

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Shahar Banoo v. Aga Mahomed Jaffer Bindaneem and others, from the Chief Court of Lower Burma; delivered the 14th December 1906.

Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

Hajee Ahmed Bindaneem, a Shiah Mohammedan, died in 1882, leaving a will by which he devoted the one third of his estate of which he was capable of disposing to religious and charitable purposes. The testator left six sons and one daughter, of whom the eldest was a son Mahomed Jaffer, the first Respondent, and the second a daughter, Shahar Banoo, the Appellant. In his will the testator said, "I appoint my obedient son Aga Mahomed Jaffer Bindaneem my legal executor. And the superintendence of all the affairs relating to the heritage and the sools is entrusted to Aga Ahmed Ispahani." He further said :—

" 5. The furniture, such as lamps, utensils for cooking, carpets, silver *alams*, silver *sarposh*, and all the articles belonging to the Emambara, shall not be the subject of inheritance, and shall be used by the executor in performance of *taziadari* rites.

" 6. The executor shall, after taking possession, with the information of the Nazir, of the *sools*, purchase therewith (in the) share market any good property or Government paper, and shall out of the income thereof spend Rs. 1,000 during the

“ first ten days of Mohurram every year, in accordance with
 “ the custom in vogue, in performance of the *taziadari* and
 “ distribution of food in connection with the Emambara. The
 “ expenses that are to be preferred to all the expenses to be
 “ met out of the income of the said property, are those of
 “ sending money to Kerbela or Holy Najaf and engaging
 “ *naiib* (proxy) on remuneration for the performance of prayer
 “ and fasting in my stead for the omissions during sixty years
 “ of my age ; provided these be done through any *mujtahid*.
 “ And next to these are the expenses of engaging *naiib* for
 “ visiting Khana-e-Khoda (House of God), the holy shrine of
 “ the Prophet and those of Imams (who guided people in the
 “ right path), and for visiting the shrine of Raza (on whom
 “ may God send His thousand blessings). Next to these
 “ are the expenses of heirs and nearest relatives, if they
 “ stand in need, or the expenses of repairing mosques or
 “ performance of *taziadari* on the nights preceding Friday,
 “ and distributing food, and feeding travellers, to the possible
 “ extent.”

Mahomed Jaffer obtained probate of the will, and carried on the administration of the estate until 1897. In that year the present Appellant and other members of the family, who are or were parties to the present Appeal, brought a suit in the Court of the Recorder of Rangoon against Mahomed Jaffer, in which they charged him with certain breaches of trust. They asked that the trustee should be removed from his office, and that a Nazir should be appointed.

In 1898 the Recorder of Rangoon made his decree, by which he refused to remove the trustee from his office, but directed him to keep proper trust accounts for the future. Against that decree an Appeal was brought, in accordance with the law then in force, to the High Court at Calcutta. While the case was before that Court a compromise was arrived at, in accordance with which a decree was passed on the 13th May 1902, by which it was decreed that Mahomed Jaffer should retire from the trusteeship “ and
 “ that a new trustee be appointed in his place by
 “ the Chief Court of Lower Burma, preference
 “ in such appointment being given to the lineal
 “ descendants of the settlor.”

Upon that the case went back to the Chief Court in Rangoon, and was disposed of in the first instance by Chitty, J. At that stage of the case several different members of the family claimed to be entitled to the trusteeship, but of those claims it is only necessary, for the purpose of the present Appeal, to notice that put forward on behalf of the now Appellant, the principal Plaintiff in the suit. Her case was that as the next in seniority, after the retiring trustee, of the children of the testator, she was entitled to be appointed trustee or Mutawalli of the endowment. Two specific objections to her appointment were raised: first, that as a woman she was disqualified from carrying out the trusts; secondly, that, being a member of the Babee sect, she was excluded from the trusteeship of an orthodox Shiah endowment.

The learned Judge overruled these objections, and appointed the lady to the position which she sought. An appeal against that order was heard before the Chief Judge and Bigge, J. Those learned Judges agreed with Chitty, J., in thinking that there is no legal prohibition against a woman holding a Mutawalliship when the trust, by its nature, involves no spiritual duties such as a woman could not properly discharge in person or by deputy. And it appears to their Lordships that there is ample authority for that proposition.

It was held secondly, in accordance with the view of the First Court, that "the objects of the trust do not seem to involve any duties of a spiritual nature such as taking part in or conducting religious services or the like, and that they could be carried out by a deputy." This proposition is perhaps not quite so clear as the first; the case seems to be rather close to the line. But for the purpose of the present

Judgment their Lordships assume the view taken in Burma to be correct.

The Court of Appeal also agreed with the First Court in holding that one who is not a Mohammedan, and *à fortiori* one who is so but who follows a sect not orthodox according to the standard of the settlor, is not disqualified by law for the post of Mutawalli. The authority for this view is somewhat scanty, but for the purpose of the present Judgment their Lordships assume it to be correct.

But having conceded these points in favour of the now Appellant, the learned Judges held that they did not necessarily conclude the case, but that the Court had still a discretion to exercise in the selection of a trustee. In exercising that discretion they took into account the nature of the duties imposed upon the trustee, the fact that the Appellant, by reason of her sex, could at best discharge many of her duties only by deputy, and the circumstance that the Appellant is a Babee, and as such might take a less zealous interest in carrying on the religious observances of the Shiah school. And in the result the learned Judges set aside the order which nominated the Appellant, and appointed as trustee one Aga Mahomed Sherazee, who appears to be a Shiah resident in Rangoon, not apparently a lineal descendant of the testator. Against that Order the present Appeal has been brought.

On the argument of the Appeal it was not disputed that the rights of the parties, as between themselves, are governed by the terms of the consent decree of the 13th May 1902, which directed merely that a new trustee should be appointed by the Chief Court, "preference in such appointment being given to the lineal descendants of the settlor." But it was said

(and no doubt rightly), that, in construing that decree, account should be taken of what the previously existing rights of the parties under the Mohammedan law were. And it was contended that under that law, and therefore (it was said) under the consent decree, the Appellant as the senior in order of the children of the testator, not being subject to any legal disqualification, had an absolute right to the trusteeship, and that the Court possessed no such discretion as it claimed to exercise.

Their Lordships' attention was called to the earlier texts bearing upon the matter, which are few in number, and to the interpretation placed upon them by modern writers. The authorities seem to their Lordships to fall far short of establishing the absolute right of the lineal descendants of the founder of the endowment, in a case like the present, in which that founder has not prescribed any line of devolution.

Their Lordships are of opinion that the Court had a discretion to exercise in the selection of a trustee, and that the circumstances by which the learned Judges were guided in the exercise of that discretion were matters proper for their consideration. Their Lordships see no reason to dissent from the conclusion arrived at. They will humbly advise His Majesty that the Appeal should be dismissed.

The Appellant will pay the costs.

