

**(1949) 08 AHC CK 0038**  
**In the Allahabad High Court**  
**Case No : First Appeal No. 119 of 1943**

|                                     |            |
|-------------------------------------|------------|
| Anjuman Islamia through Zahur Uddin | APPELLANT  |
| Vs                                  |            |
| Latafat Ali and Others              | RESPONDENT |

**Date of Decision :** 31-08-1949

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, 92, 92(1)  
Evidence Act, 1872 — Section 41  
Transfer of Property Act, 1882 — Section 41

**Citation :** AIR 1950 All 109

**Hon'ble Judges :** Malik, C.J.; Desai, J

**Bench :** Division Bench

**Advocate :** Waheed Ahmad Khan and A.P. Pandey, for the Appellant; G.S. Pathak, Gopalji Mehrotra, Jagdish Swarup, Prem Mohan Verma, S.P. Kumar and Lakshmi Saran, for the Respondent

**Final Decision :** Allowed

## Judgement

Malik, C.J.—I have read the judgment of brother Desai and agree that this appeal should be allowed.

2. The lower Court was of the opinion that Wilait Ali had executed the waqfnama dated 21st January 1917, of the six shops with the object of defeating the claim of Mahmoodi Begum. Mahmoodi Begum filed her suit No. 192 of 1920, on 1st November 1920, and it is very unlikely that Wilait Ali would have made this waqf in 1917 with the object of defeating Mahmoodi Begum's claim. Further, there is no reason why Wilait Ali should have made a waqf of only six shops with the object of defeating Mahmoodi Begum's claim when he was possessed of considerable other property. To meet this argument it was stated that Wilait Ali had made a waqf of certain other properties under two waqfnamas of 1918. Those waqfnamas have been held to be valid and no one has challenged the validity thereof. There is no satisfactory evidence to prove that the waqfnama executed in 1917 by Wilait Ali was not intended to take effect. We are satisfied

on the materials on the record that Wilait Ali had intended to make a waqf of the six shops and the waqf being, in other ways, valid has to be enforced.

3. The question whether the waqf was acted upon or not cannot affect the validity of the waqf. If the waqf was not acted upon it is a circumstance from which it can be deduced that the wakif had no real intention of making a waqf of his property. Apart from the oral evidence that the waqfnama had been acted upon, we have the leases executed of the six shops by various tenants soon after the waqf and the fact that accounts had been furnished, for three years, by the then mutwalli, of the income and expenses of the waqf in accordance with the provisions of the Mussalman Wakf Act (XLII [42] of 1923).

4. The learned Judge has not given due weight to the fact that the accounts were furnished from 1925 to 1927. The waqf being valid, the partition suit of 1928 between the descendants of Inayat Ali which was filed on 80th September 1928, and decreed on 25th June 1929, could not affect or bind the trust. It is admitted that the transferees cannot claim the benefit of Section 41, T. P. Act against the waqf.

5. The only other point was whether the defendants could challenge the plaintiff's right to file a suit on the ground that the plaintiff was not a duly appointed trustee. Plaintiff was appointed trustee in a suit u/s 92, Civil P. C. A suit u/s 92 is a suit by members of the public interested in the trust, for safeguarding the interest of the trust, and an appointment of a mutwalli by the District Judge made in such a suit must be held to be binding so long as the order cannot be challenged on the ground of fraud or want of jurisdiction or some such similar ground. To hold otherwise would lead to this difficulty that a person appointed a mutwalli by the District Judge in a suit u/s 92 can claim to be a mutwalli only against those who are parties to that suit and his right to act as mutwalli would be subject to a challenge by every other third party. I do not mean to suggest that after a decree in a suit u/s 92 it is not open to a person interested in the property and not a party to the suit to claim that the property was his private property and there was no public trust which could be made a subject-matter of a suit u/s 92, or that it is not open to a person, who is the real trustee, to claim that a decree has been obtained behind his back against persons who were not the real trustees and were not in charge of the property. But where there is a public trust and the District Judge has appointed a person as trustee in a suit brought against the then trustee, to my mind, it is not open to a third party to claim that the District Judge should not have appointed the person so appointed by him but should have appointed some others who had a better claim. To that extent a decree u/s 92 of the Code, in my opinion, is binding not only on those who are parties to the suit but also on others.

6. I. therefore, agree with the order proposed that the appeal should be allowed, the decree of the lower Court set aside and the plaintiff's suit decreed with costs of both the Courts.

7. Desai J.--This is a plaintiff's appeal from a decree of a Civil Judge of Bareilly dismissing its suit for declaration, possession and mense profits. The property in dispute is six shops, three situated in mohalla Bans-ki-mandi, and the remaining three in mohalla Katra Man Rai of Bareilly city.

8. The shops were admittedly owned by Inyat Ali, a Sunni Muslim, who left considerable property at his death in December 1914. The following pedigree will show who his descendants were:

INAYAT ALI, HUSBAND OF Mt. RAHIMAN | Wilait Ali, husband of Mustaz-ul-nissa  
(d. August 1922) |  
----- | | Latafat Ali  
(deft. 1.) Fida Ali (Deft. 2.) Bunyadi Begum (deft. 3.)

9. Inayat Ali left surviving him his widow Rahiman and his son Wilait Ali. On 21st January 1917 Wilait Ali executed a registered deed of waqf dedicating the six shops in dispute to Almighty God. There was a dispute in the lower Court whether the deed is a valid charitable trust; the lower Court held that it is and the finding is not challenged before us. Latafat Ali under the deed appointed himself as the first mutwalli and laid down a line of succession to the post of mutwalli. On 14th March 1917 three persons executed rent notes in respect of the three shops of Mohalla Katra Man Rai and on 21st March 1917 three other persons executed rent notes in respect of the other three shops of mohalla Bans-ki-mandi; all in favour of Wilait Ali. They were all registered though registration was not compulsory. In all of them it is stated that the executant had taken the shops on rent from Wilait Ali as mutwalli because the shops were waqf property. On 22nd September 1918 and 15th November 1918 Wilait Ali executed two distinct deeds of waqf-alal-aulad in respect of other property; the former was in respect of a house described as a haveli and 14 shops, and the latter of two houses and 17 shops, together worth Rs. 40,000. He made himself a mutwalli under these two waqfs also. One Mahmooda Begum instituted Suit No. 192 of 1920 against Wilait Ali for one-third share in property claiming that she was a daughter of Inayat Ali. She was admittedly a daughter of Hidayati Begum and she claimed that Hidayati Begum was Inayat Ali's second wife. Accordingly she claimed one-third share in the property left by Inayat Ali. She completely ignored the waqfs executed by Wilait Ali. The property involved in the suit was considerable and included the six shops in dispute. Wilait Ali contested the suit, denying that Hidayati Begum was married to Inayat Ali, contending that she was only employed by him as a maid, denying that the property formed Inayat Ali's estate and alleging that Inayat Ali and Rahiman had made an oral waqf in respect of certain shops and that in order to confirm the waqf he had executed the deed of waqf on 21st January 1917. He did not give details of those shops, but presumably they are the shops now in dispute. The "suit was" compromised on 23rd December 1920. The terms of the compromise were that Mahmooda Begum surrendered her claim to one-third share in the property in lieu of Rs. 2,400 to be paid by Wilait Ali, and that Wilait Ali should withdraw the suit filed

by him against Mahmooda Begum's brother Amir Hasan Khan. In the result Mahmooda Begum's suit was dismissed.

10. Wilait Ali died in August 1922. On 8th March 1924 his daughter Bunyadi Begum instituted Suit No. 63 of 1944 in forma pauperis for her share in the estate of Wilait Ali by partition and accounts. She did not mention the waqfs executed by Wilait Ali in her plaint, but she did not include the shops in dispute in the assets left by Wilait Ali. Latafat Ali was the eldest son and was entitled to be the mutwalli on the death of Wilait Ali, subject to his being fit for the office. On 10th January 1924, one Tulan entered into a contract of tenancy with Latafat Ali in respect of the three shops in dispute of Bans-ki-Mandi. The contract is in the form of a rent note registered as usual. It is mentioned in it that Latafat Ali was the new mutwalli and that the shops were waqf property. Mumtaz-ul-nissa and Bunyadi Begum filed suit No. 667 of 1928 against Latafat Ali and Fida Ali for partition of their share in the assets of Wilait Ali. They referred to the waqf of 1917, but pleaded that it was a fictitious transaction which had absolutely no effect, that it was entered into in order to prevent some claim to the assets of Inayat Ali, that Wilait Ali had never an intention of dedicating the property to GOD Almighty that he never relinquished possession and that the waqf was never given effect to. So the shops in dispute were included in the property to be partitioned, Latafat Ali and Fida Ali filed a written statement alike warmly contesting the claim. He stated that the waqf executed by Wilait Ali was not given effect to in his lifetime that on his death-bed he made an oral will assigning the income from the property to charitable objects and that consequently Mumtaz-ul-nissa and Bunyadi Begum could not claim any share. The suit was decided in almost record time. Latafat Ali himself applied on 12th April 1929 for transfer of the suit from the Court of the City Munsif, Bareilly, to that of the Additional Munsif on the ground that there was great congestion of work in the former Court. It seems that the application was rejected. 25th June 1929, was fixed for the hearing. Latafat Ali and Fida Ali moved another application on 18th April 1929 praying that an earlier date be fixed. That request also was not granted. The suit was heard on 26th June 1929 and was decreed the same day; Mumtaz-ul-nissa and Bunyadi Begum were given 12/40th share in the property. An Amin carried out the partition on the spot and final decree was passed on 29th July 1929. Under this decree, Latafat Ali, Fida Ali, Mumtaz-ul-nissa and Bunyadi Begum got shares in the shops in dispute, which they proceeded to alienate one after another. Latafat Ali, Fida Ali and Mumtaz-ul-nissa sold two of the shops of Bans-ki-mandi on 18th October 1929 to Maqbool Ahmed, defendant 15, The third shop of Bans-ki-Mandi was sold to him by Bunyadi Begum on and January 1930. On 7th March 1930 Fida Ali sold one of the shops of Katra Man Rai to Mt. Jamuna Kuar, defendant 4, on 23rd January 1931 Latafat Ali sold another shop to Mohammad Qasim, and on 24th September 1936 the remaining third shop was sold by Bunyadi Begum to Mt. Harduwari, defendant 16. The result of these transfers was that defendant 15 claims to be the owner of the three shops of Bans-ki-mandi and defendants 4 to 14 and 16 claim to be the owners of the

shops of Katra Man Rai. Haji Mohammad Qasim was the predecessor-in-interest of defendants 5 to 14. The plaintiff is a registered association of Muslims of Bareilly for charitable purposes. P.W. Zahur Uddin is a secretary of the association. He and one Basityar Khan obtained permission from the Advocate-General U. P., and instituted Suit No. 2 of 1938 u/s 92, Civil P. C. for the removal of Latafat Ali from the office of mutwalli and the appointment of another mutwalli. Originally the alienees from Latafat Ali etc. were impleaded as defendants to that suit, but subsequently they were discharged and the suit proceeded only against Latafat Ali, Fida Ali and Bunyadi Begum. On 19th January 1940 the District Judge of Bareilly found that the waqf executed by Wilait Ali in 1917 was a valid waqf, and that Latafat Ali proved himself to be unworthy of the office of mutwalli, removed him from the office and appointed the plaintiff as mutwalli in his place. The plaintiff has since then been acting as mutwalli of the waqf. The present suit was brought by it for (1) declaration that the shops in dispute are waqf property, (2) possession over them from defendants 4 to 16 and (3) mesne profits, past and future. It also alleged that some of the shops were demolished by the defendants and claimed damages from them; the lower Court rejected this claim for damages and the plaintiff has submitted to its finding. Consequently the question of damages for the alleged demolition is not in dispute now.

11. The suit was contested by defendants 4 to 16; defendants 1 to 3 (Latafat Ali, Fida Ali and Bunyadi Begum), having no interest left in the property remained ex parte. The defence was that the waqf deed was a sham document never intended to have effect, that the shops are not waqf property, the plaintiff, being a corporation, could not be appointed as mutwalli and has no right to sue as such, the judgment in suit No. 2 of 1938 (under Section 92) was fraudulent and collusive and the defendants being bona fide purchasers for value are protected u/s 41, T. P. Act, The defence raised other issues also, but we are not concerned with them any more. The learned Civil Judge dismissed the suit. His findings were that "the waqf-deed in question was duly executed, and that it created a valid waqf," that it was a fictitious deed and never acted upon, that the plaintiff was not bound by the decree in the partition suit, that the decree in the partition suit was not collusive though it was open to challenge by the plaintiff that the defendants were bona fide purchasers for value whose legal title was protected by Section 41, and that the plaintiff is not a mutwalli and was not competent to sue. Most of these findings are challenged through this appeal.

12. The due execution of the waqf-deed is proved and is even admitted by the defendants' predecessors-in-title. The finding of the learned Civil Judge that the waqf-deed in question was duly executed and that it created a valid waqf, is inconsistent with his subsequent finding that it was a fictitious deed never acted upon. The law is clear that if a valid waqf was created, the property at once passed to God and neither could the waqf be revoked later nor could God be divested of the property and the waqif or his successors-in-interest restored to it by any subsequent breaches of the terms of the waqf or abuse by the mutwalli of

his office. Once it is found that a waqf was valid, "it is wholly immaterial whether its provisions were carried out or not, for that is a matter of breach of trust only:" (Syed) Zainuddin Hossain and Others Vs. (Moulvi) Muhammad Abdur Rahim and Others, It sometimes becomes necessary to enter into the question whether the waqf was acted upon or not but that is for a different purpose, namely, that of finding out the intention of the waqif at the time of the execution of the waqf, in order to determine whether it was good and valid at its inception. In AIR 1948 168 (Privy Council) Sir John Beaumont stated the law as follows :

"It is, no doubt, the law that the validity of a waqf involves that there was an intention to dedicate on the part of the waqif. Where there is evidence that the waqfnama has been retained by the wakif and never acted upon such evidence may lead to an inference that no dedication of the waqif was ever intended, and that the deed was designed merely to provide a shield against possible claims. On the other hand it is established law that once there is an effective dedication in waqf it cannot be revoked; and it is obvious that breaches of trust on the part of a trustee, however numerous, and extending over however long a period, cannot put an end to the trust."

13. The learned Civil Judge misapplied the law to the facts found by him and he fell into this error by the wrong pleadings. Whether the waqf was acted upon or not, was not a matter of pleading. If a waqf, valid at its inception, could not become invalid on account of its not being acted upon, the question whether it was acted upon or not would be irrelevant so far as the question of its validity was concerned. If the case of the defendants was that there was no valid waqf brought into being at all because there was no intention in the mind of Wilait Ali to execute any waqf, that was a matter to be specifically pleaded, and whether the waqf was acted upon or not would be only a piece of evidence to prove whether the intention existed or not. As matters of evidence are prohibited from being put down in pleadings, the allegation that the waqf was not acted upon should not have found place in the written statements. But, even if it did, the learned Civil Judge should not have framed an issue about it. If he had taken the correct view of the law and framed proper issues, he might have come to a different finding from that arrived at by him. As it is, he has not paid sufficient attention to the question of intention at the time of the execution of the waqf.

14. There is absolutely no evidence about the intention existing in the mind of Wilait Ali at the time of the execution of the waqf, except what is furnished by the deed itself. According to that deed the intention was to create a waqf. It was followed up by a declaration that he had dedicated the property to God and divested himself of its ownership and that he would remain mutwalli and manager of it for his whole life. He also mentioned that the property had already been dedicated by his parents who, however, did not execute any deed and directed him to execute it. There can be no doubt from a reading of the deed that Wilait Ali had an intention of creating waqf. The essentials of a waqf, as far as this Court is concerned, are a declaration of endowment and delivery of

possession to the mutwalli; see Muhammad Imdad Ullah Vs. Mt. Bishmillah alias Haliman Bibi and Others, the wakf deed contains the declaration of endowment. It also contains the statement that he would be the first mutwalli and remain so for his lifetime. This statement amounts to a statement that he had divested himself of the possession as private owner and taken over possession as mutwalli; vide Mt. Alimunnisa Bibi Vs. Mohammad Abdur Rahman and Others, . The fact that he, as mutwalli, got rent notes executed by six tenants in respect of the shops immediately after the execution of the waqf shows that he had delivered possession to himself as mutwalli. Consequently a valid waqf came into being in January 1917. After that it was in the power of nobody to divest God of His ownership of the property.

15. The defendants tried to rebut the evidence about the intention by showing that Wilait Ali had an oblique motive behind the execution of the deed and that it was not acted upon. The oblique motive is stated to be the motive to defraud Mahmooda Begum of her share in the assets left by Inayat Ali. [His Lordship discussed the evidence and proceeded.] I am, therefore satisfied that Mahmooda Begum had no real claim against the assets of Inayat Ali and that Wilait Ali had no motive for indulging in a fictitious transaction of executing a deed of waqf.

16. It was argued before us that the rent notes were not proved, but the argument is against the admission of counsel of the defendants that they

"be read in evidence and marked as exhibits; and the said papers may not be requisitioned for formal proof."

The defendants clearly accepted the genuineness, of the rent notes; they simply contested the effect as against them. None of the tenants has been examined, but the mere fact that Wilait Ali got the rent notes executed in his favour as mutwalli and that he got the shops described as waqf property is sufficient for the plaintiff's, purposes. I do not attach any importance to the fact that Wilait Ali went out of his way to get the rent notes registered. The rent notes were for one year. There is no evidence that Wilait, Ali got any fresh rent notes subsequently. I do not see anything wrong in his not getting rent notes executed subsequently. He had to get the rent notes executed in March 1917, in order to show that he had created the waqf and that he had transferred possession to himself as mutwalli. Once he showed that a valid waqf was created, it was not necessary for him to show that it continued in existence by repeatedly getting rent notes executed from the same or different tenants. The execution of Tulan's rent note on 10th January 1924 shows that even in 1924 Latafat Ali claimed that the property was waqf. In 1923 the Musalman Waqf Act was passed by the Legislature. Section 3 of it required a mutwalli of every waqf to submit to the District Judge a statement containing a description and particulars of the waqf property and Section 5 of it required him to prepare and file in the District Judge's Court annually an account of all moneys received and expended by him on behalf of the waqf. In compliance with these provisions Latafat Ali (Wilait Ali being dead) acting as mutwalli submitted to the District Judge a statement giving

description of the shops in dispute, and also filed accounts for the period 15th August 1922 to 31st March 1927. Thus Latafat Ali also admitted that the waqf-deed was genuine and acted upon it. There was no reason why he should have submitted the statement and the accounts if no valid waqf were brought into existence through the deed of 1917. The learned Civil Judge observed that the accounts were haphazardly prepared and were not genuine. This was not a sufficient reason for brushing aside the evidence furnished by the accounts in support of the genuineness of the waqf-deed. The question before him was not whether the accounts were correct and whether any of the income was concealed or not; the question was whether it was or was not claimed that the shops were waqf property. No other accounts have been produced though there is evidence that Wilait Ali also used to maintain accounts as mutwalli. The plaintiff was fighting this suit against the successors-in-interest of Latafat Ali, etc. and could not be expected to produce accounts which must have been in their possession. It could produce the accounts filed by Latafat Ali because they were filed in Court. Wilait Ali made provision for his sons Latafat Ali and Fida Ali, who were said to be bad characters, by executing two waqfs-alal-aulad. It is significant that he did not include the shops in dispute in either. It is also significant that Bunyadi Begum, in her Suit No. 63 of 1924 for a share in the assets of Wilait Ali, did not include the shops in the property. Had the waqf been a fictitious transaction, she must have claimed a share in the shops. If she did not claim it, it only means that she knew that the waqf was genuine and that the property had passed to God Almighty.

17. There is oral evidence to prove that the income from the shops was devoted by Wilait Ali and Latafat Ali, as mutwallis, to charity, Under the waqf-deed it was to be devoted to feeding the poor and darud and fateha ceremonies. The plaintiff has examined witnesses to prove that money was spent on these objects. The defendants also have led evidence to prove that it was not. There is nothing to choose between the evidence of the two parties. In the partition suit of 1928 of Mumtaz-ul-nissa, Latafat Ali admitted that Wilait Ali had directed him to spend the income of the shops on charity, that Wilait Ali used to make religious offerings and that after his death he and Fida Ali also continued to make religious offerings. The plaintiff's evidence that money was spent on charity thus finds corroboration from the statement of Latafat Ali in that suit.

18. Wilait Ali remained alive for five years after the creation of the waqf and never repudiated it. The defendants could not point to even one circumstance suggesting that he repudiated it. The repudiation came from Latafat Ali and Fida Ali and that too some years after Wilait Ali's death. They mismanaged the waqf-alal-aulad of which they were mutwallis and were consequently removed from their offices at the instance of Latafat Ali's son and wife. They had vices and it seems that in order to pay for the vices they thought of selling the shops in dispute. As the shops were waqf, they could not sell them. They contrived to get a collusive decree for partition of the shops and so got the partition suit instituted in 1928. It was a collusive suit in which the final decree was passed



within three months of the institution. As soon as the decree was passed they started selling off the shops one after another. There would have been no partition decree and no repudiation if Latafat Ali and Fida Ali had no vices. In the very first sale-deed executed by them they wrote that the waqf-deed had been declared null and void in the partition suit. This was a false statement. The decree in the partition suit did not declare the waqf-deed null and void. There was a reference to it in the plaint as well as in the written statement, but there was no issue about it because none of the parties took his stand upon it. Latafat Ali and Fida Ali half-heartedly set up an oral waqf by Wilait Ali at his death-bed, but could not prove it. It was only a bogus plea taken for the sake of show.

19. I have dealt with all the evidence about subsequent conduct of Wilait Ali and all his heirs. I do not find anything in it indicating that Wilait Ali had no intention of creating a waqf. Even if there were something suspicious in the subsequent conduct, it does not avail the defendants. If there is any ambiguity about the intention of the founder of a waqf his subsequent conduct can be looked to in order to ascertain his real intention. If, however, the intention was clearly expressed in the waqf deed itself, it might be either genuine or disputed by the opposite party. If there was a genuine intention, the subsequent conduct, which in that case must necessarily be due to a reversal of the (original) intention to create waqf, is absolutely immaterial and ineffective" against God in whom the property has already vested, If the intention as expressed in the deed is disputed, it is open to the opposite party to prove that it really did not exist. Clearly, the onus will lie upon him. He may prove it by reference to the subsequent conduct. But he will have to show that the subsequent conduct was influenced not by reversal of the original intention but by the very non-existence of it at the time of the alleged creation of waqf. No hard and fast rule can be laid down for distinguishing between subsequent conduct influenced by the absence of intention to create waqf and that influenced by a reversal of the intention existing in the beginning. It is difficult for the opposite party to satisfy the Court that the subsequent conduct was really the result of the absence of intention in the beginning.

20. In (Syed) Zainuddin Hossain and Others Vs. (Moulvi) Muhammad Abdur Rahim and Others, , it was stated that subsequent circumstances may be looked into only if they throw any light on the intention of the waqif. Ebratannessa Bibi Vs. Sarat Chandra Sen and Others, , the waqif"s subsequent conduct.

"if it is merely in continuation of his conduct at the time and of a piece with it,"

is relevant in any inquiry into the existence of intention, If the evidence is about his conduct at a time which is separated from the time of the execution of waqf by an interval in which the intention could have undergone a change, it cannot be said that the subsequent conduct was necessarily influenced by the want of intention in the very beginning. Jonabali Sardar and Others Vs. Sm. Saleha Khatun and Others, , lays down that:

"Where the intention is clear from the surrounding circumstances, it is unnecessary to look into the subsequent conduct to find out the intention." It is stated by Amir Ali in his "Mohammedan law," vol. I, p. 323 (1912) ;

Once a particular property is dedicated, the right of the waqif is extinguished for ever. He cannot turn round and say afterwards that he had no intention of creating a waqf, nor can his heirs or creditors, or other person deriving title from him say that it was "pretended" waqf ; that at the time of making the dedication he had no intention of making a "real" waqf."

When Amir Ali refers to the waqifs turning round, he evidently means his revoking the intention to create waqf. The property is not dedicated unless there was an intention to dedicate it, and, so far as this Court is concerned, possession was delivered to the mutwalli. When one is making an inquiry into the very existence of the intention, the above quoted statement has no application. So it was open to the defendants to rely upon the subsequent conduct of Wilayat Ali in order to prove that he had no intention of creating waqf at the time when he purported to create it. They have, however, failed to refer to any such subsequent conduct as could not be attributed to a reversal of the intention. I also think that they could rely upon the conduct of only Wilait Ali, who purported to create the waqf; they could not rely upon the conduct of his heirs. Whether a person had a particular intention or not, can be proved by his own subsequent conduct but not by the subsequent conduct of another person. The defendants did not point out any subsequent conduct of a positive nature on the part of Wilait Ali. The defendants' allegation that Wilait Ali made a show of creating a waqf when he had no real intention of creating it, is one charging him with fraud and must be proved strictly. There must be evidence; it need not be direct, but it must be definite. Its place cannot be taken by surmises or suspicions. I find a total lack of evidence proving that Wilait Ali was guilty of fraud against the public. In the result I hold it as proved that Wilait Ali created a valid waqf in January 1927.

21. After the creation of the waqf, it was not open to his heirs to divide the waqf property among themselves either privately or through Court and to transfer it. It is quite unnecessary to decide whether the partition decree was collusive. Even if it were not collusive, it would not have any effect against God. The property did not belong to Latafat Ali, etc. Similarly, it is not necessary to decide whether the contesting defendants are bona fide purchasers. Even if they were bona fide purchasers, they cannot seek protection u/s 41, T. P. Act, against: God. Latafat Ali, etc., could not pass a better title to them than what they themselves had and they had none. I am not satisfied even with the bona fides of the defendants. The waqf-deed was a registered deed and there was reference to it in the pleadings of the parties to the partition suit. The defendants, if they had acted bona fide, must have known that the property was the subject-matter of waqf. Kakainandan (husband of Shrimati Jamuna Kunwar, defendant 4) and Mohd. Kamil (defendant 11) stated that they were not aware of the waqf-deed before

they purchased the property. I am unable to believe them; Kakainandan is himself a lawyer and the waqf-deed was referred to in the first sale-deed in favour of Maqbool Ahmad, defendant 15.

22. The plaintiff claims the right to recover possession from the defendants on the ground that it is a mutwalli appointed by the District Judge in the suit u/s 92, Civil P. C. The fact that it has been so appointed is proved by a copy of the order of the learned District Judge. It is not disputed that the learned District Judge had jurisdiction to remove Latafat All from the office of mutwalli and to appoint another mutwalli in his place. It was, however, contended that he could not appoint a corporation as a mutwalli. It was stated that though he could appoint A, B, C, etc., as joint mutwallis, he could not appoint a corporation even though the same persons A, B, C, etc., happened to be its members. No authority was cited in support of the contention, and the result of my researches is that it has no substance.

23. It is not quite correct to say that the pure Mohammedan law does not recognise a juristic person. Abdul Rahim writes in his "Mohammedan Jurisprudence" 1911 at p. 218:

"It may be doubted whether the earlier jurists would recognise an artificial or juristic person. The State or Community is regarded by them as holding and exercising the right of God in his behalf through the Imam.....

But later jurists seem inclined to recognise an artificial person, for instance, they, would allow a gift to be made directly to a mosque, while the ancient doctors would require the intervention of a trustee."

The Anglo-Mohammedan law undoubtedly recognises a juristic person; see for instance the case of (Prince) Gholam Hossain Shah and Others Vs. Altaf Hossain and Others, which recognised a statutory corporation as a juristic person having power to appoint a mutwalli.

24. Even if a juristic or artificial person was not recognised in the pure Mohammedan law, a Court acting u/s 92, Civil P. C., has certainly the power to appoint a corporation as a mutwalli of a waqf because it is then governed by the rules of procedure and not by the pure Mohammedan law. Removal of a trustee, appointment of another and fixation of a scheme of management are all matters of procedure. Even under the pure Mohammedan law, the appointment of a corporation as a trustee would not be illegal. I say this on the basis of the following passage in *Md. Ismail Ariff v. Ahmed Moola Dawood*, 14 A. L. J. 741: (A. I. R. (3) 1916 P. C. 132) of his Lordship Ameer Ali J. delivering the judgment of the Judicial Committee, at p. 751:

"With respect, however, to public, religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction ; but as regards management

which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interest of the institution."

The place of the Kazi is now taken by the Court. It cannot entrust the management to anyone, either a natural person or an artificial person ; it has full discretion in the matter.

25. The Court has general powers of supervision over a waqf and may remove a dishonest mutwalli despite anything to the contrary laid down by the waqif; (see Abdul Rahim's Mohammedan Jurisprudence, p. 309).

"There is in law no absolute right to be appointed mutwalli and it is not a matter of property" Hafiz Wazir Ali and Another Vs. Ladley Begum and Another, ." and,

"In settling a scheme for the administration of a charitable trust involving the appointment of trustees or managers, the Court is bound to secure persons whom it regards as suitable" AIR 1948 214 (Privy Council) The duties of a mutwalli are akin to those of a superintendent or manager. He is concerned only with the management of the secular affairs of the trust. His duties, thus, are such as can be performed by a corporation. The right of a mutwalli can be acquired by prescription and can also be lost by adverse possession. It is stated in Tudor on Charities, 4th Edn. p. 127, that

"the duty of carrying charitable trusts into execution may be entrusted either to trustees or to corporations. In England corporations are frequently made trustees of charities though it is regarded with disfavour (Tudor at p. 597).

26. In registered Corporation named Jamiat Dawat v. Mohammad Sharif, A. I. R. (25) 1938 Lah. 869 a person sued to recover possession as a mutwalli from a corporation (Jamiat Dawat wa Tabligh Islam); the waqif himself had entrusted the management of the income to a body named Jamiat Dawat wa Tabligh Islam which got itself incorporated later. It was found that the corporation was performing the duties of a mutwalli and it was decided that the plaintiff could not succeed in recovering possession from it. It is noteworthy that it was not contended by the plaintiff that the corporation as such could not be a mutwalli. The High Court of Madras allowed the claim of a corporation to be a mutwalli of a waqf in Khaji Muhammad Hussain Sahib Vs. The Masjiday Mahmood Jamait Managing Committee of Pudupet, . In Hassannullah Khan v. Royal Mosque Trust Board, A. I. R. (36) 1948 Mad. 184 : (I. L. R. (1948) Mad. 257) a corporation was appointed as mutwalli in a suit u/s 92, Civil P. C., and the District Judge's order was confirmed by the High Court. There is, therefore, nothing illegal in the appointment of the plaintiff as mutwalli.

27. Even if it were illegal for the learned District Judge to appoint a corporation

as mutwalli, the order is not open to challenge now. The order could have been challenged only through appeal. In these proceedings one cannot go into the merits of that order. It does not become a nullity simply on ground that it was illegal. An order without jurisdiction is a nullity, but an illegal order is only a voidable order ; it has got to be set aside on appeal, review or revision before it ceases to be effective.

28. Now it remains to be seen what is the effect of the order of the District Judge in a suit u/s 92, Civil P. C. It was claimed by the plaintiff that the judgment was a judgment in rem conclusive against the whole world. A judgment in rem is not defined in the Evidence Act, but it is conceded that it is dealt with in Section 41. That section however, gives conclusive effect to a judgment of a competent Court only in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction. A judgment passed in a suit u/s 92, Civil P. C., is not a judgment in the exercise of any such jurisdiction and is not covered by Section 41. It may be relevant but it will not have conclusive effect.

29. There are, however, authorities which lay down that a judgment in a suit u/s 92 binds the entire world. For example, a Bench of this Court stated in *Baba Suraj Gir and Others Vs. B. Bramh Narain Advocate and Others*,

"Their Lordships said that a scheme framed u/s 92, Civil P. C., was binding on everyone, (whether a worshipper or not) including even one who might have claimed an hereditary trusteeship and have brought a suit to enforce such a right before the settlement of the scheme. And they said, moreover, that a decree framing a scheme was a bar to a suit by such a person, even though the denial of such a right of suit might act prejudicially to his interest and even though his application to be made a party to the suit in which the scheme was framed had previously been rejected. That, we think, is exactly the position here."

30. A Bench of the High Court of Madras in the case of *Hasanullah Khan*, (A. I. R. (35) 1948 Mad. 134: I. L. R. (1948) Mad. 257) (supra), took the same view and held that a charitable scheme settled by Court must be considered to have been settled for the benefit of the public.

31. Under the English law, the judgment would be a judgment in-rem which is defined as, "an adjudication pronounced, as its name indeed denotes, upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose." (2 Sm. L. C. p. 752, (11th Edn.) ).

This definition has met with criticism. Taylor, remarks in his "Treatise on Evidence, vol. 2, 10th Edn. p. 1205, that "it is not an absolutely perfect definition though it is sufficient for all practical purposes." There is an exhaustive criticism of the definition in *Yarakallamma v. Naramma*, 2 M.H.C.R. 276. It also received-criticism at the hands of Peacock, C. J. in *Kanhaiya Lal v. Radha Charan*, 7 W. R. 388 : (Beng. L. R. Sup. vol.662). Phipson in his book on Evidence, 8th Edn., p. 402, quotes the definition that a judgment in rem is a "judgment by a Court having special jurisdiction over the subject-matter; Provided it alters status.

32. Bower defines a judgment in rem as one which

"declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally." (See Bower on Res judicata, p. 132.)

According to one or more of these definitions the judgment in a suit u/s 92, Civil P. C., appointing a particular person as mutwalli, would be a judgment in rem. It would be so because it confers a status upon a person as against the world. The whole Muslim public is interested in a public waqf and when a certain person is appointed its mutwalli, the status is conferred upon him as against the entire world. It is not possible to conceive of him as mutwalli as against the actual parties in the suit and as anything but a mutwalli as against the rest of the world. The principle underlying a judgment in rem is that the entire world may be regarded as a party to the suit in which it was pronounced ; see the case of Yarakalamma v. Naramma, 2 M. H. C. R. 276, Ubi Supra, at pp. 282 and 287. Bower on Res judicata at p. 133, and Bigelow on Estoppel, 6th Edn., p. 47. The principle stated by Phipson at p. 403.

"As regards persons is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt ; and as regards things, that, generally speaking, everyone who can be affected by the decision may protect his interests by becoming a party to the proceedings."

The public should not be left in any doubt as to who is the mutwalli of a waqf and a District Judge is given the power u/s 92, Civil P. C., not only to declare that a person is a mutwalli but also ipso facto to render him as mutwalli. The District Judge not only declared the plaintiff as mutwalli, but actually made it a mutwalli. The nearest approach to a judgment appointing a person as mutwalli in a suit u/s 92 is a judgment of a Court of probate appointing a particular person as administrator of an estate. Such a judgment is binding upon the entire world not only according to the English law (vide Bigelow on Estoppel, 6th Edn. p. 256) but also according to Section 41, Evidence Act. Another analogous judgment is one appointing a guardian of a minor's estate ; so long as that judgment stands unreversed it constitutes a full warrant for the demand and collection by the appointee of debts due to the minor (ibid, p. 258). Under the English law, therefore, the judgment appointing the plaintiff as mutwalli, would certainly be one in rem.

33. It is not, however, necessary to go to English Law. The simple question is, whether the plaintiff is a mutwalli or not ? A mutwalli can be nominated by the waqif or by a preceding mutwalli or by a congregation or may be appointed by a District Judge in a summary proceeding or in a regular trial u/s 92, Civil P. C. So long as there is no clash between rival claimants no difficulty should arise. If there is only one person who has been nominated or appointed as mutwalli, he will have to be held as mutwalli, and that is the case here. Previously Latafat Ali was the mutwalli, but he was removed by the learned District Judge and now

there is only the plaintiff appointed or nominated as mutwalli. Nobody else claims to be the mutwalli. The learned District Judge had jurisdiction to appoint the plaintiff as mutwalli and that is the end of the matter. The matter is as simple as of proving that; a particular man was convicted or acquitted. By simply producing the judgment of conviction or acquittal. It is truly said that every judgment is

"conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence and legal effect, as distinguished from the accuracy of the decision rendered" (Phipson at p. 398).

A judgment of conviction is conclusive on an issue whether the person was convicted or not arising between strangers who were no parties to the case resulting in conviction. The grounds on which the conviction was based will not be conclusive ; if the issue was whether he committed the offence, it will not be conclusive. But the issue simply being whether he was convicted or not, the judgment is certainly conclusive. It is conclusive out of sheer impossibility of rebuttal. Once the judgment is produced and the fact of conviction proved, it would be impossible for the opposite party to rebut the evidence. The same reasoning applies in the present case. It being granted that the learned District Judge could appoint the plaintiff as mutwalli, the production of a copy of his judgment appointing it as such clinches the issue whether it was appointed or not.

34. In the alternative, the entire world may be treated as a party to Section 92, suit, in which case also it would be unnecessary to consider if the judgment is a judgment in rem. Even as a judgment inter partes, it would bind the entire world. That seems to be the basis on which the authorities have given conclusive effect to a judgment in the suit even though it does not come within the four corners of Section 41, Evidence Act. In *Abdul Rahim v. Abu Mohammed Barkat Ali Shah*, A. I. R. (15) 1928 P. C. 16 : (55 Cal. 519), Lord Sinha dealing with a suit u/s 92 observed :

"In so far as the nature of the suit was changed by the amendments . . . , the suit ceased to be one of a representative character and the decree based on compromise . . . , however binding as against the consenting parties, cannot bind the rest of the public."

This lends support to the importing of legal fiction that the whole world is a party to the suit. The legal fiction is not an arbitrary or unreasonable one; as observed by Bower on *Res judicata*, page 126.

"For the purposes of estoppel per rem juridic-at-am, a "party" means not only a person named as such, but also one . . . who, being cognizant of the proceedings and of the fact that a party thereto is professing to act in his Interests, allows his battle to be fought by that party intending to take the benefit of his championship in the event of success."

35. Whatever view is taken of the nature of a suit u/s 92, Civil P. C. and of the effect of the judgment in it, the plaintiff is proved to be the mutwalli of the waqf.

36. The plaintiff claimed past and future mesne profits. The learned Civil Judge did not decide what past mesne profits it would have been entitled to if its claim were decreed. There is therefore no finding of his before us on that issue and learned counsel for the plaintiff-appellant did not address us at all on the question of mesne profits, past or future, I would assume that he has given up the claim to mesne profits and would not decree any.

37. I would allow the appeal and, setting aside the decree of the learned Civil Judge, decree the plaintiff's claim for declarations that the property in dispute is waqf property and that the plaintiff is its mutwalli, and for possession over it. The plaintiff may get its costs of both Courts from the contesting defendants.