

(1946) 01 AHC CK 0001
In the Allahabad High Court
Case No : First Appeal No. 62 of 1943

Raja Muhammad Azam Khan	Vs	APPELLANT
Hamid Shah and Maqbool Ahmad Shah		RESPONDENT

Date of Decision : 29-01-1946

Acts Referred:

Mussalman Wakf Validating Act, 1913 — Section 3(a)

Citation : (1946) 01 AHC CK 0001

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

Bench : Division Bench

Advocate : P.L. Banerji and Mukhtar Ahmad, for the Appellant; S.N. Verma and J.N. Chatterji, for the Respondent

Final Decision : Dismissed

Judgement

Mathur, J.—The suit out of which this appeal arises was brought by the Plaintiff Appellant Raja Mohammad Azam Khan for a declaration that the deed of waqf dated the 17th of July 1920, was invalid. There was also a prayer for possession over the zamindari property and the house which were the subject matter of the waqf. The said deed of waqf was executed by the father of the Plaintiff Raja Mohammad Shah in favour of his nephew Babu Hamid Shah and Babu Maqbool Ahmad Shah the Defendants Respondents. It was mentioned in the deed of waqf that as Mahmud Khan the father of the Defendants met his death by drowning and left the Defendant unprovided the object of the waqf was to provide maintenance for the Defendants and their heirs. Out of the income of the dedicated property Rs. 120 annually was to be spent for the expenses of Ashra Moharram and the Majlises held in commemoration of the martyrs of Karbala and also for feeding of the poor in the month of Ramzan. The Plaintiff's claim was that the said deed of waqf was invalid, because the waqif Raja Mohammad Shah never had any intention of making and did not in fact make a permanent waqf under the Mobammadan Law, because there was no residuary gift in favour of charity, and because the waqf had never been acted upon. The Plaintiff claimed

that the property was still a part of the assets of his father, Raja Mohammad Shah, and he was entitled to the declaration sought for and to the possession of the property dispute.

2. The defence was that the deed of waqf dated the 17th of July 1920, created a real waqf and was perfectly valid according to Mohammadan Law, that it has all along been acted upon, and that the suit was barred by limitation.

3. The learned Civil Judge has dismissed the suit holding that the deed was valid and operative and divested the creator of the waqf Raja Mohammad Shah of the ownership of the property in dispute that the waqf was acted upon, and that the claim was barred by time.

4. It is contended on behalf of the Plaintiff Appellant that the waqf in question did not fulfil the requirements of Section 3 of the Act VI of 1913 (Mussalman Waqf Validating Act) and therefore it was invalid, that the waqf never seems to have, contemplated the contingency of the extinction of his family, and therefore there was no reservation of the income of the property for pious and charitable purposes, that the lower Court has wrongly applied the doctrine of cypres in the case of a Mohammadan waqf, and that the claim was not barred either by twelve years or three years limitation.

5. After bearing the learned Counsel for the parties, I have come to the conclusion that this appeal has got no force, and must be dismissed. The arguments addressed to us are based on the assumption that Act VI of 1913 applied to the present case, and if the provisions of that Act were not complied with the waqf would be invalid. It must however be noted that if a deed of waqf is valid according to Mohammadan Law as it stood and was being interpreted before the passing of Act VI of 1913 (sic) there would be no necessity to investigate whether the provisions of that Act had been complied with or not. The deed of waqf dated the 17th of July 1920, which is in dispute in this case does not mention anywhere in the body of the document that it was executed as waqf *atal-ul-aulad* (sic), or that it was executed according to the provisions of Act VI of 1913. There can be no doubt that the waqf in dispute is both for the benefit of the settlor's family and for charity. Such a gift according to Mohammadan Law as interpreted by the Privy Council would be valid if there was a substantial dedication of the property to charitable uses at some period of time or other and that it was not for the (sic) of the family or that the gift to charity was illusory having regard to the small amount reserved for that purpose or from its uncertainty or remoteness. In my estimation when out of an income of a few hundred rupees a substantial sum was specifically earmarked for charitable purposes the waqf would not be invalid even when a part of the income was set apart for the maintenance of the members of the family. In this connection it will be right to point out that the maintenance of poor relations and dependents is also a valid object of waqf. *vide* *Mukarram v. Anjuman-un-nissa* 1923, 45 All, 152 and the principles of Mohammadan Law by Sir Dharma Mulla page 156, Twelfth Edition, in this view of the matter, the deed of waqf dated the 17th of July 1920

was a valid waqf and the plaintiff's suit was bound to fail.

6. If however it is found that the document in dispute constituted a waqf Ala-ul aulad, it will have to be considered whether the provisions of Act VI of 1913 which validated such a waqf had been complied with.

7. It has been argued that by the said Act it was made lawful for a person professing the Mussalman faith to create a waqf which in all other respects was in accordance with the provisions of the Mussalman Law for the maintenance and support wholly or partially of his family, children or descendants; and that no waqf could be created in favour of the nephews as they did not come within the description of the family, children or descendants. The matter is however concluded by a Bench decision of this Court in Ghazanfar Husain V. Ahmad(sic) Bibi (1930) 52 All , 368., where it was held that the word "family" in Section 3 (a) of the Mussalman Waqf Validating Act was not restricted to only those persons residing in the house of the settlor for whose maintenance he was mainly responsible, but that the word was intended to be used in its broad popular sense; persons descended from one common progenitor and having a common lineage, a g, nephews of the settlor and their descendants, were included in the term, irrespective of whether they lived in the settlor's house, or whether the settlor was responsible for their maintenance. I am in full agreement with the view that is expressed and do not find any force in this argument. The next contention is that there was no residuary gift in favour of charity. It is do doubt true that it is nowhere expressly mentioned that after the extinction of the family of the grantees and the grantor the income from the property will spent for the purposes of the charity. It is however clear from the wordings of the proviso to Section 3 of the Alussalman Waqf Validating Act (Act Vlo(sic) 1913) that the ultimate benefit must in each case be expressly or (sic) reserved for the poor or for any other purpose recognised by the Mussalman Law as is religious, pious, or charitable purpose of a permanent character. In the case of Baqa Ullah Khan v. Ghulam Siddique Khan 1935 A W R. 591 It was held that where the words "waqf fi sahi lillah" have been used and a waqf has been created in perpetuity, and there is provision for the appointment of the Mutwallis for all time to come, and a portion of the usufruct of the waqf property has been reserved for pious and charitable purposes, and the waqif had in contemplation the possible extinction of the line, of his descendants who were to be the principle recipients of the profits of the waqf property, the irresistible conclusion is that the waqif intended by implication to reserve the ultimate benefit for the purposes enumerated in the proviso It may be mentioned that the deed of waqf in the present case also provides "dawam ke liye rah khuda me sadkatan wa hasbatan lillah waqf kar diya" which is the same thing as creating a waqf fi sabi lillah in perpetuity. A portion of the usufruct of the property has also been reserved for pious and charitable purposes. The only difference is that no provision has expressly been made for the appointment of. a Mutwalli if the lines of both the grantor and the grantee were extinct, because it has been laid down in the deed of waqf that the Mutwalliship of the waqf property shall never be out of the

family of the executant. The learned Civil Judge has no doubt remarked that this expression does not mean that there will be no Mutwalli after the family of the grantor was extinct. But I do not think that interpretation can be rightly put. It also appears that the grantor never contemplated the possibility of the extinction of the line of the beneficiaries But I do not think that it was ever contemplated by that Bench to lay down that these were the essential conditions in order to justify an inference that the waqf intended by implication to reserve the ultimate benefit for the purposes of charity etc. In my judgment when the waqf has been made in the name of God, has been created in perpetuity, and a portion of the Waqf property has been reserved for pious and charitable purposes the same result should follow, vide *Masuda Khatun Bibi v. Mohammad Ibrahim* (1937) 59 Cal. 402.. In the event of the line of the beneficiaries and the grantor both being extinct a question would certainly arise as to how the income of the property after deducting the amount of Rs. 120 which has been expressly provided for charitable purposes should be devoted. In my judgment the doctrine of cypress would then apply and the income will be applied for the benefit of the poor or to objects or as near as possible to the objects which failed In the case of *Ruqia Begam v. Suraj Mal* 1936 A.W. R. 278 , Sir Shah Sulaiman. C. J. observed:

Where the waqf has indicated his intention that his object is to benefit his family, and also religious, pious or charitable purposes, it can be implied that there is an ultimate reservation for such purposes, particularly so when he has provided, that a part of the income should be applied to such purposes during his own lifetime. If one object, namely, the maintenance of his descendants, fails, there is no reason why the other object should also fail, and no reason whatsoever why the whole income should not be devoted to the remaining object as indicated

8. I am thus prepared to hold that even as a Waqf Ala-ul-aulad under the provision of Act VI of 1913 the waqf deed in question would not be invalid. In any view of the case, the Plaintiff's suit was rightly dismissed. I do not think it is necessary to express any opinion on the question of limitation. The appeal fails and I would dismiss it with costs.

Allsop, J.

9. I concur.

10. The appeal is dismissed with costs.