

(1936) 04 AHC CK 0033
In the Allahabad High Court

Ahmad Ali Khan and Others

APPELLANT

Vs

Mohammad Aitzad Ali Khan and Others

RESPONDENT

Date of Decision : 23-04-1936

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : AIR 1936 All 704 : 165 Ind. Cas. 1

Final Decision : Dismissed

Judgement

1. This is a first appeal by the defendants against a decree of a learned Subordinate Judge in favour of the plaintiffs. Defendant 1, appellant, Khan Bahadur Munshi Ahmad Ali Khan, executed a deed of wakf in favour of himself and his descendants and his family on 18th May 1916, and appointed himself mutawalli of the endowed property during his lifetime. He provided for a share of the profits of the property for his two daughters who were then surviving, Mt. Rabia Khatun and Mt. Taswir Fatma, and the plaintiffs claim that the plaintiffs are the descendants of these two ladies. The two ladies died during the lifetime of the wakif. On 21st November 1931 M. Ahmad Ali Khan executed what he called a supplement to the wakfnama by means of which he cut off the descendants of his two daughters from inheriting any profits in the wakf.

2. These descendants of the two ladies have now sued for a declaration that this supplementary deed of wakf of 21st November 1931 be held to be void and ineffectual and that it be declared that after the death of defendant 1 the plaintiffs are entitled to realize the share which was given by the original deed of wakf to the two daughters, Mt. Rabia Khatun and Mt. Taswir Fatma. Other points were raised in regard to undue influence, etc., but the main contest in the case is simply this: what was the meaning of the deed of wakf originally executed by defendant 1 on 18th May 1916. Learned Counsel for the appellants did not contest that as the deed of wakf did not make any reservation of power for a supplementary deed, therefore the supplementary deed of 21st November 1931 is entirely void and without legal effect.

3. The learned Subordinate Judge, himself a Mahomedan, has construed the terms of the wakfnama and has come to the conclusion that the terms of the wakfnama are in favour of the case for the plaintiffs. Now it is admitted by the learned Subordinate Judge, and we agree that in Wilson's Anglo-Muhammadan Law, para. 326, and Tyabji's Muhammadan Law, p. 632, the term "aulad" includes males as well as females but does not include the descendants of females. Further the term "aulad-dar-aulad" which is synonymous with the term aulad-ki-aulad" used in the wakfnama, has been held by the High Court of Bombay in Abdul Ganne Kasam v. Hussan Miya Rahimtula (1873) 10 Bom HCR 7, not to include the sons of a daughter. There are however no less than five provisions in the wakfnama of 1916 which indicate that the heirs of the daughters of the executant were to have a share in the benefits under the wakf. The first of these paragraphs is para. 8 and it provides:

All my "heirs shall have a right of easement in respect of and of residence in the residential house, but no co-sharer ("Sharik aur uska waris") or his heir shall be entitled to get it partitioned.

4. Now the word aulad" must include sons and daughters, and these persons are the co-sharers in the house. The reference therefore to a co-sharer or his heir must include the heirs of the daughters. Further on in this paragraph it is stated: "The income from the houses facing east shall go to my two sons alone and my other " aulad" and " uske warisan" shall have no right or interest in it." The "other aulad" comprises the daughters of the executant and the provision is that the heirs of the daughters shall have no right in the income of these two particular houses. The executant therefore thought it necessary to provide in regard to this small portion of the income of his estate that the heirs of the daughters should have no share in it. The inference to be drawn is that the wakfnama provided for a share of the income for the heirs of the daughters in the alleged property. Learned Counsel could only explain this by urging that the provision was made for greater precaution. But this argument fails because if it was necessary to take precautions in regard to a very small amount of the income it was much more necessary to take precautions in regard to the whole of the income. The next paragraph which we think of importance is para. 14:

If unfortunately any of my children dies childless, whether in my life-time or after me, his right of "tauliat" and profits shall pass on to his own brothers and sisters.

5. The word "children" includes the sons and daughters of the executant. The provision therefore applies to a daughter that if she dies childless her right of "tauliat," that is of becoming mutwalli and the profits which go with that office, shall pass to her own brothers and sisters. The inference is that if she does not die childless her children will have a right. The next paragraph of importance is para. 17 which provides that the executant shall spend as much income of the property as

I like on my maintenance...and shall spend the same on my children and

similarly my children ("meri aulad") and in future their heirs shall each spend on himself and children.

6. The word "aulad" includes sons and daughters and the provision is that the heirs of the sons and also the heirs of the daughters shall each spend money on themselves and their children. The reference here to the heirs of daughters indicates that they must have an interest in the income of the property. In para. 23 there is a provision: "None of my children or their heirs shall be able to transfer, hypothecate or encumber the said property in any way." We have again here the provision in regard to "meri aulad" which includes both sons and daughters and a reference to their heirs and so this also refers to the heirs of the daughters. In para. 24 it is provided:

If at any time any of my descendants ("aulad") (which includes daughters) gives up the faith of Islam, he shall no longer have any concern with the wakf property.... The right of the person giving up the faith shall vest in his legal heirs according to Mahomedan law.

7. There is therefore a provision that on an apostasy of a daughter her legal heirs would succeed to her share. We have therefore in no less than six separate places in this document a clear reference to the heirs of the daughters as taking some interest in the wakf. For these reasons we consider that the learned Subordinate Judge was correct in holding that the document did give a right to the plaintiffs as heirs of the daughters to succeed to the income allotted to the daughters on the death of the wakif. One other point advanced in ground No. 5 of the memorandum of appeal was that the Subordinate Judge wrongly prevented the wakif defendant 1, from giving in his evidence an explanation of what he meant by the provisions of the wakfnama. We are of opinion that this evidence was rightly excluded as Section 92, Evidence Act, states that when any grant has been reduced to writing no evidence of its terms shall be given except the document itself, where the case is between parties to the document. It was argued that the plaintiffs were not parties to the document, but although they did not sign it they claim to be beneficiaries under it, and we therefore consider that they are parties to it in the meaning of Section 92. A vendee does not sign a sale deed in this country to the document but he is clearly a party to the transaction. We consider that the decree of the lower Court was correct and we dismiss this first appeal with costs.