

1937
SITA RAM
vs.
POTTU LAL

Srivastava,
C.J.

merely a village road the incidents with regard to which should be decided on the basis of custom. In the first place there is nothing on the record to show that the road is not a public road. The plan prepared by the commissioner shows it to be a public road and it has been referred to as such all along in both the lower courts. There is also nothing to show that there is any custom in the village applicable to the case which may give the residents of the village a right to have encroachments removed irrespective of any special injury or inconvenience. For the above reasons I am of opinion that no case has been made out for interference with the decision of the courts below. I accordingly dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice
W. Y. Madeley*

1937
July, 16,

THAKURAIN MAHBOOB BANDI (OBJECTOR-APPLICANT) v.
K. B. MAHBOOB HUSAIN KHAN (OPPOSITE-PARTY)*

Musalman Waqf Act (XLII of 1923), scope of—Waqf partly to provide for waqif or his family—Musalman Waqf Act, when will apply.

If part of the purpose of a waqf is to provide for the waqif himself or for any member of his family or his descendants, the provisions of the Mussalman Waqf Act will not come into force till after the death of such persons. *Shabbir Husain v. Ashiq Husain* (1), referred to.

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

Mr. *Ali Zaheer*, for the opposite party.

ZIAUL HASAN and MADELEY, JJ.:—The question involved in this application for revision of an order of the learned District Judge of Fyzabad, dated the 24th of August, 1936, is whether or not a waqf made on the 30th of October, 1913, by Babu Abul Qasim, deceased

*Section 115 Application no. 167 of 1936, against the order of M. Humayan Mirza, District Judge of Fyzabad, dated the 24th of August, 1936.

(1) (1929) I.L.R. 4 Luck., 429.

husband of the applicant, is or is not subject to the provisions of the Mussalman Waqf Act (XLII of 1923).

The property, the subject of the waqf consisted of certain villages, houses and a grove. The object of the waqf was to make provision for *taziadari*, support of indigent Shia Mussalmans, other objects considered religious or charitable by the Shias and for the support of the waqif's wife, the present applicant. A sum of Rs.100 a month was allowed to the applicant and she was to remain in possession of about 33 bighas of *sir* land, the grove and the houses for her life. It was also provided that if the waqif should have any issue subsequently the *sir* land, the houses and the grove would remain in the possession of the issue and of the issue of that issue and that the profits of those properties would be applied to the other purposes of the waqf only when the family should become extinct. A committee of four trustees, including the Deputy Commissioner of Fyzabad, was appointed of whom one was to be the managing trustee on a salary of Rs.50 per mensem.

It appears that the managing trustee filed accounts of the waqf in the District Court from 1926 up to 1936. In 1933 the present applicant put in an application before the learned District Judge making certain allegations against the managing trustee, Khan Bahadur Mahboob Husain Khan, opposite-party and praying that he be ordered to deposit the cash balance of the income of the trust in his hands in court. The managing trustee replied that he had purchased some property for the trust with the money of the trust that he had in his hands. On this another application was submitted by the applicant on the 29th of January, 1936 praying that the managing trustee be ordered to appear in court in person "to explain a number of material facts which still remain unexplained and to satisfy this Honourable Court with regard to the objections raised by your humble petitioner" and that he may be ordered to produce the mortgage-deed of 1916, the rights under which

1937

THAKURAIN
MAHBOOB
BANDI
vs.
K. B.
MAHBOOB
HUSAIN
KHAN

Ziaul Hasan
and
Madeley, JJ.

1937

THAKURAIN
MAHBOOB
BANDI
vs.
K. B.
MAHBOOB
HUSAIN
KHAN

Ziari Hasan
and
Madeley, JJ.

were said to have been purchased by the trustee, and some other documents. In August 1936 the opposite-party objected to the applicant's application on the ground that the waqf in question was exempted from the operation of Act XLII of 1923 and saying that it was on account of misunderstanding and wrong legal advice that he filed accounts in court, though as a matter of fact he was not bound to furnish any accounts. It was on this application that the learned Judge considered the matter and coming to the conclusion that the waqf in question was not governed by Act XLII of 1923 held that no accounts ought to have filed in his court and set aside all the proceedings taken in his court relating to the accounts filed, and ordered the case to be consigned to the records. It is against this order that the present application has been brought.

We have heard the learned counsel for parties at length and are of opinion that the order of the learned District Judge was perfectly correct. The provisions of Act XLII of 1923 apply to waqfs other than such waqfs as are "described in section 3 of the Mussalman Waqf Validating Act of 1913 under which any benefit is for the time being claimable for himself by the person by whom the waqf was created or by any of his family or descendants" [*vide* section 2(e)]. Now, section 3 of the Mussalman Waqf Validating Act of 1913 runs as follows:

"It shall be lawful for any person professing the Mussalman faith to create a waqf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family, children or descendants".

(b)

The waqf now in question being one created among other purposes for the maintenance and support of the waqif's wife, children and descendants is clearly one such as is mentioned in section 3 of the Mussalman Waqf

Validating Act of 1913 under which a "benefit is for the time being claimable by" the waqif's wife and descendants. It is thus excluded from the operation of Act XLII of 1923 by section 2(e) of the Act.

It was argued by the learned counsel for the applicant that only those waqfs could come under Act VI of 1913 which were made wholly or mainly for the maintenance and support of the waqif's family, children or descendants but that the present waqf being mainly for religious and charitable purposes and not for the support of the waqif's family could not come under that Act and was not consequently exempt from the operation of Act XLII of 1923. We are unable to accept this argument as we find nothing in section 3 of Act VI of 1913 to justify the view that waqfs which are partly for the maintenance and support of the waqif's family and partly for religious and charitable purposes are excluded from the provisions of that section.

The learned counsel places great reliance on the Full Bench case of *Shabbir Husain v. Ashiq Husain* (1) but the question for decision in that case was whether the Charitable and Religious Trusts Act (XIV of 1920) applies to the cases of mixed waqfs or trusts where a portion of the benefit is allotted for private purposes and a portion for public purposes, or whether it applies only to those cases where the entire benefit is allotted for public purposes. No doubt the learned Judges remarked in passing that a waqf which is partly private and partly public is governed by Act XLII of 1923 but in view of the questions for decision before the learned Judges, this remark can only be regarded as an *obiter dictum*.

The view we have taken is supported by section 3(3) (b) of Act XLII of 1923 which lays down that "where in the case of a waqf such as is described in section 3 of the Waqf Validating Act VI of 1913 the person creating the waqf or any member of his family or any of his

1937

THAKURAIN
MAHBOOB
BANDI
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K. B.
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Zinnil Hasan
and
Madeley, JJ

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MAHBOOB
BANDI
vs.
K. B.
MAHBOOB
HUSAIN
KHAN

Ziaul Hasan
and
Madeley, JJ.

descendants is at the commencement of this Act alive and entitled to claim any benefit thereunder, the statement referred to in sub-section (i) shall be furnished within six months of the date of the death of the person entitled to such benefit, as aforesaid or of the last survivor of any such persons as the case may be." This clearly shows that if part of the purpose of a waqf is to provide for the waqif himself or for any member of his family or his descendants, the provisions of the Act will not come into force till after the death of such persons. We are therefore of opinion that the order of the learned District Judge was correct and dismiss this application with costs.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice
W. Y. Madeley

PANDIT SIDH NATH (PLAINTIFF-APPELLANT) v. HAR
NARAIN (DEFENDANT-RESPONDENT)*

1937
July, 20,

Transfer of Property Act (IV of 1882), section 51—Permanent lease taken from mother-guardian of minor by exercise of undue influence—Rent reserved ridiculously low—Lease conferring no benefit on lessee—Lessee, if can claim compensation under section 51—Permanent lessee, if entitled to the benefit of section 51.

A lessee or even a permanent lessee who has incurred expenses in making improvements cannot be allowed compensation in a suit to avoid the lease for so long as a transfer is subject to payment of rent or to any other condition the transferee cannot believe that he is "absolutely entitled" to the property. But even if it be granted that a permanent lessee is entitled to claim the benefit of section 51 of the Transfer of Property Act, a lessee cannot claim to have "believed in good faith" that he was absolutely entitled to the land when he takes a permanent lease from the mother-guardian of a minor, whose powers are no better than those of the *shebait* of a temple,

*Section 12(2) Appeal no. 5 of 1936, against the decree of Mr. Justice E. M. Nanavutty, Judge of the Chief Court of Oudh, dated the 10th of March, 1936, modifying the decree of Syed Shaukat Husain, Civil Judge of Unao, dated the 28th of February, 1934.