Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abdul Gafur and others v. *Nizamudin and others, from the High Court of Judicature at Bombay; delivered 2nd July* 1892.

Present:

LORD WATSON.
LORD MORRIS.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Watson.*]

The Appellants are Plaintiffs in this suit, which was brought in 1884 for possession of lands which had been taken in execution and judicially sold in the year 1866, and were thereafter purchased by the father of the Defendants. The cause of action disclosed in the plaint was this—that Tahirabibi, the judgment debtor, held the lands under a wakfnama executed in January 1838 by her father Karimudin, which limited her interest to a bare life rent; that the decree of sale only carried the life estate of Tahirabibi, who died in November 1873; that the Defendants' title to possess came to an end upon her death, and the lands reverted, in the first place to her sister Fatehsahebbibi in liferent, and on her decease to the Appellants as heirs of Karimudin and his daughter Fatehsahebbibi. The issue adjusted to try the only matter affecting the merits of the case, namely, the nature of the interest which the judgment debtor had in the lands sold for

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her debt, was thus expressed,—" Is the wakfnama " of 1838 valid according to the Mahomedan " law ?"

The Second Class Subordinate Judge of Panvel found for the Appellants, being of opinion that Karimudin's deed of 1838, although ineffectual to constitute a proper wakf, was nevertheless valid as a settlement, and also that Tahirabibi had a mere life estate. The Assistant Judge of Thana affirmed his decree for reasons substantially the same, recognizing the efficacy of the deed as a settlement; but, on second appeal to the High Court of Bombay, both judgments were reversed and the Appellants' claim rejected with costs. The learned Judges agreed with both Courts below that the deed was invalid as a wakfnama; but they held that it was also inoperative as a settlement, in respect that no possession had followed upon the lifetime of Karimudin.

The learned Counsel who appeared for the Appellants, with great candour and propriety, admitted that after the recent decision of this Board in the case of *Sheik Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (17 Ind. Ap., 28), he could not successfully maintain the document of 1838 to be valid as a wakfnama. In that case Lord Hobhouse said that their Lordships " have not been referred to, nor can " they find any authority showing that, according " to Mohamedan law, a gift is good as a wakf- " nama, unless there is a substantial dedication " of the property to charitable uses at some " period of time or other." In this case the so-called wakfnama makes no gift of the lands in question, either immediate or ultimate, for religious or charitable purposes. The document professes to create a wakf, but, in reality, the legal heirs of Karimudin are the only objects of his bounty. The lands are destined to his

wives and children, and to the descendants of the latter in perpetuity, in the order and according to the shares prescribed by the Mohamedan law of succession, but subject to the limitation that none of them shall have the power of alienation by sale, gift, or mortgage.

Counsel also admitted that he could not successfully maintain that the document was a settlement, but he endeavoured to support the appeal on the ground that the deed styled a wakfnama ought to be treated as the will of Karimudin. He did not dispute that a Mahomedan cannot of himself, by a testamentary writing, either curtail or defeat the legal interests of his heirs; and that a Mahomedan will is therefore inoperative with regard to two thirds of the testator's succession, unless it is validated by the consent of the heirs having interest. Their Lordships do not think the Appellants would take any benefit from the document of 1838 if it were construed as the will of Karimudin. It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see *Humeeda and others* v. *Budlun and The Government*, 17 Sutherland W. R., 525), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life estate, but a full owner, with a prohibition against alienation, which, being void in law, could not affect either herself or her creditors. Although this point was taken in the High Court the Appellants were not in a position to press it. They have not averred in their pleadings that Tahirabibi gave such consent, and there is no evidence to show that she did.

Besides, there was no issue taken upon the point, and therefore no finding in fact upon which the High Court could proceed in a second apppeal.

The judgment of the High Court appears to their Lordships to dispose in a satisfactory manner of all the arguments which have been addressed to them in the *ex parte* argument upon this appeal. They will humbly advise Her Majesty to affirm the judgment complained of and to dismiss the appeal.