APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Abdul Raoof.

TAFAZZAL BEG, *alias* BADSHAH MIRZA (DEFENDANT) Appellant,

versus

MAJID ULLAH, ETC. (PLAINTIFFS) Respondents.

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Dec. 4.

Civil Appeal No. 659 of 1920.

Muhammadan Law—Wakf—Wakif *retaining possession during his lifetime as* Mutwalli—*and directing that a small amount out of the income of the dedicated property be paid to his daughter-in-law for life—Illusory* Wakf—*Public Religious Trust—Civil Procedure Code, Act V of 1908, section 92.*

One K. B. made a *wakf* of certain house property for the support and maintenance of a mosque. He appointed himself the first *mutwalli* for life, and appointed his great-grandson as the second *mutwalli*, and both carried out the objects of the *wakf* during their lifetime. He also appointed six *naib-mutwallis* to assist the *mutwalli* in the management and upkeep of the mosque. The dedicated house property yielded an income of Rs. 22-4-0 per month, out of which Rs. 2 were to be paid to the daughter-in-law of the *wakif* for her life, and the remaining amount was to be utilised for the repair and management of the mosque. Three members of the Muhammadan community brought the present suit for removal of the present *mutwalli*, accounts, etc.

Held, that according to Hanafi Law a *wakif* can appoint himself the *mutwalli* of the *wakf* created by him, and retain the *wakf* property in his possession as such *mutwalli*.

Muhammad Aziz-ud-Din Ahmad Khan v. *Legal Remembrancer* (1), distinguished.

Ameer Ali's Muhammadan Law, Volume 1, Fourth Edition, page 441, referred to.

Held also, that the *wakf* was not an illusory one merely because Rs. 2 *per mensem* were to be paid to the daughter-in-law for life out of the income of the dedicated house property.

(1) (1893) I. L. R. 15 All. 321.

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Pathukutti v. *Avathalakutti* (1), distinguished.

Held further, that the mosque in question was a public religious trust, as it was never even alleged that it was a private mosque and that the public had no right to congregate therein without special permission ; the provisions of section 92 of the Code of Civil Procedure were therefore applicable.

Mahomad Ismail Ariff v. *Ahmed Moola Dawood* (2), referred to.

First appeal from the decree of J. Coldstream, Esquire, District Judge, Delhi, dated the 21st January 1920, decreeing the plaintiff's claim for administration of the mosque, etc.

B. D. KURESHI, for Appellant.

TIRATH RAM, for Respondents.

The judgment of the Court was delivered by—

ABDUL RAOOF J.—This was a suit brought under section 92 of the Civil Procedure Code by three members of the Muhammadan community of the city of Delhi for the removal of the present *mutwalli* of a public *wakf* ; for the appointment of a new *mutwalli* ; for accounts from the present *mutwalli* and generally for the settling of a scheme for the management of the trust. One Kadir Bakhsh, a resident of Delhi, Kashmiri Gate, made a *wakf* of certain house property for the support and maintenance of a mosque. He appointed himself the first *mutwalli* for his life and after his death he appointed Badshah Mirza *alias* Tafazzal Beg, his great-grandson under the guardianship of his grandmother *Mussammat* Ashraf-ul-Nisa, as the boy was a minor. He also appointed six *naib-mutwallis* to assist the *mutwalli* in the management and upkeep of the mosque. The dedicated house property yielded an income of Rs. 22-4-0 per month. Out of this Rs. 2 *per mensem* were provided under the deed to be paid to *Mussammat* Barkat-ul-Nisa, daughter-in-law of the *wakif*, for her

(1) (1888) I. L. R. 13 Mad. 66. (2) (1916) I. R. L. 43 Cal. 1085, 1100 (P. C.).

life. The rest of the income was directed to be utilised for the following purposes :—

(*a*) Remuneration of one of the six *mutwallis* who would undertake to collect the rents ;

(*b*) Purchase of matting for the mosque ;

(*c*) Providing *dols* (buckets), rope, etc., for the mosque and well, earthen pots and fuel ;

(*d*) Appointment of a *Hafiz* to teach the Quran ;

(*e*) Appointment of a *moazzan* ;

(*f*) Feeding the poor during the Ashra Muharram ; and

(*g*) if any balance remained in the hands of the *mutwalli* after remunerating himself it was to be utilised for the purchase of property to be added to the endowed property.

Kadir Bakhsh acted as the first *mutwalli* and utilised the income for the objects mentioned in the deed. After his death the properties came under the management of the *mutwalli* and his assistants; but it is stated in the plaint that they did not manage the *wakf* as directed in the *wakfnama* by the *wakif*. It is further stated in the plaint that after the death of the *naib-mutwallis* Badshah Mirza alone continued to realize the rents, but he did not spend a single farthing on the mosque and in connection with the management of the mosque and in carrying out other instructions contained in the *wakfnama* but that he had all along been spending the entire money for private purposes. The plaintiffs called upon him to render accounts of the income of the endowed property but he refused to do so. Thereupon the plaintiffs made an application under section 92 of the Civil Procedure Code to the Deputy Commissioner for sanction to institute a suit against the *mutwalli*. Such permission having been granted, a suit was insti-

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tuted on the 23rd of July 1919, but owing to non-payment of process fee it was dismissed on the 21st of August 1919 with permission to bring a fresh suit. Hence this suit was filed on the 30th of August 1919.

The defendant Tafazzal Beg resisted the suit and put forward some contradictory pleas. In paragraph 1 of the written statement he totally denied the *wakf* of the property in favour of the mosque. In paragraph 3 he, however, alleged that the income of the *wakf* was not misappropriated but that he had been discharging his duties very honestly and in good faith. In paragraph 1 of the additional pleas he denied the public character of the *wakf* and alleged that it was not enforceable under the Muhammadan Law owing to its being uncertain and vague. In paragraph 2 he further attacked the *wakf* on the ground of its being illusory because only a very small amount of the income was provided to be spent on the mosque. Section 92 of the Civil Procedure Code was alleged to be inapplicable owing to the private character of the *wakf*. In paragraphs 5 and 6 of the written statement he, however, admitted that he had been appointed the permanent *mutwalli* by the *wakif* on account of his near relationship and in paragraph 7 he pleaded that the property was managed properly and that there was nothing to justify the institution of the suit. The statement of the defendant was taken on oath before the framing of the issues in which he completely admitted the existence of the *wakf* but denied its public character. The substance of that statement is to be found in the following passage :—" The property is not mine, it is *wakf* but not a public *wakf*. The deed provides for certain expenditure connected with the mosque. This is not a public matter. I now spend money according to the *wakfnama* or rather more upon the mosque."

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Of the assistant *mutwallis* only Muhammad Ishak has survived. He has been examined on behalf of the plaintiffs in the case as a witness. The following significant passage is to be found in his deposition :— "I am a *naib-mutwalli*. Four other *mutwallis* are dead. I worked as *mutwalli* until about 12 years ago. The mosque had an income of Rs. 24 *per mensem* then. About Rs. 15 or 16 *per mensem* was spent on the mosque. We saved money enough to buy two shops and a *kotha* with balcony for Rs. 600 and added them to the mosque."

As to the present condition of the mosque he stated that the walls were broken down ; that the mosque was badly in need of repair; that the property bought was in need of repair, and that *Mussammat* Ashraf-ul-Nisa herself had complained of the conduct of the defendant. In addition to this witness there were other witnesses called to prove the mismanagement of the affairs of the *wakf* by the *mutwalli*. The Court found against the defendant on all the points urged by him. It, however, refused to remove him from *towliat* for the present. The gist of the findings of the Court below is contained in the following passage to be found in the judgment :—

"My conclusions are that this is a public trust of a religious nature, that the property described in the deed is wholly devoted to the trust with the exeeption of Rs. 2 *per mensem*, that the trust is explicit and not so vague as to be incapable of execution, that its instructions can readily be understood and followed by the *mutwalli*, that the *mutwalli* is bound to account for the whole of the income when called upon by an interested person, that the defendant has not faithfully executed the trust in the past, and that plaintiffs are entitled to ask for accounts."

The Court directed the defendant to hand over the accounts of the income from the *wakf* property and expenditure on the mosque and connected with it from

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the date he took over the trust to the plaintiffs within one month, and the plaintiffs were directed to submit a scheme within two months for the future management of the *wakf*. The Court further laid down that Muhammad Ishak would act as assistant *mutwalli* along with two other assistant *mutwallis* to be appointed hereafter. Against the decision of the Court below the present appeal has been preferred and Mr. B. D. Kureshi has appeared on behalf of the defendant.

The first argument put forward by him is that, as the *wakif* remained in possession of the *wakf* property in spite of the execution of the document, the dedication never took effect and the property continued to be his private property. In support of this contention he has cited the case of *Muhammad Aziz-ud-Din Ahmad Khan* (*defendant*) v. *The Legal Remembrancer to Government, N. W. P. & Oudh* (*plaintiff*) (1). That case has no manner of application to the facts of the present case. In that case the *wakf* was never acted upon and the *wakif* continue to retain possession until his death of the property dealt with by the deed. In the present case the *wakif* constituted himself the first *mutwalli* and retained the property in his possession as such. The evidence tendered in this case clearly shows that he acted upon the deed and carried out the objects of the *wakf* in his lifetime and that the subsequent *mutwalli* also carried out the objects of the *wakf*. According to the Hanafi Law a *wakif* can appoint himself the *mutwalli* of the *wakf* created by him, see Ameer Ali's Muhammadan Law, Volume I, IV Edition, page 441. The rule is thus stated there :—" The *wakif* may lawfully reserve the *wilayat* (the management of the trust) for himself; this is according to Abu Yusaf; and Hillal

(1) (1893) I. L. R. 15 All. 321.

also has said the same. And the Sahib-ul-Hedaya (the author of the Hedaya) states this is the approved doctrine."

There is a slight difference of opinion between Abu Yusaf and Imam Muhammad, the two celebrated disciples of Imam Abu Hanifa, with respect to the *towliat* of the *wakif*. According to Imam Abu Muhammad "a *wakif* will not be the trustee unless he has reserved the trusteeship for himself at the time of consecration; but according to Abu Yusaf consignment is not necessary in the case of the *wakif*, so even when he does not (expressly) reserve the trusteeship for himself, he will still be the trustee." In this case, however, the trustee has reserved the trusteeship for himself in the deed of *wakf*. Thus, according to both the Imams the *wakif* was entitled to manage the *wakf* property as its *mutwalli*. The contention, therefore, has no force and must be overruled.

The next contention put forward before us by the learned counsel is that, as only a small portion of the income of the *wakf* property has been directed to be utilised for the purposes of the mosque, the *wakf* must be treated as illusory and ineffectual. In support of this contention the learned counsel has cited the case of *Pathukutti, plaintiff-appellant* v. *Avathalakutti and others, defendants-respondents* (1). The facts of the reported case clearly show that it was designed by the so-called creator of the *wakf* to keep the property for the aggrandizement of his family. In the present case, as already shown, with the exception of Rs. 2 *per mensem* directed to be given to *Mussammat* Barkat-ul-Nisa, the entire income had been directed to be devoted to the purposes of the mosque. It is impossible to hold in this case that the *wakf* was an illusory one. The statement

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of the defendant himself clearly shows that the entire income had been spent on the mosque. The surviving assistant *mutwalli*, namely Muhammad Ishak (P. W. 2), has also stated that after the death of the *wakif* he worked as *mutwalli* until about 12 years ago and that the major portion of the income derived from the dedicated property was spent on the mosque. The balance that remained in the hands of the *mutwallis* was utilised for the purpose of purchasing property to be added to the *wakf* property. There is other evidence also which shows that the *wakf* had been acted upon by Kadir Bakhsh, the first *mutwalli*, during his lifetime and afterwards by the *mutwalli* and the assistant *mutwallis*.

The argument that the dedication in favour of a mosque is a private *wakf* and not public is futile as no one ever alleged that the mosque was a private mosque and that the public had no right to congregate therein without special permission. The following remark of their Lordships of the Privy Council in the case of *Mahomed Ismail Ariff* v. *Ahmed Moola Dawood* (1), disposes of this plea :—"With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well known example, the *Kazi's* discretion is very wide."

From this it is clear that the *wakf* in question comes within the rule laid down in section 92 of the Civil Procedure Code.

In our opinion, the view taken by the learned District Judge is correct and no valid exception can be taken to the decree passed by him. We, therefore, affirm his decision, uphold his decree, and dismiss the appeal with costs.

A. R.

Appeal dismissed.

(1) (1916) I. L. R. 43 Cal. 1085, 1100 (P. C.)