Privy Council Appeal No. 67 of 1946

Haji Abdul Razaq - - - - - - - - - *Appellant*

v.

Sheikh Ali Bakhsh and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH APRIL 1948

Present at the Hearing :

LORD NORMAND

LORD MACDERMOTT

SIR JOHN BEAUMONT.

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature at Lahore dated the 12th July, 1944 which affirmed a judgment and decree of the Commercial Subordinate Judge, 1st Class, Delhi, dated the 28th June, 1941.

Leave to appeal to His Majesty in Council was granted by the High Court on the ground that substantial questions of law were involved. The only question of law which appears to arise is whether the father of respondent No. 2, who was mutwalli of a wakf, had power to appoint respondent No. 2 as his successor. The respondents have not appeared on the appeal but counsel for the appellant has placed before the Board the relevant arguments on both sides.

The facts giving rise to the appeal can be stated shortly. In the year 1855 one Sheikh Mohammad Taqi made a will by which, so far as relevant, he gave one-third of his property in charity and appointed Qutab-ud-Din as his executor. In or about the year 1872 Qutab-ud-Din received a sum of Rs. 1,66,683-3-8 on account of the share of the estate of Sheikh Mohammad Taqi given in charity, and their Lordships think in agreement with the High Court in India that Qutab-ud-Din was in possession of this property as mutwalli of a wakf. On the 17th April, 1874 Qutab-ud-Din made a will in which he stated that he was the manager of an institution created for religious purposes by the said Sheikh Mohammad Taqi and he executed his will in favour of his three sons, Abdul Ghani, Mohammad Shafi and the appellant, Abdul Razaq, with the idea that the entire business of the Institution should continue and subsist after his death. He then admitted that he was in possession of immovable property worth Rs.40,000 pertaining to the said Institution and directed the legatee to apply the income for religious purposes. It is not clear how the balance of the fund originally received by Qutab-ud-Din in 1874 had been dealt with, but his sons never disputed that they held the fund received by them under his will as mutwallis of a wakf. Probably their appointment as mutwallis can be justified on the ground that Qutab-ud-Din was the executor of the wakif but, in any case, their appointment has never been challenged. In 1902 Mohammad Shafi, one of the sons of Qutab-ud-Din, died, and thereafter Abdul Ghani and the appellant continued to act as mutwallis. By two agreements dated respectively the 15th September,

1914 and the 27th June, 1927 Abdul Ghani and the appellant divided between them work connected with the wakf. Their Lordships think that these agreements were designed only to facilitate the administration of the wakf, and that such agreements did not purport, and in law were incompetent, to divide the wakf into two wakfs.

On the 2nd March, 1924 Abdul Ghani, while in sound health, made a will by which, after reciting that under the will of his father he along with his brother the appellant was the executor and trustee of the properties therein mentioned and that he and his said brother held proprietary possession of the entire property bequeathed as trustees and managed the same and that he considered that the charitable institution should continue after his death, he appointed his son, respondent No. 2, his executor, successor and representative and directed that after his, the testator's, death respondent No. 2 should be competent to manage the property bequeathed along with the appellant jointly or severally as the testator was then doing, and he directed that respondent No. 2 should utilize the entire income from the aforesaid property for charitable purposes.

Abdul Ghani died on the 10th April, 1939. On the 24th October, 1939 the second respondent mortgaged part of the property comprised in the said wakf to the first respondent to secure a sum of Rs.10,000 and it was recited in the mortgage that the father of the second respondent was the owner as trustee of the property, that he, the second respondent, was the executor, successor and representative under his father's will, and that the purpose for which the mortgage was executed was to meet the cost of repairs, construction and improvement of the trust property. On the same day the second respondent executed a lease in favour of the first respondent in respect of the property comprised in the mortgage.

This suit was filed on the 19th April, 1940 by the appellant as plaintiff against the respondents as defendants. The relief claimed was a declaration that the properties referred to in the mortgage and lease of the 24th October, 1939 were wakf properties and that respondent No. 2 was not competent to execute the said documents in favour of respondent No. 1, or to create a mortgage on the wakf properties; that the said documents be cancelled and that the appellant be given a decree for possession of such properties.

Both the courts in India held that the said mortgage and lease granted by the second respondent to the first respondent were not made for necessity and this finding has not been challenged. The mortgage and lease, therefore, must be declared invalid. The courts in India held that the second respondent had been validly appointed mutwalli of the wakf by the will of his father and accordingly refused to make an order for delivery up of the property comprised in the said mortgage and lease to the appellant. The judgment of the High Court was delivered by Mr. Justice Din Mohammad, the Chief Justice, Sir Trevor Harries, concurring. The main question discussed in the judgment was whether, under Mohammadan law and in the absence of any express directions given by the wakif, a mutwalli is competent to appoint a successor only when he is on his death bed, or whether such an appointment can be made by an incumbent in good health. The High Court took the view that such an appointment can be made by a mutwalli in good health, and that the appointment of respondent No. 2 contained in the will of Abdul Ghani was valid.

It is certainly not easy to see any rational basis for a rule which requires that an appointment to take effect on death shall be made only by one in mortal sickness, when the appointor's judgment may well be impaired. Moreover death may come without warning, or the expectation of death may not be realised. In the former case no appointment will be made, and in the latter any appointment will be ineffective. In *Pir Ahsanullah Shah* v. *Pir Ziauddin Shah* (41 C.W.N. 624) the rule that such an appointment can only be made by a mutwalli on his death bed was criticised by the Board, but it was unnecessary to express an opinion upon the validity of the rule.

Their Lordships have, however, been referred to a considerable body of authority in support of the rule. In Mulla's Mahomedan Law 12th Edition p. 181 the rule is stated in these terms:

> " If the founder and his executor are both dead, and there is no provision in the wakfnama for succession to the office, the mutwalli for the time being may appoint a successor on his death bed. He cannot, however, do so while he is in health, as distinguished from death sickness."

The rule is accepted in the 3rd Edition of Tyabji's Muhammadan Law pp. 617 and 622 where reference is made to an opinion of the officers of the Sadre Diwani Adallat (1798 Cal. 17) which confirms the rule. Baillie 2nd Edition Part I p. 604 says:

> " A superintendent may at death commit his office to another, in the same way as an executor may commit his to another. . . . . A superintendent while alive and in good health cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust."

The last sentence seems to refer to the appointment of a substitute for a mutwalli in his lifetime.

There are also a considerable number of Indian cases mentioned in the judgment of the High Court in which the rule that a successor can only be appointed by a mutwalli when on his death bed was upheld either expressly or inferentially.

However, whatever the correct answer to this interesting question may be, their Lordships are of opinion that the problem does not arise in the present case. Qutab-ud-Din was appointed by the wakif as sole executor and mutwalli, and on the construction of the will of Qutab-ud-Din their Lordships think that his three sons were appointed as joint mutwallis, that is to say as joint holders of a single office, and not as separate holders of separate offices. There is nothing in the will to suggest that the three sons were to act independently of each other, and it is to be noted that on the death of Mohammad Shafi the office was treated as surviving to his two brothers. Their Lordships think that in the absence of any direction express or implied given by the wakif or other competent authority, or of any evidence of custom supporting a usage to the contrary, the ordinary rule that an office held jointly will pass on the death of one holder to the survivors or survivor must prevail. On the death of Abdul Ghani their Lordships think that the office of mutwalli survived to the appellant, that Abdul Ghani had no power to appoint the second respondent as a mutwalli, and that the decision of the courts in India cannot be upheld.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that there be a declaration that the mortgage and lease of the 24th October, 1939 were invalid, that the properties mentioned in schedule A to the plaint are wakf properties; and that respondent No. 2 was not validly appointed mutwalli of the wakf; and that there be a decree for possession of the said properties in favour of the appellant. The respondents must pay the costs of the hearing and appeal in India and the costs of this appeal.

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In the Privy Council

HAJI ABDUL RAZAQ

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DELIVERED BY SIR JOHN BEAUMONT

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