(1926) 11 BOM CK 0012

Bombay High Court

Case No: None

Abadi Begum		APPELLANT
	Vs	
Kaniz Zainab		RESPONDENT

Date of Decision: Nov. 1, 1926

Citation: (1927) 29 BOMLR 763

Hon'ble Judges: John Wallis, J; Carson, J; Atkinson, J

Bench: Full Bench

Judgement

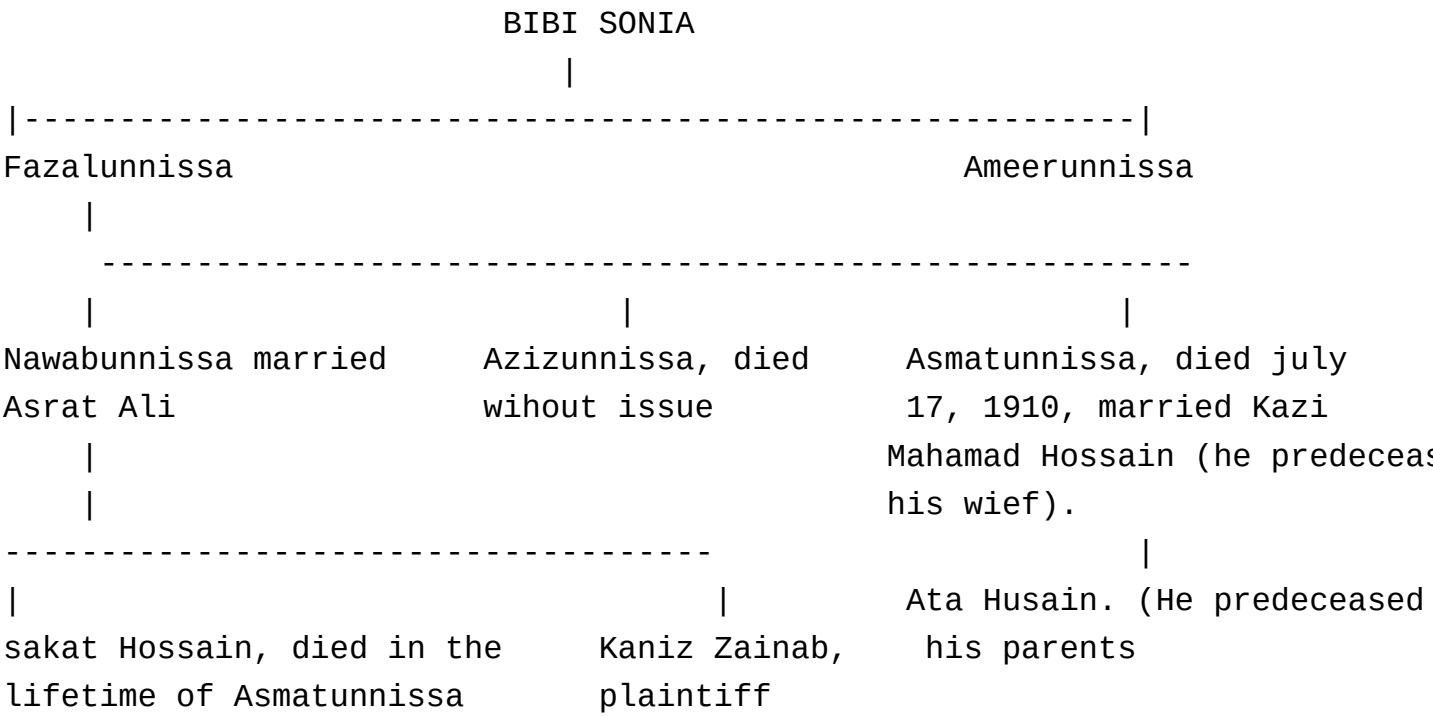
John Wallis, J.

This is an appeal from the judgment of the High Court of Patna reversing the decision of the Subordinate Judge, and giving plaintiff No. 1 Musammat Bibi Kaniz Zainab (hereinafter referred to as the plaintiff) and the other plaintiffs her assigns a decree as sole heiress of one Musummat Asmatunnissa, who died in 1910, for possession of certain lands in respect of which that lady during her lifetime had executed three wakfnamas dated February 15, 1882, December 7, 1897, and July 17, 1907, dedicating them to religions and charitable uses, and providing for the appointment of mutawallis. Before coming to the points on which the lower Courts have differed, it may be mentioned that the plaintiff also attacked these transactions unsuccessfully on the ground that they were brought about by fraud without the knowledge of the settlor, who was incapable of understanding them, and also on the ground that the wakfnamas were merely nominal transactions, but there are concurrent findings of both Courts against the plaintiff on these issues, and they have not been questioned before their Lordships.

2. On this appeal it has been contended for the appellants that the Subordinate Judge was right in holding that the plaintiff has not established her right to sue as heiress of the deceased, and in rejecting the plaintiff''s contention that the wakfs were invalid because the endowed lands had remained all along in the possession of the settlor as owner. For the respondents it was contended that the High Court was right in differing from these findings, and it was also argued that the wakfnamas

were bad on the face of them, as they did not sufficiently divest the settlor of all interest in the endowed properties in accordance with the requirements of the Shia law. This contention was not specifically pleadid, but was raised in the general allegation in the eleventh paragraph of the plaint, that the wakf was not valid under the British and Mahomedan law, and was covered by the concluding portion of the sixth issue.

3. Their Lordships will deal, in the first place, with the question of heirships and give their reasons for agreeing with the finding of the High Court that it is sufficiently proved. The following genealogical table shows how the plaintiff traces her descent from Bibi Sonia, the grandmother of the deceased.



4. The defendants, in answer to the averment in paragraph 2 of the plaint that the plaintiff was the daughter of Nawabunnissa, uterine sister of the deceased, pleaded in paragraph 5 of their written statement, that it was not at all true that the plaintiff was the daughter of the deceased''s sister, and again in paragraph 7 that the deceased had no sister of her own named Musammat Nawabunnissa. "She had only one sister named Azizunnissa, whose name is mentioned in all the deeds of wakf."

5. At the trial, however, they went further and set up that the plaintiff was not the daughter of Nawabunnissa, but was the daughter of Nawabunnissa''s husband by another of his wives, Amnan Bibi. This further development may possibly have been due to the fact that the documents produced by the plaintiff clearly established that Nawabunnissa was the daughter either of the deceased''s mother Fazalunnissa or of her sister Ameerunnissa, and that in either case the plaintiff as Nawabunissa''s daughter would be entitled to succeed in default of nearer heirs. However this may be. their Lordships are of opinion that in coming to the conclusion that the plaintiff

had failed to prove that she was the daughter of Nawabunnissa, the Subordinate Judge failed to attach due weight to this aspect of the case. If the plaintiff'' was the daughter of Amnan Bibi, the evidence suggests that that fact must have been known to the defendants from the first, and that, if not, they could easily have ascertained and pleaded it. Their Lordships agree with Das J., who delivered the judgment of the High Court, that the fact that they failed to do so greatly impairs the effect of the purely oral evidence by which they sought to prove this part of their case.

6. [The judgment then proceeded to deal with the evidence, holding thereon that heirship had been sufficiently proved.] Before dealing with the plaintiff''s right to recover the properties included in the wakfaamis executed by the deceased, it will be convenient to refer to the law governing the question. The Mahomedan law, which only allows a testator restricted powers of disposition over his property, contains no such restriction as regards gifts inter vivos but does not recognize such gifts as valid unless possession is given to the donee. This also applies to wakfs or gifts for religious or charitable purposes, at any rate among Shias. Further, in the case of wakfs or gifts for charitable purposes, the Shia law imposes a further restriction that the wakif settlor shall not retain for himself any interest in the subjects of the gift. This restriction, for which reasons of a religious character are assigned, undoubtedly operates as a check on the creation of wakfs not from purely religious motives, but with a view of defeating the rights of heirs and transmitting the possession and control of the settlor''s property after his death to other persons in the character of mutawallis, It is not immaterial to note in this connection that deeds now in question confer the office of mutawalli on the brothers of the settlor''s deceased husband and make provision for the office remaining in their families. This restriction is the last of the four conditions as to the validity of wakfs laid down in the Suraya, the leading Shia authority, as follows: "(1) It must be perpetual ; (2) absolute and unconditional; (3) possession must be given of the mowkoof of the thing appropriated, and (4) it must be entirely taken out of the wakif or appropriator himself" (Baillie, "Digest of Pt. II," p. 218). Elsewhere this last restriction has been expressed in direct and homely language by saying that the wakif must not eat out of the wakf. The law is laid down to the same effect in the other authorities cited textually by Mr. Ameer AH in his valuable treatise (Vol. I, p. 218, 4th ed.).

7. In the present case the wakfs have been attacked as failing to comply with the third and fourth of the above conditions on the ground that possession was not given and that the wakif, or settlor, did not divest herself of all interest in the subject of the gift. The Subordinate Judge disallowed both these contentions; and the High Court, holding that possession was not shown to have been given, reversed the judgment on that ground and gave the plaintiff a decree, without dealing with the further question whether the wakf was bad for failing to comply with the fourth condition, a contention which would appear not to have been argued, though raised in the grounds of appeal from the lower Court. It has, however, been strenuously

argued here, and, as it may be said to arise on the face of the documents themselves and is of general importance, their Lordships will proceed to consider it.

8. Ex. G, the principal wakfnama of February 15, 1882, after reciting the desire of the settlor to make a wakf of the properties specified in the deed for reward in the next world and for the maintenance of the mosque and the imambara constructed by her late husband, for the support of fakirs and travellers, and for the annual Fataha of herself and her husband, goes on to provide as follows:-

1. I make Wakf absolutely of the properties mentioned below in the name of God without any condition valid or invalid. I, the declarant, or my heirs and representatives have not and shall not have, from this day, any personal connection with or any rights in future to the endowed property.

2. For carrying out the objects of the Wakf, I, the declarant, shall remain mutawalli of the endowed property during my lifetime and I have got the power to appoint a Mutawalli who will manage the Wakf property after my death. If I, the executant, before my death fail to execute any Tawliat in contravention of the arrangement now made, then the arrangement made under this deed shall remain in tact and in force.

3. I, the executant, shall during my lifetime receive a monthly salary of Rs. 125 of the Company''s coin in the capacity of a Mutawalli. The remaining income of the Wakf property shall after the payment of the Government revenue, other demands and the collection expenses, be applied to the expenses of the mosque and Imambara. An account of income and expenditure shall be kept in the Khankah and it shall be signed and sealed daily by the mutawalli of the mosque for the time being. The proof, i.e., voucher of the said account shall be kept and it shall be kept in a book and not in a separate piece of paper.

9. The document further provides that on her death there should be two mutawallis-one for the mosque, the other for the imambara-and they should each receive a salary of Rs. 15 a month. The result was that the settlor received herself a salary as mutawalli of Rs. 1,500 a year for life out of the income of the wakf properties, valued in the deed at Rs. 19,000, and that after her death each mutawalli was to receive Rs. 180 a year, or Rs. 360 in all. For the respondents it was contended before the Subordinate Judge that their reservation rendered the wakf invalid, citing Mr. Tyabji''s "Principles of Mahommedan Law" (1913) and Mr. Ameer Ali''s well-known work. On this the Subordinate Judge observed quite truly, that it did not follow that the wakif or settlor could not, when he was himself to be mutawalli, reserve any benefit out of the wakf properties for his benefit as mutawalli. Oh the contrary, he correctly stated, it appears that the wakif can lawfully take the allowance found for the mutawalli generally when he himself holds the office. This is in accordance with what is laid down in the texts cited in Mr. Ameer Ali''s book in this connection. Instead, however, of adverting to the fact that in this wakf he takes, not

the salary fixed for the mutawalli generally, but the bulk of the income, the Subordinate Judge goes on:-

I should observe that the allowance fixed for herself by the mutawalli in this case did not only not consume the whole of the income, but left a sufficient margin for the religious and charitable uses, and thus the fixing of the allowance did not negative the object of the wakf, and was not, hence, illegal, as it was only for the lifetime of the wakif as mutawalli.

10. These observations appear to be based on a misconception, as the condition is that the wakif shall not retain any benefit for himself, and the fact that he leaves enough for the performance of the charities appears to their Lordships to be immaterial.

11. It seems clear in the present case that the settlor, under colour of fixing her salary as mutawalli, was really reserving for her lifetime a portion of the income or usufruct of the property far in excess of what was assigned in the deed to future mutawallis or could reasonably have been assigned to them. It was, therefore, in their Lordships'' opinion a clear violation of the condition.

12. Assuming that this is so, it has been further contended before their Lordships that the only result is that the wakf fails as to the reserved Rs. 1,500, and must be supported as to the rest of the income on the authority of Hajee Kalub Hossein v. Mussumat Mehrum Beebee (1872) 4 N.W.P. 155 where it was held, a wakf in which the wakif had reserved to himself two-thirds of the income of the wakf properties for life failed only as to these two-thirds, but could be supported as to the remaining third, which under the terms of the deed was to be devoted from the first to religious uses. It appears to their Lordships that this ruling is not in accordance with what is stated to be "the more approved opinion" in the Suraya, on which the learned Judges rely (Baillie, Part II, pp. 218, 219), or with the other authorities cited textually by Mr. Ameer Ali. As observed by that learned author, the following extract from the Jam''aa-ush-Shittat, dealing with a case where the wakif reserved the whole income to himself for life, throws considerable light on this subject :-

A. This wakf is void ab inito, for the wakif reserved to himself during his lifetime the profits of the property. It is one of the conditions for the legality of a wakf that the wakif should take out the subject of the wakf from himself. Therefore, when a wakf is made on his own nafs (self) it is batil (void), though there are others mentioned after himself as the beneficiaries thereof. With reference to the voidableness of the wakf as to himself there is consensus; as regards the voidableness of the remainder, the general opinion is that it is so, for the arguments in support of the validity of the wakf in favour of the others are weak.

13. With this last observation their Lordships are disposed to agree, It is an entire departure from the principle that it is a condition of the validity of the wakf that the wakif should not reserve any interest in the endowed property for himself to hold

that where the wakif reserves a portion of the income for himself the wakf only fails as property sufficient to produce the reserved income and is good as to the rest.

14. The rule that the settlor when mutawalli can take the salary fixed for mutawallis generally is really no exception, for in that case he takes in his capacity as mutawalli and not in his capacity as settlor, just as it is laid down a little further on (Baillie, Pt. II, p. 219, 2nd Edn.) : "But if one should make an appropriation for the poor and should himself ...become poor, or for lawyers, and himself become a lawyer, there is no objection to his participating in its benefits"-that is to say, as a poor man or a lawyer, not as a settlor. There is, in fact, in all these cases no reservation at all.

15. As regards this part of the case, their Lordships are disposed to agree with the reasoning in the extract from the Jain''aa-ush-Shittat set out above, and are not prepared, as at present advised, to hold on the authority of the decision in Hajee Kalub Hossein v. Mussumat Mehrun Beebee, that a wakf in which the wakif reserves the bulk of the income for herself as mutawalli during her own lifetime whilst fixing a modest salary for the mutawallis who succeed her can be held valid even to the extent of the unreserved income. As regards the supplementary deed of wakf of December 7, 1897, in which the settlor included her remaining lands stated to be worth Rs. 1,600 and cancelled the salary she had fixed for herself for life in the former deed, adding "that is I have given up the salary and included it in the wakf," their Lordships are of opinion that if the deed had stopped there it might possibly have been treated as a fresh dedication of all the properties free from any reservation in her own favour; but after reciting her intention to go for Haj and to make Zearut (visit sacred places), the deed provides, c. 17, "That the said manager shall from time to time send money for expenses from the income of the Wakf estate to me either at Mecca or to the place to which I shall direct him to send." This, in their Lordships'' opinion, amounts to a clear reservation of the right of the wakif to draw money for the expenses of her pilgrimage to Mecca and to other non-wakf purposes, and therefore, also, to involve a breach of the fourth condition, The last deed of 1907 need not be considered as it was necessitated by the death of the mutawallis, previously appointed to succeed the settlor in the office, and merely appoints other members of her husband''s family in their place.

16. Their Lordships, as at present advised, are disposed to hold that the two principal wakfnamas were wholly invalid by reason of the reservations in the wakif''s favour, but they do not propose to base their advice to His Majesty on this ground as to which they have not had the assistance of the High Court, because on a careful examination of the evidence they have come to the conclusion that the learned Judges of the High Court were right in holding that the defendants have failed to prove that possession of the wakf properties was ever given so as to comply with the third of the conditions set out above, and the defendants'' appeal must fail on this ground.

17. What the very unusual terms of these wakfnamas suggest is that her husband''s relations desired that this lady''s property should pass to them on her death as hereditary mutawallis of the wakfs instead of to the legal heirs, and that she was willing to comply with their wishes so long as her own enjoyment was not seriously impaired. The balance left for religious and charitable purposes under the first deed probably did not differ very much from the expenditure previously incurred by her husband and herself for these purposes, and the surrender of her salary and the inclusion of all the remaining lands in the second deed leaving nothing for herself or her heirs was counterbalanced by the provision allowing her to draw freely on the income. That she did so and, indeed, made little or no distinction between the wakf monies and her own may be gathered from the fact that, according to the findings of both the lower Courts, the defendants have suppressed her accounts and put forward forged accounts in their place. In view of her determination to retain the income for herself during her lifetime, she may well have been reluctant to take the final step of parting with her possession as owner. On the other hand, it was clearly in the interests of her husband''s relations and of her agent Imam Ali, in view of the annuity settled upon him and his heirs, to get her to do so in the clearest possible manner, and their failure to effect more than they did would appear to be attributable to her unwillingness rather than to any want of effort of theirs.

18. It was, of course, impossible for the settlor to hand over possession as malik or owner to herself as mutawalli or trustee of the endowment, but it was none the less incumbent on her to give such possession as the case admitted. Now the obvious and ordinary means of showing the change in the character of her possession would have been by mutation of names, that is to say, by getting her herself entered in the public registry as holding as mutawalli. That was the course adopted and held sufficient in Hajee Kalub Hossein v. Musmmat Mehrum Beebee (1872) 4 N.W.P. 155 and in Hamid Ali v. Mujawar Husain Khan ILR (1902) All. 257 the Court observed that, if the wakif in that case had been sincere in his desire to divest himself of his property, he would at once have obtained mutation of names and held in the absence of such mutation that possession had not been surrendered.

19. In the present case it is significant that between 1882 and 1907 there was no mutation of names except as to one item consisting of a share in certain lands, as to which an additional share was purchased for her in 1883, and both shares were then registered in her name as mutawalli. This isolated instance may well have been brought about without her knowledge by her husband''s brother and her agent Imam AH, who both witnessed the sale deed, and were both interested as already stated in getting the wakfs perfected by delivery of possession. It is much more significant that they did not obtain any mutation of names as to the other numerous items; and in 1907, when the public record of rights for this area was prepared by the revenue authorities, after the fullest notice and inquiry, the settlor was again registered as regards all the other items as malik or full owner, which would not have been done if it had been brought to the notice of the authorities that she was

in possession as mutawalli. In these circumstances the belated registration in the same year of some five items out of more than thirty, which may well have been effected without her knowledge by her husband''s brother and Imam Ali under a general power of attorney given to them after the execution of the third wakfnama, is entitled to very little weight as evidence that there was ever any change in the character of her possession.

20. The defence also relied on certain kabuliats or rental agreements taken from tenants in which she is described as mutawalli, but, as has been pointed out to their Lordships, no corresponding pattas granted by her to the tenants in which she is so described have been put in evidence. On the other hand, in one patta of November 27, 1898, the original patta has the word mutawalli struck out and the word malik or owner substituted; and the this was done at the time appears clearly from the fact that in the registration copy of the patta she is described simply as malik and not as mutawalli. This certainly suggests, as Das J. has observed, that an effort had been made to get the lady to grant the patta as mutawalli and that she had refused to do so; and it is also significant, as Das J. has pointed out, that not one single document bearing her seal has been produced in which she is described as mutawalli. On the whole their Lordships agree with the conclusion of Das J., who has carefully examined them, that the documents in which she is described as the mutawalli are of a very inconclusive character and may well have been drawn up by her husband''s brothers and her agent who were managing her affairs and interested in creating evidence of the surrender of possession.

21. As regards the oral evidence it is, no doubt, true that the lady incurred expenditure for the purposes mentioned in the wakf, as her husband and she herself had done before any of the wakfs were created, but in view of the suppression of the accounts, it is impossible to say what the amount of the expenditure was, and the natural inference from the suppression is that if produced, the accounts would not have helped the defendants'' case.

22. On the whole, their Lordships agree with the learned Judges of the High Court that possession is not shown to have been given, and are of opinion that the appeal fails on this ground and should be dismissed with costs, and they will humbly advise His Majesty accordingly.