

I would, therefore, dismiss appeal No. 1251 of 1931, with costs, and allow appeal No. 1334 of 1931, and give the plaintiffs a decree for Rs. 1,638-4-4 with interest at 6 per cent. from the 4th October, 1930, the date of the institution of the suit till payment, together with costs in all Courts.

TEK CHAND J.—I agree with the order proposed by my learned brother.

N. F. E.

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Appeal dismissed.

APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

MUHAMMAD YUSUF AND OTHERS (DEFENDANTS)

Appellants

versus

MUHAMMAD SADIQ AND OTHERS (PLAINTIFFS)

Respondents.

Civil Appeal No. 22²⁴ of 1927.

Muhammadian Law—Waqf—property dedicated to be sold and sale-proceeds to be used for construction of a robot for pilgrims in Mecca—validity of—Civil Procedure Code, Act V of 1908, section 92: Suit under—competency of.

In 1897 in the course of arbitration proceedings for partition of the Estate of a deceased Mussalman, *M.I.*; at the request, and with the agreement, of the heirs in whom the property had vested on his death, the arbitrator had declared in express terms that the property in question was dedicated for the purpose of constructing a *robot* in Mecca for the benefit of pilgrims, and that *M.*, the younger brother of the deceased, was to be appointed *Mutwalli*, and either himself remain the *Mutwalli*, or appoint some other person as such with the consent of the other heirs. *M.* entered into possession of the plots in 1897, but took no steps to sell them or otherwise administer the trust during his life-time. After his death in

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1925, his sons, defendants Nos. 1 to 3 took possession. In 1926, the brother and nephew of the widow of *M.I.* brought an action under section 92 of the Code of Civil Procedure, with the sanction of the Collector, alleging that *M.* had failed to administer the trust, and that his sons, the defendants, were holding possession as trespassers, and praying that a scheme for the administration of the *waqf* be settled by the appointment of a new trustee. It was contended that the suit was not maintainable under section 92 as no trust, express or constructive, for a public purpose of a charitable or religious nature had been created.

Held, that the construction of a *robot* for pilgrims is a fit purpose for which a *waqf* can be validly made under Muhammadan Law.

And, that a direction to the *Mutwalli* in a deed of *waqf* authorising him to sell the dedicated property, and apply the proceeds thereof in carrying out the purpose of a *waqf* is not invalid under Muhammadan Law.

Mulla's Principles of Muhammadan Law, page 153, para. 168, and Tyabji's Muhammadan Law, page 623, para. 501, referred to.

Held, therefore, that the suit was properly brought under section 92 of the Code of Civil Procedure with the sanction of the Collector.

First appeal from the decree of Sayyed Abdul Haq, Subordinate Judge, 1st Class, Delhi, dated the 16th May, 1927, decreeing the plaintiffs' suit.

KISHAN DAYAL and BHAGWAT DAYAL, for Appellants.

SHUJA-UD-DIN and ABDUL QAYUM, for Respondents.

TEK CHAND J.

TEK CHAND J.—One *Sheikh* Muhammad Ishaq of Delhi died childless in 1896, possessed of considerable property. His heirs under Muhammadan Law were *Mussammat* Salamati Jan (widow), Muhammad Yaqub (brother), and *Mussammat* Fatima Bi and *Mussammat* Rehmat Bi (sisters). Disputes having

arisen among these persons for partition of the estate, they appointed one Muhammad Ibrahim as the sole arbitrator. After the arbitrator had entered upon his duties, all the heirs presented a written petition to him stating that the deceased had intended to make a charitable endowment of a portion of his estate, but that he had died before he could give effect to his intention, that they were now desirous of setting apart a portion of his property for the purpose and had accordingly agreed among themselves that eight plots of land in Delhi, with the superstructure existing thereon, valued approximately at Rs. 12,000, be made *waqf* with the direction that these plots be sold, and the sale-proceeds thereof utilized in constructing a *robot* or free boarding house at Mecca, in the name of Hafiz Muhammad Ishaq, for the benefit of the *Hajis*. Muhammad Yaqub, younger brother of the deceased, was to be appointed *Mutwalli*. He was to keep a true and correct account of the income, arrange for the sale of property, and see that the sale-proceeds and the income were applied for the construction of the building at Mecca. It was further agreed that Muhammad Yakub would either himself remain the *Mutwalli* or appoint some other person as such *with the consent of the other heirs*. The arbitrator delivered his award on the 22nd of March, 1897, and in paragraph 13 he incorporated the terms of the agreement relating to the creation of the endowment and its administration. Muhammad Yaqub accordingly entered into possession of the plots in 1897, but took no steps to sell them or otherwise administer the trust during his life-time. He died on 25th September 1925, and after his death, his sons Muhammad Yusuf, Muhammad Yamin and Muhammad Yunis, defendants 1 to 3, took possession.

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In March, 1926, Muhammad Sadiq and Muhammad Abdur Rehman, who are the brother and nephew respectively of *Mussammât* Salamati Jan, widow of Muhammad Ishaq, brought an action under section 92 of the Code of Civil Procedure, with the sanction of the Collector, alleging that Muhammad Yakub had failed to administer the trust and that his sons, the defendants, were holding possession as trespassers, and praying that a scheme for the administration of the *waqf* be settled by the appointment of a new trustee or trustees, that the property be vested in the trustees, that the defendants be directed to render accounts from 1896 up-to-date, and that the trust properties be ordered to be sold with a view to carry out the object of the trust.

The defendants pleaded *inter alia* that section 92 was inapplicable, that the suit was not maintainable in its present form, that the defendants had been duly appointed *Mutwallis* in succession to their father, and that they could not be removed.

The learned Senior Subordinate Judge has decreed the suit and has directed that a new trustee be appointed: the selection to be made from amongst the members of the family of the founder, after hearing the parties and *Mussammats* Rehmat Bi and Fatima Bi.

From this decree a first appeal has been lodged in this Court by the defendants, and on their behalf Mr. Kishen Dayal has contended that the suit was not maintainable under section 92 as no trust, express or constructive, for a public purpose of a charitable or religious nature had been created. After hearing him at length and examining the terms of the award, dated the 22nd March, 1897, and the other materials

on the record, I have no doubt that this contention is without force and must be overruled. It is not denied that in 1897, at the request and with the agreement of the heirs of Muhammad Ishaq, in whom the property had vested on his death, the arbitrator had declared in express terms that the property in question was dedicated for the purpose of constructing a *robot* in Mecca for the benefit of pilgrims. Admittedly, the construction of such a building is a fit purpose for which a *waqf* can be validly made under Muhammadan Law, and before us Mr. Kishan Dayal frankly admitted that from the date of the award the plots in question ceased to be the personal property of the heirs of Muhammad Ishaq. He urged, however, that these plots could not be regarded as having been made *waqf*, as there was an express direction in the award for their sale, and, under Muhammadan Law, property once made *waqf* could not be validly alienated. He argued, therefore, that, though the *robot*, after its construction at Mecca, would be a public trust, the plots at Delhi, which were to be sold in order to raise money for the purpose, did not constitute a trust for a public purpose of a religious nature. This contention is, however, based on an incorrect view of the Muhammadan Law. It is well settled that a direction to the *Mutwalli* in the deed of *waqf* authorising him to sell the dedicated property and apply the proceeds thereof in carrying out the purpose of a *waqf* is valid under Muhammadan Law. (See Mulla's *Principles of Muhammadan Law*, page 152, paragraph 168, and Tyabji's *Muhammadan Law*, page 623, paragraph 501.) In such a case the sale of the property is not in contravention of, but is in accordance with, the terms of the endowment, and its object is not to defeat, but to carry out, the purpose which

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the founder had in view. I hold, therefore, that the suit was properly brought under section 92, with the sanction of the Collector.

The second contention raised is that the first *Mutwalli* Muhammad Yakub appointed the defendants as his successors-in-office a few days before his death, and, therefore, the Court had no power to appoint a new *Mutwalli*. The alleged appointment of the defendants, however, is not supported by any documentary evidence. The oral evidence consists of the statement of Muhammad Yusuf, defendant, himself, as D. W. 9, and of three witnesses Aziz-ud-Din (D. W. 2), *Sayyad* Mahmud (D. W. 7), and Muhammad Ismail (D. W. 8). These statements are full of contradictions and discrepancies and cannot be relied upon. Moreover, in the award Muhammad Yakub had been authorised to appoint his successor as *Mutwalli*, with the consent of the other heirs. Two of the heirs, namely, *Mussammat* Rehmat Bi and *Mussammat* Fatima Bi, were admittedly alive at the time of the alleged appointment, and *Mussammat* Fatima Bi appeared as a witness and deposed that no such appointment was ever made and that, at any rate, she was never consulted about it. There is no reason to disbelieve her, and I have no doubt that the alleged appointment, even if made, was invalid.

In my opinion the decree passed by the learned Subordinate Judge must be upheld and this appeal dismissed with costs.

MONROE J.

MONROE J.—I agree.

N. F. E.

Appeal dismissed.