

(1916) 04 AHC CK 0018
In the Allahabad High Court

Ali Khan and Another

APPELLANT

Vs

Nawab Muhammad Mushtaq Husain and Others

RESPONDENT

Date of Decision : 03-04-1916

Acts Referred:

Registration Act, 1908 — Section 69

Citation : AIR 1916 All 68 : 35 Ind. Cas. 718(1)

Hon'ble Judges : Tudball, J;P.C. Banerji, J

Bench : Division Bench

Judgement

1. This is the defendants' appeal in a suit for possession of Immovable property, which has been decreed to the plaintiffs by the Court below.

2. The plaintiffs are five Muhammadan gentlemen and their case is as follows:-- That Nawab Rukn-ud-Danla Muhammad Azmat Ali Khan was the owner of a large estate lying partly in the Punjab and partly in the Muzaffarnagar District of these Provinces, including the properties claimed; that the Nawab created a waqf of the aforesaid properties under a deed dated 25th August 1908 and registered on 1st September 1908; that he appointed himself the first mutawalli and remained in possession as such up to the date of his death on 26th December 1908; that in his lifetime on 9th November 1908, he executed a document, designated therein a "trusteenamah," framing rules for the management of the trust property and nominating six gentlemen to succeed him as trustees on his death; that four of these are among the plaintiffs; that one of them has died and the second plaintiff has been appointed in his place under the rules framed by the Nawab; and another has resigned and so far no one has been appointed in his place; that on the death of the Nawab the two defendants, denying the waqf, took possession of the waqf property and certain cash (the proceeds of the said property) and all papers connected therewith. The plaintiffs, therefore, ask for possession of the waqf property as mutawallis, possession of the papers connected therewith (account-books, etc.), Rs. 4,715-6-11, the cash alleged to have been appropriated by the defendants, and mesne profits, past and future.

3. The defendants have contested the claim on various grounds to which we deem "it" unnecessary to refer at present, as most of them have been repeated in the appeal before us.

4. The Court below has decreed the plaintiffs' claim for possession together with Rs. 57,564 mesne profits plus Rs. 1,227-4-0 cash. The rest of the claim was dismissed. Goats in proportion to success and failure were awarded to the parties. The defendants alone have appealed. Of the pleas contained in the memorandum of appeal, the seventh relates to mesne profits and challenges the lower Courts' finding in regard to it, but this ground has not been pressed before us and not a word has been addressed to us thereon in the course of the arguments.

5. The case for the appellants as to the actual facts is put before us as follows:-- That Nawab Azmat Ali Khan was an old man of from 75 to 80 years age in 1908, enfeebled both mentally and physically by reason of old age and illness; that he was consumed with a hatred of his heirs, the defendants, so intense and bitter as to overstep the border line of sanity; that he was completely in the hands of his servants, chief of whom was Qazi Muhammad Yakub; that the latter completely dominated his master's mind and used his power for his own benefit and gain; that early in August 1908 Major Buck, the Deputy Commissioner of Karnal, having learnt that the Nawab was being looted and ruined by his servants, paid a visit to him and broached the subject of his estate being taken over by the Court of Wards; that this alarmed Qazi Muhammad Yakub and his satellites and they instilled into the Nawab's mind that his estates were about to be taken from him and he himself would be dishonoured and disgraced in his old age and that some steps should be taken to prevent the estate falling into the hands of the Court of Wards and of the defendants on his death; that with this object they consulted lawyers and on August 21st, 1908, they carried off the old Nawab from Karnal in the Punjab to Jarauda in the Muzaffarnagar District in these Provinces in order to get him out of the reach of Major Buck; that the latter took action on August 24th, 1908, under Sections 11 and 12 of the Punjab Court of Wards Act, commencing his enquiry, and for the protection of the estate took possession of it; that in obedience to the orders of his Commissioner he gave up possession of the estate on August 26th but continued his enquiry; that on August 30th he issued an injunction to the Nawab restraining him from executing or registering any deed of alienation of his property until the further orders of the Deputy Commissioner; that this injunction was served at Jarauda on August 31st; that Qazi Muhammad Yakub on some date after August 25th (most probably on August 30th or 31st but certainly not on August 21st) having had the deed of waqf drawn up either obtained the Nawab's signature and seal to it without his knowing or understanding what he was doing, or placed his seal on it and forged his signature to it, and having secured the attendance of the Sub-Registrar at Jarauda, ostensibly for the registration of a lease, caused the Nawab to present the deed of waqf for registration and to acknowledge its due execution and had it registered; that the deed of 9th November 1908, the so-called trusteesnamah,

was caused to be fabricated by the Qazi who impressed on it the Nawab's seal without his knowledge or consent.

6. To put it briefly, their case is that the waqf was all a bogus transaction, that there was never any desire or intention on the part of the Nawab to create a waqf and that the waqf deed was a sham carried through to enable the Qazi to keep some, if not all, of the estate in his hands and out of the hands of the Court of Wards, and to defeat the defendants.

7. If these allegations were true we should, of course, have to find in favour of the appellants and dismiss the suit, apart from the points of law which have been raised for decision. The case may for convenience be divided into two heads, namely,

(1) The actual facts;

(2) The points of law.

8. Eight main questions of fact and law arise for our decision, some of which have subdivisions.

9. They are as follows:

(1) Was the deed of waqf in point of fact executed by the Nawab?

(2) Had he sound disposing mind?

(3) Was it freely and willingly executed by him or under the undue influence of Qazi Muhammad Yakub?

(4) Was it a mere paper transaction or a real bona fide act to which effect was given?

(5) Was the "trusteenamah" executed by him or fabricated? If the former, then was it executed by him while of sound mind willingly and of his own free-will?

(6) Did the "trusteenamah" require registration?

(7) What was the legal effect of the action taken by the Deputy Commissioner of Karnal under the Punjab Court of Wards Act?

(8) Is the waqf deed invalid under any rule of Muhammadan Law or Statute Law?

10. We will consider the above points in the order in which they have been stated.

11. The present defendants are the step-brothers of the late Nawab and the relations that existed between them and him, have considerable bearing on the facts of this case. There can be no doubt that they were bitterly hostile. The cause of the hostility goes back to litigation which commenced so far back as 1874 and terminated in a decision of their Lordships of the Privy Council in the year 1881, reported *As Mohammad Azmat Ali Khan v. Musammat Lalli Begum* 8 C. 422 : 9 I.A. 8 : 4 Star. P.C.J. 310 (the two present defendants were then the

"minor" sons of Musammat Lalli). Ahmad Ali Khan, the former Nawab of Karnal, left three sons, Muhammad Azmat Ali Khan, by his lawful wife, and the two defendants by Musammat Lalli. Musammat Lalli on his death sued Azmat Ali Khan on her own behalf as widow and as guardian on behalf of her two minor sons for shares in the estate. He defended the suit, contending that Musammat Lalli was not the lawfully wedded wife of his father and that her sons were not legitimate.

12. The first Court dismissed the claim after a remand by the Chief Court of the Punjab, holding on all points in favour of Azmat Ali Khan. Musammat Lalli did not appeal, but her sons did and their claim was decreed by the Chief Court. Azmat Ali Khan appealed to the Privy Council, where the decree was upheld on the ground of recognition." Their Lordships of the Privy Council did not decide the question as to whether or not there had in fact been a lawful marriage though they remarked that from the state of the evidence, if it stood alone, it would be difficult to affirm that a marriage had been established.

13. The result, however, was that 2/3rds of the estate of his father passed out of the hands of Muhammad Azmat Ali Khan into those of his two step-brothers whom he, at least, deemed to be illegitimate. It can be easily understood that he had no friendly feelings towards them. And that these hostile feelings on the Nawab's part continued, is evident from the evidence of Majar Buck, Deputy Commissioner of Karnal, and Khurshed Husain (defendants' witness) which shows that early in August 1908 (August 3rd) the Deputy Commissioner paid a visit to the old Nawab and in a tactless manner, after losing his temper, suggested that the estate should be either managed by himself or be made over to the two appellants. The old Nawab, on hearing the names of the two appellants, lost control of himself and poured out his opinion of them in somewhat abusive language. If, therefore, he had any religious motive to induce him to create a waqf, he also had, it is urged, another incentive (i.e., his dislike of his heirs) to carry out this idea, for he would thereby deprive them of some at least of his property.

14. But there is very good and practically unchallenged evidence on the record, which shows that the creation of a waqf was no new idea arising for the first time in the year 1908.

15. Khan Bahadur Khwaja Tasadduk Husain, the Judge of the Small Cause Court at Delhi, was examined as a witness for the plaintiffs on commission at Delhi. With the papers sent to Delhi for this purpose, a draft waqf deed in English, bearing date 8th May 1904, was forwarded to the Court at Delhi to be proved by the evidence of this witness. That document was either lost or stolen while in the possession of the Delhi Court and before the witness could be examined. The record of the Court below distinctly shows this.

16. The witness proves that "in the year 1904 he met the Nawab at Lahore, and had a talk with him about his intention of creating a waqf. He accompanied Qazi

Mohammad Yaqub, the manager, to consult a Barrister, Mr. Parker. A draft waqf deed was then in existence. He again visited the Nawab in 1908 and talked over the matter and the Nawab evinced a keen desire to carry out the waqf and complained that the desire which he had cherished in "his heart for years had remained unsatisfied owing to the supineness of the Qazi, and remarked that his step-brothers were fortunate as it looked as if they would also get all his property as well as the 2/3rds they had already obtained.

17. If this witness is to be believed, and no good reason has been shown to us why an independent gentleman of his position should not be believed, the intention of creating a waqf was firmly fixed in the Nawab's mind as early as 1904 and probably earlier, for a draft deed was clearly then in existence. One such draft, dated 8th May 1904, was filed by the plaintiffs and we have mentioned above the suspicious manner in which it vanished. We note also that this witness was not cross-examined and the refusal to cross-examine was based on very petty grounds. The Counsel for the plaintiffs after examining the witness claimed the right" to put three more questions to him on the lost deed being found. They could not be put until the document was before the Court. Objection was taken to this for the defendants, whose legal representative refused to cross-examine until the examination-in-chief had been completed.

18. The lower Court's Rubkar No. 8650 of the 26th June 1903 and connected papers show that the lower Court again in that month offered the defence an opportunity of cross-examining the witness and that finally on 8th August 1913, the Counsel for the defence stated clearly that he would not cross-examine unless the lost draft was found. It has never been found and the witness's evidence stands unchallenged. It is corroborated by the testimony of Qazi Mohammad Yaqub [vide Rule 24(d)], who says that the idea was 15 or 16 years old and mentions the preparation of a draft in 1904 by Mr. Parker. This Barrister is no longer in India. This witness, no doubt, has been, sharply criticised and portions of his evidence on other points may be difficult to accept, but Oil this point we do not hesitate to accept his statement.

19. The witness Mohammad Ibrahim (for the plaintiffs) produced the draft deed (in English) when he gave his evidence on 3rd March 1913.

20. It is, we think, beyond doubt that Nawab Azmat Ali Khan had for a long period prior to August 1908 cherished the desire to create a toaqf and had had at least one draft, if not more, drawn up. We now come to the evidence as to the actual execution of the deed of August 25th, 1908.

[After discussing the evidence at length their Lordships held that it had been fully established that the Nawab executed the waqfnama on the 25th August 1915, having a sound disposing mind and fully understanding what he was doing and the effect thereof; that the execution of the waqfnamah was not procured by the manager by the exercise of undue influence over the Nawab; that the waqf was a genuine transaction; that all steps were taken to put it in force at once; that the

Nawab executed the trusteesnamah, affixing his private seal to it in lieu of his signature; and then continued:-]

The next question for decision is, whether this document is of such a nature that its registration is compulsory u/s 17 of the Registration Act. It does not fall under Clauses (a), (c) and (d) of that section; Clause (b) covers other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, vested or contingent, of the value of Rs. 100 and upwards to, or in, Immovable property. We have carefully examined the document. We fail to see that it comes within any of the clauses of Section 17 of the Act.

21. The Nawab under the deed of waqf had appointed himself as the first mutawalli. In this document he declares his intention of continuing in that office. He then selects certain persons to succeed him in case of his death or incapacity, He reserves to himself the power of giving up the post and handing over his powers to the persons thus selected during his lifetime, of removing those of them found unfit or dying and of appointing others in their place. He lays down that they have power to appoint a secretary. He sets forth the duties of the secretary. He then mentions certain powers to be exercised by the body of trustees and gives certain directions as to their course of conduct and he appoints Qazi Mohammad Yakub to be his co-mutawalli on a salary of Rs. 100 per mensem. He directs, the manner in which the 2/16th share in the waqf income, which under the deed of waqf was reserved to himself for salary as mutawalli, was to be applied after his death" to the objects of the trust and also the manner in which the- 4/16th share of the income dedicated to the Jama Masjid at Karnal was to be applied.

22. It is urged that though in Muhammadan Law the Deity may be recognised as the owner of property on earth, the law only recognises the trustee" as the owner and that there has been a transfer to other trustees. The document does not purport to transfer the property to other persons. The Nawab merely nominated certain persons who might succeed him in the post of mutawalli, in - case of his death or his becoming incapable of managing the waqf, and he appoints the Qazi to assist him as a co-mutawalli. We do not think that any portions of this document in any way modify the terms of the deed of waqf. In our opinion the registration of this document is not compulsory u/s 17 of the Act.

23. The seventh question relates to the legal effect of the action taken by the, Deputy Commissioner of Karnal under the Punjab Court of Wards Act. We set out in chronological order the various steps that he took. They are to be found in the evidence given by Major Buck and the Court of Wards file. Major Buck had recently come to the district of Karnal in 1908. He acted on information supplied to him mainly by Rustam Ali Khan, one of the defendants-appellants, as is evident from his own statement.

24. On August 24th, 1908, he wired to the District Judge of Meerut, who is also

the District Registrar, asking him to order the Sub-Registrar to delay registration of any deeds which might be presented by the Nawab as Government was considering the question of the Court of Wards. He had apparently written to the Commissioner of the Division proposing to take action under Sections 11 and 12 of the Punjab Court of Wards Act, though that letter is not before us.

25. The District Registrar of Meerut refused to pass any such orders (vide his letter of August 25th to the Deputy Commissioner).

26. The latter appears, however, to have also addressed the Sub-Registrar direct and his communication was received by the latter on August 27th (vide his letter of that date asking the District Registrar for orders as to what action he was to take). The District Registrar ordered him to do his duty and to register all documents.

27. On 26th August 1908 the Commissioner wired to the Deputy Commissioner sanctioning the latter's proposal to make inquiry u/s 11 of the Act. On the back of that telegram Major Buck noted place on file, am taking action at once." He started the inquiry that same day and took possession only of so much of the estate as was in the Karnal District, u/s 12 of the Act.

28. On August 27th in compliance with the order of his Commissioner he dropped all proceedings u/s 12 of the Act and gave up possession of the estate. He continued the inquiry u/s 11.

29. On August 30th he issued a temporary injunction to the Nawab restraining him from executing or registering any deed of alienation until his further orders. This was sent by special messenger to the Civil Court at Muzaffarnagar.

30. On August 31st a Civil Court peon took it for service to the Nawab at Jarauda. The latter refused to take it on the ground that it was in English and he had no one who could translate it or understand it. The peon took it back to the Civil Court but on the order of the Munsif returned the same day to Jarauda, tendered it again and on a second refusal attached it to the door of the Nawab's house and reported.

31. Next day, September 1st, the waqf deed was registered. The Deputy Commissioner continued his inquiry u/s 11 of the Act and reported to the Local Government. The estate had, however, not been taken over by the Court of Wards when the Nawab died on 26th December and the proceedings then appear to have come to an end. It may be noted that on August 30th a copy of the injunction issued was sent by post to the Sub-Registrar of Muzaffarnagar. He acted, however, on the order of the District Registrar and accepted the deed of waqf on September 1st for registration.

32. He "subsequently" received a direction from his District Registrar advising him not to register documents even though the Deputy Commissioner's action appeared to be ultra vires. This, however, was too late.

33. The questions for decision are (1) whether the Deputy Commissioner had any power in law to issue the injunction and (2) if he had such power, whether the registration of the deed in violation thereof was of no force and the deed, therefore, null and void, or only voidable; and if only voidable, whether it is voidable at the option of the defendants-appellants.

34. The only proceeding or case pending in the Court of the Deputy Commissioner on August 30th, 1908, was an inquiry u/s 11 of the Punjab Act II of 1903.

35. The action originally taken u/s 12 of the Act on August 26th was dropped on August 27th in obedience to the Commissioner's second telegram of August 26th, wherein he forbade the taking of possession of the estate. Section 11, Act II of 1903 (Punjab Local Act), lays down that for the purpose of satisfying himself as to whether in respect of any landholder the Local Government should be moved to make an order under Sub-section (2) of Section 5, the Deputy Commissioner may make such inquiry into the circumstances of such land holder as he may deem necessary and pending the taking of such action may issue such order for the temporary custody and protection of the property of such land holder as he thinks fit.

36. Clause 2 of Section 12 lays down that he may, for the purpose of protecting the property pending such inquiry, take possession subject to the direction and control of the Court of Wards and appoint a manager.

37. In the present case the Deputy Commissioner started the inquiry u/s 11 on August 26th and on the same date took possession of the Karnal property and issued certain orders in respect thereto. He, however, gave up the possession and cancelled these orders in obedience to his Commissioner's order received by wire which conveyed the Financial Commissioner's order that the estate was not to be, touched but only an inquiry made. Clause (2) of Section 11 enables the Deputy Commissioner to issue certain directions where the landholder is a, minor. We are, therefore, not concerned with this.

38. Section 12, Clause (1), lays down that for the purpose of every inquiry to be made or direction to be given in pursuance of any of the provisions of the Act, the Deputy Commissioner may exercise all or any of the powers of a Civil Court under the Code of Civil Procedure. Order XXIX, Rule 1, gives a Civil Court power, where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, to grant a temporary injunction to restrain such act.

39. The temporary injunction in the present case purports to have been issued by the Deputy Commissioner in exercise of the powers granted to him u/s 12(1) of the Court of Wards Act. Section 12 of the Act and Section 492 of the old Code of Civil "Procedure are quoted in the injunction. The old and the new Law of Procedure are the same so far as we are concerned with it here.

40. It is clear that in the proceeding pending before the Deputy Commissioner there was no property in dispute" at all. The inquiry was one into the circumstances of the Nawab, as to whether owing to any physical or mental defect or infirmity or his having entered upon a course of wasteful extravagance likely to dissipate his property, he was incapable of managing or unfitted to manage his affairs and the inquiry was being made with a view, if found necessary, of moving the Local Government to take action u/s 5(2) of the Act.

41. Furthermore, so far as the evidence has been placed before us, it was not proved by affidavit or otherwise before the Deputy Commissioner that the Nawab was about to alienate his property. Evidence apparently on the point there was none before him. Be this as it may, it is clear that Section 492 of the CPC of 1882 did not apply and could not be utilised for the purpose of restraining the Nawab from alienating his own property.

42. This difficulty was perceived by the learned Counsel for the appellants and he urged that even though inapplicable sections were quoted in the order, still the Deputy Commissioner had power to issue such an order under the latter part of Clause (I) of Section 11 of the Punjab Act, which rung as follows:--"and pending the taking of any such action (i.e., by the Local Government u/s 5) may issue such orders for the temporary custody and protection of the person or property, or both, of such landholder, as he thinks fit." We cannot agree with this contention. The temporary injunction was not an order for the temporary custody "and" protection of the property. The conjunction "and" cannot be read as meaning "or."

43. Moreover, the Deputy Commissioner had already taken possession once and passed certain orders in respect to the Karnal property on August 26th, but these he had cancelled as the Financial Commissioner had ordered him not to take possession (vide the Commissioner's second telegram of August 26th).

44. We do not think that the latter portion of Clause (1) of Section 11 ever contemplated the issue of an injunction such as is now before us, nor did the Deputy Commissioner purport to act under that section. It was a restriction placed by the Deputy Commissioner on the Nawab's exercise of his lawful right and power as an owner, and unless the law in clear and unambiguous terms gave the former such powers of restriction we refuse to read them into Section 11 of the Act. As the Commissioner's 2nd telegram of August 26th, 1908, shows, the Court of Wards, i.e., the Financial Commissioner deemed it undesirable to interfere with the Nawab's possession of the estate until inquiry had been made and the Nawab's objections fully considered. It is urged that if the Deputy Commissioner had no power to issue such an injunction in such circumstances as these, the landholder could easily defeat the object of the Act by alienating all his property before the Local Government could consider the case. This may be so, but we must take the law as it is. We would point out that this very difficulty was perceived and considered by our own local Legislature. Section 9 of the U.P. Act IV of 1912 shows for what purposes the Collector may exercise the powers of a

Civil Court and the Collector has to notify the date of his inquiry in the Gazette, and Clause (3) of Section 9 directs that from the date of publication the prohibitions contained in Clause (a) of Section 37 of the Act shall apply to the proprietor as long as the inquiry is proceeding. Clause (a), Section 37, prohibits, among other things, the alienation by the proprietor of his property. This Clause (3) of Section 9 was specially enacted in the U.P. Act IV of 1912. There was no such provision in the former Court of Wards Act. It will be noted that it is not left to the option of the District Officer to make the inquiry u/s 9. The Local Government alone can direct the inquiry. The legislative body in the Punjab may amend the law; we cannot, and must take it as we find it.

45. In our opinion the issue of the injunction of August 30th, 1908, by the Deputy Commissioner of Karnal was "ultra vires" and of no effect.

46. It is unnecessary to decide whether if it were intra vires, the execution and registration of the deed by the Nawab were void or voidable and if the latter, whether the appellants could avoid it, seeing that they do not claim under the Court of Wards but as heirs to the Nawab. We have considerable doubt that they could void it, if voidable. We have equally great doubt that the registration for such a reason could be held void." It is unnecessary, however, to go into these points. It is equally unnecessary to decide the question whether the Deputy Commissioner could take action in this way in respect to property lying in another Province where the Punjab Court of Wards Act does not apply, though there is a great deal to be said on the point in favour of the respondents. We decide the issue in favour of the latter.

47. The last question for decision and one that has been very much argued is, whether the deed of waqf is invalid under any rule of Muhammadan Law or Statute Law.

48. In so far as Statute Law is concerned only one point is taken, viz., that the Sub-Registrar who registered the deed of waqf on September 1st, 1908, was a trustee of the Aligarh College, one of the institutions which is benefited by the waqf, that he was, therefore, interested in the document and under Rule 74 of the rules made by the Inspector General of Registration (which u/s 69 of the Registration Act have the force of law) he was prohibited from registering the document. Its registration is, therefore, invalid.

49. The rule in question prohibits Sub-Registrars from registering documents in which they are personally or otherwise connected or interested." The Aligarh College is an educational institution with a very large body of trustees, and the Sub-Registrar admits that he was one of the trustees. Under the deed of waqf, the mutawalli is directed to devote 1/16th of the income of the waqf property to the Aligarh College and the question is, whether the word "interested" in the rule was intended to cover and include such an interest as the Sub-Registrar qua a trustee of the College may be said to have had in the deed of waqf. The word "interested", no doubt, is wide enough to include even any person interested in

education generally and even every Mohamedan, whether a trustee of the Aligarh College or not, who takes an interest in that institution; but we do not think that the rule was ever intended to have so wide a meaning as this or that it was intended to include such an interest as the Sub-Registrar can be said to have had in the present case. The rule, moreover, is the first Rule in Chapter XI of the rules and is headed "Procedure", and Section 87 of the Act lays down that nothing done in good faith pursuant to the Act by any registering officer shall be deemed invalid merely by reason of any defect in his procedure. There is nothing to show that the Sub-Registrar acted otherwise than in good faith. He had referred to his District Registrar and received an order to register all documents presented to him. We, therefore, hold that the registration was not invalid by reason of Rule 174.

50. We assume that this rule was duly published u/s G9 (2) in the official Gazette after approval by Government, though this has not been shown to us and the Registration Manual does not indicate that there has been any such publication since 1886, after which year there have been many alterations of the rules.

51. The points taken under Muhammadan Law are the following:

(1) That the rule of hajib or prohibition operated to prevent the Nawab from making a waqf.

(2) That the waqf is bad in that the Nawab did not appoint some other person mutawalli and make over possession to him but appointed himself mutawalli.

(3) That the waqf was bad in that its operation was suspended indefinitely, because in the deed of waqf the Nawab directed that the income should first be devoted to clearing off the mortgage-debt upon the property.

(4) That the waqf failed in that one of the institutions to be benefited by it (i.e., the school at Karnal attached to the mosque which the Nawab was building) was not in existence at the date of the waqf and is even yet not in existence.

(5) That the waqf was bad in that it was made not from religious motives but to spite the heirs to the estate and defeat the Deputy Commissioner of Karnal.

(1) In regard to the rule of hajib or prohibition there is one effectual reply. Assuming that, this bit of archaic law is applicable, at least the prohibitory order must be one of a competent authority. In the present case the plea is based on the injunction issued by the Deputy Commissioner of Karnal, We have held that that was ultra vires and not intra vires, and assuming that the Deputy Commissioner might be deemed to be a Qazi he could only act within his jurisdiction. We see no force whatsoever in this plea.

5 We take next the fifth ground, namely, that the waqf was bad in that it was made to spite the heirs and not from religious motives. That the Nawab did not love his heirs is patent, but it is equally clear that he had for many years contemplated making a waqf. The action of the Deputy Commissioner no doubt

precipitated matters. The facts do not, in our opinion, suffice to prove that the waqf was made primarily to spite the heirs and not from religious motives. It is extremely difficult, if not impossible, to accurately weigh the motives which operate on a man's mind and drive him to a certain course of action specially when there are several which may or may not be operating at the same time. In the deed the Nawab set forth that it was the religious motive that operated on his mind and we know that he had long been contemplating this action. Moreover, the fact that he did not create a waqf of the whole of his property as he might easily have done, if he had wished to totally defeat his heirs thereby, is not without its significance. As far as we are able to judge, we consider that the waqf was made from religious motives and that it is not established that its main object was to spite the heirs and defeat the Deputy Commissioner.

(3) The third point taken is that the waqf is bad in that its operation had been suspended, because the Nawab directed that the income of the estate should be devoted in the first instance to paying off the mortgage-debt which is a burden on it. It is pleaded that the direction of the Nawab is "really a suspension of the operation of the waqf, because he clearly directs that the income must be devoted in the first instance to the repayment of the burden on the property.

52. We note that all the ivaqf property is not burdened with the mortgage. Part of it is entirely free from all burdens. We cannot agree that the direction is tantamount to a suspension of the waqf for an indefinite time.

53. There is ample authority for holding that a waqf of property subject to a mortgage, even where the latter is usufructuary, is valid. They are to be found at page 203 of Volume I of Ameer Ali's work on Muhammadan Law, 4th Edition. It is hardly necessary to repeat them here for no authority to the contrary has been quoted before us. The same point is noted in Section 497 of Tayabji's Principles of Muhammadan Law. One quotation from the Fatawt-i-Alamgiri will suffice, "in like manner if a man were to mortgage his land and then dedicate it before redeeming it, the waqf would take effect but the land would not in the same way be withdrawn from the mortgage and if it should remain for years in the hand of the mortgagee and then be redeemed, it would revert to the uses for which it was made waqf." We would also refer to the ruling of *Shahazadee Hazara Begum v. Khaja Hossein Ali Khan* 12 W.R. 498 : 4 B.L.R. A.C. 86. We cannot hold that the Nawab by his direction intended to suspend the operation of the waqf. A waqf of mortgaged property is valid. The mortgagee was entitled to demand payment of his money out of the mortgaged property and a mutaiwalli who carried out such a direction would clearly be merely doing his duty as a superintendent of the waqf. The waqf itself came into being at the moment of dedication and delivery to the mutaiwalli and there has been no suspension of it. In our opinion there is no force in this plea.

(4) The fourth plea is that the Islamia School located in the Jama Masjid at Karnal, the second of the various objects on which the income of the waqf property was to be spent, was not in existence On the date of the waqf and is

not even now in existence, that the waqf must, therefore, fail in respect thereto and the heirs of the Nawab have a right to retain possession of the property, the trustees merely having a right to recover a share of the income from them for application to the other objects of the trust, for which there would be a charge upon, the property.

54. The facts appear from the evidence and the waqf deed itself to be that the "mosque at Karnal was not completed at the date of the deed. It was apparently the Nawab's intention to found the Islamia School in connection with the mosque, as is so frequently done by Mussalmans. His intention in this respect had not been carried out when he died. After enumerating the objects of the waqf the deed of waqf goes on to say: If any of the things specified above on which the income of the waqf property has been proposed by me to be spent by way of charity ceases to exist, it shall be spent on similar charitable objects." It then goes on to lay down that if none of the objects remains in existence, the income shall be spent on the poor" in general. The document clearly discloses a general charitable purpose.

55. Mr. Ameer Ali in his treatise on Muhammadan Law, Volume I, page. 277, 4th Edition, says that where no express reservation for the poor in general has been made, the Muhammadan Law supplies the deficiency and declares that on failure of the primary object of the waqf it will continue for the benefit of the poor. The waqf can under no circumstance fail.

56. In dealing with public and semi-public waqfs and the failure of the waqf, at page 412 of the same volume, he lays it down that the failure or non-existence of the initial or primary object of a waqf does not, under the Hanafi Law, affect the operative character or validity of the waqf or avoid it. He quotes authorities and instances, one of which is the non-existence of a school. On page 414 he says, in pointing out that a certain English ruling in a trust case was not applicable to Mahomedan waqfs:-- For the cy-pres doctrine is carried to the utmost limit in the Muslim system and the failure of the original purpose does not in any case cause the failure of the waqf."

57. In the present case, however, there is a very clear and unmistakeable indication in the deed of waqf of an ultimate reservation in favour of the poor in general, i.e., of a general charitable intention and the document clearly directs the application of the principle of cy-pres, though it does not actually use these words.

58. Tyabji in his Principles of Muhammadan Law also states the law to be as laid down by Imam Abu Yusuf (vide page 380 to 383). At page 360 he gives in tabular form the difference in the views on the law of waqf of three great lawyers, Abu Hanifa, Abu Yusuf and Imam Mohammad. Abu Yusuf according to this ruled that if the object of the waqf failed it would always result in favour of the poor. The other two held that the waqf would be void if the object failed " and" there was no reservation over in favour of the poor clearly stated in the

waqf. Baillie, in his Digest at page 566, says that the ultimate object must be one that cannot fail and that Imam Mohammad and Abu Hanifa lay down that unless the ultimate object is one that cannot be cut off or fail and unless such be mentioned in the waqf, it is not valid if the primary object fail. The only commentary on the subject to which our attention has been called on behalf of the appellants (besides Tyabji's) is the Kashf-ul Qinaa, from which a sentence has been quoted which has been translated thus: And a waqf or what has no existence is null and void". We are informed that this is a book which according to the title page was written by one Allaraa Sheikh Manser son of Idris Al-Hanbali, but that nothing is known as to who he was and when he lived and wrote. We need not give much attention to him.

59. In the present case, the Islamia School in question no doubt did not exist and if the waqf deed had gone no further the waqf might have been void or not void according to the school of law preferred, but the ultimate object of this waqf, as set out in the deed if any of the immediate objects failed, was "the poor and indigent", and the waqf also distinctly lays down that the doctrine of cy-pres should be applied in case of the failure of any one object. In these circumstances, we do not think the waqf can be held to be void under any of the Schools of Muhammadan Law applicable to Sunnis which have been mentioned.

(2) The second point, which we have taken last of all, is that the waqf is bad in that the waqt'f appointed himself mutawalli and failed to appoint a third person and deliver possession to him.

60. The argument is as follows:--In these Provinces the opinion of Imam Mohammad is the law on the point and is binding on Mussalmans and Imam Mohammad clearly laid it down that to constitute a valid waqf and make it operative it is necessary for the waqif to deliver possession to another" person appointed as mutawalli. The Nawab constituted himself the first mutaivalli and, therefore, failed to deliver possession to another" person. The waqf is, therefore, not operative or binding. Reliance is placed, in primis, on a decision of this Court in Muhammad Aziz-ud-din Ahmad Khan v. Legal Remembrancer 15 A. 32 : A.W.N. (1893) 109.

61. The facts of that case were as follows:

A Mussalman executed a deed of waqf appointing therein his two sons as mutawallis. He registered the deed, took it home and then apparently destroyed it. He did not make over possession to his sons in any capacity, but continued in possession himself and enjoyed the estate as his own and did not apply the income to the purposes of the waqf.

62. The Judges who heard the appeal quoted from the Tgore Law Lecture of 1894 the summary of the author, wherein he pointed out the differences in the views" of Abu Hauifa, Abu Yusuf and Imam Mohammad. They then quoted the decision in Bikani Mia v. Shuk Lal Poddar 20 C. 116 (F.B.) as an authority for holding that on questions of Muhammadan Law among Sunnis the comparative authority of

Abu Yusuf is to be postponed to that of Mohammad "it was not a unanimous decision) and as the latter's exposition supported the appellant's case, they held that there was no valid waqf.

63. It will be noted that the point which is now before us was not before the Court in the above-mentioned case. In that case the sons had been appointed mutawallis but the estate had not been made over to them. In the present case the waqif appointed himself mutawalli and announced to the world in every manner possible that he held the property as mutawalli, and we have clearly held that he did so hold it.

64. It is difficult to understand how the learned Judges who decided the above noted case considered that the decision in Bikani Mia's case 20 C. 116 (F.B.) was an authority for holding that the comparative authority of Imam Abu Yusuf is to be postponed to that of Imam Mohammad.

65. We have carefully considered the ruling and fail to see that the decision of the majority was any. such authority as was held by the Bench of this Court [in Muhammad Aziz-din Ahmad Khan v. Legal Remembrancer 15 A. 32 : A.W.N. (1893) 109]. Moreover that Bench apparently had not before it the expression of opinion to be found in the Full Bench decision in Abdul Kadir v. Salima 8 A. 149 : A.W.N. (1883) 53. The judgment therein was. written by Mahmood, J., but it was adopted by the Full Bench. At page 102 of the report Mahmood, J., pointed out the reason why the dicta of Abu Yusuf commanded such high respect in the interpretation of Muhammadan Law.

66. Tyabji in his Principles of Muhammadan Law (page 360 note) says that the Hanafi authorities are equally divided on the question as to when the waqf becomes irrevocable, though Malik, Shafie and Ibn Hanbal agree with Abu Yusuf. On behalf of the appellants a number of quotations from various books have been translated and printed in pamphlet-form and presented to us. The name of the translator or the person who has selected these quotations has not been disclosed. Many quotations go to show that the authors of these books considered that the rule of Imam Mohammad should prevail over that of Abu Yusuf. As Petheram, C.J., pointed out in Bikani Mia's case 20 C. 116 (F.B.), such quotations can be cited on both sides and Tyabji has pointed out that Hanafi authorities are equally divided. We do not think it necessary to incumber our judgment with them.

67. In the Tagore Law Lectures of 1874, pages 114 and 115, Shama Charan Sarcar makes quotations from both the Fatawa-i-Alamgiri (which says that the opinion of the learned seem to be nearly balanced between the two authorities Abu Yusuf and Mohammad) and from the Hidayah (which gives the greater weight to Mohammad). He then expresses his own opinion that decisions appear to be both ways but " preference seems to be given to Mohammad." Mr. Ameer Ali in his treatise upholds the rule laid down by Abu Yusuf that delivery of seisin is not necessary in waqf as it is in "hiba" and he quotes at length the decision of

the Supreme Court of Calcutta in Doe dem. Jaun Beebee v. Abdollah Barber (1838) Fulton 345 : 1 Ind. Dec. (O.S.) 848 wherein it was held that the opinion of Abu Yusuf was the better law. It is thus clear that the Muhammadan authorities are much divided as to whether delivery of possession is necessary to make a waqf operative or binding. If we adopt the opinion of Abu Yusuf then the appellants' plea clearly has no force. And if we adopt the rule of Imam Mohammad, it seems to us that the appellants' plea must equally fail, for in this case the Nawab appointed himself mutawalli and clearly continued to hold as such. On behalf of the appellants it is urged that the rule of Imam Mohammad imports the delivery of possession to another person and that the waqif cannot appoint himself a mutawalli. Reference is again made to the pamphlet containing extracts (of which mention has already been made), see section E thereof. The preface is the mere expression of the opinion of the unknown author of the pamphlet and carries no weight. Extracts Nos. 34 to (J9 are quoted¹ to show that the authors of the books named all held that Imam Mohammad's rule should prevail that delivery of possession to a mutawalli is necessary to complete a waqf but only three of them Nos. 51, 63 and 64 at all lay it down that the waqif cannot be the mutaivalli. These are quotations from the Bahr-ur-Raiq, Khula-sail and the Zakhair-ul-Ashraflah.

68. Shama Oharan Saroar in the Tagore Law Lectures (page 155) lays down the rule that a person may appoint himself a mutawalli, quoting from Baillie's Digest a saying of Mohammad ? son of Alfazl: It is lawful according to all". Mr. Ameer Ali in Chapter XIV, Volume I, page 421 (4th Edition), expresses the same opinion and quotes various authorities. Tyabji in his treatise, in the tabular statement on page 320, says that according to Abu Yusuf the appointment is valid but that according to Mohammad it is invalid. The latter rule, however, he puts into brackets and prefixes a note to the effect that Mohammad's rule is not followed in British India. At page 410, he clearly lays down that the waqif may appoint himself mutawalli and in a foot-note suggests that imam Mohammad probably held the same view. Baillie's Digest, page 601, is another authority against the appellants' contention. It is a quotation from the Fatawa-i- Alamgin. The point was clearly decided in the case of Doe dem. Jaun Beebse v. Abdollah Barber (1838) Fulton 345 : 1 Ind. Dec. (O.S.) 848 mentioned above and it was clearly ruled that the waqif could appoint himself the mutawalli.

69. The point was considered by the Bombay High Court in Abdul Rajak v. Bai Jimbabai 14 Ind Cas. 988 : 14 Boom. L.R. 295. At page 300 we find the following: "in British India the validity of wag/sunder which the appropriate" constitutes himself the first mutaivalli has been repeatedly recognised and where the dominion over the property is with the mutawalli at the time of the appropriation, we are not aware that their validity has ever been challenged upon that ground, where the appropriation has been acted upon".

70. Roland Wilson, in his Digest, lays down the same rule.

71. The real fact is that the practice of the waqif appointing himself the first

mutawalli is common all over British India. No one has ever thought of questioning the validity thereof since the decision in *Doe dem. Jaun Beebee v. Abdollah Barber* (1838) *Fulton* 345 : 1 *Ind. Dec. (O.S.)* 848. The Law Reports abound in cases in which the validity of waqfs has been questioned and attacked. In a very large number of these the waqif has been appointed by himself the first mutawalli, yet no one has dreamt of questioning the validity on the ground which is now taken before us.

72. The learned and able Counsel for the appellants admit that they are unable to quote a single instance of such an objection being taken to any waqf. It is ingeniously pleaded that there is a general ignorance of the law and that the Courts must amend matters. This omits consideration of the fact that consensus of opinion among the people is one of the solid bases of the Muhammadan Law. Our own knowledge and experience is all the one way. Where the waqf is a genuine transaction and has been put into force, we can safely say that its validity has never been challenged (at least since 1845) in British India on the ground that the waqif had appointed himself the first mutaivalli. We have no hesitation in overruling the appellants' contention on this point.

73. We note here that there are certain other points which were raised in the Court below but which have not been pressed in any way before us. It is unnecessary to discuss them, as we have touched on each and every point both of fact and law to which our attention has been called in the able arguments addressed to us on behalf of the appellants. To sum up briefly, we hold that the waqf in dispute was a genuine transaction created by the Nawab with good intent and not for the mere purpose of spiting his heirs, that the Nawab had for years desired to create the waqf and that the action of the Deputy Commissioner only caused him to act promptly so that he might carry out his desire while still legally able to do so. We hold that he acted of his own free will and accord and not under the undue influence of any body, that he fully understood what he was doing and that he was in full possession of his mental faculties when he, on August 25th, 1908, executed the deed of waqf and had it registered on 1st September 1908, that he having appointed himself the mutawalli or superintendent at once took steps to secure mutation of names and to proclaim to the world that he held not as owner but as mutawalli that he separated the accounts of the waqf property and that the income, such as it was prior to his death, was not spent on any improper objects but on the costs of management and the payment of the Government demand, that he duly executed the "trusteenamah" of 9th November 1908, of his own free will and accord while in possession (f his mental faculties and with a full understanding of what he was doing and of its effect, that he was under no legal disability, that there is no legal flaw in either of the two documents and that the waqf is valid and binding on the heirs, the present appellants. In the view that we have taken, the appeal fails and we, therefore, dismiss it with costs, including fees on the higher scale.