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hold that the widow has a right to hold this portion of the estate, of which she is in possession in lieu of maintenance, as long as she is entitled to maintenance as a Hindu widow. On her death or if she ceases to be entitled to maintenance as a Hindu widow the right to hold the estate would terminate. Subject to her right to hold the estate it is open to the decree-holder defendant No. 1 to bring this property to sale.

Accordingly we modify the decree of the lower court and the decree which we grant to the plaintiff appellant is a declaration that the property in suit may be sold but the purchaser is not entitled to possession during the period in which the plaintiff is entitled to maintenance as a Hindu widow and the plaintiff is entitled to hold the property in suit for that period. As neither party has succeeded in the suit in full, we consider that the correct order for costs is that each party shall pay its own costs throughout.

REVISIONAL CIVIL.

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

NASRULLAH (APPLICANT) v. WAJID ALI AND ANOTHER (OPPOSITE PARTIES).*

1932 *January* 6.

Mussalman Waqf Act (XLII of 1923), sections 3, 5 and 10—Mutwalli failing to file accounts—Jurisdiction of District Judge to fine—Proof of "waqf"—Admission by conduct of mutwalli in complying with provisions of section 3.

If a mutwalli of a "waqf" as defined by the Mussalman Waqf Act, 1923, has failed to comply with the requirements of section 5 of the Act, section 10 is applicable provided the character of the property as such "waqf" and his own position as mutwalli are either admitted or are established by evidence, if denied. If a mutwalli has complied with the provisions of section 3, no question as to whether he denies the waqf or admits it can arise, because by his conduct

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in furnishing particulars of the waqf property he must be deemed to have admitted the "waqf" and his own position as mutwalli.

By his compliance with section 3 he brought himself under the other provisions of the Act also and established his own liability to furnish a statement of accounts under section 5 and made himself open to punishment under section 10 for not doing so. His denial that the property managed by him was a "waqf" within the meaning of the Act was of no value in view of his own action in complying with the requirements of the Act in the first instance.

Held, also (NIAMAT-ULLAH, J., *dubitante*), that the District Judge is the authority who can take proceedings under and enforce section 10 of the Act by imposing the fine provided by it.

Mr. *A. M. Khwaja*, for the applicant.

Mr. *M. A. Aziz*, for the opposite parties.

PULLAN, J. :—This is an application in revision of an order of the District Judge of Moradabad imposing a fine of Rs. 50 upon the applicant, Nasrullah, under section 10 of the Mussalman Waqf Act (Act XLII of 1923). The proceedings are the direct outcome of former proceedings which have been the subject of a reported ruling of this Court, *Nasrullah Khan* v. *Wajid Ali* (1). My brother NIAMAT-ULLAH was a member of the Bench which decided that case. There the question was whether under section 5 of Act XLII of 1923 the District Judge could, on the intervention of other persons, call upon a mutwalli to furnish accounts of a waqf, and the view taken by the Bench was that the Act does not authorise the District Judge to pass an order that the mutwalli should file a statement of accounts, as contemplated by section 5, and that the only procedure provided was to punish him under section 10 of the same Act for not doing so. Accordingly, the same persons approached the District Judge and requested him to take action under section 10. The Judge felt that he had to decide the question which was left undecided by this Court, namely whether the

(1) (1929) I.L.R., 52 All., 167.

waqf was a "waqf" covered by Act XLII of 1923, before passing an order of fine. In my opinion, he was bound to decide this question. His jurisdiction depended on the fact that the "waqf" was one under Act XLII of 1923; and until he decided that question he could impose no fine under the Act. Nasrullah is a person who, in compliance with section 3 of the Act, made a statement as to the property of the "waqf"; and by so doing was held in the judgment of this Court, to which I have already referred, to have fulfilled the requirements of section 3 of the Act. I am of opinion that he brought himself under the other provisions of the Act also and established his own liability to furnish accounts and made himself open to punishment for not doing so. It is true that from time to time Nasrullah has denied that the property which he manages was a "waqf" within the meaning of the Act; but I cannot consider that this denial is of any value in view of his own action in complying with the requirements of the Act in the first instance. Moreover, once the learned District Judge went into the facts of the case as, in my opinion, he was entitled to do, he found that in the year 1842 the Commissioner passed an order showing the nature of this waqf, and it is clear from that order that this was a "waqf" such as is contemplated by Act XLII of 1923 and is not one of those waqfs which are excluded from the Act by section 2 (*e*). Thus, in my opinion, the District Judge was in a position to deal with Nasrullah under the Act if he found that Nasrullah had not complied with the provisions of the Act in the matter of filing accounts. In such cases the District Judge appears to act *suo motu;* but in actual practice he can never take action unless somebody calls his attention to the fact that a mutwalli has failed to perform his duties. The part played by the opposite party in this case is merely the part of calling to the notice of the

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District Judge an impropriety of which he is able to take cognizance. The Judge has imposed a fine of Rs. 50. His jurisdiction is not impeached in the grounds for revision; and although the wording of section 10 is far from clear, I am of opinion that the District Judge is, under that section, the only person who can take proceedings and who can, therefore, impose the fine. The fine does not appear to be excessive, and I do not consider that this Court has any cause to interfere with the decision. I would therefore dismiss this application, but I do not consider this is a case in which costs should be allowed.

NIAMAT-ULLAH, J. :—The applicant has been held guilty of what should be considered to be an offence under section 10 of Act XLII of 1923, and sentenced to a fine of Rs. 50. Two main questions arise in revision; first, whether the applicant incurred the penalty provided for by section 10 of the aforesaid Act, and secondly, whether the District Judge who convicted and fined him had jurisdiction to do so.

As regards the first question, section 10 makes an omission to do what is required of a mutwalli by section 3 or section 5 of the Act to be punishable. As both these sections make use of the words "mutwalli" and "waqf", we must consider, at the threshold of the case, whether the applicant is a "mutwalli" and the property in question in the present case is "waqf". "Waqf" has been so defined in Act XLII of 1923, section 2 (*e*), as to include all endowments other than those to which the Mussalman Waqf Validating Act (VI of 1913) applies. In other words, all waqfs other than "waqfs-alul-aulad" are within the purview of Act XLII of 1923. The property in dispute in this case has been in possession of the applicant and his predecessors for a considerable length of time, and its character is clearly determined by an order of the Commissioner passed in 1843. The learned District Judge has referred to the

terms of that order which satisfied him that the property in question was waqf for the support and upkeep of a mosque and incidental purposes, including the maintenance of a *muazzin* who is to be selected from among the descendants of the original mutwalli, the applicant's ancestor. Nothing has been said on behalf of the applicant which can induce me to differ from the view taken by the learned District Judge as regards the character of the property in possession of the applicant. I am, therefore, in entire agreement with my learned colleague that the property in question is "waqf" and not dedicated for the personal benefit of the descendants or family of the waqif. The applicant himself professed to act as "mutwalli", and thereby admitted his position as such, in furnishing particulars of the property in his possession, as required by section 3 of Act XLII of 1923. It follows from what has been said already that the property in question is "waqf" within the meaning of that Act and the applicant is the "mutwalli" thereof.

It is necessary to refer to two sections of Act XLII of 1923 before examining the terms of section 10. Section 3 requires every mutwalli to furnish particulars of the waqf property in his possession. Section 5 requires him, if he has furnished particulars under section 3, to file a statement of account within three months after the 31st day of March following the passing of Act XLII of 1923, and thereafter within three months after the 31st of March of each year. Section 10 makes failure to furnish particulars as required by section 3 or to file statements of accounts as required by section 5 punishable with fine, which may extend to Rs. 500. It has been argued before us that Act XLII of 1923 is applicable only to cases in which a "mutwalli" accepts his position as such and furnishes particulars required by section 3. This contention is correct so far as the mutwalli's omission to file

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a statement of accounts under section 5 is concerned, because he has to file such statement only if he has already furnished particulars under section 3. It is, however, incorrect to say that a person is not liable to be punished under section 10 at all, unless he admits certain property in his possession to be "waqf" and himself to be the "mutwalli" thereof. Section 10 makes omission to furnish particulars as required by section 3 also punishable. All that is needed to bring home an offence under section 10, read with section 3, to a defaulting mutwalli is to establish by evidence that he is a "mutwalli" in respect of property which is "waqf" within the meaning of Act XLII of 1923. Whether the character of the property as "waqf" and his own position as "mutwalli" are admitted or are established by evidence if denied, section 10 is equally applicable if a mutwalli has failed to comply with section 3. If a mutwalli has complied with the provisions of section 3, no question as to whether he denies the waqf or admits it can arise, because by his conduct in furnishing particulars of the waqf property he must be deemed to have admitted the "waqf" and his own position as "mutwalli".

The applicant in this case furnished particulars of the property in question under section 3. He cannot, therefore, be convicted of an offence under section 10 read with section 3. Nor has the learned District Judge convicted him of such offence. But, having furnished particulars required by section 3, he was also under an obligation to file a statement of accounts in terms of section 5. He omitted to do so. Section 10 makes such omission to be as much punishable as the non-compliance with the provisions of section 3, the penalty in either case being the same. In those circumstances I do not think there is anything wanting in the case before us to complete an offence under section 10 of Act XLII of 1923; and so far as the applicant's

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liability to pay the penalty provided for by section 10 is concerned, there can be no doubt.

The next question, which is not free from difficulty, relates to the court empowered to enforce the penal provision contained in section 10. I was a member of the Bench which decided *Nasrullah Khan* v. *Wajid Ali* (1), which is in fact an earlier stage of the case before us. The only question which called for decision in that case was whether section 5 of Act XLII of 1923, apart from laying an obligation on a mutwalli to furnish a statement of accounts, also contemplated regular proceedings being taken before the District Judge for the determination of the question whether a certain property is "waqf" or whether a certain person is a "mutwalli" in respect thereof. It was held that section 5 did not empower the District Judge to decide these questions in a proceeding taken by interested parties under section 5. The court went on to observe that the determination of such questions may be necessary if the mutwalli is prosecuted for an offence under section 10 and the alleged "mutwalli" denies facts which establish his offence and which have to be enquired into. As regards the forum, it was assumed rather than decided that the District Judge can enforce the penal provision contained in section 10. Any remark, therefore, as to whether the District Judge could impose the fine provided for by section 10 is in the nature of an *obiter dictum*. The question has directly arisen in the present case and must be decided, though, I may note, that it was not argued before us that any court other than that of the District Judge could impose a fine under section 10. The applicant's contention was that no court had jurisdiction to do so in the circumstances of the case. We cannot, however, refuse to take notice of the narrower question, namely whether the District Judge as such can take cognizance of a case under section 10. On the one hand, it can be reasonably contended that section 10

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contains merely a penal provision which declares a certain omission to be an offence punishable with fine, that the manner in which and the court by which the penalty is to be enforced are outside the purview of Act XLII of 1923, and that the mutwalli should be punished by a regular criminal court in accordance with the provisions of the Criminal Procedure Code. There are many enactments, besides the Indian Penal Code, which declare certain acts and omissions to be offences, though the trial for those offences is regulated not by those Acts but by the general criminal law. On the other hand, the whole scheme of Act XLII of 1923 suggests that the District Judge is the proper authority to impose the penalty provided for by section 10 in respect of certain duties enjoined by that Act. Section 11 requires the Local Government to make rules "to carry into effect the purposes of this Act". This seems to include rules prescribing the forum and the procedure for enforcement of the penalty laid down in section 10. No rules have, however, been framed by the Local Government in this behalf. In this state of things I am inclined to the view, though not without hesitation, that the District Judge is the proper authority to enforce the provision contained in section 10 of Act XLII of 1923. For these reasons I concur with my learned brother in dismissing this revision.

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

1932 *January*, 8.

RAM SAHAI (PLAINTIFF) *v.* DEBI DIN (DEFENDANT).*

Bundelkhand Alienation of Land Act (Local Act II of 1903), sections 6, 9 and 16—Simple mortgage by member of agricultural tribe in favour of another such member—Mortgagee's suit disposed of, before Amending Act, without any relief—Bundelkhand Alienation of Land (Amendment) Act (Local Act VII of 1929)—Whether retrospective effect—"Decree"—Final adjustment of suit without formal decree being drawn up.

A member of an agricultural tribe, within the meaning of the Bundelkhand Alienation of Land Act, made a simple

*Civil Revision No. 17 of 1931.