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that the obligation to repay was imposed upon Akhtar Begam and accepted by her.

We accordingly allow the appeal and in addition to the decree passed by the lower court against the other defendants to the suit we pass a decree in favour of the plaintiff against Gauhar Begam also for the sum of Rs. 8,512-12-0 with interest at 6 per cent. per annum from the date of the suit to the date of realization. The plaintiff will also be entitled to her costs in both the courts in proportion to the sum of money hereby decreed. The decree will be executable only against the assets of Akhtar Begam which might have come or may come into the hands of Gauhar Begam.

*Hasan, C. J. and Srivastava, J.*

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Syed Wazir Hasan, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.*

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SHEIKH RAMZAN AND ANOTHER (PLAINTIFF-APPELLANTS) *v.* MUSAMMAT RAHMANI AND OTHERS (DEFENDANTS-RESPONDENTS).*

*Musalman Waqf Validating Act (VI of 1913,) sections 2 and 3—Annual profits of* waqf *property after deducting expenses specified to be spent by* mutawallis *for maintenance of themselves and their children—Waqf, if valid—Use of word* waqf *if enough to create dedication—Proviso to section 3 of waqf Validating Act, 1913, object of*—Waqfnama *containing the expression "religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul"*—Waqf, *if satisfies the requirements of proviso to section 3—Non-specification in the deed of* waqf *of religious and charitable objects, if renders dedication vague.*

Where the annual profits of the *waqf* properties are Rs. 700 a year and after deducting the expenses on charitable

*First Civil Appeal No. 115 of 1930, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Partabgarh, dated the 25th of August, 1930.

objects, etc. specified in the *waqfnama* the aggregate of which comes to Rs. 225 the balance of Rs. 475 is to be spent by the *mutawallis* in equal proportions for the maintenance of themselves and their children, such a *waqf* is clearly valid by virtue of the enactment contained in clauses (*a*) and (*b*) of section 3 of the Musalman Waqf Validating Act, 1913, provided also that the requirements of the proviso attached to that section are fulfilled.

The definition of "*waqf*" in the Musalman Waqf Validating Act excludes the view that the mere use of the word "*waqf*" is enough to create a dedication in favour of the poor as ultimate beneficiaries. As the *waqf* must be adjudged valid or otherwise by the provisions of this Act this definition should be the test of determining the limits of the meaning of the word "*waqf*". That a reservation of the ultimate benefit for the poor is not included within the definition is clear from the proviso attached to section 3, for were it not so the proviso becomes redundant in its entirety. The object of the proviso is that it should appear on the construction of the instrument of *waqf* that the ultimate benefit is either expressly or impliedly reserved for the poor or for any other purpose recognized by the Musalman law as religious or charitable purpose of a permanent character. The word "*waqf*" therefore used in section 3 should not only satisfy the definition of that word given in section 2 but should also satisfy the limitations of the proviso before a *waqf* can be adjudged to be lawful within the meaning of the Act. Further the use of the term "*waqf*" is not enough to create a valid *waqf*.

Where a deed of *waqf* contained the expression "religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul", *held* that the ultimate objects of the *waqf* is clearly stated to be religious and charitable and to be continued permanently and in perpetuity, and the *waqf* satisfies the requirements of the proviso to section 3 also, and the fact that there is no specification in the deed itself of such religious and charitable objects does not render the dedication vague. Such objects can be ascertained by reference to the texts of Muhammadan law and this matter relates to the administration and not to the construction of *waqf*. *Sheikh Mahomed Ahsanullah* v. *Amarchand Kundu* (1), *Abdul Fata Mahomed Ishak* v. *Russomoy Dhir Chowdhry* (2), *Norendra Nath*

(1) (1889) L.R., 17 I.A., 28. (2) (1894) L.R., 22 I.A., 76.

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*Sircar* v. *Kamalbasini Dasi* (1), *Bank of England* v. *Vagliano* (2), *Majibunnissa* v. *Abdul Rahman* (3), *Khajeh Soleman Quadar* v. *Salimullah* (4), and *Balla Mal* v. *Ata Ulloh Khan* (5), discussed and relied on.

Messrs. *Ali Zaheer* and *Ghulam Imam*, for the appellants.

Messrs. *M. Wasim* and *Bhagwati Nath Srivastava*, for the respondents.

HASAN, C.J. and SRIVASTAVA, J. :—This is the plaintiff's appeal from the decree of the Subordinate Judge of Partabgarh, dated the 25th of August, 1930. The plaintiff No. 1, Sheikh Ramzan, claims a share by right of inheritance under the Hanafi Muhammadan law in the estate of one Fazal Ahmad, who died on the 14th of February, 1928. The plaintiff No. 2, Bhola Faqir, is a transferee of half share which is claimed by the plaintiff No. 1. There are three defendants to the suit out of which this appeal arises. The defendant No. 1, Musammat Rahmani, alleges to be the widow of Fazal Ahmad; the defendant No. 2, Musammat Laiqunnisa, claims to be the daughter of Musammat Rahmani and Fazal Ahmad and the defendant No. 3, Musammat Zohra Begam, is admittedly the daughter of Fazal Ahmad born of a predeceased wife. The property in suit is in the possession of the three defendants mentioned above. It is agreed that Sheikh Ramzan, plaintiff No. 1, is an heir-at-law to the estate of Fazal Ahmad, deceased, in the right of *asbah* (collateral) and if the three defendants are also the heirs of Fazal Ahmad in the right of *zaviul-furuz* (sharers) then Rahman's share comes to 5/24ths and the remaining 19/24ths share belongs to the defendants. The main defence, however, is that Fazal Ahmad made a *waqf* of his entire immovable property by executing a

(1) (1895) L.R., 23 I.A., 18.
(2) (1891) A.C., 107.
(3) (1900) L.R., 28 I.A., 15.
(4) (1922) L.R., 49 I.A., 153

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*waqfnama* on the 30th of April, 1927, and that the defendants are in possession of the subject-matter of the *waqf* by virtue of the terms of the *waqfnama*. The plaintiffs do not accept the validity of the *waqfnama* and therefore the primary question for decision in the suit is the question of legality of the *waqf* as evidenced by the deed of the 30th of April, 1927. For the purpose of this part of the case it is assumed that Musammat Rahmani, defendant No. 1, is the widow and the other two defendants are the daughters of Fazal Ahmad.

It is common ground that the legality of the *waqfnama* of the 30th of April, 1927, must be tested with reference to the terms of the enactment called Musalman Waqf Validating Act, 1913. Indeed in the *waqfnama* in question this Act and the Muhammadan law are expressly mentioned as the law under which the *waqf* was being made. If it is found as it has been found by the learned Subordinate Judge that the *waqfnama* of the 30th of April, 1927, creates a valid *waqf* within the Act the plaintiff's suit must fail.

The learned Counsel for the plaintiffs commenced his arguments against the validity of the *waqf* with a reference to the series of decisions of their Lordships of the Judicial Committee prior to the passing of the Act of 1913 with a view to show what was the state of law at that period of time and asked us to determine how much of that law has been altered and how much of it has been maintained by the enactment of 1913. Equally the learned Counsel for the defendants took us through several texts of Muhammadan law as quoted in the well-known book, Ameer Ali's Muhammadan Law, volume I, for the purpose of construing the provisions of the Act of 1913.

We are of opinion that neither method is the proper method of construing the law as codified in the Act

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of 1913. In *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1) Lord MACNAGHTEN quoted with approval the following observations of Lord HERSCHELL in *Bank of England* v. *Vagliano* (2):—"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with the view. If a statute intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions . . . "

We will however after having constructed the Act by examining its language and giving to it its natural meaning advert to some of the decisions of their Lordships of the Judicial Committee and also to some of the texts of the Muhammadan law with a view to discover how far such decisions and such texts support the construction which we might adopt.

On the question of the interpretation of the *waqfnama* the argument advanced by the learned Counsel for the plaintiffs was two-fold:—(1) That it does not fulfil the requirements of the proviso attached to section 3 of the Act of 1913 and (2) that if it be held that the *waqfnama* in question expressly or impliedly reserves the ultimate benefit for a purpose recognized by

(1) (1895) I.L.R., 23 I.A., 18. (2) (1891) A.C., 107.

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the Musalman law as a religious, pious or charitable purpose of a permanent character such purpose is not definitely stated in the *waqfnama* and therefore the *waqf* fails by reason of vagueness in the purpose of the dedication.

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We now proceed to examine the argument and with a view to do this it is necessary to refer first to the contents of the *waqfnama*. It begins as follows:—"I . . . am governed by the Hanafi law . . . with a view to maintain my children, enforce religious objects and charitable purposes I do hereby make *waqf* of my immovable property mentioned below . . . keeping in view my salvation in the next world, according to the Muhammadan law as also Act VI of 1913 . . . today, the 30th of April, 1927, by reading the *waqf* formula in the way of God for the following objects . . . " Clause 1 is as follows:—"(1) My intention is that my children shall continue to be maintained by the said properties and the religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul." In clause 2 the three defendants are mentioned by names as the heirs of the *waqif* and there is a direction that they "shall enter into possession as trustees after my death." In clause 3 the *waqif* creates himself as the first *mutawalli* for his lifetime and thereafter comes the disposition that "Musammat Zohra Bibi shall remain in possession of one-third, Musammat Laiqunnisa of one-third and Musammat Rahmani Bibi of one-third out of the said properties as *mutawallis*." In clause 4 the *mutawallis* are laid under the obligation "to pay Rs. 50 a year for repairs of the house to the person who may live in my house and pay Rs. 50 for upkeep of the mosque situate in village Mouli . . . and to pay Rs. 125 a year to the successor of the said Syed Muhammad Zafar towards the aid of the Islamia

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school and anniversary of the monastry of Hussaina situate in Pura Shah Khalilullah . . . after the deduction of the rent due to the taluqdars and the expenses of religious and charitable objects and the repairs of the house aforesaid each trustee shall continue to spend the profits of his share towards the maintenance of himself and of his children." Clause 5 contains prohibition against alienation. In clause 6 provision is made as to the succession in the office of *mutawalli* after the death of the first three *mutawallis*. Laiqunnisa is to be succeeded by her husband, Iqbal Ahmad, and after the death of Iqbal Ahmad the male heir of Laiqunnisa is to succeed. Musammat Rahmani's interest in the one-third of the estate as a *mutawalli* is to be divided into two halves after her death; one-half is to be possessed by Laiqunnisa and the other half by Muhammad Mustafa, son of Rahmani, by a previous husband. The clause winds up "every *mutawalli* shall be entitled to appoint a successor after him and if a *mutawalli* dies without nominating his successor then in that case a competent member of the family of the deceased *mutawalli* shall be "appointed *mutawalli*." There are three more clauses which are of no importance in this connection.

The learned Subordinate Judge has found and the finding is not disputed before us that the annual profits of the *waqf* properties are Rs. 700 a year: after deducting the expenses specified in the *waqfnama* the aggregate of which comes to Rs. 225 the balance of Rs. 475 is to be spent by the *mutawallis* in equal proportions for the maintenance of themselves and their children. Such a *waqf* is clearly valid by virtue of the enactment contained in clauses (*a*) and (*b*) of section 3 of the Musalman Waqf Validating Act, 1913, provided also that the requirements of the proviso attached to that section are fulfilled.

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On the side of the defendants their learned Advocate frankly stated that there was no express reservation of the ultimate benefit for the poor. He however, contended that the preamble and the first clause of the *waqfnama* show by implication that the ultimate benefit is reserved for the poor or for a purpose recognized by the Musalman law as a religious or charitable purpose of a permanent character. The learned Advocate's first argument is that the use of the word "*waqf*" is enough to create a valid dedication in favour of the poor as ultimate beneficiaries. His second argument is that the expression "religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul" amply satisfies the second alternative condition laid down in the proviso.

In Ameer Ali's Muhammadan Law 4th edition, volume I, a large number of quotations from original text books on Muhammadan law are given in sections 1 and 2 of Chapter VIII. There is a passage in the Fatawai Alamgiri which seems to us to cover the entire ground and which we reproduce here:—"If the word of *sadakah* is not uttered but the word *waqf* is uttered and it is said that 'my land is *waqf*' or that 'I have made this land *waqf*' or 'that this land of mine has been made *waqf*' then according to Abu Yusuf the *waqf* is complete for the benefit of the poor. Sheikh Sadar Shahid and Sheikhs of Balkh and also we give *Fatwas* in accordance with the opinion of Abu Yusuf."

We are satisfied that the view of law for which the learned Counsel has contended is the view of Abu Yusuf and we are also satisfied that it is *shared by a large number of jurists.* But it is equally clear that this is not the view of Abu Hanifa as will appear from a perusal of the Chapter relating to *waqf* in Hedaya—Hamilton's Hedaya, volume II, pages 234-237.

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Be that as it may, we realize that we are constrained to reject this argument on two grounds. Section 3 of the Musalman Waqf Validating Act, 1913, is as follows :—

> "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 definition of "*waqf*" in the Musalman Waqf Validating Act excludes in our opinion the view that the mere use of the word "*waqf*" is enough to create a dedication in favour of the poor as ultimate beneficiaries. As the *waqf* before us must be adjudged valid or otherwise by the provisions of this Act this definition should be the test of determining the limits of the meaning of the word "*waqf*". That a reservation of the ultimate benefit for the poor is not included within the definition is clear from the proviso attached to section 3, for were it not so the proviso becomes redundant in its entirety. The object of the proviso is that

it should appear on the construction of the instrument of *waqf* that the ultimate benefit is either expressly or impliedly reserved for the poor or for any other purpose recognized by the Musalman law as a religious or charitable purpose of a permanent character. The phraseology employed in section 3 as well as the preamble and the title of the Act show that a *waqf* for the maintenance and support wholly or partially of a settler's family, children or descendants would have been invalid if this Act had not been passed. That this is so is clear from the decisions of their Lordships of the Judicial Committee given before the passing of this Act and also after the passing of the Act in cases to which the provisions of the Act did not apply—*Sheikh Mahomed Ahsanulla* v. *Amarchand Kundu* (1), *Abdul Fata Mahomed Ishak* v. *Russomoy Dhir Choudhry* (2). *Majibunnissa* v. *Abdur Rahman* (3), *Khajeh Soleman Quadar* v. *Salimullah* (4) and *Balla Mal* v. *Ata Ullah Khan* (5). The object of the Act is to validate such a *waqf*. The proviso, however, places limitations on the general enactment contained in the first portion of section 3. The word "*waqf*" therefore used in section 3 should not only satisfy the definition of that word given in section 2 but should also satisfy the limitations of the proviso before a *waqf* can be adjudged to be lawful within the meaning of the Act.

The second ground on which we should reject this part of the learned Advocate's argument is that it has been authoritatively decided by their Lordships of the Judicial Committee that the use of the term "*waqf*" is not enough to create a *waqf*—*Khajeh Soleman Quadar* v. *Salimullah* (4). It is true that this case was decided independently of the Act of 1913. That fact, however, does not in our opinion affect the validity of

(1) (1889) L.R., 17 I.A., 28. (2) (1894) L.R., 22 I.A., 76.
(3) (1900) L.R., 28 I.A., 15. (4) (1922) L.R., 49 I.A., 158
(5) (1927) L.R., 54 I.A., 372.

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the decision of their Lordships of the Judicial Committee. Indeed it seems to us that when section 3 of that Act and the proviso to that section are read together we are unavoidably led to the conclusion that the term *waqf* when applied to a settlement of the nature described in clause (*a*) of the section will not make such a settlement valid unless the conditions of the proviso are also fulfilled. The Act is therefore in consonance with and not opposed to the decision.

We now come to the second part of the learned Advocate's arguments. In this connection reliance is placed on the preamble and clause (1) of the deed of *waqf* and it is contended that the expression "religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul" fulfils the requirements of the second alternative of the proviso to section 3. We have already said that the deed of *waqf* in question expressly refers to the Act of 1913. The similarity of language employed in the two makes us think that the draftsman of the deed of *waqf* borrowed the important words of the expression quoted above from the Act itself. In the quotation just now given the ulimate object of the *waqf* is clearly stated to be religious and charitable and to be continued permanently and in perpetuity. We are therefore of opinion that the *waqf* in question satisfies the requirements of the proviso also. There is no doubt that there is no specification in the deed itself of such religious and charitable objects. This, however, in our opinion does not render the dedication vague. Such objects can be ascertained by reference to the texts of Muhammadan law and this matter relates to the administration and not to the construction of *waqf*. It may be that in the course of administration recourse to the doctrine of cypres is found to be necessary. We do not agree with the learned Advocate for the plaintiffs

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that the religious and charitable objects mentioned in clause (1) of the *waqfnama* are limited to the objects specified in clause (4) of the same. It appears to us that they are general in their nature and are intended to express the ultimate destination of the charity.

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The learned counsel for the plaintiffs also argued that that part of the *waqf* which provides for the enjoyment of a portion of the profits of the estate by Muhammad Mustafa after the death of Rahmani Bibi is invalid for the reason that Muhammad Mustafa cannot be treated to be a member of the settler's family. We agree with the learned counsel that that part of the *waqf* cannot be given effect to but this does not invalidate the *waqf* at its inception. The question will arise after the death of Rahmani Bibi as to whether the benefits allotted to Muhammad Mustafa should go to the heirs of the settler or be captured by the objects immediate and ultimate.

The *waqfnama* of the 30th of April, 1927, was also attacked by the plaintiffs on the ground that it was executed by Fazal Ahmad under the undue influence of Musammat Rahmani and without understanding its terms. Issue 2 was framed by the court below to cover this line of attack and was decided against the plaintiffs. The issue was not abandoned by the learned Counsel for the plaintiffs before us but nothing was said against the judgment of the court below in that behalf. For the reasons given by that court we are of opinion that issue No. 2 has been rightly decided.

The plaintiffs further pleaded that Musammat Rahmani, defendant No. 1, was not legally married wife of Fazal Ahmad and that Musammat Laiqunnisa, defendant No. 2, was not the daughter born of their union. This plea was the subject-matter of issue No. 1 in the court below. The issue has been decided by that court against the plaintiffs and in favour of the

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defendants. Again at the hearing of the appeal before us the finding of the learned Subordinate Judge on this issue was not expressly admitted on behalf of the plaintiffs but no argument was addressed to us against the finding. For the reasons stated by the learned Subordinate Judge we agree with him that it has been proved that Musammat Rahmani was married to Fazal Ahmad and that the defendant No. 2 is their legitimate daughter.

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There was one more attack made by the plaintiffs on the status of the two daughters of Fazal Ahmad, defendants Nos. 2 and 3, and it was to the effect that they were excluded under a family custom from inheriting any portion of their father's estate. This controversy was the subject-matter of issue No. 5. The finding of the learned Subordinate Judge on the issue relating to custom is in the negative and we agree with him that there is no evidence worth the name to prove the alleged custom. The finding of the court below was not questioned at the hearing of the appeal before us.

The defendants raised the plea of limitation against the plaintiffs' suit but it seems to have been abandoned in the court below and was not reiterated in this Court.

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

*Appeal dismissed.*