TRUSTEES OF SAHEBZADI OALIA KULSUM TRUST

v.

CONTROLLER OF ESTATE DUTY, A.P.

AUGUST 3, 1998

[SUJATA V. MANOHAR AND M. SRINIVASAN, JJ.]

Muslim Law :

Transfer of Property Act, 1882 : Sections 2, 13, and 14.

Wakfs—Dedication of property—In perpetuity—Validity of—Muslim settlor created trusts in respect of certain jewellery and other properties for the benefit of his children and their descendants for life and thereafter for the maintenance of a holy shrine—Held, According to the principles of Muslim law such a Wakf is valid and not affected by Ss. 13 and 14—Mussalman Wakf Validating Act, 1913—Mussalman Wakf Validation Act, 1930.

Wakfs—Wakf-alal-aulad—Wakf property—Estate duty—Liability of—Dedication of property—In perpetuity— For the benefit of Settlor's children and their descendants for life and thereafter for the maintenance of a holy shrine—Held, such Wakf property not part of settlor's estate—Hence, not liable for estate duty.

The deceased executed a deed of trust under which he settled certain jewellery and other properties on trust for the benefit of his grand daughter for life and thereafter for her children and their children for life etc. and ultimately for the maintenance of a holy shrine. The deceased also executed a similar deed of trust in favour of his daughter-in-law.

On the death of the settlor the Additional Assistant Collector of Estate Duty included the corpus of the said two trust deeds in the principal value of the estate of the settlor for the purposes of estate duty. The Appellate Controller of Estate Duty allowed the appeal filed by the appellant-Trust. The Tribunal dismissed the appeal filed by the respondent-Revenue. However, the High Court allowed the respondent's appeal. Hence this appeal.

On behalf of the respondent it was contended that the trusts created under the said deeds of trust werevoid ab initio since they violated Sections

A 13 and 14 of the Transfer of Property Act, 1882, particularly the Rule against Perpetuity incorporated therein.

Allowing the Appeal this, Court

HELD: 1. In the light of the principles of Mohammedan Law the two
B trusts are valid Wakfs and are not affected by Sections 13 and 14 of the Transfer of Property Act, 1882. As a result the settlor had divested himself of these properties during his lifetime for the benefit of his grand daughter and his daughter-in-law and thereafter for their descendants and then for holy shrine. On the date of his death the settlor did not have any interest in the
C properties nor had he reserved any interest to himself under these trusts. Hence, for the purposes of Estate Duty, the deceased cannot be considered as having any interest in the trust property, which passed on his death. The properties, which constituted the subject matter of the two trusts, therefore cannot be included in the estate of the deceased for purposes of estate duty.

[955-F-H]

D

Sala v. *Hussain,* AIR (1955) Hyd 229, approved.

Abul Fata Mohammad Ishak v. *Rasamaya Dhur Chowdhary,* (1894) 22 IA 76, overruled.

E *Rasamaya Dhur Chowdhary* v. *Abul Fata Mohammad Ishak,* (1891) ILR 18 Cal 399, referred to.

Syed Ameer Ali : Mahommedan Law (Fourth Edn.) Vol. 1 p. 284, A.A. Fyzee Outlines of Muhammadan Law (Fourth Edn.) p. 303, referred to.

F *Baillie's Dig 2nd Edn. p. 593,* cited.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2961-62 of 1984 Etc.

From the Judgment and Order dated 9.12.84 of the Andhra Pradesh
G High Court in C. R. No. 87-88 of 1978.

K. N. Shukla, (P. Murli Krishanan, Mrs. A. K. Verma) for JBD & Co., (Rajeev Sharma) for B. K. Prasad and (A. D. N. Rao) for A. Subba Rao, B. Parthasarthy for the appearing parties.

H The Judgment of the Court was delivered by

MRS. SUJATA V. MANOHAR. J. On 21st of March, 1953, the Nizam of Hyderabad, Sir Mir Osman Ali Khan, executed a deed of trust under which he settled certain jewellery and other properties on trust for the benefit of Sahebzadi Oalia Kulsum, his grand daughter for life and thereafter for her children and their children for life etc. and ultimately for the maintenance of a holy shrine. On the same date, he also executed a deed of trust in favour of his daughter-in-law, Sahebzadi Anwar Begum, the wife of second Prince Muazzam Jah. The terms of the two trust deeds are similar. For the sake of convenience, we are referring only to the trust deed executed in favour of Sahebzadi Oalia Kulsum.

Under the deed of trust, the settlor who was a Muslim, created a trust in respect of certain jewellery and ornaments and other properties for the benefit of his grand daughter Oalia Kulsum who was given a right to wear the jewellery after her marriage or on completing the age of 30 years whichever was earlier. She was allowed to wear the jewellery and ornaments during her life time and after her death the trustees were directed to sell the ornaments and invest the sale proceeds, thus turning them into an income yielding investment. A further direction was given to the trustees to pay the income to the children of Oalia Kulsum or remoter issue of Prince Muazzam Jah Bahadur from generation to generation in the ratio of two shares for male and one share female heirs. In the absence of the contingencies mentioned above, the income was directed to be paid to remoter issues of Prince Muazzam Jah Bahadur from generation to generation in the ratio of two shares for male and one share for female. On the death of the last survivor of the persons entitled to the net income of the fund, the income was directed to be utilised for the benefit of the holy shrine at Khum in Iran. Thus the trust was in the nature of wakf-alal-Aulad. In fact the recital in the trust deed is to the same effect:

> "AND WHEREAS out of natural love and affection which the settlor bears towards his relatives hereinafter mentioned and for divers other good causes and considerations him thereunto moving he the settlor is desirous of making a settlement and wakf-ul-aulad in the name of the most merciful God in respect of the said articles specified in the First Schedule hereunder written..... for the purpose of the maintenance and support of the members of his family and his descendants and ultimately for the religious and charitable purposes hereinafter mentioned in the manner hereinafter appearing...."

Pursuant to the deed of trust the jewellery and ornaments and certain other properties were transferred by the settlor as a wakf.

A The settlor Sir Mir Osman Ali Khan expired on 24th of February, 1967. By an order passed by the Additional Assistant Collector of Estate Duty dated 25th of January, 1973, the properties which were the subject matter of these two trusts were deemed to pass on the death of the deceased and were treated as property passing on the death of the deceased for the purposes of estate duty. The appeal of the present appellant, however, was allowed by B the Appellate Controller of Estate Duty by his order dated 2nd of June, 1975. In the further appeal to the Tribunal, the Tribunal by its order dated 7th of July, 1976 dismissed the appeal of the department and confirmed the order of the Appellate Controller by holding that the value of the property forming the corpus of the trust cannot be included in the principal value of the estate of C the deceased.

From this finding of the Tribunal, the following two questions were referred to the High Court of Andhra Pradesh at Hyderabad:

> "A: Whether on the facts and in the circumstances of the case the D trust created by the deceased on 21.3.1953 known as Sahebzadi Oalia Kulsum Trust is ab initio void?
>
> B: Whether on the facts and in the circumstances of the case and on the interpretation of the trust deed the value of the corpus of the Shabzadi Oalia Kulsum Trust is liable to be included in the Principal E value of the estate of late Sir Osman Ali Khan Bahadur?"

Similar questions were referred in connection with the second trust. The High Court by its impugned judgment and order dated 9th of December, 1983 decided the questions in favour of the revenue and against the assessee. The present appeals arise from the impugned judgment of the High Court F dated 9th of December, 1983.

It is contended by the respondent i.e. the department that the trusts created under the said deeds of trust are void ab initio since they violate Sections 13 and 14 of the Transfer of Property Act, particularly the Rule against Perpetuity incorporated there. The appellant, however, relies upon G Section 2 of the Transfer of Property Act under which it is provided, inter alia, that nothing in the second chapter of this Act shall be deemed to affect any rule of Mahomedan law. Sections 13 and 14 relied upon by the department, form a part of the second chapter of the Transfer of Property Act. The appellant submits that under Mahomedan Law it is permissible to create a H Wakf-alal-aulad under which a trust in perpetuity can be created for the

maintenance and support wholly or partially, of the family of the settlor, his children or descendants from generation to generation and thereafter for the benefit of poor or for any other purpose recongnised by Mohammedan Law as a religious, pious or charitable purpose of a permanent character. The provisions of Chapter 2 of the Transfer of Property Act which inter alia embody the Rule against Perpetuity applicable to transfers *inter vivos*, do not apply to such trusts.

Syed Ameer Ali in his book on Mahommedan Law, Fourth Edition, Volume 1, page 284 stated as follows:

> "When a man,' says the Fatawai Alamgiri quoting the Zakhira, has made a wakf of land or something else with a condition, that the whole or part of it shall be for himself while he lives and after him for the poor, the wakf is valid according to Abu Yusuf, and the jurists of Balkh have adopted his opinion and ruled accordingly, and the Fatwa is in conformity with that opinion as an inducement to the making of wakfs."

Dealing with wakf in favour of descendants, Ameer Ali says (p.284):

> "So also if he should, 'This my land is a sadakah-mowkoofa, he (meaning the mutwalli) will pass the produce to me while I live, then after me to my child and my child's child and their nasl for ever, while there are any and when they cease, to the indigent,' This is lawful."
>
> (N.B. nasl = descendants)

There is general consensus on this proposition amongst the various authorities on Islam.

The Privy Council, however, had an occasion to consider a wakf-alal-aulad created by a Muslim in the case of *Abul Fata Mohammad Ishak* v. *Rasamaya Dhur Chowdhary,* (1894) 22 Indian Appeals 76 in which two Muslim brothers made a wakf whereby they were the first mutwallis of the wakf. The entire benefit of the wakf was to go to the children in the first instance and their descendants from generation to generation until the total extinction of the family. Thereafter the income was to be applied for the benefit of widows, orphans, beggars, and the poor. The Privy Council held that since the bequest to charity was illusory and too remote, the wakfs were not valid as they offended the rule against perpetuity.

A Criticising the decision of the Calcutta High Court in the case of *Rasamaya Dhur Chowdhary* v. *Abul Fata Mohammad Ishak,* (1891) I.L.R. 18 Cal. 399 which was subsequently upheld by the Privy Council in *Abul Fata Mohammad Ishak* v. *Rasamaya Dhur Chowdhary,* (supra), Ameer Ali explains the position in Mahommadan Law by saying that the provision for one's children and descendants is regarded as a pious duty by which nearness B (kurbat) to God is attained. The mention of the poor is required by Mohammad (not by Abu Yusuf with whom is the Fatwa) not to give validity to the wakf, but to ensure perpetuity; and as human beings are liable to become extinct and as a wakf must be a permanent dedication, Mohammad required that the poor should be expressly named or implied by the use of the word "sadakah". C Abu Yusuf, on the other hand, held that whether the poor were named or not, or whether the word "sadakah" was used or not, the word "wakf" implied perpetuity, and, therefore, unless some other object was named, on failure of the wakif's posterity, the income would be applied for the poor. There is no question about the validity of the wakf; the mention of the poor does not make the wakf per se more or less valid; it only ensures perpetuity insisted D upon in the law (pages 296-297).

Asaf A.A. Fyzee in his book "Outlines of Muhammadan Law", Fourth Edition at page 303 states that according to the ancient texts, wakfs for the support of a man's descendants and family were considered to be proper and E lawful. He says, " The Prophet is reported to have said that 'When a Muslim bestows on his family and kindred, hoping for reward in the next world, it becomes alms, although he was not given to the poor, but to his family and children.' What in the estimation of the English lawyers would be a pernicious perpetuity, calculated to aggrandize the family of the founder, is, according to the shariat, the best of charities." The position in Islamic Law is summed F up by Fyzee at page 303 by quoting the words of Ameer Ali:

> "From the promulgation of Islam up to the present day there has been an absolute consensus of opinion regarding the validity of wakfs on one's children, kindred and neighbours. Practical lawyers, experienced G judges, high officers of every sect and school under Mussulman sovereigns are all in unison on this point. There are minor differences, *viz.* Whether a wakf can be created for one's self, whether the unfailing object should be designated, whether the property should be partitioned or not, whether consignment is necessary or not; but so far as the validity of a wakf constituting one's family or children the H recipients of the benefaction, in whole or in part, is concerned, there

is absolutely no difference. A wakf is a permanent benefaction for the good of God's creatures: the wakif may bestow the usufruct, but not the property, upon whomsoever he chooses and in whatever manner he likes, only it must endure for ever. If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as they exist to prevent their falling into indigence, it is a pious act, - more pious, according to the Prophet than giving to the general body of the poor. He laid down that one's family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater 'reward' than to bestow on the indigent stranger. And this is insisted upon so strongly that when a wakf is made for the indigent or poor generally, the proceeds of the endowment is applied to relieve the wants of the endower's children and descendants and kindred in the first place (see Baillie's Dig., 2nd ed., p.593). When a wakf is created constituting the family or descendants of the wakf [sic, for wakif] the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in not for the purpose of making the wakf charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made), but simply to impart permanency to the endowment. When the wakif's descendants fail, it must come to the poor. So it is an enduring benefaction - an act of ibadat or worship, to use the language of the Jawahir-ul-Kalam—an act by which kurbat or 'nearness' is gained to the Deity, according to the Bahr-ur-Raik."

Despite this clear Islamic pronouncement regarding the validity of wakfs-alal-aulad, the Privy Council pronounced in the case of *Abul Fata Mohammad Ishak* (supra) that such a wakf would be invalid, even if there is an express ultimate dedication to the poor, because the bequest to "charity" is too remote. The decision can, at best, be held as interpreting Mohammedan Law as interpreted in British India of the time, as the case arose in British India. Not surprisingly, it led to large scale protests.

On account of large scale protests in British India against the decision, the Mussalman Wakf Validating Act of 1913 was enacted to validate such wakfs. This Act cannot be looked upon as laying down any new principle of Mohammedan Law. As Fyzee has put it, (page 304) the Act purported to restore the law of the Shariat in India and to overrule the law as laid down

A by the Privy Council. This Act was given retrospective effect by the Mussalman Wakf Validation Act of 1930. Both the Acts applied to British India. After the Constitution came into force, the operation of the Validation Act of 1913 was, therefore, by amendment, excluded from Part-B States i.e. territories which were originally native States or outside British India. After the Constitution (Seventh Amendment) Act, 1956 abolishing Part-B States (inter alia), all the territories which were included in Part-B States prior to 1956 were excluded from the Validation Act, 1913. It is, therefore, contended by the department that the Validation Act did not apply to the State of Hyderabad which was a Part-B State upto 1956. And hence the wakfs in the present case are hit by the Privy Council decision in *Abul Fata Mohammad Ishak (Supra).*

B

C

However, the Privy Council decision in *Abul Fata Mohammad Ishak* (supra) can be taken to have interpreted Mohammedan Law as applicable in British India. The Validation Act, 1913 merely restored the law of the Shariat which had been disturbed by the Privy Council judgment. Hyderabad, which was outside British India, must be considered as continuing to be governed by the principles of Mohammadan Law as understood by the accepted authorities on the subject. Non-applicability of the Mussalman Wakf Validation Act, 1913 to the State of Hyderabad will not affect wakfs-alal-aulad created in the State of Hyderabad which are valid under the accepted principles of Mohammadan Law.

D

E

In fact, the Hyderabad High Court in 1955, referred to and applied the general principles of Mohammadan Law to declare a wakf invalid. In the case of *Salah* v. *Husain and Ors.,* AIR (1955) Hyderabad 229, one Salah Bin Ahmed purported to create a wakf-alal-aulad with himself as mutawalli. After his death his sons were to be mutwallis and thereafter his grandsons. There was no dedication to the poor. Dealing with the position under the Mohammedan Law, the High Court of Hyderabad referred to the difference of opinion between the disciples of Abu Hanif viz. Imam Mohammad and Abu Yusuf. While Imam Mohammed was of the view that without dedication to the poor, the wakf was invalid, Abu Yusuf was said to be of the view that such a dedication was implicit in the wakf. The Court held that there was no clear authority that the view of Abu Yusuf differed from that of Imam Mohammad on this point. On the principles of Mohammadan Law the wakf, in the absence of dedication to the poor, was invalid.

F

G

Although the High Court referred, inter alia, to the Privy Council decision in *ABUL FATA MOHAMMAD ISHAK,* (supra), and the Mussalman Wakf

H

Validation Acts 1913 and 1930 which applied only to British India, it appears to have accepted the submission that the Court was obliged to apply the original principles of Mohammedan Law in as much as H.E.H. the Nizam in the Charter granted to the High Court directed that in cases where the parties were Muslims the case would be governed by Sharai-Shariff. The High Court held the wakf to be invalid under Mohammedan Law. A B

Of course, in the case before it, both under the law as declared by the Privy Council as also the dictum of Imam Mohammad (said to be no different from that of Abu Yusuf on this issue) the wakf was invalid. But the High Court, in the light of its Charter also took the assistance of Mohammedan Law as laid down by Islamic authorities in deciding the issue. C

In the light of the principles of Mohammadan Law as set out earlier, the two trusts created in 1953 in the present case are valid wakfs. The wakif-settlor made a dedication in perpetuity of the subject matter of these trusts for purposes which are considered pious under Islamic Law. The properties, D therefore, ceased to be the properties of the settlor on the creation of the wakfs in 1953. When the settlor died in 1967, they could not form a part of his estate - the settlor having divested himself of these properties fourteen years prior to his death.

E

The appellant has also pointed out that during the life time of the settlor, the income-tax authorities had accepted the validity of the wakfs and had not treated the income of the wakfs as the income of the settlor.

In the present case, therefore, the beneficial interest created in favour of Oalia Kulsum and Anwar Begum is a valid creation of trust which is not F affected by Sections 13 and 14 of the Transfer of Property Act. As a result the settlor had divested himself of these properties during his lifetime for the benefit of his grand daughter Oalia Kulsum and his daughter-in-law Anwar Begum and thereafter for their descendants and then for the holy shrine at Khum. On the date of his death the Settlor did not have any interest in the G properties nor had he reserved any interest to himself under these trusts. Hence, for the purposes of Estate Duty, the deceased cannot be considered as having any interest in the trust property which passed on his death. The properties which constituted the subject matter of the two trusts, therefore, cannot be included in the estate of the deceased Sir Mir Osman Ali Khan, H

A the Nizam of Hyderabad for the purposes of estate duty.

In the premises, the judgment and order of the High Court are set aside and the two questions are answered in the negative and in favour of the appellant. The appeals are accordingly allowed with costs.

B V.S.S. Appeals allowed.