BOMBAY HIGH COURT

The Advocate-General of Bombay

Vs.

Yusuf Alli Ebrahim

(Marten, J.)

19.03.1921

JUDGMENT

Marten, J.

1. This is a suit by the Advocate-General ex officio to establish certain charities in the community of the Dawoodi Borahs, who are Shiah Muhamadans of the Mustaalian Branch of the Ismaili sect. The principal defendant is defendant No. 3, His Holiness the Mullaji Saheb, who is the High Priest and Dai or head of the community. Defendants No. 1 and 2 merely claim to be his managers or agents and are of minor importance in this suit.

2. The charity is denied. The contest largely turns on the, exceptional position, and powers which are claimed for the Mullaji Saheb, and as to how far they can be recognized and enforced in a Court of law consistently with the general law of the land. This in its turn involves, a close investigation of the religious tenets of the community.

3. The suit relates to (a) a mosque building. In Bohra Musjid street, (b) the tomb of Seth Chandabhoy Currimbhoy and the offerings placed there in a gulla or offertory box, (c) four Immovable properties purchased out of the surplus gulla funds, and (d) Badri Mahal, the Bombay residence of the Mullaji Saheb, which is alleged by the plaintiff to have been partly acquired by the aid of the gulla funds.

4. His Lordship dealt with the respective positions of the. Advocate-General and the Attorney-General, in charity matters and also set out the pleadings and issues and then proceeded to observe as follows.

5. At the Bar, the respective cases of the parties are to the following effect. The plaintiff's, case at the Bar is that the above properties (a) to (c) are all devoted to charitable, uses, and that Badri Mahal is partly devoted to such uses in proportion to the gulla funds utilized thereon. He further says that, as the charity is denied, there, ought to be a. decree to establish it. His contention that for the same reason the Court's discretion ought to displace that of the Mullaji's as regards the choitee of charitable objects for the surplus gulla funds, and that educational objects should be selected by the Court, was, I think, abandoned during the concluding stages of the trial. The plaintiff does not now seek to have trustees appointed or to deprive the Mullaji of his

management of the suit properties. In particular it is not alleged that there has been any misapplication of the gulla funds apart from a technical question as regards Badri Mahal, nor that there has been any breach of trust apart from the denial of the trust.

6. The charitable objects of the gulla funds as finally contended for by the plaintiff are, first the up-keep of the tomb, secondly, an annual or as feast and majlis ceremony in honour of Seth Chandabhoy with its accompanying illuminations, thirdly, the up-keep of the mosque, fourthly, the holding of a feast on the 21st Ramzan, and, fifthly, such other charity or charities for the benefit of the Dawoodi Borah community as the Mullaji Saheb and his successors, in office may, from time to time, select. An account of the gulla funds expended in connection with Badri Mahal is asked for.

7. As regards the fourth of the above objects, no question arises in this case and it has only been occasionally mentioned. This feast has been regularly held in honor of Ali in the sacred month of Ramzan, and paid for out of, the gulla funds. The defendants do not contend that either this feast, or another feast which has occasionally been held on the birthday of a Mullaji are not charitable objects. This presumably is, because Ali is a saint, and because according to the defendants each Mulaji Saheb (including the present holder of that office) is a saint.

8. The defendants case at the Bar, or as put forward by principal witnesses, is in effect as follows: The defendants admit that the suit properties are not the personal property of the Mullaji Saheb, but form part of the property belonging to the dawat This word dawat means, according to the Mullaji Saheb, the spiritual kingdom of the Dawoodi Borahs and their general affairs." Its approximate meaning is also conveyed by the expression "the administration" and has been so understood at the trial. The defendants further say that the Mullaji Saheb holds the suit properties by virtue of his office as Dai or head of the community, and that on his death these properties will pass to his successor-in-office, and not to his heirs. They, however, contend that there is no charitable trust enforceable in a Court of law, and that the Mullaji Saheb is not accountable to anybody except the Imam in seclusion. To substantiate this, they allege that, according to the tenets of their religion, the Mullaji Saheb is the representative of God on earth, and, as such, is infallible and immaculate. The defendants witnesses further say that, according to these tenets, the Mullaji is the master of the mind, property, body and soul, of each of his followers; that these followers are bound to obey him implicitly and cannot question any act of his that he is entitled to take any property, from his followers, whether trust or private property, and if the former, to alter and cancel the trusts and that there can be no such thing in the Dawoodi Borah community as a permanent irrevocable charitable trust, and that it makes no difference in this respect whether the trust purports to be established by deed or by a scheme of the Court. Defendants Counsel, however, are not prepared to support these extreme allegations of their witnesses so far as they relate to the private property of the followers and to private trusts. Counsel stale that they do not want to put their case too high and that they are not concerned in the present case with private property or private trusts, and so the point does not really arise.

9. Substantially, however, Counsel base their case on the exceptional position or overriding powers, enjoyed by the Mullaji by virtue of (a) his infallibility, and (b) his mastership of all property, whether dawat or otherwise, Infallibility they say is inconsistent with accountability as a trustee. Mastership is equally inconsistent with trusteeship. He is malek or dhdni, so their witnesses say. That means absolute owner. The gulla offerings are given to him as such malek.

To hold, therefore, that he is a trustee would be to defeat the intentions of the donors. So too it is for him to say what are the purposes of the dawat. No one can say him nay.

10. The defendants further contend that, quite apart from any tenets peculiar to their community, no charity is established on the facts. They say in particular that Seth Chandabhoy was not a saint, and that consequently under Shiah Mulfammadan Law his tomb and gulla could not be the subject of a charity. But, even if he was a saint, they contend that the gulla funds are applicable at the sole discretion of the Mullaji for the purposes of the dawat, and that as those purposes include non-charitable as well as charitable objects, there can be no charitable trust. Alternatively they say that the gulla is governed by the law as it stood before the Mussalman Wakf Validating Act, 1913, and that under that law and the Bombay decisions on the subject there could be no wakf of money or other moveable property. Further, if the offerings are regarded as gifts by way of sadakah, such gifts are too vague to constitute a charitable gift.

11. In the earliar stages of the trial, it was contended by defendants Counsel on several occasions that the Mullaji Saheb was in effect God, or for all practical purposes God, and that this suit was sacrilege. The former contention was eventually withdrawn, but it is claimed for the Mullaji Saheb that though he has not the rank he has the powers of the Holy Prophet Mahomed, and that he is a saint or wali.

12. The defendants case, in so far as it depends on tenets peculiar to their community, is based on the Mullaji Saheb being the Dai-ul-Mutlak or 51st Dai in regular succession. If that is not so, they say the Mullaji has no exceptional powers, and the religion is at an end. This is because according to their religion no Dai can die without appointing a successor. Curiously enough the defendants did not expressly plead that the Mullaji Saheb was Dai-ul-Mutlak. They, however, mentioned this title in Issue No. 12A and on August 31, 1920 I gave them liberty to amend their pleadings in this respect. Subsequently, on September 20, I overruled an objection taken by the defendants to this matter being contested, and I directed an express Issue No. 12(B) to be raised on the point.

13. The point as to Dai-ul-Mutlak is this The succession in 1840 of Najmudin, the 47th Dai, has been disputed by the plaintiff, who has alleged that the 46th Dai intended to nominate Najmudin as his successor but died without in fact doing so. In support of this a writing of Buhranudin, the 49th Dai, dated September 11, 1891 (Ex. A.T.1), is relied on, but this is alleged by the defendants to be a forgery. The plaintiff also relies by way of corroboration on a case for opinion of Counsel in April 1895 (Ex. E.O.) This was put in at a late stage, after argument as to its admissibility.

14. In his final address to the Court, the Advocate-General suggested that it was unnecessary for the Court to decide this point. It is at any rate a separate point and I will deal with it later. Meanwhile I will assume that the Mullaji Saheb is, or is considered to be Dai-ul-Mutlak.

15. His Lordship gave a brief history of the suit and then proceeded as follows.
16. Turning then to the facts, what is the community which I have to deal with? The Dawoodi Borahs are the main body of Shia Borahs and mostly descended from Hindu converts to Islam. In Campbell's Bombay Gazetteer, Vol. 9, Part 2, they are described at page 28 as "the richest, best organised, and most widely spread class of Gujarat Mussalmans," and at page 30, "though fierce sectarians, keenly hating and hated by the regular Sunnis and other Mussalmans not of the Daudi

sect, their reverence for Ali and their high priest seems to be further removed from adoration than among the Khojahs." At page 31 it is said that "Daudi customs do not, so far as has been ascertained, differ from those of ordinary Mussalmans," except for the specific instances there mentioned, such as the ruka laid in a dead man's hands. (See Ex. 11 and Notes, pages 188-89.) At page 33 it is said: "Though they seem little inclined to teach their children English or to take to other than their heriditary calling of trade, the Daudis for shrewdness and enterprise hold their own with any class of traders in western India, and of late years the growing use of iron has been a source of special gain to them." This was written in 1889. In recent years it is well-known in Bombay that the war has resulted in a great increase of, prosperity to many members of this community. Education, however, seems to make slow progress among them notwithstanding that the field would seem to be a promising one, and I was impressed by the higher intelligence shown by educated witnesses, such as Nos. 15, 19, 28, 33, 35 and 40, over certain other witnesses for the defence who had not received the same advantages. I was also impressed by the scrupulous neatness and care shown in the dress of most Dawoodis attending Court, and also by their patience and quiet in the discomfort of what was at times an overcrowded Court and exceptionally hot and trying whether.

17. But the Dawoodis are by no means confined to Gujarat. They are found all over India and outside it and the Mullaji Saheb claims to hold sway over them from the Straits Settlement in the East to Zanzibar, in the West. The community is said to number about 3,00,000: their mosques about 648 (see Ex. 56) their Amils, who are local deputies for the Mullaji, about 266 (see Ex. 53) and their principal gullets about 69 (see Ex. 52).

18. According to the pamphlet Ex. A.L. (page 2) "the founder of this line was Ali, son of Muhammad Solaihi, a missionary sent by Ulmustansir, the 8th Fatimite Khaliph of Egypt (who reigned towards the end of the tenth century of the Christian era or fifth of the Hijri), to Yemen with the, double object to preach the Shia faith of the Egyptian dynasty and to rule over the country. He sent several deputies to Sindh and Gujarat to teach religion to the Shias of his faith and to get proselytes among the natives of India. He and his successors were called Sultanis and Dais of Yemen." Ulmustansir was the 18th Imam and reigned from 1036 A. D. to 1095 A.I), (see Ex. 34.) The reference to the 10th century is, therefore, a mistake for the 11th century. The count in Campbell's Bombay Gazetteer at page 26 agrees roughly with the above date of the mission, but states that the missionary's name was Abdulla, or else Muhammad Ali (see note 1), and that he landed at Cambay.

19. It was at the death of this 18th Imam that the break occurred which now divides the Borahs from the Khojas. The Borahs followed the younger son Mustaali,and the Khojas the other son Nazar, and hence arose the two branches of the Ismaili sect known as the Mustaalians and the Nazarians. (See Campbell, page 30, note 1.) The Ismaili sect in its turn had arisen from a disputed succession at the death of the 5th Imam, about 765 A.D., they following Ismail, the son of the 5th Imam's eldest son, in preference to Musi Kazim, the 5th Imam's second son, who was supported by the majority of the Shiah community, now called Asna-Asharyas (see note). These sects and sub-sects are conveniently tabulated at page 97 of Wilson's Anglo-Muhammadan Law (4th Edition).

20. To contimie the history of the Borahs, the Dawoodi sub-sect arose about 1589 A. D. on the death of the 26th Dai Dawoodji. They then followed. Dawood bin Kutubshah in preference to

Sulaimani whom the minority followed. (See Campbell, page 27). Hence arose the name Dawoodi Borahs. They are however, sometimes called Tyebis after Tyeb the 21st and last revealed Imam. An important event in the history of the Borahs occurred about 1539 A.D. when the seat of their High Priest was removed from Yemen in Arabia to Gujarat. For the last 155 years or so this seat has been established at Surat. It had previously, been at Sidh-pur, Ahamadabad, Jamnagar, Mandvi, Uj-jain and Burahnpur. (See Campbell, pages 27 and 31.).

21. It is also important to bear in mind that the Dais have never had any sovereign power since they ceased to be Sultans of Yemen and came to India. Thus at pages 1-3 of Ex. A.L. the 48th Dai says:

> My predecessors do not belong to one family.... They are all missionaries and spiritual teachers and consequently kept aloof from political matters....They had no wordly ambitions, the spiritual happiness of the next world being all in all to them and their greatest ambition was to have beatitude of the Lord.... As the Dais in India had no hand in the ruling of the country on account of their exclusively religious calling they had taken no share in the political events and their names never appeared in any of the Indian histories.

22. In this connection I may also refer to the evidence taken in camera. It would, however, appear from page.5 of this pamphlet, Ex. A.L., that at one time the Dai and his followers possessed certain extra territorial privileges granted by the Maharajas Holkar and Scindhia.

23. But in fact the Dai does not claim to interfere in any way with the temporal ruling of this country nor with its law Courts. On the contrary in Ex.A.L. emphasis is laid by the then Dai on the friendly relations that have always existed between the priestly gadi and Government. The present Mullaji bears this out in his evidence. He also states that he is content that the temporal affairs of his community should be entirely subject to the British Courts of Justice and that he would not be entitled to dictate to, or otherwise interfere with, a Dawoodi Borah Judge or Magistrate. He goes even further when he says that if necessary he would enforce his powers as Mullaji in the ordinary Courts of Law, supposing any member of the community resisted him.

24. The official position of the Mullaji Saheb is thus described in Campbell's Bombay Gazetteer at page 31:

> Their leader, both in things religious and social, is the head Mulla of Surat. The ruling Mulla names his successor generally but it is said not always, from among the members of his own family. Short of worship, the. head Mulla is treated with the greatest respect. He lives in much state and entertains with the most profuse liberality. On both religious and civil questions his authority is final.

25. This description is amplified in the pamphlet (Ex. A.L.) which was published in 1890 by the 48th Dai. It is much to the same effect, but at page 11 it speaks of "the Mullaji as a supreme being, inferior only to the one Deity who has created them all.

26. To appreciate the high position which the Mullaji occupies in the estimation of his followers, one must understand the nature of the spiritual mission claimed for him. One leading tenet of the Dawoodi Borah faith is that God has always had and still has a representative on earth through whom His Commands are conveyed to His people. That representative is called an Imam. The early Imams were the major Prophets Adam, Noah, Abraham, Moses, and Our Lord Jesus Christ. There were also otherJmams who were minor Prophets. Then came the Holy Prophet Muhammad, and after him his son-in-law Ali, and Ali's sons Hassan and Hussein by Fatima, the Prophet's daughter. It is their devotion to the Prophet's daughter, her husband and sons which is amain point of difference between Shias and Sunnis, but this was dealt with exhaustively by Mr. Justice Arnould in *Advocate-General v. Muhammad Husen, Hmmi*[1] *(Agh Khan case)* and I need not dwell on it.

27. Following on the tragic deaths of Hassan and Husein came a succession of revealed Imams, the last of whom was Tyeb, the 21st Imam, who succeeded in 1131 A.D. when a child and afterwards went into seclusion. Since that time there has been no revealed Imam, but the belief is that some successor of the 21st Imam is always on earth and that one day the Imam of the time will, reveal himself. Meanwhile the Imam of the time must in his turn act through a representative, and that representative is the Dai-ul-Mutlak or absolute Dai.

28. Accordingly the Dai-ul-Mutlak as the representative of the Imam is the representative of God and conveys God's message to his people. For that purpose the Dai must have similar powers to those of the Imam. Thus as the Imam is immaculate and infallible (mazoon), so the Dai is like immaculate and infallible (kul-mazoon). The defendants say that there is no practical difference between these two expressions, and that the only use of the word "kul" is to mark the difference in rank between the Imam and his Dai. In like manner one might argue as to what difference exists between a trustee and a quasi trustee.
29. When the Imam comes out of seclusion, these powers of the Dai will immediately cease. Meanwhile the Imam has a staff of 26 in seclusion with him. viz., the Bab (the chief of the Imam's staff); 25 Hujjats, 12 of whom are with the Imam and 12 in charge of the different districts, and the Dai-ul-Balagah. If the Imam was revealed the Dai-ul-Mutlak would occupy a lower rank than any of the above officials.

30. Prior to the 21st Imam, there had also been seclusion of the 7th to 10th Imams, but their names and whereabouts were known to their head officers. This seclusion was probably due to persecution by the Sunni Caliphs, and it really meant that they were hiding from their enemies.
[1]12 B.H.C.R. 32
31. Another belief is that as an Imam cannot die without leaving a son, his line is still being perpetuated by earthly descendants, although it is not known who those descendants are, so, too, the Dai on earth cannot die without appointing a successor.

32. Another tenet put forward by the defendants is a chain of intercession with the Almighty. This can only be through the Dai, the Imam and the Holy Prophet, If the intercession is-sought by or by the aid of the deceased person, such as, Seth Chandabhoy, then it is said that the intercession can only reach the Almighty through the Dai and the Imam of the time of such deceased person. Thus it would be proper for the present Mullaji to ask for Seth Chandabhoy's intercession, but in that event the prayer would reach God through the Dai and the Imam of Seth Ohandabhoy's time. If, on the other hand, the intercession is sought by a person now living, then

it would reach God through the present Dai and Imam.

33. Some comment was made that this chain of intercession was not put to the plaintiffs principal witness Shaikh Faizullabhoy. But I am satisfied on the evidence that it is an article of belief, and that though its details may be esoteric and known only to a few, its essentials are dealt with in. periodical sermons, to the people.

34. On this particular point the evidence was mainly oral, but on the main points a large quantity of religious texts and writing were put in by the parties. The interpretations of certain texts or the deductions to be drawn from them, varied as one might expect from theologians, but on the broad general principles, of the faith, as above described, I do not think any serious difference was disclosed. The claim to mastership over all property I will deal with later.

35. A remarkable document, which is relied on by the Mullaji, is the meshak or oath of allegiance (Ex. 17), which it is customary for all Dawoodi Borahs to take on attaining puberty, and also subsequently. To a considerable extent it bears out the Mullaji's claim to authority, and it is particularly emphatic on obedience to him and on the punishment meted out to an oath-breaker. The community looks upon this document as sacred and secret so I will not cite its exact terms, but I may note in passing that at times it may be the duty of the follower to conceal the truth as to his religion. Probably this is due to persecution in days before the British Rule. I notice that in the Aga Khan case 12 B.H.C.R. 323 a similar practice was found to exist among the Khojas. It is called Takiat. I may note, too, that, in weighing, evidence one must bear in mind the doctrine of implicit obedience to defendants No. 3,and his powers of ex-communication and their consequences. In certain particulars the modern meshak would appear to have been taken from a form now obsolete. For one thing, it purports to give the Mullaji certain powers which he expressly disclaimed in the witness-box. For another, it countenances the possession of slaves which has long since been a criminal offence in India (see Indian Penal Code, Section 370). The Mullaji himself says that Ex. 17 purports to be ninety years old.

36. I have now said enough to show that the Mullaji's religious position is so high that it only causes confusion and perhaps injury to overstate it as his Counsel did. It is incorrect to say that the Mullaji Saheb is in effect God, or for all practical purposes God, and that it is a sacrilege to bring the present suit. This is, I think, opposed to the leading tenet of the Muhammadan faith which is known to educated people all the world over, viz., "There is but one God and Muhammad is his Prophet." The Holy Koran itself lays it down that the error the Christians made was in treating the Prophet Jesus as divine and in adopting the doctrine of the Triune God but that they were sight in so far as they treated our Lord as a prophet and that the error of the Jews was in rejecting him altogether. Divinity, therefore, is a real distinction.

37. Moreover, the Mullaji Saheb does not claim the rank but only the powers of the, Prophet Muhammad. The Dai's rank comes below that of the Imam and the Hujjat. His powers are at least thrice delegated, viz., by God to Muhammad, by Muhammad to the Imam, and by the Imam to the Dai-ul-Mutlak. It is sufficient to say that the holder of such powers is masoom or kul-masoom. To go further is to expose him to the criticism of Mr. Justice Arnould in the Aga Khan case 12 B.H.C.R. 323 where that learned Judge says: "Spiritual heads of communities are not generally remarkable for the modesty with which they state their pretensions," and also to that of the learned author of Wilson's Anglo-Mnhammedan Law, 4th Edition at page 7, where he says:

"Of the formula, there is one God and Muhammad is His Prophet the actual though, unacknowledged and unintended effect is to identify the divine will with the personal idiosyncrasy of Muhammad far more absolutely and exclusively than it is identified by Trinitarian Christians with, the personality of the deified Jesus.

38. I may here deal with the Mullaji's claim to be the owner and master of all property possessed by any Dawoodi Borah, and to be also the master of their minds, bodies, and souls. Defendant No. 1, who was the first follower to be cross-examined on this point, agreed with this claim, and stated that he held the whole of his property at the disposal of the Mullaji. A little later, he said:

> The Mullaji is the owner and master of the community. Everything is vested in the Mullaji. We are only working as his mehtas and clerks. By we I mean the, whole community. The whole community are only his mehtas. The Mullaji is the owner of everything. By owner of everything I mean of everything appertaining to our community.

39. General questions B and D of the Advocate-General (See Ex. D.P.) were much to the same effect. They were usually answered in the affirmative by the defendants witnesses, but further cross-examination usually found them in difficulties when they were required to justify their answers.

40. The principal religious books in this community are: (1) The Koran, (2) the Hadees or sayings and doings of the Holy Prophet. Muhammad, and (3) the Nehjul Balagh or sayings and doings of Ali. In none of this is the claim which the Mullaji now makes specifically put forward. His Counsel admitted that he had no religious authority to show in precise words that the Mullaji could take away trust property under a deed, Will, or scheme. That text in the-Koran which was principally relied on was the one which says: "The Prophet has a greater claim on the faithful than they have on themselves (Mahomed Ali's translation, page 815, verse 6). The wide interpretation placed on this passage by the defendants is shown in Ex. 124-5A, pages 1-5, Another passage, which is relied on by Mr, Inverarity, will be found at page 424 verse 111, viz., "Surely Allah has bought of the-believers their persons and their property for this, that they shall have the garden." This showed, said Counsel, that the relation between God and the faithful was that of seller and purchaser. Stress was also laid on the covenant with Allah (page 984, verse, 10), which is now exemplified in the ceremoney accompanying the taking of the meshak. Or again it was said that there is a rope connecting Allah and his Dai on earth and that all believers must through the help of the Dal, cling to the rope and so gain salvation.

41. I have been through all the other religious writings which were cited, but it is impracticable to do this in a judgment. I have given them my best consideration, but in the result I am not satisfied that they fairly substantiate the claims of the Mullaji to ownership of the minds and properties of the followers. I mean even as a matter of religious belief. Further, the priests themselves would seem to draw a distinction between ownership in a wordly sense and ownership in a religious sense. Thus, when Shaik Kokab, a former Sub-Amil of Bombay, was cross-examined on the Surat Priest's litigation, Ex. E.J., and the written statement of the 49th Dai, Ex. E. 13, and was asked whether it was true or false when the 49th Dai said that he had not the slightest interest in the property, the witness replied: "In a wordly sense he had no interest and therefore, his statement was correct.

42. This Surat litigation will re-pay careful study, for to my mind the attitude then taken up by the 49th Dai is totally inconsistent with the claims now put forward by his son the present Mullaji. And it will be borne in mind that the father was just as infallible as the son, and that he must still be thus regarded, so it is said.

43. But before doing so, I should mention an extremely important fact, viz., that the defendants cannot produce a single instance of these extreme claims having been exercised by any Mullaji Saheb prior to the present suit. They cannot even show that these claims have ever been put forward prior to this suit. Not even their present pleadings show it, at any rate expressly. The trial of this suit in 1920 would seem to be the first occasion, whereas the first Dai came to the gadi, in 1137 A.D. The defendants own witnesses make it clear in cross-examination that these claims are at best purely theoretical and that in fact they never have been exercised and never would be exercised. Possibly these claims owe their origin to legends of the days when the Dais as Sultans of Yemen had sovereign, independent rights. But, as I have already pointed out, these days ended about 1539 A.D., if not earlier, when the Dais left Yemen and came to India.

44. His Lordship discussed the Surat litigation and then proceeded as follows: in the concluding stages of the trial it was paid that the Mullaji need not assert these extreme claims unless he chose. But if he would not even assert them when a follower was trying to imprison him, when would he assert them? His Solicitor with thirty years experience and a large number of Dawoodi Borah clients has no recollection of such a point having ever been raised as regards the private property of Dawoodi Borahs. The inference which I draw from all the facts before me is that these claims are the; result of the stress of the present suit, and that, if they ever existed, before the trial, nobody regarded them seriously or as giving any legal rights.

45. The Dawoodi Borah Charity Suits, Exs. B.N. to B.T., which the Advocate-General has put in, all tend to support this, inference. Hitherto, nobody has ever suggested that the Dai should be made a party to any such suit. And yet if his claim is true, he ought to have been a party to every suit as being the sole person who can represent Dawoodi Borah Charity. I need not go into the details of these suits. The bare fact speaks for itself.

46. I have dealt with the religious position at length, for it is the foundation of the defendants case. Unless, therefore, one appreciates it, the defendants are likely to be prejudiced when their legal position comes under consideration. But before considering the law, I will continue dealing with the more material facts.

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47. His Lordship discussed the facts and then proceeded as follows.

48. I next turn to the law. The first question is what law ought to be applied. Speaking in general terms and without attempting any definition, I think that this suit ought to be decided in accordance with Shiah Muhammadan Law in so far as the same is applicable to this community, and is not expressly or impliedly negatived by the general law of the land. If any customary variations are proved to exist, they should, I think, be given effect to. Now the facts of this case do not appear to fall within the precise wording of Section 112 of the Government of India Act, 1915, for that section only regulates the law applicable to such Original Side suits in the High

Courts of Calcutta, Madras, and Bombay, as deal with "matters of inheritance and succession and contract, and dealing between party and party," and are brought against inhabitants of these cities, respectively. I think, therefore, that under Clouse 28 of the Supreme Court I Charter, 1823, I have to decide this case according to "justice and right," or alternatively that I must administer "justice" in accordance with the equitable jurisdiction given in Clause 36 as modified by subsequent legislation. This seems to be the conjoint effect of Section 130 of the Government of India Act, 1915, Sections 8, 9 and 11 of the Indian High Courts Act, 1861, Section 18 of the Original Letters Patent of 1862, Section 19 of the amended Letters Patent of 1863, and the above Clouse 28 and 36 of the Supreme Court Charter, 1823. This is rather a cumbrous mode of ascertaining jurisdiction, but it appears to be the effect of legislation by reference extending over nearly a century.

50. But in my judgment it is a matter of justice and right and also a matter of justice, equity, and conscience, that I should apply Muhammad an Law to questions raised in a Muhammadan community relating to a Muhammadan mosque and tomb. In the mofussils of Bengal and Madras, it is specifically provided by Section 37 of Act I of, 1887 and Section 16 of the Madras Civil Courts Act, I of 1873, respectively, that all questions relating to "any religious usage or institution" should be decided by Muhammadan Law where the parties are Muham-madans. Similar legislative provisions exist in the United Provinces and Burma. With these legislative precedents before me, I need not at this stage quote Her Mejesty Queen Victoria's Proclamation of November 1, 1858, nor any decided case, to support the general proposition. The qualifications on its application to any particular set of facts, and what is meant in this country by Muhammadan Law, I will deal with separately.

51. What then is the relevant Shiah Muhammadan Law of this community? In fact the community has no formal code of law of its own. Nor has its own legal text books and legal decisions. Defendants counsel say that their law is to be found in their religious books and writings and that they have no other. That law and religion are mixed up together in the Muhammadan communities no doubt is true: *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhri*[2] The religious books are valuable, therefore, so far as they go, but they do not solve all the points I have to deal with here. I must, therefore, go further a field and see on what principles Muhammadan Law, whether Shiah or Sunni is administered in the Indian Courts.

52. The Advocate-General in his opening address submitted to me that, broadly speaking, the Muhammadan Law of charities as administered in Bombay was the same as the English Law of charities: provided you eliminated from the Muhammadan Law the power a Mussalaman has to create a wakf for his own family, and from the English Law the prohibition against gifts to superstitious uses, and also the Mortmain Acts. I think I may accept this as a broad working proposition for the purpose of the present case. Indeed in some respects I think that English Law is more favourable to the defendants than Muhammadan Law, for English Law seems to me the more exacting law of the two in its requirements as to what constitutes in law a charity.

53. Under Muhammadan Law, a gift for charity may take two forms, viz., either by way of wakf, which signifies an endowment, or else by way of sadakah, which signifies a donation. In the Mussalman Wakf Validating Act, 1913, which in effect set aside the decision in *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhri*[3] wakf is defined to mean "the permanent dedication by a person professing the Mussalman faith of any property for any purpose

recognised by the Mussalman Law as religious, pious, or charitable.

54. This Act is not, I think, retrospective, but the definition is none-the-less useful. In Hamilton's Hidaya, page 231, wakf is said to be "the appropriation of any particular article in such a manner as subjects it to the rules of divine property whence the proprietor's right to it is extinguished and it becomes a property of God by the advantage resulting to his creatures.

55. In Bailie's Muhammadan Law, page 550, wakf is defined as: "the detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind.

56. A clear definition in Wilson, 4th Edition, page 363, runs as follows: "All works of religious charity or public utility not condemned by the Muhammadan religion are objects of wakf. But the particular objects intended must be indicated with a reasonable degree of precision in order that the Courts of Birtish India may give effect to the endowment.

57. In this latter respect the learned author disagrees, and I think rightly so with the view of Mr. Ameer Ali that the principle laid down in *Moriee v. Bishop of Durham*[4] is not applicable to trusts or consecrations under Muhammadan Law. (See Wilson, pages 363-364, note 2). The peculiarties of the Shiali Law in relation to gifts and wakf are set out in Wilson, pages 477-485. They do not seem to be of any particular importance in the present case. Or if I turn to Section 92 of the C.P.C, I find that section applies generally to a "trust created for public purposes of a charitable or religious nature.

[2]22 I.A. 76 : 11 Ind. Dec. 412 [4](1805) 10 Ves. 522 : 32 E.R. 947

[3]22 C. 619 : 11 Ind. Dec. 412

58. A gift by way of sadakah indicates that the special motive of the gift is to acquire religious merit or nearness to God. (See Wilson, page 557,) I need hardly, however, say that it does not necessarily follow that because such a gift is made, it is a charity in the eye of the law.

59. On the other hand I think it quite clear that under Muhammadan Law a gift may be made either directly, or by means of a trust. See *Moosabhai v. Yacoobbhai*[5] and *Sadik Hasain Khan v. Hashim Ali Khan*[6] both of which were Shia cases.

60. As to what constitutes a charity in English Law one of the oldest statements--I will not treat it as a definition--is that of Lord Camdon in 1769 when he described it as a "gift to a general public use which extends to the poor as well as-to the rich." See *Jones v. Williams* See too *In re Vaughan, Vaughan v. Thomas*[7] Coming to modern times, I may refer to Lord Macnaghten's well-known statement in *Income Tax Commissioners v. Pemsel*[8] where he says:

> No doubt the popular meaning of the words charity' and 'charitable' does not coincide with their legal meaning.... No one as yet has succeeded in defining the popular meaning of the word 'charity'...'Charity' in its legal sense comprises four principal divisions trusts for the relief of poverty; trusts for the advancement of education trusts for the advancement of religion and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.

61. But, as pointed out by Lord Lindley In *In re Macduff*[9] although all charity to be administered by the Court must fall within one of those four divisions, it does not follow that every thing which cornea within any one of them must be a charity. Thus some purposes of general public utility may not be charitable. See *In re Nottage* (10) where the gift was to encourage yacht racing. Accordingly, under English Law, a gift for religious purposes, simpliciter, is prima facie charitable. See *In re Macduff*[10] But these religious purposes must be for the instruction or edification of the public. Thus a convent of ladies whose object is to benefit the public is charitable, but not so where their object is primarily to benefit-themselves spiritually. See *Cocks v. Manners*[11] The distinctions run on fine lines and perhaps unavoidably so, and in *Dunne v. Byrne*[12] a gift for the "good of religion" in a diocese was held not to be identical with the expression "for religious purposes," and was accordingly held void.

62. As instances of specific religious purposes, I may mention that gifts for the worship of God [see *Attorney General v. Pearson*[13] or for the repair of a parsonage see *Attorney General v. Bishop of Chester*[14] or for church expenses generally, have all been held to be charitable see *In re Scowaroft*[15] So, too, has a trust to provide or maintain a churchyard or a monument in a church as opposed

[5]7 Bom. L.R. 45 [7](1886) 33 Ch. D. 187 : 55 L.T. 547 : 35 W.R. 104
[6]36 Ind. Cas. 101 : 4 C.L.J. 22 ; 25 C.L.J. 333 : 6 L.W. 378 : 10 Bur. L.T. 140
[8](1891) A.C. 531: 61 L.T.Q.B. 265 [9](1896) 2 Ch. 451 : 65 L.J. Ch. 700 : 74 L.T. 706
[10]55 S.J. 324 : 28 T.L.R. 257 12(1912) A.C. 407: 81 L.J.P.C. 202 : 106 L.T. 394 [14](1785) 1 Bro. C.C. 444
[11]18 T.L.R. 741. [13](1817) 3 Mer. 353 [15](1898) 2 CH. 638

to gifts for the building or repair of a tomb not forming part of the fabric or ornament of the church see In re *Vaughan Vaughan v. Thomas*[16] *Yeap Cheah Neo v. Ong Cheng Neo*[17]

63. Again, if one finds that the distribution of a gift is to be made by persons in succession as holders of a particular religious or charitable office that goes far to establish and it may be, goes sufficiently far to establish that the whole gift is charitable. Per Lord Cozens-Hardy in *In re Davidson*[18] But the mere fact that the donee holds a religious office is not by itself enough, and if trusts are added which are not all charitable, the whole gift fails. Accordingly in *In re Delany*[19] a gift to A, Band C, or their successors, was held to be a gift to the convent in which they held certain offices and not to them as individuals.

64. So, too, in *In re Garrard*[20] a legacy to a Vicar and Church Wardens of a parish to be applied by them in such manner as they should think fit was held to be a good charitable gift for ecclesiastical purposes in the parish. It was clear, said Mr. Justice Joyce, "that a legacy to the Vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes." The correctness of this decision was left open in *In re Davidson*[21] but there it was unnecessary to refer to the line of authority as exemplified in *In re Allen*[22] which upheld gifts for the benefit of a parish or town, or any particular class of inhabitants.

65. Indeed, in *Attorney-General v. Webster*[23] Sir George Jessel held that a trust of property in favour of a parish or the parishioners of a parish for ever can only be Upheld on the ground of its being a charitable trust except perhaps in the case of an advowson. In In re St. Stephens', *In re Coleman Street*[24] Mr. Justice Kay held that an advowson was no exception from the general law as "to charitable trusts, and that both the suit advowsons were held in trust for charity.

66. English Law recognizes that a wide discretion or choice of objects may be left to the trustees. But the object must not be too vague. Thus a gift for "such objects of benevolence and liberality" as the trustee approves is bad. See *Morice v. Bishop of Durham*[25] So, too, if charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as "charitable or benevolent" or "charitable or philanthropic" or "charitable, or pious" purposes) or where the description includes purposes which may or may not be charitable (such as "undertakings of public utility") and a discretion is vested in the trustees, the whole gift fails for uncertainty. Per Lord Davev in *Hunter v. Attorney-General*[26.]

67. Accordingly the following gifts have been held void, viz., a gift for "such charitable or religious institutions and societies" as the trustees select *Grimond v. Grimond*[27] such charitable or public purposes as my trustee thinks proper" *Blair v. Duncan*[28] for charity or works of public utility" *Langham v. Peterson*[29] for "charitable or philanthropic purposes"

[16](1886) 33 Ch. D. 187 :55 L.T. 547 [18](1909) I Ch 567 [20](1907) 1 Ch. 382
[17](1875) 6 P.C. 381 : (1915) I Ch. 543 [19](192) 2 Ch. 642 [21](1909) 1 Ch. 567
[22](1905) 2 Ch. 400 [24](1888) 39 Ch. D. 492: 59 L.T. 393 [26](1899) A.C. 309
[23](1875) 20 Eq. 483 25(1805) 10 Ves. 522 [27](1905) A.C. 124 : 74 L.J.C.P. 35 : 92 L.T. 477 : 21 T.L.R. 323
[28]1902 A.C. 37 : 71 L.J.P.C. 22 : 50 W.R. 369 : 86 L.T. 157 : 18 T.L.R. 194
[29](1903) 87 L.T. 744 : 67 J.P. 75 : 19 T.L.R. 157

In re Macduff[30] and for "public, benevolent, or charitable purposes" *Houston v. Burns*[31] It is this line, of authority which makes me think that English Law is stricter, than Muhammadan Law. The Wakf Validating Act, 1913. refers to "religious, pious, or charitable" purposes. Even Section 92 of the, C.P.C. speaks of "public purposes of a charitable or religious nature.

68. But there is an exception which is of importance in the present case. Although a gift for public purposes generally is void as being so general and undefined that it cannot be executed by the Court yet a gift for public purposes in a specified locality is a valid charitable gift. See *In re Allen*[32] In the case cited there was a trust "for such charitable, educational, or other institutions of the town of Kendal, and also for such other general purposes for the benefit of the town of Kendal or any of the inhabitants thereof as the trustees shall think fit." It was held by Mr. Justice Swinfen Eady that the purposes to which the money could be applied were all limited to general or public purposes for the benefit of the town and its inhabitants, and, therefore, it was a good charitable gift.

69. The learned Judge cited several cases in support of his decision. I will refer to two only. In *Mitford v. Reynolds*[33] a testator left "the remainder of his property to the Government of Bengal, to be applied to charitable, beneficial, and public works, at and in the city of Dacca in Bengal, for the exclusive benefit of the native inhabitants, in such manner as they and the Government might regard as most conducive to that end." Lord Lyndhurst held that such a bequest was a valid charitable bequest within all the authorities. In Goodman Saltash Corporation (1882) 7 App. Cas. 633 : 52 L.J.Q.B. 193 : 48 L.T. 239 which was a fishery case, Lord Selborne said:

> A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust. Lord Cairns said (at p. 650,) Such a condition would create that which in the very wide

> language of our Courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities. It is a principle which has been established in many cases.

70. I put it to Mr. Inverarity whether the principle of *In re Allen*[34] and these other cases applied to a community, such as the Dawoodi Borahs, although the community was not confined to one town. He replied that you must first find that there is a gift here for the benefit of the whole community collectively, and not for individual objects. His contention on the facts was that the gifts were not for the whole body of the community but for private persons among them. Subject to that, he did

[30](1896) 2 Ch. 451 : 65 L.J. Ch. 700 : 74 L.T. 706 : 45 W.R. 154
[31](1918) A.C. 337 : 87 L.J.P.C. 99 : 118 L.T. 462
[32](1905) 2 Ch. 400 : 74 L.J. Ch. 593 : 54 W.R. 91 : 21 T.L.R. 662 : 93 L.T. 597
[33](1841) 1 Ph. 185 : 12 L.J. Ch. 40 [34](1905) 2 Ch. 400 : 74 Ch. 593 : 54 W.R. 91

not dispute that the principle of a gift to inhabitants of a particular town being charitable applied also to a sect like the Dawoodi Borahs.

71. In *Ibrahim Esmael v. Abdool Carrim Peermamode*[35] the wakf properties were purchased "for the whole Muhammadan congregation of the Island" of Mauritius. The first two properties purchased were declared to be devoted to no other uses than the erection of a building consecrated to the Muhammadan worship. On them a small mosque was erected. Subsequently other adjoining properties were purchased for the whbleMuhammadan community. (See pages 532-83). Later on "disputes arose between the Cutchi Memons and the Halai Memons, and the Soortees" (Surat emigrants) due to an attempt by the Cutchis in certain deeds to monopolize the management. Their Lordships of the Privy Council set aside these deeds, but held that a scheme could not be framed until a new Charter was obtained from Government, as owing to the local law the community was at the time an unauthorized one. This local law was the French Civil Code, under which no association of more than fifteen persons for the consideration of any religious or political subject could be formed unless with the sanction of Government and under such conditions as the public authority" should deem necessary to impose. (See page 536.) This case is of course distinguishable from the present but, so far as it goes, it upholds the validity of an assurance in perpetuity for the" benefit of a community like the Dawoodis apart from special laws.

71. On the other side of the line and a showing the limits to the above exception, I may refer to *In re Drummond*[36] There a fund for in effect paying part of the holiday expenses of the work people of a particular firm was held not to be charitable. It may be contrasted with *In re Mann*[37] where a particular institute was held to be for the benefit of the inhabitants generally and, therefore, charitable. The distinction in principle is important. It lies in the difference between a public trust

and a private one. It is emphasised in Section 92 of the C.P.C. by the use of the words "public, purpose." The Advocate-General is only concerned with public charitable trusts. He is not concerned with private trusts.

72. In contrasting the principles of English Law exemplified in these cases with, the principles of Muhammadan, Law, one finds one main principle in common. It is that perpetuities are obnoxious to the law, and void, but that charities are an exception to the law against perpetuities. Thus in *Doe dem,. Howard v. Pestonji*[38] which was a case of an invalid consecration of a Parsi fire temple in Bombay, Sir Erskine Perry said:

> The law looks with great jealousy on any attempts to fetter the transmission of property.... The law in most civilized countries has interposed to prevent individuals from imposing shackles on the enjoyment of property after their decease.

73. So too, in *Yeap Cheah Neo v. Ong Cheng Neo (1875) 6 P.C. 381* which was a case

[35](1908) A.C. 526 : 99 L.T. 445 : 24 T.L.R. 790
[36](1914) 2 Ch. 90 : 83 L.J. Ch. 817 : 111 L.T. 56 : 58 S.J. 472
[37](1903) 1 Ch. 232 : 71 L.J. Ch. 150 : 51 W.R. 165 : 87 L.T. 734 [38]4 Ind. Dec. 488

from Penang, it was held in the Privy Council as follows:

> Their Lordships think it was rightly held by Sir P. Benson Maxwell, Chief Justice, in the case of *Choah Choon Nioh v. Spottiswoode Woods oriental* cases that whilst the English Statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities was to be considered a part of it. This rule, which certainly has, been recognised as existing in the law of England independently of any Statute, is founded upon considerations of public policy, which seem to be as applicable to the condition of such a place as Penang as to England: viz., to prevent the mischief of making property inalienable; unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the island if land convenient for the purposes of trade or for the enlargement of a town or port could be, dedicated to a purpose which would forever prevent such a beneficial use of it. The law of England has, however, made an exception, also on grounds of public policy, in favour of gifts for purposes use land beneficial to the public, and which, in a wide sense of the term, are called charity able uses and this exception may properly be assumed to have passed with the rule into the law of the colony.

74. In *Fatmabibi v. Advocate-General of Bombay*[39] Mr. Justice West applied those principles to a trust deed made by a Sunni Muhammadan lady in favour of herself and her descendants, and subject thereto "for charitable purposes, such as, pilgrimages, temples, marriages and wells." Accepting the rule against perpetuities because it had its foundation in principles of general application, and accepting its exception of charities liberally construed as objects useful and beneficial to the community, the learned Judge held that to ascertain those objects, the Court must in general apply the standard of customary law and common opinion amongst the community td which the parties belonged (page 50); that the general principle of the public law

of British India was that of supporting the private customary law of each of the principal classes and that according to Muhammedan Law there could be no doubt that the proposed application of the fund" was a highly commendable charity (page 51). In conclusion, the judgment pointed out that a dedication in wakf is irrevocable, and that charitable grants being tenderly regarded, it would be inconsistent that a power of revocation should be recognised in the grantor.

75. The Hindu religious cases illustrate how broadly the exception in favour of charities is applied in India. The principal cases on this side of India are-(1) the Dakore Temple case with its numerous ramifications extending from *Manohar Ganesh Tembekar v. Lakhmiram Govindram*[40] to *Asharam Ganpatram v. Dakore Temple Committee*[41] *Chintaman Bajaji Dev v. Dhondo*[42] the unreported Swaminarayan case F.A. No. 119 of 1905 on the appellate side of this High Court: an echo of which has recently come before the Privy Council in an appeal from Oudh, *Kamla Lachhmi v. Basdev Prasad*[43] which was decided on the 15th June 1920.

[39]6 B. 42 : 3 Ind. Dec. 485

[40]12 B. 247 : 12 Ind. Jur. 387 : 6 Ind. Dec. 650 in 1887

[41]55 Ind. Cas. 956

[42]8 Ind. Dec. 413 and (1805) 10 Ves. 522 : 7 R.R. 232 : E.R. 947

[43]58 Ind. Cas. 900 : 7 O.L.J 134 : (1920) M.W.N 553 : 28 M.U.T 404

76. These may be contrasted With the Muth cases from Madras, such as, *Samantaha Pandara v. Sellappachetti*[44] *Giyana Sam-bandha Pandara Sannadhi v. Kandasawi Tambiran*[45] and *Vidyapurna Tirthasivami v. Vidyanidhi Tirthasivami*[46] which have culminated in *Arunachelam Chatty v. Ven-katachalapatti Guruswamigal*[47] where thePrivy Council summarised the effect of their Lordships previous decisions in *Ram Parkash v. Anand Das*[48] *Palaniappa Chetty v. Deivasikamony Pandara*[49] *Sethuramaswamiar v. Meruswamiar*[50]

77. In the Dakore Temple, case. *Manohar Ganesh Tambekar v. Lakhmiram Govindram 6 B. 42 : 6 Ind. Jur. 253* a trust for a Hindu idol and temple was held to be a public charitable trust. The case is an especially useful one as regards the relevant principles of law. The defendant sheraks or ministers of idol there claimed that they as a body were the owners for all secular purposes of the idol whom in he spiritual sense they served; and that the offerings and land presented by devotees were their property free from any secular obligation, as none had ever in practice or in the intention of the donors been annexed to the gift by which religious merit was sought and gained (page 258). The judgment recognized that a society might exist, such as a guild in a trading city, which could hold estates without, the attendant obligation of a charitable trust, but in that case it would not normally be for the promotion of any purpose of recognised public utility (page 259 pages of 22 Bom. L.R.-Ed.). But it was decided that the religion of the Hindu population being jurally allowed, the duties and services connected with it must be deemed an object of; public concern, and at least as to their physical and secular elements, enforceable like other obligations (page 261 Pages of 22 Bom. L.R.-Ed.). After observing that the votary was little interested in what afterwards becomes of the offering (page 261), and that under Hindu Law a trust is not necessary (page 263 Pages of L.R.-Ed.), the judgment proceeded at page 265 Pages of 22 Bom. L.R.-Ed:

> But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of, taking offerings of cash and jewels as of land. Those who take physical possession; of the one as of the other kind of property incur thereby a responsibility for its due application to the purposes of the foundation. They are answerable as trustees even though they have not

consciously accepted a trust, and a remedy may be sought against them for mal-administration by a suit open to any one interested, as under the Roman system in a like case by means of a popularis actio.

78. Then at p. 266 pages of 22 Bom. L.R.-(Ed.) it was said:

The law which protects the foundation t against external violence guards it also

[42]2 M. 175 : 1 Ind. Dec. 393 [46]27 M. 435 : 14 M.L.J. 105
[45]10 M. 375 : 3 Ind. Dec. 1015
[47]53 Ind. Cas. 288 : 37 M.L.J. 460 : (1919) M.W.N. 850 : 17 A.L.J. 1097 : 10 L.W. 642 : 26 M.L.T. 479 : 24 C.W.N. 249 : 46 1.A. 204 : 22 Bom. L.R. 45
[48]33 Ind. Cas. 583 : 43 I.A. 73 : 20 C.W.N. 802 : 14 A.L.J. 621 : (1916) 1 M.W.N. 406 : 31 M.L.J. 1 : 18 Bom. L.R. 490 : 3 L.W. 556 : 24 C.L.J. 116 : 43 C. 707 : 20 M.L.T. 267
[49]39 Ind. Cas. 722 : 44 L.A. 147 : 21 C.W.N. 729 : 15 A.L.J. 485 : 1 P.L.W. 697 : 33 M.L.J. 1 : 19 Bom. L.R. 567 : 22 M.L.T. 1 : (1917) M.W.N. 507 : 26 C.L.J. 153 : 40 M. 709 : 6 L.W. 222
[50] 43 Ind Cas. 806 : 7 L.W. 22 : 41 M. 296 : 16 A.L.J. 113 : 22 C.W.N. 457 : 20 Bom. L.R. 514

internally against mal-administration, and regulates, conformably to the central principle of the institution, the use of its augmented funds. It is only as Subject to this control in the generarinterest of the community that the State through the law Courts recognizes a merely artificial person.... This principle is recognized in the law of England as it was in the Roman Law, whence indeed it was derived by the modern, codes of Europe. It is equally consistent with the Hindu Law.

79. Accordingly the claim of the shevaks failed. This decision was subsequently upheld in the Privy Council, except that directions for a scheme were postponed. See *Chotalal Lakhmiram v. Manohar Ganesh Tambakar*[51] Subsequently & scheme was approved by the Privy Council see *Sevak Kirpa Shankar Daji v. Gopal Rao Manohar Tambikar*[52] which in its details is still the subject of litigation. See *Asharam Ganpatram v. Dakore Temple Committee*[53]

80. There was also a second suit see *Kalidas Jivram v. Gor Parjaram Hirji*[54] in which it was again held that the shevaks as recipients of the offerings were responsible for their due application to the purposes of the foundation and that they were liable as trustees to render an account of their management (p. 318). And at p. 322 it was said:

Whatever is placed upon or given to the idol belongs to the idol, that is, to the temple. The gors (priests) have the right to keep only what is given to them as remuneration for their own personal services wherever the gift is made. (p. 322.)

81. The case of *Chintaman Bajaji Dev v. Dhondu Ganesh Dev*[55] is interesting, because there the defendant claimed to be god. He said:

I understand that I am Mangal Murti, the god of Chinchwad. We are not pujaris. It is not the case that Mangal Murti is owner and I am the manager. All the villages.... I regard as my private imams.

82. Nor wfts this altogether a fanciful contention, for the legend ran that the deity would be incarnate in the founder Monga and his descendants for seven generations (p. 618). I can not find that the defendant was within that limit, but be that as it may, his contention was unsuccessful, and it was held that the shrines and their endowments were a public religious and charitable trust (page 622) and that under all the circumstances the defendants ought to be removed from the management (page 624).

83. The Muth cases are also instructive, because there (1) the institution with its preceptor or head and its disciples or students more resembled a monastery than a public temple; (2) the Muth property was attached to the office and passed to the head for the time being; and (3) in one case the superior claimed to be the owner of the bodies, souls, and wealth of his disciples in pursuance of a religious ceremony in that behalf. In the earlier cases there was considerable doubt as to the legal position of the superior. It was, said that the property was in a certain sense trust property" but the superior was not accountable for its management nor for the expenditure of income, provided he applied it for the objects of

[51]24 B. 50 : 2 Bom. L.R. 516. [53]55 Ind. Cas. 956 : 22 Bom. L.R. 232 : 44 B. 151
[52]17 Ind. Cas. 441 : 15 Bom. L.R. 13 : 12 L.T. 448 : (1912) M.W.N. 1106 [54]15 B. 309 : 8 Ind. Dec. 210
[55]15 B. 612 : 8 Ind. Dec. 413

the institution; *Sammantha Pandora v. Sellappa Chetti*[56] In *Vidyapurna Tirthaswami v. Vidyanidhi Tirihaswami*[57] it was held that the head was not a mere trustee but a corporation sole having a life estate in the permanent endowments and an absolute property in the income from offerings, subject only to the burden of maintaining the institution.

84. In *Arunachellam Chetty v. Venkata-chalapathi Guruswamigal*[58] the true legal position was laid down by the Privy Council, viz., first, that the nature of the ownership is an ownership in trust for the institution itself, and, secondly, that while the ownership in the general sense is with the head of the institution, this may vary by the usage and custom of any particular Muth (page 474 Pages of 22 Bom. L.R.-Ed.). Their Lordships, further said at page 476 pages of 22 Bom. L.R.-Ed:

> It is of course, the duty of a trustee to refrain from the personal enjoyment of such surplus and to add the same to the capital of the estate to be administered; and this law also applies to the property of a Muth...and that whether the title...is in...the spiritual head...or is in trustees like the Chetties.

85. This decision followed that in *Ram Parkash v. Anand Das*[59] where it was held at page 76 pages of 43 I.A.-Ed. that although large administrative powers were undoubtedly vested in the reigning mohant or head, the trust did exist and must be respected, and at page 90f that the mohant was not only a spiritual preceptor, but also a trustee in respect of the asthal over which he presided.

86. *Giyana Sambandha Pandara Sannadhi v. Kqndasami Tambiran*[60] resembles the present case in its length and complexity, and also in the claim by the head to ownership of the followers property. Curiously enough, it was never cited to me on the latter point, and I only discovered the relevant passage in re-reading the report after the trial had ended. The judgment sets out at page

386 pages of 10 M.-Ed. the nature of a Muth, and then at page 475 pages of 10 M.-Ed. it "deals with the "ceremony of dattam whereby each, tambiran (disciple) makes a gift of his soul body, and wealth, to his guru (preceptor)," The judgment then proceeds as follows:

> There is a great deal of oral evidence to the effect that such a ceremony is gone through by the tambirans of Dharmapuram during their ordination, and it is corroborated by the allusions made, to the spiritual slavery, which is an incident of that ceremony, by several managing tambirans, including Ganpati I for upwards of sixty years. Although this ceremony may perhaps be a pious motive for a gift and a reason for upholding it when it is completed and executed, still we cannot recognise it as a source of property or legal right in those cases in which the tambiran acquiring the property either refuses to surrender it or devotes it to charity and thereby clothes it with a special trust, religious and charitable. It is provided by Act V of 1843, Section 3, that no person who may have acquired property by his own industry or by the exercise of any art, calling or profession, or

[56]2 M. 175 : 3 Ind. Jur. 558

[57]27 M. 435 : 14 M.L.J. 105

[58]53 Ind. Cas. 288 : 37 M.L.J. 460 : (1919) M.W.N. 850 : 26 M.L.T. 479 : 24 C.W.N. 249 : 22 Bom. L.R. 457

[59]33 Ind. Cas. 583 : 43 L.A. 73 : 20 C.W.N. 802 : 31 M.L.J. 1: 24 C.L.J. 116 : 43 C. 707 : 20 M.L.T

[60]10 M., 375 : 3 Ind. Dec

> by inheritance, assignment, gift or bequest, shall be dispossessed of such property or prevented from taking possession of it on the ground that such person or that the person from whom the property may have been derived was a slave. It is clear, then, that the agreement of a tambiran to become the slave of his guru could have had no legal operation since 1843.

87. This Madras case seems to me precisely in point so far as the principle goes, and it answers Mr. Binning's contention, if answer is needed that; his client's claims did not amount to slavery, because the followers, submitted to them voluntarily and no voluntary. submission could be slavery.

88. The Swaminarayan case F.A. No. 119 of 1905 comes midway between the Temple cases and the Muth cases. The printed judgment of the District Judge, Mr. Knight, has been of much service to me. It was affirmed on appeal with a variation, but the High Court judgment is practically confined to the variation, and is consequently of little use in the present case. In that case the object of the founder was neither the provision of facilities for public worship, such as, a temple, nor the establishment of a centre of theological learning, such as, a Muth. "The essential characteristic of his foundation lay in recognition of the congregation whose encouragement or maintenance in the path of righteousness was the grand objective of his reformation." (See judgment page 15.). It was held that all the suit property, was public religious property (page 27), and that the late .Acharya or head had no power to bequeath it by his Will. On appeal, part of the suit property viz., that arising from namvero, or salutation tax, was held to be the personal property of the Acharya. This namvero resembles the salaam in the present case, which is admittedly a present to, and the private property of the Mullaji Saheb.

89. I may give, two more illustrations of what have been held in India to be public charitable trusts. In *Jugalkishore v. Lakshmandas Raghunathdas*[61] a dharmashala attached to a temple was held a public charitable trust, and that the defendant by taking charge and managing had made himself a constructive trustee, and was liable as such to the beneficiaries. In *Salebhai Abdul Kadur v. Bai Safiabu*[62] it was held that two bequests for gadi feast to celebrate the appointment of Ali as successor to the Holy Prophet were valid charitable gifts, but the validity of another bequest for fatyeh dinners for the testator and his wife was left open. It appears from the head-note that the testator was a Shia Muhammadan. In *Assqbai v. Noorbai*[63] a trust deed inculded a trust to provide a least for the jama't in the sacred month of Warfar, which is the month in which Muhammad died. An action by the settler to set aside the deed failed, and it does riot appear to have been contended that this particular gift was in itself invalid.

90. Now let me apply, some of these general legal principles to the facts of this particular case, and see, what legal deductions ought to be drawn. I take first the mosque, for its legal position, is simpler than that, of the gulla. This seemed to me from the outset the weak point in the pleaded case of both the plaintiff, and defendants, and Counsel on both sides showed a tendency to avoid it in the earlier stages of the trial.

91. Now in my judgment it is clear on the evidence (1) that the mosque is God's house

[61]23 B. 659 : 1 Bom. L.R. 118

[62]12 Ind. Cas. 702 : 13 Bom. L.R. 1025

[63]8 Bom. L.R. 245

and is held by the Mullaji as Dai and passes on his death to his successor on the gadi and not to his heirs, (2) that the Mullaji cannot sell or alienate the mosque, (3) that he cannot close it except for some temporary and necessary purpose, such as, repairs or sanitation, (4) that it is a mosque for the use of the Dawoodi Borah community, although others may occasionally be permitted to use it, and (5) that it cannot be used for any other purpose than a mosque. It is also clear that the old site has been used for a mosque for over 100 years. As stated by Jessel, M.R. in *Bunting v. Surgent*[64] with reference to the user of a Non-Conformist Chapel: "It is pretty good evidence of a trust if 105 years user can be proved." I need not repeat the facts I have already mentioned as to the re-building and the additional 196 square yards, and the oral wakf in 1912 and the formal deed of wakf in 1914 with its express declaration of a trust. On the other hand, it is clear that the sole management and general control of the mosque is vested in the Mullaji in right of his office as Dai. He may also have the right to prohibit his followers from attending any particular mosque, but this I need not decide.

92. Now on those facts and oh the principles of Shiah Muhammadan Law administered in the Indian Courts which I have already dealt with, one would think it clear that in law the mosque is devoted to charitable uses, and that the trustee or mutawalli is the Mullaji for the time being. At a late stage in the case, it transpired that the original instructions to defendants Counsel were to that effect (See Ex. 157). Mr. Acworth gave those instructions on behalf of the Mullaji in 1917. They are clear and in my judgment correct. They run as follows: No one is going to start out to contend that the mosque qua mosque is not a religious trust.... As regards the mosque it is admitted that it is a religious trust, but by virtue of his office, the Mullaji Saheb is entitled to the sole managership thereof...It is not contended that the Mullaji Saheb can dispose of the mosque building or site. He cannot do so....The deed (Ex. 07)...would appear to he without objection....The property...went to him (Mullaji) impressed with the trust that it should be allowed to be used as part of the mosque from generation to generation.

93. The pleadings carried this out, and no application was made to amend them till November 25,1920, when the trial had been, in progress for nearly three months.

93. What then made defendants adopt a different attitude at the trial, and persist in the contention that, if the Mullaji was in fact a trustee and so in theory accountable, the Muhammadan religion was at an end? Why, too, did they call many ignorant witnesses to say that the Mullaji was absolute owner (Malik or Dhani) of the mosque, when cross-examination was bound to show that whatever he was, he was not that? When I say ignorant, I mean ignorant of what absolute ownership really means in law. You might almost as usefully ask an English layman whether the local Squire was tenant-in-tail male.

94. The answer may be (1) that the trusteeship familiar to the western lawyer is misunderstood by the eastern layman, and (2) that any concession as regards the mosque might logically weaken the position taken up with respect to the gulla. Be that as it may, the final contention put forward was that the mosque was held upon a religious trust, hut it was a trust peculiar to Dawoodi Borah, and to no other known law, inasmuch as the trustee was not accountable. (See Ex. 158.) This theory of a non-accountable trustee was

[64](1880) 13 Ch. D. 330 : 41 L.T. 643 : 28 W.R. 123

based on the proposition that an infallible being cannot be accountable. Peculiar though it may seem, this, as I have already said, is the rock upon which the parties have split and I must deal with it. It is admittedly a legal novelty. Its justification is said to be the novel facts.

95. Now coming down to first principles, British Government brings to its subjects, as a general rule, liberty of the person, liberty of conscience, liberty of speech, liberty to own property, and last, but perhaps not least, equality of man in the sight of the law. But the liberty granted to one subject must not be used to the detriment of another subject. The principle sic utere tuo ut alienum non loedas is applicable to rights as well as property. In other words, liberty must not degenerate into license. Hence the law has to impose restraints on those who misuse the privileges of a free citizen. The slanderer, for instance, is restrained by the law of libel, the thief by the Indian Penal Code. But the fact that such restraints exist and apply to all citizens alike is not a slur upon the honest citizen. It is unthinkable that His Grace the Archbishop of Canterbury, for instance, would commit a criminal offence, but he is subject to the Criminal Law all the same, and this fact involves no slur. So, too, in theory the Mullaji Saheb is amenable to the Criminal and Civil Law of this country, though it is unthinkable that he would commit any offence. A striking instance of his is the attempt made by the Dawoodi Borah Priest to put the 49th Dai into prison for failure to pay a judgment debt, and which I have already referred to. (See Ex. B. E5).

96. Similar principles apply, I think, to trustees. The foundation of the law of trusts is that the trustee is trusted. Hence the greater the trust, the more unthinkable does it become that the trustee will violate it. And yet the law has to impose restraints on the guilty or negligent trustee and to give its assistance to any honest trustee who requires it. But the existence of these civil restraints is no more a slur upon the honest trustee, than the existence of criminal restraints is upon the honest citizen. Hence in my judgment the infallibility of any particular individual does not affect his theoretical legal position in the slightest. In short the test of a trust is not whether the alleged trustee can ever commit a breach of trust, which is what the defendants contention in effect

amounts to. His Holiness the Pope of Rome claims to be infallible and immaculate, and Iris followers are numbered by the million and are found in ail parts of the globe. And yet in *Moore v. The Pope*[65] His Holiness submitted to the jurisdiction of the Irish Courts and contended that a bequest to him to be applied at his sole, discretion in carrying out the duties of his sacred office was a valid charitable bequest. If the defendants are correct, the Holy Father ought to have strongly protested against any suggestion that he could be a trustee of a charitable fund. He was held to be a trustee but that the trust was invalid.

97. In 1 Blackstone's Commentaries 112 (which is quoted in Halsbury's Laws of England, Volume 11, page 717), I find the following passage:

> In respect of these lands the King as supreme Ecclesiastical head was entitled to the Ecclesiastical emoluments in trust that he should distribute the same for the good of the Church.

98. This, of course, was before the days of Governors of Queen Anne's Bounty and Ecclesiastical Commissioners and Charity Commissioners, who now relieve the burden

[65](1919) 1 Ir. R. 316

which would otherwise fall upon the Crown, But it shows that even in olden days the Crown thought it no slur to be regarded as a trustee. As the present is not a case of Sovereign rights, I need not consider what remedies, if any would be open in such a case to a subject who alleged a misapplication of such emoluments.

99. Nor has the Mullaji or his predecessors been ashamed in other days to be called trustees. In the book, Ex. A.L., to which I attach great importance, the 48th Dai describes the Dai and his duties as follows:

> He is the trustee of the public funds which it is his duty to dispose of economically and at his discretion as directed by the sacred rules, in relieving the distressed and needy so as to save them from sordid beggary, and paying the expenses incurred by them and his deputies and discharging their sacred duties and in keeping schools and institutions for religious and secular instructions.

100. In Ex. 16, which is a later edition by the present Mullaji, the corresponding passage runs:

> He is the trustee of the public funds of the community which it is his duty to dispose of economically as directed by the sacred Laws of Islam.

101. The defendants have relied on Her late Majesty Queen Victoria's Proclamation of November 1, 1858.* * *

102. His Lordship quoted the portion of the Proclamation dealing with religious toleration and then proceeded as follows.

103. If, in the words of the Proclamation, all alike are to enjoy the equal and impartial portection of the law, charitable trusts must be protected just as other trusts are. This is no breach of the rest

of the Proclamation. Accordingly, Section 14 of the Religious Endowments Act, 1863, gives some protection as regards certain mosques and other places of worship. Section 92 of the C.P.C. is still wider in its application. And recently in response to a public demand for still greater protection for Indian religious and other charities, the Charitable and Religious Trust Act, 1920, has been passed. Nowhere do I find any express exemption of Dawoodi Borah mosques or other charities.

104. But speaking very generally, the protection of the law in religious matters of confined to the protection of religious property or a religious office. The Court will not decide mere questions of religious rites or ceremonies (see C.P.C. Section 9), nor will it, I think, pronounce on any religious doctrine see *Attorney-General v. Pearson*[67] unless it is necessary to do so in order to determine rights to property, as in *Free Church of Scotland (General Assembly of) v. Oyertoun (Lord)*[66] As put by Mr. Justice Melvill in *Vasudev v. Vamnaji*[68] It is the policy of the State to protect all religions, but to interfere with none.

105. Accordingly, at a very early stage, I pointed out that the Court would not interfere with the worship at the mosque, and that apart from the denial of the trust, no case was

[66](1904) A.C. 515 [68]5 Ind. Jur. 427 : 3 Ind. Dec. 55

[67]17 R.R. 100

made out by the Advocate-General for interfering with the general management. So the only point left was as to the theoretical trusteeship of the Mullaji. The defendants, however, persisted in contesting this, and in my judgment they were wrong. Their religion, however, stands where it did. A theoretical accountability affects the doctrine of infallibility no more than the theoretical criminal liability does that is, not at all. Neither could materialise, except under-unthinkable circumstances, e. g., if the Dai sold the mosque and appropriated the proceeds for his private ends.

106. The claim to non-accountability is all the more surprising, because in effect it involves the infallibility of some 266 Amils and numerous other managers and officers under the Mullaji. No man can manage personally 648 mosques, to say nothing of 69 gullas. The Mullaji must, therefore, act by agents. But no one suggests that they are infallible. If then any such agent is corrupt or negligent, why should the community be without a remedy against him? It may be that the Dai might thus be obliged to repair the misdeeds of his agents. But this would be no slur on him, any more than the misdeeds of the King's ministers would affect the constitutional doctrine that the King can do no wrong.

107. The other main ground upon which trusteeship was sought to be avoided, viz., the theory of universal ownership, I have already dealt with in paras. 91-116, and elsewhere. I repeat that I am not satisfied that this theory is well-founded even as a matter of religious belief. But whether that be so or not, I am of opinion that this theory conflicts with the law of the land when applied to the followers or their possessions. The application of it in their case would substantially amount to slavery, as was held in *Giyana Sambavdha Pandara Sannadhi v. Kandasami Tanibiran*[69] already cited in para. 194; nor I think can this theory prevent a Bombay Dawoodi Borah from doing what every other Muhammadan British subject may do, viz., to create a binding and irrevocable wakf or trust in favour of charity. Why should the Court deny to the Dawoodi Borahs of Bombay the rights which the Mullaji is forced to give them by the Laws of Mecca? The answer that the Mecca Government is Sunni but the Dawoodis are Shiahs, seems to me

insufficient. A Dawoodi is entitled to liberty just as much as any fether Shiah or Sunni is in this country. To hold that this important branch of the Shiah sect can never be benefited as a whole by what in other communities would be a valid charitable trust for the community would, in my opinion, be contrary to public policy. The Mullaji Saheb has not and never has had any Sovereign rights in India and, even if he had, his claims far exceed those which were unsuccessfully made for the Royal Prerogative in *De Keysers Royal Hotel, Limited, v. Regent*[70] The theory of the Mullaji Saheb's universal ownership, therefore, seems to me to be unfounded in fact and bad in law.

108. The conclusion, therefore, which I have arrived at on this part of the case is that in law the Mullaji is a trustee of the suit mosque and theoretically accountable as such, but that no case has been made out for interfering with his management of the mosque, or for directing any account against him.

109. This conclusion applies not only to the prayer-hall, but also to the rest of the mosque

[69]3 Ind. Dec. 1015

[70](1919) 2 Ch. 197 : 88 L.J. Ch. 415 : 120 L.T. 396 : 35 T.L.R. 418 : on appeal (1922) A.C. 508 : 89 L.J. Ch. 417 : 64 S.J. 513

building, including its site but excluding the tomb. In view of defendants Counsel's admission in his final address, I need not dwell further on that point.

110. Next I will deal with the tomb and gulla. These differ somewhat in their legal aspect. The tomb is real property and is in the nature of a perpetuity. The surplus of the past gulla offerings have also been invested in land, and it is at any rate arguable that they now form a permanent landed endowment, and hence a perpetuity. The future gulla offerings, however, do not necessarily involve a perpetuity, for I take it they could all be applied as income. There is clearly some connection between tomb and gulla, but it is not altogether simple to define in law. The Advocate-General suggested that the gulla offerings were the income of the tomb. This is to some degree supported by *Zooleka Bibi v. Syed Zynul Abedin*[71] where the Court held that nazranas (offerings), to the Durga should be treated as income of the Durga and were liable to partition, (see pages 1069 and 1071), but that nazranas to the defendants personally could be retained by them. I am not, however, altogether satisfied that this is the correct legal relation of the tomb and the gulla. On the other hand there would seem to be something in the nature of a good will attaching to the tomb, viz., expectation that worshippers will repeat their visits and repeat their gifts. There may, therefore, be a remedy against those 1 who might try to injure that good will. But for present purposes I do not think it necessary to pursue this. Whether it be wakf or sadakah, endowment or donation, the tomb pr the offering may yet be charitable.

111. The first point then that arises on the authorities is, whether Chandabhoy should be regarded as a saint. Now on the facts, which I have already detailed, I think that Chandabhoy would in ordinary English parlance be called a saint. Short of canonisation, which is unknown in this community, Chandabhoy would appear to have all the ordinary attributes of a saint, and perhaps more Piety, shrine, worshippers, offerings, intercession, miracles, anniversaries, feasts and illuminations. The shrine itself is an honoured position close to the prayer-hall. The mosque was frequently called Chandabhoy's mosque. I need not quote the definitions of "saint" in Webster's

or Murray's or Johnson's Dictionaries; but the latter quotes Addison as saying "miracles are required for all who aspire to this dignity, because they say a hypocrite may imitate a saint in all other particulars."

112. The word "wali" has, I think, substantially the same meaning as "saint." Both words are flexible to some extent, and depend on the context, As regards this community, I accept Shaikh Faizulabhais opinion that the expression "wali" is not confined to saints of the highest degree, such as Ali, the Holy Prophet's son-in-law, but includes saints of lower degree, such as, Chandabhoy. The meaning put forward by the defendants varied as the case went on. The endeavour to confine it to Imams and Dais failed, and in cross-examination the Mullaji had to admit that many others besides Imams and Dais were saints.

113. What assistance then do the authorities give on this point? The defendants rely on *Zooleka Bibi v. Syed Zynul Abedin*[72] and *Kaleloola Sahib v. Nusseerudeen Sahib*[73] as showing that only the tombs of saints are charitable, and that according to the standards there mentioned, Chandabhoy cannot be regarded as a saint. But in both those cases the

[71]6 Bom. L.R. 1058 [73]5 M.L.J. 40 : 6 Ind. Dec. 489

[72]6 Bom. L.R. 1058

facts were quite different for the deceased persons were ordinary individuals. In the former case, Budruddin was an ordinary member of the family of the founder or Pir Syed Ahmed Rafai. He had no religious sanctity or any distinction whatever. He was just an ordinary Muhammadan husband whose memory his wife wanted to honour in perpetuity. The Judge held that he was not a saint, and that consequently the gift for the upkeep of his tomb was void for perpetuity. The same conclusion was arrived at as regards a second tomb, viz., that of Bis-millah. So, too, in *Kaleloola Sahib v. Nusseerudeen Sahib*[74] the settlor and her deceased husband were both ordinary individuals. As stated at page 213, the tomb was a private tomb. Further, as, regards the ceremonies, it is clear that the learned Judges were influenced by the then decisions in Madras and England that gifts of property for masses for the dead were invalid on the grounds of public policy. The English decisions to that effect have now been over ruled by the House of Lords in *Bourne v. Keane*[75] and presumably a similar course will be taken elsewhere. The "general rule of public policy" referred to in *Kaleloola Sahib v. Nusseerudeen Sahib*[76] no longer exists.

114. The defendants further relied on an unreported case in this High Court, viz., Suit No. 1267 of 1914 and Appeal No. 28 of 1916. There, too, the facts were quite different. The deceased was an ordinary individual, and his tomb was in a private building. It was pleaded in that case that monetary offerings were made at the tomb, but the Appellate Court pointed out that only offerings of flowers were proved to have been made. The decision was that the tomb was not shown to be that of a saint or Pir.

115. In *Muthukana Ana Ramanadhan Chettiar v. Vada Levvai Marakayar*[77] it is suggested that no line of distinction can be drawn on grounds of religion between the tombs of saints and those of ordinary individuals. The point was, however, left open, and although it has some support in Wilson's Anglo-Muhammadan Law, 4th Edition at pages 369-370, and is to some extent borne out by the evidence in the present case, I think that in this Court I aim bound to follow the existing authorities to the contrary effect. But in those cases it was unnecessary to consider

closely the definition of a saint, for the persons in question were clearly ordinary individuals. In *Zooleka Bibi v. Syed Zynul Abedin*[78] Mr. Justice Tyabji did not, I think, intend to confine saints to great religious teachers. At page 1064 pages of 6 Bom. L.R.-Ed. he says: "It is not shown that he (the deceased) was particularly learned member of the society, or that he was looked upon with reverence by the Mussalman community or that he was considered a Pir." An echo of this is found in para. 1 of the Mullaji's written statement where he pleads that Chandabhoy was not a saint or a learned man or otherwise a public character. The conclusion of the learned Judge at page 1086 pages of 6 bom. L.R.-Ed., was that Badruddin "was not a religious person to whom any such sanctity was attached that his tomb could itself be considered a religious object." As regards the other Durga, it was held at page 1067 pages of Bom. L.R.-Ed that the deceased Bismillah was not even a member of the Kafai family, and that he was not possessed of any religious character. These passages seem to me once more to draw the distinction between matters of public and of merely private interest. This time it is the private individual as compared with the public character. In my judgment

[74]18 M. 201 : 6 Ind. Dec. 489 [76]18 M. 201 [77](1910) M.W.N. 180 : 20 M.L.J. 254 : 8 M.L.T. 16
[75](1919) A.C. 815 : 89 L.J. Ch. 17 : 121 L.T. 426 : 35 T.L.R. 560 [78]6 Bom. L.R. 1058.

Chandabhoy satisfied the tests adopted in the above passages. I think that he is looked on with reverence by the Dawoodi Borah community; that he is a man of public character; and that he is a religious person to whom such sanctity is attached that his tomb can itself be considered a religious object.

116. I have considered the objection that he was not considered a saint in his lifetime or at his death. This allegation mainly rests on his description "Seth," and I am not satisfied that it is sound. In the light of subsequent events, it may be that I ought to presume a legal origin for present-day facts. It is clear for instance that the community has a right of access to the tomb. In effect witness No. 54 thought that, the tomb belonged to, or was for the benefit of the whole community, just as was the case as regards the tomb of Firoze of Ahmedabad. I agree with the witness, but it is difficult to find a valid legal origin for this, if Chandabhoy was only a private individual.

117. Nor is it altogether sound to limit sainthood to popular belief at death. Sometimes it is only after death that the world discovers its saints. The canonisation of Joan of Arc has taken 500 years to effect. And even if Chandabhoy was only a trader in calling does this mere fact debar sainthood in a community which is essentially a community of traders? If one turns to Ex. 52, it will be found that only 8 out of the 69 tombs and gullas there mentioned are in honour of Imams or Dais. Some of the deceased are admitted not even learned men, though they are waits, e.g., Tombs Nos. 7, 17, and 20. No. 20 for instance were cultivators. Their distinction appears to be that they were the first man and wife to be converted.

118. In the result, after a full consideration of the evidence and arguments on this point, I am of opinion that in this community Chandabhoy is regarded as a saint.

119. On that finding it follows that the tomb itself may be charitable, and that gifts for its perpetual up-keep may be valid charitable gifts. Nor can the analogies of English Law be invoked to invalidate the gift, as was done in *Kaleloola Sahib v. Nusseerudeen Sahib*[79] Under English Law, the gift would I. think be valid, because the tomb would be held to be part of the fabric or ornament of the Church: see In re *Vaughan, Vaughan v. Thomas*[80] Is then the tomb held

on a charitable trust? In my judgment it is-I think it stands on much the same footing as the rest of the mosque building, and is held by the Mullaji as trustee or mutawalli accordingly. To borrow the language of Lord Macnaghten in Court of *Wards v. Ilahi Bakhsh*[81] 1 think that by user, if not by dedication, the tomb is wakf. But here again I do not propose to interfere with the management of the Mullaji Saheb. It is preferable that it should be left to him to do what is seemly and right.

120. I will next consider whether the offerings at Chandabhoy's tomb are charitable. These admittedly come to the Mullaji in right of his office: they pass to his successor as Dai and not to his heirs: they are not his private property like the Salam; but according to him are dawat property. In the past they have been spent regularly on the upkeep of the mosque and tomb, the feasts, majlis and illuminations. The surplus has been invested in land, and the resulting rents carried to the gulla account. But I need not repeat the facts already mentioned. The essential features of the offerings are (1) their religious

[79]18 M. 201 : 5 M.L.J. 40 [81]1 W.R. 1913

[80](1886) 33 Ch D. 187 : 55 L.T. 547 : 51 J.P. 70

connection and merit, and (2) their practical benefit to the community. They are given in connection with prayers to, through, or for Chandabhoy, and in the knowledge that the High Priest as such will receive them and in the ordinary course distribute them for the benefit of the community. As I have already stated, I accept the view that they are gifts to God and are God's property.

121. But then comes the important question whether it is obligatory on the High Priest to follow that course, or whether in theory he is entitled to spend them for any purpose he likes, whether what purposes or not. It was difficult at times to force the defendants to consider the latter alternative. I was told that the suggestion was unthinkable that the Mullaji would never do such a thing, and that it was a reflection on him to consider it. In fact there was no reflection on the Mullaji. The question was solely a legal test.to determine his le-al position. It was substantially the same test which the Court of Appeal adopted in re Davidson (19), viz., whether the Archbishop could put the money into his own pocket. I respectfully adopt what Lord Cozens Hardy said there Of course I do not suggest for a, moment that the Archbishop would do that. But one cannot have regard to the circumstances of the particular individual.

122. In fact the answer to the question would determine whether in law there was a trust or nothing.

123. Let me once more go back to first principles. One essential of a trust is that it should be imperative. If a man can carry out or not carry out the alleged trust just as he likes, then there is no trust. In other words, if he is entitled to put the money into his own pocket, he is not a trustee known to the law. See *Morice v. Bishop of Durham*[82]

124. That brings me to the important point as to the intentions of the donors, no which great stress was laid by the defendants. I have already dealt with some of the evidence on this point. It is not disputed that if donors want to make a personal gift to the Mullaji, they can do so. The gifts known as salam are an instance of, this. But the gulla offerings seem tome to stand on a totally different footing. After giving my best consideration to the evidence and arguments, I am of opinion that it is imperative on the Mullaji Saheb to distribute these gulla offerings for the benefit

of the community, and that he is a trustee in respect thereof.

125. The next question is whether the objects of this trust are all charitable. If, for instance, the trust is for private and not for public purposes, the Advocate-General cannot intervene. In my opinion the purposes here are public purposes, viz., for the benfit of the Dawoodi Borah community. This large community is quite unlike the Dominican convent in *Cocks v. Manners*[83] on which the defendants relied. Nor can I accept their argument that perpetuity is essential for a charitable gift. A donation may be charitable just as well as an endowment. But, if the donation can wholly be applied as income, it is often unnecessary to consider whether it is charitable and thus within the exception to the rule against perpetuities. Accordingly in *Cocks v. Manners*[84] the Judge, first held that the convent was not charitable because it only existed for the edification of its inmates, and then considered whether the gift was void for perpetuity. It was held that there was no

[82](1805) 10 Ves. 522 : 32 E.R. 947

[83](1871) 12 Eq. 574 : 40 L.J. Ch. 640 : 19 W.R. 1055

[84](1871) 12 Eq. 574 : 24 L.T. 869

perpetuity because although the Mother Superior was bound to bring the gift into convent, there was nothing to prevent the members from spending it as they pleased, viz., as income. Consequently the gift was valid and did not infringe the Mortmain Acts. In the present case I agree that the offerings when made do not necessarily involve a perpetuity, for presumably they can be applied as income. But it does not follow that they are not charitable.

126. Taking the specified objects which have been proved in this case, it is clear that the upkeep of the tomb and mosque are both charitable objects. So I think are the jamat feasts on 21st Ramzan. These are not disputed, nor are the occasional feasts on, the Mullaji's birthday. As regards the other usual applications of the suit guild offerings, viz., for the majlis ceremony and ooros feast and illuminations in honour of Charidabhoy, I have already stated that these are some of the usual modes in which a gulla fund is applied. On December 9th Mr. Binning said that he would not argue that applications of that nature were not a proper use of a gulla fund. Mr. Inverarity in his final address contended that unless alms were given to the poor, these majlis and ooros ceremonies and feasts were invalid. In view of Mr. Binning's previous admission, I think that this contention was not then open to the defendant. But even if it was, I think it ought not to succeed.

127. I regard these ceremonies and feasts as religious celebrations by the whole community in honour of a saint of theirs. They tend I think to the advancement of religion in their community. In my opinion they are quite distinct from fatyeh ceremonies in honour of a private individual. But even these have been held to be valid charities when accompanied by the giving of alms [see *Muthukana Ana Ramanadham Chettiar v. Vada Levvai Marakayar*[85] the latter, is a decision of the Privy Council]. In the Allahabad Courts some doubts have arisen in. two Sunni cases, but the eventual decision was that the fatyeh ceremonies, were valid charities see *Mazhar Husain Khan v. Abdul Hadi Khan*[86] In the present case, it does not appear that any alms are given id the poor but on the other hand the celebrations are open to the rich and poor alike. It is true that the Mullaji sends out the invitations for the feasts, but these are effected by a crier, and are of a general nature. In my opinion, then, these celebrations stand on' much the same legal footing as the gadi feasts in honour of Ali, which were held charitable in Sakbhai Abdul Qadirv. Bai Safiabu 12 Ind. Cas. 702 although of course there is a big difference in the relative religious positions of Ali and Chandabhoy. There is, also an unreported decision in Chambers of Mr.

Justice Macleod in Suit No. 334 of 1909 which is substantially to the same effect as regards feasts in honour of Ali.

128. It is a far cry from a BombayJamai feast, to a Yorkshire clerical dinner, but some observations of Mr. Justice Eve *in re Charlesworth*[87] seem to me to be apposite, and I will quote them. The gift in that case was to the Chairman, etc., of the Cleveland Clerical Society upon trust to appropriate the dividends in payment of the expenses of the annual dinners which the Society held. Mr. Justice Eve said that the gift must increase the attendance at the meetings, and proceeded:

> Having regard to the fact that the meetings are held for the advancement of religious doctrines, I should be splitting straws if I held the gift to be bad because

[85](1910) M.W.N. 180 [87](1910) 101 L.T. 908
[86]18 A.L.J. 152.

> a dinner per se is not a religious ceremony, and because some of the persons who partake of the dinner might without inconvenience pay for...themselves.

129. If then, as I held to be the case, the usual applications of the suit gulla funds in the past have all been charitable, what is the legal position as regards the surplus? Ill the first place, has the Mullaji a discretion to apply the whole fund for any of what I will call the surplus objects as well as the usual objects? Could he, for instance, apply the whole income of any one year exclusively on the surplus objects? I think not. I have felt some doubt on this point because of the admittedly wide powers of the Mullaji. On the other hand the consistent past user of the suit gulla funds, fortified as it is by similar consistent user of other gulla funds, and the absence of instances in India of cessation or substantial alteration of usual gulla objects, goes far, I think, to show that these usual objects must be satisfied first. In my judgment, therefore, it is only the surplus of the gulla funds which can be spent on surplus objects.

130. The defendants contended that the surplus objects were those of the dawat generally. Assuming for the sake of argument that that contention is correct, are the general objects of the dawat charitable? I will again site the book Ex. A.L., for it is the then Dai's own description of his obligations before the present controversy arose. It runs:

> He (the Dai) is the trustee of the public funds which it is his duty to dispose of economically, and at his discretion as directed by the sacred rules, in relieving the distressed and the needy and paying the expenses incurred by them and his deputies and discharging their sacred duties and in keeping schools and institutions for religious and secular instructions.

131. These purposes are, I think, all charitable. In the Mullaji's Memorandum, dated September 19, 1920, Ex. YYY, it is recited, "that the moneys collected in Chandhabhoy's gulla have at all times been applied under the control of the Dai-ul-Mutlak for the time being of the Dawoodi Borah community in and for purposes of the community." The objects mentioned in that Memorandum for the intended application of the surplus gulla moneys are, I think, charitable objects. If necessary I think that this view may be justified on similar principles to those on

which *In re Allen*[88] was decided as already mentioned.

131. The examination-in-chief of the Mullaji as to the objects of the dawat will be found at pp. 180-182 of the Notes and his cross-examination at pp. 276-280. In chief the Mullaji mentioned allowances to the learned; allowances to anvils; allowances to Dawoodis in trouble; assistance to Dawoodi Borahs to start business; assistance on marriage; the maintenance of schools; the repairs of mosques and other dawat property; and assistance to pilgrims. It is true that he added that the funds could be spent on any purpose the Dai thought fit; but apart from a contribution to the War Loan without interests and illuminations on some occasions of public rejoicing which he mentioned in cross-examination, there was no plain instance of this.

132. After discussing the evidence relating to this part of the case his Lordship proceeded.

133. Assuming, however, for the sake of argument that the items of dawat expenditure

[88](1905) 2 Ch. 400 : 74 L.J. Ch. 593 : 54 W.R. 91 : 21 T.L.T. 662 : 93 L.T. 597

put forward by the defendants are correct, the question still remains whether they are not all charitable. In my opinion they are charitable. The funds are held by a religious head for the benefit of the community as a whole. The particular applications of this fund as shown in those items are to my mind consistent with the central object of the fund. The selection of individual objects of relief does not necessarily negative a charity.

134. His Lordship discussed Dawat accounts and then proceeded as follows.

135. Mr. Inverarity argued that the purposes of the dawat were so wide that they might fairly include non-charitable objects. He suggested that subscriptions to apolitical party might be such a purpose. But this suggestion seems to me inconsistent with the book Ex. A.L. At page 2 it is said that, the Dais kept aloof from political, matters. Page 3 states: "As the Dais in India had no hand in the ruling of the country on account of their exclusively religious calling, they had taken no share in the political events." And against any mere suggestion of possible objects, we have the hard fact of actual objects over a long series of years. We are dealing with offerings which are God's property, and which are distributable by a religious head for the. benefit of a particular community. The gifts, therefore, are not merely for "Sarakam" or "Dharam". in which latter case they would presumably be void. See *Runchordas Vandravandas v. Parvatibai*[89] Being gifts at a shrine, they are already consecrated to God,, and presumably must be used for religious or pious purposes. A mere gift by Will has not, I think, in its inception the same religious significance. But the purposes here are riot merely religious or pious purposes in general. They must also be for the benefit of the Dawoodi Borah community. The case is distinguishable, therefore, from *Dunne v. Byrne*[90] and *In re Davidson*[91] which I have already referred to, and also from *In re Costa*[92] where the gift was to such persons, and for such public purposes as the Governor-in-Chief of South' Australia should direct. As I have already pointed out, the principles referred to in *In re Allen*[93] may be applied by analogy, and in some respects the present case may be compared to *In re Garrard*[94]

136. For similar reasons, I think that *Moore v. The Pope*[95] is also distinguishable. A gift for carrying out the duties of the sacred office of the Pope is not, I think, the same as a gift for religious or pious purposes for the benefit of a community. In that case as stated by the learned Judge at page 321 page of (1919) Ir. R.-Ed. "The bequest is not an endowment for the Pope, the

benefit of which was ultimately to enure for a congregation, but it is for the purpose of the carrying out of the office of the Pope." Nor is the position of the Pope in international law at all comparable to that of the Mullaji. One main ground on which the bequest was held to be void was because it was open to the Pope to benefit the King's enemies or injure the King's Allies, and that that could not be a charitable purpose in British Law. I may observe that the judgment in that case occupies some 41 printed pages and is substantially confined to law, the facts not being in dispute. The case shows also considerable difference of opinion among the Irish Judges as to the effect of gifts to an ecclesiastic. It affords, therefore, some justification for my inability to share the confidence of Counsel in the "simplicity of the law in the present case, and for my referring them to *Moore v. The Pope (1919) 1. Ir. R. 316* and many other authorities to ascertain the principles which have guided Judges in other cases.

[89]26 I.A. 71 : 1 Bom. L.R. 607
[90](1912) A.C. 407 : 81 L.J.C. 202 : 28 T.L.R. 257
[93](1905) 2 Ch. 567 : 99 L.T. 222 : 24 T.L.R. 760
[94](1907) I.Ch. 382
[91](1909) I. Ch. 567 : 78 L.J. Ch. 437
[92](1912) I.C.h. 337 : 106 L.T. 458
[95](1919) I. Ir. R. 316

137. As regards the Aga Khan's case 12 B.H.C.R. 323 the decision depended on whether the Khojas were Sunnis as the plaintiffs contended, or Shiahs as the defendants contended. The decision was that the Khojas were Shiahs, and consequently the suit failed. (See p.-360). As I read the judgment, that was sufficient to dispose of the whole case. The learned Judge did, however, proceed to deal with the curious injunction prayed for at page 324 which inter alia was to restrain the Aga Khan from interfering with the affairs of the community and from excommunicating any Khoja and from deceiving? any offerings. (See pp. 361--3). Naturally enough this injunction was refused. He also held at pp. 360--1 that there was no other ground for the interference of the Court. The gifts there appear to have been gifts to the Aga Khan personally, like the salaam in the present case which admittedly belongs to the Mullaji; or else were religious taxes (zakat). The only suit property in that case arose from these sources and it was held that it belonged to the Aga Khan. (See pp. 345-47.) The Court there had not to deal with offerings at a shrine, nor apparently with any trust deeds (See page 361), nor even with mosques (page 347). Nor had it to deal as in the present case with "public funds of the community" of which the Dai had described himself as trustee in the book Ex. A.L. and in the written statement Ex. B.E. 2. I should, however, infer from what is said at page 348 that the Court thought that a suit by the Aga Khan to enforce payment of religious taxes would fail.

138. The conclusion then, which I have arrived at, is that all the suit gulla moneys, whether surplus or otherwise, are held upon charitable trusts. I am also of opinion that in law the Mullaji is the trustee thereof, and that as such trustee he has wide powers of management, and also a wide discretionary power as to the particular purposes for the benefit of the community on which the surplus moneys should be expended.

139. For present purposes, I think I need not decide whether these gulla offerings may more properly be described as wakf or as sadakah. Either form of gift may be the subject of a trust. See *Muthukana Ana Ramanadham Chettiar v. Vada Levvai Mara-kayar*[96] Properties Nos. 1 to 4 would now seem to form a permanent endowmentof the gulla charity; and a similar observation probably applies to property No. 6. Nor I think need I decide whether moveable property could form the subject of a wakf prior to the Wakf Validating Act, 1913. In *Banubi v. Narsingrao*[97] Sir

Lawrence Jenkins and Mr. Justice Beaman held that it could, but did not think it necessary for the purposes of that case to give a considered opinion upon the point. In *Bai Fatmabai v. GulamHusen*[98] Mr. Justice Russell held that shares in a limited company could not be given in wakf. The objection to moveable property is based on the alleged illegality of taking interest. But in the present case there is a large body of evidence to show that in this community of traders interest is paid and received as a matter of course. It is charged in the accounts between defendants Nos. 1 and 2 and the Mullaji himself: and there are many other striking instances. There is, therefore much to support the view taken in Banubi v, Narsingrao 9 Bom. L.R. 91.

140. I think, however, I should state shortly my conclusion on the issue as to whether the Mullaji is regarded as the Dai-ul-Mutlak. In my opinion this issue should be decided in

[96]6 Ind. Cas. 1 : (1910) M.W.N. 180 : 20 M.L.J. 254 [98]9 Bom. L.R. 1367
[97]9 Bom. L.R. 91

favor of the Mullaji Saheb. The 46th Dai died as long ago as 1840, and there is no oral evidence now available from contemporary witnesses. But it is clearly proved that, so far as all outward manifestations are concerned, the succession of the 47th Dai was regular that he was accepted as Dai and ruled as such for some 45 years, and was suceeded by his appointee. For instance the dawat books of the time record the accession of the 47th Dai and the taking of the oath of allegiance by various officials, and the payment of the customary gifts. Much correspondence, too has been put in recognizing him as Dai-ul-Mutlak. I think, therefore, that the onus lies heavily on the plaintiff to disprove the validity of this succession after this long lapse of time, and nonetheless so because the plaint itself describes defendant No. 3 as the High Priest.

141. After discussing the evidence his Lordship proceeded.

142. Under these circumstances I think the plaintiff has failed to discharge the onus of proof which the de jacto succession has thrown upon him.

143. I may now consider what relief ought to be given in this suit on the above findings. As to that the guiding principle should, I think, be the benefit of the charity. See *Attorney-General v. Bosanquet*[99] What this charity wants most at present is peace, and a cessation of litigation and angry disputes. If, therefore, the Court could have made an end of this suit once and for all, there would have been much to justify such a course being taken. But a discordant note was struck in Mr. Inverarity's final address. ? He intimated that his client would not accept the position of "a trustee appointed by the Court," and that in the event of an adverse decision, his client would leave the suit properties in the hands of the Court. I stopped Mr. Inverarity on this, because I thought it an unfair statement to make at that stage of the case, and one which, if permitted, might necessitate the further recall of the Mullaji.

144. If the Mullaji Saheb had wished to adopt that attitude the candid, course would have been to plead it, or at any rate to state it in his evidence. He could then have been cross-examined on it. As it was he put forward sand adhered to the Memorandum Ex. Y.Y.Y., and he also intimated that he was content that the temporal affairs of his community should be entirely subject to the British Courts of Justice, and that in certain contingencies he would seek the protection of those Courts to enforce the rights he claimed as Dai.

145. I also took exception to Counsel's expression "trustee appointed by the Court." In my

judgment that expression is inaccurate and misleading. The Court is not appointing the Mullaji trustee of anything. It merely declares that his own acts and deeds in the past and also those of, his predecessors constitute him in law a turstee. The Mullaji and his predecessors have in various writings described themselves as trustees. The Court merely holds that their own description of themselves is correct in law. To say, therefore, that the Court is appointing trustees of the mosque may tend to inflame religious feelings, but in fact it is untrue.

146. I cannot, however, entirely overlook Counsel's statement, and make an end now of the suit. Some provisions should, I think, be made for future contingencies, although I

[99](1941) 11 L.J. Ch. 43

trust they will never arise in fact. There must of course be declaratory relief as to the existence of the charitable trusts, but at the present time, I think, that the discretion as to the distribution of the surplus gulla funds should still be left to the Mullaji. The general management of the suit properties may also be left to him as trustee as heretofore. At the present juncture I see no necessity for a scheme, but in any event it would be desirable to ascertain what the charity properties consist of before any scheme was framed. See *Chotalal Lakhmiram v. Manohar Ganesh Tambekar*[100]

147. Badri Mahal creates a difficulty here, and I shall accordingly direct enquiries as to what properties and moneys are now held for the benefit of the gulla trust and as to what gulla moneys have been expended in connection with Badri Mahal. But, in the hope that the parties will themselves try to minimize further proceedings and that time may make for peace, I will direct that those equiries are not to be taken without the leave of the Judge to whom this suit, may for the time being be assigned by the Chief Justice. The reservation of further directions and the liberty to apply will, I think, afford some protection to the charity against the contingencies I have referred to, or the necessity to file a new suit.

148. As regards Badri Mahal, some further direction of the Court is necessary, as the plaintiff contends that the gulla charity is entitled to an aliquot share of Badri Mahal and of the past and future rents, while the defendants contend that the charity is only entitled to a charge. The practical importance of the point arises from the increase in value of Badri Mahal. On the other hand, I think, that under Ex. O.4, Badri Mahal is held on a charitable trust as a residence for the High Priest for the time being. So the contest only lies between two charities of the same community, subject, of course, to the claims of the Official Assignee.

149. On the legal aspect of this question, I am disposed to think that the plaintiff is right. Mr. Inverarity tried to show that the gulla moneys all went for payment of interest on the moneys provided by defendants Nos. 1 and 2. I think he failed in this. But be that as it may, the gulla moneys were utilized towards the acquisition of Badri Mahal free from incumbrances. I think, therefore, that, on the principles adopted in Lord Provost, etc. of *Edinburgh v. Lord Advocate*[101] the gulla charity might claim a proportionate share of the property. No. doubt in *In re Hal left's Estate*[102] Sir George Jessel said that the beneficiary was entitled to a charge. The Indian Trusts Act, 1882, Section 63, Illustration (b) is to the like effect. But in *In re Hallett's Estate*[103] the exact point did not arise for decision, and the Indian Trusts Act does not apply to charities. Further they do not expressly negative the right of the beneficiary to an aliquot share if that would be more to his benefit. In *Attorney-General v. Corporation of New Castle*[104] on appeal (1845) 12 C. And

Fin. 69 R.R. 111 the case was settled in the House of Lords by giving the charity a rent charge for an agreed sum.

150. I think, however, that the interests of the charity will best be served by merely directing re-payment of the moneys expended with interest at 6 per cent, per annum and declaring an interim charge for the amount. It will make for simplicity and I hope for

[100]43 Ind. Cas. 806.
[101](1879) 4 A.C. 823
[102](1880) 13 Ch. D. 693 : 49 L.J. Ch. 415
[103](1880) 13 Ch. D. 693 : 49 L.J. Ch. 415 : 42 L.T. 421
[104](1852) 5 Beav. 307 : 49 E.R. 596

peace, and I think I have jurisdiction to adopt this cause. I see possibilities of considerable legal friction and delay, if some complicated enquiry is directed to ascertain the exact proportionate shares, and in the result the Mullaji's residence is to be held on a tenancy-in-common with the gulla charity. This I wish to avoid.

151. As regards properties Nos. 1 to 4 and No. 6, the Advocate-General is content with a declaration by the Court as to the charitable purposes for which these properties are held. He does not require a conveyance from the defendants Nos. 1 and 2 although they are described there as trustees or managers of the mosque. Under these circumstances, I think that no further directions are necessary at present with regard to these properties.

152. The question of costs is not an easy one. This is not a case, I think, where I ought to let the charity bear the costs of the litigation. If I did, little or no charity property might perhaps be left. The costs are at any rate very large and probably amount to several lakhs. The result of the suit is that though the plaintiff has succeeded on the main point of principle, viz., the trusteeship, he has failed in the attempt made in the plaint to deprive the Mullaji Saheb of the management of the suit properties. He has also failed on the point as to the Dai-ul-Mutlak. Proper accounts have been kept of the suit gulla moneys by defendants Nos. 1 and 2, or their predecessors, down to the date of the suit. The suggestions made in the plaintiff's affidavits on the summons for discovery that the defendants might be tampering with the books have been shown to be quite unfounded. On the other hand the plaintiff's modified case was formulated as long ago as September 30, 1920, and in the result he has substantially succeeded on that modified case. As regards defendants Nos. 1 and 2, I think that they ought not to have severed from the Mullaji in their defense. I see no reason for their employing separate Solicitors and separate Counsel. They however, persisted in this throughout the trial, and intimated that they were not much concerned about costs. All the defendants have denied the trust, and that in it self is a breach of trust. On the whole, then, I think the right order will be to direct that the defendants to pay three-fourth of the costs of the plaintiff of the suit, but that all other costs to date be borne by the parties themselves. Further costs will be reserved. In giving the above directions I have taken into consideration the Advocate-General's exceptional position in charity matters but under the peculiar circumstances of this particular case I do not think it would be right to give him the difference between attorney and client costs and party and party costs out of the charity estate nor the remaining th costs either.

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