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PUNJAB WAKF BOARD

v.

SHAKUR MASIH

OCTOBER 1, 1996

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[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Mohammedan Law :

Mussalman Wakf Validating Act, 1913 : s.3 :

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Wakf—Contingent wakf—Testator executing a will bequeathing all his properties in favour of his deceased son's mother-in-law with a note that after her death the property would become wakf and the income therefrom would be spent for maintenance of the Mosque—Held, a disposition by way of will given in future or subject to the contingency or conditional one is void under Mohammedan Law—The bequest creating a wakf contingent upon the lifetime of the donee is invalid and contingent wakf is not valid wakf.

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Aamjad Khan v. Ashraf Khan & Ors., AIR (1929) PC 149; Rasoolbibbi v. Yusuf Ajam Piperdi, AIR (1933) Bom. 324; Bai Saroobai v. Hussein Somji & Ors., AIR (1936) Bom. 330 and MT. Mehrai Begum v. Din Mohammad, AIR (1937) Lahore 669, referred to.

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"Mulla Principles of Mohammedan Law", Nineteenth Edn. Edited by M. Hidayatullah, ss. 174, 176 and 191, referred to.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8225 of 1996.

From the Judgment and Order dated 16.3.94 of the Himachal Pradesh High Court in R.S.A. No. 97 of 1983.

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A. Sharan, Irshad Ahmad and Arvind K. Shukla for the Appellant.

Seeraj Bagga for Mrs. S. Bagga for the Respondent.

The following Order of the Court was delivered :

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This appeal by special leave arises from the judgment of the learned single Judge of the High Court of Himachal Pradesh, Shimla made on

March 16, 1994 in RSA No. 97/93.

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The admitted facts are that Najaf Khan was the owner of the properties, namely, houses and shops situated in Jatog. He had executed a Will on August 29, 1949 bequeathing all his properties to his son's mother-in-law, namely, Smt. Musamat Kariman. He added a note to the Will on dated 29.9.1949 stating thus:

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"After the death of Masomat Kariman, my entire property would become wakf and the income from that would be spent for the maintenance of the Mosque at Jatog. Nobody shall have the right either to mortgage or sell these properties."

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The appellant filed the suit for declaration that it is a wakf property and the respondent has no manner of right whatsoever. All the courts below have concurrently held that the wakf has not been created by Najaf Khan and, therefore, the will is void and the wakf thereby has not been created. The question is: whether the view taken by the courts below including the High Court is correct in law?

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In Chapter XII of the principles of Mohammedan Law, Nineteenth Edition edited by M. Hidayatullah, former Chief Justice of this Court, it is stated that a wakf means permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable. Under Section 174, the dedication must be permanent. Under Section 176, the subject of wakf must belong to the wakif, namely, the property dedicated by way of wakf must belong to the wakif (dedicator) at the time of dedication. Under Section 191, contingent wakf is not valid. It is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency. Where the deed of wakf provides that the ultimate gift to charity is to take effect only if a certain person dies without leaving any issue, the rule of contingency under the Mohammedan law would affect such disposition, and the position in that respect is not altered by anything in the Mussalman Wakf Validating Act, 1913. That act undoubtedly authorizes a postponement of the ultimate gift to charity, which would not have been valid under the original law, but it does not abrogate the rule of contingency under the Mohammedan Law.

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A In the will, the testator has stated as under:

B "I am writing this will for the reasons that I have become old and I do not know when I would die. I have neither any child and nor any legal heir, the only person who have served me, is my late son Gohar Khan's mother-in-law and she is still serving me, and she also has no legal heir. She does not have any property, for the income of which she may be able to maintain herself after my death. Since this lady Musamat Kariman has served me devotedly and has been looking after my houses and shops which are situated at Jatog and I therefore, execute this will, written by me in my own hand writing and attested by the executive officer of the Jatog Cant
 C and also signed by the witnesses. Whatever movable and immovable properties I have, she will own and possess these properties. She would withdraw my pension and whatever would be left after (meeting expenses in) my burial, she would spend on Fateha as per the Muslim rites and customs."
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A reading of it would indicate that the testator's only son died during his life time. He left behind his mother-in-law, namely, Smt. Musamat Kariman who was living with the testator. She also had no other issue. She
 E was looking after him and the properties. Therefore, he had executed the Will and bequeathed the movable and immovable properties to her in those words. "She will own and possess these properties. She would withdraw my pension and whatever would be left after (meeting expenses in) by burial, she would spent on Fateha as per the Muslim rites and customs." Thus, he had given the properties by way of absolute disposition to her. The
 F question arises: whether the contingent wakf created in the note would be valid in law and a valid wakf has been created thereunder? It has been held by the Privy Council in *Aamjad Khan v. Ashraf Khan & Ors.*, AIR (1929) PC 149, followed by other decisions in *Rasoolbibi v. Yusuf Ajam Piperdi*, AIR (1933) Bom. 324, *Bai Saroobai v. Hussein Somji & Ors.*, AIR (1936)
 G Bom. 330 and *MT. Mehraj Begum v. Din Mohammad*, AIR (1937) Lahore 669, that in Mohammedan Law, if a bequest is made by way of Will in future or subject to the contingency, the condition is void. In Section 191 of the Mulla's Principles of Mohamedan Law it is stated that it is essential to the validity of a wakf that the appropriation should not be made to
 H depend on a contingency. It would thus be clear that a disposition by way

of Will given in future or subject to the contingency or conditional one is void under the Mohammedan Law. A bequest creating a wakf contingent upon the life time of the Mussamat Kariman is invalid and, therefore, the contingent wakf is not valid wakf as per Section 191 of the principles of Mohammedan Law referred to hereinbefore. It would thus be seen that view taken by the High Court is not vitiated by any error of law warranting interference. A B

The appeal is accordingly dismissed. No costs.

R.P.

Appeal dismissed.