

(1926) 09 MAD CK 0050
In the Madras High Court

(Alabin) Muhammad Aydress Cheria Koya Thangal

APPELLANT

Vs

Abdul Kadir and Others

RESPONDENT

Date of Decision : 24-09-1926

Acts Referred:

Citation : AIR 1927 Mad 411

Judgement

1. The first question raised in this second appeal is whether the creation of wakf of property which is subject to mortgage is invalid according to Shafi Law. This point was not taken in the first Court. A number of issues were framed and the first issue runs thus:

Whether the wakf deed in question is valid for any of the reasons stated in the plaint.

2. In the plaint there is no mention of wakf being invalid by reason of its offending against Shafi Law. In the lower Court at the time of the argument the appellant submitted that there were a number of Arabic books of Shafi Law which would support his contention and that they should be referred to. The learned District Judge found that they were not books which were admittedly treated as authorities in this part of the country and he refused to look into them though, no doubt, the reason he gave was that they being books in Arabic neither he nor the vakils for the parties were able to read them and, therefore, he would not look into them. I take it that what the learned District Judge meant was that he could not refer to books which were not accepted as authorities on the subject. Mr. K. P. M. Menon, for the appellant, contends that the law governing wakfs in the case of Shafis is to be found in certain books and these must be referred to in order to decide this point. As this point was not specifically raised in the first Court the appellant is not entitled to rely upon it here. It must be said that question of law may be raised at any stage. But when the question of law depends upon the determination of other questions, namely, whether the books which are supposed to contain the law are really authorities on the subject such points cannot be raised in second appeal.

3. In the grounds of appeal to the lower appellate Court which are 27 in number this point was not specifically raised. The appellant contented himself by stating that the wakf deed was against the principle of Mahomedan Law as understood in this part of the country and against principles that are contained in well-known books and in the decisions of Courts. If he wanted to rely upon an exception to the general rules of Mahomedan Law applicable only to the case of Moplahs that should have been specifically pleaded in the first Court and should have been raised in the ground of appeal. Mr. Justice Tyabji in his book "Principles of Muhammadan Law" (1913), pages 387-388 says that

land and everything which admits of use without destruction of the subject and of everything lawfully saleable, such articles as admit of usufruct resumable land, horses or arms

can be the subject of wakf. Ameer Ali in his book "Muhammadan Law," Vol. I, at page 544, says:

The wakf of Mushas or property held in joint tenancy is valid. The validity of a wakf of buildings or plantations upon another person's land by the owner of the buildings or plantations under a lease is acknowledged.

4. There is nothing to support the contention of the appellant in Wilson's book of Muhammadan Law.

5. When all these text-books which notice the differences between Shafi and Hanafi Law on the various points do not refer to such principles which are not enunciated by the appellant's counsel can the Court allow him to refer to some books which his client says are authorities on Mahomedan Law. The appellant has filed affidavits containing extracts from some books but there is nothing to show that any of them can be held to be authorities on the Shafi School of Mahomedan Law. It is not every book that is written or published in the Arabic language that can be held to be authorities on questions of this kind. I do not think in the circumstances of this case the appellant can be allowed to show that some books which he wants to rely upon are authorities on the subject of wakf. I, therefore, disallow this contention.

6. The second point raised is that the wakf is illusory. This point was not raised in the pleadings and it is not open to the appellant to raise it here. He raised a number of contentions as regards the validity of wakf but not a word was said in the pleadings of the lower Court as regards the illusory nature of the wakf. There is nothing in this point.

7. In the result the second appeal fails and is dismissed with costs.