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the present suit appears to be the annulment of the order which has become final. We think the plaintiffs were not well advised in bringing the present suit.

It should be borne in mind that it is not a matter of absolute right to obtain a declaratory decree and it is discretionary with the court to grant it or not. Having regard to all the facts and circumstances of the case we do not think that it is either possible or reasonable to grant the relief prayed for in the present suit.

The result is that we allow this appeal, and setting aside the decree of the lower courts dismiss the plaintiffs' suit, with costs of all the courts.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

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January, 17

NIAMATUN-NISSA, MUSAMMAT (DEFENDANT-APPELLANT) v. HAFIZUL RAHMAN AND OTHERS (PLAINTIFFS-RESPONDENTS)*

*Mahomedan law—*Waqf *by a Sunni Mahomedan—Deed of* waqf *providing for the education of children of his village and maintenance of the mosque of that village—Subsequent deed by* waqif *depriving the Muslims of that village from the benefits under the* waqf *deed—Suit for declaration by some residents of that village that* waqif *was not competent to execute the subsequent deed which was null and void, maintainability of.*

Where a Sunni Mahomedan executed a deed of *waqf* providing that in case his line became extinct the entire profits of the property were to go towards religious and charitable objects including the education of the children of the Muslims of his village and the maintenance of the mosque in that village and subsequently, when his wife and son had died, executed another deed in favour of his daughter-in-law which deprived the Muslim residents of the village of the benefits which they would derive under the original deed of *waqf*, a suit by some of his

*Second Civil Appeal No. 388 of 1931, against the decree of S. Asghar Hasan, District Judge of Bara Banki, dated the 5th of October, 1931, confirming the decree of Pandit Brij Kishen Topa, Additional Subordinate Judge of Bara Banki, dated the 30th of August, 1930.

relations who were also residents of that village for a declaration under section 42 of the Specific Relief Act that the *waqif* was not competent to execute the subsequent deed and that it was null and void and not binding on the *waqf* property was maintainable. *Zafaryab Ali* v. *Bakhtawar Singh* (1), *Jawahra* v. *Akbar Husain* (2), and *Muhammad Alam* v. *Akbar Husain* (3), relied on. *Wajid Ali Shah* v. *Dianat-ullah Beg* (4), distinguished.

Mr. *A. P. Sen*, for the appellant.

Mr. *M. Wasim*, for the respondents.

SRIVASTAVA and NANAVUTTY, JJ. :—This is a defendant's appeal against the decree, dated the 5th of October, 1931, of the learned District Judge of Bara Banki affirming the decree, dated the 30th of August, 1930, of the Additional Subordinate Judge of that place.

The facts of the case are as follows :

On the 6th of August, 1920, one Shaikh Abdul Rauf, a Sunni Mahomedan, resident of Bhilsar, executed a deed of *waqf* "for the maintenance of himself and his *aulad*", in respect of his entire property. The main provisions of this deed were that the executant was to be a *mutawalli* for his life and that he was to appropriate during his lifetime the entire profits of the *waqf* property, that after him his son Fazlul Rahman was to be *mutawalli* and the latter was also to get the entire profits of the property, that his wife Rasulun-nissa after his death was to get a maintenance of Rs.20 per month, and Niamatun-nissa, wife of Fazlul Rahman, if she survived the latter, was also to get the same amount of maintenance and in case the *waqif's* line became extinct, the entire profits of the property were to go towards the propagation of Islam, maintenance of orphans, secular and religious education of Sunni Mussulmans, other charitable and religious purposes particularly in aid of the Aligarh College, Nudwatul Ulma, Anjuman Himayat Islam, Lahore, Arabic

(1) (1883) I. L. R., 5 All., 497.
(2) (1884) I. L. R., 7 All., 178.
(3) (1910) I. L. R., 32 All., 631.
(4) (1885) I. L. R., 8 All., 31.

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School of Deoband, other Islamic schools and Anjumans and the education of the children of Moslems of Bhilsar and the maintenance of the mosque in Bhilsar. The deed also provided that a fixed amount of Rs.100 per annum was to be spent from the date of the execution of the deed for expenses of Maulud, Fatiha on Giarhwin, Fatiha of the dead of the family, in aid of Moslem orphans and in propagation of Islam. As regards the *mutawalliship,* it was laid down that after Fazlul Rahman, his wife Niamatun-nissa was to be *mutawalli* and after her, the eldest in the male line and failing them the eldest daughter of Fazlul Rahman and her descendants. The *waqif's* wife and his only son Fazlul Rahman both died in the *waqif's* lifetime and the latter left no issue. So Niamatun-nissa, widow of Fazlul Rahman, was the only person out of those named in the *waqfnama* who was left. Thereupon Shaikh Abdul Rauf on the 8th of July, 1929, executed another deed empowering her to appoint a *mutawalli* to succeed her, but providing expressly that he did not wish any of his brothers, nephews or their descendants to be appointed *mutawallis.* The deed also authorized Niamatun-nissa during her lifetime to appropriate the whole of the income of the *waqf* property just like himself. It also gave her full power of alienation in respect of certain groves and *abadis* entered in the *waqf* deed.

Abdul Mabud and Mohammad Yusuf, plaintiffs, the own brothers of the *waqif* Abdul Rauf, brought the present suit for a declaration that Abdul Rauf was not competent to execute the deed, dated the 8th of July, 1929, and that it was null and void and not binding on the *waqf* property.

Both the lower courts have held that Abdul Rauf having parted with the ownership of the property by execution of the deed of *waqf* in favour of God, he had no power left to make any alteration in the terms of the deed. The learned District Judge also observed

that as the plaintiffs in certain eventualities could, under the terms of the deed of *waqf* of 1920, be appointed *mutawallis* and they had been expressly excluded from it under the subsequent deed of 1929, they are entitled to ask for a removal of this cloud upon their right to be made *mutawallis*.

The main contention urged by the learned counsel for the defendant is that the plaintiffs had no *locus standi* to maintain the suit, under section 42 of the Specific Relief Act. It is argued that the plaintiffs are not persons entitled to any legal character or to any right as to any property which could entitle them to claim the declaration sought. It is further contended that the right contemplated by section 42 refers to an existing and not a mere contingent right. Paragraph 6 of the plaint shows that the plaintiffs claimed to be interested in the protection and due management of the *waqf* property as well as in keeping alive the purposes of the *waqf* and to be entitled to be benefited by it as members of the public as well as family heirs of the creator of the *waqf*. There can be no doubt that under the terms of the deed of *waqf* and in the events which have happened, the whole of the income of the *waqf* property since the death of the *waqif* was to be appropriated for religious and charitable purposes mentioned in the deed which included the education of the Mussulman children of Bhilsar and the maintenance of the mosque in that village. The plaintiffs as Mahomedan residents of Bhilsar would, if this provision of the deed of 1920 were to come into operation, clearly derive certain benefits from the *waqf*. The later deed of 1929 deprives them of these benefits and allows the defendant Niamatun-nissa to appropriate the whole income of the *waqf* property, with the exception of Rs.100 to her own use. In *Zafaryab Ali* v. *Bakhtawar Singh* (1) a suit was brought by certain Mahomedans

(1) (1883) I. L. R., 5 All., 497.

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to set aside a mortgage of endowed property belonging to a mosque, a decree enforcing the mortgage and sale of the mortgaged property in execution thereof and for the demolition of buildings erected by the purchaser and also for ejectment of the purchaser. It was held that the plaintiffs, as Mahomedans entitled to frequent the mosque and to use the other religious buildings connected with the endowment, could maintain the suit. This decision was referred to with approval in the Full Bench case of *Jawahra* v. *Akbar Husain* (1) and was followed in *Muhammad Alam* v. *Akbar Husain* (2). In the last mentioned case their Lordships of the Allahabad High Court quoted with approval the following observations of Mr. Amir Ali in his work on Mahomedan Law, Vol. I, 3rd edition, at page 455:

> "The judgment of the Allahabad High Court in *Jawahra* v. *Akbar Husain* (1) seems to be in conformity with the provisions of the Mahomedan law. As has been already pointed out from Raddul-Mukhtar and Fatwai Kazi Khan every Mahomedan who derives any benefit from a *waqf* or trust is entitled to maintain an action against the *mutawalli* to establish his right thereto, or against a trespasser to recover any portion of the *waqf* property which has been misappropriated, joining any other person who may participate with him in the benefit."

The learned counsel for the appellants has placed strong reliance on the decision of the Allahabad High Court in *Wajid Ali Shah* v. *Dianat-ullah Beg* (3). In this case a Mahomedan brought a suit against a person in possession of certain property for a declaration that the property was *waqf*. He did not allege himself to be interested in the property further or

(1) (1884) I. L. R., 7 All., 178. (2) (1910) I. L. R., 32 All., 631.
(3) (1885) I. L. R., 8 All., 31.

otherwise than as being a Mahomedan. It was held that the suit was not maintainable under the provisions of section 42 of Act I of 1877. In our opinion this case is not in point. The plaintiffs in the present case are interested in the *waqf* not merely as Mahomedans or as brothers of the *waqif* but also as residents of Bhilsar. They are as such entitled to certain benefits from the provisions of the *waqf* deed relating to the education of their children and the maintenance of the mosque in the village. As they are deprived of these benefits, for the time being, by the deed of 1929, we think that they should be held entitled to maintain the present action. We must, therefore, overrule the defendant's contention on this ground.

It was also faintly contended that the deed of 1929 does not modify the deed of 1920 in such a way as to make it invalid. We think this contention has no substance. Even a casual glance at the two deeds is sufficient to show that the later deed imposes new conditions and introduces new provisions which are in direct contravention of the provisions contained in the earlier deed.

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

Appeal dismissed.