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that the latter case was governed by the Transfer of Property Act. The case of *Shepard* v. *Jones* (1) had not been decided by the Court of Appeal when the Transfer of Property Act was passed, but there were many other published decisions on the subject including the case of *Sandon* v. *Hooper* (2), which is referred to by BANERJI, J., in the course of his judgement. Nothing is said in the Act about compensation for improvements and we think that the Legislature advisedly refrained from including in the Act any provision which would enable a mortgagee, without consent of of the mortgagor, to add to and improve, or alter the property. Such a power in the hands of the ordinary mortgagee in this country would obviously lead to much litigation, and the Legislature was, we think, well advised in restricting the powers of the mortgagee within narrow limits.

The court below refused to allow interest on the sum of Rs. 147-6-0, and omitted to deal with the claim on account of taxes paid by the mortgagee. We allow interest at the rate of one per cent. per mensem from the 20th of April, 1911, up to the date of redemption on the sum of Rs. 147-6-0, and by consent of the plaintiff respondent we allowed the sum of Rs. 8-8-0 on account of taxes paid by the mortgagee. To this extent and as regards costs the appeal is allowed. The cross-objection is dismissed. The plaintiff respondent and defendant appellant will pay and receive proportionate costs throughout, other parties will pay their own costs.

Decree modified.

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Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

NIAMAT ALI (DEFENDANT) *v.* ALI RAZA AND OTHERS (PLAINTIFFS.) *

Civil Procedure Code (1908), *section* 92—*Waqf*—*Suit for removal of mutawalli*—*Defendant alleged to be a minor, but no allegation of mismanagement of waqf property.*

Held that no suit would lie under section 92 of the Code of Civil Procedure for the removal of a *mutawalli* where no case of mismanagement of the waqf property was made out; but the sole ground was that the defendant (who was the grandson of the last *mutawalli* and most substantial benefactor of the waqf) was a minor according to the provisions of the Indian

* First Appeal No. 131 of 1913, from a decree of J. L. Johnston, District Judge of Farrukhaba dated the 19th of February, 1913.

(1) (1882) 21 Ch. D., 469. (2) (1843) 6 Beav., 246; 14 L. J., Ch, 120.

Majority Act, 1874,) though apparently not so according to the Muhammadan law.

THE facts of this case were, briefly, as follows :—

One Waliullah started an Arabic School at Farrukhabad in 1808 and dedicated property, the income of which is Rs. 22 per month, for its maintenance. One Fazal Ali was *de facto mutawalli* of the property and himself dedicated considerable property for its upkeep. He provided under the decument by which he dedicated his property that his son Inam Ali, and after him his heirs were to become *mutawaltis* of the waqf property. After Inam Ali's death his brother Karam Ali became the *mutawalli*. Karam Ali died leaving a will by which he appointed his son Niamat Ali to be the *mutawalli*. Niamat Ali, at the time he became *mutawalli*, was only 16 years of age. The plaintiffs, who were members of the Muhammadan community, brought this suit under section 92 of the Code of Civil Procedure for removal of Niamat Ali from *mutawallishiip*. The suit was decreed by the District Judge. The defendant appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Agha Haidar*), for the appellant, first submitted that it was not a suit contemplated by section 92 of the Code of Civil Procedure. There was no breach of trust proved nor even alleged in the plaint. The relief did not ask for any scheme of administration and the whole object of the suit was merely the appointment of a new trutee and the removal of the defendant who was in possession. Such a suit did not lie under section 92 of the Code. It was a misconceived suit and the Judge had no jurisdiction to entertain it. He next contended that under the Muhammadan law, in the absence of any thing to the contrary in the deed of waqf, a founder's heir was entitled to preference to the office of a *mutawalli*. The defendant was such an heir, and upon the findings, the plaintiffs were strangers. It was true the defendant was a minor when the suit was filed, but his mother could look after the management of the estate and there were no personal services attached to the office. This was not a case of a minor being appointed *mutawalli* for the first time; but one of a minor inheriting the office, and the Muhammadan law did not stand in the way of the defendant. It must be remembered that the defendant was a minor under the

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Indian Majority Act but not under the Muhammadan law. Under that law two things were necessary for majority (1) *Buloogh* (puberty), (2) *Rashad* (discretion). Ordinarily under Muhammadan law these conditions were satisfied upon the completion of the fifteenth year, which was the case here according to evidence. He cited *Shahoo Banoo* v. *Aga Mohamed Jaffer Bindaneem* (1) *Manijan Bibee* v. *Khadem Hossein*, (2) *Budree Das Mukim* v. *Chooni Lal Johurry*, (3) *Strinivasa Ayyangar* v. *Strinivasa Swami*, (4) Tyabji's Muhammadan Law, p. 413.

The Hon'ble Mr. *Abdul Raoof*, for the respondents :—

Breach of the conditions of the waqf was alleged and not denied and the relief claimed the removal of the alleged *mutawalli* and the appointment by the court of a suitable *mutawalli*. Such a suit was contemplated by the Code of Civil Procedure, section 92. As regards the second part of the argument a minor could be appointed a *mutawalli* only in the case of his being a member of the class specified by the waqf, otherwise minority was given as one of the disqualifications in the text-books for the appointment of *mutawalli*. The Indian Majority Act would apply and the minor was incapable of managing the waqf property. A guardian or a manager could only manage the waqf property in the case where a minor was validly appointed. The appellant, not coming within the category of the class specified by the *waqif* could not have been appointed a *mutawalli* even by the *Qazi*. So the question of management by the mother was beside the point.

The Hon'ble Dr *Tej Bahadur Sapru*, was not called upon.

RICHARDS, C. J., and BANERJI, J.—In this suit which purports to have been brought under the provisions of section 92 of the Code of Civil Procedure, the plaintiffs claimed that the defendant should be removed from the *mutawallishiip* of certain property which was specified in lists A and B appended to the plaint, that the defendant should be called upon to furnish accounts and that new trustee or trustees from the family of the original appropriator (one Wali-ullah) should be appointed. In the plaint are set forth the history of the waqf about which there appears to be no doubt. One Maulvi Wali-ullah started an Arabic School of

(1) (1906) I. L. R., 34 Calc., 118.
(2) (1904) I L. R., 32 Calc., 273.
(3) (1906) I. L. R., 33 Calc., 789.
(4) (1882) I. L. R., 16 Mad., 31.

literature and Muhammadan Jurisprudence in the city of Farrukhabad about the year 1808. He dedicated certain shops which at present produce about Rs. 22 per mensem for the expenses. For a long time a man of the name of Syed Fazal Ali was *de facto mutawalli*. He made a futher waqf of property worth about Rs. 7,500. He continued to be, at least, *de facto mutawalli* during the remainder of his life and named his son Inam Ali to be *mutawalli* after his death. Inam Ali succeeded Fazl Ali and died on the 5th of February, 1908. Fazal Ali when making his dedication provided that the descendants of Inam Ali should be the *mutawalli* of the entire endowment. After the death of Syed Inam Ali, who apparently died without issue, his brother Karamat Ali assumed the *mutawallishiip*. Then followed some litigation. Karamat Ali brought a suit asking for a declaration that he was the lawful *mutawalli* of all the property. The court of first instance decided in his favour. The principal plaintiff in the present suit, Syed Ali Raza, was a party. Syed Ali Raza appealed and on the case coming before this Court the suit was withdrawn with liberty to bring a fresh suit. From the judgement it would seem that the Court had indicated that the evidence adduced by Karamat Ali was not sufficient to justify it in making an affirmative declaration in his favour. No fresh suit was apparently brought owing to the death of Karamat Ali. On the death of Karamat Ali which took place on the 23rd of August, 1911, the present defendant, Niamat Ali, became *mutawalli* under the guardianship of his mother Musammat Tasliman. This was in accordance with a provision in the will of Karamat Ali. The present suit was then instituted on the 20th of February, 1912. It must be noted here that there is no allegation in the plaint that there has been any misappropriation of trust funds or any breach of trust. It is not alleged that any scheme was required. The prayer is simply for the removal of the defendant from the office of *mutawalli* and that some new trustee or trustees from the family of the original appropriator should be appointed. The court below has made a decree removing the defendant from being trustee and has appointed the plaintiff Syed Ali Raza *mutawalli*. It has even given the costs of the suit against the defendant.

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Section 92 of the Code of Civil Procedure provides for a suit for certain relief in the court of the District Judge in a case of an alleged "breach" of a trust created for public purposes of a charitable or religious nature or where the direction of the court is deemed necessary for the administration of any such trust. Suits relating to disputes between parties as to who is entitled to be *mutawalli* on the ground of family relationship are not brought under this section. We have already pointed out that no breach of trust was alleged nor proved, nor was it shown in any way that the intervention of the court was necessary. Assuming that Karamat Ali was legally entitled to be the *mutawalli* (an office which he undoubtedly *de facto* enjoyed) he was entitled to appoint his successor. It seems to us that the suit was entirely misconceived and ought not to have been entertained by the learned Judge. It is argued that there was no *muatwalli* and that the waqf property was derelict and that accordingly the intervention of the court was absolutely necessary. This is clearly not so. Karamat Ali was *de facto mutawalli* and it was never decided that he was not also *de jure* so. As a matter of fact it clearly appears that the defendant did assume the office and apparently the trust property was being properly managed.

It is said that the defendant Niamat Ali is a minor. It is possible that he was a minor according to the Indian Majority Act, but it is by no means certain that he was a minor according to the Muhammadan law, that is to say, that he had not reached the years of puberty and discretion. In the will of Karamat Ali which was made before the present dispute arose, he is described as being a boy of 16 years of age.

On the general merits of the case it seems to us that the present suit has very little. The defendant is the grandson of Fazal Ali, who made the last endowment, the most substantial portion of the waqf. Fazal Ali had for many years been at least *de facto mutawalli* of the endowment created by Waliullah and the presumption would be that he was also *de jure mutawalli*. According to the spirit of Muhammadan law Niamat Ali, his grandson, would have the best right to be *mutawalli*. We need hardly say that if there is a breach of trust in the future, it will be open, upon proper proof, to get the *mutawalli* removed and a

new trustee appointed. We allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs in both courts.

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Appeal decreed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

RAS BEHARI LAL (PLAINTIFF) *v.* AKHAI KUNWAR AND OTHERS (DEFENDANTS.) *

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Act No. V of 1882 (*Indian Easements Act*), *sections* 59 *and* 60—*Licence —Revocation —Rights of transferee of property in respect of which a licence has been granted.*

Held that the rule laid down by section 59 of the Indian Easedments Act, 1882, is not independent of that laid down by section 60, and does not confer upon the transferee any higher rights than those possessed by the transferor.

THE facts of this case were as follows :—

In the year 1888 one Jhingur Singh, a zamindar, gave unconditionally six plots of land situate in his zamindari to the respondent No. 1 in consideration of medical services rendered to the grandson of Jhingur Singh. The grant was made by means of an unregistered document. The respondent No. 1 entered into possession of the land, constructed buildings and two pacca wells thereon and laid out a garden. He never paid any rent or dues for the land. Jhingur Singh sold his zamindari to the appellant in 1906. The appellant sued in the Revenue Court for assessment of rent on the land granted to respondent No. 1, but his claim was dismissed. Thereupon he brought the present suit in the Civil Court for possession and for damages by way of mesne profits for three years. Both the lower courts dismissed the suit. The plaintiff appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Babu *Purushottam Das Tandon*), for the appellant :—

In the absence of any registered document there could be no transfer of property, and the respondent No. 1 is a mere licensee. The appellant who is a transferee from the grantor is not, under section 59 of the Easements Act, bound by the licence and can revoke it. Section 59 is not controlled by section 60. The latter is not a modification of or proviso to section 59. The Indian Easements Act makes a difference between the grantor of the licence

* Second Appeal No. 1250 of 1913 from a decree of Sri Lal, District Judge of Ghazipur, dated the 20th of August, 1913, confirming a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 29th of January, 1913.