

(1959) 11 MAD CK 0055
In the Madras High Court
Case No : Second Appeal No. 486 of 1957

Thanga Mayil Ammal

APPELLANT

Vs

Pappa alias Fathima Bibi and Another

RESPONDENT

Date of Decision : 07-11-1959

Acts Referred:

Mussalman Wakf Validating Act, 1913 — Section 3

Citation : AIR 1960 Mad 318 : (1960) ILR (Mad) 481 : (1960) 73 LW 85

Hon'ble Judges : Subrahmanyam, J

Bench : Single Bench

Judgement

(1) This appeal arises out of a suit instituted in the court of the district Munsif of Tiruchirapalli, for possession of certain properties alleged by the plaintiff to be wakf properties. The District Munsif granted a decree as prayed for. The second defendant's appeal to the Subordinate judge, Tiruchirappalli was dismissed. The third defendant to whom the second defendant has transferred the property is the appellant in this second appeal.

(2) The property belonged to one Hyder Masthan Sahib. He executed a wakf deed dedicating the property for the use of the Prophet on 12-10-1946. In the document Hyder Masthan said that the property was till then his and would thereafter be the Prophet's. Hyder Masthan declared that he would be the Mutavalli during his lifetime and after his death, the plaintiff, his daughter by his deceased first wife, would be the Mutavalli; and that after her death, the Mutavallis would be her descendants. There was also a direction in the document that, out of the income from the property, fatia should be performed in the name of the Prophet and that 11 fakirs should be fed on His birth-day, that Rs. 5 should be spent for the purpose; that kist should be paid; that the balance of the income should be taken by his daughter and her descendants from generation to generation and that they would have no right to alienate the corpus of the property.

In 1954, the founder executed another deed purporting to cancel the wakf deed

and to settle the property on his second wife, namely, the second defendant. The second defendant made a transfer of the property to the third defendant-the appellant in this second appeal. The suit which has given rise to this second appeal was instituted during the lifetime of the founder, namely, the first defendant. In the plaint as laid, the plaintiff prayed for a declaration that the cancellation and the alienation in favour of the third defendant were void. After the first defendant's death, the plaintiff amended the plaint so as to pray for possession.

(3) Defendants 2 and 3 pleaded that the deed could not take effect as a wakf deed; and secondly that the deed was not intended to be given effect to and had never been given effect to.

(4) The first question for decision in this appeal is whether the deed could not, in law, take effect as a deed of wakf. The religious object which the deed provides for is the performance of fatia and feeding of Fakirs on the Prophet's birth-day; and it was directed by the founder of the Wakf that after his death, the net income from the property should be taken by his daughter and her descendants, who, after his death, would be the trustees of the charity.

(5) On the facts, the case before me cannot be distinguished from the case reported in Syed Ahmed and Another Vs. Julaiha Bivi and Others, . The charitable purposes provided for in the deed of wakf considered in that case were the performance of one Movulthu and one Hattam in the name of the Prophet, one Hattam in the name of Andawar, one Hattam in the name of Meera Ahamed Shakathari and one Hattam in the name of the Wakif after his death. There was a further provision for recitation of mevulth in the name of the Prophet and distribution of food at a cost of Rs. 100.

The total expenses directed to be incurred for the performance of these services amounted to Rs. 160. The annual income of the property was Rs. 1500. The rest of the income was directed to be distributed among the four daughters and their descendants from generation to generation,. In the case before us Rs. 5 amounting roughly to a thirtieth of the income of the property which is given in the plaint as Rs. 150 per annum was directed to be spent on the religious objects mentioned in the instrument and the rest of the income was directed to be taken by the trustees after the Wakif's lifetime, namely, his daughter and her descendants.

(6) It is argued that, since the income other than the sum of Rs. 5 directed to be spent on the performance of fatia on the Prophet's birthday and the feeding of the poor on that day, is directed to be given not to the Wakif's descendants as such but to the Wakif's descendants in their capacity as Mutavallis, the object of that part of the instrument cannot be said to be the maintenance and support of the descendants of the founder of the Wakf. I am unable to agree. The Wakif's daughter and descendants were constituted trustees in order to prevent them effectively from alienating the properties. The document expressly states that

subject to the obligation to spend Rs. 5 on the performance of the charity and to pay the kist, they might utilise the income for their own benefit without any power of alienation.

They are described as trustees in order to make it clear that they have no power of alienation over the properties and are subject to the obligation of performing the charities described in the instrument. Otherwise, the purpose of the beneficial interest conferred on them is not to remunerate them for the services they render as trustees, but to provide for their maintenance and support because they are the descendants of the Wakif. I find that the main purpose of the instrument was to provide for the maintenance and support of the plaintiff and her descendants and that it was a concurrent purpose that Rs. 5 a year should be spent on the charity specified in the instrument, namely, the performance of the fatia and the feeding of Fakirs on the Prophet's birthday.

(7) Under S. 3 of the Mussalman Wakf Validating Act (VI of 1913), it is lawful for a Muslim to create a wakf which, in all other respects, is in accordance with the provisions of Mussalman law, for the maintenance and support of his children or descendants provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. We have before us a case where a wakf is created for the maintenance and support of the descendants of the Wakif and at the same time for a purpose recognised by the Mussalman law as a religious purpose of a permanent character.

But there is no express provision in the Wakf deed that, in the event of the plaintiff failing to have descendants, that is to say, the plaintiff's line of descendants becoming extinct, the entire property will be applied for the other purpose stated in the instrument, namely, the performance of fatiha and the feeding of the poor on the Prophet's birth day. It is argued, that since there is no express provision about the reservation of the ultimate benefit for the poor or for any purpose recognised as religious, the Wakf fails even on the terms of S. 3, of the Act. But the proviso to S. 3 does not require that the reservation of the ultimate benefit should be by express terms found in the document. Such reservation may be implied.

The case already cited is authority for the provision that a concurrent and immediate gift for permanent charitable objects in a wakf created in favour of one's own children and descendants may be held to warrant the implication of an ultimate trust for those objects on the failure of descendants. I hold that, in this case, the reservation in favour of the religious object, namely, the performance of fatia and feeding of Fakirs on the Prophet's birthday on the failure of the line of plaintiff's descendants, may be implied and that the Wakf is valid under the Muhammadan law.

(8) The next point is whether the instrument of wakf was intended to be real and

was acted upon. It is said that the first defendant had debts and that he executed the wakf deed and other deeds on the same day with a view to defraud his creditors. If it was intended to defraud creditors without being executed nominally, then the deed would be voidable at the instance of the creditors. No creditor has sought to avoid it. Hence the question of intent to defraud creditors does not directly arise for consideration. On the other hand, the deed may be executed nominally without any intention to transfer title to the charity or to the persons mentioned in the deed.

On that question, it has to be noted that patta was transferred in favour of the charity and continued to stand in the name of the charity until 1954. The defence witnesses say that fatia has not been performed and fakirs are not being fed as stated in the document. On the other hand, the evidence of P.W. 1 is that Fatia was being performed and fakirs were being fed, even before the instrument was executed and that the charity was continued after the execution of the document. I accept the evidence of P.W. 1 on the point. but even if the charity was not performed, that could not invalidate the wakf which had been validly created. I see no reason to take the view that the wakif did not intend the instrument to take effect. I hold that he intended to extinguish his own title and make the charity--the owner of the property.

(9) The appeal is dismissed with costs. No leave.

(10) Appeal dismissed.