

Assoobai Vs. Noorbai

Assoobai Vs. Noorbai

SooperKanoon Citation : sooperkanoon.com/328657

Court : Mumbai

Decided On : Sep-22-1905

Reported in : (1906)8BOMLR245

Judge : Chandavarkar, J.

Appeal No. : O.C.J. Suit No. 206 of 1905

Appellant : Assoobai

Respondent : Noorbai

Disposition : Suit dismissed

Judgement :

Chandavarkar, J.

1. This is a suit brought by the plaintiffs as heirs and next-of-kin of one Yemnabai, deceased, to set aside a deed of trust executed by her on the 22nd day of July 1898, for their declaration of title to and possession of the properties comprised in that deed and for an account of the management thereof by the first defendant.

2. The deed of trust (Ex. No. I) is admitted in the plaint and is moreover proved by Mr. Captain, Solicitor, who prepared it under instructions from Yemnabai and attested it.

3. The plaintiffs, however, allege that it is null and void on two grounds :-(1) that Yemnabai did not at any time during her life-time act as trustee thereof but on the contrary continued to treat the properties comprised in the deed as her own and disposed of the income thereof at her pleasure without any reference whatever to the said deed of trust and (2) that there was no complete appropriation of the properties to charitable According to the Mahomedan law of wakf the appropriation and dedication in favour of charity must be at the time such appropriation or dedication is made so complete that it should not be in the power of the donor or settlor to recall it ever afterwards. It should be such that no proprietary interest is reserved by the settlor and the property is effectually and once for all dedicated to charity and constituted chanty property leaving no power to the settlor to recall the trust and regain the ownership.purposes as required by the same law as an essentialcondition of a valid wakf.

4. On the first of these points it is to be remarked that by the trust deed it was provided that the trustor Yemnabai should be the trustee till her death. The evidence of the witnesses, examined for the plaintiffs, proves that Yemnabai acted till her death as trustee of the properties in accordance with the provisions of the trust deed. One of the plaintiffs, Yemnabai, examined in this case has admitted that Yemnabai supported a Madressa in the house at Duncan Road and that she paid the expenses thereof. Plaintiff's witness, Melloo Bomom Irani, who was Yemnabai's tenant for nine or ten years, also speaks to that fact. And defendant's witness Hafiz Alahibax says that Yemnabai employed him as teacher in the Madresha and that he still holds that office. It is also proved by the evidence in the case that Yemnabai used to provide shrouds for corpses of destitute Mahomedans. These acts coupled with the declaration in the trust deed are sufficient proof that after the execution thereof and until her death she held possession of the properties as trustee and not as owner.

5. The second ground urged against the trust is, that there was no complete appropriation of the properties to charitable purposes, as required by the Mahomedan Law, to constitute a valid Wakf, because the trust deed provides that part of the income should be devoted to the maintenance of the trustor Yemnabai herself, and of some of her relatives named in the deed. It is true that the trust

deed sets out by providing that, out of the rents realised from the properties, Rs. 10 shall be paid to the trustor Yemnabai for life, Rs. 10 to Sonabai widow of Ali Suleman for life and Rs. 10 to Noorbai for life, and that the residue, after the deduction of a quarter for the payments of taxes and sundry repairs, shall be spent for one or more of the charitable purposes which are specified in Clause 2. But these preliminary gifts do not make the ultimate appropriation of the residue to charity invalid according to Mahomedan Law. Those gifts come to an end with the deaths of the donees and fall into the residue for the purposes of the charity. In *Shaikh Mahomed Ahsanalla Chowdhery v. Amarchand Kundu* ILR (1889) Cal. 498, P.C. the Privy Council have held that provisions for the family out of the grantor's property may be consistent with the gift of it as a Wakf and they agree with the views expressed by the Calcutta High Court in *Murzhurool Huq v. Puhraj Ditarey* (1870) 3 W.R. 235 that 'the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease being confined to one family and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made does not render the endowment invalid under the Mahomedan law.' See also *Luchmiput Singh v. Amir Alum* ILR (1882) Cal. 16. The question in every case is whether the gift to the charity is of an illusory or a substantial character: *Abdul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhuri* ILR (1894) Cal. 619, P.C. Here the dedication to charity is substantial.

6. A more important question in the case, however, is whether the fact of the lady having by the trust deed reserved to herself the option of revoking the trusts created by it and of declaring new trusts invalidates the wakf under the Mahomedan Law. It is not disputed that one essential condition of a valid wakf, according to that law, is that 'it must be certain as to the property appropriated, unconditional, and not subject to an option'. *FatmdbContext v. The Advocate General of Bombay* ILR (1881) Bom. 42, 51; *Pullukhoti v. Avathulkatti* ILR (1889) 13 Mad. 74. According to Baillie on Mahomedan Law, there should be no option annexed to a wakf 'for if one should make an appropriation on condition that he is to have an option it would not be valid according to Mohammad and though the condition were cancelled the Wakaf would not become lawful in his opinion'. See, also, Hamilton's *Hedaya*, Vol. II, p. 238. The principle in substance is that the

appropriation and dedication in favo'ur of charity must be at the time such appropriation or dedication is made so complete that it should not be in the power of the donor or settlor to recall it ever afterwards. It should be such that no proprietary interest is reserved by the settlor and that the property is effectually and once for all dedicated to charity and constituted charity property leaving no power to the settlor to recall the trust and regain the ownership.

7. The question, therefore, is whether, as contended for the plaintiffs, Yemnabai had reserved to herself by this deed the power to revoke the trust and deal with the property as her own. What is relied upon by the plaintiffs, in support of their contention, is clause XI of the deed (Ex. I), which runs as follows:-

And it is also hereby declared that I the said Yomnabai shall be entitled at any time during my life byauydeed or deeds to revoke all or any of the trusts, powers and provisions declared and contained by and in these presents concerning the said trust premises and the accumulation or any part thereof and by the same or any other deed or deeds to appoint and declare any new and other trusts powers and provisions concerning the premises to which revocation shall extend.

8. Mr. Baptista, for the plaintiff, construes this clause to mean that Yemnabai reserved to herself the option of Avithdrawing the property altogether from charity of all kind and dealing with it again as her own. He paraphrases the clause as follows : 'I have the liberty to revoke the trusts specified in this deed and use the property for any other trusts I like'. The clause, however, must be construed with reference to the context of the whole deed. At the very beginning of the deed she uses language from which it is clear that she divests herself and her heirs of the ownership of the properties and holds them for the purposes of the trusts 'hereinafter declared', i.e. the trusts specified in the second clause subject to the condition in Clause 11. That condition does not say that she can deal with the property as her own after she has revoked the specified trust but it confines her power of revocation to the substitution of 'any new and other trusts. ' These words standing by themselves no doubt are Avide enough to include any secular or charitable trusts ; but coming, as the words do, after the charitable trusts specified, they must be interpreted, in my opinion, on the principle of ejusdem generis to

mean trusts for charity. Clause 11 comes after Yemnabai had divested herself of the ownership of the property and constituted herself trustee thereof during her life-time. The power of option must be referred to her capacity as such trustee. Had she intended to reserve to herself the power of revoking the trusts specified in the deed and of withdrawing the property altogether from charity so as to enable her to deal with it thenceforth as owner she would have said so clearly in the deed.

9. It has been faintly contended before me that the plaintiffs are estopped from impeaching the consent decree in Suit 236 of 1904, because, though aware of the proceedings in that suit and of the fact that the first defendant in the present suit was claiming there as trustee these very properties from the second defendant, the plaintiffs took no steps to assert their rights but allowed the first and the second defendant to get a consent decree from the Court establishing the trusts which the plaintiffs now seek to set aside. There was, however, no obligation on the part of the plaintiffs to intervene in that suit so as to prevent the parties to it from dealing with the property in the proceeding there as they thought best. They were acting of their own motion without any prompting or encouragement direct or indirect, from any of the plaintiffs. The mere fact that the plaintiffs knew of the suit and what was going on in it is not sufficient to charge them with either acquiescence or estoppel. See *Baswantapa Shidapa v. Ranu* (1). So long as the plaintiffs did not, by any declaration, act, or omission, lead the defendants into the belief that they (the plaintiffs) had no right and to act upon such belief the principle of estoppel cannot apply. It is proved in this case that the first plaintiff Yemnabai gave a solicitors' notice to the defendants asserting her right (See Ex.No. 2). Her conduct as that of her co-plaintiffs, could at most amount to quiescence; but the elements of acquiescence and estoppel are completely wanting.

10. I dismiss the suit. Defendants to have their costs as between attorney and client from the plaintiffs. If they (defendants) are unable to recover the costs from the plaintiffs they can recover from the estate.