

(1943) 06 CAL CK 0022
In the Calcutta High Court

Gobinda Chandra Ghosh alias G. Ghosh and Another	APPELLANT
Vs	
Abdul Majid Ostagar and Others	RESPONDENT

Date of Decision : 22-06-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 92

Citation : AIR 1944 Cal 163

Hon'ble Judges : Pal, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—This appeal is on behalf of defendants 2 and 3 in a suit commenced by the plaintiffs u/s 92, Civil P.C. The suit relates to certain immovable properties situated at Rai Sahib Bazar in the town of Dacca, with regard to which he alleged one Khidir Buksh Khansama to have made a wakf for the upkeep of a mosque built. The plaintiffs are the members of the Mahomedan public who are interested in the mosque, two of them being the brother's grandsons of Khidir Buksh, and the suit was commenced with the sanction of the Collector of Dacca as contemplated by Section 98, Civil P.C. According to the plaintiffs the wakf was created by a towliatnama executed by Khidir Buksh on 9th May 1851, by which the properties specified in sch. A of the plaint were dedicated to the mosque which is itself described as property No. 1 of Sch. B. Another person named Miran who lived in the same locality is said to have dedicated a plot of land to the services of the same mosque by a deed executed on 25th June 1866, and this property has been described in Sch. C of the plaint. The defendants to the suit are three in number; defendant 1 is Akhtar Nabi, a daughter's son of Khidir Buksh who according to the plaintiffs became the sole mutwalli of the wakf estate by reason of certain transactions, which took place between the heirs of Khidir Buksh after the death of the latter. Defendants 2 and 3 are the present possessors of the properties, which are alleged to have been dedicated to the mosque by Khidir Buksh by the towliatnama of 1851. They got them by several conveyances executed by defendant 1 as well as by certain other transferees from the heirs of Khidir Buksh. Defendant 3 is a deity named Ganesh

Deb and is represented by defendant 2 as its shebait.

2. To appreciate the contentions of the respective parties it will be convenient I think to give a brief narrative of the main events and transactions, as they appear on the record in chronological order. Khidir Buksh Khan, sama, the alleged wakif, was a man of moderate means living at Rai Sahib Bazar in the town of Dacca. Sometime before 1851 he had built a mosque on a small plot of land contiguous to his dwelling house. On 9th May 1851, he executed a document, which is de, scribed as a towliatnama and has been marked Ex.1 in this case. By this document he purported to make a wakf of his self-acquired pucca building and lakheraj land for the lighting of lamps of the mosque mentioned above. At that time he had no son and he made his wife Rostam Bibi alias Dana Bibi and his daughter Mohorjan mutwallis of the wakf, with a further provision that all his sons and grandsons as well as his daughter's sons and grandsons who might be born in future would become mutwallis and as such would be entitled to reside in the dwelling house and perform the work of lighting the mosque. Although the wife and daughter of Khidir Buksh were appointed mutwallis it is not disputed that there was no delivery of possession of the wakf properties in their favour and they never purported to exercise their function as mutwallis of the wakf. On 17th December 1874, a second towliatnama (Ex.z-1) was executed by Khidir Buksh. At that time two sons were born to him and by this deed he purported to remove both his wife and daughter from their office as mutwallis and appoint his two sons, Kasim and Mohammad, mutwallis in their place. The material portion of this document reads as follows:

The said two mutwallis being owners in posses, sion of the brick built havelli of the said wakf property described in the schedule below down to their sons, grandsons and other heirs in succession, shall personally reside therein, let out the same on rent and realise rent from the lessees, induct tenants in the wakf land appertaining to the same and eject them there from and make realisations of rents etc. from them and by residing in the Masjid shall do repairs thereto, give lights etc. therein and shall either appoint Mowazzin and Khutib thereof or do the duties of Mowazzin and Khatib etc., themselves, and shall do all the necessary acts, etc., relating to the said Masjid and shall themselves appropriate the savings from the income and usufruct of the said wakf property.

3. This towliatnama was subesquently revoked by Khidir Buksh subsequently revoked this towliatnama and a third one was executed by him on 27th May 1884 (Ex.3). It appears that between the dates of the second and the third document one of his two sons namely Mohammad had died. By this deed all the heirs of Khidir Buksh including his wife, Danna Bibi, his two daughters, Mohorjan Bibi and Kulsom Bibi, one Ismail a grandson by a predeceased daughter and his existing son Kasim were appointed mutwallis. The wakf property was divided into two portions; one was the residential portion with regard to which provisions were made for separate allotment of specific rooms to the mutwallis separately where they were to reside after the death of Khidir Buksh and the other portion

which consisted of vacant land was to remain in possession of the mutwallis jointly. They were to settle tenants on that portion, make orchards etc. and out of the income of the same repair the mosque and do all other duties in connexion with the same. The surplus income would go to the mutwallis in equal shares. It is not disputed that none of the mutwallis mentioned above did anything in connexion with the wakf properties so long as Khidir Buksh was alive, and the latter continued to perform services to the mosque as he had been doing from before. The exact date of death of Khidir Buksh is not known but it is probable that he died sometime in. 1894 or 1895. Kasim, his son followed him soon after and then Kustom Bibi, his wife died. In 1897 the surviving heirs of Khidir Buksh were his two daughters Moharjan and Kulsom Hafez Ahmadulla, a son of Moharjan, and Ismail and Abdus Samad the two grandsons by his predeceased daughter Mariam. On 12th January 1897, there was a deed of family settlement executed by all these heirs of Khidir Buksh by which the properties left by the latter including the alleged wakf properties were partitioned in a certain way. This document is marked Ex.B. Under it Kulsom got five annas share in all the properties of Khidir Buksh and another five annas share was given jointly to Ismail and Abdul Samad. The remaining six annas share remained with Moharjan and her son Hafez Ahmadulla. The mother got three annas 18 gds. and odd and the son got the remaining 1 anna 2 gds. and odd share. Paragraph 4 of the document reads as follows:

According to the shares allotted to us now we shall each take the profits due to our respective shares and possess and use (the land) and repair the building and defray the expenses of lighting the lamps of the mosque and pay the municipal taxes and if there be any litigation we shall pay the expenses thereof in equal shares.

4. Thus his heirs as purely personal properties treated the properties comprised in the Towliatnama of Khidir Buksh except that they recognised it as one of their duties to defray the expenses of lighting the mos. que. In 1904 Hafez Ahmadulla mortgaged his share in the alleged wakf property to one Badhika Saha to secure an advance of rupees 600 (vide EX. K). On 26th July 1908, Meherjan transferred her share in all the properties left by Khidir Buksh which she got under the deed of settlement referred to above to her son Hafez Ahmadulla (vide Ex.K) and the latter thus acquired a 6 annas share in all the properties. A portion of these properties including the wakf property, Hafez Ahmadulla sold to one Abdul Kader by a deed of sale which is "Ex.C and which was executed on 20th October 1913. On 24th February 1915, the heirs of Ismail and Abdul Samad sold their 5 annas share in all the properties which they got under the deed of settlement of Kulsom, the other daughter of Khidir Buksh and her son Aktar Nabi, defendant 1 in this suit, by a deed of sale which has been marked Ex.E, and Kulsom in her turn made a gift of her entire share to Aktar Nabi who thus acquired a 10 annas share in the properties of Khidir Buksh (vide Ex.Y). Defendant 2 first came into the picture in the year 1917. On 1st February 1917, he took mirash patta of a plot of land, which is now identified to be the land of C.S. Plot No.64 from Aktar

Nabi and Hafez Ahmadulla on payment of a selami of Rs. 2700 at a fixed annual rent of Re. 1-4-0 only. In this deed of mirash patta which is Ex.O, it was recited by the lessors that there was no legal or valid wakf created by Khidir Buksh but it was the duty of the executants of the patta who were the heirs of Khidir Buksh to meet the expenses of the mosque to the best of their abilities and that the expenses would be defrayed by settling the lands in mires and by employing the premium thereof properly. It must be mentioned here that Hafez Ahmadulla had already sold his share in the property to Abdul Kader but this fact was not mentioned in this mirash patta. On the very same day that this mirash patta was executed, Hafez Ahmadulla sold his 6 annas share in the remaining properties to Aktar Nabi, defendant 1, by the kobala Ex.F. Thus with the exception of the land covered by the mirash patta the rest of the properties were now jointly owned by Aktar Nabi and Abdul Kader. Abdul Kader sold his 6 annas share to defendant 2 in the benami of his son-in-law Nepal Bose by the kobala Ex.G on 18th July 1923. Hafez Ahmadulla was now dead, but as has been said above, he dealt with some portion of the properties as his own even after he transferred the same to Abdul Kader, and we find that Abdul Kader took a release from the heirs of Hafez Ahmadulla for the purpose of perfecting his title. This release, which is marked Ex.Z, was executed just a few days before Kader sold his interest to Nepal Bose. Aktar Nabi, defendant 1, mortgaged his share by two different instruments of mortgage in favour of one Jatindra Kumar Das one of which was executed on 28th March 1919 and the other on 31st October of the same year (vide Exs.Land H). On 10th October 1925, Aktar Nabi sold to defendant 2 his share in some of the properties covered by the towliatnama and they have been now identified as the western half of C.S. Plot No.63. The document is Ex.M and the consideration specified in it is Rs.5500. Defendant 2, it is said, conveyed a half share of this property as well as of the property which he had previously purchased in the benami of Nepal Bose in favour of the deity Ganesh Deb Thakur who has been made defendant 3 in this suit. On 29th November 1929 defendant 1 transferred his interest in the remaining plots of land covered by the towliatnama of Khidir Buksh with the exception of a small portion of the land appertaining to C.S. plot NO.57 to defendants 2 and 8 jointly for a consideration of Rs.11, 500. This document is marked Ex.10. It is in this way that defendants 2 and 3 claim to have acquired title to the properties covered by the kobalaa mentioned above.

5. The present suit was filed on 1st December 1931, against defendants 1 and 2 only. The allegations of the plaintiffs in substance were that the wakf property was properly administered by Khidir Buksh during his lifetime and also by the subsequent mutwallis after his death; it was defendant 1 who having become the sole mutwalli on the strength of certain transactions which he entered into with his cosharers began to treat the wakf property as his personal property and did not look to the interest of the wakf at all. He mortgaged the wakf properties and raised money for his own use in contravention of the terms of the wakfnama and against the directions and practices of the previous mutwallis. In collusion with defendant 2 he transferred the wakf property wrongfully and illegally to

defendant 2 with the full knowledge of the fact that the properties were dedicated to the mosque. Defendant 2 was thus in possession of the wakf properties and the rents of the same were realised by him for his own benefit and not for the benefit of the mosque Paragraphs 19 and 20 of the plaint stand as follows:

19. That defendant 2 knowingly and fraudulently took possession of the wakf properties and has been utilising the income thereof in collusion with defendant 1 and hence both of them are liable to accounting as trustees de son tort.

20. That defendant 2 is not a bona fide purchaser for value without notice and as such is a constructive trustee of the wakf properties in his possession and is therefore legally liable to restore the possession of the said properties to the legally appointed mutwallis.

6. On these allegations the plaintiffs prayed that both the defendants might be removed from the position of trustees or mutwallis de jure or de son tort or constructive; that a new mutwalli may be appointed to take charge of the wakf property and that the wakf properties might vest in such a mutwalli. There was further a claim for accounts against both the defendants and a prayer for framing scheme for the proper management of the wakf estate.

7. Both the defendants filed written statements traversing the material allegations contained in the plaint. It was contended inter alia in the written statements of the defendants that no real wakf was created or intended to be created by Khidir Buksh by the towliatnama of 1851 and there was no valid or legal wakf under the provisions of the Mahomedan law. It was said that during the lifetime of Khidir Buksh and after his death the properties were all along treated as the private properties of Khidir Buksh and it was never treated as the properties belonging to the Masjid. It was averred further that even if there was any wakf it was a private wakf and did not attract the provisions of Section 92, Civil P.C. So far as defendant 2 was concerned his special plea was that he was a purchaser of the property for lawful consideration and in good faith and had no knowledge of or belief in the existence of the trust alleged by the plaintiffs. It was also contended on his behalf that as he was a stranger to the wakf no relief could be claimed against him u/s 92, Civil P.C.

8. After these written statements were filed wherein inter alia the existence of the trust alleged by the plaintiffs was denied the matter was put up before the District Judge on 21st March 1932 when the following Order was passed:

Pleaders heard. The defendants deny that the property is a public trust at all and contend that it is their private property. The suit cannot proceed unless the plaintiffs obtain a declaration that the property is trust property. It is perfectly true that such a suit could be instituted in the Court of the Subordinate Judge. But this Court has jurisdiction over the property and no useful purpose would be served by compelling the plaintiffs to institute two suits. The plaintiffs are directed to amend their plaint and pay court-fees within a month; failing which

the suit will be dismissed.

9. As no court-fees were paid in accordance with this Order the suit was dismissed. Against this Order of dismissal the plaintiffs took an appeal to this Court. It was heard by Mitter and Rau JJ. In the appeal it was conceded on behalf of the defendants-respondents that even when the defendants in a suit u/s 92, Civil P.C, denied that there was any public trust which would attract the operation of that section, a separate suit for declaration of trust was not necessary, and it was competent for the Court itself to decide as to whether a trust of a public nature existed or not. It was however argued on behalf of defendant 2 that as he was a stranger purchaser and took the property adversely to the trust, if any, the suit lost its character as a suit u/s 92 on impleading him as a party defendant. It was held by the learned Judges that although in a suit u/s 92, Civil P.C, the plaintiff is not entitled to claim relief against a stranger to the trust, yet when according to the averments made in the plaint the stranger occupied the position of a constructive trustee the suit would come within the purview of Section 92, it being a matter of evidence whether the allegations in the plaint were ultimately made out or not. Such a suit was maintainable without the payment of ad valorem court-fees. This decision is reported in *Abdul Majid v. Sk. Aktar Nabi* AIR 1935 Oal.505. The result was that the Order of dismissal made by the Court below was set aside and the suit was sent back to the trial Court to be tried on its merits.

10. After the suit went back the plaint was amended and defendant 3 was added as a party defendant. This Order of amendment was made on 3rd February 1936. Defendant 3 filed a separate written statement. Defendant 2 practically on the same lines as the written statement filed it. The learned District Judge after a protracted hearing pronounced his judgment on 7th July 1939 decreeing the suit in favour of the plaintiffs. The decree directed the removal of defendant 1 from the office of mutwalli and defendants 2 and 8 from the position of constructive trustees. It further directed that a new mutwalli should be appointed in whom the trust property would vest and a scheme would be prepared for the management of the estate. There was a dispute between the parties as to the identity and existence of the lands covered by the Towliatnama of 1851. The District Judge directed a local investigation to be made on this point and on a consideration of the evidence adduced by the parties came to the conclusion that C.S. Plots 57, 68 and 64 constituted the wakf properties under the Towliatnama of Khidir Buksh. As regards the mosque itself and the other property which was dedicated by Miran and which was found to comprise a portion of C.S. Plot 55, there was no dispute.

11. The effect of the decree so far as defendants 2 and 3 are concerned is that they have been made liable to restore C.S. plots 57, 63 and 64 together with all structures erected by them to the new mutwalli that would be appointed by the Court. It is against this decision that defendants 2 and 3 have come up on appeal to this Court.

12. The arguments put forward by Dr.Basak who appears in support of the appeal can be conveniently grouped under six heads: His first contention is that there was no real wakf made by Khidir Buksh by the towliatnama dated 9th May 1851, and the circumstances of this case conclusively show that his whole intention was to keep the property perpetually in his family under the guise of an illusory dedication: at the best, Dr.Basak argues, the document could be construed to create a charge on secular properties for certain expenses of the mosque. The second argument put forward is that if any wakf was made at all by Khidir Buksh, there was no public trust, which would attract the provisions of Section 92, Civil P.C. The third argument raised is that no sanction having been obtained under Section's 92 or 93, Civil P.C, so far as defendant 3 is concerned, the suit against him is not maintainable in law. The fourth argument is-and it seems to be the principal argument in this appeal-that defendants 2 and 3 being stranger purchasers who have all along held the properties purchased by them adversely to the trust were neither proper nor necessary parties to a suit u/s 92, Civil P.C, and no relief could be granted against them. The fifth point raised relates to the identity of the properties covered by the towliatnama of Khidir Buksh and it is contended that the Court below was wrong in holding that C.S. Plots 63 and 64 were included in the document. Lastly, it is against that the suit is barred by limitation. I shall take up these points one after another.

13. Now, the first contention of Dr. Basak resolves itself into two parts. In the first place, the argument is that even though on the face of the document, the towliatnama of 1851 might make a formal declaration of wakf, yet the language of the document and the circumstances of this case will go to establish that the whole transaction was intended to be unreal and fictitious, and there was no real intention on the part of the settlor to create a wakf at all. The other part of the contention is that what was dedicated to religious or charitable purposes was only a very small and insignificant portion of the alleged wakf properties-the bulk being reserved for the benefit of the family. The wakf was thus a mere veil to cover an arrangement for the aggrandisement of the donor's family, and, at best, the properties mentioned in the document might be subject to a charge to the extent of the charitable purposes indicated therein. The first branch of the contention, therefore, relates to the reality of the wakf, while the second refers to its validity in law.

14. For both the branches of his argument; Dr.Basak relied strongly upon the language of the towliatnama, Ex.1. The document is a simple one and its material. Portion may be set out as follows:

... Hence I make wakf of the above-mentioned purchased lakheraj land and building for the lighting of lamps of the above-mentioned mosque and execute this towaliatnama to the effect following: I appoint at present my wife Rostum alias Dana Bibi and my daughter Srimati Meherjan as mutwallis. They will live and reside in the above-mentioned building and will light the lamps of the above-mentioned mosque. They will not be entitled to sell or make gift of the above-

mentioned building and land. God willing, if other issues are born to me they also will enjoy the above-mentioned building and lands as mutwallis and my sons and grandsons, etc., and my daughter's sons and grandsons, whoever survives will enjoy the above-mentioned building and lands as mutwallis and will light the lamps of the mosque.

Thus, there is no doubt that the settlor has made a formal declaration of endowment, He uses the expression "wakf which indicates that he relinquishes the properties which are consigned to the custody of God. The object of the wakf is the burning of lamps in the mosque and this is one of the objects recognized as religious and pious under the Mahomedan law. Vide *Muzbar Husain v. Abdul Hadi Khan* 33 All. 400: 9 I.C.753

15. Mr.Gupta concedes that it is open to the appellants to show that the wakf, even though formally declared, was never intended to be acted upon. For that purpose, we are to look primarily to the surrounding facts and circumstances as well as to the conduct of the wakif himself after the wakfnama was executed. The question whether the wakfnama was in fact acted upon or not is not strictly relevant except as a means of and by way of step for determining that intention. Vide *Sm. Masuda Khatun Bibi Vs. Mahomed Ebrahim*, . Dr.Basak lays stress upon the fact that the two mutwallis appointed by the deed never exercised their function as such and the wakf property was never delivered to them. As a matter, of low no delivery of possession of the wakf properties to the mutwalli is necessary for the purpose of completing the wakf according to the view taken in this province, which follows the view of Abu Yusuf. Vide *Mulla's Mahomedan Law*, Article 151, p. 154, Edn. 11. The point undoubtedly has bearing on the other question as to whether there was any intention to ereate a wakf or not. We have no materials placed before us in this case, which would indicate clearly that the provisions of the wakfnama were never given effect to at all. According to the directions in the towaliatnama, the mutwallis were to reside in the house and perform the duties of burning lamps in the mosque. It is true, as Dr.Basak points out, that Khidir Bux never constituted himself mutwalli of the wakf estate, but whatever evidence we have got in this case goes to show that he looked after the mosque and performed its services in the same way as he did before. It appears that although Khidir Bux appointed different mutwallis from amongst his descendants at different times, he really intended that all these arrangements would take effect after his death, and so longfas he was alive he arrogated to himself the function of a sole de facto mutwalli. If Khidir Bux dealt with any portion of the property comprised in the towaliatnama as his personal property obviously that would be a very strong circumstance to show that the document was never meant to be acted upon. In this connexion some reliance has been placed upon Ex.Q, which is, a hebanama executed by Khidir Bux in favour of his wife Rostum alias Dana Bibi on 17th June 1884. Plot 1 of this document is said to be a portion of the property comprised in the towaliatnama. The learned Judge in the Court below has found that this plot which corresponds to C.S. Dag No.56 is outside the wakf. As I shall point out later on, this conclusion is correct. The only

other transactions which are relied upon as throwing any light on the intention of Khidir Buksh in the matter of creation of the wakf are the two towaliatnamas, Ex.Z (1) and 3, executed on 17th December 1874 and 27th, May 1884, respectively. In both these documents, it is recited that Khidir Bux has made wakf of these properties already and what he purports to do is simply to make provisions relating to the appointment of mutwallis and management of the wakf estate. Dr.Basak is right in saying that Khidir Bux did not reserve to himself the power of altering the arrangement relating to the appointment of mutwallis, as made in the first towaliatnama. These acts, therefore, might be regarded as unauthorized acts, which would not in law, affect the rights of the mutwallis who were to act under the first deed. But whatever the legal effects of these documents might be- and with that question we are not concerned in the present litigation-they do not certainly show that Khidir Bux had no intention to make the wakf and that he treated the properties as his own personal and secular properties. In the towaliatnama, Ex.z (1), it is said that the mutwallis, will enjoy the property as Malik Dakhalkar, that is to say, owners in possession, and they were given the rights to appropriate the savings from the income of the wakf property. This looks suspicious. But it may be taken as a remuneration to the mutwalli and there is nothing wrong in allowing the mutwallis to appropriate the surplus as their remuneration after executing the trust.. It would have been otherwise certainly if the direction was that the mutwallis would be entitled to take up as much out of the income as was necessary for their maintenance, and the trust would be carried out with the residues of the income. By the third towaliatnama which is Ex.3, there is some sort of division made with regard to the residential portion of the homestead and the settlor indicates who were to act as mutwallis. It may be argued that as this arrangement was to take effect after the death of Khidir Buksh, he was treating the properties as his. But here again it may be pointed that by the first towaliatnama only the right of residence was given to the mutwallis, and Khidir Buksh was merely indicating here how that right was to be enjoyed.

16. As regards the portion of the lands, which were lying vacant, the mutwallis were enjoined to let it out to tenants or otherwise use it profitably, and out of the income of the same, they were to perform the different duties in connexion with the mosque which were specified in detail in the towaliatnama. There was indeed the provision for the appropriation of the surplus. But as I have said already, it does not show that there was no intention to create a wakf.

17. The difficulty is that there is no evidence to show what was the conduct of Khidir Buksh himself during his lifetime. It is true as Dr.Basak points out that Khidir Bux even before the execution of the towaliatnama had been carrying on the services of the mosque as a pious Musalman, and there was no change in his conduct or mode of enjoyment of the property after the creation of the wakf, so far as outward appearance is concerned. All this may be conceded, but at the same time, if his conduct was not inconsistent with the wakf character of the properties, we are unable to say that it shows that there was no intention to

create a wakf. After the death of Khidir Buksh, his heirs undoubtedly began to deal with the properties as their own personal properties. This cannot be relied upon for the purpose of showing what the real intention of Khidir Buksh was. After all, it seems to me that an apparent transaction must be presumed to be real unless the contrary is established, and the onus of establishing the contrary is on the person who asserts that the transaction is not what it seems. There are undoubtedly, certain matters, which might legitimately create suspicion in our minds and give rise to doubts. But as has been said over and over again, the decision of the Court must rest not upon suspicion but upon legal evidence. I am unable to hold that the defendtints have been able to prove in this case that there was no intention on the part of Khidir Buksh to create a wakf. The first branch of Dr.Basak's contention under this head must, therefore, fail.

18. In support of the other branch of his contention, Dr.Basak relies most strongly upon the decisions of the Judicial Committee in Sheikh Mahomed Ahsanullah v. Amarehand Kundu 17 I.A. 28, Abdul Gafiur v. Nizamuddin 19 I.A.170, Abul Fata Mahomed Ishak v. Russomoy Dhur Choucljiury.22 I.A.76, and Mujibunnissa y, Abdul Rahim. 28 I.A, 15. Dr.Basak's argument, in substance, is that practically the whole of the property mentioned in the towaliatnama was left for the benefit of the founder's heirs with a nominal endowment for religious purposes. He says, therefore, that the wakf is illusory and not valid wakf under the Mahomedan law. In all these cases which were decided under the law as it stood before the passing of the Wakf Act in 1913 it was held by their Lordships of the Judicial Committee that when the effect of a deed of wakf was in substance to give the property to the donor's family and only an insignificant portion was set apart for charity or religious purposes, such a wakf was invalid under the Mahomedan law. In Sheikh Mahomed Ahsanullah v. Amarehand Kundu.17 I.A. 28, the wakf deed contained elaborate provisions for the appointment of the settlor's sons and descendants as mutwallis and their salaries and for the maintenance of the family of the donor from generation to generation, and the only provision in the deed relating to charity was that the mutwallis should defray the customary expenses of a masjid, two madrassahs, and of travellers. It was found that these required a very small expenditure compared with the income and it was held that the main purpose was the aggrandisement of the settlor's family and the gift to charity was illusory. In Abdul Gafiur v. Nizamuddin.19 I.A.170, the legal heirs of the settlor were the only recipients of the bounty. In Abul Fata Mahomed Ishak v. Russomoy Dhur Choucljiury.22 I.A.76, two brothers executed a deed making a wakf of their properties for the benefit of the children of the donors and their descendants from generation to generation, and On total failure of their descendants for the benefit of widows, orphans, beggars, etc. It was held that the gift to the poor was too remote and was hence bad. In Mujibunnissa y, Abdul Rahim.28 I.A.15, the income to be devoted to charity was left entirely to the discretion of the mutwallis and consequently, it was held to be invalid.

19. I do not think that any of these decisions has got direct application to the

facts of the present case. Here, the settlor makes wakf of his properties consisting of the dwelling house and the adjacent lands for the purpose of rendering certain services to the mosque. The dwelling house was intended to be used as a place of residence by the mutwallis and they could only derive some small income from the vacant lands. Out of this income, they were to defray the expenses of the mosque and the rest they were entitled to appropriate as mutwallis. There is nothing in the record to show that the vacant lands could fetch a large income, and that only an insignificant part would be required for services of the mosque and the bulk of it could be absorbed by the descendants of the founder. Moreover, nothing was left to the descendants as such, and whatever they got they got as mutwallis. In these circumstances, I find it difficult to hold that the trust was illusory and the property was really given to the heirs with a charge for religious expenses mentioned in the deed. There is no question of the wakf being considered wakf-al-aulad and the question need not be considered at all. It is true that in the subsequent transactions, which were entered into by the heirs of Khidir Buksh, the property was treated as secular property, and the heirs acknowledged only in a vague way their duty to render service to the mosque. But the subsequent conduct of the heirs, as I have said already cannot invalidate the endowment. I hold, therefore, that there was a valid wakf created by Khidir Buksh and the decision of the Court below on this point must stand.

20. The next point for our consideration is whether the trust created by Khidir Bux constituted a public trust within the meaning of Section 92, Civil P.C. Dr.Basak argues that the trust would not constitute a public trust, firstly, because the mosque for the benefit of which the property was dedicated was not a public mosque; and secondly, because the major portion of the benefit arising out of the wakf was reserved for the mutwallis and not for the mosque and hence the trust according to him must be deemed to have been created for a private purpose. The learned District Judge has found on evidence that the mosque is a public mosque and not a family mosque of Khidir Bux. The mosque was undoubtedly built on a plot of land contiguous to the homestead of Khidir Bux, but the map and the evidence go to show that it was not in any way attached to the dwelling house. There is a vacant piece between the house of and the masjid and the fact that the entrance door, which was said to be situated on the northwest, has since been shifted further to the east does not really affect the position. A large number of witnesses have been examined on behalf of the plaintiffs to prove that the mosque has all along been used freely by the members of the Muslim public for all prayers including congregational prayers, and neither defendant 1 nor any member of the family of Khidir Bux has come forward to say that the mosque was used for the members of the family of Khidir Bux alone. The learned advocate for the appellants has not challenged the oral evidence on this point, which was relied upon by the Court below. He has merely laid stress on two documents, viz., Exs. B and Section in both of which Khidir Bux treated the mosque as the private property left. Exhibit B is the deed of family

settlement executed by and between the heirs of Khidir Bux to which reference has been made already and Ex. Section is a deed of gift executed by one Jahura Bibi, a sister and heiress of Rostam Bibi alias Dana Bibi, widow of Khidir Bux in favour of Hafez Ahmedulla. As has been said already, the heirs of Khidir Bux all along ignored the wakf character of the property altogether and treated the properties as their own secular properties. There is nothing unnatural therefore for them to speak of their shares in the mosque as well. One strong circumstance in favour of the plaintiffs is that Miran who was a perfect stranger did make a gift of some lands to the mosque. This would be unthought of, if the mosque was a family mosque as alleged by the defendants. In the absence of any rebutting evidence coming from the defendants' side regarding the nature of the mosque, I am unable to say that the decision of the Court below on this point is wrong.

21. The other point raised by Dr.Basak in this connexion does not appear to me to be convincing. In the first place, the mutwallis were appointed for the purpose of carrying on the duties in connexion with the mosque and the benefits given to them must be considered as appurtenant to the main purpose for which the dedication was made and cannot be regarded as a separate and independent gift. Moreover, there are no materials before us for determining the respective money values of the benefits reserved for the mosque and that for the mutwallis themselves, and it is difficult to say that one is greater than the other. No evidence is adduced to show what was the income of the wakf properties, and how much of the income would be absorbed for the purpose of lighting the mosque and performing other services in connexion therewith. The mutwallis again were only given the right of residence and it is extremely difficult to assess a right of residence at its money value. This contention therefore must fail.

22. The third point raised in this appeal is that the suit must fail against defendant 3 for want of sanction u/s 92, Civil P.C. It is not disputed that the sanction that was obtained from the Collector of Dacca u/s 93, Civil P.C, and on the basis of which the suit was instituted did not include defendant 3 as a party to the suit. The sanction was given to file a suit only against Akhtar Nabi and Gobinda Chandra Ghosh: (vide page 30 of the paper book). Defendant 3, as I have said already, was added a party on 3rd February 1936, after the suit went back from this Court. The plaint was altered and all the allegations made against defendant 2 were also made against defendant 3 and it was prayed that both defendants 2 and 3 might be removed from their positions as trustees de jure or de son tort or constructive. It admits of no doubt that the obtaining of sanctioning of the relevant authorities is a condition precedent to a validly instituted suit u/s 92, Civil P.C. When in a suit of this description, a new defendant was added and certain additional reliefs were prayed for against him, it was held by Daver J., in Abdul Rahman V. Cassum Ebrahim 36 Bom.168, that a fresh sanction of the Advocate-General was necessary. Mr.Gupta argues that once a suit is validly commenced after obtaining sanction as is necessary u/s 92, Civil P.C, no fresh sanction is necessary at a further stage of the suit. This cannot possibly be disputed nor can it be disputed that the amendment of the plaint or

the addition of the party which does not alter the nature of the claim in the suit does not necessitate a fresh sanction, but when such amendment or addition of party does change the nature or scope of the suit, a fresh sanction is certainly required. Here, as against defendant 3, there is a totally different cause of action; the relief claimed against him is also different. The plaintiffs seek to make defendant 3 liable as a constructive trustee and claim reliefs against him on that footing. That, in my opinion, certainly extends and alters the scope of the suit, and as no sanction was obtained previous to defendant 3 being added as a party to the suit, so far as defendant 3 is concerned, the suit cannot be held to be maintainable.

23. I now come to the next point urged by Dr. Basak, namely whether defendants 2 and 3 could at all be impleaded as parties defendants to the suit u/s 92, Civil P.C, and whether any relief could be granted against them. A suit u/s 92, Civil P.C, is for execution and administration of a public trust either express or constructive, provided that the trust is of a religious or charitable nature, and the object of the section is to protect the rights of the public in such trust and to stop misuse of the income of charitable institution. In Order that the section may apply it is necessary: (1) that there must exist a trust either express or constructive for public purposes of charitable or religious nature; (2) the plaint must allege that there is a breach of trust or that direction of the Court is necessary for the administration of the trust; (3) the suit must be one on behalf of the public and not by individuals for the protection of their own interest and lastly (4) the relief claimed must be one of the reliefs mentioned in the section. If the existence of a public trust of the nature mentioned above is admitted or proved, and it is found that the trustee in breach of the trust has improperly alienated the trust property to a stranger, the question arises whether the alienee is a necessary or proper party to the suit u/s 92, Civil P.C. and whether the Court can grant any relief against him under that section.

24. The view that has been taken by all the High Courts in India is that if the essence of the plaintiffs' claim against such alienee is that he is a trespasser and the property of which he is in possession should be restored to the new trustee, that is to be appointed by the Court, such relief is outside the scope of a suit u/s 92, Civil P.C. This Court has held in a long series of cases that it is not competent to the Court to implead the alienee at all in such a suit. Reference may be made to the cases in *Budh Singh Dudhuria v. Nirad Baran Roy* 2 C.L.J.431, *Budree Das Mukim v. Chooni Lai Johury* 33 Cal. 789, *Gholam Mowlah v. Ali Hafiz* 5 AIR 1918 Cal. 5, *Faizunnessa v. Asad Bpkht* 41 C.W.N. 298 and *S. Massirat Hossain and Others Vs. Hossain Ahmad Choudhuri and Another*, . The Allahabad High Court is of opinion that the alienee is not a necessary party to a suit u/s 92, Civil P.C.: vide *Huseni Begam v. Collector of Moradabad* 20 ALL. 46, though he may be a proper party: vide *Ghazaffar Hussain v. Yawar Husein* 28 ALL. 112. In Madras the view taken is that the transferee cannot be made a party, but if he himself desires it he could be made a party. Vide the observations of the Officiating Chief Justice in *Asam Raghavalu v. Sitamma* AIR 1915 Mad. 517 *Seshagiri Aiyar J.*, on

the other hand, was of opinion, that he was a proper party though no relief could be claimed against him. This was also the view taken in Rangayya Naidu v. Chinnasamy AIR 1916 Mad. 979. In Anjaneya Sastri Vs. Kothandapani Chettiar and Others, . Varadachariar J., made a distinction between an absolute stranger to a trust property and one who derives his title from the settlor or cestui que trust. In the latter case, he was of opinion that the person could be joined as a proper party though no relief could be claimed against him. The Bombay High Court has held that the alienee is a necessary party in such a suit though possession could not be recovered from him in the suit itself: vide Collector of Poona v. Bai Chanchal Bai 35 Bom. 470. The Rangoon High Court has taken the same view as the Calcutta High Court: vide D. Po Min Johnson v. U Ogh AIR 1932 Rang. 132. In Abdur Rahim v. Mahomed Barkat Ali AIR 1928 P.C. 16. Lord Sinha thus sums up the law on the point:

Their Lordships see no reason to consider that Section 92 was intended to enlarge the scope of Section 539 by the addition of any relief or remedy against third parties, i. e., strangers to the trust. They were aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit u/s 539, but the general current of decisions was to the effect that even if such third parties could properly be made parties u/s 539, no relief could be granted as against them. In that state of the previous law, their Lordships cannot agree that the Legislature intended to include relief against third parties in Clause(h) under the general words "further or other relief.

25. Now the main ground of all these decisions referred to above is that a relief against a third party is not one of the reliefs specified in Section 92, Civil P.C, and cannot be brought within the words "such further or other relief which should be construed ejusdem generis with the previous Clauses. Another reason given is that persons who are not prima facie entitled to possession themselves start a suit u/s 92, Civil P.C. Till the trustee is removed, the trust property vests in him, and he alone is competent to sue for possession. If such trustee is removed and the estate vests in the new trustee, the latter can undoubtedly sue to recover possession. In the present case, it may be noticed that there is no distinct prayer for recovery of possession. All that is wanted is that defendants 2 and 3, either as de jure or de facto trustees or trustees de son tort should be removed and this means both according to the plaint and the judgment that they should restore possession of the properties in their possession to the trustee appointed by the Court. The District Judge in the present case has proceeded entirely on the ground which was indicated by Mitter and Rau JJ., in Abdul Majid v. Sk. Aktar Nabi AIR 1935 Oal. 505., which as I have already said, is a pronouncement at an earlier stage of this very suit. Mitter J., who delivered judgment points out that though no relief by way of declaration of trust or recovery of possession of the trust property, can be claimed against a stranger to the trust in a suit u/s 92, Civil P.C, yet if on the allegations made in the plaint, such a stranger is a constructive trustee, the suit could be treated as one u/s 92, Civil P.C. The learned Judge quoted certain passages from the well-known

treatises of Underhill and Lewin on the subject of trust, and said that when a stranger to a trust receives money or property from the trustee which he knew to be part of the trust estate and paid or handed over to him in breach of trust, he is a constructive trustee for the persons equitably entitled. In the plaint in the present case, there were allegations to the effect that defendants 2 and 3 were trustees de son tort and they procured defendant 1 to do various illegal and unconscionable things with a view to injure the wakf property with full knowledge of the fact that the properties were permanently dedicated to the wakf. It was said by Mitter J., that if these allegations were proved, defendant 2 might be held to be a proper party to a suit u/s 92, Civil P.C.

26. It may be pointed out here that in none of the cases to which I have referred already the question was approached from this standpoint. In many of the cases cited above, the properties were either wakf or debutter properties, and if the point had been investigated it could possibly have been found that the alienee had notice of the trust. The question was raised in *Gholam Mowlah v. Ali Hafiz* AIR 1918 Cal. 5. and was slightly touched in the judgment of Sanderson C.J. The point however was not fully discussed, as the Chief Justice thought that though the stranger had constructive notice of the trust, he had no actual knowledge of it. In *S. Massirat Hossain and Others Vs. Hossain Ahmad Choudhuri and Another*, . defendant 2 in the suit was an ijaradar under defendant 1 who was mutwalli of a wakf estate, and it was distinctly alleged in the plaint that defendant 1 had come under the hands of defendant 2 who induced him to enter into an arrangement by which the wakf property was leased out to defendant 2 at a rental of Rs.1200 a year, and this money was appropriated by defendant 1 for his own personal use. In spite of this allegation, it was held by the learned Judges that defendant 2 was not a necessary party to a suit u/s 92, Civil P.C. The question therefore is an important one and requires careful investigation.

27. Now, in English law, the legal estate is in the trustee and the beneficiary has a mere equitable estate. If the trustee in breach of trust transfers the property to another person and the alienee has notice of the trust, he is regarded in English law as a constructive trustee for the cestui que trust. He undoubtedly acquires the legal estate in the property by virtue of the transfer, but to the legal estate was annexed an equitable obligation in favour of the cestui que trust and the obligation could be enforced against the transferee if he was either a volunteer or even if the transfer was for value he had notice of the same. Apart from the cases where a person occupying a fiduciary position makes profit by taking advantage of his position as such, a constructive trust arises generally, under English law, whenever, a person has the legal estate but has not the complete equitable estate in him. To the extent that he lacks equitable estate, he is a constructive trustee for the person or persons who have the equitable estate: vide *Underbill's Law of Trust*, Article 32, p. 188, Edn. 9. This doctrine of constructive trust enables the beneficiary to follow the trust property in the hands of a stranger who though he has acquired the legal estate from the trustee is affected with a notice of the trust. This conception, in my opinion, is absolutely

inapplicable when the property transferred is wakf property. Both in Hindu debatter as well as in wakf under the Mahomedanlaw, the full legal and beneficial ownership of the property is in the deity or in the wakf. The mutwalli or the shebait is a mere manager who has not the legal estate in him as in the case of an English trustee. The transferee from the mutwalli, therefore, does not get the legal estate and the question whether he purchases with notice of the wakf or not is really immaterial. The mutwalli has no right to transfer the property except in certain exceptional circumstances recognised by the Mahomedan law, and the fact that the purchaser is a bona fide purchaser for value without notice would afford no protection to him. If the wakf character of the property is established, the transferee becomes a trespasser pure and simple who has purchased from one-person property belonging to another and the proper remedy against him would be an action in ejectment. Mr.Gupta concedes that there is no necessity of importing this principle of English law into the law of Hindu or Mahomedan endowments, but he says that as a shebait or mutwalli is regarded as a trustee for purposes of Section 92, Civil P.C, there is nothing per se improper in extending this doctrine of constructive trust in the case of a shebait or mutwalli as well. To this the answer is that S.92, Civil P.C, has been held to be applicable to shebait or mutwallis, not because they are trustees in the English sense of the word, but because in view of the obligations and duties resting upon them, they are liable as trustees in the general sense for maladministration of the trust fund or trust property: vide *Vidya Varuthi Thirtha v. Balusami Avyar*. *Vidya Varuthi Thirtha v. Balusami Avyar* A.I.R 1922 P.C. 123.

28. If the position of a transferee of a wakf property, either with or without notice of the wakf is that of a trespasser, I do not see any reason why he should be regarded as a trustee for the purposes of a suit u/s 92, Civil P.C. The essence of the claim against him must be that he should restore possession of the property, which is held by him. There is no question of execution or administration of trust so far as he is concerned. If the purchaser had taken upon himself the duties of a trustee and became a trustee de son tort, relief against him u/s 92, Civil P.C, might certainly be claimed. But when he has purchased the property not as wakf property, but as the personal property of the mutwalli and purports to hold it adversely to the trust, he is in the position of a rank trespasser and not that of a trustee either actual or constructive. It would be disastrous, I think, to the interests of the wakf estate itself if for the recovery of trust property in such circumstances a suit u/s 92, Civil P.C, is deemed to be necessary.

29. Assuming however that the English law is applicable to the present case, let us analyse the position more in detail. A transferee of the trust property with notice of the trust is a bare trustee in English law. Mere notice of the trust does not impose upon him the duties of a trustee and he cannot be called upon to perform any of the functions of a trustee either de jure or de facto (vide Underbill's Law of Trust, Article 202) and the only right which the cestui que trust can assert against him is the right to follow the property in his hands.

Mr. Gupta has argued before us that a transferee with mere notice may not have any duties as a trustee, but the obligations of a trustee could be imposed upon him if certain other conditions are fulfilled, and he relies in this connexion upon the decisions in *Barnes v. Addy* (1874) 9 Ch. A. 244, *In re Barney*; *Barney v. Barney* (1892) 2 Ch. D. 265. and *Soar v. Ashwell* (1893) 2 Q.B.D.390. In the first of these cases a question arose regarding the liability of the solicitor who prepared certain deeds at the instance of his clients who were trustees, relating to certain matter, which amounted to breach of trust but advised his clients against their execution. Lord Selborne LC. Who delivered the judgment observed as follows:

Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust.

This dictum was quoted in extenso in *Barney v. Barney* (1892) 2 Ch. D. 265 where it was held that a cestui que trust might proceed against an agent of the trustee when he has not confined himself to the duties of an agent, but by accepting a delegation of the trust, or by fraudulently mixing himself up with a breach of trust has himself become a trustee by construction of law, i.e., a trustee de son tort. In *Soar v. Ashwell* (1893) 2 Q.B.D. 390. a solicitor had retained some money which he got from his clients who were trustees. Lord Esher, M.R. and Bowen L.J. that he was liable as a trustee because he received the money in a fiduciary capacity held it. Kay L.J. held that he was trustee, because, though a stranger to the trust, he had assumed to act and had acted as a trustee and had received the trust money under a breach of trust in which he concurred.

30. As was pointed out by Mitter J. in *Abdul Majid v. Sk. Aktar Nabi* AIR 1935 Oal. 505 referred to above, there were allegations in the plaint in the present case, which would bring defendant 2 to this suit within the purview of the principles enunciated by Lord Selborne in *Barnes v. Addy* (1874) 9 Ch.A. 244. It was alleged in the first place, that defendant 2 had acted as trustee de son tort. It was also alleged that he had procured defendant 1 to commit various acts of bad faith and mis. appropriation in breach of the trust and to the injury of the wakf estate. If either of these two sets of allegations were proved, defendant 2 could be held to be constructive trustee within the principles enunciated in the English cases and this was all that was held by Mitter J. After the plaint was amended and defendant 3 was added as a party to the suit, the case against him also stood on the same ground.

31. It is not disputed that in the present case there is no question of either of

these two defendants acting as trustees de son tort. They had never taken upon themselves the obligation of performing any of the duties connected with the wakf. The question now is whether they could be made liable as constructive trustees by reason of their actively participating in the fraud and breach of trust that are alleged to have been committed by defendant 1. Now, the deeds by which defendants 2 and 3 acquired the properties are Exs. O, G, M, and 10. Exhibit O is the Miras patta executed by Aktar Nabi and Hafez Ahammed ulla in favour of defendant 2. Exhibit G is the kobala by which Abdul Kader sold six annas share of the properties to Nepal Chandra Bose, the benamdar of defendant 2 while Exs. M and 10 are the other two sale deeds by which these defendants acquired title to the remaining share. The recitals in almost all these documents mention the towliatnama of 1884 and we might hold that defendants 2 and 3 had actual notice of the last towliatnama and constructively of the earlier ones. It was recited by the executants in these documents that on the face of the towliatnama there was no legal and valid wakf made by the wakif and that the properties were all along treated by the heirs of Khidir Buksh as their personal properties. They recognised in a vague way their obligation to defray certain expenses of the mosque but this was more or less treated to be a personal liability on the part of the heirs of Khidir Buksh rather than a charge upon the property itself. In the Mirash patta Ex.O, there was some recital of legal necessity and the indemnity bonds taken by the defendants also show that they had some suspicion in the matter.

32. In my opinion, the mere fact that defendants 2 and 3 had notice of the towliatnama or of the fact that the properties which they were purchasing were comprised in the towliatnama would not bring them within the purview of the principle enunciated by Lord Selborne in the case mentioned above. The mere fact that they had notice of a document which was described as a towliatnama is not enough, they must be aware of the legal effect and implications of the document and they must know that what they were concurring in what amounted to a breach of trust on the part of the trustee. In the case before us it appears from the evidence that Aktar Nabi and the other vendor did represent to the other defendants that there was no valid or legal wakf existing with regard to these properties and they were all along being bought and sold and transferred as secular properties. So far as outward appearances go there was nothing to indicate that the properties were ever treated as wakf properties and during the long course of years extending over half a century, no member of the Mahomedan public ever asserted that these properties belonged to the mosque. The towliatnamas as the District Judge himself points out, are not at all clear and unambiguous documents and it was certainly an arguable point whether any valid or legal trust was created thereby. Moreover, the various circumstances and the long course of conduct which I have referred to already do not unnaturally raise a suspicion that there was no real intention on the part of the settlor to make a wakf. As the properties are now held to be wakf properties, these circumstances would not afford any protection to the transferees, but they show

certainly that the latter might not have been aware of and actively participated in any act of fraud committed by defendant 1 and hence could not be regarded as constructive trustees, although they might not have acquired any title to the properties purchased by them. No case of constructive trust arises in English law, when the transferee has notice of a doubtful equity and the document upon which it is founded is not unambiguous: vide Underbill's Law of Trusts, p. 556, Edn. 9. In my opinion, therefore, the principles to English law are not at all applicable to such cases, but even if they are deemed to be applicable, defendants 2 and 3 cannot be held to be constructive trustees on these principles which could make them proper parties to a suit for execution and administration of a trust which Section 92, Civil P.C, contemplate.

33. Mr.Gupta has laid considerable stress on the judgment of Mitter and Rau, JJ. We may even take it that the decision is binding on defendant 2 as *res judicata*. As I have said already, I do not agree with the view taken by the learned Judges, but taking the judgment to be correct, it does not affect the present position in the least. The allegations made in the plaint wanted to fix on defendants 2 and 3 the liability as trustees *de son tort* or constructive trustees. The decision of Mitter and Rau JJ. was to the effect that defendant 2 may be a proper party to a suit u/s 92, Civil P.C, if the allegations made in the plaint were proved. In my opinion these allegations have not been made out and the decision of Mitter and Rau JJ. therefore does not stand in the way. It is conceded by Mr.Gupta that the decision would not be binding on defendant 3.

34. Mr.Gupta has argued in the last resort that, at any rate, defendants 2 and 3 might be retained as parties to the suit and the decision might be given in their presence. This is undoubtedly the view taken by some of the other High Courts in India. It seems to us to be opposed to all principles to make a decision in the presence of a particular party with a view to make him bound by it when admittedly no relief can be given against him. The matter would have been different if he were a mere formal or *pro forma* party. It is an arguable point whether such party would have the right of appeal against such decision, although no decree was passed against him. So far as this Court is concerned, one consistent view has been followed throughout, and we do not think that it would be proper on our part to make a departure in this direction.

35. The next point raised by the appellant relates to the identity of the properties that are covered by the *towliatnama*, EX.1. On this point, we think that the decision of the Court below is right. The argument of the appellants is that plots Nos. 63 and 64 are outside *towliatnama*; Ex.1, it is said, includes c.s. plot No.56 on the south. If one takes measurements from c.s. plot No.56 and proceeds upwards, then according to the dimensions given in Ex (3) plots Nos.63 and 64 would stand outside the *towliatnama*. We do not think that this view is right, although the Commissioner who made the local investigation accepted it. The question really is as to what was the southern boundary of the land covered by Ex.I. The southern boundary is there stated to be the lands of

Nidus Saheb. This document was executed in 1851. In 1861, by Ex.4, Khidir Bux acquired the lands of Nidus Saheb. The northern boundary of that land was stated to be the pucca dewri of Khidir Bux Khansama. If the pucca dewri be on c.s. plot No.57, then this plot cannot but be c.s. plot No.56, and obviously it would be outside the wakf. Mr.Guha contends primarily on the basis of the map of 1859 that the pucca dewri was on c.s. plot NO.56 and consequently the land sold by Ex.4 was further to the south and tallied with c.s. plot NO.12. Mr.Guha has however conceded that plot 1 of Ex.Q is c.s. plot No.56. Exhibit Q is of the year 1884, and it does not mention any chow dewari existing on it. On the other hand, it mentions a one storied pucca building. If plot 1 of Ex.Q is the same as the plot covered by Ex.4 and we have no doubt that it is so, it must be held that the dewri really stood on c.s. plot No.57 and not upon plot NO.56. It is true that Mr.Guha's argument is supported by the relaying of the pleader commissioner who based his local investigation upon the survey map of 1859. I, however, agree with the District Judge that the survey map cannot be taken to have shown the dimensions of the structures accurately and to the scale. In these circumstances, we think that the decision of the Court below on this point must stand.

36. The last point is one of limitation. As I have said already, no reliefs could be granted against defendants 2 and 3, and it is not necessary to decide the question of limitation so far as they are concerned. If and when the new trustee institutes a suit against defendants 2 and 3, this question would have to be decided. As regards defendant 1 it is conceded that no question of limitation arises.

37. The result, therefore, is that we allow this appeal in part, the decree of the Court below against defendant 1 will stand. Defendant 1 will be removed from his position, as mutwalli and a new mutwalli will be appointed. We think that the plaintiffs can also claim accounts against defendant 1 and the cross objections filed by them is allowed to this extent. The reliefs given against defendants 2 and 3 will be vacated and the suit will stand dismissed against them.

38. We make no Order as to costs in this appeal. Plaintiffs will get costs against defendant 1 in the trial Court. Defendants 2 and 3 will bear their own costs throughout.

Pal, J.

39. This appeal is by defendants 2 and 3 in a suit u/s 92, Civil P.C. The trust in question is an alleged wakf for the upkeep and maintenance of a mosque at Raisahebbazar in the town of Dacca. The mosque is alleged to have been erected by one Khidir Buksh Khansama of the locality and the wakf is alleged to have been created by him by a wakfnama dated 27th Baisakh 1258 B.S. corresponding to 9th May 1851. This alleged wakfnamah is Ex. 1 in this case. The properties claimed as appertaining to this wakf are given in the three schedules of the plaint. The property given in Seh. A is the same as given in Sch.

B as items 2 and 3. Item 1 of sch. B is the mosque. Defendants 2 and 3 are concerned only with the proper ties given in Sch. A and in Sch. B, Items 2 and 3. In the original plaint the properties were described in the schedules only by the boundaries as found in the documents of 1851 to 1884 (Ex. 3) subsequently on 24th September 1936, in course of a local investigation the plaintiffs gave the present boundaries and the corresponding C.S. Dags.

40. The plaintiffs are six persons of the locality and they instituted the present suit on 1st December 1931 after having obtained on 30th November 1931 the consent in writing of the Collector of Dacca u/s 93, Civil P.C. The suit as originally constituted and instituted on 1st December 1981 was only against defendants 1 and 2. The consent of the Col lector was obtained for the suit, as it was then constituted. The consent was given on the plaint itself and it was in the following terms:

(1) Abdul Majid Stagers (2) Sheik Ismail Osta gar (3) Sheik Ismail Ostagar (4) Mia Chand (5) Golam Ali and (6) Abdul Aziz, all of Raisahebbazar, P.S. Sutrapur, are hereby permitted to file a suit in the Court of the District Judge, Dacca, against (1) Sheikh Akhtar Nabi son of late Abdul Jabbar of Raisahebbazar and (2) Gobinda Chandra Ghose alias G.Ghose, son of late Shib Chandra Ghose of Rai Saheb Bazar P.S. Sutrapur and I hereby give con sent to the institution of the suit u/s 93, Civil Procedure Code.

Defendant 1 was alleged to be sole mutwalli of the wakf and defendant 2, who was purchaser of some of properties of the alleged wakf, was alleged to have become a constructive trustee, having received trust property from the trustee knowing the same to be part of the trust estate and to be handed to him in breach of the trust. Defendant 3 is the deity Gonesh Deb Thakur and is represented by its Sheba it defendant 2. The deity was added as the party defendant 3 only on 3rd February 1936 on the application of the plaintiffs. It was alleged that this defendant also became a constructive trustee like defendant 2 having purchased the trust property from the mutwalli, knowing the same to be part of the trust estate and to be handed to it in breach of the trust. It may be noticed in this connation that no fresh consent either of the Collector or of the Advocate General was obtained permitting this addition of party.

41. The following genealogical table will show the position of the alleged mutwalli in relation to the alleged wakif and will also show the relationship of some of the plaintiffs with the said wakif.

SHEIKH JAMALUDDIN		_____		
Moula Bux Khidir Buksh (died about 1889)=Rostam alias Dana Bibi				
Fakirchand	_____			
		_____	Kasem	Mahammad
(predeceased			3 as. 18. 1. 5 as. her father)	Ismail (P. 2) Israil (O. 3) 1.
as. 1. 2. 2				Hafezahamadulla Aktarnabi (D. 1) _____
=Belatunnessa			Sm. Sonuya Khatun	_____ and

others | | | _____ Munshi Abdul Kadir Rest of the properties to | (part) 6 as. D. 1 who had then 16 as. _____ | | Mahammad Ismail . Mahammad Abdus Samad 5 as. |_____sold to Kulsum and D. 1 |_____gift tq D. 1 of 7 as. The plaintiffs" case is:

(1) That the above-named Khidir Buksh Khansama erected a mosque at Raisaheb Bazar and permanently dedicated to this mosque the properties described in Sch. A of the plaint for its upkeep and maintenance, and in pursuance thereof he executed a wakf name on 27th Baisakh 1258, B.S. corresponding to 9th May 1851 (Ex. I).

(2) That the property in Sch. C was dedicated to this mosque by one Miran, a stranger to the family of Khidir Buksh in 1866 by a towliatnamas executed by him on 12th Asar 1273 B.S. corresponding to 25th June 1866 (Ex.2).

(3) That Khidir Buksh Khansama appointed his wife Mt. Rostam alias Dana Bibi and his daughter Meherjan to be the first mutwalli of the wakf and that Miran appointed Khidir Buksh to be the mutwalli of the wakf created by him.

(4) (a) That during his lifetime Khidir Buksh, the wakif, in exercise of his power of discharging, dismissing and reappointing mutwallis, appointed his two sons, Mia Muhammad Kasem and Muhammad to be the mutwallis and then on Muhammad's death appointed by a fresh towliatnama dated 15th Jeth 1291 B.S. corresponding to 27th May 1884, his son Md. Kasem, his wife Rostam alias Dana Bibi, his daughters Meherjan and Kulsom and his grandson Md. Ismail to be the mutwallis. (b)" That these mutwallis assumed the mutwalliship and all along acted as such.

(5) That after the death of the above mutwallis their heirs assumed a different attitude and began to treat the wakf property as their own private property and eventually defendant 1 in collusion with the heirs of other mutwallis created some paper transactions and thereby assumed the position of the 16 annas owner of the wakf properties: (para. 7 of the plaint.) (The case of the plaintiffs seems to be that the legal effect of this was to constitute defendant I the sole mutwalli of the wakf since then.)

(6) That defendant 1 havmg thus been the Sole mutwalli began to treat the wakf pro perty as his own although at the same time he managed and administered the wakf pro parties as mutwalli de son tort.

(7) (a) That defendant 1 in collusion with defendant 2 transferred the , wakf properties to defendant 2 most wrongfully and illegally (Para. 13). (b) That defendant 1 contracted heavy debts and defendant 2 taking advantage of this involved position of defendant 1 got him under his unfair and undue influence and by the use thereof procured the said de fondant 1 to do various wrongful and unconscionable things with reference to the wakf properties with full knowledge of the factum of the wakf (Para. 14). (c) That defendant 1 sold the properties to

defendant 2 in 1332 B.S. (Para. 15). (d) That defendant 2 has now been in possession of the wakf properties and he is now utilizing the rents, profits and income of the wakf properties for his own use and benefit (Para. 17). (e) That defendant 2 knowingly and fraudulently took possession of the wakf properties and has been utilising the income thereof in collusion with defendant 1 and hence both of them are liable to accounting as trustees de son tort (Para. 19).

(8) That by the above transaction defendant 2 became a constructive trustee and rendered himself liable to account for the rents, profits etc., misappropriated by him. (9) That defendant 1 was guilty of various breaches of trust (Para. 22).

42. The plaintiffs claimed the following reliefs, namely: (1) removing defendants 1 and 2 from the position of trustees or mutwalliship de jure, de son tort or constructive; (2) appointing a new mutwalli (3) vesting the entire wakf properties given in Schs. A, B and C of the plaint in the new mutwalli; (4) directing accounts of the wakf income coming to the hands of the defendants or which but for their wilful neglect, fraud and collusion would have come to the funds of the mosque and (5) settling a scheme for the management of the wakf. The plaint was subsequently amended when defendant 3 was added as a party on 3rd February 1936. By the amendment defendant 3 was alleged to have become a constructive trustee like defendant 2 and in place of words "defendant 2" wherever occurring in the original plaint, the words "defendants 2 and 3" were substituted.

43. Defendants 1 and 2 appeared and filed their respective written statements on 10th March 1932.

44. The case of defendant 1 inter alia is: (1) That he was not and is not a trustee or mutwalli de jure, de son tort or constructive and that the property was not at all wakf property. (2) That Khidir Buksh had no intention to make any real wakf for the service of the mosque. Even after the alleged wakfnama Khidir Buksh during his lifetime and after his death his heirs and successors all along possessed and enjoyed the properties asserting their personal right in them openly. (3) That there was no valid wakf made by Khidir Buksh by his so-called wakfnama of 1258 and there was no real appointment of mutwallis Khidir Buksh or the alleged mutwallis named in the wakfnamas never managed or administered the properties as wakf properties. That neither Khidir Buksh during his lifetime nor his heirs after his death, nor the alleged mutwallis named in the deeds ever assumed mutwalliship or acted as mutwalli of any of the properties described in schs. A, B and C. (i) That the mosque in question was a private mosque; it was in the western portion of the residential house of Khidir Buksh and there was no access thereto from outside; only the family members of Khidir Buksh's family could say their prayer in it.

45. The case of defendant 2 inter alia is: (1) That this defendant being a stranger to the alleged trust the present suit u/s 92, Civil P.C. is not maintainable as against him and no relief can be obtained against him in this suit (Para. 11).

(2) That defendant 2 not having taken upon himself the character of a trustee he cannot be treated as trustee de jure or de son tort, or constructive and the present suit is not maintainable as against him: (Para. 18) that this defendant is not and cannot be deemed to be trustee de son tort or liable for accounts as alleged in Para. 19 of the plaint (Para. 33). (3) That the plaintiff cannot get any relief against defendant 2 without a suit in a competent Court for recovery of possession of the properties in his possession on a declaration that the same are valid wakf properties. This defendant also denies the existence of any wakf as alleged in the plaint and denies the allegations of collusion and fraud etc., made in paras. 13 to 20 of the plaint. Like defendant 1, this defendant also asserts that the property has all along been the secular property of Khidir Buksh during his lifetime and has all along been possessed and enjoyed as such by Khidir Buksh during his lifetime and after his death by his heirs. His case also is that the mosque in question is not at all a public mosque and there was no dedication of the property to the services of this mosque.

46. Defendant 3 after being added as a party filed written statement on 4th April 1986. The case of this defendant is, in substance, the same as that of defendant 2. The plea special to his case is that as no consent either of the Advocate-General or of the Collector was taken as required by Section 92, Civil P.C. for adding him as party defendant and for amending the plaint by inserting a claim for reliefs against him u/s 92, Civil P.C. the suit was not competent as against him at the instance of the present plaintiffs. It may be noticed here that before defendant 3 was added as a party, the District Judge once dismissed the suit by his Order dated 21st April 1932. The reason for this dismissal was this: On 21st March 1932 the learned Judge heard the suit on a preliminary issue, namely, whether a suit u/s 92, Civil P.C, was maintainable in this case without a suit for a declaration that the property was a trust pro perty. The learned District Judge recorded the following order:

The defendants deny that the property is a public trust at all and contend that it is their private pro perty. The suit cannot proceed unless the plaintiffs obtain a declaration that the property is trust pro perty. It is perfectly true that such a suit could be instituted in the Court of the Subordinate Judge. But this Court has jurisdiction over the property and no useful purpose would be served by compelling the plaintiffs to institute two suits. The plaintiffs are directed to amend their plaint and pay court-fees within a month; failing which the suit will be dismissed.

47. The plaintiffs did not comply with this Order and consequently the suit was dismissed on 21st April 1932. The plaintiffs thereupon preferred an appeal to the High Court. This was F.A.No. 174 of 1932. On 28th May 1935 this appeal was allowed by the High Court. The decision is reported in Abdul Majid v. Sk. Aktar Nabi AIR 1935 Oal. 505. The High Court held that in a suit u/s 92, Civil P.C, it is competent for the Court to decide the question whether the trust in res pect of which the suit is brought is a public charitable trust or not so as to attract the

application of Section 92, Civil P.C, and that a separate suit for the declaration that the pro party is trust property is not necessary. It seems that the defendants-respondents conceded this. They however sought to support the Order of dismissal on another ground, which was formulated in the judgment thus:

It has been said that as defendant 2 is an alienee in respect of the trust property and the property has been sold to him, the suit is not one u/s 92 because where a stranger to a trust has been added as party to a suit which is purported to have been brought u/s 92, the suit loses its character as such. In other words, it is said, that it falls outside the range of a Section 92 suit as soon as a stranger to the trust has been made a party to the suit.

The learned Judges held:

1. That it has been consistently held through out, in so far as this High Court is concerned, that a stranger to a trust is neither a necessary nor a proper party to a suit u/s 92, Civil P.C. *Budh Singh Dudhoria v. Nirad Baran Roy*. 2 C.L.J. 431; *Gholam Mowlah v. Ali Hafiz* AIR 1918 Cal. 5.

2. That the question is to be decided on the pleadings as to whether the trust is a public charitable trust within the meaning of Section 92, Civil P.C, and whether such a declaration can in this case be made when the transferee is a stranger to the trust so as to be binding on the alienee.

3. (a) That in a suit u/s 92 a decree cannot be passed against the alienee directing him to deliver possession of the property to the plaintiff (b) That the Court has also no power under this section to make a declaration that the property in suit is the trust property so as to bind the alienee, such a relief being also outside the scope of the section: *Abdur Rahim v. Mahomed Barkat Ali* AIR 1928 P.C. 16; *D. Po Min Johnson v. U Ogh* AIR 1932 Rang. 132.

4. That the present case, however, is one where according to the allegations made in the plaint, the purchaser defendant 2 became a constructive trustee, and that the case of a constructive trustee or de jure trustee or trustee de son tort is covered by the provisions of Section 92, Civil P.C. (a) That the allegations made in the plaint do constitute defendant 2 a constructive trustee (i) that where a stranger to a trust receives money or property from the trustee, which he knows (1) to be part of the trust estate, and (2) to be paid or handed to him in breach of the trust, he is a constructive trustee of it for the persons equitably entitled, but not otherwise: *Underhill, Law of Trusts* (ii) That:

If the alienee be a purchaser of the estate at its full value, then... if he takes with notice of the trust, whether the notice be actual or constructive, he is bound to the same extent and in the same manner as the person of whom he purchased, even though the conveyance was made to him ..

(iii) That therefore looking to the averment of the appellants in the pleadings, defendant 2 is a constructive trustee of the wakf property. The suit cannot be

said, on the allegations made in the plaint, not to be one falling within the provisions of Section 92, Civil P.C.: (Averments in paras. 13,14,17,19 and 20 of the plaint were referred to in the judgment.)

48. The Order of dismissal was set aside and it was directed that the case be sent back to the District Judge in Order that he may try the suit in accordance with law. The learned Judges observed in conclusion that the allegations if proved, are quite sufficient in law to bring the suit under the provisions of Section 92, Civil P.C. As has already been pointed out, after the case thus went back to the Court of the District Judge, defendant 3 was added as a party defendant on 3rd February 1936 and the suit finally came up for hearing on 3rd April 1939 after a local investigation by a Commissioner. The Commissioner directed to relay the alleged towliatnamas (Exs. 1, 2 and 3) and the 16 documents by which the defendants acquired title to the properties and to see whether the lands given in Schs. A, B and C cover these lands. The suit was ultimately heard on 18 issues, of which issues 2, 4, 5,6, 10,11,12, 13 will be relevant for the purposes of the appeal before us. These issues are:

2. Is the suit barred by Section's. 92 and 93, Civil P.C.? 4. Are the defendants, especially defendants 2 and 3 trustees de jure, de son tort or constructive? 5. Was there any valid wakf and substantial dedication made by the deeds of 1258,1273 and 1291, and were these deeds intended to be acted upon? Were they in fact acted upon? 6. Have the plaintiffs any right or interest in the mosque? Have the plaintiffs or the Mahommedan public any right to say their prayer in it? Is it a public mosque? 10. Are the defendants liable to be removed from their position as constructive trustees? 11. Are defendants 2 and 3 bona fide purchasers for value without notice? 12. Are the defendants liable to restore possession of the wakf properties to the legally appointed Mutwalli? 13. Did defendants 2 and 3 knowingly and fraudulently take possession of the wakf properties and are they utilising the rents, profits and income thereof for their own benefit?

49. The learned District Judge decreed the plaintiffs' suit on 7th July 1939 and ordered as follows:

Defendant 1 be removed from the position of Mutwalli, and defendants 2 and 3 be removed from the position of constructive trustees. A new mutwalli be appointed; and the wakf property (C.S. plots Nos. 57, 63 and 64 and the structures standing thereon, and the southern part of C.S. plot No. 55) do vest in the mutwalli so appointed by this Court. A scheme be settled for the administration of the wakf property.

The learned. District Judge held:

1. That the mosque in question was a public mosque during Khidir Buksh's lifetime and has been so since its erection.

2. (a) That in the present ease the amend ment has not led to the enlargement

of the scope of this suit and that there is no bar to the suit proceeding against defendant 3 with out fresh sanction against him. (b) That once a suit has been instituted with proper sanction, the question of amending the plaint and adding parties should be left entirely to the Court covenant as being in the best position to determine the advisability or otherwise of such amendment or addition of parties.

3. (a) That on the question whether defendants 2 and 3 are necessary and proper parties, the decision in Abdul Majid v. Sk. Aktar Nabi AIR 1935 Cal. 505. is binding so far as defendant 2 is concerned and is an authority for deciding in the affirmative so far as defendant 3 is concerned, they being constructive trustees in view of the allegations in the plaint against them (b) That even if it be found that defendants 2 and 3 are not constructive trustees they are still necessary parties.

4. That a valid wakf was created by the document of 1258 (Ex. I) in respect of the properties covered by it, that this was intended to be acted upon, and was in fact acted upon that the towliatnama of 1291 (as also that of 1281) was merely intended to effect some changes in the management without affecting in any way the nature or validity of the wakf created by the document of 1258. (a) That the suggestion of the defendants that this document merely created a charge on the property, the property itself being left to the heirs of Khidir Buksh is quite unacceptable (b) That defendant 1 was a mutwalli from birth according to the terms of the deeds: The transactions whereby, he says, he acquired in terest in this property were by express trustees in favour of the defendant who was also then an express trustee.

5. That the properties covered by the deed of 1258 B.S. (Ex. I) are c.s. Dags Nos. 57, 63, 64 and portion of 60. This portion of 60 has been acquired under the Land Acquisition Act.

6. (a) That defendants 2 and 3 are neither express trustees nor trustee de son tort, they did not do anything in pursuance of the terms of the wakf deed or to carry out its objects (b) That defendants 2 and 3 acquired these properties with notice of the wakf and are therefore constructive trustees in respect of the wakf property in their possession: they are not bona fide purchasers without notice (i) that defendant 2 had himself full knowledge of the wakf when the earliest of these trans actions took place-he made due enquiries, consulted pleaders, and then took lease of the property covered by Ex. O and subsequently acquired the properties covered by Exs.M and 10 with full knowledge that all these properties were included within a wakf. (ii) As permanent lessees and purchasers of wakf property with notice of wakf, defendants 2 and 3 are constructive trustees in respect. of the wakf properties in their possession: the whole of the property (excluding the portion covered by Miran's Towliatnama) is admittedly in the possession of defendants 2 and 3. (iii) As to defendants 2 and 3, they took possession of the wakf property knowing these to be wakf properties on the strength of certain transactions, which, they must have known, were beyond the

competence of the mutwallis to enter into. Such conduct must be treated as fraudulent intended to defraud the beneficiaries under the trust, namely, the worshippers. It is admitted that defendants 2 and 3 are utilising the rents, profits and income of the wakf properties for their own benefit. They are liable to be removed from their position as constructive trustees.

50. Dr.Basak appearing for the appellants contends: (1) That as against defendant 3 the suit is not maintainable in view of the fact that no consent of the relevant authorities was obtained for this suit against him. (2) That as against defendants 2 and 3 the suit u/s 92, Civil P.C, is not maintainable, in the absence of any case that they had any duty to perform in relation to the alleged trust and that there has been any breach in the performance of that duty. (3) That even assuming that defendants 2 and 3 as purchasers of the trust property could, under certain circumstances, be said to be constructive trustees for certain purposes, no relief contemplated by Section 92, Civil P.C, is intended as against such constructive trustees (4) That the alleged wakf was merely a sham transaction and was an illusory one: (a) That on a proper construction of the alleged wakfnama (Ex. 1), it did not constitute a deed of wakf at all-it did not convey any property from Khidir Buksh to God Almighty (b) That even if the document be construed as apparently having created a wakf: (i) creation of wakf was not at all intended (ii) it was never intended to give effect to the document (iii) it was never given effect to. (5) That the construction of the alleged wakfnama is at least ambiguous or equivocal and consequently in view of the fact that there was no visible change in the user of the property during the lifetime of Khidir Buksh and that thereafter the property was all along openly enjoyed and dealt with as secular property of the heirs of Khidir Buksh, the trust itself was at least a doubtful one and defendants 2 and 3 cannot be said to have taken the property with such knowledge of the trust and of its breach as would constitute them constructive trustees. (6) That even assuming that Ex. 1 created a wakf, the C.S. Dags 63 and 64 are not covered by this document and are outside the alleged wakf. (7) That in any case the mosque itself being only a private family mosque, the wakf for the purposes of this mosque could not be a trust created for public purposes of charitable and a religious nature within the meaning of Section 92, Civil P.C. (8) That even assuming that the mosque was a public mosque, residence of the mutwallis of a wakf cannot be said to be a public purpose of the nature contemplated by Section 92, Civil P.C. (9) That so far as defendants 2 and 3 are concerned the claim of the plaintiffs is barred by limitation.

51. Mr.Gupta appearing for the plaintiffs contends: (1) That in view of the decision of the High Court reported in Abdul Majid v. Sk. Aktar Nabi AIR 1935 Cal. 505. the question whether the present suit u/s 92, Civil P.C, is maintainable as against defendant 2 is no longer open and it must be held: (a) that the present suit with all the reliefs claimed against defendants 1 and 2 is maintainable as against them; (b) that, at any rate, defendant 2 is a necessary and proper party to this suit and the suit is to be decided in his presence. (2) (a) That as against defendant 3, his addition as a party defendant did not alter the

scope and character of the suit and consequently the amendment did not require any consent of the Advocate-General or of the Collector (b) That at least his addition as a necessary and pro per party to the suit did not require any consent of the Advocate-General or of the Collector and even assuming that no relief u/s 92, Civil P.C, is available against him as his addition was not with the consent of the relevant authorities, the suit is to be decided in his presence. (3) That in the facts and circumstances of this case defendants 2 and 3 became constructive trustees in respect of the properties in their possession and a suit with all the appropriate relief u/s 92, Civil P.C. is available against them (4) That the document of 1851 (Ex. I) in clear and unambiguous terms created a wakf for the purposes of the mosque and that the C.S. Plots 63, 64 and 57 were covered by this wakf. That the evidence on the record clearly shows that the mosque was a public mosque: (a) That the subsequent towliatnamas (Exs. Z (1) and 3) and the subsequent dealings by Khidir Buksh do not show that the wakfnama was not acted upon.

52. The learned District Judge found that the mosque was a public mosque at the time when Ex. 1 was executed. Nothing has been placed before us, which will entitle us to differ from this view. There might have been some difficulty in this respect had it been necessary for us to rely on the oral evidence only at this distance of time. But Ex. 2, the towliatnama by a third party, is there and it is dated 25th June 1866. Nothing could be suggested against this document.

53. We shall first of all take up the question whether or not any wakf was, in fact, created in this case. It is the common case of both the parties that if any wakf was at all created, it was created by the deed of 1851, which is Ex. 1 in this case.

54. Exhibit 1 has been placed before us. Though not without some hesitation we feel inclined to hold that this document, if given effect to, created a wakf in respect of the property covered by it. The document after reciting that the executant owned and was possessed of some lakheraj land on which stood his pucca building, etc., and that he had erected a mosque (Khodai Masjid) on a plot of land previously acquired by him, proceeds to say:

Hence I make wakf of the above-mentioned purchased lakheraj land and building for the lighting of lamps (cherag afruji) of the above-mentioned moaque and execute this towliatnama to the effect following:

After this follows the Clause appointing mutwallis of the wakf. The executant did not retain for him even the office of the mutwalli His daughter Meherjan and his wife Rostam alias Dana Bibi were appointed mutwallis. Standing by itself therefore, the document purported to create a wakf of the property described in it. The object mentioned is certainly a valid object to sustain a wakf: *Muzbar Husain v. Abdul Hadi Khan* 33 All. 400.

55. Dr. Basak contends that the terms of the document itself taken with the subsequent dealings of the property by the alleged wakif himself show, that the

wakif never intended to create any real wakf. According to him the transaction was a sham and illusory one, the real intention being only to tie down the property for the benefit of the family. Dr. Basak refers to Ex. Z (1), Ex. 3, Ex. Q, Ex. B and the admitted subsequent dealings of the property by the heirs of Khidir Buksh.

56. It is not disputed that in Order to make out whether the wakf in any particular case is a real one or not, the intention of the settlor is a relevant consideration. Indeed, the reality or otherwise of the transaction will depend upon whether or not the wakif intended to divest himself of the ownership of the property: *Sm. Masuda Khatun Bibi Vs. Mahomed Ebrahim, Mohammad Ali Moham mad Khan v. Mt, Bismullah BegAm* AIR 1980 P.C. 255.

57. In examining the intention of the alleged wakif in this respect there is one great risk, which must be kept in mind and must be avoided by all means. It is the risk of making confusion between the Judge's subjective view of the justice of the law itself and his view of the character of the transaction really intended by the man. Here, for example, the law allows a Mussalman to appoint himself and his descendants and heirs to be the mutwallis of the wakf. He may appoint the members of his own family to be the mutwallis and may lay down a scheme for the administration of the wakf and for succession to the office of the mutwalli. He may empower the mutwallis including himself to sell or mortgage the property or to lease it out for any period. He may fix remunerations for the mutwallis and may make the office of the mutwallis descendible to his descendants in perpetuity. In short while creating a wakf a hanafi Musalman may divest himself of one character and assume another character retaining practically the same power. This by itself, should not lead a Judge to an inference that the man did not intend to divest himself of the property and did not intend to create a real wakf.

58. The document (Ex. I) on the face of it creates a wakf. Dr.Basak contends that the only object of the wakf that is specified in the deed is the lighting of lamps in the mosque and this involves an insignificant expenditure. Even this insignificant expenditure is left at the absolute discretion of the mutwallis. Practically the whole of the property is reserved for the enjoyment of his own family members. The document says:

If other issues are born to me they also will enjoy the above-mentioned buildings and lands as mutwallis.

Later on as soon as sons are born to Khidir Buksh he executes Ex. z (1) to make the position of these sons secure. A son dies and Khidir Buksh comes forward with Ex. 3 and this time makes a partition of the property amongst the members of his family. Then again, by Ex. Q Khidir Buksh himself, it is alleged, treats this property as his own secular property and makes a gift of a portion to his wife Rostam Bibi. According to Dr.Basak all this show that Khidir Buksh never intended to divest himself of the ownership and the alleged wakf was not acted

upon during his lifetime. After his death his heirs admittedly treated this property as their own secular property.

59. These are certainly weighty considerations. Exhibit Q, however, does not deal with any of the properties covered by Ex. 1. Plot No. 1 of Ex. Q is the only property alleged to be covered by Ex. 1. This plot No. 1 is admitted to be the present Cadastral survey plot NO. 56. The learned District Judge found that this cadastral Survey plot No. 56 was not covered by Ex. 1 and, as we shall show later on, this view of the learned Judge is correct. Exhibit z (1) and Ex. 8 both recite the property as comprising the wakf. It may be that after having created the wakf in 1851, Khidir Buksh had no legal right to make fresh appointment of mutwallis or to interfere with the user by the mutwallis. But as a matter of fact he did so interfere and these documents do not show anything worse than that the so-called partition made by Ex. 3 no doubt seems to indicate as if the author thereof considered himself still not divested of the ownership. He makes provision for separate enjoyment by his descendants after his lifetime. These no doubt might lead to the inference that Khidir Buksh did never intend to divest himself of the ownership when he executed the document of 1851. But there was that declaration of dedication in Ex. I and this was repeated in all the subsequent documents. The subsequent dealing by the heirs of Khidir Buksh do not, in my opinion, affect the question. If there was a real wakf then these dealings were in clear breach of trust. Such dealings will be no evidence of the intention of the original settlor. After thus giving our anxious consideration to the facts in this case though we cannot say that the position is absolutely clear, yet we are not in a position to declare this wakf as sham and illusory. In our opinion there is ample material on the record to establish that Khidir Buksh intended by the transaction evidenced by Ex. I to divest himself of the ownership of the properties covered by the deed and that as a matter of fact he divested himself of such ownership by the transaction and created a real and operative wakf.

60. As regards the extent of the properties covered by Ex. I, we are in agreement with the finding arrived at by the learned District Judge. The appellants before us contend that the cadastral survey dags 63 and 64 are not covered by the deed of wakf but that the wakf extends southwards and covers the Cadastral Survey plot No. 56. Mr.Guha argued this point for the appellants and he mainly relied on the map of 1859 and contended that on a comparison of the boundaries given in Exs. 1, 4 and Q with the help of the map of 1859, the Cadastral Survey plot No. 56 will be found covered by Ex. I and consequently taking the admitted area of the wakf property as given in Ex. 3 (namely land measuring 39 yards east to west and 45 yards north to south), cadastral Survey Plots Nos, 63 and 64 will be outside the wakf. The whole argument of Mr.Guha is based on the location of what is named as "Chowdewari" in Ex. 1. On the land, dedicated by Ex. 1 stood the Chowdewari according to the recital in that document. This was in 1851. The southern boundary of the land covered by Ex. 1 is given as the land of Nidus Saheb. In 1861 Khidir Buksh purchased the land of Nidus Saheb from one Mr.Jakin Gregory Nicholas Pogose. This is Ex. 4. The northern boundary of the

land sold by this document is given as "the immediate south of the puccadewari of Khidirbux Khansama." If the "puccadewari" be on cadastral Survey Plot No. 57 then this plot must be the Cadastral survey plot NO. 56 and obviously it was not included in the wakf. Mr.Guha contends on the strength of the map of 1859 that this puccadewari was on the C.S. plot. No. 56 and consequently the land sold by Ex. 4 was the plot to the south of cadastral Survey plot No. 56. So, this plot 56 was covered by Ex. I. Mr.Guha however admits that Plot No. 1 to EX. Q is Cadastral Survey Hot NO. 56. Exhibit Q is of the year 1884. In its description of plot NO. I, it does not mention any chowdewari" standing on it. These documents consistently point to Cadastral Survey plot NO. 57 as the plot containing the "chowdewari." The map of 1859 might be of some help to contradict all this only if we were sure that on it the buildings and structures were depicted according to some scale. But the map does not even give the different plots. It may be noticed in this connation that the defendants obviously felt no difficulty as to the extent of the land covered by Ex. 1 as is obvious from the fact that they did not in their written statement make any case that any of the properties acquired by them was not covered by the document.

61. We feel some difficulty in saying that defendant 2 had full knowledge of the fact that the properties acquired by him were covered by the wakf. No doubt the very documents relating to the transactions by which he acquired the property point to the fact that he had knowledge of the alleged deed of wakf and knew fully well that the property in question was covered by that document. These documents are Exs. Q, 15, M, I and 10 in this case. Exhibit O is the document by which the Cadastral Survey plot No. 64 was acquired by defendant 2 from defendant 1 and another in 1917. Exhibit 15 is the indemnity bond executed by defendant 1 and that other in that connation. Exhibit M is the sale deed by which western part of cadastral Survey Plot No. 63 was acquired by defendant 2 from defendant 1 in 1925. Exhibit I is the bond by which defendant 1 mortgaged the rest of the Cadastral Survey Plot No. 63 and the Cadastral survey plot NO. 57 to defendant 2 in 1925 on the same date (8th October 1925) on which Ex. M was executed. Exhibit 10 is the sale deed by which defendants 2 and 3 purchased this mortgaged property (the cadastral Survey Plot No. 57 and the eastern portion of 63) from defendant 1 in 1929. Exhibit O recites

that Sheikh Khidir Buksh...while in possession and ownership of the lands described in the schedule built a mosque in the locality ... and in connation with creating a wakf of the lands of the schedule below and of other properties executed a registered tauliatnama on 10th Jaistha 1291 B.S. and appointed his son...as mutwallis.

The tauliatnama referred to in this recital is Ex. 3 in this case and there is no dispute that plot NO. 1 of Ex. 3 is the mosque and plots Nos. 2 and 3 are the lands of Ex. 1. This tauliatnama refers to the wakf deed and recites the property as the wakf property thus created. Exhibit o shows that the parties there to ad before them this tauliatnama. The document says:

On a reference to the abovementioned tauliatnama dated 15th Jaistha 1291 B.S. itself the properties enumerated in that deed cannot be regarded as legal and valid wakf properties.

How the parties were satisfied as to this we do not know. But this much must be said that the creation of wakf by the alleged wakfnama was not beyond all doubt. It is clear that the parties had full knowledge of the contents of the document and of the fact that they were entering into a transaction relating to a property covered by that document. Yet if the document itself was of doubtful operation as creating a valid wakf it is difficult to say that defendant 2 had knowledge of the wakf when he acquired this property. The knowledge is the certain perception of truth. It is something more than a mere suspicion and perhaps is more than belief. Knowledge is firm belief. Belief includes things, which do not make a very deep impression on the memory. The difference may only be in degree but still there is this difference. Knowledge is clear perception of fact.

62. That defendant 2 had a strong suspicion that EX. I might have created an operative wakf is evident from his conduct as evidenced by the transactions themselves. In Ex. 0, for example, in its earlier part the document takes care to say that the wakif provided that the mutwallis would have power to induct tenants for the purpose of the mosque, and later on it carefully recites the necessity for the exercise of this power. With all these precautions, defendant 2 purports to take permanent lease of the land, which the document itself declares to be covered by the wakf, from two persons who would be mutwallis if there were a real wakf. The premium paid is Rs. 2700 and the rent reserved is only 1-4 per annum. He takes an indemnity bond from the lessors by way of further security. Exhibit M also shows the same thing. The wakf is recited and it is also recited how the heirs of the wakif are dealing with the property as their own secular property. It is again recited that on the face of the tauliatnama of 1291 B.S. the properties mentioned cannot and could not be deemed as legal and valid wakf properties. It then says:

As a matter of fact the heirs of Khidir Buksh and the mutwallis named and proposed in the abovementioned deed have not treated the property as wakf property and have been dealing with them in any way they like and making transfers.

But if there was a real and operative wakf all these dealings would merely be breaches of trust and would not change the character of the property. Hence immediately after the above recitals in Ex. M, we find a cautious recital of necessity for the transaction created by the requirement of the very mosque:

I am not bound and liable to defray the expenses of the abovementioned mosque from the profits of the abovementioned lands. Still I the vendor think it proper to spend the profits arising out of the abovementioned lands for the necessities of the abovementioned mosque. The lands of the schedule given below yield very little as rent. The expenses of the mosque cannot be met by that. For this

reason ... some money being needed

he sells the property and defendant 2 purchases. On the same date the rest of the wakf property is mortgaged to the same person by Ex. 1 which four years later is sold to him by Ex. 10. This Ex. 10 also contains recitals about the illusory character of the wakf. It says:

As a matter of fact Khidirbuksh himself instead of treating the abovementioned property as wakf property has dealt with it in the manner he liked.

There is however no evidence on the record to support this recital. We are thus of opinion: (1) That Khidirbuksh by Ex. 1 created a valid and operative wakf for the purposes of the mosque; (2) That the mosque was and still is a public mosque; (3) That Ex. 1 covers the lands of the Cadastral Survey plots Nos. 63, 64 and 57; (i) That defendants 2 and 3 acquired the lands of this wakf for valuable consideration (a) with full knowledge that the lands were covered by Ex. 1 and (b) with strong suspicion that Ex. 1 created a valid wakf.

63. In my opinion in the circumstances of this case it is not possible to ascribe full knowledge of the wakf to this defendant. It is not disputed that if there were a real wakf, defendant 1 would have been one of its mutwallis. Nor can there be any doubt that so far as this defendant 1 is concerned, the suit u/s 92, Civil P.C, is competent and a case as against him for giving the reliefs claimed under that section in the present suit has been made out. The decree of the learned District Judge, so far as defendant 1 is concerned, therefore, must stand. As defendant 1 was a trustee no question of limitation can arise so far as he is concerned.

64. The question now to be considered is whether the reliefs claimed u/s 92, Civil P.C, in the present case can be obtained by the plaintiffs as against defendants 2 and 3 or either of them. Section 92, Civil P.C, lays down:

(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General or two or more persons having an interest in the trust may institute a suit, whether contentious or not, in the principal civil Court to obtain a decree (a) removing a trustee (b) appointing a new trustee (c) vesting any property in a trustee (d) directing accounts and inquiries (e) declaring what proposition of the trust property or of the interest therein shall be allocated to any particular object of the trust (f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged (g) settling a scheme, or (h) granting such further or other relief as the nature of the case may require.

2. ... no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that Sub-section.

65. In Order to make the reliefs specified in Sub-section (1) of Section 92, Civil P.C, available against any person, the following requirements must be present,

namely:

1. There must be a trust: (a) express or constructive; (b) created for public purposes (i) of a charitable or (ii) religious nature.
2. The claim to the reliefs must be founded on (a) a breach of the trust, or (b) a necessity for the administration of the trust.
3. So far as the reliefs specified. in cls. (a) and (d) are concerned, the party against whom these reliefs are claimed must be a trustee, express or constructive: (i) who has been guilty of the breach of trust or (ii) whose duty it was to administer the trust.

66. It cannot now be disputed that a public wakf is a trust for public purposes of a charitable or religious nature within the meaning of this section and that if the reliefs specified in the section are claimed with reference to a wakf, the section applies: *Abdur Rahim v. Mahomed Barkat Ali* AIR 1928 P.C. 16.

67. It should also be taken as settled: 1. That a suit which prays for any of the reliefs mentioned in Section 92, Civil P.C, in respect of a trust for public purposes of a charitable or religious nature can be instituted only in accordance with the provisions of that section: *Abdur Rahim v. Mahomed Barkat Ali* AIR 1928 P.C. 16 (a) That all suits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, do not require to be brought in accordance with the provisions of Section 92, Civil P.C.: *Abdur Rahim v. Mahomed Barkat Ali* AIR 1928 P.C. . (b) That if a suit does not claim any such relief as is specified in Sub-section (1) of Section 92, that section is no bar to the maintainability of the suit without the sanction of the Advocate-General and in the Court of the Subordinate Judge: *Abdur Rahim v. Mahomed Barkat Ali* AIR 1928 P.C. 16 That a relief or remedy against strangers to the trust is not within the scope of Section 92, Civil P.P.C. Such a relief is not included in Clause(h) under the general words "further or other relief": *Abdur Rahim v. Mahomed Barkat Ali* A.I.R. 1928 P.C. 16; (a) because the words further or other relief must on general principles of construction be taken to mean relief of the same nature as cls. (a) to (g); (b) because, if the words be construed as meaning "any relief other than (a) to (g) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case," then such construction would cut down substantive rights which existed prior to the enactment of the Code of 1908, and it is unlikely that in a Code regulating procedure the Legislature intended, without express words, to abolish or extinguish substantive rights of an important nature which admittedly existed at that time: *Abdur Rahim v. Mahomed Barkat Ali* AIR 1928 P.C.

68. The substantive rights referred to above are obviously the reliefs that were available to a party as of right without any consent of anybody.

69. In the above case their Lordships of the Judicial Committee also noticed the divergence of the judicial opinion in India on the question whether third parties

could or should be made parties to a suit u/s 92. Their Lordships, however, noticed that "the general current of decisions was to the effect that even if such third parties could properly be made parties u/s 539 of the Code of 1882, no relief could be granted as against them. In the case before us, there is no question that the reliefs claimed are those coming under Sub-section (1) of Section 92, Civil P.C. The question is not (i) whether any other relief was available against defendants 2 and 3 and (ii) if so, whether such a relief could also be sought for in this suit, but (iii) whether the reliefs claimed in the suit are available against them.

70. The claim to the reliefs in the present case is founded on: (1) the alleged breach of trust by defendant 1 (plaint para. 22); (2) (a) the alleged procurement of breach of trust by defendants 2 and 3 (plaint paras. 14 and 19) (b) the alleged breach of constructive trust and of trust de son tort by defendants 2 and 3 (plaint paras. 17 and 19). (4) The alleged necessity for the administration of the trust both of the original express trust and of the constructive trust resulting from the breach of the original express trust.

71. So far as defendants 2 and 3 are concerned the reliefs specified in cls. (a) and (d) of Sub-section. (1) of Section 92, Civil P.C, are claimed against them on the footing: (1) that they became constructive trustees (a) by reason of their getting the property by making defendant 1 to commit breach of trust by the exercise of undue influence (b) by reason of their purchasing the wakf property with full knowledge (i) that it was such wakf property and (ii) that it was being transferred to them in breach of the trust, such breach having been procured by defendants 2 and 3 by the exercise of undue influence.

72. Mr.Gupta contends that so far as defendant 2 is concerned, the question is no longer open for determination in the view of the decision of this Court in Abdul Majid v. Sk. Aktar Nabi AIR 1935 Cal. 505. at is resjudicata between the parties. Mr. Gupta relies on the decisions in G. H. Hook v. Administrator General of Bengal AIR 1921 P.C. 11 and Ram Kirpal v. Rup Kuari. 11 I. A. 37.

73. Mr. Gupta further contends that irrespective of the question whether any other relief is available against these defendants in respect of the property in their hands, as soon as it is found that there is a trust of the kind contemplated by the section and that a particular property appertains to that trust, the Court can at least grant the relief contemplated by Clause(c) of Sub-section (1) of Section 92, Civil P.C, as against defendants 2 and 3 as well. His further contention is that if defendants 2 and 3 took the trust property with full knowledge that it was trust property and that it was being transferred in breach of trust then they became constructive trustees and in that case even the relief under Clause(a) would be available against them. Apart from the question whether or not the decision in Abdul Majid v. Sk. Aktar Nabi AIR 1935 Cal. 505. would operate as resjudicata, so far as this question is concerned, Mr.Gupta relies on this decision also as an authority in support of his contention.

74. In Order to see the exact scope of the decision in Abdul Majid v. Sk. Aktar Nabi AIR 1935 Cal. 505 we must not forget what was the matter for decision before the High Court on that occasion. As has been stated above, the present suit u/s 92, Civil P.C, was dismissed by the learned District Judge as he was of opinion that as soon as the defendants denied that the property was a public trust and contended that it was their private property, the suit u/s 92, Civil P.C, became incompetent. On appeal to the High Court defendant 2 as respondent did not seek to support the Order of dismissal on this ground. It was conceded that the suit could not be dismissed on this ground. Defendant 2, however, sought to support the dismissal of the suit so far as he was concerned on the ground that he being a stranger to the alleged trust was neither a necessary nor a proper party to the suit u/s 92, Civil P.C, and none of the reliefs claimed in the suit was available against him. The learned Judges who heard the appeal upheld this contention of defendant 2 in so far as it was only an abstract proposition of law. But so far as the present suit is concerned, the learned Judges considered it to be one where according to the allegations made in the plaint, the purchaser, defendant 2, became a constructive trustee and a trustee de son tort. Consequently, the present suit u/s 92, Civil P.C, was held to be competent as against him and it was decided that if the allegations made in the plaint be established, then the reliefs claimed in the suit would be available against him.

75. The relevant allegations which if established would make defendant 2 a constructive trustee were referred to by the learned Judges to be those contained in paras. 13, 14, 17, 19 and 20 of the plaint. In para. 13 of the plaint it was alleged that defendant 1 in collusion with defendant 2 transferred the wakf properties to defendant 2. No such collusion has been established in this case.

76. In para. 14 of the plaint it was alleged that defendant 2 taking advantage of the involved position of defendant 1 got him under his unfair and undue influence and by the use thereof defendant 2 procured defendant 1 to commit breach of trust in respect of the wakf properties. There is absolutely nothing on the record to establish these allegations of undue influence and of procurement of breach of trust by defendant 2.

77. In para. 19 of the plaint it was alleged that defendant 2 knowingly and fraudulently took possession of the wakf properties and had been utilising the income thereof in collusion with defendant 1. No fraud or collusion as alleged here has been established in this case. As to, the knowledge, it has already been pointed out that defendant 2 no doubt took the property with knowledge of the fact that it was covered by Ex. I. There was however some doubt as to whether or not the document at all created a real wakf. In this paragraph it was also alleged that defendant 2 became liable to accounting as a trustee de son tort. No evidence has been adduced in this case to show that defendant 2 ever took upon himself the duty of the trustee. There is absolutely nothing on the record to make him a trustee de son tort.

78. In my opinion the averments in the pleadings which if established would

have made defendant 2 a constructive trustee according to the decision in *Abdul Majid v. Sk. Aktar Nabi* AIR 1935 Cal. 505 have not been established by the evidence on the record and consequently that decision does not entitle the plaintiffs to obtain the reliefs claimed as against defendant 2. The law relating to trust is not the same in India as in England. The law in India recognises no distinction between legal and equitable estates: *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* I.A.Sup. 47. This was pointed out by their Lordships of the Judicial Committee also in *Webb v. Macpherson*. 30 I. A. 238. Their Lordships observed:

The law of India, speaking broadly, knows nothing of that distinction between legal and equitable property in the sense in which it was understood when administered by the Court of Chancery in England.

By the law of India there can be but one owner and where the property is vested in a trustee the owner must be the trustee: AIR 1931 196 (Privy Council) . This is the view embodied in the Indian Trusts Act, 1882, Section's 3, 55, 56, etc. A trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner. The interest of the beneficiary of a trust is defined in Section 3, Trusts Act, not as an interest in the trust property but as a right against a trustee as owner of the trust property. According to the definition of trust and of beneficiary given in Section 3, Trusts Act, 1882, what in English law would be the equitable estate of the cestuique trust is only the benefit of an obligation annexed to the ownership of property. This obligation of a fiduciary character can under certain circumstances be enforced even against a purchaser for consideration. What the cestuique trust has is the right to call upon the trustee and, if necessary, to compel the trustees to administer the property so as to give him his dues according to the provisions of the trust. The position here in India in this respect is like that in American law: *Garland v. Archer Shee* 1931 A. C. 212.

79. Whatever may be the position of a purchaser from a trustee who is the legal owner of the property in the eye of the law, a purchaser from a mutwalli of Musalman wakf is in a very different and precarious position. Unless the mutwalli is expressly empowered by the deed of wakf to do so, he has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof and a transferee from him acquires no interest in the property by such transfer. Similarly, a mutwalli has no power to grant a lease of wakf property permanently unless he has been expressly authorised by the deed of wakf to do so, or unless he has obtained the leave of the Court to do so. In the present case neither the deed of wakf conferred any such power on the mutwalli, nor did he take any leave of the Court. Unlike a transferee from a trustee in English law the transferee from a mutwalli gets nothing by the transfer. He becomes a trespasser pure and simple irrespective of the question of any notice or knowledge.

80. Then again a mutwalli is a trustee not in the sense of having in him any legal ownership of the property. He no doubt has an obligation arising out of a confidence reposed in and accepted by him. But as he himself has no title to the ownership and no power to alienate the property, his act of transfer of the property may not affect this obligation at all so as to impose it on the transferee of the property and make him a constructive trustee. Such a transferee has consistently been held by all the High Courts in India to be a person against whom the reliefs specified in Sub-section (1) of Section 92, Civil P.C. are not available. A mutwalli himself is a trustee as the result of some projection of ideas. To clothe an alienee from him who is otherwise a trespasser pure and simple with the constructive trusteeship so as to make the special reliefs u/s 92, Civil P.C, available against him will be a further projection. We constantly cover things up so to speak, by our readymade images and thus conceal from ourselves what is new and distinctive in them.

81. In my opinion none of the reliefs claimed in the present suit u/s 92, Civil P.C, is available against defendants 2 and 3 and consequently the suit as against them must be dismissed. I am further of opinion that as against defendant 3 the suit is liable to be dismissed also on the ground that the suit as against him is not competent at the instance of the present plaintiffs in view of the fact that no consent of the relevant authorities u/s 92 or Section 93 was taken for the purpose of adding him as party defendant. The amendment certainly enlarged the scope of the suit inasmuch as it sought reliefs in respect of the properties in his possession and these reliefs were claimed as against him and by his removal as a constructive trustee. In the result I agree that the appeal should be allowed and I concur in the Order made by my learned brother.