Privy Council Appeal No. 115 *of* 1914.

Mutu K. A. Ramanadan Chettiar - - - *Appellant,*

v.

Vava Levvai Marakayar and Others - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST DECEMBER, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ATKINSON.
LORD WRENBURY.
MR. AMEER ALI.

[*Delivered by* LORD ATKINSON]

This is an appeal from the decree of the High Court of Judicature at Madras, dated the 8th February, 1910, affirming the decree of the District Judge of Tanjore, dated the 23rd April, 1906, which varied the decree of the Subordinate Judge of Negapatam, dated the 28th March, 1901.

The suit out of which the appeal arises was brought for a declaration that the plaintiff was entitled to bring certain lands to sale in execution of a decree obtained by him. The lands in question were comprised in a trust deed dated the 28th July, 1893, whereby they were settled substantially in trust to apply an indeterminate portion of the income for the due performance of customary *fatehas* for ancestors and to almsgiving, and to apply the residue of the income in perpetuity for the benefit of the defendants and their descendants without power of alienation.

The grantors in this deed, named Ahmed Naina Marakayar and Asan Kutu Saheb Marakayar, were brothers. They were both Mahommedans of the Hanafi sect. At the date of the deed they were men of considerable means, owning property worth a lac of rupees. The value of the land comprised in the deed was about one-fifth of that amount. Subsequently to the date of the deed they met with considerable losses. The appellant was their execution creditor, and in that capacity

obtained the above-mentioned decree. If the deed of the 28th July, 1893, be absolutely void, he would be entitled to the relief he seeks; if it be not wholly void, his suit must fail.

This is all admitted. The respondents are the sons and grandsons of the two grantors. Those of them numbered 1 and 2 are respectively their sons. They are also the trustees named in the deed. Thus the sole question for decision in the case is whether this deed is a good and valid deed of wakf, or is wholly void. It has been found by the Subordinate Judge, before whom the case was tried, that the deed was not made to delay, hinder, or defraud creditors. That finding has not been questioned on this appeal. The case of the appellant is that the effect of the deed is to give the property comprised in it in substance to the grantors' family in perpetuity, and that it is therefore not a valid deed of wakf, while the case of the respondents is that its effect is to give that property in substance to charitable uses, and that therefore it is a good and valid deed of wakf.

The provisions of the deed are carefully analysed in the following passage in the judgment of the High Court:—

"The deed begins with a recital that the property, consisting of two villages of the total value of 20,000 rupees, is given for the purpose of charity, and then states that out of the gross yields the melvaram, repairs, salaries for servants, maganam, and other important expenses are to be defrayed; and the balance of the income is to be divided in three shares. From two shares out of the three shares of the income, the Dharmakartas or trustees appointed by the deed and their successors are to take 10 rupees per mensem as salary for discharging their duties; and as regards the remainder of the two shares, the direction to the trustees is as follows: 'You should perform annually without failure the customary (not "the annual" as wrongly translated in the paper book) *Pattah* (meaning *Fateha*), *Kuthum* (meaning *Khatam*), &c., for our ancestors and for us after our decease. You should annually give in the month of Ramzan to the *mikins* or the poor *ujivanam*, *i.e.*, food, *udumanam*, *i.e.*, clothes, *sadaka* meaning alms, *jaggath*, &c. The surplus should be divided in equal shares once a year by our heirs or their sons, grandsons in existence from generation to generation inclusive of you.' The third share of the income after paying the expenses is to be utilised in purchasing other immovable property which is 'to be added to the said charity properties and dealt with according to the above terms'; and if in any year no immovable property is bought with the one-third of the net income, the amount is to be added to the two-thirds and 'divided according to the above particulars.' Two sons of the two executants were appointed Dharmakartas or trustees of the deed; and it is provided that their successors should be male members of the family not exceeding three in number; the heirs of the donors should be entitled to call upon the trustees to render proper account of the management, and to remove such of the trustees as may be guilty of mismanagement, and appoint competent men in their place. The Dharmakartas and the successors, the heirs, and the descendants are not to receive more than the shares allotted to them out of the income; and they will not be entitled to alienate the properties, nor will the properties be liable for their debts."

Their Lordships have little doubt but that the grantors executed this deed in the belief that the gift in perpetuity to their families and their descendants which it contains was according to the law governing the matter, namely, the Mahommedan law, a good gift to a charitable use. There is a good deal of authority in support of that view, especially amongst the earlier writers, and by the Act 6, 1913, passed by the Governor-General of India in Council, subsequently to the date of the decision appealed from, the law in India has been brought into conformity, in this respect, with the opinion of these writers. By section 3 of that statute it is expressly enacted that it shall be lawful for any person professing the Mussulman faith to create a wakf, which in all other respects is in accordance with the provisions of the Mussulman law, "for the maintenance and support, wholly or partially, of his family, children, or descendants." It was not contended that this statute affects the present appeal, and the following decisions of this Board, which their Lordships think they are bound to follow, clearly establish that the Mahommedan law, as interpreted by the Board, does not treat such a gift *per se* as a good and valid wakf. These decisions are Mahomed Ahsanulla Chowdrey *v.* Amarchand Kundu and others, 17 L.R.I.A., 28; Abul Fata Mahomed Ishak and others *v.* Russomoy Dhur Chowdry and others, 22 I.A., 76; and Mujibunnissa and others *v.* Abdul Rahim and Abdul Aziz, 28 I.A., p. 15. In this case (at p. 23) Lord Robertson said:—

"Their Lordships have, however, considered the question whether even assuming it to have been registered, the deed is, according to its terms, a valid deed of wakf. It will be so if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family."

All the Courts before which this case has come have adopted the test thus laid down by Lord Robertson, and its accuracy has not been questioned on this appeal. To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor, the amount of the property, the nature and the needs of the charity, their probable or possible expansion, the priority of their claim upon the settled fund, and such like. It was not shown, or indeed contended, on the hearing of this appeal, that the High Court was not right in its conclusion that a certain word in the trust deed which should have been translated as "customary," had in fact been translated "annual." No doubt this alleged mistranslation had not been pointed out either in the Court of the Subordinate Judge or in that of the District Judge, but their Lordships think they must assume that the Judges of the High Court satisfied themselves that the mistranslation had taken place, and are of opinion that under the circumstances the deed must now be read and

construed as if the words "the customary" had been substituted at the place indicated for the words "the annual." The Subordinate Judge at pages 327–329 classifies the charitable objects provided for in the deed under four heads :—

1. Cash doles to the poor on the 28th and 29th of the Ramzan month, which among Mahommedans is regarded as a holy month in which giving alms to the poor is enjoined as a duty.
2. Distribution of clothes to the poor on those days.
3. Distribution of *conjee* to the poor on a *misjed* during the thirty days of that month (Ramzan).
4. Performance of *fateha* on three days of ancestors, and feeding of friends and the poor.

The word "wakf" is not used in the deed, but it is not pretended that these objects are not, according to Mahommedan law, which governs the case, charitable objects, or that the grant to trustees to promote them did not create a good charitable trust. The trusts too are active trusts, troublesome to discharge, and the petty salary given to the trustees may accordingly well be held to have been given to them as remuneration for their trouble in this respect, and therefore as part of the expenditure on the charitable objects.

The Subordinate Judge estimated that it would be necessary to spend 230 to 260 rupees per annum on the first three of these charitable objects, and 100 rupees per annum on the fourth, making in all 360 rupees, which, with the salary of the trustees, would amount to 600 rupees per annum, leaving, since the income of the trust estate was estimated at 1,500 rupees per annum, a balance of about 900 rupees per annum to feed the grant in perpetuity to the family and descendants of the grantors. Much stress was laid by the appellants on the fact that only two-fifths of the income would be devoted to the charity, while three-fifths would go to the family. But these figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently, and the needs of the charity may expand. The number of poor people usually relieved, which is put by the first defendant at 2,500 to 3,000, and by the third, fourth, and fifth witnesses examined on his behalf at 2,000, may vastly increase, since their only necessary qualification is that they should be Mahommedans and be poor. It is not necessary that they should be inhabitants of any particular town or district, and it is obvious that the number of applicants for or objects of relief would tend to depend upon the distress prevailing amongst the Mahommedan population in the districts within reach of the place of distribution, namely, the home of the trustees. The expenses of the *fateha* will be increased by what has already occurred—the deaths of the two grantors. Well, the paramount purpose of the grantors was evidently to provide for all the needs of these charities up to the limit of the trust

funds, the income received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum, that is given to the family. The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is so to give the property in substance to the family, and that therefore it is invalid as a deed of wakf is, their Lordships think, entirely unsound.

It is next urged on behalf of the appellant that, inasmuch as no particular sum is named which the trustees are required to spend on any or on all of the charitable objects mentioned in the deed, they may spend on them as much or as little as they please, may, if they feel inclined, in fact, starve these charitable trusts, and that therefore the provision for charities is illusory. Well, their Lordships cannot at all take that view of the powers and duties of the trustees. As far as the *fatcha* is concerned, it is to be the "customary" ceremony that the trustees are to perform without fail. Part of that ceremony is to feed the poor.

The trustees are, in their Lordships' view, at the least bound, so far as the funds under their control will permit, to make such provisions for the other charities as in the circumstances of the case a pious and charitable Mahommedan would consider reasonable and proper; and it is not disputed that, if the trustees failed to perform their trust, the Advocate-General, or some other authority having control over the administration of charities, could in a court of law compel them to do their duty and secure the due administration of the trust fund.

The sum devoted to these charities is according to any standard not large, though for the present it is abundant for their needs. Having regard to the wealth of the grantors at the date of the deed the provision made by it is a modest provision. Their Lordships take the view that, having regard to all the circumstances of the case, the dominating purpose and intention of the grantors in executing this deed evidently was to provide adequately for these charities. That was their main and paramount object. The secondary and subsidiary object was to secure for their families and descendants any surplus that might remain over after the needs of the charities had been satisfied. As the gift for the charities was perpetual, it was necessary and right that the provision for capturing any possible residue should also be perpetual. The provisions of the deed carry out these objects, and that being so, it is, in their Lordships' view, only right to hold that the effect of the instrument is not to give the trust property in substance to the family of the grantors, but to give it in substance to the charitable purposes named in it. If this be so, as they think it is, the deed is within the authorities a good and valid deed of wakf and must be allowed to take effect according to its tenor. The appeal therefore fails and must be dismissed, and their Lordships will advise His Majesty accordingly. The appellant must pay the costs.

In the Privy Council.

MUTU K. A. RAMANADAN CHETTIAR

v.

VAVA LEVVAI MARAKAYAR AND OTHERS.

DELIVERED BY LORD ATKINSON.

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