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SMT. ZUBEDA BEGUM ETC.

v.

SYED SHAH KHURSHEED AHMAD HASHMI AND ORS. ETC.

NOVEMBER 28, 1996

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[K. RAMASWAMY AND G.T. NANAVATI, JJ.]

C

Muslim Law—Wakf—Meaning, Object and validity of—Wakfnama executed by a follower of Hanfi Sunnet-ul-Jammat of Islam—Executant giving up proprietary interest in properties and appointing himself as Mutawalli of the wakf—Vesting of properties in God—Provision that after death of executant his nephew would be mutawalli of Estate—Wakfnama duly registered with Sub- Registrar—Death of executant—Wife of executant filing a suit for cancellation of Wakfnama and for possession of properties—Suit partly decreed by Trial Court—On appeal suit dismissed by High Court—Appeal before Supreme Court—Finding that the executant of wakfnama was in a fit mental condition to execute the Wakfnama held correct—Contention that the nephew of executant had played greater role in having the wakfnama executed for his benefit by bringing about undue influence on the executant rejected—Held, in the circumstances of the case the wakf was duly created in accordance with law—Held, the wakf was not vitiated by error of law warranting interference—But clauses 6, 7 and 11 held not valid.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 567 of 1981 Etc.

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From the Judgment and Order dated 14.3.80 of the Allahabad High Court in F.A. No. 399 of 1962.

S.K. Dholakia, T. Khan, Anil K. Chopra, Anis Suhrawardy, Ejaz Maqbool, Dr. N.A. Siddiqui, Mohan Pandey and S.K. Jain for the appearing parties.

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The following Order of the Court was delivered:

Leave granted in SLP (C) No. 1638/81.

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This appeal by special leave arises from the judgment of the Division Bench of the Allahabad High Court, made on March 14, 1980 in First Appeal No. 399/62 and 28/64. The Nawab Sir Mohammad Yusuf of Jaun-

pur had executed Wakfnama on April 5, 1956 and he died on May 3, 1956. The appellant-Zubeda Begum, his widow filed the suit for cancellation of the Wakf-nama and for possession of the properties with a declaration that she is entitled to the compensation to the extent of 1/4th share of the properties given in the list. The trial Court partly decreed the suit. On appeal, the High Court dismissed the suit. Thus, this appeal by special leave.

The main controversy is with regard to the validity of the Wakf- nama created by Nawab Sir Mohd. Yusuf which reads as under :

"I, Nawab Mohammad Yusuf, son of Nawab Abdul Majid Saheb, resident of Mohalla Alam, Post Office Sadar Jaunpur City.

Whereas I am a follower of Hanfi Sunnet Ul Jammāt of Islam and whereas it is obligatory on every person that he should make arrangement by which charity and alms may continue to be given and dependent may also be looked after. The properties mentioned are worth Rs. 2,44,679 which are my exclusive ownership the detail of which has been given in Schedule As, Ba, Da and Sa.

The executant has no issue either male or female. I have got a nephew (My sister's son) Syed Shah Mohdammad Hashmi, B.A., LL.B, Vakil, Allahabad who is the son of Moulvi Nazir Shah Hashmi. He is very promising, able and virtuous by nature. I have brought him up as if he was my own son.

The cherished desire of me is that (1) Syed Shah Mohammad Hashmi aforesaid as well as (2) descendants of my wife and (3) other poor penniless people should be benefited by this Waqf. Therefore, after considering pros and cons of this document without any coercion or undue influence from anyone in a state of my full senses and wisdom and with my own free will, I hereby create a waqf of the properties in pursuance of Act 6 of 1913. I have given up my proprietary possession over the properties and have re-taken them as the Mutawalli of the Waqf from this day onwards. I have no proprietary interest left in the properties and every bit of the property has become vested in God for the benefit of the persons mentioned above. These properties have become Waqf property for all times to come. This document will be binding

A on everybody and the name of the property hereafter will be called "Waqf-e-Yusufia."

And all the proceedings against the Waqf estate will be taken under the name of "Waqf-e-Yusufia". I settle the line of Tauliat as follows :

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(1) That upto my lifetime, I, the executant will be the Mutawalli of the Waqf properties and perform and take all proceedings vis-a-vis the properties in the capacity of my becoming the Mutawalli. No one will have the right to question my doings. The executant will have the right on the Waqf properties, whether they are planted trees, groves, groves' cultivation and the groves of the fruit-bearing mango trees. If and when it is necessary for the preservation of the Waqf properties, I will have the right for sale, lease or mortgage for the benefit of the Waqf. I will also have a right on the abolition of the Zamindari to get the compensation as Mutawalli of the Waqf. These rights will continue till I am alive and when I am no more, the succeeding Mutawalli will have the same rights in pursuance of this Waqf Deed.

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(2) That after the lifetime of the executant Syed Shah Ahmad Hashmi would be the Mutwalli of this estate. And after Syed Shah Ahmed Hashmi, his eldest son and after him the eldest son of his eldest son, generation after generation will continue in perpetuity as Mutwalli of the Waqf estate.

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(3) If per chance the eldest son of Syed Shah Ahmed Hashmi does not remain alive and died without any issue; in that contingency, the Tauliat will go to the branch of the second son of Syed Shah Ahmed Hashmi and the Mutwalliship will continue till then in perpetuity.

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(4) That it is imperative that the Mutwalli of this Waqf will only be such a person who is virtuous, honest, able and capable to manage the properties. He should also follow Hanfi Tenets of the Mohammedan Law. If the main line of Syed Shah Ahmed Hashmi becomes extinct, then the Mutwalliship will go to the female line of Syed Shah Ahmed Hashmi.

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(6) In case, the line of Moulvi Haider Hussain who is the grand-father of the executant also becomes extinct and no one of his descendants is alive, then all the Muslim residents of Jaunpur will be entitled to elect a muslim who is honest, virtuous and belongs to the Sunni Hanfi sect to get appointed Mutwalli through court, such a person will have to follow the directions given in this deed. A
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(7) That every person who is a Mutwalli will be entitled to nominate his successor.

(8) The executant will be utilising usufruct and income of the property till he is alive for self and for the needs of my wife Smt. Zubeda Khatun as well as for the benefit of Syed Shah Ahmed Hashmi. C

(9) That on the death of the executant, Government demands, Revenue, taxes, repair of houses and other necessary expenses including litigation expenses, etc., a sum of Rs. 200 will be paid to my wife Zubeda Khatun till her lifetime and the remaining sum will be distributed among the legal heirs of Shah Ahmed Hashmi. D

(10) That the amount which is payable to my wife on her death will be paid to the heirs of Syed Shah Ahmed Hashmi. E

(11) That if all the descendants of Syed Shah Ahmed Hashmi become extinct, then the income from the Waqf properties will be distributed to the descendant of my grand-father Moulvi Haider Hussain proportionately according to the Hanfi School.

(12) When all the class of persons mentioned above are no more, the entire income will be given to the poor beggars and destitute Muslims. It will also be spent over Qurankhani and virtuous acts for the benefit of the Muslims at large. F

I have, therefore, this day executed waqfnama so that it may be referred to if and when an occasion arises. G

5th April, 1956."

Shri Dholakia, learned senior counsel appearing for the appellant, contends that the reading of the wakfnama does indicate that it is not a H

A wakfnama but it was executed to benefit Syed Shah Ahmad Hashmi (for short, Hashmi) who had played greater role in having the wakfnama executed for his benefit by bringing about undue influence on the Nawab. Therefore, the wakfnama is void under law by reason of Section 16 of the Contract Act. He read to us the evidence discussed by the trial Court regarding the mental and physical condition of Nawab Mohd. Yusuf and contends that the High Court has not considered this evidence, in particular medical evidence of PW-11 and the doctor examined on behalf of the respondent. Therefore, it amounts to excluding the relevant evidence which was taken into consideration by the trial Court vitiating the finding recorded by the appellate Court. We find no force in the contention. It is seen that the appellate Court has considered the evidence elaborately and came to the conclusion that the Nawab Mohd. Yusuf was in a mentally fit condition to execute the wakfnama. He was a Barister at Law and an M.L.A. The finding recorded by the High Court is as follows :

D "In the instant case a perusal of paragraph 9 along with various other allegations made in the plaint with regard to the physical and mental condition of the Nawab shows that according to the plaintiff, at the time when the waqf deed is said to have been executed, no relation, other than Khurshed Ahmad Hashmi, was present near the Nawab. The nature of undue influence said to have been disclosed in the plaint was that Syed Khurshed Ahmad Hashmi stood in fiduciary relationship and was in a position to dominate the will of the Nawab whose mental capacity had been impaired. He utilised that position in obtaining the waqf deed and thus obtained for himself the entire benefit in respect of the property belonging to the Nawab. We have, therefore, to see if there is any reliable evidence on the record to establish the following:

1. That the nawab was mentally weak and his mental capacity had been temporarily or permanently effected by reason of age illness or mental or bodily distress.
2. That Syed Khurshed Ahmad Hashmi stood in fiduciary relation with the Nawab.
3. That Khurshed Ahmad Hashmi used his position or relationship in obtaining the waqf deed.

So, far as the first question is concerned, we have, while considering the question whether the waqf deed in question was executed by the Nawab, pointed out that even though the evidence discloses that at the time of execution of the waqf deed the Nawab was in bad health, there was nothing on the record to show that his mental condition had been impaired to the extent that he was not in a position to understand the consequences of his action. Apart from urging that due to protracted illness and advanced age, the mental capacity of the Nawab must have been impaired, learned counsel for the plaintiff could not bring to our notice, any circumstances appearing in the evidence, which could justify the inference that the mental capacity of the Nawab had been impaired. The inference that Khurshed Ahmad Hashmi was in a position to dominate the will of the Nawab is also sought to be drawn merely from the fact that at the time of the execution of the waqf deed the Nawab was in weak health and was totally blind. In our opinion, this fact by itself cannot lead to an inference that Khurshed Ahmad Hashmi was in a position to dominate the will of the Nawab. The evidence discloses that the Nawab had been practically blind for about 3 years and that mostly his family members were living away from him. It is not suggested that during that period the Nawab had been dominated by any one and that he had not been acting on his own free will. The evidence produced on behalf of Syed Khurshed Ahmed Hashmi clearly shows that due to certain reasons even before Khurshed Ahmad Hashmi came to live with the Nawab at Jaunpur, the Nawab wanted him to come to Jaunpur and to look after his estate and that he wanted to settle his property for his benefit. Accordingly merely because the Nawab was in a weak state of health and from amongst his relatives only Khurshed Ahmad Hashmi happened to be at Jaunpur at the time of execution of the waqf deed, it does not mean that the Nawab executed the waqf deed because of any undue influence exercised by Khurshed Ahmad Hashmi.

The waqf deed shows that the Nawab had taken care to see that his wife Smt. Zubeda Begum was throughout her life to get a sum of Rs. 200 p.m. for her maintenance, Accordingly, it cannot be said that the Nawab did not provide for his wife. Learned counsel for Smt. Zubeda Begum argued that considering the status of Nawab.

A Smt. Zubeda Begum could not possibly make her both ends meet in a petty sum of Rs. 200 p.m. and in substance no provision had been made in the waqf deed for her maintenance.

B In the result, we find that there is nothing on record to indicate that the waqf deed in question had been obtained by Syed Khurshet Ahmad Hashmi by exercising under influence on the Nawab and that the same is not invalid on that account. The finding recorded by the trial Court to the contrary is accordingly set aside."

C It is seen that wakfnama as executed and duly registered by the Sub-Registrar who was also examined in this case. A gruelling cross-examination has been done of the Sub-Registrar and the High Court accepted his evidence. It is true that the trial Court has given diverse reason for disbelieving the evidence of the respondent and accepted the case of the appellant. The High Court also being a final court of fact had appreciated the evidence and came to the conclusion that the Nawab Mohd. Yusuf was in fit mental condition though he was weak to execute the wakfnama.

E It is then contended that wakfnama was not in accordance with law and, therefore, it is not valid in law. We find no force in the contention. Mulla's Principles of Mohomedan Law, (18th Edn.) by Justice M. Hidayatullah, Former Chief Justice of this Court, mentions the definition of Wakf in paragraph 173. Wakf means "The permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable". The dedication must be permanent and the subject of wakf may be any property. A valid wakf may, therefore, be made not only of immovable property, but also of movable, such as shares in joint stock companies, Government promissory notes, and even money. In paragraph 176, it is stated that the wakf must be owner on the date of creation. It is not in dispute that the Nawab Mohd. Yusuf was the owner of the property. The object of the wakf has been stated in paragraph 178, namely, as religious, pious or charitable. A wakf may also be created in favour of the settler's family, children and descendants. Paragraph 202 envisages that under the Mohomedan law, the moment of wakf is created, all rights of property pass out of the wakif and vest in the Almighty. The Mutawalli has no right in the property belonging to the wakf; the property is not vested in him, and he is not a trustee in

the technical sense. He is merely a superintendent or manager. Paragraph 203 states that subject to the provisions of sub-section (2), the founder of a wakf may appoint himself, or his children and descendants or any other person, even a female or a non-Mahomedan to be Mutawalli of a wakf property. A reading of wakf deed clearly indicates that he created a wakf. He is a follower of Hanif Sunnet Ul Jammal of Islam. He is the owner of the properties mentioned in the wakfnama. He named the wakf as Wakf-e-Yusufia. He also stated that the property vested in God for the benefit of the persons mentioned therein. He also stated thus : "I will have the right to sell, lease or mortgage for the benefit of the Wakf, I will also have a right on the abolition of the Zamindari to get the compensation as Mutawalli of the wakf". Thus, it is clear that he executed the wakf for religious benefit and thereafter the property vested in the God and he assumed his character only as a Mutawalli. He nominated the first respondent, as his successor of Mutawalli etc. Thus, it could be seen that the wakf created by Nawab Mohd. Yusuf is a valid wakf duly created in accordance with law. Only clauses 6, 7 and 11 are not valid in law. They accordingly stand excluded. As regards mental and physical condition of the Nawab, it is a question fact. The High Court equally has gone into the entire evidence and recorded the finding, as extracted earlier. Under these circumstances, the wakf is not vitiated by any error of law warranting interference.

The appeal is accordingly dismissed. Consequently, the other appeal, viz., CA @ SLP (C) No. 1638/81 filed by the respondent also stands dismissed. No costs. All the interlocutory applications are dismissed.

T.N.A.

Appeal dismissed.