PRIVY COUNCIL.

Before Lord Romer, Sir Shadi Lal and Sir George Rankin.

MUSSAMMAT ALI BEGAM AND OTHERS
Appellants,
versus
BADR-UL-ISLAM ALI KHAN AND OTHERS
Respondents.

1938
March 29.

Privy Council Appeal No. 120 of 1936.

On appeal from the High Court at Lahore (1).

Civil Procedure Code (Act V of 1908), SS. 92 and 93 — Muhammadan Law — Shiahs — Wakf *created by will — Right of residence in dedicated* Serai *given to heirs, whether inconsistent with divestment — Reservation of life interest, whether invalidates* wakf.

Where consent to the institution of a suit under ss. 92 and 93 of the Code of Civil Procedure has been given to a number of persons named, the suit must be instituted by all of them in conformity with the sanction.

The consent is a condition to the valid institution of the suit and has no reference to other stages of the suit.

Where, therefore, consent to the institution of a suit was given by the Collector to 5 named individuals and the suit was instituted by them and an appeal in the suit was preferred by only 4 of them, the 5th being made a respondent.

Held, that the appeal was competent and regular.

Where a Shiah Muhammadan by his will made a *wakf* of property including a *Serai* and provided in the will that his brother and his brother's descendants should have a right of private residence in the *Serai*.

Held, that the provision was not obnoxious to the rule of Shiah law which requires a *wakif* to divest himself of all interest in the property dedicated and its usufruct.

Semble. A *wakf* created by will subject to a life interest in the usufruct is not invalid under Shiah law.

(1) I. L. R. (1935) 16 Lah. 782.

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Anand Rao v. *Ramdas Daduram* (1), *Abadi Begum* v. *Kaniz Zainab* (2) and *Bakar Ali Khan* v. *Aujuman Ara Begam* (3), referred to.

Observation in *Muhammad Ahsan* v. *Umardraz* (4), dissented from.

Appeal from the order of the High Court at Lahore (January 14, 1935), (5) reversing the decree of the Senior Subordinate Judge, Amritsar (January 2, 1929).

The material facts are stated in the judgment of the Judicial Committee.

1938, March 11, 14 and 15. DUNNE, K. C. and I. M. PARIKH, for the appellants :—The powers given by the testator to his brother are inconsistent with a *wakf*. Under the Shiah Law there must be a complete divestment of interest in the property and the usufruct. Here there was a reservation of a right of private residence in the *Serai* for the *wakif*'s brother and his brother's descendants. That is inconsistent with complete divestment. Moreover in the clause dealing with the *Serai* it is said it was "built with the intention of *wakf*." There is not a word of dedication in the clause. Certain properties were also subject to a life estate. That also makes the *wakf* invalid. There was also a provision for payment of debts which makes the *wakf* invaild. Involved with the question whether the *Serai* was *wakf* is the question whether the Lahore property attached to the *Serai* is *wakf*. It is submitted it is not. The will read as a whole shows an arrangement for the management of the property and nothing more.

(1) (1921) L. R. 48 I. A. 12: I. L. R. 48 Cal. 493 (P. C.).
(2) (1927) L. R. 54 I. A. 33: I. L. R. 6 Pat. 259 (P. C.).
(3) (1902) L. R. 30 I. A. 94: I. L. R. 25 All. 236 (P. C.).
(4) I. L. R. (1906) 28 All. 633.
(5) I. L. R. (1935) 16 Lah. 782.

Reference was made to Baillie, Volume II, page 218, Amir Ali's Muhammadan Law (4th edition), Volume I, pages 513 to 516, *Bakar Ali Khan* v. *Anjuman Ara Begam* (1), *Abadi Begum* v. *Kaniz Zainab* (2), *Syeda Bibi* v. *Mughal Jan* (3) and *Muhammad Ahsan* v. *Umardraz* (4).

On the question of the competency of the appeal to the High Court the following cases were referred to, *Vishondas* v. *Damomal* (5), *Muhammad Ishaq* v. *Muhammad Hussain Khan* (6) and *Pitchayya* v. *Venkata Krishna Macharlu* (7).

PUGH, K. C. and MAJID, for the respondents:— The *Serai* was a proper object of *wakf*: Baillie (1st edition), page 610. The evidence is that there were 25 rooms. Reservation of a few would not invalidate the *wakf*. A man cannot, it is true, in making a *wakf* reserve any benefit for himself. But here the *wakf* is created by will. There is no question of benefit to himself. The reservation is for the family and the provision for relations is a good charitable trust under Muhammadan Law—Amir Ali, page 309. If the main purpose is to benefit the family the *wakf* would not be good, but here the main purpose is a *Serai* for the benefit of travellers. The debts referred to in Shiah Law mean future debts. The prohibition is directed against taking money out of the estate. The debts here are not charged on the property. Reference was made to Amir Ali, pages 309 and 345, *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (8),

(1) (1902) L. R. 30 I. A. 94: I. L. R. 25 All. 236 (P. C.).
(2) (1927) L. R. 54 I. A. 33: I. L. R. 6 Pat. 259 (P. C.).
(3) I. L. R. (1902) 24 All. 231.
(4) I. L. R. (1906) 28 All. 633.
(5) 1925 A. I. R. (Sindh) 1.
(6) 1927 A. I. R. (Lah.) 382.
(7) I. L. R. (1930) 53 Mad. 223.
(8) (1889) 38 L. R. 17 I. A. 28: I. L. R. 17 Cal. 498 (P. C.).

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Abdul Gafur v. *Nizamudin* (1), *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (2). *Ramanadan Chettiar* v. *Vava Levvai Marakayar* (3), *Abadi Begum* v. *Kaniz Zainab* (4), *Balla Mal* v. *Ata Ullah Khan* (5), *Bakar Ali Khan* v. *Anjuman Ara Begam* (6) and *Mussammat Musharraf Begam* v. *Mst. Sikandar Jehan Begam* (7).

The power of sale given to the brother does not invalidate the *wakf*. It is merely a power to change the investment: Amir Ali, pages 422 and 529, Baillie, Volume II, page 219.

On the question of the competence of the appeal to the High Court, reference was made to *Anand Rao* v. *Ramdas Daduram* (8), *Venkatanarayana Pillai* v. *Subbammal* (9), *Watson* v. *Cave* (10) and *Darves Haji Mahamad Sidik* v. *Jainudin* (11)

As far as the Lahore properties are concerned, they have been sold. All I can ask is that they be declared a part of the *wakf*. It can be left to the trustees to take any steps, if necessary, to recover them.

MAJID, following, referred to Baillie, pages 214, 216 and 218 and Amir Ali, page 441, and submitted that an endowment otherwise valid does not become invalid because no *Mutawalli* has been properly appointed.

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(1) (1892) L. R. 19 I. A. 170: I. L. R. 17 Bom. 1 (P. C.).
(2) (1894) L. R. 22 I. A. 76: I. L. R. 22 Cal. 619 (P. C.).
(3) (1916) L. R. 44 I. A. 21: I. L. R. 40 Mad. 116 (P. C.).
(4) (1927) L. R. 54 I. A. 33: I. L. R. 6 Pat. 259 (P. C.).
(5) (1927) L. R. 54 I. A. 372: I. L. R. 9 Lah. 203 (P. C.).
(6) (1902) L. R. 30 I. A. 94: I. L. R. 29 All. 236 (P. C.).
(7) 1928 A. I. R. (All.) 516.
(8) (1921) L. R. 48 I. A. 12: I. L. R. 48 Cal. 493 (P. C.).
(9) (1915) L. R. 42 I. A. 125: I. L. R. 38 Mad. 406 (P. C.).
(10) (1881) L. R. 17 Ch. D. 19.
(11) I. L. R. (1906) 30 Bom. 603.

Dunne, K. C., replied. As regards debts, the passage from Baillie cited will not bear the gloss put upon it by the respondent. The direction as to payment of debts here is a general administrative direction. If the testator contemplated a *wakf* he certainly would have appointed a *Mutawalli*. His appointment was that of a manager.

The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—On the 25th May, 1887, Agha Kalb Abid Khan a Shia Mussalman of Persian origin died at Amritsar leaving as his heirs a brother Kalb Ali Khan and a sister *Mussammat* Hussaini Khanum. On 3rd March, 1887, he had made a will the true construction and effect whereof is the subject of this appeal. He was possessed of a half share in certain immovable property in the district of Farrukhabad which he had inherited from his father and of which the income was expended on an Imambara and other religious purposes at Fatehgarh. In addition thereto he was possessed of immovable property at Amritsar and Lahore valued by him in his will at Rs.1,73,000 and thereby described, valued and disposed of in detail. Of his properties at Lahore valued by him at about Rs.60,000, three, of a total value of Rs.36,200, were given by the will to his brother Kalb Ali and one, valued at Rs.18,000, to his sister Hussaini Khanum. There remained two parcels of land at or near Lahore—one measuring 45 bighas and valued at Rs.4,000, the other measuring 16 bighas and valued at Rs.2,000. By his will the testator gave the former to a lady called Mussammat Buti and her son Ismail Hussain for their lives and the latter to one Muzaffar Ali for his life. The interests in remainder he disposed of by directions that they should

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be "attached" to the *Sarai* hereinafter mentioned: the validity and effect of these directions need not now be considered, as it is not in the events that have happened possible on this appeal to pronounce any binding decision thereon or to give relief in respect thereof. The properties at Amritsar, to which the dispute in the present suit is now confined, are valued in the will at Rs.1,13,000. This figure includes two properties in Amritsar Cantonment—one called the Mess Kothi (valued at Rs.2,000) and the other called the Small Kothi (valued at Rs.1,000). The income from the former was given by the will to *Mussammat* Buti and her son Ismail Hussain for their lives upon certain conditions. The income of the latter was given to Muzaffar Ali for his life upon certain other conditions. A question arises as to the validity of the testator's directions as regards the interests in remainder which question their Lordships will deal with in due course.

In addition to these two small properties the will includes as an item of the testator's property at Amritsar, "promissory notes value Rs.36,000 income Rs.1,490." These promissory notes are included in the figure of Rs.1,10,000 hereinafter mentioned: the two small properties are not.

The main disposition made by the testator in his will is that whereby five properties at Amritsar (in addition to the promissory notes already mentioned)—total value Rs.1,10,000—are characterised as "pertaining to the *Sarai*" "built and attached to the *Serai*" "built in connection with the new *Serai*." These are (1) a house in the Civil Lines occupying with garden, etc., 25 bighas—Rs.15,000 (2) cultivated land nearby—Rs.5,000 (3) plots near the church and dâk

bungalow—Rs.1,000 (4) Begum Sahiba's land and garden—Rs.3,000 (5) "the *Sarai* under construction"—Rs.50,000. The main question upon this appeal is whether the true construction and effect of the will is to make these properties *wakf* for the purposes of a *Sarai*.

Soon after the death of the testator his brother Kalb Ali was entered in the revenue records as owner of the lands at Amritsar. On 12th May, 1892, mutation of the Amritsar property was effected in favour of the *Sarai*. In 1895 Kalb Ali died leaving a widow *Mussammat* Bismillah Khanum, a son Kalb Haidar and a daughter *Mussammat* Ali Begum (defendant No.1). On 14th May, 1896, mutation of the Amritsar property was effected in the name of the *Sarai* under the management of Kalb Haidar. On 13th May, 1907, for Rs.15,500 Kalb Haidar sold to one Sundar Singh five plots of the Amritsar property above set forth (in all 39 kanals, 3 marlas) reciting that he had been in possession thereof as proprietor under his uncle's will of 3rd March, 1887. He died in 1909 and on the 11th September of that year the Amritsar land was recorded in the name of the *Sarai* under the management of *Mussammat* Bismillah. In 1921 *Mussammat* Bismillah leased 12 kanals of the lands at Amritsar to one Piara Singh (original defendant No.3) for 50 years at an annual rent of Rs.200. *Mussammat* Bismillah died in 1922 and her daughter *Mussammat* Ali Begum took possession of the Amritsar property as her heiress. *Mussammat* Ali Begum has at all times claimed to hold it as absolute owner and has not at any time acknowledged any *wakf* or dedication. On the 7th April, 1926, she sold to Nizam-uddin (defendant No.2) 12 kanals, 4 marlas of the land at Amritsar.

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On the 30th June, 1906, the present respondents Nos.1 to 5, with the sanction of the Collector under sections 92-93 of the Code of Civil Procedure brought in the Court of the Senior Subordinate Judge at Amritsar the suit out of which this appeal arises. The plaint treating *Mussammat* Ali Begum as *de facto Mutawalli* asked that she be removed from that office and made to account for the *wakf* property and for the proceeds of the various sales and of the lease to Piara Singh: also that a scheme be framed for the *wakf*. The trial Judge dismissed the suit (2nd January, 1929), holding that though Kalb Abid had dedicated the suit lands for the purposes of a *Sarai* in his lifetime the dedication was invalid as he had retained possession: that he had not made a dedication thereof by his will; that if his will did purport to effect a dedication, that also was invalid having regard to certain provisions in the will as to the testator's heirs. Four of the five plaintiffs appealed to the High Court at Lahore making the remaining plaintiff a respondent to the appeal. The High Court having at the hearing made this plaintiff an appellant instead of a respondent, held that a valid *wakf* of the *Sarai* was created by the will of Kalb Abid, set aside the decree of the Subordinate Judge and remanded the case to him in order that he might decide whether *Mussammat* Ali Begum should be *Mutawalli*, prepare a scheme, take accounts and give other directions as necessary. From this decree (14th January, 1935), *Mussammat* Ali Begum appealed to His Majesty and on her death her representatives have been duly substituted as appellants.

In view of the observations made by the learned Judges in the High Court Mr. Dunne for the appellants has very properly raised before their Lordships

the question whether the appeal as brought to the High Court was competent and if not whether the defect was cured by making the respondent plaintiff an appellant. As it appears that the appeal was brought with this plaintiff's concurrence and that he was made a respondent only because he had gone on business to another province, it is difficult to discern any substance in the preliminary objection. Where the consent in writing of the Advocate-General or Collector has been given to a suit by three persons as plaintiffs the suit cannot validly be instituted by two only. The suit as instituted must conform to the consent. On the other hand if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent. (*Anand Rao* v. *Ramdas Daduram* (1). There is no provision whatever in the Code for recourse being had to the Advocate-General or Collector during the course of a suit or of any proceedings in appeal. As sub-section (2) of section 92 sufficiently shows the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular. Their Lordships cannot accept the doctrine of Jai Lal J. in the present case that the persons who have instituted the suit with the leave of the Collector are to be deemed to be one plaintiff, nor do they see any reason why one of several plaintiffs in such a suit should not appeal on the same terms and conditions as are applicable to suits in general. In the present case the appeal was in their Lordships' view competent and regular as

(1) (1921) L. R. 48 I. A. 12.

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originally brought: the amendment though unobjectionable was not necessary.

On the main question their Lordships in agreement with the High Court consider that upon the true construction of the will of Kalb Abid the five Amritsar properties above-mentioned were made *wakf* for the purposes of a *Sarai* and for the specified purposes subsidiary thereto. They are further of opinion that the dedication thereof is valid and in accordance with Shia law. The properties are described as " pertaining to the Sarai " in the same sense as the properties given by the will to the testator's brother and sister are described as " pertaining to my brother " and " pertaining to my sister." It is not in doubt that the testator had obtained a plot of land from Major Warburton for the very purpose of being used for a *Sarai*. There are repeated references to this *Sarai* throughout the will and one of the five plots of land now in question (value about Rs.50,000) is thus described:—

" The *Sarai* under construction which is about to be completed. The building operations are going on. It was built with the intention of *waqf* for the benefit of the general public and for performance of religious ceremonies, such as Ashura, prayers on both the Ids, Muharram and Nauroz, etc., and for the comfort of every man, without charging any rent, etc., and is excluded from the rights of relations, etc. But my brother Kalb Ali Khan and his heirs who are his decendants have the right of private residence in it."

The will concludes as follows:—

" It is to be noted that I have given Mirza Kalb Ali Khan, my real brother, the powers for the management of the entire property, left by me, and the power of disposal as owner of every kind like myself. He should use all these powers in obedience to the directions given in this will. He should continue the maintenance allowance of the persons, to whom I

have assigned some maintenance, subject to the conditions and for the period mentioned in this will, provided they do their work faithfully, earnestly, honestly, eagerly, and obediently with good conduct and keep him pleased. In case of default of the above conditions or displeasure of my aforesaid brother, or in case of any embezzlement, misappropriation or dishonesty, he has full authority to dismiss them and to stop and confiscate the maintenance fixed. All these powers will be exercised by the male descendants of my brother Kalb Ali Khan, after his death and will thus continue generation after generation. But if the said brother does not care to take this trouble or refuses to manage the above property, it should be made over to the Government and the Deputy Commissioner for management. The Deputy Commissioner alone or by appointing a committee and an advisory board of some Mohammadan gentlemen belonging to the Asna Ashari community, should then manage the *waqf* property. The same action should be taken in case the male heirs of the said brother should happen to be inefficient and should be guilty of breach of the conditions and misappropriation. If, after my death or during the severe attack of disease or unconsciousness, any one of my dependants is guilty of dishonesty or embezzlement or misappropriation, etc., in respect of my property and goods or if my brother suspects the said dependant of these things, then my brother will have the power to dismiss him or to deprive him of the gift."

From these passages it sufficiently appears that the testator's intention was to dedicate the five items of property for a public charitable purpose well known and highly esteemed as pious by the Mussalman law. He not only used the word "*wakf*" but expressed his intention to benefit the general public and directed that the property should be "excluded from the rights of relations" thus giving ample evidence that he knew what was meant by "*wakf*" and fully intended to effect a *wakf*. It is true that after the words "excluded from the rights of relations" come words which say that Kalb Ali and his heirs who are his

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descendants shall have the right of private residence in the *Sarai*. This would include female heirs who would not necessarily be managers of the *wakf*. But in their Lordships' view this provision does not show that the testator did not intend to make *wakf* of the properties nor does it render the dedication illusory or make it invalid either on the ground that the property was not substantially dedicated to charity or on the ground that the *wakif* had retained a benefit for himself. It is not necessary in this case to pray in aid the provisions of the Mussalman Wakf Validating Act, 1913. There is no ground for holding that the right of residence was intended or was likely to exhaust the accommodation of the *Sarai* or could in law be insisted on to the exclusion of the charity. Nor is the right given to the testator's heirs obnoxious to the rule of Shia law which requires a *wakif* to divest himself of all interest in the property and in its usufruct. (c.f. *Abadi Begum* v. *Kaniz Zainab* (1).

Again it is true that the testator having set forth in detail each of his properties and his disposition thereof, adds thereto a list headed "Details of Expenses." Having entered "expenses on account of my burial" at Rs.500 and expenses on account of fast and prayers and the taking of his body to Karbala, etc., at Rs.1,500, and the marriage expenses of two girls at Rs.500 the testator concluded with an entry: "for payment of debt—about Rs.10,000 or the amount remaining due from me after my death." There is no evidence as to the amount owing by him at his death nor as to the funds from which his debts if any were discharged. The will contains no direction for the payment of debts out of any particular asset nor does

(1) (1926) L. R. 54 I. A. 33.

it charge any property with his debts. The wide powers of disposal given to the testator's brother, which would include a power of sale, are in their Lordships' opinion to be read, so far as the *wakf* properties are concerned, as powers given to a manager to be exercised in the course of proper management; and this is indeed comprehended in the direction to " use all these powers in obedience to the directions given in this will." No objection arises in the present case upon the fact that the property dedicated by the will exceeds the one-third share beyond which a Muslim cannot without the consent of his heirs dispose of his property by will: there are concurrent findings of the Courts in India that the testator's heirs consented. Nor does any difficulty arise upon the concluding passages which their Lordships have already cited from the will by reason that the testator does not use the word " *Mutawalli* " when making provision for the management of the *Sarai* and the property devoted thereto. Upon a proper construction of the will their Lordships are of opinion that there was a valid and effective dedication of the five properties above-mentioned for the purposes specified. There appears to be no evidence as to the amount or value of the promissory notes outstanding at the testator's death or as to what was done with them.

It remains to consider the two properties in Amritsar Cantonment hereinbefore described as the Mess Kothi and the Small Kothi, of which the income was given for life to *Mussammat* Buti and her son, and to Muzaffar Ali, respectively. The effect of the testator's directions as to the interests in remainder is that on the death of the persons mentioned the property and the income should be " attached to the *Sarai* " and that if either property should be sold

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during the lifetime of the person entitled for life, he or she should get a specified sum out of the *wakf*, and the proceeds of the sale should be invested and "attached to the *Sarai*." This raises a question of some nicety in the application of the Shia law. If the will can be read as intending that on the death of the testator these two properties should become "*wakf*" it would be in no way unlawful that a life interest in the usufruct should be reserved for the beneficiaries abovenamed. On the other hand a direction that the property should become *wakf* after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedications *inter vivos*. "If one should say I have appropriated when the beginning of the month has come . . . . the appropriation would not be valid" (Shuraya-ool-Islam. Baillie, v. II, p. 218). Their Lordships recognise that the decision in *Bakar Ali Khan* v. *Anjuman Ara Begum* (1) which permits a Shia to create a *wakf* by will is itself a mitigation of the rigour of this principle, but they are not of opinion that the principle is abrogated for all purposes in the case of a testamentary disposition, nor do they think that it can be confined to cases where the passing of the property to the endowment is made to depend upon an event which is problematical as well as future. On these points they are not in agreement with the observations made in the case of *Muhammad Ahsan* v. *Umardaraz* (2). While not disposed to put a narrow or unduly technical construction on this will, upon a careful consideration of the language used by the testator and of the substance and effect of his dispositions their Lordships find themselves unable to hold that he intended either of the two properties now

(1) (1902) L. R. 30 I. A. 94 (2) I. L. R. (1906) 28