IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das &Ors. etc. etc. ... Respondents

AND

OTHER CONNECTED CIVIL APPEALS

NOTE ON THE ISSUE OF WAKF

BY DR. RAJEEV DHAVAN, SENIOR ADVOCATE

ADVOCATE ON RECORD:EJAZ MAQBOOL

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I. PRELIMINARY

1.1. This written submission arises on the issue of whether this Mosque is a valid mosque under Islamic law and practice.

1.2. The judgment derived as follows:

i. Justice Khan decided that the mosque was waqf by user.

ii. Justice Agarwal found it to be a mosque as it was known as one for more than two and a half centuries.

iii. Justice Sharma held that the mosque was contrary to the tenets of Islam because (a) it was contrary to Quran, (ii) Babar did not the own the property and (iii)Masjid did not have minarets, place for vazoo, was in the vicinity of graveyard , lack of Azan, presence of idols and images in the mosque.

1.3. All the judges took the view that the notification under Section 5(1) of the Muslim Waqf Act of 1936 was not valid one to the decision of 1966 that some particulars in the land were not in the original notification.

1.4. The views raised in the Appeals are broadly:

i. Mosque was used till 1949.

ii. The challenge to mosque be contrary to Islam on various grounds including various supposed incidents of a mosque are many (for example vazoo etc.) are wrong.

iii. The invalidity of the mosque due to 1966 judgment does not in any way take away the continuing validity of a waqf.

iv. This is a waqf by user.

v. Several aspects relating to limitation and adverse possession.

[See Appeals filed before this Court]

II. ISSUES, PLEADINGS, EXHIBITS AND WITNESSES BEFORE THE HIGH COURT

A. ISSUES:

2.1. The Impugned order framed several issues on the waqf nature of the disputed property and the statutory law governing waqf. The issues can be broadly categorized into the following:

(i) Issues on waqf nature of the property

a. Whether the building was constructed by Emperor Babar, whether it was dedicated to Allah and if it was being used as a Mosque by Muslims for offering prayers? **See Issue Nos. 5 and 6- Suit no. 3; Issue Nos. 1, 1(B)(b), 1B(c)- Suit no. 4 and Issue Nos. 9- Suit No.5**

b. Whether the build and architecture of the disputed structure was such that it could not be a valid Mosque as per the tenets of Islam? **See**

Issue Nos. 19(c) to(f), Suit no. 4; and Issue Nos. 10 and 11- Suit No.5

(ii) Issues on effect of invalidity of notification under Muslim Waqf, 1936 Act

a. Whether on declaration that notification under the Muslim Wakfs Act declaring Babri Masjid as sunni wakf was invalid, the Babri Masjid would no longer remain a waqf property? **See Issue No. 7(a) and 7(b)- Suit no. 3; Issue no. 5 (e), 5(f), and 17- Suit 4**

B. PLEADINGS:

2.2. The following assertions emerge from the Pleadings of the Muslim parties:-

Pleadings on the waqf nature of property- Pro mosque

i. Mosque was constructed by Babar Shah through his Minister Mohammad Mir Baqi in the year 1528and was dedicated as a waqf. The land belonged to state and was a vacant land. [**Para 9 @ pg 9-10, Running Volume 72]**; Also at **Para 10@ pg. 39, Running Volume 72]; [Para 1, page no. 85, Running Volume 72]; [Para 24(A), page no. 282-283, Running Volume 72]**

ii. Muslims have been in possession of the mosque as a wakf property and have used it for worship since 1528. **[Para 16 @ pg. 12, Running Volume 72]; [Para 12 @ pg. 24. And also at Para 12, pg. 33, Running Volume 72]**

iii. That after its construction Babar had provided a Rs. 60 per annum as grant for maintenance of mosque. The grant continued during the regime of British government and in lieu of cash, grant free land were given. [**Para 15-16@ pg. 54-55, Running Volume 72]**

iv. That the Muslims have been in peaceful possession of the aforesaid Mosque and use to recite prayer in it, till 23 .12. 1949.." **[Para 11, page no. 88 Running Volume 72]**

v. That under the Muslim Law Mosque is place where prayers are offered publicly as a matter of right and the same neither requires any structure and nor any particular mode of structure is provided for the same, even open space where prayers are offered may be a Mosque and as such even after the demolition of the mosque building by the miscreants the land over the which building was stood still a Mosque and Muslims are entitled to offer prayer thereon**[Para 21, page no. 92, Running Volume 72]**

vi. That no requirement that mosque should be built in quiet place or near a place where there is sizeable Muslim population. **[Para 24(D), page no. 283, Running Volume 72]**

vii. That existence of dome and minarets is not at all required for any mosque although in the vicinity of the Masjid, a well was very much there for the purpose of vazoo (ablution). **[Para 23, 24 (E) and (G), page no. 281,284 Running Volume 72]**

Pleadings on the invalidity of notification under 1936 Act- Pro mosque

viii. Under Muslim Waqf Act 1936, Chief Commissioner Waqf was appointed and after inspection, he decided that mosque was constructed by Babar and as per law, the Mosque was a Sunni Waqf. **[Para 15 @ pg. 12, Running Volume 72]; Para 14@ pg. 41, Running Volume 72]; [Para 21@ pg. 56, Running Volume 72]**

ix. The Mosque stands registered as Waqf No.26 Faizabad in the register of Waqf under UP Muslim Waqf Act. **[Para 16@ pg. 42, Running Volume 72]**

x. That the ownership of the mosque in question vests in the God Almighty and the said mosque is a waqf property and the waqf character of the said Waqf cannot be challenged by the Plaintiff in the suit specially so when the Plaintiff has never challenged the entry of said waqf made in pursuance of notification issued under the Waqf Act, 1936. **[Para 25@ pg. 44, Running Volume 72]**

2.3. **The following assertions emerge from the Pleadings of the Hindu parties**:-

Pleadings on the waqf nature of property- Pro Temple

i. It has never been a mosque after 1934 and it is denied that it is Babri Mosque, dedication to wakf is also denied. **[Para 9 @ pg. 19-20, Running Volume 72]; [Para 15@ pg. 69, Running Volume 72]; [Para 2@ pg. 96, Running Volume 72]**

ii. Deny existence of any mosque built by Babur, deny maintenance, repair, grant claims on the mosque. **[Para 1,3,8page no. 109-110 Running Volume 72]; [Para 2 @ pg. 200, Running Volume 72]**

iii. That the act of demolition of temple and entering upon Ram Janambhoomi was an act of trespass, and was not according to tenets of Islam, for Allah does not accept anything taken by force or by an illegal act. A waqf cannot be made of a property not belonging to Waqf as owner. Title by way of waqf cannot be acquired by adverse possession too. **[Para 11A, page no. 163-164 Running Volume 72]; [Para 2, page no. 191, Running Volume 72]**

iv. The alleged existence of a grave-yard all round Babrimasjid, also shows that the Muslims could not have gone to offer Namaz in the building, which was abandoned and was never used as a 'mosque' by the Muslims. **[Para 25, page no. 169-170 Running Volume 72]**

v. The following facts show that three domed structure was not a 'mosque' at all. **(A)** By erecting a mosque after the illegal act of trespass, Islamic tenets were violated. **(B)** Worship was continuing and no one could enter the mosque structure without passing the places of Hindu Worship. That according to Islam, there can be no idol worship within the precincts of a 'mosque'. **(C) (D)and (E)** There were no minarets and no place for vazoo and there were Kasauti pillars with the figures of Hindu Gods inscribed and that the building was surrounded by a graveyard and such a place could never be a mosque. **[Para 28, page no. 171-173, Running Volume 72]; [Para 24, page no. 247-249, Running Volume 72]**

vi. That there exist images of two tigers and a peacock on the north door and that this is not the characteristic of a mosque. That holy Quran does not permit construction of a mosque after demolishing a temple. **[Para 41 (2) and (5), page no. 208, Running Volume 72]**

Pleadings on the invalidity of notification under 1936 Act- Pro temple

vii. That enquiry by waqf commissioner was ex parte and not binding. **[Para 9, page no. 110-111 Running Volume 72]**

viii. That the notification published in the Official Gazette dated 26.02.1944 having being declared invalid by the Court's finding dated 21.04.1966 has become final and irreversible between parties. Thus, suit no. 4 was not maintainable on behalf of sunni central waqf board as it had no jurisdiction or competence to sue for want of valid notification. **[Para 36, page no. 179 Running Volume 72]**

C. EXHIBITS / DOCUMENTS:

2.4. There are several exhibits that are relevant to indicate that the Mosque was built by or under the commands of Babar, that maintenance grants were given both by the emperor and continued as such by the British Government for the up keep of the Mosque and that even the British authorities considered the disputed structure as Mosque which was used continuously by Muslims as a place of worship.

Built by Babur and dedicated as waqf

i. Land revenue registers show the name of Babur as the donor/grantee and register of revenue records show that revenue was granted to Mir Baqi for the purposes of construction and maintenance of Mosque namely Babri Mosque at village Shahnawa. Further, land revenue records wherein the name of Mohd. Asgahr and Mohd. Rajjab Ali is reflected, who were mutawalis of mosque.

Relevant Exhibits: A-11 (Suit 1) [Pgs. 34-35/ Running Vol. 3; Pg. 1451 @ para 2389-2390/Vol. II of the Impugned Judgment]; Exhibits A-10

(Suit 1) [Pgs. 30-33/Running Vol. 3] Exhibit A-12 (Suit 1) [Pgs. 1297-1300/Running Vol. 10; Pg. 1377 @ para 2333/Vol. II of the Impugned Judgment]

Recognition as a mosque by British government

i. Several documents indicate grant made by the British towards the maintenance of mosque. Later, on the cash grants were also converted into land grants in lieu of cash.

ii. Exhibits indicate the inter communication between Government authorities and Deputy commissioner regarding grant of rent free land, its sanction, selection and delivery of possession of land/ allotment of land in lieu of cash.

iii. Several instances pertaining to maintenance of mosque, repair, payment of compensation after loss in riots of 1934further indicate the continuous acknowledgment of existence of mosque by the Authorities.

Relevant Exhibits: Exhibit A3 (Suit 1) [Pgs. 11-12/Running Vol. 3; Pg. 1379-1380 @ para no. 2335/Vol. II of the Impugned Judgment]; Exhibit No. 7 (Suit 4) [Pg. 1570/Running Vol. 11]; Exhibit A14 to A 17 (Suit 1) [Pgs. 38-47/Running Vol. 3]; Exhibit A18 (Suit 1) [Pgs. 1161-1165/Running Vol. 78]; Exhibit 6 (Suit 4) [Pg. 1569/Running Vol. 11]; Exhibit A19 (Suit 1) [Pgs. 48-50/Running Vol. 3]; Exhibit 23 (Suit 4) [Pgs. 1627-1630/Running Vol. 9]; Exhibit A 49 (Suit 1) [Pgs. 124-125/Running Vol. 3]; Exhibit A-6 (Suit 1) [Pgs. 23-25/Running Vol. 3]; Exhibit A 43 (Suit 1) [Pgs. 109-110/Running Vol. 3];Exhibit C11 (Suit 5) [Pgs. 125-126/Running Vol. 92]; Exhibit A 51 (Suit 1) [Pgs. 156/Running Vol. 3]; Exhibit A-45 (Suit 1) [Pgs. 115-116/Running Vol. 3]; Exhibit A 44 (Suit 1) [Pgs. 111-114/Running Vol. 3];Exhibit A 50 (Suit 1) [Pg. 126/Running Vol. 3]; Exhibit A 48 (Suit 1) [Pgs. 121-123/Running Vol. 3]; Exhibit A 53 (Suit 1) [Pgs. 1169-1170/Running Vol. 78]; Exhibit A 46 (Suit 1) [Pgs. 117-118/Running Vol. 3];Exhibit A 47 (Suit 1) [Pgs. 119-120/Running Vol. 3];Exhibit A 52 (Suit 1) [Pgs. 129-130/Running Vol. 3]

Continuous possession and use as a mosque

i. Several exhibits document instances of disturbances to the ownership and possession of mosque and complaints filed against the same to the authorities, including judicial authorities.

ii. Further, exhibits contain the pleadings of 1885 suit by Mahant Raghubar Das seeking permission to erect a temple on chabutra, wherein the Plaintiff admits the existence of Mosque.

iii. Exhibits indicate the dispute between Shia and Sunni on rights on Babri Masjid being Suit no. 29/ 1945 wherein it was found that Sunni Muslims were praying in the mosque and that it was a Sunni mosque.

Relevant Exhibits: Exhibit 19 (Suit 1) [Pgs.86-89/Running Vol. 87]; Exhibit No. 20 (Suit Pgs. 90-94/Running Vol. 87]; Exhibit 21 (Suit 1) [Pg. 98/Running Vol. 87]; Exhibit A-70 (Suit 1) [Pg. 153/Running Vol. 3]; Exhibit 22 (Suit 1) [Pgs. 99-102/Running Vol. 87]; Exhibit A-69 (Suit 1) [Pgs. 1332-1338/Running Vol. 10]; Exhibit 31 (Suit 1) [Pgs. 151-152/Running Vol. 87]; Exhibit 54 (Suit 4) [Pgs. 1712/Running Vol. 11]; Exhibit 55 (Suit 4) [Pg. 1713/Running Vol. 11];Exhibit A 13 (Suit 1) [Pgs. 36-37/Running Vol. 3]; Exhibit 29 (Suit 1) [Pgs. 131-135/Running Vol. 87]; Exhibit 33 (Suit 1) [Pgs. 158-161/Running Vol. 87]; Exhibit 26 (Suit 1) [Pgs. 116-121/Running Vol. 87]; Exhibit 25 (Suit 1) [Pgs. 112-115/Running Vol. 87]; Exhibit 30 (Suit 1) [Pgs. 136-144/Running Vol. 87]; Exhibit 15 (Suit 1) [Pgs. 61-65/Vol. 87]; Exhibit 16 (Suit 1) [Pgs. 66-68/Vol. 87]; Exhibit 24 (Suit 1) [Pgs. 107-111/Vol. 87]; Exhibit No. 18 in O.O.S. No. 1 of 1989 @ Pg. Nos. 80-85 of Volume 87; Exhibit No. 34 in O.O.S. No. 1 of 1989 @Pg. Nos. 162-164 of Volume 87; Please see Exhibit No. 27 of O.O.S. No. 1 of 1989 at Pg. Nos. 122-125 of Volume 87; Exhibit No. 28 of O.O.S. No. 1 of 1989 at Pg. Nos. 126-130 of Volume 87; Exhibit No. A-7 of O.O.S. No. 1 of 1989; at Pg. Nos. 26-27 of Vol.3; Exhibit No. A-61 of O.O.S. No. 1 of 1989 at Pg. Nos. 137-138 of Vol. 3 **[The relevant exhibits qua (A), (B) and (C) are dealt with in the Note on Title, Suit 4 Submissions A112]. Also, are annexed in Convenience Compilation of exhibits.**

Expenditure accounts of mosque as waqf.

i. Income expenditure statement of 1299, 1306 and 1307 Fasli is 'document that dates back to years 1889, 1896 and 1897in English calendar respectively. The exhibit- A-8/ Suit 1 indicates that waqf - masjid was continuously being used as a mosque. **[See Convenience compilation of Exhibits @ 43-61]; Also at pgs. 1278-1296/Vol. 10]**

ii. Naqual Hisab Madkhala Mohd. Zaki dated 9.7.1925 is Exhibit A-72/ Suit 1 detailing the copy of accounts of the Masjid before the Hakim Tahsil. **[See Convenience compilation of Exhibits @224-227]; Also at pgs. 1334-1337/Vol. 10]**

iii. Copy of account dated 31.03.1926 was given by Sayed Mohd Zaki, Mutawalli. This Exhibit A-31/ Suit 1 is the balance sheet wherein various expenses incurred for Babri Mosque including payment for the white wash of the Babri Mosque and the labour charges paid to the contractor

for the same etc are indicated for the period 07.04.1824 to 28.03.1825. **[See Convenience compilation @ 228-230]; Also at pgs. 82-84/Vol. 3**

iv. Similarly, Naqual Hisab for the period 29.3.1925 to 14.4.1926 is yet another Exhibit no. A-32/ Suit 1 which shows expenditure of the mosque. **[See Convenience compilation @ 231-234]; Also at pgs. 85-88/Vol. 3**

v. Similarly, account income and expenditure dated 27/29.05.1943 regarding Bahoranpur Moafi Mauja Bahoranpur for 25.9.41 to 12.9.42 was filed by Kalbe Hussain and is Exhibit A-33/Suit 1 and shows income and expenditure of the Mosque. **[See Convenience compilation @ pgs.235-237]; Also at pgs. 89-91/Vol. 3**

vi. The note dated September 27, 1943 of Inspector Waqf under Form 38 of Waqf U/s 38 U.P. Muslim Waqf Act No. 13/1936 is Exhibit A-60/Suit 1 and provides the details of annual income of Waqf property from rural property. **[See Convenience compilation @ pgs. 238-241]; Also at 1326-1329/Vol. 10**

vii. Exhibit A-55/Suit 1 is a Naqual Hisab Amdani Aur Kharcha Babat 1.10.1947 to 31.3.1948, Sunni Central Waqf Board U.P. by Jawwad Husain Mutwali is the income and expenditure given by the mutawalli of the mosque as field before the waqf board. **[See Convenience compilation @ pgs. 242-245]; Also at 1312-1315/Vol. 10**

viii. Similarly, exhibit A-54/ Suit 1 is Report of the auditor dated 27.7.1948 for the year 1947-48 stating that the income of the Waqf No. 26 Faizabad were more than Rs. 500/-. **[See Convenience compilation @ pgs. 246-248]; Also at 1309-1311/Vol. 10**

ix. Exhibit 32/ suit 4 is copy of the report of Auditor of Sunni Central Board of Waqf for the year 1947-48, waqf file No.26 District Faizabad/-.**[See Convenience compilation @ 249-251]; Also at pgs. 1641-1643/Vol. 11]**

x. Exhibit A57/ Suit 1 is Naqual Hisab Aamdani Aur Kharch 1.4.1948 to 31.3.1949, i.e. income and expenditure for the year 1948-49 indicating the mosque as waqf. **[See Convenience compilation @ 252-256]; Also at 1316-1320/Vol. 10**

xi. Exhibit A56/ Suit 1 is the auditor's Report for 1948-1949, regarding Waqf file no.26, i.e. Babri Masjid indicating the recognition of the mosque as waqf in public records. **[See Convenience compilation @ pgs. 257- 258]; Also at 131-132/Vol. 3**

xii. Exhibit A-58/ Suit 1 is a Report of the auditor from 1949-50 dated 23.12.1950 for the Waqf No. 26 stating that the waqf property appended to the statement of accounts submitted by the Mutawalli is verified and

gives the details of the income and expenditure of Waqf. **[See Convenience compilation @ pgs. 259-262]; Also at 133-136/Vol. 3**

xiii. Exhibit A-59/Suit 1 is the report of income and expenditure 1.4.1949 to 31.3.1950 by Jawad Husain Mutwali of Babri Mosque. **[See Convenience compilation @ pgs. 263-267];.1321-1325/Vol. 10]**

Masjid as waqf under the U.P. Muslim Waqf Act, 1936

i. Copy of extract of Waqfs in respect of Waqf no. 26 of the Masjid Babri District Faizabad Published in U.P. Gazette dated 26.2.1944 records Babri Masjid registered as Sunni waqf is Exhibit 39, suit no. 4] .**[See Convenience compilation of Exhibits @204]; [See pgs. 1668/Vol. 11]**

ii. The Document Exhibit No. A-67 of O.O.S. No. 1 of 1989 is a notice issued to Mohd. Zaki by the Wakf Commissioner under Section 4 of the U.P. Muslim Waqfs Act, 1936, on July 19/20, 1938, wherein reply was filed providing the geological tree of Saiyed Abdul Baqi and his descendants and stating that the British Government continued the grant to Mohd. Asghar and Mohd. Afzal. **[See Convenience compilation of Exhibits @205-208]; See pgs.148-151/Vol.3]**

iii. Exhibit A-4/Suit 1 shows that the Waqfs Commissioner, vide his decision dated September 16, 1938 held that the object for the grant was maintenance of Mosque known as Babri Mosque and therefore the grant must be regarded as Waqf and that it was desirable to appoint a committee of management to supervise the maintenance and repairs of mosque and discharge duties as Mutavalli, as the current Mutavalli was an opium addict. **[See Convenience compilation of Exhibits @209-213]; See pgs. 13-17/Vol. 3]**

iv. The Report dated September 16,1938 was returned on January 19,1939 with the intimation that the post of Chief Commissioner of Waqf was terminated and the District Waqf Commissioner was himself empowered under Section 4 of the United Provinces Acts (Act XIII of 1936), to decide Waqf Cases. Accordingly, the subsequent District Commissioner of Waqfs, after conducting further enquiries submitted another report on February 8,1941 agreeing with the previous report dated September 16,1938 that the Babari Mosque was a Sunni Waqf and also recording the history of the Mosque being built by Babar and the grant given by him and later continued by the British Government. This was marked as Exhibit A5/ Suit 1. **[See Convenience compilation of Exhibits @214-218]; [See pgs. 18-22/Vol. 3]**

v. Exhibit A-63/Suit 1 is Report by Mohd. Ibrahim, Waqf Inspector dated December 12, 1949. The report detailed that Numberdar was the Mutawalli and that Javed Hussain's name was proposed as the

Mutawalli. That on investigation it was revealed that Muslims were harassed by Hindus and Sikhs if they go and pray in the Masjid. **[See Convenience compilation of Exhibits @219-220]; pgs. 1330-1331/Vol. 10]**

vi. Exhibit A-64/ Suit 1 is report by Mohd. Ibrahim Saheb Waqf Inspector dated 23.12.1949 for protection of mosque as he noted that bairagis had places axes etc in the Courtyard of Masjid. **[See Convenience compilation of Exhibits @221-223; See pgs. 140-142/Vol. 3]**

vii. The Learned Civil Judge Faizabad vide Order dated April 21, 1966 held that the Defendants in O.O.S. No. 4 of 1989 are not estopped from challenging the character of property in suit as a Waqf under the administration of Plaintiff No. 1 in view of provision of Section 5(3) of the Uttar Pradesh. Further held that that there was no valid notification under Section 5(1) of the U.P. Muslim Waqf Act No. XIII of 1936. **[Pg. No. 205 of Vol. I; Pg. No. 1744 of Vol. II; Pg. Nos. 2998-2999 and Pg. Nos. 3035-3036 of Vol. III of the Impugned Judgment]**

viii. A detailed note on certain exhibits in Suit 4 of 1989 and revenue records are annexed separately as **Annexure 1 to this note.**

ix. These annexures on: (i) Admissibility of exhibits and (ii)Evidentiary value of revenue records have been added *ex abundanti cautela* to assert that the finding of the court on Exhibits are overstated without detailed examination.

x. *Admissibility of Exhibits*: A number of exhibits field in SUIT No. 4 have been doubted on the broad basis that even though from a duly authenticated source, they cannot be relied upon or that they were denied the status of public documents. We submit that a very overbroad view was taken without sufficient detailed examination thereof.

xi. *Limited evidentiary value of Revenue records:* Certain documents/ exhibits on Revenue records were filed to show that the plaintiffs in Suit No. 4 were in possession of the suit property. While it is accepted that revenue records cannot be evidence of title but they have limited evidentiary value with reference to presumption of possession and issues related thereto.

xii. *A* detailed note on judgments on limited value of revenue records are annexed separately as **Annexure 2 to this note.**

D. RELEVANT WITNESSES:

2.5. That the submission on Babri Masjid being sharia consonant was also dealt by Mr. Nizam Pasha, Advocate **[See submissions A-97]**

2.6. Several witnesses have deposed that about the nature and character of Mosque in Islam:

i. **PW-10-**Mohammad Idris-Resident of Mehrawal-52 years, teaching at Jamia Ashrafia, Mubarakpur, Azamgarh deposed on non requirement of a particular manner of construction of mosque. That it could be with or without minarets, could be surrounded by graveyards. That even after mosque is demolished, that land on which it stood would remain a mosque and could not be used for any other purpose. **(Pg. 4333-4335/Vol. 33)**

ii. **PW-11-**Mohammad Burhanuddin-Resident of Sambhal-60 years, teaching at Nadawa, Lucknow deposed on non -requirement of particular type of building for a mosque, except that it must face qibla. **(Pg. 4424/Vol. 33)**

iii. **PW-19-**Maulan Atiq Ahmed-Resident of Lucknow-47 years deposed that the presence of pictures of man and women, birds or animals on the pillars or walls, would not change the character of mosque. **(Pg. 5568, 5589/Vol. 38);** That even a land that is dedicated as wakf can be used as a mosque. **(Pg. 5625/Vol. 38)**

iv. **PW-22-**Mohd. Khalid Nadvi-Resident of Lucknow-48 years, teaching at Nadwa, Lucknow deposed on effect of presence of idol in a mosque and that it would not change the status of mosque. **(Pg. 5833/Vol. 39);** that even if not in use, the place once used as a mosque, would remain a mosque. **(Pg.5838/ Vol. 39)**

v. **PW-26-**Syed Kalbe Jawwad-Resident of Lucknow-38 years, Shia Cleric of Lucknow deposed that according to Sharia the disputed structure was a Masjid **(Pg. 6149/Vol. 40)**

vi. **PW-25-**Sibte Mohd. Naqvi-Resident of Akbar Pur-76 years, Shia Cleric of Faizabad/Lucknow deposed that the building of the Masjid need not be of a special kind. That after demolition or its felling down, the status of mosque still remains intact. **(Pg. 6022/Vol. 40)**

NOTE: All these witnesses were accepted by the Court and their evidence was accepted by the Court as expert religious teachers testifying on Islamic faith.

2.7. From the testimony of these witnesses as well as from the extracts of documents filed by the parties, the following can be concluded;

i. It is fully established that neither any special kind of structure / building, including place for Wazu or minaret etc. are required in the Mosque and nor demolition of the building or placement of idols etc. in the Mosque changes the character of mosque.

ii. Even the existence of any kind of images on the walls or Pillars of the Mosque cannot change its character and specially so when the said images etc. are not even ordinarily identifiable by the Muslims who offer prayers in the said Mosque.

iii. In this respect, the cardinal principle is that a Muslim is not supposed to bow his head before any image and as such if he has no intention of bowing his head before anyone else other than God, then mere existence of some kind of image in the wall or Pillar of the Mosque can in no way effect the prayers or nature of the building as Mosque.

E. FINDINGS OF THE JUDGES

2.8. The Hon'ble judges took the following view: -

On construction of mosque

2.9. **Two judges of the Hon'ble High Court found that the disputed structure was built by Babur. Minority view was that of Justice Agarwal who took informed guess and held it to be probably built by Aurangzeb. Justice Khan held that no temple was demolished to build a mosque (at page 103./ Vol 1.) while Justice Sharma held that a Hindu temple was demolished and the Mosque was constructed in its place. (at pg. 3243/Vol.3, of the impugned Judgment)**

i. That the property in dispute was constructed as a mosque by or under the orders of Babar. Whether it was actually built by Mir Baqi or some one else is not much material. **(Justice Khan, at pg. 99/Vol.1 of the Impugned Judgement.)**

ii. That the question as to whether Babar constructed the property in dispute as a 'mosque' does not arise and needs no answer. Further, on the basis of 'informed guess' Justice Agarwal was of the view that building in dispute may have been constructed probably between 1659 to 1707 AD during the regime of Aurangzeb. **(Justice Agarwal, at para 1682 pg. 1100-1101/Vol.1 of the Impugned Judgement.)**

iii. It transpires that the temple was demolished and a mosque was constructed at the site of old Hindu temple by Mir Baqi at the command of Babur. **(Justice Sharma, at pg. 3243/Vol.3 of the Impugned Judgement.)**

On validity of mosque as per Islamic law

2.10. **The majority of judges found that the mosque was valid as per Quranic injunctions. Justice Sharma held the mosque as invalid as per Islamic law.**

i. Justice Khan held that no temple was demolished for constructing the mosque. **(Justice Khan, at pg. 103/Vol.1 of the Impugned Judgement.)**

ii. It cannot be said that the mosque was not a valid mosque. **(Justice Khan, at pg. 107/Vol.1 of the Impugned Judgement.)**

iii. Justice Agarwal observed that it was not shown to them that building would not be construed as a mosque if it is having no minarets or if it is

surrounded by graveyards. **(Justice Agarwal, at para 3431-3433 pg. 1942/Vol.2 of the Impugned Judgement.)**

iv. Despite existence of certain images on some pillars, inside and outside the building in question of Hindu Gods and Goddesses, the character of the building would remain unaffected. **(Justice Agarwal, at para 3447 pg. 1975/Vol.2 of the Impugned Judgement.)**

v. The building was not dedicated to the Almighty and was contrary to the injunctions of Quran and other religious material. **(Justice Sharma, at pg. 2975/Vol.3 of the Impugned Judgement.)**

vi. According to the tenets of Islam, minarets are required for Azan, place of wazoo is required and in absence of which a building surrounded by graveyard cannot be a mosque. **(Justice Sharma, at pg. 3039/Vol.3 and 3046 of the Impugned Judgement.)**

On waqf by user

2.11. **Justice Khan held that the mosque was a Waqf by user. Justice Agarwal held it to be a mosque as it considered so for centuries. Justice Sharma was of the view that the building was not a valid mosque as per the Quranic injunctions.**

i. Till 1934 Muslims were offering regular prayers and since 1934 till 22.12.1949 only Friday prayers in the premises in dispute. However, offering of only Friday prayers is also sufficient for continuance of possession and use. **(Justice Khan, Page 100/Vol. 1 of the Impugned judgment)**

ii. As far as dedication is concerned, there is no difficulty in presuming the dedication by user. It has been held in the earlier part of this judgement that since its construction prayers were offered in the mosque in question and Friday prayer were being offered up till 16.12.1949. **(Justice Khan, at page 107-108/Vol.2 of the Impugned judgment)**

iii. When the building in dispute itself was not constructed in 1528 AD by Babar or any of his agent, the question of creation of a waqf by dedication to Almighty by any of them would not arise. **(Justice Agarwal, at para 3141@pg. 1757/Vol. 2 of the Impugned judgment)**

iv. The Plaint (OOS No. 4 of 1989) does not state that Emperor Babar dedicated alleged mosque for worship by Muslims in general and made it a public Waqf property. One of the essential condition of creating a waqf is "dedication". **(Justice Agarwal, at para 3336@pg. 1909/Vol. 2 of the Impugned Judgment)**

v. In absence of other evidence, if, public prayer is once said there, with the permission of the owner, it can be treated to have been dedicated.

(Justice Agarwal, at para 3336@pg. 1909/Vol. 2 of the Impugned Judgment)

vi. It is clear that the building was constructed, whosoever have built it, so as to give it a shape as a mosque. It was also known to the local people including Hindus that the constructed structure was a mosque. In such circumstances, the question whether the building in dispute could be a mosque as per the tenets of Shariyat loses its significance. **(Justice Agarwal, at para 3403@pg.1929-1930/Vol. 2 of the Impugned Judgment)**

vii. The building in dispute, for the last more than 2 and half centuries and at least about 200 years before the present dispute arose in 1950, has always been termed, called and known as a "mosque". **(Justice Agarwal, at para 3411@pg. 1932/Vol. 2 of the Impugned Judgment)**

On effect of invalidity of notification

2.12. **All the three judges gave a concurrent finding that there was no valid notification under Section 5 (1) of 1936 Act.**

i. As per the statement recorded at **Page 109 (mid) para (e)/ Vol.1.,** Justice Khan confirmed the findings of Justice Agarwal.

ii. Already been held that no valid notification under Section 5(1) of the 1936 Act. **(Justice Agarwal, at para1077, page 836/Vol.1 of the impugned judgement)**

iii. In view of the order dated April 21,1966, the Government Notification dated February 26,1944 does not comply to be a valid notification. **(Justice Agarwal at page 835/Vol. 1 of the Impugned Judgment)**

iv. However, the 1936 Act does not contain any provision that even though a Waqf has been created in accordance with Islamic Law yet it would not be governed by the Act and shall be beyond the power of supervision, administration of Sunni Central Waqf Board. **(Justice Agarwal, at para 1155@pg. 866-867/Vol.1 of the impugned judgement)**

v. The registration of the disputed structure as a Waqf was not done in accordance with the provisions of Section 5(1) the Act and therefore it cannot be deemed to be a valid registration. The registration does not confer any right to the Waqf Board to maintain the present suit without complying with the valid required notification. **(Justice Sharma, at page 3019-3020/Vol. 3 of the impugned judgement)**

vi. As after invalidation of notification under Section 5(1) of the United Provinces Act, 1936, the alleged Wakf remained unregistered Wakf to which neither 1936 Act nor 1960 Act or 1995 Act are applicable as such the Plaintiff Wakf board has no locus standi and instant Suit is hit by the

provision of Section 87(1) of the Wakf Act, 1995. **(See Point 11@Pg. 3008/Vol. 3)**

III. SUBMISSIONS ON FACTS:

3.1. Suit no. 5 of 1989 accepts Babr built the mosque in 1528 A D Mir Baqi.

3.2. There is no dispute that Babri Masjid was a mosque. The 'Babri Masjid' that was attacked in 1855, injured in 1934 and destroyed in 1992 looked like and was a mosque.

3.3. The assertion whether the Babri Mosque was built by Aurangzeb is without foundation and correctly rejected by Khan and Sharma and, in any event, immaterial qua the nature and character of the building being a mosque used by the Muslims for performing religious duties, including offering of Prayers.

3.4. The existence of the Mosque has been noted from the year 1528 till the year 1992, having the words "Allah " and "Babar inscribed on it until its demolition:

(i) The inscriptions engraved on the Mosque declare it to be a mosque as dedicated by Emperor Babar.

(ii) Travellers and Gazetteers except William Foster (on travels by William Finch), Walter Hamilton and Cunningham affirm the existence of a mosque

(iii) The British Government recognized the Masjid as a 'Babri mosque' and continued to make grants of money / land towards it.

(iv) Further, various administrative orders and judicial cases during the British Rule recognised, accepted and considered it to be a Mosque.

(v) In a definitive Court proceeding in 1885-6, it was held that the Mahant Raghubar Das (who was later accepted by the Nirmohi Akharas as their Mahant) claim to the title of the property vested in the Masjid (waqf) but though without title the Hindus had a 'prescriptive' right to pray at Ram Chabutra, use the Bhandar and pray at the Sita ki Rasoi. It is pertinent to note that these judicial proceedings of 1885 Suit too considered the mosque as "Babri masjid". However, Nirmohi Akhara in pleadings denies the existence of Mosque completely.

(vi) A Court judgment passed in O.S. No. 29 of 1945 dated 30.03.1946 while adjudicating a dispute between Shias and Sunnis on rights on Babri Mosque affirmed that this was a Sunni mosque. However, a SLP is filed against the said order of 30.03.1946 in which notice has not been issued yet.

(vii) The pleadings in the present matter accepted that the disputed structure has been used by the Muslims to offer Namaz.

(viii) The disputed structure has been continuously addressed as "Babri Masjid" and was 'custodia legis" before this Hon'ble Court when it was demolished in the year 1992, in contempt of this Hon'ble Court.

(ix) Several illegalities were committed on the Babri mosque before and after 1950 namely Preventing, and harassing Muslims when they went to offer Namaz in the Babri Mosque, Destroying part of the Babri Mosque in 1934, for the repairs of which fine was imposed on Hindus, Criminal trespass in the Mosque, desecration of the mosque on December 22/23,1949, Complete defacement of the entire mosque by putting of vermillion on all pillars, Photos were hung inside the mosque (Cf. Photos of 1950 & 1990) – even though mosque was in the charge of the receiver ,using the mosque for sleeping and tampering of evidence relating to inscriptions

3.5. There is no finding even by the ASI qua the assertion that a temple was destroyed to build a mosque at the disputed site.

Specific reply to the arguments of pro temple parties

3.6. The arguments made by the Pro temple parties vis a vis the issue of waqf nature of the Babri mosque was pre dominantly that building was not built and dedicated as per Islamic law and thus was invalid. Further, there was absence of documentary evidence of prayers before 1855 as admitted by Mr. Jilani, Sr. Advocate. Infact, Mr. Jilani did not assert that mosque was not in existence or was not freely used or had lost the character of a mosque. **(See response no. 3.10)**

3.7. That further, no prayer was going on for more than 12 years between 1934 and 1949; and at best only Friday prayers and that Even if there was a mosque, title was lost by adverse possession between 1934-49

3.8. The Pro Temple parties also asserted that the registration of Mosque by the UP Board of Waqfs which had registered the property vide notification on 26.02.1944 was later found to be defective in a ruling dated 21.04.1966 and hence the Sunni Waqf board has no locus to maintain the suit.

3.9. The Pro Temple parties also relied heavily on ASI report asserting that The ASI report shows a temple was destroyed and there was evidence of a massive temple below the ruins with many pillars.

Response:

3.10. The building is a mosque and that minarets and vazoo are not essential for a valid Mosque. Existence of a temple, would not de-legitimize the mosque. The ASI report does not show that there was a temple immediately below the mosque and that it was destroyed to build a mosque in its place.

3.11. Mr Jilani, Senior Advocate was correct in the asserting that definitive documentary evidence before the year 1855 was not available. That the same was true even for the pro temple parties. The only evidence is that of travellers and gazetteers who relied on hearsay evidence and wrote stories of their travels in the region. Such evidence is only illustrative and cannot provide and any kind of right to the land in question. In any case, almost all the travellers have noted the existence of a mosque.

3.12. From 1858, there is continuous official in the nature of administrative and judicial orders to show recognition of the building as mosque. Notably, the judgments of 1885-86 and the Shia Sunni dispute as decided on 30.03.1946 in R.S. No. 29 of 1945.

3.13. Further, in any event, the mosque was being used for religious purposes and thus is a waqf as established by user. Plethora of judgments have held that once a building is used a mosque, it becomes irreversible and that it becomes the property of Allah.

3.14. The fact that the registration of 1944 was found technically wanting in the judgement of 1966 does not take away from the status of the mosque as a waqf or take away the jurisdiction of the Waqf Board to maintain the suit.

3.15. Without prejudice to the above, the absence of the waqf board would not disentitle the Muslim plaintiffs to have locus in the suit.

IV. SUBMISSIONS ON LAW

A. DEFINITION OF WAQF AND INTERPRETATION IN ISLAMIC JURISPRUDENCE

4.1 **A waqf in Islamic law is an irrevocable dedication of any and all kinds of moveable and immovable forms of property (including, adaptively, new forms of property such as shares or intellectual property) for religious and charitable purposes by an owner of the property including any property which is so dedicated by a ruler over which he has dominion by acquisition or surrender of property voluntarily or by any other means including conquest.**

4.2 Islamic Law has developed the concept of waqf in an extra ordinary way over the time.

4.3 Even the spoils of conquest are advisedly capable of being the subject matter of waqf and were preferably for the benefit of all. As an example, the following incident is recorded from Hadees, Bukhari.

> *"Narrated Ibn `Umar: When `Umar got a piece of land in Khaibar, he came to the Prophet saying, "I have got a piece of land, better than which I have never got. So what do you advise me regarding it?" The Prophet said, "If you wish you can keep it as an endowment to be used for charitable purposes." So, `Umar gave the land in charity (i.e. as*

an endowment on the condition that the land would neither be sold nor given as a present, nor bequeathed, (and its yield) would be used for the poor, the kinsmen, the emancipation of slaves, jihad, and for guests and travelers; and its administrator could eat in a reasonable just manner, and he also could feed his friends without intending to be wealthy by its means.""

Sources of Islamic Law

4.4 There are 2 kinds of sources of Islamic law- Primary and secondary. Primary source constitute:

a. The Holy Quran (Divine Revelation of God to the Prophet (PBUH)
b. The Sunnah and Hadees (Prophet's words/ actions/ practice)
c. Ijma (consensus)
d. Qiyas (Analogical deductions)

Secondary sources constitute:

e. Urf (custom)
f. Judicial decisions
g. Legislation
h. Justice, equity and good conscience
i. Istishan (juristic preference)

[***See Aqil Ahmad, "Textbook of Mohammedan law" Central Law Agency, 2005, pg. 28-31]***

[See Mulla, "Principles of Mahomedan law", 19th ed., pgs.20
A copy of the relevant pages of the text book are annexed herewith as Annexure- 3 to this note]

Rules of Interpretation

4.5 **The interpretation of the texts of the Quran requires special knowledge of grammar comprising sarf and nahw, then that of Arabi adab i.e literature. Since, the Islamic law is derived from a number of sources, interpretation and extrapolation are fundamental to derive a satisfactory substance applicable to the circumstances. For example use of balaghat or rhetoric and then that of tarjuma (translation) and tafseer (commentary/ explanation). These are one of the many tools of Islamic hermeneutics.**

Hadees

4.6 The study of Hadees is from six canonical books from Jurists Imam Bukhari to Tirmizi. Along with that understanding of fiqh i.e jurisprudence, followed by usool e fiqh i.e. principles of jurisprudence, followed thereafter by Mantiq or

logic and finally by aqaid or usool e-deen discourses on Islamic theology and dogma.

4.7 A thorough understanding of the aforesaid throws light on the law of waqfs. This has been further explicated in Islamic sources of law and Indo- Anglo law.

Applicability of personal law on waqf in India

4.8 The Muslim Personal Law (Shariat) Application Act, 1937 was passed in order to "to make provision for the application of the Muslim Personal Law (Shariat) to Muslims in India." Under Section 2 of the Act, for all questions regarding wakfs, the rule of decision is Muslim Personal law (Shariat).

4.9 Further, personal laws are granted recognition and protection by the Constitution of India under Article 13 read with Articles 25, 26 and 30 subject to limitations.

B. PROPOSITIONS ON WAQF

4.10 In the light of the aforesaid, the following legal propositions emerge on the issue.

4.11 **Proposition No. 1:** The best working definition of Waqf was made in the Muslim Wakf Validating Act (VI of) 1913 which came into force on 7 March 1913 and was prospective and retrospective:

> *"Wakf means the permanent dedication by a person professing a Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable"*

4.12 **Proposition No. 2:** A waqf (which means detention) of a property is a permanent dedication to God Almighty.

- *Vidyavaruthi v. Balusami (l921) 48 IA 302* explicates at pg. 312

> *'But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of Jewun Doss Sahoo v. Shah Kubeeruddin (I) that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. In Jewan Doss Sahoo's case (I) the Judicial Committee call him "procurator." That case related to a*

khankah, a Mahommedan institution analogous in many respects to a math where Hindu religious instruction is dispensed. The head of these khankhas, which exist in large numbers in India, is called a sajjadanishin. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities and has in most cases a larger interest in the usufruct than an ordinary mutawalli. But neither the sajjadanishin nor the mutawalli has any right in the property belonging to the wakf.'

[A copy of the judgment in Vidyavaruthi v. Balusami (1921) 48 IA 302 is annexed hereto as Annexure 4 to this note]

- The Mussalaman Waqf Validating Act 1923 invalidated the decision in *Abu Fatah v. Russomoy (1894) 22 IA 76* to lay down that a waqf would be valid as long as there is an ultimate dedication to God even if for family purposes in the interim.

[See Written submissions No A 69]

4.13 **Proposition No. 3:** The purpose for which a waqf may be created is the one recognized by Mahomedan law as 'religious, pious or charitable'

- This is abstracted from Section 2 of the Act of 1913 *(supra)*
- An illustrative list is given in Mulla's Principles of Mohomedan Law (1990, 19th Edition) at pgs. 146-147:

'The following are valid objects of a wakf:-

(1) mosques and provision for imams to conduct worship therein;

(2) colleges and provision for professors to teach in colleges;

(3) aqueducts, bridges and caravanserais;

(4) distribution of alms to poor persons, and assistance to the poor to enable them to perform the pilgrimage to Mecca;

(5) celebrating the birth of Ali Murtaza;

(6) keeping tazias in the month of Muharram, and provision for camels and duldul for religious processions during Muharram;

(7) repairs of imambaras;

(7a) the maintenance of a khankah;

(8) celebrating the death anniversaries (barsi) of the settler and of the members of his family;

(9) performance of ceremonies know as kadam sharif;

(10) burning lamps in a mosque;

(11) reading the Koran in public place, and also at private houses;

(12) *performance of annual fateha of the settler and of the members of his family;*

[The ceremony of fateha consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied with distribution of alms to the poor.]

(13) *the construction of a robat or free boarding house for pilgrims at Mecca;*

(14) *maintenance of poor relations and dependents;*

(15) *payment of money to fakirs, i.e., the poor;*

(16) *grant to an Idgah;*

(17) *A durgah or shrine of a pir which has long been held in veneration by the public.'*

There is nothing to suggest that a commitment of property by a Muslim ruler after conquest cannot be a waqf.

4.14 **Proposition No. 4:** The concept of a property be dedicated for waqf has been adapted to modern situations and countenances modern property including stock.

4.15 **Proposition No. 5:** A waqf can be constituted by a mere declaration without more. Once made, the property which constitutes the waqf is permanent and irrevocable.

Mulla*(supra)* at pgs. 152-153 indicates how controversies in relation to this proposition were resolved by Indian courts.

"(1) A wakf inter vivos is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. This view has been adopted by the High Courts of Calcutta, Rangoon, Patna, Lahore, Madras, and Bombay, and by the Oudh Chief Court. According to Muhammad, the wakf is not complete unless, besides a declaration of wakf, a mutawalli (superintendent) is appointed by the owner and possession of the endowed property is delivered to him (Hedaya, 233; Baillie, 550). At one time the High Court of Allahabad adopted this view, but a Full Bench decision of that Court has since decided that a mere declaration of endowment by the owner is sufficient to complete the Wakf. The Nagpur High Court has also adopted this view.

(2) The founder of a wakf may constitute himself the first mutawalli (superintendent). The founder and mutawalli being the same person, no transfer of physical possession is necessary, whichever of the two views is upheld. Nor is it necessary that the property should be transferred from his name as owner to his name as mutawalli. Such a transfer is not necessary even in Allahabad where the view of Muhammad prevails."

4.16 **Proposition No. 6:** An unequivocal expression of intention by the waqif coupled with an act to show separation of the property from his personal property is sufficient to constitute the waqf. Once the property is dedicated as a mosque, it is sufficient to show that some public prayers were held in it even once to confirm its character as a mosque.

i. *Syed Mohd. SalieLabbai (Dead) by L.Rs.* v. *Mohd. Hanifa (Dead) by L.Rs.*, (1976) 4 SCC 780, para 14, 16, 34, 36, 39, 44 and 47 **[TAB 1]**

Facts:

The plaintiffs had alleged that property belonging to waqf included graveyard, mosque and tomb of one Makhdoom sahib. That defendants were de facto managers and were mismanaging the waqf. The defendants claimed that they were owners and permission to prayers was given as per leave and license and that prayer hall and graveyard were private properties.

Here, the court found the mosque and adjunct are to be waqf properties and had been used for a long time so as to culminate into a valid and binding public waqf **(para 62)**

ii. *N.R. Abdul Azeez* v. *E. Sundaresa Chettiar*, AIR 1993 Mad 169, para 14-15 **[TAB 2]**

The case was concerning the title rights of an old dilapidated mosque wherein the appellants claimed it to be a mosque while the defendants claimed it as private property where he stocked agricultural implements and paddy. Title was also claimed by way of adverse possession. Suit was filed to restrain the defendants from preventing worship. Question before the Court was if the building was a public mosque.

The Court held that once a mosque is consecrated by public worship, it. ceases to be property of the builder and vests in God. That once the dedication is done for worship, no Muslim can be denied to offer prayer on the ground that it fell in disuse long back. Here, village map showed existence of mosque in the year 1938 and thus Respondents were restrained to interfere in worship**. (Para 16)**

Note: This Judgment was set aside on facts by this Hon'ble court in *E. Sundaresa Chettiar v N.R. Abdul Azeez (JT 2002, 8 SC 360). However, the law point of irreversibility of Waqf once dedicated was not set aside.*

iii. Charles Hamilton, "The Hedaya or Guide: A Commentary of Musalman Laws", Lahore, 1957, p. 239 **[See written submissions A-97]**

In this case, the inscriptions on Babri Masjid which unequivocally state that this is a "masjid" will be sufficient to constitute express dedication. Thereafter, there is official record of public prayer being offered in the Babri Masjid.

ON WAQF BY USER

4.17 **Proposition No. 7:** Even without an express dedication, if it is shown that a land was being used since times immemorial for a religious purpose for a mosque or graveyard, the land or property in question would be waqf by user.

i. In Fakir Mohamad Shah v. Qazi Fasihuddin AIR 1956 SC 713, para 20, 70 **[TAB 3]**

It was a case regarding one kotwali masjid and its surrounding area wherein the plaintiff alleged that the defendant was only a mutawaali while the defendant claimed himself to be the owner. The portion qua masjid was admitted as waqf property. The court found that only the mosque was waqf and no area beyond it. **(para 70)**

ii. Court of Ward v. Ilahi Bakhsh, (1912-13) ILR 40 Cal 297 (P.C.), page 307**[TAB 4]**

The case was about a mai pak daman graveyard and the dispute therein if it was wakf property. The Court relying upon the record of rights under t the Punjab land revenue Act of 1887 found the entry as a graveyard as conclusive and also further by way of user as a waqf. **(page 306)**

iii. Mehraj Din v. Ghulam Muhammad, (1931) ILR 12 Lah 540, page 541 **[TAB 5]**

This was case of a waqf property dedicated by one Pir Balkhi. The defendants claimed it to be as their property. The court found that Mohammedans had been lighting diyas and saying prayers. Held to be waqf by user. **(pages 541-542)**

iv. In Abdul Ghafoor v. Rahmat Ali, AIR 1930 Oudh 245, para 7, it was held that a waqf may, even in the absence of dedication, be established by evidence of long user. Once established, a waqf is permanent and cannot become private property by disuse. **[TAB 6]**

This was a suit for declaration of the property as public graveyard. The defendant had claimed title by adverse possession and denied the suit property as public graveyard. The Court found it to be public graveyard. **(para 7)**

v. Syed Maher Husain v. Haji Ali Mohammad, AIR 1934 Bom 257, para 17 and 25 **[TAB 7]**

This case is about the declaration of suit properties as waqf properties as dedicated to God by Saint Pir Mushayak. The defendants were alleged to have claimed the same as private properties. The mosque was held to be waqf but other properties in other survey numbers were not found to waqf properties. **(para 23 and 25)**

vi. Khati v. Mirza Hossain Beg, AIR 1962 Ori 95,para 7and 9**[TAB 8]**

Here, dispute arose between the parties that the suit property was a waqf property and not a mortaged property. The Court found that record of rights mentioned it as mosque and in the plots muharram feats were organized. **(para 11)**

4.18 **Proposition No. 8:** Long user would imply living memory, which has been construed variously as 30 years, 60 years and 105 years. In any event, the Babri Masjid had been in use as a mosque for much longer than this on the date that the dispute first ever arose.

i. That in *Mahamaya Debi* v. *HaridasHaldar*,(1915) ILR 42 Cal 455, (a case involving Hindu Trusts), the court cited authorities to interpret that 'living memory' has been interpreted variously as 60 to 105 years. **[TAB 9]**

ii. In *Sheo Raj Chamar* v. *Mudeer Khan*, (1934) ILR 51 All 166, 30 years was held to be sufficient to constitute a plot as graveyard by long user., page 176 **[TAB 10]**

The facts of the case was the claim of a mohammedan family (defendants) to bury their dead in a land belonging to plaintiffs. Plea was that they have been doing so for many years and were principal tenants on the land. The question arose if defendants had easement rights by way of prescription. The Court upheld the lower court's order that restrained from future burying in the plots. Justice Mukherji held that right to bury dead is not a right of easement while Justice Sulaiman held that easement act was wide enough to cover a right to bury dead bodies. **(page 171, 175)**

4.19 **Proposition No.9 :** Where a wakf property has been found to be wakf by user, the status of the wakf will be the same as if by dedication to derivative/ suggestive claims by others (Whether Hindus or Muslims).

i. Miru And Ors. vs Ramgopal (AIR 1935 All 891), page128-129 **[TAB 11]**
Note: This is a case of easement rights. The dispute was between a hindu zamindar who had given land for prayers to muslims. Later, the muslims wanted to construct a pucca mosque and thus injunction was sought. The court found that there existed a "masjid" as per land records. Here, Justice Suleman had observed as follows:

> *"Where therefore the Court finds that a mosque or a temple has stood for a long time and worship ahs been performed in it by the Public, it is open to the Court to infer that the building does not stand there merely by the leave and license of the site, but that the land itself is a dedicated property and the site is a consecrated land is no longer the private property of the original owner"*

4.20 **Proposition No. 10:** The UP Muslims Waqf Act 1936 is a regulatory and supervisory measure which does not affect the status of a waqf.

i. Under the Religious Endowments Act 1863, Section 3 indicated:

"Government to make special provision respecting mosques etc., - In case of every mosque, temple or other religious establishment to which the provisions of either the Regulations specified in [preamble to the this Act] are applicable, and nomination of the trustee, manager or superintendent thereof, at any time of the passing of this Act, is vested in, or may be exercised by, the Government or any public officer, or in which the nomination of such a trustee , manager or superintendent shall be subject to the conformation of te Government, or any Public officer, the [state Government] shall, as soon as possible after passing of this Act, make special provision as hereinafter provided.

ii. The Mussalman Waqf Act 1923 also defines waqf in Section 2(e) as follows:

"Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable, but does not include Waqf, such as is described under Section 3 of the Mussalman Wakf Act, 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.

Section 3-9 indicates that the exercise was only for the purposes of identification and furnishing accounts and contributory payments under penalty. (section 10) and subject to exemptions of waqfs in certain cases(Section 13)

iii. The UP Muslim Waqfs Act 1936 :

a) exempts certain waqfs from registration certain waqfs (Sect. 2(i)) but keep a register for the other (Section 38-39)

b) Section 3 clearly states that for the purposes of this Act Waqf shall be redefined as follows (excluding the exemptions):
Waqf means the permanent dedication or grant of any property for any purposes recognised by the Musalman law or usuage as religious, pious or charitable and, where no deed of Waqf is traceable, includes Waqf by user, and a waqif means any person who makes such dedication or grant.

c) The intention of Section 4-5 indicates that the purpose of the Act is to do a survey and then to create statutory institution(s) (Section 6-17)

d) The purpose of the Central and State Boards and committees is simply to ensure waqfs "under its superintendence

"are properly maintained, controlled and administered and duly appropriated to the purposes for which they were founded and for which they exist (Section 18(1))

e) The function of the Commissioner is to ensure the above and report it to the Central Board (Section 31)

f) Where there is mismanagement of the kind indicated above, the matter may be referred to a Court for directions (Section 47). Other legal proceedings are also covered (Section 48-52)

4.21 If the UP Act of 1936 is interpreted in any other way to affect the status of a waqf or to extinguish its existence, it would be unconstitutional after 1950. In any event, that Act does nothing of the sort.

4.22 There was nothing in the application made to the UP Board which could possibly be used to deny the present waqf as being alien to Islamic law. However, full particulars of the land were not given.

4.23 The order of 21.04.1966 simply sets aside the specific registration for incompleteness but still is subject to the regulatory jurisdiction.

4.24 It is submitted that any submission that the waqf ceased to be one either at the time of filing the Suit 4 in 1961 or thereafter is wholly incorrect.

4.25 **Proposition No. 11:** Once a wakf, always a wakf; more particularly, once a mosque, always a mosque. Even if the mosque has been abandoned and proper prayers are no longer being offered, the property does not lose its character as a mosque.

i. In *N.R. Abdul Azeez* v. *E. Sundaresa Chettiar*, AIR 1993 Mad 169, it was held that "once a mosque, always a mosque". para16 **[TAB 2]** ***(facts mentioned above)***

ii. In *Mohammad Kasam Abdul Rehman* v. *Abdul Gafoor Ahmedji*, AIR 1964 MP 227, it was held that graveyard which was a waqf property would remain a waqf property even if it was not being used. para 22, 28 **[Tab 12]**

This was a case pertaining to graveyard in Ujjain wherein it was the contention of the Plaintiffs that defendants were mismanaging the waqf property and claimed their ejection as trustees. The Court found it to be defunct graveyard but nevertheless a waqf property. Defendants were prevented from making private use of the same. **(para 39)**

iii. In *Noor Mohammad* v. *Ballabh Das*, AIR 1931 Oudh 293, **[TAB 13]**

Here the dispute was that suit property was graveyard being used since times immemorial and alienation of the same by way of sale deed was invalid. Here, even after around 60 years of non-use as a graveyard., it was held that even discontinuance of use of a plot as a graveyard under orders of the Municipal Commissioner would not take away the character

of the land as waqf once it is shown that dedication was complete and the land was held to still be a waqf.(The decision was confirmed by the Privy Council in *Ballabh Das* v. *Nur Mohammad*, (1935) 43 LW 685**[TAB 14]**

4.26 **Proposition No. 12:** Even demolition would not take away the character of a mosque as even an open space can be masjid and therefore, the site of Babri Masjid remains a mosque even today.

i. In *Akbarally A. AdamjiPeerbhoy* v. *MahomedallyAdamjiPeerbhoy*, AIR 1932 Bom 536, page 567 **[TAB 15]**
Here the suit was filed for declaration that the suit properties including mosque were waqf properties and that scheme be framed for proper administration of the same. Elaborate discussions were made on applicabity of different schools of law amongst Muslims. It was held that even an open space can constitute a mosque. A 'masjid' is merely a place where 'sajda' (prostration) is performed. This has to be adopted to mean a 'congregational' place in use which will though not include public property(i.e. road) or property owned by others.

ii. In *Miru* v. *Ramgopal*, AIR 1935 All 891, a plot dedicated for use as a mosque was held to be a valid waqf by user even in the absence of a katcha or pucca mosque. **[TAB 12]- (facts discussed above.)**

C. SUBMISSIONS: CAUTION AGAINST OVERBROAD STATEMENTS OF LAW

4.27 By way of caution, it is respectfully submitted that in trying to show that the Babri mosque fails to meet the standards of Islam

(a) The onus was on the Hindu parties which has not been discharged by scattered reference to Islamic law

(b) While Indian courts have discerned the personal law of Muslims in matters of marriage, property, inheritance, waqfs, it has never gone into the legitimacy of rulers, conquests and matters of rulership of Islamic States.

(c) If it decides to go into matters of Rulers and States, it needs a much more comprehensive analysis of the multiple sources of the Islamic history, law and faith over 15 centuries.

(d) Lawyers who pick and choose from Islamic sources reading out submissions before the Lucknow bench with limited knowledge of Islamic history, culture and jurisprudence to the extent that a reply was needed to these cannot be treated as competent and substitute for expert.

(e) This court has not been apprised of sufficient knowledge comprehensively to hold that (a) any appropriation by conquest, or (b) building a mosque on a place there was a temple unknown to the conqueror (c) or even if known to the conqueror who may have destroyed what stood on the site, is un Islamic.

(f) The ASI has not come to the firm conclusion that a temple was destroyed.
(see Submissions by Ms. Meenaxi Arora, Sr. Advocate A90-92, 94-95)

D. EFFECT OF HINDU SUBMISSIONS TO LAY DOWN BAD LAW

4.28 With respect, the effect of such assertions would be to persuade this Court to hypothetically rule:

i. **All mosques in the world where the land is obtained by conquest are liable to be void or voidable by courts even where the conquest took place centuries ago whether in India or elsewhere.**

ii. **Where a conqueror destroys a particular site of another religion, such land and mosque created therefrom is liable to be declared void even if this happened centuries ago.**

iii. **It is perfectly valid for a mosque to be destroyed or even otherwise, and for digging to take place to show that there existed a site of another faith albeit in India or elsewhere even if the mosque was created centuries ago.**

iv. **Where such remains of another faith are found, the mosque should be declared un-Islamic and void even qua events a long time ago.**

v. **The dangers will persist even where claims are made of special significance with incomplete law and usages.**

4.29 With respect such propositions have no foundation in law and are pre-eminently dangerous for India and the world.

4.30 The only safe proposition of law is that any destruction of a religious site after 1947-50 is illegitimate and any benefit therefrom cannot be treated as valid or just and fundamentally unjust benefit or enrichment.

V. CONCLUSION

i. That Babri Masjid was a waqf property dedicated and/ or accepted as a mosque as is evident from documentary evidences including inscriptions, revenue records, grants and judicial decisions.

ii. That the building is a mosque admitted by several travellers and gazzetters, Hindu parties and Government authorities.

iii. That the building is sharia compliant in build and architecture.

iv. That invalidity of notification under the Waqf Act, 1936 does not render the building outside the purview of it being a mosque and a waqf property.

v. The UP Muslims Waqf Act 1936 is a regulatory and supervisory measure which does not affect the status of a waqf.

vi. Without prejudice to the above, the fact that the building stood from 16th century till its demolition in contempt of this Hon'ble Court, indicates that the mosque was widely accepted and used as a mosque and thus, a mosque by user.

ANNEXURE -1

A.ADMISSIBILITY OF EXHIBITS

Sr. No.	Exhibit No.	Particulars	Findings of the Hon'ble High Court	Comments
1.	**Exhibit A-8 (Suit-1)**	(Income and Expenditure of the period of 1299 Fasli, 1306 Fasli and 1307 Fasli submitted by Mutawalli of Mosque)	A copy of a document filed in an earlier litigation in a Court of law, would not be either a public document merely because a certified copy has been issued by the Court, or an old document received from the proper custody. **[Para 2357 @ Page 1412 of Vol.II of Impugned Judgment]**	**<u>On facts:</u>** These exhibits were exhibited independently after obtaining authenticated copies thereof. **<u>On law:</u>** Section 90A introduced as UP State Amendment: (w.e.f. 30-11-1954). *"(1) Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a Court of Justice, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the original was executed by the person by whom it purports to have been executed."*
2.	**Exhibit A-7 (Suit-1)**	An agreement between Syed Mohd. Zaki and Abdul Gaffar on 25th July 1936 with respect to payment of arrears of salary of Abdul Gaffar who is said to have worked as Pesh Imam.	This document ex facie does not satisfy the requirement of a public document under Section 74 of Evidence Act, 1872 and nothing has been placed on record to show that it was filed after obtaining a copy thereof from a public authority in whose possession it ought to be. **[Para 2379 @ Page 1443 of Vol.II of Impugned Judgment]**	

3.	**Exhibit A-6 (Suit-1)**	Application for claiming compensation for damaging Babri Mosque in 1934 riots.	The above document is not a public document and when it was filed, could not have been said to be 30 years old document. Even otherwise, it does not satisfy the requirement of Section 90 of the Evidence Act. **[Para 2387 @ Page 1450 of Vol.II of Impugned Judgment]**	*This is a public document of the office of the Dy. Commissioner.*
4.	**Exhibit A-32 (Suit-1),**	Copy of the accounts submitted by Syed Mohd. Zaki in Case No. 64 in the Court of Tahsildar Faizabad on 23.08.1927 for the period 29.03.1925 to 24.04.1926 with respect to the income from the grant of Mauza Bahoranpur and Sholapur.	These documents cannot be termed to be "public documents" under Section 74 of the Evidence Act. **[Para 3097 @ Page 1716 of Vol. II of Impugned Judgment]**	These are public documents which the U.P. Sunni Central Waqf Board is authorized to issue under Rule 40 of the United Provinces Sunni Central Board Rules, 1944 & Section 26 of the Uttar Pradesh Muslim Waqfs Act, 1960.
5.	**Exhibit A-35 (Suit-1),**	Copy of accounts of income and expenditure relating to 1.4.1947 to 31.03.1948		
6.	**Exhibit A-36 (Suit-1)** =	copy of the auditor's report for the period 1947-1948 finalized on		

	Exhibit A-54 (Suit-1)	27.07.1948		
7.	**Exhibit A-60 (Suit-1),**	Copy of the statement in Form 38 U.P. Muslim Waqf Act NO. 13 of 1936 with respect to annual income of the waqf property from rural property		
8.	**Exhibit A-55 (Suit-1),**	Copy of the account of income and expenditure with respect to the year 1947-48		
9.	**Exhibit A-57 (Suit-1),**	Copy of account of income and expenditure with respect to the period from 1.4.1948 to 31.3.1949		
10.	**Exhibit A-59 (Suit-1),**	Copy of the Statement of income and expenditure for the period from 1.4.1949 to 31.3.1950 under section 57 U.P. Muslim Waqf Act 1936, included in 26 Masjid Babri District Faizabad		

11.	**Exhibit A-56 (Suit-1),**	Copy of another Auditor's report for 1948-49 signed by the Auditor on 23.2.1950		
12.	**Exhibit A-58 (Suit-1)**	Copy of another Auditor's report for 1948-49 signed by the Auditor on 23.12.1950		
13.	**Exhibit A-63 (Suit-1), Exhibit A-64 (Suit-1)**	**Reports of Waqf Inspector regarding Babri Mosque on 10.12.1949 & 23.12.1949 respectively.**	So far as the report of Waqf Inspector dated 10.12.1949 and 23.12.1949 are concerned almost all the witnesses of plaintiffs (Suit-4) who have been examined on this aspect have expressed their ignorance about his visit on the dates on which Mohammad Ibrahim claimed to have prepared the said reports. Neither the author has been examined nor even otherwise the two documents have been proved. The documents cannot be termed to be "public document" merely because the copy thereof has been issued by the Sunni Board since they do	• These reports have been relied upon by the Hindu parties. • These reports have been prepared by the Waqf Inspector in discharge of his statutory duties under Rule 60 of the United Provinces Sunni Central Board Rules, 1944. • OPW 2 Shri Devaki Nandan Agarwal states about the presence of Wakf Inspector and his two reports submitted on 10.12.1949 and 23.12.1949.**[Pg.**

			not answer the description of "public document" under Section 74 of the Evidence Act. **[Para 3104 @ Page 1743 of Impugned Judgment Volume II]**	**365/Vol. 17]**

B. LIMITED EVIDENTIARY VALUE OF REVENUE RECORDS

Sr. No	Exhibit No.	Particulars	High Court Findings	Comments
1.	**Exhibit A-30 (Suit-1)**	Copy of the Khewat Patwari Mauza Bahoranpur of the period 1332 Fasli (1929 A.D.).	The legal status of entry in revenue record was considered and the Court held that it does not confer ownership or title. **[Para 3095 @ Page 1697 of Vol.II of Impugned Judgment]**	*It is submitted that entries in the revenue record give rise to presumption regarding possession in the land.*
2.	**Exhibit A-37 (Suit-1)**	Copy of Khasara Abadi Mashmoola Misil bandobast Sabik relating to Mauza Ramkot Pargana Haweli Awadh Tehsil and District Faizabad dated 20.03.1950		
3.	**Exhibit A-38 (Suit-1)**	Copy of the Naqual Khasara Mashmoola Misil bandobast Sabik Mauza Ramkot Pargana Haweli Oudh Tehsil and District Faizabad.		

4.	**Exhibits A-39 and A-40 (Suit-1)**	copies of the map Kishtwar Misil Bandobast Sabik Mauza Ramkot Pargana Haweli Tehsil and District Faizabad dated 09.03.1950 and Intekhab Naksha Abadi Mauza Ramkot Pargana Haweli Tehsil and District Faizabad		
5.	**Exhibit A-41 (Suit-1)**	Copy of the Khewat Mauza Bahoranpur		

ANNEXURE -2

NOTE ON JUDGMENTS ON REVENUE DOCUMENTS

The fact that Revenue records raise presumption of possession is fully supported by the following:

i. ***Gurunath Manohar Pavaskar & Ors Vs. Nagesh Siddappa Navalgund & Ors (2007) 13 SCC 565, para 11 and 12.***

Here, the plaintiffs/respondents filed suit for mandatary and permanent injunction and for possession against the defendants/appellants. All the court relied upon Ex. P-35 (revenue record) and decreed the suit. The suit could not have been, therefore, decreed inter alia on the basis of Ex. P-35 alone. The Hon'ble Supreme Court remanded back the matter to Ld. Trial Judge to decide afresh.

"A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/ or continuity thereof both forward and backward can also be raised under Section 110 of the Indian Evidence Act."

ii. ***State Of A.P. & Ors. Vs M/S. Star Bone Mill & Fertiliser Company (2013) 9 SCC 319, para 21***

The respondent filed Original Suit No. 582 of 1974 for declaration of title and for injunction, restraining the appellants from evicting the said respondent/plaintiff from the property in dispute. The trial court decreed the suit and Appeal filed by the Appellant was dismissed. The Hon'ble Supreme Court on appeal held the courts below erred in holding, that revenue records confer title, for the reason that they merely show possession of a person set aside judgment of courts below and dismissed the suit.

"Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act."

iii. ***Kamla Vs. Smt. Gulabi Devi & Another (2015) SCC Online All 1261, para 11- 12***

Original Suit was instituted by respondent /plaintiff seeking permanent injunction in respect to property in dispute. The plaintiff relied upon the sale deed and revenue entries in khatauni in her favour and the defendant relied upon the revenue entries made in her favour in later khataunis. The lower courts decreed the suit however the Hon'ble High Court set aside the judgment of sub ordinate courts and dismissed the suit.

"The entries in revenue record may refer to the possession of the person on the land in dispute and prima facie it may raise a presumption of title but such presumption is rebuttable."

Paras 11, 12.

35

(2007) 13 Supreme Court Cases 565

(BEFORE S.B. SINHA AND H.S. BEDI, JJ.)

GURUNATH MANOHAR PAVASKAR AND OTHERS .. Appellants;

Versus

NAGESH SIDDAPPA NAVALGUND AND OTHERS .. Respondents.

Civil Appeal No. 5794 of 2007†, decided on December 11, 2007

A. **Specific Relief Act, 1963 — Ss. 36, 38 and 39 — Permanent mandatory injunction and prohibitory injunction — Title to the land should first be proved by plaintiff seeking injunction — Suit filed by respondent-plaintiffs for direction for demolition of structure and removal of signboard raised by appellant-defendants on the suit land by encroaching thereon and for restoration of vacant possession and for injunction against defendants' interference with peaceful enjoyment of the property — Burden of proof on plaintiffs to prove that the suit land belonged to them — Suit cannot be decreed on the basis of revenue records alone but should be decided on appreciation of evidence keeping in view correct legal principles — Court erred in issuing permanent injunction in mandatory form without deciding title to the land**

B. **Evidence Act, 1872 — Ss. 83, 35, 101 and 110 — Revenue records — Survey map — Not a document of title — Only raises a presumption — Burden to prove title to the land on plaintiff**

Held :

It is one thing to say that there does not exist any ambiguity as regards description of the suit land in the plaint with reference to the boundaries as mentioned therein, but it is another thing to say that the land in suit belongs to the respondents. It was for the plaintiffs to prove that the land in suit formed part of his own land. It was not for the defendants to do so. It was, therefore, not necessary for them to file an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the Advocate Commissioner was not correct. The suit could not have been, therefore, decreed inter alia on the basis of survey map alone. In a case of this nature, even Section 83 of the Evidence Act would not have any application. (Para 10)

Furthermore, the High Court committed an error in also throwing the burden of proof upon the appellant-defendants without taking into consideration the provisions of Section 101 of the Evidence Act. A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act. The courts below, were, therefore, required to appreciate the evidence keeping in view the correct legal principles in mind. (Paras 11 and 12)

Narain Prasad Aggarwal v. *State of M.P.*, (2007) 11 SCC 736 : (2007) 8 Scale 250, *relied on*

† Arising out of SLP (C) No. 20584 of 2005. From the Judgment and Order dated 4-7-2005 of the High Court of Karnataka at Bangalore in RSA No. 135 of 2003

The courts below not only passed a decree for prohibitory injunction but also passed a decree for mandatory injunction. The High Court opined that the trial court could exercise discretion in this behalf. It is again one thing to say that the courts could pass an interlocutory order in the nature of mandatory injunction in exercise of its jurisdiction under Section 151 CPC on the premise that a party against whom an order of injunction was passed, acted in breach thereof; so as to relegate the parties to the same position as if the order of injunction has not been violated, but, it is another thing to say that the courts shall exercise the same power while granting a decree of permanent injunction in mandatory form without deciding the question of title and/or leaving the same open. How, in the event the structures are demolished, it would be possible for the appellants to work out their remedies in accordance with law in regard to the title of the property has not been spelt out by the High Court. (Para 13)

Therefore, the interest of justice would be subserved if the impugned judgments are set aside and the matter is remitted to the learned trial Judge for consideration of the matter afresh. (Para 14)

Appeal allowed R-M/A/37082/S

Advocates who appeared in this case :
S.N. Bhat, Advocate, for the Appellants;
Ms Kiran Suri and Rajesh Mahale, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2007) 11 SCC 736 : (2007) 8 Scale 250, *Narain Prasad Aggarwal* v. *State of M.P.* 568*e*

The Judgment of the Court was delivered by

S.B. SINHA, J.— Leave granted.

2. The defendants before the trial court are the appellants herein.

3. The respondent-plaintiffs filed a suit against the appellants praying inter alia for the following reliefs:

> "(*a*) That the encroached portion of the suit property by erection of structure measuring 369 1/9 sq yd be directed to be demolished at the cost and risk of Defendants 1 to 5 and consequently the defendants be further directed to maintain the rules of set back in respect of their remaining construction enabling the plaintiffs to use and enjoy the free light and air to their property and similarly Defendant 6 be directed to remove the signboard and the firm from the encroached area of the suit property. Further, the defendants be directed to give the respective vacant possession of the suit land to the plaintiffs.
>
> (*aa*) A decree of permanent injunction against the defendants, their agents, their relative or anybody on their behalf to interfere with the plaintiffs' peaceful possession and enjoyment of suit property...."

4. The respondents contended that they are owners of a portion of Survey No. 1008/1 bearing CTS Nos. 4823/A-17 and 4823/A-18 measuring 662 2/9 and 533 3/9 sq yd respectively and the appellants who are the owners of the abutting land bearing CTS No. 4823/A-1 had encroached upon a portion of CTS Nos. 4823/A-17 and 4823/A-18 measuring 249 1/9 and 120 sq yd respectively. The plaintiffs purchased the said plots by a deed of sale dated

7-11-1984, whereas the date of purchase made by the defendants dated 17-8-1992.

5. The learned trial Judge having regard to the pleadings of the parties framed issues; Issue 3 whereof reads as under:

> "*3.* Whether Defendants 1 to 5 prove that the vendor of the plaintiff by way of fabrication of false documents had sold the suit schedule property to these plaintiffs, thus, the plaintiffs are not the owners of the suit schedule property?"

It was answered stating:

> "My answers to the above issues are as follows:
>
> * * *
>
> Issue 3 does not arise."

6. During the pendency of the said suit, an application for injunction was filed. Allegedly, the appellants raised constructions upon the suit land in violation of the said order of injunction. The learned trial Judge in regard to the title of the plaintiffs over the suit land held:

> "... According to the learned counsel for the plaintiff since CTS No. 4823/A-1 is completely acquired by Municipal Corporation, Belgaum for Malmaruti Extension Scheme then the property of Defendants 1 to 6 is not in existence in the name of the defendants. But according to me since Defendants 1 to 5 also have purchased the property through a registered sale deed and also their vendors have also purchased the said property through a registered sale deed and as such it cannot be said that the property of the defendants is not in existence. But at the same time the say of the defendant cannot be taken into believed (sic) that CTS Nos. 4823/A-17 and 4823/A-18 are not in existence. When in the survey map as well as in other documents these properties are clearly demarcated and identified then according to me, these properties have been clearly demarcated in relevant records...."

7. The High Court affirmed the said findings stating:

> "It is also clear from the perusal of the judgment and decree passed by the courts below that both the courts below have rightly decided on the basis that it is unnecessary to give any decision on the title of the property as the suit is for permanent and mandatory injunction and the trial court has rightly observed that it is always open to the defendants to work out their remedy in accordance with law, regarding their title to the property CTS No. 4823/A-1 and no finding could be given on title in the present case and when there is no finding on the title of the property in the present case, it is clear that it is always open to the defendants to work out their remedy, in accordance with law. It is clear from the perusal of the material on record that Defendant 6 who also suffered decree of injunction and permanent injunction though had filed first appeal before the lower appellate court has not chosen to challenge the judgment and decree passed by first appellate court in RA No. 252 of 2001...."

8. Indisputably, an Advocate Commissioner was appointed. He filed a report. An objection thereto was also filed. He, however, could not be cross-examined. His report, therefore, could not have been taken into consideration although the same formed part of the record.

9. The High Court although took into consideration the fact that the plaintiffs did not seek for any declaration of title, as noticed hereinbefore, opined that the question of title can be gone into in an appropriate suit. All the courts relied on Ext. P-35 which was allegedly produced by the appellants but were made use of by the respondents, wherein it had been shown that Chalta No. 63 was allotted in respect of CTS No. 4823/A-1, Chalta No. 62-A was allotted in respect of CTS No. 4823/A-17 and Chalta No. 62-B was allotted in respect of CTS No. 4823/A-18.

10. It is one thing to say that there does not exist any ambiguity as regards description of the suit land in the plaint with reference to the boundaries as mentioned therein, but it is another thing to say that the land in suit belongs to the respondents. It was for the plaintiffs to prove that the land in suit formed part of CTS Nos. 4823/A-17 and 4823/A-18. It was not for the defendants to do so. It was, therefore, not necessary for them to file an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the Advocate Commissioner was not correct. The suit could not have been, therefore, decreed inter alia on the basis of Ext. P-35 alone. In a case of this nature, even Section 83 of the Evidence Act would not have any application.

11. Furthermore, the High Court committed an error in also throwing the burden of proof upon the appellant-defendants without taking into consideration the provisions of Section 101 of the Evidence Act. In *Narain Prasad Aggarwal* v. *State of M.P.*[1] this Court opined: (SCC p. 746, para 19)

> "*19.* Record-of-right is not a document of title. Entries made therein in terms of Section 35 of the Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable."

12. A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act. The courts below, were, therefore, required to appreciate the evidence keeping in view the correct legal principles in mind.

13. The courts below appeared to have taken note of the entries made in the revenue records wherein the name of Municipal Corporation, Belgaum appeared in respect of CTS No. 4823/A-1. We have, however, noticed that the learned trial Judge proceeded on the basis that the said property may be belonging to the appellant-defendants. The courts below not only passed a decree for prohibitory injunction but also passed a decree for mandatory

1 (2007) 11 SCC 736 : (2007) 8 Scale 250

injunction. The High Court opined that the trial court could exercise discretion in this behalf. It is again one thing to say that the courts could pass an interlocutory order in the nature of mandatory injunction in exercise of its jurisdiction under Section 151 of the Code of Civil Procedure on the premise that a party against whom an order of injunction was passed, acted in breach thereof; so as to relegate the parties to the same position as if the order of injunction has not been violated, but, it is another thing to say that the courts shall exercise the same power while granting a decree of permanent injunction in mandatory form without deciding the question of title and/or leaving the same open. How, in the event the structures are demolished, it would be possible for the appellants to work out their remedies in accordance with law in regard to the title of the property has not been spelt out by the High Court.

14. We, therefore, are of the opinion that the interest of justice would be subserved if the impugned judgments are set aside and the matter is remitted to the learned trial Judge for consideration of the matter afresh. The plaintiffs may, if they so desire, file an application for amendment of plaint praying inter alia for declaration of his title as also for damages as against the respondents for illegal occupation of the land. It would also be open to the parties to adduce additional evidence(s). The learned trial Judge may also appoint a Commissioner for the purpose of measurement of the suit land, whether an Advocate Commissioner or an officer of the Revenue Department.

15. Before us, additional documents have been filed by the appellants showing some subsequent events. It would be open to the defendants to file an application for adduction of additional evidence before the trial Judge which may be considered on its own merits.

16. The appeal is allowed with the aforementioned observations. We would request the trial court to consider the desirability of disposing of the matter as expeditiously as possible and preferably within a period of six months from the date of communication of this order. Costs of this appeal shall be the cost in the suit.

(2007) 13 Supreme Court Cases 569

(BEFORE DR. ARIJIT PASAYAT AND P.P. NAOLEKAR, JJ.)

STATE OF UTTAR PRADESH .. Appellant;

Versus

ABDUL KARIM AND OTHERS .. Respondents.

Criminal Appeal No. 364 of 2002†, decided on July 26, 2007

Penal Code, 1860 — Ss. 302/34 — Benefit of doubt — Identification of accused — Discrepancy in evidence — Deceased assaulted in a field resulting in his death — Deceased's widow claimed to have seen the assailants while they were escaping after the assault from a distance of

† From the Judgment and Order dated 15-5-2000 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1019 of 1980

Para-21

(40)

the provisions of Order 39 Rules 1 and 2 CPC and has committed a serious error in deciding the scope of Section 53-A of the Transfer of Property Act, 1882 and Order 2 Rule 2 CPC. As noticed above the Civil Judge while granting ad interim injunction very categorically observed in the order that respective rights of the parties shall be decided at the time of final disposal of the suit. The very fact that Plaintiff 2 is in possession of the property as a tenant under Plaintiff 1 and possession of Plaintiff 2 was not denied, the interim protection was given to Plaintiff 2 against the threatened action of the defendants to evict her without following the due process of law. In our considered opinion, the order[1] passed by the learned Single Judge cannot be sustained in law.

8. For the aforesaid reasons, we allow this appeal and set aside the order[1] passed by the High Court in the aforesaid appeal arising out of the order of injunction. However, before parting with the order we are of the view that since the suit is pending for a long time the trial court shall hear and dispose of the suit within a period of four months from the date of receipt of copy of this order. It goes without saying that the trial court shall not be influenced by any of the observation made in the order passed by the appellate court as also by this Court and the suit shall be decided on its own merits.

(2013) 9 Supreme Court Cases 319

(BEFORE DR B.S. CHAUHAN AND F.M. IBRAHIM KALIFULLA, JJ.)

STATE OF ANDHRA PRADESH AND OTHERS .. Appellants;

Versus

STAR BONE MILL AND FERTILISER COMPANY .. Respondent.

Civil Appeal No. 6690 of 2004†, decided on February 21, 2013

A. **Property Law — Transfer of Property Act, 1882 — Ss. 54, 55(1)(a) to 55(1)(c) & 55(2) and 7 & 8 — Buyer's claim to paramount ownership and title in respect of property purchased — Seller having different title from title that was professed to be sold i.e. seller concerned owned only leasehold title, but professed to sell paramount title — Seller concerned (one *A*) held the leasehold under the Government as lessor — Effect — Held, such sale deed was invalid and inoperative — Suit for declaration of paramount title to said property by buyer against Government, held, could not be decreed — Doctrines and Maxims — *Nemo dat qui non habet* (no one gives what he has not got) — *Nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he has himself) — Specific Relief Act, 1963, S. 34**

B. **Evidence Act, 1872 — S. 17 — Admission by transferee as to non-holding of title by transferor — Letter written by buyer, *S* who had purportedly been sold the paramount title by registered sale deed by *A*,**

† From the Judgment and Order dated 22-3-2004 of the High Court of Judicature of Andhra Pradesh at Hyderabad in City Civil Court Appeal No. 72 of 1989

stating that *S* had been cheated by its seller, *A*, as *A* had professed to sell paramount title which *A* did not hold — Held, this was a clear admission by *S* that *A* did not have paramount title — Hence, as no person can grant a better title than he himself holds, *S* could not come to hold paramount title by virtue of the said sale deed — Property Law — *Nemo dat quod non habet* — Admission by purported transferee of title that purported transferor did not hold that title — Held, will bind such purported transferee — Transfer of Property Act, 1882 — Ss. 7, 8 and 54 — Civil Procedure Code, 1908, Or. 12 R. 6 (Paras 6, 16 and 17)

Held :

No person can grant a title better than he himself possesses. In the instant case, unless it is shown that *A* (i.e. seller) had valid paramount title, the respondent-plaintiff (i.e. buyer) could not claim any relief whatsoever from court. The courts below failed to appreciate that the sale deed dated 11-11-1959 was invalid and inoperative, as the documents on record established that the seller *A* was merely a lessee of the Government. The documents show that the Government was the absolute owner of the suit land since at least 1920. Hence, the judgments of the courts below decreeing the suit filed by the respondent-plaintiff for declaration of paramount title are hereby set aside and the suit is dismissed. (Paras 17, 24, 16 and 25)

State of A.P. v. *Star Bone Mill & Fertiliser Co.*, City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP), *reversed*

C. **Property Law — Ownership and Title — Proof — Presumption of title in favour of possessor under S. 110, Evidence Act, 1872 — Rebuttability of — Held, presumption of title as a result of possession arises only where the facts disclose that no title vests in any party — Further held, where possession of plaintiff is not prima facie wrongful, and his title is not proved, it certainly does not mean that because a man has title over some land, he is necessarily in possession of it — It in fact means that, if at any time a man with title was in possession of said property, the law allows the presumption that such possession was in continuation of the title vested in him — Thus, all that S. 110 provides for is that where apparent title is with the plaintiffs, then in order to displace said claim of apparent title and to establish good title in himself, it is incumbent upon defendant to establish by satisfactory evidence the circumstances that favour defendant's version — Presumption of possession and/or continuity thereof, both forward and backward, can be raised under S. 110, Evidence Act, 1872**

— In present case, plaintiff *S* was in possession of property in dispute as transferee (as sub-lessee) of a lessee (*A*) of the Government — *S* claiming paramount title by filing suit for declaration of paramount title against Government — One *R* shown as pattadar in revenue record of that land — No explanation by plaintiff *S* as to who *R* was and how plaintiff was concerned with it — Documents showing that the Government was absolute owner of disputed land — On such facts, judgments of courts below decreeing plaintiff's suit for paramount title, held, not justified and, therefore, set aside — Evidence Act, 1872 — Ss. 110 and 114 — Specific Relief Act, 1963 — Ss. 34, 5 and 6 — Criminal Procedure Code, 1973 — S. 145 — Penal Code, 1860, Ss. 154 and 158

Held :

The principle enshrined in Section 110 of the Evidence Act, 1872 is based on public policy with the object of preventing persons from committing breach of the peace by taking the law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 CrPC, and Sections 154 and 158 IPC, were enacted. All the aforesaid provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of wastelands, or where nothing is known about possession one way or another. Presumption of title as a result of possession can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means that, if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment, etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act. (Para 21)

The trial court recorded a finding to the effect that the name of one *R* was shown as pattadar in respect of the land in dispute and the respondent-plaintiff *S* is in possession. The respondent-plaintiff could not furnish any explanation herein as to who was this *R* and how the respondent-plaintiff was concerned with it. The courts below have erred in ignoring the revenue record, particularly, the documents showing that the Government was the absolute owner of the suit land since at least 1920. (Paras 16 and 23)

Gurunath Manohar Pavaskar v. *Nagesh Siddappa Navalgund*, (2007) 13 SCC 565; *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165; *Chief Conservator of Forests* v. *Collector*, (2003) 3 SCC 472, *relied on*

D. **Property Law — Ownership and Title — Proof — Revenue record — Nature and value of — Held, it is not a document of title — It merely shows possession of a person — Evidence Act, 1872, S. 35 (Paras 21 and 24)**

Gurunath Manohar Pavaskar v. *Nagesh Siddappa Navalgund*, (2007) 13 SCC 565, *relied on*

E. **Evidence Act, 1872 — S. 90 — Presumption under, as to documents 30 yrs old — Reckoning of period of 30 yrs mentioned in S. 90 — Mode of — Held, said period must be reckoned backward from the date of offering of the document, and not any subsequent date i.e. the date of decision of suit or appeal — In present case, suit filed in 1974 on basis of registered sale deed dt. 11-11-1959 — High Court considering said sale deed in the light of S. 90 and reckoning period of 30 yrs as to said deed from 1959 till the date of its impugned decision passed in appeal i.e. 22-3-2004, treating the appeal as a continuation of the suit — Held, such a view by High Court was impermissible and perverse — Hence, not acceptable (Paras 14 and 15)**

F. **Property Law — Ownership and Title — Estoppel or acquiescence — Ownership of property — Acceptance of municipal/agricultural tax by State in respect of property or grant of loan by bank upon hypothecation/ mortgage of the property — Effect of — Held, mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there cannot be estoppel against the statute — Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property — Evidence Act, 1872, S. 115 otherwise — Transfer of Property Act, 1882 — Ss. 7, 8 and 54 — *Nemo dat quod non habet*** **(Para 22)**

Appeal allowed W-D/51461/CV

Advocates who appeared in this case :
Amarendra Sharan, Senior Advocate (C.K. Sucharita and Ms Rumi Chanda, Advocates) for the Appellants;
D. Rama Krishna Reddy and Ms Asha Gopalan Nair, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2007) 13 SCC 565, *Gurunath Manohar Pavaskar* v. *Nagesh Siddappa Navalgund* 326*c*
2. City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP), *State of A.P.* v. *Star Bone Mill & Fertiliser Co.* **(reversed)** 322*e*, 324*d*, 325*d*
3. (2003) 3 SCC 472, *Chief Conservator of Forests* v. *Collector* 326*e*
4. AIR 1968 SC 1165, *Nair Service Society Ltd.* v. *K.C. Alexander* 326*c*

The Judgment of the Court was delivered by

DR B.S. CHAUHAN, J.— This appeal has been preferred against the impugned judgment and order dated 22-3-2004, passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in *State of A.P.* v. *Star Bone Mill & Fertiliser Co.*[1], by way of which the civil suit filed by the respondent against the appellants, claiming title over the suit land in dispute, has been upheld.

2. The facts and circumstances giving rise to this appeal are: one Shri M.A. Samad, Assistant Engineer, City Improvement Board, Hyderabad, along with his associate, converted the land in dispute measuring 3.525 acres i.e. 17,061 sq yd, in favour of the Forest Department in 1920. The suit land was given on lease on 21-5-1943 to M/s A. Allauddin & Sons for a fixed time period, incorporating the terms and conditions that the lessee would not be entitled to extend the existing building in any way, or to erect any structure on the land leased. The lessee was also prohibited from transferring the suit land by any means.

3. The said M/s A. Allauddin & Sons, a proprietary concern, sent a letter dated 29-9-1945 in response to the eviction notice, informing the appellants that it was not possible for it to remove the factory established on the suit land, and thus, the said lessee asked the appellants to put up the said property for rent. The said firm, then sent a letter dated 1-5-1951, offering rent of

1 City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP)

(44)

Rs 600 per annum. The appellants vide letter dated 20-12-1954, informed M/s A. Allauddin & Sons to vacate the site within a period of one month, or else be evicted in accordance with law, and in that case it would also be liable to pay damages. In spite of receiving such a letter, the said lessee/tenant remained in possession of the suit premises, and continued to pay rent, as is evident from the letter dated 15-8-1956.

4. The appellants, however, vide letter dated 21-2-1958, asked the said lessee/tenant M/s A. Allauddin & Sons, yet again, to vacate the suit land. Instead of vacating the suit land, M/s A. Allauddin & Sons executed a lease deed dated 24-2-1958, and got it registered on 6-4-1958, in favour of Syed Jehangir Ahmed and others (partners of the respondent firm, M/s Star Bone Mill and Fertiliser Co.), for a period of two years. During the subsistence of the said sublease, the partners of the firm M/s A. Allauddin & Sons, executed a sale deed on 11-11-1959 in favour of the respondent, for a consideration of Rs 45,000. The said sale deed was also registered, and possession was handed over to the respondent.

5. The respondent herein filed a petition in 1964 before the Minister for Agriculture & Forest, seeking permanent lease of the suit premises in his favour. On 26-4-1967, an order was passed by the Ministry of Agriculture & Forest in respect of recovery of arrears of rent as regards the said land. The respondent vide letter dated 7-5-1969, offered higher rent to the appellants for the suit land.

6. On 22-5-1970, the respondent wrote a letter to the Chief Minister of Andhra Pradesh (Ext. B-39), stating that he had been cheated by M/s A. Allauddin & Sons, as it had executed a sale deed in his favour, even though it had no title, and a very high rate of rent was fixed by the department, which should be reduced and till the matter is finally decided, a rent of Rs 569 per month should be accepted. The said application/petition was rejected by the Assistant Secretary to the Government, Food & Agriculture Department, vide letter dated 18-12-1970. Aggrieved, the respondent filed Writ Petition No. 187 of 1971 wherein an interim order dated 12-1-1971 was passed, to the effect that the recovery of rent for the period prior to 26-4-1969 would be made at the rate of Rs 568 per month instead of Rs 1279 per month. Subsequent to 26-4-1969, rent would be recovered at the rate of Rs 1279 per month. In case arrears are not paid by the respondent, he would be vacated from the suit land.

7. In view of the interim order of the High Court, the appellants issued a demand notice for a sum of Rs 45,484.62p. However, vide order dated 19-10-1971, the High Court directed the respondent to deposit a sum of Rs 30,000, in eight monthly instalments. The said writ petition was disposed of vide order dated 18-2-1972, asking the respondent to approach the appropriate forum to establish his rights over the suit land, or to make a representation to the State Government for this purpose.

8. The appellants served notice dated 8-4-1974, upon the respondent under Section 7 of the Land Encroachment Act, and the respondent submitted

a reply to the said show-cause notice on 24-6-1974. The matter was adjudicated and decided on 21-8-1974, under Section 6 of the Land Encroachment Act, and the respondent was directed to vacate the suit land. The respondent filed Writ Petition No. 5222 of 1974 before the High Court, however, the same was dismissed, after giving liberty to the respondent to approach the civil court. Thus, the respondent filed Original Suit No. 582 of 1974 for declaration of title and for injunction, restraining the appellants from evicting the said respondent-plaintiff from the property in dispute.

9. The appellants contested the suit by filing a written statement, and on the basis of the pleadings therein, a large number of issues were framed, including whether M/s A. Allauddin & Sons was actually the owner and possessor of the suit land; and whether it could transfer the suit land to the respondent-plaintiff, vide registered sale deed dated 11-11-1959. The City Civil Court, vide judgment and decree dated 25-4-1989 decreed the suit, holding that the Government was not the owner of the suit land, and that the respondent-plaintiff had a better title over it. Thus, he was entitled for declaration of title, and injunction as sought by him.

10. Aggrieved, the appellants preferred City Civil Court Appeal No. 72 of 1989 before the High Court, challenging the said judgment and decree dated 25-4-1989, which was dismissed vide judgment and decree dated 22-3-2004[1], affirming the judgment and decree of the trial court. Hence, this appeal.

11. Shri Amarendra Sharan, learned Senior Counsel appearing on behalf of the appellants, has submitted that the courts below misdirected themselves and did not determine the issue as regards, whether the vendor of the respondent-plaintiff had any title over the suit property. The same is necessary to determine the validity of the sale deed in favour of the respondent-plaintiff. The issue before the trial court was not whether the Government was the owner of the said land or not. No such issue was framed either. Moreover, such an issue could not be framed in view of the admission made by the respondent-plaintiff itself, as it had been paying rent regularly to the Government, and the same was admitted by it, by way of filing an application before the Government stating, that M/s A. Allauddin & Sons had cheated it by executing a sale deed in its favour, without any authority/title. It thus, requested the Government to execute a lease deed/rent deed in its favour. It was not its case, that in its earlier two writ petitions filed by it, it had acquired title over the land validly, or that M/s A. Allauddin & Sons, etc. had any title over the said suit land. The lease deed executed by the Government in favour of M/s A. Allauddin & Sons, dated 21-5-1943 must be considered in light of the provisions of Section 90 of the Evidence Act, 1872 (hereinafter referred to as "the Evidence Act"), and not the sale deed dated 11-11-1959, as the suit was filed in 1974, just after a period of 15 years of sale, and not 30 years. The courts below have erred in applying the provisions

1 *State of A.P.* v. *Star Bone Mill & Fertiliser Co.*, City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP)

of Section 90 of the Evidence Act. The findings of fact recorded by the courts below are perverse, being based on no evidence and have been recorded by a misapplication of the law. Thus, the appeal deserves to be allowed.

12. On the contrary, Shri D. Rama Krishna Reddy, learned counsel appearing on behalf of the respondent, has opposed the appeal, contending that the findings of fact recorded by the courts below, do not warrant interference by this Court. It is evident from the revenue records that possession is prima facie evidence of ownership, and that the same is by itself, a limited title, which is good except to the true owner. The admission and receipt of tax constitutes admission of ownership, and the entries in the revenue record must hence, be presumed to be correct. In the revenue record, one Raja Ram has been shown to be the owner of the land, the Forest Department cannot claim any title or interest therein. The said appeal lacks merit, and is liable to be dismissed.

13. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

14. Admittedly, the High Court erred in holding that the sale deed dated 11-11-1959, must be considered in the light of the provisions of Section 90 of the Evidence Act, instead of the period mentioned therein, thereby treating the appeal as a continuation of the suit. Therefore, the period of 30 years mentioned therein, has been calculated from 1959, till the date of the decision of the appeal i.e. 22-3-2004[1]. This view itself is impermissible and perverse, and cannot be accepted. The courts below have not given any reason, whatsoever, for the said lease deed to be treated as having been executed on 21-5-1943, under Section 90 of the Evidence Act and, thus, for believing that the land belonging to the Forest Department, which had in turn, given it to M/s A. Allauddin & Sons on lease.

15. Section 90 of the Evidence Act is based on the legal maxims: *nemo dat qui non habet* (no one gives what he has not got); and *nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he has himself). This section does away with the strict rules, as regards the requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The period is to be reckoned backward from the date of the offering of the document, and not any subsequent date i.e. the date of decision of suit or appeal. Thus, the said section deals with the admissibility of ancient documents, dispensing with proof as would be required, in the usual course of events in a usual manner.

16. There has been a clear admission by the respondent-plaintiff in its letter dated 22-5-1970 (Ext. B-39), to the effect that it had been cheated by M/s A. Allauddin & Sons, who had no title over the suit land, and sale deed dated 11-11-1959, had thus been executed in favour of the respondent-plaintiff by way of misrepresentation. The said application was

1 *State of A.P.* v. *Star Bone Mill & Fertiliser Co.*, City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP)

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rejected vide order dated 18-12-1970. While filing the writ petition, the respondent-plaintiff did not raise the issue of title of the Forest Department, in fact, the dispute was limited only to the extent of the amount of rent, and its case remained the same even in the second writ petition, when it was evicted under the Encroachment Act. The trial court framed various issues, and without giving any weightage to the documents filed by the appellant-defendant, decided the case in favour of the respondent-plaintiff, with total disregard to any legal requirements. The courts below have erred in ignoring the revenue record, particularly, the documents showing that the Government was the absolute owner of the suit land since at least 1920.

17. No person can claim a title better than he himself possesses. In the instant case, unless it is shown that M/s A. Allauddin & Sons had valid title, the respondent-plaintiff could not claim any relief whatsoever from court.

18. In *Gurunath Manohar Pavaskar* v. *Nagesh Siddappa Navalgund*[2] this Court held as under: (SCC p. 568, para 12)

> "*12.* A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act."

19. In *Nair Service Society Ltd.* v. *K.C. Alexander*[3], dealing with the provisions of Section 110 of the Evidence Act, this Court held as under: (AIR p. 1173, para 15)

> "*15.* ... possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides."

20. In *Chief Conservator of Forests* v. *Collector*[4], this Court held that: (SCC p. 484, para 20)

> "*20.* ... presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title."

21. The principle enshrined in Section 110 of the Evidence Act is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of the Code of Criminal Procedure, 1973, and Sections 154 and 158 of the Penal Code, 1860, were enacted. All the aforesaid provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases

2 (2007) 13 SCC 565 : AIR 2008 SC 901
3 AIR 1968 SC 1165
4 (2003) 3 SCC 472 : AIR 2003 SC 1805

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where proof of actual possession cannot reasonably be expected, for instance, in the case of wastelands, or where nothing is known about possession one way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment, etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act.

22. The courts below have failed to appreciate that mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there may not be estoppel against the statute. Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property.

23. The trial court has recorded a finding to the effect that the name of one Raja Ram was shown as pattadar in respect of the land in dispute and the respondent-plaintiff is in possession. Therefore, the burden of proof was shifted on the Government to establish that the suit land belonged to it. The learned counsel for the respondent-plaintiff could not furnish any explanation before us as to who was this Raja Ram, pattadar and how the respondent-plaintiff was concerned with it. Moreover, in absence of his impleadment by the respondent-plaintiff such a finding could not have been recorded.

24. The courts below erred in holding that revenue records confer title for the reason that they merely show possession of a person. The courts below further failed to appreciate that the sale deed dated 11-11-1959 was invalid and inoperative, as the documents on record established that the vendor was merely a lessee of the Government.

25. In view of the above, we are of the considered opinion that findings of fact recorded by the courts below are perverse and liable to be set aside. The appeal succeeds and is allowed. The judgments of the courts below are hereby set aside. The suit filed by the respondent-plaintiff is dismissed.

Para. 11-12

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Second Appeal No. - 1356 of 1998

Kamla v. Gulabi Devi

2015 SCC OnLine All 1261

(BEFORE SUDHIR AGARWAL, J.)

Kamla ..... Appellant

V.

Smt. Gulabi Devi & Another ..... Respondents

Counsel for Appellant:- Faujdar Rai, Chandra Kumar Rai

Counsel for Respondent:- Avadhesh Singh

Second Appeal No. - 1356 of 1998

Decided on January 17, 2015

Hon'ble Sudhir Agarwal, J.

1. Heard Sri. C.K. Rai, Advocate, for appellant. None appeared on behalf of respondents though the case has been called in revised and name of Sri. Avadhesh Singh has been shown in the cause list and counsel for respondents. In these circumstances, I proceed to hear and decide this appeal after hearing learned counsel for appellant.

2. This appeal was admitted vide order dated 12.5.2014 on the following substantial questions of law:

"(i) Whether in view of the law laid down in Azahar Husain v. District Judge, Saharanpur reported in 1998 RD. 493 the decision of the Courts below for upholding the Civil Court jurisdiction suffers from the error of law?

(ii) Whether the Courts below have erred in holding that the Suit of the plaintiff-respondent is not barred by section 49 of the U.P.C.H. Act is contrary to law laid down in AIR 1991 SC 249?

(iii) Whether the decree passed by the Courts below suffers from the error of law as the Courts below have acted on conjecture and surmises in ignoring the entries in the revenue papers in favour of the appellant?"

3. Both the Courts below have found that defendant-appellant was in possession of property in dispute and in the revenue record, his name was entered but observing that revenue entries have been obtained probably fraudulently, Courts below have granted injunction in favour of plaintiff by ignoring the said entries. It is contended that once the revenue entries exists in favour of defendant, the same could not have been ignored by Civil Court and the revenue entries could have been disputed before the Revenue Court. Reliance is placed on the Apex Court's decision in *Azhar Hasan v. District Judge, Saharanpur* 1998 (89) RD 493.

4. Learned counsel for respondents, however, sought to support the judgments impugned in this appeal and contended that the revenue entries have rightly been ignored by Courts below since they were obtained illegally and fraudulently and, therefore, the jurisdiction of Civil Court was not barred.

5. Before answering the questions as above, it would be appropriate to look into certain relevant facts giving rise to the dispute in the present appeal.

6. Original Suit No. 417 of 1987 was instituted by Smt. Gulabi Devi and her son Ram Asrey, seeking permanent injunction in respect to property in dispute shown as ABCD in the map appended to the plaint situated in Plot No. 632/346, new number 148, area 55 kari. It is not in dispute that aforesaid property belong to one Ram Badan Pandey. The case set up by plaintiffs was that aforesaid property along with other holdings of Ram Badan was transferred by sale in favour of plaintiff no. 1 Smt. Gulabi Devi, widow of Ram Briksh Pandey vide registered sale-deed dated 7.7.1958 and since then it is in her possession but defendant, Kamala Prasad, an influential person, is trying to interfere in the peaceful possession of plaintiffs, therefore, should be restrained from such interference.

7. The case set up by defendant-appellant was that plaintiffs have no connection with the property in dispute and it was never in their possession. There was consolidation proceeding in the village in question in 1958 in which no attempt was made by plaintiffs at any point of time to get their name recorded in the revenue records. The disputed land was transferred by sale by Sri. Ram Badan vide sale-deed dated 11.11.1985 to Vijay Shankar, Jai Prakash and Ramdei who thereafter transferred the same to the defendant vide sale deed dated 3.2.1987 and it is recorded in revenue record in the name of defendant who is also in possession thereof. He pleaded that suit was barred by Section 49 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "Act, 1953") as also Section 331 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act, No. 1 of 1951) (hereinafter referred to as "Act, 1950") read with Section 34 of Specific Relief Act, 1963 (hereinafter referred to as "Act, 1963"). The Trial Court formulated 8 issues and relevant issues no. 1, 2, 3, 4 and 6 are as under:

"(1) क्या वादीगण विवादित भूमि के स्वामी व अधिव्यय भोगी हैं?

(2) क्या वाद धारा–49 उ0प्र0 चकबन्दी अधि0 से बाधित है?

(3) क्या वाद का दर्शनाधिकार इस न्यायालय को नहीं है?

(4) क्या वाद धारा–331 जमींदारी उन्मूलन अधि0 से बाधित है?"

"(6) क्या वाद धारा 34 वि0अनुतोष अधि0 से बाधित है?

English Translation by the Court:

"(1) Whether the plaintiffs are owners in occupation over the disputed land?

(2) Whether the suit is barred by Section 49 of The Uttar Pradesh Consolidation Act?

(3) Whether this court has no jurisdiction to hear the suit?

(4) Whether the suit is barred by Section 331 of The Zamindari Abolition Act?

(6) Whether the suit is barred by Section 34 of The Specific Relief Act?

8. The plaintiffs placed on record the registered sale-deed dated 7.7.1958 and copy of Khatauni of 1371-1373 fasali showing that her name was recorded in revenue records after striking off name of Ram Badan. On the contrary, the documentary evidence relied by defendant included the copy of Khatauni of 1390 fasali and 1395 fasali which shows that on 15.3.1986 name of Ram Badan was cancelled and in his place names of Vijay Shankar, Jai Prakash sons of Ram Badan were recorded. Thereafter, on

16.5.1986 name of defendant was recorded on the basis of sale-deed dated 12.3.1987 after cancelling names of Vijay Shankar, Jai Prakash and Ram Dei. An order was passed for recording the name of defendant-appellant Kamla Prasad. The sale-deeds executed by Ram Badan in favour of Vijay Shankar etc. and subsequently in favour of defendant were not challenged by plaintiffs.

9. It is no doubt true that the revenue entries are not an evidence to show title of tenure holder but shows possession of property concerned by the person, whose name is recorded in the revenue entries. That too a presumption only. This presumption is rebuttable.

10. In *Narain Prasad Agarwal* v. *State of Madhya Pradesh* 2007 (8) SCALE 250, the Court said:

"Record of right is not a document of title. Entries made therein in terms of Section 35 of the Indian Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt that such a presumption is rebuttable."

11. In *Gurunath Manohar Pavaskar* v. *Nagesh Siddappa Navalgund* AIR 2008 SC 901, the Court said:

"A revenue record is a not a document of title. It merely raises a presumption in regard to the possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Indian Evidence Act."

12. The entries in revenue record may refer to the possession of the person on the land in dispute and prima facie it may raise a presumption of title but such presumption is rebuttable.

13. In *Nair Service Society Ltd.* v. *K.C. Alexander* AIR 1968 SC 1165, construing Section 110 of Evidence Act, the Court said:

"Possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides."

14. In *Chief Conservator of Forests* v. *Collector* AIR 2003 SC 1805, the Court said:

"Presumption, which is rebuttable is attracted when the possession is prima facie lawful and when the contesting party has no title."

15. Recently, referring to above authorities, the Court in *State of A.P.* v. *Star Bone Mill and Fertilizer Co.* JT 2013 (3) SC 401 said:

"13. The principle enshrined in Section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of Code of Criminal Procedure, 1973, and Sections 154 and 158 of Indian Penal Code, 1860, were enacted. All the afore-said provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof

of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act."

16. Trial Court, while answering issue no. 1, chose to ignore the revenue entries of 1390 and 1395 fasali by observing that there was a registered sale-deed executed in 1958 in favour of plaintiff no. 1 and in 1373 *fasali* her name was also shown to have been recorded, how it got removed and name of defendant came to be recorded in revenue entries has not been demonstrated and therefore, subsequent revenue entries showing possession of defendant cannot be relied on. Therefore after ignoring the said revenue entries, it answered Issue No. 1 in favour of plaintiffs. Then considering Issue No. 2, it held that alteration/change in entries of revenue records may be by fraud or misrepresentation, therefore, those subsequent entries can be ignored and in that view of the matter, the suit is not barred by Section 49 of Act, 1953.

17. The Lower Appellate Court then considered the same question no. 1 and held that once a registered sale-deed was executed by Ram Badan in 1958, the subsequent sale -deed would have no legal consequences and, therefore, no right would have been conferred upon Vijay Shankar etc. It also observed that pursuant to sale-deed dated 7.7.1958, by order dated 14.7.1966, name of Gulabi Devi was mutated in place of Ram Badan. Thereafter again name of Ram Badan reappeared though there was no transfer by Gulabi Devi to any one which shows that the said change in entry was on account of fraud and such revenue entry would have no legal consequences. It also noticed some of the authorities which laid down the exposition of law that if a revenue entry has been made fraudulently, the same can be cancelled by filing a suit under Section 229-B of Act, 1950 but having said so, he has said that since revenue entries, if has been obtained by fraud, would not confer any legal or otherwise right upon individual concerned, has proceeded to hold that in such a case, suit would not be barred by Section 49 of Act, 1953.

18. In my view, the approach of Courts below in the case in hand was clearly erroneous.

19. It is no doubt true that there were certain instruments executed in favour of defendant also, on the basis whereof entries in revenue record were made in his favour. Whether all those documents were on account of any fraud or misrepresentation, neither there was any issue raised in this regard nor any such issue was framed. In absence thereof, those documents could not have been nullified in an injunction suit on mere presumption while answering the question whether plaintiffs were owner and in possession of property in dispute or not. Except of initial sale deed of 1958 and the order of 1966 for mutation of name of plaintiff, no other document

was placed on record to show that at the time of filing of suit, plaintiff was in possession of property in dispute. On the contrary, there were revenue entries of subsequent period of 1966 showing possession of defendant over property in dispute. Once defendant was a recorded tenure holder, his rights and status as recorded tenure holders could not have been affected by Civil Court in an injunction suit in which it became necessary to consider correctness of revenue entries. In such a case, a suit should have been filed before Revenue Court. The Civil Court in such case would have no jurisdiction. The aforesaid judgement of Apex Court in *Azhar Hasan* v. *District Judge* (supra) has made it very clear and this is evident from following:

"The instant suit was filed by the plaintiff-appellants claiming that the revenue records were wrong and that on the abandonment of tenancy of tenants, possession ought not to have been recorded in favour of those persons and, as a corollary, the sale deed executed in favour of the last mentioned persons was illegal and based on fraud. The courts below have taken the view that who should have been recorded in possession of the land in dispute, was a matter for the Revenue authorities to determine, and thus the civil court had no jurisdiction in the matter. The plaint accordingly was ordered to be returned to the plaintiffs to be filed before an appropriate Revenue Court. The appeal of the plaintiffs in the first appellate court was dismissed. Instead of filing a second appeal, they moved the High Court by way of a writ petition which, too, was dismissed.

On reading the plaint and on understanding the controversy, we get to the view that whether those persons who succeeded the recorded tenants, were rightly recorded as tenants or not, was a question determinable by the Revenue authorities. Besides that, the sale deed which has been questioned on the basis of fraud, was not executed by the plaintiffs but by others, and they were not parties thereto so as to allege the incidence of fraud. In these circumstances, we are of the view that the plaint was rightly returned to the plaintiffs."

20. In the present case also, the sale-deed executed by Ram Badan in 1985 could not have been ignored by declaring illegal since neither Ram Badan was a party nor Vijay Shankar, Jai Prakash and Ram Dei were party in the suit though the documents were executed by them. Accordingly, I answer all the three question in favour of defendant-appellant and against plaintiffs.

21. In the result, the appeal stands allowed. The impugned judgments and decree dated 11.8.1998 and 20.2.1992 are hereby set aside and Original Suit No. 417 of 1987 of plaintiff-respondent stands dismissed.

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AQIL AHMAD

Mohammedan Law

Revised by

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CHAPTER 3
SOURCES OF MUSLIM LAW

SYNOPSIS

I. Primary sources.

The word *Quran* has been derived from the Arabic word Quarra which means to read.

1. The Quran.—The word *Quran* which is the 'divine communication' and revelation to the Prophet of Islam is the first source of Muslim Law. It is the paramount and universal authority of Muslim Law. It contains the revelation of God to His Prophet Mohammad, through angel Gabriel. Thus it embodied the very word of God as they were communicated to the Prophet. The *Quran* in its present form is a book divided into 114 Chapters and consists of approximately 6666 verses. The chapters were arranged under the personal direction of the Prophet, who used to ask the scribe present to insert the revealed passage in a particular chapter. Thus it is not arranged in chronological order, not by oversight but as commanded by the Prophet.

The verses of *Quran* are called *Ayat* and the chapters of this Holy Book are called *Sura.* Not more than 200 verses are concerned with legal principles and nearly about 80 verses are concerned with marriage, dower, divorce and inheritance. The portion of *Quran* which was disclosed to Prophet *Mohammad* at *Madina* is concerned with legal principles, and the portion at *Mecca* deal with the philosophy of life and Islamic religion. The *Quran* does not in any of its portions proftess to be a code complete in itself. It was given to the world in fragments, during a period of 23 years (609 to 632 A.D.). and it was never collected and arranged in the lifetime of the Prophet. *Abu Bakar* (who succeeded the Prophet as *Khalifa*, and died in 634 after a rule of two years) for the first time collected the various passages of *Quran*. Another sixteen years elapsed and then *Usman* the third Caliph ordered the second revision of the *Quran* in 650 A.D. *i.e.*, 18 years after the death of Prophet, it took the textual form in which we have it at the present day[1]. The arrangement of the whole Sacred Book into chapters, was completed under the supervision of the following expert—Zaid, the son of Thabit; second, Abdullah, the son of Zubair, third Said, the son of As; and fourth Abdur Rahman, the son of Harith. The work was completed after careful scrutiny and comparison with other

1. Tyabji, Principles of Muslim Law pp. 2,3.

fragments and presented to khalipha, who caused a number of copies to be made and sent them to different centres of *Islam* and these became texts for all subsequent copies of the Sacred Book. The fragments in the possession of different people were recovered and burnt. The Prophet (PBUH) encouraged his companions to write and learn the text of the Surahs by heart. The attachment of the Muslims to the Sacred Book was so great that it has retained its purity, without the least change, for the last one thousand and three hundred years.

The style of the *Quran* is the most beautiful, fluent, concise, persuasive and possesses great force of expression. It is composed neither in poetry nor in simple prose. The sentences generally end in rhyme; words being well selected and beautifully placed.[2]

A very small portion of it has any reference to law laying down the broad general principles concerning with marriage, dower divorce and inheritance. Broadly speaking it can be pointed out that—

(*a*) *Quran* is the primary source of Muslim Law, in point of time as well as in importance. *Quran* is the first source of Muslim law. The *Islamic* religion and *Islamic* society owes its birth to the word of *Quran*. It is the paramount source of Muslim law in point of importance because it contains the very words of *God* and it is the foundation upon which the very structure of *Islam* rests. *Quran* regulates individual, social, secular and spiritual life of the Muslims.

(*b*) It contains the very words of God as communicated to Prophet *Mohammad* through angel Gabriel.

(*c*) It was given to the world in fragmentary forms, extending over a period of twenty three years.

(*d*) It originally had for its objects (i) repealing objectionable customs, such as, usury, unlimited polygamy and gambling, etc., and (ii) effecting social reforms, such as raising the legal status of women and equitable division of the matters of inheritance and succession.

Quran as a Source of Law

The contents of *Quran* may be classified under the four heads :

1. Metaphysical and abstract;
2. Theological;
3. Ethical and Mystical; and
4. Rituals and legal.

We are here concerned with the legal aspect only. The rules of Islamic law occur in the following chapters of *Quran*—Al-baqara-cow, Al-nise-woman Al-Imran-the family of Imran, Al-maidah—the food, An-nur-the light and Bani-Israel—a family of Israel.

There rules relate to—

(*a*) Reform in unlawful heathen customs, such as infanticide, gambling, drinking of intoxicants, usury, polygamy etc.

2. See. Mohd. Hamidullah Khan, The school of Islamic Jurisprudence, pp. 14-15.

(*ii*) Social reforms, such as marriage, position of women, divorce, chastity of men and women, texts relating to which came to be quoted subsequently in connection with the use of the veil by women, their seclusion, succession *etc.*

(*iii*) Criminal laws relating to punishment for theft, fornication, murder *etc.*.

(*iv*) Direction relating to the treatment of enemy, the distribution of booty *etc.*

(v) International law of war and peace, and directions relating to the treatment of non-Muslim and their protection of rights.

Validity of Laws Revealed Before Islam.

Regarding the validity of laws revealed before, *Islam*, there are difference of opinion among Jurists. The Hanafi doctrine is that only such laws of previous religions are binding, as have been mentioned in the *Quran* without disapproval. This restriction is due to the fact that the teachings of previous religions have not been transmitted to us in the original form revealed by God.

Legislative Functions of the Quran :

Although as professor Fitzgerald says in his book titled 'Muhammadan Law'.

> The *Quran* is an eloquent appeal (to Muslim ears a miracle of eloquence) to mankind and to the Arabs in particular, to obey the law of God which, it is (in the main) implied, has already been revealed or capable of being discovered".
>
> the *Quran* has influenced the creation of Islamic legal system in the following ways :[3]
>
> (*a*) The Prophet (peace be upon him) faced legal problems and so did his companions and the *Quran* provided guidance. In doing so, along with building up concrete behaviour patterns of the Islamic social system, it gave such texts which possesses definite legal element. There are about five hundred such texts. Most of these deal with the ritual and eighty of these provide the material which would be called legal by a western lawyer. These eighty verses have been construed by method of statute interpretation, so as to extract the utmost ounce meaning from them. For example the intricate system of inheritance has been built up from about half dozen verses only. The following verse can give entire constitutional law.
>
> (*b*) Non-legal texts in the *Quran* moral exhortations, and Divine Promises have been construed by reasoning to afford legal rules. Thus the texts, "surely they say, usury is like sale, but God has made sale lawful and usury unlawful, and they ask thee concerning wine and gambling. Say in both is sin and advantage for men (too) but the sin thereof is greater than the doctrine of contract. (The lawfulness of contract and those

3. Dr. Jilani, R : Reconstruction of Legal Thoughts in Islam, p. 57.

unilateral acts (*e.g.*, Kafala, Iqrar) which in Islamic Law resemble with contract, is mostly estimated in terms of their resemblance, to sale and the unlawfulness in the terms of usury and gambling. Similarly the texts proclaiming that God will not punish anyone save for one's own sins have been applied to debts which a person leaves unpaid at his death with far reaching results in the law of administration of assets. The text making lawful the permit of water hunting has been restricted, by reasoning to the fish only.

(*c*) By pointing out that the previous revelations have been corrupted the *Quran* declared the legal material with the 'people of the Book' unreliable. It also called upon the people to abandon the customs of their ancestors in favour of the law of God. In any case it repealed the entire legal provisions available outside the sphere of the Book and the *Sunnah.* It adopted certain previous customs as well. For instance, it made the sale lawful. In the condemnation being general and adaptation be specific the legal principle will be, that the custom practices, shall be presumed to be prohibited unexpressly adopted by *Islam.*

(*d*) The *Quran* converted the heathen Arabs to the law that is the direct command of God. Since it is cordial tenet of *Islam* that God is one, the whole must emerge from him. The believers are bound to search for that whole, which can be found, in addition to the *Quran,* from the social system built up by holy Prophet (peace be upon him) the *Sunnah.*

Rules of Interpretation.

The Interpretation of a legal text is governed by principle called *istidlal.* The following are the important principles according to which words and phrases occurs in a text are interpreted. The object is to discover the legal provisions contained therein.

(*i*) *The General and the specific.*—A general word covers everything to which it is applicable. The general text cannot be limited except by another text. Effort should be made, first of all, to reconcile two apparently conflicting propositions. About waiting period of the widows it has been laid down in the *Quran.* Those women whose husband are dead should restrain themselves (from marrying again) four four months and ten days". In another verse the *Quran* lays that waiting time for the pregnant widows is until delivery. The two texts would be reconciled by holding that the period of waiting for widow is the remotest of the two, as the case may be.

When the conflict cannot be resolved and the two texts are of general import; one of them sanctioning a certain thing and another prohibiting it, the prohibiting speech, will prevail. In case both the texts are of the same character, and conflict cannot be resolved, the latter will repeal the former to the extent to which they are in conflict.

When two propositions one of general and the other of specific import, conflict with each other, if the general propositions is later in date, the specific will be held to have been repealed so much of what is laid down by the

general to the extent of inconsistency and the general propositions will retain its general character.

(*ii*) *The absolute and the qualified.*—Where there are two propositions, one absolute and the other qualified, and what is laid down by one of them is distinct from what is laid down by the other, effect should be given to both. If two relate to a single injunction of law with reference to the same facts, the one absolute in its terms will be read subject to the qualified text. For instance, it is laid down that in a certain event one must fast for sixty days, and it is also laid down with reference to the same event one must fast for sixty successive days. The inference is that the fasting must be for sixty successive days.

(*iii*) *The Primary and the secondary.*—The words should be interpreted in their ordinary sense unless the content requires a secondary meaning. If a word is used in its dictionary sense it is regarded as proper in connection with such application and, if that word is used in another sense, it may convey conventional, technical or figurative meaning. The tropical or a secondary application of a word consists in its transference from its original to a connected sense. After such transference has taken place, it is the new meaning which prevails, and both the meanings cannot be assigned at one and the same time.

(*iv*) *Denotation and connotation.*—A word conveys its meaning either by denoting the thing to which it is originally implied or that which it necessarily implies as a consequence of its application in the text. Such expression of meaning may be directly by the language of the text or indirectly by way of connotation or suggestion. Sometimes a word may indicate something which its application precedent sometimes from what is expressed in a text it may appear that it applies to some other matter which comes within its intendment by the necessary implication of the language.

The denotation means that what is clearly and manifestly the subject matter of the text. Connotation means what is indicated by the words of the text without adding anything to it or taking into consideration context thereof. For instance, the denotation of the verse.

"For the destitute immigrants who were turned out of their houses (Q. ix. 8)."

> "is the share of the immigrants into the property acquired in war. Its connotation is that the right of ownership of such persons over the property they left is lost, because the word destitute has been used which is applied only in respect of the persons who own nothing. This lays down the laws that the disbelievers become absolute owners of the properties of the Muslims which they capture in *Dar-al-Harb.*

The instance of necessary implication is if a husband utters to his wife that she be spend her waiting period this implies that he has divorced her because divorce is the precondition of waiting period.

The intendment of the text means the object of the legislator. This should be inferred literally and not by way of analogical deduction. For instance, it has been ordained in the *Quran* regarding the parents :

"Do not utter anything contemptuous to them, nor dessert them", (Q. xv 17).

If a person physically beats his father but does not utter any contemptuous words to him, he has still violated the verse by defeating the object of the legal provision contained therein.

The intendment of text is called in the Western legal terminology Mischief of Text. Paton summarises the discussion of Interpretation of Statutes in the following words :

"In the English Law there are three basic rules of interpretation. The first is the literal principle, the second is called the Golden principle which means that ordinary meaning should be attached to the language of law unless it involves some difficulty or conflicts with the other provisions. The third principle is the Mischief Rule which emphasises the general policy of law".

Doctrine of Repeal :

Naskh literally means to delete. Legally it means repeal of a legal provision by another legal provision. Both the repealing and repealed laws must be revealed. By way of repeal alteration is made in the law by the Law Giver.

The instances of repeal are found in the previous Shariahs also. In the Shariah of Jacob real sisters could be married together, but the Shariah of Moses repealed it.

The jurists differ among themselves about the scope and definition of repeal. Some jurists include specification of general and qualification of absolute in the definition of repeal. According to them the number of the repealed verses of the *Quran* is sufficiently large. But the later jurists restrict the definition of repeal to those verses whose legal effect has been totally abrogated. There are five verses in the *Quran*, according to the research of Shah Wali-Allah Dehlawi, whose legal effects has been totally repealed. The law which these verses enunciate has been repealed so far as their recitation is concerned text has not been repealed. The repeal may of :

(*i*) One quranic text by another. In the verse.

It is prescribed, when death approaches any of you, if he leaves any goods, that he make bequest to parents and next of kin. (Q. ii 180).

It was laid down that one must make provision by will for his parents and other relatives but this was repealed by the verse.

"Allah directs you as regards you children" (Q. iv. : ii) wherein the parents and other relatives of a deceased are allotted shares in the inheritance as heirs.

(*ii*) A tradition by another tradition.

(iii) A tradition by a Quranic text.

(*iv*) A Quranic text by tradition. There is difference of opinion among the Hanafi and the Shafi jurist regarding this kind of repeal.

In interpretation, the *Quran* is subject to the express rulings in ancient commentaries.

In *Aga Mohammad Jaffer* v. *Koolsom Beebee*,[4] Their Lordships of the Privy Council held that where a passage of *Quran* has been interpreted in particular manner in the *Hedaya* and *Imamia*, it was not open to court to construe the same in a different manner.

2. The Sunnat and Ahadis (Traditions) :— It is the belief of Muslims that revelations were of two kinds—Manifest (zahir) and internal (batin). Manifest revelations consisted of the communications which were made by the angel Gabriel under the direction of God to *Mohammad* in the very words of God. *Quran* is composed of manifest revelations. Internal revelations consisted of the opinions of the Prophet and delivered from time to time on questions that happened to be raised before him. Sometimes, it happened that no direct revelation came to the Prophet and in the meantime some question had to be decided. In such circumstances, the Prophet exercised his own judgment and frequently consulted his companions. The ideas contained in such opinions of the Prophet were inspired by God. During his lifetime, the Prophet pronounced his verdicts, did certain things and also allowed tacitly the doing of certain things permitted by Islam. Consequently "what was said or done or upheld in silence by the Prophet" becomes a primary source of Muslim Law, second in point of time and authority, only to the pious *Quran* and is technically known as *Sunnat*. *Sunna* means the model behaviour of the Prophet. The narrations of "what the Prophet said, did or tacitly allowed" is called *Hadis* or Traditions. The Traditions, however, were not reduced to writing during the lifetime of *Mohammad*. They have been preserved as Traditions handed down from generation to generation by authorised persons. That is why a minute inquiry is necessary to accept a *Hadis*. Thus when a *Hadis* is confirmed by one person, it is known a *Khabar-al wahid* and is a weak *Hadis*. When a *Hadis*, is proved by several declarations, it becomes a strong *Hadis*. The Shias do not believe in a *Hadis*. which is not derived from the house of the Prophet, particularly from the house of *Ali*. At the time of his death, *Quran* supplemented by *Sunnat* framed the whole body of Mohammadan Law—Civil, Criminal and Religious. The importance of Hadith as an important source of Muslim laws has been laid down in the *Quran* itself.

The *Quran* says :— "Whatever the Prophet gives accept it, and whatever he forbids you abstain from it." LIX : 7).

It also says: —"He does not speak out of his desire. It is not but the revelation revealed to him." (LIII : 3-4).

"Obey God and obey the messenger." (IV : 58).

Once the Prophet said to his followers : "So long as you hold fast to two things which I have left among you will not go astray, God's Book, and His messengers Sunna.".

Kinds of Traditions—The Traditions are of two kinds :—

1. *Sunnat :* and

2. *Ahadis*.

4. (1897) 25 Cal. 9, 18 : 24 I.A 196, 204.

These two have been classified into the following three classes on the basis of the mode or manner in which it has actually originated :—

(*i*) *Sunnat-ul-fail i.e.,* Traditions about which the Prophet did himself.

(*ii*) *Sunnat-ul-qaul i.e.,* Traditions about which he enjoined by words.

(*iii*) *Sunnat-ul-tuqrir i.e.,* The things done in his presence without his disapproval.

Above are enumerated the three kinds of *Sunnat.* The three classes of *Ahadis* are given below. This classification unlike the above, has been made on the basis of the authenticity of the traditions which in its turn is dependent in the manner in which each particular tradition has been preserved :

(*i*) *Alhadis-i-mutwatir i.e.,* Traditions that are of public and universal propriety and are held as absolutely authentic. In such *Hadis* the chain is complete.

(*ii*) *Ahadis-i-Mashhoor, i.e.,* Traditions which though known to a majority of people, do not possess the character of universal propriety.

(*iii*) *Ahadis-e-wahid i.e.,* Traditions which depend on isolated individuals.

Compilation of Hadis.

Generally two misconceptions have been spread about the compilation of Hadis. Firstly they were orally transmitted and were not recorded during the period of the Prophet. Secondly, the sense uttered by the Prophet could change during the oral transmission.[5]

The companions of the Prophet used to take the *Sunnah* as binding authority and were very anxious to learn it by heart for themselves and for the purpose of further transmission. Some of them used to write it also. Abu Daud and Darimi have narrated from 'Abdullah bin Amr bin al As :

> "Whatever I heard from the Prophet I used to write it to learn it by heart. Some persons from the Qureish objected to this and said that the Prophet was a man and sometimes he was talking in anger and sometimes he was happy. At this I stop writing and also told this to the Prophet. He ordered to continue writing and pointed with his finger towards his mouth and said after swearing in the name of God that nothing but the truth comes out of that".

Many books of traditions were compiled by the companions of the Prophet. The remarkable ones are Sahifa Sadiqa, Shafia Ali, Aahifa Abu Bakr, Sahifa Jabir, Sahifa Samura and Sahifa Sahia *etc.* The traditions of these books have been narrated by famous traditionists like Bukhari, Abu Daud, Hakim, Zailai *etc* in their collection,. Perhaps this is sufficient to remove the misconception that the work of compilation of Hadis started one hundred years after the death of the Prophet.

Abu Hurairah, a reputed authority on *Hadith* said, "None is a better keeper and narrator of Hadis than me except Abd Allah bin Amr bin al-As. That is because he used to write whatever he heard from the Prophet.

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5. See, Dr. R. Jilani : The Reconstruction of legal thought is Islam, p. 74.

Anas bin Malik the devout servant who lived with the Prophet all through his stay in Madina, and who died in 93 A.H. said, "Every now and then I took down notes on interesting points from what the Prophet said in his discourses and other occasions of conversation; and I used to read these notes over to the Prophet whenever I found him having leisure, and after he had corrected them, I made a fair copy of them for my own record."

It is also incorrect to say that the traditions were transmitted orally. Ahmad bin Hanbal says about Abd Allah bin Mubarak that he used to transmit traditions from the book.[6] There are persons who generally assume that traditions were recorded for the first time by compilers of the classic collections like Bukhari, Muslim, *etc.* The reason for this assumption is the misunderstanding of the term HADDATHANA (it was reported to us). Sprenger was the first orientalist who understood that this word usually did not mean an oral transmission, and in those days it was the practice to refer to authors instead of works.[7]

Qualifications of Narrators.—A trustworthy narrator must have understanding. The report of an infant or a lunatic cannot be accepted. He must possess the power of retention which implies that he should have properly heard the words of the speaker, is capable to understand their meaning, should be able to retain them in memory, and is capable to reproduce with accuracy at the time of narration. Lastly he must be a Muslim of righteous conduct, which signifies that he generally follows the injunctions of religion and reason.

3. The Ijma (consensus of opinion).—*Ijma* has been defined by *Sir Abdul Rahim* as "agreement of the jurists among the followers of Prophet Mohammad in a particular age on a particular question of law". Wilson defines it as concurrence, meaning propositions shown to have been accepted as indisputable under the first four "rightly directed", Caliphs or in the time of the companions and of the generation immediately succeeding them.

Under this collective name are included the explanations. elucidations and the decisions of the disciples of the Prophet. According to the classical theory, failing *Quran* and traditions, the consensus of opinion amongst the companions of the Prophet is recognised as the best guide of law. Thus it is the third source of law, both in the point of time and importance.

However, there is great difference of opinion among the important Muslim jurists with regard to the requirements of a valid *'Ijma"*. Nevertheless there is general agreement that *Ijma* of the companions of the Prophet should invariably be accepted.

The authority of *Ijma* as a source of Muslim law is also founded on *Quran* and *Hadith.* Quran says :

> "O ye who believe; obey God and obey the Prophet and those of you who are in authority, and if ye have a dispute concerning any matter refer it to God and the Prophet." 4 : 59.

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6. See, Dr R. Jilani : The Reconstruction of legal thought is Islam, p. 78.
7. Sprenger J.A.S.B. 1850 p. 9.

(64)

"There can be no consensus on error or misguided behaviour amongst my people".

Importance of Ijma.—The Law is something living and changing. Social values are subject to constant changes and these changes in their turn affect law. *Hanafi School* is of the view that law must change with the changing of times. According to *Maliki School.* new facts require a new decisions. The aim of the law is to fulfil the needs of the Society. The principle of *Ijma* is based upon the following texts : "God will not allow His people to agree on an error and whatever Muslims hold to be good is good before God". With the march of time, development of civilization and the expansion of the Islamic influence numerous problems arose which could not be decided by reference to only *Quran* and *Ahadis* (Traditions). The jurists, therefore, evolved the principle of *Ijma* The laws are needed for the benefit of the community. Therefore the Divine Legislator has delaged power to lay down laws by the resolution of those men in the community who are competent in that behalf, *i.e.*, the *Mujtahids* or jurists. Since the Muslim religion does not admit the possibility of further revelation after the death of the Prophet, the principle of *Ijma* is the only authority for legislation in the present Muslim system.

Essential Ingredients of a valid Ijma.—The definition of *Ijma* has got the following ingredients.

(*i*) *The consensus.*—The majority of the jurists is of the view that unanimity is a pre-requisite for *Ijma.* If there is a dissension, although it is by a small minority, *Ijma* will not be constituted. However, some of the jurists are of the view that *Ijma* may be constituted by majority also.[8]

Consensus may be reached through three stages. Firstly, The people express their views Secondly, discussions and debates take place. Thirdly, the differences are dropped and they agree on one point. *Ijma* constituted by majority is binding in action but it is not obligatory to believe in its truth also. It is not absolute like *Ijma* by unanimity, in the sense that a person disputing it would become an infidel.

(*ii*) *The Jurists.*—In every field of knowledge, only the opinions of the experts are admissible. Since the jurists being the experts, therefore only their opinions are relevant for *Ijma.* There are, however, two kinds of religious matters. One which do not require any advanced knowledge for their recognition; such as saying the prayers five times a day, keeping fast during the month of Ramdhan etc. These matters do not call for any discrimination between the jurists and the general public. There are others which are beyond the reach of the competence of the public at large and which require skilled opinion; such as the rites of the marriage, the rules of divorce, the principles of sale etc. In the latter category only opinions of the jurists are admissible and the views of the general public are irrelevant.

(*iii*) *Jurists of a Particular Period.*—There could be no law laid down by *Ijma* during the Prophets life time.

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8. Dr. Jilani, R : op. cit. p. 107.

Ijma of one age may be reversed by subsequent *Ijma* of the same age. Similarly *Ijma* of one age may be superseded by *Ijma* of a subsequent age. But the *Ijma* arrived at by the companions is incapable of being reversed or superseded.

(*iv*) *Jurists to be the Muslims.*—The views of the jurists belong to the non-Muslim communities are not admissible for *Ijma.*

(*v*) *Consensus on a Religious Matter.*—The religious matter may be of two kinds : points of fact and points of law. *Ijma* on the matter that the text of the *Quran* which is with us, is the same that was revealed to the Prophet, is *Ijma* on point of fact. *Ijma* on the matter that the Government of the Muslims must have representative capacity and should run by consultation, is *Ijma* on point of law.

Repeal of Ijma.— Repeal means abrogation of the legal effect of a text by means of another text. *Ijma* is not in itself a text. It is an opinion or judgment based on the authority of some text which may or may not be quoted alongwith : The texts are contained only in the *Quran* and the *Sunnah.* Thus *Ijma* cannot repeat the *Quran* or the *Sunnah.*

The doctors of Islamic jurisprudence are generally of the view that *Ijma* can neither repeal anything nor can be repealed by anything. Bazdawi, however, is of the view that a latter *Ijma* can repeal a former *Ijma.*

Kinds of Ijma—The *Ijma* is of three kinds—

(*a*) **Ijma of the Companions of the Prophet.**—It is universally acceptable, throughout the Muslim world and is unrepealable. *Abdul Rahim* in his book entitled Muhammadan Jurisprudence says : "Great weight will be attached to the *Ijma* of the Companions of Prophet inasmuch as the Companions were appointed with the viewpoint of Prophet and remaining close to the Prophet they had almost adopted the same way of reasoning as the Prophet. However, due weight could only be attached to such *Ijma* of the Companions which was well known in their lifetime and has been held thereafter by reliable men".

(*b*) **Ijma of Jurists.**—So far this particular kind of *Ijma* is concerned there is divergence of opinion regarding (a) the exact procedure of formation—Which nowhere has been laid down, (b) the exact number of jurists necessary to form *Ijma,* (c) whether the *Ijma* is by majority decision or by unanimous opinion, (d) whether the decision of a jurists should be preceded by reasoning, and (e) whether all of the jurists should sit together to form *Ijma.*

(*c*) **Ijma of the People.**—Though in theory the opinion of Mulsim population as a whole may have any importance but in actual practice *Ijma* of Muslim public had no value with regard to legal matters, but in matters relating to religion, prayer and other observances great weight is attached to it. The fundamental observances of *Islam* as to prayers, fasting, pilgrimage and proof rate have been established by *Ijma* of the people.

Ijma cannot be confined or limited to any particular age or country. It is completed when the jurists, after due deliberation, come to a finding. It cannot then be questioned or challenged by any individual Jurist. *Ijma* of one age may be reversed or modified by the *Ijma* of the same or subsequent age.[9]

4. The Qiyas (Analogical deductions).—This is the last primary source of Muslim Law. *Qiyas* means reasoning by analogy from the above three sources, *i.e.*, the *Quran*, the *Sunnat* and the *Ijma*. In *Qiyas* rules are deduced by the exercise of reason. This has been supported by a *Hadis* of Prophet which may be quoted here. When Mu'adh was being sent to Yemen, the Prophet asked him on what would base his decisions. "I will judge them according to the Book of God", he replied.

Prophet : "If the *Quran* does not give guidance to the purpose?

Mu'adh : *'Then upon the usage of the Prophet'.*

Prophet : 'But if that also fails you'.

Mu'adh : 'Then I shall follow my own reasons'.

The Prophet raised his hands, and said. 'Praise thee to God, who guides the messenger of His Prophet in what He pleases".[10] *Qiyas* consists in applying some text if the case can be demonstrated to be governed by the reason of the rule underlying it although the language may not apply.

Thus *Qiyas* may be defined as a process of deduction by which the law of the text is applied to cases, which though not covered by the language are governed by reason of the text. Thus, it should be noted that *Qiyas* does not purport to create new law, but merely to apply old established principles to new circumstances.

It also give rise to the new school of law represented by *Az-Zahir*. But though the majority of jurists were agreed on the necessity of having recourse to find reasoning in order to supplement the *Quran, Sunna* and *Ijma* for developing the law, they had great difficulty in fixing upon the exact form in which, and the limitations with which reason could be employed in questions of law and religion.[11]

This source, namely, *Qiyas* is of no value to persons belonging to the school of Ahmad Ibn Hanbal, the great traditionist. The *Shias* also do not accept *Qiyas* because they are of the opinion that if law need to be enlarged it must be by the *Imam* and none else. The Shafis also regard *Ijtihad* and *Qiyas* as contradictory of their own views.

Those who do not give much value to this source quoted the following text from *Quran* ;

"And we revealed the Book unto thee as an exposition of all things." (16 : 89)

"We have neglected nothing in the Book". (6 : 38)

9. K.P. Saxena; Muslim Law p. 9.
10. Principles of Muslim Law by Tyabji, 4th Edn. p. 21.
11. *Ibid.*

The pro-*Qiyas* group also cite many Quranic text and Hadith in their support, few of which are as follows :

"As for these similitudes we cite them for mankind but none will grasp their meaning save the wise." (19 : 43)

"Learn a lesson, O ye who have vision to see" (59 : 2)

The Prophet is reported to have said : "Give your rulings in accordance with the (provisions of the) Book and the *Sunnah* if such are available. If you do not find such provisions, have recourse to your opinion and interpretation."

Legal Authority of Qiyas as a Source of Islamic Law :

Qiyas in the Light of Holy Quran.—Holy *Quran*, says, "Spend (*i.e.* charity) out of your good things because as you dislike to take bad things, others also may dislike."

In the *Quran* it is often said, 'Ye men of wisdom take lesson' : These verses are enough to indicate how the validity of *Qiyas* is established by holy *Quran*.

The *Quran* is all comprehensive and no one can claim to have full and complete knowledge of it. The verses of the *Quran* are classified into two categories—MUHAKAMAT and MUTASHABEHAT—Muhakamat are clear in meaning whereas Mutashabehat are such verses which are capable of various meaning. It is the duty of a jurist to ascertain the meanings of such verses. Sometimes they are expressive, sometime indicative and sometimes elucidative, hence such verses provide room for *Qiyas* .

Qiyas in the Light of Hadith.—In deciding legal issues, Prophet himself relied on the *Quran* and on *Qiyas* . Instructions to *Muadh Ibn Jabal* clearly shows how he approved *Qiyas* in deciding legal issues.

Qiyas was upheld by the Prophet both by precept and practice. Even in the period of caliphate the validity of *Qiyas* was not questioned. According to Imam Abu Hanifa, by the process of *Qiyas* the proposition is diverted towards the *Quran* and *Hadith*. All the four Sunni schools accepted *Qiyas* as valid source of law and in fact much of the Sunni law is evolved as a result of the recognition of this institution.[12]

Conditions for the validity of Qiyas

1. The original source from which *Qiyas* is deduced must be capable of being extended, that is, it should not be of any special nature.

2. The law of the text must not be such that its raison de'tre cannot be understood by human intelligence nor must it be in the nature of an exception to some general rule.

3. The original order of the *Quran* or *Hadith* to which the process of *Qiyas* is applied should not have been abrogated or repealed.

4. The result of *Qiyas* should not be inconsistent with any other verse of *Quran* or any established Sunna.

5. *Qiyas* should be applied to ascertain a point of law and not to determine the meanings of words used.

12. *See*, Mohd. Hamidullah Khan, op. cit., p. 48.

6. The deduction must not be such as to involve a change in the law embodied in the text.

However, concluding the discussion it can be said that *Qiyas* is a weak source of law and rules analogically deduced do not rank so high as authority, as those laid down by *Quran* or *Hadith* or by consensus of opinion. The reason is that with respect to analogical deductions one cannot be certain that they are what the law giver intended. Such deductions always rest upon the application of human reason which always are liable to err.

II. Secondary Sources.—In addition to these four principal sources of the Muslim law, we find that law was occasionally supplemented by *Urf* or local usage also.

1. Urf or Custom.—Custom was never formally recognised as a source of Muslim Law, though it has been occasionally referred to as supplementing the law. The Muslim Law includes many rules of pre-Islamic customary law, which have been embodied in it by express or implied recognition. *Sir Abdur Rahim* says : "The ground-work of Mohammedan legal system, like that of any other legal system, is to be found in the customs and usages of the people among whom it grew and developed. Those customs and usages of the people of Arabia, which were not expressly repealed during the lifetime of the Prophet, are held to have been sanctioned by the Law-giver by his silence. Customs (Urf-tasmul-ul-adaat) generally as a source of law are spoken of as having the force of *Ijma*, and their validity is based on the same texts, as the validity of the latter. It is laid down in Hedaya that custom holds the same rank as *Ijma* in the absence of an express text, and in another place in the same book, custom is spoken of as being the arbiter of analogy. Custom does not command any spiritual authority like *Ijma* of the learned, but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule of law derived from analogy; it must not, however, be opposed to a clear test of the '*Quran*' or of an authentic tradition. Custom which is recognised as having the force of law, must be generally prevalent in a country. It is not necessary that it should have had its origin in the time of the companions of the Prophet. It is of the very essence of custom that it should be territorial, so that custom of one country cannot affect the general law of other countries. Further, it has authority only so long as it prevails, so that the custom of one age has no force in another age".[13]

The requirements of a valid custom are as follows :

(1) General prevalence in the country is necessary. The practice of a limited number of individuals cannot be recognised as custom;

(2) It must be territorial;

(3) It need not be existing from the time of the Prophet's companions. All that is necessary is that it should be immemorial. The word 'immemorial' means beyond human memory. Customs springing up within living memory, will be enforced if prevalent among the Muslims of the country in which the question of their validity arises;

13. Mohammedan Jurisprudence, pp. 136-37.

(4) It must be ancient and invariable; and

(5) It should not be opposed to public policy.

Shariat Act, 1937 aims at restoring the law of Islam to all Muslim communities residing in India and abolishing customs contrary to the Shariat. This Act is applicable to every Muslim irrespective of the school to which he or she belongs. Section 2 of this Act has abrogated customs and usage in so far as they had displaced the rules of Muslim Law. This section lays down that in all questions regarding intestate succession, special property of females, marriage, dissolution of marriage, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs, the rule of decision in case where the parties are Muslims shall be the Muslim Personal Law (*Shariat*), and any custom to the contrary effect would not apply in such cases. But in the following matters a *Muslim* is still governed by customary law :

(*i*) agricultural land;

(*ii*) testamentary succession in certain communities; and

(*iii*) charities, other than wakfs.

If a person belonging to a community whose customs regarding adoption, wills and legacies prevail, makes a declaration in a prescribed form before a prescribed authority under Section 3 of the *Shariat Act*, he will thereafter be governed in all respects by Muslim Law. For example under customary law, a Khoja Muslim has power to will away the whole of his property. But by making this declaration, he loses this right and is governed in all respects by Muslim Law.

Before 1938, the Cutchi Memon Muslims retained their customary law, which was identical with Hindu Law regarding succession and inheritance and they could dispose of the whole of their property by will. But after the passing of the Cuthchi Memons Act, 1938 the Cutchi Memons have been governed in all respects by Muslim Law.

2. Judicial decisions.—These include the decisions of the Privy Council, the Supreme Court, as well as of the High Courts of India. In deciding particular cases the judges enunciate what that law is. These decisions are regarded as precedents for future cases. A precedent is not merely an evidence of law but a source of it and the courts of law are bound to follow the precedents. Strictly speaking, judicial decisions only declare the law as it is and are not a source of it but they undoubtedly supplement and modify the Law. Muslim Law is no exception to this rule. While applying and interpreting law in a particular case, the Judge expressly or impliedly declare as to what law would apply in a particular circumstances. The decisions become an authority for subsequent cases arising in subordinate courts. Thus, decisions of Supreme Court are binding upon all the courts of India and decisions of the High Courts are binding upon the subordinate courts. The Muslim Law has been supplemented on many points by the judicial decisions. On some points judicial decisions have modified the pure Muslim law. Thus, under the pure Muslim law, no interest is allowed on a loan. But in *Hammeera Bibi* v. *Zubaida Bibi*,[14] the Privy Council allowed interest on the amount of unpaid dower.

14. *Hameera Bibi* v. *Zubaida Bibi*, (1916) 43 I.A. 294.

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3. Legislation.—In India, Muslims are also governed by the various legislations passed either by the Parliament or by State Legislature. The following are the instances of the legislation in India. The Usurious Loans Act, 1918, Religious Toleration Act, Freedom of Religion Act, 1850, the Guardians and Wards Act, 1890, the Mussalman Wakf Validating Act, 1913, the Mussalman Wakf Validating Act, 1930, Wakf Act, 1954, the Child Marriage Restraint Act, 1929, the Shariat Act, 1937, and the Dissolution of Muslim Marriage Act, 1939, the Indian Contract Act, 1872, have considerably affected, supplemented and modified the Muslim Law. In 1986 an Act *i.e.*, Muslim Woman (Protection of Rights on Divorce) Act, 1986 to provide separate law in respect of divorced Muslim women was enacted by the Indian Parliament.

4. Justice, equity and good conscience.—Under Muslim Law principles of justice, equity and good conscience can also be regarded as one of the source. Abu Hanifa, the founder of the Hanafi sect of Sunnis, expounded the principle that the rule of law based on analogy could be set aside at the option of the Judge on a liberal construction or juristic preference to meet the requirements of a particular case These principles of Muslim Law are known as *Istihsan* or "juristic equity". With regard to the Muslim Law, Their Lordships of the Privy Council observed as follows :

> "The Chapter on the duties (*Adab*) of the *Qazi* in the principal works on Musalman Law clearly shows that the rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England, are not foreign to the Musalman system, but are in fact often referred to and invoked in the adjudication of cases."

Istihsan—Its Meaning.—*Istihsan* literally means approbation and may be translated as "liberal construction" or "juristic preference". This term was used by the great Jurist *Abu Hanifa* to express the liberty that he assumed of laying down the law, which in his discretion, the special circumstances required, rather than law which analogy indicated. But it was objected to not only as it left a great deal of discretion in the exposition of the law, but what was far more important in the eyes of the Muslims, it applied to the law a test not referable to the *Quran* and religion, but to external circumstances independent of *Islam*. The use of *Istihsan* was not accepted by the colleagues' of *Abu Hanifa*, *Malika-Ibn-Anas* felt the necessity of some surer test for the development of law on right lines but he considered that the introduction of *Istihsan* as recommended by *Abu Hanifa* was open to grave objections. With the aim of reconciling these two opposing factors he proposed the use of *Istislah i.e.*, "seeking peace" or "amending". *Imam Malik* laid down that ordinarily analogy was to be the means by which the law should be made to expand, but if it appears that a rule indicated by analogy is opposed to general utility, then *Istislah* or "amendment" should be resorted to.[15] Thus *Imam Malik* invented the doctrine of *Istislah* (public good) a process similar or *Istihsan* (juristic equity) and followed it up by a distinct method of juristic interpretation known as *Istidlal*. The development of law by *Istislah* and *Istidlal* represents the

15. Principles of Mohammedan Law by Tyabji, p. 21.

MULLA'S
Principles
of
MAHOMEDAN
LAW

NINETEENTH EDITION

By

M. HIDAYATULLAH

and

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TRIPATHI

CHAPTER XII

WAKFS

173. Wakf as defined in the Wakf Act.— "Wakf means the permanent (s. 174) dedication by a person professing the Mussalman faith of any property (ss. 175-177) for any purpose recognized by the Mussalman law as religious, pious or charitable (s. 178)."

The above is the definition of wakf as given in the Mussalman Wakf Validating Act, No. VI of 1913, s. 2. That Act came into force on the 7th March 1913. It has a retrospective effect, and applies to all wakfs, whether created before or after that date: see sec. 199 below. Referring to the above definition the Judicial Committee observed that it was a definition for the purposes of the Act, and not necessarily exhaustive *(a)*. See also Section 182.

Wakf as defined by Mahomedan jurists.— The term wakf literally means *detention.* The legal meaning of wakf, according to Abu Hanifa, is the detention of a specific thing in the ownership of the *wakif* or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects." According to the two disciples, Abu Yusuf and Muhammad, *wakf* signifies the extinction of the appropriator's ownership in the thing dedicated and the *detention* of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied "for the benefit of mankind." Baillie, 557-558. See *Hedaya,* 231, 234. A wakf extinguishes the right of the wakif or dedicator and transfers ownership to God. The mutawalli is the manager of the wakf, but the property does not vest in him, as it would in a trustee in English law *(b)*. The expression "vested in trust" in section 10 of the Limitation Act does not apply to the mutawalli of a wakf *(c)*: and it was for this reason that the section was amended by s. 2 of the Limitation Act, 1929. It is also for this reason that the Indian Trusts Act, 1882, exempts from its scope the rules of law applicable to wakfs *(d)*. A wakf, however, is a trust for the purposes of s. 92 of the Code of Civil Procedure *(e)*.

A *wakf* may be made in writing or the dedication may be oral. There must, however, be appropriate words to show an intention to dedicate the property. The use of the word *'wakf'* is neither necessary nor conclusive. The word *'wakf'* means detention or stoppage. There is extinction of the proprietor's ownership and detention in the implied ownership of God. *Mariam Bai* v. *Jaffar Abdul Rahiman Sait* ('73) A. Mad. 191.

By dedication and declaration the property in the wakif is divested and vests in the Almighty. *Ahmed G. H. Ariff* v. *Commr. of Wealth-tax* ('71) A.S.C. 1691.

To constitute a wakf it is not necessary that the word 'wakf' should be used. A grant to a *Kazi* for the purpose of his performing a religious or pious duties constitutes a wakf. *Yarakareddi Mallereddi* v. *Sayed Amanulla* (1972) 2 A.W.R. 327 D.B.

As pointed out by the Privy council— ". . . the Mahomedan Law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means 'the trying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.' When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of *Jewun Doss* v. *Shah Kubeer-ood-deed* (1840) 2 M.I.A. 390, that a dedication to a pious or charitable purpose is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit." *Vidyavaruthi* v. *Balusami* 48 I.A. 302; ('22) A.P.C. 123.

(a) Ma Mi v. *Kallander Ammal* (1927) 54 I.A. 23, 27, 5 Rang. 7, 100 I.C. 32, ('27) A.PC. 22; *Mst. Peeran* v. *Hafiz Mohd.* ('66) A. All. 201. See also: *Mst. Mundaria* v. *Shyam Sunder* ('63) A.P. 98.

(b) Muhammad Rustom Ali v. *Mustaq Husain* (1920) 47 I.A. 224, 42 All. 609, 57 I.C. 329. See also: *Zain Yar Jung* v. *Director of Endowments* ('63) A.S.C. 985.

(c) Mt. Allah Rakhi v. *Shah Mohammad Abdur Rahim* (1934) 61 I.A. 50, 56 All. 111, 147 I.C. 887, ('34) A.PC. 77.

(d) Per Ameer Ali J., In *Vaidya Varuti* v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123.

(e) Mahomed Kazim v. *Syed Abi* (1932) 11 Pat. 238. 136 I.C. 417, ('32) A.PC. 33.

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There is no prohibition in Muslim law to create a charitable trust as in English law. Distinction between a wakf and an English Charitable trust pointed out. *Mariam Bai* v. *Mohd. Jaffar (supra).*

To constitute a valid wakf, whether religious or charitable, except in the case of donations to neighbours or charitable public utilities, the beneficiaries should be Muslims *(f). Sk. Mamtaj Ali* v. *Sk. Alli* ('68) A. Ori. 208. (See under S. 171 same case).

174. The dedication must be permanent.— The dedication must be permanent. A wakf, therefore, for a limited period, *e.g.,* twenty years, is not valid. Further, the purpose for which a wakf is created must be of a permanent character.

Baillie, 565; *Hedaya,* 234. See sec. 197 below.

The dedication is not permanent and the wakf is invalid, if the wakfnama contains a condition that in case of mismanagement the property should be divided among the heirs of the settlor *(g).* Nor can the dedication be permanent if the wakif is only a usufructuary mortgagee and has no permanent control over the property *(h).* The wakf of a house standing on land leased for a fixed term has been held to be invalid as the dedication could not be said to be of property of a permanent character *(i).*

175. Subject of wakf.— The subject of wakf under the Wakf Act may be "any property." A valid wakf may, therefore, be made only of immovable property, but also of movables, such as shares in joint stock companies, Government promissory notes, and even money *(j).*

In case before the Wakf Act, there was a conflict of opinion whether a valid wakf could be made of movables. It was held in Calcutta, Bombay and Madras, that a valid wakf could not be made of movables, unless the movables were accessory to immovable property, such as cattle attached to agricultural land and implements of husbandry, or unless a wakf of movables was allowed by custom *(k).* This was in accordance with the view taken by Mahomedan jurists on the subject: Baillie, 570-571; *Hedaya,* 234-235. On the other hand, it was held in Allahabad that a valid wakf may be made of movables, and that a wakf even of coins or shares in a joint stock company was not invalid *(l).* Such a wakf would be valid under the Wakf Act. In a Privy Council case the question arose whether a valid wakf can be made under the Wakf Act of Government promissory notes, but it was not decided, as the wakf had been acted upon for a number of years and it was held valid on that ground *(m).* It has been held that a wakf of a money decree is not valid, as the decretal amount may not be realised *(n).*

176. Subject of wakf must belong to wakif.— The property dedicated by way of wakf must belong to the wakif (dedicator) at the time of dedication *(o).* A person who is in fact the owner of the property but is under the belief that he is only a mutawalli thereof is competent to make a valid wakf of the property. What is to be seen in such cases is whether or not that person had a power of

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(f) See *Kassimiah Charities* v. *M.S.W. Board* ('64) A.M. 18.

(g) Habib Ashraff v. *Syed Wajihuddin* (1933) 144 I.C. 654, ('33) A.O. 222.

(h) Rahiman v. *Bagridan* (1936) 11 Luck. 735, 160 I.C. 495, ('36) A.O. 213.

(i) Mst. Peeran v. *Hafiz Mohd.* ('66) A. All. 201.

(j) Abdulsakur v. *Abubakkar* (1930) 54 Bom. 358, 369-370, 127 I.C. 401, ('30) A.B. 191. Cf. *Syed Ali Zamin* v. *Syed Akbar Ali Khan* (1937) 64 I.A. 158 (a Shia case); *Sattar Ismail* v. *Hamid Sait* (1944) 2 M.L.J. 92. ('44) A.M. 504.

(k) Kulsom Bibee v. *Golam Hossein* (1905) 10 Cal. W.N. 449; *Fatmabai* v. *Gulam Husen* (1907) 9 Bom. L.R. 1337; *Kadir Ibrahim* v. *Mahomed* (1909) 33 Mad. 118, 4 I.C. 136.

(l) Abu Sayid v. *Bakar Ali* (1901) 24 All. 190; see *Hashim Haroon* v. *Gounsalishah* (1942) Kar. 179, ('42) A.S. 137.

(m) Mohammad Sadiq v. *Fakhr Jahan Begam* (1932) 59 I.A. 1, 17-18, 6 Luck. 556, 136 I.C. 385, ('32) A.PC. 13.

(n) Ghulam Mohiuddin v. *Hafiz Abdul* (1947) All. 334, ('47) A.A. 127.

(o) Masihuddin v. Ballabh Das (1912) 35 All. 68, 17 I.C. 471; *Ehsan Beg* v. *Rahmat Ali* (1934) 10 Luck. 547. 152 I.C. 798 ('35) A.O. 47; *Mahomed Ali* v. *Dinesh Chandra Roy* (1940) 2 Cal. 189, 44 C.W.N. 718. ('40) A.C. 417; *Commissioner of Wakfs* v. *Mohammad Mohsin* ('54) A.C. 463, 48 C.W.N. 252.

disposition over the property *(p)*.

Baillie, 562.

Wakf of property subject to mortgage or lease.— A valid wakf may be made of property though it is subject to a mortgage *(q)* or lease *(r)*: Baillie, 563-564.

Usufructuary mortgagee.— A usufructuary mortgagee cannot make a valid wakf of his rights for he is not the owner and the mortgage is an evasion of the Mahomedan law against usury *(s)*.

Groveholder.— A Groveholder has permanent dominion and full proprietary right over the trees. A wakf of full groveholder's rights is therefore valid *(t)*.

Property agreed to be purchased by wakif.— A valid wakf may be made of property, of which the wakif has been put in possession under a contract for the purchase thereof by him, provided the sale is eventually completed *(u)*.

Wakf in fraud of heirs.— A wakfnama executed by a widow as part of a transaction which is a fraud on the heirs of her husband is altogether void and not effective even against the share which she inherits *(v)*.

Dower debt.— A dower debt which may or may not be paid to the widow at the option of the residuaries cannot be made the subject of a wakf *(w)*.

177. Wakf of mushaa.— A *mushaa* or an undivided share in property may, according to the more approved view, form the subject of wakf, whether the property be capable of division or not *(x)*.

Exception.— The wakf of a *mushaa* for a mosque or burial ground is not valid, whether the property is capable of division or not.

Hedaya, 233; Baillie, 573. The approved opinion above referred to is that of Abu Yusuf. According to Muhammad, the wakf of a *mushaa* in property *capable* of partition is not valid, for he holds that delivery of possession by the endower to a *mutawalli* is a condition necessary for the validity of a wakf; see sec. 186 below. But though Abu Yusuf holds that a wakf of a *mushaa* is valid though the property may be capable of partition, he has declared that a wakf of a *mushaa* for *a mosque or burial ground* is invalid. He gives two reasons, one of which is that "the continuance of a participation in anything is repugnant to its becoming the exclusive right of God."

It follows from what is stated above that one of several heirs of a deceased Mahomedan cannot make a valid wakf of his undivided share of the inheritance *for a mosque or burial ground* though he may do so for other purposes. In a Rangoon case *(y)*, however, it was held, relying on a passage in Wilson's Anglo-Muhammadan Law, 6th ed., para 321, and on the judgment of the Privy Council in *Muhammad Mumtaz* v. *Zubaida Jan (z)*, that if one of several heirs takes possession of the *whole* property and delivers possession of it to the trustees of a mosque for the benefit of the mosque, though it be without the consent of the other heirs, the wakf is valid to the extent of *his own share.* The passage referred to above is in these terms: "But if a wakf is valid as in the cases noted in n. 1 above, they are valid for the endowment or construction of mosques or burial grounds." This passage appears for the first time in the 6th ed., and the cases referred to there are cases of a wakf of a *mushaa* for purposes *other than a mosque* or *a burial ground.* The Privy Council case referred to above is a case of a *gift* of a *mushaa.* A wakf of a *mushaa* for a mosque or burial ground is invalid

(p) Haider Husain v. *Sudama Prasad* (1940) 15 Luck. 30. (1939) O.W.N. 858. ('40) A.O. 18.

(q) Shahazadee v. *Khaja Hossein* (1869) 12 W.R. 498; *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 483, 67 I.C. 77, ('22) A.C. 429.

(r) Hashim Ali v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180 (case under the Shia Law).

(s) Rahiman v. *Bagridan* (1936) 11 Luck. 735. 160 I.C. 495, ('36) A.O. 213; *Abdul Qavi* v. *Asaf Ali* ('62) A. All. 364.

(t) Haji Amir Ahmed v. *Mahomed Ejaz Hussain* (1936) 58 All. 464. 160 I.C. 354. ('36) A.A. 15.

(u) Mussammat Bismilla v. *Mohammad Ali* ('27) A.O. 162, 102 I.C. 77.

(v) Har Prasad v. *Fayaz Ahmad* (1933) 60 I.A. 116, 55 All. 83. 142 I.C. 271. ('33) A.PC. 83.

(w) Nosh Ali v. *Shamsunnissa Bibi* (1939) All. 322, 1939 A.L.J. 138. 183 I.C. 379, ('39) A.A. 319.

(x) Mohammad Badrul v. *Shah Hason* (1935) All. L.J. 400, 159 I.C. 37. ('35) A.A. 278; *Mohamed Ayub Ali* v. *Amir Khan* (1939) 43 C.W.N. 118, 181 I.C. 76 ('39) A.C. 268.

(y) Abdul Rahman v. *Maung Mutu* ('32) A.R. 65, 138 I.C. 851.

(z) (1889) 11 All. 460, 16 I.A. 205.

for the specific reasons stated by Abu Yusuf. However, it has been held by the Calcutta and Allahabad High Courts that a wakf of *Mushaa* for maintenance of a mosque is valid *(a)*.

See also:—

A *mushaa* or an undivided share in property may not be dedicated by way of wakf for a mosque or burial ground irrespective of whether the property is or is not capable of division. The wakf of *mushaa* for purpose like a mosque or burial ground is invalid for the reasons that the continuance of participation in anything is repugnant to its becoming the exclusive right of God.

In the instant case, a Mahomedan died leaving behind a widow, two sons and three daughters as heirs to his property. The widow created a wakf of *mushaa* or undivided share in the property for purpose of a mosque.

Held, inasmuch as there could be no wakf of a *mushaa* or undivided share in the property for a purpose like a mosque, the creation of the wakf by the widow was invalid.

Execution of the wakf by the mother for and on behalf of the minor was illegal and void, inasmuch as a *de facto*, guardian had no right to alienate the minor's property and it was not the case of the mother that she had been appointed by the Court, moreover, had no power, without the previous permission of the Court under the Guardians and Wards Act, 1890, to make transfer including by way of wakf. No such permission was claimed to have been sought in the present. It follows, therefore, that the mother in the instant case was not competent to execute wakf as guardian for or on behalf of the minor child, and wakf so executed was illegal and void. *Gyasuddin* v. *Allah Tala Wakf Mausama*, A.I.R. 1986 Allahabad 39.

178. Objects of wakf.— The purpose for which a wakf may be created must be one recognized by the Mahomedan law as "religious, pious or charitable" [Wakf Act, s. 2(1)]. A wakf may also be created in favour of the settlor's family, children and descendants [Wakf Act, s. 3].

The following are valid objects of a wakf:—

(1) mosques and provision for imams to conduct worship therein *(b)*;
(2) colleges and provision for professors to teach in colleges *(c)*;
(3) aqueducts, bridges and caravanserais *(d)*;
(4) distribution of alms to poor persons, and assistance to the poor to enable them to perform the pilgrimage to Mecca *(e)*;
(5) celebrating the birth of Ali Murtaza *(f)*;
(6) keeping *tazias* in the month of Muharram *(g)*, and provision for camels and *duldul* for religious processions during Muharram *(h)*;
(7) repairs of imambaras *(i)*;
(7a) the maintenance of a khankah *(j)*;
(8) celebrating the death anniversaries *(barsi)* of the settlor and of the members of his family *(k)*;
(9) performance of ceremonies known as *kadam sharif (l)*;
(10) burning lamps in a mosque *(m)*;

(a) Mahomed Ayub Ali v. *Amir Khan* (1939) 43 C.W.N. 118, 181 I.C. 76, ('39) A.C. 268; *Mst. Peeran* v. *Hafiz Mohd.* ('66) A. All. 201.

(b) Baillie, 574.

(c) Baillie, 574.

(d) Hedaya, 240.

(e) Hedaya, 240.

(f) Biba Jan v. *Kalb Husain* (1909) 31 All. 136, 1 I.C. 763; *Sayid Ismail* v. *Hamidi Begum* (1921) 6 Pat. L.J. 218, 235-236, 62 I.C. 455, ('21) A.P. 125; *Haji Abdul* v. *Haji Hamid* (1903) 5 Bom. L.R. 1010 [Cutchi Memon will].

(g) Ibid.

(h) Syed Ali v. *Syed Muhammad Ali* (1928) 7 Pat. 426, 116 I.C. 525, ('28) A.P. 441.

(i) See cases cited in foot-note *(i)*

(j) Mahomed Kazim v. *Syed Abi* (1932) 11 Pat. 288, 136 I.C. 417, ('32) A.P. 33. *Ghulam Rasul* v. *Chief Administrator of Auqaf*, P.L.D. 1966 Lah. 978, (upkeep and maintenance of Khankah).

(k) See cases cited in foot-note *(i)*; *Sattar Ismail* v. *Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

(l) Phul Chand v. *Akbar Yar Khan* (1896) 19 All. 211.

(m) Mazhar Husain v. *Abdul* (1911) 33 All. 400, 9 I.C. 753; *Gobinda Chandra* v. *Abdul Maijd* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163.

(11) reading the Koran in public places, and also at private houses *(n)*;

(12) performance of annual *fateha* of the settlor and of the members of his family *(o)*;

[The ceremony of *fateha* consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied with distribution of alms to the poor.]

(13) the construction of a *robat* or free boarding house for pilgrims at Mecca *(p)*;

(14) maintenance of poor relations and dependents *(q)*;

(15) payment of money to *fakirs, i.e.,* the poor *(r)*;

(16) grant to an Idgah *(s)*;

(17) A durgah or shrine of a *pir* which has long been held in veneration by the public *(t)*.

Charitable trusts created with the object of starting a school or a college or constructing a mosque or establishing a hospital are not prohibited by Muslim law. *Mariam Bai* v. *Jaffar Abdul Rahiman Sait* ('73) A. Mad. 191.

Where the deed is not clear, previous and subsequent conduct and attendant circumstances may be called in aid to clear the ambiguity. But this is only permissible to remove the ambiguity. *Mahomed Khan Rowther* v. *A. Rahman,* (1968) Ker. L.T. 564.

B. The following are not valid objects of a wakf:—

(i) objects prohibited by Islam, *e.g.,* erecting or maintaining a church or a temple; Baillie, 560;

(ii) the Madras High Court has held that if there is no distribution of alms, the reading of the Koran and the performance of ceremonies for the benefit of the soul of the deceased is not a valid object of a wakf *(u)*. This is on the ground that the object though religious and pious is not charitable: *sed quare,* for there is nothing in the Indian statutes of in Mahomedan law which draws a clear-cut distinction between religious and pious purposes on the one hand, and charitable purposes on the other *(v)*. In the Bombay High Court Mirza, J., has held that the performance of such ceremonies whether at the tomb of a saint or the grave or a private person is a valid object of wakf *(w)*;

(iii) the High Court of Allahabad has held, following the opinion of Ameer Ali, expressed in his Mahomedan law [4th ed., vol. I, p. 276], that a provision for the wages and pensions of servants and dependants is valid *(x)*. A similar question arose in a case before the Privy Council *(y)*, and it was argued, relying on the same passage in Ameer Ali's work, that a wakf for servants was valid, but the point, it would appear, was later on abandoned, and the Board said: "It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act (VI of 1913)." The Chief Court of Oudh has taken the view that a wakf providing for maintenance of servants is valid under Mahomedan law. In *Hashim Ali* v. *Iffat Ara Hamidi Begum,* the Calcutta High Court has taken the view that a provision for a small pension for three of the faithful servants would not render the wakf invalid, as the main purpose of the wakf in question

(n) Ibid, Sattar Ismail v. *Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

(o) Luchmiput Singh v. *Amir Alum* (1882) 9 Cal. 176; *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211; *Biba Jan* v. *Kalb Husain* (1909) 31 All. 136, see p. 139 of the report: 1 I.C. 763; *Mazhar Hussain* v. *Abdul* (1911) 33 All. 400, 9 I.C. 753, [*Stanly, C.J., dubitante*); *Mutu Ramanadhan* v. *Vava Levvi* (1917) 44 I.A. 21, 27, 40 Mad. 116, 122, 39 I.C. 235. See also *Salebhoy* v. *Safiabu* (1912) 36 Bom. 111, 12 I.C. 702.

(p) Mahomed Yusuf v. *Muhammad Sadiq* (1933) 14 Lah. 431, 144 I.C. 271, ('33) A.L. 501.

(q) Mukaram v. *Anjuman-un-Nissa* (1923) 45 All. 152, 69 I.C. 836, ('24) A.A. 223; *Abdul Karim* v. *Rahimabai* (1946) 48 Bom. L.R. 67, ('48) A.B. 342.

(r) Abdul Karim v. *Pahimabai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

(s) Kulsambi v. *Mohamam Abdul Satar* ('48) A.N. 183.

(t) Sunni Central Board of Wakf v. *Sirajul* ('54) A.A. 88. *Ghulam Ali* v. *Sultan Khan* ('67) A. Ori. 55.

(u) Kaleloola v. *Nusserudeen* (1894) 18 Mad. 201; *Kunhamutty* v. *Ahmed Musaliar* (1935) 58 Mad. 204, 154 I.C. 151, ('35) A.M. 29.

(v) Gholam Hossain Shah v. *Syed Muslim Hossain* (1934) 58 Cal. L.J. 356, 150 I.C. 124, ('34) A.C. 348.

(w) Abdulsakur v. *Abubakkar* (1930) 54 Bom. 358, 127 I.C. 401, ('30) A.B. 191; *Azimunnissa Begum* v. *Sirdar Ali Khan* (1927) 29 Bom. L.R. 434. 102 I.C. 129, ('27) A.B. 387 dissenting from *Fakr-ud-din* v. *Kiayat-ullah* (1910) 7 All. L.J. 1095, 8 I.C. 578.

(x) Ghulam Mohammad v. *Ghulam Husain* (1932) 59 I.A. 74, 85, 54 All. 93, 136 I.C. 454, ('32) A.PC. 81.

(y) Ibid at p. 86.

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was not to make a settlement on those servants *(z)*.

(iv) A wakf in favour of utter strangers was held to be invalid although there was an immediate and substantial gift to charity *(a)*.

(v) A provision in a wakf for the repair of the wakif's secular property is invalid according to Shia law *(b)*.

(vi) A direction to spend a certain sum of money for feasting Cutchi Memons every year on the anniversary of the settlor's death is not valid *(c)*.

It is fundamental for the creation of a valid wakf that there should be permanent dedication of the property forming the subject-matter of the wakf for any purpose recognised by the Musalman law as religious, pious or charitable. What is involved in the creation of the wakf is "the tying up of property in the ownership of God the almighty and the devotion of the profits for the benefit of human beings. As a result of the creation of a wakf, the right of wakf is extinguished and the ownership is transferred to the Almighty." In the instant case, under the deed Ext. A-2 there is no dedication at all of either the corpus or even the income of the property for any religious or charitable purpose. The ownership of the property is not transferred in favour of God the Almighty; on the other hand, it is expressly stipulated that the property shall remain as the joint property of executants Nos. 4, 5 and 6 and they are to hold that the property from generation to generation subject only to the restrictions that the property should not be alienated in favour of any strangers nor burdened with debts, attachments or injunctions and that from out of the income the recitation of Quran and reading of Moulood in the family house should be got performed. Since the basic requisite that there should be a permanent dedication of the property for religious or charitable purposes is not satisfied in the present case it must be held that no valid wakf has been created in respect of the plaint schedule property in question. 1965 S.C. 985, relied on.

The reading of Moulood in the private residence of the family and recital of the Quran at the said place cannot by themselves, be regarded as objects for which a wakf can be validly created. [Krishna Eradi and Narendran, JJ.] *Mariyumma* v. *Andunhi* 1979 K.L.T. 231.

179. Wakf void for uncertainty.— The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty [see note (1)]. But it is not necessary that the objects should be *named (d)*. Nor is it necessary, where the objects are specified, to name the sum to be spent on each object *(e)* [see note (2)].

By a deed of wakfnama, one Md. Safulla created a wakf-al-al-aulad for the maintenance and support of his family, children and descendants and ultimately "for such purpose or purposes as are recognised by the Mussalman law as religious, pious and charitable, as the then Mutwali shall think fit add proper". He appointed himself as the first mutwali during his life time and confined the succession to mutwaliship to the eldest male members of his descendants for the time being. He also reserved to himself the right to alter the terms of the wakfnama and the beneficiaries of the wakfnama, either by adding to their number or excluding some and to increase or reduce their shares. He directed the creation of certain reserve funds which in fact were not created. The Income-tax Authorities initiated certificates proceedings under the Bengal Public Demands Recovery Act, 1913 for the realisation of income-tax due from the said Safulla from the properties which were the subject-matter of the wakf. The certificate officer held that the wakf was a valid one and rejected the certificate. The Union of India thereupon brought the suit out of which the present appeal arose for a declaration that the deed of wakf was fraudulent, illegal and void and

(z) Mt. Akhtar Banu Begum v. *Kanhaiya Lal* (1941) 16 Luck. 769, (1941) O.W.N. 829, 195 I.C. 326, ('41) A.O. 492; *Hashim Ali* v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 182.

(a) Ismail Haji Arat v. *Umar Abdulla* (1942) 44 Bom. L.R. 256, ('42) A.B. 155.

(b) Pulin Behary v. *M.A. Davar* (1946) 49 C.W.N. 721 224 I.C. 32, ('46) A.C. 83.

(c) Abdul Karim v. *Rahimabai* (1946) 48 Bom. L.R. 67, ('48) A.B. 342.

(d) Sheikh Ramzan v. *Mussammat Rehmani* (1932) 7 Luck. 300, 135 I.C. 372, ('32) A.O. 71; *Gangabai* v. *Thavar* (1863) 1 Bom. H.C.O.C. 71.

(e) Mutu Ramanadan v. *Vava Levvai* (1916) 44 I.A. 21, 28-29, 40 Mad. 116, 39 I.C. 235, ('16) A.PC. 86; *Syed Shah* v. *Syed Abi* (1932) 11 Pat. 288, 325-326, 136 I.C. 417, ('32) A.P. 33.

that the order of the certificate officer was not binding on the plaintiff. the lower Court held that the wakf was void for uncertainty, because the wakf did not divest himself of ownership and because it was not acted upon and that the order of the certificate officer was not binding upon the plaintiff. It was held:

(i) The wakfnama is not void for uncertainty, because the wakf has used general words of the proviso to S. 3 of the Mussalman Wakf Validating Act, 1913 in making the ultimate gift to charitable purposes.

(ii) Under the Muslim law, the wakif is entitled at the time of dedication to reserve to himself the power to alter the beneficiaries, either by adding to or excluding from their number and to increase or reduce their shares; the wakf was not, therefore, void on that ground;

(iii) when a wakf is found to be validly created, the failure of the first mutwali to carry out the terms of the wakfnama does not make the wakf invalid or void;

(iv) The suit was barred under S. 37 of the Bengal Public Demands Recovery Act, 1913; Ss. 10 and 55 of the said Act have no application to the facts of the present case.

(v) On sects it has to be held that the wakf was acted upon. [M.M. Dutt and R.K. Sharma, JJ.] *Ayesha Khatoon* v. *Union of India*, 83 C.W.N. 776.

Note (1).— According to the English law the object of a trust, whether private or public, must be certain, otherwise the trust is void for uncertainty. The leading English case on public trusts is *Morice* v. *The Bishop of Durham (f)*. In that case it was held by Lord Eldon that a bequest for "such objects of benevolence or liberality as the executor should most approve of" was too vague to be enforced. It has similarly been held that a trust for "charitable or benevolent purposes" *(g)*, or for "purposes charitable or philanthropic" *(h)*, or for "such charitable or public purposes as my trustee thinks proper" *(i)*, is void for uncertainty. Following this principle, it has been held by the Privy Council that a gift by a Hindu for *dharam*, an expression equivalent to "charitable, religious or philanthropic purposes," is void for uncertainty *(j)*.

Turning now to Mahomedan cases, there appears to be a conflict of decisions. The High Court of Bombay expressed the opinion in an old case that a bequest by a Khoja Mahomedan for *dharam* was void for uncertainty *(k)*. In a later Bombay case, a bequest by a Mahomedan for *dharam, kherat, vigere,* was held to be void for uncertainty. The Gujarati word "kherat" it was said was derived from the Arabic "Khairat," and that "Khair" in Arabic means "good", and "khairat," means "good works, alms, charities" *(l)*. In a Punjab case it was held that a wakf for such charitable objects as the trustees should think proper and for such purpose as that the settlor should obtain certain bliss therefrom, is void for uncertainty *(m)*. In an Allahabad case it was held that a *wakf* for *fateha* and for *amar-i-khair* including the maintenance of poor relations and dependants was not void for uncertainty *(n)*. In another Allahabad case the opinion was expressed that a trust for "khairat" or of "Khairati kam" was valid, and in such a case, specification of objects of charity is not necessary. But, if a trust is for *umure khair* or *kare khair,* it is a question of construction in what sense the expression is used, and if it is used in the sense of benevolent purposes or good purposes, the trust will be void for uncertainty *(o)*. So also *kar-kher* which means "any good act" *(p)*. But "amar-i-khair" means "khair" or "good" works, and if that is the correct meaning of the word [see *Mahammad Yusuf* v. *Azimuddin (o)* p. 174], the wakf would be void for uncertainty, unless it can be said that when a Mahomedan dedicates his property by way of wakf for "good works," it must be taken that the dedication is for "purposes recognized by the Mussalman law as religious, pious

(f) (1804) 10 Ves. 522.

(g) In re Riland (1881) W.N. 173.

(h) In re Macduff (1896) 2 Ch. 463.

(i) Blair v. *Duncan* [1902] A.C. 37; *Grimond* v. *Grimond* (1905) A.C. 124.

(j) Runchordas v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71.

(k) Gangabai v. *Thavar* (1863) 1 Bom. H.C.O.C. 71.

(l) Mariambi v. *Fatmabai* (1928) 31 Bom. L.R 135, 116 I.C. 242, ('29) A.B. 127.

(m) Shahab-ud-din v. *Sohan Lal* (1907) Punj. Rec. No. 75. See also *Advocate General* v. *Hormusji* (1905) 29 Bom. 375.

(n) Mukkaram v. *Anjuman-un-Nissa* (1923) 45 All. 152, 69 I.C. 836, ('24) A.A. 223.

(o) Mohammad Yusuf v. *Azimuddin* (1941) All. 443. (1941) A.L.J. 269. 196 I.C. 324, ('41) A.A. 235.

(p) Faqir Mohammad v. *Abda Khatoon* ('52) A.A. 127.

or charitable" within the meaning of sec 2(1) of the Wakf Act. This contention was accepted in an Oudh case *(q)*, but the Lahore High Court has dissented holding that the use of the general words of the proviso to sec. 3 of the Wakf Act "religious and charitable objects" is not a sufficient specification of the object *(r)*. But the Lahore High Court has dissented from this view and held that the words *mazhabi aur khairati kam*, meaning "religious and charitable works" were sufficient to uphold the validity of a wakf *(s)*. In appeal to the Privy Council, this view was upheld *(t)*. A Full Bench of the Chief Court of Oudh, however, has now taken the view that a dedication in general terms for "charitable purposes highly commendable according to the Hanafi school of Mussalman law" is not a valid dedication *(u)*. The High Court of Calcutta in a recent case has held that the use of the general words of the proviso to sec. 3 of the Wakf Act without specification of the object of charity does not invalidate a wakf as it contemplates an ultimate gift effective in law and that the ultimate benefit in a wakf alal-aulad can also be impliedly reserved for the poor or for any purpose of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama. In that case it was held that the wakf deed manifested an overriding intention to charity in the contingency of the failure of the descendants of the settlor and the ultimate gift of "proper acts of charity" was held to be valid, as these words would imply a gift to the poor, and the benefit to the poor is the prime concern of the Muslim jurists *(v)*. A dedication of the property for the benefit of the Mahomedan community on the occasions of rejoicings and mournings was held not to be void for uncertainty. It was construed with reference to the congested condition of the testator's town to mean the provision of a building for the accommodation of marriage and funeral parties *(w)*. A discretion to pay money to Sayyads, i.e., descendants of the Prophet, is void for uncertainty, as it would be impossible to ascertain who were genuinely the members of the Prophet's family *(x)*.

Note (2).— A bequest by a Khoja Mahomedan under a will in the English language of a fund "to be disposed of in *charity* as my executor shall think fit," is not void for uncertainty *(y)*.

The salient features of a document executed by a Muslim are: (a) The document is styled as a Wakf deed; (b) The charities mentioned therein and for reading of Koran five times a day, for imparting instructions in the school, for lighting, for drawing water from the tank, distribution of Narasa (Prasadam) of certain value at the end of every month and certain amount to be spent on dharamam by way of feeding annually, (c) the properties worth of Rs.3000 shall be subject to above charities; (d) During lifetime of executant be alone shall be muthavali and perform charities, paying kist, land cost etc. and (e) After death of the executant his son and thereafter his heirs according to law of primogeniture, shall take possession of and enjoy the properties and from and out of its income they are to perform abovementioned charitable as muthavallis without any power of alienation or creating encumbrances.

Where the document was executed by a pious Muslim in the year 1944 who, under normal circumstances, could not have thought of anything but a wakf to create a method by which there should be a perpetual performance of certain charities. The various classes show (1) that on and from the date of creation of the document, the executant ceases to own the properties in his personal capacity and he assumes the role of muthavalli. Therefore there is a clear divestiture; (2) The executant has no power of alienation, but has a mere power to enjoy; (3) The line of succession in relation to muthavalli is something which runs counter to Muslim law because it is stated very emphatically that the succession shall be according to the law of primogeniture; (4) Those muthavallis who would succeeed will have also no power of alienation, nor the power of creating

(q) Sheikha Ramzan v. *Mussammat Rahmani* (1932) 7 Luck, 300, 135 I.C. 372, ('32) A.O. 71.

(r) Punjabi Sindh Bank v. *Anjuman Himayet Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

(s) Mohammad Afzal v. *Din Mohammad* ('47) A.L. 117.

(t) Beli Ram v. *Mohammad Afzal* (1949) Lah. 1,50, Bom. L.R. 674, (48) A.PC. 168.

(u) Ahmadi Begum v. *Badrum Nisa* (1940) 15 Luck. 586, (1940) O.W.N. 689, 189 I.C. 391, ('40) A.O. 324 (F.B.) See *Mohammad Yusuf* v. *Azimuddin* (1941) All. 443, (1911) A.L.J. 269, 196 I.C. 324, ('41) A.A. 235.

(v) Hasim Ali v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180 (case under Shia Law); *Haji Ishak* v. *Faiz Mohomed* (1943) Kar. 166, ('43) A.S. 134; *Syed Ahmed* v. *Julaiha Bivi* (1946) 2 M.L.J. 335, ('47) A.M. 176.

(w) Fazal Din v. *Karam Hussain* (1936) 162 I.C. 404, ('36) A.L. 81.

(x) Abdul Karim v. *Rahimabai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

(y) Gangabai v. *Thavar* (1863) 1 Bom. H.C.O.C. 71.

an encumbrance. By a reading of all these clauses and the document as a whole one gains the only impression that this is a deed of wakf. Relying on certain words in the clause it cannot be contended that those words are clear enough to indicate the creation of a charge and the restraint on alienation is bad. If that clause only is taken into consideration all the other classes will be rendered as otiose or nugatory. The document has not the effect of creating a charge for the performance of charities. 5 Cal. 438 1941 Mad. 59:1 L.W. 223, A.I.R. 1974 S.C. 740, distinguished; A.P. No. 103 of 1972 dated 20th August, 1975 (Mad.). [S. Natarajan and S. Mohan JJ.] *Kani Ammal* v. *Tamil Nadu State Wakf Board.* (1982) 2 M.L.J. 196.

There is a distinction between an instrument creating a Wakf and a document recording a transaction in the nature of wakf which had taken place earlier by words of mouth. Where the executant had specifically stated in the document that she had created wakf of her properties, and the document did not say that the executant was creating a wakf in present through the instrumentality of the document itself, the document could be construed as a memo of wakf which had been orally created or a document appointing mutwallis, and hence did not require registration. A.I.R. 1921 P.C. 105; A.I.R. 1958 S.C. 532; A.I.R. 1966 S.C. 337; A.I.R. 1959 S.C. 620. Rel. on [S.J. Hyder, J.] *Anjuman Islamia* v. *Mohammad Khair Husain* 1981 All. L.J. 1120.

180. Objects partly valid and partly invalid.— Where a wakf is created for mixed purposes, some of which are lawful and some are not, it is valid as to the lawful purposes, but invalid as to the rest, and so much of the property as is dedicated for invalid purposes will revert to the wakif (dedicator) *(z)*. Where the property is not specifically dedicated to an object which fails, the whole amount will be devoted to the valid object of charity *(a)*.

181. Doctrine of cy-pres.— Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed *(b)*.

The doctrine is not applicable unless the original wakf is valid. A wakf that is void for uncertainty cannot be validated by the application of the doctrine *(c)*, nor can a wakf *alal-aulad* which fails and is invalid be turned into a public wakf by applying the doctrine *(d)*.

Shia law.— The same is the rule of Shia law: Baillie, II, 216.

182. Persons capable of making a wakf.— Every Mahomedan of sound mind and not a minor may dedicate his property by way of wakf.

Baillie, 560. As to majority, see notes to sec. 115 above.

It has been held that a non-muslim may also create a wakf for any purpose which is religious under the Mahomedan law provided it is also lawful according to his own religious creed *(e)*.

The definition of wakf in the Wakf Act, 1954 limits wakfs to dedication by persons professing Islam.

183. Form of wakf immaterial.— A wakf may be made either verbally or in writing. It is not necessary in order to constitute a wakf, that the term "wakf" should be used in the grant, if from the general nature of the grant itself such a dedication can be inferred *(f)*. Where it is not clear whether a grant constitutes

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(z) Mazhar Husain v. *Abdul* (1911) 33 All. 400, 406, 9 I.C. 753; *Abdul Husain Moosaji* v. *Sugranbai* ('39) A.S. 322.

(a) Mt. Ruqia Begum v. *Sarajmal* (1936) All. L.J. 231, 163 I.C. 344 ('36) A.A. 404; *Sattar Ismail* v. *Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

(b) Kulsom Bibee v. *Golam Hossein* (1905) 10 C.W.N. 449, 484-485; *Salebhai* v. *Safiabu* (1912) 36 Bom. 111, 12 I.C. 702; *Hashim Ali* v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180.

(c) Punjab Sindh Bank v. *Anjuman Himayet Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

(d) Mohamad Sabir Ali v. *Tahir Ali* (1954) 2 All. 556.

(e) Mst. Mundaria v. *Shyam Sunder* ('63) A.P. 98; *Kassimiah Charities* v. *M.S.W. Board* ('64) A.M. 18.

(f) Jewun Doss v. *Shah Kuber-ood-Deen* (1840) 2 M.I.A. 390; *Saliq- un-Nissa* v. *Mati Ahmad* (1903) 25 All. 418 [Shia law]; *Muhammad Hamid* v. *Mian Mahomud* (1923) 50 I.A. 92, 104, 4 Lah. 15, 28, 77 I.C. 1009, ('22) A.PC. 384; *Budrul Islam Ali Khan* v. *Mt.*

a wakf, the statements and conduct of the grantee and his successors, and the method in which the property has been treated, are circumstances which, though not conclusive, are worthy of consideration *(g)*.

Note that the provisions of the Indian Trusts Act II of 1882 do not apply to wakfs: see sec. 1 of the Act.

Though a wakf may be created orally, yet when the terms of a dedication ave been reduced to writing no evidence can be given to prove the terms except the document itself or secondary evidence of its contents *(h)*.

It is not absolutely necessary the the writing by which a Wakf is created should exist or that there should be direct evidence about the creation of a wakf and its terms. A wakf can be proved by showing immemorial user of the property as wakf *(i)*.

184. Wakf may be inter vivos or testamentary.— A wakf may be created by act inter vivos or by will [s. 185].

A wakf created by will is not invalid because it contains a clause that the wakf shall not operate if a child is born to the testator. The reason is that a testator has power in law to revoke or modify his will at any time he likes, and he may therefore revoke a wakf created by will even without reserving any express power in that behalf *(j)*.

Shia law.— It was held at one time that a Shia cannot create a wakf by will. But this view was erroneous, and it has been held by the Privy Council that a Shia may create a wakf by will *(k)*.

There is a distinction between a *wakf-bil-wasiyat,* i.e., a will which conveys the property on the death of the testator to the mutawalli as wakf and a *wasiyat-bil-wakf*, i.e., a will which makes a gift of the property with a direction to the donee to create the wakf desired. The distinction is of form not of substance. In the later case the property is not impressed with the character of wakf immediately *(l)*.

185. Testamentary wakf and wakf made in death-illness.— A Mahomedan may dedicate the whole of his property by way of wakf. But a wakf made by will or during *marz-ul-maut* cannot operate upon more than one-third of the net assets without the consent of the heirs.

Hedaya, 233; Baillie, 612.

Shia law.— The same is the rule of Shia law *(m)*.

A testamentary wakf is no more than a *bequest* to charity, and it is subject to the same restrictions as a bequest to an individual *(n)*: see sec. 118 above.

186. Wakf how completed.— (1) A wakf inter vivos is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. This view has been adopted by the High Courts of Calcutta *(o)*, Rangoon *(p)*, Patna *(q)*,

Ali Begum (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251; *Ram Rup* v. *Saran Dayal* (1936) 160 I.C. 289, ('36) A.L. 283; *Mohammad Qasim* v. *Mohammad Mehdi* (1938) 13 Luck. 458, ('37) A.O. 465; *Haider Hussain* v. *Sudama Prasad* (1940) 15 Luck. 30, (1939) O.W.N. 858, ('40) A.O. 18; *Khurshed Jahan Begum* v. *Qamquam Ali* ('47) A.O. 17.

(g) Muhammad Raza v. *Yadgar* (1924) 51 I.A. 192, 195, 51 Cal. 446, 80 I.C. 645 ('24) A.PC. 109.

(h) Shaikh Muhammad v. *Bibi Mariam* (1929) 8 Pat. 484, 117 I.C. 638, ('29) A.P. 410.

(i) Chief Administrator of Auqaf v. *Rashid-ud-daula* P.L.D. 1961 (W.P.) Lah. 993.

(j) Muhammad Ahsan v. *Umardaraz* (1906) 28 All. 633; *Abdul Karim* v. *Shofiannissa* (1906) 33 Cal. 853.

(k) Baqar Ali Khan v. *Anjuman Ara Begam* (1902) 25 All. 236, 30 I.A. 94.

(l) Mahabir Prasad v. *Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.PC. 174; *Baqar Ali Khan* v. *Anjuman Ara Begam* (1902) 30 I.A. 94, 25 All. 236; *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429.

(m) Ali Husain v. *Fazal* (1914) 36 All. 431, 23 I.C. 291; *Budrul Islam Ali Khan* v. *Mt. Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251,

(n) Nanhoobeg v. *Gulam Husain* (1950) Nag. 633, ('51) A.N. 327.

(o) Deo dem Juan Beebee v. *Abdollah Barber* (1838) Fulton 345; *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 485-488, 67 I.C. 77, ('22) A.C. 429; *Gobinda Chandra* v. *Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163.

(p) Ma E Kin v. *Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71.

(q) Muhammad Ibrahim v. *Bibi Mariam* (1929) 8

Lahore *(r)*, Madras *(s)*, and Bombay *(t)*, and by the Oudh Chief Court *(u)*. According to Muhammad, the wakf is not complete unless, besides a declaration of wakf, a mutawalli (superintendent) is appointed by the owner and possession of the endowed property is delivered to him [*Hedaya,* 233; Baillie, 550]. At one time the High Court of Allahabad *(v)* adopted this view, but a Full Bench decision of that Court has since decided that a mere declaration of endowment by the owner is sufficient to complete the Wakf *(w)*. The Nagpur High Court *(x)* has also adopted this view.

(2) The founder of a wakf may constitute himself the first mutawalli (superintendent). The founder and the mutawalli being the same person, no transfer of physical possession is necessary, whichever of the two views is upheld. Nor is it necessary that the property should be transferred from his name as owner to his name as mutawalli *(y)*. Such a transfer is not necessary even in Allahabad where the view of Muhammad prevails *(z)*.

Intention.— Where there is neither a declaration of wakf nor delivery of possession, a *mere intention* to set apart property for charitable purposes is not sufficient, to create a wakf, even if the income of the property is applied to the intended purpose *(a)*. If the document purporting to create a wakf is invalid, subsequent conduct proving the intention to treat the property as wakf cannot render the endowment valid *(b)*.

If a wakf is created by a document which establishes by its terms a religious or charitable trust, and it is completed by delivery of possession it is not open to the settlor or those claiming under him to say that it was not intended to be acted upon. For if a wakf has been created it is immaterial that it has not been acted upon as that is only a matter of breach of trust *(c)*. But the settlor and those claiming under him are not precluded from showing that no wakf has been created at all and that the deed was not intended to operate as a wakf, but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon. For the purpose of such an enquiry subsequent conduct, if it is merely a continuation of conduct at the

Pat. 484, 117 I.C. 638, ('29) A.P. 410.

(r) Muhammad Said v. *Mt. Sakina Begam* (1935) 16 Lah. 432, 159 I.C. 250, ('35) A.L. 626; *Zaffar Hussain* v. *Mahomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L. 552.

(s) Pathu Kutti Umma v. *Nedungadi Bank Ltd.*, (1938) Mad. 148, 173 I.C. 699, ('37) A.M. 731.

(t) Abdul Rajak v. *Jimbabai* (1911) 14 Bom. L.R. 295, 300-301, 14 I.C. 988; *Husseinbhai* v. *Advocate-General of Bombay* (1920) 22 Bom. L.R. 846, 57 I.C. 991.

(u) Rahiman v. *Baqridan* (1936) 11 Luck. 735, 160 I.C. 495, ('35) A.O. 213.

(v) Muhammad Aziz-ud-din v. *The Legal Remembrancer* (1893) 15 All. 321; *Muhammad Yunus* v. *Muhammad Ishaq* (1921) 43 All. 487, 62 I.C. 896, ('21) A.A. 103; *Muhammad Shafi* v. *Muhammad Abdul* (1927) 49 All. 391, 99 I.C. 1052, ('27) A.A. 255.

(w) Mohammad Yasin v. *Rahmat Ilahi* (1947) All. L.J. 85, ('47) A.A. 201 F.B.

(x) Zainab Bi v. *Jamalkhan* (1949) Nag. 426, ('51) A.N. 428.

(y) Beli Ram v. *Mohammad Afzal* (1949) Lah. 1, 50 Bom. L.R. 674, ('48) A.PC. 168; *Abdul Rajak* v. *Jimabai* (1911) 14 Bom. L.R. 295, 300, 14 I.C. 988; *Muhammad Rustom Ali* v. *Mushtaq Hussain* (1920) 47 I.A. 224, 227, 42 All. 609, 612, 57 I.C. 329; *Husseinbhai* v. *Advocate-General of Bombay* (1920) 22 Bom. L.R. 846, 57 I.C. 991; *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 488, 67 I.C. 77, ('22) A.C. 429; *Abdul Jalil* v. *Obed-ullah* (1921) 43 All. 416, 62 I.C. 725, ('21) A.A. 165; *Muhammad Zain* v. *Nur-ul-Hasan* (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113; *Tafazzal* v. *Majid Ullah* (1924) 5 Lah. 59; 79 I.C. 120, ('24) A.L. 432; *Ailmunnissa Bibi* v. *Mohammad Abdul Rahman* (1938) A.L.J. 727, 177 I.C. 205, ('38) A.A. 485; *Mohammad Afzal* v. *Din Mohammad* (1946) L. 867, ('47) A.L. 117.

(z) (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113, *supra; Ghazanfar* v. *Ahmadi Bibi* (1930) 52 All. 368, 123 I.C. 369, ('30) A.A. 169; *Mohamed Abdul Aziz Khan* v. *Mahbub Singh* (1936) All. L.J. 488, 160 I.C. 48, ('36) A.A. 202.

(a) Banubi v. *Narsingrao* (1907) 31 Bom. 250; *Zaffar Hussain* v. *Mahomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L. 552; *Rahima Bibi* v. *S. Mustafa* (1938) 178 I.C. 83, ('38) A.R. 264.

(b) Mahomad Safi v. *Khadim Ali* ('44) A.O. 291.

(c) Beli Ram v. *Mohammad Afzal* ('48) A.PC. 168; *Syed Zainuddin Hussain* v. *Moulvi Mohammad Abdur Rahim* (1933) 58 Cal. L.J. 259, 140 I.C. 799, ('33) A.C. 102; *Muhammad Said* v. *Mt. Sakina Begum* (1935) 16 Lah. 432, 159 I.C. 250, ('35) A.L. 626; *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C.W.N. 449, 484.

time of execution, is relevant *(d)*. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not meant to be acted upon *(e)*. It has been held by the Privy Council that if a person executes a deed of wakf but without any intention of divesting himself of his ownership of the property the real intention being to utilise the document should it become necessary as a shield against any claims that any other person might have against him either then or at any future time, the deed cannot be given effect to as a wakf *(f)*.

Evidence of intention is always admissible if the wakf is not created by a document *(g)* or, if it is created by a document, the language used is ambiguous *(h)*. A creditor, of course, is always entitled to show that a wakf was created to defraud the creditors.

Importance of subsequent conduct and circumstances at the time of the execution of the wakf-deed: considered. See: *Official Receiver* v. *Kassim Moosa* ('67) A. Ker. 73. A wakf *inter vivos* is completed by a mere declaration of endowment by the owner. (Mulla 16th. Edn. page 178, article 186 approved).

Wakif may constitute himself as the first Mutawalli and no transfer of physical possession is necessary. Nor is it necessary that the property should be transferred from the name of the owner to his name as a mutawalli. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not intended to be acted upon. The settlor and those claiming under him can however show that no wakf was created and the wakf was illusory or fictitious. Subsequent conduct if it is in continuation of conduct at the time of the execution of the deed is irrelevant. Note: In this case the Mussalman Wakf Act 1923 is wrongly referred to as the Mussalman Wakf Validating Act, 1923. Penalties of S. 10 held applicable only in those cases to which the Act of 1913 applied and the benefit for the time being was claimed by the wakif or any of his family. *Garib Das* v. *Munshi Abdul Hamid* ('70) A. Sc. 1035.

Shafei law.— According to Shafei law delivery of possession is not necessary to validate a wakf *(i)*.

Shia law.— Under the Shia law, a wakf *inter vivos* cannot be created by a mere declaration; there must also be delivery of possession; Baillie, II, 212. Under the Shia law the wakif is entitled to constitute himself the first mutawalli and he is entitled to reasonable remuneration as a mutawalli, the ordinary rule being that he should not take more by way of salary than that which is fixed for other mutawallis *(j)*. No delivery of possession is necessary when the wakif constitutes himself the first mutawalli, but it is necessary in that case that the character of his possession should be changed from that of owner to that of mutawalli or custodian of the wakf. Where the ordinary means of showing change of possession is mutation of names in a public register the absence of change of names is significant and important; but mutation is not for this purpose the only method nor is it necessary as to every item of the property dedicated. In any case of doubt the settlor's conduct must be regarded broadly and as a whole. But where change of possession has been effected, the settlor's actions in dealing with the property as his own will not invalidate the wakf, but amount to breaches of trust *(k)*. If the wakf is testamentary a clear and unequivocal direction in the will dedicating specified property of God and "vesting" it in a mutawalli is sufficient *(l)*.

Under Shia law for the creation of a *Wakf* delivery of possession of property to a *mutawalli*

(d) Masuda Khatun v. *Muhammad* (1932) 50 Cal. 402, 133 I.C. 657, ('32) A.C. 93; *Ebratennessa Bibi* v. *Sarat Chandra* (1934) 37 Cal. W.N. 892, 150 I.C. 386, ('34) A.C. 14; *Gobinda Chandra* v. *Abdul Majid* (1944) 1 Cal. 329, 216, I.C. 143, ('44) A.C. 163.

(e) Gobinda Chandra v. *Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163.

(f) Mohammad Ali v. *Mt. Bismillah Begam* (1930) 35 C.W.N. 324, 128, I.C. 647, ('30) A.PC. 255; *Beli Ram* v. *Mohammad Afzal* ('48) A.PC. 168.

(g) Salig Ram v. *Amjad Khan* (1906) All. W.N. 159; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L.R. 1058, 1067; *Muhammad Imdad* v. *Mt. Bishmillah* (1947) 227 I.C. 50, ('46) A.A. 468.

(h) Kulsom Bibee v. *Golam Hoosein* (1905) 10 C.W.N. 449, 484.

(i) Pathu Kutti Umma v. *Nedungadi Bank Ltd.* (1938) Mad. 148, 173 I.C. 699, ('37) A.M. 731.

(j) Hashim Ali v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180.

(k) Abadi Begum v. *Kaniz Zainab* (1927) 51 I.A. 33, 6 Pat. 259, 99 I.C. 669, ('27) A.PC. 2, approving *Hamid Ali* v. *Mujawar Husain* (1902) 24 All. 257; *Syed Ali Zamin* v. *Syed Akbar Ali Khan* (1937) 64 I.A. 158 16 Pat. 344, 41 Cal. W.N. 709, 167 I.C. 884, ('37) A.PC. 127 reserving 7 Pat. 426.

(l) Badrul Islam Ali Khan v. *Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251.

must be proved. If the wakif becomes the first *mutawalli,* he must change the nature of his own position accordingly. In case of oral dedications cogent evidence is required. *Jamaluddin* v. *Mosque Mashakganj* ('73) All. 328.

187. Registration.— A wakfnama by which immovable property of the value of Rs.100 and upwards is dedicated by way of wakf requires to be registered under the Indian Registration Act, 1908, though the wakif (dedicator) may have constituted himself sole mutawalli thereof, but a "trusteenama" by which he appoints additional mutawallis does not require registration if the document does not purport to transfer any interest in the property to them *(m)*.

Every wakfnama, that is, a document creating a wakf, operates to *extinguish* the ownership of the wakif in the wakf property (see note to sec. 173), and therefore requires registration under sec. 17(1)(b) of the Registration Act. This was assumed in the Privy Council case of *Muhammad Rustom Ali* v. *Mushtaq Husain (n)*, upon which the present section (s. 187) is founded. The facts of the case are more fully reported in 42 All. 609, than in 47 I.A. 224. In that case the wakif first executed a wakfnama by which he constituted himself as the first mutawalli, and reserved to himself the power to appoint additional mutawallis. By that document he defined the powers and duties of the mutawallis and the relation in which they were to stand to the property. After three months he executed another document called "trusteenama," by which he appointed additional mutawallis some to act jointly with him, and others to act after his death. He died after about a month, and the suit was brought by the mutawallis to recover possession of the property from his heirs. The wakfnama was registered in fact, but it was argued for the heirs that it was not *duly* registered as certain rules made under sec. 69 of the Registration Act were contravened. The Privy Council held that it was duly registered. The "trusteenama," however, was not registered, and it was argued that, not being registered, it did not confer upon the mutawallis any right of suit. But this argument was not accepted, and it was held that the document, even if read with the wakfnama, did not purport to assign the property to the mutawallis, and did not therefore require registration. See in this connection sec. 202 which defines the position of a mutawalli. See also the following case:

Document purporting to be a memo of Wakf which has already been orally created or a document appointing Mutawallis—Validity—If required to be registered. 1981 All. L.J. 1120.

188. Wakf by immemorial user.— If land has been used from time immemorial for a religious purpose, e.g., for a mosque, or a burial ground or for the maintenance of a Mosque, then the land is by user wakf although there is no evidence of an express dedication *(o)*.

As a matter of law a wakf normally requires express dedication but if land has been used from time to time immemorial for a religious purpose then the land is by user wakf although there is no evidence of an express dedication.

Thus, where to the original mosque, which is proved to be a wakf property, an area is added by the mutawallis by way of construction of rooms and this area is used by the public for religious purposes alongwith the old mosque then if the area has been made into a separately demarcated compact unit for a single purpose, namely collective and individual worship in the mosque, it must be regarded as one unit and be treated as such. The whole becomes accordingly wakf by user *Mohammad Shah* v. *Fasihuddin Ansari,* A.I.R. 1956 Supreme Court 713.

Baillie, 622.

Mosque.— Land used from time immemorial for the purpose of a masjid and for its courtyard which formed part and parcel of the masjid and for celebration of Moharram festival has been held to constitute a wakf by user *(p)*. If a building has been set apart as a mosque it is enough to make it wakf if public prayers are said there with the permission of the owner. Both a mosque and a

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(m) Muhammad Rustam Ali v. *Mushtaq Husain* (1920) 47 I.A. 224, 42 All. 609, 57 I.C. 329.

(n) (1920) 47 I.A. 224, 42, All. 609, 57 I.C. 329.

(o) Mazar Husain v. *Adiya Saran* (1948) 1 M.L.J. 259, ('48) A.PC. 42; *Mohd. Shah* v. *Fasihuddin* ('56) A.S.C. 713.

(p) Khati v. *Mirza Hossain* ('62) A. Ori. 95.

saint's tomb become wakf by user *(q)*. If a mosque has stood for a long time and worship has been performed in it, the Court will infer that it does not stand by leave and licence of the owner of the site but that the land is dedicated property and no longer belongs to the original owner *(r)*. If the entire premises can be regarded as one whole and members of the public have exercised acts on parts of it in assertion of their right to the whole, the whole property will be considered wakf *(s)*. Where to the original mosque, which is proved to be a *wakf* property, an area is added by the *mutawallis* by way of construction of rooms and this area is used by the public for religious purposes along with the old mosque, then it must be regarded as one unit and treated as such. The whole becomes, accordingly, *wakf* by user *(t)*. But it has been held that rooms occupied by a mullah or mouezin solely for his residential purposes with the leave and licence of a third party which are some distance away and not a part of the mosque construction did not become wakf property *(u)*. A platform used as a praying place, not by the general public, but by the Mahomedan inhabitants of an "ahata" is private property and cannot be appropriated for the building of a mosque *(v)*. In the absence of an intention to dedicate or of a dedication by the owner, user will not divest land of its private character and make it wakf *(w)*. The construction of a mosque in a private house does not by itself mean that the public are entitled to worship there. There must be proof of dedication or of user such as by the saying of prayers in a congregational manner *(x)*.

In order to create a valid dedication of a public nature, the following conditions must be satisfied: (1) the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder either express or implied; (2) the founder must divest himself completely from the ownership of the property, the divestment can be inferred from the fact that he had delivered possession to the Mutawalli or Imam of the mosque. Even if there is no actual delivery of possession the mere fact that members of the Mahomedan public are permitted to offer prayers with *azan* and *ikamat*, is sufficient to hold that the wakf is complete and irrevocable; and (3) the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.

As regards the adjuncts, the law is that where a mosque is built or dedicated for the public, if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque.

The Mahomedans of village Vijayapuram, Tiruvarur District, Madras State, the plaintiffs' ancestors (who constituted the bulk of the Muslim population in the village) sought permission of the founder, the defendants' ancestors (being a small family in that village) for erecting a building for the purpose of worship on the land belonging to them. There was no mosque at all in the village which consisted of a substantial portion of the Muslim population. The idea of constructing the mosque originated from the plaintiffs' ancestors (the Rowthers). The agreement following the permission recited: (i) that the Rowthers (the plaintiffs' ancestors) were constructing a Pallivasal at the raised platform belonging to the Labbai M.K.A. Sahib (the founder or the owner) with his permission; (ii) that after completion of the construction which was described as a mosque in the agreement, the Rowthers would have no claim or right, except the right to worship therein; (iii) that the only rights which the Muslims would claim would be the right to worship, to light lamps and would also be responsible for the maintenance of the mosque; (iv) that the said construction was made purely for the purpose of worship; (v) that there should be a doorway and two windows affixed on the southern hall of the mosque and one doorway on the eastern side so as to serve as

(q) Syed Maher Husain v. *Haji Ali Mahomed* (1934) 36 Bom. L.R. 526, 152 I.C. 50, ('34) A.B. 257.

(r) Miru v. *Ram Gopal* (1935) All. L.J. 1269, 156 I.C. 942, ('35) A.A. 891; *Abdul Rahim* v. *Fakir Mohammad* (1946) Nag. 518 ('46) A.N. 401.

(s) Abdul Rahim v. *Fakir Mohamed* (1946) Nag. 588, ('46) A.N. 401; *Busquid* v. *Newaj Ahmed Khan* (1929) 119 I.C. 116, ('29) A.C. 533; *Maher Hussein* v. *Ahonahmed* (1934) 152 I.C. 50 ('34) A.B. 257.

(t) Mohd. Shah v. *Fasihuddin* ('56) A.S.C. 713.

(u) State of Madras v. *Mohd. Sahib* ('63) A.M. 39.

(v) Mt. Manik Devi v. *Habib Ullah* ('36) A.L. 876.

(w) Zaffar Hussain v. *Mohomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L. 552; *Faiz Modh.* v. *Kanahiyalal* 1964. Raj. L.W. 567.

(x) Musaheb Khan v. *Rajkumar Bakshi* (1938) O.W.N. 937, 177 I.C. 718, ('38) A.O. 238; *Khalil Ahamed* v. *Sheikh Md. Askari* ('65) A. All. 320.

entrances. It was held: that the document unmistakably evidenced the clear intention of the founder to consecrate the mosque for public worship and amounted to a declaration of a public wakf.

Once the mosque was constructed, it stood dedicated to God and all the right, title and interest of the owner got completely extinguished.

Once there was a complete dedication to the mosque, as a place of public worship, any reservation or condition imposed by the owner would be deemed to be void and would have to be ignored. However, the so-called stipulation by the plaintiffs, ancestors at the time of erecting the prayer hall not to claim any right or interest in the mosque could not be construed as an assertion that the mosque was not a public wakf. Reading the statements made in the agreement as a whole what the plaintiffs' ancestors meant was that the mosque would be undoubtedly a public wakf meant 'for the purpose of public worship' and that they would not interfere with the management of the same. This does not mean that if the founder's descendants indulged in mismanagement of the mosque, the plaintiffs as members of the Mahomedan community could not take any action under the law against the defendants. A.I.R. 1937 Lah. 552; A.I.R. 1963 S.C. 985 and A.I.R. 1956 Nag. 257, Disting:

Held further: As regards the adjuncts of the mosque which were built by the Mahomedan community from time to time for the purpose of the mosque or by way of gift to the mosque, the question of the person who actually made the construction is wholly irrelevant, because all the constructions made by any person used for religious purposes, incidental to offering prayers in the mosque, would be deemed to be accretions to the mosque itself. [P.K. Goswami and S. Murtaza Fazl Ali JJ.] *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*. A.I.R. 1976 S.C. 1569.

In the absence of a custom or usage to the contrary, the Mahomedan Law does not favour the hereditary rights of being an Imam, because an Imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers. This, however, is a matter for the entire Muslim community to decide, because an Imam is normally chosen under the Mahomedan Law by the Muslim community. [P.K. Goswami and S. Murtaza Fazl Ali JJ.] *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*. A.I.R. 1976 S.C. 1569.

Graveyard.— The Oudh Chief Court, relying on a decision of the Allahabad High Court *(y)* has held that the question whether a plot of land is a graveyard or not is primarily a question of fact *(z)*. In an earlier decision the same court took the view that the question whether a certain property is private or public property, held in trust for religious or charitable purposes, is a mixed question of law and fact *(a)*. In a later case *(b)* it was held by the same court that whether a building is a private or public mosque is not a question of fact but a question of law. That is a question of a legal inference to be drawn from the proved facts. In *Hasansab* v. *Mohidinsab (c)* the Bombay High Court held that the question whether a particular building is a public mosque or not is a question of fact. The Sind Chief Court has held that whether instances of burial proved in any particular case are "adequate in character, number and extent" to justify an inference of dedication is a question of pure fact. It is submitted that the proper legal effect of a proved fact is essentially a question of law and the view taken by the Oudh Chief Court in the later decision is correct and supported by the observations of the Privy Council in *Dhanna Mal* v. *Moti Sagar (d)*. A description in a settlement register of a site as a *kabaristan* is *prima facie* evidence that it is a public graveyard in the sense known to Mahomedan law *(e)*, and long user makes such evidence conclusive for a wakf may be established by user *(f)*, but the mere fact of a few burials many years ago has been

(y) Shevoraj Chamar v. *Mudee Khan* (1934) 149 I.C. 797, ('34) A.A. 868.

(z) Quadir Baksh v. *Saddullah* (1938) 173 I.C. 260, ('38) A.O. 77.

(a) Hari Kishen v. *Raghubar* (1926) 1 Luck. 489, 97 I.C. 853, ('26) A.O. 578.

(b) Musaheb Khan v. *Rajkumar Bakshi* (1938) O.W.N. 937, 177 I.C. 718, ('38) A.O. 238.

(c) (1923) 70 I.C. 850, ('23) A.B. 42.

(d) (1927) 8 Lah. 573, 54 I.A. 178, ('27) A.PC. 102.

(e) Ballabh Das v. *Nur Mahomed* (1936) 40 Cal. W.N. 499, 70 Mad. L.J. 55, 160, I.C. 579 ('36) A.PC. 83 affirming 7 Luck. 198; *Imam Baksha Munawar Din* v. *Narasingh Puri* (1938) 175 I.C. 1005, ('38) A.L. 246.

(f) Court of Wards v. *Ilahi Baksh* (1912) 40 Cal. 297, 40 I.A. 18, 17 I.C. 744; *Mehraj Din* v. *Ghulam* (1931) 12 Lah. 540, 134 I.C. 492, ('31) A.L. 607; *Mehar Din* v. *Hakim Ali* (1935) 157 I.C. 561, ('35) A.L. 912; *Jhao Lal* v. *Ahmadullah* (1934) All. L.J. 248, 149 I.C. 966, ('34) A.A. 335; *Abdul Rahim* v. *Fakir Mohamed* (1946) Nag. 518, ('46) A.N. 401; *Ramzan Momin* v. *Dasrath Raut* ('53) A.P. 138; *Gulam Mohideen Khan* v. *Abdul Majid Khan* 1956 Andh. W.R. 922; 1956 Andh. L.T. 673; ('57) A. Andh. Pr. 941.

held to be no evidence of public user *(g)*. In order to prove dedication by evidence of burials in a land and to justify the inference that the land is a cemetery, it is necessary to prove a number of instances adequate in character, number and extent. Long user, as evidence of a dedication, must be long and absolute and there should be no break. If there is evidence of discontinuance of the use of the land as a burial ground, that may cause the land to lose its consecrated character. A stray burial or two in a plot does not furnish ground for treating the land as a burial ground and there is no wakf by user *(h)*. Where a certain land was used as a Mahomedan graveyard and it is amply supported by the entries in the revenue records, the mere fact that in recent years it was not so used does not deprive it of its character as a wakf *(i)*. If a site is described in the revenue register as a grove and is owned by a Hindu zemindar the existence of a few graves will not justify the presumption of a dedication *(j)*; for the burials must be adequate in number, character and extent to justify the inference *(k)*. But although one burial in a plot will not make the land wakf *(l)* it has been held in Allahabad that the presumption is that the part of the site where the dead body is buried is dedicated with the consent of the owner so that the grave is wakf and the Muslim community have access to it *(m)*. But in the absence of evidence of user such a claim for a private grave would seem to be of doubtful validity: a Pir's tomb or a Dargah is accessible to the public and proof of user would establish the nature of the institution. Where in a public graveyard, one portion was used as burial ground from time immemorial and another portion was quite separate and distinct and in the possession of the mutawalli but was not shown in the settlement papers as the personal property of the mutawalli, and there were no burials in the built portion, it was held that the whole piece of land in the graveyard could not be considered wakf property; the built portion was the private property of the Mutawalli *(n)*. A public graveyard is wakf property and therefore inalienable even after it has been closed by the Municipality *(o)*. The Muslim community has a right to require the demolition of a house built on a disused graveyard in contravention of the original purposes of the wakf *(p)*. But the building of a temporary hut by the custodian of the graveyard does not amount to an assertion of title hostile to the wakf *(q)*. When the land has become wakf for a graveyard, the rights of the former owner are extinguished and he has no right to graze his cattle on it *(r)*. Private ownership of a plot is incompatible with the plot having been dedicated as a wakf for graveyards *(s)*. Where a mortgage decree was obtained in respect of the alleged wakf property, there would be an inference against wakf by user *(t)*.

Under the Mahomedan Law, graveyard may be of two kinds; a family or private graveyard and a public graveyard. A graveyard is a private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground no person who does not belong to the family of the founder is permitted to bury the dead. On the other hand, if any member of the public is permitted to be buried in a graveyard and this practice grows, so that it is proved by instances, adequate in character, number and extent, then the presumption will be that the dedication is complete and the graveyard has become a public graveyard where the Mahomedan public will have the right to bury their dead. It is also well settled that a conclusive proof of the public graveyard is the description of the burial ground in the revenue records as a public graveyard.

(g) Raushan Din v. *Mahomed Shariff* (1936) 161 I.C. 650, ('36) A.L. 87; *Quadir Baksha* v. *Saddullah* (1938) 173 I.C. 260, ('38) A.O. 77.

(h) Quadir Baksha v. *Saddullah* (1938) 173 I.C. 260, ('38) A.O. 77; *Mohammed Kasam* v. *Abdul Gafoor* ('64) A.M.P. 227; *Punjab Waqf Board, Ambala* v. *The Panchayat Deh* ('71) A. Punjab 482.

(i) Arur Singh v. *Badar Din* (1940) 188 I.C. 877, ('40) A.L. 119; *Mohammad Kasam* v. *Abdul Gafoor supra.*

(j) Baqar Khan v. *Badu Raghindra Pratap Sahi* (1934) 9 Luck. 568 148 I.C. 433, ('34) A.O. 263.

(k) Mahabir Prasad v. *Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.PC. 174.

(l) Ballabh Das v. *Nur Mahomed supra; Siraj Ahmad Khan* v. *Gaya Prasad* (1939) A.L.J. 115, 180 I.C. 942, ('39) A.A. 219.

(m) Nazira v. *Subhdarshan Lal* (1936) All L.J. 651.

(n) Mohammad Kasam v. *Abdul Gafoor* ('64) A.M.P. 227. See also: *Abdul Gafoor* v. *Hakim Ali* ('59) A. All. 78.

(o) Abdul Ghafoor v. *Rahmat Ali* (1930) 122 I.C. 326, ('30) A.O. 245.

(p) Ehsan Beg v. *Rahmat Ali* (1934) 10 Luck. 547, 152 I.C. 798, ('35) A.O. 47.

(q) Ramzan v. *Mohammad Ahmad Khan* (1936) 165 I.C. 104, ('36) A.O. 207.

(r) Jhao Lal v. *Ahmudallah* (1934) All. L.J. 248, 149 I.C. 966, ('34) A.A. 335.

(s) Dost Mahomed v. *Chainrai* (1940) Kar. 174, 187 I.C. 227, ('40) A.S. 43.

(t) Jawaharbeg v. *Abdul Aziz* ('56) A.N. 257.

Once a Kabaristan has been held to be a public graveyard, it vests in the public and constitutes a wakf and it cannot be divested by non-user but will always continue to be so whether it is used or not.

The following rules apply in order to determine whether a graveyard is a public or a private one:

(1) even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user, i.e., where the corpses of the members of the Mahomedan community have been buried in a particular graveyard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all; (2) if the graveyard is a private or a family graveyard then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in a family graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard; (3) in order to prove that a graveyard is public dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community had buried their corpses from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is a public one; and (4) where a burial ground is mentioned as a public graveyard in either a revenue or historical papers, that would be conclusive proof of the public character of the graveyard. A.I.R. 1936 P.C. 83; A.I.R. 1938 Lahore 246; A.I.R. 1934 All. 868; A.I.R. 1938 Oudh. 77 and A.I.R. 1964 Madh. Pra. 227 Ref. It was held on facts, that the entire burial ground of village Vijayapuram, Tiruvarur District, Madras State, was a public graveyard and the Mahomedan community have a right to bury their dead subject to payment of pit fees and other charges that may be fixed by the defendants Labbais, descendants of the founder. That the Labbais used to realize pit fees or other incidental charges would not detract from the public nature of the dedication. [P.K. Goswami and S. Murtaza Fazl Ali. JJ.] *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*. A.I.R. 1976 S.C. 1569.

It has been held that a Hindu may dedicate a plot of land for the purpose of a Muslim graveyard *(u)*.

In the absence of a plea that a presumption of dedication arises from long user, there can be no such presumption. Land was recorded in *Jamabandis* in 1909-1910 and in 1954-56 as *'gher mumkin kabrastan'* the entry was held to be not correct because the village was predominantly Hindu before partition of India and no Muslim remained after it. No graves were found on the spot. The entries of 1957-58 and 1960-61 were held to repeat merely the earlier entries. *Panchayat Deh* v. *Punjab Wakf Board* ('69) A. Punj. 344.

Land used as a graveyard ceases to be private property. *Pirbux* v. *Sher Mohd.* 1969 All. L.J. 169. Apart from immemorial user of land as a graveyard, evidence of instances must be given. From the number of instances a reasonable inference of dedication can be drawn, if the nature of the property admits it. *Skh. Bashir Ahmad* v. *Skh. Abdul Jabbar* ('68) A. Pat. 29.

189. Revocation of wakf.— (1) A testamentary wakf, that is a wakf made by will, may be revoked by the wakif (dedicator) at any time before his death *(v)* [sec. 184].

A testamentary wakf, being no more than a *bequest* for a religious or charitable purpose, may be revoked as any other bequest may be, see sec. 128 above. A wakf created during *marz-ul-maut* stands on the same footing *(w)*, see sec. 135 above.

(2) Where at the time of creating a non-testamentary wakf, the wakif reserves to himself the power of revoking the wakf, the wakf is invalid *(x)*.

(u) Arur Singh v. *Badar Din* (1940) 188 I.C. 877, ('40) A.L. 119 (Decision of a single Judge); *Motishah* v. *Abdul Khan* (1955) Nag. 1000.

(v) Muhammad Ahsan v. *Umardaraz* (1906) 28 All. 633.

(w) Sayad Abdulla v. *Sayad Zain* (1889) 13 Bom. 555, 560.

(x) Fatmabibi v. *The Advocate-General of Bombay* (1882) 6 Bom. 42, 51; *Assoobai* v. *Noorbai* (1906) 8 Bom. L.R. 245, 250-251; *Pathukutti* v. *Avathalakutti* (1890) 13 Mad. 66, 73-74; *Ashna Bibi* v. *Awaljadi* (1917) 44 Cal. 689, 702, 37 I.C. 887; *Abdul Satar* v. *Advocate-General of Bombay* (1933) 35 Bom. L.R. 18, 143 I.C. 799, ('33) A.B. 87; *Janabali Sardar* v.

he is expressly empowered to do so *(z)*.

A hereditary ministrant cannot make a valid settlement of his right to receive offerings at a Darga or Shrine *(a)*.

215. Attachment of office of mutawalli.— The office of mutawalli cannot be attached in execution of a personal decree against the mutawalli *(b)*. See sec. 194.

216. Limitation for suit against mutawalli.— No suit against a mutawalli or manager or wakf property, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, is now barred by any length of time.

Section 10 of the Limitation Act, 1908, as amended by sec. 2 of Act I of 1929. As to limitation for suits where the property is transferred for a consideration, see arts. 48B, 134A, 134B and 134C, inserted by sec. 3 of Act I of 1929. Sec. 10 of the Limitation Act referred to a person in whom the property has become "vested in trust" and the amendment was made in consequence of the decision in *Vidya Varuthi* v. *Balusami (c)* that a mutawalli is not such a person. The amendment is not retrospective. In a suit instituted before the 1st January 1929 the mujawars or servants of a shrine who has been put in possession of a wakf land by the Sajjadanashin on account of their services could not claim the benefit of the section as assigns of the Sajjadanashin or manager of the shrine *(d)*.

217. Adverse possession against wakf.— Wakf property may be lost by adverse possession *(e)*. But a *mutawalli's* possession cannot be adverse to the wakf *(f)*.

A stranger to the trust can encroach on the trust estate and will in course of time acquire a title by adverse possession. But a Mutawalli cannot take up such a position. If the Mutawallis of a mosque choose to build on part of the mosque property in such a way as to integrate the whole into one unit then the Court is bound to regard this as an accretion to the estate of which they are trustees, and they will be estopped from adopting any other attitude because no trustee can be allowed to set up a title adverse to the trust or be allowed to make a benefit out of the trust for his own personal ends. *Mohammad Shah* v. *Fasihuddin Ansari,* A.I.R. 1956 Supreme Court 713.

Miscellaneous

218. Public Mosques.— Every Mahomedan is entitled to enter a mosque dedicated to God, whatever may be the sect or school to which he belongs, and to perform his devotions according to the ritual of his own sect or school. But it is not certain whether a mosque *appropriated exclusively by the founder to any particular sect or school* can be used by the followers of another sect or school *(g)*.

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158 I.C. 544, ('35) A.C. 623; *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732; *Abdul Mannan* v. *Mutwali of Sm. Janebali* ('56) A.C. 584.

(z) Abdul Sobhan v. *Wasin Bhuvia* (1950) 54 C.W.N.

(a) Hakim Khan v. *Sahibjan Sahib* (1935) 69 Mad. L.J. 722, 159 I.C. 694, ('35) A.M. 1040.

(b) Sarkum v. *Rahaman Buksh* (1896) 24 Cal. 83, 91.

(c) (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.P.C. 123.

(d) Allah Rakhi v. *Shah Mahammad Abdul Rahim* (1934) 61 I.A. 50, 56 All. 111, 36 Bom. L.R. 408, 38 Cal. W.N. 400, 59 Cal. L.J. 157, 66 Mad. 431, 147 I.C. 887, ('34) A.P.C. 77.

(e) Shahidganj v. *Gurdwara Parbhanda Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.P.C. 116; *Abdur Rahim* v. *Narayandas* (1923) 50 I.A. 84, 50, Cal. 329, 71 I.C. 646, ('23) A.P.C. 44; *Hafiz Mohammad* v. *Swarup Chand* (1941) 2 Cal. 434, 73 C.L.J. 475, 200 I.C. 822, ('42) A.C. 1.

(f) Mohd. Shah v. *Fasihuddin* ('56) A.S.C. 713. *Kunhalavi Muschiar* v. *Kunhali* 1969 Ker. L.R. 685.

(g) Ata-Ullah v. *Azim Ullah* (1889) 12 All. 494; *Jangu* v. *Ahmad-Ullah* (1889) 13 All. 419 F.B.; *Fazl Karim* v. *Maula Baksh* (1891) 18 Cal. 448, 18 I.A. 59; *Abdus Subhan* v. *Korban Ali* (1908) 35 Cal. 294; *Maula Baksh* v. *Amir-ud-Din* (1920) 1 Lah. 317, 57

The right to offer prayers in a mosque is a legal right, for the disturbance of which a muslim is entitled to seek relief in a court of law *(h)*.

In *Ata-Ullah's* case *(i)*, it was held by the High Court of Allahabad, that a mosque dedicated to God is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. This ruling was referred to by their Lordships of the Privy Council in *Fazl Karim's* case, but they did not express any opinion on it stating that the facts of the case before them did not properly raise that question. In *Abdus Subhan's* case, the High Court of Calcutta doubted whether a special dedication of a mosque to any particular sect of Mahomedans was in accordance with Mahomedan Ecclesiastical law. The view taken in *Ata-Ullah's* case was followed by the High Court of Lahore *(j)* and that Court has said that there is no such thing as a Shia mosque or a Sunni mosque *(k)*. The question therefore cannot be said to be definitely settled. But when a mosque is not appropriated to a particular sect, there is no doubt that it may be used by any Mahomedan for the purpose of worship or customary religious ceremonies *(l)* without distinction of sect. Thus a Shafei may join in a congregational worship, though the majority of worshippers in the congregation may be Hanafis; and he cannot be prevented from taking part in the service, because the Shafei practice is to pronounce *amin* (amen) in a loud voice and the Hanafi practice is to mutter the word softly. Similarly, Mahomedans of the *Amil-bil-hadis* or *Wahabi* sect have the right to worship in a mosque built primarily for the use of Hanafis and generally used by them, though their views in the matter of ritual differ from those of the Hanafis. Shias may worship in a mosque where the rest of the congregation are Sunnis but they are not entitled to have a separate call to prayer or to hold a congregation behind an Imam of their own; and there is no rule of Mahomedan law to entitle the members of a new sect to pray as a separate congregation behind an Imam chosen by themselves *(m)*.

A mosque is not capable of human ownership or possession as it belongs to God and is dedicated to His Worship.

The Court will not, in framing a scheme under a decree by which it is declared that the members of a particular sect are entitled to use a particular mosque, vest in the religious head of the sect the power to exclude at his discretion any member of the community from joining in congregational prayers, or to prevent him from attending the mosque for prayers *(n)*.

As to management of mosques, see note to sec. 204, "Powers of Court."

219. Whether mosque a juristic person. — In the undermentioned case *(o)* the Lahore High Court held that a mosque is a juristic person. The question was discussed in the *Shahidganj* case *(p)*, and although their Lordships of the Privy Council reserved their opinion on it, the trend of their observations seems to show that the view of the Lahore High Court did not commend itself to them. Their Lordships however held that suits cannot be brought by or against mosques as artificial persons. The Rajasthan High Court has held that a mosque is not a juristic person *(q)*.

220. Sajjadanashin; Khankhah.— A *sajjadanashin* is a head of a *khankhah*, a Mahomedan institution analogous in many respects to a *math* where Hindu religious instruction is given. He is the teacher of the religious doctrine and rules

I.C. 1000; *Jiwan Khan* v. *Habib* (1933) 14 Lah. 518, 144 I.C. 658, ('33) A.L. 759; *Syed Ahmed* v. *Hafiz Zahid* (1934) 153 I.C. 1095 ('34) A.A. 732.

(h) P. Majilissae Islamia v. *Sheik Muhammad* ('63) A. Ker. 49. Follg. ('52) A.S.C. 245.

(i) (1889) 12 All. 494, *supra*.

(j) (1950) 1 Lah. 317 *supra*. (1933) 14 Lah. 518, *supra*.

(k) Mt. Iqbal Begum v. *Mt. Syed Begum* (1933) 140 I.C. 829, ('33) A.L. 80; *Haji Mohammad* v. *Abdul Ghafoor* ('55) A.A. 688.

(l) Mohd. Wasi v. *Bachan Sahib* ('55) A.A. 68.

(m) Hakim Khalil v. *Malik Israfi* (1917) 2 Pat. L.J. 108, 37 I.C. 302; *Safat Ali Khan* v. *Syed Ali Mian* (1933) All. L.J. 513, 144 I.C. 298, ('33) A.A. 284.

(n) Akbarally v. *Mahomedally* (1932) 57 Bom. 551, 34 Bom. L.R. 655, 138 I.C. 810, ('32) A.B. 356.

(o) Maula Bux v. *Hafizuddin* (1926) 94 I.C. 7, ('26) A.L. 372.

(p) Shahidganj v. *Gurdwara Parbandha Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.PC. 116.

(q) Mahomed Shafluddin v. *Chatur Bhuj* (1958) Raj. L.W. 461.

(91)

ANNEXURE-4

J. C.* 1921 July 5.

VIDYA VARUTHI THIRTHA . . . . . APPELLANT;

AND

BALUSAMI AYYAR AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Religious Endowment—Math—Relation of Heads and Managers of Religious Institutions to Property—Alienation by Head of Math—"Trustee"—Indian Limitation Act (IX. of 1908), Sch. I., arts. 134, 144.

The endowments of a Hindu math are not "conveyed in trust," nor is the head of the math a "trustee" with regard to them, save as to specific property proved to have been vested in him for a specific object.

Consequently, art. 134 of Sch. I. of the Indian Limitation Act, 1908, which contains the expressions above quoted, does not apply where the head of a math has granted a permanent lease of part of its property not proved to be vested in him subject to a specific trust.

Semble, the same rule applies to the endowments of Mahommedan religious institutions, and to alienations made by the sajjadanishin or mutawalli.

Ram Parkash Das v. *Anand Das* (1916) L. R. 43 I. A. 73 explained.

Kailasam Pillai v. *Nataraja Thambiran* (1909) I. L. R. 33 M. 265 (F. B.) and *Muthusamier* v. *Sreemethanithi* (1913) I. L. R. 38 M. 356 approved.

Behari Lall v. *Muhammad Muttaki* (1898) I. L. R. 20 A. 482, and *Dattagiri* v. *Dattatraya* (1902) I. L. R. 27 B. 363 disapproved.

Nilmony Singh v. *Jagabandhu Roy* (1896) I. L. R. 23 C. 536 commented on.

Judgment of the High Court reversed.

Except for unavoidable necessity, the head of a math cannot create any interest in the math property to endure beyond his life. A lessee, however, has not adverse possession under art. 144 of the schedule above named until the death of the head who granted the lease. If the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him, and there is no adverse possession until his death.

APPEAL (No. 48 of 1919) from a judgment and decree of the High Court (October 19, 1916) reversing a decree of the temporary Subordinate Judge of Ramnad.

The suit was instituted in 1913 by the present respondents for possession of land in Madura forming part of the endowments of a math situated in Mysore State. The defendants were the present appellant, the head of the math (referred to as the pandara sannadhi or matathipathi), certain lessees

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW, and MR. AMEER ALI.

from him, who were in possession, and others. The plaintiffs claimed under a permanent lease granted to them in 1891 by a former head of the math. They also claimed that they had acquired a good title under the Indian Limitation Act; they relied on arts. 134 and 144 of the Schedule and s. 28. (1)

The facts are stated at the beginning of the judgment of the Judicial Committee. . . . . .

Both Courts in India held that the lease of 1891 was not made for necessity, and that the land in suit was part of the general endowment of the math, not being subject to any specific trust. The Subordinate Judge dismissed the suit. He held that the head of the math was not a "trustee" of its endowed property, and that consequently art. 134 of Sch. I. did not apply; he was also of opinion that there had not been adverse possession so as to bring art. 144 into operation. The High Court allowed an appeal. A decree was made declaring that the first plaintiff was a permanent lessee of the land in suit and for possession and mesne profits. The judgment was delivered by Burn J. (Sudasiva Ayyar J. agreeing). The learned judge was of opinion that expressions in the judgment of the Board in *Ram Parkash Das* v. *Anand Das* (2) constrained the Court to hold that the head of the math was a trustee of the properties, and that consequently art. 134 applied. The appeal to the High Court is reported at I. L. R. 40 M. 745.

1921. Feb. 18, 21. *Clauson K.C.* and *Kenworthy Brown* for the appellant. Both Courts in India found that the permanent lease was not made for necessity, and that the property in suit was not subject to any specific trust, but formed part of the general endowment of the math. Art. 134

(1) Indian Limitation Act, 1908, Sch. I., art. 134, provides that for a suit "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration," the period of limitation shall be 12 years from "the date of the transfer."

By s. 28: "At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

(2) (1916) L. R. 43 I. A. 73, 76, 90.

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does not apply. The head of a math is not a "trustee" of its general endowments: *Kailasam Pillai* v. *Nataraja Thambiran*. (1) The Board gave no decision to the contrary in *Ram Parkash Das* v. *Anand Das*. (2) The expressions in the judgment upon which the High Court based its decision were intended to convey merely that the head of a math was in a fiduciary position with regard to its property, not that he was a "trustee" in the full sense in which that word is used in English law. The terms of art. 134 show that the word is there used in the latter sense; and s. 10 of the Act makes that clear. The case in the course of which the judgment of the Full Bench in *Kailasam Pillai* v. *Nataraja Thambiran* (1) was rendered, came before the Board on appeal in *Nataraja Thambiran* v. *Kailasam Pillai*. (3) Although the decision of the Full Bench was not approved in terms, the decree based upon that decision was affirmed. The respondents acquired no title under art. 144 by adverse possession. When the head of a math grants a permanent lease there is no adverse possession during his life: *Muthusamier* v. *Sreemethanithi*. (4) Consent to the lessee's possession by the succeeding head must be referred to a new lease; consequently there was no adverse possession during the successor's lifetime.

De Gruyther K.C. and *Dube* for the respondents. The land in suit was part of an inam for religious and charitable purposes, as appears from the Inam Register. It was land of which the head was "trustee" within the meaning of art. 134. Every High Court, with the exception of that at Madras, has held that art. 134 applies to land so held: *Dattagiri* v. *Dattatraya* (5); *Behari Lall* v. *Muhammad Muttaki* (6); *Nilmony Singh* v. *Jagabandhu Roy* (7); *Rameshwar Malia* v. *Jiu Thakur*. (8) The decision of the Madras Full Bench in *Kailasam Pillai* v. *Nataraja Thambiran* (1) did not relate to art. 134. It was an affirmance on consideration

(1) I. L. R. 33 M. 265.
(2) (1916) L. R. 43 I. R. 73, 76, 90.
(3) (1920) L. R. 48 I. A. 1.
(4) I. L. R. 38 M. 356.
(5) I. L. R. 27 B. 363.
(6) I. L. R. 20 A. 482.
(7) I. L. R. 23 C. 536.
(8) I. L. R. 43 C. 34.

of *Vidyapurna* v. *Vidyanidhi*. (1) In art. 134 the Indian Legislature used the words "trust" and "trustee," not in a technical sense, but to cover cases in which a person is charged with the application of property in a particular manner; the Religious Endowment Act (XX. of 1863), s. 14, uses "trustee" in relation to the head of a math. If, however, art. 134 applies only to a transfer by a "trustee" in the technical sense in which the word is used in English law, and if the distinction drawn in *Kailasam Pillai's Case* (2) is correct, then the property in suit was held on a specific trust. The evidence shows that the property was granted for the support of the titular deity; the title was confirmed under r. 3, cl. 1, of the Inam Rules (S. O. Bd. of Rev., 1859). Further, the respondents acquired a good title under art. 144. It is settled law that the holder of a permanent lease has adverse possession: Mitra's Law of Limitation, pp. 160, 161, and cases there referred to. Under s. 14 of Act XX. of 1863 proceedings could have been taken both in the life of the grantor and after to set aside the alienation.

Clauson K.C. in reply. Art. 144 was not relied on in the High Court; the case of the appellants being not adverse possession, but that the appellant had recognized the tenancy and was estopped.

July 5. The judgment of their Lordships was delivered by

MR. AMEER ALI. The suit that has given rise to this appeal relates to certain lands lying in the town of Madura in the Madras Presidency which admittedly belong to an old math situated within the Mysore State. The origin, development, and raison d'être of these maths have been discussed in a number of cases decided in the Madras High Court to some of which their Lordships propose to refer in the course of this judgment. In their general characteristics they are almost identical with similar institutions in Northern India and in the Bombay Presidency. The heads of these foundations bear different designations in respect of the rights and incidents attached to the office; the difference

(1) (1904) I. L. R. 27 M. 435. (2) I. L. R. 33 M. 265.

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arises from the customs and usages of each institution. The superior of this particular math has been called in these proceedings matathipathi and sometimes pandara sannadhi, which their Lordships understand connote the same idea of headship. At the time this action was brought, the 26th defendant held the office of matathipathe. He has since died and the present appellant is the head of the institution. In 1891 one Srinivasa was the matathipathi and he on March 17 of that year granted to the 2nd plaintiff, a near relative, a permanent lease of the lands in suit, on a small quit rent of Rs.24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by one Samudra, who held the office until 1906. On his death the now deceased defendant No. 26 became the head. In 1902 the 2nd plaintiff sub-leased the lands to the 1st and 2nd defendants for a period of ten years.

Since 1905 the math has been under the management of the Mysore State under a power of attorney, executed at first by the matathipathe Samudra and afterwards by his successor, in favour of the Dewan and his successors in office. About the same time the 2nd plaintiff conjointly with his son (the 3rd plaintiff) assigned their right and interest in the lands in suit to the 1st plaintiff. It is in evidence and, so far as appears from the judgments of the two Courts in India, does not appear to be contradicted, that it was only in 1908 that the representative of the Dewan acting under the power granted by the matathipathe became aware of the transaction of 1891 under which the plaintiffs claim title. The sublease created in 1902 by the 2nd plaintiff in favour of the 1st and 2nd defendants was to have expired in 1912. But before its expiry they obtained a lease for 17 years from the representative of the Dewan. They are now in possession of the lands in suit under this lease. The plaintiffs are and were at the time they brought their suit on March 5, 1913, in the Court of the Subordinate Judge of Madura, admittedly out of possession. The present action is for declaration of title and for ejectment and possession, principally directed against the matathipathi as the head of the math and the 1st and 2nd defendants lessees holding possessions under him. The

other defendants have been joined as parties apparently in consequence of certain rights they possess or exercise under those defendants.

The plaintiffs base their title on two grounds: First, that the permanent lease under which they claim was created under circumstances that would bind not only the grantor but all his successors; and secondly, that even if the lease was not valid they had acquired a title under the Indian Limitation Act.

Their case throughout has been that Srinivasa was a "trustee" and that all his successors are "trustees," that the lands were granted on a "specific" trust, and that consequently under art. 134 of Sch. I. of the Indian Limitation Act (IX. of 1908) they have acquired a good title against the math. The matathipathi controverted both allegations. He denied that the alienation by Srinivasa was of such a character as would bind the math; he further denied that he and his predecessors were "trustees" of the math or that the 2nd plaintiff or his assignee had acquired any right to the math lands by adverse possession. On these contentions, two points arose for determination which are embodied in the first two issues.

The Subordinate Judge, after giving the substance of the 2nd plaintiff's evidence and of the other witnesses, formulates the position which the pleader took up. "He contends," says the learned judge, "that the plaint property is trust property set apart for the worship of the titular deity of the math, that the head of the math is a trustee merely, and that the permanent lease to 2nd plaintiff is an alienation of math property and that 26th defendant at this distance of time could possibly have no right to such property. The alienation being ab initio void, the 26th defendant had no right to plaint property as he succeeded only in 1906 and 1st plaintiff had perfected his title by adverse possession for over twelve years."

The Subordinate Judge negatived that contention; he held upon the admissions of the 2nd plaintiff that the property in suit was "ordinary math property" and was not set apart on any specific trust; that the head of the math was not a

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"bare trustee," as it was admitted that the income was at his absolute disposal and that "none had a right to question him about it." He found also that the 2nd plaintiff took the lease with full knowledge of the character of the endowment and had learnt on inquiry that "he could not safely purchase it."

With regard to the question of estoppel arising from the alleged acceptance of rent by the 26th defendant as the plaintiffs contended, the Subordinate Judge held: "In fact the 1st plaintiff never paid money as rent and the 26th defendant or his agent never accepted payment with knowledge that the payment was as rent for plaint property. In these circumstances, I find that these defendants are not estopped from denying plaintiff's title. I find this issue against plaintiffs." He accordingly dismissed the suit save and except in respect of a money claim against the 1st and 2nd defendants.

The plaintiffs appealed to the High Court of Madras, which reversed the trial judge's order and decreed the claim. The learned judges do not negative the finding of the first Court that the 2nd plaintiff took the lease with notice. But they considered that the matter in dispute fell within art. 134 referred to above. They summed up their conclusion in the following words: "that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of art. 134 have been complied with."

The findings of the learned judges on the issue relating to limitation and the acquisition of right by adverse possession require notice. They deal first with the question of justifiable necessity, which they decide against the plaintiffs. They say "there is no doubt that the head of a math cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time." And then add: "There is no allegation, much less proof, of any such necessity. The first contention must be rejected." They then proceed to discuss the nature of the endowment in question and the position of its head. Their finding on this point is important;

they say as follows: "In connection with the second point a question arises as to the nature of the endowment and the position of the head of the math in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Naicken dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose, i.e., for the worship of Gopalakrishnaswami, who is described by defendants' 1st witness as the 'titular deity of the math.' The evidence does not support this contention and it has been found against in the lower Court. A statement made by a local agent of the math during the Inam Commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence. The description of the inam as given at the close of the inquiry is that it was granted 'for the support of Vyasaraya matam' (Exhibit L). Compare also description in Exhibit F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the math. I think the grant must be held to have been made for the general purposes of the math."

They thus concur with the first Court that there was no "specific trust" which was the foundation of the plaintiff's case. But after examining some of the judgments of their own Court, they apparently felt constrained to hold that the decision of this Board in *Ram Parkash Das* v. *Anand Das* (1) had crystallized the law on the subject, and definitely declared the mahant to be a "trustee." It is to be observed that in that case the decision related to the office of mahant, but in the course of their judgment their Lordships conceived it desirable to indicate inter alia what upon the evidence of the usages and customs applicable to the institution with which they were dealing, and similar institutions, were the duties and obligations attached to the office of superior; and they used the term "trustee" in a general sense, as in previous decisions of the Board, by way of compendious expression to convey a general conception of those obligations. They

(1) L. R. 43 I. A. 73.

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did not attempt to define the term or to hold that the word in its specific sense is applicable to the laws and usages of the country. As pointed out by their predecessors in *Greedhari Doss* v. *Nundkissore Doss* (1): "The only law as to these mahants and their functions and duties is to be found in custom and practice, which is to be proved by testimony." Generally speaking, however, the duties and obligations resting on the superior indicated in *Ram Parkash Das* v. *Anand Das* (2) do not seem to vary. In this particular institution the position of the matathipathe in relation to the math was clearly established by testimony and concurrently found by both Courts. But the learned judges misapprehended their Lordships' judgment and proceeded to hold that as Srinivasa who granted the permanent lease was a "trustee," his act fell under art. 134. To this article their Lordships will presently refer. Before doing so, however, they consider it necessary to observe that there are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well-recognized rules relating to their religious and charitable institutions. From the year 1774 the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs so far as they are not in conflict with the statutory laws, by Hindus and Mahommedans. It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Mahommedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in pari materia. The vice of this method of construction by analogy is well illustrated in the case of *Vidyapurna* v. *Vidyanidhi* (3), where a mahant's position was attempted to be explained by comparing it with that of a bishop and of a beneficed clergyman in England under the ecclesiastical law. It was criticised, and rightly, in their Lordships' opinion, in the subsequent case,

(1) (1867) 11 Moo. I. A. 405, 428. (2) L. R. 43 I. A. 73.
(3) I. L. R. 27 M. 435.

which arose also in the Madras High Court, of *Kailasam Pillai* v. *Nataraja Thambiran*. (1) To this judgment their Lordships will have to refer further later on.

It is also to be remembered that a "trust" in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple (J. G. Ghose, "Hindu Law," p. 276). Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system; to brahmans, goswamis, sanyasis, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a "juristic entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them eo nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of math were founded under spiritual teachers of recognized sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal-administration.

(1) I. L. R. 33 M. 265.

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The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Mahommedan influence has been predominant, such as Upper India and the Carnatic, the expression wakf is used to express dedication.

But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of *Jewan Doss Sahu* v. *Shah Kubeeruddin* (1) that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. In *Jewan Doss Sahu's Case* (1) the Judicial Committee call him "procurator." That case related to a khankah, a Mahommedan institution analogous in many respects to a math where Hindu religious instruction is dispensed. The head of these khankhas, which exist in large numbers in India, is called a sajjadanishin. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary mutawalli. But neither the sajjadanishin nor the mutawalli has any right in the property belonging to the wakf; the property is not vested in him and he is not a "trustee" in the technical sense.

It was in view of this fundamental difference between the juridical conceptions on which the English law relating to trusts is based and those which form the foundations of the Hindu and the Mahommedan systems that the Indian Legislature in enacting the Indian Trusts Act (II. of 1882)

(1) (1840) 2 Moo. I. A. 390.

deliberately exempted from its scope the rules of law applicable to wakf and Hindu religious endowments. Sect. 1 of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance," lays down, "but nothing herein contained affects the rules of Mahommedan law as to wakf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments. . . . ." Sect. 3 of the Act gives a definition of the word "trust" in terms familiar to English lawyers. It says: "A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust-property' or 'trust-money'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust.'"

In this connection it may be observed that in the case of *Muhammad Rustam Ali* v. *Mushtag Husain* (1) the dedication was of specific property created by an instrument called a "trustee-namah." Lord Buckmaster, delivering the judgment of the Board, dealt thus with the objection as to the validity of the document: "It is argued," said the noble lord, "that the 'trustee-nama' must have dealt with an interest in immovable property, for otherwise the trustees could have no right to maintain the suit; and such an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the

(1) (1920) L. R. 47 I. A. 224.

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assumption that the trustees of the wakf-nama in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The wakf-nama itself does not purport to assign property to trustees."

In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Mahommedan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Government considered it expedient to divest itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object, Act XX. of 1863 was enacted; a system of Committees was devised to which were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents"; rules were enacted to ensure proper management and to empower the superior court in the district to take cognizance of allegations of misfeasance against the managing authority. Their Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee"; it uses indifferently and indiscriminately the terms "manager, trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863, the Committees, to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of "managers, trustees or superintendents."

Art. 134 of Sch. I. to the Indian Limitation Act (IX. of 1908) is in these terms: "To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration," the period prescribed for the institution of the suit is twelve years "from the date of transfer." In the old Act, XV. of 1877, the words were "purchased from the

trustee or mortgagee." The alteration was made with the object of including permanent leases in transactions of the character contemplated in the article.

Art. 134 is, as pointed out in *Abhiram Goswami's Case* (1), controlled by s. 10 of the Limitation Act, which runs thus: "Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time." The language of s. 10 gives the clue to the meaning and applicability of art. 134. It clearly shows that the article refers to cases of specific trust, and relates to property "conveyed in trust." Neither under the Hindu Law nor in the Mahommedan system is any property "conveyed" to a shebait or a mutawalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Mahommedan Law, the moment a wakf is created all rights of property pass out of the wakif, and vest in God Almighty. The curator, whether called mutawalli or sajjadanishin, or by any other name, is merely a manager. He is certainly not a "trustee" as understood in the English system.

In *Sammantha Pandara* v. *Sellappa Chetti* (2) the position of the superior in relation to the properties of the math was laid down in terms which have an important bearing on the present case. The learned judges say there: "The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any

(1) (1909) L. R. 36 I. A. 148. (2) (1879) I. L. R. 2 M. 175.

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purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his mattam, and debts so contracted might be recovered from the mattam property and would devolve as a liability on his successor to the extent of the assets received by him."

The origin and nature of these maths were again considered at great length in a case which arose in the same Court in 1886. In that case (*Giyana Sambandha* v. *Kandasami* (1)) the learned judges pronounced that the head of the institution held the mattam under his charge, and its endowment in trust for the maintenance of the math, for his own support, for that of his disciples, and for the performance of religious and other charities in connection therewith according to usage. An almost identical question came up for consideration in 1904 in *Vidyapurna* v. *Vidyanidhi* (2) already referred to. In that case the learned judges, after an elaborate examination of English institutions which they conceived to be analogous to Hindu maths, came to the conclusion that whilst a dharmakarta of a temple who has specific duties to perform might be regarded as a trustee, the superior of a math is not a trustee but a "life-tenant."

The same question in another form came up again for consideration in 1909 before a Divisional Bench of the Madras High Court in the case of *Kailasam Pillai* v. *Nataraja Thambiran*. (3) The learned judges before whom the point arose considered that the view taken in *Vidyapurna* v. *Vidyanidhi* (2) was in conflict with that propounded in the two earlier cases (4) and referred the question to a Full Bench. The reference was in these terms: "Does the head of a math hold the properties constituting its endowment as a life-tenant or as a trustee?"

The officiating Chief Justice expressed his opinion in the following terms: "I think, then, that it cannot be predicated of the head of a math, as such, that he holds the properties

(1) (1887) I. L. R. 10 M. 375.
(2) I. L. R. 27 M. 435.
(3) I. L. R. 33 M. 265.
(4) I. L. R. 2 M. 175; I. L. R. 10 M. 375.

constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long-continued and well-established usage and custom of the institution in respect thereto." Wallis J. substantially agreed in this view. Sankaran Nair J. pointed out that in the case of these maths: "Any surplus that remains in the hands of the pandara sannadhi, he is expected to utilise for the spiritual advancement of himself, his disciples or of the people. But his discretion in this matter is unfettered. He is not accountable to anyone and he is not bound to utilise the surplus. He may leave it to accumulate." And he further added: "It is also true in my opinion that he is under a legal obligation to maintain the math, to support the disciples and to perform certain ceremonies which are indispensable. That will be only a charge on the income in his hands and does not show that the surplus is not at his disposal." In the result, he was of opinion "that in the absence of any evidence to the contrary, the pandara sannadhi (the superior) as such is not a trustee. He is not also a life-tenant for the reasons already stated." All three judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes he might be regarded as a "trustee" with regard to that property; but that in the absence of any such evidence the superior was not a trustee in respect of any part of the endowment.

The point came up for discussion again in a concrete form in 1913 in *Muthusamier* v. *Sreemethanithi* (1), where the exact point for decision was the question of limitation. The facts which gave rise to the litigation were almost identical with the present case before their Lordships, with this difference, that the suit there was brought by the head of the math to recover possession of the leased properties. Miller J. stated thus the question for determination: "The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded

(1) I. L. R. 38 M. 356.

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for the appellants that the lease is in excess of the powers of the matathipathi, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890."

The learned judges held in substance that there was no specific trust, that the properties were given or endowed generally for the performance of the worship of the deities in the math and other attendant duties and for the support of the superior and his disciples; that a lease granted by him was valid for his life, and if adopted by his successor would enure during his term of office; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession.

These cases deal exclusively with the position of the superior of a math in relation to its endowment. But there are some others respecting the powers of the managers of religious institutions generally. In *Mahomed* v. *Ganapati* (1) a lease was granted by the dharmakarta of a temple; and the suit to recover the leased lands was brought by his successor in office. The defence was limitation, running from the date of alienation. Shephard J. (Muttusami Ayyar J. concurring) held as follows: "In the present case, though the plaintiff may in point of time have succeeded the dharmakarta who made the alienation, he does not derive his title from that dharmakarta and is, therefore, not bound by his acts. Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors (*Papaya* v. *Ramana* (2); *Jamal Saheb* v. *Murgaya Swami* (3); *Modho Kooery* v. *Tekait Ram Chunder Singh* (4)), and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession. Accordingly, Raman Pujari having died so recently as 1885,

(1) (1889) I. L. R. 13 M. 277.
(2) (1883) I. L. R. 7 M. 85.
(3) (1885) I. L. R. 10 B. 34.
(4) (1882) I. L. R. 9 C. 411.

the plaintiff's suit cannot be barred by limitation." That was followed in *Sathianama Bharati* v. *Saravanabagi Ammal.*(1) In that case the superior is called the "manager."

In *Chockalingam Pillai* v. *Mayandi Chettiar* (2) it was conceded that "the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation." But from the long lapse of time between the alienation and the challenge of its validity, coupled with other circumstances, the learned judges came to the conclusion that necessity may reasonably be presumed.

From the above review of the general law relating to Hindu and Mahommedan pious institutions it would prima facie follow that an alienation by a manager or superior by whatever name called cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course, a Hindu or a Mahommedan may "convey in trust" a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term.

But the respondents rely on three decisions of the Indian Courts in support of their contention that persons holding properties generally for Hindu and Mahommedan religious purposes are to be treated as "trustees." The first is a decision of the Bombay High Court in *Dattagiri* v. *Dattatraya.* (3) The facts of that case were peculiar. The math there was an old one and the dedication was recognized and confirmed by the Mahratta Government. The village was granted to a holy ascetic for the maintenance of a charity attached to the math; the governance went by succession to the disciples of the garu (the spiritual preceptor or head). In 1871 the village was divided between two disciples, Shivgiri and Shankargiri, in equal moieties, and each held his half separately

(1) (1894) I. L. R. 18 M. 266. (2) (1896) I. L. R. 19 M. 485.
(3) I. L. R. 27 B. 363.

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from the other. In the same year one of them, Shankargiri, sold the lands in dispute to the defendant. In 1897 Shankargiri obtained a sanad from Government under Act II. of 1863 declaring him to be the absolute owner of his share. He died in August, 1897, after appointing the plaintiff as his successor, who in 1898 brought an action to recover possession of the alienated lands on the ground that Shankargiri had no power to alienate them as they were dedicated property. The defence was first that the sanad had altered the character of the property, and secondly that the suit was barred. The lower appellate Court found that the lands in suit were private alienable property and that consequently the action was barred. The first finding was strongly challenged by the plaintiff's counsel on second appeal. He contended that as it was dedicated property its holders from time to time "could not allow the Government to treat it as private property." The learned judges of the High Court refrained from deciding that point; and confined their attention solely to the question of limitation. They proceeded to deal with the case, as they expressly say, "on the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads of the math and as trustees therefor." On that hypothesis the conclusion at which they arrived was inevitable. The position of the head of the math in relation to its property under the Hindu law, custom and practice, was not considered; he was simply assumed to be a trustee. The pith of the judgment consists in the following words: "We have then here a suit to recover possession of immovable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration." "Conveyed in trust" is hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. The learned judges relied on the two decisions of the Allahabad and Calcutta High Courts to which their Lordships will presently refer. The case, however, was practically decided on the exposition of the law in the case of *St. Mary Magdalen, Oxford* v. *Attorney-General.* (1) With

(1) (1857) 6 H. L. C. 189.

respect to it they say as follows: "In further support of this conclusion we would also refer to the already cited case of *St. Mary Magdalen, Oxford* v. *Attorney-General* (1), for though it is a decision on the English statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law applicable to cases of this class. We propose to refer to that case in some detail, as it probably is not within the reach of most mofussil Courts in this Presidency." They set out the provisions of ss. 2, 24 and 25 of Will. IV. c. 27, and then add "the section (s. 25), it will be seen, corresponds more or less with our arts. 134 and 144 and s. 10 of the Limitation Act." Speaking with respect, it seems to their Lordships that the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Mahommedan law was overlooked, and the case was decided on analogies drawn from English law inapplicable in the main to Hindu and Mahommedan institutions. That case can hardly be treated as authority in the decision of the present controversy.

The case of *Narayan* v. *Shri Ramchandra* (2) only followed the view expressed in *Dattagiri* v. *Dattatraya*. (3) But the facts, when examined, show a marked difference in the legal position of the parties in the two cases. The mulgeni lease under which the defendant claimed title was granted in 1845, and the suit to set it aside was brought somewhere in 1899. Repeated attempts were made by successive managers of the temple to obtain enhancement of rent, but the suits were invariably withdrawn. There was thus clear acquiescence on the part of successive managers in the validity of the transaction. The case fell within the principle of *Chockalingam Pillai's Case* (4), and might well have been decided without disturbance of Hindu Law or usage.

The second decision relied upon in support of the respondents' contention is the case of *Behari Lall* v. *Muhammad Muttaki* (5), which related to a Mahommedan shrine. The

(1) (1857) 6 H. L. C. 189.
(2) (1903) I. L. R. 27 B. 373.
(3) I. L. R. 27 B. 363.
(4) I. L. R. 19 M. 485.
(5) I. L. R. 20 A. 482.

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origin and history of these shrines or durgahs, as they are called, is described compendiously in the judgment in *Piran Bibi* v. *Abdul Karim* (1): "The sajjadanishin has certain spiritual functions to perform. He is not only a mutwali, but also a spiritual preceptor. He is the curator of the durgah where his ancestor is buried, and in him is supposed to continue the spiritual line (silsilla). As is well known, these durgahs are the tombs of celebrated dervishes, who in their lifetime were regarded as saints. Some of these men had established khankahs where they lived and their disciples congregated. Many of them never rose to the importance of a khankah, and when they died their mausolea became shrines or durgahs. These dervishes professed esoteric doctrines and distinct systems of initiation. . . . . The preceptor is called the pir, the disciple the murid. On the death of the pir his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or sufism. This privilege of initiation, of making murids, of imparting to them spiritual knowledge, is one of the functions which the sajjadanishin performs or is supposed to perform. The endowment is maintained by grants of land to the shrines by pious Moslems. The head of the institution, like that of a khankah, is called a sajjadanishin. The governance (towliat) of the endowment is in his hands; he is a mutawalli, with the duty of imparting spiritual instruction to those who seek it. The property of the 'shrine' is wakf 'tied up in the ownership of God.'" The appointment of the sajjadanishin is regulated by usage and practice. This is referred to in the same judgment: "Upon the death of the last incumbent, generally on the day of what is called the sium or teja ceremony (performed on the third day after his decease), the fakirs and murids of the durgah, assisted by the heads of neighbouring durgahs, instal a competent person on the guddi; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some

(1) (1891) I. L. R. 19 C. 203, 220, 222.

instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent."

The duties in connection with the "shrine," apart from giving spiritual instruction, consist in the due observance of the annual ceremonies at the tomb of the Saint, the distribution of charity at fasts and festivals, the celebration of the birthday of the Prophet, and the performance of other rites and ceremonials prescribed either by the religious law or by usage and practice. Ordinarily speaking, the sajjadanishin has a larger right in the surplus income than a mutawalli, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the mahant of a Hindu math, has full power of disposition over it.

In *Behari Lall* v. *Muhammad Muttaki* (1), the plaintiff as sajjadanishin sued to set aside certain mortgages executed by his predecessor in office, and dated his cause of action from the time he was appointed as sajjadanishin. The learned judges, on a misconception of the rules of the Mahommedan law and of the judgment of their Lordships in *Jewan Doss Sahoo* v. *Shah Kubeeruddeen* (2), held that the sajjadanashin was a "trustee." One judge held that the suit was barred either under art. 134 or art. 144; the two others held that art. 134 was applicable as the mortgages were created by a "trustee." Their Lordships have to differ from that conclusion. In their opinion this case was not, in view of the considerations set forth above, correctly decided.

As regards the third case, *Nilmony Singh* v. *Jagabandhu Roy* (3), the suit was brought by the plaintiff as the shebait of a Hindu idol to set aside a dar-mukarrari pottah, executed in respect of certain of the debottar lands by two ladies who acted as shebaits during his minority. He alleged that he became entitled to sue for possession of the alienated lands on his appointment to the office of shebait by a decree of the Court. The material defence was that the claim was barred.

(1) I. L. R. 20 A. 482. (2) 2 Moo. I. A. 390.
(3) I. L. R. 23 C. 536.

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It should be observed that the dar-mukarrari was created in 1857 and the suit was brought after 1888. In the judgment of the High Court the words shebait and trustee are used as synonymous and convertible terms; the expression is always "shebait or trustee." Probably the fact that the shebait has duties and obligations in connection with the dedication, influenced the employment of the word "trustee" in a general sense. Mr. Mayne uses the expression in the same general sense to connote the same idea. That the learned judge did not regard the shebait as a trustee in the specific sense may be inferred from his indecisive conclusion as to the application of art. 134 to the plaintiff's claim. It is quite clear, however, that the legal position of a shebait is quite different from that of a trustee to whom specific property is "conveyed" on a specific trust. In *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1), where the question for determination was whether a particular transaction challenged as invalid had been entered into for such necessity as would make it binding on the dedication, Sir Montague E. Smith, in delivering the judgment of the Board, scrupulously avoided the use of the confusing word "trustee." Dealing with the powers of the shebait, he said as follows: "But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the shebait of property dedicated to the worship of an idol, in the capacity as shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Knight Bruce L.J. . . . . It is only in an ideal sense that property can be said to belong to an idol; the possession and management of it must, in

(1) (1875) L. R. 2 I. A. 145, 151.

the nature of things, be entrusted to some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

The identical question relating to the powers and position of a shebait was again before the Board in *Abhiram Goswami's Case* (1) already referred to. With regard to the powers of the shebait, their Lordships say as follows: "The second question is whether, this being so, the mahant had power to grant a mukarrari pottah of the mauza. It is well settled law that the power of the mahant to alienate debottar property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity: *Prosunno Kumari Debya* v. *Golab Chand*. (2) In the case of *Konwur Doorganath Roy* v. *Ram Chunder Sen* (3) a mukarrari pottah of debottar lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (4), that apart from such necessity 'to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty' in the mahant. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the pottah of 1860, which on the most favourable construction enured only for the lifetime of the grantor, Prananda, who died in 1891, or of the pottah of 1896, which, at best, could only be deemed operative during the lifetime of Raghubananda, who died in 1900."

(1) L. R. 36 I. A. 148, 165.
(2) L. R. 2 I. A. 145.
(3) (1876) L. R. 4 I. A. 52.
(4) (1869) 13 Moo. I. A. 270, 275.

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The question came up again for consideration by the Board in the case of *Palaniappa Chetty* v. *Deivasikanony Pandara*. (1) The suit was instituted by the head of a math to recover possession of certain land which formed part of the endowment of a Hindu temple attached to the math, and had been granted by his predecessor to the defendant by a perpetual rent-free lease in consideration of a small sum of money paid at the time. The contention in that case was that the alienation was for the benefit of the institution; that contention was overruled, and the decision proceeded on the basis that the shebait was only a manager. Lord Atkinson, delivering the judgment of the Board, further added: "Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased." In that case the leased lands were situated in the street of a village; here they are in the town of Madura.

Reverting then to the judgment in *Nilmony Singh's Case* (2), their Lordships think that the expression "trustee" was loosely and, speaking with respect, wrongly applied to the shebait in order to bring the case under art. 134. It is to be observed that in none of the three cases was there any examination of the laws and usages governing the respective institutions, or of the Madras decisions, in which the subject had been elaborately considered.

In the present case the character of the endowment in relation to the superior is proved beyond contradiction. It has been found concurrently by both the Courts in India that the endowment was held by the defendant No. 26 for the general purposes of the institution. Considerable stress was laid on behalf of the respondents on the entry in the Inam Register that the dedication was for a specific purpose—

(1) (1917) L. R. 44 I. A. 147, 155, 156. (2) I. L. R. 23 C. 536.

namely, the worship of the idol. The Inam proceedings did not create any dedication. They were instituted simply with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. The gifts were made long before the Inam proceedings by the Hindu kings or chiefs who then held the country. The purposes of the dedication must therefore be gathered from established usage and practice, and that has been found by the Courts in India. Again, "valuable consideration" forms the essence of both s. 10 of the Limitation Act and of art. 134 of Sch. I. Even if this were a specific trust, which it is not, it would be ridiculous to hold that the rent reserved in the grant to the second plaintiff was "valuable consideration."

In the Courts below the plaintiffs rested their claim mainly, if not entirely, on art. 134. Before the Board an alternative argument has been advanced. It is contended that the second plaintiff acquired the title he is seeking to establish by twelve years' adverse possession under art. 144. That article declares that for a suit "for possession of immoveable property or any interest therein not hereby (i.e., by the schedule) otherwise specially provided for" the period of limitation is twelve years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity which does not here arise) a mahant is incompetent to create any interest in respect of the math property to endure beyond his life. With regard to mahant No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. The receipt of rent was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by

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himself. It was within his power to continue the tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death.

There is one other point which deserves notice. The administration of the second mahant lasted until 1906. In 1905, however, the math went under the management of the Dewan of the Mysore State, under a power of attorney granted by the mahant and his successor, who may conveniently be designated as mahant No. 3. Certain persons to whom the second plaintiff had sub-leased the lands for ten years thereupon obtained from the Dewan during the currency of their term a lease for seventeen years. It is a direct lease from the Dewan as holder of a power of attorney from mahant No. 3. The lessees thereunder have been in possession for some years prior to this suit, and the object of the present action is not to keep the plaintiff in possession, but to eject these possessors, who hold under a title proceeding from the Dewan and mahant No. 3, and to upset the act of administration of mahant No. 3, on the ground of rights acquired adversely to the math by lapse of time during the incumbency of mahant No. 2.

For the foregoing reasons their Lordships are of opinion that neither art. 134 nor art. 144 applies to this case; that the plaintiffs have acquired no title under either of those articles; that the judgment and decree of the High Court of Madras must therefore be reversed, and the order of the Subordinate Judge dismissing the suit restored with costs here and of the appellate Court.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*
Solicitor for respondents: *H. S. L. Polak.*