Patna High Court
Syed Ali Zamin And Anr. vs Syed Muhammad Akbar Ali Khan And ... on 16 January, 1928
Equivalent citations: 116 Ind Cas 525
Author: D Miller
Bench: D Miller, Adami
JUDGMENT Dawson Miller, C.J.

1. The main question for determination in this appeal is whether a wakf deed dated the 25th May, 1917, and a supplementary deed dated the 19th February, 1919, executed by the late Nawab Haji Syed Nawab Mehdi Husain Khan,' commonly known as Syed Badshah Nawab, were valid and operative documents according to the Shiah Law by which the parties in the suit are governed.

2. The plaintiff Syed Muhammad Ali Akbar Khan, commonly known as Syed Chhote Nawab, is the brother of the late Syed Badshah Nawab, and instituted the suit out of which this appeal arises claiming a declaration that the wakf deeds are invalid and inoperative and that he be given possession of a one-third share in the estate of his late brother including the endowed properties to which he is entitled by inheritance. There is also a claim for a declaration that a house No. 68 Dharamtalla Street Calcutta, now claimed by the defendant Musammat Bibi Zainia, the widow of Syed Badshah Nawab, and a Hupmobile car claimed by Syed Ali Zamin, the first defendant, are part of the estate of the late Syed Badshah Nawab.

3. The principal defendants are Syed Ali Zamin, who succeeded Badshah Nawab as mutawalli of the endowed properties, and Musammat Bibi Zainia, the widow of Badshah Nawab. Two sisters and a brother of the plaintiff and the late Nawab who are entitled to a share in the inheritance have been added as pro forma defendants. They have not entered appearance or contested the claim.

4. The Subordinate Judge of Patna before whom the suit came for trial held that the wakf deeds were invalid and inoperative and that the properties set out in the schedule to the plaint, except a few items which belonged exclusively to the plaintiff formed part of the estate of Badshah Nawab at his death and that the plaintiff was entitled to a third share in the immoveables and a fourth share in the moveables and should be given possession thereof.

5. The plaintiff at the trial challenged the validity of the wakf deed on various grounds which are set out in para. 12 of the plaint, the more important of which may be summarised as follows:

(1) That the settlor owing to his infirm health, weak intellect and unsound mind was not of disposing capacity, or a free agent.

(2) That there was no real divestment of interest by the wakf deed, the settlor having reserved to himself the ownership and control of the property and the right to dispose of the income in any manner he liked without restraint during his lifetime, and that he in fact so disposed of it and it was never intended that the deed should operate as a valid wakf.

(3) That there was no transfer of possession of the endowed property as required by Shia Law.

(4) That the deed was executed under undue influence by the defendants Nos. 1 and 2 and by collusion and was merely a cloak to secure benefits to them.

6. It was also contended that the objects to which the properties were dedicated were in some respects such as the Shia Law did not countenance and that the deed was consequently invalid. Objection was also taken to the dedication of the moveable properties.

7. The learned Judge found that although Badshah Nawab was not a person of unsound mind so as to be incapable of transacting business he was a man of weak intellect and easily influenced. Many factors contributed to this. His health was impaired by recurring attacks of paralysis from which he eventually died. His financial affairs had become seriously involved by the failure of a banking business in which he was a partner and his only nephew, the son of the plaintiff, to whom he was much attached having no children of his own, had been betrothed by his parents to a girl of Kashmiri blood of which he strongly disapproved. These combined causes in the opinion of the learned Judge affected the mental capacity of Badshah Nawab. In these circumstances he found that undue influence was exercised upon the settlor by the defendant Ali Zamin, his nephew by marriage and manager of his estate, who under the deed became mutawalli on the settlor's death at a salary of Rs. 250 per month with a palatial and richly furnished house to live in. He also found that the deed was illusory as by its terms the settlor retained unfettered control of the property during his lifetime and in fact dealt with the income as his own until his death and did not divest himself of his proprietary rights. He also found that certain of the objects of dedication were not permissible under Shia Law, and, finally he held that the house in Calcutta and the Hupmobile car had not been transferred to the defendants but remained part of Badshah Nawab's estate. A further point was taken by the defendants that the plaintiff was estopped by his conduct from questioning the validity of the deed. The point was dealt with at great length by the learned Judge in the trial Court who found that there was no such estoppel. The point was but faintly argued on appeal in this Court and I do not propose to deal with it further except to say that I can find no evidence which would justify the Court in saying that the plaintiff was estopped from challenging the validity of the deed. The first two defendants have appealed from the decision of the Subordinate Judge.

8. The main arguments in appeal before us were addressed to the construction of the wakf deed of 1917 and the conduct of the settlor with regard to the property thereafter with a view to showing that there was never any real intention on his part to divest himself of the usufruct of the properties during his lifetime as required by the Shia Law. It may be mentioned that the late Nawab Lutf Ali Khan, the father of the plaintiff and of Badshah Nawab, had created a verbal wakf of certain properties in Patna yielding an income of between Rs. 2,000 and Rs. 3,000 of which Badshah Nawab after his father's death was the mutawalli. The religious ceremonies provided for by that endowment were carried out in a mosque known as Bauli mosque and an imambara connected therewith. The imambara had been either built or renovated by Lutf Ali Khan during his lifetime and further moneys had been spent on it by Badshah Nawab and the evidence shows that even before the creation of the new wakf in 1917 Badshah Nawab was in the habit of spending out of his own income additional sums above those provided by his father for conducting the religious ceremonies of that endowment. The ceremonies prescribed by the wakf deed of 1917 were to a large extent, if not entirely, the same as those already provided for under the existing endowment and were performed

in the same buildings. Some evidence was adduced to prove that two different sets of services were carried on after 1917, but the evidence was contradictory and not very convincing and it was admitted that some of the officers whose salaries were provided for under the new endowment were not in fact appointed either because their places were already filled under the existing endowment or suitable persons could not be found. The only new officer appointed was one additional peshnemaz.

9. One of the points raised and insisted on in the trial Court and accepted by the learned Judge was that the dedication was not the result of an independent act of volition on the part of the settlor, but was due to the commanding influence of the first two defendants both of whom benefited by the endowment. The case of insanity was not pressed, but it was contended that Ali Zamin as manager of the Nawab's estate stood in a fiduciary relationship towards him and exercised his influence upon a mind weakened by disease and anxiety to secure for himself substantial benefits under the guise of a charitable endowment which gave him a very desirable residence to live in and a competence for life under a deed which left him every opportunity, if he were so minded, of appropriating to his own use a considerable share of the income of the endowed property in the same manner as Badshah Nawab himself undoubtedly did during his life-time. There is, however, no direct evidence to support the case that Ali Zamin brought any pressure to bear upon Badshah Nawab; still less is there any reason for holding that Bibi Zainia exerted any undue influence upon her husband. I consider from the evidence that the most that can be said on this part of the case is that there was opportunity for an unscrupulous person to influence the mind of Badshah Nawab by suggesting to him the plan of creating an endowment of a substantial part of his remaining properties, far his affairs were then seriously involved, in order to defeat or delay his creditor during his lifetime and incidentally to benefit the conspirators after his death. It must be remembered that this is not a case of contract to which the provisions of Section 16 of the Indian Contract Act as to undue influence would apply; nor is there, in my opinion, anything unconscionable in the transaction regarded merely as a charitable endowment which, were it legitimate to regard it as a contract, would throw the burden of proof upon the defendants. There is, as I have stated, no positive evidence of any sort to prove that Ali Zamin or Bibi Zainia exercised any undue influence upon the settlor. In order to prove undue influence sufficient to invalidate a transaction like the present, I think it must be shown that there was some coercion, amounting almost to fraud, whereby the will of one party was dominated by the other so that the resulting transaction cannot be regarded as expressing the real intention of the party coerced. I can find nothing throughout the evidence to support such a conclusion. Apart from the surrounding circumstances which I shall refer to later a perusal of the document itself strongly supports the view that Badshah Nawab knew perfectly well what he was about when he executed it, and was not under the domination of Ali Zamin. By its terms he reserves to himself a free hand to deal with, the endowed properties in any manner he liked without being accountable to any one during his lifetime, but places great restrictions upon the actions of his successors by the appointment of a managing committee to come into existence after his death with power, amongst other things, to remove the mutawalli for any act of impropriety or such as will be prejudicial to the objects of the wakf. A perusal of this document points to the conclusion that the dominating will was that of Badshah Nawab and not of Ali Zamin, his subordinate. The mere fact that Ali Zamin was appointed mutawalli at a salary of Rs. 250 per month and given a house to live in is in itself no ground for suspicion. He was allied by marriage to Badshah Nawab's family, having

married his niece, the daughter of Manjhley Nawab, defendant No. 5, and had come to Patna at Badshah Nawab's urgent request to assist him in his financial difficulties which he helped to straighten out. He gave his whole time and labour to Badshah Nawab's affairs without apparently any definite or fixed remuneration. Nothing could be more natural than that Badshah Nawab should wish to make some provision for him in the future. Nothing is proved against his character and I am not prepared upon such a slender foundation as that of mere suspicion to build up a case of fraud and coercion. The learned Judge said that Ali Zamin got a substantial personal advantage which he considers unconscionable, treating the transaction as a bargain, but he leaves out of consideration the circumstances which I have just mentioned and the claim which Ali Zamin had upon his uncle by marriage. He says this advantage was secured by him by keeping in the dark all the nearest and dearest relations, male and female of the Nawab, presumably excluding his wife Musammat Bibi Zainia from the category. If one is making a disposition of property the effect of which will be to divert the inheritance from the heirs it is not unusual in such cases to refrain from seeking their advice and no adverse inference can be drawn from the fact that they were not consulted. The document was witnessed by nearly thirty witnesses, friends of the settlor and most of them men of substance, and it cannot be contended that the transaction was carried out in secrecy. With great respect to the learned Judge who has considered the case at great length and who speaks repeatedly of the unbounded influence of Ali Zamin and the unconscionable bargain secured by him, I think he has allowed his mind to be influenced too much by mere suspicion and has given too little consideration to the lack of evidence on this part of the case. I am unable to agree with the learned Judge that the wakf deed is invalid on the ground of any undue influence exerted by the defendants.

10. The learned Counsel for the respondents, although he did not concede that the trial Court's finding could not be supported on the question of undue influence, and in no way abandoned the point, addressed the greater part of his argument to us in support of the finding that the wakf deed is illusory. This part of the argument may be divided into two heads; first, that the deed itself does not by its terms, when properly construed, divest the settlor of his proprietary interest during his lifetime and secondly, that he never intended to and did not in fact change the character of his possession from that of proprietor to that of mutawalli, as required by Shia Law, but continued to enjoy the usufruct for his own purposes as he had previously done and in two instances alienated a part, although a small part, of the corpus in his capacity as private owner. In connection with this part of the case the question of the motive which is said to have influenced the settlor in making an illusory dedication of his property is important and it will be convenient before discussing the document to refer to some of the more important facts proved in evidence concerning the mental and bodily condition of the settlor and the financial position in which he was placed in 1917 when the deed was executed. When his father died in 1890 he inherited a considerable estate in land said to yield about Rs. 75,000 par annum in addition to cash to the extent of three or four lakhs. His two brothers inherited a similar fortune. He completed the building of the imambara which had begun in his father's lifetime and was appointed mutawalli of the endowment created by his father. He appears to have spent from his own purse in connection with this institution more than the income of the endowed properties. In 1907 he went on pilgrimage to Mecca where he met and married the defendant Musammat Bibi Zainia, who was his third wife. In 1909 he established and endowed with an income of Rs. 8,020 a girls' school in Patna. He also founded scholarships for Muhammadan students in three of the schools and colleges there. He had no children of his own but appears to

have had a great affection for his nephew Mian, the son of his brother the plaintiff. In 1911 the first signs of the malady which eventually caused his death manifested themselves. In that year he had an attack of facial paralysis which, however, was not severe and did not disable him. About a month later he attended the Delhi Darbar. In 1914 he had a second attack of paralysis of a more serious nature. This attack which happened in Calcutta is not admitted by the appellants. It is spoken to, however, by the plaintiff and other witnesses and I have no doubt on the evidence that he had a stroke of paralysis in Calcutta in that year. The plaintiff deposes that he went to see his brother in Calcutta during the acute stage of his illness and found him in bad with his left arm paralysed and incapable of coherent speech. This attack was also deposed to by at least one of the defendants' witnesses in previous proceedings. It kept him in bed for sometime and although he gradually recovered sufficiently to be able to walk about and transact business his general health, mental and physical, must, I think, have been somewhat impaired and it is admitted that he suffered from palpitation of the heart and dyspepsia and from time to time exhibited eccentric habits. The plaintiff's account of this illness which does not seem to be exaggerated is as follows: After speaking of the medical treatment ho received at the hands of various Doctors he gays: "All complaints were removed by the treatment of Abdul Hamid Saheb except the kaji (contraction) of the eyes and the face. He could walk about. But he could not look after his affairs well. This necessitated the appointment of a manager. There were signs of forgetfulness in him indicating affection of the brain. I can't tell if he could supervise his works. He was not a mad man. Abdul Ali and others could not give him any relief. The Nawab did reply to our questions and we could understand him. This state of the Nawab continued till there was another attack of paralysis in Calcutta of a more serious type". The later attack there spoken to occurred at the end of 1918 two or three months before his death.

11. In 1915 his financial affairs first became involved and he began to sell his properties to pay his debts. He had a house in Chowranghee, the principal street in Calcutta which he sold in January that year for Rs. 1,35,000. According to the evidence of the defendants' witness, Kali Prasad, Rs. 95,000 of this went in payment of debts. In the following month he contracted to purchase the house in Dharamtalla Street now claimed by his widow for Rs. 36,000 and paid the deposit but the transaction was not completed until July. In the meantime in March, 1915, his banking business failed involving him in a liability of three or four lakhs of rupees and from this time until May, 1917, when the wakf dead was executed we find him selling and mortgaging his properties to meet his liabilities. In July, 1915, the purchase of the Dharamtalla house was completed in the name of his wife as purchaser. This is alleged by the plaintiff and found by the trial Court to have been a benami transaction, I shall deal with this question later. In September, 1915, a suit was brought against him by the Gorakhpur Bank claiming Rs. 58,821 and attachment of some of his properties before judgment was applied for. He had also many other creditors. It is unnecessary to detail the various transactions by which he endeavoured to meet his liabilities. He borrowed a sum of Rs. 1,25,000 at 7 1/2 per cent. compound interest from one Saligram, a mahajan, on the security of a mortgage of a considerable part of his estate and sold other parts for sums amounting in all to about Rs. 82,000 and at the date of his death in 1919 he still owed about Rs. 74,000 or Rs. 75,000. These figures may be taken as the result of the evidence of different witnesses and principally that of Kali Prasad, the mukhtaram of Badshah Nawab. It should be mentioned that in May, 1915, he had sent an urgent request to defendant Ali Zamin to come to Patna to help him in his difficulties. This Ali Zamin did, living first with his father-in-law Manjhley Nawab but afterwards taking up his residence in

Badshah Nawab's house, helping him to manage his estate, obtain loans, sell his property and generally assist in managing his affairs. That Badshah Nawab was very anxious about his financial affairs at this period can hardly be disputed. He had already in 1915 bought the Dharamtalla Street house in the name of his wife and when he purchased a motor car in June, 1916, he wrote to Ali Zamin in somewhat anxious language to take the receipt in the name of Ali Zamin and not in his own Another matter which he undoubtedly regarded somewhat in the nature of a calamity was the betrothal of his nephew Mian to a girl of Kashmiri blood although I cannot help thinking that this incident has been given undue prominence in the judgment of the learned Judge as affecting his mental balance.

12. Such were the conditions under which Badshah Nawab executed the wakf deed of the 25th May, 1917, whereby he dedicated all that still remained unencumbered of his property yielding a net income of, in round figures, Rs. 20,000 per annum to charitable and religious objects. The main contention of the respondent is that this transaction was merely a device to secure to himself the income of the property during his life by appointing himself mutawalli with unlimited powers of management and disposal and that he never intended to and did not in fact divest himself of the proprietary right. The properties dedicated by the settlor are situated in the Districts of Shahabad, Patna, Monghyr and Purnea and included his two houses known as Badshah Manzil and Badshah Mahal together with the effects and jewellery therein which were valuable. The former was to be the residence of the mutawalli and the latter the residence of his wife who was also to receive during her lifetime Rs. 3,600 per annum out of the income of the endowed properties. The mutawalli was to receive Rs. 3,000 per annum and two other annuitants Rs. 1,200 and Rs. 360, respectively. The Municipal taxes and repairs of the houses are estimated at Rs. 1,872 and the auditors' fee at Rs. 312. Rs. 2,888 were to be spent in celebrating religious ceremonies (majlises and mahafils), Rs. 624 were to be spent on an orphanage, Rs. 468 on the burial of the dead, Rs. 312 in connection with a mausoleum, Rs. 104 for breakfasts in Ramzan and Rs. 728 on the upkeep of horses and camels for religious processions. About Rs. 1,600 were to be spent on leaders of the prayers and servants of the mosque and imambara and the balance, about one-seventh of the whole, was to go to reserve fund, to be dealt with as provided in the deed in buying further property. The settlor was to be the first mutawalli and was to be succeeded on his death by Ali Zamin, A Managing Committee was to be appointed to come into existence after his death with certain powers of control and the right of appointing and dismissing future mutawallis. The wife's annuity after her death was to be spent on the maintenance and education of orphans and widows and any large accumulations in the reserve fund were to go in acquiring immoveable properties to be treated as part of the wakf. The following clauses of the document are important in considering the question of the validity of the deed and the intention of the settlor:

1. During my lifetime, the tauliat of the entire wakf properties, noted in Schedules Nos. 1 and 2, shall have concern with me personally. During my lifetime, I shall keep the entire wakf properties in my possession and under my management as mutawalli and carry out the tauliat work. During my lifetime, no one shall have absolutely any power to interfere with and raise an objection regarding the right of tauliat or the management of the properties. I, the mutawalli, too shall spend (money) in whatever manner I would like,

7. In order to bring this wakfnama into force it will be incumbent upon me to get my name removed as a proprietor and to get it registered in the Government Office as a mutawalli of the wakf properties specified in Schedule No. 1. Similarly the future mutawallis also shall do the same.

8. Should any mutawalli besides myself, give up the Isna-Asharia sect of the Shia School or prove dishonest, the Committee shall have power to remove him and to select another mutawalli, according to the terms of this wakfnama.

22. During my lifetime, I shall, as a mutawalli, carry on the entire work relating to the wakf according to my own personal choice. I have nominated and appointed the said Saiyid Ali Zamin Sahib a mutawalli. Therefore his name shall be registered in the Government, Municipal and other offices along with my name. But during my lifetime the powers of tauliat shall be exclusively possessed by me while the name of the said Saiyid Ali Zamin Sahib, mutawalli, shall be recorded along with my name in every action that will be taken. During any lifetime, the said Saiyid Ali Zamin Sahib, mutawalli, shall not have the power to take any action independently. But the said mutawalli shall comply with my orders in conducting the business for which an order will be passed by me. The name of the said mutawallili shall be registered in the Government Offices, so that it may be thoroughly published (well known to all) and no one may raise any dispute in future regarding the tauliat right of the said mutawalli. On my death the said mutawalli shall possess full power in the same way in which it is possessed and shall be possessed by me during my lifetime.

13. It is contended by the respondent that these clauses reserve to the settlor an unfettered power of disposal of the income in any manner he likes during his lifetime and permit him to appropriate the same for his own personal use. If this is the proper construction of the deed it is conceded that it contravenes the Shia Law which requires that the dedication must be absolute and unconditional and the property must be entirely taken out of the wakif or dedicator, himself. The appellants on the other hand contend that whilst the wakif, is given unrestricted power of management during his lifetime his powers are limited by the terms of the deed and are those of a mutawalli or manager only and not those of a proprietor. The property, it is argued, as Clause 1 states, is to be in his possession and under his management as mutawalli and not otherwise and the extensive powers of management and control are nevertheless restricted to such acts only as a mutawalli could properly perform, Although I confess that the deed is of a somewhat unusual character and presents some difficulties of construction, I am of opinion on the whole that the appellants' construction is right and that so far as the deed itself is concerned it does not necessarily purport to retain in the wakif any proprietary rights in the property. Much stress was laid by the learned Counsel for the respondent upon the words "shall concern me personally" in Clause 1 and upon the provisions of Clause 8, but Clause 1 must be read as a whole and the expression there relied on may be regarded merely as emphasising the fact that the first mutawalli should not be subject to any control by the Managing Committee or any one else. This, however, would not entitle him to act dishonestly or to dissipate the trust property or convert it to his own use with impunity. If such a case could be made out he would be liable to be removed from office at the instance of persona interested in proceedings properly framed for that purpose. With regard to Clause 8 it would certainly be astonishing if it implied that Badshah Nawab could not be removed for dishonesty, but it must be remembered that this clause refers to the powers of the Managing Committee which was only to come into existence

after his death and, therefore, although it was un-necessary to do so, the settlor, as the first mutawalli of the endowment, was properly excluded from the operation of the clause. If instead of framing the first words of the clause as they appear in the translation before us he had said "should any future mutawalli give up." etc., the sense would have been the same and the words would hardly have been open to comment. As Mr. Khurshaid Husnain in his able argument for the appellant expressed it, the only inference that can legitimately be drawn from the clause is that Badshah Nawab could trust himself not to change his religion or act dishonestly but he could not be sure of his successors.

14. This finding, however, does not conclude the matter for under Shia Law there must be not only a valid dedication, either oral or documentary, but also a complete divestment of interest and a transfer of possession of the dedicated properties. A wakf is not complete under Shia Law by mere dedication. Where the settlor appoints himself the mutawalli actual transfer of possession from one person to another cannot take place, but if it should appear that after the dedication the settlor continued to deal with the properties as if they were his own the inference would be that there was no change in the character of his possession and no intention completely to divest himself of proprietary rights. The discretionary powers reserved to the wakif himself by the deed, although capable of the construction I have placed upon them, are so unrestricted as to raise at least a doubt as to his real intention; but the manner in which he, in fact, dealt with the property after the dedication appears to me to show clearly that he never had any real intention of completely divesting himself of the proprietary rights during his lifetime for, as will presently appear, he continued for a long time to retain possession as proprietor and appropriated the great bulk of the net profits to his own use. The reason for this may well be that his financial difficulties suggested to him, crippled as he was in mind and body with anxiety and ill health, the device of retaining for his own use as hitherto the residue of his unencumbered estate whilst tying up the corpus in the form of a religious endowment. That he had a strong motive is beyond doubt, and that he honestly believed he was entitled to act as he subsequently did with the property may well be the fact. He does not appear to have taken legal advice before executing the deed and although there is some evidence to show that at the end of 1915 he contemplated protecting his property from the claims of creditors by executing a mukarrari deed and sent to Calcutta to seek the opinion of the late Sir Rash Behari Ghose and other lawyers this is denied by the defendant Ali Zamin and I am not prepared to give much credit to the evidence of the witness Abdul Wahid who spoke to it and whose evidence was not corroborated as it might have been by any other witness.

15. Dealing now with the conduct of Badshah Nawab after the wakfnama was executed on the 25th May, 1917, it appears that from that date until the 4th November a period of between five and six months no separate accounts were kept of the income and expenditure of the wakf property, but from the seahas showing the private income of Badshah Nawab during the period named a sum of Rs. 6,868 was derived from the rents and profits of those properties alone and went into Badshah Nawab's private account. No explanation has been offered as to how this money was spent and the private accounts of Badshah Nawab for the period, except the seahas, have cot been placed in evidence. The inference is irresistible that he made no distinction between his private income and the income of the endowed properties. The seahas show income from other properties but everything is included in the same document without distinction. It was argued that the sum of Rs.

6,868 might have been arrears of rent due before May, 1917, but as there were two kists during the period in question when rent became due it would be a strange phenomenon if none of the rents then paid were for the current kist and, in any case, it was for the defendants to prove how much, if anything, of that sum was for arrears even assuming that the arrears of rent did not pass under the wakfnama which transfers all proprietary rights. In the absence of accounts there is nothing to show how much of this sum, if anything, was spent on the objects of the trust. Turning now to the trust accounts beginning on the 4th November, 1917, (Exs. P-84 and P-85), produced by the defendants, the learned Judge had some doubts about their genuineness as they were produced late, but taking them as genuine we find that one of the first transactions disclosed, namely, on the 19th November, is the appropriation of a sum of Rs. 5.100 by Badshah Nawab to his own use. On that day the opening balance, omitting fractions was Rs. 96. A sum of Rs. 5,100 was received that day as the rents from Surjapur in the Purnea District through the Tahsildar of that place and the whole of this was taken by Badshah Nawab "for expenses at the Sonepur Fair" and is not accounted for. It is suggested that he went to Sonepur where he had been in the habit of going in previous years and purchased a horse (duldul) for the processions in the religious ceremonies connected with the wakf. It is stated by Kali Prasad, the mukhtaram of Badshah Nawab and the principal witness for the defendants, that an Arab horse had died so another horse had to be purchased to fill its place, but there is no mention of the purchase of a horse in the account-books and he admits that a separate account was kept of the money spent at Sonepur but this does not show the purchase of any duldul; and from the evidence of another witness it would appear that the same two horses were used in the procession both before and after the date of the wakf deed. In any case the purchase of a horse would not account for more than a small fraction of the sum taken. From time to time there appear in the accounts small sums refunded by Badshah Nawab as the balance in hand ran low and money was required for expenses but the sums which he took out under the head of "accommodation loan" far exceed anything he returned. This went on until his death on the 19th March, 1919, when there remained a credit balance in hand of Rs. 79. Nothing was placed to the reserve fund as provided by the deed the amount of which was estimated after providing for the other expenses at Rs. 2,860 per annum and there can be no doubt that Badshah Nawab helped himself to the income of the trust properties, refunding from time to time such sums as might be necessary as the account ran low. The total income of the wakf properties shown in the accounts produced from the 4th November, 1917, to the 19th March, 1913, when Badshah Nawab died, a period of sixteen and a half months, is Rs. 31,524 and if the sum of Rs. 6,868 the income shown in the seahas from the 15th May, to the 3rd November, 1917, be added, this makes a total income of Rs. 38,392 for a period of about a year and ten months which corresponds closely to the estimated income of about Rs. 20,000 per annum according to the wakf deed. During this period there was no audit of the accounts as provided for in the deed. An analysis of these accounts discloses the following results: The total income for the full period is Rs. 38,392. This is accounted for as follows:

Rs.

Government revenue and cesses	9,358
Law expenses and other miscellaneous charges	3,909
Municipal taxes	1,112
Spent on the objects of the wakf	

deed		6,934
Taken by Badshah Nawab for his personal use (including Rs. 6,868 shown in the seahas, from the 25th May, 1917, to the 3rd November, 1917) ...		17,000
Balance in hand on the 19th March, 1919 ...		79
Total ...		38,392

16. These figures do not take account of a sum of Rs. 1,780 re-paid to the wakf account from the tavil of Badshah Nawab five days after his death. Why this amount was re-paid, or by whose authority, has not been explained. In the total of Rs. 17,000 stated above to have been taken by Badshah Nawab for his personal use are included Rs. 1,549 re-payment of a loan due from him to mahajans under a hand-note, Rs. 50 per month paid to Ali Zamin amounting in all to Rs. 750 representing an allowance which Badshah Nawab had been in the habit of making him before the deed was executed, Rs. 133 subscription to a hospital, Rs. 173 for income-tax and various small loans to different people, but the bulk of the amount including the sum of Rs. 5,100 taken for his expenses at Sonepore is unaccounted for. It appears that Bibi Zainia was paid at the rate of Rs. 150 per month instead of Rs. 300 as provided in the deed and, as far as the accounts show, the other two annuitants were not paid anything. It may be presumed in the absence of the personal accounts that Bibi Zainia had some sort of allowance from her husband before the deed was executed. Although the sum of Rs. 6,934 was spent on the declared objects of the trust during the period covered by the accounts, it is admitted that Badshah Nawab had previously been performing the same kind of religious ceremonies as mutawalli of his father's endowment and had supplemented the income thereof from his own resources, and it, seems probable that after the new wakf deed was executed his expenditure in this respect did not appreciably increase. The accounts of the old wakf are not before us and there is no means of showing how the income derived therefrom was expended after May, 1917. It would appear, therefore, that the settlor to all intents and purposes continued to treat the income of the endowed properties as at his own disposal and spent the money as the deed says "in whatever manner I would like" but whereas under the deed, as I interpret it, his choice of the mode of expenditure would be confined to the objects of the trust, in fact he spent the bulk of the available assets after payment of revenue and taxes upon his own personal needs. I am constrained to hold agreeing with the learned Subordinate Judge, upon this part of the case, that there was never such complete divestment of interest or transfer of possession as the Shia Law requires.

17. Turning now to another aspect of the same question it is remarkable that although there was a belated effort to indicate a change in the character of the settlor's possession of some of the properties, the Purnea estates yielding an income of between one-third and one-half of the whole property endowed remained recorded in the public register in Badshah Nawab's name as proprietor and not as mutawalli until his death; nor was there any attempt made from first to last to effect a change in the Municipal register of the valuable houses and other property in Patna City. On the 7th April, 1918, nearly a year after the wakf deed was executed we find that mutation of names was

effected with respect to the villages in the Patna District. On the 14th August, 1918, there was also mutation of names of the Shahabad villages and those in Monghyr were similarly dealt with at some later period which has not been disclosed. But neither in Shahabad nor in Monghyr was there mutation of names in all cases although in some cases it would appear that this was due to some formal defect in the application whilst in Purnea and in Patna City there was no mutation at all. Paragraph 7 of the wakf deed itself provides that in order to bring it into force it will be incumbent upon the wakif to get his name removed as proprietor and to get it registered as mutawalli in the Government Office. He was aware, therefore, of the importance of this change and yet nearly a year passes before any attempt is made to carry out this part of the transaction and then only in a half-hearted and hesitating manner. In the meantime, and indeed subsequently, the wakif is treating the income as his own. As pointed out in the judgment of the Judicial Committee in Abadi Begum v. Bibi Kaniz Zainab 99 Ind. Cas. 669 : 8 P.L.T. 107 : A.I.R. 1927 P.C. 2 : (1927) M.W.N. 12 : 25 A.L.J. 51 : 38 M L.T. 33 : 4 O.W.N. 153 : 31 C.W.N. 365: 52 M.L.J. 430 : 29 Bom. L.R. 763 : 25 L.W. 710 : 6 Pat. 259 : 45 C.L.J. 408 : 54 I.A. 33 (P.C.) one would expect that if the wakif is sincere in his desire to divest himself of his property he would at once obtain mutation of names in the Collector's register.

18. Another matter in this connection which is not without significance is that, with the exception of one single village, the applications for mutation of names have not been produced and there is nothing to show that Badshah Nawab himself was instrumental in bringing about this change. In the single instance where the application is produced it doss contain the signature of Badshah Nawab. I should have thought that where the point is of such vital importance this document would have been supplemented by others and in this connection it is important to remember that both Ali Zamin and Kali Prasad who were looking after the late Nawab's affairs admit that he, on account of his temperament and the state of his brain, sometimes signed blank papers and it cannot be said with confidence that the one application produced was not one of those. It may well be that Ali Zamin as Badshah Nawab's health got worse was becoming anxious about his future position if no effort should be made to bring about a mutation of names and as it was provided by Clause 22 of the deed that his name also should be recorded as mutawalli, although he was to have no powers as such, the applications were made at his instance without the knowledge of Badshah Nawab.

19. Many documents were produced on behalf of the plaintiff including the plaints in 24 rent suits against tenants in the endowed property in which Badshah Nawab is described as proprietor and not as mutawalli and in two cases where he sold property not included in the wakf deed small portions of the endowed property in Patna were also included in the sale deeds. It is argued that this was done with the object of enabling registration of these sale-deeds to take place in Patna. If this was so and if Badshah Nawab considered that he had no right to dispose of this property, it was a fraud upon the registration authorities. It is nobody's case that he was wilfully dishonest and I prefer to think that it was merely another instance of the manner in which he considered he was legitimately entitled to deal with the property during his lifetime.

20. Before leaving this part of the case it is necessary to deal with certain documents which were put to one of the plaintiff's witnesses with regard to the Purnea properties which admittedly remained registered in the name of Badshah Nawab as proprietor up to his death. Ahmadulla, witness No. 6

for the plaintiff, who had been a Tahsildar in the Purnea District under Badshah Nawab and had apparently acted also for the plaintiff, gave evidence to the effect that Badshah Nawab was in, possession of the estate in the Purnea District as malik and not as mutawalli until the time of his death and that no hukumnama or any other document was sent to anybody in that District to indicate that the property had been given in wakf. Many tenants in this District were called and produced their rent receipts which supported this witness's evidence. It was also admitted by Kali Prasad that the old forms of rent receipts in use before 1917 describing Badshah Nawab as proprietor were kept in use after his death. It appears that the witness had previously had some dispute with the plaintiff's manager and had been dismissed. Certain counterfoil receipt books were put to him in cross-examination from which it appeared that Badahah Nawab was described as mutawalli. He admitted that these had been kept in his charge and that the receipts issued bore his signature. Where these came from is a mystery. They were not included in the plaintiff's list of documents but it was said that they were discovered amongst the plaintiff's documents in Court by the Vakil for the defendants. They cover the same period as the receipts produced on behalf of the plaintiff which show Badshah Nawab's name as proprietor and not as mutawalli. This witness in giving his evidence on this part of the case, as the Judge's note shows, appeared to be concealing the truth and he refused to accept his evidence. I am not prepared to differ from the learned Judge who had an opportunity of observing the demeanour of the witness, in his appreciation of his evidence, and it is a significant fact that no tenants were called from this District to show that they ever got receipts in the form appearing in these books while several tenants who were called for the plaintiff from the same District produced their receipts in the old form. These counterfoil receipt books also were not printed at the press which the late Nawab was in the habit of employing for this purpose. Their origin is a mystery and in the circumstances I am inclined to think that the Judge's view that the witness had been tampered with is correct. It is hardly likely that such receipts would have been printed by Badshah Nawab when he had admittedly effected no mutation of names in the Collector's register in respect of these villages.

21. Certain minor points relating to the wakf deed were raised by the respondent. It was contended that some of the objects of the charity to which certain sums were allocated under the deed were not the legitimate objects of a charitable endowment. These comprise the expenses in connection with the mausoleum, the daily breakfasts during Ramzan, the expense on account of camels, duldul, etc., and the annuities to Wahid Husain Khan and Mirza Karar Husain. The Subordinate Judge found that these and many other objects of the charity set out in the deed could not be the lawful objects of a charitable endowment, but it was conceded by Sir Ali Imam on behalf of the respondent that he could not support the finding except as to the items above-mentioned.

22. If I am right in holding that there was no such complete divestment of interest or transfer of possession as the Shia Law requires, this question does not arise; but I may say after hearing the argument of Mr. Khurshaid Husnain for the appellants on this part of the case and the texts and authorities referred to by him I consider that the items objected to might be the legitimate objects of a charitable endowment under Muhammadan Law. As to the annuities, they were given in the one case to a member of Badshah Nawab's family, namely his sister's grandson, who would come under the heading of kindred even if not included in the word 'family' in the Wakf Validating Act of 1913. In the other case the annuity was given subject to discharging the duties entrusted to the annuitant

by the mutawalli. In any case if one or more of these items should be excluded by Muhammadan Law this would not invalidate the whole document. Whatever is provided for that object would go into the reserve. It was argued, however, that the wide discretionary powers given to the settlor as mutawalli would entitle him to spend the whole income on any particular object named in the deed even if it were a prohibited object under the law. If, therefore, a single object of the charity is unlawful, the whole deed is illegal. I consider that this is giving the deed a meaning it will not bear. It does not appear to me that the extensive powers of management given to the mutawalli would entitle him to alter the whole scheme of the deed. The discretion given is with regard to the management of the properties and is to be the discretion of a mutawalli. The real difficulty arises from the last sentence of Clause (1) of the document which gives the settlor power to spend the money in any manner he would like. But here again he must spend as mutawalli and by Clause (17) there shall be no decrease or change in the heads of charges except in time of need.

23. A further question arose as to the extent of the properties dedicated in the Purnea District including Dinajpur. These appear at the end of the First Schedule of the deed. The question is whether under the description Taluqa Surjapur, Touzi No. 7, the whole of the settlor's interest in Surjapur passed or only his interest in 29 villages out of about 800 in which he was interested in Pergana Surjapur. It appears that in the head office of Badshah Nawab at Patna all the income arising from the Surjapur' villages was entered under the heading Taluqa Surjapur and not Pergana Surjapur. On the spot, however, in Purnea, Pergana Surjapur is divided into different Taluqas for the purpose of collecting rents, one of which containing 29 villages is known as Taluqa Surjapur. The question is as to the meaning of Taluqa Surjapur as used in the deed. The Subordinate Judge did not decide this question as in view of his decision on other points he considered it unnecessary. The point was argued before us and the opinion I have arrived at is that Taluqa Surjapur was used to include the larger interest. My reasons for arriving at this decision are that according to the evidence of Mr. Mackay, the sub-manager of the Nazirganj estate in that District, and a witness for the plaintiff, all the 29. villages comprised in the smaller area known locally as Taluqa Surjapur are within the jurisdiction of Kishunganj thana whereas the villages described compendiously as Taluqa Surjapur in the deed are said to be in the thanas of Islampur, Kishunganj, etc. Further in the deed the net, income of the settlor's interest is stated as Rs. 8,500 which is the income of the whole and would be considerably less if the 29 villages only were included. The supplementary deed of the 19th February, 1919, referred to in the earlier part of this judgment was executed in order to set at rest the doubt on this point as well as to correct some minor defects in the original deed.

24. It was also argued on behalf of the appellants that the supplementary deed in any case amounted to a fresh dedication of the Surjapur properties. But even if it should be regarded as a dedication of the Surjapur properties omitted in the previous deed it does not appear that it was followed by any transfer of possession or change in the character of possession of those properties before Badshah Nawab's death about a month later. There is, however, a further matter with regard to this document which has been dealt with by the learned Subordinate Judge. It is admitted that Badshah Nawab had another serious stroke of paralysis in December, 1918. He never really recovered from this attack and the postcards written on his behalf in January, 1919, show that he had given up all hope of recovery and was in expectation of imminent death and his condition thereafter until the final stroke on the day of his death on the 19th March was almost that of imbecility as may be

gathered from the evidence of the photographer Mr. Palmer. The learned Judge considered that he was then suffering from Marz-ul-maut, and I consider on the evidence that he was justified in so finding. A gift made in mortal sickness cannot operate on more than one-third of the donor's assets.

25. With regard to the Hupmobile car, I see no reason to differ from the finding of the trial Court on this point. The circumstances under which it was purchased seem to indicate that Badshah Nawab was the real purchaser. He admittedly supplied the money and his letter of the 29th June, 1916, (Ex. X), in which he asks Ali Zamin to take a receipt in his own name and not in that of Badshah Nawab leaves little doubt that this was really a farzi transaction and probably was intended as a protection against the possibility of the car being attached by his creditors. I think that if it had been intended as a gift to Ali Zamin the language of the letter would have been different. The price paid was over Rs. 5,000 and the story about a carriage and horses having been provided for Ali Zamin at the time of his marriage some years earlier and sold shortly afterwards for Rs. 2,000, or Rs. 3,000 is not very convincing. It may be that the carriage and horses had been purchased for his use but he does not seem ever to have been in possession of them and the cost of maintaining them was paid by Badshah Nawab. They were sold by him without Ali Zamin's knowledge and the price realised was retained by Badshah Nawab. The upkeep of the motor car and the cost of petrol was also paid for by Badshah Nawab and I am not satisfied that the learned Subordinate Judge arrived at a wrong decision on this question.

26. With regard to the house in Dharamtalla Street claimed by the widow, I think different considerations arise. I concede that it is quite possible that Badshah Nawab may have purchased this house in the name of his wife for the same reason as he purchased the motor car in the name of Ali Zamin, but there is nothing inherently improbable in supposing that he really intended that the house should belong to his wife. The contract to purchase dated the 26th February, 1915, was for sale to Badshah Nawab or his nominee which is consistent with either view and the sale-deed which followed on the 2nd July recites that the previous agreement was entered into by him on behalf of his wife and that the purchaser Bibi Zainia is paying the purchase price Rs. 36,000 out of her own dower and it is admitted that her dower whatever, it may have been, was still due to her. Moreover, there are subsequent acknowledgments by Badshah Nawab that the house in question belonged to his wife. The petition Ex. B (1) dated the 27th September, 1915, states clearly that the house belonged to his wife and was purchased out of her dower money. An affidavit sworn by Badshah Nawab in the same proceedings on the 27th September, 1915, is to the same effect and in the letter, dated the 29th June, 1916, (Ex. X), already referred to, Badshah Nawab asks Ali Zamin to take the papers from his Solicitor regarding the house in Dharamtalla Street and bring them to Patna as his wife wanted them and they are afterwards produced from her custody. It appears also from the evidence of the Solicitor that Badshah Nawab always told him that his wife was buying the house out of her dower money. Had the question been one between Badshah. Nawab and his wife I think it would have been very difficult for him to escape from his own admissions made on different occasions with regard to this property, and I do not think it has been made out that the purchase was a benami transaction. 1 hold, therefore, that the house No. 68 Dharamtalla Street belongs to the defendant Bibi Zainia and the plaintiff is not entitled to any interest therein.

27. A further small matter remains to be dealt with. By the decree appealed from the plaintiff is declared entitled to a third share in the immoveable properties and a fourth share in the moveable properties. Under Shia Law, however, a childless widow is entitled to one-fourth share in the moveables including household effects and the value of tress 'and buildings forming part of her husband's (c) state. The plaintiff's share in such property will be subject to the right of the defendant No. 2 to her one-fourth share therein.

28. The decree of the trial Court will be varied by declaring that the plaintiff is not entitled to any share in the house No. 68, Dharamtalla Street, Calcutta, which belongs to the defendant No. 2 and that the plaintiff's share in the moveable and immoveable properties is subject to the one-fourth share of the defendant No. 2 in the moveables including household effects and the value of buildings and trees forming part of the estate of the late Badshah Nawab.

29. Before passing any orders as to costs or mesne profits in this case we thought it desirable to invite the parties to discuss the matter here before the Court. With regard to the costs we think that having regard to the peculiar circumstances of this case it is not one in which the ordinary rule as to the successful party getting the costs of the action are applicable. The circumstances are peculiar in this way. The whole trouble in this case has arisen from the fact that the late proprietor of the estate executed a wakf deed apparently valid on the face of it but which in fact after investigation has been pronounced by the Court to be illusory, and that entirely due to the acts of the late proprietor himself. In these circumstances, the defendant Ali Zamin who was appointed mutawalli and was in the position of a trustee for a religious endowment, was in our view entitled at all events to defend the suit up to the decision of the trial Court. He was in a position of trust and so far as he could see he had a case which certainly ought to be put before the Court on behalf of the public who are benefited by the endowment. Further there were personal charges of dishonesty made against him in the plaint and had he not defended the suit he would have had to submit to those charges without any opportunity of defending his character. In the circumstances we consider that the costs of the trial Court ought to come out of that part of the estate which is represented by the endowed properties. The balance after deducting the costs of both parties will be available for distribution amongst those who are entitled to it.

30. With regard to the costs of the appeal it is true that the appellant Ali Zamin has failed. At the same time Musammat Bibi Zainia has succeeded upon a substantial part of her appeal the value of which amounts to Rs. 36,000. Ali Zamin also has succeeded to this extent that by the judgment of this Court differing from the judgment of the lower Court, he has entirely cleared his character and, therefore, it was not, in our opinion, a case of a wanton appeal against a decision which was so clear that we could say that he was in no sense justified in bringing the appeal. At the same time we cannot refuse to take notice of the fact that upon the main question whether there was a valid wakf or not the appellant has failed. In these circumstances it seems to us that the appellant in this case should be entitled to half his costs of the appeal out of the estate and the costs of the respondents will also be paid from the same fund.

31. With regard to the mesne profits this is not a case in which a decree for mesne profits ought to be awarded. We consider that the defendant Ali Zamin was entitled at all events until the matter was

determined by a Court of Justice to remain in possession of the property and administer the estate in accordance with the strict terms of the instrument of wakf. He will, therefore, have to account to the plaintiff for the management of the wakf property from the time he took possession from the late Badshah Nawab in March, 1919, upto the 31st October, 1922, when he gave up possession of one-third of the property to the plaintiff. We understand that he is still in possession of the other two-thirds which may form the subject of further proceedings on behalf of Manjhley Nawab and the other pro forma defendants in the suit who we understand have taken proceedings for the purpose of recovering their share of the wakf property. The defendant will, therefore, render an account to be taken before the Subordinate Judge of his management and dealing with the wakf property during the period mentioned above. Any sums which he may have expended on the legitimate objects of the wakf including his own salary during that time will not be recovered back but the balance after deducting those sums will be available or he will have to account for it for distribution amongst the parties entitled thereto. The only party who at present is entitled to any decree against that fund for his share is the plaintiff himself. The plaintiff will be at liberty to apply to the Subordinate Judge for the purpose of fixing a day or taking such proceedings as may be necessary for the rendering of accounts by Ali Zamin.

32. It appears that a sum of Rs. 3,500 was deposited in the trial Court in cash as security for payment of the costs of the plaintiff. That sum will remain on deposit until further orders. The parties will be at liberty to apply to the Court with regard to that sum as advised hereafter. We understand that security to the extent of Rs. 4,000 was also given in immoveable property. We make no order with regard to that.

33. One small matter which was not specifically dealt with in the judgment delivered on the 9th January was a question relating to a small piece of property known as Kalimabad. This matter has been drawn to our attention and it is sufficient to say that we cannot see any reason to interfere with the judgment of the learned Judge on that question. We consider that there is no satisfactory evidence to show that that property was the subject of a legal endowment.

Adami, J.

34. I agree.