

(1916) 07 MAD CK 0007
In the Madras High Court

Mulla Veettill Ussain and Others

APPELLANT

Vs

Subramania Aiyar and Others

RESPONDENT

Date of Decision : 27-07-1916

Acts Referred:

Citation : 35 Ind. Cas. 877 : (1916) 31 MLJ 431

Judgement

1. A.S. No. 171 of 1914.--The question for decision in this appeal is whether the properties mortgaged to the plaintiff by Athan, the deceased

father of defendants 1 to 7 were wakf properties dedicated for pious and religious purposes. There are two mortgages in suit, one executed on the

16th July 1910 and the other on the 19th September 1910. On the 23rd January 1910, Athan had executed and got registered, a document called

wakf deed by which he purported to make a wakf of certain properties specified in it for purposes which prima facie are charitable. The mortgage

properties are some of those so settled. If the transaction was a real one and if the same was not invalid as one intended to defraud the creditors of

Athan, it may be that the wakf constituted under the document was binding on Athan and his subsequent assignees. But, as we have come to a

clear conclusion that that document was executed by Athan for the purpose of defeating his creditors, that in fact it was merely a cloak to screen

the properties from them, we do not think it necessary to discuss the various grounds of invalidity raised by the plaintiff in the Lower Court and

accepted by the learned Judge. We may, however, point out that the learned Judge was not correct in stating that the bulk of the income from the

properties was left undisposed of ; for it will be seen that after appropriating certain sums of money for the several objects specified in the

document, the settlor directed that the residue of the income should be devoted for objects (2) and (3) which were certainly charitable. It is also

not correct that there was no appointment of a muttawali or trustee; for the appellant Ussain, Athan's youngest son, was appointed manager after

the death of Athan. Further, directions were given for the appointment of successors to Ussain. Whether the learned Judge intended to draw a

distinction between a muttawali or trustee and a manager, we do not know; but we think it is clear that Ussain was appointed a trustee under Ex.

1.

2. Ex. I covers admittedly the whole of the Immovable properties belonging to Athan. It is also clear, that at the time of its execution he was

indebted to the extent of over Rs. 20,000. On the 24th January, i. e., the very date on which Ex. I was registered, an order nisi preventing Athan

from alienating his properties was issued at the instance of a creditor who had sued Athan and others for a comparatively small sum of about Rs.

700. In reply to an affidavit, charging Athan with attempting to put away his properties so as to prevent his creditors from realising their dues,

Athan on the 31st January distinctly denied that he had alienated any portion of his properties and denied that he had any intention of doing so in

future. This statement must be untrue, if Athan had as a matter of fact made a wakf of his Immovable properties under Ex. I which was only a few

days earlier. In the same affidavit Athan stated that he had moveable property of considerable value consisting of timber and elephants which he

said was more than sufficient to pay his debts ; and curiously enough, in the wakf deed Ex. I there is a statement that he has reserved his moveable

properties for the payment of his debts. It is clear, he was unable to pay his debts from out of his moveable properties and was therefore obliged

to give security for the considerable sums which he owed to the plaintiff in this suit. The 6th defendant and his brothers defendants 1 to 5 who are

contesting this suit have not chosen to produce the account books of Athan which are in their possession to prove the value of the moveable

properties possessed by Athan and the extent of his indebtedness, on the date of Ex. I. What became of the moveables and why he was unable to

pay his debts soon after the execution of Ex. I is also not explained. Athan was a trader doing a pretty large business and had at the time of Ex. I

apparently got into difficulties. He purported to make a charitable trust of the whole of his Immovable properties. The principal defendants who

were in a position to show whether he retained enough to pay his creditors have not chosen to produce his accounts; in fact we have reason to

think that they have deliberately withheld these accounts though summoned to produce them. It is we think, a reasonable inference to draw that if

Ex I represented a real transaction, Athan after the withdrawal of the bulk of his properties from the reach of his creditors was in an insolvent

condition. Ex. I, therefore which is a voluntary settlement, was void as against his creditors.

3. There are other circumstances proved in the case which go materially to strengthen this conclusion; in fact taken with the facts already stated

they lead to the conclusion that Ex I does not represent a real transaction at all, but was executed by Athan as a cloak to retain the benefit to

himself. Though Ex. I purported to create a wakf of these properties, it is clear from the terms of the document that the wakf was not intended to

take effect till after Athan's death. The learned Counsel for the appellant contended that the wakf took effect immediately on the execution of Ex. I

and that Athan himself was by implication constituted the first trustee. We are unable to agree with this contention. There is nothing in the language

of Ex I to compel us to hold that there was an immediate dedication of the properties. The settlor appointed his last son as manager expressly after

his death. He fixed a salary of Rs. 200 for the manager for the time being after his death He did not fix any salary for himself, made no provision for

the management of the property and none for the utilization of the income during his life ; and nobody could have compelled him to devote one

single rupee of the income on the objects specified in Ex, I. He revoked Ex. I by Ex. F on the 14th July 1910, mortgaged some of the alleged trust

properties on the 16th July 1910 to the plaintiff (Ex. A), made a gift of other portions to his daughter Ummayya Umma the 7th defendant and his

son Ussain the 6th defendant on the 17th and 29th July respectively (Ex. H and J.). Ussain, being the very person who was to be. the trustee under

Ex. I after the death of Athan enjoyed the socalled wakf properties as if they were his own and treated them as his private property as before. The

defendants have attempted to prove that Athan had given effect to Ex. I but they have not cared to produce the accounts of Athan which would

have settled this matter one way or the other. After the death of Athan his heirs including Ussain have been dealing with the property as their

private property. In fact everyone interested has been treating Ex. I as a nominal or sham transaction and we think that was the truth. The learned

Judge in the court below appears to have come to the same conclusion though his finding is neither clear nor certain. The learned Counsel for the

appellant contended that Ex. I having been executed and registered, it was not competent for the plaintiff to question the reality of the transaction

and that evidence of subsequent conduct should not have been admitted to prove that Ex. I was a nominal or sham document and relied on certain

observations contained at page 484 in *Kulsom Bibee v. Golam Hossain Cassim Ariff* 10 C.W.N. 449. With all respect, we think that those

observations are too broadly expressed. In cases where the question is whether there has been a real dedication, the production of a registered

instrument in writing making a transfer of the property would no doubt be strong prima facie evidence of such dedication. But we think that it is

competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no real dedication. It has

been so held in several cases and the user of the property subsequent to the alleged dedication has always been held to furnish excellent evidence

of the reality or otherwise of the transaction. (See *M.A. Ahmad Khan v. Legal Remembrancer* ILR (1893) A. 321, *Suppammal v. Collector of*

Tanjore ILR (1889) M. 387 , *Watson and Company v. Ramchund Dutt* ILR (1890) C. 10 and *Ram Chandra Mukerjee v. Ranjit Singh* ILR

(1899) C. 242 . It must be remembered that the transaction is questioned by a creditor of the settlor at whose instance the transaction was liable to

be set aside.

4. In this case, however, we have as already stated come to the conclusion that Ex. I was executed with intent to defeat creditors and in this view,

it makes no difference whether Athan intended Ex. I to be a real or nominal transaction. The appellant does not contend that if the intention was to

defeat creditors the transaction would still be valid under the Muhammadan Law.

5. It is just possible to take another view of the transaction and that is, whether Ex. I could not be construed as a dedication of these properties

after the lifetime of Athan and whether such a dedication is valid under the

Muhammadan Law appears to be a matter of doubt. As already observed Ex. I does not create an immediate wakf of the properties, giving a life estate in the income to the grantor himself as a beneficiary under the trust. If that had been the nature of the transaction, it may be possible to hold that such a dedication is valid. See *Muzhurool Huk v. Puhraj Ditarly Mohepattur* (1870) 13 W.R. 285 approved by the Privy Council in *Absanulla Chowdhry v. Amarchand Kundu* (1890) ILR 17 C. 498.

However that may be, we are inclined to think that if the transaction was real, the intention of the author of the trust as it appears from the language used by him in Ex. I was to keep the property under his absolute control and disposition, so long as he was alive. In fact he intended practically a testamentary disposition of the property for charitable purpose. As already stated, there is a provision for the payment of debts from out of his moveables. The person who is to realise his moveable property and pay his debts is not specified. Whether the debts payable were those existing at the date of instrument or at the date of his death is not clear. It looks as if he intended that provision to be carried into effect after his death. This is the view on which he himself acted. The settlor then would be entitled to revoke it and as he had revoked it before the execution of the mortgage he was entitled to deal with the properties as his own.

6. For these reasons we dismiss the appeal with costs. Appeal No. 231 follows and is also dismissed with costs.

7. Appeal No. 170 of 1914:--This is an appeal by a daughter of Athan who was made a defendant in O.S. No. 3 of 1913 against an order for costs against her. We see no reason to interfere with the discretion exercised by the learned Judge in the court below.

8. This also will be dismissed with costs.