
(1877) 06 PRI CK 0001

Privy Council

Case No: None

Ashgar Ali and Others

APPELLANT

Vs

Delroos Banoo Begum

RESPONDENT

Date of Decision: June 28, 1877

Citation: (1878) 3 ILRPC 325

Hon'ble Judges: J. W. Colvile, B. Peacock, M. E. Smith, R. P. Collier, JJ.

Judgement

M.E. Smith, J.

1. This suit was instituted under Act XX of 1863, against the respondent, as the mutawalli of a Mahomedan religious endowment, for malversation in wasting and misappropriating the estate. The plaintiff's (appellants) sought to obtain an account, the removal of the respondent from the office of mutawalli, and the appointment of two of the plaintiffs, who are her nephews and next heirs, in her place. The allegation in the plaint, which is the foundation of the plaintiff's case, is as follows: "That the defendant has, by a registered waqfnamah of the 25th Zikad 1268, Hijri," answering to the 10th September 1852, "endowed the entire estate held and owned by her to the Imambara for religious purposes." The Judge of the Court of the 24-Pergannas made a decree in favour of the plaintiff's, establishing the validity of the endowment, and granting the relief prayed. This decree was reversed by the High Court, on ground that the allegation in the plaint, which has just been cited, was not established. It was also held that the endowment, if established, was not of such a public nature as would sustain a suit under Act XX of 1863.

2. The respondent inherited a large estate from her mother, Nigarara Begum, having survived two brothers, who died in their mother's lifetime. Two of the plaintiffs are the sons of one of these brothers; the other three plaintiff's are persons in no way connected with the family, but who claim the benefit of the endowment. The mother, Nigarara, died in 1850; and about two years afterwards the tauliutnamah relied on was executed. The family are Mahomedans of the Sheah sect. The tauliutnamah is dated the 10th September 1852, and the material parts of

it are these: "I make a trustworthy declaration and a legal acknowledgment, and give in writing to the effect that I consider it indispensable and incumbent upon me to continue and perpetuate the ceremonies for pious uses of such description as "fatiha" (offering prayers for the dead) "hazrat," on whom be the benedictions, &c, which is the fixed and settled usage of my family. I have no lawful children or grandchildren who may be my legal heirs, therefore talooka of Chitpore, describing certain property, and all the compensation money, &c, the price "of which at present is estimated at one lakh of Rs. (1,00,000) which I hold in my possession, without any one having any share therein, and without there being any other co-partner, as my legal hereditary right, having received the same from my ancestors in accordance with what is laid down in separate documents, the same for special pious purposes I have made waqf in perpetuity, with all inherent adventitious rights and interests, large and small, lying therein attached thereto, and arising there from, with all appurtenances particularly of pious uses. As long as I live, the wife of my brother of blessed memory, Mussummat Jigri Khanum, the daughter of the late Moonshi Hidayat Ali, shall remain mutawalli of the aforementioned waqf. If I, the endower, die before the aforesaid lady, then the affairs connected with tauliut shall, in a perfect form, revert to the aforementioned lady. Should the aforementioned lady die before me, I, the bequeather, alone will act as a mutawalli of the waqf endowed property. The one of us two who may survive the other shall, either at the time of death or previous to it, appoint whomsoever she finds most worthy and befitting as a trustee {mutawalli} to the endowment. Then the deed goes on, The specification of the expenses is this: All the income derived from the aforementioned endowment has, after the payment of the Government revenue, been divided into 28 parts. Of these, 15 parts are to be applied to the expenses of the fatiha of the Lord of the Universe, the last of the prophets (Mahomed) and the Imams, the blessing and peace of God be with them all, and the expenses of the ten days of Mohurram and all the holy days, the repairs of Imambari and tombs seven parts thereof shall be received by all the amlahs and servants, whose names are inserted at the foot of this or other documents bearing the seal and signature of me, the declarant, which they may have in their possession, some from generation to generation, and others as long as they retain the service, as detailed in separate documents; and six parts thereof will be received by us, the mutawallis, in equal shares. Now, the effect of this instrument is to devote all the property which this lady possessed to religious uses, to destroy her rights as proprietor, and to constitute her one only of the mutawallis for the management of the endowment, giving her three-twenty-eighths parts of the income of the whole property only for her management. The deed was written in Persian, a language the Begum did not understand. Her case is, that although she executed the instrument, its contents were not explained to her, and that she was ignorant that its effect would be that which has just been described.

3. Their Lordships are of opinion, agreeing with the High Court, that it is not established that the Begum understood the full import and effect of the document

she executed. It is incumbent on the Court, when dealing with the disposition of her property by a purdahnashin woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing; and especially so in a case like the present, where, for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property.

4. A mutation of names from her own alone, to her own and Jigri Khanum's as mutawallis was effected; but the mooktearnamah was not proved. Undoubtedly, also, the estates were afterwards described in several documents as waqf mehals, and she herself was described in many transactions relating to the estates as mutawalli. Receipts for rents were given first in her own and Jigri's name as mutawallis, and, after Jigri's death, which happened about two years, after the deed, in her own name as mutawalli. Pottahs were granted in which she is so described. Suits were also brought in which she is plaintiff with a similar description. On the other hand, for more than twenty years, notwithstanding she was nominally described in the transactions to which I have referred as mutawalli, she actually dealt with the property as her own. She granted mourusi leases, sold parts, and mortgaged other parts, and in every way treated the property as her own, and as if it were not subject to a religious trust. Those acts, which extended over the whole time from the execution of the deed to the commencement of the suit, are very strong to show her own consciousness, that while she was described as mutawalli she really believed herself to be the proprietor and owner of the property, and had no idea that she had reduced herself to the state of a mere manager of it, entitled only to three-twenty-eighths parts of the income for her maintenance.

5. Her own evidence, with reference to the deed, is given in an apparently candid manner. She admits its execution, and that she intended to create some trust for religious purposes; but she denies that she knew what was the full extent and import of the deed. She says: "I executed the tauliutnamah when I was residing in this house. I have been, prior to the execution of the tauliutnamah, residing and am still residing in this house, since my mother's " death. When my mother died I was then at Moorshedabad. A year after my mother's death I came here, but on the way my nephews Nawab Ashgar Ali and Nawab Ahmed Ali, the plaintiff's in this suit, stopped my boat. I was detained for twenty days near Roushenabad, and then I applied to the Magistrate and got my boat released. After this I came here. Two or three years after I came here, I executed this tauliutnamah. I myself do not know how to read and write. I told Ali Zamir, my servant, to draw out a will, or some such writing, as will after my death be able to keep up the religious ceremonies of my mother. Then he brought to me a writing which he read to me. She says in another place that it was read in Persian: "He also told me that, after my death, whoever will be the mutawalli will perpetuate the works (i.e., the religious affairs) of my mother. I do not understand Persian." Then there is a note by the Commissioner. A portion of the document marked A was read to the witness, and she says, I do not understand it. That portion being translated into Urdu by Abdool Aziz, she says: I now

understand it. My object in making the tauliutnamah was not what is stated in the part marked A. This part of the deed is not identified, but no doubt it was a material part. Then there is this question, Whether for the purpose of perpetuating the ceremonies observed in your family from ancient time, you executed the tauliutnamah? Answer, Moonshi Ali Zamen brought to me a writing saying that I shall have absolute power over the properties during my lifetime." If the deed was thus represented to her, then it did not carry out her intentions. It was a deed which not only did not carry them into effect, but was entirely and absolutely opposed to them. She intended and desired to retain the estate for her own life, and to create an endowment by way of testamentary disposition of it after her death. The person who prepared the tauliutnamah may have been aware that she could not effect her purpose by such a disposition, and having prepared this deed may have led her to suppose that it did carry out her purpose, without explaining to her that it would deprive her of her property and leave her in the state of a mere manager of it, liable to be deprived of that management if she broke any of the trusts of the deed. It is impossible to suppose that she could have been conscious of the tenor and effect of the deed, when immediately after, and ever after, she wholly disregarded the trusts of it by the mode in which she dealt with the property.

6. There are eight witnesses to the deed; one only has been called, and he does not prove that the deed was read over and explained. This witness does not say that he was present when it was read over to her in Persian. Undoubtedly, if a person of competent capacity signs a deed, it is to be presumed that he understood the instrument to which he has affixed his name; but in the case of a purdahnashin woman, who had, as in this case, no legal assistance, the ordinary presumption does not arise; and it is incumbent upon the Court to be satisfied, as a matter of fact, that she really did understand the instrument to which she has put her name. This seems to have been the view of the High Court, which it has expressed in two passages of the judgment. The Court says: "It is clear that she had no professional assistance at the time. Ali Zamen is described as an old and trustworthy servant, but not a lawyer,--(it may be observed, the respondent says that this is the only deed that he ever drew as far as she knows,)--and none of the witnesses examined for the plaintiffs prove that the Begum, in creating the waqf, was in any way cognizant of the effect of her act. It has been generally held in this country that purdahnashin ladies have a claim to special consideration, particularly in cases where they deny on oath an effectual knowledge of documents which they are said to have made. And, again, the Court says: In this case we have an illiterate and prejudiced woman, with no professional assistance, executing a deed written in a language which she did not understand, and which, as she swears, was not explained to her, by which she completely divests herself of the whole of a large property, and then immediately sets to work to do a series of acts which would have the effect of turning her out of the mutawalliship she had created for herself, and of throwing her upon the world absolutely penniless. Before we come to such a conclusion we ought to have very

distinct proof that the real purport of the waqf deed was properly explained to Delroos Banoo Begum, and that she knew what she was about, and that it is not too much to say that no such proof has been attempted to be given by the plaintiffs."

7. Their Lordships having come to this conclusion upon the main facts of the case, it is not necessary for them to determine the other point which the High Court decided,--namely, that this endowment was not of such a public character as would sustain a suit under Act XX of 1863, but their Lordships desire to say that they see no reason for disagreeing with that part of the judgment.

8. In the result, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal, with costs.