tion has failed and cause must be shown, if any can be shown, on the merits. *

1873.
Dhurandhar Dos Sakhárám v. Bhau Govind.

Attorneys for the plaintiffs — *Shapurjee and Thankurdas.*
Attorney for the defendants — *C. Tyebji.*

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 674 *of* 1870.

1873.
January 31.

ABDUL GANNE KÁSAM and others..... .... *Plaintiffs*
HUSSEN MIYA RAHIMTULA and others... ..... *Defendants*

Muhámmadon law—wakf—*Settlement on a man and his descendants*—*Perpetuity*—Aulad dar Aulad—Warrasan

Semble. To constitute a valid *Wakf* according to Muhammadan law, it is not sufficient that the word "*Wakf*" be used in the instrument of endowment. There must be a dedication of the property solely to the worship of God or to religious and charitable purposes. A Muhammadan cannot, therefore, by using the term "Wakf," effect a settlement of property upon himself and his descendants, which will keep such property inalienable by himself and his descendants for ever.

Held that the plaintiffs, who were sons of a daughter of one of the original settlers, did not come within the meaning of the term *aulad dar aulad* or the term *warrasan* used in the instrument of settlement.

THIS suit was filed by the plaintiffs to have the trusts of a writing in the Persian language, dated the 25th of October 1820, carried into execution.

II. For a declaration that the plaintiffs were entitled to live in a certain house mentioned in the said writing.

III. That the rights and interests of the plaintiffs and defendants in the said house might be ascertained and declared, and that, if necessary, the house might be sold and the proceeds divided amongst the plaintiffs and the defendants.

Note.—Before cause was shown on the merits the defendants lodged their accounts in the Commissioner's office, and on the 6th of March the rule was discharged, the defendants being ordered to pay the costs of and occasioned by it. Leave was granted to the defendants to file in the Commissioner's office the accounts they had lodged there.

1873.

Abdul Ganne Kasan v. Hussen Miza Rahimtula.

IV. For an account of the rents and proceeds of the house and of the application thereof by the defendants.

The translation of the Persian writing sued upon ran as follows:—

"The cause of writing this valid and legal declaration is as follows:—

We, namely, I named Jijibái, the daguhter of Sheriff and the wife of hussen Rahimtulá the deceased and I named Muhammad and I named Ahmed and I named Abdullá the sons of Hussen Rahimtula—three brothers and one mother—making four, reside in Bombay. We make a valid declaration and a clear acknowledgment, being sound in mind, &c., as follows:—

There is a house (decribing it) situated in Meman Wada stree which is our own property and has been built by us four persons. At present we, the abovementioned four persons, have, willingly and of our own accord and with our consent and of our own choice, made a wakf of the abovementioned house in favour of ourselves and our family (ayal) and children (atfal). It is as follows: While we live, the abovementationed house shall remain and will be in our possession; and our abode and living together with our families and children shall be in the same, and we shall never sell the abovementioned house, nor shall we mortgage it; and whenever any of us shall depart from this world, his wife (zun) and children (furzand) that may survive shall remain in the house, and they shall not think of selling or mortgaging the said house. And out of the surviving persons, whether male or female, he who may be the eldest shall be a trustee of the said house.

Accordingly the trusteeship of the abovementioned house had been given to your mother Jijibái unanimously and with our consent. In like manner he who may be the eldest shall have the trusteeship of the abovementioned house; and it is necessary that the abovementioned house should be repaired every year. We have, therefore, willingly reserved three godowns which are situated on the ground floor of the said house, in order that having recovered the rents of the three godowns the same may be spent on the repaires of the said house; and taxes and ground-rent shall be paid out of the same, and they shall keep the abovementioned endowment house accupied and in good ordered. And in this manner our children and childrens' children (aulad dar aulad) shall keep the house in their possession, and shall in no way act otherwise in respect of the said house. And we, the four

persons, have made a *wakf* of the abovementioned house for ourselves and family (ayal) and children (atfal) and our heirs (warrasan) hereafter. We, or any of us, shall have no claim by way of ownership against this endowed house. Should any of us raise a claim against another in respect of the endowed house, the same shall be null and void and inadmissible. Therefore these few words have been written by way of a valid, legal, and trustworthy endowment paper.

The above writing was signed by Jibibái and her three sons.

Jibibái died in 1824 leaving her three sons surviving her.

Muhammad did in 1830 leaving two daughters, Hudbái and Khatizábái, of whom Khatizábái died without issue. The plaintiffs were the surviving sons and daughter of Hudbái.

Ahmed did in 1827 leaving a son Rahimtulá.

Rahimtulá and his two sons, Hussen Miyá and Fattey Muhámmad, were by the plaint alleged to be in possession of the house mentioned in the endowment writing, and were, with Jamnábái, the daughter of Abdullá, the original defendants to the suit. Rahaimtulá died during the progress of the suit, and his daughters and widow in addition to his said two sons were made defendants as his representatives.

Abdullá died in 1846 leaving a daughter Jamnábái who, as above stated, was made a defendant in the suit, but was not in possession of any portion of the house.

On the death of Muhammad in 1830, Abdulla, the third son, took up the management of the house; but, in consequence of a quarrel between him and Rahimtulá, Abdullá left the house about 1835. He took the endowment paper with him and shortly before his death, gave it to his daughter Jamnábái.

Hudbái, the mother of the plaintiffs, left the house about the same time, and the plaintiffs never afterwards lived in the house.

The parties to the suit were of the Hullaí Memon sect.

The important issues raised were—

1873.

Abdul Ganie Kasam v. Hussen Miya Rahimtula.

1. Whether the Persain writing was executed by Jíjibái and her three sons;

2. Whether the writing was valid according to law;

3. Whether the persons executing the writing had power to make the disposition of the property therein comprised;

4. Whether the suit was barred by the provisions of Act XIV. of 1859.

The evidence in the suit was taken before BAYLEY, J. who considered it desirable that the questions involved should be argued before two Judges. Thr case accordingly came on for argument before BAYLEY and MELVILL, JJ., on the 20th of January 1873.

Mayhew and *Marriott* for the plaintiffs.

The Honourable *A. R. Scoble* and *Latham* for the defendants other than Jamnabái.

Anstey and *B. Tyebji* for the defendant, Jamnbái.

Cur. adv. vult.

MELVILL, J.—It is certain that the settlement made by the ancestors of the parties, to which the plaintiffs and the defendant Jamnábái ask the Court to give effect, is one which would be invalid under English law. It creates a perpetuity of the worst description, for it prevents the alienation of the house for ever, and necessitates its use in a manner which the natural increase in the number of descendants would probably render impossible, even if they should be willing (which could hardly be expected) to live amicably under one roof throughout all generations. The absurdity of the settlement is sufficiently shown by the circumstance that, even during the lifetime of the executing parties, family quarrels arose which rendered it impossible for them to continue to live together.

If the parties to the present suit were Hindus, there would be little difficulty in deciding it. The Supreme court of Bombay in a case (of *Maccundass Valubdass* v. *Ganpútrao Gopinath and others*) reported in Perry's Oriental Cases

(p. 148), refused to give effect to a will restricting for ever the alienation of a family house; and the current of judicial decisions has always been unfavorable to attempts by Hindus to create perpetuities. Any doubt which might have existed on the subject has been removed by legislation, the provisions of Sec. 101 of the Indian Succession Act having been made applicable to the wills of Hindus in the Presidency Towns by Act XXI. of 1870.

The Legislature declined to make the provisions of that Act applicable to the wills of Muhammadans, avowedly on the ground that the Muhammadans possess an elaborate legal system of their own upon the subject of wills, which is so closely connected with all their customs and with their religious belief that it would be improper to distrub it.* There are not, so far as we are aware, any reported decisions on the point in suits which have arisen between Muhammadans. The question, therefore, of the right of a Muhammadan to create a perpetuity is one which is untouched by either legislative or judicial authority.

The same general principle, however, which in other countries and other systems of law has led to the discouragement of perpetuities, as being equally opposed to public policy and to the interests of private persons, is as applicable to Muhammadans as to people of other races and creeds. The spirit of Muhammadan law would seem to be strongly opposed to an unlimited power to dispose of property; for, under it conditional gifts are invalid, while legacies cannot exceed one-third of the testator's estate, and a will made in favour of one son, or of one heir, cannot take effect to the prejudice and without the consent of the other sons or the other heirs. It was almost admitted in the argument before us, and we think that it must be admitted, that if the disposition of property, which we are considering, be regarded as a mere family settlement, it cannot be enforced; and that the

* See Speech of the Honourable Mr. Stephen in Legislative Council 1st January 1870.

1873
Abdul Ganue Kasam v. Hussen Miya Rahimtula.

only ground on which effect can be given to it, is that it falls within the peculiar provisions of Muhammadan law relating to what is called "wakf."

Now, there is perhaps no question of Muhammadan law in regard to which it is more difficult to find materials for a sound judgment than that of *wakf* or appropriations. As to the meaning of the term, and as to the constitution and effect of the theory which it describes, Hanifa and the two disciples appear to be in almost every particular hopelessly at variance; and in attempting to grasp at some intelligible principle on which to base a preference for the opinion one over another, one is met by verbal subtleties and artificial distinctions from which one labors in vain to extract any definite meaning. After the best consideration which we have been able to give to the matter, we think that the correct legal meaning of the term "wakf," which originally means nothing more than "detention," is an appropriation of a pious or charitable nature. This is the definition given by Mr. Hamilton in his translation of the Hedaya (Vol. II., p. 334, note); and he is followed by Sir. W. Macnaughten. Professor Johnson, in his Persian and Arabic Dictionary, defines it as a "bequeathing for pious uses (as habitations for the poor and books for the use of learned men)." So Professor Wilson in his Glossary of Indian Terms: "*Wakf*—a bequest for religious or charitable purposes, an endowment, an appropriation of property by will or by gift to the service of God in such a way that it may be beneficial to men, the donor or testator having the power of designating the persons to be so benefited." It is true that Mr. Baillie, in his Digest of Muhammadan law (p. 549 note), expresses an opinion that the term is more comprehensive and includes settlements on a person's self and children. This opinion seems to be founded on the opinion of Aboo Yoosaf, but is opposed to that of the other disciple, Mahomed, and other doctors of the law (2 Hedaya 349); and it would seem to derive its chief support from a saying attributed to the Prophet "a man giving subsistence

to himself giveth alms." This saying, if it stood unexplained, would be as little consistent with our sense of what constitutes a meritorious action as the selfish interpretation sometimes given to our own common saying that "charity begins at home"; but the Prophet's meaning is probably correctly explained by Mr. Hamilton (2 Hedaya 351, note): "As where (for instance) a man appropriates *the whole* of his property, thus reducing himself to poverty; in which case the charity is as effectual with respect to *him* (where he necessarily reserves a sufficiency from the product for his own subsistence) as with respect to *any other pauper*." And even Aboo Yoosaf, liberal and even radical as he is in his desire to bring family settlements within the category of lawfull appropriations, does not venture to exclude the idea of charity altogether. For, though he differs from Aboo Huneefa and Mahomed as to the necessity of mentioning in express terms that the ultimate destination of the produce of the endowment is the support of the poor, he still admits that it must revert to the poor, as that must be supposed to be the appropriator's design, though he should fail to mention it (Baillie pp. 557, 558).

We think that the balance of authority is strongly in favour of the conclusion that, to constitute a valid *wakf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes. This view is in accordance with that taken by the Calcutta High Court in *Bibee Kuneez Fatima* v. *Bibee Saheba Jan and others* (*a*). It also derives support from the decision of the Judicial Committee of the Privy Council in *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* (*b*). In that case, it was held that, according to the Mahommadan law, it is not necessary, in order to constitute a *wakf*, "or endowment to religious and charitable uses," that the term *wakf* be used in the grant, if from the general nature of the grant such tenure can be inferred. We think that the converse of this proposition holds good, namely, that it is necessary, in order to

(*a*) 8 Calc. W. Rep. Civ. R. 13. (*b*) 2 Moo Ind. App. 390.

1873.
Abdul Ganne Kasam v. Hussen Miya Rahimtula,

constitute a *wakf*, that the endowment should be to religious and charitable uses, and that it is not sufficient that the mere term *wakf* should be used in the grant. To hold otherwise would be to enable every person by a mere verbal fiction to create a perpetuity of any description.

Now in the document with which we are dealing there is not, as it appears to us, the faintest indication, beyond the use of the word "wakf," that the persons making the settlement had any religious or charitable object in contemplation. We can see in it nothing but a spirit of family pride endeavouring to keep up a family house in perpetuity.

We are, therefore, inclined to hold that the settlement which the plaintiffs ask us to enforce, cannot be maintained on the ground that it is a *wakf*.

It is not, however, necessary that we should come to a positive decision on this point, because there are other grounds on which we think that the plaintiffs must fail. Even if the settlement could be maintained as *wakf*, it is more than doubtful whether the plaintiffs, as the sons of a daughter of one of the appropriators, could take under its provisions. They are certainly not included as beneficiaries under the terms "ayál" (family) or "aftál" (children). It is equally certain that they do not come within the term "furzundán," or its Arabic equivalent "awlád" (see Wilson's Glossary under "furzand"; Baillie p. 570 and note, p. 571 note; Macnaughten's Principles pp. 331 to 333). They are not "warrasan" or heirs, being only the first of the distant kindred. There is only one expression in the whole document, viz., "awlád dar awlád," under which they might possibly come in on the authority of Baillie p. 572. But the words there used are more comprehensive. Looking to the limited signification of the word "awlád," it would be difficult to hold that the mere reduplication of the word could have the effect of letting in an entirely new class of beneficiaries. It would be necessary that the words should be very clear and explicit, before they could be held to ad-

mit the descendants of females, who had married out of the family, since the admission of persons who would be comparatively strangers to the family, would apparently frustrate the whole object of the endowment.

On this ground, therefore, we are of opinion that the plaintiffs have failed to make out a case entitling them to any benefit from the settlement, even if the settlement could be held to be valid, which, in our opinion, it would be very difficult to hold.

Are they then entitled to succeed on any other ground? It must be regarded as a case of intestacy, and the plainntiffs as the first of the distant kindred, would be entitled, under ordinary circumstances, to a share of the inheritance. But they are met by the plea of the law of limitation, and it appears to us that the plea is a good one. Undonbtedly, if the original defendant, Rahimtula, was a trustee under the settlement, he could not plead the statute. But can he be considered to have been in possession at any time as a trustee? We think not. He was the son of Ahmed, the second of the three brothers who were the appropriators. By the terms of the settlement, the eldest surviving member of the fimily for the time being, whether male or female, was constituted the trustee. Accordingly on the death of the mother, Jijibái, the eldest son, muhammad, became trustee. On his death, he was succeeded by the third son Abdullá; Rahimtula's father, Ahmed, having intermediately deceased. Now, there can bo no doubt on the evidence that, in consequence of a quarrel with Rahimtulá, Abdullá left the house about the year 1835, and was followed by the plaintiff's father and mother. Abdulla went to reside in another house, in which, according to some of the witnesses, he died. Jamnábái and the plaintiff's father say that he returned to the family house and died there, but the other story seems the more probable. It is certain that the instrument creating the trust has always been in Jamnabái's possession, having been given to her, as she says, by her

1873.

Abdul Ganne Kasam v. Hussen Miya Rahimtula.

father, Abdullá, two months before his death. This seems to indicate that he regarded her, and not Rahimtulá, as his successor. There is nothing in the evidence to show whether she or Rahimtulá is the elder. If she be so, then under the terms or the settlement she would succeed to the trusteeship as a matter of right.

The matter then stands thus:—Rahimtulá has been in undisturbed possession of the house, to the exclusion of all other members of the family, for more than 33 years. His possession certainly was not, in its inception, the possession of a trustee, for another trustee was living, and there is nothing whatever to show that at any subsquent period it necessarily assumed that character, nor that he ever admitted himself to be a trustee, nor that, until a few months before the institution of the suit, he received any notice from the other members of the family that he was held to be a trustee. Under these circumstances, we must hold that his possession was adverse, and that any claim which the plaintiffs or Jamnábái may have by virtue of inheritance is barred by lapse of time.

We find on the first issue in the affirmative. We find the 4th, 7th and 8th issues in favour of the defendants other than Jamnabái. On the 9th issue we find in the negative. On the 2nd, 3rd, 5th, and 6th issues it is unnecessary to record any finding.

We pass a decree in favour of the defendants other than Jamnábái.

Jamnábái will pay her own costs. The plaintiffs will bear the costs of the other defendants.