Privy Council Appeal No. 80 *of* 1934

Oudh Appeal No.

Mahabir Prasad and another - - - - *Appellants*

v.

Syed Mustafa Husain and others - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH MARCH, 1937.

Present at the Hearing:

LORD THANKERTON.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

On the 13th April, 1918, one Mir Fida Husain, a Mussulman of the Asna-Ashari sect of the Shias died leaving him surviving a widow, six sons of whom two were minors, and three daughters of whom two were minors. The appellants are judgment creditors of three of the sons—viz., Mohammad Askari Hasan Askari and Baqar Mehdi—who were all of full age at the date of their father's death. In execution of money decrees against these sons the appellants in 1928 attached certain of the properties left by Mir Fida Husain, in consequence whereof they were impleaded as defendants 1 and 2 in the suit out of which this appeal arises.

This suit was brought on 17th October, 1929, by two of Mir Fida Husain's daughters seeking to establish that the whole of the properties left by their father, including the properties attached by the appellants, were wakf property. The learned Subordinate Judge has held that the shares (in all thirteen twentieths) which would ordinarily be inherited by the widow, and by the four sons and one daughter who were of age at the time of their father's death, had become wakf property; but that the remaining seven twentieths were not included in the wakf. The Chief Court of Oudh has held in effect that the wakf extends to the whole of the property left by Mir Fida Husain, which may be taken as worth about a lac of rupees and to have produced a gross income of over Rs.13,000 per annum leaving a balance, after payment of land revenue, of Rs.7,766.

A week or ten days before his death on 13th April, 1918, Mir Fida Husain, as both Courts in India have found, made a statement, the precise effect of which is now in question. It is spoken to by five witnesses, two of whom gave evidence on commission, and three at the trial before the learned Subordinate Judge. All his heirs are said to have been present when the statement was made, but though the five witnesses include a son-in-law a nephew and a niece, none of his children have given evidence. Three witnesses at least are of good position—a Deputy Collector, a Hakim and an Honorary Magistrate. In fact after his death —in August, 1918—Musammat Azmat-un-nisa, the widow, was, with her sons' consent, recorded by the revenue authorities as entitled for her life to the whole of her late husband's properties. Two and a half years after the death —viz., 16th December, 1920, a registered deed was entered into by the members of the family in the following terms:

> Whereas it was the desire of our father, the late Mir Fida Husain, that he should make a *waqf* of his property in favour of his children so that the property be saved from being wasted and with this particular object in view, the deceased got a draft prepared but owing to illness and the severity of his maladies, he could not get an opportunity to complete the deed and therefore a few days before his death, the deceased expressed his desire to all of us, his children, and made a will to us to the effect that after his death, mutation in respect of the entire property should be got effected in favour of our mother as absolute owner in lieu of her dower debt and he directed our mother to make a *waqf* in favour of children in respect of the entire property as her own; whereas after the death of our deceased father, the mutation of names was accordingly got effected in favour of our mother; but in the application for mutation, owing to a misapprehension of our intention, some such words came to be entered as seem to show that the ownership of our mother is limited to her life only and whereas this has given rise to complaint and displeasure on the part of our mother so for the satisfaction and the removal of the complaints of our mother, and with a view to enforce the intention and will of our late father, we, the sons of the late Mir Saheb, do hereby affirm and reduce to writing that in conformity with the oral will of our late father, our mother, Musammat Azmat-un-nisa Begam, after the death of our father, has become the absolute owner of the entire assets of our late father and that we have no right in his assets. We, Musammats Amir Bano, Shabbir Bano and Safdari Bano, the daughters of the late Mir Saheb, do hereby declare and reduce to writing that under the will of our deceased father, our mother, Musammat Azmat-un-nisa Begam has become the absolute owner of his entire assets; that under custom we, the daughters, have no right to any legal share as against our aforesaid brothers nor do we wish to obtain any such right in the face of our late father's oral will and his desire and that our mother, Musammat Azmat-un-nisa Begam, is owner of the entire estate left by our deceased father, a detail whereof, so far as the immovable property is concerned, is given below. Wherefore these few presents have been reduced to writing by way of a deed of relinquishment so that it may serve as an authority and be of use when required.

To this deed the widow and all the children whether major or minor were made parties, the only notice taken of the disability of minors being that the eldest son signed as guardian for Asqhar the youngest. The deed denominates itself "dastbardarinama" which is translated

"deed of relinquishment". There was in fact no custom to exclude daughters from inheritance. The question whether and to what extent the recitals in this deed can be relied upon as correctly representing the nature and effect of what was said by Mir Fida Husain, is an important question in the present case. The trial Judge was of opinion that the deed gives the import of what was said by Mir Fida Husain, but wrongly represents his speech as a will though it was intended only as advice to his heirs as to how they should act after his death.

On the 28th January, 1922, the widow, Musammat Azmat-un-nisa, executed a deed of wakf of which the opening recital was in these terms:

> Whereas my deceased husband died leaving the following property worth about a lac of rupees and after him, according to his desire and will, the said property came into my ownership and possession in lieu of dower debt; whereas his other heirs, out of their own free will and consent, having executed a deed of relinquishment, dated 16th December, 1920, registered on 20th December, 1920, in respect of the said property, admitted my ownership and thus I am the absolute proprietor in possession of the said property and enjoy all proprietary powers with regard to the same, whereas the whole of the said property is free and immune from all sorts of transfers, like sale, mortgage, gift, etc., and I wish to make a perpetual *waqf* of the said property in favour of children in conformity with the wish and will of my husband, so that the said property, as a memorial of my late husband, having remained free and immune from all kinds of transfers, his children should, in perpetuity, be profiting from the same while a portion of the profits thereof from this very time and the entire profits, in the absence of the existence of children, should continue to be spent on charitable purposes in perpetuity, whereby I and my deceased husband should continue to be benefited from such a religious *waqf* (spiritually).

By the terms of this wakfnama, it was provided that the lady herself should be the first mutwalli; that after her the office should go to the eldest in the male line and in default to the eldest among the daughters' male issue; that Rs.120 per annum should be paid to an old servant; that the marriage expenses of daughters should be met out of the income; that Rs.560 should be spent annually on religious ceremonies; that certain specified houses should remain in the occupation of the sons and their successors; and that the produce of the lands held in khas should be divided in a certain way and on certain terms.

The main destination of the profits was that each daughter should get an allowance of Rs.300 per annum and that the balance of the income should be divided equally among the sons for their maintenance. Upon the death of a son or daughter, his or her male issue was to get in equal shares what he or she would have received if alive. On the death of any male recipient without leaving male issue his widow and thereafter his daughters were to take his share; on failure of these it was to be divided among the other male issue of the settlor's son to whose branch he had belonged; and in default thereof was to go to the other sons of the settlor or their representatives. There was an ultimate destination of the profits, in the absence of any person

entitled under the conditions of the deed, to the effect that " they shall be spent upon such educational enterprise as might benefit students of the Asna Ashari sect."

A *wakf-alal-aulad* having thus been made of Mir Fida Husain's property, it was acted on for two years, more or less; but on 21st October, 1924, five of the sons sued the widow and the sixth brother for cancellation of the deed of wakf and partition of the property. The defendants consented, a preliminary decree for partition was passed on 13th February, 1925, and after final decree on 22nd October, 1925, the property ceased in September, 1926, to stand in the name of the widow as mutwalli, and was recorded in the names of the widow and the sons according to the shares stated in the partition decree. The daughters had been altogether ignored in this partition suit, but one of them Musammat Shabbir, unsuccessfully objected in the mutation proceedings, and filed a civil suit on the 10th September, 1926, asserting in the alternative her rights by inheritance and her rights under the wakf. This suit having been dismissed in two Courts was nevertheless still pending on appeal before the Chief Court on 7th May, 1929, when it was compromised on the basis of the validity of the wakf.

Meanwhile the widow had died on 26th January, 1929, and certain of the sons had incurred debts secured and unsecured exceeding in all half a lac of rupees, and were in trouble with their creditors. Among other efforts to protect their rights, on 18th March, 1929, Musammat Amir, and on 11th May, 1929, her sister Musammat Shabbir, filed objections to the execution sale of certain of the properties left by their father which had been attached by Mahabir Prasad (the first of the present appellants) in execution of a decree against two of her brothers, Mohammad Askari, and Hasan Askari. The objections of both sisters were disallowed: hence the present suit.

The first question is as to the statement made by Mir Fida Husain shortly before his death and the effect thereof. Three views seem on the evidence to be possible. First, the view of the Chief Court that he made an oral testament for a wakf (*wasiyat bil wakf*). Second, the view of the trial Judge, that what he said was not intended as an oral will but was advice to his family to secure the protection of a wakf by first constituting his widow as full owner in lieu of her dower debt so that she could make a wakf. Third,—an intermediate view—that what he said amounted to an oral will purporting to give all his property to his widow in lieu of her dower, it being left to her to make her own wakf of her own property but without any attempt to impose a legal obligation so to do.

Mir Fida Husain was a practising lawyer of Rae Barelli and had studied the Wakf Validating Act (VI of 1913). The evidence is that he had intended to make a *wakf-alal-aulad* himself and there is some evidence that a draft deed had been in part prepared. Before he had completed his scheme he found himself as a Shia in the position that without the

consent of his heirs he could not deal with more than one-third of his estate. The doctrine of *marz-ul-maut* (death illness) prevented his doing so by gift and the ordinary law prevented his doing so by will. Consent of the heirs (if sui juris) could, however, be given in the case of a will before or after the testator's death. Whether or not it was open to him in spite of death illness to make a gift to his wife of the whole of his estate in lieu of dower is a moot point [cf. *Mustafa* v. *Hurmat* 1880 I.L.R. 2 Allahabad 854, *Abbas Ali* v. *Karim Baksh* 1908 13 Calcutta Weekly Notes 160, *Esahaq Chowdhry* v. *Abedunessa* 1914 I.L.R. 42 Calcutta 361. Ameer Ali " Mahommedan Law ", 4th Ed., Vol. I, p. 63, and Tyabji " Principles of Muhammadan Law ", 2nd Ed., p. 814, differ in their views]. Such a transaction, as the cases show, has been treated as a sale: in which view however a registered instrument would be necessary. It is not the case of anyone that he purported to make such a gift inter vivos; and as the evidence proves no such gift this possibility may be discarded. The approach of death made it necessary for Mir Fida Husain to do something and yet impossible to complete anything by his own act. In this dilemma what did he do?

Their Lordships cannot agree with the Chief Court that what he is proved to have said can be regarded as founding a wakf by will whether in the more direct form (wakf bil wasiyat) or, as the Chief Court thought, by testament for a wakf (wasiyat bil wakf). This distinction, much discussed in *Agha Ali Khan* v. *Altaf Hasan Khan* 1892 I.L.R. 14 Allahabad 429 and *Baker Ali Khan* v. *Anjuman Ara Begam* 1903 30 I.A. 94, lost most of its importance by the decision of this Board in the latter case. The distinction is one of form and not of substance as Sir Arthur Wilson therein explained. It is between a will which conveys the property on the death of the testator to the mutwalli as wakf, or at least impresses the property with the character of wakf immediately on the testator's death, and a will which makes a gift of property with a direction to the donee to create the wakf desired, or gives a direction to the heir, executor or other representative to that effect. On the evidence it is clear that Mir Fida Husain intended the property to become vested in his widow as her own property in lieu of dower, though how he intended this result to be brought about is not so clear. This intended result is strong to negative the case of wasiyat bil wakf and the complete absence of detailed instructions as to the provisions of the proposed wakf, and other circumstances point firmly in the same direction. Their Lordships consider that a wasiyat bil wakf is not made out by the evidence.

As already noticed, the trial Judge was of opinion that Mir Fida Husain's statements were at the time of the deed of relinquishment (December, 1920) represented as amounting to an oral will though in fact they were merely intended to point out a device whereby after his heirs had inherited in the ordinary way they should effect what he could no longer

effect himself, a *wakf-alal-aulad*. Accordingly the learned Judge regarded the deeds of 16th December, 1920, and 28th January, 1922, as evidencing and carrying out an agreement made between the widow and her children with the result that it was good so far as regards the children who were of age and wholly void under the Indian Contract Act (section 11) as regards the four who were minors.

Upon a question whether an oral statement amounted to a will the greatest care must be taken and strict proof must be required. The Court must be made certain that it knows what the speaker said and must from the circumstances and from the statement be able to infer for itself that testamentary effect was intended in addition to being satisfied of the content of the direction given. Their Lordships fully agree with the learned Trial Judge that on the question whether the statement was intended by Mir Fida Husain to have testamentary effect the deed of 16th December, 1920, is by no means conclusive. The absence of the sons from the witness box and the inconsistent conduct of so many of the heirs enforce this opinion. The question must be answered primarily upon a scrutiny of the evidence given in this case by persons present when the statement was made, and it is difficult for the plaintiffs to put their case higher than the evidence of their most cautious witness. As to the terms of the actual statement, the nephew and the niece gave evidence which if fully believed would mean that Mir Fida Husain was making an oral will, but the evidence of the Deputy Collector (son-in-law) and the Hakim which is more objective and precise does not necessarily involve any such implication. This is all the more important that Mir Fida Husain was a lawyer unlikely to have been content with an oral will, and very unlikely, if he did decide to make one, to have omitted the most elaborate expression of his intention that his words should be regarded as a solemn testamentary disposition. Their Lordships are accordingly unable to hold that the words used by Mir Fida Husain had any greater effect that the learned trial Judge was satisfied of, and the third of the views abovementioned must like the first be rejected.

The next question for decision is whether the wakf can stand if it has to be regarded as resting upon an agreement to which the widow and the five major children were the parties, the four children who were minors being in no way bound thereby. Both Courts in India have thought that the wakf can on this footing be held valid so far as regards the shares of the widow and the major children. The question has to be answered by examining the particular provisions of the wakfnama of 28th January, 1922, and upon a scrutiny thereof their Lordships are of opinion that the wakf must fail altogether. To apply the provisions of the deed to thirteen-twentieths of the property after seven-twentieths had been taken away by partition would in their Lordships' view produce results which no one intended.

Even if it be assumed that no child whose share was not bound by the deed could take benefit under it, the provisions as to expenditure on religious ceremonies (Rs.560) and servants pension (Rs.120), as to particular houses and groves going to each son, and as to the office of mutwalli would be altered in their operation and effect by the absence of four out of the nine sharers and seven-twentieths of the property. This is emphasised by the fact that what each son is to take is a share in the residue of the income; and also by the fact that the motive of the parties was to carry out the wishes of Mir Fida Husain who never had envisaged a *wakf-alal-aulad* which should not include all his property and all his family. The hopelessness of the attempt to create the intended results by agreement so long as there were minor children explains no doubt the early determination, evidenced by the partition suit of 21st October, 1924, to repudiate the wakf. It must, moreover, be borne in mind that if the immediate dedication of their own shares by the widow and major children was conditional upon the other children doing likewise when they came of age, then the dedication not being absolute was bad altogether [Suraya: Baillie's Digest of Moohumudan Law, 1869, Part II, p. 218]. The result is that the suit fails and must be dismissed.

The Chief Court, on the footing that Mir Fida Husain had made a testament for a wakf (*wasiyat bil wakf*), were of opinion that two minor sons, who on coming of age had refused assent as heirs to this bequest, could change their minds and by assenting make valid what had been void and even sweep away securities granted by themselves. Their Lordships must not be taken to accept this opinion. It was contended that if the compromise of 7th May, 1929, made before the Chief Court in Musammat Shabbir's suit was collusive, then the decree of the District Judge confirming dismissal of her suit became binding upon her as res judicata, but this contention in their Lordships' opinion is erroneous. It was argued before both Courts in India that the wakfnama of 28th January, 1922, was wholly void by reason that Musammat Azmat-un-nisa had provided for herself as mutwalli an allowance of Rs.600 per annum and for other mutwallis Rs.300 per annum only. *Abadi Begum* v. *Kaniz Zainab* 1926 54 I.A. 33 was cited in support of this argument but was in their Lordships' opinion rightly distinguished by the Chief Court and the contention was not pressed at the hearing of this appeal.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of both Courts in India should be set aside and the suit dismissed. The plaintiffs must pay the appellants' costs throughout but may recover one-ninth of such costs from each of the defendants 15 to 21. There will be no order as to any other costs.

(41028—3A) Wt. 8151—17 190 4/37 P. St. G. 338

In the Privy Council

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