

1926

MUHAMMAD
SHARI
v.
MUHAMMAD
ABDUL
AZIZ.

if he does so, he can lawfully reserve the benefit for himself or partially." He makes no distinction in the case of a building dedicated as a mosque, and *a fortiori* no distinction in the case of a building dedicated to, and not for, a mosque, as is the case in the present suit. The deed I construe to be one where no curator has been appointed to function during the lifetime of the *waqif* and, consequently, the office could appertain to the *waqif quâ waqif*; and he could reserve the use to himself.

On the sole ground, therefore, that I am not prepared to dissent from the decision of two Judges of this Court in 15 Allahabad to the effect that Inam Muhammad is to be preferred as an authority to Abu Yusuf, I concur in the order of my learned brother and would allow this appeal.

BY THE COURT.—The order of the Court is that this appeal is allowed with costs throughout and the decree of the court of first instance restored.

Appeal allowed.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji.

1926

Decem-
ber, 15.

RAM CHANDRA BANSAL AND ANOTHER (APPLICANTS) v. LALMAN AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, section 2(2)—Preliminary decree, passed ex parte—Notice to other side necessary before final decree.

Where the preliminary decree in a suit has been passed *ex parte*, notice ought to be issued to the other side before the final decree is passed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu *Satish Chandra Das*, for the appellants.

* First Appeal No. 35 of 1926, from an order of Shamsuddin Khan, Subordinate Judge of Jhansi, dated the 4th of January, 1926.

Munshi *Girdhari Lal Agarwala*, for the respondents.

1926

 RAM
 CHANDRA
 BANSAL
 v.
 LALMAN.

WALSH, A. C. J., and BANERJI, J.:—In our opinion this appeal must be allowed. Circumstances alter cases. We are not attempting to lay down an invariable rule that in every case where there is a preliminary decree, notice ought to be issued to the other side before the final decree is passed. But in a case where the other side is absent and the preliminary decree is *ex parte*, we do lay down the rule. It appears that there is nothing in the Code especially dealing with the matter where, in a case like partnership or a similar matter, where the liability to pay a sum of money depends on the decision of a preliminary point, for example, the existence of the partnership, the issue to be decided in the preliminary decree is quite different from the issue to be decided in the final decree. If the preliminary decree is in favour of the claimant and accounts have to be adjusted, then it is quite clear that the matter takes an entirely different aspect and complexion, and that the person whom it is sought to make liable is just as entitled to notice of the judicial proceeding which is to settle the question of the amount as he is in an ordinary suit. There is nothing in the rules enabling the court to decide *ex parte* without further notice which is inconsistent with this rule, and on that ground we are bound to hold that the commissioner had no jurisdiction at all to find the amount without having issued previous notice to the defendant. We must allow the appeal, set aside the final decree and direct the court below to carry out the order appertaining to accounts according to law, after due notice to both parties.

Appeal allowed.