Before Mr. Justice Morris and Mr. Justice Tottenham.

1881 *Feb.* 2.

MAHOMED HAMIDULLA KHAN (PLAINTIFF) *v.* LOTFUL HUQ AND OTHERS (DEFENDANTS).*

Mahomedan Law—Waqf—Construction of Deed of Endowment—Settlement on Person and his Descendants to three generations, and afterwards to Charity—Appropriations of Property by Settlement.

A Mahomedan settled a portion of his immoveable property as follows:—"I have made waqf of the remaining four annas in favor of my daughter *B* and her descendants, as also her descendants' descendants' descendants, how low soever, and when they no longer exist, then in favor of the poor and needy." *Held*, this settlement did not create a valid waqf.

To constitute a valid waqf, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes.

Semble.—Appropriations in the nature of a settlement of property on a man and his descendants can only be treated as legitimate appropriations under the designation of waqf, where the term sadukah is used.

Even supposing they could be so treated, it would be necessary, in order to validate a waqf by making a settlement of property on himself or his descendants, for a man to reduce himself to a state of absolute poverty.

THE plaintiff was the great grandson, on the mother's side, of one Moulvie Golam Sharuff, who was possessed, among other properties not now in dispute, of an eight-anna share of an estate called Kantabari. By a registered waqfnama dated 1st Bhadro 1248 (15th August 1841), Golam Sharuff made the following settlement of his share of Kantabari, together with some of the other properties:—"I have assigned eight annas of the abovementioned endowed properties for the mosque built by me, and the expenses thereof. Out of the remaining eight annas I have made waqf of four annas in favor of Mussamut Jamila Khatun, *alias* Dhun Bibi, daughter of my daughter, and her descendants, as also her descendants' descendants' descendants, so long as they may continue to have offspring; and when they no longer exist, then in favor of the poor and needy. I have made waqf of the remaining four

* Appeal from Original Decree, No. 152 of 1879, against the decree of Baboo Bhubun Chunder Mukerjee, Subordinate Judge of Dinagepore, dated the 23rd January 1879.

annas in favor of my daughter Bibi Budrunnessa and her descendants, as also her descendants' descendants' descendants how low soever; and when they no longer exist, then in favor of the poor and needy . . . . . After payment of the Government revenue and the collection charges, &c., and after deduction of the mutwalli's towliat right from the proceeds of all the abovementioned endowed properties, the surplus, whatever it may be, shall be divided as follows—*i. e.*, four annas thereof shall be given to Jamila Khatun, *alias* Dhun Bibi, and four annas thereof to Budrunnessa Bibi, inasmuch as four annas share has been endowed in favor of each of the said ladies, &c." Golam Sharuff appointed his wife, Nosima Bibi, as the first mutwalli; on her death, the mutwallis were to be Dhun Bibi and Budrunnessa Bibi, the first defendant, "both of whom will get the towliat right in two equal shares. One of the male descendants of each of these two Mussamuts, so long as such descendants may continue to have offspring, shall be appointed as mutwalli of the endowed properties, and each of the two mutwallis so appointed shall get the towliat right in two equal shares."

Golam Sharuff died in 1849. After the death of his wife Nosima, and his grand-daughter Dhun Bibi, Budrunnessa and the plaintiff had possession of the property as mutwallis, and administered it for some time under the waqfnama.

Subsequently, Budrunnessa, acting, as the plaintiff alleged, in collusion with her husband, the second defendant, executed a solehnama and mortgage of the entire eight annas shares of the estate Kantabari in favor of Roy Lutchmiput Singh, and in execution of a decree against Budrunnessa, obtained on the solehnama and mortgage, that property was put up for sale on 2nd April 1877, and purchased by the other defendants.

The present suit was brought to set aside that sale and recover possession of the property, on the ground, that being waqf or endowed property, it could not be alienated.

The only defence raised, which is material to this report, was, that the property belonged to Budrunnessa in her own absolute right, and was not endowed property.

The Subordinate Judge was of opinion that a waqf was

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created by the document only so far as a moiety of the disputed property was concerned. As to the share left to Dhun Bibi and her descendants, &c., and Budrunnessa and her descendants, &c., he was of opinion, referring to Baillie's Digest of Mahomedan Law, p. 571, that no waqf was created, but that those shares vested absolutely in the mutwallis.

The Subordinate Judge held, that the execution-sale was good as regarded the share which vested absolutely in Budrunnessa, amounting to two out of the eight annas, and therefore the suit was dismissed as to that share. As to the other shares the suit was decreed, four out of the eight annas to be held by the plaintiff and Budrunnessa as mutwallis, and the remaining two annas by the plaintiff alone as absolute proprietor.

The plaintiff appealed from this decision only as regards the share of the property decreed to belong to Budrunnessa absolutely. As to this he contended that it did not vest absolutely in Budrunnessa; that it was waqf property and inalienable; and that the sale of the property was therefore invalid, or at most could only stand good for the lifetime of Budrunnessa.

Baboo *Obhoy Churn Bose* and Baboo *Doorga Mohun Doss* for the appellant.

Baboo *Sreenath Doss*, Baboo *Tarucknath Palit*, Baboo *Mohiney Mohun Roy*, and Baboo *Gurudas Banerjee* for the respondents.

The judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

MORRIS, J.—There is no question that Moulvi Golam Sharuff executed the document styled a "waqfnama," which bears date 1st Bhadro 1248. The only question raised in this appeal is, whether the four annas, or rather the fourth share of the property which he appropriated under that deed to his daughter Budrunnessa, is, under Mahomedan law, a valid "waqf," or, in other words, that it is inalienable and incapable of being attached and sold in execution of a decree against Budrunnessa.

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The Subordinate Judge, relying upon a passage which is to be found in page 571 of Baillie's Digest of Mahomedan Law, is of opinion, that the "defendant No. 1, Budrunnessa, became absolutely vested in the two annas share out of the eight annas share of Kantabari, and so it became heritable and alienable." The passage in question is in these terms:—"If one should say, this my land is a *sadukah* settled on my child, and child of my child, the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards are included, and the two generations participate in the produce, but none below them are included, nor the children of daughters, according to the Zahir Rewayut; and the *putma* is in accordance with it. And if he should say, 'upon my child, and child of my child, and child of the child of my child, meaning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor," &c.

The lower Court is of opinion that if a person makes a settlement of his land in favor of his descendants to the third generation, the poor are absolutely excluded from all benefit in the appropriation, and that consequently the property becomes absolutely vested in the descendants of the appropriator. But it seems to us that what was meant in this passage is, that only so long as the descendants survive shall the poor be excluded from the benefit of the appropriation. It becomes necessary, therefore, to consider whether, under Mahomedan law, the settlement which has been made by Moulvie Golam Sharuff is of the nature of a valid waqf. The terms of the deed which bear upon this part of the case are as follows: (*reads* portion of waqfnama set out, *ante*, pp. 744-5.)

There has been much argument before us as to the real signification of the term "*waqf*." There is no doubt that there is a conflict of authority between Baillie and the other writers on Mahomedan law, Macnaghten and Hamilton, on this subject. But looking to the principal authority, the "Hidaya" as read by Abu Hanifa, who was undoubtedly a Sunori, to which sect the family of Golam Sharuff belong, and looking to the doctrines of his disciples, it seems to us that the balance

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of authority is strongly in favor of the view as stated by the Bombay Court in the case of *Abdul Ganne Kasam* v. *Hussen Miya Rahimtulla* (1)—*viz.*, that "to constitute a valid waqf there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes." Abu Hanifa, undoubtedly, in 2 Hidaya, Hamilton, p. 334, points out that the appropriation, that is waqf, must be to some "charitable" purpose. Now here it is manifest that the appropriation in favor of Budrunnessa is not in the nature of a charity. It is simply in the nature of a settlement upon the daughter—a settlement of property which was to be heritable and to be taken by Budrunnessa's descendants in certain shares. The words are clear; each daughter is to take four annas, and in the terms of the deed "four annas share has been endowed *in favor of each of the said ladies.*" If, therefore, the principle underlying a waqf is charity, and if the ultimate applications of property, the subject of "waqf," must be to objects which never become extinct, and those objects are all of a religious and charitable character, then this particular appropriation fails to answer to this description. Consequently the appropriation of the one-fourth share, which is the subject of this appeal, is invalid, and cannot be held to be "waqf."

There is, however, some force in the argument which has been addressed to us, that appropriations in the nature of settlement of property upon a man and his descendants have been treated by various exponents of Mahomedan law as legitimate appropriations under the designation of "waqf." But these settlements are all under Mahomedan law termed *sadukah*, and in the view, apparently, of Baillie, when a settlement of property is made in this way by a man in favor of his descendants, the term *sadukah* must be used.

But we do not gather that this term is employed in the deed of 1st Bhadro 1248. But further, even admitting that, under Mahomedan law, appropriations or rather settlements of this character can be made, it seems to us clear that the present appropriation falls outside the principle of "waqf." As explained in the case of *Abdul Ganne Kasam* v. *Hussen Miya*

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Rahimtulla (1), the doctrine of settlement rests entirely upon a saying attributed to the prophet—"a man giving subsistence to himself is giving alms;" but this doctrine only holds good according to Hamilton (2), "where a man appropriates *the whole* of his property, and so reduces 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 sustenance) as with respect to *any other pauper*." So that to validate a "waqf" by making a settlement of his property on himself or his descendants, a man must, in the view taken by the prophet, reduce himself to a state of absolute poverty. In the present case it is clear, and it is admitted by the both sides, that there are other properties vested in the appropriator besides those which are the subject of this deed. Consequently, it cannot be said that Budrunnessa has received this property as a pauper. In both points of view, therefore, it seems to us that this appropriation of a one-fourth share, or two annas out of eight annas of Lot Kantabari, cannot be treated as a valid waqf. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

UPOOROOP TEWARY AND OTHERS (DEFENDANTS) *v.* LALLA BANDHJEE SUHAY (PLAINTIFF).*

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Hindu Law—Mitakshara—Mortgage of Family Property—Sale of Interest of one of several Co-sharers in a joint Estate.

In a suit on a mortgage against a member of a joint Hindu family governed by the Mitakshara law, the whole of the interest of the joint family in the estate was decreed to the mortgagees, who subsequently obtained possession of it. Afterwards a suit was brought by another member of the family, who had attained majority prior to the mortgage, to set it and the decree aside, so far as he was concerned, and to recover possession of his share of the joint family property.

* Appeal from Appellate Decree, No. 2376 of 1879, against the decree of J. F. Stevens, Esq., District Judge of Shahabad, dated the 11th August 1879, modifying the decree of Moulvie Narul Hossein, Subordinate Judge of that district, dated the 30th December 1878.

(1) 10 Bom. H. C. R., 7, at p. 18. (2) 2 Hidaya, 351, note.