

(1914) 02 CAL CK 0021

Calcutta High Court

Case No: Suit No. 887 of 1911

Rahimunissa Bibi

APPELLANT

Vs

Shaikh Manik Jan and Others

RESPONDENT

Date of Decision: Feb. 12, 1914

Judgement

Chaudhuri, J.

This is a suit to have a towliatnama or waqfnama, dated the 12th Aswin 1297, executed by one Abdul Khansama, declared invalid, and for partition of the properties therein mentioned according to the Mahomedan law, should it be held to be invalid either wholly or in part. The partition is to be of such part as may be declared not legally affected by that instrument. So far as the appearing Defendants are concerned, no question has been raised as regards the correctness of the facts stated in the plaint either with regard to the pedigree set out therein, or the dates of death and the subsequent devolution of the shares of the parties named; but inasmuch as Defendants Nos. 5 and 6 have not appeared and some others have not put in their written statements, I give leave to the Plaintiff to prove the facts stated in the plaint, so far as the pedigree and devolution of shares are concerned, by filing an affidavit. Such affidavit is to be filed before the decree is drawn up. It appears that Abdul Khansama executed a waqfnama the 17th October 1880. So far as that waqfnama is concerned, I do not think there can be any doubt that it was a proper endowment. It is stated by some of the parties that there is a suit pending in the Alipore Court relating to this document. But the Plaintiff asserts that that suit has been recently withdrawn--a fact which is not admitted by the Defendant Sukur Jan. But whether that be so or not, I am not called upon to construe that document. Having regard to its tenor alone, it does not seem to be an illusory dedication. With the subsequent dealings with the property by the creator, whether they were treated by him as subject to a valid waqf or not, I am not concerned. I am not dealing with those contentions in this suit. Nothing in connection therewith has been brought before me in this suit. As regards the second deed, the question is how far it is a good dedication. It seems to me to be an illusory dedication,

excepting in respect of the charitable trusts specifically mentioned therein. It begins by saying that ""provision for the livelihood and support of one's children and the destitute is also reckoned amongst religious deeds under the Mahomedan law," and that he therefore makes a charitable waqfnama"" for children and the poor in the name of God." He constitutes himself the first Mutwalli by this deed, and lays down certain rules which are to govern the management of the so-called dedicated properties. Rule (1) states, "that out of the income of the properties, in the first place, Government revenue and taxes shall be paid and repairs to the mosque and other buildings shall be effected, when necessary." The other buildings do not refer to the mosque, but to other buildings belonging to the estate. Rule (2) runs thus : "out of the surplus remaining after deducting the charges of collection, the expenses of and in connection with the mosque at Narkeldanga founded under the first deed shall be paid in accordance with the list given in schedule "kha." Rule (3) : "that out of the amount of profits from the waqf properties which will remain after deducting the expenses, etc., in paras. 1 and 2 members of his family shall get monthly allowances as stated in schedule "ga." Rule (4) goes on to say that "out of the surplus, certain sums are to be paid by the Mutwallis for specially important matters relating to the dedicated property and on occasions of joy and grief of the Mutwallis and others." Rule (5) says that in the event of his or their children being totally extinct, the amount of maintenance will vest in the poor. Then there is a provision that in the event of the monthly allowance lapsing, the Mutwalli for the time being is to distribute it according to the provisions of the Mahomedan law. Then elaborate rules are laid down for the appointment of Mutwallis. He recites the earlier endowment and says that it is to be treated as part of the present waqf. Then in para 28 he says that his heirs (naming them) are to get their respective shares according to the Mahomedan law in the property in his ""khas"" possession, and the surplus is to be similarly divided amongst them, after deducting all costs from the amount of the income of the waqf properties. I think that the dedication for waqf purposes of property yielding an income of Rs. 316 is good. This amount should be set apart, namely, Rs. 300 mentioned in schedule ""kha"" and a sum of Rs. 8 for the salary of a sircar for making collections and Rs. 8 for the salary of the person who is to be the manager amongst the Mutwallis. Properties sufficient to yield the above income and also for the upkeep of the mosque at Narkeldanga are to be set apart, and also such amount as may be necessary for the payment of the Government revenue and taxes. By upkeep I meant repairs, etc., because all other expenses are provided for in schedule "kha." With regard to the rest of the property, I considered there has been no proper dedication. It was intended, and the only intention appears to be, to tie up the property for the benefit of his children and heirs, and, as such, cannot be considered to have been properly endowed for religious purposes. The properties mentioned in the first waqfnama, I am told, are quite sufficient for the expenses of the mosque; and since that document has been made part of the present document, and since all those properties are included in the document under construction, I have made the order aforesaid. The parties are declared

entitled to the shares mentioned by learned Counsel. An affidavit is to be put in, shewing that the shares have been correctly calculated. As there is no contest in respect of the shares and it is only a matter of arithmetical calculation, I allow such an affidavit to be put in. Since the institution of this suit, the Waqf Validating Act of 1913 has been passed. It was passed in March 1913, and it seems to me to have prospective effect from that date. I do not think, it has any retrospective effect. It does not seem to have been intended that it should have retrospective effect. The managing Mutwalli, namely, the first Defendant, will get credit for all payments made by him to the co-sharers. The mesne profits are only to be calculated for the last six years. In setting apart the property to meet the above valid charges, the Commissioner of Partition is to take into account the properties purchased by Sukur Jan in execution of decrees obtained by her in other Courts and also the sale-certificates she holds, that is to say, that, unless absolutely necessary, those properties are not to be set apart for the above purposes. There will be a decree for partition as regards the rest of the property according to the shares declared. Liberty to the parties to name the Commissioner of Partition hereafter. Costs up to date are to be paid out of the estate of Abdul Khansama Costs of partition will be according to the shares of the parties respectively. Costs of the taking of the accounts above mentioned will be dealt with after the report. Liberty generally to the parties to apply. All the costs are to be taxed on scale No. II as of a contested action. Copies of the affidavit relating to the working out of the shares and pedigree are to be given to the parties appearing for the purpose of verification. It is to be filed as soon as practicable.