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1907, or else a re-union of the family. The judgement then concluded :—]

The agreement dated the 30th of September, 1907, has the effect of creating a partition of the joint family. The defendants' direct evidence relating to the renunciation of that intention and of a formal re-union of the several members of the family has been rejected as utterly unworthy of credit. The other documents produced by the defendants are inconclusive. They do not prove jointness or re-union, and are not inconsistent with the business of the family being carried from 1907 onwards on the basis of a partnership amongst the members of the family who held as tenants in common. The failure of Hira Lal, Khamman Lal and Jhanjhan Rai to offer themselves as witnesses in this case, the non-production of account books, and the non-production of Chhote Lal, one of the surviving arbitrators, as a witness, are matters which cannot be lightly disregarded. They raise presumptions against the defendants.

We would allow the appeal and grant the plaintiffs a declaratory decree for the property claimed, except such items of property as have been acquired by the defendants after the 10th of April, 1915. The plaintiffs will receive their costs throughout.

Appeal allowed.

Before Mr. Justice Banerji and Mr. Justice Weir.

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June, 19.

MUHAMMAD SHAFIQ AHMAD (PLAINTIFF) *v.* MUHAMMAD MUJTABA AND ANOTHER (DEFENDANTS).*

Muhammadan law—Waqf—Waqf-al-ul-aulad—*Private or public trust—Civil Procedure Code, section* 92.

A "*waqf-al-ul-aulad*" in Muhammadan law is not, generally speaking, a public trust of the kind to which section 92 of the Civil Procedure Code applies, and the fact that

*First Appeal No. 352 of 1925, from a decree of Vishnu Ram Mehta, Additional Judge of the Court of Small Causes, exercising the powers of First Subordinate Judge of Cawnpore, dated the 31st of March, 1925.

a very small portion of the income of the *waqf* property may be assigned to purposes of a charitable nature will not make it so.

Mahomed Ismail Ariff v. *Ahmed Moola Dawood* (1), *Williams* v. *Kershaw* (2), *Attorney-General for New Zealand* v. *Brown* (3), *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (4), *Mujib-un-nissa* v. *Abdur Rahim* (5), *Muhammad Munawar Ali* v. *Razia Bibi* (6), *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (7), *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* (8), *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan* (9), *Puttu Lal* v. *Daya Nand* (10) and *Abdur Rahim* v. *Mahomed Barkat Ali* (11), referred to.

THE facts of this case are fully stated in the judgement of WEIR, J.

Maulvi *Iqbal Ahmad* and Maulvi *Muhammad Abdul Aziz*, for the appellant.

Dr. *Kailas Nath Katju* and Maulvi *Mushtaq Ahmad*, for the respondents.

WEIR, J:—This appeal arises out of a suit for the following reliefs. First, a declaration that the right of the first defendant to remain *mutwalli* of certain *waqf* property has become extinct, and that the plaintiff is entitled to possession of the *waqf* property as *mutwalli*, and that he may be put in possession of it as such. Secondly, a declaration that a sale-deed of the 5th of October, 1920, by which the first defendant transferred a certain portion of the *waqf* property to the second defendant is void, and that the second defendant may be ejected from that property and the plaintiff put in possession of it as *mutwalli*. The plaintiff is the eldest son of the first defendant, and the *waqf* in question was

(1) (1916) I.L.R., 43 Calc., 1065.
(2) (1835) 55 Cl. and F., 111.
(3) (1917) A.C., 393.
(4) (1889) I.L.R., 17 Calc., 493.
(5) (1900) I.L.R., 23 All., 233 (242).
(6) (1905) I.L.R., 27 All., 320.
(7) (1897) I.L.R., 24 Calc., 418.
(8) (1910) I.L.R., 32 All., 503.
(9) (1913) I.L.R., 35 All., 459.
(10) (1922) I.L.R., 44 All., 721.
(11) (1927) I.L.R., 55 Calc., 519.

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created by the father of the first defendant by a deed, dated the 13th of September, 1919. The deed declares that the *waqif* makes "a *waqf* for self and children" in respect of his immovable property specified at the foot of the deed, and that the property "shall henceforward be property dedicated to God." The deed contains the following provisions:—That the *waqif* should remain *mutwalli* to the end of his life; that on his death his son Muhammad Mujtaba (first defendant) should be sole *mutwalli* and, after him, his son, Muhammad Shafiq Ahmad (the plaintiff) should be *mutwalli;* that the office of *mutwalli* should be hereditary in the family of the *waqif*: that after the death of the *waqif*, it should be the duty of the *mutwalli* to maintain the *waqf* property in repair, and to pay taxes and to expend at least 6 pies per rupee of the residue of the income on "good deeds and charity." The balance of the income, so far as the plaintiff and the first defendant are concerned, is to be divided as follows:—2 *suls* share to the first defendant and 1 *suls* share to the plaintiff. The deed further provides that inasmuch as a portion of the *waqf* property, namely an *ahata*, (which I shall henceforth call the *ahata*), had been mortgaged by the *waqif* before he created the *waqf*, and inasmuch as the *waqif* was also under an obligation to build upper stories on certain shops which are also included in the *waqf*, it should be the duty of the *mutwalli* to pay off the mortgage debt and to build the upper stories of the shops "out of the rent of the *ahata*" or "by raising money against the said *ahata* in any other reasonable and proper manner." (This *ahata* is the property which the first defendant subsequently sold to the second defendant and which the plaintiff now seeks to recover.) The deed finally provides that if any of the *mutwallis* "fails to abide by the dictates of Islam or does anything against the condition of the *waqfnama* he shall be deprived of the right of

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being *mutwalli*, and after him whoever may be surviving and entitled according to the conditions of the *waqf-nama* shall be *mutwalli*"; but if none of the male or female descendants of the *waqif* survives, "the District Judge shall have power to appoint any reliable Musalman of the Sunni sect and belonging to the Hanafi school as *mutwalli*"; and that such *mutwalli* should spend the income from the *waqf* property on the religious education of Musalmans, submit an account of income and expenditure to the District Judge every year, and comply with his orders regarding management of the property.

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The present suit was brought as an ordinary suit before the first Subordinate Judge of Cawnpore, who, holding that it should have been brought under section 92 of the Civil Procedure Code, granted a decree declaring that the properties mentioned in the plaint were *waqf* property and refused to give the plaintiff any other relief. The plaintiff has appealed against so much of this order as refuses him the relief for which he asks, and the defendants have appealed on the ground that no declaration should have been given to the plaintiff.

The first point to be decided is whether section 92 of the Civil Procedure Code applies to this suit or not. Counsel for the defendants divided his argument on this point into two heads; first, that under Muhammadan law every *waqf-ul-aulad* is an express trust for a charitable purpose of a public nature, so that, even if the whole of the income of the *waqf* be devoted to the support of the *waqif's* family, the *waqf* is, by reason of the ultimate remainder to charitable purposes, a public *waqf*. Secondly, that even if this is not so, the obligation to expend 6 pies per rupee of the net income of the property on good deeds and charity makes this *waqf* a public *waqf*.

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As to the first point, in *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood* (1), their Lordships of the Privy Council make the following observations :—"The Musalman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a *waqf* or trust created for specific individuals or a determinate body of individuals, the Qazi, whose place in the British Indian system is taken by the civil court, has in carrying the trust into execution to give effect as far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Qazi's discretion is very wide." In view of this authoritative expression of the law on the subject, I think it is not open to this Court to hold that there can be no such thing as a private *waqf* in Muhammadan law; but even if we had not the opinion of their Lordships to guide us, I should, though with less confidence, be inclined to agree with the argument of counsel for the plaintiff that in construing section 92 of the Civil Procedure Code the words, "public trust of a charitable or religious nature", should be given their ordinary meaning, and cannot be made to vary according to the classification of trusts which may be adopted in different systems of law. The section does not affect substantive rights except in so far as it prescribes the manner in which they can be enforced. If the provision for expending six pies per rupee on good deeds and charity be ignored, the *waqf* with which we are concerned constitutes a trust for the benefit of the family of the *mutwalli* so long as any member of that family survives, and that trust is, in my opinion, a private trust even though the ultimate trust is for a charitable purpose. The situation appears to me to be similar to that which would arise if property were vested

(1) (1916) I.L.R., 43 Calc., 1085 (1100).

in a trustee upon trust for some named individual for his life and after his death upon trust for a named public charity. Such a trust, so far as the individual tenant for life would be concerned, would be a purely private trust, in enforcing which he would be entitled to proceed in the ordinary way; although, if the trustee were wasting the *corpus* of the trust funds, the Advocate-General (i.e., in these Provinces, the Legal Remembrancer), or two members of the public with his consent in writing, might institute a suit under section 92 of the Code of Civil Procedure for the purpose of preserving the *corpus* of the trust funds. I now turn to the second argument put forward on behalf of the defendants, namely that the direction to spend a 1/32 part of the income of the property on "good deeds and charity" makes the *waqf* a public trust within the meaning of section 92 of the Civil Procedure Code. The exact provisions of the *waqfnama* concerning charity are these:—There is no dedication of any defined portion of the income of the property to any benevolent or charitable purpose during the life of the *waqif*. He merely announces his intention "to spend such amount as he may think proper in the name of God." After the death of the *waqif* it becomes the duty of the *mutwalli* to spend "according as he thinks proper, at least 6 pies per rupee of the net income on good deeds and charity", and it is finally provided that "no outsider shall be entitled to benefit himself" in the life-time of the *waqif* or in the life-time of Muhammad Mujtaba and his sons, as well as of his wife Musammat Mariyam Bibi, "with the exception of the fact that the *mutwalli* may render help to any needy person by way of charity out of the aforesaid amount", that is, the 1-32nd part of the net income of the *waqf* property. The first comment which I wish to make on these provisions is that the amount to be spent in accordance with them is exceedingly small. The income of the property at the

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date of the *waqfnama* was about Rs. 180 per month, from which Rs. 70 per mensem would have to be deducted for interest at 1 per cent. per mensem on a mortgage for Rs. 7,000 on the *ahata*, so that the sum which ought to be spent would be about Rs. 3-8-0 per month. The objects on which this small sum is to be spent are stated so vaguely, and the discretion allowed to the *mutwalli* is consequently so wide, that I greatly doubt whether there is any effectual dedication of any portion of the income to charity. All good deeds are not necessarily charitable in the legal sense. Thus, for instance, in *Williams* v. *Kershaw* (1), Lord COTTENHAM held that a gift "to benevolent, charitable and religious purposes" was void, and this decision was quoted and applied by their Lordships of the Privy Council in *Attorney-General for New Zealand* v. *Brown* (2), where the legacy was for "such charitable, benevolent, religious and educational institutions, societies and objects" as the trustees of the will should select. It might, however, be said that in this case the words "good deeds" are merely used as a synonym for charitable almsgiving, and that, therefore, the fraction of the income with which I am dealing is to be devoted to the relief of poverty. But, even if this were so, the powers which are given to the *mutwalli* in spending this small sum are so extensive as to "when" and "how" and "where" it is to be disbursed, that it would be impossible effectually to enforce this trust (if there be a trust) without settling a scheme for the application of the money; and it seems to me that this is a thing that the *waqif* never contemplated. In my opinion, taking the deed as a whole, it amounts to this:—That the *waqif* wished to impose a religious or moral duty upon the *mutwalli* to spend a 1/32 part of the income on almsgiving in such a way as would be becoming to a pious Muhammadan in the position of the

(1) (1855) 5 Cl. and F., 111. (2) (1917) A.C., 393.

waqif, but that he just stopped short of imposing a legal duty to do so; because the provisions of the *waqfnama* show that it was the intention of the *waqif* that as long as any member of the *waqif's* family was living the *mutwalli* should not be obliged to render accounts to any public authority. The fixing of a minimum amount for purposes of almsgiving appears to me to have been inserted in order to prevent quarrels among the members of the *waqif's* family concerning the amount which the *mutwalli* might properly spend on charity if he chose to do so. But even if I am wrong in this, and if the deed be taken as imposing a charge on the property to the extent of 1/32 part of the income for charitable purposes, I do not think that this would have the effect of making the *waqf* a trust for a public purpose of a charitable nature within the meaning of section 92 of the Civil Procedure Code. In the absence of any express authority on this question—and none such has been cited in argument—I think that I am entitled to rely on the analogy of certain cases which came before their Lordships of the Privy Council before the Waqf Validating Act was passed, and in which the question was whether the dedication of a part of the income of *waqf* property to charity was or was not sufficient to support a valid *waqf* of the whole, where the bulk of the property was devoted to the maintenance of the *waqif's* family in perpetuity, with an ultimate remainder to charity if the family died out. In *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1), their Lordships, when discussing the effect of the *waqfnama* in that case, said :—"Their Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses except to the extent to which he (the *waqif*) had himself been accustomed to perform them

(1) (1889) I.L.R., 17 Calc., 498.

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. . . . . For all that appears, there is no reason to suppose that the charitable uses would absorb more than a devout and wealthy Muhammadan gentleman might find it desirable to spend in that way." Again in *Mujib-un-nissa* v. *Abdur Rahim* (1), their Lordships observed that a *waqf* will be valid "if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family"; and in *Muhammad Munawar Ali* v. *Razia Bibi* (2), it was held that where a provision for charity created a mere charge of an inconsiderable amount on the profits of the estate there was no valid *waqf*. It is true that in these three cases their Lordships were considering a question which has now been finally settled by the Waqf Validating Act, namely, whether a *waqf* for the benefit of the *waqif's* family was or was not void if it created a perpetuity. But, as I have said, I think that I am entitled to take them as a guide in determining whether the *waqf* before us is or is not a public trust. The conditions of this *waqf* almost exactly fit the tests which were applied by their Lordships in the three cases which I have cited to determine the question whether there was a charitable trust or whether the *waqf* was a private trust. In the present case there was no obligation on the *waqif* himself to spend any particular sum on charity. The amount to be spent by his successors is very small, both absolutely and relatively to the total amount of the income of the *waqf*, and the discretion given to the *mutwalli* in spending it is as wide as can possibly be; so that, as I have said, it would be practically impossible to control him in dispensing it. There is also the fact that, as has been proved in evidence, the *waqif* was in the habit of dispensing alms himself, and that, if I am right in the interpretation which I put upon the *waqfnama*, he

(1) (1900) I.L.R., 23 All., 233 (242). (2) (1905) I.L.R., 27 All., 320.

merely wished to provide for the continuance of this practice in his family as a moral or religious duty which he considered becoming to a man of his religion. I, therefore, hold that the deed before us does not create a public *waqf*, and consequently it is unnecessary for me to discuss the effect of a line of decisions which were cited in argument, beginning with *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (1). These decisions all deal with a distinction between cases in which the public may sue to enforce a public trust and cases in which a private party may sue to enforce his own rights under such a trust, and with the effect of section 539 of the old Civil Procedure Code, or of section 92 of the present Code, upon such suits. This distinction was recognized by Benches of this Court in *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* (2), *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan* (3) and in *Puttu Lal* v. *Daya Nand* (4), in which latter case it was held that section 92 of the Code of Civil Procedure did not apply to a case where a plaintiff claimed a declaration of his right to act as a trustee of a temple under a deed of endowment in preference to the defendant who claimed a similar right. In the case before us the plaintiff admits that he is claiming to be appointed *mutwalli* in order to make certain of getting his 1/3rd share of the income of the *waqf* property, which, he says, has been wrongfully withheld from him by the first defendant, and that he wants to recover the property which has been sold; so that it might be argued on the analogy of the case to which I have just referred that, even if the *waqf* is a public *waqf*, the plaintiff is seeking only to enforce his private rights under it. But in view of certain observations of their Lordships of the Privy Council in *Abdur Rahim* v. *Mahomed Barkat Ali* (5), I am not certain how far this

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(1) (1897) I.L.R., 24 Calc., 418. (2) (1910) I.L.R., 32 All., 503.
(3) (1913) I.L.R., 35 All., 459. (4) (1922) I.L.R., 44 All., 721.
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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.