Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheik Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu and others, from the High Court of Judicature at Fort William in Bengal*; *delivered 9th November* 1889.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The Plaintiff in this suit, who is also the Appellant, is one of the sons of Sheikh Ahsanulla Chowdhry; the second Defendant is another son; the first Defendant is a judgment creditor of the second Defendant, and in that character obtained an attachment against the property now in dispute. The Plaintiff contends that the property is wakf and that he is the mutwali, and that his brother has no interest therein which can be taken in execution. He accordingly made a claim in the execution proceedings which on the 31st December 1881 was rejected by the Court on the ground that no genuine wakf had been created.

The Plaintiff then brought the present suit. In his plaint he states that the properties mentioned in the schedule were owned by his father Ahmedulla; that Ahmedulla by a wakfnama of the 5th December 1864 made a wakf

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of them, which ever since has continued in force; and that he and his brother are simply salaried servants, for the purpose of performing the work specified in the wakfnama. He prays for a declaration that the specified properties are wakf, and that the order of the 31st December 1881 may be set aside.

The only substantial issue throughout the litigation has been whether the intention of the deed of 5th December 1864 was to turn the properties in question into wakf property. If it was, the Plaintiff is entitled to succeed; and if not, he must fail. The Subordinate Judge decided in his favour. On appeal the High Court thought that the intention of the deed was not to create an entire wakf of the properties, but only to create a charge on them for the maintenance in the customary manner of objects designated in the opening clause of the deed. They reversed the decree of the Lower Court, dismissed the suit so far as it seeks to have the properties declared wakf and released from attachment, and declared "that the said pro-
"perties are subject to the charge (the extent
"whereof has to be hereafter determined) spe-
"cified in paragraph 1 of the wakfnama dated
"the 5th December 1864, that is to say, of de-
"fraying the expenses, in the customary manner
"of the brick-built musjid of Jorip Mahomed
"Chowdhry in Paragulpore, and of two ma-
"drassas and sadir warid (travellers) as
"mentioned in the said clause."

From that decree the Plaintiff appeals, and his appeal must be decided entirely by the construction put upon the deed.

At the outset of the deed the grantor adverts to his age and his coming death, and says, "I hereby appropriate and dedicate as "fisabilillah wakf, in the manner provided in the paragraphs mentioned below,"—the pro-

perties now in question and other property there described,—" for defraying the expenses of the " brick-built musjid of my grandfather Jorip " Mahomed Chowdry at my own family dwelling " house in the village of Paragulpore, and of " the two madrassas at my own ancestral home- " stead, and my lodging house in the town of " Chitagong and sadir warid (persons coming " and going), and I pray to God that he may in " his mercy accept and preserve the same for " ever for being applied to those purposes."

The " paragraphs mentioned below " are 13 in number.

Paragraph 1 appoints the grantor's three sons to be mutwalis of the wakf properties in a gradation of rank, and it contains some very elaborate instructions respecting the management of the property.

Paragraph 2 runs as follows:—

" The mutwali, after payment of the proper expenses of the mosaref and the necessary costs of collections of the zemindari and the salaries of mokhtars and other servants and the expenses of litigation and the like, and all other charges which may be incurred on the occurrence of any peril or emergency, out of all kinds of income and profits of the endowed properties according to the long standing practice, shall take from the residue his own monthly allowance, pay over the allowance due to the naib mutwali and naib-ul-maniab and my daughters as specified in the schedule, and continue to perform the stated religious works according to custom. He shall, having regard to the provisions contained in the first paragraph, keep his eye to the legitimate objects of the mosaref, and not commit extravagance and waste or practise fraud in connection therewith. The balance that may be left after meeting the above-mentioned expenses

shall be kept in a proper, that is to say, a safe place, under the supervision and management of all the three persons."

The schedule provides Rs. 100 per month for the first mutwali, Rs. 90 for the second, Rs. 80 for the third, and Rs. 30 for the daughters.

Paragraph 3 provides for the succession of mutwalis in case of retirement or death. It is very inartificially expressed, and in some contingencies might be difficult to apply. But for its bearing on the construction of the deed it is sufficient for their Lordships to say that in their judgment it was meant by its framer to provide for a perpetual succession of some of the male members of his family as mutwalis, to be appointed either by existing mutwalis, or by a committee or by an officer of Government.

Paragraph 4 provides for the addition to the wakf of surpluses occurring under paragraph 2.

Paragraph 5 declares that the persons getting monthly allowances shall have no power to assign or charge them, and that creditors shall have no claim against them.

Paragraph 7 declares that, if "the mutwalis" have sons exceeding three in number, for those who are not mutwalis the mutwalis shall fix a monthly allowance. Those persons are to live on their own earnings in professions, trades, or service; but when any one becomes a mutwali he is to bring into the wakf all the property he has got.

Paragraph 8 provides that if "any one" dies leaving no sons his wife and daughter shall receive allowances. It then continues, "It shall "be competent to the mutwalis, having regard "to the income and expenditure of the wakf "properties, to proportionately increase or de-"crease these allowances as well as their own

" salaries, and those of other salaried persons, " and no one shall be able to raise any objections " to the same."

The other paragraphs have no material bearing on the present question.

The case has been very elaborately argued at the bar, and numerous text books and decisions have been cited; on the Plaintiff's side to show that a wakf may lawfully embrace provisions for the family of the grantor; and on the Defendants' side to show that there can be no wakf unless the whole property is substantially and primarily dedicated to charitable uses.

Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid wakf, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.

On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as wakf. On this point they agree with and adopt the views of the Calcutta High Court, stated by Mr. Justice Kemp in one of the cited cases (13 W. R., 235). After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says, " We are of opinion " that the mere charge upon the profits of the " estate of certain items which must in the

"course of time necessarily cease, being con-
"fined to one family, and which after they
"lapse will leave the whole property intact for
"the original purposes for which the endowment
"was made, does not render the endowment
"invalid under the Mahomedan law."

On the other hand they have not been referred to, nor can they find, any authority showing that, according to Mahomedan law, a gift is good as a wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other. Mr. Arathoon indeed contended that a family settlement of itself imports an ultimate gift to the poor, founding himself on a passage in the Tagore Lectures delivered in 1885 by a learned Mahomedan lawyer (see p. 230.) But no authority has been adduced for that proposition. The observations of Mr. Justice West, which are relied on by the learned lecturer, do not go that length; and they are themselves of an extra-judicial character, as the case in which they were uttered did not raise the question. Their Lordships therefore look to see whether the property in question is in substance given to charitable uses.

The leading clause of the deed contains no charitable gift except "in the manner provided by the paragraphs mentioned below," and we must search those paragraphs to find the real nature of the gift. Now as regards the grantor's moveable property he was advised that there would be legal difficulty if he did not then define the objects on which it was to be spent. So he expressly mentions that it is to be spent in pious and virtuous works, and it is not necessary to decide whether the terms which he uses constitute a separate absolute gift to such purposes, or are controlled by the other paragraphs. As regards the immoveables he uses different language; and the only direction

creating a trust for the objects mentioned in the opening sentence is that which is contained in the second paragraph. That trust is (after payment of "mosaref," expenses, and salaries), "to perform the stated religious works according "to custom."

There is a great deal in the deed which is designed for the aggrandisement of the family property, and for keeping it perpetually in the hands of the family. The provisions for accumulation in paragraph 4; the attempt to save salaries from alienations and from creditors in paragraph 5; the provisions for appointment of male issue as mutwalis in paragraph 3, coupled with the allowances to other male issue, and to wives and daughters of such issue in paragraphs 7 and 8, all indefinite in point of duration, and, as their Lordships think, intended to be commensurate with the existence of the family; the direction in paragraph 7 that new mutwalis should bring all their private acquisitions into settlement; all these things point to the same end, the increase of property available for the family. In paragraph 8 the grantor allows increases of salaries and allowances to members of the family, so that as the property increases the family may grow richer. There is not a word said about increasing the amount spent on charitable uses beyond the expenditure which was according to custom. Their Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses except to the extent to which he had himself been accustomed to perform them.

If indeed it were shown that the customary uses were of such magnitude as to exhaust the income, or to absorb the bulk of

it, such a circumstance would have its weight in ascertaining the intention of the grantor. But the Court, in the execution proceedings, considered that the charitable outlays which he contemplated were of small amount compared with the property. The Subordinate Judge in this suit does not deal with the matter. The High Court says that the Plaintiff has carefully withheld evidence as to value, and believes that it was much more than he represented. For all that appears there is no reason to suppose that the charitable uses would absorb more than a devout and wealthy Mahomedan gentleman might find it becoming to spend in that way.

Under these circumstances their Lordships agree with the High Court that the gift in question is not a *bonâ fide* dedication of the property, and that the use of the expressions "fisabilillah wakf," and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

The result is that in their judgment this appeal should be dismissed with costs, and they will humbly advise Her Majesty to that effect.