Privy Council Appeal No. 68 *of* 1930
Patna Appeal No. 47 *of* 1923

Syed Ali Zamin - - - - - - - - - - *Appellant*

v.

Syed Akbar Ali Khan *alias* Syed Chhotey Nawab, since deceased, and others - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH FEBRUARY, 1937.

Present at the Hearing :

LORD THANKERTON.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

The sole question in this appeal is whether a wakfnama, dated 25th May, 1917, is valid and operative according to Shia law. The settlor was the late Nawab Haji Syed Nawab Mehdi Husain Khan, commonly known as Badshah Nawab. The suit was brought on the 9th January, 1920, in the Court of the Subordinate Judge at Patna by the respondent, Syed Akbar Ali Khan *alias* Syed Chhotey Nawab, one of the two surviving brothers of the settlor. The main though not the sole purpose of the suit was to obtain a declaration that the deed of 25th May, 1917, was invalid, and did not in law operate as a dedication of the properties comprised therein, and that, notwithstanding the deed, the plaintiff was entitled to possession of a third share of the properties by inheritance from his brother the settlor, who had died on 19th March, 1919. The appellant before their Lordships is Syed Ali Zamin who was the first defendant in the suit; by the terms of the deed he was appointed to be sole mutwalli on the death of the settlor. The other causes of action, and the other defendants need not now be detailed. The Subordinate Judge on 31st July, 1922, decreed the suit declaring the deed to be inoperative and the properties therein mentioned to be part and parcel of the estate which Badshah Nawab left at his death. On appeal this decree was, in certain respects, modified by the decree of the High Court at Patna, dated 16th January, 1928. But on the main question, namely the invalidity of the deed, the learned Judges of the High Court, Dawson Miller C.J. and Adami J. concurred in the conclusion reached by the Subordinate Judge though not in all his reasons.

In 1917 Badshah Nawab was about 60 years of age; he had a wife living (the second defendant in this suit), but he had no sons or daughters. His family had for long enjoyed the advantages of wealth and position, and his father had created a verbal wakf of three villages in Patna yielding an income of between Rs.2,000 and Rs.3,000 of which Badshah Nawab, after his father's death, was the mutwalli. This had provided for certain religious ceremonies in a mosque and imambara and Badshah Nawab had before 1917 been in the habit of adding money of his own to the income of his father's endowment for conducting the ceremonies. Since 1911 Badshah Nawab had suffered from paralysis, his second attack (in 1914) having impaired his ability to transact business of any difficulty: the third and last attack was in December, 1918, two or three months before his death. In 1915 he found it necessary to sell property in order to meet his debts. A banking business in which he was a partner had failed, involving him in heavy liability. With the help of the appellant, Ali Zamin, whom he called in to help him in managing his affairs, by borrowing money on mortgage and by the sale of properties he had dealt with the position and at the date of his death though he owed about Rs.74,000, he was not insolvent even if the dedicated properties be disregarded.

The wakfnama now in dispute is an elaborate document and the schedules thereof specify a large number of properties, moveable and immoveable, with full details of the latter. The description of the objects upon which the settlor's bounty is to be expended and of the sums of money to be appropriated to each, is careful and lengthy. The net income from the dedicated properties is stated in the deed to be just under Rs.20,000 per annum; according to the High Court the properties comprised in the deed are, substantially speaking, the whole of the unincumbered property which the settlor at that time possessed. The learned Chief Justice has given a short description of the nature and effect of the deed as follows:—

> "The properties dedicated by the settlor are situated in the districts of Shahabad, Patna, Monghyr and Purnea and included his two houses known as Badshah Manzil and Badshah Mahal together with the effects and jewellery therein which were valuable. The former was to be the residence of the mutwali and the latter the residence of his wife who was also to receive during her lifetime Rs.3,600 per annum out of the income of the endowed properties. The mutwali was to receive Rs.3,000 per annum and two other annuitants Rs.1,200 and Rs.360 respectively. The municipal taxes and repairs of the houses are estimated at Rs.1,872 and the auditors' fee at Rs.312. Rs.2,288 were to be spent in celebrating religious ceremonies (majlises and mahafils), Rs.624 were to be spent on an orphanage, Rs.468 on the burial of the dead, Rs.312 in connection with a mausoleum, Rs.104 for breakfasts in Ramzan and Rs.728 on the upkeep of horses and camels for religious processions. About Rs.1,600 were to be spent on leaders of the prayers and servants of the mosque and imambara and the balance, about one-seventh of the whole, was to go to reserve fund, to be dealt with as provided in the deed in buying further property. The settlor was to be the first mutwali and was to be succeeded on his death by Ali Zamin. A managing committee was to be appointed to come into existence

after his death with certain powers of control and the right of appointing and dismissing future mutwallis. The wife's annuity after her death was to be spent on the maintenance and education of orphans and widows and any large accumulations in the reserve fund were to go in acquiring immovable properties to be treated as part of the wakf."

The appellant Ali Zamin was during the settlor's life to be co-mutwalli with him, but only nominally as the right of management was to be in the settlor. Clauses 1, 7 and 8 of the regulations laid down by the settlor for the management of the wakf are as follows:—

"1. During my lifetime, the Tauliat of the entire wakf properties, noted in schedules Nos. 1 and 2, shall have concern with me personally. During my lifetime, I shall keep the entire wakf properties in my possession and under my management as mutawalli and carry out the Tauliat work. During my lifetime, no one shall have absolutely any power to interfere with and raise an objection regarding the right of Tauliat or the management of the properties. I, the mutwalli too shall spend (money) in whatever manner I would like.

"7. In order to bring this wakfnama into force it will be incumbent upon me to get my name removed as a proprietor and to get it registered in the Government office as a mutwalli of the wakf properties specified in schedule No. 1. Similarly the future mutwallis also shall do the same.

"8. Should any mutawalli, besides myself, give up the Isna—Ashari sects of the Shia school or prove dishonest, the committee shall have power to remove him and to select another mutawalli, according to the terms of this wakfnama."

The first respondent by his plaint did not sue as a creditor of the settlor making a case that the wakfnama was a transfer executed with the intention to defeat and delay creditors and thus voidable under section 53 of the Transfer of Property Act or the well known principles therein embodied. In fact no creditor appears at any time to have sought to impeach the deed. The plaint attacked the deed upon a number of grounds: that the settlor was not of sound disposing mind; that he executed the deed under undue influence by the appellant Ali Zamin who desired the office of mutwalli; that no valid wakf could be made of moveables; and that the dedication was illusory in the sense that the settlor intended to use the income of the properties as he pleased and to continue throughout his life to spend the income as he had done in the past. Most of these contentions were accepted by the Subordinate Judge, who held, in particular, that the wakf was illusory, never having been intended to operate; that it was executed under undue influence and was a cloak to secure benefits for the appellant and the settlor's widow. The High Court disagreed with the Subordinate Judge upon the question of undue influence and before them the case that the settlor was not of sound disposing mind was abandoned. They disagreed also with the contention that by the deed in the clauses which have been already quoted, the settlor was given power to do whatever he liked with the dedicated property, so that he really retained, during his life time, his original proprietary interest. They held, as their Lordships think rightly, that on a true construction of these clauses the powers given to the

settlor are the powers of a mutwalli and nothing more. But the High Court held the deed to be invalid by reason that the manner in which Badshah Nawab in fact dealt with the property after the dedication was proof that he never had any real intention of completely divesting himself of the proprietary rights during his life time. In the view of the High Court the settlor continued to retain possession as proprietor and to appropriate the bulk of the net profits to his own use; they held, accordingly, that the dedication did not comply with the requirements of the Shia law.

In Baillie's Digest of Mooḥumudan Law, 1869, Part II, p. 218, the Shia law as laid down in the Suraya (Shuraya-ool-Islam) "the most authoritative work of that school" (per Sir Arthur Wilson in *Baker Ali Khan's case,* 1903, 30 I.A. 94, 112) is given as follows:—

> "Conditions that relate to the *wukf* itself which are four in number. First it must be perpetual; second absolute and unconditional; third possession must be given of the *mowkoof* or thing appropriated, and fourth it must be entirely taken out of the wakif or appropriator himself."

In *Aga Ali Khan* v. *Altaf Hasan Khan,* 1892, I.L.R. 14 Allahabad 429 and in *Abadi Begum* v. *Kaniz Zainab,* 1926, 54 I.A. 33, 37, this has been quoted and applied. In the former case the third of these conditions was expounded by Mahmood J. (p. 455) as flowing from the fact that the Shia law recognises wakf, not as an unilateral disposition of property as does the Sunni law, but as partaking of the character of a contract, at least in so far as to involve acceptance as well as offer. The most immediate application of this principle is the necessity of delivery of actual possession by the wakif himself of the appropriated property to the mutwalli or the person appointed as superintendent of the wakf property (p. 457). In other words the wakf does not become perfect or obligatory by a mere declaration of the settlor. Mahmood J. cited ample authority for these propositions and their Lordships are clearly of opinion that under Shia law actual delivery of possession by or by direction of the wakif is a condition precedent to the wakf having validity and effect. But the same judgment contains high authority from the texts for the proposition that "an appropriator could appoint himself as the mutwalli of a wakf, and that in such a case change in the character of the possession amounts to transfer of the possession which would be required when the mutwalli appointed by the wakif is a person other than the wakif himself". (p. 479). A case is instanced as being one "in which the wakif Ali had appointed himself as mutwalli of the wakf and administered it as such thus fulfilling the requisite change in the character of possession which takes the place of actual transfer of possession when the wakif appoints another person as mutwalli". No doubt is cast upon any of these propositions by the judgment of the Board in *Baker Ali Khan's* case (*supra*) though on the question of the validity under Shia law of a wakf made by will the decision was reversed.

Their Lordships, therefore, in applying the Shia law to the present case have two questions to consider, both of which have been contested at the hearing. The first is whether Badshah Nawab completely divested himself of all interest in the property which he dedicated. This, in their Lordships' judgment, is a question of construction of the terms of the wakfnama, as may indeed be seen from the illustrations given in the Suraya, as explaining the fourth condition, e.g. the case of a person making a settlement on himself, or making a settlement on another with a condition to pay the settlor's debts or expenses. The matter was so regarded in *Abadi's* case (*supra*), the question being deemed to arise on the face of the documents themselves. Agreeing as their Lordships do with the High Court that the powers given to the settlor by the wide language of the first clause, already quoted from the deed, are not more than the powers of a mutwalli to be exercised free from control by a committee of management or other such body, they are of opinion that there is nothing contrary to Shia law in the terms of the deed and that the wakf cannot be held to be invalid by reason of any failure to comply with the requirement that the settlor must divest himself of his proprietary right.

The next question for consideration is whether or not the settlor gave possession of the thing appropriated. As the settlor was to be himself the first mutwalli, this requirement will be satisfied, as has been already shown, if it be held proved that the settlor changed the character of his possession, continuing to hold the property not as malik of the property but as mutwalli of the wakf. The evidence in their Lordships' view establishes that this condition also was fulfilled. By the deed itself (cl. 7 above quoted) the settlor had indicated that by mutation of names (kharij) in Register D kept under the Land Registration Act of 1876 he would fulfil this requirement which was present to his mind; and though the steps taken by him or on his behalf may be criticised as dilatory the fact is that in the course of 1918 Badshah Nawab and Ali Zamin were registered as holding the great bulk of the zemindary properties as mutwallis under the wakfnama of 25 May, 1917. The exact dates of the various applications, and in many cases of the new entries on the Register, are not shown by the certified extracts on the record in this suit, but it is sufficiently clear that between April and August, 1918, if not from an earlier date, the settlor by his agents was engaged in effecting mutation in Patna Shahabad and Monghyr districts. Certain properties in the district of Purnea (including Dinajpur) had been included at the end of the scheduled list of dedicated properties in the wakfnama. They had been lumped together in a summary manner for purposes of description and the name Taluqa Surjapur with the names that followed it gave an ambiguous indication of the property intended to pass under the deed. The learned Chief Justice has carefully explained the difficulty and in their Lordships' view has rightly held that the property referred to included the whole of the settlor's interest in the pargana of that name and not merely his

interest in twenty-nine villages. That the settlor was advised to have this ambiguity cleared up before seeking mutation in respect of the Purnea properties is in their Lordships' view established, and in fact he executed a supplemental deed on 19th February, 1919, very shortly before his death, to effect this purpose. It contains full particulars of the patni tenures which had been originally intended but imperfectly detailed as well as a correction of the Tauzi number of mausa Khajura in Monghyr. While it is true that suits for rent were in general brought in the name of Badshah Nawab as before, rent receipts given to tenants on the same printed forms as were before in use, and challans for payment of revenue, etc., made out as before, it is true on the other hand that on 4th November, 1917, ("on the Tauzi day the 5th Kartik, 1325, Fasli") an account was begun in the name of the wakf headed "annual jama karach in respect of the mahals recently given in wakf . . . by Badshah Nawab and Ali Zamin mutwallis" and into this account were brought the receipts from the wakf properties including properties as to which there had been no mutation of names whether in Register D or (for patnis) in the zemindar's sherista. Certain comments on this account will be considered later in this judgment. Some of the dedicated property was situated in the area of a municipality and in the strict sense no system of mutation applied to it though it was possible to get an entry made in the books kept by the municipality for purposes of tax, etc. In a partition suit brought in September, 1918, against Badshah Nawab and Ali Zamin as mutwallis in respect of a property in Patna municipality called Nawab Chak it was alleged by the plaint that they were so recorded, but their Lordships will take it that for municipal property no such steps were taken. It is on the other hand proved that in November, 1917, a receipt given to Mohammad Aqil for Rs.5,100 being his collection of rents in Surjapur was given in the names of the mutwallis. Without entering further into detail their Lordships think that the broad effect of the evidence is that the settlor had done what was necessary to change the character of his possession, to give possession to the mutwallis and to discontinue his own possession as proprietor. In their Lordships' opinion mutation of names is not for the present purpose the only method by which possession can be given or altered. The observations made by Sir John Edge delivering the judgment of the Board in *Mohammad Abdul Gani* v. *Fakhr Jahan Begam*, 1922, 49 I.A. 195 at 209, are clearly against any such rule and the decision in *Abadi Begum* v. *Kaniz Zainab* (*supra*) does not conflict with them, though in that case the importance of mutation and the significance of its absence were emphasised. In the present case the number and value of the properties as to which this most formal act of transfer of possession was carried out and the opening of a separate account in the name of the wakf are sufficient evidence that the properties comprised in the deed had been put into the possession of the mutwallis especially as there is no basis for a suggestion or suspicion that the settlor had

a particular motive or desire to withhold any special item of the property. It would be to mistake the character and scope of the third condition in the passage above quoted from the Suraya, and to misinterpret it, to hold that the wakf was bad because one or two properties had not been recorded formally in the new names or because the utmost technicality had not been observed in granting rent receipts or framing plaints in rent suits.

The real basis of the decision of the High Court is to be found in the fact that an examination of the wakf jama karach discloses that, while keeping an account of the wakf receipts and of the monies taken by himself or spent on his behalf, the settlor was nevertheless using the income much as he might have done before the date of the deed. One striking instance may be mentioned, viz., that of Rs.5,100 received from Mohammad Aqil as rents collected by him from Surjapur. He had been given a receipt therefor in the names of the mutwallis and the money was credited to the wakf account (19th November, 1917), but the account shows that it had been handed out at once to the settlor who had spent it at or in connection with the Sonepur fair. The account does not show that all such monies had been refunded: something had been refunded but very little. It does not show that the settlor's wife or that he himself as mutwalli was being paid the salary provided by the wakf-nama. It shows expenditure on religious ceremonies but of this part, not covered by the settlor's father's wakf, was of a kind which the settlor was quite probably meeting out of his own monies prior to May, 1917. Examining this unaudited, incomplete and badly kept account for the twenty-two months which separated the wakfnama from the settlor's death the High Court made out the result as follows:—

"The total income for the full period is Rs.38,392. This is accounted for as follows:—

	Rs.	a.	p.
Government revenue and cesses	9,358	0	0
Law expenses and other miscellaneous charges	3,909	0	0
Municipal taxes	1,112	0	0
Spent on the objects of the wakf deed ...	6,934	0	0
Taken by Badshah Nawab for his personal use (including Rs.6,868 shown in the seahas from the 25th May, 1917, to the 3rd November, 1917) ...	17,000	0	0
Balance in hand on the 19th March, 1919	79	0	0
Total	38,392	0	0

"These figures do not take account of a sum of Rs.1,780 repaid to the wakf account from the tahvil of Badshah Nawab five days after his death. Why this amount was repaid, or by whose authority, has not been explained. In the total of Rs.17,000 stated above to have been taken by Badshah Nawab for his personal use are included Rs.1,549 repayment of a loan due from him to mahajans under a handnote, Rs.50 per month paid to Ali Zamin amounting in all to Rs.750 representing an allowance which Badshah Nawab had been in the habit of making him before the deed was executed, Rs.133 subscription to a hospital, Rs.173 for income-tax

and various small loans to different people, but the bulk of the amount including the sum of Rs.5,100 taken for his expenses at Sonepore is unaccounted for. It appears that Bibi Zainia was paid at the rate of Rs.150 per month instead of Rs.300 as provided in the deed and, as far as the accounts show, the other two annuitants were not paid anything. It may be presumed in the absence of the personal accounts that Bibi Zainia had some sort of allowance from her husband before the deed was executed. Although the sum of Rs.6,934 was spent on the declared objects of the trust during the period covered by the accounts, it is admitted that Badshah Nawab had previously been performing the same kind of religious ceremonies as mutwali of his father's endowment and had supplemented the income thereof from his own resources, and it seems probable that after the new wakf deed was executed his expenditure in this respect did not appreciably increase. The accounts of the old wakf are not before us and there is no means of showing how the income derived therefrom was expended after May, 1917. It would appear therefore that the settlor to all intents and purposes continued to treat the income of the endowed properties as at his own disposal and spent the money as the deed says ' in whatever manner I would like ' but whereas under the deed, as I interpret it, his choice of the mode of expenditure would be confined to the objects of the trust, in fact he spent the bulk of the available assets after payment of revenue and taxes upon his own personal needs. I am constrained to hold, agreeing with the learned Subordinate Judge, upon this part of the case, that there was never such complete divestment of interest or transfer of possession as the Shia law requires."

To this conclusion it is doubtless no sufficient answer to say that if the settlor committed breaches of trust, the trust is not thereby rendered invalid, and the settlor can be called upon to account. The settlor's intromissions with the income of the properties are part of the evidence upon which as a whole must be answered the question whether the character of his possession of the properties had been changed. Had the other evidence been less decisive this evidence might have had great importance upon the question of transfer of possession. Moreover by the contention that the wakfnama was " illusory ", is meant, it would seem, that while the settlor intended it to take effect after his death, intended to transfer the possession to the mutwallis in 1918, and to come under the obligations of a mutwalli in his lifetime, yet he never intended in fact to expend the wakf income during his life upon wakf purposes but fully intended throughout to commit unlimited breaches of trust. This, of course, is an extreme interpretation to put upon the conduct of a settlor but it seems to be required for the contention that he " never had any real intention of divesting himself of the proprietary right during his lifetime ". A consideration of the wakf account and of the settlor's conduct and circumstances does not, however, lead their Lordships to think that there is anything more exceptional or extraordinary in the present case than can be accounted for by attributing to the settlor loose ideas as to the duty of a mutwalli and laxity of practice at the stage which followed upon the execution of the wakfnama. The settlor was a Muslim of position who had for a long time contemplated founding a wakf and who was childless. He had given the utmost publicity to his wakfnama, taking pains to have it

witnessed by a large number of persons both Hindus and Muslims. He may not have felt secure from all trouble with creditors but his finances were in no such state as to impel him to make a wakf to defeat or delay creditors. Still less reasonable is it to suppose that for this purpose he contemplated becoming mutwalli and then omitting altogether to carry out the terms of his own deed. The circumstance that he did not proceed to obtain mutation as if it were a matter of urgency but left this lengthy and troublesome business to be carried out in 1918 is not in any way surprising. He was in bad health and in no condition to exercise much driving power over his agents in the different districts. The purposes of his wakf included a good deal that he had been in the habit of carrying out in previous years but this does not entitle a court of law to find that his expenditure thereon after May, 1917, was not expenditure made under the wakfnama or that he never acted upon the wakfnama. For the appellant before their Lordships it has been pointed out that against the Rs.17,000 taken by the settlor from the wakf income a number of items may be credited to him. He was, or may at least have thought that he was, entitled to Rs.5,500 for his own remuneration and his wife to Rs.6,600 for the same period. He had spent Rs.2,015 for stamp duty on the wakfnama and Rs.452 for expenses of registration. Part of the Rs.17,000 moreover consists of rents apportionable to a period prior to the deed. It is not in strictness true that of the expenditure upon religious objects none can be attributed unequivocably to the provisions of the deed as distinct from his previous practice. In these circumstances the wakfnama passes the tests (1) that the settlor retained no interest to himself upon a true construction of the deed, and (2) that he had before his death transferred the possession from himself as malik to himself and Ali Zamin as mutwallis, and their Lordships think that the wakf is valid at Shia law. They express no opinion as to the supplemental deed of 22nd June, 1917, but as to the mausa Kalimabad which is not comprised in the wakfnama of 25th May, 1917, the moveables numbered 6, 7 and 11 and the Hupmobile car numbered 8 in schedule IV to the plaint, they think the decision of the Subordinate Judge should stand.

The plaintiff is not upon the view taken by their Lordships entitled to any substantial relief in the suit, the contention that it is not lawful to make wakf of moveables having been abandoned by his learned counsel and his claim for possession having extended only to properties now held to have been dedicated by the deed of 25th May, 1917.

In their Lordships' opinion this appeal should be allowed and the decrees of the Courts in India set aside save as regards the declaration made by the Subordinate Judge that the moveables numbered 6, 7 and 11 in schedule IV of the plaint belong to the plaintiff and the declaration made by the High Court that the house No 68, Dharamtala Street, Calcutta, belongs to defendant No. 2. There should be a further declaration that mausa Kalimabad and the Hupmobile car (item 8 of schedule IV to the plaint) are part o

the assets belonging to Badshah Nawab at his death. Subject thereto the suit should be dismissed as against defendant No. 2 with costs of both Courts in India and as against the appellant with five-sixths of the costs of each Court in India and with the costs of this appeal. An application by the appellant to the Board to admit new evidence on this appeal must be dismissed with costs to the first respondent. The appellant to have leave to reimburse himself out of the wakf estate for any costs not recovered from the plaintiff. Their Lordships will humbly advise His Majesty accordingly.

(40794—3A) Wt. 8136—2 180 3/37 P. St. G. 338

In the Privy Council

SYED ALI ZAMIN

v.

SYED AKBAR ALI KHAN, *alias* SYED CHHOTEY NAWAB, SINCE DECEASED, AND OTHERS.

DELIVERED BY SIR GEORGE RANKIN

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