purposes of a permanent character. (2) No such waqf is to be deemed to be invalid, merely because the ultimate benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants, of the person creating the waqf. According to Mahomedan law a contingent waqf is not valid. The dedication should be complete and should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. The question which we have to consider is whether in the case before us it can be said that waqf is a contingent one. On a consideration of the terms of the deeds before us we are of opinion that it cannot be said that it is a contingent waqf. As pointed out by the learned Subordinate Judge in his appellate judgment, it is mentioned in the deed that the ownership in the waqf property shall immediately pass from the donor. The learned Subordinate Judge doss not say that

the waqf is invalid because it is dependent on some contingency, but he thinks that until the debts are paid the waqf does not come into operation and therefore the waqf property can be sold. We find ourselves unable to agree with the view taken by him. It appears to us : that a waqf would be valid even if there be a stipulation in the deed that the income of the waqf property would first go towards the payment of the debt due from the waqif. It is open, in our opinion, to a Mahomedan (the executant of the waqf was a Hanafi in this case) to execute a waqf making provisions that out of the income of the waqf property his debts shall be paid first. A waqf does not become invalid merely because in the deed there is a direction that the debts of the waqif are to be paid out of the rents and profits of the waqf. In Luohmiput Singh v. Amir Alum (1883) 9 Cal. 176 it was held by a bench of two learned Judges of the Calcutta High Court that where a waqf-deed contained a provision that in the first place certain debts should be paid and. then provided that the property should be applied towards the religious and charitable purposes etc., the waqf was valid. In Bibi Jinjira Khatun and Others Vs. Mahomed Fakirulla Mea and Others, it was held that u/s 3(b) of Waqf Validating Act, it is lawful for a person professing the Mussalman faith to create a waqf for the payment of his debts out of the rents and profits of the property dedicated, provided that the ultimate benefit is reserved for defined religious and charitable purposes. In Pathukutti v. Avathalakutti (1890) 13 Mad. 66 Muthusami Ayyar, J., made the following observation:

The instrument being a wakfnama, the further question arises whether it is valid, and I am of opinion that it is not. The dedication should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. Baillie, at p. 656, gives an illustration, observing : if one were to say "my mansion is a charity appropriated to the poor if my son arrives," and the son should arrive, the mansion does not still become wakf. He adds, if one should say this, "my land is charity if such a. one pleases " and if the person referred to should indicate his pleasure, still the wakf would be void. I take the reason to be that at the time of settlement there was no absolute or complete appropriation in the sense that no proprietary interest was reserved and that the property was effectually constituted to be charity property. I do not desire to be understood assaying that the interposition of an intermediate estate limited1 in duration would invalidate the creation of a. wakf provided that there was an out and out appropriation at the time of the settlement, In that case, the appropriation to religious use would only, be deferred so long as the interposed estate continued and there would be no reason for saying that the religious appropriation, might fail altogether.

4. Thus it will be seen that the real test. for deciding as to whether or no a particular waqf deed was good would be to see whether the dedication was complete at." the time when it was made and not dependent on any contingent event which mayor may not happen, and the mere; interposition of an estate would be not reason for saying that the religious appropriation would fail altogether. Under the Mabomedan law a person can devote " his property in waqf and yet reserve to himself and to his

descendants in a very undefined manner, the usufruct of the property. In such a case waqf is not necessarily invalidated by reason of the postponement of the waqf to a life enjoyment by the donor. A donor may give his property in waqf, that is to say, appropriate and dedicate the corpus of it to the service of God while reserving to himself a life interest in the usufruct. If in a valid waqf it is open to a Mahomedan to enjoy the usufruct for his life there is-no reason why a stipulation that his personal debts should be paid out of the property before the income is applied for religious and charitable purposes should not be valid. Section 3, Clause (b) of the Mussalman'' Waqf Validating Act (Act 6 of 1913), makes the point perfectly clear. It runs thus:

It is lawful for a person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of the Mussalman law, for the following among other purposes : (b) where the person creating a. wakf is a Hanafi Mussalman, also for his own'' maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated. Provided that the ultimate benefit is in such case s expressly or impliedly reserved for the poor or for other purposes recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

5. The learned Counsel for the respondent relied on a ruling of this Court reported in Saidah Bibi v. Moghul Khan (1902) 24 All. 231. The facts of that ease were different. There the maker of the waqf deed stated in the deed that it would be ineffectual till the registration of the deed. It is also to be borne in mind that the case related to Shia Mahomedans and not to Hanafis. In view of the clear provisions of the Mussalman Waqf Act contained in 8. 3, Clause (b) the ruling is not applioable to the case of a Hanafi Mussalman. Mulla in his "Principles of Mahomedan Law" 10th edition p 139 says that where a Hanafi Mahomedan executes a deed of waqf by which he directs his debts to be paid out of the rents and profits of the waqf property it is a valid waqf. For the reasons given above we are clearly of opinion that a waqf by Hanafi Mahomedan containing a provision that his debts be paid out of the renta and profits of the waqf property is perfectly valid in view of the provisions contained in Section 3, Clause (b), Mussalman Waqf Validating Act of 1913. It is clear that Jamiluddin was a very honest man, and was anxious that before the terms of the waqf were given effect to, the personal debts due by him should be paid off. It is equally clear that his brother, plaintiff appellant is not honest because he made no attempts whatsoever to carry out the wishes of his deceased brother in respect of the [payment of his debts. The granting of a relief by declaration is discretionary and lit is open to us to grant the declaration lasted for subject to conditions consistent with the terms of the deed of waqf. We do not see any reason in equity why the plaintiff mutwalli should not carry out the wishes of the waqif as expressed in the deed of waqf that his debts should be paid off first.

6. For the reasons given above we allow the appeal, set aside the decree of the lower appellate Court, and give the plaintiff a decree declaring that the property in suit is not liable to be attached and sold in execution of the decree obtained by defendant 1 in suit No. 99 of 1924 Lala Sri Bam v. Khaliluddin and Ors.; but we further declare that the income of the property in suit is liable for the payment of the debt to defendant 1, and this income can be attached in execution of the decree of defendant 1 against the plaintiff and other defendants-respondents and it is not open to the appellant to spend the income on any of the other object mentioned in the deed of waqf till the debt due to defendant 1 has been fully paid off. As regards the costs we are of opinion that it is a fit case in which the parties should bear their own costa in all the Courts and we order accordingly.