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necessity. The plaintiffs were, therefore, entitled to the unconditional decree granted to them by the court below.

The decree of the lower appellate court, however, requires modification in one respect. The lower appellate court has decreed that the sale deed is not binding on the plaintiffs and other reversioners of Ram Subhag deceased. Dhanai is undoubtedly bound by the sale. He joined in the execution of the sale deed and received a portion of the consideration of the same. He, therefore, is estopped from assailing the validity of the sale deed. The decree of the lower appellate court will, therefore, be modified by the addition of the words "except Dhanai Sahu" after the words "other reversioners of Ram Subhag deceased". In other respects the appeal fails and is dismissed with costs.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and
Mr. Justice Bennet

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KISHWAR JAHAN BEGAM (DEPENDANT) v. ZAFAR
MUHAMMAD KHAN (PLAINTIFF)*

Interest—Beneficiary under a deed of waqf entitled to interest against a mutwalli—Equitable jurisdiction to allow interest—Trusts Act (II of 1882), section 23(b).

Where a mutwalli unreasonably delays the making of payment to a beneficiary under a deed of waqf, the beneficiary is entitled to receive interest from the mutwalli on equitable grounds.

Where a case, in England, would fall within the common law jurisdiction, no equitable principles are to be applied in awarding or withholding interest; but where a case would fall within the equitable jurisdiction exercised by the Court of Chancery, equitable considerations might induce the court to allow interest. A suit by a beneficiary, entitled under a deed of waqf to a certain share in the profits of a zamindari property, against the mutwalli for accounts and recovery of the profits due would fall under the latter class and interest could be allowed on equitable grounds.

*First Appeal No. 221 of 1929, from a decree of S. Iftikhar Husain, Subordinate Judge of Pilibhit, dated the 22nd of December, 1928.

The position of a mutwalli, *qua* his duty to make certain payments enjoined by the deed of waqf, was that of a *quasi* trustee, and section 23 of the Indian Trusts Act would be a proper guide in deciding whether there were equitable grounds for allowing interest in this case, although the case did not fall within the Trusts Act.

Dr. K. N. Katju and Mr. S. Muhammad Husain, for the appellant.

Dr. S. N. Sen and Mr. Mukhtar Ahmad, for the respondent.

MUKERJI, A. C. J., and BENNET, J. :—This is an appeal by the defendant in the suit and she raises two questions, one of construction of a document and the other of law.

There is a pedigree appended to the plaint which explains the relationship that exists between the parties. It appears that Musammât Bismilla Begam, the mother of the defendant, executed, among other documents, a deed of waqf by which she sought to confer certain benefits in certain properties on Akhtar Jahan Begam and, after her, on some other persons. We have to decide whether the plaintiff respondent is one of those other persons to benefit under the deed of waqf. The document is dated the 24th of September, 1926. It has not been translated and printed, but the original document has been read out to us and we are of opinion that the court below was right in its construction of the document. The document says at two places that on the death of Akhtar Jahan Begam her heirs according to the Muhammadan law would be entitled to the profits (from the property) which were being enjoyed by Akhtar Jahan Begam. The learned counsel for the appellant has argued that Bismilla Begam really meant to say that the lineal descendants of Akhtar Jahan Begam would alone enjoy the profits and not any other heir under the Muhammadan law. The plaintiff is the husband of Akhtar Jahan Begam and is

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not, therefore, a lineal descendant of Akhtar Jahan Begam, though he is one of her legal heirs.

Some evidence was admitted by the court below which was meant to explain what was in the mind of Musammat Bismilla Begam. This oral evidence, in our opinion, was inadmissible, having regard to the provisions of section 91 of the Indian Evidence Act. Musammat Bismilla Begam lived for several years after the execution of the deed of waqf and she never sought to rectify it on the ground that her intentions were not fully expressed by the document. As we have said, we hold with the court below that the plaintiff respondent is entitled to a share in the profits which were earmarked for Akhtar Jahan Begam.

The second point is whether the respondent has been properly allowed interest on his claim by the court below. The question of interest is not entirely free from difficulty. The learned Subordinate Judge held that the appellant was in the position of a lambardar, and as interest was allowed against a lambardar by the Tenancy Act, on principle, he, the learned Judge, was entitled to award interest against the defendant.

A number of rulings have been cited before us and we may refer to some of them. In *Jwala Prasad v. Hoti Lal* (1) a Bench of this Court held that interest could be awarded only as a matter of law, and in the case of a contract as damages. What the Bench laid down was that there was no arbitrary rule for awarding interest. The correctness of this case was doubted in a later case, *Anrudh Kumar v. Lachmi Chand* (2), but the decision in that case was based on a *quasi* contract and the principle of law enunciated under section 73 of the Contract Act applied.

In *Kalyan Das v. Maqbul Ahmad* (3), their Lordships of the Privy Council are reported to have stated,

(1) (1924) I.L.R., 46 All. 625.

(2) (1928) I.L.R., 50 All., 818.

(3) (1918) I.L.R., 40 All., 497.

at the top of page 504, that "interest depends on contract, express or implied, or on some rule of law allowing it. Here there is no express contract for interest and none can be implied, and no circumstances less capable of justifying the allowance of interest as a matter of law can be imagined." In *Hamira Bibi v. Zubaida Bibi* (1) their Lordships of the Privy Council allowed to a Muhammadan lady, who was in possession of her husband's estate in lieu of dower, a certain amount of interest by way of compensation to her, as she had to manage the property and render an account, and had refrained from enforcing her right of dower against the estate. Their Lordships there said that they were allowing interest on "equitable grounds".

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In a much later case, *Maine and New Brunswick Electrical Power Co. v. Alice M. Hart* (2), disallowing interest which had been allowed by the lower court, their Lordships of the Privy Council are reported to have stated at page 1069 as follows: "It remains to consider whether any rule of equity entitles the plaintiff to interest." Their Lordships before making this statement had examined the language of a certain statute somewhat similar to our Interest Act, and had come to the conclusion that no interest could be allowed under that rule of law. Then their Lordships further stated: "In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as for example, the non-performance of a contract of which equity can give specific performance." Then their Lordships proceeded to examine whether the case before them was one in which interest could be awarded as a matter of equity and their Lordships remarked that the suit was based on a covenant which was contained in a contract which had been fully

1) (1916) I.L.R., 28 All., 581.

(2) [1929] A.L.J., 1065.

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executed and there was no room for exercise of equitable jurisdiction.

From these cases, the rule laid down by their Lordships seems to be this: Where a case, in England, would fall within the common law jurisdiction, no equitable principles are to be applied in awarding or withholding interest; but where a case fell within the equitable jurisdiction exercised by the Court of Chancery, equitable considerations might induce the court to allow interest. In the case of *Maine and New Brunswick Electrical Power Co. v. Alice M. Hart* (1) there was no jurisdiction of the equity court and, therefore, it was held that no interest could be allowed.

If this principle be correct, we are of opinion that interest would be allowed in this case if it were tried in England. It is true that their Lordships of the Privy Council have held, in *Muhammad Rustam Ali Khan v. Mushtaq Husain* (2), that the mutwalli was not a "trustee" and therefore had no interest in the property which he managed and therefore the deed of trust was not required by the law of registration to be registered. But so far as the position of a mutwalli as the manager of the estate goes and so far as it is his duty to make certain payments enjoined by the deed of waqf, he, in our opinion, stands in the position of a *quasi* trustee. He may not have any personal interest in the property, but he has to discharge all the obligations which would ordinarily fall upon a trustee. A suit for accounts in England would lie in the Court of Chancery, and that was the reason why in *Hamira Bibi's* case (3) their Lordships applied "equitable considerations" and awarded interest. If then the case before us would fall within the equity jurisdiction of the court in England, interest would be allowed on equitable considerations. Here, in India, section 23 of the Indian Trusts Act would be our guide in deciding

(1) [1929] A.L.J., 1065.

(2) (1920) I.L.R., 42 All., 609.

(3) (1916) I.L.R., 38 All., 581.

whether, on equitable considerations, interest may be allowed to the respondent or not. Section 23 of the Trusts Act lays down that "A trustee committing a breach of trust is not liable to pay interest except in the following cases: . . . (b) where the breach consists in unreasonable delay in paying trust money to the beneficiary."

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We think that taking section 23(b) as our guide, we are entitled to hold that interest was properly allowed against the appellant by the court below. We are not forgetful of the fact that the case does not fall within the Trusts Act. We have tried to find out, with the aid of that Act, whether we are entitled to award interest on what has been termed by their Lordships of the Privy Council as "equitable grounds".

The result is that the appeal fails and is hereby dismissed with costs.

REVISIONAL CIVIL

Before Mr. Justice Kendall

DILSUKH RAI BAIJNATH AND ANOTHER (DEFENDANTS)
v. DWARKA DAS (PLAINTIFF)*

1932
November, 8

Civil Procedure Code, order VI, rule 17—Amendment of plaint—Order granting amendment—Revision—"Case decided"—Civil Procedure Code, sections 115, 151—Abuse of process of the court.

The plaintiff sued to recover a specified sum alleged to be due from the defendant as the result of three transactions in which the defendant was his commission agent. After the whole of the evidence in the suit had been recorded the plaintiff applied to amend the plaint so as to convert the suit into one for rendition of accounts. Against the order granting the application the defendant filed a revision. *Held* that the order allowing the plaint to be amended could not be deemed to be a "case decided" within the meaning of section 115 of the Civil Procedure Code and no revision lay.