

(1881) 02 CAL CK 0021

Calcutta High Court

Case No: None

Mahomed Hamidulla
Khan

APPELLANT

Vs

Lotful Huq and Others

RESPONDENT

Date of Decision: Feb. 2, 1881

Citation: (1881) ILR (Cal) 744

Hon'ble Judges: Tottenham, J; Morris, J

Bench: Division Bench

Judgement

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.

2. 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.

3. The lower Court is of opinion that if a person makes a settlement of his land in favour 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).

4. 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 of authority is strongly in favour of the view as stated by the Bombay Court in the case of Abdul Ganne Kasam v. Hussien Miya Rahimtulla (10 Bom. H. C. R. 7)-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 two Hidaya, Hamilton, p. 334, points out that the appropriation, that is waqf, must be some "charitable" purpose. Now here it is manifest that the appropriation in favour 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 favour 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."

5. 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, Baillie, when a settlement of property is made in this way by a man in favour of his descendants, the term sadukah must be used.

6. 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. Russen Miya Rahimtulla* (10 Bom. H. C. R. 7), 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 *Hidaya*, 351, note), "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.