

(1945) 02 CAL CK 0010
In the Calcutta High Court

Siddiq Ahmed Choudhury

APPELLANT

Vs

Syed Ahmed Choudhury and Others

RESPONDENT

Date of Decision : 20-02-1945

Acts Referred:

Citation : AIR 1945 Cal 418

Hon'ble Judges : Ellis, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—This is an appeal under Clause 15, Letters Patent and it is directed against a judgment of Henderson J., dated 22nd May 1944 passed in Second Appeal No. 1890 of 1943. The appellant before us is the plaintiff and the suit was one commenced by him for establishment of his title as mutwalli in respect of a wakf created by his father Osi Mia and for a permanent injunction restraining defendants 1 to 3 from interfering with his possession as mutwalli of the wakf estate. The material facts are not in controversy and may be stated as follows:

2. The plaintiff as well as the four defendants in the suit are all sons of Osi Mia, though, their mothers were not the same. Osi Mia, married three wives in succession; the plaintiff and the pro forma defendant 4 are the two sons by his first wife. By the second wife also Osi Mia had two sons and they are defendants 1 and 3 in the suit; defendant 2 is the only son born of the third wife of Osi Mia. On 30th January 1934, Osi Mia created a wakf in respect of certain properties and appointed" himself mutwalli of the wakf estate. The provision in the deed of wakf was that after his death all his sons would become mutwallis by rotation and each one of them would hold the office for a period of four years only. It appears that Asgar Ali, the father of Osi Mia had also made a wakf in respect of his own property some time in the year 1885 and Osi Mia became the sole mutwalli of his father's wakf after the death of his brother Gani Mia. On 9th October 1939, Osi Mia executed, what has been called a deed of rectification and it is marked Ex. 0 in this case, and it was pro-vided by this deed that those of his

sons who would be mutwallis in respect of the wakf created by his father Asgar Ali would not be competent to act as mutwallis of his own wakf. On 5th June 1940, another deed was executed by Osi Mia by which he purported to resign his office as mutwalli of both the wakfs and appointed his third and fifth sons mutwallis of his father's wakf and the first, second and fourth sons mutwallis of the wakf created by himself. In this document it was expressly laid down that any of his sons acting contrary to the provisions of this deed or the earlier deed of rectification would forfeit his title to act as mutwalli with regard to any of these wakfs. Osi Mia died on 16th April 1941, and after his death certain disputes arose regarding succession to mutwalliship in respect of both the wakf estates. The plaintiff being the eldest son of Osi Mia was undoubtedly entitled to come in first as mutwalli of his father's wakf and hold the office for a period of four years according to the terms of the wakfnama and after his period was over the next term would be that of his own brother, the pro forma defendant 4 who is the second son of Osi Mia. Defendant 1 and the other step brothers of the plaintiff however disputed his claim to act as mutwalli of Osi Mia's wakf on the ground that the plaintiff along with his full brother, defendant 4, had got themselves enrolled as mutwallis of Asgar Ali's wakf. At the objection of defendant 1, the order recording their names as mutwallis of the said wakf was vacated, but even then the plaintiff filed a civil suit to establish his right. As these acts amounted to violation of the terms of the deed of rectification and the subsequent document executed on 5th June 1940, the plaintiff, it was said, forfeited his right to be appointed a mutwalli of his father's wakf. As on these allegations defendants 1 to 3 denied the title of the plaintiff to act as mutwalli of Osi Mia's wakf and threatened to dispossess him, the present suit was brought.

3. The suit was contested by defendants 1 and 2, and their allegations in substance were that the two later deeds executed by Osi Mia on 9th October 1939 and 5th June 1940 should be taken as integral parts of the original wakfnama and the plaintiff having violated the express provisions of the later deeds, was not competent to act as mutwalli. The munsif who heard the suit overruled the defence and decreed the plaintiff's suit. It was held that the subsequent documents executed by Osi Mia could not alter the terms of the original deed of wakf, as the founder had not reserved to himself the power of making changes when he executed the wakfnama and divested himself of his ownership in the dedicated properties.

4. On appeal the District Judge of Chittagong affirmed the decision of the Munsif but kept open the question as to whether the founder could make any changes in the provisions of a deed of wakf when no such rights were reserved to him at the time of creating the wakf. The learned District Judge based his decision entirely on the ground that as the plaintiff had actually succeeded to the office of mutwalli after the death of his father, he could be removed only by the kazi, and so long as he was not removed, it would not be competent for a third party, as the defendants were in this case, to interfere with his management. Against this decision a second appeal was taken to this Court which was heard by my learned

brother Henderson J. sitting singly. Henderson J. rightly pointed out that the real point for decision in this case was whether it was competent" to Osi Mia as the founder of the wakf to alter the provisions of the wakfnama by subsequent deeds of rectification and appointment and that the District Judge was entirely wrong in keeping that question open. My learned brother allowed the appeal and dismissed the plaintiff's suit, being of opinion that the wakif had the power of making alterations regarding appointment of mutwallis even if no such power was reserved to him by the deed of wakf. It is against this decision that this appeal has been filed by the plaintiff under Clause 15, Letters Patent.

5. The question that requires determination in this appeal is undoubtedly one of general importance in relation to the Mahomedan law of wakf and so far as this Court is concerned, there is no previous authority on the point. The question is whether a founder or wakif under Mahomedan law after he has dedicated his property to the Almighty and made provisions for the appointment of mutwallis can subsequently alter the arrangement and remove the mutwallis appointed by him if he had not reserved such powers for himself when he created the wakf. Unfortunately there is a divergence of opinion on this point entertained by notable Mahomedan jurists. The three great exponents of Sunni law are Abu Hanifa and his two disciples, Abu Yusuf and Imam Mohomed. There is nothing said by the master, as regards the question that arises for consideration in the present case, but there is a clear difference of opinion between his two disciples. Abu Yusuf holds that "the wakif is absolutely entitled to remove the mutwalli appointed by himself whether he has reserved the power or not." Imam Mohomed differs, holding that "it is only when the wakif has reserved the power that he can remove the mutwalli without any misfeasance" (Ameer Ali, Mahomedan Law, 4th Edn., page 458). Henderson J. has held that in case of difference of opinion between the two, disciples of Abu Hanifa the view taken by Abu Yusuf should prevail at least so far as Bengal is concerned, and accordingly he has dismissed the plaintiff's suit. It is quite true that on account of the high judiciary office held by Abu Yusuf the Mahomedan doctors attach the highest authority to his opinion on matters of civil law, though in matters spiritual and those relating to inheritance the views respectively of Abu Hanifa and Imam Mohomed are considered authoritative. It is also a general rule of interpretation adopted by Mahomedan lawyers that when there is a difference of opinion between the three masters (Abu Hanifa and his two disciples) the opinion of two is allowed to prevail against the opinion of the third: vide Mulla's Mahomedan Law, 12th Edn., p. 25. These rules are however not in-" flexible rules of law, nor are they of universal application. As Sulaiman C.J. points out in Mt. Anis Begam and Others Vs. Malik Muhammad Istafa Wali Khan these rules of preference were for the guidance of ancient jurists and different doctors have followed different rules of preference. "Those who are more orthodox," thus observed the learned Chief Justice,

and generally speaking more ancient, prefer the solitary opinion of Abu Hanifa to even the joint opinion of his disciples. But such rules are helpful only when there

is no clear consensus of opinion. In the early days when new points arose and the decision had to depend on inferences drawn from other fatawas or from analogy, it was open to the learned doctors to prefer one opinion to the other which they considered more correct and consonant with the other principles, in as much as the three Imams were not law givers but merely interpreters of the law. But if one finds a question well thrashed out and in later centuries, a particular interpretation adopted by the leading doctors and text-book writers, it would not be proper for us in the 20th century to go behind such a consensus of opinion and decide a point contrary to such opinion, on the ground that the majority of the three Imams favoured that view in the earlier centuries.

These observations in our opinion fully apply to the facts of this case. It may be that there was some difference of opinion amongst the ancient jurists but our duty in modern times is to see which of the two opinions, if any, has been accepted by later commentators who are of recognized authority in India, and if we find that they have consistently adopted one particular view to the exclusion of the other, it would be presumptuous on our part to attempt at this day to decide the point on the basis of original authorities by application of any general rule of interpretation. We may refer in this connexion to the observation of their Lordships of the Judicial Committee in *Aga Mahomed Jaffer v. Koolsom Beebee* ('98) 25 Cal. 9, on which reliance has been placed by Sulaiman C.J. in the case noted above. "But it would be wrong for the Courts," thus observed their Lordships,

on a point of this kind to attempt to put their own interpretation on the Quran in opposition to the expressed ruling of commentators of such great antiquity and high authority" (as the *Hedaya* and *Fatawa Alamgiri*).

So far as the question before us is concerned, the *Fatawa Alamgiri* which is undoubtedly regarded as a work of high authority in India has definitely adopted the view of Imam Mahomed in preference to that of Abu Yusuf. The law on this point is thus stated in *Fatawa Alamgiri*:

A person having made a wakf of his property and after having transferred it to the curator (Kyyum) desires to take it back from his hands; if he made a condition for himself in the wakf that he should have power to discharge the curator and take back the property, in that case he may do so according to Mahomed and not otherwise. But according to Abu Yusuf he may do so (in either case, i.e., whether he has reserved the power or not). And the Mashaikh (jurist) of Balkh decided according to Abu Yusuf and the jurist Abu Lais has adopted the same view. The Mashaikh of Bokhara decided according to the rule of Mahommed and the fatawa is thereon; so in the *Muzmirat*" (Ameer Ali, *Mahomedan Law*, 4th Edn., page 458).

6. The same view is accepted by the author of *Radd-ul-Muhtar* who explains that according to Abu Yusuf the mutwalli is taken to be a deputy of the wakif and is consequently removable by the latter at his option, whereas according to Imam

Mahomed the mutwalli is a deputy of the beneficiaries and consequently the wakif has no power to discharge him unless he reserved such power at the time of dedication (Radd-ul-Muhtar, vol. III, p. 63; see also Ameer Ali, 4th Edn., pp. 458-9). A question, very similar to that which arises in the present case, has been discussed in Surrat-ul-fatawa and certain passages from this work which have been quoted by Ameer Ali will demonstrate conclusively that the opinion of Imam Mahomed has been generally followed by later writers. The passages are as follows:

In the chapter of wakf in the Khazanat-ul-Fatawa it is stated that the Sahib-ul-Manah (the author of the Manah-ul-Ghuffar) was asked about a deed of wakf in which there was a condition to the effect that the wilayet of the trust should appertain only to the wakif's male descendants, but now a deed has been discovered bearing a prior date, in which the towliat was given to his male as well as female descendants; the question was which deed should be acted upon (in regard to the towliat). The Sahib-ul-Manah answered, if the wakif in the first deed at the time of dedication reserved to himself the power of altering any of the provisions regarding the management, etc., of the wakf, in that case the second deed should be acted upon, that is, the deed in which the towliat is restricted to his male descendants. But if he reserved to himself in the original wakf no such power, in that case the first deed of wakf, viz., in which there was no restriction, should be acted upon." (Ameer Ali, 4th Edn., p. 437).

7. Bailee's Digest of Mahomedan Law which is based primarily upon Fatawa Alamgiri adopts the view that reservation of power is necessary before the wakif can discharge an administrator appointed by him when he created the wakf for his lands (Bailee, 2nd Edn., page 601). R. Wilson in his Anglo-Mahomedan Law lays down the law in the following manner:

A mutwalli once lawfully appointed cannot be removed except by the Court; not even by the founder himself unless the power of removal was expressly reserved in the deed of appointment." (R. Wilson's Digest on Anglo-Mahomedan Law, p. 132.)

8. If we now come to judicial decisions, we find that the few decisions which we have got so far are all in one way and accept the view propounded by the compilers of Fatawa Alamgiri. In *Hidaitoonnessa v. ("70) 2 N.W.P.H.C.R. 420* the question arose as to whether a man who had devoted property to charitable uses and appointed a trustee or manager, could at his pleasure take the property back from the trustee. The parties were governed by Shia law which has no express provision on this point. Reliance was however placed on the view expressed in Fatawa Alamgiri which was adopted by Bailee in his digest and also on the opinion of Macnaghten which was in identical terms, and it was held that unless the donor reserved to him the power in express words, he had no authority to take back the property from the trustee appointed by him. This case was decided in 1870. Two years before that the Madras High Court expressed the same view in *Gulam Hossein v. Aji Ajan. ("68) 4 M.H.C.R. 44*. It is true that in this case the

mutwalli was a trustee having hereditary proprietary right and consequently was not removable as an ordinary mutwalli. Yet an additional reason was given by the Court in support of the decision and that was, that the power of removing the trustee was not reserved by the grantor at the time of endowment. In a recent case decided by the Full Bench of the Oudh Chief Court *Mt. Rahiman v. Mt. Baqridan* ('36) 23 AIR 1936 Oudh 213, one of the questions referred to the Full Bench was

whether any change in the terms of the wakf or in the personnel of the mutwallis can be made by the wakif where no such power has been reserved by him in the deed of wakf, after the wakf had been completed?

9. The Judges held that it was settled law that a wakif was not under the Mahomedan law empowered to make an alteration in the terms of the wakf unless he reserved such powers to himself. It is not, we think, proper in the face of these clear authorities to go back upon the views which have been accepted in India since the days of *Fatawa Alamgiri*, merely on an abstract discussion of the relative authority of the two great exponents of Hanafi law. The result, therefore, is that the appeal is allowed, the decision of Henderson J., is set aside, and that of the Courts below restored. The plaintiff will have a decree in terms of that made by the trial Court and will have costs of all Courts.

Ellis, J.

10. I agree