

(1932) 06 CAL CK 0023
In the Calcutta High Court

(Syed) Zainuddin Hossain and Others APPELLANT
Vs
(Moulvi) Muhammad Abdur Rahim and Others RESPONDENT

Date of Decision : 01-06-1932

Acts Referred:

Citation : AIR 1933 Cal 102 : 140 Ind. Cas. 799

Judgement

1. The relationship of the parties who figure in this case will appear from the following genealogical tree:

MOHAMED ISMAIL _____ |
_____ | | | | Mohamed Israil Mohammad
Mohammed Fatema Bibi Azimunnessa (predeceased his Ibrahim Abdur Rahim
(pro forma Bibi m, Syed father) plaintiff). defendant 5). Tajammal | Hossein
Mohamed Gous | _____ |
_____ | _____ | | | |
Syed Zainuddin Syed Sharfuddin Mt. Fakherunnessa Mt. Zohra Khatun Hossein
Hossein Bibi (pro forma (defendant 1). (defendant 2). (defendant 3). defendant
4).

2. The plaintiff's case shortly put was the following: that his father Mohammed Ismail, who owned considerable properties in and near about Calcutta built a mosque at No. 21, Ismail Street, and dedicated it as a place of worship for the Mahomedan public; and for the upkeep of the same he also, by a deed of wakfnama dated 17th January 1864 dedicated, amongst other properties, premises No. 20, Ismail Street, which consisted of some land with buildings standing thereon; that the said Mohamed Ismail acted as muttawali during his lifetime, that on his death his son Mohamed Ibrahim, and on the death of the latter the plaintiff came to be muttawali; that during the minority of the plaintiff, Syed Tajammal Hossein, father of defendants 1 to 4, who was the husband of the plaintiffs' sister Srimati Azimunnessa Bibi, managed the properties on his behalf; that by lease and license of the plaintiff, his two sisters, viz., Srimati Fatema Bibi and the said Srimati Azimunnessa Bibi, lived with their respective families in

pertain rooms in the said premises No. 20 Ismail Street; that the said Azimunnessa Bibi died in 1915, and since her death her children, defendants 1 to 4, were allowed permission by the plaintiff to remain in occupation of certain rooms in the said premises which were described in the schedule to the plaint, and in 1916, defendant 1 agreed to pay Rs. 5 as rent for an outer room which he also came to occupy; and that the plaintiff as muttawali of the wakf served a notice on the defendants to vacate the rooms in their possession, but the defendants set up a claim to retain possession thereof. It was said in the plaint that the pro forma defendants 4 and 5 did not question the title of the plaintiffs and on the contrary expressed their willingness to vacate the rooms in their possession, and so no relief was claimed as against them.

3. The defence was that no valid wakf was created by Mohammad Ismail and at any rate the wakf which he created was never acted upon by him; that soon after the wakfnama he himself converted premises No. 20 Ismail Street, into a family dwelling house; that he executed a will before his death; that on his death the heirs executed an ekrarnama as amongst themselves and partitioned the properties left by him; that by the ekrarnama it was agreed that the said premises would be used as a family dwelling house by his heirs; and that having acquired the right so conferred by the ekrarnama the father or the defendant made extensive addition and alterations at his own expense. Occupation of the heirs under the leave and license of the plaintiff, as well as the lease at a rental of Rs. 5 were denied. The Subordinate Judge having decreed the suit defendants 1 to 3 have preferred this appeal.

4. Before dealing with the questions raised a few more facts require to be stated. By the wakfnama executed on 17th January 1864, Mohamed Ismail dedicated two plots of land, Nos. 393 and 394 said to comprise 1 bigha 4 cottas of land together with certain structures. He constituted himself the first muttawali and reserved to himself the right to appoint either one of his heirs or a stranger as muttawali to act after him. He provided that:

If during my life-time I do not appoint anybody as muttawali either from amongst my heirs or outsiders, then out of my heirs, first of all out of my male heirs, my sons, should they be competent or honest, or otherwise one of them (my other heirs), who may be competent or honest, shall carry out the duties of the towliat.

5. He directed that after defraying the expenses detailed, whoever would be mutwalli would get a remuneration not exceeding Rs. 10 per month.

6. It appears that Muhammad Ismail made a will on 24th June 1875. The will is not forthcoming and it is not possible to say if and to what extent it interfered with the wakf. It then appears that after the death of Muhammad Ismail and on 30th June 1876 an ekrarnama was executed. The parties to this document were: (1) Mt. Sharfunnessa, the widow of Muhammad Ismail, for self and as mother and guardian of her minor son Abdur Rahim; (2) Muhammad Ibrahim, son of

Muhammad Ismail; (3) Fatima Bibi; and (4) Azimunnessa Bibi. It was stated in this document that Muhammad Ismail had built a mosque and had dedicated three plots of lands, Nos. 383, 393 and 394 not the last two plots only as in the wakfnama, and the first plot (containing 13 cottas of land) and had divided his house properties in Gardener's Lane and European Asylum Lane amongst the executants, his heirs, by virtue of the will dated 24th June 1875. It was stated further that the heirs agreeing with one another thought it better to perform all acts according to the desire of their deceased ancestor and that they accordingly made certain stipulations the more important of which, to quote the words of the deed, were the following:

1. We by this deed declare that we shall in compliance with the will and towliat, be bound by the recitals in this deed, that is to say, our claim in the capacity of heirs respecting the lands bearing holdings Nos. 383, 393 and 394 with the brick-built houses relating to the wakf shall not be valid.

2. We, Muhammad Ebrahim, Muhammad; Abdur Bahim and Muhammad Gholam Gous shall remain mutwallis thereof, but during the minority of Muhammad Abdur Bahim and Muhammad Gholam Gous all the affairs relating to the trust shall be conducted by me Muhammad Ebrahim.

3. After defraying the proper and necessary expenses of the wakf, whatever balance out of the income of the wakf property will be left shall be divided equally amongst us the three mutwallis monthly by way of remuneration,

4. None of the heirs or mutwallis shall have any claim to the right of direct or exclusive possession of the particular dwelling house No. 20 nor shall any of them have the right to prevent, any other from residing therein or occupying it for residence. On the other hand excepting the right of transfer, etc., we the heirs and the mutwallis shall always have equal right of residence. All the heirs and mutwallis shall equally be bound to do all improvements and repairs with regard to the said house.

5. Whatever debts are due by the said deceased ancestor shall be paid according to the details given below. The details given are that Muhammad Ebrahim should pay Rs. 229, Muhammad Abdur Bahim Rs. 173, Fatima Bibi Rs. 291 and Azimunnessa Bibi Rs. 177, that is to say Rs. 1,070 in all.

7. Now, one of the issues framed in the suit in view of the pleadings of the parties, was:

Was the wakfnama acted upon ? Is it a valid and binding document ? Can the defendants raise this question ?

8. The intention, as far as one can gather, was on the part of the defendants to challenge the validity of the dedication itself and to assert that it was not operative because the wakf himself did not act according to its terms; and on the other hand on the part of the plaintiff to deny the right of the defendants to raise these questions. In the letter (Ex. C) which was written by the defendants

solicitor in answer to the notice dated 12th June 1930 calling upon them to vacate by 30th June 1930, it was said:

They (i.e., the defendants) state that they are occupying a portion of the premises No. 20 Moulvi Ismail Street, as heirs of the wakf and they have every right to do so. A reference to the wakfnama and the deed of confirmation of the said wakfnama dated 30th June 1876 will convince you of the fact. Your allegation that they are occupying a portion of the said premises with your client's leave and license is without foundation and my clients totally deny the same.

9. It is clear therefore that the defendants claim at that time was based upon the wakfnama and the ekrarnama, which purported to confirm the wakf and not to dispute it. It is quite true that in the written statement, substance of which has been already quoted above, the validity of the original dedication and the operative character of the wakf were challenged; but it is obvious that such a position is not consistent with the letter Ex. C.

10. Be that as it may, when the issue has been tried and decided, we think we should express our view on it. The original dedication does not seem faulty in any respect. The wakf went through the formality and the procedure of having the deed registered. There is nothing to indicate that it was not executed with the bona fide intention of creating a wakf. The intentions of the settler have to be gathered primarily from the terms of the deed, though attendant circumstances may be looked into if the intention is not apparent or clear from such terms, and subsequent circumstances also, but only if and so far as they throw any light on such intention: see *Sm. Masuda Khatun Bibi Vs. Mahomed Ebrahim*, and the cases referred to in it. According to Abu Yusuf whose tenets hold the field so far as Bengal is concerned [*Bibi Jinjira Khatun and Others Vs. Mahomed Fakirulla Mea and Others*,] the wakf becomes absolute and binding on the mere declaration of the wakf, and on such declaration being made his rights in the properties which form the subject-matter of the declaration become extinguished at once: *Debendra Nath Sadhukhan and Others Vs. Naharmal Jalan and Others*, In the case of AIR 1927 191 (Privy Council) their Lordships of the Judicial Committee have observed:

Under the Act (meaning the Wakf Validating Act, 1913) a wakf is not rendered invalid merely because it appears that the main object of the settlor was to make a settlement of his property on his family rather than to devote it to what are understood as charitable purposes, whereas with regard to a wakf created before the passing of the Act the test still is, as laid down by the Board in *Ahsanulla Chowdhury v. Amar Chand Kundu* (1890) 17 Cal 498, *Mujibunnissa v. Abdur Rahim* (1901) 23 All 233, *Bamanandan Chettiar v. Veva Levvai Marakayar* AIR 1916 PC 86 and *Solehman Quader v. Saliam Ullah Bahadur* AIR 1922 PC 107, was there a substantial dedication of the properties included in the wakf to charitable purposes. The test may sometimes be difficult of application and in applying it, the Courts especially, since the passing of the Act, will not be

disposed to construe the provision of the deed too strictly; but still the question must remain whether the properties included in the wakf have been substantially dedicated to charity, or whether they have been put into wakf by the settlor with the real object of effecting some non-charitable purpose,. such as, for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Mahomedan law of succession.... The law as laid down by the Board is that the properties must be substantially dedicated to charity, and not... that the gift to charity should be substantial.

11. Judged in the light of these tests, the materials placed before the Court do not suggest that the wakf was anything else than a valid one. Once this is found, it is wholly immaterial whether its provisions were carried out or not, for that is a matter of breach of trust only. In so far therefore as it has been contended that the wakf himself did not act according to the terms of the wakf, or that he subsequently converted the premises No. 20, Ismail Street, into a family dwelling house for himself or his heirs or that he disposed of some of the properties of the endowment as if they were personal properties of his own, allegations even if proved would not affect the validity or operative character of the wakf which in our opinion was in its inception a good Mussalman Wakf. In our judgment, no claim of the defendants based on the position that the premises was not a property of the endowment, but a personal property left by Muhammad Ismail can possibly succeed.

12. Subsidiary to the contention just dealt with, it has been argued that the wakif by the will which was subsequently executed interfered with the wakf. Once it is found that the wakf was valid and operative, even the wakif himself had no power to interfere with it; but it is not at all clear that he, in fact, did so. The will as already stated is not forthcoming. It is very likely that it is being withheld by the plaintiff and so a presumption may not unreasonably be drawn against them that if produced it would have gone against some part of his case. The secondary evidence that has been sought to be given of its contents by certain witnesses is not of a convincing character at all. In a conveyance executed by the plaintiff in 1891 in respect of premises No. 19, Gardener Lane, it was recited that Muhammad Ismail being absolutely seized and possessed of the Said premises had executed a will on 24th June 1875 by which he had partitioned and divided his real estate amongst his widow and children, and that after his death the said widow and children had amicably divided and partitioned the said estate amongst themselves by an instrument of partition dated 30th June 1876. The plaintiff's evidence betrays an anxiety on his part to deny all knowledge of everything. He deposed thus:

I am not aware of any will of my father. No will of his is with me. I am not aware of any ekrarnama, I sold the property No. 19, Gardener Lane. In that respect I relied upon my brother-in-law Syed Tajammal Hossein, father of defendants 1 to 4, for everything I did as I was directed by him. I cannot understand English documents. He dictated what was recited in the kobala. He told me that

everything was all right. So I accepted it as correct. I was not aware of its contents. I do not know that in this deed any reference to the will was true.

13. It is evident that these denials are not true and that they must have been made with an ulterior motive. But even then it cannot be inferred from them or from what was said in the conveyance that the will in any way concerned the wakf properties. On the other hand the avowed object of the ekrarnama and the basis on which it proceeded was to leave the endowment untouched. And further, the defendants, if they rest their case upon the ekrarnama, as they most undoubtedly do, must be held bound by the admission contained in it as regards the validity and operative character of the wakfnama. This being the position, what has to be considered next is whether the plaintiff should be held bound by the ekrarnama. It has been contended on behalf of the defendants, in the first place, that the parties to this deed are bound by its terms inasmuch as it embodies a family settlement arrived at bona fide. It may be assumed from what is to be gathered from the terms of the deed, though there is no direct evidence worthy of belief to that effect, that there was an apprehension of dispute, that the arrangement was made bona fide with the object of removing that dispute which might induce a litigation the result of which was uncertain, and that there was a policy of giving and taking pursued in arriving at that settlement. This is apparent from the recitals in the deed itself; Muhammad Gous being given the status of a mutwalli, provision being made as to who should act as guardian of the mutwallis as minors, and arrangement being made as to which party was to discharge what share of the debts.

14. In these essentials the arrangement satisfies the requirements of a bona fide family settlement. But such settlement could not possibly affect any properties which were not the properties of the family but were the properties of an endowment validly created, the ownership of which belonged not to the parties to the settlement but to the Almighty. Under the guise of a family arrangement a party cannot enter into a transaction which he is not under the law competent to do and which is beyond his disposing power, *Indra Narain Manna Vs. Sarbasova Dasi*, . It has next been contended that the plaintiff is estopped from questioning the settlement embodied in the ekrarnama because the plaintiff himself came in as a mutwalli by reason of the terms of the ekrarnama, On behalf of the plaintiff it has been argued that no estoppel can possibly arise as against the plaintiff because the plaintiff was a minor at the date of the ekrarnama and whatever arrangement may have been agreed by his mother as her guardian is not binding on her, and reliance in this behalf has been placed upon the decision of the Judicial Committee in the case of *Imambandi v. Mutsaddi* AIR 1918 PC 11. As far as the last mentioned contention is concerned it is quite true that under the Mahomedan law a mother has no power as de facto guardian of her infant children to alienate or charge their immovable property. But it cannot be disputed that if the minor on coming of age ratifies the arrangement or accepts a benefit under it, he would be estopped from questioning its validity. A more sound position for the plaintiff to take would have been to say that even though

there might be an estoppel personal to the plaintiff by reason of such benefits as he might have received for himself under the ekrarnama, and which he would not be entitled to under the towliat, such estoppel can only be personal to the plaintiff and can in no way be operative as against the endowment.

15. Under the wakfnama the plaintiff was to be a mutwalli if he was competent and honest and under the ekrarnama he became one of the mutwallis. It is possible that there was no objection to his being the mutwalli on the ground of want of competency and honesty, and in that way he, by being appointed mutwalli under the ekrarnama, got nothing under it to which he was not entitled under the wakfnama. But, that he obtained certain advantages under the ekrarnama which he had not under the Wakfnama, cannot be seriously disputed for, as far as can be gathered now, it removed a dispute as to mutwalliship; it divided the liability for the debts and it enhanced the remuneration for the mutwalli which in the absence of the accounts, which must be with him and which he has not filed, must be taken to have been drawn by him since then, That there may be an estoppel personally to that extent as against the plaintiff is a matter on which we entertain no doubt. It has been argued that there can be no estoppel where both the parties made an agreement with full knowledge of the real facts. This proposition cannot be disputed. But the defendant may say that though the property was wakf property and they were aware of that fact they were not aware that an arrangement of the character embodied in the ekrarnama was outside the competency of the mutwalli to make. Of course, the defendants rested their case upon a much higher footing, alleging that they and their father had spent money on improvements and repairs and the plaintiff has reaped the benefit thereof, but in this respect their case has failed.

16. This leads us to a consideration of the next question that arises, namely whether this estoppel which is personal to the plaintiff precludes him from suing to recover possession on behalf of the endowment. In the case of *Juggut Mohinee Dossee v. Sookha, Mony Dasi* (1870) 14 MIA 289 their Lordships of the Judicial Committee held that a former abuse of trust in another instance could not be pleaded against a trustee who sought to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he was seeking to protect the property, though it would be a reason for excluding him from administration of the property as shebait. The question of estoppel did not arise in that case. Their Lordships observed:

The Court could not with propriety say: "We will decline to protect the property and leave it further exposed to loss," and decline to make a declaration that it is trust property merely because they would not trust the plaintiff with its administration.

17. Their Lordships made a decree declaring that the properties were and continued dedicated to a trust, but made no decree for possession which had been prayed for and further declared that the decree was to be without prejudice to any further suit or proceedings for the enforcement of the trust declared on

the appointment of a proper shebait. It has been contended before us on behalf of the plaintiff that it is always open to a shebait or a trustee to sue for recovering trust property alienated by himself and that there is nothing to stand in the way of his succeeding, in the suit once he establishes that the alienation was unauthorised and beyond his powers. The following observations in *Narain Das v. Abdul, Rahim* AIR 1920 Cal 379 (at p. 879 of 47 Cal.) have been relied on in this connection:

A mutwalli is a mere manager and in the case of public charitable endowment, such as the present the legal ownership of the property dedicated is the Divine Being or in the charity Created in his name. A transfer by a mutwalli who assumes to deal with the trust property as if he were the true owners, in breach of his duty and in fraud of the trust reposed in him, is ultra vires and may be avoided by timely proceedings taken for the purpose.

18. The observations do not support the position contended for, and it will be seen that the case in which they were made was a suit by the successor of a mutwalli who had made the alienation. Reference in this connection has also been made to the decision of the Patna High Court in the case of *Muhammad Fahinmul Haq v. Jaggat Ballaw Ghosh* AIR 1923 Pat 475 (at p. 400 of 2 Pat) where it has been said:

The general principle in these cases is that where the transfer is void in law no question of equity as between the transferor and the transferee can arise.

19. Whether the principle can be laid down in so general terms is a matter which we need not discuss. But we are not prepared to hold that a Court is so powerless as to feel compelled in all cases to place the property again in the hands of the same delinquent mutwalli or shebait who had previously committed a breach of trust in respect of it and who now seeks to avoid the consequences of his own act, even though proper defences are taken resisting such a course. That a trustee of an endowment may under circumstances be estopped from questioning his own breach of trust is a proposition that cannot be denied: *Sidhu Sahu v. Gopi Charan Das* (1913) 18 IC 969. It is unnecessary however to pursue this matter any further because it has not been pleaded in this case on behalf of the defence that by virtue of any misconduct on the part of the plaintiff he is disentitled to recover possession of the properties in his capacity as mutwalli. There was no plea of the character, and there was no issue raised in order to determine whether and if so to what extent the plaintiff was debarred from suing for possession in his capacity as mutwalli, nor any issue as to what sort of a decree, if any, he was entitled to in the circumstances of the case. In our judgment therefore, in so far as the present case is concerned, there is nothing in the nature of a bar to stand in the way of the plaintiff getting a declaration to the effect that the property in suit is the property of the endowment in respect of which he is the mutwalli and also an order that the said property be restored to the endowment. In other words, in our opinion, the plaintiff is entitled to succeed, in his claim for khas possession, if the defendants fail to establish their

right to remain on the premises.

20. So far as this right is concerned the material on which the defendants rely is the ekrarnama; the wakfnama gives them no such right. So far as the ekrarnama is concerned, it is impossible to read its terms as creating any right in favour of anybody except the heirs of Muhammad Ismail who were parties to the deed. We have examined its clauses as carefully as possible, but we can find no means of construing it as creating any right whatever in favour of any descendants of the said heirs. Unless such an interpretation is permissible the defendants get no benefit from its terms.

21. The last contention of the defendants is, as it must be, that the claim is barred. It has been maintained on their behalf that Article 142, Lim. Act, is the article to apply. As authority they rely on the decision of the Judicial Committee in the cases of AIR 1932 55 (Privy Council) . In that case there was an alienation, a gift, void ab initio and consequent on it a discontinuance of possession of the real owner. In the present case there was no transfer of any interest in immovable property at all but only permission to reside in the premises, and so there was no dispossession nor any discontinuance of possession on the part of the plaintiff; notwithstanding the permission, such possession as the grantor of the leave of license could have, he had in the premises. It has also been argued that the defendants and their predecessors acquired by virtue of adverse possession for over twelve years a limited interest, namely, a right to reside which could not be defeated. One amongst several answers to this contention is that there was never any such right asserted adversely to the plaintiff at any time before the solicitor's letter Ex. C. In our opinion the article applicable to the case is Article 144 of the Act, and time began to run only after the plaintiff's right to khas possession was denied, when only and not before the defendants possession became adverse to the plaintiff. We can find no justification for holding that the plaintiff's claim is barred.

22. We have no option therefore but to dismiss the appeal and uphold the decision of the Court below. As we are not satisfied that the plaintiff really wants the rooms for the purposes of the wakf, and as a certain amount of deferential treatment in respect of the descendants of the founder of the wakf at the hands of the plaintiff, the present mutwalli, is apparent from the very frame of the suit, we would not make any order for costs in favour of the plaintiff so far as the appeal is concerned.