*Privy Council Appeal No.* 122 *of* 1921.

*Bengal Appeal No.* 7 *of* 1920.

**Haji Abdur Rahim** - - - - - - - *Appellant*

*v.*

**Narayan Das Aurora, since deceased, and others** - - - *Respondents*

FROM

**THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH DECEMBER, 1922.

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*Present at the Hearing:*

LORD SUMNER.
LORD CARSON.
MR. AMEER ALI.

[*Delivered by* LORD SUMNER.]

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This was a suit brought by the mutwalli of a mosque to recover possession of property, alleged to have been settled as a valid wakf, from the defendants, whose title arose under incumbrances created by his predecessors in that office.

The principal issue tried in India was whether or not the claim was statute-barred, and, relying on Article 134 of the first Schedule of Act No. 9 of 1908, the High Court gave judgment in favour of the defendants. This was before the decision of their Lordships' Board in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (L.R. 48 I.A. 302), which held that Article 134 does not apply to a wakf, and accordingly their conclusion is admitted to be no longer sustainable. There has further been much discussion on the present appeal whether the case is governed by Article 142 or by Article 144, since Article 134 is inapplicable; but again it is common ground that, if the plaintiff's evidence established that his predecessor in office remained in possession of the property in

question until after the year 1901, then his claim is not statute-barred. As to this, oral evidence, relating to the receipt of the rents and profits, was called on both sides. The learned trial Judge, after criticising adversely the evidence given on this point by the defendants' witnesses, accepted the plaintiff's case, and held that the mortgagors had remained in possession until less than twelve years before the present suit was begun. With this finding of fact one of the learned Judges in the High Court, Richardson J., agreed. His colleague, Syed Shamsul Huda J., dissenting, drew attention to the burden of proof, which he said rested on the plaintiff and had not been discharged, the probabilities being in favour of the defendants. If the learned Judge meant, as his reference to the onus of proof seems to indicate, that the plaintiff had given no evidence, that the mortgagee had not received possession at the time when the mortgage was executed and in accordance with its terms, he overlooked the fact that several of his witnesses gave positive and precise evidence on the subject, and so far as the burden of proof goes, there was enough to call for an answer. If, on the other hand, as his allusion to the probabilities of the case seems to show, he only meant that, weighing the plaintiff's evidence against that of the defendants', he rejected the former and accepted the latter, his opinion is not fortified by any detailed examination or comparison of the evidence, which the respective witnesses gave. Their Lordships do not think that under these circumstances the opinion of Syed Shamsul Huda J. ought to prevail against the concurrent opinions of Richardson J. and of the learned trial Judge ; nor does their own examination of the evidence, which need not be set out in detail, lead them to discredit the plaintiff's case in this respect.

The affirmation of the finding that the mortgagors retained possession down to a date, which defeats the plea of the Statute of Limitations, would dispose of this appeal, but for the following point. The original settlement was undoubtedly a valid creation of a wakf, for the provision intended to benefit the family of the settlor was not the preponderating feature of the settlement, nor was the provision made for the perpetuation of religious ceremonies and charitable gifts by any means illusory or unsubstantial ; but, equally undoubtedly, the two provisions—that for the upkeep of the mosque and celebration of worship there on the one hand, and that for the benefit of the settlor's family on the other—are, as a matter of drafting, separate and severable dispositions. Indeed, it could not have been otherwise. The new contention for the respondents was that a mortgagee, who had parted with his money to the persons, members of the plaintiff's and of the settlor's family, who were then in the position of mutwalli, ought not to lose his money altogether, and that too at the plaintiff's instance, but was at least entitled to have a charge declared in his favour over the portion of the property, which was settled for the benefit of the settlor's family.

This point was not taken below, or even in the respondents' case, unless it can be brought within the third reason, " because

the trusts created were not those of a valid wakf—at any rate as to the half of the property settled on the founder's heirs." Their Lordships would not in any event have declared that the respondents were entitled to the suggested charge, for they are by no means sure that all necessary parties are before them or that all necessary matters have been proved, and the case would have to be remitted to India, even if the contention be sound.

In the present case there is a dedication, which has already taken effect, and it is so substantial that one half of the net income has to be devoted to specified pious purposes. It is impossible to say that this gift is only a veil to cover arrangements for the aggrandisement of the settlor's family and a device to make the property inalienable. There is nothing illusory about it. The most that can be said is that the provision for the settlor's family is considerable, for the mere provision itself is clearly permissible, as is the provision that the settlor's heirs shall be the mutwalis of the wakf in their order. In delivering the judgment of their Lordships' Board in *Mujibunissa* v. *Abdul Rahim* (28 Ind. App.), Lord Robertson says, at page 23 : " It will be so " (that is it will be a valid deed of wakf) " if the effect of the deed is to give the property in substance to charitable uses. It will not be so, if the effect is to give the property in substance to the testator's family." In view of the fact that this deed has been taken as creating a valid wakf in both Courts in India, and that effect has been given to it as creating a valid wakf in separate proceedings by the decree appointing the appellant to be mutwalli, their Lordships think it needless to discuss further the genuine character of the wakf. Its dominating purpose is to make adequate provision for the pious uses mentioned.

In *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (48 Ind. App. 302), it was explained that the idea conveyed by the word " trust " is foreign to the religious conception involved in the word wakf :—

> " ' When once it is declared that a particular property is wakf or any such expression is used as implies wakf . . . the right of the wakif is extinguished and the ownership is transferred to the Almighty,' says Mr. Ameer Ali in delivering judgment. ' The manager of the wakf is the mutawalli, the governor, superintendent, or curator.' In the case of khankhas the head is called a sajjadanishin. ' But neither the sajjadanishin nor the mutawalli has any right in the property belonging to the wakf ; the property is not vested in him, and he is not a trustee in the technical sense. . . . The wakfnama does not transfer property to trustees. . . .' Under the Mohammedan law the moment a wakf is created all rights of property pass out of the wakf and vest in God Almighty. ' The curator, whether called mutawalli or sajjadanishin, or-by any other name, is merely a manager.' "

The principle of the respondents' contention, accordingly, appears to their Lordships to be fallacious. The property, in respect of which a wakf is created by the settlor, is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed " God's acre,"

and this is the basis of the settled rule that such property as is held in wakf is inalienable, except for the purposes of the wakf. A similar view forms the basis of the inalienability of a Hindu math and, if the settlor declares himself, as he is entitled to do, to be the first mutiwalli or the first shebait, that does not affect the fundamental principle, that the whole property is considered as having passed from him for the purposes which he has declared, and not merely such portion of it as will suffice to produce the part of the income which he has expressly dedicated to pious and charitable uses. From this it follows that where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the wakf, which is therefore as such unsustainable, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges, one declared for pious uses on one part of the property, and another and separate charge declared on another part for the uses of the mortgagor only. The property itself is not to be regarded as severable and chargeable according to the measure of the interest, which the settlor's family may have in the rents and profits of the whole. The contention now advanced is inconsistent with the character of a wakf, as fully explained in the above-mentioned and many other decisions of their Lordships' Board. Their Lordships are of opinion that, for an advance of money, otherwise than to satisfy the legitimate needs and purposes of the wakf, no part of the property held in wakf is chargeable either by the settlor or by the Court. In such a case any claim by the person who advances the money must be in the nature of a claim *in personam*, and cannot be secured by holding liable the wakf property itself. For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and the judgment of the High Court set aside and that of the trial Judge restored with costs here and below.

**In the Privy Council.**

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HAJI ABDUR RAHIM

*v.*

NARAYAN DAS AURORA, SINCE DECEASED, AND OTHERS.

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DELIVERED BY LORD SUMNER.

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