APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Shephard.

1888. July 30. 1889. April 26.

PATHUKUTTI (PLAINTIFF), APPELLANT,

v.

AVATHALAKUTTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Muhammadan law—Wakf—Conditional and revocable dedication—Conditions of a valid dedication.

A Muhammadan by an instrument revoking a previous trust deed conveyed her property to her husband on trust as follows:—(1) to maintain the settlor and her children out of the income; (2) to hand over the property to the children on their attaining majority; (3) in the event of the settlor's death without leaving children, with the income of the property to have *Kathom* recited in a mosque, give food to the Mollahs who come there for reciting the same and get the *moilu* performed. The settlor reserved to herself and her representatives an option of dealing with the property as a special fund for the maintenance of her children, if any.

The settlor died leaving no children. In a suit by her half-sister against her husband and others to recover her share of the property:

Held, *per* Muttusami Ayyar and Parker, JJ., that the plaintiff was entitled to recover her proportionate share of the property, notwithstanding the provisions of the above instrument.

per Shephard, J. There has been no complete dedication of the property, and, except so far as regards the income required for the three specific objects named by the donor, her property is undisposed of.

Conditions of a valid *wakf* considered.

SECOND APPEAL against the decree of the District Judge of South Malabar in appeal suit No. 381 of 1887 confirming the decree of the Subordinate Judge of South Malabar in original suit No. 79 of 1885.

The parties to this suit were Moplahs. The plaintiff sued defendants Nos. 2 and 3 (her brothers), defendant No. 4 (her half-sister), and defendant No. 1 (the husband of her late half-sister, Kuttiyachamma) to recover from them her share of the property of the late Kuttiyachamma and of her late half-brother, Kammali Kutti.

It was pleaded that the plaintiff's claim on the estate of Kammali Kutti was barred by limitation, and this plea prevailed in both the Subordinate Court and the District Court. With

* Second Appeal No. 1082 of 1887.

reference to the plaintiff's claim on the estate of Kuttiyachamma the defence was that she had by an instrument which was filed as exhibit I, conveyed her property including certain property which she held under the will of Kammali Kutti to defendant No. 1 on certain charitable trusts which were described in the will of Kammali Kutti, and that the plaintiff accordingly had no right to share in it. Both the Subordinate Judge and the District Judge held that exhibit I, of which the material portions appear *in extenso* in the judgment of Muthusami Ayyar, J., was a valid *wakf* deed, and prevailed against the claim of the plaintiff, and they accordingly passed decrees for the defendants.

The plaintiff preferred this appeal.

Ramasami Mudaliar and *Sankara Menon* for appellant.

Narayana Rau for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following judgments.

PARKER, J.—I am of opinion that the District Judge clearly intended to express his agreement with the Subordinate Judge that the plaintiff's allegation that she had shared in the income of her late brother's property was untrue, and hence that the suit with respect to that was barred. As to item No. 1 (the house), the District Judge found that the alleged gift to Biyachu Kutti and her daughters was not proved.

The remaining point is whether exhibit I is a wakfnama and valid against the plaintiff, and the sole difficulty in construing it has arisen from paragraph 5.

It must be remembered that exhibit I refers to two distinct properties—(1) those of the executant (Kuttiyachamma) herself, (2) those which she held under the will of her late brother, Kammali Kutti. Kammali Kutti would appear to have dedicated all his property to charitable purposes for which his sister was the trustee, and she provides (paragraph 6) that the holder of her property in the future shall continue to conduct the charities founded by her brother.

With respect to her own property, Kuttiyachamma revokes a former deed and provides (paragraph 2) that her husband shall take possession of it. He is to pay the Government kist, &c., with the surplus income and maintain her and any children that may be born to her. If any children attained majority the husband was then to make over the property to them.

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Paragraph 3 provides that if the lady have no offspring or they die after birth, her husband is, after the lady's death, to spend the whole income in prayers and charities which may be beneficial to her, and after his death the senior male and senior female of the tarwad are jointly to conduct these charities.

Paragraph 4 provides that if the children survive their parents the above-mentioned members of the tarwad (the senior male and senior female) shall be guardians of the children and shall render account to them and make over the property to them on attaining majority. Then follows a declaration that if the husband predecease the lady, she will, whether with or without children, conduct *these charities* until her death. I apprehend that the charities here referred to must be Kammali Kutti's charities, since the lady apparently intended (paragraph 2) that she was to have the income of her own property during her life and that, after her death, it should go to her children (if any).

This construction is borne out by paragraph 5 by which I understand the lady to mean that no charities are to be conducted out of her own property till her death, and that if she has children who survive, the property is to go to them absolutely, unburdened by any dedication for charitable purposes, though of course they would have to perform Kammali Kutti's charities.

Taking this view of the document, I think that exhibit I was only a conditional dedication of the lady's property for religious and charitable purposes,—conditional upon the event which has happened, viz., the death of the lady herself and the failure of any issue which attained majority.

Is such a conditional deed a *wakfnama?* It appears to me that it is not.

In *Jugatmoni Chowdrani* v. *Romjani Bibee*(1) the essentials of a *wakf* grant were discussed, and they are defined to be four in number—(1) the ultimate application must be to objects not liable to become extinct; (2) the appropriation must be *at once* complete; (3) there must be no stipulation for sale and expenditure of the price on the appropriator's necessities; (4) perpetuity is a necessary condition.

Conditions number 1 and 2 do not apply in the present case. Had one of the lady's children lived to attain majority, he would

(1) I.L.R., 10 Cal., 533.

have taken an absolute interest, and the religious and charitable appropriation would have altogether failed. This condition being interposed, the appropriation as *wakf* was not at once complete.

In *Fatmabibi* v. *The Advocate-General of Bombay*(1) it was held that a *wakf* must be unconditional and not subject to an option; this is not the case here (paragraph 5 of exhibit I), and exhibit I itself revokes a former deed. (See Baillie's Moohummudan Law, p. 556). In the Bombay case the *corpus* of the property could never absolutely revert, and the interposed private interests, which might or might not endure, were held not to avoid the ultimate charitable trust. In this case the trust, as far as the children were concerned, was certainly revocable.

The decision in *Amruttal Kalidas* v. *Shaik Hussein*(2) differs from the present case: in that case the *corpus* of the property was irrevocably dedicated to charitable and religious purposes, though as to the income there was a perpetuity created in favor of the descendants of the founder as long as any should exist.

For these reasons, it appears to me that exhibit I is invalid as a *wakf* deed and that the provisions of paragraph 3 as to the appropriation of the income of Kuttiyachamma's own property for religious and charitable purposes wholly fail.

I would ask the District Judge to return a finding on the issue, "To what proportionate share in the properties described in exhibit I is the plaintiff entitled?"

SHEPHARD, J.—The plaintiff seeks to recover her share of the property left by her half-brother Kammali who died in 1868 and her half share of the estate of her sister who died in 1882. The first part of the plaintiff's claim the Subordinate Judge held to be barred by limitation, finding that it was not proved as alleged by the plaintiff that she had enjoyed any part of the income of the property since 1868 and that there was no admission to take the case out of the statute. The District Judge concurred in this finding, and, though he did not say so in express words, clearly meant to agree with the Subordinate Judge in holding that the suit was barred; and in their holding I think the Courts below were right, inasmuch as the plaintiff was entitled to her share immediately on the death of her brother Kammali, and more than twelve years intervened between the date of his death and the

(1) I.L.R., 6 Bom., 42. (2) I.L.R., 11 Bom., 492.

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filing of the suit (article 123 of the second schedule to the Limitation Act). The District Judge also found, agreeing with the Subordinate Judge, that the alleged gift by Maria Kutti to Biyachu and her daughter was not proved. So far therefore the appeal must be dismissed. To the rest of the claim, that is, to the claim in respect of Kuttiyacha's estate the Courts agreed in thinking that the instrument executed by her in 1881 afforded a complete answer.

In both Courts this instrument (exhibit I) was construed as an instrument constituting the property dealt with *wakf* with a condition attached that, if children were born to Kuttiyacha, they were to take the property. In this instrument, executed by Kuttiyacha when pregnant, she directs her husband to take possession of the property specified, and with the surplus income to support her children and conduct the charities according to the will of Kammali. He is to hand over the property to the children on their attaining majority.

Then follows the clause which is supposed to make the instrument an instrument of *wakf*. In this clause the trustee is directed in the event which has happened, viz., of Kuttiyachamma leaving no children, with the income of the properties to have kathom recited in Jumath mosque at Ponnani, give food to the Mollahs who come there for reciting the same, and get the *moilu* performed. It was not present to her mind that then those objects would exhaust the income of the properties, for she proceeds to direct the trustee to conduct "other charities beneficial to me for ever."

If the further direction had been so framed that any effect could be given to it, it might be said that there was a complete dedication of the property, no part of the income being left undisposed of. But the direction is expressed in such general terms as to give the trustee no sort of guidance. In order that a gift for a charitable purpose or indeed for any purpose should be operative and take effect, the object which the giver proposes must be defined with certainty. The requisite certainty is here wholly wanting and therefore no effect can, in my opinion, be given to the final direction of Kuttiyachamma. It follows that there has been no complete dedication of the property, and that, except so far as regards the income required for the three specific objects named by the donor, her property is undisposed of.

Taking this view of the instrument, I think that no question of *wakf* arises and that the plaintiff as one of the Kuttiyachamma's heirs is entitled to the share of her property burdened with the charges she has imposed upon it.

I would reverse the decree of the Lower Court except so far as relates to the estate of Kammali and grant the plaintiff a decree for the recovery of her share of the estate of Kuttiyacha, the decree being made, however, without prejudice to the rights of the trustee in respect of the three specific duties imposed upon by clause 3 of exhibit I.

This second appeal was referred under the provisions of section 575 of the Civil Procedure Code to Muttusami Ayyar, J., who delivered the following judgment:—

MUTTUSAMI AYYAR, J.—This second appeal has been referred to me under section 575 of the Civil Procedure Code owing to a difference of opinion between the learned Judges who heard it.

The appellant, a Mopla lady in South Malabar, sued for her share under Mahomedan law in the property of her deceased half-brother Kammali Kutti and half-sister Kuttiyachamma. The claim was considered by the Courts below to be barred by limitation so far as it related to the property of Kammali Kutti. Their decision rested on the ground that the half-brother died more than twelve years before suit and that the appellant's averment that she participated in the enjoyment of his property within twelve years was not true. Upon the facts found, the decision is correct, and on this point, there is no difference of opinion between the Judges who first heard this appeal. They also agreed that upon the finding that there was no movable property of which partition could be decreed, the claim regarding a share therein was properly dismissed. They concurred further in holding that the appeal must fail in regard to item No. 1 of the immovable property. It is only necessary for me for the purposes of this reference to mention the nature of the contest with reference to items 2 to 6 which belonged to the appellant's deceased half-sister Kuttiyachamma. The appellant's case was that the settlement made by that lady under exhibit I was inoperative and that the property forming the subject of the settlement was liable to be divided. Both the Courts below considered the settlement to be valid. In this Court Mr. Justice Parker held that exhibit I was a *wakfnama* and no effect could be given to it as the dedication to charitable and

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religious use it provided for was not unconditional and complete. Mr. Justice Shephard was of opinion that the instrument was not a *wakfnama*, and that even if it were the gift, was complete in the sense that the giver reserved no power of revocation. The question I have to consider is whether the instrument is a *wakfnama*, and whether effect can be given to it in part or in whole. The material portions of the document are paragraphs 2 to 5, and they run in these terms:—

"2. You shall from this day onwards keep in possession the properties specified in the schedule along with the above-mentioned documents, defray the customary expenses and pay the Government revenue, and with the surplus income you shall until death maintain me who am pregnant and the children I may bring forth, and conduct the charities according to the testamentary instrument of the deceased Kammali Kutti. Besides, when the children I may bring forth attain majority, you shall make over the properties to them along with the documents.

"3. If either I have no offspring, or if they die after birth, with the income from the properties, you shall, after my death, have *kathom* recited in the Jumath mosque at Ponnani, give food to the Mollahs who come and live there for reciting the same and get the *moilu* performed, and you shall, with due regard to time and propriety, conduct other charities beneficial to me for ever without any default. But you, till your death, and after your lifetime, the senior male member and the senior female member of my tarwad for the time being jointly, shall be responsible for the management of the charities. The Mahadur Tangal for the time being of Ponnani shall have the superintendence of the charities conducted by my tarwad and the power to conduct them without default.

"4. If children be born and they survive us, the aforesaid members of my tarwad, who have been appointed to conduct the charities, shall have the liberty and power to be the guardian of the children and to render account and make over the (properties) in case (they) have to be transferred on their attaining majority. If you die after children are born and I be alive, or if there be no children and I survive, I shall, in the capacity of the guardian of the children (in the former case), be prepared to conduct these charities, and I shall in accordance with the provisions of the above paragraphs conduct the charities until my death.

"5. Nothing in this shall be considered to affect my arrangement that the charities cannot be conducted until my death, and that the properties cannot, [?] at any time during the lifetime of the children, be taken up as special property for their maintenance."

There appears to me to be sufficient ground for holding that the document in question is a *wakfnama*. The event that has arisen was anticipated by the settlor, and by paragraph 3, she dedicated the property permanently and exclusively to religious and charitable use if the contingency anticipated should arise. It may be that the creation of *wakf* subject to a contingency is either valid or invalid, in part or in whole, but this cannot affect the construction which ought to be placed on the instrument. The criterion is whether from the contents of the document it could reasonably be inferred that a *wakf* or an endowment for religious and charitable use was intended. It should also be borne in mind that the creation of a perpetuity except for and in connection with the ultimate destination of property to such use would be open to objection. The instrument being a *wakfnama*, the further question arises whether it is valid, and I am of opinion that it is not. The dedication should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. Baillie, at page 556, gives an illustration, observing if one were to say "my mansion is a charity appropriated to the poor if my son arrives," and the son should arrive, the mansion does not still become *wakf*. He adds, if one should say this, "my land is charity if such a one pleases," and if the person referred to should indicate his pleasure, still the *wakf* would be void. I take the reason to be that at the time of settlement there was no absolute or complete appropriation in the sense that no proprietary interest was reserved and that the property was effectually constituted to be charity property. I do not desire to be understood as saying that the interposition of an intermediate estate limited in duration would invalidate the creation of a *wakf*, provided that there was an out and out appropriation at the time of the settlement. In that case, the appropriation to religious use would only be deferred so long as the interposed estate continued and there would be no reason for saying that the religious appropriation might fail altogether. In the present case there is also another objection as observed by Mr. Justice Parker. In paragraph 5, the settlor

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reserved an option to her during her life and an option to her representatives even after her death, to the extent of dealing with the endowment as a special fund for the maintenance of her children, if any. Seeing that she revoked a former settlement, I cannot say that she did not desire to have an option to do the same in regard to the settlement before me. As to the decided cases to which my attention was called, the ground on which the decision rested in *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*(1) was that the settlor did not understand in making the settlement that she was creating a tenure in the nature of a *wakf*. The decision in *Mahomed Hamidulla Khan* v. *Lotful Huq*(2) is an authority in support of the view which I take, and the facts of that case were similar to this, inasmuch as a contingency was indicated by the creation of an intermediate estate which might prevent the ultimate dedication to religious use from ever taking any effect at all. Nor does the case in *Luchmiput Singh* v. *Amir Alum*(3) support this appeal. The case in *Jewun Doss Sahoo* v. *Shah Kubeerooddeen*(4) did not decide the question which is here raised for decision. As for the case in *Fatma Bibi* v. *The Advocate-General of Bombay*(5) Mr. Justice West observes that the direct ownership of the property was completely parted with, whilst in the case before us the settlor reserved an option. The *ratio decidendi* in *Mahomed Hamidulla Khan* v. *Lotful Huq*(2) is that the principle underlying a *wakf* is charity and the ultimate application of property, the subject of *wakf* must be certain and to objects which never become extinct and those objects must be all of religious and charitable character. This is in accordance with Hedaya as read by Hanifa, "that to constitute a *wakf*, there must be a dedication solely to the worship of God or to religious or charitable purposes." It seems to me that unless the ultimate application of the property to religious or charitable use can be predicated with certainty from the deed of the settlement, it cannot be said that one essential ingredient, viz., application to charity is not wanting and that a valid *wakf* is created. For these reasons, I come to the same conclusion to which Mr. Justice Parker has come. The result is that the order proposed by him

(1) 15 B.L.R., 167.
(2) I.L.R., 6 Cal., 744.
(3) I.L.R., 9 Cal., 176.
(4) 2 M.I.A., 390.
(5) I.L.R., 6 Bom., 42.

will be the order of the majority of the Judges who took part in this appeal.

[In compliance with the above order the District Judge returned a finding which was accepted by the High Court, and the decree appealed against was accordingly modified by awarding to the plaintiff $\frac{9}{64}$ of items Nos. 2—5 described in exhibit I.]

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

KOMBI (PLAINTIFF), APPELLANT,

v.

AUNDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. July 8, 30.

Specific Relief Act—Act I of 1877, *s.* 42—*Suit for declaration of title as holder of a stanom to which a malikana allowance is attached—Pensions Act—Act XXIII of* 1871, *s.* 6.

Suit to declare plaintiff's title to the stanom of fifth Raja of Palghat; the first Raja (defendant No. 1) received a malikana allowance from Government payable to the various stanomdars, but had refused to pay to plaintiff the fifth Raja's share:

Held, the plaintiff being entitled to sue for further relief than the declaration of his title and having omitted to do so, the suit must be dismissed under Specific Relief Act, s. 42.

Per cur: Pensions Act, s. 6, was not applicable to this case.

SECOND APPEAL against the decree of L. Moore, Acting District Judge of South Malabar, in appeal suit No. 25 of 1888, reversing the decree of S. Subbramanya Ayyar, District Munsif of Temelprom, in original suit No. 8 of 1887.

Suit for a declaration that the plaintiff was entitled to the stanom of the fifth Raja of Palghat. Defendant No. 1 was the first Raja, and as such he received from Government a *malikana* to distribute among the other Rajas, being the stanomdars of the kovilagom. The plaint stated that defendant No. 1 refused to pay the fifth Raja's share to the plaintiff, who accordingly brought this suit to establish his title.

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* Second Appeal No. 744 of 1888.