Privy Council Appeal No. 28 *of* 1921.

Bengal Appeal No. 63 *of* 1919.

Khajeh Solehman Quadir and another - - - - *Appellants*

v.

Nawab Sir Salimullah Bahadur, since deceased, and others - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MARCH, 1922.

Present at the Hearing:

VISCOUNT CAVE.
LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal dated the 6th June, 1919, which reversed a judgment and decree of the Court of the Subordinate Judge of Dacca dated the 16th April, 1917. The facts giving rise to the dispute may be stated as follows:—

Early in the 19th century one Khajeh Abdullah, a Mahomedan trader of Dacca, died intestate, possessed of the property in dispute and leaving among other heirs four sons named Ahsanullah, Hafizullah, Abdul Azim and Abdul Karim.

On the 5th May, 1846, certain members of the family executed a deed whereby they purported to "make *wakf* of" certain family properties therein described for the benefit of themselves and their descendants generation after generation, and relatives, and then for the poor and destitute; and they thereby appointed Abdul Gani (grandson of Ahsanullah) to be *mutwali* of the properties, and directed him to pay to the heirs of Hafizullah, Abdul Azim and

Abdul Karim, certain monthly allowances mentioned in the schedule and to keep the balance in deposit. On the 11th September, 1868, Abdul Gani appointed his son Ahsanullah to be *mutwali* of this deed in his place.

On the same date, namely, the 11th September, 1868, Abdul Gani executed a deed whereby he purported to " make perpetual *wakf* of " certain other properties of which he claimed to be the owner by inheritance or purchase in favour of his sons and offspring and all the members and relatives descended from his grandfather, the *wakf* being descendible to children both in the male and female lines, and on their failure, in favour of the fakirs and the poor indigent of Dacca ; and he thereby appointed his son Ahsanullah to be *mutwali* of the *wakf* so created, and directed him to spend money befitting his *reasat* and to pay allowances to the parties in whose favour the *wakf* was made, with power to increase or reduce such allowances. This deed contained the following clause :—

> The object of the *wakf* of the properties is this, that they be protected from injury and ruin, and that the name and dignity of the family be maintained, and that the profits of the estate be, according to the practice and usage of the family, spent for the improvement of the position and dignity of the family, for the comfort and benefit of the persons in whose favour the *wakf* is made, and for the performance of the worldly and religious affairs and of charitable acts.

The purpose of these two deeds is plain. The intention of the donors in each case was to make perpetual provision for the members of their family by settling the properties upon such members generation after generation so long as the family should last ; and as such a settlement was not recognised by Mahomedan law, they sought to validate it by calling it a *wakf* and by inserting a distant and contingent provision for charitable purposes.

In the year 1880 some members of the family descended from the donors of 1846, being dissatisfied with the allowances paid to them out of the income of the settled properties (which had greatly increased), brought a suit in the Court of the Subordinate Judge at Dacca against Abdul Gani and Ahsanullah his son, alleging that the deed of 1846 was not valid as a *wakf* and that the deed of 1868 comprised properties purchased by the *mutwali* out of income accrued under the deed of 1846 and claiming accounts upon that footing and payment of their share. Among the parties to this suit were Amirullah (the father of the appellants), his mother Izzatennessa Bibi, his wife Halima Bibi, and her mother Ayesha Khanum. The precise interests of these persons in the properties comprised in the two deeds of *wakf* are not clear on the record, and it is not now material to ascertain them ; but it is plain that they had or claimed interests in the properties comprised in both deeds.

The suit was heard, but before judgment was pronounced some friends of the family (including the then Lieutenant-Governor, Sir Ashley Eden, and the District Judge, Mr. Rampini) intervened in the interests of peace, and ultimately a compromise was effected and the suit was stayed upon the terms of two agreements dated the 26th August, 1881, and the 17th September, 1881.

By the agreement of the 26th August, 1881, which was signed by or on behalf of all the parties to the suit of 1880, it was agreed that all the persons entitled to receive allowances under the deed of 1846, and all the defendants to the suit except Abdul Gani and his son Ahsanullah, should be made plaintiffs in the suit, and that the suit should be withdrawn without power to bring any fresh suit for the same subject-matter. The principal terms of the agreement were contained in the following clauses :—

4. The persons signing this Memorandum of Agreement admit that the two deeds of 1253 B. E. and 1275 B. E. [1846 and 1868] are valid and binding deeds of *wakf*.

5. The persons signing this Memorandum of Agreement admit that the properties held as *wakf* by the Nawab Ashanullah under the deed of 1253 B. E. now consist of the properties entered in Schedule A appended to this Memorandum of Agreement and of no other properties, and that the properties held as *wakf* by the Nawab Ahsanullah under the deed of 1275 B. E. now consist of the properties entered in Schedule B appended to this Memorandum of Agreement and of no other properties.

6. The Nawab Ahsanullah consents, by virtue of the power vested in him as *mutwali* by the said two deeds, to increase the allowances of the various members of the family whose names are entered in the Schedules C and D appended to this Memorandum of Agreement to an aggregate or total amount of Rupees one lac thirty-three thousand and eighty-four and eleven annas only per annum. And it is declared that the persons whose names are entered in the Schedule C appended to this Memorandum of Agreement are the persons entitled to allowances payable out of the income of the properties held as *wakf* under the deed of 1253 B. E. And the persons whose names are entered in the Schedule D appended to this Memorandum of Agreement are the persons entitled to allowances payable out of the income of the properties held as *wakf* under the deed of 1275 B. E. And it is agreed that the particular amount to be paid to each individual person shall be fixed hereafter by a Committee consisting of four male members of the family who shall be lineal descendants of the original proprietors of the estates entered in the said Schedules A and B, two of the said four male members being nominated by the Nawab Ahsanullah and two by the plaintiffs of the Suit No. 189 of 1880, and the said four members having power to select an umpire with a casting vote from amongst their number or to select one other member of the family to be an additional member of their Committee, but who shall have one vote only.

7. On the amounts of the allowances to be paid to each individual member of the family being fixed by the said Committee, the Nawab Ahsanullah shall within two weeks' time execute an agreement on stamped paper agreeing to pay to each individual member the amount of the allowance fixed for him or for her by the said Committee, and stipulating that such allowance shall not be stopped except as hereinafter provided in this Memorandum of Agreement.

11. On the death of any member of the family in receipt of an allowance, his or her allowance shall be distributed amongst his or her heirs and residuaries in proportions to be determined by the family *panchayet* to be appointed as hereinafter provided.

18. The family *panchayet* refrered to in Clauses 8, 11, 12, 13, 14, 15 and 17, and which shall consider and determine all the aforesaid family arrangements shall consist of the *mutwali* for the time being, if he chooses to sit, and four male members of the family being lineal descendants of the original proprietors of the estates mentioned in the said Schedules A and B,

which four members shall be elected biennially by such adult male and female members of the family as choose to vote at the election, after having received due notice.

The agreement of the 17th September, 1881, which was signed by Ahsanullah only, after a recital to the effect that a Committee, selected in accordance with clause 6 of the agreement of the 26th August, 1881, had fixed the amounts entered in the schedule given below as the amounts of the monthly allowances to be paid to the members of the family, whose names were entered in the same schedule, proceeded as follows :—

I, the Nawab Ahsanullah Khan Bahadur, as *mutwali* of the deeds of *wakf* of 1253 B. E., and 1275 B. E., referred to in the said Memorandum of Agreement, do hereby execute this agreement and agree, firstly, that within seven days after the beginning of each month of the Bengali calendar I and all future *mutwalis* shall pay to each member of the family whose name is entered in the Schedule appended to this agreement the amount of the allowances entered against his or her name ; secondly, that neither I nor any future *mutwali* shall stop or withhold payment of the allowances entered in the Schedule given below without just cause, such cause to be first declared just by the family *panchayet* to be elected biennially in accordance with Clause eighteen of the said Memorandum of Agreement ; thirdly, that on the allowance of any member of the family being so stopped, I and all future *mutwalis*, after deduction of any compassionate allowance which I or or any future *mutwali* may make to the said offending member, shall pay the balance of the allowance so stopped to his or her family or relatives dependent on him or her ; fourthly, that on the said biennially elected family *panchayet* determining on sufficient cause being shown to it that the allowance so stopped should be restored to the offending member, I or any future *mutwalis* shall accordingly restore and continue it ; and fifthly, on the death of any member of the family in receipt of an allowance, I and all future *mutwalis* shall distribute the amount of his or her allowance amongst his or her heirs and residuaries in proportions to be determined by the said biennially elected family *panchayet*.

The schedule contained a list of the monthly allowances to be paid to the several members of the family out of the income arising from each of the two deeds, and included allowances under the deed of 1868 of Rs. 20 a month to Izzatennessa, Rs. 150 a month to Ayesha Khanum, and Rs. 150 a month to Amirullah. The suit was duly withdrawn in accordance with the agreements.

For some years after the execution of these agreements peace reigned in the family and the allowances secured by the agreements were duly paid. On the death of Izzatennessa her son Amirullah became entitled to a share of her estate, and a proportionate part of her monthly allowance of Rs. 20 was thenceforth paid to him ; and on the death of Ayesha Khanum her daughter Halima (the wife of Amirullah) succeeded to a share of her estate, and a proportionate part of her monthly allowance of Rs. 150 was thenceforth paid to her. But in the year 1889 and the following years a series of decisions of this Board established that a settlement of property upon successive generations of a Mahomedan family, such as was attempted to be made by the deeds of 1846 and 1868, was void by Mahomedan law and was not validated by the use of the term "*wakf*" and the insertion of a remote and illusory provision for charitable purposes. (See *Sheik Mahomed Ahsanulla Chowdhry*

v. *Amarchand Kundu and others*, 1889, L.R. 17 I.A. 28 ; *Abdul Gafur and others* v. *Nizamudin*, 1892, L.R. 19 I.A. 170 ; *Abdul Fata Mahomed Ishak and others* v. *Russomoy Dhur Chowdhry and others*, 1894, L.R. 22 I.A. 76.) In consequence of these decisions the Nawab Ahsanullah and his father (then Sir Abdul Gani, K.C.S.I.) appear to have taken advice as to the legal effect of the two deeds of *wakf* and the agreements of 1881, with the results to be now stated.

On the 18th January, 1895, Sir Abdul Gani executed a *Heba-Bilwaz* (or deed of gift) whereby, after referring to the decisions of the Board and reciting that he was convinced and had been advised by lawyers that the *wakfnama* executed by him on the 11th September, 1868, was not legally valid, he purported to make a gift in favour of his son Ahsanullah and his heirs of the properties therein described, being the greater part of those comprised in the deed of 1868 ; and he added :—

> As I am a party to the said Memorandum of Agreement executed on the 26th of August, 1881, and as the legal effect, construction and force thereof are therefore binding upon me, you shall as the malik in possession hold and enjoy the properties which I make over to you by this Heba-Bilwaz, subject to the legal effect and construction of the said Memorandum of Agreement.

Shortly afterwards Ahsanullah gave notice to the heirs of such of the persons entitled to allowances under the agreements of 1881 as had died since the execution of those agreements that he had been advised that the effect of the agreements of 1881 was that he was liable to pay allowances from the income of the properties covered by the *wakf* of 1868 to such persons only as were parties to the agreement of the 26th August, 1881, and whose names were given in schedule D of that agreement, but that he was not liable to pay such allowances to the heirs of such persons in perpetuity. Accordingly on the death of Amirullah (who died on the 3rd December, 1895) and of his wife Halima (who died on the 29th April, 1896) Ahsanullah stopped payment of the allowances under the deed of 1868 to which they had been entitled under the agreements either personally or as heirs of Izzatennessa and Ayesha Khanum, and refused to continue those allowances to their heirs. The heirs of Amirullah and Halima, who are the present appellants, were then minors of the age of four and three years respectively ; but shortly after attaining their majority they instituted the present suit against Salimullah Bahadur (the heir of Ahsanullah, who had then died), claiming arrears of their allowances, amounting to Rs. 45,692 and a declaration that the allowances were a charge on the properties comprised in the deed of 1868. They also claimed that a residence should be provided for them.

The suit was heard by the Subordinate Judge of Dacca, who on the 16th April, 1917, gave judgment for the plaintiffs (the present appellants) for the arrears of maintenance allowances and costs, but disallowed the claim for a residence.

On appeal by the defendants to the High Court at Calcutta, that Court, on the 6th June, 1919, gave judgment allowing the

appeal and dismissing the appellants' suit with costs. The reasons given by the Court for their decision were briefly :—

(1) that on the authority of the cases above cited (to which may be added *Maulvi Savyid Muhammad Ali* v. *Razia Bibi and others*, 1905, L.R. 32. I.A. 86) the *wakfs* of 1846 and 1868 were invalid ;

(2) that they were not validated by the Mussulman Wakf Validating Act, 1913, which is not retrospective ; and

(3) that the agreements of 1881, being founded upon and inseparably associated with the *wakfs* of 1846 and 1868, fell with those *wakfs*.

Against this judgment the present appeal was brought.

In the argument before their Lordships there was no serious dispute as to the above propositions numbered (1) and (2). There can be no doubt that, having regard to the decisions of the Board above referred to, the deeds of 1846 and 1868, which purported to create by gift a perpetual succession of interests for the aggrandisement of the family of the donors, were invalid by the Mahomedan law and were not validated by the use of the term "*wakf*" or by the insertion of a remote trust for the poor ; nor can the Act of 1913 be construed as validating deeds executed before its date. The real question to be determined, therefore, is whether the High Court was right in holding that, the deeds of *wakf* being invalid, the scheme of maintenance allowances contained in the agreements of 1881 also fell to the ground. The conclusion of the learned Judges of the High Court to that effect appears to have been based upon the view that the scheme of 1881 was founded upon and inseparable from the illegal *wakfnamas* and could not be supported by the Court without also supporting a family settlement which is contrary to Mahomedan law. They appear to have assumed, on the authority of the decision of the Board in *Lakshmi Narayana Ananga Garu* v. *Madhawa Deo Garu* (1892, L.R. 20 I.A. 9), that if the maintenance allowances had been charged on the property they might have been upheld as heritable allowances ; but they held that the parties to the agreements could not have intended to create a charge on property which they were dedicating to religious purposes, and accordingly that no charge was created.

With great respect to the learned Judges who came to that conclusion, it appears to their Lordships to give too little weight to the essential differences between the two deeds of *wakf* on the one hand and the agreements of 1881 on the other. The deeds of *wakf* were invalid because they attempted to create a perpetual succession of estates contrary to Mahomedan law, and the attempt was not validated by giving to the settlements a colour of charity ; but the main purpose of the agreements of 1881 was quite different. The principal purpose of those agreements was to secure to living and named persons certain fixed allowances which were to become payable immediately and were to be continued to their heirs. It is true that the agreements purported to confirm the *wakfnamas*, and that the allowances were made payable by the hand of the *mutwali* of the *wakfnamas* out of the income accruing to him from

the properties thereby settled; but the allowances were intended to take effect as immediate and heritable charges on such incomes taking priority of all the limitations contained in the settlement, and they may, therefore, be supported although those limitations fail. The direction to pay the allowances "out of the income" of the settled properties, which appears in both agreements, shows an intention to create a charge, and this intention was not frustrated by the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlements.

There is a further difference between the two sets of documents which is also of importance. The *wakfnamas* were gifts and were, therefore, subject to the rule of Mahomedan law which requires that a gift shall be accompanied by delivery; but the agreements of 1881 are not gifts, but contracts for valuable consideration. By those agreements the members of the family other than Sir Abdul Gani and his son Ahsanullah surrendered their claims to property of considerable value and stayed their suit in consideration of a firm contract securing to them annuities to an amount exceeding Rs. 1,30,000, and continuing such annuities to their heirs. Such an agreement if made for valuable consideration is not subject to the restrictions affecting gifts among Mahomedans, but is a contract creating a charge on lands, which may be enforced like other charges by the Courts. The provision contained in the agreements that the distribution of an annuity among the heirs of the annuitant should be in proportions to be determined by the family *panchayet* (if it was intended to do more than to authorize the *panchayet* to settle disputes as to heirship) may be disregarded, the more so as no *panchayet* has functioned for many years past. This view is in accordance with the decisions of the Board in *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum and others* (1867, 11 Moore's I.A. 517 at page 548); *Lakshmi Narayana Ananga Garu* v. *Madhava Deo Garu* (1892, L.R. 20 I.A. 9); *Khwaja Muhammad Khan* v. *Husaini Begam* (1910, L.R. 37 I.A. 152); and *Raja of Ramnad* v. *Sundara Pandiyasami Tevar* (1918, L.R. 46 I.A. 64); and it appears to their Lordships that it should prevail.

It is satisfactory that the above conclusion as to the law applicable to the case corresponds with the justice of the matter. It would be lamentable if the heirs of Ahsanullah, who in 1881 was confirmed in the possession of valuable properties as *mutwali* only and on a clear agreement for the payment out of the income of such property of annuities to the members of the family and their heirs, were now at liberty to repudiate the fiduciary character of that possession and the conditions on which it was given and to keep the property in their own hands free from all charges. It is consistent not only with law, but with "equity, justice and good conscience," that the agreements should be observed.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and that the judgment of the Subordinate Judge should be restored, the respondents to pay the costs in both Courts and the costs of this appeal.

In the Privy Council.

KHAJEH SOLEHMAN QUADIR AND ANOTHER

v.

NAWAB SIR SALIMULLAH BAHADUR, SINCE DECEASED, AND OTHERS.

DELIVERED BY VISCOUNT CAVE.

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