Siddiq Ahmad And Anr. vs Wilayat Ahmad And Ors. on 25 September, 1951

Equivalent citations: AIR1952ALL1, AIR 1952 ALLAHABAD 1

JUDGMENT

Malik, C.J.

1. One Hakim Ali was the owner of two annas eight pies share out of sixteen annas in village Kasmandi Kalan, Pargana and Tehsil Malihabad, in the district of Lucknow. He had four sons Wajid Ali, Faqir Mohammad, Nazar Mohammad and Saiyid Ahmad. Wajid Ali died in his father's lifetime. He left a son Wahid Ali, alias Kallan. Under the Mahomedan Law Wahid Ali, his father having predeceased Hakim Ali, was not an heir of Hakim Ali. Hakim Ali on 17th May 1903, executed a will in favour of his three surviving sons Faqir Mohammad, Nazar Mohammad and Saiyid Ahmad and his grandson, Wahid Ali. It is the interpretation of this will with which we are mainly concerned.

2. Hakim Ali died on 18th September 1909. His three sons and his grandson Wahid Ali alias Kalian survived him. The property, that is, the two annas and eight pies share, was mutated in the name of his three sons and his grandson Wahid Ali on the basis of inheritance. On 11th April 1928, Wahid Ali gifted his entire share which was eight pies in the village aforementioned, to Kulaumunnissa, wife of Faqir Mohammad, that is, to his aunt. She got mutation in her favour and in 1937 the property waa partitioned through the revenue Court and a separate chitthi was prepared in favour of Kulsumunnissa of this eight piea share. Tbis partition was affirmed on 30th July 1939. Wahid Ali died on 5th October 1940. Wilayat Ahmad, one of the five sons of Nazar Mohammad claimed a one seventh share in these eight pies and filed the suit on the allegation that defendants 1 and 2, who were sona of Kulsumunnissa, Kulsumunnissa having died in 1941, were in wrongful possession of the property in suit.

3. The suit was contested by defendants 1 and 2, Siddiq Ahmad and Mushtaq Ahmad sons of Kulsumunnisaa, on various grounds.

4. The suit was, however, decreed with half the costs in favour of the plaintiff for joint possession of plaintiff's one-fifteenth's share of 16 Biswansis 13 Kachwansis and 6.11/16 Anwansisshare of patti Kulsumunnissa. The learned Munsif held that the plaintiff's share was not one-seventh but one-fifteenth, that Wahid Ali got merely a life estate under the will and on the death of Wahid Ali the property reverted to the three sons of Hakim Ali and the gift executed by Wahid Ali in favour of Kulsamunnissa was, therefore, of no legal validity after Kulsumunnissa's death.

5. This judgment was upheld by the Additional Civil Judge of Lucknow who dismissed the appeal

filed by the defendants, the plaintiff having submitted to the decree.

6. On second appeal to this Court a learned single Judge held that on a true interpretation of the will the testator intended to give to Wahid Ali for his lifetime merely the usufruct of the one-fourth share and he had no intention to give the corpus of the property to Wahid Ali. That the will was, therefore, valid and, on the death of Wahid Ali, the property vested in the three sons of Hakim Ali, and if they were dead, in their legal representatives. Second plea that had been raised before the learned single Judge that the suit was barred by Section 233 (k), Land Revenue Act was decided against the defendants. The appeal was dismissed bat the learned single Judge gave leave to the defendants to file an appeal under Section 12 (2), Oudh Courts Act.

7. Learned counsel for the respondents has raised a preliminary objection that the learned single Judge should not have granted leave under Section 12 (2), Oudh Courts Act. He has relied on several decisions of the Oudh Chief Court that a mere question of the interpretation of a document is no ground for giving leave. The cases cited are: Dayanat Ullah v. Atia Khanam, 1940 Oudh W.N. 193, Uman Shankar v. Ashraf Husain, 1943 Oudh W. N. 372, Brij Bhukhan v. Bhagwan Datt, 1948 Oudh W. N. 404 and Beni Madho v. Harihar Prasad, 1946 Oudh W. N. 331. Learned counsel has urged that this view has been consistently followed by the Chief Court ever since its foundation in 1925 It is not necessary for us to examine these cases in detail as in our view this case does not depend on a mere question of interpretation of the document on the language used in the deed but raises a much larger question, whether a document, whatever the language, must be interpreted in the manner suggested by learned counsel for the respondents and whether that was the law intended to be laid down by their Lordships of the Judicial Committee in Nawazish Ali Khan's case, (75 Ind. App. 62). We are, therefore, of the opinion that the leave was correctly granted. The learned single Judge when granting leave observed: "The appeal involves principles of interpretation with respect to the will in suit.," and the case to our minds raises a question of some importance which is likely to arise in other cases of transfers by Muslim parties.

8. We may, however, point out that the words "the case is a fit one for appeal" in Section 12 (2), Oudh Courts Act cannot be interpreted to mean the same thing as the words "the case is a fit one for appeal" in Section 110, Civil P.C. Sections 109 and 110, Civil P. C , provide for three types of appeals : (1) Cases in which valuation is above Rs. 10,000 and the High Court has not affirmed the decree of the trial Court. There is a right of appeal in that case; (2) Cases in which the valuation is over Rs. 10,000 but the High Court has affirmed the decree of the lower Court. In such a case the appellant has to make out that the case involves a substantial question of law; and (3) Cases which have been certified as fit one for appeal to the Privy Council. In a series of cases their Lordships have pointed out that in this third group of cases it was not enough to establish that there was a substantial question of law involved. (See Banarasi Parshad v. Kashi Krishna Narain, 28 Ind. App. 11 and Radha Krishn Das v. Rai Krishn Chand, 28 Ind, App. 82) where their Londships said:

> "It is noticed in the judgment of this Board, in the case to which their Lordships have just referred, that there was a prevailing impression in the High Court that the mere existence of a substantial question of law was sufficient to give the Gour& jurisdiction to give leave to appeal to Her Majesty in Council. Lord Hobhouse says: 'Their

> Lordships have found on previous occasions that the existence of a point of law has been supposed to give a right of appeal in the ordinary course of procedure under the Code.' That is mistake."

9. In Radhakrishna Ayyar v. Swaminatha Ayyar, 48 Ind. App. 31 at p. 33 after having dealt with the first two classes of cases their Lordships observed:

> "This does not cover the whole grounds of appeal because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money."

10. It could not be said that under Section 12 (2), Oudh Courts Act existence of a substantial question of law was not enough to justify a learned single Judge in granting leave. The learned single Judge deciding the case was the proper person to judge whether the case was such that it needed further consideration by a Bench. The grounds on which leave should be granted in such cases was considered in Kalyan Das v. Brij Keshore, A.I.R. (28) 1941 ALL 9 by Braund J., who held that there were at any rate, four classes of cases in which such leave should be granted. First a case in which a question of general importance has arisen and in which it is manifestly in the public interest that a more authoritative decision should be given or a case in which the matter involved is of unusual private importance by reason of the magnitude of the material issues involved or for some other reason. Secondly, cases in which the question decided is of a very frequent occurrence in which authoritative decision by a beach is, therefore, desirable. Thirdly, when the case involves a point on which the existing authorities are obscure or conflicting. Fourthly a case in which the Judge feels that a view other than the view taken by him is possible and it is, therefore, just to the parties that a further appeal should be allowed. These are matters which are eminently suited for the decision by the Judge himself who had decided the case and should not be subject to review by the Bench after the appeal ia filed. In some cases no doubt the Privy Council have considered the questions whether leave was rightly granted but leave to appeal to the Privy Council cannot be placed in the same class as leave by a single Judge of a Court to a Bench of the same Court. Special leave could be granted by their Lordships of the Judicial Committee when leave had been refused by the High Court, but no such power is given to a Bench under the Oudh Courts Act when a learned single Judge has refused to grant leave under Section 12 (2) of that Act. If the learned single Judge has refused to grant leave, the order is final. There appears to be no reason why the order granting leave should be open to challenge. If the Bench agrees with the decision it can dismiss the appeal on the merits. It does not appear to us to be proper that the Bench should allow the order granting leave to be questioned before it. We were told that there is a practice in Lucknow of giving leave without notice to the other side. This practice should cease and if leave is granted by a learned single Judge after hearing the parties there is no reason why such an order should be allowed to be questioned before the Bench hearing the appeal under Section 12, Oudh Courts Act. As we have already said in the view that we have taken that the certificate was rightly granted it is not necessary to pursue this matter further.

11. The main point for decision in this case is the question of interpretation of the will of Hakim Ali dated 17th May 1903. The learned single Judge has quoted in extenso a translation of the document. Though learned counsel has read out to us the will in the original, the correctness of the translation is not disputed. The will starts by providing that the executant was making a will in respect of his entire property to the effect that after his death three sons with powers of transfer and his grandson without power of transfer shall become the owners in possession of his entire aforesaid property as well as other moveable and immoveable properties. He then gives to his widow, Najmunnissa, eight bighas odd of land as owner in possession without power of transfer and provides that after the death of the widow all the four beneficiaries and their representatives shall become the owners in possestion thereof in equal share. It is then provided that Wahid Ali alias Kallan shall have no right to transfer his property and his male issue shall generation after generation have the right to make a transfer in respect of the property and if Wahid Ali alias Kallan has no issue then his three sons and their representatives shall become the owners in possession after the death of Wahid Ali.

12. These are the only provisions that are really relevant and it would appear from the same that all the four beneficiaries, that is, the three sons and grandson, were included in the same dispositive clause with merely this difference that Wahid Ali was not given the right to transfer. He was described as malik wa kabiz like the three sons. If Wahid Ali had a son then also it was made clear that that son was to get the property with full right of transfer, but if he had no male issue it was only in that case that the property was to revert to the sons of the testator.

13. We find it extremely difficult to interpret this document as a document by which the corpus of the property was not transferred and it was merely the usufruct that was dealt with. The Muslim law makes a clear distinction between property and its usufruct and it is well settled now that life estate with vested remainders is not recognised under the Mahomedan Law and such an estate, if attempted to be created whether by will or by gift, is invalid. Authorities are all one way that when a Mahomedan has made a gift and has stipulated for a condition that is fasid or invalid, the gift is valid and the condition is void. See Abdul Gafur v. Nizamuddin, 19 Ind. App. 170 and Babu Lal v. Ghanshiam Das, 44 ALL. 633. The fact that a life estate with a vested remainder is not recognised by Mahomedan Law is not seriously disputed, but what is urged is that on a correct interpretation of the document it should be held that the testator intended to give to Wahid All merely the usufruct in the eight pies share and not the corpus with restriction against alienation. It is urged in the alternative, on behalf of the plaintiff, that where a Mahomedin has purported to create a life estate a gift for life should be construed as an interest for life in the usufruct. Reliance is placed for this argument on the observations made in Mulla's Mahomedan Law, Edn 18, p. 151, which are as follows :

> "In a recent case Nawazish Ali Khan's case, (75 Ind. App. 62) the Privy Council observed that there was no such thing as life estate or vested remainder in Mahomedan Law as understood ia English Law, but a gift for life would be construed as an interest for life in the usufruct."

Before we deal with this point, however, we may dispose of another point.

14. Learned counsel for the respondents has urged in the alternative that though it may not be possible to create a life e3tate by a gift, such an estate can be created by a will. Reliance is placed on two decisions of the Oudh Chief Court Naziruddin v. Khairat Ali, A.I.R. (25) 1938 Oudh 51 by Ziaul Hasan and Hamilton JJ. and Fakir Mohammad v. Hasan Khan, A.I.R. (28) 1941 Oudh 25 by Bennett J. In Naziruddin's case learned counsel for the defendant-respondent had urged that the condition that the legatee should remain in possession of the property for her lifetime only was void under the Mahomedan Law and that, therefore, the bequest was absolute. Mr. Justice Ziaul Husan held that under the Mahomadan law a condition repugnant to the grant is invalid, applies to gifts only and not to wills. In support of the proposition he quoted the following passage from Hedaya :

> "If a person made a will of the services of his slave or of the right of residence in his house for a definite period or for ever in favour of another, such a will is valid, as the giving of the proprietorship of the usufruct either for consideration or without it in the lifetime of the testator is valid, and similarly it will be valid after his death."

It will appear from the quotation that the author of the Hedaya had made no distinction about giving the proprietor ship of the usufruct either in the lifetime of the testator or after his death. A similar quotation from Baillie's Digest of Mahomedan Law made it also clear that a grant of the usufruct limited in duration whether in the lifetime of the testator or after his death, was valid. With great respect to the learned Judge the passage from Helaya and from Baillie quoted by him make no distinction between a gift and a will. In Fakir Mohammad Khan's case Bennet J., held that a creation of a life interest under a will is valid. It does not appear that he made a distinction between a will and a gift.

15. The point however, appears to us to have been set at rest by certain decisions of their Lordships of the Judicial Committee. Before we come to the latest decision on the point in Nawazis Ali Khan v. Ali Raza Khan 75 Ind. App. 62, it would be more convenient to deal with the earlier case of Amjad Khan v. Ashraf Khan, 56 Ind. App. 213, especially as there has been a certain amount of misapprehension in some of the reported decisions as to what their Lordships had actually decided. The case was decided by a bench of the Judicial Commissioner's Court, Lucknow, of which Sir Wazir Hasan was a member. It has been assumed in some cases that their Lordships of the Judicial Committee approved of the decision of the Judicial Commissioner's Court. A careful examination of the decision, however, makes it clear that their Lordshipa after having carefully considered the document agreed with Mr. Wazir Hasan, as he then was, that the deed read as a whole and giving effect to all the terms thereof affords clear proof that the donor intended to make and did make a gift to his wife of a life interest only in the entire property comprised in the deed together with a power of alienation in respect of one-third of the property. Their Lordships of the Judicial Committee, however, did not express any opinion on the question whether a transfer of a life estate could be made by means of a gift as in their view the plaintiff who had claimed the property as the legal representative of Srimati Waziran in whose favour the life estate was created could not claim the property if the life estate was valid as on her death the life estate came to an end, and if the life estate was invalid then Srimati Waziran having no right the plaintiff as her legal representative could not claim the property. This decision cannot, therefore, be said to have recognised the validity of a life estate under the Mahomedan Law, nor could it be said that the observations made by Mr. Wazir

Hasan, Judicial Commissioner, except as regards the interpretation of the deed, was approved of by their Lordships of the Judicial Committee.

16. In Nawazish Ali Khan's (75 Ind. App. 62), the point arose under the Shia Law whether it was competent for a Shia Mahomedan by his will to leave property for a person for his life and after his death to such members of the class aa such person may appoint. Dealing with the question whether the Muslim Law recognises the power of appointment given under a will to a person to whom an estate had been granted for life after the death of the testator their Lordships said:

> "In general Muslim Law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim Law, whether the Hedaya, or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognises the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim Law does recognise and insist on, is the distinction between the corpus of the property itself (ayn) and the usufruct in the property (manafi). Over the corpus of property the law recognises only absolute dominion, heritable, and unrestricted in point of time, and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interests."

Their Lordships laid down for the guidance of the Courts that in dealing with a gift under Muslim Law, the first duty of the Court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant; but if on construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownerships of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest.

17. From the said decision, it must now be deemed to be finally settled that creation of a life estate or of an estate of limited duration is not possible under the Mahomedan Law. Such an estate not being known to that system of law cannot be created whether by a gift or by a will. The question, however, remains whether when a testator has executed a document, whether a will or a gift, in which he has put absolute restriction on the power of alienation it must necessarily be construed as a transfer of the usufruct and not as a transfer of the corpus of the property. It does not appear that their Lordships intended to lay down that the language of the document should be disregarded and wherever a life estate has been created it must be deemed to be a transfer of the usufruct. If this were so, their Lordships would not have said that it was for the Courts to construe the deed and pointed out in Amjad Khan's case (66 Ind. App. 213) that the intention of the donor is to be ascertained by reading the terms of the deed as a whole and giving to them the natural meaning of the language used. Learned counsel has urged that we have to put ourselves in the arm chair of the testator and to make every effort to give effect to his intentions rather than interpret the will in such a manner as to invalidate its provisions. This no doubt is true, but at the same time no Court has a

right to make out a new will for a testator if the old will made by him is not capable of an interpretation which would validate it. It must be read as a whole and the language used in the document must be given its natural meaning. The mere fact that a life estate in the corpus is not recognised under the Mahomedan Law would not justify the Courts in holding that it was a life estate in the usufruct that was intended to be created when the document read as a whole and giving the natural meaning to the language used is not capable of that interpretation.

18. Where a person has been given a property for life with an absolute restraint on the power of alienation and with no right of succession in favour of his legal representatives and with directions that on his death the property shall come into the possession of his own heirs or their legal representative, there is very little difference in fact between such a transfer and a transfer of the usufruct in the property for the lifetime of the transferee, though Mahomedan Law has made a clear distinction between a transfer of the usufruct and a transfer of the property. Where, however, as in this case, not only has the property been given to the legatee (or his lifetime, like the three other legatees to whom the property was given absolutely, but the property was to go to the legatee's male issues absolutely, if the document was to be interpreted as transferring to Wahid Ali the mere right to enjoy the usufruct then the property would immediately vest in the three sons of Hakim Ali with this limitation that in his lifetime. Wahid Ali would enjoy the property and the provision in the will that the property should go absolutely to the son of Wahid Ali, if any on his death would become invalid. There can be no doubt after the death of his eldest son Wajid Ali and knowing that Wajid Ali's descendants would not inherit his property under the Mahomedan Law, Hakim Ali executed the will to benefit his grand son and his male descendants who would otherwise have not got any share in his property. It is said that Wahid Ali was mentally weak and at one time an attempt was made to have a guardian appointed for him under the Lunacy Act. It may be that on that account the testator deprived him of the power of transfer but the dominant intention of the testator to help Wahid Ali and his male descendants would be partially nullified by interpreting the will as a gift of the usufruct to Wahid Ali for his lifetime. We have no right to make out a new will for the testators and when it is clear that he wanted to give the property to Wahid Ali and his sons a forced construction cannot be placed on the document and it cannot be said that the testator did not intend to give the corpus to Wahid Ali and his sons but only the usufruct to Wahid Ali for his life. Reading the document as a whole and keeping in mind its various provisions we are of the opinion that the deed cannot be interpreted as a mere transfer of the usufruct. It was intended to be a bequest of the corpus with certain limitation and the limitations being invalid Wahid Ali became the absolute owner of the property.

19. One small point was mentioned to us that though under the Mahomedan Law Hakim Ali could not make a will as regards the whole of his property and the will could operate only as regards one third this defect was cured by the consent given by the heirs to Hakim Ali. Learned counsel for the appellants pointed out that mutation of names was not on the basis of the will but on the basis of inheritance. The importance of this point might arise in this way that Wahid Ali having got possession of the property in 1909 and having transferred it to Kalsumunniss in 1915 it had to be seriously considered whether the suit filed in 1944 was within time. As we are dismissing the appeal (suit?) on another point and as this point was not raised in any of the Courts, it is not necessary for us to consider it. In the view that we have taken it is also not necessary for us to discuss the question

whether Section 233 (k) of the Land Revenue Act barred the plaintiff's claim.

20. The result, therefore, is that this appeal is allowed, the decrees of the learned single Judge and the lower appellate Court are set aside, the decree of the trial Court is modified and the plaintiff's suit is dismissed in its entirety with costs in all the Courts.