Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abul Fata Mahomed Ishak and others v. *Russomoy Dhur Chowdhry and others, from the High Court of Judicature at Fort William in Bengal; delivered* 15*th December* 1894.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The object of this suit is to establish as a valid wakfnama a settlement of property effected by deed dated the 21st December 1868. The settlors were two brothers called Abdur Rahman and Abdool Kadir, Mahomedan gentlemen belonging to the Hanifa sect of the Sunnis. The Plaintiffs, now Appellants, are sons of Abdur Rahman to whom interests are given by the settlement. The Defendants, a hundred and more in number, are the settlors themselves, and persons claiming interests in portions of the settled property by virtue of transactions with Abdur Rahman subsequently to the date of the settlement. Some of these claimants are Respondents to the present appeal.

The Subordinate Judge of Sylhet held that the settlement was valid as a wakfnama, and gave the Plaintiffs a decree on that footing. On appeal the High Court took a different view, and dismissed the suit. The great mass of the

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record relates to subordinate disputes—what parcels of property fall within the settlement, and what inferences are to be drawn from the way in which the settlors dealt with the property after the settlement. But the only question argued here has been the nature of the settlement itself; for in the view taken by their Lordships all others are immaterial.

The settlement begins thus :—" Committing " ourselves to the mercy and kindness of the " Great God, and relying upon the bounty of " Providence for the perpetuation of the names " of our forefathers and for the preservation of " our properties, we . . . . have made this " permanent wakf according to our Mahomedan " law." Then they describe the property conveyed by them. The objects are :—

"For the benefit of our children, the children of our " children and the members and relatives of our family and " their descendants in male and female lines, and, in their " absence, for the benefit of the poor and beggars and widows " and orphans of Sylhet, on valid conditions and true decla- " rations hereinafter set forth below. We, two brothers, " have for our lifetime taken upon ourselves the management " and supervision of the same in the capacity of matwalis, " and taken out the wakf properties from our ownership " and enjoyment in a private capacity, and we have put them " in our possession and under our control in our capacity as " matwalis."

Then are stated various incidents and duties attaching to the office of matwali, amongst which occur the following :—

"In order to maintain the name and prestige of our family, " we, the matwalis, will make reasonable and suitable expenses " according to our means and position in life. We will at our " own choice and discretion fix allowances for the support and " maintenance of the persons intended to be benefited by this " wakf, who are now living or who may be born afterwards, " and we will pay the same to them every month, and also the " expenses for their festive and mourning ceremonies, when " required.

"It will be competent for us the matwalis and our successor " matwalis to enhance or reduce the allowances of the persons " for whose benefit the wakf is made, who are now living, or " who may hereafter be born, in consideration of course of " their position and circumstances and the state of the income "of the wakf properties. It will be competent for us the "present matwalis and the matwalis who will be appointed "after us, to use the wakf properties as security and to grant "putni, dur-putni and permanent and temporary ijara settle- "ments in respect of them, and with the money to be received "as salami for the aforesaid settlements, to purchase some "other properties and to exchange any of the lands of this "wakf with some other lands, and to include the lands so "acquired by purchase or in exchange in the wakf, and to "spend the profit of the same towards the expenses of the "wakf, and to keep the surplus profit in stock in the tehbil, "and to try always to increase the wakf properties and the "amount in cash. Whatever properties may be acquired by "us the matwalis and our successor matwalis after execution "of this document, shall be included in this wakf. We the "matwalis and the matwalis who will be appointed in our place "hereafter shall have no power to make gift of any property "in favor of relatives or strangers."

It is provided that future matwalis shall always be chosen from the male issue of the settlors, or if they fail, from their relatives. Provisions are made to prevent any of the persons for whose benefit the wakf is made from claiming anything as of right, and from calling for accounts, and from alienating his interest or subjecting it to attachment. And towards the end of the deed its object is again stated:—

"The object of this wakf of properties is that the properties "may be protected against all risks, the name and the prestige "of the family maintained, and the profits of these properties "appropriated towards the maintenance of the name and prestige "of the family, the support of the persons for whose benefit the "wakf is made, and religious purposes, &c."

Such is the instrument which is propounded as a wakfnama. The motives stated are, regard for the family name, and preservation of the property in the family. Every specific trust is for some member of the family. The family is to be aggrandised by accumulations of surpluses, and apparently by absorption into the settlement of after-acquired properties; and no person is to have any right of calling the managers to account. These possessions are to be secured for ever for the enjoyment of the family, so far as the settlors could accomplish such a result, by provisions that nobody's share shall be alienated, or be attached for his debts. There is no reference to religion unless it be the invocation of the Deity to perpetuate the family name and to preserve their property, and the casual mention of unspecified religious purposes &c. at the end of the sentence last-quoted. There is a gift to the poor and to widows and orphans, but they are to take nothing, not even surplus income, until the total extinction of the blood of the settlors, whether lineal or collateral.

It seems that in the High Court the learned Advocate-General contended for the Plaintiffs that a gift to the donors' descendants without any mention of the poor might be supported as a wakf; and even that the Mahomedan law intends that perpetual family settlements may be made in the name of religious trusts. In the case of *Ahsanulla Chowdhry* v. *Amarchand Kundu* (17 L. R. Ind. App. p. 37) this Board said: "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." The Board proceeded to affirm the decision of the High Court of Calcutta, who held that a small part of the property had been well devoted to charity, but that as to the bulk of it, the settlement was, notwithstanding some expressions importing a wakf, in substance nothing but a family settlement in perpetuity, and as such contrary to Mahomedan law. The principle of this decision has been quoted and approved in a subsequent case *Abdul Gafur* v. *Nizamudin* (19 L.R. Ind. App. p. 170). This is a sufficient answer to the arguments used in the High Court.

Their Lordships however cannot now say that they have not been referred to any authority for the contrary opinion; for Mr. Branson has cited to them two cases in which there are very elaborate judgments delivered in the Calcutta High Court by the learned Judge Mr. Ameer Ali.

Those judgments are in accordance with the opinion expressed by him in his Tagore Lectures, and if their Lordships have rightly apprehended them, they do go the whole length of the Advocate-General's argument. One is in the case of *Meer Mahomed Israil Khan* v. *Sashti Churn Ghose* (19 Ind. L. R. Calc. p. 412) where there were some immediate gifts to the poor, and the gift was upheld, and no further appeal was presented. The other case is that of *Bikani Mia* v. *Shuk Lal Poddar* (20 Ind. L. R. Calc. p. 116) where there was no gift to the poor till after the failure of the settlor's family. It was heard by a Full Bench of five Judges, who decided that the deed was invalid, Mr. Justice Ameer Ali dissenting.

The opinion of that learned Mahomedan lawyer is founded, as their Lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated. For instance he quotes a precept of the Prophet Mahomet himself, to the effect that "A pious offering to one's "family, to provide against their getting into "want, is more pious than giving alms to beggars. "The most excellent of *sadakah* is that which a "man bestows upon his family." And by way of precedent he refers to the gift of a house in wakf or *sadakah*, of which the revenues were to be received by the descendants of the donor Arkan (20 Ind. L. R. Calc. 140). His other old authorities are of the same kind.

As regards precedents, their Lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property—except that in the case cited the house seems to have been regarded with special reverence—or of the family, or of the donor. As regards precepts which are held up as the fundamental principles of Mahomedan law, their Lordships are not forgetting how far law and religion are mixed up together in the Mahomedan communities; but they asked during the argument how it comes about that by the general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as wakf, in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any. It is true that the donor's absolute interest in the property is curtailed and becomes a life interest; that is to say, the wakfnama makes him take as mutwali or manager. But he is in that position for life; he may spend the income at his will, and no one is to call him to account. That amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed is necessary for the immediate accomplishment of such a design.

Among the very elaborate arguments and judgments reported in *Bikani Mia's* case, some doubts are expressed whether cases of this kind are governed by Mahomedan law; and it is suggested that the decision in *Ahsanulla Chowdhry's* case displaced the Mahomedan law in favour of English law. Clearly the Mahomedan law ought to govern a purely Mahomedan disposition of property. Their Lordships have endeavoured to the best of their ability to ascertain and apply the Mahomedan law, as known and administered in India; but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law and practice of wakf, as the learned Judge says they have. But it would be doing wrong to the great lawgiver to suppose that he is thereby commending gifts for which the donor exercises no self-denial; in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words.

Mr. Branson indeed did not contend for such sweeping conclusions, though, as in duty bound, he submitted the arguments which lead up to them. But he argued that where, as in this case, there is an ultimate gift for the poor, a perpetual family settlement expressly made as wakf is legal. He had a right to argue that point as not being covered by the decision in *Ahsanulla Chowdhry's* case. This Board expressly left it open, because they found that contradictory views had been taken in India, and they did not desire to enter into that controversy in a case where the facts did not raise it. The facts of this case do raise it.

Having examined the authorities cited, their Lordships find a great preponderance against the contentions of the Appellants. Some authorities go so far as to hold that for a valid wakf the property should be solely dedicated to pious uses. On that point however this Board in *Ahsanulla Chowdhry's* case adopted the opinion of Mr. Justice Kemp to the effect that provisions for the family out of the grantor's property may be consistent with the gift of it as wakf. In favour of the view now urged for the Appellants there is the judicial opinion of Mr. Justice Ameer Ali in *Bikani Mia's* case, dissenting from the rest of the Court; a *dictum* of Sir Raymond West in the Bombay High Court in the case of *Fatma Bibi* v. *The Advocate-General of Bombay* (6 Ind. L. R. Bomb. p. 53) and a decision of Mr. Justice Farran in the same Court in the case of *Amrutlal Kalidas* v. *Shaik Husain* (11 Ind. L. R. Bomb. p. 492). The weight of Mr. Justice Ameer Ali's opinion on this subordinate point is somewhat lessened by his support of the gift under consideration on the very broad grounds which their Lordships have considered to be untenable. The *dictum* of Sir R. West is mentioned in *Ahsanulla Chowdhry's* case. Mr. Justice Farran had before him a case very closely resembling the present one. He described the settlement as "A perpetuity of "the worst and most pernicious kind, and would "be invalid on that ground unless it can be "supported as a *wakfnama*"; (11 Ind. L. R. Bomb. p. 497) and he thought that the authority of the Hedaya is against it; but he adopted the principle stated by Sir R. West, which he treated as a decision, and he supported the gift on the strength of the ultimate trust for the poor.

Their Lordships cannot assent to these conclusions. They make words of more regard than things, and form more than substance. In their judgment the Calcutta High Court have in this case rightly decided that there is no substantial gift to the poor. A gift may be illusory whether from its small amount or from its uncertainty and remoteness. If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognized as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position. Their Lordships agree that the poor have been put into this settlement merely to give it a colour of piety, and so to legalize arrangements meant to serve for the aggrandizement of a family.

They will humbly advise Her Majesty to dismiss this appeal with costs.