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distinction between the enforcement of public and private rights can now be maintained where the relief sought is of one of the kinds enumerated in section 92 of the Civil Procedure Code. I, therefore, prefer to base my judgement on the ground that the *waqf* with which we are concerned does not constitute a public trust.

[His Lordship then discussed the case on the merits and was for dismissing the appeal with regard to these also.]

BANERJI, J. :—I concur.

BY THE COURT.—The order of the Court is that the plaintiff's appeal is dismissed with costs.

Appeal dismissed.

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June, 20.

Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.

MUSHARRAF BEGAM AND OTHERS (DEFENDANTS) *v.* SIKANDAR JAHAN BEGAM (PLAINTIFF).*

Muhammadan law—Waqf—*Shias*—Waqf-alul-aulad—"*Family*" *of waqif*—*Daughter-in-law*—*Act No. VI of* 1913 (*Musalman Waqf Validating Act*), *section* 3—*Act* (*Local*) *No.* 1 *of* 1903 (*Bundelkhand Encumbered Estates Act*), *section* 10.

Held on a construction of a deed of *waqf* executed by a Shia Muhammadan mainly for the benefit of his son and daughter-in-law :—

(1) that the daughter-in-law would be included in the term "family" as used in section 3(*a*) of the Musalman Waqf Validating Act, 1913;

(2) that the fact that part of the endowed property was subject to a mortgage and part was subject to a charge imposed under the provisions of the Bundelkhand Encumbered Estates Act, 1903, and the deed directed these incumbrances

*First Appeal No. 350 of 1925, from a decree of Saiyid Muhammad Saiduddin, Additional Subordinate Judge of Allahabad, dated the 29th of September, 1925.

to be discharged, did not affect the validity of the *waqf*. *Hamid Ali* v. *Mujawar Husain Khan* (1), referred to:

(3) that part of the endowed property, being within an area to which the Bundelkhand Encumbered Estates Act, 1903, applied, and having been made the subject of a settlement for the liquidation of debts under the Act, could not be made *waqf*, having regard to section 10(2) (*a*). The word "give" as used in that section is not confined to the restricted sense in which it is used in the Transfer of Property Act, 1882, but would include the dedication of property by way of *waqf*. *Sadik Husain Khan* v. *Hashim Ali Khan* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Mr. *B. E. O'Conor*, Sir *Tej Bahadur Sapru*, Pandit *Uma Shankar Bajpai*, Maulvi *Iqbal Ahmad*, *Mr. S. C. Goyle*, Maulvi *Majid Ali* and Mr. *Muhammad Ahmadul Haq Ansari*, for the appellants.

Dr. *Kailas Nath Katju*, Maulvi *Mushtaq Ahmad* and Maulvi *Haidar Mehdi*, for the respondent.

KENDALL and NIAMAT-ULLAH, JJ.:—This is an appeal from a judgement of the Additional Subordinate Judge of Allahabad, giving the plaintiff respondent a decree for a declaration that certain properties named in the plaint are *waqf* properties, and for possession thereof as *mutwalli*, and a sum of nearly Rs. 2,000 mesne profits which had been realized by some of the defendants from the property during the period of their possession and that of the receiver. The property concerned was owned by one Arab Ali Khan, a resident of Allahabad city. It is mostly zamindari property in the three parganas of Arail, Sikandra and Chail, a consideration the importance of which will become clear later on. There is also some land occupied by the houses of tenants or lying waste in the city of Allahabad. The plaintiff respondent, Musammat Sikandar Jahan Begam, is the

(1) (1902) I.L.R., 24 All., 257. (2) (1916) I.L.R., 38 All., 627.

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daughter-in-law of Arab Ali Khan, and she claimed possession as *mutwalli* under the terms of a deed of *waqf* said to have been executed by Arab Ali Khan on the 14th of April, 1919. The first three defendants are one of the widows and the two surviving daughters of Arab Ali Khan, and the fourth defendant is Khan Sahib Mahmud Ali Khan, to whom a small portion of the *waqf* property had been transferred before the institution of the suit.

[A portion of the judgement, not material for the purpose of this report, is here omitted.]

In the deed, after setting forth that a part of the property is pledged and hypothecated to the creditors in security of debts, he states that he wishes to make a *waqf* of the entire property described, "in favour of my male issues and their male issues under the provisions of Act VI of 1913." The legal formula is referred to, and the *mutwallis* are named in order, viz :—

(1) My son Haidar Husain Khan.

(2) His eldest son by his wife Sikandar Jahan Begam (the plaintiff) or the ablest of the several sons, or *if perchance Haidar Husain has no son by Sikandar Begam and he dies childless in my presence or if he, for any reason, resigns his office as a mutawalli, I shall manage the* waqf *property as a* mutwalli, *but I shall not be benefited by the income of the* waqf *property.*

(3) After me or after Haidar Husain Khan, Musammat Sikandar Begam.

(4) The son of Haidar Husain, if any, by his second wife.

(5) After the son of Haidar Husain Khan, his eldest son, etc.

Finally, if none of Haidar Husain's line be available, a managing committee is to be appointed as described in the deed to spend the income on the religious and charitable purposes named in paragraph No. 4.

There is then a description of certain debts which have to be paid, viz. :—

(*a*) Rs. 2,900 a year is to be paid along with the Government revenue in accordance with the provisions of the "Bundelkhand Act."

(*b*) Rs. 40,000, in security of which the property is pledged and hypothecated, and in lieu of the interest on which profits are paid to the mortgagee.

There is a direction that after the Government debt has been paid "the annual amount . . . . . shall be paid to my creditors towards the payment of their principal amount so long as the entire debt is not paid up." Then follow directions that the *mutwalli* shall pay monthly allowances to the two widows, viz., Rs. 15 to Musammat Musharraf Begam (the defendant) and Rs. 25 to Musammat Imtiazan, with a further allowance of Rs. 30 a year for clothes to the former. After the payment of these debts and allowances the balance of the profits is to be realized by the *mutwalli* for his expenses and the maintenance of his children, except in the event of Arab Ali Khan himself being *mutwalli*. It is to be observed that not only is a reference made to the legal formula which is to be recited and to the Act validating *waqfs* of this nature, but Arab Ali Khan, with the apparent intention of conforming with the law relating to *waqfs* executed by Shias, is careful to provide that he shall not himself be permitted, when acting as *mutwalli*, to use the profits to meet his own expenses.

[A portion of the judgement is here omitted.]

The defendants appellants, as has been remarked above, suggested that the deed of *waqf* had never been

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executed. But, apart from this, they contend that even if it was formally signed it was a fictitious deed, that is to say that Arab Ali Khan never really intended to create a *waqf*, and also that the deed had never been acted upon and that possession had never been given to Haidar Husain. Other legal objections to the deed have been urged.

[On the merits it was found that the *waqfnama* was duly executed and that it was not fictitious document. The judgement then continued :—]

It has been next contended that the plaintiff respondent, not being a member of the settlor's family, no provision could be validly made in her favour under the Musalman Waqf Validating Act of 1913. Section 3 of that Act lays down :—

"It shall be lawful for any person professing the Musalman faith to create a *waqf* which in all other respects is in accordance with the provisions of Musalman law, for the following, among other, purposes :—

(*a*) for the maintenance and support wholly or partially of his family, children or descendants, and

(*b*) where the person creating a *waqf* is a Hanafi Musalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated :

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Musalman law as a religious, pious or charitable purpose of a permanent character."

The circumstances which led to this enactment are well known. Their Lordships of the Judicial Committee had held in a series of cases that a *waqf* in favour of the settlor's family, children and descendants, generation after generation, and ultimately in favour of the

poor when the settlor's family becomes extinct is invalid, as the main object in such cases was to create a perpetuity for the benefit of his own famliy, the charitable object being too remote and illusory, and that unless real and substantial provisions be made for charitable objects the *waqf* cannot be upheld—see, for example, *Abul Fata Mahomed* v. *Rasamaya Dhur* (1). It was represented by the Indian Muslim community that the law thus laid down was a departure from Muhammadan law, which regarded a provision for one's family and children as an act of charity. Mr. Ameer Ali exhaustively dealt with the subject in *Bikani Mia* v. *Shuk Lal Poddar* (2), and referred to a large number of original texts and earlier cases decided by British courts upholding the validity of such dispositions. Accordingly, the bill, which subsequently became the Waqf Validating Act, was allowed to be introduced in the Imperial Legislative Council (as it was then designated) by a non-official Muslim member. Section 3 (*a*) with its proviso and section 4 of the Act declare that such *waqfs*, i.e., those in favour of the settlor's family, children and descendants, with ultimate benefit to the poor or other charitable objects, shall be deemed to be valid and that the remoteness of the contingency in which the benefit is to accrue to the poor or other charitable purposes shall not affect the validity thereof. Section 3(*b*) is confined to Hanafi Muhammadans, because there was a difference of opinion between two of their doctors, one of whom, Imam Muhammad, maintained that the settlor could not reserve any benefit to himself, while, according to the other, Imam Abu Yusuf, such a provision ranked with that in favour of his family, children, and descendants and could be validly made. The Shia authorities were unanimously in favour of the former view and consequently no special legislation on that point was necessary in

(1) (1894) I.L.R., 22 Calc., 619. (2) (1892) I.L.R., 20 Calc., 116.

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case of Shia Muhammadans. Among the Sunnis, on the other hand, the generally accepted view was the latter, and therefore section 3(*b*) was enacted to remove the element of uncertainty due to the difference of opinion above indicated.

The effect of the Waqf Validating Act on the Muhammadan law is that a provision in favour of the settlor's "family, children and descendants" with ultimate benefit reserved for the poor or for any other religious or charitable purpose is valid, though, but for the enactment, it would have been otherwise in view of the pronouncement of their Lordships of the Privy Council. In the case before us it is necessary to have recourse to the Act only if the word "family" be held to include a son's widow, because in that case, but for the Act, the *waqf* would be questionable on the view taken by the highest tribunal. Therefore, if she is one of the family, the Act applies and the validity of the *waqf* is declared thereby; if she is not, then she cannot and need not avail herself of that Act, but must found her case on the Muhammadan law pure and simple, and the appellants must refer to some rule of that law which makes the *waqf* invalid for conferring a beneficial interest for life on the son's widow. We have not been referred to any authority in support of the appellants' contention. On the contrary, Muhammadan law clearly allows provisions similar to life interests or other limited interests to be made in a *waqf;* see Baillie, volume 1, pages 570—584, quoted by Tyabji in section 473, p. 571, 2nd edition, which relates to Sunnis. The Shia law is the same, with this difference only, that where a series of life interests are created, the person taking in the first instance should be one in being and competent to take beneficially at the time when the *waqf* is made (Tyabji's Muhammadan Law, section 485, pages 602-603, 2nd edition, both of which conditions are fulfilled in the case

before us. It would be a very unsatisfactory state of law if a provision like the one in question invalidates the *waqf*. The plaintiff is to take a beneficial interest for life in the *waqf* property after her husband's death, only if she has no son of her own, who would, if there be one, take precedence over her. Sons born of any other wife of her husband are postponed till after her death. But for a provision of this kind it was felt that she would have to depend for her maintenance on the bounty of her stepson. We think that the word "family" has been used in the decision of their Lordships of the Privy Council and in the Waqf Validating Act in its broad popular sense so as to include all relatives more or less dependent on the settlor. A daughter-in-law living with an Indian householder is undoubtedly a member of his family in that sense. The point is, however, only of academic interest, because, as shown already, her position is not worse if she be not regarded as a member of the family. In this view of the matter we hold that this ground of attack on the validity of the *waqf* fails.

Another ground on which the validity of the *waqf* is impugned is that the settlor has reserved benefits under it for himself in so far as he has directed the payment of certain debts. Reference to these debts and directions with respect to them has already been made in an earlier part of the judgement, where relevant passages have been extracted from the official translation of the deed of *waqf*. In the preamble of the deed we have the following:—"The said property is owned and possessed by me as a proprietor without the partnership of any one else and no one has a claim in respect thereof, with the exception of this, that a portion of the property is pledged and hypothecated to the creditors in security of debts, and I have all powers of making transfers of and exercising proprietary rights in respect of the said property." It is to be noticed that the debts mentioned

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in the deed are of two kinds: *Firstly*, a large sum of money was due to the Government, who had paid up the debts of Arab Ali Khan under the Bundelkhand Encumbered Estates Act, I of 1903, and to whom it was repayable by easy instalments at a concessional rate of interest. The amount of yearly instalment was Rs. 2,900, recoverable as if it were Government revenue. (See section 26, Bundelkhand Encumbered Estates Act, I of 1903). With the Government revenue it was a charge on the property, taking precedence over any other incumbrances. (See sections 141, 142 and 146, United Provinces Land Revenue Act, III of 1901). The property situate within the area to which the Act applied could be sold in case of default. Clause (1) of the deed declares that this sum is "paid along with the Government revenue." It proceeds to direct "therefore" that it should be paid. *Secondly*, a sum of Rs. 40,000 was due to various creditors who held lands under possessory mortgage deeds and recovered interest from the usufruct thereof. There can be no doubt as to this class of debts being an incumbrance on the property. The opening lines of the deed clearly indicate that part of the property made *waqf* was encumbered property, and as such the *mutwalli*, as representing the *waqif*, must discharge the debt if the property is to be recovered from the mortgagees for the benefit of the *waqf*. As regards the first-mentioned liability the direction in the deed to pay future instalments recoverable as Government revenue is no more a direction to pay the settlor's debt than a direction to pay the Government revenue itself. We think it cannot be reasonably contended that a direction in a deed of *waqf* for payment of Government revenue as it falls due is a direction to pay the settlor's debt, making the *waqf* invalid. Nor is a direction to discharge certain incumbrances, subject to which the property has been made *waqf*, a direction to pay the settlor's debt. It is in the

nature of a direction for due administration of *waqf* properties. If the deed had made no reference to these debts, the *waqf* property would nevertheless have been liable therefor and the *mutwalli* for the time being would be responsible for payment.

The rule of Shia law on the subject is thus stated by Sir R. K. Wilson :—"*Section* 484.—It is essential to the validity of a Shia *waqf* that the founder should divest himself not only of full ownership, but of everything in th enature of usufruct; and, therefore, where by the terms of the endowment a portion of the income is reserved to the endower himself during his life, not only is the actual clause of reservation void, but all that part of the deed which relates to the subsequent devolution of the reserved income is also void; but so much of the deed as relates to property devoted from the first to purposes unconnected with the personal benefit of the endower may nevertheless be valid."

"*Explanation I.*—If the endower (*waqif*) happens to be included in some general class of beneficiaries described in the deed of endowment, he will not be debarred from claiming in that capacity."

"*Explanation II.*—There is no objection (any more than in Hanafi law) to an endower constituting himself trustee (*mutwalli*) of his own endowment and allotting to himself for his services in that capacity the same remuneration that he assigns to his successors." (Wilson's Digest of Anglo-Muhammadan Law, section 484, pages 480-481, 4th edition).

One of the Hanafi law-givers who is of the same opinion has tersely expressed the rule that the settlor should not "eat out of" the *waqf* property. It is only a corollary from this general rule that some text-book writers have stated that "if the *waqf* were made in favour of another with a condition for the payment of

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the *waqif's* (appropriator's) debts and current expenses, it would not be valid" (e.g., Shama Charan Sarkar's Tagore Law Lectures 1874, page 473). The principle underlying the rule obviously is that, having made *waqf* of his property, the settlor should not participate in the enjoyment of the property. Where debts are charged on the property made *waqf* and must therefore be paid out of it, there is no benefit reserved for the settlor in the direction to pay such debts. Payment of such debts by the *waqf* is a discharge of its own obligation. The case will be otherwise if the settlor makes it a condition that his personal debts for which the *waqf* property cannot be made liable should be paid, for, in such a case the *waqf* funds are to be spent on him and would not be so spent but for the condition. Such was apparently the character of the debts referred to in *Hamid Ali* v. *Mujawar Husain Khan* (1). In view of these considerations we hold that this line of attack on the validity of the *waqf* also cannot succeed.

The third contention against the validity of the *waqf* is more serious and refers to section 10 (2), Bundelkhand Encumbered Estates Act, I of 1903, which is designed to afford facility to proprietors of land in certain areas for liquidation of their debts. It is not disputed that a part of the *waqf* property, detailed in the deed at pages 95 and 96 and reproduced in the plaint at pages 2—4, mentioned as situate in pargana Arail, lies within the area to which the Act applies. The procedure prescribed by the Act is that the Local Government should appoint a Special Judge (section 4) to whom applications made by indebted proprietors stating the particulars of their debts and property are to be forwarded, for inquiry and report, by the Commissioner who is to receive such applications in the first instance (sections 6 and 7). The Special Judge should "publish in the Gazette a notice in

(1) (1902) I.L.R., 24 All., 257 (263).

the vernacular language of the district calling upon all persons having claims against the person or the property of the proprietor . . . . to present to the Special Judge, within two months from the date of the publication, a written statement of their claims" (section 9). The Special Judge is to inquire into the history of dealings between the parties (section 13), and has wide powers to reduce interest in taking accounts, and has to declare the amount due to a particular claimant (sections 14 and 15). If the proprietor cannot himself pay the amount so found due, the Special Judge is to submit a report to the Commissioner, who may direct the money to be advanced from the public treasury, repayable with interest at the rate of 5 per cent. per annum by instalments within fifteen years. Section 10 (2) of the Act runs as follows :—

"Until the Commissioner has declared, as hereinafter provided, that the proprietor has ceased to be subject to the disabilities mentioned in this clause,—

(*a*) the proprietor shall be incompetent to exchange, give or, without the consent of the Commissioner, sell, mortgage or lease his proprietary rights in land or any part thereof; and

(*b*) no suit or other proceeding shall be instituted in any civil or revenue court in the United Provinces against those rights in respect of any private debt contracted by the proprietor after the publication of the notice."

The disability created by this section terminates on the Commissioner declaring under section 28 that the proprietor has ceased to be subject to the disabilities mentioned in section 10, sub-section (2), which he (the Commissioner) cannot declare except when the entire sum due has been recovered.

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We have found it necessary to outline the framework of the Encumbered Estates Act as it has been questioned whether Arab Ali Khan was under the disability created by section 10 (2) of that Act, or whether certain circumstances relied on by the appellants necessarily prove that he was. We think, however, that the evidence is conclusive. [After detailing certain evidence, the judgement proceeded.] In view of these circumstances, we think that it is incontrovertible that he was under the disability which section 10 (2) of the Encumbered Estates Act imposes on the proprietors coming within its purview.

The next question of importance is whether the disability contemplated by section 10 (2) of the Act extends to a transaction like the one in question. It is argued that the expression "give", occurring in the section, which alone can be relied on as importing a prohibition against making a *waqf*, is applicable only to cases of gift as defined in the Transfer of Property Act, IV of 1882. Section 10 of the Encumbered Estates Act, it is contended, declares the proprietor to be "incompetent to exchange, give . . . sell, mortgage or lease his proprietary right" and, dealing as the Transfer of Property Act does with transactions of exchange, gift, sale, mortgage and lease, the word "give" in the former has reference to gift as defined in the latter. We are unable to give effect to this contention, as it unnecessarily narrows down the meaning of the word "give," which should be construed in its natural sense as implying a transfer without consideration—a view which is in accord with the object underlying the entire provisions, viz., that a proprietor to whom the benefit of the Act has been extended should keep the property affected by the enactment intact till his liabilities are fully discharged. In every *waqf* there is a transfer of ownership. It is generally without any consideration. The right of the settlor is completely

extinguished. It vests in the deity to whom it is dedicated for the benefit of mankind. This in substance is the definition of a *waqf* as given in the Waqf Validating Act and most text books on Muhammadan law. In *Sadik Husain Khan* v. *Hashim Ali Khan* (1), the creation of a beneficial interest in a deed of trust conveying the property to a trustee was held to be a "gift through the medium of a trust." The case is not different where a beneficial interest is created under a *waqf*, which in many aspects partakes of a gift, *inter vivos* or testamentary. Delivery of possession is as essential in case of a *waqf* as in that of a gift. A testamentary *waqf* is, like an ordinary will by a Muhammadan, valid only to the extent of one third of the testator's assets. For these reasons we are of opinion that the word "give" in section 10(2) of the Bundelkhand Encumbered Estates Act, I of 1903, is wide enough to cover a case of giving away property by way of *waqf*, and that Arab Ali was incompetent to make the *waqf* evidenced by the deed dated the 14th of April, 1919. The learned counsel for the defendants appellants would not extend the disability created by the section to the case of property other than that situate within the area to which the Act has been made applicable, and does not contend that such disability is personal, affecting all properties belonging to hte person who is declared as incompetent to exchange, give etc. We are therefore relieved of the necessity of entering into a question which could possibly arise. Our view of this part of the case, therefore, is that the *waqf* is invalid as regards the property lying in pargana Arail which is admittedly part of the area to which the Encumbered Estates Act applies and which is separately detailed in the deed in question.

[A portion of the judgement, not material for the purpose of this report, is here omitted.]

(1) (1916) I.L.R., 38 All., 627.

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The result, therefore, is that the *waqf* must be held to be invalid so far as it relates to the landed property of Arab Ali Khan in the pargana of Arail, and the appeal must be allowed to this extent.

[The judgement then proceeded to pass certain orders regarding mesne profits and costs.]

Decree modified.

Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.

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June, 21.

HIRA LAL AND OTHERS (PLAINTIFFS) v. PIARI LAL AND ANOTHER (DEFENDANTS.)*

Hindu law—Adoption—Authority to adopt given by a member of a joint Hindu family.

There is nothing to prevent a Hindu who is a member of a joint family giving a valid authority to his wife to adopt a son to him after his death, and the exercise of such authority is not dependent on her inheriting as a Hindu female owner her husband's estate. Such an authority cannot be considered to be extinguished by reason of the other member or members of the husband's family having succeeded to the estate by survivorship.

Mussumat Bhoobun Moyee Debia v. *Ram Kishore Acharj Chowdhry* (1), *Sivagnanam Servaigar* v. *Ramsawmy Chettiar* (2), *Madana Mohana* v. *Purushothama* (3), *Venkataramier* v. *Gopalan* (4), *Bachoo* v. *Mankorebai* (5) and *Pratapsingh Shivsingh* v. *Agarsingji Rajasangji* (6), referred to.

Bhimabai v. *Tayappa Murarrao* (7), *Adiveva Fakirgowda* v. *Chanmallgowda Ramangowda* (8) and *Chandra* v. *Gojarabai* (9), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

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*First Appeal No. 455 of 1925, from a decree of Ganga Prasad Varma, Subordinate Judge of Bulandshahr, dated the 21st of July, 1925.

(1) (1865) 10 Moo. I.A., 279. (2) (1911) 22 M.L.J., 85.
(3) (1914) I.L.R., 38 Mad., 1105. (4) (1918) 35 M.L.J., 698.
(5) (1907) I.L.R., 31 Bom., 373. (6) (1918) I.L.R., 43 Bom., 778.
(7) (1913) I.L.R., 37 Bom., 598. (8) (1924) 26 Bom., L.R., 360.
(9) (1890) I.L.R, 14 Bom., 463.