

(1943) 11 PAT CK 0003
In the Patna High Court

Birjis Mahal Begum

APPELLANT

Vs

Humayun Reza Chaudhury and Another

RESPONDENT

Date of Decision : 19-11-1943

Acts Referred:

Santhal Parganas Settlement Regulations, 1872 — Section 11, 25A

Citation : AIR 1944 Patna 234

Hon'ble Judges : Fazl Ali, C.J.; Chatterji, J

Bench : Full Bench

Judgement

Chatterji, J.—This is an appeal by defendant 2 in a suit for a declaratory decree, the declaration sought by the plaintiffs being in substance, that they are mutwallis with regard to the disputed properties described in the schedule to the plaint and that the entries in the record of rights in respect thereof are wrong. The schedule in the plaint consists of 7 items of properties of which the first 5 are shares in zamindaris bearing touzi Nos. 110/1, 110/2, 110/4, 110/5 and 110/B, respectively, of 9 the Dumka Collectorate. Item 6 is patni interest comprised in touzi No. 110/S and the seventh is 16 annas proprietary interest in touzi No. 111 of the same Collectorate. It will be convenient to refer to the following genealogy which shows the relationship between the parties:

MOHAMED ISMAIL CHOUDHURY (Defendant 1)
_____|_____|_____|
Sajjad Ahmed Zohad Ahmed Choudhury Choudhury (died on 24-8-28) (died on 21-7-29) | married Saleha | Khatun (Deft. 3) _____|_____|
| | | 1st wife 2nd wife | Birjis Mahal Azad Baza | Begum Choudhury | (Deft. 2)
(died in 1926) | _____| | _____|
_____| | | | Humayun Murtuza Momtaz Bilkis Raza Raza Mahal
Babia Choudhury Choudhury (Deft. 4) (Deft. 5). (Plff. 1) (Plff. 2). 2. It will be noticed that of the two brothers, Sajjad and Zohad, the former died on 24th August 1928 and the latter on 21st July 1929. It is also to be mentioned that both the wives of Sajjad predeceased him. Besides the five defendants shown in

the genealogy, there are three other defendants, that is, defendants 6, 7 and 8, of whom No. 6 is said to be a Hindu widow and concubine of Sajjad Ahmed Choudhury and Nos. 7 and 8 his illegitimate sons by her. The plaintiffs' case may be briefly stated as follows: Defendant 1 and his two sons Sajjad and Zohad created a wakf in respect of several properties including items 2 to 6 and a patni interest in item 7 (in the plaint there is a mistake about the numbers of these items) of the disputed properties under a registered wakfnama dated 28th December 1922. The properties belonged to defendant 1, but his sons joined in the execution of the wakfnama, so that no question might be raised as to its validity.

3. Under the terms of the wakfnama Sajjad and Zohad acted as joint mutwallis, and after Sajjad's death Zohad became and acted as the sole mutwalli till his death. After Sajjad's death, defendant 1 and Zohad executed a deed on 12th October 1928, confirming the wakfnama dated 28th December 1922. On 3rd April 1929, a partition deed was executed by defendants 1, and 2 and Zohad by which, amongst other properties, item 1 of the disputed properties was allotted to Zohad. On 19th July 1929, defendant 1 and Zohad executed a wakfnama in respect of item 1 and the zamindari interest in item 7 of the disputed properties with the result that so far as the patni interest comprised in item 7 was concerned, it merged in the zamindari interest. After Zohad's death, plaintiff 1 became mutwalli under the terms of the first wakfnama and plaintiff 2 was selected as joint mutwalli by the majority of the descendants of the wakifs in accordance with the provisions of the wakfnama.

4. In the record of rights, however, which were finally published between 18th January 1927 and 15th July 1927, Sajjad and Zohad were recorded "as zamindars with regard to items 2 to 5 and as patnidars with regard to item 0 and the patni interest in item of the disputed properties without being mentioned as mutwallis. In 1929 revision cases for correction of the record of rights, so far as the patni interests were concerned, were started in the Court of the Settlement Officer of the Santal Parganas on a note submitted by the Assistant Settlement Officer to the Settlement Officer. Notices being served on Zohad, he appeared before the Settlement Officer and filed a petition praying that the record of rights be corrected so that his name might be entered as sole mutwalli in respect of items 2 to 6 of the disputed properties. His claim was contested by defendant 7 who asserted that he was the son of Sajjad and that the wakfnama had not been given effect to ? and was invalid and inoperative in law. The Settlement Officer rejected the claim of Zohad by his order dated 28th June 1929. In the meantime Zohad died, and after his death the plaintiffs preferred an appeal before the Commissioner against the order of the Settlement Officer, but the Commissioner dismissed the appeal on 28rd December 1929. The plaintiffs then brought the present suit on 4th April 1930, claiming the following principal reliefs:

(a) That it be adjudged that the order of the Settlement Officer, dated 28th June 1929, and that of the Commissioner, dated 23rd December 1929, are wrong and

incorrect, (b) That it be adjudged that the record of rights of the mauzas contained within f the tauzi numbers and mahals mentioned in the schedule below are wrong, in so far as the names of proprietors are concerned, and the same should contain the names of the plaintiffs as mutwallis on the basis of the wakfnama, dated 28th December 1922, and its confirmation dated 12th October 1928, and the wakfnama, dated 19th July 1929, and selection referred to in the body of the plaint, Sajjad Ahmad Choudhury not having left any legitimate male issue behind him and defendants 6 to 8 not being his heirs.

5. Defendants 1, 3, 4 and 5 filed written statements admitting the plaintiffs' claim. Defendants 6, 7 and 8 at first contested the suit, but subsequently entered into a compromise with the plaintiffs and admitted their claim. The suit was contested by defendant 2 alone substantially on the grounds, that the suit for mere declaration was not maintainable; that it was barred under Sections 11 and 25A, Santal Parganas Regulation (3 of 1872), that the alleged wakfnamas were fraudulent and sham transactions and were invalid and inoperative in law and could not affect defendant 2's share in the properties inherited by her from her father; that the partition deed was also a fraudulent document which she was made to execute on the representation that she was given under it her proper share in the properties left by her father; and that there was no merger of the patni right in tauzi No. III (item 7 of the disputed properties) when the wakfnama dated 19th July 1929, was executed. The learned Subordinate Judge at first tried the following preliminary issues:

(3) Is Section 11 of Regulation 3 of 1872 a bar to this suit? (4) Is Section 25A of Regulation 3 of 1872 a bar to this suit? (7) Is the suit for mere declaration maintainable without consequential relief in this Court in Santal Parganas?

6. He decided issue 7 in favour of the plaintiffs. As regards issues 3 and 4, he held that the suit was barred, so far as patni interests in tauzis 110/3 and 111 were concerned. With regard to the proprietary interests in items 1 to 5 and 7 of the disputed properties, he held that the suit was maintainable. Against his order, so far as it related to the patni interests, the plaintiffs filed an application in revision to this Court. The application was heard by Wort J., and he allowed it on 14th August 1934 See ("34) 21 Humayun Raza Choudhury and Another Vs. Mohammad Ismail Choudhury and Others, . He held that the suit was not barred under Sections 11 and 25A of the Santal Parganas Regulation. He accordingly directed the Subordinate Judge to hear and determine the issue relating to the patni interests in tauzis 110/8 and 111 with other issues in the case according to law. The learned Subordinate Judge then proceeded to try the other issues in the suit. He held that the wakfnamas were acted upon and were valid and operative. He also overruled the other defences raised. Accordingly he decreed the suit. Hence this appeal by defendant 2.

7. The first point argued by Mr. N. N. Sinha on behalf of the appellant is that the suit is barred under Sections 11 and 25A of the Santal Parganas Regulation, so far as item 6 and the patni interest comprised in item 7 of the disputed

properties, are concerned. It is not disputed that the provisions of this Regulation will apply to this case, as the disputed properties are in the Santal Parganas. Section 11 of the Regulation is in these words:

Except as provided in Section 25A, no suit shall lie in any civil Court regarding any matter decided by any Settlement Court under these rules; but the decisions and orders of the Settlement Courts made under these rules, regarding the interests and rights above-mentioned, shall have the force of a decree of Court.

Section 25A runs as follows:

Where only the rights of zamindars and other proprietors as between themselves are concerned, a suit may, unless it is barred by Section 13, Civil P.C., be brought in a Court established under the Bengal, Agra and Assam Civil Courts Act, 1887, to contest the finding or record of the Settlement Officer, within three years from the date of the publication of the record-of-rights, or of the final order of the Revenue Court. But no such suit shall be brought in any Court after the expiration of three years from such date. If in any such suit it is found that the finding of the Settlement Officer is erroneous, the record shall be amended accordingly.

8. Section 25A must be read with Section 25 which provides (omitting Sub-section (3) which is not material to this case):

(1) After a period of six months from the date of the publication of the record-of-rights of any village, such record shall be conclusive proof of the rights and customs therein recorded, other than the rights mentioned in Section 25A, except so far as concerns entries in such record regarding which objections by parties interested may still be pending in the original or appellate Courts, or may still be open to appeal.

(2) Notwithstanding anything contained in Sub-section (1), the Settlement Officer may, at any time before the settlement is declared by a notification in the Calcutta Gazette to have been completed,--(a) inquire into and correct any material error in such record; and (b) revise any order or decision passed by himself e or by an Assistant Settlement Officer:

Provided that no such order or decision shall be so revised where any order passed by the Commissioner is likely to be affected by such revision, or where an appeal from such order or decision is pending before the Commissioner.

Provided, further, that no material error shall be corrected and no decision or order shall be revised, until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

9. The cause of action for this suit is stated to have arisen on 23rd December 1929, that is, the date of the order passed by the Commissioner. This order as well as the order of the Settlement Officer are specifically referred to in prayer (a) of the plaint. It appears from the Commissioner's order Ex. 2 that the

proceedings in which it was passed originated in a note submitted by the Assistant Settlement Officer pointing out that there were some inconsistencies regarding the entries in the record of rights for touzi 111. The inconsistencies pointed out were that all the mauzas of tauzi ill were formerly held in patni right by Sajjad and Zohad, but Zohad had purchased the 16 annas proprietary right.

10. It was suggested that the patni right might merge into the proprietary right. Notices were accordingly issued to the parties so that the record might be corrected, apparently u/s 25(2) of the Regulation. Zohad then appeared and filed a petition stating that he and his elder brother Sajjad, who was then dead, were joint mutwallis with respect to the patni right in touzi 111 and other properties, and he prayed that he should be recorded as the sole mutwalli.

11. To this petition defendant 7, describing himself as son of Sajjad, filed an objection alleging that the alleged waqfnama was merely a paper transaction, and he claimed that the legal heirs of the deceased Sajjad including himself should be recorded in his place. The Settlement Officer after hearing the parties held that as intricate questions of law regarding the validity of the waqf and the Mohamedan law of inheritance were involved, the case would more properly, be decided in the civil Court and that the parties were at liberty to go to the civil Court u/s 25A of the Regulation. He accordingly by his order Ex. 1, dated 28th June 1929, rejected the petition filed by Zohad and declined to correct the record. Zohad having died in the meantime, the plaintiffs preferred an appeal from this order to the Commissioner. The Commissioner also took the view that the matter could best be decided by the civil Court. He accordingly dismissed the appeal by his order Ex, 2.

12. It will thus appear that neither the Settlement Officer nor the Commissioner decided the question as to the validity of the waqf. Wort J. accordingly held that Section 11 of the Regulation was no bar to the suit, because what that section prohibits is a suit regarding any matter decided by a Settlement Court. As regards Section 25A, he pointed out that it is an enabling, and not disabling, section, and that it is an exception to Section 11, as the latter section itself shows. I agree with the view thus taken by Wort J. The effect of Sections 11 and 25A is this: Where there has been a decision or order of the Settlement Court, it will have the force of a decree of Court, and no suit will lie in the civil Court to contest such decision or order, unless it relates to "the rights of zamindars or other proprietors as between themselves," in which case a suit will lie in the civil Court, subject to the limitations laid down in Section 25A. In this case the question as to the validity of the waqf, though raised in the settlement Court in the proceedings u/s 25(2), was not decided. Section 11, therefore, does not bar this suit. So far as it relates to the proprietary rights, it is authorised by Section 25A. There has been some controversy as to whether the decision of Wort J. is final and binding on the parties, so far as the proceedings in this Court are concerned. But in the view I take, it is unnecessary to express any opinion on this point, particularly when it will be of no importance if the case is carried to

the Privy Council.

13. It has been argued by Mr. N.N. Sinha, that though in the proceedings u/s 25(2) the settlement Court refused to decide the question as to the validity of the waqf, the record of rights is still there and the entries therein should be regarded as decisions or orders of the Settlement Court within the meaning of Section 11. Reference has been made to Section 14 which runs as follows:

The Settlement Office) shall give due notice to the people of ii village for which he is about to prepare a record-of-rights, so that all persons interested may bring forward their claims either in writing or by verbal application.

But the Settlement Officer shall inquire into, settle and record all rights in, or claims to, the lands of a village of which he is preparing a record-of-rights, even though such claims or rights may not be urged by the parties interested.

14. The implication of this section, it is said, is that whenever the Settlement Officer makes an entry in the record of rights it is made after enquiry, and therefore the entry must be taken to be his decision, having the force of a decree of Court within the meaning of Section 11. If this view were to be maintained, it (would hardly be consistent with the provision of Section 25(1) which says that "such record shall be conclusive proof of the rights and customs therein recorded," and would be distinctly opposed to the provision of Section 25(2) which gives the Settlement Officer power to correct any material error in the record at any time before the completion of the settlement is notified in the Gazette.

15. It has next been argued by Mr. N.N. Sinha, relying on the said provision of Section 25(1), that the entries in the record of rights in this case, so far as the patni interests in tauzis 110/3 and ill are concerned, are conclusive. This argument is confined to the patni rights only, because the zamindari rights are covered by Section 25A. The plaintiffs, though they claim as mutwallis, are undoubtedly zamindars, while defendant 2 asserts her right as zamindar.

16. Thus, the dispute relates to the rights of zamindars as between themselves within the meaning of Section 25A. It has been conceded by Mr. P.R. Das on behalf of the respondents that the suit, so far as it relates to the patni interests, does not come u/s 25A. But with regard to Section 25(1), his contention is that the plaintiffs need not dispute the correctness of the entries in the record of rights, because all that the entries show is that Sajjad and Zohad were the patnidars, whereas what the plaintiffs claim is that, Sajjad and Zohad having both died, they should be recorded as mutwallis. The plaintiffs' right, therefore, it is said, cannot be affected by the record of rights. Even as regards Sajjad and Zohad, it is contended that their rights were also not affected by the record of rights, because undoubtedly they were patnidars, and the mere fact that they were not recorded as mutwallis did not affect their rights as mutwallis, the record of rights being conclusive proof only of "the rights and customs therein recorded," and not of any right which is not recorded. It has also been argued by

Mr. Das that if Sajjad and Zohad, either wilfully or by negligence, did not get their names recorded as mutwallis, the record of rights prepared in their names could not affect the rights of the succeeding mutwallis. I think there is much force in the contention of Mr. Das.

17. The real scope of the present suit is to establish the validity of the waqf, and also the title of the plaintiffs as mutwallis. The entries in the record of rights with regard to the patni interests may be conclusive proof that Sajjad and Zohad were the patnidars. But they afford no proof that the patni interests in dispute are not waqf properties; nor do they afford any proof that the plaintiffs are not the mutwallis.

18. It has been argued by Mr. Das that the provision of Sub-section (1) of Section 25 is controlled by Sub-section (2) of the same section. This is undoubtedly so, but in this case though proceedings were taken under Sub-section (2), they did not result in any correction of the record. In fact the Settlement Officer declined to correct the record. Therefore, Sub-section (2) is of no avail to the respondents, so far as this operation of Sub-section (1) is concerned.

19. As regards the proprietary interests, it has been argued by Mr. N.N. Sinha that though the suit, so far as it relates to such interests, is covered by Section 25A, the suit, not having been brought within three years from the date of the publication of the record of rights, is barred under that section. Paragraph 11 of the plaint shows that the publication of the record of rights took place from 18th January 1927 to 15th July 1927. The present suit was brought on 4th April 1930, and therefore, it is said, that with regard to those properties for which the record of rights was finally published before 4th April 1927, the suit will be barred. But it has not been shown that the record of rights with respect to any of the proprietary interests in dispute was finally published before 4th April 1927. Our attention has been drawn to a portion of the record of rights Ex. 0 at p. 128 of the Paper Book, Part. 3, which shows that the record of rights was published on 4th March 1927. But it is not clear whether the village to which that particular portion of the record of rights relates was held in proprietary right or in patni right. From p. 127 it appears that Sajjad and Zohad were also recorded as tenure-holders. It is to be observed that the question of limitation does not appear to have been raised in the Court below.

20. On the other hand, it has been argued by Mr. Das that the period of three years should be computed from the date of the final order passed by the Commissioner, that is, 23rd December 1929. The cause of action for the suit, as I have already stated, is said to have arisen on the date when the Commissioner passed the order. The plaintiffs brought the suit as they felt aggrieved by the order passed by the Settlement Officer as well as by the Commissioner. There is a specific prayer for declaration that the orders passed by them are wrong. Though the proceedings in which these orders were passed were taken u/s 25(2), it was open to the Settlement Officer to correct the record, as prayed for

by Zohad. So long as those proceedings were pending, Zohad could not be reasonably expected to bring a suit u/s 25A. It was only when Zohad's application was rejected that the cause of action for the suit arose. In this view three years must be computed from the date of the final order of the Commissioner. The suit, therefore, is much within time. It may be observed that so far as item 1 and the proprietary interest in item 7 of the disputed properties are concerned, the record of rights does not affect the plaintiffs' case in any way, because the wakf in respect of these two properties was created by the wakfnama dated 19th July 1929, that is to say, long after the publication of the record of rights.

21. The next point argued by Mr. N.N. Sinha is that the wakfnamas dated 28th December 1922 and 19th July 1929 are invalid and inoperative. The argument is twofold. In the first place, it is said that the wakfnamas were executed not with the intention to make any gift to charity, but for the aggrandizement of the family. In the second place, it is said that the wakfnamas are not in accordance with the provisions of the Mahomedan law, as contemplated by Section 3, Musalman Wakf "Validating Act, 6 of 1913. These contentions are based on the provisions of the wakfnama (Ex. 4) dated 28th December 1922. Reference to the provisions of the other wakfnama dated 19th July 1929 (Ex. 20) is unnecessary, because by its terms the provisions of the first wakfnama Ex. 4 are made applicable to it in their entirety, subject to such notifications only as were rendered necessary by the death of Sajjad.

22. Clause 1 in the wakfnama Ex. 4 specifies several charitable and religious purposes for which the expenses are to be met out of the income of the wakf properties, e. g., daily lighting the lamp in the mosque, feeding the fakirs and poor, defraying the expenses of Fateha Dawazdahum, Shobebarat, Idulfitir, Idozzoha, Muharram etc. Clause 2 makes provisions for the appointment of mutwallis. Sajjad and Zohad jointly are to be the first mutwallis, and after the death of both of them the eldest member among the sons, grandsons, great-grandsons and so on in the male line will be mutwallis. There is also provision for joint mutwalli. There are various other provisions regarding the appointment of mutwallis including the provision for their monthly allowance. Clause 3, which is most important, provides that after paying all Government dues for revenue, cess etc., and the zamindar's dues for rent and cess and also meeting all necessary expenses for the proper management of the wakf properties including mutwalli's remuneration and the salaries of the servants, the balance of the income of the properties, as to 15 annas, will be distributed as follows: 2 annas share will be spent for religious and charitable purposes mentioned in Clause 1; 11 annas will be appropriated by Sajjad and Zohad in equal shares for the maintenance of their family, and after their death it will be divided equally among the male descendants in the male line of each of them from generation to generation, the interest of each recipient in the allowance being for his life only. In case any male descendant dies leaving no male issue, but leaving a widow, she will get one-fourth of the allowance which her husband was getting and the

remaining three-fourth will go to the other male descendants of the line to which her husband belonged.

23. Two annas will be distributed equally among the fatherless female descendants in the female line of Sajjad and Zohad; but during their lifetime this two annas is to be divided amongst them equally. Clause 3 further provides that in case of extinction of the descendants in the male line of either Sajjad or Zohad, the $\frac{12}{13}$ annas share distributable among the descendants of that line will go to the descendants of the other line; and in case of extinction of the male descendants in both the lines, the 11 annas will be distributed equally among the respective female descendants of each of the two lines. Similarly, on extinction of the female line of either Sajjad or Zohad, half the income distributable among the female descendants of the extinct line will be distributed among the female members of the other line. In the event of the extinction of both the male and female lines of both Sajjad and Zohad, the entire share, that is, 13 annas will be applied for charitable and religious purposes specified in Clause 1, under the supervision of the Government. Clause 5 provides that the remaining 1 anna share of the net income will be invested in purchasing Government papers or landed properties, or in any other safe and profitable manner with the object of creating a reserve fund to save the wakf properties in case of emergency, such as famine or non-realisation of rents. Any property thus acquired will be considered as accretion to the wakf estate.

24. With reference to the provisions in Clause (3) and (5) regarding the disposal of the income of the properties, it has been strenuously contended by Mr. N. N. Sinha, in the first place, that the real intention of the wakifs was to make provision for their family and their descendants and not to make any gift to charity. It is said that the whole object of the waqfnama is the aggrandizement of the family and to tie up the properties in the family, and therefore the waqf is invalid. Reliance is placed on the Privy Council decision in *Sheik Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1990) 17 Cal. 498 in which their Lordships with reference to the provisions of the waqfnama before them said:

There is a great deal in the deed which is designed for the aggrandizement of the family property, and for keeping it perpetually in the hands of the family. The provisions for accumulation in para. 4; the attempt to save salaries from alienations and from creditors in para. 5; the provisions for appointment of male issue as mutwalis in para. 3, coupled with the allowances to other male issue, and to wives and daughters of such issue in paras. 7 and 8, all indefinite in point of duration, and, as their Lordships think, intended to be commensurate with the existence of the family; the direction in para. 7 that new mutwallis should bring all their private acquisitions into settlement; all these things point to the same end, the increase of property available for the family. In para. 8 the grantor allows increases of salaries and allowances to members of the family, so that as the property increases the family may grow richer. There is not a word said about increasing the amount spent on charitable uses beyond the expenditure which

was according to custom. Their Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses except to the extent to which he had himself been accustomed to perform them.

25. These observations are sought to be applied to the present ease. But there has been a change in the law on account of the Mussalman Waqf Validating Act, 1913. The preamble of that Act shows that it is : "An Act to declare the rights of Mussalmans to make settlements of property by way of wakf in favour of their families, children and descendants." Sections 3 and 4 of the Act provide as follows:

3."It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes: (a) for the maintenance and support wholly or partially of his family, children or descendants, and (b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and sup, port during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

4.No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purposes of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

26. It is, therefore, clear that there may be a valid waqf for the maintenance and support, wholly or partially, of the waqif's family and their descendants, provided that the ultimate benefit is reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character. In the present case, two annas share of the net income of the waqf estate is to be spent for religious and charitable purposes. 13 annas share of the income is no doubt to be applied for the maintenance of the donors' family and their descendants from generation to generation, but there is a clear provision that in case of extinction of both the male and female lines of the family, the income will be applied for charitable and religious purposes. Such provision is expressly authorized by Section Mussalman Waqf Validating Act, 1913. As regards the remaining 1 anna share, the properties acquired with it arc to be treated as part of the waqf estate. There is, therefore, nothing in the waqfnama which offends against the provisions of the Mussalman Waqf Validating Act. On the contrary it is quite in accordance with its provisions. The waqfnama cannot, therefore, be said to be invalid.

27. With reference to the provisions of Clause (3) of the waqfnama, it has been contended by, Mr. N.N. Sinha, in the next place, that " undue preference has

been given to the male over the female descendants, which is contrary to the rules of the Mahomedan law of inheritance, and therefore, the waqf offends against the provisions of Section 3, Mussalman Waqf Validating Act. Reliance is placed on the following words in Section 3 of the Act: "which in other respects is in accordance with the provisions of Mussalman law." It is said that the words "in all other respects" include the law of inheritance, and therefore if the provisions of the waqfnama are not in accordance with the Mahomedan law of inheritance, the waqf is not valid. The construction thus put upon the words "in all other respects" is obviously untenable. A waqf is in the nature of a gift; so it is not subject to the operation of the ordinary rules of the Mahomedan law of inheritance. It is conceded that the income of the waqf property may be given entirely to outsiders, but it is said that when the dedication is in favour of the descendants of the waqif, it must be in accordance with the Mahomedan law of inheritance. This argument is sought to be supported by reference to the following paragraph in Ameer Ali's Mahomedan Law, Edn. 4, vol. 1 at p. 36&:

When a wakf is made in favour of children, the income is to be divided among them equally. This is according to Abu Yusuf and "the Fatwa is with him." A condition in the wakfnama giving to one child a greater interest than the other, or to the sons more than the daughter is sinful, as it is sinful to make any difference in gifts. This is the opinion of all leading jurists.

28. But the very first sentence of this paragraph itself is destructive of the argument put forward, because it says that the income is to be divided among the children equally, though according to the law of inheritance the son will get twice as much as the daughter. The statement that it is sinful to give the sons more than the daughters does not imply that such unequal distribution will render invalid a wakf which is otherwise valid. If this were the effect of the unequal distribution, it would have been clearly stated. Suppose, a dedication is made in favour of the children and their descendants with the condition that the income will be divided among them according to their shares under the ordinary rules of inheritance. Can it be suggested that such dedication would be invalid? Again suppose the wakfnama provides that among the children the poorer will get a larger share than the richer. Can it be said that the wakf would be invalid? The words "which in all other respects is in accordance with the provisions of Mussalman law" in Section 3, Wakf Validating Act, really mean "which otherwise satisfies the conditions of a valid wakf under the Mussalman law." For instance if the object of a wakf is sinful according to the laws of Islam, it would not be valid. To take a concrete example, a Moslem cannot make a dedication in favour of an idol or a non-Moslem place of worship. So also, "if a wakf is made by a person of some property which he has unlawfully acquired, it would, be invalid" (Ameer Ali's Mahomedan Law, same volume at p. 201). It has been faintly suggested that the wakfnama creates a succession of life-estates in favour of unborn persons and thus offends against the rule against perpetuity, and therefore, it is invalid. But in *Saadat Kamal v. Attorney-General, Palestine*. AIR 1939 P.C. 185 their Lordships of the Privy Council held that:

A wakf is not governed by rules against perpetuity, and successive life-interests in favour of unborn persons are valid by the Mahomedan law of wakf.

29. It has been further contended by Mr. N.N. Sinha that most of the properties belonged to Sajjad and Zohad, and therefore defendant 1 had no right to create a wakf in respect of those properties. It is said that admittedly these properties stood in the names of Sajjad and Zohad. But in the wakfnama Ex. 4 there is a clear admission on their part that they really belonged to their father. This admission is binding on defendant 2 who claims as heir to her father Sajjad. There is nothing to show that the admission was incorrect. But it is immaterial whether the properties belonged to the father or the sons, because all of them jointly executed the wakfnama.

30. Lastly, it has been contended by Mr. N.N. Sinha that the wakfnama Ex. 4 was not acted upon. This contention is sought to be supported mainly by reference to the fact that in the records of rights, which were published about five years later, Sajjad and Zohad did not get their names recorded as mutwallis in respect of the disputed properties. Nor did they get their names mutated in the Land Registration Department in respect of the zamindaris. Our attention has also been drawn to the fact that in the rent receipts Exs. A series, B series, c series, D series and F series, which were granted by Sajjad and Zohad, they never described themselves as mutwallis. But these circumstances are of no consequence, if the wakfnama is valid. Of course, if the wakfnama was not a genuine transaction and was executed with a view to defraud others, for instance, creditors, the position would have been quite different. But there is nothing to suggest that defendant 1 or his sons had any creditors who were sought to be defrauded. Indeed it was suggested that the illegitimate children of Sajjad, that is, defendants 7 and 8 were sought to be defrauded. But it is significant that they entered into a compromise with the plaintiffs and admitted their claim. On the other hand, there is some evidence on behalf of the plaintiffs to show that Sajjad and Zohad asserted their right as mutwallis. Exhibit 21 is an am-Mukhtarnama executed by them on 26th February 1923, that is to say, within two months after the execution of the wakfnama in which they described themselves as mutwallis. Exhibit 22 is another am-Mukhtarnama executed by them on 14th October 1925 in which also they described themselves as mutwallis. The wakfnama Ex. 4 includes several properties in the District of Murshidabad in Bengal. Exhibits 59 and 60 are decrees dated 29th October 1925 obtained by Sajjad and Zohad as mutwallis in rent suits in respect of some of those properties. Exhibit 53 is an order dated 7th December 1928 passed in an appeal in the Calcutta High Court which shows that the appeal had been "preferred by Sajjad and Zohad and after Sajjad's death Zohad was allowed to prosecute the appeal "as the sole mutwalli of the wakf property which is the property in suit."

31. All these documents undoubtedly show that the wakfnama was acted upon even during Sajjad's life-time. The question of merger of the patni interest in

Tauzi No. ill covered by issue 8, though decided in favour of the plaintiffs has not been seriously pressed before us. All the contentions raised on behalf of the appellant fail.

32.I would accordingly dismiss the appeal with costs.

Fazl Ali C.J.

33. I agree.