Privy Council Appeal No. 2 of 1936

Saadat Kamel Hanum - - - - - - *Appellant*

v.

The Attorney General of Palestine - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MAY, 1939.

Present at the Hearing:

LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE RANKIN]

In this case the appellant's suit has been dismissed as barred by limitation and the sole question is whether the dismissal is justified upon a true construction of the relevant provisions of the Mejelle.

By a deed of wakf (*wakfieh*) dated 11th Muharram, 1228 A.H. (1812 A.D.), Emir Ali Pasha made wakf of a number of properties directing that the income should be applied in the first place to the upkeep of a certain mosque and fountain. As regards the balance of income, he directed that it should be paid or distributed to himself for his life and after his death to his three children, Abdulla, Miriam and Hanifeh, and their children.

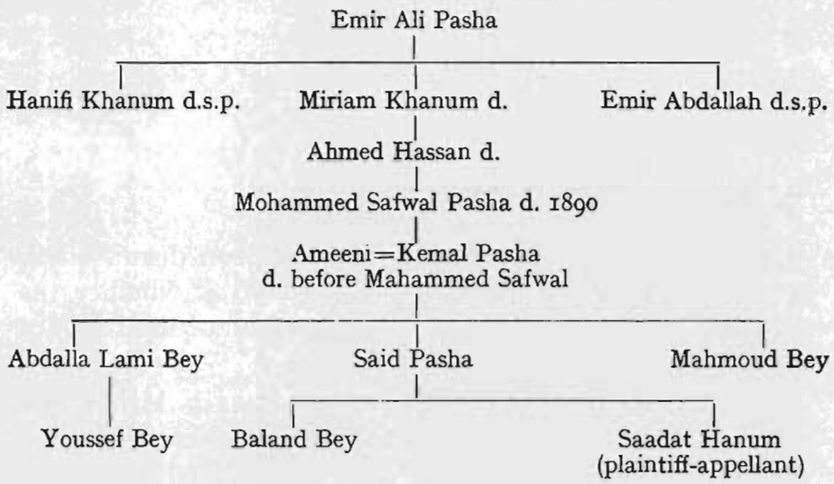
> " Then after them it shall be for their children, then to their grand-children and then to their great-grand-children etc., etc., and and so on, males and females according to the Sharia distribution viz. the share of a male shall be twice as much as that of a female and for their descendants after them as long as they live and continually as they generate, provided that any one of them who dies leaving after him a child, or a grand-child or a great-grand-child his share shall pass down to his child or grand-child or great-grand-child. When one of them dies leaving after him no child, or grand-child or great grand-child, then his share shall pass down to those who are of his category. The upper category (ascendants) shall enjoy it before the lower category (descendants) and the parents shall enjoy it before the children but not before the children of other beneficiaries. When one of them dies leaving after him a child, or grand-child or a great-grand-child, before becoming a beneficiary to anything in the Waqf, then his child, or grand-child, or great-grand-child shall become beneficiaries to the share of their father, as if he were alive. One of them may enjoy it independently in the event if he alone remains alive."

In case of failure of all descendants there was a provision that the money was to be expended for the benefit of two named mosques, and that if this should not be feasible, it should be spent on the poor.

The provision as to the office of mutawalli was as follows:—

> " The second condition is that the Mutawalliship shall be vested in His honoured son Abdallah Bey Salhashoor Khassa, and then after him it will devolve on the most prudent amongst the male children (descendants) of the dedicator, then after them it shall devolve on the most prudent amongst the female children and then it shall devolve on the most prudent amongst their grand-children and great-grand-children, etc., etc., and so on. If they (Waqf properties) revert to both honoured Harams (Mosques), then the Management shall be vested in the Nazir (manager of both of them)."

The appellant, Saadat Kamel Hanum, claims to be descended from Ali Pasha through his daughter Miriam in the manner disclosed by the pedigree table hereunder:—



In 1915 the appellant's uncle, Abdulla Lami Bey, was appointed to be mutawalli, and by an order of the Sharia Court at Acre, dated 10th January, 1926, the appellant was found to be more prudent than either Baland Bey or Youssef Bey and was appointed mutawalli. This order does not expressly mention that Abdulla Lami Bey or the appellant's father, Said Pasha, had died, nor do the dates of their deaths appear from any other of the documents on the record.

On the 26th October, 1931, the appellant as mutawalli and beneficiary of the wakf of Ali Pasha, brought in the Land Court, Haifa, the suit out of which the present appeal arises. She sued the Attorney-General on behalf of the Government of Palestine to recover for the wakf two properties in or near Acre as being properties comprised in the deed of 1812. The two properties are known as Kishleh and Dubaya: they have long been in the possession of the Palestine Government, the former being now used as a prison and the latter as a depot and stables.

At the trial the only matter of defence which was dealt with by the Land Court was the question of limitation, though the learned President considered that the appellant's claim to the Dubaya must in any event fail on another

ground. It does not appear that any evidence was taken upon the question of limitation. It was admitted by the appellant that for a period exceeding 36 years prior to the suit the properties claimed had been in the possession of the Government. On the other hand it was conceded that she did not become mutawalli until 1926. The appellant further contended that neither she nor any of her generation had become entitled beneficially in possession until within the said period of 36 years: this appears to have been assumed (provisionally at least) by the Courts below, and must be taken to be true for the purposes of this appeal.

The provisions of the Mejelle (Ottoman Civil Code) upon Limitation are articles 1660 to 1675, which form the second portion or chapter of Book XIV which is entitled "Actions." The Courts in Palestine do not appear to be provided with any official or authoritative English version of this Code, the original of which is in the Turkish language. Several translations have been brought to the notice of their Lordships and have been found to differ as regards the exact meaning which they attribute to important phrases in articles 1660 and 1667. In the translation of Mr. C. A. Hooper (Jerusalem 1933) articles 1660, 1661 and 1667 are as follows:—

> Article 1660.—Actions relating to a debt, or property deposited for safe-keeping, or real property held in absolute ownership, or inheritance, or actions not relating to the fundamental constitution of a pious foundation, such as actions relating to real property dedicated to pious purposes leased for a single or double rent, or to pious foundations with a condition as to the appointment of a trustee, or the revenue of a pious foundation, or actions not relating to the public, shall not be heard after the expiration of a period of fifteen years since action was last taken in connection therewith.
>
> Article 1661.—Actions brought by a trustee of a pious foundation relating to the fundamental constitution thereof or by persons maintained by such foundation may be heard up to a period of thirty-six years. They shall not be heard in any event, however, after the period of thirty-six years has expired.
>
> Example:—
>
> A has held a piece of real property in absolute ownership for a period of thirty-six years. The trustee of a pious foundation thereupon brings an action claiming that the piece of real property in question is part of the land belonging to his pious foundation. The action will not be heard.
>
> Article 1667.—The period of limitation begins to run as from the date at which the plaintiff had the right to bring an action in respect to the subject matter of his claim. Consequently, in an action in respect to a debt repayable at some future definite date, the period of limitation only begins to run as from the date on which the debt fell due for payment, since the plaintiff has no right to bring an action in respect to the debt before the due date has arrived.
>
> Examples:—
>
> (1) A brings an action against B claiming from him the price of a thing sold to him fifteen years ago, subject to a period of three years for payment of the price. The action may be heard, since only twelve years have passed since the date of payment arrived.
>
> (2) An action is brought in regard to property dedicated to pious purposes limited to children from generation to

generation. The period for limitation in respect to an action brought by the children of the second generation begins to run as from the date of the extinction of the children of the first generation, since the children of the second generation have no right to bring an action while the children of the first generation are alive.

(3) In actions relating to a marriage portion payable at a future date, the period of limitation begins to run from the date of the divorce or death of one of the spouses, since a marriage portion payable at a future date only falls due for payment on divorce or death.

The contention of the appellant is that while her suit would doubtless fall within the terms of article 1661 if this be considered by itself, the article has to be considered as one of a series of articles in a Code which necessarily introduces different considerations one by one; thus, while the period of limitation applicable to this particular type of case is prescribed by article 1661, the exceptions for minority and lunacy and the provisions as to the *terminus a quo* of the period of limitation are to be gathered from other articles in the chapter, and are to be taken into account before the terms of article 1661 are applied to the facts of a particular case. Accordingly she contends that article 1667 controls or affects the application of article 1661; that her case is within the principle of article 1667 and in particular is within the exact terms of the second of the three examples mentioned thereunder.

The Land Court dismissed the appellant's suit as a result of a difference of opinion between the President and Aziz J. The learned President considered that articles 1661 and 1667 were irreconcilable and applied the former. Aziz J. held, under article 1667, that " no prescription runs against cases where generation after generation has been conditioned ". On appeal to the Supreme Court, three learned Judges held that the wakf in this case was not " from generation to generation " within the meaning of article 1667 and on this ground, applying article 1661, dismissed the appeal. Their view was: " There is no inconsistency between the two articles. Article 1661 fixes the period of limitation in respect of all wakfs at 36 years. Article 1667 does not deal with the length of the period of limitation, but with the date from which such period begins to run, in the case of a wakf of a particular nature ". To this reasoning, learned counsel for the appellant objects not only that on a true construction of its provisions Ali Pasha's wakf and the appellant's interest thereunder is within the exact terms of the example, but also that the case cannot be excluded from the article on the mere ground that it is not covered by an example.

It is clear that the meaning and effect of the second example to article 1667 has been a matter of doubt and difficulty in the present and in other cases. In the translation by Dr. W. E. Grigsby (London 1895) the example appears in the following form:—

" In the same way if the instrument which consecrates a thing to pious uses say that the descendants of the man who consecrates it shall have the management from generation to generation, in an

> action which the second generation begins, prescription only begins from the day of the total failure of the first generation, because while the first generation exists those belonging to the second generation cannot bring an action."

In the French version by George Young (Corps de Droit Ottoman, Vol. VI (Oxford 1906)) the example is given thus:—

> " Dans les actions relatives aux vakoufs stipulés avec substitution aux enfants de génération en génération, la prescription ne court pour les descendants de la seconde génération qu'à partir du moment où il n'existe plus aucun descendant de la première génération, car jusque-là les descendants de la seconde génération n'ont pas droit d'action."

In Omer Helmi Effendi's " Treatise on the Laws of Evqaf " (translated by Tyser and Demetriades) (Nicosia 1899), p. 111, the learned author gives in para. 436 two examples of the effect of the condition " from generation to generation ". One shows the period of 15 years as not applicable until the first generation has become extinct to an action claiming the office of mutawalli by children of the second generation against a stranger. The other is:—

> " If a property of which the Muteveliship and the income is dedicated in favour of the children of the dedicator from generation to generation, is sold by a child of the first generation and delivered to another, and the purchaser receive and possess it for 35 years, and afterwards when the first generation is wholly extinct, the children of the second generation are appointed Mutevelis, and after the lapse of a year they bring an action against the purchaser, alleging that the property is wakf, this action is heard."

The President of the Land Court has referred in his judgment to Ali Hadar Effendi as being generally considered the most authoritative commentator in the Mejelle. He states as the view of this learned author that a mutawalli's action is only barred under article 1661 if brought by the mutawalli who was the cause of the failure to sue and not if brought by a successor in the office. Now the principle of limitation may be regarded rather as grafted upon the Muslim law than as an integral part thereof originally, and the Commission which drafted the Mejelle may well have felt special difficulty in making drastic provisions which would deprive wakfs of their property. Even so, their Lordships are not able to attribute to article 1661 an effect so slight as that which is thus suggested. That the result of a delay for so long a period as 36 years should last only for the balance of the time during which the same mutawalli should be in office is not in their Lordships' view a reasonable interpretation of this Code. No one of the learned Judges in either of the Courts in Palestine proceeded on that view of the law in the present case. Aziz J., as well as the members of the Supreme Court, considered that the case must turn upon a principle or rule special to the case of wakfs when the limitation is " from generation to generation ".

The general effect of the Code's provision of periods of limitation as regards wakf property was broadly stated in *Muzaffer Bey* v. *W. Collet,* 1904, 6 Cyprus Law Reports 108, 109, by the Chief Justice of the Supreme Court of Cyprus:—

> " The answer to the first question . . . depends on sections 1660 and 1661 of the Mejelle, which enact that actions for the ' tassaruf ' (i.e., possession), by ijaretein or muqataa in respect of immoveable wakf property are not heard after 15 years; and that actions of the Muteveli, or of the people who receive salary and food from the wakf, in respect of the corpus of wakf property, are heard up to 36 years. That is, where a man claims the possession of property which both he and the other party admit to be wakf, his action is heard up to 15 years; but where he claims wakf property as trustee (Muteveli) or as beneficiary from a person who denies that it is wakf, his action is heard up to 36 years."

Their Lordships think this to be a useful and succinct statement of the effect of these articles, though the word mutawalli is not properly translated by the word " trustee " and for important purposes it is necessary to bear in mind that wakf property is not vested in the mutawalli. [*Vidya Varuthi* v. *Balusami,* 1921, L.R. 48 I.A. 302.]

The principle of article 1667 has to be considered in relation to article 1661. It is clear, if only from article 1661, that in some circumstances a beneficiary may sue to recover property for the wakf from someone holding adversely to the wakf. Wakfs are made of very different kinds of property and the beneficial interests may be infinitely various. It is therefore possible for one or more beneficiaries in some circumstances to sue tenants or others directly to recover monies as income of the wakf payable to them. And it is, of course, open to a beneficiary to put in suit against the mutawalli or other persons interested in the wakf his own immediate claim to benefit thereunder. The example given in article 1667 does not specify the nature of the action envisaged thereby and the question arises whether it can safely be extended to cover every kind of action which a beneficiary may bring. Dr. Grigsby's translation does not seem to be warranted in so far as it interprets the example as specially concerned with the rights of a mutawalli to bring an action. It is dealing with beneficiaries and beneficial interests.

Does the wording of the example require it to be supposed that the action by children of the second generation therein contemplated is an action brought to recover for the wakf property held adversely to it? Such an action can be brought by a beneficiary; but it would seem that it is only in special circumstances that a beneficiary and not the mutawalli is the proper plaintiff: by whomsoever brought the right asserted by such a suit is the right of the wakf itself, and it is asserted on behalf of all interests therein, whether present or future, absolute or contingent. The assumption that what is given as an example of the principle enunciated by the opening words of article 1667 is or includes a case of this special character is attended with difficulty. If the last surviving member of the first generation is mutawalli and is alienating or wasting the wakf property, is it a clear and obvious truth that the children of the second generation

would have no right to bring an action? If not, the case does not appear to be the case given by way of example. From the mere fact that it is given by way of illustration, there is every presumption that the case put is conceived as a plain case of an action to enforce the immediate right newly accrued upon the extinction of the previous generation. Prima facie this does not necessarily cover the whole ground if the beneficiary, to enforce his new-found right, has first to bring a suit on behalf of all interests in the wakf.

Aziz J. and the Supreme Court appear to have considered that the example makes a special rule applicable where the limitation is qualified by the condition "from generation to generation". This phrase appears in authoritative works on Mahomedan law in its Arabic form (*butnun baâd butn*) as having the intention and effect of preventing nearer and more remote descendants from being treated alike. The following passage from the Fatâwai Alamgiri explains it.

> "And if he should say, 'upon my child and child of my child, and child of the child of my child', mentioning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor; while one remains, the *wakf* is to them, and the lowest among them: the nearer and more remote being alike unless the appropriator say in making the *wakf*, 'the nearer is nearer', or say, 'on my child, then after them on the child of my child', or say, 'generation after generation' (*butnun baâd butn*) when a beginning must be made with them with whom the appropriator has begun."

[Baillie, Digest of Moohammadun Law, 2nd ed., Vol. I, p. 580. Ameer Ali, Mahommedan Law, 4th ed., Vol. I, p. 353. See also Macnaghten's Moohummudan Law, 1897, p. 341, Case VIII.]

With great respect to those learned Judges who seem to have thought that the example given in article 1667 imports a special rule applicable to cases where the phrase is employed to qualify the order of succession laid down by the wakf, their Lordships think that it is outside the proper scope of an illustration or example to convey special legislation for a particular type of case. Its function, on the contrary, is to show how the principle already enunciated is to be applied, or how the particular facts of the case supposed come under the principle. The natural approach to the example is that the case is only put as an illustration of a right which has not accrued before a certain date, and without the intention of conveying any implication that the case supposed is necessarily different in principle from many other cases.

A wakf is not governed by rules against perpetuity, and successive future life interests in favour of unborn persons are valid by the Mahomedan law of wakf. The special rule "from generation to generation" has no exceptional effect to make the particular descendant whose interest accrues thereunder take by purchase and not by limitation. The effect is to make A take instead of B, or to make A take a different share than he would otherwise have taken. The particular example given may be one in which all the beneficial interests happen to arise at one and the same time. It looks

as if the draftsman had in contemplation a case where descendants were to take *per capita* subject to the condition, though the condition may be applied equally well to qualify a stirpital order of succession [cf. Macnaghten, op. cit., p. 342, Wilson's Anglo-Muhammadan Law, 6th ed., section 324, p. 363] so that (as the present *wakfieh* puts it) parents enjoy before children but not before children of other beneficiaries. But this special feature of the example given is not the point of the example. The right of A to a share of the income may arise according to any order of succession appointed by the wakf. It may arise on his birth, on the death of his father or on the complete extinction of the previous generation. For purposes of putting it in suit it is a new right when it accrues. As the first of the three examples given under article 1667 is that of a sale, with a stipulation for payment of the price in future and not at once; so the second is that of a beneficial interest which arises when the previous generation becomes extinct and not before; and the third is a case, not of prompt, but deferred dower. These may well be intended as familiar types of case under article 1660.

The assumption that the action referred to by the example is an action brought on behalf of all persons interested in the wakf to recover property held adversely to the wakf had led to the further assumption that the example lays down a special rule of limitation in the case of a particular kind of wakf. Their Lordships think, however, for the reasons above stated, that a more correct construction of this Code is reached without either assumption. What is required is to relate the principle laid down in articile 1667 to such a suit as the present, which comes within article 1661. For this, it is necessary to consider with exactness what is the right asserted and in whom is the right. That the right is not the right of a mere manager, such as is the mutawalli, is plain upon principles of Mohamedan law. Nor is a claim to recover for the wakf property held adversely to it a claim made on behalf of a particular beneficiary (though such a one may be the plaintiff), or even on behalf of all those whose beneficial interests have accrued to them at the date of suit. It is a claim made on behalf of the wakf in a sense which includes all interests therein present and future. The principle that limitation will not begin to run until the individual who is nominally and formally the plaintiff in the suit came to be in a position to sue on behalf of the wakf, would render limitation to all intents and purposes inapplicable to this subject matter; and as the office of mutawalli, though only a managership, provides continuous representation of the wakf and of all interests therein, it is not necessary to suppose that limitation is intended to be so controlled. Apart from the question whether there is any special exception provided for cases where " generation to generation " has been stipulated, their Lordships gather that the Courts in Palestine are agreed in regarding such a principle as inapplicable to such a case as the present. Cases in which there is no dispute as to the property in suit being property of the wakf give rise to different considerations—under the Mejelle to very different

considerations; but the present case is under article 1661 and within the very terms of the example given thereunder. It is difficult to interpret that example as implying no more than that at the end of 36 years an inquiry is to be made as to changes in the office of mutawalli or in the personnel of the beneficiaries, and that A must have held possession not for 36 years but for 36 years after the last change of this kind took place. Their Lordships do not consider that in such a case it is intended by the Code that time should begin to run afresh by reason either that the office of mutawalli has passed to a new incumbent or that an interest has accrued to a new beneficiary. In their Lordships' opinion in the case of an action such as the present which is an action to recover property of the waqf for the benefit of all persons now interested or hereafter to become interested therein, and which falls directly under article 1661 and its example, the period of 36 years begins to run from the time the right of recovery could first have been asserted by any one on behalf of those interested therein *in praesenti* or *in futuro*. Such an action is neither within the principle of article 1667 nor within its second example.

They will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the respondents' costs of the appeal.

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In the Privy Council

SAADAT KAMEL HANUM

v.

THE ATTORNEY GENERAL OF PALESTINE

DELIVERED BY SIR GEORGE RANKIN

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