
(1931) 07 PAT CK 0016

In the Patna High Court

(Syed Shah) Muhammad Kazim

APPELLANT

Vs

(Syed) Abi Saghir and Others

RESPONDENT

Date of Decision : 06-07-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : AIR 1932 Patna 33

Hon'ble Judges : Mohamad Noor, J

Bench : Division Bench

Judgement

Mohamad Noor, J.—This appeal arises out of a suit instituted with the previous sanction of the Legal Remembrancer u/s 92, Civil P.C., and relates to the properties mentioned in Schedules 1-a and 1-b of the plaint, commonly known as the Maulanagar Khankah estate, on the allegation that they are public trust properties and is for their declaration as such with a prayer that a scheme be prepared for their management and for the removal of the defendant from his office of sajjadanashin and manager and, finally, for a declaration that a substantial part of their income is to be spent upon public, religious and charitable objects.

2. Maulanagar estate has its origin from a Mahomedan saint, Shah Najimuddin alias Shah Maula, who settled in the locality some time in the latter part of the seventeenth or in the earlier part of the eighteenth century A.D. This saint seems to have attracted the attention of the Ruler of Bengal and a grant of pargana Abhaipur was made to him. This grant is not available nor its exact date is known, but its terms can fairly be gathered from a subsequent grant or sanad relating to this very pargana in favour of Shah Gholam Moula, the successor of Shah Najimuddin. By this sanad dated 22nd Jama-deus-sani 1161 A.H. (1748), Nawab Alivardi Khan, the Governor of Bengal, made or confirmed a grant of Abhaipur to Shah Gholam Maula who, it is said, was the wife's brother of Sahah Najimuddin, a fact which has been accepted by the compiler of the Gazetteer of the District of Monghyr. Two copies (or copies of copies) of this sanad are on the

record. A complete copy has been filed by the plaintiff (Ex. 50) and an incomplete one (Ex. 5) by the defendant. They are in the form of an order to the revenue officer of the State (motasaddis, etc.).

3. Leaving aside the controversial words of the sanad for the present it recites that the entire pargana aforesaid (Pargana Abhaipur Sarkar Monghyr in the province of Bihar) had been from before granted revenue-free (sic) for defraying the expenses of the drum beaters appointed by Huzur (the Nawab himself) and for the casual visitors to the Moulanagar Khankah and as madadmash (maintenance) of the holy saint Hazrat Shah Najimuddin Ali deceased. It then proceeds that, having regard to the rights (or claims) of the Great Divine Shah Gholam Moula sajjadanashin (successor) of the deceased saint the grant as per detail is confirmed in the (sic)nae of the Great Sheikh Muhammad Bhek, a servant of the said Shah.

It is proper that you (meaning the revenue officer of the pargana) should consider that the entire pargana aforesaid is granted revenue-free for defraying the expenses of the casual visitors to the Moulanagar Khankah and the drumbeaters appointed by Huzur and madadmash (maintenance) to Shah Ghulam Maula descendable to the children, etc., etc.

4. Then comes the details of the properties and again the terms of the grant are practically repeated.

5. This grant was by a sanad dated 11th March 1791 (Ex. U) in favour of the descendants of Shah Gholam Moula confirmed by the East India Company when they took over the Diwani of Bengal, Bihar and Orissa. It appears that (the exact date is not known) another grant consisting of Mustafanagar, etc., was made in istamrari mukarrari settlement to Shah Gholam Moula by the Governor of Bengal under the seal of Raja Sitab Rai. This was also confirmed by the East India Company under a sanad dated 7th February 1787 granted to the aforesaid persons. This recites that Mustafanagar and Murtazanagar, etc., were given in istamrari mukarrari to Shah Gholam Moula for defraying the expenses of the students, the faqirs (beggars) and the casual visitors of Moulanagar Khankah and confirms and enjoins that the said persons should make proper cultivation of the said villages and, after payment of the istamrari mukarrari jama, should utilize the entire jama in defraying the expenses of the causal visitors, students, etc. The revenue-free property of Pargana Abhaipur and the mukarrari istimrari of Mustafanagar, etc., and their appurtenances are the subject-matter of the present litigation.

6. The suit was instituted by five plaintiffs, but subsequently nine Mahomedans of Moulanagar with, the sanction of the Legal Remembrancer, were added as plaintiffs. Four of the latter subsequently withdrew from the suit and the remaining ten proceeded with it. The plaintiff's case is that the properties described above namely, pargana Abhaipur and villages Mustafanagar and Murtazanagar, etc., are endowed properties and constitute a trust for public

purposes of a religious and charitable nature and that a substantial part of their income should be spent towards such object. They allege that according to the custom prevailing in this trust the properties are managed by sajjadanashins and that on the death of a sajjadanashin his successor is elected by the maintenance-holders who are by courtesy called shareholders. The sajjadanashin is to spend suitable amounts on the religious and charitable objects of the trust and to distribute the balance among the descendants of Shah Gholam Moula called by courtesy shareholders; and according to the same custom the sajjadanashin on his installation is to execute an ekrarnama binding himself to carry out the objects of the trust, and, as its counterpart, the electors execute a mahzarnama describing the duties of the sajjadanashin and the manner in which he is to carry them out. The plaint goes on to say that in pursuance of this custom the last sajjadanashin was Shah Sami Ahmad, that up to his time visitors were looked after and a madrassa was kept up and in short the trust was fairly well managed.

7. On his death in 1913, however the defendant was elected sajjadanashin, though with some demur. He has avoided the execution of the customary ekrarnama and he committed various acts of malfeasance and misfeasance. Consequently in October 1922, with the previous sanction of the Legal Remembrancer, a suit was instituted for his removal. In that suit the defendant denied the existence of wakf, but later on the matter was compromised out of Court; and on the petition of both the parties the suit was dismissed without costs on 22nd June 1923, the defendant having executed an ekrarnama on 21st June 1923. The terms of this ekrarnama are given in detail in the plaint. It is alleged now that subsequently the defendant started committing acts of mismanagement and breaches of trust and has even gone the length of cancelling the ekrarnama executed by him on 21st June 1923. On these grounds the plaintiffs seek the removal of the defendant from the sajjadanashin ship of the khankah and estate and ask for preparation of a scheme for their management.

8. In the written statement the defendant controverts almost all the allegations of the plaint, and on the pleadings the learned District Judge framed nine issues and decided all in favour of the plaintiff. He has passed a decree removing the defendant, directing the full discovery of the trust estate and the taking of its accounts from the defendant, declaring that the public, charitable and religious objects are a first charge on the estate and directing the preparation of a scheme for carrying out the objects of the trust. He has appointed a receiver to take charge of the properties pending preparation of the scheme and the appointment of a manager or sajjadanashin. The defendant has appealed.

9. Sir Abdur Rahim appearing on his behalf has confined himself to issues 1, 5 and 6 as framed by the learned District Judge:

(1) Is the suit maintainable?

(5) Is the subject-matter of the suit a trust property as contemplated by Section

92, Civil P.C. ?

(6) Has the defendant been guilty of the charges set out in para. 22 of the plaint on any breach of trust or neglect of duties, and is he or not a fit and proper person to hold charge of the trust properties?

10. Issue 5 is the main issue in the case and I take it up first. Sir Abdur Rahim contends that the property in suit is neither a wakf under Mahomedan law nor a trust under English law. The term "wakf" literally means "detention or stoppage" and the legal meaning of "wakf" according to the accepted doctrine of the Hanafi School is the extinction of the proprietor's ownership in the thing dedicated and its detention in the implied ownership of God in such a manner that the profits may revert to and be applied for the benefit of mankind.

11. The earliest decision on the question is Kulb Ali Hussain v. Syf Ali [1814] 2 Sel. Rep. (S.D.A. Beng.) 139. There the Court had to construe a Royal grant enjoining that Mauza Bishunpur should be exempted from the payment of revenue, that the profits arising from its land should be applied to the support of religious mendicants and students and the repairs of mosques and other public edifices, and that the general superintendence of its resources should be confided to one Darvesh Hussain and should remain vested in him, his heirs and successors. The Saddar Diwani Adawlut, basing its decision upon the opinion of its law officers, held this to be a wakf. The law officers declared that the appropriation of land or other property to pious and charitable purposes is sufficient to constitute a wakf without the express use of that term in the grant. The grant was again in issue in the case of Asheerooddeen v. Sreemutty Drobo Moyee [1875] 25 W.R. 557 and was found to be a wakf. See also the Sasaram case. Mt. Quadira (sic) Shah Kabeer Ooddeen Ahmud [1824] 3 Sel. Rep. (S.D.A. Beng.) 544, the second of the two grants which formed the subject-matter of that case is an order on the Revenue Officers (as in the present case) in the following terms.....:

...granted as inam altumgha free from all charges to Shah Quamooddeen for the support of travelers... Let the imperial officers constantly remembering this order leave the above grants in his and his children's possession from generation after generation.

12. In this case the grant was to Shah Quamuuddin by name and not by virtue of his holding any office, to him and his children, heirs and successors for the support of travellers, etc. The words used are "warid sadir" as in the grant which is the subject-matter of the present litigation. Thus the only difference between the grant in the Sasaram case and this grant is that there is a clear mention of a provision for the maintenance of the grantee and his descendants. The effect of this case is to lay down that a grant to an individual, heritable by his descendants, may be a wakf in spite of the fact that the word "wakf" is not mentioned and that there is no transfer of the property to God. The muftis, while dealing with the firman which I have quoted above, expressed their views in the

following terms:

We infer from the purport of the second firman that Sheikh Quamuddin is the grantee and the travellers are mentioned, because many such alight at a Sheikh's house and become a burden on his hospitality. Whereas then Sheikh Quamuddin is a determinate grantee, the intent of the grantor is the creation of a proprietary right in him by that permanent grant and not a wakf.

13. This is exactly the contention of Sir Abdur Rahim before us. He argues that as the travellers and others used to visit Shah Najimuddin and Shah Gholam Moula, the grantor made a grant to them personally in order to enable them to meet the expenses. When the case was referred to Kaziulkazzat, he gave as his opinion that

there were some expressions in particular firmance which might be considered as conveying a gift with certain stipulations for the repair of the khankah and support of the poor and others which supported the construction of their being a grant of wakf.

14. Then comes a very important passage:

In cases of such perplexity he declared reference should be had to the custom of the country and the question should be decided by the sense attached by common usage to the expressions.

15. In other words, the opinion was that in order to interpret a document and to decide whether the property granted to an individual by name is or is not wakf, it is necessary to refer to the customary use of the income of the property. The *sasaram wakf* came up again for consideration before the Privy Council in *Jewan Doss Sahoo v. Shah Kabirooddeen* [1840] 2 M.I.A. 390. Their Lordships construed the grant and held that the word "altumgha" or "altumgha inam" used in the Royal grant does not by itself convey an absolute proprietary right to the grantee where from the general tenor of the grant it is to be inferred that a wakf or endowment to religious and charitable uses was intended; and that it is not so necessary to consider the words used in the grant as to find out what the intention of the grantor was. When I come to consider the various documents produced in this case, I shall show from the grants that the grantor intended that at least a substantial portion of the income of the property if not the whole of it, should be devoted to public, charitable and religious purposes.

16. Sir Abdur Rahim relies upon the decision in *Fatima v. Saheba Jan* [1867] 8 W.R. 313. In this case there was the sanad as usual addressed to the must addis, chowdhuries and kanungoes of Pargana Bhagalpur, The grantee had a large family to support and had to defray the expenses of a khankah for travellers and benighted students etc. and in consideration of this the village was given to him at a fixed annual jama of Rs. 896. It was found as a fact that the property had never been considered as endowed by any of the descendants of the original grantee and was not wakf. In this case the grant was made in favour of an

individual and recited that the grantee had to meet certain expenses and therefore the grant was being made it was clearly a case in which the expenses incurred by the grantee were motives for making the grant and the treatment of the property as private was considered as a ground for holding the property not to be a wakf.

17. The next case to be considered is the decision in *Muthu Kana Ana Ramanadhan Chettiar v. Vava Levvani Marakayar* [1911] 34 Mad. 12 which was modified by the Privy Council: *Mutu K.A. Ramanandan Chettiar v. Vava Levvai Marakayar* AIR 1916 P.C. 86. The High Court as well as the Privy Council held that the test whether; a deed was or was not valid as wakf was to see if the effect of the deed was to give the property substantially to charitable uses. Then the Judicial Committee observed that in that case though the sum devoted to the charities was not large for the present it was abundant for their need and that the dominating purpose and the intention of the grantor in executing the deed was to provide for those charities. In the case of *Abdur Rahim v. Narayan Das Aurora* AIR 1923 P.C. 44 their Lordships of the Privy Council had to consider the question of a wakf in which there were severable provisions for substantial religious purposes and for the benefit of the settlor's family. The dedication was held to be a wakf in spite of the fact that there were some provisions for the maintenance of the family of the dedicator himself.

18. Another case is AIR 1927 191 (Privy Council) where their Lordships held that the wakf is not necessarily bad because of auxiliary provisions made therein by the settlor for the maintenance of himself and his dependants. But it was held that if the bulk of the income is settled on the line of one's own descendants and need only go to charity on failure of any such line--an event which might be definitely postponed--and the settlor's real purpose is to make a family settlement there can be no substantial dedication of the property to charity and the wakf would in consequence be invalid. In consequence of the passing of Act 6 of 1913 and Act 32 of 1930 the last view is no longer law but this case is an authority for the proposition that a "substantial dedication to charity is sufficient to validate a wakf."

19. The following principles seem to me to emerge from the above cases: the requirement of a valid wakf is a substantial dedication of the usufruct of the property to charitable religious or good purposes as understood in the Mahomedan law; no particular form is necessary; a wakf may be construed from Royal grants of properties made in favour of individual persons as long as it was for a perpetual religious charitable or good purposes: the dedicator need not use the word wakf at all or may not formally transfer the properties to the ownership of God. If there is a substantial dedication to a valid object it will not cease to be a wakf because some objects are mentioned which are not legal objects of wakf.

20. This being the law let us examine whether the properties in question are wakf. The earliest document available is Ex. 50, a copy of a grant by Alivardi Khan to Ghulam Bhek, a servant of Shah Gholam Moula. At the top of this copy

there are words the reading and meaning of which have been the subject-matter of controversy before us. The appellants would read them as "naqul-Moula Karim" and contend that the first word "naqul" means a copy. This according to the appellants is no part of the contents of the grant. They contend that the copyist started with this heading in order to indicate that it was a copy of a copy. They would take the subsequent two words "Moula Karim" to indicate the name of the grantee. The respondents contend that the words are "Bafazal Moula Karim" meaning "by the grace of the Master, the benefactor" and that as the Governor of Bengal was creating a wakf, and dedicating the property to God, he invoked His blessings.

21. In my opinion it is not at all necessary to decide this controversial question. The reading of the first word may be either "naqul" or "bafazal." Most probably it is "naqul" (copy) indicating that it is being copied from a copy and the next words "Moula Karim" may be the invoking of God. It has been the practice even up till recent times (though now rarely) in writing anything even private letters, to begin with the name of God. This does not indicate anything. Mahomedans call the deity by various names which are about 100 in number. They are called "isim safat" (the names of the attributes of God) as distinguished from "isim zat" (the name of the person of God). The word "Allah" meaning "God" is the name of the person of God. All other names are the names of his attributes: as for instance, Rahim merciful; Ghaffar forgiver, and so on. The word "Moula Karim" literally mean, "Master the benefactor." Among other names the word "Moula" has particularly been used here having regard to the name of the man in whose favour the grant was being made. A similar thing will be found in Ex. 30. At the top of it is the word "Howal quadir" meaning: "He is the powerful" namely the deity. But this particular attribute of God (that is, Quadir powerful) has obviously been used in consideration of the name of the saint in whose spiritual line the writer of the document was, i.e., Seikh Abdur Quadir Jilani, the famous saint of Bagdad: see the evidence of the defendant Shah Muhammad Kazim. This choosing of a particular attribute of God to indicate God himself is sometimes done according to the occasion when that name is being used.

22. I am therefore of opinion that the words "Moula Karim" at the top of the document refers to God, but is merely formal, the epithet being chosen in consideration of the name of the man who was the ostensible grantee. This does not help either the plaintiff or the defendant. There are however later on the words, nazar Moula Karim" which mean "offering or present to Moula Karim." The official translator has not translated the words "Moula Karim" and their translation was again a subject-matter of controversy between the parties. The appellant contends that it is the name of the grantee in whose favour the grant was being made and according to the respondent it means "God." Its literal meaning is Master the benefactor. I shall discuss this later on. Leaving aside these controversial meanings of some words the grant says:

Whereas the entire pargana aforesaid (Pargana Abhaipur) has been from before

granted revenue-free as nazar (present) (torn) for defraying the expenses of the drum-beaters appointed by the Huzur (i.e. the Governor himself) and of the casual visitors to the Moulanagar khankah and madad mash (help for livelihood) to the only saint Hazrat Shah Najimuddin Ali deceased, now having regard to the rights (or claims) of the Great Divine Shah Gholam Moula Sajjadanashin (successor) of the deceased saint, the grant as per detail is confirmed in the name of the Great Sheikh Mahomed Bhek, a servant of the said Shah.

23. Having found the translation of this gram in the paper book to be unsatisfactory, we directed a retranslation by the head translator. Copies of this were supplied to the parties and one is attached to this judgment and the case has been argued on its basis. The words torn were obviously "Moula Karim." This is clear from the use of this word later on in the description and in some subsequent rubkars. The grant is addressed to the revenue officers of the Pargana Abhaipur. It is obvious by reading the grant as a whole that before this grant this very pargana had been given in revenue free grant to Shah Najimuddin Ali. It is immaterial whether the words used in the description "nazar Moula Karim" refer to Shah Najimuddin, who was admittedly called Shah Moula also, or indicate a present to God. As I have said, to constitute a wakf it is not necessary that the property should specifically be made over to God.

24. On the other hand a grant to a person may be wakf. The learned District Judge thought that an epithet applicable to the deity could not have been applied to a human being however saintly he might be and that view is in accord with strict Islamic ideas, but the fact is that in course of time these exclusive attributes of God have come to be applied to human beings of high and saintly character; for instance Hazrat Ali, son-in-law of the Prophet is called Moula Ali indicating that he is the master of all.

25. In my opinion the words "nazar Moula Karim" are not used in respect of the grant which was then being made by this document to Shah Gholam Moula. It says that the property was from before "nazar Moula Karim" i. e. a present to Moula Karim. The grant in question (Ex. 50) is a confirmation or renewal of a grant which had been made previously to the predecessor of Shah Gholam Moula, namely, to Shah Najimuddin. As I have said it is not of much importance as the case law indicates in whose name the grant is made. The question always is, for what purpose the grant is made ? This document shows that prior to this grant there was a khankah at Moulanagar; that drum-beaters were deputed by the Governor at that khankah and that the grant was made to Shah Najimuddin for the purposes of maintaining these drum-beaters who were deputed by the Governor and for the expenses of the casual visitors to the khankah and for the maintenance of the saint himself. The question arises, whether a grant like this is or is not a wakf?

26. The points for consideration are:

(1) Was this a grant to the institution, namely, to the khankah of Moulanagar, or

was it a grant to Shah Gholam Moula personally ?

(2) Is the expenditure mentioned in the grant simply a recital of the motive for making the grant or is it the object of the grant ?

(3) Are the objects fit ones for a valid wakf under the Mahomedan law ?

(4) Does the grant fulfil the requirements of a valid wakf under the Mahomedan law ?

(1) I have already mentioned that the grant starts with a recital that Pargana Abhaipur had been from before a revenue free grant as nazar (torn) and I have held that the portion torn was certainly "Moula Karim." I have no doubt also that the property in question has been described as "Nazar Moula Karim" that is, a present to Moula Karim. It is to be noted that the sanad recites that at the time of this grant Shah Najimuddin was dead. If the words refer to him, then it means that the property was being presented to the deceased saint. Now a present to a dead man cannot, by any stretch of imagination be, construed to mean a personal grant to the successor of "the saint. In the case of Sujjadu Mahamad Yusuf v. Shaw Habit 53 Ind.Cas.677 there was a grant to a living saint Hazrat Khaja Rahamtulla as a present to the Prophet Muhammad for the purpose of feeding the poor and it was never contended that it was not a valid wakf or that it was a personal grant to the saint. Therefore in my opinion whether the words "Moula Karim" refer to Shah Najimuddin who was then dead or to God, they in no way indicate a personal grant to Shah Gholam Moula. As to the nature of a khankah and the position of a sajjadanashin, they have been referred to in various decisions: see Vidya Varuthi Thirtha v. Balusami Ayyar AIR 1922 P.C. 123, Piran Bibi v. Abdool Karrim [1692] 19 Cal. 203 and Mohiuddin v. Sayiduddin [1893] 20 Cal. 810 and are fully described in Amir Ali's Mahomedan law, Vol. 1.

27. In Muhammad Hamid v. Mean Mahmud AIR 1922 P.C. 384 Lord Gave, in delivering the judgment of their Lordships of the Privy Council, observed that the khankah is a monastery or religious institution where darveshes and seekers of truth congregate for religious instruction and devotional exercises. It has generally been founded by a darvesh or a sufi professing esoteric belief whose teachings and personal sanctity have attracted disciples, whom he initiates into his doctrine After his death he is often revered as a saint. A khankah is usually under the governance of a sajjadanashin (the one seated on the prayer mat) who not only acts as muttawali or manager of the institution and of the adjoining mosques, but also as the spiritual preceptor of the adherents. The founder is generally the first sajjadanashin and after his death the spiritual line (sil silla) is extended by succession of sajjadanashins. Generally members of his family chosen by him or according to the directions given by him in his lifetime are selected by the fakirs and murids are formally installed.

28. Now it will be noticed that the grant now in question was made to Shah Gholam Moula describing him as sajjadanashin of the deceased saint Shah Najimuddin. In fact it is a renewal of the grant which had already been made to

Shah Najimuddin: the property is the same, the purposes of the grant are the same and the expenditures mentioned are the same. Under the circumstances on the grant itself it cannot but be held that the grant was being made to the institution and not the saint.

29. Then it should be noticed that though the grant being made to Shah Gholam Moula, the actual grant is in the name of his servant Sheikh Gholam Bhek. The compiler of the Gazetteer, basing his information on tradition, says that Shah Gholam Moula did not like to take a grant for himself, but agreed to take it if it was for charitable purposes. This tradition is certainly of some value and is admissible in evidence.

(2) Now as to the expenses mentioned in the grant itself, the order in which they are mentioned are of no importance. The first is the item, drum beaters deputed by Huzur i.e., the Governor himself. The translation of Naubitnawaz as drum-beaters is in a way correct, but requires a little explanation. Naubat" literally means "turn" and "Nawaz" means one who plays a musical instrument. In days when striking clocks were not in vogue Kings and other big men used to employ drum beaters to beat drums to make the time. There was also Naubat played on ceremonial and festive occasions; it was a paraphernalia of the King. Saints are treated as Kings of the spiritual world. The appellation "Shah" (which means) "King" is almost invariably used before their names as is borne out from the sanad itself where the grantee and the deceased saint were described as Shah Najimuddin and Shah Gholam Moula. The khankahs of these saints were treated by their successors and by the devotees as if they were King's Courts and devotees provided for these institutions the paraphernalia of a King's Court. The "ura," i.e., the anniversary of the death of the saints took the place of the ceremonials of a Royal Court. Accordingly in this sanad we find the Naubat Nawaz or dram-beaters were deputed by Nawab Alivardi Khan himself and naturally the Nawab had to make provisions for their maintenance. It cannot therefore be said that; this was an expenditure which Shah Najimuddin or Shah Gholam Moula were incurring themselves and it was with a view to relieve them of this burden that this grant was made.

30. The next item of expenditure is "warid sadir." Warid means incomer and sadir means outgoer. The two words taken together mean casual visitors or travellers. I have described a khankah. When a khankah is established and the reputation of the saint presiding at it spreads far and wide, large numbers of persons come to visit him and to receive from him religious and esoteric teachings. Apart from these the institution becomes a shelter for wayfarers and forlorn and indigent travellers. It is absolutely impossible for the saint to provide for their board and lodging. Ordinarily, unless there is a sufficient income attached to the institution such people have to make their own provisions or go away disappointed. Pious men with religious instincts have from time to time made provisions for these people. The word used in the sanad is "jehet" which means "for the purpose of." It is the same word which has been used in the Sasaram grant which had been

the subject-matter of various decisions referred to above. Clearly the grant was for the purpose of the expenditure on these casual visitors and travellers and not as a motive to relieve the grantee from the expenses which he had been incurring. The words are "warid sadir khankah Moulanagar" (casual visitors to the khankah at Moulanagar) and not casual visitors to the grantee.

31. The next item is "madad mash" to the grantee, namely, Shah Najimuddin or Shah Gholam Moula and his descendants. The question arises whether this was for the purpose of maintaining the grantee in his individual and private capacity or in his capacity as sajjadanashin. Provision for a sajjadanashin is not a provision for the man, but for the institution. A khankah cannot exist and continue without a sajjadanashin. In other systems the personal expenditure of the head of such an institution has been curtailed to almost nothing by enjoining celibacy as for instance, in the case of Christian monasteries or Hindu mutts and sangats. But Islam prohibits celibacy and a saint with a family is the rule rather than an exception. In these circumstances devotees and adherents of the khankah have always made provisions for the maintenance of the sajjadanashin and his family so that he may devote all his time to imparting religious and spiritual instruction to his disciples and be free from secular cares. A sajjadanashin is an integral part of the institution and the central figure so to speak therein. Its existence depends on his personality. In him is supposed to continue the spiritual line. Therefore I would hold that the provision for the maintenance of Shah Gholam Moula and his descendants was a provision for him as the head of the institution which he was then occupying as a sajjadanashin of Shah Nijimuddin. It was a trust and not a personal grant. In the case of Mahomed Athar v. Ramjan Khan [1907] 34 Cal. 587 the grant was described as madadmash, (for the maintenance) of the muttawali. The learned Judges held that it was a public endowment. Their Lordships observed as follows:

The expression "madad mash" has been defined in Mitra's Tagore Law Lectures (1885) on the Land Law of Bengal as follows: Madadmash grants are not uncommon in Bengal. They were made for religious purposes and as such are inalienable. The grants were in perpetuity. The distinction between madadmash and grants of similar nature known by other names is very little except as to the origin and use of the land.

32. The grant in the case of Klub Ali Hussain v. Syf Ali [1914] 2 Sel.139 was also described in the firman as the madad mash grant to Mullah Faquiruddin, but it was nevertheless held to be a public endowment. This interpretation was put on the firman in the case of Asheerooddeen v. Sreemutty Drobo Moyee [1875] 25 W.R. 557. In the case of Abdulla Sahib v. Hyder Beg 51 Ind.Cas. 42 a grant to an individual who was servant of a mosque for the mosque was held to be public trust. I have already said that the grant was originally made to Shah Najimuddin. It was renewed not in favour of his natural heir but in favour of his successor-in-office as sajjadanashin of the Moulanger Khankah. Part of the expenditures (naubat nawaz) was imposed upon the khankah by the grantor himself and the

grantee Shah Gholam Moula is being described not in his individual capacity but as a successor (sajjadanashin.) There is nothing in the grant from which it can be inferred that the expenditure mentioned therein represents a mere pious wish. I therefore hold that the objects of expenditure mentioned are the objects for carrying out which this grant was made.

33. Sir Abdur Rahim has laid much stress upon the fact that a provision for naubat nawaz (drum-beaters) cannot be the subject-matter of a valid wakf. This is so, if the drum-beaters are detached from the institution; such a provision by itself does not come within the scope of the Mahomedan law. But I have shown that the drum-beaters in this case are the drum beaters attached to the khankah, and I have shown the object of having them. They are the necessary paraphernalia of a khankah of some schools of Sufis like an organ for a Christian church. I have shown that according to the evidence of the defendant's witness himself the drum-beaters perform an important function "Naubat" is played four times a day and on important occasions. Admittedly "warid sadir" and "madad mash" for the sajjadanashin are not valid objects of wakf, as well as maintenance of a khankah.

(4). In *Jugatmoni Chowdrani v. Romjani Bibee* [1884] 10 Cal. 533 the Calcutta High Court held the essentials of a valid wakf to be these: an appropriator must destine the ultimate application of the income to the objects not liable to become extinct; secondly, the appropriation must be at once complete; thirdly, there must be no stipulation in the wakf for sale of the property and expenditure of the price on the appropriator's necessities; and fourthly, perpetuity must be a necessary condition. In my opinion all the conditions are fulfilled in the present case. Sir Abdur Rahim attacked this grant on the following grounds. He contended that in the grant in question there is no ultimate reversion to charity; the property has not been tied down and, as the descendants of Shah Gholam Moula may become extinct or the khankah itself disappear the object is not a perpetual one. True it is that perpetuity is a necessary condition; but according to the acknowledged and accepted view it is not necessary to mention it at the time of the dedication: in other words, though all the jurists insist that the property should be dedicated permanently and the right of the donor therein parted with for ever, according to Abu Yusuf it is not necessary that the word "abad" (perpetual) should be mentioned or that the object in favour of which the dedication is primarily made should be of a continuing and permanent character. According to him when the dedicator has named a purpose liable to failure, even then the wakf is valid, and after failure of the object the property will be for the poor though they are not named. Now in this particular case it is obvious that the grant was perpetual.

34. The grant itself uses the word "ba farzandan" or "generation after generation." This being the law, I have no hesitation in overruling this contention raised on behalf of the appellants. I have already held that provisions for Shah Gholam Moula and his family are valid objects of wakf as they were provided for

not as individuals but as persons connected with the khankah. But assuming that these provisions do not come within the purview of the legal objects of a wakf, even then such a wakf will not be invalid. I have referred to the case of *Abdur Rahim v. Narayan Das Aurora* AIR 1923 P.C. 44 where a mixed wakf was held to be valid: see also *Bazlul Ghani Mia v. Adah Patari* 19 Ind.Cas. 896. In *Muthu Kana Ana Ramanadhan Chettiar v. Vava Levvai* [1911] 34 Mad. 12 the High Court of Madras held that a gift by way of wakf partly for valid charitable purposes and partly for the donor's heirs will not be void because the latter is not a legal purpose of a wakf. The wakf will be valid and the whole income will be devoted for the valid purposes. When this case went up to the Privy Council AIR 1916 P.C. 86 the Lord Chancellor delivering the judgment of their Lordships of the Judicial Committee observed:

The paramount purpose of the grantor was evidently to provide for all the needs of those charities up to the limit of the trust funds the income received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum that is given to the family.

35. I shall show later that in this case it is the residue which has been left for the family of Shah Gholam Moula. Sir Abdur Rahim however contends that no proportion between charity and noncharity having been fixed either in the earlier grant of Alivardi Khan or in the later confirmations of the East India Company, the wakf is void for uncertainty. I have said more than once that in my opinion the provisions for Shah Gholam Moula and his family are charitable and religious purposes; but assuming they are not, the fixing of a proportion is not necessary. It was considered in the two Madras cases above referred to, and both the High Courts of Madras and the Privy Council decided that this did not militate against the property being a wakf. The Madras High Court held that the fact that the donor did not direct the proportion in which the income should be divided between charities and his heirs who were appointed trustees will not raise a presumption that he intended the heirs to take the whole. It must be presumed that charities and his heirs should benefit equally. The Privy Council did not go so far, but held that the trustees were bound within the limits of the funds to make reasonable and proper provision and if they failed to do so they would be set right by a proper tribunal. A wakf is not invalid if the proportion of appropriation between several objects is not specified: *Makhlachar Rahman v. Faizur Rahman* 35 Ind.Cas. 880. This is exactly according to the English law on charities. The law is thus laid down:

When a testator gives funds partly for objects which are charitable and partly for objects which either are not charitable or does not specify the proportion in which the funds are to be applied for the different objects, the Court will make an apportionment.

36. Again where a fund is given for several objects, some charitable and some non-charitable or illegal, there being a clear intention to devote some part to the charitable objects, if it can be ascertained what are the proportions to be

attributed to the several objects, the Court directs an inquiry, but if from the nature of the gift it appears impracticable to fix the proportion or the proportion were to be in the discretion of the trustees, the Court divides the funds equally between the different objects: Halsbury's Laws of England, Vol. 4, paras 233, 237. I therefore hold that Ex. 30 creates a valid wakf.

37. Hitherto I have been dealing with the earliest grant, that for pargana Abhaipur. On the assumption of the Diwani by the East India Company this grant of Alivardi Khan was confirmed by them under a sanad (Ex. U). This sanad also starts with the words "Moula Karim" discussed above. While giving the details of the property, it describes them almost in the same manner as the sanad (Ex. 30). Great stress is laid on the wording in this sanad which as usual is an order on the Revenue Officer of the pargana:

You should regard them (the heirs of Shah Gholam Moula) as mokhtar (malik of the said pargana).

38. The learned District Judge has rightly pointed out that the word used is "mokhtar" (one having power) and not "malik." But apart from this, for whatever purpose the grant is made, its holder for the time being is, for the purposes of the Revenue Officers, a malik. They must deal with him as such. At about the same time another grant of Mustafanagar and other villages was confirmed by Ex. W which shows that before this confirmation Mustafanagar, etc., had also been granted by the Governor of Bengal to Shah Gholam Moula. The last few lines of this grant are important. They are:

The said persons should make proper cultivation of the said village and, after payment of the istamrari mukarrari jama, utilize the entire amount in defraying the expenses of the casual visitors and in meeting their own necessities and devote themselves to the prayer of God for the eternal welfare of the estate.

39. In the body of the sanad, among the expenses mentioned, are students, the fakirs (beggars), the casual visitors to the Maulanagar khankah. I do not propose to discuss these two confirmatory grants (Exs. U and W) in detail. What I have said above about Ex. 30 applies to these two grants with much more force and clearly indicates that the grants were wakf and not personal grants. In Ex. W the words "devote themselves to the prayer of God" obviously refer to the necessity of relieving the sajjidanashin from secular burdens and thereby enabling him to devote himself to the works of a sajjadanashin which as head of the khankah he was expected to do. These three documents, namely, Exs. 50 U and W are the only grants relating to the property in question and they prove wakf.

40. Let us now examine the usage in respect of this property and contemporaneous expositions of the grants as established by evidence. Fortunately the parties are not at variance about the facts. The controversy is as to their effect. Shah Gholam Moula had obviously been in possession of Pargana Abhaipur in revenue-free grant and Mustafanagar, etc., as istamrari mukarrari. On 18th Ramzan 1190 A.H. Hizri (7th November 1776) he executed what is

described as a werasatnama (Ex. 30). An old copy of this is before us, and though damaged in places the operative clauses are clear. We found the original translation to be unsatisfactory and directed it to be retranslated. We have used it, and a copy of it is attached to this judgment. The document describes the children and grandchildren the said Shah had and then goes on to say that the balance (of his property) remaining after spending the produce thereof on sadabrat (daily alms) at Maulanagar khankah and on casual visitors and drum beaters, etc., should after him be divided into eight shares; and then it describes who the recipients of these eight shares were to be. It should be noted that what he willed to be distributed was not the corpus of the property but the income thereof left after meeting the religious and charitable expenses. This document is relied upon by both the parties.

41. The appellant contends that Shah Gholam Moula treated this property as his personal one and distributed it among his descendants. They rely upon the words "which are owned and possessed by me at present," while Mr. Khurshaid Husnain on behalf of the respondent contends that if the property was not wakf from before, Shah Gholam Moula created a wakf by this instrument. In my opinion neither of these contentions can be accepted. Shah Gholam Moula neither treated the property as his own or dealt with it as such, nor is there any indication in this document that he was thereby creating a wakf. Had it been so it would have been a mixed wakf which I have shown is valid. Even if it were a wakf for his family alone it would have been valid now, but it would not have been a public trust. In this document there is however no indication that he was creating a wakf. He called this document a werasatnama. It is however clearly a trust, and I shall deal with this aspect of the case later on. On the other hand the contention of the appellant, that he was treating it as personal property, is untenable. No doubt the words "owned and possessed" are mentioned, but they are loose expressions. It only means that the properties were in possession and control of Shah Gholam Moula. He was doing nothing more than ensuring that after his death the arrangement for the expenditure of the income of the property should be carried on as it was carried on in his lifetime, namely, that the charitable expenses should be met first. It seems that he had two grandsons from a predeceased son, and he was anxious that after him they might not be left out from the maintenance and the sajjidanashin for the time being may not appropriate the whole thing himself. He says:

The balance of the income thereof [after meeting the expenditure on sadabrat, (daily alms) at Moulanager and on khankah and on casual visitors and on naubit players, establishment and Court expenses will after me be divided into eight shares.

42. This is exactly what was indicated in the original grant (Ex. 50) and the two confirmatory grants (Exs. U and W). Had the property been the private property of Shah Gholam Moula the property itself would have been divided and not the balance of the income which is left after meeting all the charges on religious and

charitable heads. Sir Abdur Rahim contends that the assignment of the income is tantamount to an assignment of the corpus. He relies upon the case of *Hemangini Dasi v. Nobin Chando Ghosh* [1882] 8 Cal. 788 for the proposition that the gift of share of rents and profits amounts to a gift of the share in the corpus of the estate; but in the case before us there is no gift or devise of a specific share of the rent or profit of the property. What is devised and distributed is what remains after meeting the expenses enumerated. This can in no sense be taken to be a distribution of a specific share of the rents or profits of the property. The balance may dwindle down to nothing as the expenses on charity may increase. The proposition that an assignment of the income means an assignment of the corpus is not of a universal application. It depends upon the terms of the grant and its construction: see *Shookmoy Chandra Das v. Manohari Dassi* [1881] 7 Cal. 269, which was upheld in *Shookmoy Chandra Das v. Monohari Dassi* [1885] 11 Cal. 684 and *Rameshwar Narain Singh v. Riknath Koeri* AIR 1923 Pat. 165.

43. It appears that after Shah Gholam Moula some trouble arose as to the manner in which the property was to be managed and as to the right of the descendants of Shah Gholam Moula in it. They executed an agreement dated the 9th Ramzan, 1206 Fasli, corresponding to 15th February 1799; Shah Gholam Hussain, son of Shah Gholam Moula, was at that time the *sajjadanashin*. He is described therein as *mukhtarkar* (manager) and not a sharer or proprietor (Ex. Z44). This document is relied upon by the appellants, but there is nothing in it to indicate that the properties were dealt with as private properties; rather it shows that they were treated as endowed properties and an arrangement for their management was being arrived at by the various persons concerned. I have shown above that the two confirmatory grants of the East India Company were made: one relating to Pargana Abhaipur in 1780 and the other relating to Mustafanagar in 1787 and this arrangement was arrived at shortly after the second one. The appellant's contention cannot be accepted. Gholam Hossain was a sharer to the extent of about a fourth because according to (Ex. 30) he was to get two shares out of the eight shares in which Shah Gholam Moula divided the remainder of the income left after defraying all the charitable and religious expenses but still he is described as *mukhtarkar*.

44. Then there are various *rubkars* of the Collectorates of Bhagalpur and Monghyr. The learned District Judge has dealt with them in detail and I do not wish to traverse the same ground again. Suffice it to say that in none of these proceedings was there ever any claim made that the properties were the personal properties of the maintenance holders or "share holders." I may mention that much stress has been laid upon the use of the word "shareholders." To my mind this does not show anything. They were in fact shareholders of the residue and this will not make them proprietors. However the result of the examination of the various *rubkars* referred to by the learned District Judge in his judgment is that from the time of the death of Shah Gholam Moula up till now the admitted position has been that the property was managed by a

sajjadanashin and manager who was elected by the persons interested in the distribution of the remainder; and he managed the property, met the expenses on religious observances and charities and distributed the remainder among the descendants of Shah Gholam Moula pro rata. Reliance has been placed upon the fact that these alleged rights to receive the maintenance or the remainder have been the subject-matter of some transfers.

45. I have examined these documents. Apart from the question of validity of such a transfer in none of them has a share of the property itself or of the corpus been transferred, but only the right to receive a share of the surplus. Mr. Kurshaid Husnain contends that such a transfer is illegal. This is beside the point. The question is whether these transfers in any way militate against the property being a wakf.

46. The distribution of the remainder among the descendants of the muttawali is not illegal and is permissible. Such cases have arisen in the past. In Macnaghten's Principles and Precedents of Mahomedan law, Ch. 9, we find that though the partition of the endowment itself is illegal, a partition of the profits arising therefrom is allowable (case 3). The profits also of endowment belong of right to the heirs and should be distributed amongst them; but the law of inheritance does not obtain in this species of distribution, the heirs taking per capita. Nor will the portion of one be greater than that of another supposing them to be of equal knowledge and piety. This doctrine is maintained in the Hedaya (case. 7).

47. The fact that in this case the division has been per stirpes and not par capita does not affect the question. This is a matter between them inter se and will not in any way prejudice the charitable and religious character of the endowment. As I have said before the rubkars show that the sajjadanashin and manager and the so called shareholders were before the revenue authorities several times and on every occasion they clearly admitted that the income of the properties was to be employed in the first instance in meeting the charitable and religious observances of the khankah and the balance to be utilized and enjoyed by them. Occasions have arisen in which outsiders for instance, one Sham Singh, charged them with misappropriation and breaches of trust. The Collectors and other revenue authorities summoned them and investigated the matter and found that the charities were being properly looked after. In one of them (Ex. Z-3) it is clearly mentioned that the expenditure on charities was at that time found to be more than half of the net income:

From this it is (torn) clear that out of the entire proceeds of the said pargana after paying the village expenses and the salaries of the servants connected with the collection of rent (torn) which is one of the necessary expenses, more than half of it is applied towards meeting the expenses of the khankah as given in the sanads and the balance which is less than one-half according to the account is spent on meeting necessary expenses and madad mash of all the cosharers whose number is very large.

48. The defendant's grandfather Shah Yasin was the sajjadanashin. When he died the defendant's father was an infant. So instead of him Shah Alay Ahmad was appointed sajjadanashin and manager. Shah Yasin's widow claimed that her infant son should be appointed the sajjadanashin. There was a civil suit which ultimately went up to the High Court: vide Bibee Sayeedan (on behalf of her infant son) Shah Mahomed Wasein v. Syud Allah Ahmed [1864] W.R. 327 Gap., the case referred to the present khankah Mt. Sayeedan admittedly being the grandmother of the present defendant and Shah Alay Ahmad was the de facto sajjadanashin at that time. Bibee Sayeedan lost the case. The dispute there was a succession versus election. I am not using this judgment of the High Court as proof of any particular fact decided therein. But it is admissible in evidence to show that at that time the question of the private nature of the property could have been raised but was not raised. The dispute was about the office of the sajjadanashin and the managership of the property. The whole contention of Sir Abdul Rahim has been that the property is a private one liable to division among the heirs and the expenditure on charities is at the option and sweet will of the sharers; he contends that they may spend any amount they like or if they choose, they need not spend anything. It was, he explains, for the convenience of the management that they by a compromise (Ex. Z-44) mutually agreed to have a sajjadanashin or a manager appointed. This claim of the appellant is not supported by a word in the record. On no occasion has anybody barring, the defendant, ever thought fit to claim that the properties were private. All the documents show that the expenditure on charities was considered obligatory and that the keeping up of a sajjadanashin or manager did not depend upon the will of the shareholders.

49. Much stress has been laid upon the fact that the properties and the institution were not taken charge of under Regn. 19 of 1810. That Regulation was enacted with a view to the proper management of wakfs, debuttars etc., and the superintendence and control of the institution were vested in the Board of Revenue, the Collectors of the districts being appointed local agents. Sir Abdur Rahim has contended that the authorities did not bring this institution under their control, as contemplated in the regulation, and that therefore it should be presumed that there was no trust for religious and charitable purposes. On the other hand the respondents contend, relying upon the various rubkars exhibited in the case, that as a matter of fact the institution was brought under the control of the Board of Revenue under that Regulation. The Regulation, as I have said, vested the Board of Revenue with the powers of control and the Collector of the district was appointed the local agent. The Regulation was passed in 1810 and ceased to be in force after the passing of Act 20 of 1863. The rubkars (Exs. 32 to 39) filed on behalf of the plaintiff and (Exs. X, Y, Z to Z-7) filed on behalf of the defendant refer to the intervening period. They show that the khankah and the properties were on many occasions the subject-matter of investigation and inquiries by the Collector and his subordinates and on some occasions reports were sent even to the Board of Revenue. Mr. Khurshaid Husnain contends that all

these indicate that though the authorities did not formally and directly assume the control of the estate, they from time to time looked into the management and satisfied themselves that everything was all right.

50. First of all no authority has been placed before us to show that if an institution was not taken charge of under the Regulation, it is to be presumed that it was not a public endowment. Certainly if it was taken charge of, it will be almost conclusive proof of the fact that it was a public institution. But the converse is not correct. Secondly, as the learned District Judge has pointed out, the authorities were not very consistent in their interpretation of the Regulation. I find in the rubkar (Ex. 10) that the Collector was of opinion that as the descendants of Shah Gholam Moula were receiving maintenance out of the surplus income of the properties, the Regulation did not apply. This rubkar shows that one Shyam Singh filed a petition informing the Collector that the income of the properties was being misappropriated and on inquiry held, it was ascertained that the income was being applied to the expenditures provided for in the various sanads. The sajjadanashin was called upon to produce three years account-papers. The last portion of the rubkar runs thus:

Accordingly on a perusal of the Council's sanads date 19th February 1780 and the deposition of the said Shah it has been ascertained that the entire pargana aforesaid was granted for defraying the expenses of casual visitors, drum-beaters and meeting the necessary expenses, that is, the personal expenses of the aforesaid persons. In the circumstances I am of opinion that Regn. 19 of 1810 is not applicable to the said pargana and the allegations of Shyam Singh are quite false.

51. On the other hand I find from (Ex. Z-3) that the Deputy Collector of Monghyr was of opinion that the regulation did apply to the estate in question. The report is in these terms:

However we are of opinion that the Regulation is applicable so far as the expenses of the khankah appertaining (torn) are concerned. But as the defendants are meeting the aforesaid expenses which fact has been proved as mentioned above, and as there is not the least doubt about it, it is not in any way liable for interference and reiterated inquiry on the part of the Government.

52. Thirdly it seems to me that on each occasion when the matter came up before the Collector who was a local agent under the Regulation and on inquiry it was found that the institution was being well managed and that there was no mismanagement or abuse, he did not like to interfere in the details of the management. But I fail to understand under what provisions of law these inquiries were being made if they were not under Regn. 19 of 1810. It also appears that on the occasion of the appointment of the sajjadanashins the Board of Revenue was informed and its orders were obtained. Ex. 36 shows that under the orders of the Board of Revenue the Collector visited the institution, called for accounts and submitted a report to the Board. Ex. 39 shows that the Board of

Revenue passed orders as to the sajjadanashinship of the estate. From all these my conclusions are that though the estate was not formally taken up under the regulation some sort of control was being exercised, and that could only have been under the powers vested in the Board of Revenue and the local agent under that regulation. I have said that the learned District Judge has pointed out and I agree with him, that from these proceedings it is quite clear that the action of the authorities was not very consistent. This will not in any way show that the property was not a public charitable institution at least so far as the expenses of the khankah were concerned. On the whole therefore I hold that the properties in dispute are wakf properties or at any rate, they are properties burdened with obligation in favour of the public and, by usage, they have been treated and dealt with as such. The usage can be taken into consideration in deciding whether there is trust. A trust of public nature was decided on the basis of usage in the cases of *Kumaraswamy Asary v. Lakshmana Goundan* AIR 1930 Mad. 549 and *Court of Wards v. Ilahi Bakhsh* [1912] 40 Cal. 297: see also the observations of Chamier, J., in *Puran Atal v. Darshan Das* [1911] 11 I.A. 166 which were upheld in *Puran Atal v. Darshan Das* [1912] 34 All. 468.

53. Hitherto I have discussed whether the property is wakf under the Mahomedan law and I have held that it is so; but for the purpose of the suit however it is only necessary to find whether the properties are trust for public, religious or charitable purposes and come within the purview of Section 92, Civil P.C. The words "trust" and "trustee" have not been defined in the Code and, in my opinion, the words as used in Section 92 have not been used in any technical sense of the term as used in English law or in the technical sense in which the word "wakf" is used in Mahomedan law. The words have been used in the ordinary sense. "Trust" in the most enlarged sense in which that term is used in English jurisprudence may be defined to be an equitable right, title or interest in the property, real or personal distinct from legal ownership thereof and "trustee" is:

A person holding the legal title of property under an express or implied agreement to apply it and the income arising from it to the use and for the benefit of another person: Story.

54. Under the English conception of the term, trust conveys the idea of two estates and two parties: a legal estate vested in the trustee and an equitable estate vested in the cesti que trust or beneficiary. Obviously therefore had the word "trust" been used in the Code in the technical sense of the English jurisprudence the section would have been inapplicable either to wakfs of the Mahomedan law or to debuttars of the Hindu law. But it has been held in a long series of decisions that this section does apply to Mahomedan wakfs and to Hindu debuttars where there is no conception of two estates and two ownerships. What is required for the purposes of Section 92, Civil P.C., is to find whether or not there is a property burdened with obligations for public purposes of a charitable or religious nature. It will apply in all cases, whether wakf or not,

where there is a clear indication that there is an obligation annexed to the property in favour of religious or charitable objects of a public nature. The word "trust" as used in Act 14 of 1920, was the subject-matter of judicial interpretation in *Syed Ali Hussain v. Bibi Akhtari Begum* AIR 1981 Pat. 354 by Kulwant Sahay and Macpherson, JJ. Their Lordships held that the word was not used in the technical sense of English jurisprudence and applies to wakfs. That Act is, if I may say so, a supplement to Section 92, Civil P.C., and the procedure prescribed in the Act may be the foundation of a suit under this section of the Code. It has however been contended that a trust apart from wakf is unknown in Mahomedan law and that the grant in question having been made by a Mahomedan ruler, if it is not wakf it cannot be held to be a trust.

55. I am unable to uphold this contention. If this means that a trust in the technical sense of English law (that is, a double estate: one legal and another equitable) is unknown in the Mahomedan law it is so. But a trust in the sense of being an obligation attached to the ownership of the property is known and recognized by the Mahomedan law. Anglo-Mahomedan jurists have used the word "trust" in respect of wakf. In his well-known treatise on Mahomedan law, the Hon^{ble} Mr. Ameer Ali (latterly a member of the Judicial Committee) has freely applied the word "trust" to a wakf. It is difficult of course for a technical term representing a very complex notion in one system of law to have an exactly equivalent connotation in another system of law. Mahomedan law of course does not recognize the double ownership and the double estate, an equitable right enforceable by a particular Court is unknown in the Mahomedan law. But devoid of this technicality, "wakf" is a trust in the wider meaning of the term. Trust apart from wakf is recognized by the Mahomedan law and is known as "amanat." Reliance has been placed on the dictum of Karamat Husain, J. in *Puran Atal v. Darshan Das* [1911] 11 I.A. 166 (P.C.) for the proposition that trust apart from wakf is unknown in the Mahomedan law. This view was however not accepted by his Lordship's colleague Chamier, J., (afterwards Chief Justice of this Court) and it was the view of the latter which ultimately prevailed in the Court of appeal in *Puran Atal v. Darshan, Das* [1912] 34 All. 468. With my profoundest respect to the former learned Judge I must point out that the view on the law of wakf, as enunciated by him is opposed to a large number of judicial decisions of this country which I have referred to above. Reference has been made to the observations of their Lordships of the Privy Council in the case of *Vidya Varuthi Thirtha v. Balusami Ayyar* AIR 1922 P.C. 123. In my opinion their Lordships did not lay down that a trust apart from wakf was not recognized by the Mahomedan law. That was a case in which the applicability of Article 134, Lim. Act, was under consideration and their Lordships held that in Mahomedan wakfs and Hindu debuttars the property is not transferred to a trustee and therefore the article did not apply. No doubt their Lordships remarked that the charitable dispositions of Mahomedans and Hindus did not manifest themselves in creating trusts but in creating wakfs and debuttars.

56. Their Lordships were in that case using the word "trust" in the English sense

of the term and that judgment is no authority for the proposition that a trust is unknown to Mahomedan law. On the other hand trusts apart from wakfs even for charitable and religious purposes have been recognized by our Courts: vide *Futtoo Bibee v. Bhurrit Lall Bhukut* [1868] 10 W.R. 299. In the case of *Bishen Chand Basawat v. Nadir Hossein* [1887] 15 Cal. 329 their Lordships of the Privy Council applied the principles of wakf to a partial trust. There a property burdened with obligation in favour of religious and charitable objects was sought to be sold in execution of a decree. The High Court of Calcutta held that it could not be done. An argument was advanced from the Bar that the property could be sold subject to the obligation. The High Court observed as follows:

Nor is it essential to decide whether the property became what is known technically as wakf....The Subordinate Judge finds and we think rightly that the deed created a trust for certain specific purposes. This implies the trustee for the time being entitled to hold the property subject to the performance of the duties charged upon it.

57. Their Lordships ultimately held that the property could not be sold. A trust for private purposes was upheld under the Mahomedan law in the case of *Umjad Ali Khan v. Mohumdee Begam* [1867] 11 M.I.A. 517. The distinction between an English trust for charitable and religious purposes and a Mahomedan wakf is more historical than legal. According to the accepted doctrine wakf signifies the extinction of the proprietor's ownership in the thing dedicated and the detention of the thing in the implied ownership of God in such manner that the profits may revert to and be applied for the benefit of mankind: see Baillie and Grady's *Hedaya*. According to the English doctrine historically viewed a trust involves a double ownership and two estates. Practically it involves single ownership with an obligation annexed thereto. The English conception of trust is that while the legal ownership of the property vests in one person the equitable ownership vests in the beneficiaries or what is called *cesti que trust* and this equitable right is enforced by the Courts of equity. The conception of wakf according to the accepted doctrine that the property is vested in God is a later development. The Right Honourable Mr. Ameer Ali in his preface to the second edition of *Mahomedan Law* says as follows:

In some places I have rendered the term "wakf" as trust in others as dedication or consecration....Properly analyzed it will be found that the word "wakf" combines all the ideas conveyed by these different expressions. The Mussalman law holds that there can be no milk (property) without a malik (proprietor) that all property owned by human beings is God's free gift to them and that when a man creates a wakf he transfers the milk (the ownership in the substance of the thing) to the Almighty on the condition that the usufruct should be applied for the benefit of his creatures whoever they may be. It will thus be seen that the word combines the elements of trust dedication and concecration. From one point of view God is the owner of the substance the recipient of the benefaction being His creatures. In another sense, he is the trustee on his behalf the

muttawali being a mere manager.

58. The conception of property being vested in God was evolved a century or so after the death of the Prophet. A full discourse will be found in Abdur Rahim's Mahomedan Jurisprudence, p. 304. The jurists differed as to the ownership of the property. According to Imam Abu Haneefa the ownership of the property even after dedication continues with the wakif or appropriator and the devoting or appropriating of its profits or usufruct in the charity on the poor or other good objects is in the manner of "areeut" or commodate loan but not so as to be obligatory on the appropriator and therefore according to him he may revoke the appropriation or sell the subject of it. There are two ways in which this may be made obligatory: one is by the order of the Judge and the other is by the words of bequest. According to Imam Muhammad the ownership remains with the dedicator till a trustee is appointed and then vests in God. According to Aboo Yusuf it becomes vested in God as soon as a dedication is made.. It is submitted that all this is nothing but a legal fiction. Ordinarily it looks rather strange that a mortal human being transfers a property to God. The legal fiction is brought into play in order to explain where the ownership of the property rests after once a dedication is made.

59. However, the doctrine propounded by Abu Yusuf is the Hanafi law as is at present administered. The Hanafi jurists have not accepted the doctrine enunciated by Imam Abu Haneefa. The Shia lawyers hold that the corpus after dedication becomes vested in the beneficiaries themselves. It is again, I submit, a legal fiction; otherwise it cannot be said that the beneficiaries become the owners of the property in a sense in which the word "ownership" is used in law. A similar legal fiction has been introduced by the Hindu law-givers. According to them debuttar becomes the property of the idol who has been held to be a juristic person under perpetual tutelage of the shebait.

60. From what I have said above it is clear that different systems of law have different explanations as to the legal ownership of a property dedicated for public, religious or charitable purposes. English law recognizes two estates: one legal and another equitable; Imam Abu Haneefa holds the ownership continuing in the appropriator, his two disciples hold the ownership to be in God, the Shias in the beneficiaries, and the Hindus in the idol. But whatever may be the difference in the conception of the legal ownership of the property, there is no differences whatsoever that the beneficiaries have a right in the property which the Courts of law or equity will enforce. The distinction of legal and equitable estate is of no importance now. The same Courts exercise both jurisdictions.

61. The difference in the law of trust and wakf as to the transferability or otherwise of the property is also due to this difference in the conception of the ownership of the property. As under the English law the legal ownership is vested in a human being, he can transfer it subject to the obligation placed upon it. Under the Mahomedan law, while the ownership is vested in God, the muttawali is His manager, he cannot transfer the corpus of the property. A wakf in the

terms of the English law is a trust and if I may be permitted to say so the legal ownership is vested in God and the equitable ownership in the *cesti que* trust; and as nobody can transfer the property vested in God the wakfs are not transferable. Be that as it may, there is no question on the authorities that the properties in suit are trust properties in the wider sense of the term. Even if we assume that the grants of the rulers of Bengal did not create a wakf and that the properties were the personal properties of Shah. Gholam Moula the wasiatnama (Ex. 30) obviously creates a trust in favour of charities. I have already shown that a, transfer burdened with trust is recognized in the Mahomedan law.

62. It has been contended that at the most the property can be taken as a private property burdened with certain obligations. Reliance has been placed upon the case of *Dalrymple v. Khoondkar Azeezul Islam* [1858] 14 S.D.A. 586. In that case the only question decided was that if the office of the muttawali is hereditary the muttawali has power of granting even a perpetual lease. In this case we are not concerned with the power of the muttawali or whether the office of the sajjadanashin is hereditary. In the case of *Shah Mahomed Wasim v. Syed Allah Ahmad* [1864] W.R. 327 Gap. it was held that the office was not hereditary but was based upon election, and it is of the defendant's case that the office is hereditary. Had it been so, he would have been nowhere. Nor are we concerned in this case with the right or powers of the sajjadanashin. That case in no way affects the question of this property being a wakf or a public trust.

63. was further contended that it was a conditional grant to Shah Gholam Moula, and whether the condition of the grant is being fulfilled or not is a matter between the grantor and the grantee and the plaintiffs as representing the public have no right to interfere or claim the preparation of a scheme. Mr. Hasan Jan, who gave the final reply on behalf of the appellant, contended that there was no privity of contract between the grantee and the public. The contract was between the grantor and the grantee and the public did not come in at all. In my opinion this argument is not entitled to any serious consideration. If this is to prevail, no public trust can come in within the purview of Section 92, Civil P.C. In any trust for the benefit of the public there is no privity of contract between the grantor and the grantee on the one hand and the beneficiaries on the other: the beneficiaries come in because they are beneficiaries.

64. has been contended on behalf of the respondents that the defendant having himself come in possession of the property as a trustee, cannot now take up the position that they are his private properties. Reliance has been placed upon the cases of *Srinivasa Moorthy v. Venkata Varada Aiyangar* [1911] 34 Mad. 257 and *Vaidyanatha Ayyar v. K. Swaminatha Ayyar* AIR 1924 P.C. 221. I agree that the defendant is estopped from taking up the position which he has taken in the present suit. The khewat of the Record of Rights and the Register D, maintained under the Land Registration Act show the properties to be trust. The Record of Rights has a presumptive value and has not been rebutted,

65. I now take up the question of the maintainability of the suit. Sir Abdur

Rahim's contentions are that (1) even if the property is wakf or trust, it is of a private nature and Section 92 does not apply; and (2) if it is private property burdened with obligations in favour of the public, Section 92 has no application. After what I have said above, I do not think it is necessary to consider this point. It is settled law that the word "public" means a section of the public, and it cannot be disputed that provisions for maintenance of khankahs and for distribution of alms and charities, etc., are objects of a public nature, and Section 92 has full application in such cases. Most of the cases referred to above are oases of khankahs and shrines, and no question was raised that they were not trusts of a public nature. Reliance has been placed upon the case of *Delrus Banoo Begum v. Asgur Ali Khan* [1875] 23 W.R. 453 and the decision of their Lordships of the Privy Council on appeal reported in *Ashgar Ali v. Delroos Banoo Begum* [1877] 3 Cal. 324 (P.C.). But there the imambara in question was of a private character and the case has been distinguished in the case of *Ram Charan Lal v. Fatima Begum* [1915] 42 Cal. 933. Reliance has also been placed upon the case of *Abul Hasan v. Saiyed Aziz Ahmad* AIR All. 394. There their Lordships expressly refrained from deciding whether the property was or was not a wakf, but they held that it was not a public trust. There is nothing in the report to show that any section of the public was in any way to be benefited by that institution. On these grounds I hold that it is a wakf of a public nature and Section 92 is applicable.

66. Sir Abdur Rahim has further argued that the suit is bad for defect of parties. He contends that all the maintenance holders (commonly known as shareholders) ought to have been impleaded in the suit. I see no force in this. First of all it is a suit of a representative character and on the findings which I have arrived at the shareholders are no more than beneficiaries under the trust, the plaintiff having instituted the suit on behalf of all the beneficiaries. But Sir Abdur Rahim contends that the decision of the question whether it is a trust of a public nature cannot be arrived at in the absence of the shareholders who claim the property to be a private one. In the first place there is nothing to show that any descendant of Shah Gholam Moula, except the defendant, has ever claimed the property to be a private one: rather, whenever anyone of them appeared before any public authority, the obligation of the trust was freely and ungrudgingly admitted. Apart from this in a suit u/s 92, Civil P.C., only the trustee is a necessary party and not those who may be in possession of trust properties even adverse to the trust: *Makhlachor Rahman v. Faizur Rahman* 35 Ind.Cas. 880. At any rate the plaintiff was not bound to implead those persons who do not put forward any claim adverse to the trust. The property is in possession of the defendant and the case in my opinion can proceed against him, I therefore hold that the suit is maintainable. Then it is contended that as there is a prayer for the declaration of the disputed properties to be a trust, Section 92, Civil P.C., does not apply. It is argued that the section only applies when the trust is admitted and not when the very existence of the trust is in dispute. There is no force in this contention either. When there is a breach of trust a suit for a

declaration that there is a trust and for the preparation of a scheme or the removal of the trustee can only be instituted u/s 92 of the Code. Such a suit will not be entertainable if instituted as an ordinary civil suit. The learned District Judge has rightly held that the suit is maintainable and I entirely agree with him.

67. I now take up the question of the removal of the sajjadanashin. It has been contended that the sajjadanashin as the spiritual head of the institution is not removable. Reliance has been placed upon the case of *Ishtiaq Ahmad v. Saiyid Masood Ahmad* 3 Ind.Cas. 508 and the observations of the learned Judge in the case of *Mohiuddin v. Saiyiduddin* [1898] 20 Cal. 810, *Secy. of State v. Mohiuddin Ahmad* [1900] 27 Cal. 674, and *Piran Bibi v. Abdoor Karim* [1892] 19 Cal. 203. Except in the case of *Ishtiaq Ahmad v. Syed Masood Ahmad* 3 Ind.Cas. 508 it has nowhere been laid down that a sajjadanashin is not liable to be removed however wicked and undesirable he may be. With my profoundest respect to the learned Judges of the Allahabad High Court who decided that case, I am unable to agree with this view. Cases may be conceived in which a sajjadanashin or a spiritual head of a Hindu institution, say for instance, a mohunt of a sangat, may so behave himself that his very connexion with the institution may be repulsive to the general public and may amount to desecration of the sacred places; I see no reason why the Courts cannot interfere in such cases. On the other hand I entirely agree (if I may say so) with the observation of Abdur Rahim, J., in the case of *Sajjada Shah Mahamad Yusuf v. Shaw Habit* 53 Ind.Cas. 677, that a sajjadanashin is removable if a proper case be made out. Cases of the removal of the mohunts are very numerous: see *Subbaroya Chetti v. Subramania Iyer* 48 Ind.Cas. 833, *Zamindar of Kalahasti v. Ganpathi Iyer* 48 Ind.Cas. 897 and *Raja Peari Mohan Mukerji v. Monohar Mukerji* AIR 1922 P.C. 235. No doubt the Courts have not to apply the principle of a muttawali to a sajjadanashin. By him the spiritual line of the founder is continued. People become his disciple mostly not so much on account of his personal qualifications but on account of the fact that by becoming his disciple they are connecting themselves in a spiritual link with the founder saint. Cases of mismanagement or incapacity will not ordinarily be sufficient to remove a sajjadanashin as distinct from the managership of the property. It must be shown that the man is not only incompetent to manage the property but that he is of such a low morality that his continuance as the superior of the sacred shrines and institutions is repugnant and undesirable. I do not wish however to discuss this matter in detail as I propose to allow the defendant to continue as sajjadanashin of the institution and to deprive him only of the management of the property. I shall take up this matter later on.

68. Coming to the facts justifying the removal of the defendant I entirely agree with the findings of the learned District Judge. The alleged acts of mismanagement, immorality and dishonesty of the defendant have been enumerated in para. 22 of the plaint. They are 18 in number. The learned District Judge has found some of them proved and some not proved. The acts of malfeasance and misfeasance which have been proved against the defendant and which have not been properly explained by the appellant's advocates before us

mostly, if not entirely, relate to the management of the property. There have been one or two instances of neglect of duty if not of positive dishonesty (as for instance, not contesting the suit instituted by his father against the khankah in connexion with certain gardens). There are some acts of want of uprightness in maintaining accounts. Apart from this the defendant has adopted an attitude of obstruction. He put forward a claim that the property is a private one which none of his predecessors ever thought of doing. He himself in the former suit did not go the length of claiming the property to be a purely private one. He has withheld accounts from the Courts and the learned District Judge has rightly declined to accept his reasons for doing so. On all these grounds I think that he has rendered himself unfit to be allowed to continue as a manager of the institution. On the other hand charges of immorality have not been proved and taking into consideration the circumstances of the case I do not think a case has been made out for his removal from the office of the sajjadanashin. It has not been proved that he is leading a wicked life.

69. I do not for a moment wish to belittle the misdeeds of the defendant, but at the same time I must note that he was to some extent tempted to adopt the untenable position which he took in the trial of the suit and in this Court. He was elected a sajjadanashin in 1913. Nothing was alleged against him till 1922. In that year a suit u/s 92, Civil P.C., was instituted against him. His defence was that Shah Abdul Rasheed, the son of the late sajjadanashin Shah Sami Ahmad, who was a minor in 1913 and could not be elected as sajjadanashin on his father's death, having come of age wanted to regain the position which his father held. Whatever might have been the misdeeds of the defendant, I have reason to believe that the suit of 1922 was instituted more in the interest of Shah Rasheed than in the interest of the public. The suit was withdrawn as soon as the defendant came into terms with him and executed the ekrarnama (Ex. 1 in the case). Paras. 5 and 14 of this ekrarnama have not been printed in the paper book. We got them translated and a copy is attached to this judgment. The term ON which the case was allowed to be dismissed was in effect that Shah Abdul Rasheed would get Rs. 200 per month: Rs. 100 for the expenditure of maintaining the madrassa of which he would be placed in charge and another Rs. 100 by way of allowance and it was also stipulated that though Shah Abdul Rasheed would get these allowances, he would not be required to stay at Moula nagar. In fact the provision was that Rs. 200 per month would be handed over to Shah Abdul Rasheed to do whatever he liked with it. On the defendant agreeing to these terms the suit was dismissed.

70. It is obvious that had the defendant been such a bad lot as he is painted now, the suit would not have been withdrawn on his executing the ekrarnama, the main object of which was to benefit Shah Abdul Rasheed. The defendant's case is that as this ekrarnama contained new terms contrary to the usage prevailing in the institution he had to cancel it. I have no hesitation in holding that the defendant was justified in cancelling this ekrarnama which in a way allowed Rs. 200 a month to a man holding no definite office in the institution.

71. It seems to me that the sajjadanashinship of this khankah has been an apple of discord practically throughout the whole history of this institution. Disputes and fights are apparent from some of the rubkars which have been filed in the suit. I have said that Shah Yasin, the grandfather of the defendant, was the sajjadanashin. On his death his son Shah Wasim, the plaintiff's father being an infant, one Shah Allay Ahmad was elected a sajjadanashin. There was a litigation up to the High Court. Shah Ally Ahmad was succeeded by his grandson Shah Sami. His term of office seems to have been rather peaceful. On his death the family of Shah Wasim again managed to capture the office and the defendant was elected. As soon as Shah Rasheed Ahmad, son of Shah Sami Ahmad, became of age, he wanted to get something out of the office which was formerly held by his father and managed to secure Rs. 200 a month by the ekrarnama (Ex. 1). During the litigation it is apparent that some of the account books of the defendant were stolen and then produced in Court to contradict the account filed by the defendant himself. In this litigation unfortunately there have been intrigues and counter-intrigues. The respondents have laid much stress upon the falsity of the accounts. No doubt there are contradictions between the two sets of accounts: Exs. 3, 3-a, and 4 on the one band and Exs. 5 on the other. But. these account papers exhibited on behalf of the plaintiff have a history behind them. They were stolen from the office of the defendant by some of his disloyal servants and then produced in the previous suit to contradict the accounts filed therein by the defendant. After the dismissal of the suit they were taken back and have again been filed in this suit. One of the sets bears the initials of the defendant (S.M.K.). It is difficult to find out how far the defendant is responsible for it. The manner of this production makes one suspicious. The defendant is obviously an incompetent person so far as management of a zamindari is concerned and knows very little of accounts. These papers may be the outcome of a deep planned design, as when one's subordinate are disloyal anything may happen. The clerks might have intentionally kept two sets of accounts to be used against the defendant.

72. All this however can in no way be used as an excuse for the defendant for adopting the attitude which he has taken in this case for which I have held that he is unfit to continue as the manager of the property. But it has not been shown that he is a man of such a wicked character or loose morals as to necessitate his removal from the sajjadanashinship also. After all the office is based to some extent on the belief of the people, and I am of opinion that so far as the order of the removal of the defendant from the office of the sajjadanashin is concerned, it should be reversed, He was elected by the descendant of Shah Gholam Moula and there is nothing on the record to show that the majority wanted his removal. No doubt three of them have been examined as witnesses in the case, but in an institution like this there shall always be dissentient voices: all cannot agree to one man.

73. In the documents the head of the institution has been described as sajjadanashin and manager, and I see no objection in making provisions for

separation of the offices. No doubt up till now both the offices were held by one and the same incumbent, but in preparing a scheme the Court is not bound to follow either the terms of the grant, if any, or even the usage which has been in force so far: see *Prayag Doss v. Tirumala Sri. rangacharlavaru* [1905] 28 Mad. 319 and *Mahomed Ismail Arif v. Ahmed Moolla Dawood* AIR 1916 P.C. 132. In the case of *Sujjada Mahamad Yusuf v. Shaw Habit* 53 Ind.Cas. 677 cited above, the Madras High Court did separate the office of the sajjadanashin from that of the manager. Therefore while upholding the order of the learned District Judge so far as removing the defendant from the managership of the property is concerned, I am of opinion that it is neither necessary nor desirable to remove him from the office of the sajjadanashin. This will however in no way affect the rights of the shareholders to remove him if they choose to do so in conformity with the scheme to be prepared, nor will it in any way interfere with the powers of the learned District Judge if he, for any future act of the defendant on a proper application made, to him decide to remove him.

74. There is another matter in which the decree of the learned District Judge requires some modification. This is in respect of the order about the taking of the accounts from the defendant. As sajjadanashin by election the powers of the defendant were more than that of a muttawali or trustee. The decisions which I have referred to above show that a sajjadanashin is not a muttawali and his powers of expenditure are wide, and as long as he keeps up the institutions in a fairly decent condition, he is not accountable to anybody. No doubt those decisions do not apply to the present case where the surplus after meeting the necessary expenses is to be distributed among the maintenance-holders; but nevertheless directing him to render accounts for the previous years without some limit will be a very complicated affair especially when there are indications on the record to show that at the time of the previous suit the account papers of the defendants were stolen and there is reason to believe that the plaintiffs in that case were to some extent privy to it. This being the state of affairs it will not be in the interests of justice" if the defendant be now called upon to render accounts without some limit being imposed upon it. On the other hand I do not want in any way to jeopardize the interests of the maintenance-holders who have been depending upon the allowances for the last one hundred and fifty years or more. The decree of the learned District Judge should in my opinion be modified in such a way as would confine the rendering of accounts only to ensuring that a reasonable amount has been distributed among the maintenance holders. If it is found that about half of the income of the estate has been distributed among the maintenance-holders no account of the remainder shall be taken from the defendant. This is the proportion roughly speaking which was being distributed among them.

75. If on the other hand much less than that has been distributed, the District Judge will proceed to take accounts from the defendant for a period of three years prior to the institution of the suit and for the period of the pendency of the suit. The descendants of Shah Gholam Moula, commonly called shareholders,

have been receiving the surplus of the income. I agree with the learned District Judge that these maintenance-holders should not be deprived of what they have been getting for the last 150 years. A provision to this effect fixing a proportion between the two classes of expenditure should be embodied in the scheme. I am not unmindful of the fact that a time may come when the amount to be received by a particular individual is so small and insignificant that it will be of no use to the recipient to receive it, and it will be contrary to the intention of the grantor to pay it; in other words, it will be too small to be called a maintenance. In that case the recipient may himself refuse to take it or the Court on a proper application made modify the scheme and apply the doctrine of cypress to such an amount. It is also necessary that the broad principles of the scheme should be embodied in the decree.

76. In view of the remarks I have made it is necessary that in lieu of the decree of the learned District Judge a fresh decree be prepared in this Court in the following terms:

(1) That it be declared that the Moulanagar khankah is a public, religious and charitable institution and that the properties appertaining to it mentioned in Schs. 1-A and 1-B to the plaint are public trust properties primarily intended for the maintenance of the said khankah and for the maintenance of the charitable, religious and educational institutions attached to it and a full discovery of the trust properties shall be made.

(2) That a scheme be prepared for the management of the said khankah and the properties attached thereto; that it be declared that the religious, charitable and educational expenditures on the scale provided in the scheme are the first charge on the income of the said properties and the balance left is to be distributed among the descendants of Shah Gholam Moula in the same manner in which it is being distributed up till now.

(3) That the defendant be removed from the office of the manager of the properties attached to the institution, but will continue as sajjadanashin of the khankah till he is removed either in the manner provided in the scheme aforesaid or by the District Judge for any act of misconduct committed by him subsequent to this date.

(4) That till such time as the defendant continues to be sajjadanashin of the khankah a manager or muttawali shall be appointed in the manner provided in the scheme aforesaid.

(5) That if on account of death, resignation or otherwise the defendant ceases to be the sajjadanashin, the manager to be appointed under Clause (3) shall also vacate office and a joint sajjadanashin and manager or a separate sajjadanashin and a separate manager shall be appointed in the manner provided in the scheme aforesaid.

(6) That an inquiry shall be made in such manner as the learned District Judge

directs as to the proportion of the net income of the estate that has been distributed by the defendant among the maintenance-holders during the period commencing from three years before the institution of the suit till the assumption of charge by the receiver appointed by the Court. If on such enquiry the District Judge finds that the defendant has not distributed among the maintenance-holders one-half of the net income of the property or such lesser sum as the learned District Judge considers reasonable, an account of income and expenditure of the trust properties for the period aforesaid shall be taken from the defendant and a decree for a sum not exceeding the difference of the amount so distributed and half of the net income of the property shall be passed against the defendant. The court-fee required for the preparation of this decree shall be paid by the trust estate. The decretal amount realized shall be paid into the Court and distributed among the maintenance-holders in such proportion as the District Judge directs.

(7) The scheme shall provide for, among others, the following:

(a) Provision for a sajjadanashin and a manager, the posts being held either by one or by two different persons, and the manner of their election, appointment and removal.

(b) Provision for allowances to be paid to the sajjadanashin and the manager if the offices are held by one person and also when they are held by different persons.

(c) Proportion of income to be spent on the religious, educational and charitable objects and the proportion to be distributed among maintenance-holders with due regard to the past usage.

(d) Distribution of duties between the sajjadanashin and manager when the offices are held by different persons so that the sajjadanashin may remain in charge of the religious duties and maintain them out of the funds provided by the manager.

(e) Provision for the appointment of a committee of supervision for the preparation of the budget and supervising the works of the sajjadanashin and the manager.

(f) Provision that the sajjadanashin and manager shall as far as practicable be from among the descendants of Shah Gholam Moula.

(g) Provision for periodical audit of accounts and their inspection.

(8) The scheme prepared shall be liable to be modified or altered as occasion arises on a proper application made to the District Judge.

77. The District Judge will now proceed to prepare a scheme for the management of the trust properties. At the time of the preparation fullest opportunity will be given to the descendants of Shah Gholam Moula to appear and represent their case before him. He will also consult and take the views of such persons

interested in the institution as he thinks fit. Till the scheme is prepared and given effect to, the receiver appointed by the Court will remain in office. He will pay to the sajjadanashin such sum for the performance of the religious ceremonies and his allowance as the District Judge directs.

78. The decree of the lower Court is varied but the appeal has in the main failed and with the modifications above indicated is dismissed with costs. The defendant-appellant shall personally pay the costs of the plaintiffs both of the Court below and this Court. The hearing fee in this Court shall be calculated at the rate of Rs. 75 for each day of the hearing. A fresh decree will be drawn up in this Court.

79. Scroope, J.--I have had the advantage of reading the judgment of my learned brother and I agree with his findings and the decree he proposes to pass in this case.

80. In the written statement the defendant took the plea that the reference to religious and charitable purposes in the original grant was really not a condition attaching there to and was not the operative part of the grant but was rather by way of recommendation and as expressing a pious wish of the grantor. We have in this case a number of documents in which the property is referred to, covering a period of almost two centuries from the original Moghul grant in 1748 down to the present time--I refer in particular to the original sanad, the warasatnama the confirmatory sanads of the East India Company, the rubakarīs of the Collectors of Monghyr and Bhagalpur, the different land registration proceedings, the plaints and written statements in suits relating to this property, and the finally published Record of Rights. In every one of them there is a reference either direct, incidental or inferential to the trusts attached to this property. Here and there from the different documents isolated words and sentences have been extracted by the appellants as indicating complete proprietary right in the property free from all trusts; but the document's must be read as a whole, and in my opinion applying the test of contemporaneous exposition no other conclusion whatsoever is possible than that the suit property is burdened with a public trust of a charitable or religious nature.

81. Questions relating in one way or the other to this property had been frequently before the Courts both revenue and judicial; before the former in the early days of the last century when apparently one Shyam Singh called into question the nature of the grant, again with reference to the desirability of its being taken charge of under Regn. 19 of 1810: and later still in proceedings under the Land Registration Act; before the latter in the form of suits for the disputed sajjadanashinship, suits for accounts, suits for rents and so on; in truth until in the present case the defendant has done so, nobody ever set up a claim of complete proprietorship unburdened by any obligation of a public or private nature. As to defendant himself, in 1913 he applied for registration of his name in his capacity as sajjadanashin and he was registered as muttawali in respect of the property connected with the khankah. In 1914 he defended a suit in respect

of this property and stated that it was a wakf property and that nobody had any proprietary rights in it: vide Ex. 20. In 1916 he filed a suit for accounts on the footing that certain villages including the property now in suit were wakf property of the Moulanagar khankah of which he was in possession as sajjadanashin; in the previous wakf suit in 1922 he pleaded that the properties were burdened with the discharge of certain charitable and religious functions, having been granted originally as "madad mash" to Shah Gholam Maula. There are abundant other instances on the record where litigation proceeded on the footing that these were trust properties. Again ever since its creation, this estate has spent quite a considerable portion of its income in the charitable purposes enumerated in the original grants. I refer to defendant's own document Z (3), a rubakari of resumption proceedings in 1836 in the Court of the Deputy Collector of Monghyr, for settlement of the pargana under Reg. 2 of 1819 and 3 of 1828. The Deputy Collector found that the then holders of the estate had in the seven years from 1233 to 1239 Fasli spent more than half the income on the purposes of the khankah. Again in Ex. 42 a written statement by sajjadanashin Aley Ahmad runs as follows:

The defendant admits the plaintiff's allegation in his plaint that the annual expenditure in connexion with the khankah is Rs. 20,000.

82. Again the defendant himself in his evidence pleads annual expenditure of Rs. 8,000 to Rs. 9,000 on the upkeep of the khankah and the objects connected with it. Indeed he has never challenged the actual practice in this respect and he could not do so on the facts. Sir William Hunter in his Statistical Account of Bengal describing the revenue-free tenures of the Monghyr District, writes in 1876 as follows:

The largest revenue-free tenure in the district is the entire Abhaipur Parganna held by the khankah or monastery at Maulanagar which was confirmed by sanad of council, dated 9th February 1786. The proceeds of the estate are expended in feeding travellers and beggars, in keeping a school and a mosque, and also in the personal expenses of the endowed family.

83. In face of this long course of contemporary exposition and usage and apart from there being a very clear case of estoppel against him it is in my opinion entirely idle for the defendant now for the first time to set up a claim to full proprietorship. As Lord Turner said in the Attorney General v. Corporation of Rochester [1854] 5 De. G. M. & G. 797:

Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument the Court will lean to that construction of the instrument (provided it be doubtful) which will best correspond with the mode in which the funds have been for so long a period applied.

84. Applying the test laid down by this learned Judge the plaintiffs are in my opinion on practically unassailable ground, in fact sufficient to conclude this part of the case: and as my learned brother has shown the original sanad indicates very strongly that the grant to Shah Gholam Maula was not a personal grant for the maintenance of the khankah founded by Shah Nizamuddin.

85. The really substantial contention in the appeal was that the property is not legally wakf and that if it is wakf the position of the defendant is not that of the trustee in respect of it and that therefore Section 92, Civil P.C., has no application. There is very great similarity between this case and the two grants referred to in *Kulb Ali Hussein v. Syf Ali* [1814] 2 (S.D.A. Beng.) 139 and *Mt, Quadira v. Shah Kabeer Ooddeen* [1875] 25 W.R. 557; two grants were in question in the latter case and it is to the second grant, commonly known as the Alamshahi grant that the grant in suit bears a very strong resemblance. Those two cases entirely dispose of the contention advanced for the appellant that the grants lack the essentials of wakf as no charitable intention is expressed in the document and as the characteristic of perpetuity is wanting. Wakfs in connexion with khankahs are a very well-known feature of Islamic institutions and have been recognized in numerous decisions of which the two mentioned above bear the closest resemblance to the present case.

86. I would also refer to the decision of the Privy Council in *Jewan Doss Sahoo v. Shah Kubirooddeen* [1840] 2 M.I.A. 390 which follows these two decisions. I can see no substance at all in the contention that the objects in the sanad, namely meeting the expenses of the drum-beaters, travellers, the madad mash of sajjadanashin and the upkeep of the khankah, are not valid objects of wakf. They seem to me when taken together, to fulfil the requirements completely as indicated in the leading text-books on Mahomedan law.

87. Indeed Sir Abdur Rahim has taken all what I may call the stock objections that can be taken against a claim of wakf: for instance, another contention was that the original sanad constituted a family settlement in favour of Shah Golan Mania and that the distribution on religious objects was left entirely to the holder's discretion and that these incidents negative a valid wakf. Apart from the Wakf Validating Acts, 1913 and 1923, with which admittedly we are not concerned here, whatever uncertainty there might have been at one time regarding the legality of family settlements in the form of wakf, the law is more or less crystallized by reason of the decisions of their Lordships of the Privy Council, for instance, in *Mahomed Ahsanulla Chowdhury v. Amarchand* [1889] 17 Cal. 498 and *Ramanadan Chettiar v. Vava Levvai Marakayar* AIR 1916 P.C. 86. As a result of these and other decisions an endowment is not vitiated as wakf by the fact of its containing provisions in favour of the founders of the family or in favour of a particular family and their descendants provided that the primary object appears to be a permanent application of the property to some public and unfailing purpose. As my learned brother has shown such permanent application is the result of the deed in question (Ex. 50) and, as I said above it has not been

disputed that ever since its foundation a considerable portion of the income has always been devoted to charitable purposes. Nor do I think can it be seriously contended that it is an illusory wakf; obviously the grantor could have had no object in creating a fictitious wakf in favour of the descendants of Shah Gholam Maula. His purpose undoubtedly was a charitable one, namely to provide for the upkeep of the khankah.

88. Sir Abdur Rahim relies very strongly on the case of *Kuneez Fatima v. Saheba Jan* [1840] 2 M.I.A. 390 as meeting the cases which I have followed. It is true that the sanad in that case is not at all unlike the sanad in the present case; but there the decision was very much influenced by the fact that the former proprietors had dealt with the estate in a manner wholly inconsistent with its being an endowment and the alleged endowment there had never come under the superintendence of the Board or the local agents established by Regn. 19 of 1810. As my learned brother has pointed out though the right to receive the maintenance from the residue after the necessary provision has been made for charity has been the subject-matter of transfer, there is no instance of any transfer of the corpus of this property and, as I said, there has been for well nigh two centuries consistent disposal of quite a considerable part of the funds on charitable purposes.

89. As regards the application of Regn. 19 of 1810, as has been shown in the judgment of my learned brother and of the first Court, the action of the revenue authorities at the time was seemingly inconsistent and the position is undoubtedly obscure. It must however be borne in mind that the object of this Regulation was to provide that all endowments for the support of mosques, temples, etc., should be applied according to the real will and intention of the grantor to use the words of the preamble. Government did not, under this Regulation, actually assume the management of these endowments; they only made themselves responsible for their due application; local agents were to be appointed for the discharge of these duties by the Board of Revenue and the Commissioners and they were to ascertain the necessary particulars regarding all endowments and report them to the Board of Revenue; my reading of the various rubakaris on this point is that as Government was satisfied as a result of their inquiries undertaken under this Reg. that the public trusts connected with the property were being duly provided for, they considered it unnecessary to interfere any further with the management of the property, more especially as it was a rent-free grant to Shah Gholam Maula. Whatever doubt there may have been in the minds of the officers dealing with the question as to the applicability of the Regulation, they had no doubt at all, so far as I can see, that the property was burdened with a public trust of a charitable nature. Some cases of Government interference with the trust must however be emphasized. In 1856 the Collector of Monghyr under instructions from the Board of Revenue made a personal investigation into charges against Shah Muhammad Yasin for "mismanagement of the Abhaipur trust."

90. After investigation by calling for a statement of five years receipts and expenditure, nothing was found to justify the allegation of mismanagement. In February 1858 the Commissioner asks the Collector to report the name of an individual duly qualified to be sajjadanashin in place of the late Shah Muhammad Yasin and in May 1858 ha informs the Collector ha has rejected objections against the nomination of Aley Ahmad. A letter of the Board of Revenue in September 1858 confirms these proceedings of the Collector and Commissioner: vide Exs. 36, 37, 38 and 39, where the property is referred to indifferently as the "Abhaipur Trust," "Abhaipur Endowment," "Abhaipur Institution."

91. This interference is irreconcilable on any other explanation than that it was a public trust of a charitable or religious nature. In my view of the matter, so far as the applicability of this Regulation goes, the history of the matter is decidedly against rather than for the defendant. Besides, another consideration which must be borne in mind is that we are here considering whether the property is a trust for a religious or charitable purpose as contemplated u/s 92, Civil P. C.; and the learned District Judge rightly took the view that even if the wakf theory should fail for any reason, we are not only entitled to presume, but ought to presume, the existence of a charitable and religious trust, as is said in *Mahant Puran Atal v. Darshan Das* [1912] 34 All. 468. Sir Abdur Rahim argues that a public trust other than wakf is unknown to Mahomedan law. The sole authority for this proposition seems to be the dictum of Karamat Husain, J., in *Puran Atal v. Darshan Das* [1911] 11 I.A. 166 (P.C.), but, as my learned brother has shown, the view taken in that particular case by that learned Judge was not accepted in the Court of appeal in *Puran Atal v. Darshan Das* [1911] 11 I.A. 166 (P.C.). There were some old decisions to the effect that heritable property might under Mahomedan law be burdened with a trust of a religious nature, such as, maintaining the tomb of a saint without becoming wakf and that it might then be alienated subject to that trust: see *Bibee Kuneez Fatima v. Bibee Sahiba Jan* [1840] 2 M.I.A. 390 and *Futtoo Bibee v. Bharrat Lal Bhukut* [1868] 10 W.R. 299. But these cases were overruled by the decision of the Privy Council in the case of *Bishen Chand Basawut v. Syed Nadir Hossein* [1887] 15 Cal. 329 in which a property burdened with a trust of this nature was held not to be attachable by personal creditors of the trustee as of course it would have been if he could have alienated it subject to the trust.

92. This latter case does not go the length of saying that there cannot be a public trust without its being wakf but what it does say is that a property burdened with such a trust is inalienable which of course is the main characteristic of a wakf. Similarly here the question is whether the property is trust property within the purview of Section 92, Civil P.C., and very clearly it is and has that characteristic of wakf. As to whether it has all the other characteristics of wakf the question is really academic once the above finding is arrived at. What I wish to lay stress on is that, assuming the correctness of Sir Abdur Rahim's proposition, he has not been able to show that there is any incident in this property foreign to a wakf. The learned advocate in this

connexion also relied on the decision of their Lordships in the Privy Council in *Vidya Varuthi Thirtha v. Balusami Ayyar* AIR 1922 P.C. 123 for his contention that Section 92 had no application to the head and manager of a religious institution like a wakf. The short answer to this argument is that to accept it would mean holding that the provisions of Section 92 have been consistently misapplied by the Courts in India. Decisions after decisions can be cited where Section 92 has been applied to cases of wakfs and Hindu endowments.

93. It was substantially on these lines that the finding of the learned District Judge as to the trust character of the property was challenged at very great length but the argument left me entirely unconvinced. Whatever difficulties there might be in the interpretation of the original sanad, after that the way is clear, and for its time a plainer case of a public trust for religious purposes so far as the practice of nearly two centuries goes it would be difficult to find in this country. Indeed I think that the defendant, in view of his own previous admissions was very ill advised to deny his public obligations in respect of this estate.

94. As to his removal "from the managership, that is inevitable on the findings of the learned District Judge, which passed unchallenged in Sir Abdur Rahim's argument. In his final reply to the respondents Mr. Hassan Jan for the appellant challenged them all, and thus took the respondents and ourselves rather unawares by this unusual procedure. It is perfectly clear that the trust property is being grossly mismanaged: proper accounts are not kept, Government demands are not paid in time, with the result that penalties are incurred; and the defendant has been treating the trust money as his own. Another very serious act of misbehaviour is a nominal lease of 24 bighas of kasht land to his brother-in law, which the learned District Judge has really found to be a conversion to his own use. It is clear that he cannot be allowed to continue in the management. As regards personal misbehaviour rendering him unfit to hold the sajjadanashinship I agree with my learned brother that the charges are not so well established as to justify his removal from his spiritual duties.