APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof.

MAULA BAKHSH, etc. (Defendants)—*Appellants,* 1919.

versus Dec. 9.

AMIR-UD-DIN, etc., (Plaintiffs)—*Respondents.*

Civil Appeal No. 1038 of 1919.

Muhammadan Law—Waqf—*whether a* waqif *can cancel the dedication subsequently and whether a house can be dedicated for purposes of prayer—Contingent dedication*—waqf *made exclusively for use of a particular sect—whether valid.*

One Chittu a member of a peculiar sect of Muhammadans called *Ahl-i-Quran* or *Chakralvi* purchased a house and on 23rd May 1903, executed a *wakfnama* by way of a will and declared the property *wakf* for the use of his sect, and appointed himself as its *mutwalli.* The *wakf* was to be acted upon after his life time, and after his death *mutwallis* were to be elected to manage the *wakf.* On 15th March 1905 he executed another document in which he made the *wakf* more complete and having given up his mutwalliship placed the property in possession of certain persons who were appointed *mutwallis.* In the first *wakfnama* there was a direction that a mosque should be erected to carry out the objects of the *wakf* but he consecrated the house itself for the purpose of prayers and the recitation of the *Quran.* The newly appointed *mutwallis* failed to obtain a site for the building of a mosque and so they appointed Chittu again as *mutwalli* of the *wakf* in the hope that by his influence a site might be secured. When Chittu came into the possession of the *wakf* property, he apparently changed his mind and began to deal with the property as his own. He made transfers and leases, and gifted part of the house to his wife. Thereon the other *mutwallis* removed him from the mutwalliship, and he accepted his dismissal on 3rd June 1909. In November 1911 he died, and his legal heirs took possession of a portion of the *wakf* property. The *mutwallis* then instituted the present suit against

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the heirs for a declaration that the property being *wakf* the defendants had no right to any portion of it.

Held, that the second *wakfnama* followed by possession being given to the *mutwallis* created a valid and binding *wakf* in the life time of Chittu which could not be invalidated by Chittu's subsequent acts.

Held also, that on a proper construction of both the *wakfnamas* it was not a condition of the dedication that a mosque should be built, the house itself having been constituted as a *wakf* property in the *waqif's* life time and having been used as a house of prayer by the followers of the sect ever since. It could not therefore be said that the *wakf* never came into existence or that it was a contingent one, dependent on the fulfilment of the condition of building a mosque.

Held further, that according to Muhammadan Law any place which is dedicated for the purposes of prayer may validly be treated as a mosque and it is not necessary that the building should have a minaret.

Held lastly, that the fact that Chittu in both *wakfnamas* expressed a wish that only the *Ahl-i-Quran* should perform their prayers in the house could not invalidate the *wakf* which was made according to the rules of Muhammadan Law, and the house must be treated as having become the property of God. Where a *waqf* has been validly made exclusively for the use of a particular sect the *wakf* is good and the condition attached to it is void.

Ata Ullah v. *Azim Ullah* (1) per Edge, C.J., referred to.

Abdus Subhan v. *Koiban Ali* (2), *Fatma Bibi* v. *The Advocate General of Bombay* (3), *Muhammad Rustam Ali Khan* v. *Muhammad Mushtaq Husain* (4), and *Kuttayan* v. *Mammanna Ravuthan* (5), distinguished.

Second Appeal from the decree of N. H. Prenter, Esquire, District Judge, Lahore, dated the 30th January 1919, affirming that of C. L. Bannerji, Esquire, Munsif, decreeing the claim.

M. N. MUKERJI, for *Appellants.*

JAI GOPAL SETHI, for *Respondents.*

ABDUL RAOOF, J.—The facts out of which this second appeal has arisen are fully stated in the judgment of the two Courts below and it is not necessary to

(1) (1889) I. L. R. 12 All. 494 (501) F. B.
(2) (1908) I. L. R. 35 Cal. 294.
(3) (1881) I. L. R. 6 Bom. 42.
(4) (1916) 35 Indian Cases 718.
(5) (1911) 18 Indian Cases 195.

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go over the same ground in this judgment. The salient facts on which the decision of this appeal turns and to which alone reference has been made in the argument at the Bar may be summarised thus. A peculiar sect called *Ahl-i-Quran* or *Chakralvi* has been in existence for some time in this province. One Chittu was among its adherents. He in his anxiety to assist in increasing the number of converts to the sect purchased a house and executed a *wakfnama* on the 23rd of May 1903. By this *wakfnama* he declared the property to be *wakf* and appointed himself as its *mutwali*. In this document there are words to the effect that the *wakf* was to be acted upon after his life time and that the document was to be treated as a *wasiatnama*. He, however, appointed himself its *mutwali* in *praesenti* and declared that after his death a committee would be appointed and *mutwallis* would be selected to manage the *wakf*. Later on, on the 15th of March 1905, he executed another document in which he made the *wakf* more complete and having given up his mutwalliship placed the *wakf* property in the possession of certain persons who were appointed *mutwallis*. In the first *wakfnama* there was a direction that a mosque should be erected to carry out the object of the *wakf*. But the precise words of the *wakfnama* if properly construed would show that he had consecrated the house itself for the purpose of prayers and the recitation of the *Quran*. The newly appointed *Mutwallis* tried to obtain a site for building a mosque, but their attempt was thwarted by some Muhammadan members of the municipality as they did not like that a mosque should be erected by a peculiar sect. Chittu was a wealthy and influential man. It was therefore decided that he should again be appointed the *Mutwalli* of the *wakf* in the hope that he by his influence might be able to obtain a site to construct a mosque. When Chittu came into possession of the *wakf* property again he appears to have changed his mind and to have begun to deal with it as his own property. He made transfers; executed a number of leases and did many other things which would go to show that he tried to exercise his right of ownership over the property. He even went so far as to make a gift of a part of the house to his wife on the 27th of February 1909. The other *mutwallis* again

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removed him from mutwalliship and he himself on the 3rd of June 1909 gave a writing accepting his dismissal. On the 5th of November 1911 Chittu died and his legal heirs took possession of a portion of the *wakf* property asserting their right of ownership over it. The present suit has therefore been instituted by the *mutwallis* for a declaration that the property being *wakf* the heirs of Chittu, the defendants in the case, have no right to any portion of it. The suit was defended upon numerous pleas, all of which were decided against the defendants by the first Court, and the suit was decreed. An appeal was preferred to the lower appellate Court where the issues were very much narrowed down on account of a statement made by the counsel for the defendants admitting the correctness of the finding of the Court of first instance on the facts of the case. The argument at the Bar was confined only to three points, namely—

(1) that the suit was barred by order XXIII, Rule 1, clause (3);

(2) that the *wakf* was void according to Muhammadan law;

(3) that the *wakf* was never acted upon and so never came into existence.

All those pleas were decided against the defendants-appellants by the Court below and the judgment and decree of the Court of first instance were upheld. The defendants have come up to this Court in second appeal and the same three points have been urged in the argument before me. A very feeble attempt was made to argue the first plea. The previous suit relating to which this plea was raised was brought against Chittu in his life time on the ground that he occupied the position of a *mutwalli* and had therefore no right to deal with the property as his own. Before the decision of that suit Chittu died and his legal representatives were substituted in his place. It was then discovered that the suit was of a personal nature against Chittu in his position as a *mutwalli* and that the cause of action did not survive against his legal representatives. Accordingly by a petition presented to the Court the suit was withdrawn without permission for instituting a fresh suit on the same cause of

action. It is therefore contended that the suit is barred as no permission for the institution of the present suit was obtained from the Court. The present suit is a suit against the defendants as trespassers and not as legal representatives of Chittu. The cause of action for this suit is altogether different. This plea, therefore has no force and has rightly been disallowed by the lower appellate Court. The third plea also cannot be urged having regard to the facts above stated. It is idle to contend that the *wakf* was never acted upon If the case depended only upon the document of the 23rd of May 1903 which was styled as a *wasiatnama* and under which possession to the *mutwalli* was to be given after the death of the *wakif* there would have been some room for contention that by his subsequent act the *wakif* had revoked the will and thereby the *wakf* which he had created. As stated above the character of the testamentary *wakf* was changed by the subsequent document dated the 15th of March 1905 under which the *wakf* was created *inter vivas* and the property was placed in the possession of the *mutwallis* at once. According to Imam Abu Usaf a mere declaration of a *wakf* creates a binding and valid *wakf*. According to Imam Muhammad, however, in order to complete a *wakf* it is necessary to place the dedicated property in the possession of *mutwallis*. But this was done in this case under the second *wakfnama*. Therefore there can be no possible doubt on the question that a valid and binding *wakf* had been created by Chittu in his life time. If Chittu after that tried to set aside the *wakf* by his acts that could be of no avail. The result is that so far as the subsequent acts of Chittu are concerned it cannot be said that they invalidated the *wakf* and that it never came into existence. The real question which has been the subject of discussion before me is the one raised in the second plea mentioned in the judgment of the lower appellate Court, namely, that the *wakf* is void according to Muhammadan law. Two grounds are urged in support of this plea. Firstly, that because Chittu had made it a condition that a mosque should be constructed and that as no mosque was actually built the *wakf* never came into existence. Secondly, that it was a contingent *wakf* depending upon the fulfilment of the condition of building a mosque. Looking at the

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two documents there can be no possible doubt that that was not the intention of the *wakif* himself. He constituted the house itself as a *wakf* property and it was used as a *wakf* property in his lifetime and is being used even now as a *wakf* property. The followers of the sect say their prayers in that house and recite the *Quran* there. According to Muhammadan law or usage it is not necessary that a mosque should have a minaret as was contended in the Court of first instance. Any place which is dedicated for the purposes of prayer may validly be treated as a mosque. The house in this case according to the findings of both the Courts below is treated as a place for prayer, and it must be looked upon as such. According to the true construction of the two documents there is no room for a contention that the coming into existence of the *wakf* was in any way made dependent upon the construction of a mosque. The second ground urged in relation to this plea is that as the *wakif* limited the use of the *wakf* property to a particular sect, the *wakf* according to the rules of the Muhammadan law was invalid. No doubt there are provisions in the two deeds which go to show that it was the wish of the *wakif* that only the *Ahl-i-Quran* should perform their prayers in the house. The *wakf*, however, was made according to the rules of Muhammadan law. It was dedicated to God and according to the notion of the Muhammadan law it must be treated as having become the property of God.

In the case of *Ata Ullah and another* v. *Azim Ullah* (1) a somewhat similar question was raised. That was a case relating to a mosque which had been erected by *Hanfis* and the *Suni* Muhammadans of the *Hanfi* sect only had been performing their prayers in it. Certain Muhammadans belonging to the sect known as *Ahl-i-Hadis* began to attend the mosque. Differences arose between the adherents of the two sects. The *Hanfis* claimed the mosque to have been constructed by *Hanfis* and dedicated for the use of the *Hanfis* alone. On the other hand the *Ahl-i-Hadis* claimed a right to enter the mosque and perform their prayers there on the

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ground that it was a *wakf* property and all Muhammadans as such had a right to have the benefit of it. In proceedings taken under section 145 of the Criminal Procedure Code the Criminal Court declared the *Hanfi* Muhammadans to be in exclusive possession of the mosque and prohibited the *Ahl-i-Hadis* from entering it. Thereupon the latter brought a suit for a declaration of their right to enter the mosque and perform their prayers there. In their defence to the suit the *Hanfis* put forward the plea that the mosque having been constructed by the members belonging to their sect they had a right to exclude the followers of other sects. The Court of first instance decreed the suit holding that the mosque was a public place of worship and open to all *Sunis* and that plaintiffs as Muhammadans had full liberty to exercise their religious rights and offer prayers in the mosque. On appeal the District Judge took a different view and held that the mosque was originally intended for *Hanfis* and had been long used as a place for *Hanfi* worship and that it was most undesirable that the *Muhammadi* or *Ahl-i-Hadis* should be allowed to enter into a congregation of *Hanfis* in a mosque constructed for public worship according to *Hanfi* ritual and long used for such worship. He therefore dismissed the suit. The *Ahl-i-Hadis* then preferred an appeal to the High Court at Allahabad. The matter came up before a Full Bench. The judgment in the case, was delivered by Edge, C. J., in which the rest of the members concurred. At page 501 is to be found the following passage, which has a direct bearing on the case before me. "It "appears to me that the case raises two questions, "the first being whether a mosque which is dedicated "to God can be limited in its dedication to any parti- "cular school or sect of the *Suni* persuasion of the "Muhammadans. The second question being whether "it is shown here that the plaintiffs are not in fact "Muhammadans of the *Suni* persuasion, although they "may have some peculiar views as to the ritual. That "they are believers in one God and believe that Mu- "hammad is his prophet, there is no question. Now "as to the first question, no authority has been brought "to our notice to show that a mosque which has been "dedicated to God can be appropriated exclusively to

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"or by any particular sect or denomination of the *Suni* "Muhammadans, and without very strong authority "for such a proposition I for one could not find as a "matter of law that there could be any such exclusive "appropriation. As I understand, a mosque to be not a "mosque at all must be a building dedicated to God and "not a building dedicated to God with a reservation that "it should be used only by particular persons holding "particular views of the ritual. As I understand it, "a mosque is a place where all Muhammadans are "entitled to go and perform their devotions as of right, "according to their conscience."

As found by both the Courts in the present case the *Ahl-i-Quran* believe in God and in Muhammad as his prophet. The only difference between them and the *Hanfis* being that the former reject all glosses and entries on the *Quran* and believe in the words of the *Quran* itself. It cannot therefore be said that they are not *Musalmans*. Chittu was therefore as good Muhammadan as any one could be, and as such he was bound by the law applicable to the Muhammadans generally. He must therefore be held to have created the *wakf* according to general notions of the Muhammadan law. The *wakf* created by him must therefore be taken to be a valid *wakf* in spite of the limitation which he professed to place upon it. No doubt he clearly stated in the *wakfnama* '*makan mazkur ko Ahl-i-Quran ke liye masjid bhi bana de hai*', thereby indicating that he had made this *wakf* exclusively for the use of the particular sect to which he belonged. The *wakf*, however, will remain good and the condition attached to it will be void. The learned Vakil for the appellant has relied upon the case *Abdus Subhan* v. *Korban Ali* (1) and has drawn my attention to the following passage to be found at page 296 :—

"The mosques in question appear to have been "built by *Musalmans* of the *Hanfi* sect primarily for "the use of members of their own sect. They have "been used by *Hanfis* and as a general rule by *Hanfis* "only. The Lower Appellate Court has declined to "find that either or both the mosques were expressly "reserved for the *Hanfis*. Such an inference could not

(1) (1908) I. L. R. 35 Cal. 294.

"properly be drawn from the evidence on the record. "It might also be questioned whether such a special "dedication would be in accordance with Muhammadan "ecclesiastical law."

He has laid a stress upon the concluding words of the passage and has argued that inasmuch as a reservation was made in the *wakfnama* in favour of the *Ahl-i-Quran* only, the *wakf* must be taken to be bad in law. It was nowhere held in that case that such a *wakf* would be void. At the most it can be said that a doubt was expressed by the learned Judges, but it cannot form the basis for a decision in this case. The decision in the Full Bench case of the Allahabad High Court already quoted lays down in clear words that a reservation of this character cannot be made by a Muhammadan who creates the *wakf*. The learned Judges of the Calcutta High Court themselves approved of and followed the decision of the Allahabad High Court. Some other cases were also cited by the learned vakil, namely, *Fatma Bibi* v. *The Advocate General of Bombay* (1), *Muhammad Rustam Ali Khan* v. *Muhammad Mushtaq Husain* (2) and *Kuttayan* v. *Mammanna Ravuthan* (3). They, however, in no way support the contention of the learned vakil, but on the other hand there are in them indications which are against his contention.

I am, therefore, clearly of opinion that the view taken by both the Courts below as to the facts and the law applicable to this case is right. I therefore dismiss this appeal with cost.

Appeal dismissed.

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(1) (1881) I. L. R. 6 Bom. 42. (2) (1916) 35 Indian Cases 718.
(3) (1911) 18 Indian Cases 195.