Supreme Court of India
Syed Mohd. Salie Labbai (Dead) By ... vs Mohd. Hanifs (Dead) By L.Rs. And ... on 22 March, 1976
Equivalent citations: 1976 AIR 1569, 1976 SCR (3) 721
Author: S M Fazalali
Bench: Fazalali, Syed Murtaza

PETITIONER:
SYED MOHD. SALIE LABBAI (DEAD) BY L.RS. AND ORS.

Vs.

RESPONDENT:
MOHD. HANIFS (DEAD) BY L.RS. AND ORS.

DATE OF JUDGMENT22/03/1976

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
GOSWAMI, P.K.

CITATION:
1976 AIR 1569 1976 SCR (3) 721
1976 SCC (4) 780

ACT:
Mahommadan Law-Mosque its adjuncts and graveyard, what constitutes dedication to public-Right to officiate as Imam, when recognised.
Muslim Wakfs Act, 1954, s. 55(2), Scope of-Code of Civil Procedure (Act 5 of 1908) s. 11-Res judicata, scope of.

HEADNOTE:
The land in dispute was originally acquired by a Muslim saint, about two hundred years ago. Some years later the predecessors of the respondents, who formed the major section of the Muslims of the village, approached his successor, the ancestor of the appellants and the then owner of the land, and sought his permission for building a mosque on the land as there was no mosque at all in the village. The predecessors of the respondents executed an agreement in favour of the owner. It recited that, (1) the predecessors of the respondents were constructing a prayer hall on the raised platform belonging to the ancestor of the appellants, with his permission; (2) after completion of the mosque, the predecessors of the respondents will have no claim or right, except the right to worship therein; (3) the only right which they would claim would be the right to worship and to

light lamps, while they will be responsible for the maintenance of the mosque; (4) the construction was purely for the purpose of worship; and (5) there shall be a doorway and windows on one side so as to serve as a separate entrance to the mosque in order to constitute it as a separate entity. The mosque was built by the ancestors of the respondents; and thereafter, in course of time, additional constructions which form adjuncts to the mosque, were added. All the adjuncts were built for the purpose of offering prayers in the mosque and by way of a gift to the mosque. The adjacent vacant land was used as a graveyard for the Muslims of the village. Subsequently, the appellants constructed shops on a part of the graveyard, and the respondents, who regarded the constructions desecration of the graveyard, filed a number of suits for the demolition of the shops. The appellants, however, claimed the properties as their private properties, excepting the prayer hall used as a mosque, and even there, they claimed that they had a right to manage it and lead the congregation at prayers. The result of the suits was inconclusive, and as a result of an observation in one of the suits, that the only remedy for the constant quarrels between the two sections of the Muhammadan community is a suit under s. 92, Civil Procedure Code, the respondents filed a suit under the section, in a representative capacity. after obtaining the sanction of the Advocate General. They alleged that the 3 items of property, namely, (1) the burial ground which consisted of two parts, (2) the Dargah over the tomb of the saint who first acquired the property, and (3) the mosque and its adjuncts were all wakf properties of a public and charitable nature dedicated by the predecessor of the appellants, that they were public trusts dedicated to God, and that the appellants, who were de facto managers, were guilty of acts of mismanagement and misfeasance. The respondents prayed for the removal of the appellants and for framing a scheme for administering the trust properties. The trial court dismissed the suit but on appeal. the Court, while dismissing the suit with respect to the Dargah on the ground, that it was the private property of the appellants, decreed it with respect to the mosque and its adjuncts, and the graveyard, and remanded the matter to the trial court for framing a scheme for the administration of those two trust properties.

In appeal to this Court, the appellants contended that. (1) in the previous judgments between the parties the public character of the properties was negatived and they operated as res judicata; (2) There was no public wakf of the
722
mosque which was only a private or family mosque; that there was no declalration of dedication for the purpose of a mosque, and that the prayers offered in the mosque by the respondents were only by leave and licence of the founder; (3) the graveyard was also not a public wakf but the family grayeyard of the appellants wherein corpses of other Muslims

were allowed to be buried on payment of pit fees and other charges. (4) even if the mosque was a wakf of a public character the appellants had the hereditary right to administer and govern it and so the respondents had no right to dislodge them and ask for the framing of a scheme; (5) the suit was barred by s. 55(2), Muslim Wakfs Act, 1954; and (6) section 92, Civil Procedure Code; has no application as the appellants were not trustees.

Dismissing the appeal,

^

HELD: (1) The judgments relied upon by the appellants do not operate as res judicata, because, the public character of the wakfs was not in issue in those cases. [738D]

(a) Before a plea of res judicata can be given effect to, the following conditions must be proved:-

(i) that the litigating parties are the same;

(ii) that the subject-matter of the suits is identical;

(iii) that the matter was finally decided between the parties; and

(iv) that the earlier suit was decided by a court of competent jurisdiction. [732A-733 B]

(b) In the present case, the 2nd condition is not satisfied, because, the public character of the mosque was never raised in any of the earlier suits, and consequently, there was no decision or finding upon the public character of the mosque. The only questions that were raised were the questions regard ing the performance of certain religious ceremonies, the question of the right to appoint the Imam, and as to who was to manage the affairs of the mosque. In one suit, the appellants had put forward the claim of being hereditary owners of the mosque, but that was only in a limited sense namely, for the purpose of its management. In another suit, there was a finding that the respondents were debarred from disputing the ownership of the appellants of the mosque, and from asserting that the respondents were anything more than licensees in respect of the mosque. But this observation has to be understood in the light of the pleadings which show that the suit related not to the public nature of the mosque but only to the management thereof. [733B-C, E-F, 734D-E, 736G 737A, 738D-E]

(c) In two suits there was in fact a finding against the appellants, that the mosque was public property and not descendible to the appellants. In one suit, there were observations that the burial ground and other places were the exclusive properties of the appellants but by 'exclusive property' it was never meant that it was the private property of the appellants, but only that the respondents had no interest in it. Even otherwise, as the suit was not for any declaration that the mosque was a public one the observations would only be obiter. [734G, 735F-G, 738B-C]

(d) In a criminal revision case before the High Court,

the respondents admitted that they would not interfere with the rights of the appellants and the respondents were acquitted thereupon. A perusal of the order shows that the admission was not unqualified but only amounted to this that the respondents would not take the law into their hands, but would take recourse to legal remedies. Even if it is construed as an admission, it was in a criminal case made in terrorem and loses much of its significance. Further since the respondents filed the suit under s. 92, they had not acted against the admission but have availed themselves of a remedy which was open to them under the law. [738G-739B]

(e) The earlier judgments between the parties show that it was never disputed even by the appellants that the mosque was a public mosque where prayers were offered by the Mahomedan public. [737A]

723

(2) Since the public character of the mosque was never raised in any suit, the judgments relied upon by the appellants do not establish that the mosque and its adjuncts were not wakfs of a public nature. A consideration of the facts, circumstances and the evidence in the present case, shows that the mosque and its adjuncts constituted wakf properties as a single unit and had been used as such for a long time so as to culminate into a valid and binding public wakf. [738D-E, 746B, 760B]

(a) To create a valid dedication of a public mosque, under the Hanafi school of Mahomedan law, the following conditions must be satisfied:-[746B-C]

(i) that the founder must declare his intention to dedicate a property for the purpose of a mosque. No. particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder either express or implied. It may be oral or in writing. [750-B, 755A-B]

(ii) that the founder must divest himself completely from the ownership of the property, the divestment can be inferred from the fact that he had delivered possession to the Mutawalli or an Imam of the mosque. Even if there is no actual delivery of possession, the mere fact that members of the Mahomedan public are permited to offer prayers with azan and ikamat, shows that the wakf is complete and irrevocable. It is not necessary for the dedicator of a public mosque that a Muttawali or a Pesh Imam should be appointed. That could be done later by the members of Muslim Community; and (iii) the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque. [747A, 750B-D]

As regards the adjuncts the law is that where a mosque is built or dedicated for the public, if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, these constructions would be deemed to be accretions to the mosque and the mosque and such adjuncts

will form one single unit so as to be a part of the mosque. [750D-E]

Jewan Doss Sahoo v. Shah Kubeer-ood-Deen, 2 M.I.A. 390; Adam Sheik v. Isha Sheik, I.C.W.N. 76; Saiyad Maher Husein v. Jaji Alimohomed 36 B.L.R. 526; Akbarally v. Mahomedally; I.L.R. 57 Bom. 551; Miru v. Ramgopal; A.I.R. 1935 All. 891; Abdul Rahim Khan v. Fakir Mohammad Shah, AIR 1946 Nag 401; Masjid Shahid Ganj Mosque v. Shoromani Gurdwara Prabandhak Committee, Amritsar; L.R. 67 I.A. 251; Musaheb Khan v. Raj Kummar Bakshi, A.I.R. 1938 Oudh 238; Maula Baksh v. Amiruddin; I.L.R. I Lah. 317; Mohammad Shah Shah v. Fazihuddin Ansari, A.I.R. 1956 S.C. 713 referred to.

(b) So far as the mosque and its adjuncts in the present case are concerned, they consist of, (i) the main prayer hall, (ii) a covered platform, where, according to the respondents, prayers were offered by the members of the Mahomedan public when the space in the main mosque was not sufficient to accommodate a big crowd, and (iii) a small chamber in the nature of a store room adjacent to the mosque, a thatched shed, a pond into which water is pumped by a pump set which had been installed by the Mohomedans of the village, a latrine to the south of the burial ground, and a minaret fitted with a loud speaker. On special auspicous occasions, the entire Muslim community flocks to the mosque for the purpose of prayers, because, offering prayers on such days is, according to Islamic tenets, extremely auspicious & highly efficacious. Before a Mussalman offers his prayers he has to do wazoo or wash his hands and feet in the prescribed manner and for this purpose arrangements are made in every mosque. Accordingly a tank or hauz where water is pumped for the wazoo was provided. As a large number of Muslims assembled on special occasions, the entire space-including the mosque, the raised platform and a corridor-was used for the purpose of offering prayers. The store room was used for keeping the mats which were meant to be used at the time of offering prayers and the loud speaker for reciting Azan and for delivery of Khutbas or religious sermons. Thus, the constructions were used for religious purposes incidental to the offering of prayers and have become accretions to the mosque so as to constitute one single entity. [754D-H, 758G-759C]

724

(c) In the case of a mosque, the founder's permission or the bare act of allowing the members of the Mahomedan public to offer prayers amounts to a complete delivery of possession. The agreement in favour of the ancestor of the appellants clearly shows the intention of the founder and on a proper interpretation of its terms, amounts to a permanent and irrevocable dedication to God constituting a valid public wakf. The owner of the land had given his tacit consent to all the terms of the agreement and in the eye of the law, he being a party to the agreement, he allowed the mosque to be constructed not for the private members of his

family but for the worship of God by the entire Mahomedan public. The document thus unmistakably evidences the clear intention of the founder to consecrate the mosque for public worship and amounts to a declaration of a public wakf. By providing a separate entrance, the owner agreed to separate the mosque from the rest of the property namely the Dargah and the compound; and by allowing the entire Mahomedan Community of the village to worship in the mosque and to perform other ceremonies, the owner of the land gave delivery of possession to the mosque. [756B]

(d) The owner, being a saint himself, unequivocally and categorically divested himself of the entire interest in the mosque and made it a public wakf. A place may be dedicated as a mosque or masjid without there being any building. But, since the building in the nature of a mosque was built, a clear case of dedication has been made out. Once the mosque was constructed it stood dedicated to God and all the right, title and interest of the owner got completely extinguished about a century and a half ago and since then, the mosque had been used constantly for the purpose of offering prayers. [756F-H]

(e) Once there was a complete dedication to the mosque as a place of public worship any reservation or condition imposed by the owner would be deemed to be void and would have to be ignored. Therefore, it could not be contended by the appellants that under the agreement, the respondents had stipulated not to claim any right or interest in the mosque, and hence, cannot claim the mosque as wakf property. Reading the statements in the agreement as a whole what the respondents' ancestors meant was that the mosque would undoubtedly be a public wakf meant for the purpose of public worship and that they would not interfere with its management. But that did not mean that if the appellants, who are the founder's descendants, indulged in mismanagement of the mosque, the respondents, as members of the Mahomedan Community, could not take suitable action under law against them. [757A-D]

(f) Further, under the Muslim law once the dedication was complete, the property passed from the owner to God and it never returns to the owner and therefore, the question of the mosque being private can never arise. The very concept of a private mosque is wholly foreign to the dedication of a mosque for a public purpose under Muslim Law. Under that system of law, once the founder dedicates a particular property for the purpose of a public mosque, no Muslim can be denied the right to offer prayers in the mosque to whatever section or creed he may belong, and that is why the law is so strict that the moment even a single person is allowed to offer his prayers in a mosque it becomes dedicated to the public, Also, any adjuncts to a mosque, which are also used for religious purposes, become as much a part of the mosque as the mosque itself. [734E-F; 735C-D; 736A-B; 746H]

(g) There is not an iota of evidence to prove the case of the appellants that the adjuncts were their private property. Where any construction is made for the purpose of the mosque or for its benefit or by way of gift to the mosque, that also becomes a public wakf. The question of who made the construction is wholly irrelevant, because, all constructions made by any person, used for religious purposes incidental to offering of prayers in the mosque, would be deemed to be accretions to the mosque itself. Even the appellants' witnesses admitted the nature and character of the various adjuncts to the mosque. [757H; 758F; 759B-D]

(h) The argument that there was no formal dedication is unsound. The document recites that the property being built on the land of the founder was a public mosque to be used for the public purpose of offering prayers. Even otherwise, the act of permitting the Mahomedans of the village to build a mosque, itself amounts to a complee dedication or a declaration that the mosque is a
725
public property. Further, by giving delivery of possession of the site for the purpose of building a mosque and by allowing prayers to be offered in the mosque, the founder made a complete public wakf in the shape of a mosque. [759D-F]

Zafer Hussain v. Mohd. Ghias-ud-din, A.I.R. 1937 Lah. 552; Nawab Zain Yar Jung v. The Director of Endowments [1963] 1 S.C.R. 469 and Jawaharbeg v. Abdul Aziz A.I.R. 1956 Nag. 257 distinguished.

(3) (a) Under Mahomedan law graveyards may be of two kinds, namely, family or private graveyards and public graveyards. The rules for determining whether a graveyard is a public or private one are. [742E]

(i) that even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user, that is, where corpses of the members of the Mahomadan community have been buried in a particular graveyard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all; [744B-C]

(ii) that if the graveyard is a private or family graveyard, then, it should contain only the graves of the founder, of the members of his family or of his descendants and of no others. Once even in a family graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard; [744C-D]

(iii) that in order to prove that a graveyard is public by dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community, had buried their corpses from time to time in the graveyard. Once this is proved, the Court will presume that the

graveyard is a public one; and once it is held to be a public graveyard it vests in the public and constitutes a wakf and it cannot be divested by non user; and [744A, E]

(iv) that where a burial ground is mentioned as a public graveyard either in revenue or historical papers, that would be conclusive proof to show the public character of the graveyard. [744F]

Ballabh Das v. Nur Mohammad, A.I.R. 1936 P.C. 83, Imam Baksh v. Mander Narsingh Puri, A.I.R. 1938 Lah. 246, Sheorai Chamar v. Mudeer Khan, (1934) A.L.J. 809, Qadir Baksh v. Saddullah, A.I.R. 1938 Oudh 77, and Mohammad Kassam v. Abdul Gafoor, A.I.R. 1964 M.P. 227 referred to.

(b) The position regarding the graveyard, in the present case, is that even some of the judgments relied upon by the appellants have affirmed its public character. Further, the judgments relied upon by the respondents show that the property had been dedicated as a public burial ground. These judgments operate as res-judicata against the appellants so far as the graveyard is Concerned. All the attempts by the appellans to get a declaration from the courts that the graveyard was a private one failed and all the courts have consistently held that both parts of the burial ground were a public graveyard where corpses of the Mahomadan community of the village were buried. The appellants, however, being the descendants of the founder, had established a right by usage to charge pit fees and other charges. But the mere fact that the appellants used to realise pit fees or other incidental charges would not detact from the nature of the dedication. The appellants themselves had filed an application before the Municipal Council for registering the burial ground as a graveyard, showing that the appellants themselves treated the burial ground as a public graveyard and had it so registered with the Municipal Council. [738D; 739C-D; 742B-C; 744F-745B]

(c) Even assuming that the judgments do not operate as res judicata, there is overwhelming oral and documentary evidence to prove that it is a public graveyard. [745F-G]

(d) There is no legal evidence to prove that the western part, adjacent to the Dargah, should be held to be a private burial ground belonging to the family
726
of the appellants. Both parts constitute one single burial ground and there is nothing to show that in burying the dead any distinction had been made between the two parts. [745H]

(4) There is overwhelming evidence on record to show that the appellants were guilty of grave mismanagement, and therfore a clear case for formulating a scheme under s. 92, C.P.C., has been made out by the respondents. Even the trial court found acts of mismanagement but explained away the acts of misfeasance on the ground that the respondents undertook not to interfere with the management or ask for accounts and held the appellants' negligence was not actionable. But in view of the finding that the mosque and

its adjuncts and the burial ground are public wakfs, the question of negligence assumes a new complexion. Apart from acts of mismanagement, the graveyard was not properly managed or maintained, the boundary wall was broken allowing cattle to enter and desecrate the graveyard, even the mosque was in a state of disrepair, and the appellants had constructed shops on a part of the graveyard and in spite of several decrees directing their demolition, the appellants had disobeyed the orders of the Courts. [761G-762B]

(5) Section 55(2) of the Wakfs Act provides that the suit for the reliefs in s. 55(1) shall not be instituted without the consent of the Board. But no Board had been constituted at the time the suit was filed. Therefore, the provisions of s. 55(2) are not at all attracted and were not capable of being acted upon. Hence, the non-compliance with its requirements would not bar the maintainability of the suit. [760E]

(6) Section 92, C.P.C., is clearly applicable to the case.

Section 92 applies only when there is any alleged breach of any express or constructive trust created for a public charitable, or religious, purpose. It also applies where the directions of the Court are necessary for the administration of such public trust. In the instant case the appellants have been looking after the properties as de-facto managers, either as Pesh Imams or otherwise, and have been enjoying the usufruct thereof. Therefore, they are trustees de son tort and the mere fact that they put forward their own title to the properties would not make them trespassers. [760G-H]

Mahomed Shirazi v. Province of Bengal, I.L.R. [1942] 1 Cal. 211, Ramdas Bhagat v. Krishna Prasad, A.I.R. 1940 Pat. 425 approved.

But the scheme to be framed will be confined to the mosque and its adjuncts and to the burial ground and not to the Dargah, which has been held to be private property of the appellants. [762B-C]

The evidence also shows that the appellants were acting as Imams, although not for a continuous period. There is no clear evidence of any usage or custom by which the right to act as Imam is hereditary. The question of the right to officiate in a public mosque, has to be decided according to the principles of Muslim Law and usage. Once a mosque is held to be a public mosque Muslim Law does not favour the right of a person to officiate as Imam to be hereditary in the absence of a custom or usage to the contrary. An Imam must possess certain essential virtues before he can claim to lead the congregations at prayers. The property having been dedicated to God, it is not open to the founder or his descendants to interfere with the performance of public prayers. But, since the appellants were the descendants of the founder and under the agreement the respondents undertook not to claim any right in the mosque, although it

would not act as an estoppel, the court may, at the time of framing the scheme, consider the desirability of associating some of the appellants with the framing of the scheme or even appoint one of them, if suitable, on terms, to look after the properties subject to the primary consideration of the welfare of the wakf properties. In case none of the appellants is suitable, the Court may withhold the right from the appellants and act as it deems fit in the interests of the Wakf properties. [736C; 737B-C; 762C-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1223- 1224 and 2026 of 1968.

From the Judgment and Decree dated 28-10-66 of the Madras High Court in Appeal Nos. 227/60, 427/61 and 227/60 respectively.

T. S. Krishnamurthy yer, K. Jayaram and R. Chandrasekar for Appellants in C.A. Nos. 1223-1224/68 and for Respondents in C.A. 2026/68. A. K. Sen, A. V. Rangam and A. Subhashini for Respondents in CAs. 1223-1224/68 and for Appellants in C.A. 2026/68.

The Judgment of the Court was delivered by FAZAL ALI, J.-These appeals, by certificate granted by the High Court, arise out of a common judgment and will be dealt with by one judgment. The appeals have had a chequered career resulting from a highly contested litigation spreading over a century and a half. A review of the historical background of the case reveals a rather sad story and an unfortunate saga of a perpetual strife and struggle, disputes and differences between the two sections of the Muslim community of village Vijayapuram (situated in Tiruvarur District in the State of Madras) setting up diverse rights and rival claims over the property which was essentially a religious property originating from a fountain of purity flowing from the life and teachings of a celebrated saint who was the original founder of the property. Property essentially directed to God appears to have been used for mundane purposes which evoked loud protests from another section of the Mahomedan community who wanted to protect the public character of the trust property and this has led to several suits in various courts.

The most unfortunate part of the drama long in process is that the Courts before whom the disputes came up for decision handed down judgments which were not strictly in accorance with the shariat and the essential tenets of the Mahommadan Law which encouraged the parties to plunge themselves into a long drawn and unnecessary litigation, until the High Court of Madras in one of the litigations had to point out that the only remedy to put an end to the disputes was to invoke the provisions of s. 92 of the Code of Civil Procedure and this is what appears to have been done in the action out of which these appeals arise.

With this pragmatic preface we now proceed to consider the facts of the case which are by no means short and simple, but present highly complicated and complex features. It appears that some time

towards the beginning of the 18th Century Syed Sultan Makhdoom Sahib a Sufi saint was residing at Vijayapuram who by his pious and saintly life attracted disciples not only belonging to he Mahomedan community but also some non-Muslims of that village. The saint was held in great respect and reveronce by the Hindus and Muslims alike which is evidenced by the fact of a sale deed Ext. B-1 dated May 12, 1730 which forms the starting point of the existence of the properties in suit which have been the subject-matter of such a long drawn litigation. Exhibit B-1 shows that a part of the site where the properties in dispute are situated and which was a punja land was sold to the saint Syed Sultan Magdoom Sahib by Thirmalai Kolandai Pillai who was a resident of village Vijayapuram. The sale deed conferred absolute rights on the saint with powers to alienate by way of gift, exchange and sale etc. The sale deed also mentioned that there were no encumbrances in respect of the land, and if any were found, the vendor would discharge the same. The saint died and about sixty years later another sale deed was executed by Malai Kolanda Pillai in favour of Kaidbar Sahib who appears to be a descendant of the saint and an ancestor of the Labbais who are the defendants in the present suit. This sale deed also appears to be in respect of the land which forms part of the disputed properties. The sale deed was executed on May 22, 1797. This sale deed (Ext. B-2) gives an indication that it consisted of lands and gardens and could be used a grave-yard also. Thus the properties in dispute are situated on the lands sold to the ancestors of the Labbais by the two sale deeds referred to above. It may be pertinent to note here that in the second sale deed Rowther Syed Uddin who is ancestor of one of the plaintiffs was a witness. In course of time the saint and the descendants were buried on the lands in dispute and a Dargah was set up which was managed by the descendants of the saint. Several years later, the Mahomedans of the village realised the necessity of having a mosque as no mosque existed in the village and inspired by this laudable objective, the Rowthers approached Masthan Ali Khader Sahib for permission to build a mosque on a part of the land in dispute. The permission having been granted, an agreement was excuted in favour of Masthan Ali Khader Sahib which is Ext. B. 4 and forms the sheet-anchor of the dedication said to have been made by Masthan Ali Khader Sahib for the purpose of a mosque. Thereafter in course of time certain additional constructions in the shape of a platform, few rooms, a water tank, which form adjuncts to the mosque, were added obviously without any objection from the Labbais. The vacant land appears to have been used as a grave-yard where members of the Muslim community buried their dead as a matter of right on payment of certain fees or charges to the defendants or their ancestors. Subsequently the defendants constructed a few shops on a part of the grave-yard which alienated the sympathies of the Muslims particularly the Rowther community who regarded the construction of the shops as desecration of the grave-yard and accordingly a number of suits were filed for demolition of the shops. The defendants, however, claimed the entire properties as their private properties excepting the prayer hall which was admittedly used as a mosque. There also the defendants claimed that they had a right to manage the same and to lead the congregation at prayers. The present suit has been filed by the Rowthers who were the other section of the Muslim community and whose ancestors are alleged to have built the mosque and other constructions with the previous permission of the ancestors of the defendants. This suit was brought in a representative capacity under O.1 r. 8 Code of Civil Procedure after obtaining the sanction of the Advocate General under s. 92 of the Code of Civil Procedure. According to the allegations made by the plaintiffs, there were three types of properties which were wakf properties of a public and charitable nature dedicated by the ancestors of the defendants. These properties consisted of :

(1) a huge vacant piece of land consisting of two parts which is popularly known as burial-ground. On the western part of the gurial-ground some shops had been constructed by the defendants and all attempts made by the plaintiffs or their ancestors to get the the plaintiffs or their ancestors to get the shops demolished had so far failed;

(2) towards the western portion of the grave-yard there is a tomb of the saint Syed Sultan Makhdoom Sahib over which a Dargah has been built; (3) a prayer hall adjacent to the Dargah which is known as the mosque or Pallivasal. There is also a covered platform, a pond and a thatched shed which appear to be adjuncts to the mosque.

According to the plaintiffs all the three properties were public trusts dedicated to God and the defendants could not claim any right of ownership over them. The plaintiffs alleged that these properties were dedicated for public worship and were used for offering prayers since a very long time and had become wakfs by immemorial user. It was further alleged that property No. (1) was a public grave-yard and the defendants wrongly claimed it to be their private grave- yard by refusing permission to the plaintiffs to bury their dead. It was also alleged that the defendants had been mismanaging the wakf properties as a result of which the mosque had fallen in to a state of disrepair and the grave- yard was being converted into shops and other places so as to lose its origin. Lastly the plaintiffs also contended that the Dargah was also a public property dedicated to God and the defendants had no individual or personal interest in the Dargah. The plaintiffs, therefore, filed the present suit for removing the defendants who were de facto managers and had been guilty of acts of mismanagement and misfeasance and for framing a scheme to administer the trust properties. The suit was contested by defendants 1, 2, 4 and 6 who contended, inter alia, that the entire property was acquired by their ancestor Syed Sultan Makhdoom Sahib who died four years after the purchase and was buried on a part of the land along with the members of his family. The defendants admitted that members of the Rowther community were allowed to offer their prayers in a raised platform in front of the Dargah over which a prayer hall was built by them. The defendants, however, claimed that as the Rowthers were allowed to offer the prayers by leave and licence of the founder, the prayer hall was not a public mosque but a private property of the defendants. Even if the mosque was a public property the adjuncts thereto were the personal property of the defendants and were not used for any religious purpose. Similarly with respect to the grave-yard it was alleged that this was a private grave-yard and the defendants were entitled to charge pit fees and other charges from those Muslims who wanted to bury their dead. They further contended that the shops had been built by the ancestors of the defendants in order to increase the revenue of the Dargah and for the proper administration thereof. Lastly the defendants pleaded that the present suit by the plaintiffs was clearly barred by res judicata in view of the previous judgments of the Courts pronouncing upon the rights of the parties against the plaintiffs.

These were the facts pleaded by the parties in original suits Nos. 9 of 1956 and 71 of 1957 heard by the Court of Sub-Judge Mayuram. It appears that one suit being O.S. No. 9 of 1956 was filed in the Court of the Sub-Judge Mayuram, whereas suit No. 71 of 1957 was originally filed in the Court of the District Munsiff. Tiruvarur as O.S. No. 16 of 1957 but the same was transferred by the District

Munsiff to the District Munsif's Court at Nagapattinam and was later transferred to the Sub-Judge, Mayuram to be tried along with O.S. No. 9 of 1956. The Trial Court conslidated the two suits and decided them by one common judgment. It might also be mentioned that the present action was preceded by proceedings under s. 145 of the Code of Criminal Procedure wherein the possession of the properties in dispute was found to be with the defendants. In Suit No. 9 of 1956 which was filed in the Court of Sub-Judge, Mayuram, the Court framed the following issues :

> "1. Are the Pallivasal, Durgah, the burial grounds, prayer hall etc. set out in Schedule `A' public trusts or are they private trusts belonging to the Labbais ?
>
> 2. Is the suit for framing a scheme not competent ?
>
> 2(a). If not, is it necessary or desirable to frame a scheme and if so to what trusts ?
>
> 3. Is this suit barred by the decision in O.S.
>
> No. 304 of 1898; District Munsif's Court, Tiruvarur, and O.S. No. 8 of 1937. Sub Court, Tiruvarur ?
>
> 4. Is this suit barred under Section 55 of the Muslim Wakf Act of 1954 ?
>
> 5. Is the Imamship and Muthavalli hereditary in the family of Labbais and the defendants ?
>
> 6. Is the 2nd defendant a Imam and Muthavalli ?
>
> 7. To what reliefs, if any, are the parties entitled ?"

In suit No. 71 of 1957 where substantially the same pleas were raised, the following issues were struck by the Court :

> "1. Whether suit, as framed, prayed for declaration that the order in M.C. 9 of 1955 and Cr. R.P. Nos. 784/55 are void, is sustainable in law ?
>
> 2. Whether the suit properties are properties of public trust as claimed by the plaintiffs ?
>
> 3. Whether the Rowther community of Vijayapurarm are entitled to be in management and possession of the suit properties as claimed in the plaint ?
>
> 4. Whether the pleas, covered by Issues 2 and 3 above are not barred by Res Judicata by the findings in the suits and appeals in O.S. No. 167 of 1893, O.S. No. 304 of 1898 and O.S. No. 8 of 1937 referred to in the written statement ?

"5. Whether it is open to the plaintiffs to plead that they are in possession and management in spite of orders in M.C. No. 9 of 1955 and Cr. R.P. No. 784 of 1955 and C.C. No. 120 of 1955, Sub Division Magistrate, Nagapattinam?

6. Whether the suit for declaration is maintainable ?

7. Whether the suit is not properly valued for the purposes of court fees and jurisdiction ?

8. To what relief are the plaintiffs entitled ?"

The Trial Court dismissed the plaintiffs' suits deciding the main issues against the plaintiffs. Thereafter the plaintiffs of both the suits filed appeals before the High Court of Madras and the High Court reversed the decision of the Trial Court in many respects and accepted the plaintiffs' case with respect to the mosque, its adjuncts and the graveyard but found that so far as the Dargah was concerned it was the private property of the defendants and the plaintiffs had no cause of action with respect to the same. The High Court accordingly decreed the plaintiffs' suits with respect to the mosque, its adjuncts and the grave-yard and remanded the case to the Trial Court for framing a scheme for administration of the trust properties. The suit regarding the Dargah was, however, dismissed. Both the plaintiffs and the defendants have filed appeals by certificate to this Court. Appeal No. 2026 of 1968 is by the plaintiffs regarding the adverse decision given by the High Court in respect of the Dargah, while appeal No. 1223 of 1968 which is the main appeal is by the defendants 1, 2, 4 & 6 against whom the High Court decreed the suits with respect to the mosque, its adjuncts and the grave-yard. Civil Appeal No. 1224 of 1968 has been filed against the decision of the Madras High Court which arises out of original suit No. 71 of 1957.

We have heard the learned counsel for the parties. Mr. Krishnamoorthy Iyer appearing for the appellants has raised the following points before us:

(1) that the history of the litigation would clearly show that the previous judgments between the parties operated as res judicata and the High Court was wrong in not giving effect to the plea of res judicata which would have put a final seal to the disputes between the parties (2) that there is clear evidence of the manner in which the properties appear to have been dedicated and there is no clear declaration of dedication for the purpose of the mosque and the prayers offered in the mosque were only by leave and licence of the founder, and there was no public wakf of the mosque at all which was only a private mosque or a family mosque of the defendants. The learned counsel submitted that the High Court has completely overlooked this legal aspect of the matter;

(3) that even if the mosque was wakf of a public character the defendants possessed the hereditary right to administer and govern the same and in these circumstances the plaintiffs had no right to dislodge them by asking the Court to frame a scheme. On a parity of reasoning it was contended that the graveyard was also not a public

wakf but the family grave-yard of the defendants;

(4) that the suit was clearly barred by s. 55(2) of the Muslim Wakfs Act, 1954; and (5) that s. 92 of the Code of Civil Procedure had no application to the present case inasmuch as the defendants were not trustees within the meaning of s. 92 of the Code.

Mr. Asoke Sen appearing for the plaintiffs/respondents conceded that he would not press his claim so far as the Dargah was concerned which has rightly been held as the private property of the defendants. On the other points, Mr. Sen repelled the arguments of Mr. Iyer by submitting that the plea of res judicata was totally unfounded inasmuch as the public character of the wakf never came up for decision before the Courts which decided the previous litigation, where the question was confined only to certain rights claimed by the defendants with respect to leading the congregation and administration and management of the mosque. It was further contended that there is overwhelming evidence to show that the grave-yard was a public trust by immemorial user and the defendants had no right to construct the shops thereon. On the question of the dedication it was argued that under the Mahomedan Law an oral dedication is enough to create a wakf and Ext. B-3 contains an intrinsic evidence of a clear dedication of the property for the purpose of the mosque along with its adjuncts, which were in fact used for the purposes connected with the performance of the prayers. Lastly it was submitted that s. 55 of the Muslim Wakfs Act had no application because at the time when the suit was brought no Board was constituted under the Act. As regards s. 92 of the Code of Civil Procedure it was submitted that the defendants were undoubtedly trustees de son tort and would, therefore, fall within the ambit of s. 92 of the Code of Civil Procedure and as the Trial Court had itself held that the defendants were guilty of gross negligence, the provisions of s. 92 of the Code of Civil Procedure could be clearly invoked.

In the light of these arguments of the parties and the history of a the case, we would now proceed to decide the points in controversy in this case. We would first deal with the question of res judicata. In support of this plea the defendants have relied on Exts. B-5 to B-9, B-12, B-16, B- 28, B-30, B-31 and B-73 in support of their case that these judgments constitute and operate as res judicata, and particularly judgments given in those suits which were brought in representative capacity under O. 1, r. 8 of the Code of Civil Procedure. Before we analyse these judgments, it may be necessary to mention that before a plea of res judicata can be given effect, the following conditions must be proved-

(1) that the litigating parties must be the same; (2) that the subject-matter of the suit also must be; identical;

(3) that the matter must be finally decided between the parties; and (4) that the suit must be decided by a court of competent jurisdiction.

In the instant case according to the plaintiffs / respondents the identity of the subject-matter in the present suit is quite different from the one which was adjudicated upon in the suits which formed the basis of the previous litigation. In our opinion the best method to decide the question of res

judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata. Unfortunately however in this case the pleadings of the suits instituted by the parties have not at all been filed and we have to rely upon the facts as mentioned in the judgments themselves. It is well settled that pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment. We would also like to note what the High Court has said on the question of res judicata. The High Court found that although the litigation between the parties lasted for a pretty long time it was never decided whether all or any of the suit properties constituted a public trust. Both the parties appear to have taken extreme stands but even despite the fact that the previous judgments contained an incidental finding that the mosque was a public property and so was the burial ground, the effect of these findings was nullified in 1939 when the High Court held that even if the properties in dispute were the exclusive properties of the Labbais, this expression was not meant to indicate that they were their private properties. This, in our opinion, clearly shows that the public charcter of the wakf or of the mosque was never in issue. The High Court on this point found as follows:

> "We are, therefore, of the view, that the issue as to whether the properties constituted a public trust having been never raised and decided between the parties in any of the prior suits, O.S. No. 9 of 1956 on that question was not barred by res judicata. The finding of the Court below in this regard is affirmed."

The Trial Court had also negatived the plea of res judicata taken by the defendants.

With this background we would now proceed to analyse the purport and the effect of the previous judgments relied upon by the appellants. The first litigation between the parties started as far back as 1893 when the Labbais filed a suit against the defendants in the Court of the District Munsif, Tiruvarur being O. S. No. 167 of 1893. This suit was decided by the judgment Ext. B-5 dated March 26, 1895. A perusal of the judgment will clearly disclose that the suit was confined to two points. In the first place the plaintiffs claimed certain rights for performance of ceremonies in the properties and to a share in the income accrued to the mosque from the disciples. Secondly, so far as the grave-yard was concerned the claim was confined to receiving pit fees for the burials. Thus the Court had decreed the plaintiffs' suit for injunction holding as follows:

> "The result is that the plaintiffs will have a permanent injunction restraining the defendants from interfering with the plaintiffs' right of officiating at the Khutba, the daily prayers and the Janaza and in reciting Mowlud, Khattam, Koran, and Fathas and, in the absence of a Modin and Vangu (call for prayers) and of lighting the pallivasal and doing such other duties as pertain to the Modin (it being open to the Levvai plaintiffs to do the duties of the Moden when they please), during their turn of office of four months (5th to 8th months of the Hijiri both inclusive) subject of course to their conducting themselves agreeably to the rules regulating their conduct as Lawais. Considering all the circumstances of the case, I think it only right that the plaintiffs should have their costs from the contending Rowther defendants in proportion to their success."

It is, therefore, clear that the Munsif did not at all decide either the public character of the mosque or the mode and manner or even the effect of the dedication of the site for the purpose of the mosque or the grave-yard. It is true that the plaintiffs had put forward the claim of hereditary owners of the mosque but that was only in a limited sense, nemely, for the purpose of the management of the mosque. Once the dedication was complete, the property passed from the owner to God and it never returns to the owner and, therefore, the question of the mosque being private can never arise. In fact we might mention that the very concept of a private mosque is wholly foreign to the dedication of a mosque for public purpose under the Mahomedan Law. In these circumstances it is obvious, there fore, that as the public character of the wakf of the grave-yard was not in issue in that suit, the subject-matter of the judgment was not identical with that of the present suit. In these circumstances, therefore, this judgment cannot operate as res judicata.

Exhibit B-6 dated March 16, 1897 is the judgment in appeal from the aforesaid decision where at p. 394 of the Paper Book the Subordinate Judge held that the Pallivasal or the prayer hall is public property and not descendible to the plaintiffs of that suit. Thus if at all there was any finding regarding the mosque it was against the defendants, In these circumstances, therefore, we are satisfied that this judgment does not appear to be of any assistance to the defendants.

Exhibit B-7 dated December 21, 1899 is the judgment given by the District Munsif, Tiruvarur in O.S. No. 304 of 1898. This was a suit filed by the members of the Rowther community regarding their right to offer prayers and bury the dead in the mosque compound and for managing the affairs of the mosque. In that case also while the Dargah was found to be the private property of the Labbais i.e. the defendants, no finding was given regarding the public nature of the mosque although it was held that the Rowthers had a right to make repairs and manage the mosque and to offer prayers. On the vexed question regarding the public nature of the mosque, the Court refrained from making any observation and stated as follows:

> "I therefore studiously refrain from giving any decision on that vexed question about which the Lavvais appeared to be particular. If their rights, if any, in that matter is invaded by the Rowthers, their proper remedy would be to seek compensation and get their rights declared against the community once for all in a suit properly framed for that purpose."

In fact it seems to us that although that judgment cannot operate as res judicata, the finding given by the learned District Munsif was wrong on a point of law. Once the founder dedicates the site for the purpose of building a mosque and prayers are offered in the mosque the site and the mosque become wakf properties and the ownership of the founder is completely extinguished. Under the Mahomedan Law no Muslim can be denied the right to offer prayers in a mosque to whatever section or creed he may belong. Thus that judgment also does not appear to be of any use to the defendants.

Exhibit B-8 is the judgment of the District Judge dated November 13, 1902 in appeal against the aforesaid judgment which was dismissed. The Appellate Court also held that the prayer hall was a public property although some of the rooms which formed adjuncts of the mosque belonged to the

present plaintiffs i.e. the Rowthers. The ownership of the plaintiffs was inferred merely from the fact that they held the keys of the rooms. It is true that the grave-yard was held to belong to the defendants but there also the principles of Mahomedan Law were completely overlooked.

Exhibit B-9 is the judgment of the High Court of Madras dated July 24, 1906 in second appeals Nos. 541 & 542 of 1903. Those appeals were dismissed with the modification that whereas the plaintiffs had the right to bury the corpses of the members of their community in the burial ground they had to pay the proper burial fees. Thus to a great extent the decision of the subordinate courts was modified by the High Court and the public character of the burial ground was in a way affirmed.

Exhibit B-12 dated September 4, 1923 is the judgment of the Subordinate Judge, Nagapattinam, in appeal against the judgment of the Munsif in suit No. 579 of 1920. The suit was brought by some members of the Muslim community for an injunction restraining the defendant Labbai from reciting prayers or conducting the worship in the prayer hall. The suit was dismissed on the finding that the defendent Labbai had the right to recite prayers and lead congregation in the prayer hall. The Subordinate Judge in appeal differed from the judgment of the learned Munsif and held that while an injunction could be granted with respect to the prayer hall alone, the defendants were entitled to officiate at the prayers in the adjuncts of the mosque. The decree of the Trial Court was accordingly modified. Here we might mention that the judgment suffers from a serious legal infirmity arising from a complete ignorance of the essential principles of the Mahomedan Law. Once the founder dedicates a particular property for the purpose of a public mosque, the Mahomedan Law does not permit any one from stopping the Mahomedan public from offering prayers and reciting Koran etc, Similarly the adjuncts to the mosque which are also used for religious purposes become as much a part of the mosque as the mosque itself and in these circumstances no injunction should have been granted at all by the Court. However, as here also the public character of the mosque was not at all involved either directly or indirectly this decision also cannot operate as res judigata. The question of the right to officiate in a public mosque has to be decided according to the principles of the Mahomedan Law and usage and we shall deal with this aspect when we consider the contention of the appellants regarding the public character of the mosque.

Exhibit B-16 dated September 13, 1926 is the judgment of the High Court of Madras against the aforesaid judgment of the Subordinate Judge in Second Appeal No. 1890 of 1923. This appeal was decided on September 13, 1926 and it upheld the judgment of the learned Subordinate Judge. This judgment is also confined only to the question whether public worship was carried on in portions marked B & C in the plan. Thus the limited question which fell for consideration of the High Court was not that the portions marked B & C formed parts of public mosque but whether there was right of prayrers in those places.

Exhibit B-28 dated August 31, 1937 is a judgment of the Subordinate Judge in suit No. 8 of 1937 brought by the Rowthers against the Labbais. To begin with this suit also related not to the nature of the public mosque but only to the management thereof. The main question which arose for decision in that suit was as to who was entitled to manage the affairs of the mosque, whether the right of appointing Imam was hereditary. Learned counsel for the appellants placed great reliance on the following observations of the Subordinate Judge:

> "My finding on Issue I, in so far as it relates to O.S. 304 of 1898, will be that the decision therein operates as res judicata as regards the ownership and physical control of the suit mosque, but not as regards the person who is to appoint as Imam. That is to say, the plaintiffs are debarred from disputing the Labbais ownership of the mosque and burial ground as a whole and from asserting that the plaintiffs themselves are anything more than licensee in respect of the mosque."

It was submitted that the Court had clearly found that the question of the ownership and physical control of the mosque was finally adjudicated upon and operated as res judicata as held by the Court. This observation made by the High Court has to be understood in the light of the pleadings of the parties. In fact the Court was merely called upon to decide the limited question as to who was to manage the mosque. From a review of the previous judgments discussed above, it is absolutely clear that it was never disputed even by the Labbais that the mosque was a public mosque where prayers were offered by Mahomedan public. The only question which arose before the Subordinate Judge was as to who was to manage the affairs of the mosque and whether the right to appoint Imam was hereditary. The Court itself found towards the end of its judgment that the plaintiffs could appoint a Muttavali to look after the affairs in the suit mosque but they could not appoint Imam, but the right to lead prayers as Imam was a hereditary right vested exelusively in the defendant's family. We might hasten to add that once a mosque is held to be a public mosque, the Mahomedan Law does not favour the right of a person to officiate as Imam to be hereditary in the absence of a custom or usage to the contrary. An Imam must possess certain essential virtues before he can claim to lead the congregations at the prayers. The property having been dedicated to God, it is not open to the founder or his descendants to interfere with the performance of public prayers. In these circumstances, therefore, we are unable to regard this judgment as barring the suit of the plaintiffs regarding the public character of the mosque.

Exhibit B-30 dated February 26, 1941 is a judgment of the High Court in original Suit No. 112 of 1935 brought in the Court of the District Munsif against the Municipal Council, Tiruvarur praying for an injunction restraining the Municipal Commissioner from interfering with the plaintiffs right of access to the grave-yard. Here also the public character of the Wakf was taken for granted and an injunction against the Municipal Council was granted by the High Court. This judgment is of no assistance in deciding either the question of res judicata or for that matter the question of public character of the mosque.

Exhibit B-31 dated November 13, 1941 is a judgment of the High Court in Second Appeal No. 252 of 1939, and appears to have been relied upon by counsel for both the parties in support of their respective cases. In our opinion, this judgment is really important in the sense that for the first time the judgment opens up the real and the vital issue which is to be decided in this case. Here also, the appeal arose out of a suit No. 8 of 1937 brought by the Rowthers against the Labbais and the main point in dispute was the right to officiate as Imam. The suit was brought in a representative capacity and was dismissed by both the Courts holding that the right to appoint Imam lay with the defendants Labbais. The High Court held that there was overwhelming evidence in favour of the usage relied upon by the defendants to be the Pesh Imams. The Court further pointed out that the only remedy for these constant quarrels and fights between the two communities was a suit under s.

92 of the Code of Civil Procedure. In this connection Somayya, J., observed as follows:

> "In this case I have found that there is overwhelming evidence in favour of the usage by which the defendants are to be the Pesh Imams. The only remedy for these constant quarrels and fights between the two communities is a suit under section 92 of the Civil Procedure Code in which the Court might frame scheme having sole regard to the best interests of the institution."

Learned counsel for the appellants, however, relied upon the observations of the learned Judge where he had mentioned that the burialground and other places were the exclusive properties of the Labbais. The learned Judge, however, was careful enough to add that by exclusive property he never meant that it was the private property of the Labbais but only that the Rowthers had no interest in the same. As, however, the suit was not for any declaration that the mosque was a public one the observations made by the High Court were purely obiter dicta and cannot put the present plaintiffs out of Court.

These are the judgments of the various courts in the suits filed by one party or the other relied upon by the appellants in order to prove-

> (1) that the judgments operated as res judicata;
>
> and (2) that both the burial ground and the mosque and its adjuncts were not wakfs of a public nature.

As discussed above, the judgments do not prove any of the points relied upon by the appellants. The question of the public character of the Wakfs in any suit filed by one party or the other was never raised. The only questions that were raised from time to time were the questions regarding the performance of certain religious ceremonies, the question of officiation of the Imam and so on. Even as regards the grave-yard it was never claimed by the defendants in the suits which formed the subject-matter of the aforesaid judgments that the Mahomedan community had no right at all to bury their dead in the grave-yard. All that was contended was that the grave-yard was a family grave-yard of the defendants and they allowed corpses of other Mahomedans to be buried only on charging pit fees and other amounts. As to what is the effect of this will be considered by us when we deal with the broader question as to whether or not the burial grounds shown in the sketch map could be presumed to be public grave-yards by immemorial user.

Reliance was also placed on Ext. B-73 dated April 5, 1957 an order of the High Court in Criminal Revision Petition No. 443 of 1956, where the Rowthers had admitted before the Court that they would not interfere with the rights of the defendants and on the basis of that admission they were acquitted. As perusal of the order would clearly show that the admission was not unqualified, but it amounted only to this that the Rewthers would not take the law into their own hands but would take recourse to legal remedies. This is clear from the following observations of the High Court:

> But that pretension is not persisted here by the learned Advocate and it is stated that by reason of this reconstruction they do not claim any right, title or interest which does not accrue to them from the various litigations and that this will not be a precedent and that they would not do in future any such interference without obtaining the orders of the appropriate authorities."

Further more, the admission was made in a criminal revision when the plaintiffs had been convicted and if the admission was not made their conviction would have been upheld by the High Court. The admission, therefore, being in terrorem loses much of its significance. At any rate, since the plaintiffs have filed the present suit under s. 92 of the Code of Civil Procedure for framing a scheme, they have not acted against the admission, because they have availed of a remedy which was open to them under the law. This is all the documentary evidence produced by the appellants/defendants.

As against this the plaintiffs have produced a large number of judgments in suits, particularly relating to the public nature of the grave-yard and the attempts by the plaintiffs to get an injunction from the Courts directing the defendants to demolish the shops which they had built up in some parts of the grave-yard. These judgments, in our opinion, clearly show that the burial ground was a public grave-yard and the case of the defendants that it was their family gtave-yard has been completely negatived by the judgments relied upon by the plaintiffs which extend right from 1919 to 1932. We may now proceed to discuss these judgments.

Exhibit A-4 dated May 7, 1919 is a decision of the District Munsif, Tiruvarur in O.S. 331 of 1915. This was a suit brought by the Rowthers for an injunction restraining the defendants Labbais from building shops on the burial ground in question and for a mandatory injunction directing the defendants to remove the shops erected on some parts of the burial-ground. The suit proceeded on the basis that the grave-yard was a public one and the defendants who were managing the same had no right to construct shops and thereby change the nature of the grave-yard. The defendants resisted the suit on the ground that the grave-yard was their private property and was at the most a family grave- yard. It may be noted that in their defence the defendants did not contend that no member of the public was allowed to bury the corpses and that only the members of the family of the defendants could bury their dead. It was clearly alleged that the members of the public were allowed to bury their dead on payment of burial fees. This point is of very great legal significance in order to show the nature of the grave- yard. However, the Munsiff found that although the burial- ground consisted of two parts yet he found that there was no evidence to show that there was any distinction between the first and the second part. The Court found as a fact that the property had been dedicated as a public burial ground and the defendants were merely trustees in respect of the burial ground and not absolute owners. The Court accordingly granted the injunction as prayed for. It appears that the decree of the learned Munsiff was upheld by the Subordinate Judge and also by the High Court of Madras in Second Appeal No. 386 of 1921. The judgment of the High Court has not been produced, but this fact is clearly mentioned in Ext. A-6 which is the judgment of the District Munsif, Nagapat-

tinam in another suit wherein the observations made by the Munsiff are as follows:

> "The learned Subordinate Judge says in his judgment (copy Exhibit IV-a) as follows: 'As there is no doubt that the suit land on which the shops are built forms part of the graveyards the Levvais have no right to put up the shops'. Against this decree in A.S. 13 of 1920 there was a Second Appeal (S.A. 386 of 1921) to the High Court. But the High Court confirmed the lower Appellate Court's decree."

It is, therefore, clear that the suit brought by the plaintiffs in 1915 and the decree granted by the Subordinate Judge was confirmed by the High Court in second appeal and this undoubtedly operates as res judicata, because the same question has been raised in the present suit by the defendants.

Not being satisfied with the judgment of the Munsif which was confirmed by the High Court, the defendants Labbais appear to have filed another suit being O.S. No. 53 of 1924 in the Court of the District Munsif for a declaration that the decree in Suit No. 331 of 1915 was not binding on them and for an injunction restraining the Rowthers from seeking to demolish the shops. The Munsif by his judgment dated November 30, 1925 which is Ext. A-5 dismissed the plaintiffs' (Labbais) suit and held that the judgment and decree in O.S. 331 of 1915 Ext. A-4 was binding on the Labbais. Instead of obeying the decree of the civil court the Labbais seem to have made up their mind to obstruct the execution of the decree by filing suits after suits. Consequently another suit was filed by the Labbais being O.S. No. 146 of 1928 for an injunction restraining the Rowthers from demolishing the shops or using the burial ground as the grave-yard. This suit was also dismissed by the Trial Court by virtue of its judgment dated January 14, 1939 (Ext. A-6). The Court clearly observed that the Labbais have tried to circumvent the effect of the High Court decree which could not be allowed. The Court also held that the previous judgments operated as res judicata.

Thus it would appear that the three attempts made by the Labbais to prevent the shops from being demolished and to assert their private right to the grave-yard resulted in grotesque failure. As the Labbais failed to get the previous judgments set aside either on ground of fraud or otherwise, they appear to have thought of another ingenious device to get rid of the decree passed against them. The Labbais then brought a suit being O.S. 49 of 1932 for setting aside the previous decrees, particularly the decree Ext. 4, on the ground that the grave-yard was injurious to public health and, therefore, it should not be allowed to be continued. This suit was also dismissed with the finding that there was no question of any injury to public health and that the grave-yard was a public one. This suit was decided by the District Munsif by his judgment dated December 14, 1934 which is Ext. A-10.

It may be mentioned that while the above suit was pending before the District Munsiff an ad interim injunction was prayed for by the Labbias which was refused and the Labbias then filed an appeal against this order to the District Judge who dismissed the appeal by his order dated April 20, 1932 observing as follows:

> "It appears to me that this is merely an attempt to get over the adverse result of the litigation, and that having failed in the higher courts the defendants have approached the Health authorities and got something out of them by which they hope to circumvent the decree."

This judgment is Ext. A-86. Having failed to obtain an ad interim injunction from the District Court, the Labbais filed a civil revision petition No. 741 of 1932 in the High Court which was also dismissed by the High Court observing that the Labbais wanted to circumvent the decree obtained against them. The High Court observed thus:

> "The learned Judge in the court below was right when he said that the petitioners are merely trying to circumvent the decree obtained against them after contest. The revision petition should not be used for that purpose and this petition must be dismissed with costs."

This judgment is Ext. A-87 dated August 17, 1932. The Labbais then filed an appeal against the aforesaid judgment to the District Judge who by his order dated July 11, 1936 which is Ext. A-11, after allowing some amendments prayed for remanded the suit for fresh trial. Thereafter the defendants (Rowthers) filed an appeal to the High Court against the order of remand passed by the District Judge and the High Court in A.P.P. No. 386 of 1936 allowed the appeal, set aside the judgment of the District Judge and restored the judgment of the Trial Court dismissing the suit. This judgment of the High Court is dated October 7, 1938 and is Ext. A-13. The High Court clearly held that the plaint did not disclose any cause of action and it was not open to a defeated litigant to re-open the subject-matter on one excuse or the other. In this connection, the High Court observed as follows:

> "It is now argued before me in this appeal that the decision of the learned District Munsif is right viz. that neither the original nor the amended plaint discloses a cause of action. It seems to me that that argument must be upheld. It is obvious that there can be in general no right for a defeated litigant immediately to reopen the whole subjectmatter of the litigation."

Thus the High Court put a stamp of finality on the frivolous suits brought by the Labbais to get out of the decree passed against them by Ext. A-4 in the suit No. 331 of 1915. A close and careful analysis of the judgments Ext. A-4 to Ext. A-87 as indicated above reveals two important facts:

> (1) that the Labbais expressly pleaded that the grave-yard in question was their family grave-yard and the Mahomedan public had no right to interfere with the same; and (2) that they had constructed some shops on a part of the grave-yard and had been directed by the decree of the Court to demolish them on the footing that the grave-yard was a public one and several attempts made by them to get the decree vacated or circumvented failed.

These judgments, therefore, in the first place operated as res judicata so far as the grave-yard is concerned, and secondly they constituted conclusive evidence to prove that the burial ground had been used as public grave-yard from time immemorial and thus became a public grave-yard by dedication. The Labbais, however, being the descendants of the founder had established a right by usage to charge pit fees and other charges. In these circumstances, therefore, the issue relating to the burial ground being a public grave-yard does not present much difficulty and we would like to

deal with this issue first.

The High Court has clearly held that the burial ground consisted of two parts as shown in the sketch map and has been proved to be a public grave-yard by immemorial user. There is overwhelming oral and documentary evidence to prove this. In fact the defendants themselves have not denied that the Mahomedan public of the village used to bury their dead in this grave-yard and they have only sought to protect their right to realise pit fees and other incidental charges which has been accepted by the High Court. The Mahomedan Law on the subject is very clear. Under the Mahomedan Law the grave-yards may be of two kinds-a family or private grave- yard and a public grave-yard. A grave-yard is a private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground no person who does not belong to the family of the founder is permitted to bury his dead. On the other hand if any member of the public is permitted to be buried in a grave-yard and this practice grows so that it is proved by instances adequate in character, number and extent, then the presumption will be that the dedication is complete and the grave-yard has become a public grave-yard where the Mahomedan public will have the right to bury their dead. It is also well settled that a conclusive proof of the public grave-yard is the description of the burial ground in the revenue records as a public grave-yard. In Ballabh Das v. Nur Mohammad (1) the Privy Council observed as follows:

> "If the plaintiffs had to make out dedication entirely by direct evidence of burials being made in the ground, and without any record such as the khasra of 1868, to help them, they would undoubtedly have to prove a number of instances adequate in character, number and extent to justify the inference that the plot of land in suit was a cemetery. x x x The entry "qabristan" in the khasra of 1868 has to be taken together with the map which shows the whole of plot 108 to be a grave-yard."

In Imam Baksh v. Mandar Narsingh Puri(1) a Division Bench of the High Court of Lahore observed as follows:

> "From the fact that the whole area now mapped as Nos. 3095 and 3096 was described as a graveyard in 1868, it is certain that the graveyard had been in existence a long time and the admitted fact that since then it has been a mabaristhan is by itself presumptive evidence that the land had been set apart for use a burial ground and that by user, if not by dedication, the land is wakf: x x x It is still used as a Mahomedan graveyard and the right to Mahomedans so to use it is admitted.
>
> x x x x x In my view, once it is found that a certain definite area of land has been dedicated for use as a graveyard it must be presumed, in the absence of any proof that the dedication was limited, that the whole of the land was set apart to be used solely for the purpose of burying the dead."

There is a decision of the Allahabad High Court in Sheoraj Chamar v. Mudeer Khan,(2) where Sulaiman, C. J., observed as follows:

> "But in cases where a graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. It is open to a Court to infer from circumstances that a plot of land covered by graves, which has been used as a graveyard, is in fact a grave-yard and had been set apart as such by the original owners and made a consecrated ground even though a registered document is not now forthcoming."

This case was followed by the Oudh Chief Court in Qadir Baksh v. Saddullah. (3) In Mohammed Kassam v. Abdul Gafoor (4) the High Court of Madhya Pradesh, while trying to distinguish between a private grave-yard and a public graveyard observed as follows:

> "On this point suffice it to say that we are of the view that a Kabarstan cannot be a private Kabarstan unless it is used for the family members exclusively. Once the public are allowed to bury their dead it ceases to be a private property. x x x There was no discrimination about the user. It was being used by the predecessors of the defendants as well as by the public. This will indicate that it was not a private Kabarstan.
>
> Under the Mohammadan Law if a land has been used from time immemorial for burial ground then the same may be called a Wakf although there is no express dedication."

We are of the view that once a Kabarstan has been held to be a public graveyard then it vests in the public and constitutes a wakf and it cannot be divested by non-user but will always continue to be so whether it is used or not.

The following rules in order to determine whether a graveyard is a public or a private one may be stated:

> (1) that even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user i.e. where corpses of the members of the Mahomedan community have been buried in a particular graveyard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all;
>
> (2) that if the grave-yard is a private a family grave-yard then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in a family grave-yard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public grave-yard;
>
> (3) that in order to prove that a graveyard is public by dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of

> members of the Mahomedan community had buried their corpses from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is a public one; and (4) that where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to show the public character of the graveyard.

Applying these principles, therefore, to the facts of the present case it would appear from the judgments Exts. A-4 to A-87 that right from the year 1915 to 1938 the public character of the burial ground had been established by those judgments. All attempts by the defendants who were the plaintiffs in the suits brought by them to get a declaration from the Courts that the graveyard was a private one failed and all the Courts have consistently held during the course of 22 years that both the parts of the present burial ground were a public graveyard where corpses of the Mahomedan community of the village were buried. The mere fact that the defendants Labbais used to realise pit fees or other incidental charges would not detract from the nature of the dedication. Apart from that there is a document Ext. A-8 dated March 3, 1932 which is a certified extract of the proceedings of Municipal Council, Tiruvarur which shows that the Labbais themselves had filed an application before the Municipal Council for registering the burial ground as a graveyard. This document appears at pp. 247-248 of the Paper Book. It appears from this document that Syed Muhammad Kasim Sahib and Syed Abdul Rahiman Sahib residents of Vijayapuram had applied to the Municipal Council for registering the plot in dispute as a burial ground and the Municipal Council by its resolution accepted the application and registered the plot in question as a burial ground. This, therefore, clearly shows that as early as 1932 the Labbais themselves treated the present burial ground as a public graveyard and got the same registered in the Municipal Council.

Apart from this, the oral evidence led by the parties clearly proves that the graveyard was a public one. P. W. 1 Mohamed Hanifa who is an old man of 65 years has stated in his evidence that before burial the Janaza prayers are offered and after the prayer the dead body is taken to the graveyard and buried. Similarly P. W. 2 Hyder Ali has stated that there is no other burial ground where bodies of the Rowthers could be buried, implying that the Rowthers had been burying their dead in the burial ground in question. P. W. 3 Yehiya has also testified that the remains of the Muslims of Vijayapuram are buried in the burial ground attached to the mosque and that there is no other burial ground. The defendants who had examined only two witnesses, D. W. I Syed Muharak and D. W. 2 Syed Mohamed Salia, have not denied that the Muslims of the village buried their dead in the burial ground. In this state of evidence, therefore, the conclusion is inescapabie that the graveyard has been used for burying the dead of all the persons belonging to the Mahomedan community ever since the land was sold to the saint-the ancestor of the defendants. It is true that the burial ground contains the graves of the saint and the members of his family also, but that by itself would not show that the graveyard was a private one. On a consideration of the oral and documentary evidence and the circumstarnces of the case we find ourselves in complete agreement with the finding of the High Court that the entire burial ground as shown in the sketch map is a public graveyard and the Mahomedan community have a right to bury their dead subject to payment of pit fees and other charges that may be fixed by the defendants.

In the first place the question of the graveyard being public one is clearly barred by res judicata against the defendants in view of the previous judgments discussed above, but even assuming that there is no res-judicata there is overwhelming evidence in this case to prove that the burial ground is a public graveyard. It was, however, faintly suggested by learned counsel for the appellants that it would appear from the sketch map that the burial ground consisted of two parts- the eastern part and the western part-and as the western part is adjacent to the Dargah it should be held to be a private burial ground belonging to the family of the defendants. There is, however, no legal evidence on the record to prove this fact. Both the parts constitute one single burial ground and there is nothing to show that in burying the dead any distinction has been made between the eastern part and the western part. In fact this aspect of the matter had been referred to in one of the judgments discussed above. In these circumstanaes it is not possible for us to accept the contention raised by learned counsel for the appellants. For these reasons we find ourselves in complete agreement with the finding given by the High Court on this issue and we affirm the same.

This brings us to the second question, namely, regarding the mosque and its adjuncts being public Wakfs. We have already found that the judgments relied upon by the appellants did not operate as res judicata and we now proceed to decide this issue on the facts and the evidence that have been led in this case. The parties admittedly belong to the Hanafi sect of the Mahomedans and are governed by the Hanafi (Sunni) School of Mahomedan Law. Before, however, going into this question it may be necessary to enter into an exhaustive discussion of the law on the subject, particularly because we find that the Civil Courts before whom this question came up for consideration from one angle or the other have betrayed a profound ignorance of the Mahomedan Law (Hanafi School) of Wakf relating to a public mosque. The word "wakf" means detention or appropriation. According to the well recognized Hanafi School of Mahomedan Law when a Mahomedan dedicates his property for objects of charity or to God, he completely parts with the corpus which vests in God and never returns to the founder. Mahomedan Law contemplates two kinds of Wakfs-a wakf which is private in nature where although the ultimate object is public charity or God, but the property vests in a set of beneficiaries chosen by the founder who appoints a Mutawalli to manage the wakf property. We are, however, not concerned with private wakfs which are normally known as wakf-alal-aulad. We are concerned with public wakf i.e., dedication made for the purpose of public charity e.g. an Imam-Bada, a mosque, a Serai and the like. So far as the dedication to a mosque is concerned, it is governed by special rules and special equity in the light of which a particular dedication has to be determined. A mosque is obviously a place where the Muslims offer their prayers. It is well-known that there are certain formalities which have to be observed by the Muslims before they observe the prayers. These formalities are-

(i) Wazoo i.e. washing of hands and feet in a manner prescribed by Shariat;

(ii) the recitation of "Azaan" and "Ikamat" which is usually done by the Pesh Imam or the Muazzin;

(iii)there must be a person who possesses virtuous qualities and a knowledge of Koran and other religious rites who should lead the prayers.

This is necessary in case of prayers offered in congregation. A single Muslim can also offer his paryers with or without an Imam but the prayers in a congregation or a Jamaat are offered only behind an Imam who leads the prayers. As Islam is an extremely modern and liberal religion. there is no question of any person being denied admission into a mosque for the purpose of offering prayers and that is why the law is so strict that the moment a person is allowed to offer his prayers in a mosque, the mosque becomes dedicated to the public finally, it is not necessary for the dedication of a public mosque that a Muttawali or a Pesh Imam should be appointed which could be done later by the members of the Muslim community. All that is necessary is that there should be a declaration of the intention to dedicate either expressly or impliedly and a divestment of his interest in the property by the owner followed by delivery of possession. Here also the delivery of possession does not involve any ritual formality or any technical rule. For instance in the case of a mosque if the Mahomedans of the village, town or the area are permitted to offer their prayers either on the vacant land or in a mosque built for the said purpose that amounts to the delivery of possession and divestment and after the prayers have been offered the dedication becomes complete. Unfortunately the Courts which decided the previous litigation between the parties do not appear to be aware of the considerations mentioned above.

In Baillie's Digest of Moohummudan Law, Second Edition, the following passage occurs at p. 615:

> "If a man should make a musjid within his mansion, and permit entrance to it, and prayers to be said in it, the place becomes a musjid, in all their opinions, if a way is made to it; but not otherwise according to Aboo Huneefa. According to the other two, however, it becomes a musjid and the right of way follows, without any condition to that effect. And if a door were opened to it on the highway, it would become a musjid.

It was again observed at p. 616:

> "When an assembly of worshippers pray in a musjid with permission, that is delivery. But it is a condition that the prayers be with izan, or the regular call, two times or more, and be public, not private. When a man has an unoccupied space of ground fit for building upon, and has directed a kowm, or body of persons, to assemble in it for prayers, the space becomes a musjid, if the permission were given expressly to pray in it for ever, or, in absolute terms, intending that it should be for ever; and the property does not go to his heirs at his death."

It is also provided by the Shariat that once a musiid has been established by dedication no condition can be attached by the founder and if any such condition is attached the said condition would be void : Vide the following observations of Baillie in his Digest of Moohummudan Law, 2nd Edn., at p. 617:

> "When a man has made his land a musjid, and stipulated for something out of it to himself, it is not valid, according to all. It is also generally agreed that if a man make a musjid on condition that he shall have an option, the wakf is lawful, and the condition void."

It was also pointed out by Baillie at p. 618; that where a person gives money for the repairs of a musjid or its maintenance it operates as a transfer by way of gift to the mosque and is valid. Baillie observed thus:

> "A man gives money for the repairs of a musjid, and for its maintenance, and for its benefit. This is valid; for if it cannot operate as a wakf, it operates as a transfer by way gift to the musjid, and the establishing of property in this manner to a musjid is valid, being completed by taking possession."

Ameer Ali in his book "Muhammadan Law", Vol. 1, 3rd Edn., has given several instances of a complete and irrevocable dedication made by the wakif or the founder and the consequences flowing from the same. Ameer Ali obseved as follows:

> "The proprietary right of the wakif in a building or ground set apart for prayers becomes extinguished either on the declaration of the wakif that he has constituted it a mosque or musalla or consecrated it for worship, or on the performance of prayers therein or thereon."

Thus the moment a building is set apart for offering paryers the proprietary right of the wakif is completely extinguished. Similarly the following observations of the author indicate the various contingencies in which a dedication can be made to a public mosque:

> "So that when a person erects a building with the object of dedication it as a mosque, and permits people to offer prayers therein, without declaring that he has constituted it into a mosque, and prayers are offered there bi'ljamaat, the mosque becomes irrevocably dedicated.
>
> When a mosque is erected or set up inside a dwellinghouse or residence (dar), and permission is granted to the public to come and pray, and a pathway is also made or set apart for their egress and ingress, the dedication is good by general consensus. If a pathway is not indicated, in that case, according to Abu Hanifa, the dedication is not sufficient. But according to Abu Yusuf and Mohammed it is good, and the pathway will be implied by the permision to pray, and this is correct."
>
> "At the same time, though the public may have no right in a private mosque, it may constitute a good wakf so as to exclude the rights of the heirs over it. Where prayers have been once offered, it is not necessary to prove an express dedication. The very fact of the prayers being offered in it will imply a valid and good dedication."
>
> "Similarly, as the purpose of a mosque is that people should pray there is jamaat, it is required that where there is no express dedication, prayers should have been offered there with the azan and ikamat." "If prayers are offered once in a mosque it is sufficient to constitute a good dedieation."

> "According to Kazi Khan, 'the delivery of possession as regards a masjid is complete when only one person has prayed in it with azan and ikamat.' The view universally adopted is that prayers offered by one person in a mosque is sufficient to constitute it a public mosque devoted to the worship of God, for a mosque belongs to the Deity and there affixes to it a right of the Mussalmans in general, and one person can be a proxy for the establishment of the right of the Creator and the public."
>
> "Therefore, if a person creates a mosque and gives permission to people to pray therein, it is an absolute wakf, and this opinion we adopt."

The observations of the learned author are based on Radd-ul- Muhtar and other original religious books which contain original law on the subject.

The entire law on the subject has been explicitly and adroitly eluoidated by Tyabji in his book "Muslim Law" 4th Edn., where at p. 609 the author observes thus:

> "Under Hanafi law erecting or specifying a building for dedication as a masjid, does not complete and effectuate the dedication of the land and building, nor cause the private ownership therein to cease until the owner divides them off from the rest of his property, provides a way to go to the masjid, and either permits public prayers to be said therein, or delivers possession of it to a mutawalli, or to the judge, or his deputy.
>
> x x x x For example, delivery in the case of a cemetery, is the burial of a person, and of a masjid, that people should pray there in jamaat. In the case of a mosque where there is no express dedication it is necessary that prayers should have been offered with the azan or ikamat."

It is also pointed out by the author in s. 550 at p. 612 of his Book that a masjid cannot be consecrated for only a particular type of people or people belonging to a particular locality and if any such reservation is made it is void. In s. 551 it is pointed out that the site of a masjid never reverts to its original owner, or his heirs.

Similarly Saksena in his "Muslim Law"; 4th Edn., at p. 567 observes that under the Hanafi law a wakf for a mosque will be completed only when the waqif separates the land and the building from the rest of his property, so that his ownership completely ceases in it, and either he delivers possession of the masjid to a mutawalli or to the Judge, or allows public prayers to be read in it. Similar observations are also found in Mulla's "Principles of Mahomedan Law", 17th Edn., at p. 184.

It would thus appear that in order to create a valid dedication of a public nature, the following conditions must be satisfied :

> (1) that the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be

presumed from the conduct of the founder either express or implied;

(2) that the founder must divest himself completely from the ownership of the property, the divestment can be inferred from the fact that he had delivered possession to the Mutawalli or an Imam of the mosque. Even if there is no actual delivery of possession the mere fact that members of the Mahomedan public are permitted to offer prayers with azan and ikamat, the wakf is complete and irrevocable; and (3) that the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.

As regards the adjuncts the law is that where a mosque is built or dedicated for the public if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque.

We would now refer to some authorities on the points discussed above.

In Jewun Doss Sahoo v. Shah Kubeer-ood-Deen(1) the Judicial Committee explained the significance of the word 'dedication' and observed thus:

"According to the two disciples, Wukf' signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that Aboo Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Mahomed holds it to be absolute only on the delivery of it to a Mutwaly, (or procurator), and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it x x x x 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.' "

Similarly in Adam Sheik v. Isha Shaik.(1) a Division Bench of the Calcutta High Court pointed out that a mosque becomes consecrated for public workship either by delivery or on the declaration of the wakif that he has constituted it into a Musjid, or on the performance of prayers therein even by one person. In this connection the Court observed as follows:

"According to all the authorities, a mosque becomes consecrated for public worship either by delivery to a Mutwalli (see Baillie's Digest, page 616) or on the declaration of the wakf that he has constituted it into a musjid or on the performance of prayers therein (Ruddul-Mukhtar Vol. III, p. 571). The prayers of one individual alone would be sufficient so long as it is accompanied by Azan. In the Fatwa Kazi Khan the principle is thus stated :- the delivery of possession as regards a musjid is complete when only one person has prayed in it with Azan and ikamat. The view universally adopted is that prayers offered by one person in a mosque is sufficient to constitute it

> a public mosque devoted to the worship of God, for a mosque belongs to the Deity and there affixes to it a right of the Musulmans in general, and one person can be a proxy for the establishment of the right of the Creator and the public." "Therefore, if a person create a mosque and give permission to people to pray therein, it is an absolute wakf, and this opinion we adopt. (See also Fatwa Alamgiri, Vol. VI, and Baillie's Digest p. 616). The special purpose of a mosque is that persons should perform their devotions therein; and according to the accepted doctrine even where there is no evidence of an express dedication in words, if it appears that one single individual, (other than the wakif) has offered his prayers at the place after the usual summons or call to the public, the consecration is complete."

To the same effect is the decision of the Bombay High Court Saiyad Maher Husein v. Haji Alimahmed(2) where the following observations were made:

> "There are special rules in the case of mosques- Wilson's Anglo-Mohamedan Law, s. 320; Ameer Ali's Muhammadan Law, Vo. I, p. 394 and Tyabji's Principles of Muhammadan Law, s. 514. When once a building has been set apart as a mosque it is enough to make it wakf if public prayers are once said there with the permission of the owner. x x x x Dedication may inferred from long user as wakf property.
>
> In my opinion it must be presumed that the roza and the mosque have been duly dedicated and have become wakf by user, and the presumption may fairly be extended to the other buildings and the land enclosed within the compound wall which may be regarded as appurtenant to the roza."

In Akbarally v. Mahomedally(1) the Bombay High Court pointed out that even a vacant place may be dedicated as a mosque without having the appearance of a mosque. The High Court observed as follows:

> "The general law of Islam in regard to devotions is so broad and liberal that the mosque in question will, even if not endowed with an Amil, be capable of furnishing for any devout Muslim (at least of the Dawoodi Hohra community) a place where he may-with or without the ministrations of an Amil or authorised leader of prayers-five times every day of his life offer prayers.
>
> x x x x The books speak of an open space of building ground being consecrated as a masjid. Nor is it necessary for the purpose of consecrating a place or building as a masjid that there should be an Amil or any other religious officer appointed."

It is also well settled that where a mosque has been in existence for a long time and prayers have been offered therein, the Court will infer that it is not by leave and licence but that the dedication is complete and the property no longer belongs to the owner. In Miru v. Ramgopal(2) the High Court of Allahabad observed as follows:

> "But where a building has stood on a piece of land for a long time and the worship has been performed in that building, then it would be a matter of inference for the Court which is the judge of facts, as to whether the right has been exercised in that building for such a sufficiently long time as to justify the presumption that the building itself had been allowed to be consecrated for the purposes of such rights being performed. Where there is a mosque or a temple, which has been in existence for a long time, and the terms of the original grant of the land cannot now be ascertained, there would be a fair presumption that the sites on which mosques or temples stand are dedicated property."

To the same effect is the decision of the Nagpur High Court in Abdul Rahim Khan v. Fakir Mohammad Shah.(3) The same principles are legally deducible from the decisions in Masjid Shahid Ganj Mosque v. Shrimani Gurdwara Parbandhak Committee, Amritsar; (4) Musaheb Khan v. Raj Kumar Bakshi(5) and Maula Baksh v. Amiruddin.(6) Similarly regarding the portions which are adjuncts to the mosque the Bombay High Court has clearly observed that the said adjuncts will form part of the mosque and would not be the private property of the founder. The Nagpur High Court has also made similar observations. These observations have already been quoted above. This Court also in Mohammad Shav v. Fasihuddin Ansari(1) observed as follows:

> "After a careful survey of the evidence we have reached the following conclusions: (1) that the old mosque as it stood in 1880 is proved to be wakf property but that nothing beyond the building and the site on which it stood is shown to have been wakf at that date;
>
> (2) that this property has been added to from time to time and the whole is now separately demarcated and that the additions and accretions form a composite and separate entity as shown in the plaintiffs' map. This is the area marked ABCD in that map;
>
> (3) that this area is used by the public for religious purposes along with the old mosque and as the area has been made into a separately demarcated compact unit for a single purpose, namely, collective and individual worship in the mosque, it must be regarded as one unit and be treated as such. The whole is accordingly now wakf.
>
> (4) that the accretions were made by Gulab Shah and the defendant both of whom claimed to be Mutwallis of the mosque;
>
> (5) that this area also includes the shops and chabutra shown to the west of the mosque in the plaint map on a triangular piece of land;
>
> (6) that the urinal, water pipe and bathroom were constructed for the use of the worshippers and so must be regarded as an adjunct of the wakf;"

Having discussed the law on the subject, we will not examine the question as to whether or not the mosque and the adjuncts thereof constitute a public wakf. We have already mentioned that the entire land in dispute consisting of the mosque, its adjuncts, the burial ground etc. was originally acquired by virtue of the documents Ext. B-1 dated May 12, 1730 and Ext. B-2 dated May 22, 1797 which have been referred to in an earlier part of this judgment. The land in Ext. B-1 was acquired by the saint Syed Sultau Makhdoom Sahib who has been entombed in the land on which the Dargah has been built. A part of the site has been used continuously as a public burial ground and has become a public grave-yard as wakf as held by us. So far as the Dargah is concerned the Courts below have concurrently found as a fact that it was a private Dargah of the defendants Labbais and that there was no evidence to show that it was ever constituted as a public wakf. Learned counsel for the appellants in Civil Appeal No. 2026 of 1968 has not pressed his appeal relating to the Dargah. On a perusal of the evidence both oral and documentary we are satisfied that the Dargah has not been proved to be a public property, but is the private Dargah of the Labbais whose ancestor the original saint has been entombed therein. As Sayed Sultan Magdoom Sahib was a great saint and was held in great respect by all the villagers and as there was no mosque in the village at all it was only natural that the Muslims of the village would think of building a mosque in the village and they could find no better place to construct a mosque than the land in dispute, a part of which contained the Dargah of the great saint where he was entombed. The entire land was acquired by Ext. B-1 which was executed by Thirumalai Kolanda Pillai in favour of the saint as far back as May 12, 1730. The rest of the land was acquired by another sale deed Ext. B-2 dated May 22, 1797 executed by Malai Kolanda Pillai in favour of Kaidbar Sahib who was a direct descendant of the saint. This is the origin of the lands in dispute. So far as the mosque and its adjuncts are concerned, it would appear from the sketch map as also from the evidence produced by the parties that this part of the land consists of the following constructions:

> (1) the main prayer hall which is commonly known as the mosque or Pallivasal;
>
> (2) Mandapam or Vang Mandai as described by the witnesses which is a sort of a covered platform where according to the plaintiffs prayers are offered by the members of the Mahomedan public when the space in the main mosque is not sufficient to accommodate the big crowd.
>
> (3) There is a small chamber in the nature of a store room adjacent to the mosque and a thatched shed. There is also a pond where water is pumped in through a pump-set which has been installed by the Mahomedans of the village, particularly the plaintiffs. There is also a latrine to the south of the burial ground sons east of the mosque which is used for the persons who come to offer prayers in the mosque and the Mandapam.

Apart from these constructions the evidence shows that a few years back the whole place was electrified and a tower was also built in the nature of a minaret in the mosque and a loud-speaker was also fitted for the purpose of reciting Azan and Khutbas etc. According to the defendants the mosque itself was a private mosque of the saint who had merely permitted the plaintiffs' ancestors to construct the prayer hall there, but there was no formal dedication of the property as a mosque.

The defendants further averred that even if the prayer hall be regarded as a public mosque the other constructions which were made subsequently were the private property of the defendants and did not form part of the mosque.

We would first take up the question whether the prayer hall i.e. the Pallivasal which is shown in the sketch map towards the south of the Dargah was dedicated as a mosque. We have already pointed out that under the Mahomedan Law a dedication may be oral or in writing and no particular form or method for constituting a wakf has been prescribed by the Mahomedan Law. It is largely a question of the intention of the founder who after having made a declaration divests himself of his interest in the property and gives delivery of possession of the same in accordance with the manner in which it is capable of being delivered. In the case of a mosque his permission or the bare act of allowing the members of the Mahomedan public to or prayers amounts to a complete delivery of possession. In the instant case fortunately there is an important document Ext. B-3 a better translation of which is Ext. B-4 which clearly shows the intention of the founder and which in our opinion, on a proper interpretation of the terms thereof, amounts to a permanent and an irrevocable dedication to God constituting a valid public wakf. We would now examine the contents of this document, the relevant portions of which may be extracted thus:

> "Whereas we are constructing a Pallivasal at the Durga MEDAI (raised platform) belonging to Karrath Sultan Mahdoom Sahib with the permission of the Sahib avergal for the purpose of worship, after the completion of the said Pallivasal (mosque) by the Grace of Allah, we shall claim no right whatsoever in respect of the said Pallivasal except that we shall worship therein. At the time of Kanduri (annual festival) we shall act according to usual practices (mamool). We shall not require the income derived either from the Sultan Mahdoom Sahib Durga or from the Pallivasal we now build. In the Pallivasal we build, we shall claim no other rights whatsoever except worshipping therein, we shall by lighting lamps and attending to the maintenance of the same. There shall be a doorway and two windows affixed on the southern wall of the said Pallivasal and one doorway on the eastern side with a wall around it. To this effect is this deed of agreement executed with consent by all of us living in this village in favour of Saheb Avergal."

Before analysing the terms of the above document, the following admitted facts may be reiterated:

> (1) that the Mahomedans of the village sought permission of Masthan Ali Khader Sahib for erecting a building for the purpose of worship on the land belonging to him;
> (2) that the evidence establishes that there was no mosque at all in the village of Vijayapuram which consisted of a substantial portion of the Muslim population;
>
> (3) that the idea of constructing the mosque originated from the plaintiffs' ancestors who constituted the bulk of the Muslim population in the village, the defendants' ancestors being a very small family in that village.

Against the background of these facts we might now analyse the terms and conditions of the agreement which shows the nature of the dedication. To begin with, the agreement recites (i) that the Rowthers were constructing a Pallivasal at the raised platform belonging to the Labbai Masthan Ali Khader Sahib with his permission, (ii) that after completion of the construction which is described as a mosque in the agreement, the Rowthers will have no claim or right, except the right to worship therein; (iii) that the only rights which the Muslims would claim would be the right to worship, to light lamps and will also be responsible for the maintenance of the mosque; (iv) that the said construction was made purely for the purpose of worship; (v) that there shall be a doorway and two windows affixed on the southern wall of the mosque and one doorway on the eastern side so as to serve as entrances. In other words this important recital in the agreement clearly shows that the agreement was to make a separate entrance to the mosque in order to constitute it as a separate entity. The owner Masthan Ali Khader Sahib had given his tacit consent to all the terms of the agreement and in the eye of law he being a party to the agreement he allowed the mosque to be constructed not for the private members of his family but for worship of God by the entire Mahomedan public. The document thus unmistakably evidences the clear intention of the founder to consecrate the mosque for public worship and amounts to a declaration of a public wakf. By providing for separate entrance through doorway and windows the owner agreed to separate the mosque from the rest of the property namely the Dargah and the compound. Thirdly by allowing the entire Mahomedan community of the village to worship in the mosque and to perform other ceremonies the owner of the land gave delivery of possession to the mosque.

A perusal of the terms and recitals of the document Ext. B-4, therefore, manifestly shows that Masthan Ali Khader Sahib being a saint himself unequivocally and categorically divested himself of the entire interest in the mosque and made it a public wakf. We agree with the view that a place may be dedicated as a mosque or masjid without there being any building as held in Akbarally's case (supra). But in the instant case since the building in the nature of a mosque was built a clear case of dedication has been made out. Once the mosque was constructed it stood dedicated to God and all the right, title and interest of the owner got completely extinguished. This happened as far back as February 16, 1829, i.e. about a century and a half ago. Since then the mosque has been used constantly for the purpose of offering prayers. This fact has been proved by the documents which we have discussed above and also from the oral evidence led by both the parties which we will consider hereafter.

It is further contended that under the agreement, the plaintiffs clearly stipulated not to claim any right or interest in the mosque and, therefore, they cannot now be heard to say that the mosque was a wakf property. This argument appears to have found favour with the Trial Court. But in our opinion it is based on a serious misconception of the Mahomedan Law on the subject. Once there was a complete dedication to the mosque as a place of public worship any reservation of condition imposed by the owner would be deemed to be void and would have to be ignored. Moreover we do not construe the so- called stipulation by the plaintiffs' ancestors at the time of erecting the prayer hall as an assertion that the mosque was not a public wakf. Reading the statements made in the agreement as a whole what the plaintiffs' ancestors meant was that the mosque would be undoubtedly a public wakf meant for the purpose of public worship and that they would not interfere with the management of the same. This does not mean that if the founder's descendants

indulged in mismanagement of the mosque the plaintiffs as members of the Mahomedan community could not take suitable action under the law against the defendants. This argument is, therefore, negatived.

As regards the adjuncts of the mosque the details of which have been given by us, the same were built by the Mahomedan community from time to time for the purpose of the mosque or by way of a gift to the mosque. We would now refer to the oral evidence on the point.

P. W. 1 Mohamed Hanifa who is an old man aged 65 years and is one of the Rowthers states that there are 200 houses of Rowthers and only 7 to 8 houses of the Labbais in the village. The witness mentions the various adjuncts to the mosque, namely, the tank, pump house, installed pump set, the latrine to the east of the pump house and a plaform which he calls as Vang Madai. The witness further goes on to state that the mats and loud-speakers are kept in the store- room. The mats are usually used by the Mahomedans for offering their prayers and the loud-speaker is used for reciting Azans or reading Khutbas (relgious sermons) which are usually done after the prayers are over. This witness's evidence also shows that when the Muslims want to bury their dead they come to the mosque for performing Namaz-e-Janaza (special funeral prayers). According to P. W. 1 the corridor which connects the thatched shed with the plaform was built by Ismail who was not a Labbai. The Vang Medai was built by Mustapha Rowther and this was constructed about 30 to 35 years ago and so was the Verandah which is shown in the sketch map as the thatched shed. The witness also states that so far as the doorway is concerned it is there since a long time and it actually finds mention in Ext. B-4. According to the witness the platform, the Vang Medai, was built when he was 10 to 12 years of age i.e. about 50 years from the date of his deposition. These facts do not appear to have been denied by D. Ws. 1 and 2 who have appeared on behalf of the defendants except with respect to the persons who made these constructions. In our view the question of the person who actually made the construction is wholly irrelevant because all the constructions made by any person used for religious purposes incidental to offering of prayers in the mosque would be deemed to be accretions to the mosque itself and there is unchallenged evidence to show that all the constructions were used by the Mahomedan community for the purpose of offering their prayers in the mosque on special occasions.

P. W. 2 Hyder Ali who is a Labbi admits that he acted as an Imam and that 300 to 400 of Muslims assemble for prayers and when so many persons assemble the entire space of the mosque right from the prayer hall to the corridor is fully occupied. The witness further says that after Khutbas, Koran is read and explained.

Similar is the evidence of P. W. 3 Yehiya who also says that Muslims offer their congregational prayers when their number swells upto 400 to 500 and that mats and carpets are kept in the store room.

P. W. 4 Mohamed Mesra Hussain who is aged 64 years affirms that prayers have been offered in the mosque for the last 50 years and that there is no other mosque in Vijayapuram. He also testifies to the fact that the mosque is administered by the Rowthers since last 30 years and the Dargah was managed by the Labbais. He also states that on the occasion of Friday prayers about 300 persons

assemble in the mosque right from the main hall to the corridor.

P. W. 5 Abdul Majeed says that Vanga Mandapam and the corridor were constructed by Abdul Rahzan some time in 1931 and the people assemble right from the mosque to the corridor.

This is all the evidence given by the plaintiffs. D. W. I Syed Mubark who is the contesting defendant admits that the Mandapam was constructed by Sayed Mohd. Hussian about 30 to 35 years ago and that the mosque was constructed by the Rowthers. He further admits that the defendants never objected or obstructed the Rowthers from offering their prayers. He further admits that a pump set was installed to pump water into the tank. He also admits all Muslims gather and pray in the mosque.

D. W. 2 Mohamed Salis admits that the Hauz and the Verandah were built by Abdul Rahman under the supervision of Qasim though the funds were supplied by Ismail.

Thus even the witness for the defendants clearly admitted the nature and character of the various adjuncts to the mosque. The D. Ws., however, have tried to minimise the number of people who assembled during Friday prayers by saying that it would be between 40 to 50. But that is obviously wrong. It is well known that on special occasions like Fridays, Id, Ide-Milad and other auspicious occasions the entire Muslim community flock to the mosque for the purpose of offering prayers, because offering of prayers on such days is, according to the Islamic tenets, extremely auspicious and highly efficacious. It is also established from the evidence that the constructions referred to above had been made for the purpose of the mosque. Before a Mussalman offers his prayers he has first to wash his hands and feet in the prescribed manner and for this purpose arrangements are made in every mosque, and Pallivasal is no exception. Accoedingly a tank or a Hauz, where water was pumped in was meant for the purpose of Wazoo i.e. for washing hands and feet which is a prerequisite for offering the prayers. Similarly as a large number of Muslims assembled on special occasions as mentioned above, the entire space including the mosque, the Mandapam, and the corridor was used for the purpose of offering prayers. Thus these constructions were used for religious purposes incidental to the offering of prayers and have become accretions to the mosque so as to constitute one single entity. Similarly the mats are meant for the Mahomedans to be used at the time of offering prayers. Lastly the loud speaker is used for reciting Azan and delivering Khutbas i.e. religious sermons. Thus all the adjuncts of the mosque are meant for purely religious purpose connected with the offering of prayers in the mosque.

The case of the defendants was that these constructions were their private property, but there is not an iota of evidence to prove the same. The law on the point is well settled that where any construction is made for the purpose of the mosque or for its benefit or by way of gift to the mosque, the same also becomes a public wakf. The statement of the law on the subject as mentioned by Baillie in his Digest of Mohummudan Law has already been extracted by us. In these circumstances, therefore, the conclusion is inescapable that the mosque as also all its adjuncts referred to herein constitute one single unit and the entire thing a public wakf.

Mr. Krishnamoorthy Iyer appearing for the appellants submitted that although Ext. B-4 shows that a mosque in the shape of a raised platform was constructed by the Rowthers but there is no evidence of any formal dedication or dedication to the wakf. This argument fails to consider the essential requirements of a public wakf under the Mahomadan Law and particularly the rules which require dedication to the mosque. The act of permitting the Mahomedans to build a mosque itself amounts to a complete dedication or a declaration that the mosque is a public property. Further by giving delivery of possession of the site for the purpose of building a mosque and by allowing prayers to be offered in the mosque, the founder, namely Masthan Ali Khadar Sahib made a complete public wakf in the shape of a mosque. Nothing, therefore, remained with the founder or his descendants. Mr. Iyer relied on a decision in Jafar Hussain v. Mohd. Ghias-ud-din.(1) This case is, however, clearly distinguishable because it was not a case of a mosque which is governed by special rules for dedication. In that case the property used was a Haveli or a house and on the facts of that case the Court held that there was no validly constituted wakf. Reliance was also placed on a decision of this Court in Nawab Zain Yar Jung v. The Director of Endowments (2). This also was not a case of a mosque and this Court, on the facts of that case, held a that the trust created was not a wakf but a secular public charitable trust. If the instant case, however, agreement Ext. B-4 clearly recites that the property being built on the land of the founder was a public mosque to be used for public purpose of offering prayers.

Lastly our attention was drawn to the decision of the Nagpur High Court in Jawaharbeg v. Abdul Aziz(3). That case also is of no assistance to the appellants because while the Court held a part of the pro-

perty to be a mosque the other parts which had absolutely no connection to the wakf property were held to be the private property. For these reasons, therefore, the contention put forward by the appellants is over-ruled On a consideration, therefore, of the facts, circumstances and the evidence of the present case, we are satisfied that the mosque as also its adjuncts constituted wakf properties and had been used as such for a long time so as to culminate into a valid and binding public wakf. We have already held that as the public character of the wakf was not in issue in the previous judgments relied upon by the appellants, the said judgments did not operate as res judicata. We, therefore, affirm the finding of the High Court on this issue.

It was next contended by the appellants that the suit was barred by s. 55(2) of the Wakf Act, 1954, which runs thus:

> "No suit to obtain any of the reliefs referred to in sub-section (1) relating to a wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board: Provided that no such consent shall be required for the institution of a suit against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules or orders made thereunder."

The High Court has dealt with this aspect of the matter and has pointed out that at the relevant time when the present suit was brought, no Board contemplated by the provisions of the Wakf Act had, however, been constituted and therefore the provisions of s. 55(2) were not at all attracted, nor were

those provisions capable of being acted upon. In these circumstances, therefore, the non-compliance with the requirements of s. 55(2) of the Wakf Act would not bar the maintainability of the present suit.

Lastly it was contended that even assuming everything against the appellants the conditions of s. 92 of the Code of Civil Procedure were not at all fulfilled in this case, because the defendants could not be called the trustees within the meaning of s. 92 of the Code of Civil Procedure and the Advocate-General committed an error of law in granting the sanction to file the present suit. It is true that the defendants have only been de facto managers of the properties in suit either as Pesh Inams or otherwise but that does not make any difference so far as application of s. 92 of the Code of Civil Procedure is concerned. It is true that s. 92 of the Code applies only when there is any alleged breach of any express or constructive trust created for a public, charitable or religious purpose. It also applies where the direction of the Court is necessary for the administration of any such public trust. In the instant case the defendants have no doubt been looking after the properties in one capacity or the other and had been enjoying the usufruct thereof. They are, therefore, trustees de son tort and the mere fact that they put forward their own title to the properties would not make them trespassers. In Abdul Rahim Khan's case (supra) a Division Bench of the Nagpur High Court observed thus:

> "The defendants' predecessors who were parties to that suit as defendants were in law not trespassers but trustees. They claimed to be so. They acted as such, but had wrongly begun to assert title to which they were not entitled to and therefore the suit against them, a suit under s. 529 (equivalent to the present s.
>
> 92) of the Civil Procedure Code does lie for removal of such de facto or constructive trustees, as has been laid down in I.L.R. [1942] 1 Cal 211 at pp. 215, 219 and A.I.R. 1940 Pat. 425 The plaintiffs in their plaint never stated that the defendants were trespassers, and it is the allegations in the plaint that determine the nature of the suit and the jurisdiction. The defendants' denial in the pleadings will not in any way affect the nature of the suit under S. 92, as held in 11 Pat. 288 and 63 Cal. 74."

To the same effect are the decisions in Mahomad Shirazi v. Province of Bengal(1) and Ramdas Bhagat v. Krishna Prasad(2). In our opinion these decisions lay down the correct law on the subject. We, therefore, hold that s. 92 of the Code of Civil Procedure is clearly applicable to the case.

Counsel for the appellants lastly argued that there is no evidence to show that the appellants have committed any negligence in managing the trust properties. Even the Trial Court which had dismissed the plaintiffs' suit had returned a clear finding of fact that the defendants were guilty of gross negligence in managing the properties. In this connection the Trial Court found as follows:

> "It was pointed out that there was mis-management. That there is mis managment cannot be disputed. For one thing, in spite of the decree of the court for removal of certain superstructures on the burial ground the Labbais evaded the Issues for a period of over twenty years. The plaintiffs have proved that plaint B-schedule

> property has been dedicated to the Dargah. But this property has been alienated by the predecessors-in-interest of the defendants. In exchange, they have obtained C-schedule property. The next contention was that the defendants havve not maintained accounts. It is true that the evidence does not disclose that any accounts were maintained or being maintained by the Labbais defendants."

The learned Judge, however, tried to explain away these acts of misfeasance on the ground that as the Rowthers undertook not to interfere with the management or ask for the account, the negligence committed by the defendants, if any, was not actionable. In view of our findings, however, that the mosque, its adjuncts and the burial ground are public wakfs the question of negligence assumes a new complexion. Apart from the acts of mismanagement, there is definite oral evidence of the plaintiffs to show that the graveyard is not properly managed and maintained. The boundary wall has broken and cattle enter the graveyard leading to its desecration. The evidence of the plaintiffs also shows that even the mosque is in a state of disrepair and no attempt is made to repair or maintain it properly. Further more, the defendants have constructed shops on a part of the graveyard and in spite of several decrees of the Courts to demolish those shops they have not yet obeyed the orders of the Court to demolish the same. In these circumstances, therefore, there is overwhelming evidence on the record to show that the defendants were guilty of grave mismanagement, and therefore a clear case for formulating a scheme under s. 92 of the Code of Civil Procedure by a suit has been made out by the plaintiffs. The schemes, however, will be confined only to the mosque, its adjuncts and the burial ground and not to the Dargah which has been held to be the private property of the defendants.

There is some dispute about the right to act as an Imam. We have already pointed out that the Mahomedan Law does not favour the hereditary right of being an Imam because an Imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers. The evidence shows that the Labbais have undoubtedly been acting as Imams, though not for a continuous period. This, however, is a matter for the entire Muslim community to decide because an Imam is normally chosen under the Mahomadan Law by the Muslim community. There is no clear evidence of any usage or custom by which the right to act as Imam is hereditary in this case. Nevertheless we would like to observe that the defendants are after all the descendants of the founder of the entire premises which had been constituted as public wakf by their ancestors. Under the agreement Ext. B-4 the Rowthers on behalf of the Muslim community undertook not to claim any right in the mosque and although that would not act as an estoppel once the property becomes a public wakf we think that the Court at the time of framing a scheme would consider the desirability of associating some of the defendants with the framing of the scheme and may even appoint a suitable person from among the Labbais to look after the properties on imposing such terms and conditions as the Court thinks fit. But the primary consideration should be the welfare of the wakf properties. In case the Labbais are not found suitable for being given any share in the administration of the mosque, the Court will be free to withhold the right.

We, therefore, affirm the judgment of the High Court in all the appeals. The result is that the appeals filed are dismissed, but in the peculiar circumstances of the case there will be no order as to costs in this Court.

V.P.S. Appeals dismissed.