*Privy Council Appeal No.* 57 *of* 1941
*Allahabad Appeal No.* 9 *of* 1936

**Zafrul Hasan and others** - - - - - - *Appellants*

*v.*

**Farid-Ud-Din and others** - - - - - - *Respondents*

FROM

## THE HIGH COURT OF JUDICATURE AT ALLAHABAD

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE, 1944

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*Present at the Hearing*:

LORD THANKERTON
LORD WRIGHT
SIR MADHAVAN NAIR

[*Delivered by* LORD THANKERTON]

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This is an appeal from a decree of the High Court of Judicature at Allahabad dated the 21st November, 1935, which set aside a decree of the District Judge of Badaun dated the 6th November, 1929, under which the suit of the plaintiff-respondents had been dismissed. No appearance has been made for the respondents in this appeal.

The principal question is whether a wakfnama dated the 28th June, 1915, is valid and operative. It was executed by Chaudri Salah Uddin, who was original defendant No. 2, and was the father of the present respondents Nos. 1, 2 and 3, who now represent him. Before the Board the validity of the deed was challenged by the appellants on two alternative grounds, vizt. that it was a fictitious and colourable deed, never intended to be operative, but made with the intention to avoid payment of debts, or, alternatively, that Chaudri Salah Uddin, who may be conveniently referred to as the settlor, had become a Shia prior to the making of the deed, and was not authorised by the Mussalman Wakf Validating Act (VI of 1913) to make such a deed.

This alternative contention can be shortly disposed of. Under section 3 (*b*) of the above Act, a person professing the Mussalman faith is authorised, where he is a Hanafi Mussalman, to include among the purposes for which he creates a wakf, provision for his own maintenance and support during his lifetime, or for the payment of his debts out of the rents and profits of the property dedicated. This subsection applies to Sunnis, but not to Shias. This contention, therefore, turns on a question of fact, namely, whether the settlor, who originally was a Sunni, had ceased to be a Sunni, and had become a Shia before the making of the wakfnama, which is expressed as made under Act VI of 1913. The District Judge held, on the evidence, that the settlor was a Shia at the time of execution of the wakfnama, but this finding was reversed by the High on the ground that the documentary evidence was all one way, in that it established at least as late as 1919, the settlor claimed to be a Sunni, and that the oral evidence given in 1928 and 1929 was of very little value to show whether the settlor was a Shia or a Sunni at the time of execution of the wakfnama on the 28th June, 1915. Admittedly, it is for the appellants to establish that the settlor

had ceased to be a Sunni and had become a Shia by the material date. Mr. Khambatta, for the appellants, was unable to suggest any adequate reason for disregarding the documentary evidence, and, in the opinion of their Lordships, it is not necesssary to reject the oral evidence, as its acceptance would not prove the appellants' case, but would merely suggest tergiversation or a mere desire to please his company on the part of the settlor. Accordingly, this contention fails.

Reverting to the first contention of the appellants, it may be well to clear the ground of the references which have been made in the course of the case to certain sections of the Transfer of Property Act. In the first place, Mr. Khambatta admitted that he was unable to maintain that any of the defendants still interested in the suit had not acquired their interests *pendente lite,* from which it is to be inferred that they were aware that the matter was in dispute and cannot avail themselves of sections 41 or 52 of the Transfer of Property Act. Further, under section 53 the wakfnama would only be voidable at the option of the " person so defrauded or delayed " (prior to the amendment of 1929); the deed would not be revocable by the settlor, and would bind him and his heirs. Until so voided the deed remains valid. The case made before the Board was that the wakfnama was merely a fictitious and colourable deed, made with the intention to use it to avoid payment of debts.

As regards the indebtedness of the settlor at the time of his execution of the wakfnama, the District Judge relied on (1) mortgage debts amounting to Rs.26,000, (2) dower debts to his two wives, amounting to Rs.1,00,000 and Rs.1,51,000 respectively, and (3) unsecured debts amounting to Rs.40,000. The High Court held that there was no justification for taking the secured debts into account, as there was no evidence that the security was insufficient and they would not be prejudiced by the execution of the wakfnama, and this finding was accepted by the appellants. The District Judge treated the dower debts as prompt, i.e. already due at the date of the wakfnama, but the High Court held, on the documentary evidence, that they were deferred, and this finding was accepted by the appellants. In 1917 the settlor divorced his second wife, Musammat Asghari Begum, and she thereupon brought a suit for dower, in which she restricted her claim to Rs.50,000, and stated that the cause of action arose upon the divorce. The suit was compromised for Rs.5,000, and she did not seek to avoid the wakfnama; on the contrary, in April, 1919, she acccepted the wakfnama as valid, in an application to the District Judge of Badaun for the appointment of a guardian to her minor children. The first wife, Musammat Tahir-un-nisa, died in 1918, whereupon her parents brought a suit for dower on the 18th August, 1920; as such parents they claimed half the dower debt, Rs. 50,000, and stated that the cause of action arose on her death. The suit was compromised for Rs.10,000. It is true that there is an allegation in the plaint that the wakfnama was fictitious, but, not long after, on the 25th February, 1921, the settlor executed an ibtalnama, or deed of cancellation, purporting to cancel the wakfnama of 1915 on various grounds—strained relations with his two wives, fear of suits for recovery of their dower debts, and of their minds being poisoned against him by his enemies, which led him to execute a fictitious document. There is no mention of any debts other than the dower debts and no mention of creditors other than his two wives, whose dower debts admittedly had not been due, at the date of the Wakfnama and, at the date of the ibtalnama had, in fact, been already compromised for comparatively small sums before the execution of this ibtalnama.

As regards the evidence, accepted by the District Judge, that the settlor had unsecured debts, amounting to Rs.40,000, at the date of the wakfnama, their Lordships agree with the High Court that the evidence is vague and unsatisfactory, and insufficient to prove their existence at that date.

In the opinion of their Lordships, the appellants have failed to prove that the wakfnama was a fictitious or colourable deed: it was registered and mutation was duly effected into the name of the settlor as mutwalli, and no adequate reason for the execution of such a fictitious deed, with

the very problematical advantages which could ensue, has been established. Such a proposition is a very different one from an allegation of the execution of a valid and effective deed, subject to voidability at the instance of defrauded creditors. Their Lordships may add that they are in agreement with the findings of the High Court on the evidence, and their criticisms of the findings of the District Judge, and their Lordships find it unnecessary to deal with the matter in detail.

It follows that the appeal fails, and their Lordships will humbly advise His Majesty that the decree of the High Court should be affirmed and the appeal dismissed.

As the respondents have not appeared there will be no order as to costs.

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**In the Privy Council**

**ZAFRUL HASAN AND OTHERS**

*v.*

**FARID-UD-DIN AND OTHERS**

DELIVERED BY LORD THANKERTON

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