Privy Council Appeal No. 8 of 1947

Beli Ram & Brothers and others – – – – *Appellants*

v.

Chaudri Mohammad Afzal and others – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1948

Present at the Hearing :

LORD NORMAND
LORD MACDERMOTT
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature at Lahore dated the 29th January, 1945, which reversed a judgment and decree of the Court of the Senior Subordinate Judge, Lahore, dated the 31st January, 1942.

The question in the appeal relates to the validity of a deed of wakf, or wakfnama, executed on the 29th October, 1917, by Ghulam Rasul. The respondents 1-4, the plaintiffs in the suit out of which this appeal arises, are descendants of the wakif and claim a declaration that the wakf is valid and that alienations of the wakf property made by the wakif, and after his death by his sons, are null and void. The appellants, defendants in the suit, claim under such alienations or some of them.

The questions which arise for decision are:

1. Whether the present suit is barred by *res judicata* under section 11 of the Code of Civil Procedure.

2. If not, whether the deed of wakf of the 29th October, 1917, was an effective dedication of the property comprised therein as wakf, or was a mere paper transaction never intended to be acted upon.

3. If the deed of wakf was intended to be an effective dedication to wakf, whether on its true construction it is bad in law.

4. Whether the suit is barred by limitation.

The trial judge answered all these questions against the plaintiffs and dismissed the suit. In appeal the High Court answered all the questions in favour of the plaintiffs and decreed their suit.

Before discussing these questions it will be convenient to state the material facts and the relevant terms of the wakfnama.

Ghulam Rasul was a Sunni Mohammadan of the Hanafi Sect and was possessed of considerable property. On the 29th October, 1917, he executed not only the said wakfnama, but also a will. The will disposed of part of his property described as part " A " and recited that the other part of his property described as " B " had been make wakf by a deed executed on the same day.

The relevant passages of the deed of wakf are as follows:—

The preamble stated—

" I have to-day executed a Will with a view to the distribution of part ' A ' of my property valued at Rs.3,37,448 among my two sons and one daughter according to their shares under the Mohammedan Law after my death. It is my desire that I should create a Wakf Al-an-Nafs Ta Hayat Wa Al-al-Aulad Wal Ayal in respect of part ' B ' of my property as I have mentioned in the said Will, so that the income from the said property may provide for my own maintenance, for the upbringing, education, both religious and secular, and instruction of my descendants and their descendants from generation to generation and their heirs, for charity and for the help of orphans, the poor and widows and that the property may also subsist, whereby the name of my family may be preserved. Accordingly, I fulfil my aforesaid desire to-day. After resigning myself to the mercy and indulgence of the God Almighty and trusting in Providence, I think it proper to state, in the first instance, that I am a follower of the Hanafi sect and abide by all its tenets. Hence, in accordance with the tenets of the Mohammedan Law and under Section 3 of Act 6 of 1913, I, while in the enjoyment of my senses, without any coercion or compulsion on the part of anyone else and of my own accord and free-will, declare part ' B ' of my property valued at Rs.5,63,814, full details whereof are given hereinafter, which is my self-acquired property, and which is owned solely by me without the partnership of any one else, and which is free from all kinds of encumbrances and liabilities, as Wakf Al-an-Nafs Ta Hayat Al-al-Aulad Wal Ayal and with effect from to-day I have divested myself of the proprietary possession of the property, made Wakf, and taken over the management thereof in the capacity of a Mutwalli."

Then followed particulars of the property made Wakf and of his heirs.

(Clause 1.) " I, the Wakif, shall, during my life-time, remain in possession and occupation of the property, made Wakf, detailed above, in the capacity of a Mutwalli and Manager and will spend the income of the said property, at my own option, for my own and my descendants' maintenance and for religious and charitable purposes."

(Clause 2.) " After my death my elder son, named Din Mohammad, shall be the Mutwalli and after his death my second son, Ghulam Mustafa, and after him others shall be the Mutwallis of the property made Wakf. After the death of both the said sons the method herein after stated shall be followed permanently in regard to the appointment of a Mutwalli. The eldest of the male descendants of both the aforesaid sons (provided he is educated and is qualified and be fitted for the office of Mutwalli, according to the Mohammedan Law) shall become Mutwalli. This rule shall be followed from generation to generation. If, God forbid, none of the male descendants of the two aforesaid sons were to survive but female descendants should be living there (then) one of the male descendants of my present female issue or one of their husbands who might be worthy (of the office) should be made the Mutwalli. If nobody worthy of the office of Mutwalli, among the male descendants of my female issue or the descendants of their descendants should survive, then my kindred and their male descendants and in the absence of male descendants the male descendants of the female descendants should be made the Mutwallis, provided they are qualified and be fitted for the office of Mutwalli according to the Mohammedan Law. If none of them too were to survive, then any Mohammedan from among the members of the big local Anjumans such as (1) The Anjuman Himayat Islam, Lahore, (2) The Anjuman Nomania, Lahore, (3) The Anjuman Islamia, Amritsar, and (4) The Anjuman Taraqqi-i-Talim, Amritsar, who may be a follower of the Hanafi sect, and be an honest man, should be selected by majority of votes and declared to be the Mutwalli."

Clause 3 provided that he Ghulam Rasul and succeeding Mutwallis should set apart a monthly sum of Rs.1,875 till a fund (towards which the settlor said he had already deposited Rs.12,500) should reach a sum of Rs.50,000 which was to be used for the improvement of the property thereby made wakf.

(Clause 7.) " If any one from among my male descendants or the male descendants of my female progeny openly or surreptitiously becomes an Ahmadi, Shia, Khariji, Murtaddad or Christian, he shall not only be deprived of his right to become a Mutwalli, but shall be permanently debarred from receiving his share of the income, which shall be distributed among other co-sharers."

(Clause 8.) " After my death the nett income of the property, made Wakf, shall be divided into 50 shares. Out of them 3 shares shall be devoted to the help of widows, orphans of my community or utilized for giving scholarships to poor Musalman Students for providing them with religious and secular instruction or for other religious and charitable purposes, at the discretion of the Mutwalli and the utilization thereof every year shall be essential and compulsory. And seven shares shall every month be deposited in the Government Savings Bank or the Bengal Bank or some other reliable bank and the said amount shall, in case of need, be utilized for necessary repairs to and construction of the property made Wakf. . . . Out of the remaining 40 shares, 16 shares should be given to Din Mohammad, 16 to Ghulam Mustafa and 8 to Mumtaz Begum and in the same way and order would shares be distributed in accordance with the Mohammedan Law, from generation to generation."

Clauses 9 to 13 related to the duties, powers and rights of Mutwallis.

(Clause 15.) " If, God forbid, the line of my (Wakif's) and my relatives, male and female descendants, becomes extinct then in that case the income of the Wakf property should be spent by the members of the Anjuman Himayat-i-Islam, Anjuman Nomania and Anjuman Taraqqi-i-Talim, Musalmanan, Amritsar, by majority of votes, for such religious and charitable purposes as may be beneficial to all Musulmans. For instance, if a room is got built in some College it should be got built in the name of the Wakif, if a library is started it should be done in the name of the Wakif, and if scholarships are awarded the same should be awarded in the name of the Wakif, so on and so forth. If the Anjumans, aforesaid, should happen to be extinct, then the members of any existing Islamic Anjumans, not less than three in number, should, on the principle of majority of votes, take the Wakf property into their own hands and act in accordance with the instructions set forth in this deed of Wakf."

The deed was registered on the 31st October, 1917.

There is no satisfactory evidence that Ghulam Rasul kept separate accounts of the wakf property or that he made the monthly deposit of Rs.1,875 as required by the wakf deed, or otherwise carried out the terms of the deed. The property was not transferred in the mutation register into his name as Mutwalli and he continued to grant tenancies in his own name.

In April, 1921, Mussammat Mumtaz, the daughter of Ghulam Rasul, died.

Ghulam Rasul on the 6th April, 1923, executed a deed purporting to cancel the deed of wakf. The following are the material passages of the deed:—

" 2. Now, while in the enjoyment of right senses, I, by means of this document, want to declare and make it known that by the said document, it was not intended to make the property Wakf and that it has never been acted upon so far inasmuch as it was, in reality, a wakf in name only. The real facts that led to the execution of the said document are as follows:—

" (*a*) I did not want to give full share out of my property to my daughter, Mumtaz Begum, who died a virgin, because it would

not have been spent by her upon herself, but that it would have been spent for the benefit of the family in which she might have been married.

" (*b*) In those days a few persons, who were our enemies in disguise, were bent upon creating estrangement between me and my children and this led to the execution of the document, which was detrimental to me and all of my children. Rather it could at all times be the cause of disputes and litigation and would have constituted a great restraint on the religious freedom of my offspring and family. I am afraid of the evil consequences resulting therefrom and pray to God to save me from the punishment for this act. The said document was not beneficial. So far as religious and charitable purposes were concerned, because according to that document a very small amount of the income from the above said property could be utilized for the aforesaid purposes . . .

" I hereby cancel the document, dated the 29th October, 1917, and make the following declaration and reduce the same to writing:—

" Of my children Chaudri Din Mohammad and Chaudri Ghulam Mustafa are at this time alive. By the grace of God Chaudri Din Mohammad is, in every way, intelligent and clever and is capable of managing his own affairs. Besides, he is managing my entire property. By executing this document I cancel the aforesaid document. So long as I am alive I will be the absolute owner of my entire property which is self-acquired. After my death, my children shall according to the custom of our tribe, be the owners thereof in equal half shares."

This document was registered on the 6th April, 1923.

After the death of his daughter Ghulam Rasul executed various mortgages of property included in the deed of wakf, and on the 6th February, 1925, he died. After his death his property was entered in the mutation register in favour of his two sons, Din Mohammad and Ghulam Mustafa, respondents Nos. 5 and 6, as owners in equal shares. Thereafter the two sons executed various mortgages and sales of property included in the deed of wakf. It is not necessary to refer in detail to these alienations because it is conceded on the one hand that all alienations under which any of the appellants claim were made for value, and that in each case the person making the alienation purported to act as owner on an assertion of title, and not as Mutwalli; and on the other hand that the appellants had notice of the deed of wakf at the time of the several alienations to them.

The issue of *res judicata* must be dealt with first, since, if the appellants are right upon this, the court had no jurisdiction to entertain the suit. The issue arises in this way. Amongst the encumbrances executed by Ghulam Rasul between the date of the deed of wakf and the date of his death was one to Jia Ram who was given possession under a rent note. On the 31st March, 1926, Jia Ram commenced a suit in ejectment against Din Mohammad, and in his defence Din Mohammad set up and relied upon the deed of wakf. In support of his defence he filed in court certain accounts alleged to have been kept by Ghulam Rasul in his life time, and afterwards by himself, as Mutwalli. The case of Jia Ram was that the wakf was a mere paper transaction never intended to be acted upon nor in fact acted upon. The suit was compromised on the 11th August, 1927, Din Mohammad admitting the invalidity of the wakf and Jia Ram agreeing to purchase the equity of redemption in the property mortgaged to him. After the decision of Jia Ram's ejectment suit there were considerable alienations by Din Mohammad and his brother of property included in the wakfnama, and by June, 1931, the position was that the first appellants held mortgages as security for over Rs.3½ lacs, the fourth appellant held mortgages as security for Rs.70,000, whilst the second and third appellants had purchased part of the property. It was in these circumstances that on

the 1st June, 1931, the suit was filed upon which the plea of *res judicata* is founded. The plaintiffs were the present respondents 1, 2 and 3, the only sons of Din Mohammad then living and all minors. Respondent No. 4, who is also a son of Din Mohammad, was born subsequently. They sued by their maternal grandfather, Dr. Saif-ud-Din, as their next friend. The defendants were Din Mohammad and Ghulam Mustafa, respondents 5 and 6 in this appeal, appellants 1 and 4 in this appeal and other mortgagees of property included in the Wakfnama whose claims have now been disposed of. Appellants 2 and 3 in this appeal were not parties to the former suit. The relief claimed was a declaration that the deed of wakf of the 29th October, 1917, was valid, and that the alienations of wakf property, seven in number, referred to in the plaint were null and void.

It is apparent, therefore, that the matter directly and substantially in issue in the former suit and in the present suit, namely, the validity of the wakf, was the same; that the plaintiffs in the two suits were the same except for the fourth plaintiff in the present suit, who would be bound under explanation 6 to section 11 of the Code of Civil Procedure. The defendants were the same in the two suits except for appellants 2 and 3 who were not parties to the former suit. It is contended that appellants 2 and 3 are bound by the decree in the former suit because they claim through Din Mohammad who was a party to that suit. But the answer to this contention is that the alienations under which appellants 2 and 3 claim were made before the date of the former suit. Those appellants therefore do not claim under a party to the former suit who represented their interests in that suit, but under a person who subsequently became a party, and who at the time of the suit did not represent their interests. Their Lordships think that appellants 2 and 3 in any case are not affected by the plea of *res judicata,* but it must be considered whether the plea is effective against the other parties to this appeal. The High Court held that the plea was not available to any of the parties to this suit since the judgment in the former suit was obtained by fraud or collusion within the meaning of Section 44 of the Evidence Act. Their Lordships agree with this conclusion for the reasons following, which are much the same as those which appealed to the High Court.

Dr. Saif-ud-Din, the next friend of the plaintiffs in the former suit, gave evidence in the present suit and his evidence-in-chief included the following passage:

> " On behalf of the sons of Chaudhri Din Mohammad, I instituted a suit on their behalf as their guardian relating to the property of Chaudhri Ghulam Rasul in Lahore to the effect that it was wakf. I instituted that suit because Chaudhri Din Mohammad had taken considerable amount of loan on the security of that property. He was unable to pay the debt and, therefore, he desired that he might discharge the debt by selling the property. I instituted that suit at the instance of Chaudhri Din Mohammad and certain others. Khan Sahib Khan Zaka-ud-Din, Mr. Jai Gopal Sethi, and someone connected with Messrs. Beli Ram & Brothers, Chemists, had asked me to become guardian and institute a suit. They told me that on my becoming guardian (of?) his sons, he would be able to set the mortgaged property and discharge his liabilities and thereafter sufficient property would be left to maintain him and his family. I was also told by Khan Sahib and Mr. Sethi that I would be only figure-head while the case will be prosecuted by these people. That suit was got instituted with the object of getting the wakf cancelled."

He admitted in cross-examination that he did not tell Lala Kahan Chand, who was counsel appearing for the plaintiffs, that he was instituting a fictitious suit at the instance of others. If this evidence be accepted it is clear that the suit was a collusive one, but, as the High Court recognised, Dr. Saif-ud-Din cannot be accepted on this question as an unimpeachable witness. There is, however, a good deal of circumstantial evidence to corroborate his story as to the nature of the former suit. In the first place no reason, apart from that given by the next friend, has

been suggested why the suit should have been started in 1931. The children of Din Mohammad were minors with no money to enable them to fight a suit, and the next friend had no personal knowledge of the circumstances in which the wakf was executed. The suit was dismissed with costs but there is no evidence as to how such costs were paid. In the second place the court fee paid was Rs.10 for a single declaration. As the plaint asked for a declaration as to the invalidity, not only of the wakf, but also of seven alienations, it is clear that the fee was inadequate. It was not, however, challenged by the defendants, though in the present suit a much higher valuation was successfully challenged. In the third place only two witnesses were called on behalf of the plaintiffs, one of whom was the next friend who said that he had been abroad when the wakf was executed and really knew nothing about it, and the other of whom said he had been told by Ghulam Rasul about the execution of the wakf but that it had never been acted upon. This evidence was quite useless and if there were no better evidence available there was no justification for filing the suit. In the fourth place no argument seems to have been addressed to the court that the wakif had in the deed itself declared that he held the property as Mutwalli, that he had admitted in the so-called deed of revocation that he had executed the wakf for a legal purpose which remained operative until April, 1921, and that a wakf once effective cannot be revoked. In the fifth place Din Mohammad was called as a witness and in his evidence-in-chief referred to the suit of Jia Ram, but his cross-examination was perfunctory. He was not asked about his defence in the ejectment suit in which he had relied upon the wakf, nor as to the alleged accounts which he had filed in that suit. In the sixth place it appears from the accounts between the appellants No. 1, Beli Ram & Brothers, and Din Mohammad that on the 11th June, 1931, a few days after the suit had been commenced, they advanced to him Rs.1,150, and on the 1st January, 1932, three days before the decision of the suit, they advanced to him Rs.3,935, advances which suggest a source from which the costs of the suit may have come, and also indicate that appellants No. 1 felt no anxiety as to the result of the suit. Seventhly, no appeal from the judgment was filed.

Taken separately none of these reasons conclusively proves fraud or collusion; some of them might be attributed to mere incompetence on the part of the advocate for the minor plaintiffs. But collectively they appear to their Lordships to establish conclusively that the suit of 1931 was started without justification, and was not intended to be, and was not, fought with the vigour with which a suit in which minors were concerned should have been fought, and to afford very strong corroboration for the story of Dr. Saif-ud-Din that the suit of 1931 was brought by the next friend in collusion with Din Mohammad and others, not for the purpose of establishing the wakf but for the purpose of getting it declared invalid and thus clearing the title and enabling Din Mohammad to dispose of the equity of redemption in the property mortgaged to appellants No. 1, as he did a few months later. There is no other explanation on the record which fits the facts. Their Lordships therefore reject the plea of *res judicata*.

The second question which arises, namely, whether the deed of wakf was a mere paper transaction never intended to be acted upon, was discussed at considerable length in the courts in India, but in their Lordships' view the question admits of no serious doubt and can be disposed of shortly. It is, no doubt, the law that the validity of a wakf involves that there was an intention to dedicate on the part of the wakif. Where there is evidence that a wakfnama has been retained by the wakif and never acted upon, and that the property comprised therein has been dealt with by the wakif as his own, such evidence may lead to an inference that no dedication to wakf was ever intended, and that the deed was designed merely to provide a shield against possible claims which the wakif anticipated might be made against him (see *Mohammad Ali Mohammad Khan* v. *Must Bismillah Begam*, 35 Calcutta Weekly Notes, p. 324). On the other hand it is established law that once there is an

effective dedication in wakf it cannot be revoked; and it is obvious that breaches of trust on the part of a trustee however numerous, and extending over however long a period, cannot put an end to the trust. In the present case their Lordships feel no doubt that there was an intention on the part of Ghulam Rasul to create the wakf, and that it became effective. He entered into the deed deliberately as part of his scheme for the disposal of his estate under a will and a wakfnama. The deed contains a statement that the wakif had divested himself of the possession of the property made wakf and taken over the management thereof in the capacity of a Mutwali, and their Lordships see no ground on which that declaration can be disregarded. It is not necessary under Hanafi law that there should be a change in the mutation register. Further than that, in April, 1923, he executed the so-called deed of revocation whereby he admitted the execution of the deed of wakf, and stated that his object in executing the deed was to deprive his daughter of the share in his estate which she would have taken as one of his heirs. This object was not illegal, and remained operative until the death of his daughter which occurred in April, 1921. There is no suggestion that the wakif did not understand the nature of the wakf, or that he was in embarrassed circumstances and executed the wakfnama to defraud or delay his creditors. It was only after the execution of the so-called deed of revocation that he commenced to mortgage the properties included in the wakf as an owner. Their Lordships think it clear beyond question that had Ghulam Rasul died in the lifetime of his daughter his three children would not have inherited the property comprised in the wakf as heirs of their father, but would have taken only the shares in the usufruct given to them by the wakf. Their Lordships therefore have no hesitation in holding that there was an intention on the part of Ghulam Rasul to dedicate the property to wakf.

The next question, whether the wakf deed is good in law, presents more difficulty. Before the passing of the Mussalman Wakf Validating Act (VI of 1913), it had been established by decisions of this Board that a wakf was invalid if the gift to charity contained therein was illusory, whether because of the smallness of the proportion of the property allotted to charity, or because the gift to charity was postponed for such a length of time as to make the prospect of charity ever taking problematical. The law on this point was altered by the said act which provided in section 3 " It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is within the provisions of Mussalman law for the following among other purposes: (*a*) for the maintenance and support wholly or partially of his family, children or descendants; and (*b*) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated: Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character." Clause 4 " No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious pious or charitable purpose of a permanent character is postponed until after the extinction of the family, children or descendants of the person creating the wakf." Their Lordships think that in the present wakfnama the gift to charity of three shares out of fifty is not of so substantial a part of the property as would have rendered the deed valid before the passing of the Act, and that the deed, if it is to be upheld, must come within the terms of the Act.

The deed is not altogether easy to construe. The preamble states the intention of the wakif that the income of the property may provide for his own maintenance, the upbringing, education, both religious and secular, and instruction of his descendants and their descendants from generation to generation and their heirs, for charity and for the help of orphans, the poor and widows. It is argued that the inclusion of heirs of descendants introduces possible collaterals and goes beyond the objects permitted by

the Act. It is to be observed, however, that the Act authorises the maintenance and support not only of children and descendants but also of the family of the wakif, and it is by no means clear what that word includes. However, in clause 8 of the deed which is the operative clause containing the gift to individuals, the gift is of 16 shares to one son, 16 shares to another son and 8 shares to the daughter, and then the words occur:

> " and in the same way and order would shares be distributed in accordance with the Mohammedan Law, from generation to generation."

It will be noticed that in these words of gift there is no mention of heirs, and the operative part of a deed cannot be controlled by recitals if the operative words are clear. The direction that the property is to go from generation to generation appears to their Lordships to limit the class of beneficiaries to descendants, and to exclude any heirs who might be collaterals. This consideration finds strong support from clause 7 which provides that if any one from among the wakif's male descendants or the male descendants of his female progeny (in effect) changes his faith he is to be deprived of his right to become a Mutwalli and be permanently debarred from receiving his share of the income. Their Lordships think it inconceivable that the testator could have intended that his descendants should forfeit their interests by a change of faith but that kindred who were not descendants should be in a better position. If the gift of beneficial interests in the wakf property is confined to descendants the deed clearly comes within the terms of the Act, but a difficulty is introduced by clause 15. That clause appears to provide that if the line of the wakif and his relatives, male and female descendants, becomes extinct then the income of the wakf property should be applied by the members of the Anjumans therein mentioned for the charitable purposes specified, which are wider than those mentioned in the preamble. The High Court came to the conclusion that the effect of clause 15 was by implication to include kindred and their descendants as objects of the wakf and that such persons did not come within the class of beneficiaries allowed by the Act. The court, however, decided that the gift to kindred could be struck out of the deed so as to accelerate the gift to charity. The court stated the principle on which it acted in these words:

> " When in an instrument, otherwise valid, an invalid clause is introduced, and if that clause is a clause apart, it can be excised so long as the whole instrument is not affected by the excision."

It was contended with force by the appellants that the effect of including the kindred and their heirs would be to invalidate the deed, and that the first condition postulated in the passage of the judgment quoted was not complied with, and that an invalid deed cannot be rendered valid by striking out that part which offends against the law. Their Lordships do not find it necessary to consider that question because they are not in agreement with the High Court in thinking that a gift to kindred is implied in clause 15. The one thing clear about clause 15 seems to be that it does not contain a gift of any kind, and their Lordships see no ground for implying one, particularly one which might offend against the Act under which the deed was expressed to be made. Their Lordships think that clause 15 has to be linked up with clause 2 which deals only with the appointment of Mutwallis. Under clause 2 a Mutwalli had first to be selected from amongst the descendants of the wakif and on their extinction from amongst his kindred and their male descendants or the male descendants of female descendants considered fit, and on the extinction of all those then upon a Mohammedan from among the members of the Anjumans mentioned in the clause. Their Lordships think that clause 15 was intended merely to give directions to take effect when the Anjumans got control. It was further contended by the appellants that even if no gift to the kindred was to be implied under clause 15 still that clause contained the only gift to charity, and its effect was to postpone the gift until the extinction of all the kindred of the wakif and their heirs, a date which, it was argued, went beyond the period allowed by section 4 of the Act. In their Lordships' view clause 15 of the deed does not contain a gift to

charity. It merely directs the charitable purposes to which the property was to be applied when the Anjumans got control.

In the view their Lordships take of this deed of wakf there is a clear over-riding charitable intention expressed in the preamble, and this absorbs any beneficial interests in the usufruct which are not expressly covered by the deed. The beneficial interests in the usufruct go to the three children of the wakif in the shares mentioned in clause 8 and pass to their descendants from generation to generation according to Mohammedan law under which males take twice the share of females. On the extinction of any of the three lines, the share belonging to that line will be applicable in charity in accordance with the general charitable intent since there is nothing in the deed to justify the view that the share of a line becoming extinct accrues to the other lines. The same principle will cover any beneficial interest which may accrue between the extinction of the lines of the children of the wakif and the time when the provisions of clause 15 come into operation. Their Lordships therefore hold the wakf to be valid.

On the question of limitation the only point argued before the Board was that the right to claim a declaration that the wakf was valid was governed by Article 120 of the Limitation Act. It is sufficient to say that their Lordships entirely agree with the High Court that time never runs in favour of a trustee so as to enable him to claim the trust property for himself. Ghulam Rasul never divested himself of the character of Mutwalli, and the same is true after his death of Din Mohammad. In purporting to deal with the wakf property as owners they were committing breaches of trust, not setting up title adverse to the trust.

The High Court granted a declaratory decree to the effect that the properties mentioned in the plaint are wakf and the alienations in respect of the same are null, void and ineffectual as against the wakf property. It is clear that respondents 5 and 6, the sons of Ghulam Rasul, have alienated the wakf property and received large sums of money by so doing. Their Lordships think that the decree should be without prejudice to any claim the appellants may have to obtain relief against respondents 5 and 6 in respect of their beneficial interests under the wakf or otherwise, though their Lordships must not be taken as indicating any opinion that such a claim lies. Their Lordships will therefore humbly advise His Majesty that the decree of the High Court, dated the 29th January, 1945, be modified by adding the words: " but this Order is without prejudice to any claim which Beli Ram and Brothers, Lala Jia Ram, Musammat Sardar Begum and Lala Bulaqi Mal and Son may have to obtain relief against Chaudri Din Mohammad and Chaudri Ghulam Mustafa or either of them in respect of their beneficial interests in the wakf or otherwise "; and that subject thereto this appeal be dismissed with costs.

(59832) Wt. 8013—20 180 1/48 D.L. G 338

In the Privy Council

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CHAUDRI MOHAMMAD AFZAL
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