APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Pullan.

MUHAMMAD SHAFI (DEFENDANT) *v.* MUHAMMAD ABDUL AZIZ AND OTHERS (PLAINTIFFS).* 1926 *December*, 14.

Muhammadan law—Waqf—Waqf *created in favour of mosque —Interest reserved to* waqifs *during their lifetime.*

Two Muhammadans (husband and wife) of the Hanafi sect made a *waqf* of a house in favour of a mosque which was managed by *panches*. In doing so, however, they reserved to themselves the right to live in the house until the death of the survivor.

Held that, according to the Muhammadan law, the *waqf* was invalid.

Muhammad Aziz-ud-din Ahmad Khan v. *The Legal Remembrancer to Government, North-Western Provinces and Oudh* (1), followed. *Abdul Kadir* v. *Salima* (2), and *Bikani Mia* v. *Sukh Lal Poddar* (3), referred to.

THE facts of this case were as follows :—

On the 28th of May, 1912, two Muhammadans (husband and wife) belonging to the Hanafi sect made a *waqf* of a house in favour of a certain mosque under the management of *panches*, but it was provided by the *waqf-namah* that the executants were to keep their residence in the house until their death, and that after their death the *panches* were to have a right to manage the property and spend its income on the mosque. The wife died first, and thereafter the husband left the house. The *panches* then sued for possession of the house. The court of first instance dismissed the suit on the ground that the *waqf* was invalid under the Muhammadan law. But on appeal

* Second Appeal No. 873 of 1924, from a decree of E. Bennet, District Judge of Agra dated the 1st of February, 1924, reversing a decree of Alakh Murari, Munsif of Agra, dated the 4th of August, 1923.

(1) (1893) I.L.R., 15 All., 321. (2) (1886) I.L.R., 8 All., 149.
(3) (1892) I.L.R., 20 Calc., 116.

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the District Judge reversed this decree and decreed the suit. The defendant appealed to the High Court.

Maulvi *Mushtaq Ahmad*, for the appellant.

Maulvi *Mukhtar Ahmad*, for the respondents.

The judgement of PULLAN, J., after a brief recital of the facts of the case, continued as follows :—

In commenting on the terms of the deed the learned District Judge states :—

"It will be observed that the *waqf* was to take effect at once and the property became invested in the trustees at once, but the executants reserved a right of enjoyment during their lifetime."

It does not appear to me that this is a correct interpretation of the document. The learned Judge has himself agreed that the authority of Imam Muhammad is to be preferred to that of Imam Abu Yusuf. This is the view taken by this High Court in the case of *Muhammad Aziz-ud-din Ahmad* v. *Legal Remembrancer to Government, North-Western Provinces and Oudh* (1). Abu Yusuf makes simple declaration sufficient to create a valid *waqf*, but Imam Muhammad requires that the *waqif* should divest himself of possession. In the present case it is certain that the *waqif* did not divest himself of possession at once, though he subsequently, after his wife's death, left the house in order to take up service. Nor did he appoint himself *mutawalli* to manage the property in the interest of the mosque. Thus the learned Judge was compelled to fall back upon his second position that the *waqf* was rendered complete when possession was transferred or abandoned by Amir-ud-din, and the plaintiffs began to realize rent on the property.

(1) (1893) I.L.R., 15 All., 321.

I agree with the lower courts that the authority of Imam Muhammad should be preferred generally to that of Abu Yusuf, and do not find that the Full Bench ruling of the Allahabad High Court, reported in *Abdul Kadir* v. *Salima* (1), lays down anything to the contrary. The proposition there enunciated was that whenever the opinion of Abu Yusuf is supported by either Abu Hanifa or Imam Muhammad, that opinion should be accepted, not that the opinion of one should be preferred to that of the others.

In my opinion there are two points which are fatal to the acceptance of the deed in suit as being a valid and complete *waqf*. In the first place, it is of the nature of a testamentary *waqf* which would only come into effect on the death of the *waqif*, and Amir-ud-din is still alive. I am not of opinion that the removal of Amir-ud-din from the house accelerated the operation of the deed and is equivalent to his death. In the second place, the deed is a *waqf* in favour of a mosque in which the *waqif* has reserved to himself a benefit: in fact he has stayed the operation of the *waqf* so that he may have full enjoyment of the property during his lifetime. It is true that the Musalman Waqf Validating Act (IV of 1913) accepts the opinion of Abu Yusuf that the *waqif* may derive personal benefit from a *waqf*, against the opinion of the other authorities, but this is not the case when the *waqf* is created for the benefit of a mosque. On this point the Muhammadan lawyers are unanimous. (Tyabji's Principles of Muhammadan Law, section 515.)

For these reasons I would hold that the deed executed was in substance a testamentary *waqf* which could not come into operation until the death of the

(1) (1886) I.L.R., 8 All., 149.

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waqif, and that it was invalid as such because the *waqf* being in the name of a mosque, the *waqif* reserved a benefit to himself.

ASHWORTH, J. :—I concur with the finding on the ground that according to Imam Muhammad actual delivery of the *waqf* property to the *mutawalli* is a condition precedent of the *waqf* taking effect and on the ground that we have been shown no decision of this Court which dissents from the view expressed in *Muhammad Aziz-ud-din Ahmad Khan* v. *The Legal Remembrancer to Government, North-Western Provinces and Oudh* (1), that the authority of Abu Yusuf is to be postponed to that of Imam Muhammad. This decision purports to follow a Full Bench decision of the Calcutta High Court in *Bikani Mia* v. *Sukh Lal Poddar* (2). I have examined that decision of the Calcutta High Court, but cannot find that it expressly states that Imam Muhammad is to be preferred to Abu Yusuf, but indirectly this decision appears to have followed Imam Muhammad and there have been other decisions apparently preferring the authority of Imam Muhammad, even though they do not expressly state that he is a superior authority for this province to Abu Yusuf. The case has not been argued before us in a manner which would, I think, justify a refusal to follow the decision in 15 Allahabad or would justify our putting the matter up before a Full Bench of this Court.

If, however, the question were *res integra* the contrary opinion of Mr. Amir Ali would require to be given due weight. In his Students' Handbook on Muhammadan Law, 1925, which is later than the last published edition of his larger edition of Muhammadan Law, he expresses, on page 158, the opinion

(1) (1893) I.L.R., 15 All., 321 (323). (2) (1892) I.L.R., 20 Calc., 116.

that Imam Muhammad's view is not recognized among the Hanafis of India, and this is the view which he expressed in his dissentient judgement in the case referred to in 20 Calcutta.

I am not disposed to concur with my brother PULLAN in the view that the *waqf* deed should be construed as a testamentary deed, that is to say, as postponing all effect of the dedication until the *waqif's* death. As I read the deed, it came into effect at once, although the persons nominated as managers were not to exercise management until after the testator's death and the executants were to reside in the house until their death. If the deed were testamentary, it should have expressed that the deed of dedication (and not merely the direction as to management) was not to take effect until the *waqif's* death, and, again, if it were testamentary, there would be no need to reserve to the *waqif* a right of residence in the house until his death. *Ashworth, J.*

Nor again do I find sufficient authority for the statement that there can be no reservation when the *waqf* is in favour of a mosque. It is true that Tyabji, on page 640 of his Muhammadan Law, 2nd edition, states that even according to Yusuf Ali when a mosque is the object of the "*waqf*" the *waqif* cannot be a beneficiary. But in the light of Amir Ali's Students' Muhammadan Law (referred to above), I take this to mean that the *waqif* cannot be a beneficiary where some one else is appointed manager from the date of the *waqf*. For on page 156 of this handbook, paragraph 41, Amir Ali (who considers Abu Yusuf supreme authority in India and Imam Muhammad no authority therein, see page 158, note) says:—"Under the Hanafi law, a *waqif* may constitute himself the first beneficiary of the trust, and

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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 Imam 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.

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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.