

(1919) 06 CAL CK 0022
In the Calcutta High Court

Nawab Khaseh Habibullah Saheb and Others

APPELLANT

Vs

Khajeh Soleman Quader and Others

RESPONDENT

Date of Decision : 06-06-1919

Acts Referred:

Mussalman Wakf Validating Act, 1913 — Section 3

Citation : 53 Ind. Cas. 764

Hon'ble Judges : Walmsley, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the defendants in a suit for recovery of money claimed for arrears of maintenance allowance and for the cost of construction of a house. The claim for allowance has been decreed by, the trial Court, while the claim for cost of erection of the house has been dismissed. The plaintiffs have not preferred a cross, appeal with regard to the portion of the claim disallowed by the Court below, and we are consequently concerned in this appeal solely with the question of the validity of the claim for arrears of-maintenance allowance. That claim is based on a document called a "deed of agreement" executed by the late Nawab Sir Asanulla of Dacca, father of the 1st defendant. A brief recital of the family history of the defendants and of the events which led up to the agreement in question is necessary for the appreciation of the questions in controversy between the parties.

2. Khaja Abdulla, who came from Cashmere, set up an extensive trading business in the town of Dacce, and settled there towards the end of the eighteenth century. He left four sons, Khaja Asanulla, Hafizulla, Khaja Abdul Azim and Khaja Abdul Karim. Hafizulla, after the death of his father, became the head of the family and died about the year 1831. He was succeeded by his son Abdul Gaffur who was followed by his cousin Alimulla, the son of Asanulla. On the 28th September 1835 this Alimulla made a gift of a sum of two lacs of rupees in favour of his son Abdul Gani, followed, on the 26th December 1845, by a deed of gift of valuable immovable properties. On the 8th May 1846 the other members

of the family created a wakf of which Abdul Gani was made the mutwalli. This document recited that the custom of the family had been to appoint one of the members as the head, who granted allowances to the others and was accepted by them as the leader of the family; it was stated explicitly that the object of the wakf was the maintenance of the members of the family. It was also provided that the mutwalli would not be liable to be removed and would have authority to appoint his successor. On the 11th September 1868 Abdul Gani executed a tauliatnama, whereby he transferred the mutwalliship to his son Asanulla and also executed a deed of wakf whereof he appointed his son Asanulla as a mutwalli. The wakf was created "in favour of all his sons, offspring and all the members and relatives descended from his grandfather, and was descendible to children in the male and female lines, and on their failure, in favour of the fakirs and the poor indigent of Dacca." There can be no doubt as to the purpose of the wokf, because it was expressly recited that the wakf was created for the maintenance of the members of the family, generation after generation. To remove the possibility of all doubt on this point, the founder added:

3. The object of the wakf of the properties is this, that they be protected from injury and ruin and that the name and dignity of the family be maintained and that the profits of the estate be, according to the practice and usage of the family, spent for the improvement of the position and dignity of the family, for the comfort and benefit of the persons in whose favour the wakf is made, and for the performance of worldly and religious affairs and of charitable acts."

4. Rules were laid down for the management of the wakf properties, for succession to the office of mutwalli and for other like matters, and there was a somewhat remarkable provision that none of the beneficiaries would be competent to demand accounts from the mutwalli. The mutwalli appears to have carried out the directions of the founder for many years. But harmony could not well be maintained for all time to come in an ever-growing family, and on the 2nd September 1880 a suit was instituted by some of the members against Nawab Sir Abdul Gani and Nawab Asanulla. The plaintiffs repudiated the tauliatnama of 11th. September 1868, and claimed to recover more than two lacs of rupees on settlement of accounts. Nawab Asanulla filed his written statement on the 1st December 1880, wherein he relied upon the tauliatnama and repudiated the claim for accounts as inconsistent with the rights created thereunder. The trial of the suit extended over many months, and judgment was reserved on the 11th August 1881. The friends and well wishers of the family including the then Lieutenant-Governor and the District Judge), however, intervened with a view to bring about a settlement of the disputes. Their endeavours were successful, and en the 26th August 1881 an application was presented to the Subordinate Judge by the plaintiffs for leave to withdraw the suit without right reserved to institute a fresh suit on any cause of action which formed the subject-matter of the suit. This application was based on a memorandum of agreement executed on the same date (Exhibit 12), which was followed on the 17th September 1881 by a supplementary deed of agreement

(Exhibit 11) specifying the amount of monthly allowance payable to each member of the family out of the income of the wakfs of 8th May 1846 and 11th September 1868, respectively. The application for withdrawal of the suit was accepted by the Subordinate Judge and the order for withdrawal was made on the 21st September 1881. The claim for arrears of maintenance allowance in the present litigation is based on the two documents just mentioned, dated 26th August 1881 and 17th September 1881.

5. The anticipations of the friends and well-wishers of the family for final settlement of all controversy were, however, not realised. In 1889 the decision of the Judicial Committee in *Mahomed, Ahsanullo v. Aman-chand Kundu* 17 G. 498(P.C.); 17 I. A. 28; 5 Sar. P. C. J. 476; 8 Ind, 8 Ind Dec. (N. S.) 871, negated the validity of wakfs made in favour of the family and descendants of a settlor without an ultimate substantial trust for the poor or for other religious or charitable purposes. The true position was made still clearer by subsequent judicial pronouncements, specially these in *Bikani Mia v. Shuk Lal* 20 C. 116 (F. B.); 10 Ind. Dec. (N. S.) 79, and *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhury* 22 C. 619 (P. C.); 22 I. A. 76; 6Sar, P. C. J. 572; 11 Ind. Dec. (N. S.) 412, In these circumstances, legal advice was not difficult to obtain, and on the 2nd April 1894 Nawab Sir Abdul Gani instituted a suit against his son Nawab Asanulla and the other members of the family to test the validity of the wakf of 11th September 1868 and of the agreements of the 26th August and 17th September, 1881. The father of the present plaintiffs, who was one of the defendants in that litigation, repudiated the agreement as fraudulent. During the pendency of this suit, some of the other members of the family instituted a suit on the 17th September 1894 against Nawab Sir Abdul Gani, Nawab Asanulla and others for declaration of the invalidity of the wakfs of 1846 and 1868 and of the agreements of 1881, for accounts and possession, and for other incidental reliefs. Throughout these two litigations, questions were raised as to the title to the properties covered by the wakfs, and the suggestion was made that should the wakfs be pronounced invalid, the properties must be divided amongst the persons found entitled thereto. But neither of the two suits mentioned led to a decision on the merits. The suit instituted by Nawab Sir Abdul Gani was withdrawn on the 20th March 1895. The suit instituted by the members of the family abated by reason of the death of some of the numerous parties, and an order to that effect made by the lower Court on the 9th September 1907 was confirmed by this Court on the 4th August 1914. On the 19th November 1895 some of the members of the family instituted a suit against Nawab Sir Abdul Gani and Nawab Asanulla for partition and possession of all the family properties on the assumption that no valid wakf was in existence. On the 29th September 1896 Nawab Asanulla filed his written statement wherein he did not repudiate the challenge thrown against the wakfs, but claimed to be in possession of the properties comprised therein, subject to the true meaning and legal effect of the agreement for grant of maintenance. The issues were settled on the 3rd July 1899. But we are informed that the suit has never come on for trial by reason of

the successive deaths of the numerous parties enrolled as plaintiffs and defendants. Meanwhile, as the plaintiffs allege, the Nawab has discontinued the maintenance, and they have instituted this suit for enforcement of their rights under the agreements to which they themselves were not parties. In fact, the plaintiffs were infants at the date of the institution of this suit and attained majority on the 21st September 1912 and 11th October 1913 during the pendency of the trial in the Court below; this shows that they were born sometime after the agreements of 1881, which is the foundation of their claim. The substantial matter in controversy thus is, whether there is a valid agreement enforceable at the instance of the plaintiffs. For the determination of this question, it is necessary to investigate two preliminary points, namely, first, are the wakfs valid in law? and secondly, if not valid in their inception, have they been validated by the Mussalman Wakf Validating Act, 1913.

6. As regards the first question, there has been no serious controversy between the parties in this Court that according to the decisions of the Judicial Committee the wakfs were invalid. The gift to charity was illusory and the chief if not the sole object of the settlor was to create a settlement in perpetuity for the aggrandisement of the family: *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhury* 22 C. 619 (P. C.); 22 I. A. 76; 6Sar, P. C. J. 572; 11 Ind. 11 Ind. Dec. (N. S.) 412, *Mujibunnissa v. Abdur Rahim* 23 A. 233 (P. C.); 5 C. W. N. 177; 28 I. A. 15; 11 M. L. J. 53; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829, *Muhammad Munawar Ali v. Razia Bibi* 27 A. 320 9 C. W. W. 625 (P. C.); 2 A. L. J. 513; 2 C. L. J. 179; 15 M. L. J. 261; 32 I. A. 86; 8 Sar. P. C. J. 788, The test to be applied in cases of this character is, whether there is a substantial dedication of the property to charitable uses at some period of time or other [*Mahomed Ahsanallav. Amarehand Kundu* 17 C. 498 (P. C.); 17 I. A. 28; 5 Sar. P. C. J. 476; 8 Ind Dec. (N. S.) 871, or as Lord Roortson put it in *Mujib-un-nissa v. Abdur Rahim* 23 A. 233 (P. C.); 5 C. W. N. 177; 28 I. A. 15; 11 M. L. J. 53; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829. the deed is a valid wakf, if its effect is to give the property in substance to charitable uses; it is not so, if the effect is to give the property in substance to the testators's family: *Ramanadan Chettiar v. Vava Levvai Marahiyar* 39 Ind. Cas. 235; 25 C. L. J. 224; 40 M. 116; 32 M. L. J. 10; 15 A. L. J. 139; 5 L. W 293; (1917 M. W. N. 180; 2 M. L. T. 25; 21 C. W. N 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 P. C.) The first point must consequently be decided in the sense that the watfs were cot valid according to the rule laid down by the Judicial Committee.

7. As regards the second question, it has been contended on behalf of the plaintiffs-respondents that the Mussalman Wakf Validating Act, 1913, which received the assent of the Governor-General on the 7th March 1913, is a declaratory Act and is consequently retrospective in operation. It need not be disputed that; Statutes which are properly of a merely declaratory character have a retrospective effect, because if the Statute is in its nature declaratory, the argument that it must not be so construed as to take away pre existing rights, ceases to be applicable: *Attornsy-General v. Theabald* (1890) 24 Q B. D. 557; 62

L. T. 768; 38 W. R. 587, But as was pointed out by Lord Halsbury, L. C., in the case of *Harding v. Commissioners of Stamps for Queensland* (1898) A. C. 769 ; 67 L. J. P. C. 144; 79 L. T. 42; 14 T. L. R. 488, the nature of the Statute must be determined from its provisions and the "mere fact that the expression it is declared" has been used is by no means conclusive as to the true character of the legislation. Tested in the light of this principle, what is the position in the case before us ? The preamble states the object of the legislation, namely, that as doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes, it is expedient to remove such doubts. This, read by itself, is ambiguous, and may be taken either to include wakfs to be created in the future as also wakfs created in the past or to be limited only to future wakfs. These are the alternative constructions which can be applied to the preamble. Section 1 states that the Act may be called the Mussalman Wakf Validating Act, 1913. Section 3 then provides as follows:-"It shall be lawful for any person professing the Mussalman faith to create a wakf (which fulfils certain specified conditions). Section 4 finally provides that "no such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poorer other religions, pious or charitable purposes of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf." The language used in Sections 3 and 4 leaves no room for doubt that the Legislature intended to make the provisions applicable only to wakfs created after the date of the enactment. If the intention had been otherwise, language suitable for the purpose might easily have been used. In the absence of clear provision to that effect we cannot possibly hold that the Legislature intended to affect numerous titles which might have been accepted on the faith of the correctness of the law as expounded by in the Empire. The legislation in fact is not even in terms a purely declaratory Statute; in reality, it effects a vital alteration in the law. We are consequently unable to accept the contention that the Mussalman Wakf Validating Act, 1913, is retrospective in operation, and our conclusion is in harmony with that adopted in *Rahim-un-nissa Bibi V. Manik Jan* 27 Ind. Cas. 93; 19 C. W. N. 76, *Muhammad Bukth Majumdar Ajmon Raja* 32 Ind. Cas. 701; 43 C. 58; 19 C. W. N. 967, *Amir Bibi v. Aziza Bibi* 26 Ind. Cas. 906; 16 Bom. L. R. 977; 89 B. 563, *Ramanadan Chettiar v. Vava Levval Marakayar* 39 Ind. Cas. 235; 25 C. L. J. 224; 40 M. 116; 32 M. L. J. 10; 15 A. L. J. 139; 5 L. W. 293; (1917 M. W. N. 180; 2 M. L. T. 25; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 L. A. 24 (P. C.)), We hold accordingly that the wakfs under consideration, which were invalid in their inception, have not been validated by retrospective operation of the new legislation. This brings us to the fundamental point in the case, namely, the construction and legal effect of the agreements embodied in the deeds of 26th August and 17th September 1881.

8. As regards these agreements, we may state that in view of the invalidity of the wakfs which constitute the foundation of the entire transaction, an ingenious

endeavour has been made on behalf of the respondents to put a forced construction on them not justified by the plain language of the documents. It is consequently useful to bear in mind a well known rule of construction of documents which offend against the rule against perpetuities, namely, that the instrument is to be construed without reference to the rule and then the validity of the disposition is to be tested by the application of the rule. See the observations of Baron Parke and of Patteson and Maule, JJ., in *Daungannon v. Smith* (1846) 12 CI. & F. 546 ; 10 Jur. 721; 8 E. R. 1523; 69 R. R. 137, Lord Selborne, L. C., emphasised the principle in *Pearks v. Moseley* (1880) 5 App. Cas. 714 ; 50 L. J. Ch 57; 43 L. T. 419; 29 W. R. 1, in the following terms: "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrested to something different, for the purpose of escaping from the consequences of that law. So understanding the rule, the first question in every case of this kind is that of pure and simple construction-what is the meaning of the words used? What would their effect be if there was no law of remoteness?"

9. Let us now analyse the agreement which forms the foundation of the claim. The fundamental document of the 26th August 1881 consists of twenty paragraphs. The first paragraph provides for the re constitution of the suit then pending. The second paragraph provides that in the suit as reconstituted, all charges of fraud against the Nawabs and their ancestors shall be withdrawn. The third, fourth and fifth paragraphs provide that the signatories admit that the wakfs of 1846 and 1868 are valid and binding, that they have no interest in the properties in the possession of the Nawabs and that the lists appended to the document contain a complete enumeration of the properties included in the wakfs. The sixth paragraph recites that Nawab Asanulla as mutwalli under the two wakfs has increased the allowances of the various members of the family mentioned in the schedules, which give an exhaustive enumeration of all persons entitled to receive maintenance. The paragraph further states that the parties had agreed to the appointment of a committee of family members for the determination of the exact amount payable to each person. The seventh paragraph makes it obligatory upon Nawab Asanulla to execute a formal deed when the amount of allowances has been fixed by the committee. The eighth paragraph makes the debts of each member of the family payable by himself or recovery able in instalments from the allowance fixed for him. The ninth paragraph makes the allowances invariable for a period of twenty years from the

3rd September 1880 (the date of institution of the suit); on the termination of this period, the allowances would be revised by a committee of the family. The tenth paragraph provides, for the payment of arrears of allowance. The eleventh paragraph is in these terms: "On the death of any member of the family in receipt of an allowance his or her allowance shall be distributed amongst his or her heirs and residuaries in proportions to be determined by the family Panchayet." The twelfth paragraph provides for expenditure by the mutwalli on occasions of family rejoicings and mournings, the amount to be fixed by the family Panchayet. The thirteenth paragraph relates to expenditure by the mutwalli for repairs to dwelling houses and for increased accommodation for members of the family, when deemed necessary by the family Panchayet. The fourteenth paragraph imposes on the mutwalli the obligation to provide medicines and medical attendance for members of the family, such as may be deemed necessary by the family Panchayet. The fifteenth paragraph provides that no, mutwalli present or future, shall stop the allowances fixed under Clause (6) without "just cause" to be declared as such by "the family Panchayet. The sixteenth paragraph provides for cases where the allowance of a member may be stopped for just cause, leaving it open to the mutwalli to grant a compassionate allowance to the offender and to pay the balance of allowance to members of the family dependent on the latter. The seventeenth paragraph provides that when the family Panchayet so determines, an allowance which has been stopped by the mutwalli shall be restored. The eighteenth paragraph defines the mode of constitution of the family Panchayet previously mentioned. The nineteenth and twentieth paragraphs provide for the withdrawal of the suit and for the payment of a sum of money by Nawab Asanulla to Ramkissen. The supplementary document was executed on the 17th September 1881 pursuant to the sixth paragraph of the memorandum of the 26th August 1881. It recites that a committee of family members had been constituted on the 30th August 1881, who had determined the allowance payable to each member of the family out of the wakfs of 1846 and 1866 respectively. Nawab Asanulla undertook to pay these sums within seven days from the beginning of each month, subject to the conditions set out in the original document which were briefly recited.

10. Such then is the substance of the scheme for the grant of maintenance allowance to members of the family. It is manifest that the scheme is founded on and is inseparably associated with the wakfs of 1846 and 1868; consequently, as soon as these wakfs are pronounced to be invalid and inoperative in law, the entire scheme must of necessity be shattered to pieces. The assertion of the parties or of their representatives cannot validate illegal wakfs, and the Court cannot be utilised for the enforcement of a scheme elaborately devised to carry out a plan of family aggrandisement in contravention of the whole policy of the law. In this view, a desperate effort has been made on behalf of the respondents to support the scheme as if it were not based on the wakfs of 1846 and 1868; but plainly it is not the function of the Court to reconstruct for the parties a plan of maintenance allowance out of the wreckage of the scheme they themselves

had ingeniously but unsuccessfully devised. Besides, even if such an attempt were made, it could not possibly succeed, as the Court would have to support what was in disguise a scheme of family settlement which had failed because it was based on the illegal wakfs. In our opinion, there is good ground for the contention of the appellant that a scheme for family allowances so framed would itself be contrary to law. They have supported this argument by reference to the decision of the Judicial Committee in *Chandi Churn Barua v. Sidheswari Debi* 16 C 71 (P. C.); 15 I. A. 149; 12 Ind. Jur 329; 5 Sar. P. C. J. 231; 18 Ind Dec (N. S.) 47, where a promise to make a future grant in favour of persons yet unborn was held to be an unenforceable contract. The same view was indicated by the Judicial Committee in *Raja Rajeswara Dorai v. Sundara Pandiyasami Tevar* 49 Ind. Cas. 704; 29 C. L. S. 551; 23 C. W. N. 549; 17 A. L. J. 153; 36 M. L. J. 164. 25 M. L. T. 400; 21 Bom. L. R. 885; (1919) M. W. N. 611; 42 M. 581; 10 L. W. 322 (P. C.), which affirmed the decision of the Madras High Court in *Rajaraieswara Dorai v. Sundarapandiyaswami Thevar* 27 Ind. Cas. 233; M. L. J. 694, In that case, the scheme for grant of maintenance in perpetuity was upheld, only because the maintenance was charged on the estate, and this accords with the earlier decisions of the Judicial Committee in *Narayana Ananga Garu v. Madhawa Deo Garu* 16 M 288 (.P C.); 20 I. A. 9; 17 Ind. Jur. 106; 6 Sar. P. C. 270; 5 Ind. Dec. (N. S.) 893, and *Mahomed Hossain Khan v. Mahamed Nehaluddin Khan* 13 C. L. R. -330; 40 I. A. 45; Sar. P. C. J., 412; 9 C. 945 (P. C.), In the case before us, however, the allowance payable to each member is not charged upon the estate; indeed, it could not be so charged, as the founders had made a permanent dedication of their properties for what, in their judgment, constituted purposes religious, pious or charitable, Whenever a wakf is created, the ownership of the appropriator in the thing dedicated is extinguished and there is a detention of the thing in the implied ownership of God in such a manner that its profits may revert to or be applied for the benefit of mankind. Consequently, it would be wrong to assume that the persons who created these wakfs, in the belief that the dedications were lawful, could ever have intended that a charge should be created on the dedicated estate for a purpose which was not religious, pious or charitable. We cannot hold accordingly that the eleventh paragraph of the memorandum of the 26th August 1881 created heritable interest; or the other hand, it merely made provision for the grant of money allowances from generation to generation, the amount whereof could be varied by what was sailed the family Par chayet, and this appears to have been the view adopted by Petheram, C. J., and Ghose, J., in *Khaja Abdul Ahed v. Rajanikanta Chaudhri* (A. O.O.No. 298 of 1891, decided on the 28th August 1892 unreported). But the creation of a succession of such allowances from generation to generation in favour of unborn persons, apart from a scheme of valid wakfs, does not appear to be recognised by Mnammlan Law [*Amtul Nissa Begam v. Mir Nurudin Hussein Khan* 22 B. 489; 11 Ind. Dec. (N. S.) 908, *Moos bhai v. Yacoobbhai* 29 B. 267; 7 Bom. L. R. 45, *Jainabai v. Sethna* 6 Ind. Cas. 513; 34 B. 604; 12 Bom L. R. 341, *Mahomed Ibrahim v. Abdul Latif* 17 Ind. Cas. 689; 37 B. 447; 14 Bom L. R. 987, *Mahomed Shah v. Official Trustee of Bengal* 2 Ind. Cas.

292; 36 C. 481, Humeeda v., Budlin 17 W. R. 525, Nizam-ud din v. Abdul Gofur 13 B. 264; 13 Ind Jur. 342; 7 Ind. Dec. (N. S.) 175, Tavakalbhai Sultanbhai v. Itmetiyajbegam Mirbanesaneb 39 Ind. Cas. 96; 41 B. 372; 49 Bom. L. R. 97, Nawab Umjad Ally Khan v. Mohumdee Begum 11 M. I. A. 517; 10 W. R. P. C. 25; 2 Suth. P. C. J. 98; 2 Sar. P. C. J. 315; 20 E. R. 195, It follows that in 1881 the parties intended to make such arrangements alone as would be consistent with the theory of the existence of valid wakfs created in 1846 and 1868, The framers of the scheme could not have contemplated the creation of permanent charges on what they deemed to be endowed properties, and the respondents have been driven to take up that position, only by reason of the inextricable difficulty in which they have been placed by reason of the illusory nature of the wakfs themselves. In our opinion there is no escape possible from the position that as the wakfs have failed, the entire scheme for grant of maintenance allowances by the mulwalli from the income of wakf properties has been completely demolished.

11. The result is that the appeal is allowed and the suit dismissed with costs throughout.