Privy Council Appeal No. 63 *of* 1928.
Oudh Appeal No. 13 *of* 1927.

Maharaja Sir Mohammad Ali Mohammad Khan, Khan Bahadur - *Appellant*

v.

Musammat Bismillah Begam and another - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1930.

Present at the Hearing:

VISCOUNT DUNEDIN.
SIR LANCELOT SANDERSON.
SIR BINOD MITTER.

This is an appeal from a decree of the Chief Court of Oudh, dated the 11th of February, 1927, which varied a decree of the Subordinate Judge of Mohanlal Ganj, Lucknow, dated the 31st of May, 1926, and decreed in part the plaintiff's suit with costs.

The appellant, on the 4th November, 1921, instituted a suit against Haji Siddique Hasan (hereinafter referred to as defendant No. 2) to which suit the plaintiff respondent No. 1 (who is the wife of defendant No. 2) was not a party, for the recovery of money partly as damages for breach of contract and partly by way of recovery of advances made to defendant No. 2 for the purchase of goods as commission agent. This suit was decreed for a sum a little over Rs. 24,000 on the 25th February, 1924, but on appeal was reduced by about Rs. 4,000.

After the appellant had obtained his decree in the first Court and whilst an appeal was pending, the appellant, as decree

holder, attached plots 44, 44a, 45 and 46 situated on the New Sanitary Road, Lucknow, with buildings thereon, in execution of his decree, alleging that the same belonged to defendant No. 2. The present plaintiff (his wife) claimed under Order 21, Rule 58 of the Code of Civil Procedure, that these plots were not liable to attachment as a portion of the plot No. 45 and the whole plot No. 46 was *wakf* property, and the remaining portion, *i.e.*, a portion of the plots Nos. 45 and 44, had been transferred to her in lieu of her claim for dower. Her claim was dismissed under the provisions of Order 21, Rule 61 of the Code of Civil Procedure, on the 26th January, 1925, on the ground that the *wakf* deed and the deed of gift were merely fictitious documents created with a fraudulent intention and that the defendant No. 2 and not the plaintiff was in possession of the said plots with the buildings thereon.

Plaintiff thereupon instituted the suit out of which this appeal arises on the 12th February, 1925, against the defendants for a declaration that the deed of *wakf* and deed of gift dated the 19th November, 1916, and 30th June, 1917, respectively are valid and that the said premises were not liable to attachment and sale.

The learned Subordinate Judge came to the conclusion that the *wakf* and the deed of gift did not represent genuine transactions, that there never was a *bona fide* intention on the part of defendant No. 2 to make the *wakf* and the gift, and that the same were never given effect to. He further held that these documents were executed to defeat any claim which the appellant might make against defendant No. 2, and that the plaintiff was not entitled to the relief she claimed in the suit.

The learned Judges on appeal in the Chief Court reversed that judgment and hence this appeal.

Defendant No. 2 was a *tahsildar* of the appellant on a small salary until the year 1912, when he went on a pilgrimage to Mecca, and after his return from the pilgrimage he was employed by the appellant till 1921 as a commission agent to purchase grain and other articles for the appellant's estate and was paid remuneration at the rate of 1 anna in the rupee on the price of the commodities purchased, and also his expenses. In the course of his employment as commission agent large sums of money from time to time were advanced by the appellant to him for the purchase of goods and these sums and the amounts due to him for goods supplied were entered in the account books of the appellant's estate, but he had control over a portion of such sums and could draw upon the same.

In March, 1913, the defendant No. 2 purchased the said plots Nos. 45 and 46 which adjoined a ruined mosque. After his purchase, with the sanction of the Municipality, he erected buildings on a portion of plot No. 45 and on plot No. 46 at a cost of about Rs. 15,000, and also erected a new mosque, which he alleged cost him Rs.2,000, and thereafter on the 12th August, 1915, he informed

the secretary of the Municipal Board of Lucknow that he had transferred the said premises to his wife, *i.e.*, the plaintiff, and requested the secretary to put the plots in her name in place of his own in the office records. The secretary gave effect to this request on the 2nd October, 1915.

On the 19th November, 1916, defendant No. 2 by a registered document purported to create a *wakf* of a portion of plot No. 45 and of plot No. 46 with the buildings which had already been erected thereon and appointed himself a *mutwali*.

On the 20th April, 1920, the plaintiff wrote to the Municipal Board alleging that she herself had purchased plots No. 45 and 46 for Rs. 735 and that the same should be conveyed in favour of her husband defendant No. 2. He vouched the correctness of her allegations in the application. In pursuance of her request a formal registered deed of transfer was duly executed in favour of defendant No. 2 as the absolute owner on the 14th May, 1921.

Plot No. 44 was originally purchased in March, 1913, by one Baqar Husain, who, by an application dated the 9th April, 1913, to the Municipal Board, had this plot transferred to his brothers Haidar Husain and Ahmad Beg. They executed a registered sale deed of this plot in favour of defendant No. 2 but no conveyance was ever executed by the Municipal Board with reference to the plot. He obtained sanction from the Municipal Board to build on this plot.

Under Order 21, Rule 63, the decision in the said claim proceedings was final subject to the result of this suit which the plaintiff instituted for a declaration that the deeds are valid and that the said properties are not liable to be attached in execution of the decree of the appellant. In their Lordships' opinion she is not entitled to this declaration unless she establishes to their satisfaction that the deeds in question were *bona fide* and were intended by defendant No. 2 to pass the beneficial interest in the premises in favour of the *mutwali* of the *wakf* and the plaintiff respectively.

Their Lordships will first consider the validity of the deed of gift.

Plaintiff was married to defendant No. 2 about 1898 or 1899. It is alleged that the dower was fixed at Rs. 30,000. No *kabirnama* is produced to corroborate the allegation as to what amount, if any, was fixed for the dower.

Defendant No. 2 later on married another lady, and certain properties known as *kakoori* properties, which were the only immovable properties which defendant No. 2 had in 1909, were alleged to have been given to her by way of dower, so that from 1909 he possessed no immovable property.

Plaintiff's case is that she had been pressing for the payment of her dower from 1909 but nothing seems to have been done till the time when the deed of gift was executed in 1917. Without expressing any opinion as to whether a *kabirnama* is usual or not

where the dower fixed is a large sum of money, their Lordships feel that it is incumbent on the plaintiff to prove by cogent evidence that the dower remained unsatisfied until 1917, nearly 19 years after her marriage. The evidence on this point is entirely oral and the only persons who spoke to it were the plaintiff and her husband, defendant No. 2. There is no corroboration of their evidence on this point from any other evidence and they are both interested parties. Defendant No. 2 was examined before the Trial Judge and he wholly disbelieved him, nor did he accept the evidence of the plaintiff, who was examined on commission. It will serve no useful purpose to go into any detailed examination of their evidence, but the same has been placed before their Lordships with great care by the learned Counsel who appeared for the appellant and the plaintiff respondent. Their Lordships are clearly of opinion that the evidence of the plaintiff and defendant No. 2 on this point, as also on all material points, is wholly untrustworthy. They therefore hold that the story of the unsatisfied dower is untrue.

The evidence of the plaintiff and her husband is that she spent Rs. 5,000 or Rs. 6,000 in erecting certain structures on the plot of land which was vacant at the time of the deed of gift, and that the money spent was found by the sale of her jewellery. The evidence on this point is extremely discrepant and highly improbable and unsatisfactory. No person to whom it is alleged the ornaments were sold has been called to corroborate this story. Their Lordships are unable to accept the evidence as to the way in which the ornaments were sold and the sale proceeds realised and spent in erecting the structures under the supervision of her son-in-law Mukhtar Mohammad. This witness was examined before the Trial Judge, who disbelieved his evidence. Their Lordships are also of opinion that this witness is untrustworthy, and they do not believe the story that the structures were erected on the vacant portion of the property given to her out of the proceeds of the sale of her jewellery. A portion of plot No. 45 forms the subject matter of the gift, and it is a noteworthy fact that on the 20th April, 1920, she alleged that she herself had purchased plots Nos. 45 and 46 for Rs. 735, for which she alleged that she held a receipt. No such receipt has been exhibited in this case. In the conveyance of plots Nos. 45 and 46, executed on the 14th May, 1921, it is also stated that she herself had originally purchased the said premises, and it is difficult to see why, if plot No. 45 had been purchased by her, a gift of it should or could have been made to her by her husband in 1917.

By 1917 defendant No. 2 had denuded himself of all his savings, movable or immovable, and their Lordships cannot believe the statement of defendant No. 2 that he intended to part with the only property of which he was possessed in favour of the plaintiff.

Defendant No. 2 from 1913 was carrying on a business which to a certain exent was of a hazardous character, and he had the

opportunity of utilising the money of the appellant for his own purposes, and the effect of this deed of gift certainly would be to defeat or delay any claim which defendant No. 2 might have at any time against him. Their Lordships are of opinion that defendant No. 2 was always the true owner and in possession of the property which was the subject matter of the gift from the time of his purchase in 1913 and 1915 respectively, and that this deed was false and fraudulent. The suit on this point therefore fails.

Their Lordships will next consider the evidence with regard to the *wakf* which comprised plot No. 46 and a portion of plot No. 45.

The deed of *wakf*, of which Defendant No. 2 is now the *mutwali*, and the deed of gift are intimately connected with each other. Their Lordships have already held that the evidence of the plaintiff and defendant No. 2 is false with respect to the deed of gift and, in their opinion, their evidence with regard to the deed of *wakf* must be approached with great suspicion and subjected to the strictest scrutiny. The fact that the deed of gift is a false and fraudulent transaction does not by itself prove that the deed of *wakf* is also false and fraudulent but it does throw upon the plaintiff a heavy burden to prove that the same was a *bona fide* document and not executed with a view to defeat or delay the claims, if any, of the defendant No. 1 upon defendant No. 2.

Defendant No. 2 paid a substantial portion of the purchase money and there is no evidence as to who paid the balance. The defendant No. 2 must have done so as the plaintiff did not suggest till April, 1920, that she had paid the whole of the purchase money herself—a story which is obviously false, as the defendant No. 2 paid by his own cheque a portion of the purchase money. From the 2nd March, 1913, to the 12th August, 1915, the name of defendant No. 2 appeared in the records of the Municipal Board as the purchaser. Their Lordships have already adverted to the fact that on the last mentioned date he informed the Municipal Board that he had transferred the same to his wife and requested that her name be substituted for his in the office records. This request was acceded to on the 2nd October, 1915. He had, however, executed no document in her favour. His explanation is that he had fallen ill and had made an oral will in her favour. Their Lordships agree with the Trial Judge that this story of the oral will is untrue. It is noteworthy that the letter of the 12th August, 1915, does not in any way indicate how the transfer had been made, but in 1916 he executed the *wakfnama*, treating the property as his own.

In 1920 the following application was made to the Municipal Board :

"The Secretary,
Municipal Board,
Lucknow.

"Sir,

With compliments, I purchased plots Nos. 45 and 46 situate on the Ganga Prasad Road, when the road was being opened, from the Municipal Board, for Rs. 735, for which I hold receipt. But formally no sale deed was

executed ; therefore through this application I inform you that a sale deed in respect of the plots mentioned above be got executed in favour of my husband, Molvi Mohammad Siddique Hasan Saheb. Whatever costs may be incurred shall be accepted by me. The said Molvi Saheb also agrees to this transfer, and I shall be obliged.

Yours obediently,

(sd) Bismillah Begam, wife of Molvi Mohammad Siddique Hasan Saheb, Tahsildar, of Ganga Prasad Road. (Autograph).

20th April, 1920."

" I put it in writing that I agree to this application word for word, and I accept the transfer of the plots mentioned above in my favour.

(sd) Siddique Hasan." (In English).

Defendant No. 2 was cross-examined with regard to this document before the Trial Judge and he stated that " the signature on both these papers " (meaning thereby this document and exhibit A 16) " were made when these papers were blank and I made over the papers to Abdul Baqi so that he might put in an application for the execution of the sale deed by the Municipal Board and get the deed after its execution."

He denied the plaintiff's signature on this document but could give no reason why her signature should have been forged on the original document. His evidence on this point in the claim proceedings has also been exhibited. Their Lordships consider his evidence on this point to be untrustworthy.

Exhibit A 16 is a copy of the receipt by him for the sale deed in respect of the *wakf* properties, and their Lordships do not accept his story that exhibit A 16 was handed over to Abdul Baqi in blank and that the latter was not told as to who had bought the land and in whose name. He stated in his evidence in this suit as follows :

" The sum of Rs. 11,000 or so which was left with me after the sale of the ancestral property as stated above was entrusted by me to Haji Ejaz Ali, my cousin. I did not take any receipt or other writing from him about the money. He made a note of it in his account register. He used to keep accounts."

The account register referred to has not been produced, nor is there any corroboration of this story. In his evidence in the suit he said that he did not spend any money out of his earnings as commission agent for the buildings, but in the claim proceedings he stated that the balance of the money came from the commission agency of the Mahmudabad estate. His evidence in the claim proceedings, which has been exhibited in this suit, differs from his present evidence in many material particulars.

His evidence that he realised Rs. 4,000 or Rs. 5,000 by the sale of his own ornaments to Sakhawat Ali does not commend itself to their Lordships. According to his own admission, he was only earning Rs. 100 or Rs. 125 per mensem from the commission agency business, and his personal expenses and those of his wife came to under Rs. 75 per mensem. He was not able to give any explanation

worthy of serious consideration as to how he found the money spent in erecting the building.

It is, however, strenuously urged before their Lordships by plaintiff's Counsel that the advocate for the appellant admitted in the Trial Court that the money of the appellant over which he had control, as a commission agent, was never misappropriated by defendant No. 2, and therefore it is not open to the appellant to make any suggestion that he utilised any portion of such money for the purposes of the construction of any of the buildings. The actual statement of the appellant's advocate in the Trial Court is as follows :

> " It is not defendant No. 1's case that the deeds of gift and *wakf* were executed fraudulently by reason of misappropriation of the estate money made by defendant No. 2 during the years in which the said deeds were executed. Our case is that the defendant No. 2 used to handle large sums of money belonging to the estate—money which came into his hands as Tahsildar or money which used to be advanced to him as Commission Agent.
>
> "There were always balances in favour of the estate and against defendant No. 2. The defendant No. 2's motive in executing the deed of *wakf* and the deed of gift was to save his property from being made liable in case the estate at any time tried to recover money left with him."

Counsel for the appellant here submitted that this admission merely meant that the appellant was not taking on himself the burden of proving that any particular sum of money belonging to the appellant was spent by defendant No. 2 in constructing the buildings, but he submitted that the admission of the advocate in the Trial Court did not preclude him from arguing that defendant No. 2 could not possibly have erected the buildings out of his own money. Their Lordships do not believe that the defendant No. 2 spent the said Rs. 15,000 out of the balance of the sale proceeds of his immovable property or his jewellery.

The conveyance of 14th May, 1921, transferred the property absolutely to defendant No. 2, his heirs and representatives, and there is no reference whatever in it that a portion of the properties was *wakf*.

Plaintiff has relied on exhibit 48 as proving that the defendant No. 2 was spending money out of the income of the *wakf* for purposes of *wakf*, but it is a document in his handwriting. Chittas in support of it have not been produced or proved. The Trial Judge found that exhibit 48 is not a genuine memorandum of accounts, nor did he believe the evidence of defendant No. 2 that the chittas had been lost. There is no independent corroboration from other evidence or documents that exhibit 48 was a genuine memorandum of accounts or that the chittas had been lost. The proof of its genuineness or of the loss of the chittas therefore depends largely upon the evidence of defendant No. 2 and as their Lordships cannot place any reliance on his evidence, they are unable to hold that the findings of the Trial Judge on these points were not proper findings and their Lordships are not satisfied that the plaintiff or defendant No. 2 ever gave effect to the *wakf* or

to the deed of gift. The plaintiff, and not the defendant No. 2, at the time of the execution of the deed of *wakf* was the ostensible owner of the properties covered by the deed. Although he executed the deed in 1916 and became on its execution the *mutwali* of the same, yet in 1921 he procured the conveyance of the properties in his own name. If he had really intended to create a *wakf*, it is difficult to see why the conveyance was not executed in his favour as a *mutwali*.

On a careful consideration of the whole evidence, their Lordships have come to the conclusion that defendant No. 2 executed the deed of *wakf* but without any intention of divesting himself of his ownership of the property, and that his real intention was to utilise the document should it become necessary as a shield against any claims that the appellant might have against him either then or at any future time. Their Lordships are therefore of opinion that this appeal should be allowed and the decree of the Subordinate Judge should be restored and that the appellant should have his costs in the Chief Court and of this appeal. They will therefore humbly advise His Majesty accordingly.

In the Privy Council.

MAHARAJA SIR MOHAMMAD ALI MOHAMMAD KHAN, KHAN BAHADUR

v.

MUSAMMAT BISMILLAH BEGAM AND ANOTHER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.