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and issued by this Committee on the 24th March was meant to reach the respondents It had not reached them. They, therefore, might have supposed that the date of the hearing was not yet, and had not been fixed. The real ground of this application was that, this case having been heard *ex parte*, there was evidence that the respondents did not receive, as it was meant that they should receive, intimation of the day of the hearing. From the issue of the order to appear on the 22nd March, and the confirmatory order following it, there was ground for assuming that notice was intended to be given.

Mr. *Herbert Cowell*, for the objectors, was not heard.

Their Lordships intimated that, in their opinion, the petitioners had sufficient notice No formal notice was required by the rules of the High Court of the transmission of the appeal. The petition was dismissed with costs.

Solicitor for the petitioners: Mr. *R. M. Turnbull.*

Solicitors for the objectors: Messrs. *Ranken Ford, Ford, and Chester.*

APPELLATE CIVIL.

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December 19.

Before Mr. Justice Blair and Mr Justice Banerji.

PHUL CHAND (DEFENDANT) *v.* AKBAR YAR KHAN AND ANOTHER (PLAINTIFFS).*

Muhammadan law—Waqf—Illusory dedication—Fat ha ceremony—Custom as a guide to interpreting the intention of a waqif.

In determining whether a disposition of property made by a Muhammadan is or is not a valid *waqf* the intention of the *waqif* may be interpreted by reference to custom prevailing at the time the *waqf* was made; and, if there is found to be a substantial dedication of the property dealt with to charitable uses, that dedication will constitute a valid *waqf*. *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) and *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (2) referred to.

* Second Appeal, No 820 of 1893, from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 2nd May 1893, reversing a decree of Babu Girraj Kishore Dat, Munsif, Haveli, Bareilly, dated the 22nd September 1892.

(1) I. L. R., 17 Calc., 498. (2) L. R., 22 I. A., 76.

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THIS was a suit for a declaration that certain property which the father of the plaintiffs had mortgaged to the defendant, and for the sale of which the defendant had obtained a decree, was *waqf* property. The plaintiffs alleged that their ancestor, Basharat Khan, had dedicated the property in suit for the performance of certain ceremonies known as *fateha* and *kadam sharif*.

The defendants pleaded, *inter alia*, that the dedication of the property for the purposes alleged was an illusory dedication, inasmuch as the ceremonies in question involved no substantial expenditure, and that the so-called *waqf* was merely a pretext for an attempt to prevent the property from being alienated.

The Court of first instance (Munsif of Bareilly) found as to the principal issue in the case that the proportion of the income of the so-called endowed villages which would be expended on the ceremonies of *fateha* and *kadam sharif* was very small compared with the total income, and that the descendants of Basharat Khan had up to the present never treated the property as endowed property, and it dismissed the plaintiffs' suit.

The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Bareilly), finding that the document relied upon by the plaintiffs did operate to create a valid *waqf*, decreed the appeal and the plaintiffs' suit.

The defendant vendee appealed to the High Court, and, on the appeal coming on for hearing on the 18th of November 1895, certain issues, which are stated in the judgment of the Court, were referred under section 566 of the Code of Civil Procedure.

Mr. *Amir-ud-din*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

BLAIR and BANERJI, JJ.—In this second appeal the Court below has returned findings in answer to the questions put by us in a remand order framed under section 566 of the Code of Civil Procedure. The first question we asked was:—

What was the income of the whole property dealt with by Basharat Khan in the deed of 1781 at the date of the document?

The finding in reply is :—That the income of the whole property averaged rupees 850 per annum at the date of the disposition.

The second was :—What was the amount of expenditure required for the expenses connected with the *fateha*, also those connected with the *kadam sharif*, having regard to the means and position in life of the maker of that deed?

The finding on that point is :—That such expenditure would amount to rupees 500 per annum.

The third and fourth issues are as follows :—

Does the ceremony of the *fateha* involve necessarily and essentially any distribution of alms and kindred charity among the poor? Do the ceremonies and expenses connected with the *kadam sharif* necessarily and essentially involve the distribution of alms or kindred charity among the poor?

The finding is that "under the Muhammadan ecclesiastical law it is not binding to distribute alms or to make any kindred charity in connection with *fateha* and *kadam sharif*; but, according to the custom which prevails in the country, the distribution of sweetmeats and other eatables to the poor and other visitors has become an integral part of the ceremony connected with *fateha*. The *ziarat* of *kadam sharif* when held alone by itself does not necessarily involve the distribution of alms or kindred charity."

On these findings we are asked by Mr. *Amir-ud-din* to decree this appeal. He contends that the document which we have to construe must be interpreted by express Muhammadan law. He alleges correctly that the contention between himself and Mr. *Abdul Majid* for the respondent was conducted on this basis, and the memorandum of appeal put forward one basis, and one only, that on the plain construction of the document the case set up was that, under the Muhammadan law, the *fateha* and *kadam sharif* both necessarily involved charitable expenditure. Mr. *Amir-ud-din* asked us on this ground to decline to bring to bear on the interpretation of the document any finding of custom.

He suggests also, and in this respect we are unable to follow him, that the finding of custom by the lower Court does not extend

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to the period at which the alleged *waqf* was made. That we have a right to interpret the intention of a *waqif* by reference to the custom prevailing at the time when the *waqf* was made we have no doubt. We have the express authority of the Privy Council in the case of *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) for using such custom to discover the intention of a grantor. Their Lordships say :—"If indeed it were shown that the customary uses were of such magnitude as to exhaust the income, or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor." We have the same case, which was also referred to in *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (2), as an authority for the proposition that, according to Muhammadan law, no gift is good as a *waqf* unless there is a substantial dedication of the property to charitable uses at some period of time; and that pronouncement must be taken as an authority for the converse proposition, that, when there is a substantial dedication of the property to charitable uses, the document making such dedication is a good *waqf*. We have findings as to the expenditure upon charitable uses to the effect that something like rupees 500 annually is spent upon them, and we have the finding as to custom by the light of which we can reasonably conclude that the grantor intended the income of his property to be spent in accordance with what is found to be the custom.

We hold, therefore, that the document providing a substantial and not illusory expenditure out of the settled property is a good *waqf* according to the doctrine of Muhammadan law. We dismiss the appeal with costs.

Appeal dismissed.

(1) I. L. R., 17 Calc., 498, at p. 511. (2) L. R., 22 I. A., 76.