

(1942) 08 AHC CK 0006
In the Allahabad High Court
Case No : First Appeal No. 105 of 1938

Rai Bahadur Sahu Har Prasad and others	APPELLANT
Vs	
Sheikh Mohammad Usman Husain	RESPONDENT

Date of Decision : 12-08-1942

Acts Referred:

Encumbered Estates Act, 1934 — Section 19
Transfer of Property Act, 1882 — Section 53

Citation : (1942) 08 AHC CK 0006

Hon'ble Judges : Verma, J;Allsop, J

Bench : Division Bench

Advocate : G.S. Pathak, for the Appellant; A. Mukerji and Wahid Ahmad Khan for Respondent, for the Respondent

Final Decision : Allowed

Judgement

Allsop and Verma, JJ.—This appeal has arisen out of proceedings under the United Provinces Encumbered Estates Act (No. XXV of 1934).

The Respondent, Sheikh Mohammad Usman Husain, is the landlord. He filed an application u/s 4 of the Act on the 25th of July, 1935. In this application he stated that he had only one creditor to whom he owed about Rs. 24,000 and gave the name of that creditor as Rai Bahadur Sahu Har Prasad. He further stated in the application that he was the owner of two items of zamindari property, namely, a five biswas asli out of twenty biswas in village Ballia in the district of Pilibhit and a half share of village Lauwa in the district of Budaun. He alleged that the former share was worth Rs. 20,000, that the latter was worth Rs. 30,000 and that thus the total value of these two items of property was Rs. 50,000. In due course he filed a written statement u/s 8 of the Act. In this document he stated that the creditor had filed a suit against him for the recovery of Rs. 26,085/4/6. He further made it clear that, along with Rai Bahadur Sahu Har Prasad, the latter's five nephews were also his creditors in respect of the debt in question. On the prescribed notices being published, a written statement

u/s 10 of the Act was filed by Rai Bahadur Sahu Har Prasad and his nephews on the 30th of May, 1936. They stated that they had instituted a suit against the landlord Applicant on the 27th of March, 1935, for the recovery of Rs. 26,085/4/6 and that the amount now due to them came to Rs. 29,823/4/6. They further alleged that, in addition to the two items of zamindari property shown by the landlord-Applicant in his application u/s 4 and in his written statement u/s 8, the landlord-Applicant owned various other immovable properties details of which were given by them in paragraph 3 of the written statement. The landlord-Applicant, on the 1st of October, 1937, filed a reply to this written statement and alleged therein that he had made a waqf alal-aulad of the entire property mentioned by the creditors excepting the two items of zamindari property shown by him in his application u/s 4 of the Act. Thereupon, on the 20th of November, 1937, the creditors filed an application challenging the waqf relied upon by the landlord and alleging that it was a fraudulent transaction brought into existence by the landlord with the object of delaying and defeating his creditors and that, therefore, it could not affect their rights. The learned Special Judge repelled the contention of the creditors and decided in favour of the landlord. This appeal has, thereupon, been filed by the creditors.

It appears that on the 12th of October, 1934, the Respondent executed in favour of the first Appellant, a promissory note acknowledging that a sum of Rs. 24,050 was due from him and promising to pay that sum on demand with interest at 12 annas per cent, per mensem. A fortnight later, on the 26th of October, 1934, the Respondent executed the deed in question creating a waqf alal aulad appointing himself as the first mutawalli and laying down that during his lifetime he would be entitled to spend the income from the waqf property in any way he liked at his discretion and that no one would have the right to require him to explain the accounts. This deed covered all the immovable property, except the shares in villages Ballia and Lauwa, which the Respondent owned. Shortly afterward the United Provinces Encumbered Estates Act (No. XXV of 1934) was passed by the Provincial legislature and received the assent of the Governor of the United Provinces on January 15, 1935. It received the assent of the Governor-General on April 10, 1935 and Chapters I and III of the Act came into force on the 30th of April 1935. The Respondent thereupon filed his application u/s 4 of the Act on the 25th of July 1935, as has already been stated. The contention of the Appellants before us is, as it was before the Court below, that the main purpose of the execution of this deed of waqf by the Respondent was to defeat and delay his creditors. The contention of the Respondent was that the allegation of the creditors was not well-founded. He pointed out that he had not created a waqf in respect of his entire property, but had left out the two items mentioned above and alleged that those items were sufficient for the liquidation of the debt due from him to the Appellants.

The Appellants examined their Mukhtar-i-am, Barati Lal, who deposed that the Respondents share in village Ballia was worth about Rs. 3,000 and that his share in village Lauwa was worth about Rs. 7,000. He stated that the market value of

zamindari property was generally about twenty times the land revenue. He further stated that the profits from landed property had decreased as there had been remission in rents. The Respondent examined a witness called Abdul Hakim, who at first stated that he was the Respondent's karinaa but later on had to admit that he was not his karinda but was the karinda of his nephew who was a minor under his (the Respondent's) guardianship. This witness further stated that the properties which were included in the waqf deed in question were worth about a lac of rupees. He admitted that there had been remissions in rents and that profits of zamindari property had consequently been reduced. Extracts from the khewats, containing the entries in respect of the Respondent's shares in villages Ballia and Lauwa, were produced. The khewat of Ballia shows that the government revenue of the Respondent's share is half of Rs. 326, in other words, Rs. 162-8-0. As already stated, the witness, Barati Lal, has deposed that the market value is generally about twenty times the land revenue. There is no evidence to rebut this. According to this evidence, the market value of the Respondent's share in village Ballia comes to Rs. 3,250. Learned Counsel for the Respondent has urged that the Government revenue is generally 40 per cent, of the collections and has argued that the market value of the property should be calculated in accordance with the profits. If we calculate on this basis, the profits come to a little less than Rs. 244 and at twenty year's purchase the value comes to Rs. 4,880. The revenue of the two shares held by the Respondent in village Lauwa, as shown by the khewat Ex. 2, comes to about Rs. 330. If we follow the method of calculating the market value deposed to by Barati Lal, we get Rs. 6,600. If, on the other hand, we follow the method suggested by Learned Counsel for the Respondent, the value comes to about Rs. 10,000. Thus, the market value of these two properties, according to the method deposed to by Barati Lal, which, as already stated, is the only evidence on the record, comes to Rs. 9,850 and according to the principle suggested by Learned Counsel for the Respondent comes to Rs. 14,880. The result is that these two items of property are in no way worth more than Rs. 15,000.

The learned Special Judge has referred to the evidence given by Barati Lal and has observed that, as Barati Lal was not an independent witness, his evidence could not be taken to establish that the shares in villages Ballia and Lauwa were not sufficient for the satisfaction of the debt due from the landlord. But the learned Special Judge has not arrived at any finding as to what the value of these shares is. The learned Judge has then observed that in view of the provisions of the Encumbered Estates Act it was likely "that substantial reductions would be made in the amount of the claim put forward by the creditors" and that it could not, therefore, "be said at this stage that the property which is still left with the Applicant is not sufficient to satisfy the debt due to the creditors."

2. It is common ground that, as the deed of waqf was executed before the first Chapter of the Act came into force, Section 12 of the Act is not applicable. The Appellants, however, rely on the provisions of Section 53 of the Transfer of

Property Act It was faintly suggested by Learned Counsel for the Respondent that the creditors could not invoke Section 53 of the Transfer of Property Act but must be confined to the provisions contained in the United Provinces Encumbered Estates Act. He has, however, given no valid reason for the contention that the creditors were not entitled to rely on the provisions of Section 53 of the Transfer of Property Act. He has cited no authority and is not able to show anything in the Act itself which can be interpreted as excluding the provisions of Section 53 of the Transfer of Property Act. We are, therefore, unable to accept this contention.

3. The position, thus, is this. In October 1934, when the Encumbered Estates Act was already before the provincial legislature, the Respondent executed, on the 12th of that month a promissory note for Rs. 24,050. It has never been alleged that the money was not due to the creditors and that the promissory note was without consideration or that the amount due from him on that day was less than the amount mentioned in the note. Having passed this promissory note and thus assured the creditors of his readiness to pay the amount due to the latter, he executed on the 26th of that month the deed of waqf in question which admittedly covers the major portion of the property owned by him He did not include his shares in two villages in this deed of waqf. When the Encumbered Estates Act came into force, he went and filed the application mentioned in Section 4 of that Act and showed his shares in these two villages as the only property which he owned and prayed that the provisions of the Act be applied to him. It seems to us that these facts, prima facie, go to show that his intent, when he executed the deed of waqf, was to defeat or delay his creditors. It was, of course, open to the Respondent to meet the prima facie case which was made out by the creditors against him and to satisfy the Court that the deed was not executed with the intent alleged by the creditors. He has entirely failed to place any materials before the Court which could rebut the case made out by the Appellants He has given no evidence whatsoever to show that the value of the shares in the two villages which he had excluded from the deed of waqf was more than Rs. 15,000 at the highest. He has laid no materials on the record which could lead the Court to the conclusion that his intention in executing the deed of waqf in question was other than that indicated by the facts relied upon by the Appellants. It is true that the burden initially lay upon the Appellants to make out a case u/s 53 of the Transfer of Property Act. But when they had proved facts which were sufficient to show prima facie that the situation of the executant of the deed in question was to defeat or delay his creditors, it was for the Respondent to meet that case and to explain those facts. This, as already stated, he entirely failed to do. The learned Judge below has, as already stated, decided in favour of the Respondent on the ground that the debt due to the Appellants was likely to be substantially reduced under the provisions of the Encumbered Estates Act. He has, however, not stated the extent to which it was likely to be reduced. The amount due to" the Appellants on the 27th of March, 1935 was Rs. 26,085-4(sic)6 and it has not been shown that their statement that by the 30th of May, 1936, the amount due to them was Rs. 29-823-4-6 was

incorrect. No attempt has been made by Learned Counsel for the Respondent to show that there was any possibility of the debt due to the Appellants being reduced to Rs. 15,000 or less. There are no materials on the record and the observation of the learned Special Judge is a pure surmise.

4. Learned Counsel for the Respondent has argued, that, mutation having been effected in accordance with the deed of waqf, it should be held that the deed was not executed with the intention of defeating or delaying the creditors. We see no force in this argument. A person who executes a fraudulent deed always takes steps to make it appear that it was not fraudulent. It has next been argued that the Respondent was entitled under the Mohammadan Law to execute such a deed of waqf. That, it seems to us, is an irrelevant argument. When a person executes a deed which is open to challenge u/s 53 of the Transfer of Property Act, he is bound to execute one which the law--apart from the provisions of Section 53 of the Transfer of Property Act--allows him to execute. It has further been contended that there is a recital in the deed that the Respondent's wife had remitted the dower due to her "in lieu of the conditions laid down in the deed of waqf." The argument is that a cancellation of the deed would affect the rights of the Respondent's wife and that this should not be done, as she was no party to these proceedings. The deed is a unilateral document. There is nothing to show that the wife ever assented to it, or even came to know of it. There is absolutely no evidence to show that she had remitted her dower. The recital in the deed is obviously of no value. In these circumstances, we are unable to accept the argument.

5. We need hardly point out that it is one of the principles of Muhammadan Law as indeed of the law prevailing in all civilised communities that the first duty of those who are governed by that law is to arrange for the payment of their debts before they make gifts or create waqfs. We may mention that there are instructive judgments in *Ahmad Husain v. Kallu Mian* 1929 ALJ 460 and *Bismillah Begam and Others Vs. Tahsin Ali Khan* .

6. Our conclusion is that the appeal succeeds. Accordingly we allow the appeal, set aside the decree of the Court below and direct that the entire property shown by the Appellants in their written statement dated the 30th of May, 1935, should be treated as belonging to the Respondent and as being liable to attachment, sale or mortgage in satisfaction of the debts of the Respondent. The Collector shall be accordingly informed under the provisions of Section 19 of the Encumbered Estates Act.