APPELLATE CIVIL.

Before Mitter and Roxburgh JJ.

1940

May 1, 2, 3, 4, 31.

MOHIUDDIN AHMED

v.

SAFIA KHATOON.*

Mahomedan Law—Wâkf-âlâl-âulâd—*Discretion given to* mutâwâlli *to spend on charity, if and when invalidates* wâkfs—*Pious purpose, Meaning of—Remoteness of the benefit to the poor, etc., how far permissible—Invalid* wâkf—*Possession by* mutâwâlli, *if adverse to rightful owner*—Mussalman Wâkf *Validating Act (VI of 1913), ss. 3, 4—Muslim Personal Law* (Shariat) *Application Act (XXVI of 1937), s. 2.*

Where by a *wâkf-âlâl-âulâd* the *mutâwâlli* has been given a discretion to spend more than two-thirds of the income of the endowed properties for the benefit of the *afflicted and the needy*, such discretion does not make the *wâkf* invalid unless the discretion is so unfettered that the *mutâwâlli* can divert the said income to non-charitable objects and he cannot be compelled to apply the same to the charitable objects.

Masuda Khatun Bibi v. *Mahammad Ebrahim* (1); *Morice* v. *Bishop of Durham* (2); *Majib-un-nissa* v. *Abdur Rahim* (3); *Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu* (4) and *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* (5) referred to.

When the *wâkf* is invalid, the possession of the *mutâwâlli* as *mutâwâlli* of such invalid *wâkf* is the possession for and not adverse to the rightful owner.

Muhammad Munawar Ali v. *Razia Bibi* (6) and *Rukeya Banu* v. *Najira Banu* (7) followed.

Maintenance and support of the family of the *wâkif* cannot be regarded as included within the pharse "other purpose recognised by *Mussalmân* law as pious" used in the proviso to s. 3 of the *Mussalmân Wâkf* Validating Act, 1913.

Under s. 4 of the *Mussalmân Wâkf* Validating Act, 1913, the benefit reserved for the poor or other religious, pious or charitable purpose can only

*Appeal from Original Decree, No. 38 of 1936, against the decree of Surendra Chandra Basu, First Subordinate Judge of Bakarganj, dated Sep. 11, 1935.

(1) (1931) I.L.R. 59 Cal. 402.
(2) (1805) 10 Ves. 522; 32 E.R. 947.
(3) (1900) I. L. R. 23 All. 233; L.R. 28 I. A. 15.
(4) (1889) I.L.R. 17 Cal. 498; L.R. 17 I.A. 28.
(5) (1894) I.L.R. 22 Cal. 619; L.R. 22 I. A. 76.
(6) (1905) I.L.R. 27 All. 320; L.R. 32 I. A. 86.
(7) (1927) I.L.R. 55 Cal. 448.

be postponed till the extinction of the family, children or descendants of the person creating the *wâkf*. The *wâkf* becomes invalid if the benefit aforesaid is postponed till the extinction of all kinds of heirs of the *wâkif* how-low-soever including the distant kindred.

Section 2 of the Muslim Personal Law (*Shariat*) Application Act, 1937, applies to all questions of Mahomedan law, which were previously decided on the principles of equity and good conscience, but the section has no application to the provisions of the *Mussalmân Wâkf* Validating Act, 1913.

APPEAL FROM ORIGINAL DECREE preferred by defendants Nos. 6 and 7 against the decree by which two *wâkfs* were declared to be invalid.

The material facts of the case and the arguments appear from the judgment.

Abul Quasem (II), *Jitendra Nath Guha* and *Satindra Nath Roy Choudhury* for the appellants.

Panchanan Ghose, *Radhika Ranjan Guha* and *Khondkar Mahammad Hasan* for the respondents.

Surja Kumar Aich for the Deputy Registrar.

Cur. adv. vult.

The judgment of the Court was as follows:—

On June 5, 1891, Mahomed Fazal *alias* Muchi Miya and his sons, Obedul Gani and Mahomed Abul Fazel, purported to create a *wâkf-âlâl-âulâd* by an instrument, Ex. A (II. 10). The properties included in the said deed are the properties described in Sch. *ka* and 11 annas odd *gandâs* share of the properties described in Sch. *kha* of the plaint. On June 20, 1918, another *wâkf-âlâl-âulâd* was created by the instrument, Ex. A1 (II. 28), by five persons, Safiya Khatun, Syed Mahomed Hosein Ali, Mahomed Obedul Gani, Hoseni Khatun and Ojihannessa Khatun. It comprised the remaining share of the properties of Sch. *kha* of the plaint. The relationship of the parties, who created the aforesaid two *wâkfs*, and of

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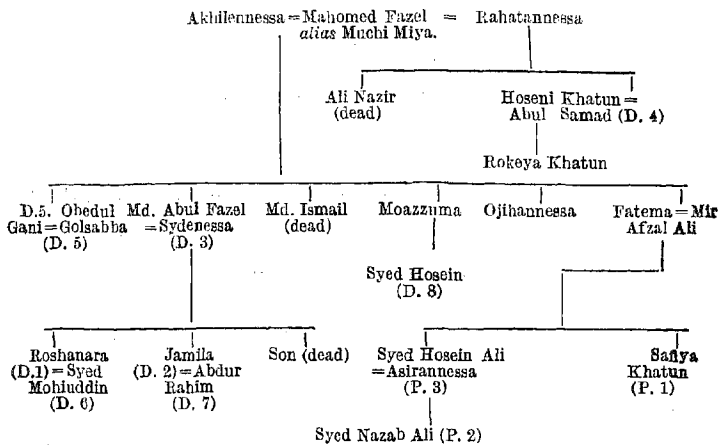
the parties to this litigation would appear from the following genealogical tree :—



The suit was brought by Safiya Khatun, Syed Hosein Ali and Syed Nazeb Ali for a declaration that the aforesaid two *wâkfs* were invalid in law. The learned Subordinate Judge adjudged them to be invalid and gave the plaintiffs the declaration they asked for. Defendants Nos. 6 and 7 have preferred this appeal. In the appeal the following questions only were raised :—

(1) Whether the two *wâkfs*, in view of their terms, are invalid?

(2) Whether the question of the validity of the *wâkfs* is *res judicata*?

(3) Whether the suit is barred by limitation?

No other point was canvassed before us.

In considering the first question, the two *wâkfs* must be dealt with separately, for the terms thereof differ from one another in material particulars, though both of them purport to be *wâkfs-âlâl-âulâd*.

The material terms of the *wâkf*, created on June 5, 1891, Ex. A (II. 10) are—

(*a*) The *mutâwâlli* was to get a yearly salary of Rs. 36.

(*b*) the yearly allowance (under the incorrect designation of salary) of—

Rs. 180 was payable to Obedul Gani;
Rs. 180 to Abul Fazel;
Rs. 20 to Ali Nazar;
Rs. 15 to Fatema;
Rs. 15 to Ojihannessa;
Rs. 15 to Hoseni Khatun and
Rs. 20 to Fazlar Rahman.

Total Rs. 445.

On the death of the abovementioned persons, the allowances payable to them were to be paid to their respective heirs in succession according to the law of inheritance (para. 4).

(*c*) The *mutâwâlli* was required to spend Rs. 50 a year towards pious acts in connection with Id-ul-Fitr, Id-ul-Zoha, Maharram, Fateha-dwaz-daham and Shab-e-barat. Over and above, he was required to make gifts to afflicted and needy persons, but no sum was specified for those purposes (para. 6). The purposes mentioned in this paragraph are stated to be the principal objects of the *wâkf*, but that statement cannot by itself make the *wâkf* a valid one if its substantial effect is otherwise.

(*d*) The deed further provides that if any person, to whom an allowance was payable, became a renegade or acted against social customs or was guilty of an act that may be regarded as dishonourable to the family, he would lose his allowance, which would then be applied to objects mentioned in para. 6 (para. 5).

(*e*) If any person, to whom an allowance was payable died heirless, then also his allowance was to be applied to the objects mentioned in para. 6. If the

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income of the *wâkf* properties increased, the allowances payable and the sums authorised to be spent on the objects mentioned in para. 6 were to be increased (para. 15). If the income decreased, then the allowances were to be reduced, but not the sum of Rs. 50 allocated towards the pious acts in connection with the five festivals, *e.g.*, Id-ul-Fitr, *etc.* (para. 14). In the residential house, which was included in the *wâkf*, the *mutâwâllis* were given the right of residence. Right of residence was also given to Obedul Gani and Mahomed Abul Fazel and to their sons and grandsons, *etc.* and to none else. The *mutâwâllis* were given a discretion to let it out and to apply the rent for the benefit of the poor and for pious acts (para. 16). The *mutâwâlli* was enjoined to render accounts (*nikâsh*) to persons connected with the *wâkf* at the end of every year and thereby to "show that the "principal objects of the *wâkf* mentioned in para. 6 "had been fulfilled by him satisfatorily".

It is established on the evidence, and the fact is also not challenged before us, that the annual net income of the dedicated properties amount to Rs. 1,800. That was certainly the income in the year 1925 (Ex. 1, II. 115) and there is no indication in the evidence that the income has since decreased. We have no definite evidence as to what was the income in 1891, when the *wâkf* was made, but from the extent of the properties it is tolerably certain that the net income was much more than Rs. 500 a year, possibly not below the figure of Rs. 1,800. Out of this amount, Rs. 445 was payable as allowances to the members of the family of the *wâkifs*, Rs. 50 was earmarked for specific charities and Rs. 36 as the *mutâwâlli's* salary. The *mutâwâlli* had, therefore, a discretion to spend the residue, about Rs. 1,300 a year, for the relief of the afflicted and the needy. If there had been an express direction on the *mutâwâlli* to spend the whole or a substantial part of the residue of the income on those objects, there could not have been any doubt

about the validity of the *wâkf*, apart from the provisions of the *Wâkf* Validating Act of 1913. The concurrent gift to charity would have been very substantial, more than two-thirds of the total income. From that fact the inference would have been that the properties had been substantially dedicated to charity. The learned advocates for the respondent, however, contend that, as no obligation had been imposed on the *mutâwâlli* to spend the residue of the income on these objects, but only a discretionary power was conferred on him and as he could not be held liable for breach of trust if he did not spend a single pice out of the residue for the relief of the afflicted and the needy, the concurrent gift to charity was only to the extent of Rs. 50 a year and the rest is illusory and consequently the *wâkf* is invalid under the Muslim law as interpreted by the Judicial Committee of the Privy Council, and the *Wâkf* Validating Act of 1913 does not validate it, as the ultimate gift to charity is more remote than has been allowed under the said Act. For supporting his argument that the concurrent gift to charity is illusory on the ground that the *mutâwâlli* was under no obligation but only had a discretion in the matter be relied upon, some observations made at 421-424 in the case of the *Masuda Khatun Bibi* v. *Mahammad Ebrahim* (1). That case left undecided the question, as to whether the principle laid down in *Morice* v. *Bishop of Durham* (2) was applicable to *wâkfs*. The question in that case, which was the case of a *wâkf*, to which the provision of the *Wâkf* Validating Act of 1913 applied, was whether there was an ultimate gift to the poor or to other permanent objects recognised by the Mussulman law as pious, religious or charitable. By the *wâkf* deed, the *mutâwâlli* was directed to pay the premium of a life-policy specified in sch. *gha* and to pay life allowances to named persons, specified in the item of sch. *uma*, except item No. 1. Charitable objects of a permanent nature were specified in sch. *ga*, and in

(1) (1931) I. L. R. 59 Cal. 402. (2) (1805) 10 Ves. 522; 32 E. R. 947.

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item No. 1 of sch. *uma*. The payments required to be made on the heads of sch. *gha* and the other items of sch. *uma*, except item No. 1, were to cease in course of time, which would not be long. The *wâkif* directed the *mutâwâlli* to spend the same thereafter, either in making improvements, or in repairing the walls of a private tomb or on the objects mentioned in sch. *ga*. It was argued that the said option prevented a trust of the same in favour of the objects mentioned in sch. *ga*. This contention was sought to be supported on the principle laid down in *Morice* v. *Bishop of Durham* (*supra*). On the construction of the deed, the learned Judges held that, in effect, an unfettered discretion had not been conferred on the *mutâwâlli* to spend these moneys for all time to come, either on the improvement of the *wâkf* estate or on the walls of the private tomb, and that there was an overriding trust in favour of the charitable objects mentioned in sch. *ga*. The *wâkf* was, accordingly, held to be valid. The *wâkf* deed we have before us makes the position clear. Paragraph 7 requires the *mutâwâlli* to give yearly accounts and to satisfy persons connected with the *wâkf*, when giving yearly accounts, that the "principal object of the *wâkf* "mentioned in para. 6 had been satisfactorily ful- "filled". That indicates that he had no unfettered discretion to divert the residue of the income to non-charitable purposes, and that he could be compelled to apply it to charitable objects mentioned in para. 6. The residue of the income was, accordingly, not under the absolute and uncontrolled discretion of the *mutâwâlli*. This distinguishes the *wâkf* from the *wâkf* under consideration in *Mujib-un-nissa* v. *Abdur Rahim* (1). There is in the case before us an effective trust of the residue of the income in favour of the needy and the afflicted and, as that residue is a substantial amount, we must hold that the properties had been substantially dedicated to pious and charitable purposes. This *wâkf*, Ex. A, is accordingly valid.

(1) (1900) I. L. R. 23 All. 233 ; L. R. 28 I.A. 15.

It is to be noted that this decision is based on the *Mussalman* law as interpreted in the cases of *Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu* (1) and *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* (2) and, as it stood before the passing of the *Wâkf* Validating Act, 1913, and that it is not necessary to invoke the provision of the Act for the purpose of establishing the validity of this *wâkf*.

The *wâkf*, Ex. A1, created on June 20, 1918, follows in broad outlines the terms of the *wâkf* (Ex. A) of 1891, but there is an important difference. Paragraph 6 is of more limited scope than para. 6 of Ex. A. The *mutâwâlli* is required to make gifts out of the *wâkf* properties to the afflicted and to those unable to earn but only to the extent of Rs. 15 a year. The total allowances (under the incorrect designation of salary) payable is Rs. 152, *i.e.*,—

Rs. 50 to Mahomed Hosein Ali,

Rs. 55 to Sofiya Khatun and

Rs. 47 to Rokeya Khatun.

These allowances were not limited to them for their lives, but were made payable to their heirs in succession after their deaths. There is in this *wâkf* no indication, like that in the other *wâkf*, that the residue of the income was to be distributed amongst the poor and afflicted. The concurrent gift to charity was, accordingly, insignificant. Apart from the provisions of the *Wâkf* Validating Act of 1913, this *wâkf* would not have been valid under the law as interpreted in the case mentioned above. We will have, therefore, to consider whether it is valid by reasons of the *Wâkf* Validating Act of 1913, which applies to it. For considering this question, the interpretation of paras. 4 and 9 of the *wâkf* is of prime importance. Paragraph 4 provides for the payment of annual allowances (under the incorrect designation of salary) to the three persons mentioned above, *viz.*,

(1) (1889) I. L. R. 17 Cal. 498; L. R. 17 I.A. 28.

(2) (1894) I. L. R. 22 Cal. 619; L. R. 22 I. A. 76.

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Md. Hosain Ali, Sofiya Khatun and Rukeya Khatun. It further provides that the said allowances were to be paid "to their heirs also according to the law of "inheritance." The vernacular words used in this paragraph would, according to context, mean that the allowances were to be made not only to the immediate heirs of those three persons, but to their heirs in succession. Paragraph 9 is in these terms:—

> If any of the persons, for whom annual salaries (allowances) are fixed die childless, their salaries shall be included in the *wâkf* estate and shall be spent towards the pious acts mentioned in para. 6, if the persons enjoying salaries die childless, that is to say, without leaving heirs.

In our judgment, the *wâkifs* used the word "child-"less" as synonymous with the word "heirless" in this paragraph and the intention was to make an ultimate gift to the poor and the afflicted on the failure of all the heirs, how low so ever, not only on the extinction of the line of descendants of the *wâkifs* or of their family, but on the extinction of a much wider group of persons, for the body of heirs would include even the distant kindred, most of whom would not be descendants, how low so ever, of the *wâkifs* and could not be regarded as members of their family. In order that a *wâkf* by way of family settlement may be valid under the *Wâkf* Validating Act of 1913, an ultimate benefit must be expressly or impliedly reserved for the poor or any other purpose of a permanent character recognised by the *Mussalman* law as religious, pious or charitable. This is the proviso to s. 3. We cannot accept the contention of the learned advocate for the appellant that, as the Mahomedan jurists considered the maintenance of one's family as a pious purpose, the legislature, by using the phrase "and other purpose recognised by *Mussalman* law as "pious" meant to validate all *wâkfs* by way of family settlement, irrespective of the fact whether there was any ultimate benefit reserved either for the poor, or for religious and charitable purposes. In our judgment, whatever may be the notions of pious acts of Mahomedan jurists, the legislature clearly meant that maintenance and support of the family, children or

descendants of the *wâkif* is not to be regarded as coming within the phrase "other purpose recognised "by *Mussalman* law as pious" used in the proviso to s. 3, for maintenance of these persons or class of persons is expressly mentioned in the body of that section. The Judicial Committee gave an authoritative interpretation on the subject before the Act was passed and that interpretation was that: (*a*) a dedication substantially for the maintenance of the family or descendants of the *wâkif* was not a pious purpose which would support a *wâkf* and (*b*) if the benefit is reserved for the poor or for other pious, religious and charitable purpose to take effect after the extinction of the line of descendants or the family of the *wâkif*, such gift is too remote and so illusory. The view of the Judicial Committee last mentioned has not in our judgment been completely done away with, but has only been restricted in operation. This is the effect of s. 4, which has defined the degree of the remoteness which is permissible. If the ultimate gift to the poor or to pious, religious and charitable purposes be postponed till after the extinction of the family, children or descendants of the *wâkif*, the *wâkf* would be valid, although the ultimate gift to such purposes is remote. If such an ultimate gift is more remote, that is, if it is to take effect on the extinction of a more extended group of persons, as for instance, heirs, how low so ever, of the *wâkif*, the dedication by way of *wâkf* substantially for the maintenance of the *wâkif's* family, children and descendants would not be valid under the *Wâkf* Validating Act. As in the *wâkf*, Ex. A1, the ultimate gift to the poor and the afflicted is more remote than what is allowed under s. 4, we must hold this *wâkf* to be invalid in law. We do not also accept the contention of the learned advocate for the appellant to the effect that s. 2 of the *Shariat* Act (XXVI of 1937) has restored in its complete form the *Mussalman* law of *wâkf* as expounded in Tagore Law Lectures of 1884 delivered by the Rt. Hon'ble Mr. Ameer Ali. Before the passing of the *Shariat* Act, s. 37 of the Bengal, Agra and Assam Civil Courts

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Act (XII of 1887) provided for the application of *Mussalman* law to questions of succession, inheritance, marriage and religious usage and institutions, only and left all other matters to be decided according to equity and good conscience. No doubt other branches of *Mussalman* law was applied to other subjects but only under the head of equity and good conscience. The Acts and Regulations in force in the Presidency towns and in other provinces were similarly worded. The effect of s. 2 of the *Shariat* Act is to make the *Mussalman* law expressly applicable to subjects, which, under the terms of previous Acts and Regulations, had to be decided on principles of equity and good conscience. That this was the object of s. 2 is made clear by the repeal of parts of the earlier Acts and Regulations mentioned in s. 6.

The decisions of the Judicial Committee in *Mahomed Ashanulla's* case and *Abul Fata's* case, referred to above, are expressly decisions interpreting what was held to be the *Musalman* law on the subject, and in our view there is nothing in the *Shariat* Act to affect those decisions. Only the *Wâkf* Validating Act, 1913, has affected these decisions to the extent indicated by us in the earlier part of our judgment. Section 2 of that Act excludes the operation of custom and usage where it applies, and may possibly have effect on previous decisions (if any) not expressly based on *Musalman* law, if based on some rule of equity and good conscience opposed to *Shariat* law, but can have no effect in regard decisions which expressly interpret *Musalman* law so as to substitute for them the views of Muslim jurists on the same points.

The questions of *res judicata* and limitation assume importance so far as the second *wâkf* (Ex. A1) is concerned. We do not see any substance in the point of *res judicata*. The validity of this *wâkf* was not directly and substantially in issue in any suit before a Court competent to try this suit. In four

suits (Ex. 11 and Ex. K series) the question was discussed. All these suits were before the Munsif. They were either suits for rent, or for ejectment of tenants or suits under s. 140 of the Bengal Tenancy Act. The question was whether the right to claim the reliefs was in the *mutâwâlli* or not. The question of the validity of the *wâkf* was in issue, but the question was decided in all the cases by Munsifs, who would have had no jurisdiction to try this suit.

The *wâkf* was created on June 20, 1918. The present suit, which is a declaratory suit, was brought on March 28, 1934. Article 120 of the Limitation Act is applicable. If the plaintiffs' title has not been extinguished by adverse possession, they would be entitled to bring a suit for declaration and their suit would be in time if brought within six years of the denial of their title. We have it in evidence that as long as Obedul Gani lived there were no disputes or differences. Only after the death of Obedul Gani, which occurred on May 17, 1928, *i.e.*, within six years of the suit, disputes arose, some members of the family asserting that this *wâkf* and the other one were invalid and so the properties were secular and others that the *wâkfs* were valid and that the persons falling within the first class had no personal rights. The suit is, therefore, within time, provided that the rights of the plaintiffs have not been extinguished by adverse possession. The evidence establishes the fact that the person appointed as *mutâwâlli* was in possession as *mutâwâlli*. The question is whether his possession would be adverse if the *wâkf* is invalid in law. This question has been answered in the negative by the Judicial Committee of the Privy Council in *Muhammad Munawar Ali* v. *Razia Bibi* (1) and by a Division Bench of this Court in *Rukeya Banu* v. *Najira Banu* (2). If the *wâkf* is valid, no question of adverse possession on the part of the *mutâwâlli* arises, for he

(1) (1905) I. L. R. 27 All. 320, L. R. 32 I. A. 86.

(2) (1927) I. L. R. 55 Cal. 448.

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is then in possession lawfully, as manager of the endowment. If the *wâkf* is invalid, the possession of a *mutâwâlli*, on the supposition that it is valid, is still the possession of a manager, not his own possession in his personal right. His possession was in the case where the *wâkf* was invalid, the possession for the rightful owner, not the possession of a wrongdoer. We, accordingly, hold that the suit is not barred by limitation. The result is that the appeal is allowed in part. The *wâkf* created by Ex. A on June 5, 1891, is declared to be valid, but the other *wâkf* created by Ex. A1 on June 20, 1918 is declared to be invalid.

As the success is divided the parties to bear their respective costs throughout.

Appeal allowed in part.

N. C. C.