Privy Council Appeal No. 31 of 1937

Mohammad Ismail and others - - - - *Appellants*

v.

Hanuman Parshad and another - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH OCTOBER, 1938

Present at the Hearing:
LORD WRIGHT.
LORD ROMER.
LORD PORTER.
SIR GEORGE LOWNDES.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE LOWNDES.]

For the purpose of this judgment the facts may be stated quite shortly. In the main they are not in dispute.

One Mahomad Sadiq, the father of the appellants was (prior to the transactions hereinafter referred to) the owner of various immoveable properties in Delhi. On the 27th February, 1922, he mortgaged a two-thirds' share in a number of small buildings in the city to Chuni Lal, the father of the respondent for Rs.25,000. No payments having been made by the mortgagor, Chuni Lal on the 5th March, 1926 served a notice on him demanding payment of the mortgage debt within 10 days. No reply appears to have been made to this demand, but the mortgagor thereupon proceeded to make dispositions of practically the whole of his other properties. On the 23rd of March he executed a deed of sale in favour of a relation of his wife for a nominal consideration of Rs.1,500. On the 29th of April following he executed (1) a deed of gift of another house valued at Rs.15,000 in favour of his wife's sister, and (2) a *wakf-alal-aulad* purporting to settle other property of the value of about Rs.12,000 upon himself and his children and their descendants, with an ultimate, but somewhat remote, remainder to charity. It is the validity of this wakf that is in dispute in the present appeal.

On the 9th August, 1926, Chuni Lal instituted a suit on his mortgage, claiming Rs.41,968 for principal and interest to that date. A preliminary decree in the usual form was passed on the 28th March, 1927, and a final decree on the

28th April of the same year. The mortgaged property was brought to sale in due course and eventually fetched only Rs.14,000 leaving a large deficit for which the mortgagee in July 1928 obtained a personal decree against Mahomad Sadiq. In execution the mortgagee attached all the alienated properties including those comprised in the wakf. The transferees objected and applied to raise the attachments, but their objections were in each case disallowed, the Court holding the transactions to be fraudulent. Suits were then instituted by the claimants under Order XXI, Rule 63, of the Civil Procedure Code which were all eventually dismissed by the High Court at Lahore. In one of them, that concerning the wakf, an appeal has been brought to His Majesty in Council, the appellants being the sons and daughters of Mahomad Sadiq now deceased. Chuni Lal also died during the proceedings in India, and is now represented by his son, the respondent.

The wakf suit, out of which the appeal arises, was heard by the Additional Subordinate Judge of Delhi who delivered his judgment on the 31st October, 1930. He held that the wakf was valid, and passed a decree in favour of the appellants. His conclusion was that at the time the wakf was executed the value of the mortgaged property was amply sufficient to cover the mortgagee's claim. In arriving at this conclusion he relied mainly on the fact that in certain interlocutory proceedings in the mortgage suit the property had been valued by a commissioner appointed by the Court at over Rs.50,000—a sum which would admittedly have sufficed to discharge the mortgage debt in full.

The appeal to the High Court was heard by Coldstream and Jai Lal JJ. The judgment of the Court was delivered by the latter, his learned colleague concurring.

The learned Judges did not place much reliance on the valuation above referred to, and their Lordships agree that it was perfunctory. The judgment says that it was established on the record, and was indeed a matter of common knowledge, that between 1921, when Mahomad Sadiq bought the mortgaged property, and 1928, when the execution sale took place, the value of properties in Delhi was falling, and this was not disputed by the appellants' counsel. The learned Judges took the auction price of Rs.14,000 as the best proof of its then value, and this was confirmed by the fact that an offer was made by another party to buy the property for Rs.15,000 which the mortgagor was willing to accept, but the would-be purchaser backed out.

They thought that the provisions of the wakf, which left the settlor in full control of the income for his life, and made the entire profits after his death divisible among his heirs according to Mahomedan law, taken in conjunction with the dates of (1) the mortagee's demand for payment, (2) the alienations of the other properties, and (3) the execution of the *wakfnama*, clearly showed that the settlor's object was only to save his other property from the creditor. It was also, they thought, significant that he did not give evidence in support of the bona fides of the wakf.

In their Lordships' opinion these considerations were of undoubted weight and properly led to the conclusion at which the learned Judges arrived, and with which their Lordships concur.

The real question is what was in the mind of Mahomad Sadiq at the time he made these dispositions of his property. The valuation upon which so much reliance is placed by the appellants had not, of course, then materialised, and he must, their Lordships think, have known that it was at least doubtful whether the value of the mortgaged property was sufficient to cover the debt. The nature of the dispositions made by him and the fact that he was not prepared to go into the witness-box to explain them, or to controvert the almost obvious implication of what he had done, lead inevitably, in their Lordships' opinion, to the conclusion at which the learned Judges of the High Court arrived.

A good deal of argument was addressed to the question of burden of proof. Apparently it has been the settled practice of the Indian Courts, when objections to an attachment in execution have been disallowed, and a suit has been filed by the objector under Order XXI, Rule 63, of the Code, to put the onus of proving the bona fides of any transaction upon which the objector relies upon him in his capacity of plaintiff. This is a matter which may possibly require further consideration when the question of onus is really material. In the present case where the facts are fully established, and the inference from them is clear, their Lordships think that nothing would be gained by any examination of the authorities to which reference has been made before them.

For the reasons given above their Lordships will humbly advise His Majesty that this appeal should be dismissed, and that the costs should be paid by the appellants.

(13018—3A) Wt. 8168—30 190 11/38 P. St. G. 338

In the Privy Council

MOHAMMAD ISMAIL AND OTHERS

v.

HANUMAN PARSHAD AND ANOTHER

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