

**Amirbibi Vs. Azizabibi**

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**SooperKanoon Citation :** [sooperkanoon.com/338959](http://sooperkanoon.com/338959)

**Court :** Mumbai

**Decided On :** Sep-19-1914

**Reported in :** AIR1914Bom109(2); (1914)16BOMLR977

**Judge :** Macleod, J.

**Appeal No. :** O.C.J. Suit No. 29 of 1914

**Appellant :** Amirbibi

**Respondent :** Azizabibi

**Judgement :**

**Macleod, J.**

1. One Shaik Abdulla bin Shaik Ebrahim, a Sunni Mahomedan, died at Bombay on or about the 14th of August 1906 leaving him surviving as his only heirs according to Mahomedan law two daughters Amirbibi and Azizabibi. By a deed-poll dated the 23rd March 1901 the said Shaik Abdulla declared in effect that he held certain property belonging to him in Huzaria Street in Wakf as a Mutavali or trustee upon the trusts following, viz:-

(a Out of the net rents of the said property 'to feed five Fakirs every Friday night, to pay for reading the Koran every month and for Fatiha ceremonies in the months of Mohram, Rabinlaxhar, Rajab and Ramzan and for offering every month oil two and

a half seers for lighting the Masjid situated in Huzaria Street.

(b) To pay the balance of the said rents to his daughters and any other child that might thereafter be born to the settlor in equal shares for their maintenance and the maintenance of their children therein named, and after the death of his daughters to pay the same to the second defendant and the said Yakubkhan and Dawoodkhan and their descendants generation after generation as well as the settlors descendants male or female generation after generation.

(c) On failure of decendants to use the balance of the said rents for the benefit of the settlors community or for meritorious acts or for the use of the said Masjid as the trustee for the time being might think proper.

2. The annual gross income of the property is said to be Rs. 960 and the annual net income about Rs. 800. The amount required for the purposes set forth in Sub-clause (a) of para 2 of the plaint is said to be about Rs. 64.

3. The plaintiff as one of the daughters of the deceased has filed this suit against her sister and her sister's son and the Advocate-General, praying that it may be declared that the said deed-poll is void and of no effect and that the plaintiff and the first defendant as the sole heirs of the said Shaik Abdulla are absolutely entitled to the said immovable property.

4. The deceased had executed a similar deed-poll in respect of another property on the same day and that deed-poll was the subject-matter of Suit No. 857 of 1911 in which a decree was passed on the 13th February 1912 by Mr. Justice Beaman, by which it was declared that the deed of settlement mentioned in the plaint was null and void except as regards the charities mentioned in Ex. B to the plaint. The decree further ordered that plaintiff and the first defendant should invest a certain sum to provide for those charitable purposes, and declared that when they had so done they would be absolutely entitled to the immovable property mentioned in the deed.

5. It cannot be doubted that under the decisions of the Privy Council, the deed in this suit would have to be declared to be void except as regards the charities

mentioned in Sub-clause (a) of para 2 of the plaint. But it has been contended that those decisions no longer apply, now that the Mussalmans Wakf Validating Act VI of 1913 has been passed. It is argued that the effect of that Act is retrospective and that all deeds of Wakfs hitherto created which might be declared void and of no effect, if brought before the Courts, are now made good, and there is some ground for that argument in the Preamble of the Act. But there is a distinct conflict between the Preamble of the Act and the Act itself. The Preamble runs as follows :-

Whereas doubts have arisen regarding the validity of Wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted

6. A preamble sets forth the reason for the particular Act of the Legislature and foreshadows what is intended to be effected by the Act. But to see what has been actually effected by the Act, one must look to the Act itself, and the Act seems to have failed entirely to produce the effect which, it might be gathered from the preamble, was intended, that is to say, intended according to the construction put upon it by advocate General. The word 'created' in the Preamble might be read as including not only Wakfs to be created in the future but also Wakfs already created in the past. It may have been the intention to validate all Wakfs which could be set aside under the previous decisions of the Privy Council when they came before the Courts, or it may have been intended that if such Wakfs were created in future, they would under the Act be held good. These are the alternative constructions which can be applied to the preamble. Then turning to the Act itself, it curiously enough does not provide as usually the case for the date on which the Act shall come into force. Therefore I presume the Act came into force on the day it received the assent of the Governor General in Council. The Act refers solely to Wakfs which shall be created in the future. Section 3 says: 'It shall be lawful for any person professing the Mussalmans faith to create a Wakf which in all other respects is in accordance with the provisions of Mussalaun law, for the following among other purposes:-

7. There is nothing in the Act about Wakfs which are already in existence when the Act was passed, and there is nothing in the Act which enables me to hold that the provisions of the Act shall apply to such Wakfs; and therefore, in my opinion, whatever the intention of the Legislature may have been, it has by this Act only enabled Mahomedans in future to create Wakfs by deeds which, under the previous decisions, would be liable to be set aside, as contrary to the provisions of Mussalmans law, and therefore as regards this Wakf which was created in March 1901 the old law applies. As the deed is clearly intended to effect a permanent settlement of the property on the settlor's descendants and the ultimate gift to charity is purely illusory, the deed must be set aside except as regards the charities referred to above which can be given effect to.

8. It has been arranged between the Advocate General on the one hand and the plaintiff and the defendants on the other hand that Government Promissory Notes of the nominal value of Rs. 2400 should be purchased and should be settled in trust to provide for those charitable purposes. After that has been done the property will be declared the absolute property of the plaintiff and the first defendant.

9. Costs will come out of the settled property, those of the third defendant as between attorney and client.

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