THE

INDIAN LAW REPORTS,

Bombay Series.

PRIVY COUNCIL.

ABDUL GAFUR AND OTHERS, PLAINTIFFS, *v.* NIZA'MUDIN AND OTHERS, DEFENDANTS.

P. C.*
1892.
May 31;
July 2.

[On appeal from the High Court at Bombay.]

Mahomedan law—Wakf—Settlement—Will—Invalidity of attempted settlement purporting to constitute a wakf—Document not establishing a trust for a religious or charitable purpose, at some time, invalid as a wakfnáma.

A *wakfnáma* to be valid must be a substantial dedication of property to a religious or charitable purpose at some time or other.

Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu*(1) referred to and followed.

Where a *wakfnáma* purported to make a settlement on heirs, the settler's intention having been to make the whole estate devolve from one generation to another, without being alienable by them, and without being liable in execution against them,

Held, that the instrument could neither be maintained as establishing a *wakf*, nor as a settlement: also, that it could not be supported as a will, not having been validated by consent of heirs, as to two-thirds of the succession; and that, even if it could have been dealt with as a will, the above provision would have been void.

APPEAL from a decree (2) (11th June, 1888) of the High Court reversing a decree (17th February, 1887) of the Assistant Judge of the Thána District, which affirmed a decree (27th March, 1886) of the Second Class Subordinate Judge of Panvel.

The *wakfnáma*, to which the appeal related, was executed on the 16th January, 1838, by Karimuddin, a Shafi, who died in 1840. Two of the five plaintiffs, now appellants, were *mutawallis* appointed by the District Court in 1884, and all were kinsmen

* *Present*:—LORDS WATSON and MORRIS, SIR R. COUCH, and LORD SHAND.

(1) L. R., 17 I. A., 28; I. L. R., 17 Calc., 498.

(2) *Nizámuddin* v. *Abdul Gafur*, I. L. R., 13 Bom., 264.

1892.

ABDUL GAFUR v. NIZA'MUDIN.

of Karimuddin. The property was a tract of salt works, with buildings, in táluka Panvel in the Kolába District. On the 22nd June, 1866, under a decree against Karimuddin's daughter, Tahira, her right, title and interest (Civil Procedure Code Act VIII of 1859, section 249) were sold at a Court sale. The defendants, (now respondents), made title through the purchasers.

The question, what right of Tahira was sold in 1866, depended on the validity and effect of a disposition, made in the *wakfnáma* of 1838, for the benefit of the family and heirs of Karimuddin.

In another case, *Phate Sáheb Bibi* v. *Dámodar Premji*[1], this document was before the Court on another point. It purported to settle, with certain exceptions, moieties of Karimuddin's estate on his two wives, and on their respective daughters, and their descendants, so long as each line should subsist, with cross-remainders, on the extinction of either line, to those who might represent the other, with a final remainder to the right heirs. Part of the estate was expressly devoted to specific religious purposes; but there was no dispute as to that; and this suit was confined to a share as to which no trust for any religious, or charitable, purpose was declared. One of the important clauses was the following:— "Neither of the said two wives, nor any one of the *aulad* of the said two wives, shall alienate by sale, gift, or mortgage, either of their shares of the above property.

The *wakfnáma* is set forth in the report of the appeal in the High Court[2].

The decisions of the Courts below, with the proceedings before this appeal, appear in their Lordships' judgment. On a second appeal, the Judges (BIRDWOOD and PARSONS, JJ.,) were of opinion that the document of 1838 could not be supported as creating a *wakf*, as it contained no ultimate dedication of the property to a religious, or charitable, purpose. As a mere deed of settlement it could not receive effect, as Karimuddin had not, by law, power to make a series of life-estates with remainder to his heirs. The judgment is given at length in I. L. R., 13 Bom., at p. 270.

On this appeal,

Mr. *J. D. Mayne* for the appellants:—The disposition for secular

(1) I. L. R., 3 Bom., 84. (2) I. L. R., 13 Bom., 264.

purposes in the *wakfnáma* can hardly be supported as constituting a *wakf*. Recent decisions are to the contrary of giving such an effect to a *wakfnáma* where there is no gift to operate at any time for a religious, or charitable, use. See *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*(1). But, if there was a consent on the part of the heirs, who are benefited, the instrument is maintainable as a will. There are difficulties in the way of treating it as a settlement. There was, however, the case of a grant for life in *Umes Chunder Sircár* v. *Zahur Fatima*(2). As a will, it might be that the document could receive effect, if assented to.

Reference was made to *Khajooroonissa* v. *Rowshan Jehan*(3).

The respondents did not appear. Their Lordships' judgment was delivered on a subsequent date (July 2nd) by

LORD WATSON:—The appellants are plaintiffs in this suit, which was brought in 1884 for possession of lands which had been taken in execution and judicially sold in the year 1866, and were thereafter purchased by the father of the defendants. The cause of action disclosed in the plaint was this—that Tahirabibi, the judgment-debtor, held the lands under a *wakfnáma* executed in January, 1838, by her father Karimuddin, which limited her interest to a bare life rent; that the decree of sale only carried the life estate of Tahirabibi who died in November, 1873; that the defendants' title to possess came to an end upon her death, and the lands reverted, in the first place, to her sister Fatehsahebbibi in life-rent and on her decease to the appellants as heirs of Karimuddin and his daughter Fatehsahebbibi. The issue adjusted to try the only matter affecting the merits of the case, namely, the nature of the interest which the judgment-debtor had in the lands sold for her debt, was thus expressed,—"Is the *wakfnáma* of 1838 valid according to the Mahomedan law?"

The Second Class Subordinate Judge of Panvel found for the appellants, being of opinion that Karimuddin's deed of 1838, although ineffectual to constitute a proper *wakf*, was nevertheless

(1) L. R., 17, I. A., 28; I. L. R., 17 Calc., 498.
(2) L. R., 17 I. A., 201; I. L. R., 18 Calc., 164.
(3) L. R., 3 I. A., 291; I. L. R., 2 Calc, 184.

1892.

ABDUL GAFUR v. NIZA'MUDIN.

valid as a settlement, and also that Tahirabibi had a mere life-estate. The Assistant Judge of Thána affirmed his decree for reasons substantially the same, recognizing the efficacy of the deed as a settlement; but, on second appeal to the High Court of Bombay, both judgments were reversed and the appellant's claim rejected with costs. The learned Judges agreed with both Courts below that the deed was invalid as a *wakfnáma*; but they held that it was also inoperative as a settlement, in respect that no possession had followed upon the lifetime of Karimuddin.

The learned counsel who appeared for the appellants, with great candour and propriety, admitted that after the recent decision of this Board in the case of *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*(1) he could not successfully maintain the document of 1838 to be valid as a *wakfnáma*. In that case Lord Hobhouse said that their Lordships "have not been referred to, nor can they find any authority showing that, according to Mahomedan law, a gift is good as a *wakfnáma*, unless there is a substantial dedication of the property to charitable uses at some period of time or other." In this case the so-called *wakfnáma* makes no gift of the lands in question, either immediate or ultimate, for religious or charitable purposes. The document professes to create a *wakf*, but, in reality, the legal heirs of Karimuddin are the only objects of his bounty. The lands are destined to his wives and children, and to the descendants of the latter in perpetuity, in the order and according to the shares prescribed by the Mahomedan law of succession, but subject to the limitation that none of them shall have the power of alienation by sale, gift, or mortgage.

Counsel also admitted that he could not successfully maintain that the document was a settlement, but he endeavoured to support the appeal on the ground that the deed, styled a *wakfnáma*, ought to be treated as the will of Karimuddin. He did not dispute that a Mahomedan cannot of himself, by a testamentary writing, either curtail or defeat the legal interests of his heirs; and that a Mahomedan will is, therefore, inoperative with regard to two-thirds of the testator's succession, unless it is validated

(1) L. R., 17 I. A., 28.

by the consent of the heirs having interest. Their Lordships do not think the appellants would take any benefit from the document of 1838 if it were construed as the will of Karimuddin. It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see *Humeeda and others* v. *Budlun and the Government* (1)), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life estate, but a full owner, with prohibition against alienation, which, being void in law, could not affect either herself or her creditors. Although this point was taken in the High Court, the appellants were not in a position to press it. They have not averred in their pleadings that Tahirabibi gave such consent, and there is no evidence to show that she did. Besides, there was no issue taken upon the point, and, therefore, no finding in fact upon which the High Court could proceed in a second appeal.

The judgment of the High Court appears to their Lordships to dispose, in a satisfactory manner, of all the arguments which have been addressed to them in the *ex parte* argument upon this appeal. They will humbly advise Her Majesty to affirm the judgment complained of, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants:—Messrs. *Barrow and Rogers.*

(1) 17 W. R., 525, Civ. Rul.