Privy Council Appeal No. 86 *of* 1928.
Bengal Appeals Nos. 10, 11, 16 *and* 17 *of* 1927.

Nawab Khajeh Habibullah Saheb - - - - - *Appellant*

v.

Raja Janaki Nath Roy and others - - - - - *Respondents*

Same - - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - - *Respondents*

Raja Janaki Nath Roy and others - - - - - *Appellants*

v.

Nawab Khajeh Habibullah Saheb - - - - - *Respondent*

Same - - - - - - - - - - *Appellants*

v.

Same - - - - - - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH NOVEMBER, 1929.

Present at the Hearing:

LORD BUCKMASTER.
VISCOUNT DUNEDIN.
LORD TOMLIN.
SIR GEORGE LOWNDES.
SIR BINOD MITTER.

[*Delivered by* LORD BUCKMASTER.]

These are two appeals, an original and a cross-appeal against decrees of the High Court of Judicature at Fort William in Bengal, which modified decrees of the Subordinate Judge of Dacca.

They arise in the following way: On the 8th May, 1846, a large number of people purported to make their property the subject of a *Wakf*, and for that purpose they declared that the first *Mutwalli* should be one Abdul Gunny, and that the purpose

of the *Wakf* was that the proceeds of the land should be enjoyed first by the grantors themselves, " and then our descendants and children, generation after generation. then our relatives, and then the poor and destitute."

On the 11th September, 1868, Abdul Gunny purported to create another *Wakf* of property of his own, and the purposes of this *Wakf* are very closely the same as that in the former case, and do not need examination in order to ascertain if there be any difference.

Apparently the property was administered in accordance with the *Wakfs* without any question or contest until 1880. In that year proceedings were taken by a number of people interested in the allowances made by virtue of the *Wakfs*. claiming that the *Wakfs* were bad, and charging that they had been obtained by fraud. These proceedings were ultimately compromised by an agreement which was dated 26th August, 1881, and it is really upon that agreement that the determination of these appeals depends. The first thing that the parties to it did was to withdraw charges of fraud that had been made, and then by paragraph 3 they declared that, save as provided by the agreement, " neither they nor any of them have or has any claim to or interest in any of the properties in the possession of the *Nawabs* Abdul Gunny and Ashanullah or either of them or belonging to them or either of them and registered whether in their or either of their names or in the names of others." The names mentioned were those of the *Mutwallis* under the *Wakfs*. They also declared that the two *Wakfs* were valid and binding deeds, and as a consideration for that arrangement on their part, an agreement was made that the amount that was to be paid to each individual person was to be fixed in a certain manner by a Committee established from people specially selected for the purpose, and that when those amounts had been fixed there should be an agreement to pay to each member the amount of the allowance so made. thus substituting rights under a definite bargain for discretionary rights under the *Wakfs*.

In 1916 the suits were instituted out of which these appeals have arisen by the respondents on the first appeal and the cross-appellants, asking for a declaration that they were entitled to possession of land the subject of the *Wakfs*. They claimed through the original grantors and their claim was based on the contention that as, since the date of the agreement of 1881, *Wakfs* of this particular character had been declared to be void. it would follow that the properties would revert back to the grantors, through whom they claimed. The real answer to that was put by the appellant on the first appeal, the defendant to the suit, viz., that even if that were so in the absence of agreement. the agreement of 1881 had entirely defeated any such right. This defence was upheld by both the Subordinate Judge and the High Court. This defence was further fortified by the fact that a dispute under that very agreement had already been

on foot, and had come before this Board in the case of *Khajeh Solehman Quadir and another* v. *Nawab Sir Salimullah Bahadur and others* (49 I.A. 153). In that case one of the persons who was entitled to the benefit of the *Wakf*, who, though he did not claim through the grantors of the original property, was yet one of the people obtaining the benefit of the agreement and the fixed allowance, took proceedings for the purpose of declaring that the interest created by that agreement constituted a definite and perpetual charge upon the income of the property that was capable of being continued to his heirs, and was enforceable accordingly. This Board held that that contention was well founded, and based their conclusion upon the fact that they regarded the rights as rights arising by virtue of the agreement made in 1881 for good consideration. The statement made in the judgment of the Board, which was delivered by Lord Cave, is this: "The *wakfnamas* were gifts and were therefore subject to the rule of Mahommedan law which requires that a gift shall be accompanied by delivery: but the agreements of 1881 are not gifts, but contracts for valuable consideration." Those contracts were contracts that the parties through whom the plaintiffs in these proceedings claim, relinquished all rights that would arise to them if the *Wakfs* were declared for any reason to be invalid, and in the place of such rights they obtained the benefit of an annuity fixed in a certain manner and secured by an agreement which by virtue of this decision grants to them and to their heirs a perpetual annuity for the amount. The claim, therefore, for possession of the land could only be based upon the view that the agreement of 1881 did not apply, or at any rate, if it did apply, that the difference between the plaintiff's position and that of the person who claimed in the suit that ended in the judgment in 49 I.A., rendered the decision of this Board inapplicable. Their Lordships, equally with the Subordinate Judge and the High Court, find themselves unable to accede to such a contention. The foundation of the judgment of this Board in 49 I.A. does not in the least depend upon the consideration of whether the plaintiff who took those proceedings had rights as claiming through one of the original grantors of the *Wakf*, or whether he was a person, as in fact he was, who, though outside the class of original grantors, was none the less entitled to the benefit of the moneys which the *Wakf* provided. In each case the contract was founded upon good consideration, and, indeed, in some ways, the person through whom the plaintiffs claim to-day might be said to be in a worse position than the plaintiff there, because in their case the consideration was obvious. They were giving up something in exchange for a definite fixed allowance which was granted or secured to them, and for this they distinctly relinquished the right to declare the *Wakf* void, and with that the rights that would in such event have resulted to them. The plaintiffs' claim, therefore, for possession could not, in their Lordships' opinion, be rightly

made, and they think that the opinions of the High Court and the District Judge are quite right upon that point.

But then the defendant who is the present appellant seeks to say that in those circumstances the benefit of the charge which has been declared in favour of the plaintiffs by the judgment of the High Court should not be allowed, upon the first ground that it was not definitely claimed, since the action merely asked for possession of the land. That matter is abundantly disposed of by the fact that the High Court accepted the reasonable view that it was none the less possible to grant them a lesser right, and it would be both unwise, and, in their Lordships' opinion, unfair to exclude the plaintiffs from that lesser right now, merely because they have asked for the larger one. The real question is: Do they possess that right? It appears to their Lordships it is the necessary corollary of the fact that they do not possess the wider right which they claimed. The reason why they do not possess that is because they relinquished it by virtue of the agreement of 1881; and the reason why they do possess the other is because that agreement in consideration of that release granted them the charge which they now seek to have declared.

For these reasons their Lordships will humbly advise His Majesty that the appeal must fail, and that the cross-appeal must fail, and that there will be no costs either of the appeal or the cross-appeal.

In the Privy Council.

NAWAB KHAJEH HABIBULLAH SAHEB

v.

RAJA JANAKI NATH ROY AND OTHERS.

SAME

v.

SAME.

RAJA JANAKI NATH ROY AND OTHERS

v.

NAWAB KHAJEH HABIBULLAH SAHEB.

SAME.

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY LORD BUCKMASTER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1929.