

**(1892) 03 CAL CK 0007**  
**In the Calcutta High Court**

Meer Mahomed Israil Khan

APPELLANT

Vs

Sashti Churn Ghose and Others

RESPONDENT

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**Date of Decision :** 18-03-1892

**Acts Referred:**

**Citation :** (1892) ILR (Cal) 412

**Hon'ble Judges :** O''Kinealy, J;Ameer Ali, J

**Bench :** Division Bench

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### Judgement

Ameer Ali, J.—This appeal arises out of a suit brought by the plaintiff under the following circumstances: Two Muhammadan ladies of the name of Azizunnissa and Kamrunnissa, respectively, were the owners, in possession, of the property in suit held as a shikmi taluq under the superior landlord. In the year 1286 they purported to make a wakf of their shares in various properties, including the one in suit. The wakfnama of Azizunnissa alone has been translated and printed in the paper-book; but the terms of both are said to be identical. Both the ladies by their respective deeds constituted themselves mutwallis in respect of the shares dedicated by themselves. And they provided that upon the death of either, the survivor should be the mutwalli or manager in respect of both shares, in other words, of the entire dedicated property, and that upon her decease the plaintiff should be the mutwalli. The plaintiff was a party to these deeds of wakf, which were duly registered in accordance with the provisions of the law in force at the time. Azizunnissa appears to have died first, whereupon Kamrunnissa became, under the wakfnama, the mutwalli of the entire wakf estate. From her position as a purdanashin lady she was naturally unable to carry on personally the work of management, which was entrusted at first to her husband, and after his dismissal to the first two defendants, who are brothers, by a registered am-mukhtarnama. In 1291 Kamrunnissa leased out the properties in suit to the third defendant, a brother of the first two. A default having been committed in the payment of the rent due to the superior landlord, he brought a suit and obtained a decree against Kamrunnissa. She died in 1886, and the decree was executed by the substitution of the name of Kamrunnissa's husband in her stead, and the

property in suit was put up to sale and purchased by the first three defendants in the name of the fourth.

2. The plaintiff brings this suit to recover this property from the defendants. He alleges, in substance, that the first two defendants, Sashti and Jogeshur, were the trusted servants of the wakf estate, and had the entire charge of the properties; that their duty was to look after and protect the same, to realize the rents from the tenants, and to pay the amount payable to the zemindar; that the ijara was taken by the three brothers jointly; that they did not pay the zemindar's rent, though they had in their hands money belonging to the wakf estate; that they gave no notice of the execution proceedings to the plaintiff, and that they brought about the sale in an irregular and fraudulent manner. He charges that their conduct was in breach of their fiduciary obligations, and he alleges that they are not entitled to retain the property purchased by them. He accordingly claims the recovery of the same.

3. The defendants raised various defences. They pleaded, *inter alia*, want of a cause of action on the part of the plaintiff and non-joinder; they alleged that the plaintiff was not a Mussulman; that the wakfnama put forward by the plaintiff was a fabricated document; that the ladies had no power to make a wakf; that the property was never called wakf; that they were never the tehsildars of the estate; that they were only charged with the conduct of Kamrunnissa's law-suits, and that they were innocent purchasers.

4. The Subordinate Judge framed several issues in the case, but it is unnecessary to set them out in detail. Shortly speaking, he found that the deeds of wakf were genuine; that the defendants Nos. 1 and 2 not only managed the law-suits, but realized monies from the tenants, and paid Government revenue as well as zamindar's rent; that they were in fact "all in all" and did everything in connection with the wakf estate. He found further that it was Sashti who conducted Kamrunnissa's defence in the rent-suit, and that both the defendants Nos. 1 and 2 were aware of the terms of the wakfnamas. In other words, he found, as a fact, that the defendants, with a full knowledge of the provisions contained in the wakfnamas, acted as *amlas* of the wakf estate. He found also that, though from their position they were bound to protect the property, they took no steps for its protection from sale. He stated "that the price was not fair is not denied". He held further that all the three brothers, who were joint in food and estate, were interested in the ijara. And he was of opinion that the wakf was valid, and that fraud was sufficiently established. He accordingly made a decree, directing the defendants to reconvey the property on the plaintiff paying into Court the purchase-money with interest.

5. On appeal, the District Judge agreed with the first Court in holding that the deeds of wakf were genuine and were duly executed by the ladies and acted upon; that the defendants Sashti and Jogeshur transacted all business connected with the dedicated property under a general power-of-attorney, and that the interests of the three brothers were identical. But he held that there was "no

fraud or collusion on the part of the defendants in failing to give notice of the sale to the plaintiff, or any misbehaviour and misconduct on the part of the defendants as would entitle the plaintiff to ask for a concealment of the sale-proceedings, and an invalidation of the defendants' purchase".

6. He also held that, in his opinion, the wakf was invalid. This latter position I shall examine later. The Judge does not upset the finding of the first Court, that the defendants were aware of the terms of the wakfnamas in question, and acted as sub-managers to the mutwalli with a full knowledge of their position as such, nor does he hold that the defendant Sashti had not the conduct of Kamrunnissa's defence in the rent-suit. He seems to think that the death of Kamrunnissa absolved the defendants from all fiduciary obligation towards the estate. In this view I cannot concur. The liabilities which spring from fiduciary relations are too clear to require discussion. It is conceded that had Kamrunnissa been alive she could have claimed a reconveyance of the property from the defendants, independently of any question of fraud. But it is said, as the District Judge has said, that the plaintiff has no right to maintain such a suit.

7. The position which the first two defendants held in connection with the estate is abundantly established, and both the lower Courts are agreed on that point. Though the defendants denied having anything to do with the estate of Kamrunnissa beyond looking after her law-suits, though they denied all knowledge of the wakf, going so far as to charge that the documents propounded were forgeries, it has been found that they were in fact entrusted with the entire charge of the dedicated property; that they transacted all business connected therewith; that they realized the rents, paid the sudder jama, and were in fact "all in all". It has been found also that they were aware of the terms of the wakf, which showed that the plaintiff was the manager in succession to Kamrunnissa. Assuming for a moment that the wakf purported to be created by the ladies did not amount to a valid dedication, the utmost that can be said is that the estate does not possess all the characteristics of a valid wakf. under the Muhammadan law. But how does that affect the position of the defendants? Assuming that it was not an absolute wakf, there can be no doubt that the deeds represented an arrangement by which certain people took an interest in the properties which formed the subject-matter of that arrangement. Kamrunnissa had succeeded to the management under the wakfnamas in question, and was in possession of the entire estate as mutwalli. She was, in fact, and could only be, in possession of her sister's share as a manager under that arrangement. Since her death the plaintiff occupies that position. As manager, and therefore acting on behalf of the endowment, she appointed the two defendants sub-managers, for that, it has been found, was their real position. Ordinarily, no doubt, the death of the principal would determine the agency. In the present case the defendants have not produced their am-mukhtarnama, though called upon to do so. It is, however, abundantly clear from the findings of the first Court, which have not been reversed by the Judge, that the lady was neither the owner, nor dealt with the estate as her own, and that they were not merely the amlas of the lady, as

owner, but of the endowment, and that they acted in that capacity with a full knowledge of the circumstances and the position of the parties. Besides, they were Court mukhtars, and had charge of all Court work connected with the estate. In my opinion, it does not lie in their mouths to say that their fiduciary relationship was one of a personal character which ceased with the death of Kamrunnissa. The Judge does not find that the defendants had been dismissed as soon as Kamrunnissa died. Any other conclusion, to my mind, would have a most mischievous tendency. Suppose, for example, the managing member of a joint Hindu family appointed a manager or attorney to transact the joint-family business, can it be contended that the death of the managing member would put an end to the fiduciary relationship of the agent, and the succeeding managing member could not sue him upon the basis of such relationship?

8. As regards that portion of the property which belonged to Azizunnissa, the position of the defendants is nowise different from that of Kamrunnissa herself in relation to the wakf created by her sister and the persons interested therein. Had Kamrunnissa purchased the property, the plaintiff, as representing the endowment, could have claimed a reconveyance from her.

9. The District Judge has wholly overlooked these considerations. He seems to think the fiduciary relationship was purely personal towards Kamrunnissa, and that as the plaintiff has failed to establish actual fraud, he is not entitled to any relief. I think this conclusion to be erroneous. To my mind the fiduciary position occupied by the defendants had relation to the endowment. This agency was, no doubt, created by Kamrunnissa, but it is clear that they were the servants and agents not of Kamrunnissa as owner, but of Kamrunnissa as manager; and the agency therefore could not and did not end with her death; and that, therefore, whether there was actual fraud on their part or not, the plaintiff, as representing the endowment, is entitled to demand a reconveyance just in the same way as Kamrunnissa could if she had been alive.

10. I have proceeded so far upon the assumption that the wakf did not amount to a valid dedication. I now proceed to consider whether the view taken by the Judge as to the character of the wakf is correct or not. The Judge on this point says as follows:

The Subordinate Judge, on the nature of the deed, concludes that there is nothing in the law or the quoted authorities to prevent bequests in favour of relatives and their descendants in perpetuity being inserted in a wakfnama and that a deed with such recitals is a valid wakf. So far as I understand the law, this argument is sound; that there is no prohibition against inserting such provisions in a wakfnama in favour of relatives, whether the latter are indigent or not, even if the grants are unlimited. The question in the present case is, was the charitable or religious dedication the primary object of the lady, or did the deed merely incorporate family settlements with the reservation, nominal as it is contended, for such objects as to constitute a valid wakf? It must be admitted that the deeds show no substantial dedication for charitable or religious

purposes. The annuities and allowances are determinate, the charges to be incurred for performance of festivals are left undefined, and would necessarily have to be met from the residue of the annual income of the property, after satisfaction of the fixed demands, if any such surplus were available. Under these circumstances, whatever may be the income of the property devoted, it is evident that provision for the members of the family was the primary intention of the grantor, and the application of the funds to purposes covered by wakfnamas merely contingent. The lower Court, of course, had not the ruling of the Privy Council in *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* ILR 17 Cal 498; ILR 17 IndAp 28 before it, as an authority in connection with an enquiry as to the essential conditions necessary to constitute a valid wakf. The facts of the present case are not so pronounced as the one the Privy Council dealt with, so far as the immediate motive was the aggrandisement of the family. This was practically a family settlement with recitals in the deeds to represent them as wakfnamas, in order to obtain advantages accruing to documents of that character.

11. In the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* ILR 17 Cal. 498; I. L.R. 17 IndAp 28 referred to by the Judge, their Lordships of the Privy Council expressly abstained from laying down any general definition. The words used by them in this respect are too important to be ignored. They said--"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid wakf, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses, which is only to take effect after the failure of all the grantor's descendants, is an illusory gift, a point on which there have been conflicting decisions in India". Nor do the facts of that case or the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* ILR 18 Cal. 399 cited at the Bar by respondent's counsel bear the least analogy to the present case. It must not be understood, however, that I assent to the principles laid down in the latter case.

12. It was contended that the Judge has found that the wakf was not valid, and that the intention was to create a family settlement, and that these conclusions, being findings of fact, cannot be impugned in special appeal. I do not think this contention could have been advanced seriously. Analysed properly, the Judge's conclusion amounts to this. A wakf (he seems to think), in order to be valid, must be a substantial dedication for charitable or pious purposes in the English sense of the terms; here it is not so, ergo it is not a valid wakf. This is as pure a question of law as can be imagined. The two points which the Judge had to consider were, in my opinion, the following: (i) What is necessary to constitute a lawful wakf under the Mussulman law; and (ii) whether the wakfnamas in question comply with the requirements of a lawful wakf. Both these points involve questions of law.

13. In dealing with the first question, viz., what is necessary to constitute a

lawful wakf under the Mussulman law, it is necessary to make one observation. In the Mussulman system law and religion are almost synonymous expressions, and are so intermixed with each other that it is wholly impossible to dissociate the one from the other: in other words, what is religious is lawful; what is lawful is religious. The notions derived from other systems of law or religion form no index to the understanding or administration of the Mussulman law. The words "piety" and "charity" have a much wider signification in Mussulman law and religion than perhaps in any other. Every "good purpose", wujuh-ul-khair (to use the language of the Kifaya), which God approves, or by which approach (kurbat) is attained to the Deity, is a fitting purpose for a valid and lawful wakf. A provision for one's children, for one's relations, and under the Hanafi Sunni law for one's self, is as good and pious an act as a dedication for the support of the general body of the pool. The principle is founded on the religion of Islam, and derived from the teachings of the Prophet.

14. I will give here a few passages from some of the best known authorities to show how utterly opposed the view taken in this case is to the Muhammadan law. The Fath-ul-kadir says--"Literally, it (the word wakf) signifies detention,...in law...according to the disciples, the tying up of property in such a manner that the substance (asl=corpus) does not belong to anybody else excepting God, whilst the produce is devotee to human beings, or is spent on whomsoever he (the wakif) likes; and the reason of it is that, though a desire to approach the Deity (kurbat) should form the ultimate motive of all wakfs, yet if, without such an (immediate) desire, a person were to dedicate a property in favour of the affluent (aghnia), the wakf would be valid in the same way as a wakf in favour of the indigent or for the purposes of a mosque; for, in giving to the affluent there is as much kurbat as in giving to the poor or to a mosque, and though the profit may not have been given to the poor on the extinction of the affluent [still] it is wakf and will be treated as wakf even before their extinction. This principle is founded on the reason that the motive in all wakfs is to make one's self beloved by doing good to the living in this world and to approach the Almighty in the next....

15. "In wakf Islam is not a condition; consequently if a Zimmi makes a wakf on his children and his posterity and gives it at the end to the indigent, it is lawful [equally with that made by a Moslem]. And it is lawful in such a case to give the usufruct conditioned for the indigent to the poor of both Moslems and Zimmis. The wakif may lawfully condition to give the usufruct solely to the poor of the Zimmis, and in that will be included Jews and Christians and Magians; or he may condition that a special body of them may get the produce (i)...whatever condition the wakif makes, if it is not contrary to the Sharaa, will be lawful. And so long as the object is not sinful, the wakif may give to whomsoever he likes.... According to Abu Yusuf the mention of perpetuity [or dedication to an object of a permanent nature] is not necessary to constitute a valid wakf, for the words wakf and sadakah conjunctively or separately imply perpetuity.... In the Baramika it is stated that, according to Abu Yusuf, when a wakf is made in favour of specific

individuals, on their extinction the profits of the wakf will be applied to the poor (2).... Among the wakfs created by the Sahaba [companions of the Prophet]...the first is the wakf of Omar (may God be pleased with him) of his land called Samagh [at Khaibar]...that created by Zobair bin Awwam of his house for the support of his daughter who had been divorced (by her husband);...that of Arkam Mukhzumi, on his children of his house called Dar-ul-Islam at Safa (near Mecca), where the Prophet used to preach Islam, and where many of the disciples, among them Omar, accepted the Faith.... Baihaki in his Khilafiat has stated upon the authority of Abu Bakr Obaidulla bin Zubair that (the Caliph) Abu Bakr (may God be pleased with him) had a house in Mecca which he bestowed in charity upon his children, and that it is still in existence.... And Saad ibn Abi Wakkas bestowed in charity his houses in Medina and Egypt upon his children, and that wakf is still in existence, and (the Caliph) Osman (may God be pleased with him) made a wakf of Ruma, which exists until to-day, and Amr-ibnal-Aas [the Amru of European history], of his lands called Wahat in Tayef, and of his houses in Mecca and Medina upon his children, and that (wakf) also is still continuing (3).... According to Abu Yusuf the wakif may lawfully retain the governance of the trust, or reserve the profits for himself during his lifetime. This has been fully dealt with by Kuduri in two parts.... The jurists, Ahmed ibn-i-Abi Laila, Ibn Shabarma, Zahri, and others, agree with Abu Yusuf. Mohammed alone holds a contrary opinion.... Abu Yusuf bases his rule upon the practice and sayings of the Prophet himself who used to eat out of the produce of the lands dedicated by him.... Another proof in support of Abu Yusuf's rule is that the meaning of wakf is to extinguish the right of property in one's self and consign it to the custody of God. Therefore, when a person reserves the whole or a portion of the profits for himself, it does not interfere with the dedication, for that also implies the approval of the Almighty and is lawful.... For example, if a man were to dedicate a caravanserai and make a condition that he may rest in it, or a cistern and condition that he should take water from it, or a cemetery, and say that he may be buried there, all this would be lawful. [Further] our Prophet (may the blessings of God be with him) has declared that a man's providing for his subsistence is a sadakah (an act of piety or charity). This Hadis has been substantially handed down by a large number (of people) and is authentic, and Ibn Maja states from Mikdam bin Maadi Karib that the Prophet declared that no gain of a man is so meritorious as that which he earns by the labour of his hands; and that which he provides for the maintenance and support of himself, the people of his household, his children and his servants, is a sadakah. And Imam Nisai from Bakia and he from Buhair has given the same tradition in these words: "Whatever thou providest for thyself is a sadakah". Ibn Haban in his Sahih states that Abu Said reports from the Prophet that anyone who acquires property in a lawful manner, and provides therewith for his maintenance and for that of the other creatures of God, gives alms in the way of the Lord.... And Dar Kutni reports from Jabir that the Prophet (may God's blessing be with him)...declared that all good acts are sadakah, and that a man providing subsistence for himself and his children and his belongings, and for the

maintenance of his position, is giving charity in the way of God.... Tibrani has reported from Abi Imama that the Prophet of God declared that a man making a provision for his own maintenance, or of his wife, or of his kindred, or of his children, is giving sadakah. And in the Sahih of Muslim it is stated from Jabir that the Prophet told a man to make a beginning with himself and give the remainder to his kinfolk. All these traditions support Abu Yusuf's Rule and Sadr-ush-Shahid has laid down that decisions are passed according to Abu Yusuf's opinion, and we decide according to it". (1)

16. I have quoted this passage at length in order to show what the Mussulman law really is. That decisions are passed according to Abu Yusuf is also laid down in the Fatawa-Alamgiri [Baillie's Dig. (2nd ed.), p. 567; Alamgir, Vol. II, p. 460].

17. As a matter of fact, there is absolutely no difference among Mussulman lawyers of any school or sect regarding the lawfulness of wakf in favour of one's children and descendants. The authors of the Radd-ul-Muhtar (quoted in this country as the Shami) and of the Majmaa-ul-Anhar lay that down in distinct terms. The latter is most explicit: "There is no difference if a person conditions the profits of a wakf for his children, and accordingly in such a wakf male and female (children) will take together, unless he condition for the males alone"(2).

18. With regard to the reserve of a part or the whole of the income by the wakif for his own use during his lifetime, there is a divergence between Abu Yusuf and Mohammed. The former holds it to be lawful, and the rule laid down by him is recognized as law in almost every Hanafi country, with the exception, perhaps of Bokhara. It is the law in India, in Turkey, in Irak, Afghanistan and Transoxiana. In the Fatawa-Alamgiri it is stated that the Fatwa is with Abu Yusuf; in other words, decrees are passed according to his rule. In the Asaaf, the Kazi Khan, the Radd-ul-Muhtar, the Majmaa-ul-Anhar, Ghait-ul-Bayan,--in fact in every law work, it is laid down that the rule of Abu Yusuf is the recognized and accepted law, and it was so distinctly enunciated in Doe d. Jaun Beebee v. Abdollah Barber (Fulton, 345).

19. In the Hawi (written in the sixth century of the Hegira and frequently quoted in the Alamgiri) the rule is thus stated: "If a man make a wakf with this condition that so long as he lives he shall eat out of it and feed others, and on his death his children will have the same right in it, and similarly his children's children in perpetuity so long as his posterity lasts, that they should eat out of it and feed others too; this wakf is valid on this condition. This is according to Abu Yusuf, and it is accepted as authority for the Fatwa". (1)

20. There are two other matters on which Abu Yusuf and Mohammed are at variance. According to Mohammed, a wakf is not operative until it has been consigned to a mutwalli, nor unless the ultimate application be destined for an unfailing object. According to Abu Yusuf, on the contrary, it is operative and obligatory the moment the wakif declares be constitutes a particular property as wakf. Nor is it necessary, according to him to specify the ultimate application of

the wakf. It is enough if the word wakf is used, for that implies perpetuity, and if the reversion is not expressly given to an unfailing object, the law will supply the deficiency. My meaning will be clear from the following passages. The Radd-ul-Muhtar lays down: "Abu Yusuf holds the declaration of wakf to be like a declaration respecting the emancipation of a slave. Accordingly he does not consider a transfer necessary. According to him the wakf becomes binding and operative on mere declaration like the declaration for emancipation...and it extinguishes the right of property, and this is stated in the Durrar [al-Ahkam] and it is correct". "Perpetuity is a condition by consensus, but according to Abu Yusuf its mention is not necessary...and if a man says "I make this dedication on my children" and add nothing further, it is valid according to him.... According to Abu Yusuf the mention of the word wakf or sadakah implies perpetuity, and consequently it is stated in the "Book" [Mukhtasur-al-Kuduri] that such a wakf is valid, and after the failure of the children it will be for the poor, though they are not named, and this is correct".

21. The Ramz-ul-Hakaik, after stating the origin of wakfs, adds "besides the incidents of a wakf are that it cannot be sold, nor can it be given by gift, nor can it be inherited, and its produce may be spent on the poor and relatives and travellers, and the wakif may eat thereof.... And according to Abu Yusuf mere saying that, "I have made this property wakf," is sufficient to extinguish the proprietary right of the wakif, for by that the property is assigned over to God, like the emancipation of a slave, and in this view the other three Imams agree, viz., Shafei, Malik, and Hanbal...and says Abu Yusuf, that even if an object is mentioned that is likely to fail, still the wakf will be valid, and after the extinction of the object named, the produce will be given to the poor, even if the poor are not mentioned".

22. According to Abu Yusuf, whose opinion, it will be seen, is the recognized law, a declaration of wakf is like a declaration of emancipation. The meaning of this passage has not, I am afraid, been fully apprehended or appreciated by our Courts of Justice. When a man declares that he has emancipated his slave, or that he emancipates him, the master's right of property in the person of the slave, under the Mussulman law, becomes extinguished immediately.

23. There can be no reserve or condition in such an act. Neither the emancipator nor his heir, nor any person deriving title from him, can say that in making that declaration he had no intention of making a bona fide emancipation or of setting free the slave absolutely. Abu Yusuf puts a declaration of wakf on the same footing as a declaration of emancipation. A wakif's right becomes extinguished immediately with his declaration, and neither he nor anybody else can say that when he made the declaration he had no intention to create a valid dedication.

24. The Courts of Justice have repeatedly laid down that it is in accordance with "justice, equity and good conscience" that the Mussulman law should be administered to Mussulmans on all these questions. To hold that a wakf in favour of one's descendants and kindred is not valid would be, in effect, to abrogate an

important branch of the Mussulman law. It is difficult to understand what the Judge means when he says that this is not a wakf "substantially for charitable or religious uses". The words "charitable" and "religious" must be understood from a Mussulman and not from an English point of view. If the Judge means to say that a provision for one's children and kindred is not a charitable and religious act, according to the Mussulman law, he is clearly wrong.

25. In this particular case the wakf is in favour of some of the wakif's kindred. The executant of the deed, which is to be found in the paper-book, begins with the statement that in 1281 she had executed a wakfnama dedicating her properties to God in order to secure welfare in her passage to the next world, as well for the purpose of providing expenses for good and charitable acts and the salvation of her soul". She then goes on to say that the rules laid down by her for the management of the property and the application of the income were not clearly stated. She now fixes amended and correct rules for religious purposes, and for the use of the profits of her properties in pious acts and in acts tending to the righteous path and to benefit the people. In effect, the new deed was confirmatory of the first, and emphasised the absolute divestment of all proprietary interest in the properties and their complete dedication to pious or religious purposes. She then provides for the governance of the trust; she constitutes herself the first mutwalli; she declares that after her death her sister, if surviving, will take her place, and upon her death the plaintiff would succeed.

26. In paragraph 2 she provides that during her lifetime, or so long as she would like to act as a mutwalli, she would make gift to the poor and indigent, and maintain and clothe them and supply their other expenses, according to the rules observed during the Ramzan, Eed, Bakri-Eed, Barwafat and other festivals; and that from "the remaining income" of the property she would supply her own personal expenses. She then proceeds to lay down the rule for the application of the income after her death:

On my death from the income of the wakf property specified in the schedule below, the Government revenue, the collection charges and expenses connected with litigation, as well as a sum of Rs. 400, as annual allowance to the mutwalli for the time being, shall be paid in the manner stated below; from what remains or shall be collected, monthly allowances shall be given to my relatives and old servants managing their duties in proper and dutiful manner. Half of what remains shall be expended according to the custom for the festivals of Ramzan, Eed, Bakri-Eed, and other religious ceremonies, and in making gifts to the poor and indigent, and in maintaining travellers and persons who take shelter after sunset. The remaining of the profits shall be kept with the mutwalli as a ready and separate fund for the protection of the property from danger.

27. In other words, during the wakifs lifetime the income is to be applied partly in giving relief to the needy and partly in defraying the expenses of certain religious festivals and those connected with her own self. After her death, the income is to be divided into three parts, one portion is to be given to a specified

body of individuals, some of whom are relations, and others, servants, and on their decease to their descendants in perpetuity; the second, to strictly religious and charitable purposes; and the third to be kept for the protection of the estate. Each and every provision is perfectly lawful under the Mussulman law.

28. Even had she primarily reserved to herself an interest in the income for her life, and the right of giving allowances to the persons named and disbursing the religious expenses according to her discretion, there would have been nothing illegal or contrary to the provisions of the Muhammadan law in such a condition. In the wakfnama, which formed the subject of discussion in *Doe d. Jaun Beebee v. Abdollah Barber* (Fulton, 345) there was a condition to that effect, and it was held to be valid. The provision that in case the mutwalli refuses to pay the allowances, the annuitants would be entitled to recover the same by suit does not affect the wakf. Under the Mussulman law, they would have been entitled, even without such provision, to have recourse to the kazi. These allowances, it is admitted, cover about half the income. A portion of the balance is to be devoted for the maintenance of the property, which is absolutely valid under the Mussulman law. From the remainder certain strictly religious and charitable expenses are to be defrayed. In case of the failure of the issue of the annuitants, the lapsed annuities are to be applied to the same purposes. So that in the end the entire income will become applicable to strictly religious purposes--see *Muzhurool Huq v. Puhraj Ditarey Mohapattur* 13 W.R. 235.

29. The Judge says there is no sum specified for what he calls the substantial religious and charitable expenses. He considers this a circumstance which militates with the idea of its being a valid wakf. This notion is clearly founded on a misconception. In Muhammadan wakfs, the amount discussable in charity to the poor, when such charity begins simultaneously with a provision for the members of the wakifs family, is often left unspecified, or only partially specified, not with the object that the wakif's children may get more, but that the right of the poor to get relief may not be restricted.

30. For all these reasons, I am of opinion that the judgment and decree of the Appellate Court must be set aside, and the decree of the first Court restored.

O'Kinealy, J.

31. I concur in the judgment which has just been delivered by Mr. Justice Ameer Ali, and on both the points.

32. It seems to me clear that the purchasers were the servants of the endowment, whose duty it was to protect the dedication and to get the best price for the property which was sold. They put themselves in the position in which their duty and interest conflicted; they bought the property; and, according to the code of morality administered both here and in England, it is quite clear to my mind that the purchaser can be called upon to transfer the property to the endowment. If servants employed in the management of property, whether temporal or religious, who are in a position to find out flaws in the title under

which the property is held, are allowed to buy the property for themselves, and retain it, many estates will be ruined in this country. I therefore agree with what has been said by my learned colleague, and hold that the death of the lady did not destroy the duty of the purchasers of returning, the purchased property, when called on to the endowment under which they served so long.

33. Nor, to my mind, is the rule by which we should be guided in deciding what constitutes wakf less clear. We know it must be an endowment for religious or charitable purposes; and if we want to interpret a document of that kind, what we must naturally look to is what is really meant by the words "religious" or "charitable" among Muhammadans. As an example, we know the words "charitable purpose" in Scotland have quite a different meaning from that in which they are used in England. And so in India, in judging of what is really meant by the words "religious" and "charitable" by a Muhammadan, we must take the view which their law takes, and not what is to be found in the English Dictionary.

34. I therefore agree with my learned colleague in thinking that the findings of the Judge do not cover the case. He has not found that according to the Muhammadan law the object of the wakf was not religious or charitable; what he has found is that the objects are not charitable and religious according to the ordinary use of the words. This, I think, is not sufficient.

35. I therefore hold that the decree of the Lower Appellate Court should be set aside, and that of the Court of First Instance restored with costs.