

(1938) 03 PRI CK 0002

In the Privy Council

Case No : Privy Council Appeal No. 120 of 1936

Mt. Ali Begam and others

APPELLANT

Vs

Badr-ul-Islam Ali Khan and others

RESPONDENT

Date of Decision : 29-03-1938

Acts Referred:

Citation : (1938) AIR(PC) 184

Hon'ble Judges : Lord Romer, Shadi Lal and George Rankin, JJ.

Advocate : A.M. Dunne and J.M. Parikh, for Appellants ; L.P.E. Pugh and Abdul Majid, for Respondents. Solicitors for Appellants, Hy.S.L. Polak and Co.; Solicitors for Respondents, Francis and Harker.

Judgement

Sir George Rankin -On 25th May 1887, Agha Kalb Abid Khan, a Shia Mussalman of Persian origin, died at Amritsar leaving as his heirs a brother Kalb Ali Khan and a sister Mt. Hussaini Khanum. On 3rd March 1887, he had made a will the true construction and effect whereof is the subject of this appeal. He was possessed of a half share in certain immovable property in the District of Farrukhabad which he had inherited from his father and of which the income was expended on an Imambara and other religious purposes at Fatehgarh. In addition thereto he was possessed of immovable property at Amritsar and Lahore valued by him in his will at Rs. 1,73,000 and thereby described, valued and disposed of in detail. Of his properties at Lahore valued by him at about Rs. 60,000, three, of a total value of Rs. 36,200, were given by the will to his brother Kalb Ali and one, valued at Rs. 18,000, to his sister Hussaini Khanum. There remained two parcels of land at or near Lahore - one measuring 45 bighas and valued at Rs. 4000, the other measuring 16 bighas and valued at Rs. 2000. By his will, the testator gave the former to a lady called Mt. Buti and her son Ismail Hussain for their lives and the latter to one Musaffar Ali for his life. The interests in remainder he disposed of by directions that they should be "attached" to the sarai hereinafter mentioned: the validity and effect of these directions need not now be considered, as it is not, in the events that have happened, possible on this appeal to pronounce any binding decision thereon or to give relief in respect

thereof. The properties at Amritsar, to which the dispute in the present suit is now confined, are valued in the will at Rs. 1,13,000. This figure includes two properties in Amritsar Cantonment - one called the Mess Kothi (valued at Rs. 2000) and the other called the Small Kothi (valued at Rs. 1000). The income from the former was given by the will to Mt. Buti and her son Ismail Hussain for their lives upon certain conditions. The income of the latter was given to Musaffar Ali for his life upon certain other conditions. A question arises as to the validity of the testator's directions as regards the interests in remainder which question their Lordships will deal with in due course. In addition to these two small properties the will includes as an item of the testator's property at Amritsar, "promissory notes value Rs. 36,000 income Rs. 1490". These promissory notes are included in the figure of Rs. 1,10,000 hereinafter mentioned: the two small properties are not. The main disposition made by the testator in his will is that whereby five properties at Amritsar (in addition to the promissory notes already mentioned)- total value Rs. 1,10,000-are characterized as "pertaining to the sarai" "built and attached to the sarai" "built in connexion with the new sarai." These are (1) a house in the Civil Lines occupying with garden etc. 25 bighas-Rs. 15,000 ; (2) cultivated land nearby-Rs. 5000 ; (3) plots near the church and dak bungalow-Rs. 1000; (4) Begum Sahiba's land and garden-Rupees 3000 ; (5) "the sarai under construction"- Rs. 50,000. The main question upon this appeal is whether the true construction and effect of the will is to make these properties wakf for the purposes of a sarai. Soon after the death of the testator, his brother Kalb Ali was entered in the revenue records as owner of the lands at Amritsar. On 12th May 1892, mutation of the Amritsar property was effected in favour of the sarai. In 1895 Kalb Ali died leaving a widow Mt. Bismillah Khanum, a son Kalb Haidar and a daughter Mt. Ali Begum (defendant 1). On 14th May 1896, mutation of the Amritsar property was effected in the name of the sarai under the management of Kalb Haidar. On 13th May 1907 for Rupees 15,500 Kalb Haidar sold to one Sundar Singh five plots of the Amritsar property above set forth (in all 39 kanals 3 marlas) reciting that he had been in possession thereof as proprietor under his uncle's will of 3rd March 1887. He died in 1909 and on 11th September of that year the Amritsar land was recorded in the name of the sarai under the management of Mt. Bismillah. In 1921 Mt. Bismillah leased 12 kanals of the lands at Amritsar to one Piara Singh (original defendant 3) for 50 years at an annual rent of Rs. 200. Mt. Bismillah died in 1922 and her daughter Mt. Ali Begum took possession of the Amritsar property as her heiress. Mt. Ali Begum has at all times claimed to hold it as absolute owner and has not at any time acknowledged any wakf or dedication. On 7th April 1926, she sold to Nizam-ud-din (defendant 2) 12 kanals 4 marlas of the land at Amritsar.

On 30th June 1906, the present respondents 1 to 5, with the sanction of the Collector under Ss. 92-93, Civil PC brought in the Court of the Senior Subordinate Judge at Amritsar the suit out of which this appeal arises. The plaint treating Mt. Ali Begum as de facto mutawalli asked that she be removed from that office and made to account for the wakf property and for the proceeds of the

various sales and of the lease to Piara Singh : also that a scheme be framed for the wakf. The trial Judge dismissed the suit (2nd January 1929), holding that though Kalb Abid had dedicated the suit lands for the purposes of a sarai in his lifetime the dedication was invalid as he had retained possession; that he had not made a dedication thereof by his will; that if his will did purport to effect a dedication, that also was invalid having regard to certain provisions in the will as to the testator's heirs. Four of the five plaintiffs appealed to the High Court at Lahore making the remaining plaintiff a respondent to the appeal. The High Court having at the hearing made this plaintiff an appellant instead of a respondent, held that a valid wakf of the sarai was created by the will of Kalb Abid, set aside the decree of the Subordinate Judge and remanded the case to him in order that he might decide whether Mt. Ali Begum should be mutawalli, prepare a scheme, take accounts and give other directions as necessary. From this decree (14th January 1935), Mt. Ali Begum appealed to His Majesty and on her death her representatives have been duly substituted as appellants.

In view of the observations made by the learned Judges in the High Court, Mr. Dunne for the appellants has very properly raised before their Lordships the question whether the appeal as brought to the High Court was competent and if not whether the defect was cured by making the respondent plaintiff an appellant. As it appears that the appeal was brought with this plaintiff's concurrence and that he was made a respondent only because he had gone on business to another province, it is difficult to discern any substance in the preliminary objection. Where the consent in writing of the Advocate-General or Collector has been given to a suit by three persons as plaintiffs the suit cannot validly be instituted by two only. The suit as instituted must conform to the consent. On the other hand if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent: 48 IA 12. There is no provision whatever in the Code for recourse being had to the Advocate-General or Collector during the course of a suit or of any proceedings in appeal. As sub-s. (2) of S. 92 sufficiently shows, the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular. Their Lordships cannot accept the doctrine of Jai Lal J., in the present case that the persons who have instituted the suit with the leave of the Collector are to be deemed to be one plaintiff, nor do they see any reason why one of several plaintiffs in such a suit should not appeal on the same terms and conditions as are applicable to suits in general. In the present case the appeal was in their Lordships' view competent and regular as originally brought: the amendment though unobjectionable was not necessary.

On the main question their Lordships in agreement with the High Court consider that upon the true construction of the will of Kalb Abid the five Amritsar properties above-mentioned were made wakf for the purposes of a sarai and for the specified purposes subsidiary thereto. They are further of opinion that the

dedication thereof is valid and in accordance with Shia law. The properties are described as "pertaining to the sarai" in the same sense as the properties given by the will to the testator's brother and sister are described as "pertaining to my brother" and "pertaining to my sister." It is not in doubt that the testator had obtained a plot of land from Major Warburton for the very purpose of being used for a sarai. There are repeated references to this sarai throughout the will and one of the five plots of land now in question (value about Rupees 50,000) is thus described :

The sarai under construction which is about to be completed. The building operations are going on. It was built with the intention of waqf for the benefit of the general public and for performance of religious ceremonies, such as Ashura, prayers on both the Ids, Muharram and Nauroz etc., and for the comfort of every man, without charging any rent, etc., and is excluded from the rights of relations, etc. But my brother Kalb Ali Khan and his heirs who are his descendants have the right of private residence in it.

The will concludes as follows :-

It is to be noted that I have given Mirza Kalb Ali Khan, my real brother, the powers for the management of the entire property, left by me, and the power of disposal as owner of every kind like myself. He should use all these powers in obedience to the directions given in this will. He should continue the maintenance allowance of the persons, to whom I have assigned some maintenance, subject to the conditions and for the period mentioned in this will, provided they do their work faithfully, earnestly, honestly, eagerly, and obediently with good conduct and keep him pleased. In case of default of the above conditions or displeasure of my aforesaid brother, or in case of any embezzlement, misappropriation or dishonesty, he has full authority to dismiss them and to stop and confiscate the maintenance fixed. All these powers will be exercised by the male descendants of my brother Kalb Ali Khan, after his death and will thus continue generation after generation. But if the said brother does not care to take this trouble or refuses to manage the above property, it should be made over to the Government and the Deputy Commissioner for management. The Deputy Commissioner alone or by appointing a committee and an advisory board of some Mahomedan gentlemen belonging to the Asna Ashari community, should then manage the waqf property. The same action should be taken in case the male heirs of the said brother should happen to be inefficient and should be guilty of breach of the conditions and misappropriation. If, after my death or during the severe attack of disease or unconsciousness, any one of my dependants is guilty of dishonesty or embezzlement or misappropriation etc., in respect of my property and goods or if my brother suspects the said dependant of these things, then my brother will have the power to dismiss him or to deprive him of the gift.

From these passages it sufficiently appears that the testator's intention was to dedicate the five items of property for a public charitable purpose well known

and highly esteemed as pious by the Mussalman law. He not only used the word "wakf" but expressed his intention to benefit the general public and directed that the property should be "excluded from the rights of relations" thus giving ample evidence that he knew what was meant by "wakf" and fully intended to effect a wakf. It is true that after the words "excluded from the rights of relations" come words which say that Kalb Ali and his heirs who are his descendants shall have the right of private residence in the sarai. This would include female heirs who would not necessarily be managers of the wakf. But in their Lordships' view this provision does not show that the testator did not intend to make wakf of the properties nor does it render the dedication illusory or make it invalid either on the ground that the property was not substantially dedicated to charity or on the ground that the wakif had retained a benefit for himself. It is not necessary in this case to pray in aid the provisions of the Mussalman Wakf Validating Act, 1913. There is no ground for holding that the right of residence was intended or was likely to exhaust the accommodation of the sarai or could in law be insisted on to the exclusion of the charity. Nor is the right given to the testator's heirs obnoxious to the rule of Shia law which requires a wakif to divest himself of all interest in the property and in its usufruct. (cf: 54 IA 33.)

Again it is true that the testator having set forth in detail each of his properties and his disposition thereof, adds thereto a list headed "Details of Expenses." Having entered "expenses on account of my burial" at Rs. 500 and expenses on account of fast and prayers and the taking of his body to Karbala etc. at Rs. 1500, and the marriage expenses of two girls at Rs. 500 the testator concluded with an entry: "for payment of debt-about Rs. 10,000 or the amount remaining due from me after my death." There is no evidence as to the amount owing by him at his death nor as to the funds from which his debts if any were discharged. The will contains no direction for the payment of debts out of any particular asset nor does it charge any property with his debts. The wide powers of disposal given to the testator's brother, which would include a power of sale, are in their Lordships' opinion to be read, so far as the wakf properties are concerned, as powers given to a manager to be exercised in the course of proper management; and this is indeed comprehended in the direction to "use all these powers in obedience to the directions given in this will." No objection arises in the present case upon the fact that the property dedicated by the will exceeds the one-third share beyond which a Muslim cannot without the consent of his heirs dispose of his property by will: there are concurrent findings of the Courts in India that the testator's heirs consented. Nor does any difficulty arise upon the concluding passages which their Lordships have already cited from the will by reason that the testator does not use the word "mutawalli" when making provision for the management of the sarai and the property devoted thereto. Upon a proper construction of the will their Lordships are of opinion that there was a valid and effective dedication of the five properties abovementioned for the purposes specified. There appears to be no evidence as to the amount or value of the promissory notes outstanding at the testator's death or as to what was done

with them.

It remains to consider the two properties in Amritsar Cantonment hereinbefore described as the Mess Kothi and the Small Kothi of which the income was given for life to Mt. Buti and her son, and to Musaffar Ali respectively. The effect of the testator's directions as to the interests in remainder is that on the death of the persons mentioned the property and the income should be "attached to the sarai" and that if either property should be sold during the lifetime of the person entitled for life, he or she should get a specified sum out of the wakf, and the proceeds of the sale should be invested and "attached to the sarai." This raises a question of some nicety in the application of the Shia law. If the will can be read as intending that on the death of the testator these two properties should become "wakf" it would be in no way unlawful that a life-interest in the usufruct should be reserved for the beneficiaries above-named. On the other hand a direction that the property should become wakf after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedications *inter vivos* :

If one should say I have appropriated when the beginning of the month has come . . . the appropriation would not be valid (*Shuraya-ool-Islam-Baillie V. II p. 218*).

Their Lordships recognize that the decision in 30 IA 94, which permits a Shia to create a wakf by will is itself a mitigation of the rigour of this principle, but they are not of opinion that the principle is abrogated for all purposes in the case of a testamentary disposition, nor do they think that it can be confined to cases where the passing of the property to the endowment is made to depend upon an event which is problematical as well as future. On these points they are not in agreement with the observations made in 28 All 633. While not disposed to put a narrow or unduly technical construction on this will, upon a careful consideration of the language used by the testator and of the substance and effect of his dispositions their Lordships find themselves unable to hold that he intended either of the two properties now in question to become wakf property until the tenant for life had died or there had been a sale under the powers conferred by the will. On this view they think that there is no valid dedication of either property, and to this extent the appeal succeeds. They will humbly advise His Majesty that it should be declared that the properties in Amritsar Cantonment described in the will of Agha Kalb Abid Khan as the Mess Kothi and the Small Kothi are not wakf; that subject thereto and save as regards the Lahore properties upon which no decision can be given in this appeal the decretal order of the High Court should stand and this appeal should be dismissed. The appellants must pay to the plaintiffs-respondents one-half of their costs of this appeal.