

(1928) 06 AHC CK 0025
In the Allahabad High Court

Irfan Ali and Others

APPELLANT

Vs

Bhagwant Kishore and Others

RESPONDENT

Date of Decision : 12-06-1928

Acts Referred:

Waqf Act, 1954 — Section 3

Citation : AIR 1929 All 180

Hon'ble Judges : Sen, J; Niamatullah, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Sen, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Agra, dated 7th May 1925, dismissing the plaintiffs' suit for a declaration that the property specified in Sch. A. of the plaint was endowed property and as such was not liable to attachment and sale in execution of the decrees held by Kedarnath, defendant 2 and by Shankar Lal, defendant 3 against Hakim Saiyed Ali Ahmad, defendant 4.

2. Hakim Saiyed Mubarak Ali was a Mahomedan of the Hanif sect. His estate consisted of a residential house, 6 small houses which used to be rented out for shops and zamindari shares in two villages, namely, Nagla Patam and Phulpur.

3. His family consisted of his wife, Mt. Sitara Begam, two sons, Hakim Saiyed Nisar Ahmad and Hakim Ali Ahmad (who figures in the suit as defendant 4) two daughters, Mt. Mustafa Begam and Mt. Murtaza Begam and a grandson named Saiyad Wahajuddin.

4. On 22nd June 1909, he executed a will which sets out in detail the properties owned by him. This will which appears to have been attested by his wife, his sons and daughters and duly registered by the Sub-Registrar of Agra provided that one-third of the income of his property after paying the Government revenue, the rates and taxes and the salaries of servants should be utilized for necessary repairs and for expenses relating to marriage and deaths (presumably

of the members of the family) and for the Fateha ceremony of his ancestors. The rest of the income of the property was to be divided amongst his wife, sons and daughters in certain fixed shares. This arrangement was to remain in force for a period of 25 years, after which the executors under the will were directed to divide the property among the heirs according to their Quranic shares under the Mahomedan law.

5. On 11th May 1911, Hakim Mubarak Ali executed a document which he describes as a codicil to the will dated 22nd June 1909. The scheme of the original will is not departed from. The legacies are confined to the members of the family but the original legacy in favour of the two sons is modified to this extent that in place of the legacies to the sons personally they are legacies to the sons, their wives, and children.

6. This document is also attested by his wife and children like the document first mentioned.

7. On 7th March 1913, the Musalman Waqf Validating Act (Act 6 of 1913) was placed upon the Indian Statute Book.

8. Saiyed Mubarak Ali did not contract any debts during his lifetime and his estate was not burdened with any liabilities.

9. The even peaceful tenor of his life appears to have been disturbed by his elder son, Saiyed Ali Ahmad who entered upon a course of extravagance, contracted debts and disgraced himself by ultimately seeking the shelter of the Court of bankruptcy. He was adjudicated an insolvent about the year 1910.

10. Matters stood thus, when on 23rd October 1913, Saiyed Mubarak Ali revoked the two wills already referred to and executed a fresh document, which purports to be an instrument of a testamentary character, under which a waqf was created relating to his entire property.

11. The governing idea of the testator as can be gathered from the first two wills, is that his estate should remain intact after his death. Although the consent of the heirs in the lifetime of the testator does not validate a will under the Hanifi law, he got these two documents attested by his heirs with a view to bind their conscience with a moral obligation to give effect to his wishes.

12. When the third document came to be executed, Hakim Mubarak Ali thought that he could create a perpetuity in favour of his descendants, by force of the Wakf Validating Act, and the assent of his heirs was no longer necessary. The third document dated 23rd October 1913, is not attested by his wife, his sons and daughters.

13. It opens with the following words:

I, the executant, am a Saiyad Musalman of Hanifi sect. Previously, I executed a will and codicil in respect of my property and had them registered. I now revoke all of them and make a wakf by will of all my property, a list of which is attached

to, and forms part, of, this document, and declare it to be wakf by will.

14. As a matter of fact no list of property is appended to this document. The omission does not invalidate the deed because the property was ascertainable and has been ascertained by the evidence produced in this case.

15. In paras. 2 and 3 of this instrument, trustees are nominated, two of whom are the plaintiffs, of this suit. The third trustee died and in his place was appointed his son who is plaintiff 2.

16. Directions have also been given as to how the vacancies were to be filled up, if the trustees died or refused to assume the office.

17. The scheme of the endowment will be apparent from the following paragraphs:

18. Paragraph 4.

It will be incumbent on the trustees to pay the Government revenue and cesses and other Government demands, etc. whatever they may be as well as to defray the expenses of repairs and other expenses relating to the property and to pay the wages of employees out of 1/3rd of the income of the wakf property and then to spend the remaining income on good acts, recognized as such by the Mahomedan law (as for instance fatiha offerings for elders, education and marriage of children etc.) and out of the other 2/3rd of the income of the wakf property:

(a) To continue to pay Rs. 20 a month to Mt. Sitara Begam, my wife, for inheritance. This sum she (will get) till the term of her life; and after her (death), the legal heirs will be entitled to get the same for their maintenance.

(b) Similarly out of the aforesaid 2/3rd of the income my daughter's son, Saiyed Wahajuddin will be entitled to get Rs. 5 a month for maintenance, generation after generation.

(c) Similarly out of the said income Hakim Saiyid Ali Ahmad, the eldest son, and his wife and children will be entitled to get Rs. 30 a month for maintenance jointly generation after generation.

(d) Likewise, Hakim Saiyid Nisar Ahmad, my second son and his wife and legitimate children will be entitled to get Rs. 30 a month for their maintenance jointly generation after generation.

(e) In the same way my daughter, Mt. Mustafa Begam will be entitled to get Rs. 15 a month for her maintenance generation after generation.

(f) In the same way, my second daughter, Mt. Murtaza Begam will be entitled to get Rs. 20 a month for her maintenance, generation after generation.

19. Paragraph 5:

It will be binding on the trustees to pay the fixed sums to the recipients for the maintenance. But the recipients will in no way, be competent to transfer these stipends, nor can the stipends be liable to attachment and sale in any decree.

20. Paragraph 6:

The dwelling house, together with its appurtenances, is also included in the wakf and it too can by no means be transferred or encumbered; of course, the persons for whom monthly stipends have been fixed by means of this wakf, will be competent to live in it.

21. Paragraph 7:

After the payment of the aforesaid stipends out of the 2/3 of the income, the balance, be whatever it may will be reserved and applied in multiplying the property. It will be lawful for the trustees to make an addition to the monthly stipends out of the balance in their hand according as it may be advisable when the number of the children of the stipendiaries grows larger.

22. Paragraph 8:

The trustees or other persons will not be competent to transfer or encumber the wakf property in any way.

23. Paragraph 11:

In case of violation of the above conditions or any other kind of misconduct relating to the wakf, it will be lawful to avert it by the provisions of the law. But it should be borne in mind that this is a wakf for the family and not for the public, so the public have nothing to do with it, The trustees will be the directors and managers of this wakf and only the persons declared entitled to stipend and maintenance under this wakf will be entitled to prevent, if necessary, violation (of the conditions) and misconduct.

I have, therefore, executed this (deed of) wakf by will in order that it may stand as authority.

24. This document is registered by Maulvi Abdus Samad, Sub-Registrar of Agra on 23rd October 1913.

25. Saiyed Mubarak Ali died on 2nd December 1914. Upon his death, the will was assented to by all his heirs. The trustees entered upon their office immediately and remained in possession of the property till troubles began in the year 1923.

26. Kedarnath, defendant 2 obtained a simple money decree against Saiyid Ali Ahmad for Rs. 655. Shankar Lal defendant 3 also obtained a similar decree against him for Rs. 371-8-6. These decree-holders caused the property in dispute to be attached by the Official Liquidator, defendant 1 on 28th February 1923. The date fixed for sale was 23rd May 1923. The plaintiffs as mutwallis of the endowment applied for and obtained the permission of the insolvency Court to institute the present suit which was filed on 29th October 1923.

27. The Official Liquidator did not contest the suit. Negotiations for a compromise were in progress in the Court below for some length of time but ultimately the compromise fell through. The suit was contested by defendants 2 and 3 upon various grounds, most of which were frivolous and which were properly rejected by the learned Subordinate Judge. Those pleas have not been urged before this Court and require no further notice.

28. The plea which prevailed in the Court below was that the instrument dated 23rd October 1913 did not create a valid wakf under Act 6 of 1913. The claim was accordingly dismissed.

29. The sole question for determination in appeal before this Court is whether the instrument conforms to the provisions of the Wakf Validating Act, 1913.

30. The judgment of the Subordinate Judge appears to have been influenced by the following considerations:

(a) A negligible sum has been provided for in the instrument of trust for charitable objects. (b) Under the terms of the Validating Act no wakf in perpetuity for the support of one's family, children or descendants generally was valid, without an ultimate provision being made either expressly or by necessary implication for the benefit of the poor and the needy or for a religious, pious or charitable purpose of a permanent character, recognized by the Mahomedan law. There was no provision in the document in controversy for the ultimate destination of the income of the 2/3rds of the property in case the family became extinct as a whole or where any of the several branches, for whom provisions had been made in the will, ceased to exist. (c). The members of the public had no hand in the control or administration of the trust.

31. In considering the circumstances which immediately preceded the execution of this document, the material fact which must have influenced the judgment of the testator was the pecuniary embarrassment of his first son which culminated in his being adjudicated an insolvent in the year 1910. The extent of his liabilities is not exactly known; but these must have been large enough and in any case embarrassing enough to force on Ali Ahmad the necessity of seeking the protection of the insolvency Court. It was about this time that the first will of Saiyid Mubarak Ali was executed. The date of the will is 22nd June 1909. The testator was about 70 years old at the time of the execution of this document. He appears to have felt considerably apprehensive as to the future of his family after his death. The provision and the underlying scheme of this document prove to a demonstration that Mubarak Ali was anxious that after his death the property left by him "may remain safe and be not wasted." The ruling idea was the preservation of the property. Restrictions were imposed against partition or transfer of the property for a period of 25 years certain. He expected that a quarter of a century was long enough to allow the storm which had gathered over the head of his first son to be allayed.

32. The Court below has taken into consideration the smallness of the sum

provided for the benefit of the needy and the poor or for other meritorious purposes out of the residue of the income of 1/3 of the wakf property. The income of the wakf property cannot be ascertained from the materials before this Court either exactly or approximately. Rs. 120 per month are charged upon the income of 2/3rds of the entire property. This may be whole of the net income or a substantial residue may be left after paying the maintenance allowances. The Subordinate Judge proceeded upon the data that Rs. 120 a month either is or may well be taken to be net income of 2/3rds of the wakf property and concluded that the income of the remaining 1/3 could be no more than Rs. 60 a month. This is pure speculation and the conclusion arrived at by the learned Subordinate Judge was unwarranted.

33. The learned Subordinate Judge has evidently failed to see that under the Wakf Validating Act where the dedication is made in favour of one's descendants, generation after generation, it is not necessary that there should be an immediate or concurrent gift in favour of religious or charitable objects under the Mahomedan law. The Act does not provide that there should be a substantial concurrent gift to meritorious objects or that there should be a concurrent gift to such objects at all. The policy of the Act is amply vindicated, if there is an ultimate gift in favour of such objects as are considered pious, religious, charitable or meritorious under the Mahomedan law or religion. The learned Subordinate Judge has, therefore, gone off the rails in taking into account the paltriness of the income set part for charity etc.

34. It is not unlikely that the provision in para. 4 relating to the residue of the income of the 1/3rd being spent upon pious and charitable objects was purely illusory and no more than a cloak with a view to circumvent the law against perpetuities. It was open to a Hanifi Muhomadan to get round the law against perpetuities by strictly adhering to the precepts contained in Act 6 of 1913, The document in controversy was executed very soon after the Act, and the testator or his advisors do not appear to have carefully considered the provisions of the said Act.

35. The Wakf Validating Act allows the settlement of properties in perpetuity in favour of the family, children or descendants of a person belonging to the Mussalman faith. A settlement of this description from its inception and in view of its scope and character is more domestic than public. The Act does not require that persons outside the family should be appointed mutwallis or trustees or that the members of the public should have a hand in the control of funds or in the general administration of the trust. It is at a remote future that the contingency may arise when the ultimate trust in favour of the poor has got to be administered either by the State or by the members of the public. But the mere fact of no member of the public having been appointed a trustee will not invalidate the trust. The learned Subordinate Judge has evidently erred in attaching undue importance to the implications flowing from the provisions of para. 11 of the will.

36. If the instrument creating the wakf does not fulfil the requirements of the Wakf Act, it may lend itself to the criticism that the provision in favour of certain pious objects was illusory and the imperative directions contained in the instrument that the members of the public can and should in no case have a voice in the administration of the trust may have an important bearing upon the question whether the testator intended an ultimate destination of the usufruct of the property in favour of the needy and the poor or in favour of an object of any recognized merit under the Mahomedan law.

37. In order to constitute a "wakf" u/s 2 01. 1, Mussulman Wakf Validating Act, certain conditions should be fulfilled: (1). The settlement should be of any property; (2) the appropriation should be permanent and not for a limited period only; (3) the object should be such as is recognized by the Mussulman law as religious, pious or charitable. The words permanent dedication imply that the subject and the object should be unfailing. It further recognizes that the wakif should have the purpose of the condition in his mind and that the said purpose should be a meritorious object under the Mahomedan law. A dedication of property in perpetuity to the members of the family may be a pious object under the Mahomedan law but a wakf in favour of one's self and descendants is not valid unless the unfailing object is indicated by express text or necessary implication.

38. The Act therefore contemplates that the object should be defined and must fall under the category of religious, pious or charitable purpose recognized by the Mussulman law.

39. Section 3 of the Act legalises a wakf created; (1) for the maintenance and support wholly or partially of one's family, children or descendants and (2) for the maintenance and support of the appropriator during his lifetime or for the payment of his debt

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

40. It dispels the doubt caused by conflict of authority on the point whether the appropriator could make any reservation for his own maintenance.

41. The Wakf Validating Act amounts to a statutory recognition of the views of West, J., if not entirely at least very substantially as set forth in *Fatima Bibi v. Advocate-General* [1881] 6 Bom. 42 (at p. 53).

A wakf must be certain as to the property appropriated, unconditional, and not subject to an option. It must too, have a final object which cannot fail and this object it seems must according to the better opinion be expressly set forth.

42. Under the Act, the final object need not be explicitly declared.

43. In *Muzhuroolu Huq v. Puhraj Ditarey* 13 W.R. 235, Kemp, J., observes (at p.

237):

we are of opinion that the mere charge upon the profits of the estate, of certain items which must in course of time necessarily cease being confined to one family and for particular purposes, and which after they lapse, will leave the whole profit intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law. A person may make an endowment settling lands on himself and enjoying the profits during his lifetime, and after his lifetime devoting the profits to the support of the poor, the main object of the Mahomedan law being that the profits of the land endowed should be endowed for a purpose which always remains in existence. Now, the poor are always with us, and, therefore, a man making an endowment and enjoying the profits during his lifetime, to go to the poor after his death, does not make the endowment for an uncertain or nonexistent object.

44. Under the Mahomedan law as distinguished from the text of the Wakf Validating Act, an ultimate dedication to the poor was necessary to indicate the perpetual character of the disposition.

45. To go back for a moment to the decision of West, J., in the case already referred to. The learned Judge observes (at p. 53):

If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits, these successively take, may constitute a perpetuity in the sense of the English law, but according to the Mahomedan law that does not vitiate the settlement provided the ultimate charitable object be clearly designated. (If the words clearly designated" in the above text mean expressly declared, to this extent, the law has been modified by statute). And he further observes (at p. 54) should the intermediate purpose of the dedication fail, the rule of Mahomedan law appears to be that the final trust for charity does not fail with them. It is but accelerated, being itself regarded as the principal object in virtue of which effect is given to the accompanying and intervening dispositions.

46. Farran, J., discusses, this aspect of the case in *Amrutlal v. Sheikh Husain* [1887] 11 Bom. 492, Mr. Bailie's statement of the law is clear. He says:

Mr. Hamilton has unnecessarily restricted the legal meaning of wakf to appropriations of a pious or charitable nature (*Hidaya* Vol. II, note p. 334)

47. and he has been followed by Sir William Macnaghten, who reads the word by "endowments." But it will be seen hereafter that the term is more comprehensive and includes settlements on a person's self and children, p. 549, note 3; see, too, Introduction, p. 36, where he says:

with regard to its objects, two conditions are required. There must be some connexion between them and appropriator; and these must be of such a nature that taken together they can never fail. The poor are held to answer both these

conditions, because they are supposed to be connected with every body and because "there will always be poor in the land "... one class of appropriations I have designated by the name of "settlement" to distinguish them from "endowments" which have hitherto been supposed by English writers to be the only proper objects of appropriation. These are appropriations by a person for the benefit of himself, his children kindred or neighbours. Thus a man may settle his land "on himself and after him on such an one and then upon the poor"... so, also if he should say upon my child and child of my child and child of the child of my child, the produce is to be expended on his child for ever so long as there are any descendants.

According to Mr. Bailie the wakf is valid though a purpose is mentioned which may fail, for in that case the rent or produce would revert to the poor, which must be supposed to be the appropriator's design though he should fail to mention it (p. 553). Introduction (p, 36, Book 9 on appropriations) is only an amplification of the above quoted introductory passage. It is founded on the work which forms the basis of Mr. Bailie's digest, the Alamgiri. In his view, settlements of almost any description may be created provided there be an ultimate remainder in favour of charity or religion to ensure their perpetuity. The logical deductions from the arguments of Abu Yusuf are responsible for this wide extension of the term "wakf". Muhammad would confine it to its more legitimate purpose.

48. The Wakf Validating Act appears to have extended the rule of Mahomedan law as formulated by the aforesaid Judges to this extent that the ultimate gift in favour of charity or any other meritorious object under the Mahomedan law need not be expressed but may also be implied.

49. There is no evidence before this Court that according to its customary meaning the term wakf imparts an ultimate benefit to the poor. According to Abu Hanifa wakf implies giving in charity. Muhammad agrees with him but insists upon a declaration that the appropriation was intended to be perpetual.

50. Ameer Ali, J. in *Bikani Mia v. Sukhlal* [1893] 20 Cal. 116 , (at pp. 132 to 177) has brought under contribution if not all, at least, all the authorities on the subject which were available to that great Judge and scholar. He cites a passage from *Zakihratul Fatawa* (taken from the Introduction to Morley's Digest). It is laid down in the book *Ajnas* that

if a man makes a wakf and lays down in it with respect to himself that he should, during his life time, eat out of it and feed those whom he likes that after him it should go to his child, his child's child and to his posterity for ever, so long as it may continue and that upon its becoming extinct, it should go to the poor, this could be valid according to Aboo Yusuf, may the mercy of God be on him, and it will not be disposition in the nature of a will in favour of his child, the child eating out of a property belonging to God the most High. Do you not see that when a man makes a wakf in favour of his children and their children so long as their

posterity may continue and gives it afterwards to the poor it is valid.

51. Bailie, in his Digest on Mahomedan law (1865 edition p. 557) states the law in the following terms:

It is a further condition according to Aboo Haneefa and Mahammed that the ultimate destination to which the rent or produce is to be applied is one that can never be cut off or fail, and unless such be mentioned in the wakf it is not valid according to them. But according to Aboo Yusuf the mention of it is not a condition. Nay, the wakf is valid in his opinion though a purpose is mentioned which is actually cut off or fails, for in that case, the rent or produce would revert to the poor, which must be supposed to be the appropriator's design, though he should fail to mention it.

52. Again at p. 559.

The word "waqf" alone or in combination with Hoobs establishes a wakf according to the approved opinion which is that of Aboo Yusuf. If one should say "I have made this my land prohibited" or "it is prohibited" that would be the same in the opinion of Abu Yusuf according to Abu Jaffar as if he had said ""appropriated," If a person should say.

this my land is appropriated for such an one "or on my son" "or the poor of my kindred being good persons "or orphans" and the appropriation of it is not to be reversed it would be no wakf according to Muhammad, because it is for a purpose that may be cut off or fail and is not perpetual but it would be wakf according to Aboo Yusuf because the making of it perpetual is not a condition with him.

53. Mr. Amir Ali, in his Tagore Lectures on Mahomedan law (vol. 1, edn. 5. p. 198)

under the Mahomedan law the ultimate beneficiaries of every wakf for which no other object has been specified are the poor and indigent. No wakf therefore is likely to fail.

54. His opinion seems to be in accord with that of Aboo Yusuf. It is significant that at pp. 210 and 211 he states that "Sodqa Maukoofa" or "Maukoofa Sodqa" imply benefit to the poor in perpetuity. The case reported in Fakhuruddin Shah v. Kifayat Ullah [1910] 7 A.L.J. 1095, illustrates the numerous ways in which wakf may be declared or created. The word "wakf" need not be used at all and, therefore, it could not be said that the customary mode of appropriation is by using the word "wakf" although there can be no doubt that the word is frequently employed. The definition of the word "wakf" as given in the Wakf Validating Act, would suggest that before the Act could be applied the purpose of the wakf had to be indicated in the text, that is, it should be indicated either in the instrument creating the wakf or in the transaction constituting the dedication. Section 3 requires that the ultimate object should be indicated either expressly or by implication.

55. Babu Shama Charan Sarkar, in his Tagore Lectures on Mahomedan law (1875 edition p. 115) says:

Thus the appropriation becomes valid, that is absolute, according to the various opinion of the three great lawyers according to Aboo Haneefa in consequence of the appropriator's declaration and a Magistrate's subsequent decree according to Aboo Yoosuf by his simple declaration and according to Muhammad by his declaration and delivery to a procurator.

56. It ought to be borne in mind that the passage quoted above relates to the formalities necessary for the creation of a wakf and although there is considerable divergence of opinion this passage is not helpful except indirectly, for the determination of the crucial question as to whether the mere use of the word "wakf" or the making of a wakf in favour of ones descendants would necessarily predicate an ultimate dedication in favour of the poor or some other meritorious object. At p. 120 of the lectures the opinion of Aboo Haneefa and Muhammad has been set out in very clear terms. It is further a condition that the ultimate destination to which the rent or produce is to be applied is one that can never be cut off or fail, and unless such be mentioned in the wakf it is not valid.

57. The foot-note shows that the above passage has been taken from Vol. 2 of Fatawa Alamgiri and has been reproduced in Bailie's Digest at pp. 557 and 558. Immediately after the aforesaid text, Mr. Sarkar adds in small print "According to Aboo Yusuf". The mention of it is not a condition. Nay, the wakf is valid in his opinion though a purpose is mentioned which is actually cut off or fails, for in that case the rent or produce would revert to the poor, which must be supposed to be the appropriator's design, though he should fail to mention it.

58. The appellant strongly relies upon the opinion of Imam Aboo Yusuf and contends that the mere use of the word "wakf" unaccompanied by anything more, was sufficiently wide in its significance to include within its orbit an ultimate dedication to the poor or to meritorious objects.

59. It cannot be questioned that the opinion of Aboo Yusuf ranks very high in the Hanafi school. But his opinion is not shared either by the great master or by his co-disciple. The recognized canon of construction is what is stated by Mahmud, J. in *Agha Ali Khan v. Altaf Ali Khan* [1892] 14 All. 429):

It is a general rule in interpretation of the Sunni law that when there is a difference of opinion between Imam Abu Hanifa and his two disciples Kazi Abu Yusuf and Imam Muhamad, the opinion of the majority prevails.

60. It is also contended that where the great Mahomedan Jurists are divided in opinion, the Qazi is entitled to decide the point on grounds most conformable to justice and equity. It is doubtful if it would be more in accord with equity to impart a final trust in favour of an unfailing object, where the text is silent on the point and the conduct of the wakif proves that he wanted to create a perpetuity in favour of his family and had no great tenderness for charity.

61. It is next argued that the opinion of Aboo Yusuf is entitled to greater weight than that of the other two. This plea may be disposed of briefly with the remark that the relative weight of the authority of one or the other of the three great jurists is unsettled in Anglo Mahomedan law and there is considerable difference of opinion on the point. As will be apparent from a reference to *Sheikh Abdool Shukkoor v. Raheemounnissa* 6 N.W.P. 94, *Abdul Kadir v. Salimanissa* [1886] 8 All. 149, *Muhammad Azizuddin Ahmad Khan v. Legal Remembrancer* [1893] 15 All. 321, *Bikani Mia v. Shuk Lal Podder* [1893] 20 Cal. 116 (F.B.) and *Ma E. Khin v. Maug Sein* AIR 1925 Rang. 71

62. In order to find whether there was an implied dedication in favour of the poor or for any meritorious object the document dated 23rd October 1913, should be construed as a whole, and it may be permissible to look at the surrounding circumstances to gather whether there was an implied intention on the part of the testator. There is no express provision to that effect in the document. There is nothing in the document from which an implied intention may be gathered. On the other hand, Clause 11 of the will clearly states that this was a wakf for the family and not for the public and so the public had nothing to do with it. This would suggest that there was no implied intention of ultimately dedicating the property to recognized purposes of charity etc. Assuming that the testator could by the mere use of the words "I make a wakf of all my property" create a valid endowment in favour of the poor because the term "wakf" implies an ultimate dedication to the poor this cannot advantage the plaintiff in the present suit. He does not make a wakf in such general terms. He indicates the objects of the endowment and limits them to the members of his family. He states in explicit language that this wakf is intended exclusively for the benefit of his family and the members of the public have no right of administration or control. It would be extremely difficult to hold under these circumstances that an ultimate benefit to the poor could be implied from a transaction of this character.

63. As has already been noticed, the one idea which obsessed the mind of the testator was the preservation of the family and the maintenance of his family members from generation to generation. He did not at all care for charity. There is not a particle of evidence on the record that during the brief period of his life after the execution of his last will he ever applied any portion of the income of the property towards charitable objects. But this need not be pressed too far. As has already been indicated the income of the property cannot be ascertained from the evidence which has been placed before this Court. It may be doubted, if after paying the Government revenue and the taxes and defraying the expenses of the repairs etc, any residue was left at all to be devoted to purposes of charity. The instrument read as a whole reminds one of a similar instrument which provoked Farran J's criticism that the instrument created "the worst and most pernicious kind of perpetuity." It is not surprising that the Subordinate Judge, under the circumstances came to the conclusion that the instrument in question did not fulfil the requirements of Act 6 of 1913 and consciously or unconsciously, he was influenced by some of the considerations which powerfully weighed with

Lord Hobhouse in the case of Abdul Fata v. Rasamaya Dhur Chaudhary [1895] 22 Cal. 619 (at p. 87 of 22 I.A.)

But it would be doing wrong to the great law-giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial in which he takes back with one hand what he appears to put away with the other which are to form the centre of attraction for accumulations of income and further accessions of family property, which carefully protect so-called managers from being called to account; which seeks to give to the donors and their family the enjoyment of their property free from all liability to creditors and which do not seek the benefit of others beyond the use of empty words.

64. Considering all the circumstances the instrument in controversy does not create a valid wakf in conformity to the provisions of Act 6 of 1913. The document offends against the rule of perpetuity. I would dismiss this appeal with costs.

Niamatullah, J.

65. (After stating facts the judgment proceeded). There is little doubt that the dispositions contained in the will, the codicil and the deed of testamentary wakf were mostly prompted by a desire to preserve the property for the maintenance of the family of Mubarak Ali and to prevent the same being sold or otherwise made responsible for the debts of his sons the elder of whom Ali Ahmad had been adjudicated an insolvent in 1910. The learned Subordinate Judge is of opinion that:

The Mahomedan law never recognized any disposition as wakf if it was intended to be used as a cloak to keep the property for the family by depriving the creditors of their right to recover the debts from the property. The criterion under the Mahomedan law was much more strict than under the new Wakf Act.

66. He seems to think that a person professing the Muslim faith should do nothing with respect to his property which may have the effect directly or indirectly to hamper the creditors of his heirs in the realization of their hope of obtaining satisfaction of their debt advanced to such heirs at a time when they had no property of their own but were expected to succeed to the estate of their father. It is impossible to subscribe to this doctrine. Neither the Mahomedan law nor any other law imposes any obligation on a person to keep his property intact for the benefit of the creditors of his would-be-heirs. In my opinion it is not only permissible but in many cases desirable for a person to place his own property beyond the reach of the creditors of his expectant heirs whose profligacy creates an apprehension lest his property which might have been acquired by his own exertions, by practising economy, and even by making sacrifice should be frittered away after him to the utter impoverishment of his family. The creditors have no equities against him. The case does not partake of the considerations which are present where a person attempts to defeat or delay his own creditors. If the deed is otherwise valid the intention to defeat the creditors of his heirs

cannot affect its validity.

67. The sole question is whether the deed of testamentary wakf quoted above falls short of the requirements of Mahomedan law read with the Wakf Validating Act in any respect. A wakf by will is not valid except to the extent of one third of the property of the testator without the consent of heirs given after his death when the succession opens. All the three deeds were attested by the heirs in token of their consent. If this had been the only act of consent the validity of the deed could not be upheld to the extent at least of two thirds of the property affected thereby. But it is not disputed that after the death of Mubarak Ali the mutwallis nominated in the deed, who seem to be strangers to the family, took possession of the property and have remained in possession thereof since the death of Mubarak Ali which occurred early in 1914. None of the heirs ever impugned the document or asserted their right of inheritance. They have been content to receive their allowances in terms of the deed. Except Ali Ahmad defendant 4 no other heir is a party to this. He has not contested it Under these circumstances the validity of the wakf has not been questioned in this Court and does not seem to have been questioned before the lower Court for want of consent of heirs given after the death of the testator

68. It has been contended and the contention has found favour with the Court below that though the wakf in question may be otherwise valid under the Mahomedan law it cannot take effect as such for the reason that the ultimate benefit is not

expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussulman law as a religious, pious, or charitable purpose of a permanent character.

69. That there is no express reservation for the poor may be conceded. I am, however, unable to accept the contention that the ultimate benefit to the poor in the remote contingency of total extinction of the family of the testator is not implied. Nor can I accede to the view that no benefit is

expressly or impliedly reserved... for any purpose recognized by the Mussulman law as a religious, pious or charitable purpose of a permanent character.

70. These contentions ignore the primary and technical meaning of the term "wakf" which has been repeatedly used in the deed and which, on the authorities, carries with it the implication of charitable disposition of a permanent character, including the maintenance of the founder's descendants which is in itself regarded as a charitable object in Mahomedan Law. It ignores likewise the history and the circumstances which led to the enactment of the proviso to Section 3 of the Wakf Act, relied on by the respondents.

"Wakf" in its primitive sense, means detention. In the language of the law (according to Haneefa) it signifies the appropriation of any particular thing in such a way that the appropriators' right in it shall still continue, and the

advantage of it go to some charitable purpose in the manner of a loan.... But since (like a loan) it is not of an absolute nature the appropriator is held to be at liberty to resume it and the sale and gift is consequently lawful. According to the two disciples, waqf 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; and consequently, that it cannot be resumed, or disposed of by gift or sale; and that inheritance also does not obtain with respect to it.... Thus the term wakf in its literal sense comprehends all that is mentioned, both by Haneefa and by the two disciples: Hiday Book 15, Hamilton's Edn. 2. p. 231 quoted by P.C. in *Jew in Dost v. Shah Kubeerooddeen* [1840] 2 M.I.A. 390.

71. The arguments of Abu Haneefa by which he supports his view are fully set forth in Hiday and concluding from one of them he (Abu Haneefa) states:

It is therefore, evident that a right of property in it still continues; and it is also evident that this right of property must rest with the appropriator, and not with any other person, as he alone is entitled to expend the revenue arising from it upon the objects of the appropriation, and to appoint a procurator; but yet, as the term wakf implies giving in charity, the use of it resembles that of a loan: see Hamilton's Heday Edn. 2, p. 232 Col. 1 bottom.

72. Thus, according to Abu Haneefa charitable disposition is implied in the use of the term wakf.

The argument of Abu Yusuf is that the design of the appropriator is to perform an act of piety acceptable to God; and this is fully answered in either case; because piety on some occasions may consist in the appropriation of an article to a terminable object, and it may on other times consist in the appropriation of a thing to an interminable object; the appropriation is, therefore, equally valid in both instances. Now some say perpetuity is essential to it. Abu Yusuf, however, does not consider the mention of perpetuity as essential, as the terms appropriation or charity do clearly argue this much, according to what was before advanced, that appropriation like manumission signifies an extinction of a right of property without a transfer of that right. According to Mahomed on the other hand the mention of perpetuity is an essential; because appropriation is a charitable donation of the use of a thing or of actual product; and as these are sometimes temporary and sometimes perpetual, the general mention of it cannot be understood as a perpetuation; it is, therefore, indispensable that perpetuity be expressly mentioned (Hamilton's Hiday Edn. 2 p. 234 Col. 2).

73. It should be noted that even according to Mahomed charity is implied to every wakf.

74. It appears therefore from these passages quoted from a well-known book on Mahomedan law that the term "wakf" implies a charitable disposition according to all the three doctors. In the view of the two disciples which became the

accepted law private ownership is completely extinguished in case of wakf property which becomes vested in God subject to the rules of divine property. Abu Haneefa's conception of wakf, viz., that it remains the property of the wakf (settlor) and only the usufruct is "freed" for charitable purposes has not found favour.

75. The opinions of Mahomed and Abu Yusuf differ in two important respects. Firstly, according to Mahomed the wakf (settlor) cannot reserve any benefit to himself and in this respect he agrees with Shia doctors while according to Abu Yusuf the settlor can make reservations in his own favour, and, secondly, Mahomed insists on the technical compliance with his rule that express mention of perpetuity or of the ultimate benefit to the poor should be made in the instrument of wakf while according to Abu Yusuf the implication arising from the use of expressions of sufficient amplitude is all that is needed.

Perpetuity is also among the conditions of wakf according to all opinions; though, according to Abu Yusuf, the mention of it is not a condition, and this is correct." (Bailie p. 557). It is further a condition, according to Abu Haneefa and Mahomed, that the ultimate destination to which the rent or produce is to be applied is one that can never be cut off or fail, and unless such be mentioned in the wakf it is not valid according to them. But according to Abu Yusuf the mention of it is not a condition. Nay, the wakf is valid, in his opinion, though a purpose is mentioned which is actually cut off or fails; for in that case the rent or produce would revert to the poor, which must be supposed to be the appropriator's design though he should fail to mention it" (Bailie pp. 557-558).

76. Bailie has noted a number of formulas under the heading "words by which wakf is and is not completed" and among them mentions the following:

77. "This my land is sudukah, appropriated to" what is "good" or "good purposes," also amounts to a wakf. Though no mention be made of sudukah, yet if wakf is mentioned, as by a person saying this my land is wakf "or I have made this wakf" or appropriated" the land would be a wakf for the poor, according to Abu Yusuf. And Sadurash Shaheed and the Sheikhs of Balakh have said:

Decrees are given on the opinion of Abu Yusuf and we decree according to it,

also from "regard to custom." And if he should say "it is appropriated to Almighty God for ever," it would be lawful without the word sudukah and would be a wakf for the poor. The word "wakf" alone or in combination with hoobs establishes a wakf, according to the approved opinion, which is that of Abu Yusuf," the ultimate benefit to the poor is taken to be implied in the word "wakf" not only because Abu Yusuf has so construed it but also because its customary meaning imports such a benefit.

78. In his Tagore Law Lectures Mr. Shama Charan Sarkar mentions the rule that the express term by which wakf can be constituted is "wakf-to" (I have appropriated) and not any other.

and in commenting on it observes that

the terms "Harm to (I have consecrated)" and "Saddakto (I have bestowed)" do not constitute wakf without accompanying circumstances, as by themselves they are susceptible of another interpretation besides waqf."

(Tagore Law Lectures by S.C. Sarkar, Lecture XIX (D CCC XIV).

79. In the Tagore Law Lectures on Mahomedan law (1884) Mr. Amir Ali has stated the rule in these terms:

If a person declare simply "this my land is maukoofa" and fix the boundaries and say nothing more, according to Abu Yusuf, it would constitute a valid wakf and the benefit thereof would go to the poor. If he say this land of mine is sadkah maukoofa or maukoofa sadkah "and say nothing more, it will be a valid wakf (according to Abu Yusuf Mahomed and Hillo) and the benefit will go to the poor in perpetuity, for the poor never become extinct and as the proper objects of a charity are the indigent, neither the express mention of the poor nor of perpetuity is necessary... If he use the expression sadkah maukoofa abadi it is valid according to all jurists (pp 210-211)....

80. The poor form by necessary implication of law, the ultimate beneficiaries of every trust, even such as private in their nature, like family settlements, where, therefore, the primary object fails, such failure instead of voiding the trust "only accelerates" the ultimate application.

81. The Sirajul Wahaj, as quoted by Tyabji in his principles of Mohamedan Law Edn. 11, p. 593, states that:

when a person constitutes a waqf generally without designating the object to which it should be applied it is lawful and this is correct; there are several words which are express in their meaning and the use of which clearly constitutes a wakf because they convey in themselves the intention to dedicate, e.g., "wakafto; "haramto; hahasto" sahalto etc... Tyabji similarly quotes the authority of "Wajizul Mohit" for the proposition that." If a man were to say. "This my land is maukufa" or "moharama" or "mahbusa" it would constitute a valid wakf according to Abu-Yusuf and this is most correct for he, the wakif has mentioned "wakf unrestrictedly and an unrestricted wakf is for the poor by custom and practice and what is customary is as if conditioned (pp. 593-594, 2nd Edn).

82. The late Mr. J. Karamat Husain has quoted a very large number of original texts to show not only that the word wakf implies a valid permanent dedication, but that in the absence of a formula verbally repeated a valid wakf cannot be constituted: see his judgment quoted in Fakhruddin Shah v. Kifayat Ullah [1910] 7 A.L.J. 1095 . He quotes 27 formulae which do or do not create a wakf according to Baharur Raik (Book on wakf p. 205 Vol. 5. Egypt Edn). Two of these are:

(11) This land of mine is forbidden," (12) "This land of mine is wakf." It is said

both create a valid wakf and both formulae are well known to the inhabitants of Hijaz (at p. 1110; 7 A.L.J. p. 1095).

83. For a considerable length of time the doctrine of Abu Yusuf was accepted by text writers and acted upon in Islamic countries and also in India.

84. In Macnaughten's Mahomedan Law p. 341 in reply to Q. 2, the law officers observed as follows:

It is laid down in the "Khizanutool Mooftien" a person made an appropriation of a village on the condition that the profits should be enjoyed by Zyed and his offspring generation after generation: in this case each branch of lineal descendants will share alike, whether consisting of one individual or of many persons; and the profits will be enjoyed by the descendants in this manner until the lineage becomes extinct, the nearer descendants continuing to exclude the more distant whose ancestors are alive, and on the death of one ancestor leaving a family, his family succeeding to the portion enjoyed by him. Where one of the sharers dies childless, his portion goes to increase the joint stock and when the whole lineage becomes extinct the appropriation should be devoted to the benefits of the poor.

85. It is to be noticed that the ultimate benefit to the poor was not expressly provided for, ex facie Zyed and his descendants were the only beneficiaries but the law officers evidently considered that the ultimate benefit was reserved for the poor by necessary implication.

86. The case of Deod Jaun Beehee v. Abdollah Barber Fulton of the Report of Bikani Mia v. Shuk Lal Poddar [1893] 20 Cal. 116 (F.B.). In referring to that case Mr. Amir Ali says:

the ultimate benefit was not given to the poor in express terms. The lady dedicated the property in general terms as is customary among Mussulmans. In the first paragraph she provided that after paying the revenue and taxes she should appropriate as much of the produce as was required for her own use and the remainder to "hereditary and charitable purposes." She provided farther that her several relatives should receive their maintenance as heretofore, that she should have the power of increasing or decreasing the number of incumbents; and the repairs of the mosque etc. and other expenses connected therewith in Ramzan and Eid should be defrayed from the produce..., it will be seen that the usufruct was, after paying the revenue to be appropriated to the endower's own use and towards the maintenance of the members of her family. The amounts disbursable for the repairs of the mosque and for the performance of the festivals were postponed until after the maintenance of the family. But neither the decision of the Judges nor the opinion of the law officers turns upon this provision, and nobody said that the provision for the maintenance of the family invalidated the wakf.

87. The question which called for decision before Mr. Amir Ali was somewhat

different and he quoted the case reported by Fulton as an authority for the proposition that where benefit for the poor is not expressly reserved the validity of the wakf is in no way affected.

88. Mr. Amir Ali has quoted in the same case a larger number of decisions collected in various books of authority in which wakfs were upheld though express mention of benefit to the poor was not made: see pp. 140, 141, 142, 143, 151, 152, 160-161.

89. Subsequent decisions made great inroads on the Mahomedan law pure and simple, at least on the law as propounded by Abu Yusuf whose authority was universally accepted before.

90. In *Abdul Ganne Kasam v. Husen Miya Rahimtulla* 10 B.H.C.R. 7 it was laid down that:

To constitute a valid wakf according to Mahomedan law it is not sufficient that the word "wakf" be used in the instrument of endowment. There must be a dedication of the property solely to the worship of God or to religious and charitable purposes. A Mahomedan cannot, therefore, by using the term "wakf", effect a settlement of property upon himself and his descendants which will keep such property inalienable by himself and his descendants for ever.

91. In *Fathima Beebee v. Advocate General of Bombay* [1881] 6 Bom. 42 the law was more correctly stated to the following effect:

A wakf must be certain as to the property appropriated, unconditional and not subject to an option. It must have a final object which cannot fail and this object must be expressly set forth.... If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take may constitute a perpetuity in the sense of English law, but according to the Mahomedan law that does not vitiate the settlement provided the ultimate charitable object be clearly designated.

92. The decision in this case refers to a number of cases decided by Calcutta and Bombay High Courts and though it does not refer either to Abu Yusuf or Mahomed's views it is obviously based on the views of the latter.

93. In *Amrut Lal v. Sheikh Husain* [1887] 11 Bom. 492 Farran, J., observed:

If I were at liberty to draw my own deduction from the sayings of Hanifa and the two disciples and to decide in the light of modern jurisprudence between the conflicting opinions of the latter I should without doubt give the preference to the view of Mahomed and refuse to press the arguments of Abu Yusuf to their legitimate conclusions.

94. The conclusion which according to that learned Judge is:

properly deducible from the above cited cases is... that where the primary and

general object of the endowment is for the furtherance of religious or charitable purposes, or for the worship of God, such endowment is valid, although the "wakfnama" may also provide for the support of the family and descendants of the founder; but that where the wakfnama has for its real object nothing connected with the worship of God or religious observances and provides only in a very remote contingency for the poor, such remote provision does not validate a perpetuity for the benefit of the dedicator's children and their descendants so long as any such exist.

95. In *Nizamuddin Gulam v. Abdul Gafur* [1889] 13 Bom. 264 it was laid down that:

A Mahomedan cannot settle his property in wakf on his own descendants in perpetuity without making an express provision for its ultimate devolution to a charitable or religious object.

96. The learned Judges refer to the difference of opinion between Abu Yusuf on the one hand and Abu Haneefa and Mohammad on the other and follow the latter. It was therefore that they laid emphasis on an express mention being made of ultimate benefit to the poor.

97. A year latter it was definitely laid down by their Lordships of the Judicial Committee in *Mohomed Ahsan Ullah Chowdhri v. Amarchand Kundu* [1893] 17 Cal. 498 that unless property is substantially dedicated to religious or charitable purposes no valid waqf can be created.

98. In the case *Bikani Mia v. Sukh Lal Poddar* [1893] 20 Cal. 116 (F.B.) Mr. Amir Ali in a dissentient judgment attempted to re-establish the law which was unsettled by the case last quoted and supported his view by numerous references to works of undoubted authority. He also maintained that the law as propounded by Abu Yusuf was the correct and generally accepted one but in cases that followed, their Lordships of the Privy Council confirmed their view and extended it by holding that a wakf by which benefit to the poor is reserved only in the remote contingency of failure of all heirs to the settlor was illusory and void.

99. Thus before the Wakf Validating Act 6 of 1913 was passed the law relating to wakf as applicable to Hanafi Mohammadans was in a very unsatisfactory state owing to conflicting opinions of Abu Haneefa, Muhammad and Abu Yusuf and to the judicial decisions, some being based on the authority of one of these doctors and some on the other or others and some again on considerations derived from the English rules as to perpetuities and from notion of what should be considered to be charitable objects.

100. It should not be assumed that if two of the three jurists were in agreement against the third the opinion of the majority must always prevail. On consideration of a large number of cases mentioned in the foot-note. Tyabji has stated his conclusion in his book on Mahomedan law as follows:

11A. When Muslim jurists of authority have expressed dissenting opinions on the same question, the Islamic Courts presided over by the Qazi, have authority to adopt that view which in the opinion of the presiding officer is most in accordance with justice in the particular circumstances" (p. 71, Edn. 2).

101. Wilson likewise quoting a number of cases states that

The relative weight of these authorities is unsettled.... But the scale may be turned in favour of any one of them by proof that his opinion was preferred by the compiler of some standard Digest, such as the Hedaya or "Fatawa Alamgiri" (S. 15 p. 98 Edn. 4).

102. The points of difference on this branch of the Mahomedan law due to causes already indicated and existing before the passing of the Wakf Validating Act 6 of 1913 may be summarized below:

(a) Whether a waqf was revocable before a decree of Court was passed in confirmation thereof and the property continued to be vested in the settlor as maintained by Abu Hanifa or such property became vested in Almighty God subject to rules of divine property as maintained by the two disciples Mohammad and Abu Yusuf; (b) Whether the property to be made wakf must be divided property and not undivided or mushaa as maintained by Mohammad or whether the validity of the waqf is not affected by the property being undivided as held by Abu Yusuf, Abu Hanifa being silent on the subject; (c) Whether the settlor can validly make provision for his own maintenance by reserving the whole or part of the income of the wakf property for himself, Mohammad being of opinion that he cannot, Abu Yusuf holding the contrary and Abu Hanifa being apparently silent on the subject. (d) Whether a wakf not being substantially for charitable purposes but for the benefit of the settlor's descendants and family, and on total extinction thereof, for the benefit of the poor, is illusory and void as ruled by some Indian High Courts and by their Lordships of the Privy Council or whether such wakf is valid as maintained by majority of the Mahomedan jurists and text writers; (e) Whether ultimate benefit to the poor which ensures perpetuity should be expressly mentioned as held in some cases decided by some Indian High Courts on the authority of Abu Hanifa and Mahomed or whether the use of an appropriate expression such as "wakf," the literal, technical and customary meaning of which implied dedication for charitable purposes and ultimate benefit to the poor.

103. As to (e) it should be remarked that there is no difference of opinion among the three Muslim Doctors that the word "wakf" "Sudakah" or like expression carries with it the implication above mentioned. In many text books reference to which has been made at an earlier part of this judgment the writers thereof accept such meaning as warranted by the etymological and customary sense. According to Abu Hanifa and Mahomed no implication however clear is sufficient and express mention of perpetuity or of ultimate benefit to the poor is essential. The most typical of cases in which such objects may be implied in words or in the

context will not meet their requirement of the law.

104. The object of the Wakf Validating Act 6 of 1913 was to remove the uncertainty which crept in the law as regards the points summarized by me above. The "doubts" referred to in the preamble are none other than those stated above. Accordingly, the definition of the "wakf" given in Section 2 of the Act makes it clear that wakf property is "dedicated property" and discards the conception of Abu Hanifa that the wakf property continues to belong to the settlor. The definition likewise indicates that "any property," divided or undivided, may be made the subject of the wakf. Section 3 declares that the settlor may make provision for his own maintenance and for that of his family and descendants. Section 4 authoritatively lays down that no wakf shall be deemed to be illusory only because the

benefit reserved therein for the poor or the religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family children or descendants of the person creating the wakf.

105. The proviso to Section 3 is obviously intended to set at rest the controversy between Abu Yusuf, the text writers and judicial decisions including that of Amir Ali, J. in *Bikani Mian v. Shuku Lal Poddar* [1893] 20 Cal. 116 (F.B.), on the one hand and Abu Hanifa, Mohammad and judicial decisions like *Abdul Ganne Kasam v. Hussein Miya Rahimtula* 10 B.H.C.R. 7, *Fatma Bibi v. Advocate General of Bombay* [1881] 6 Bom. 42 and *Nizamudin Gulam v. Abdul Gafur* [1889] 13 Bom. 264 on the other, as regards the necessity of making express mention of perpetuity or ultimate benefit to the poor. The statute has now dispensed with the necessity of such express mention being made by providing that the same may be

expressly or impliedly reserved for the poor or for any other purpose recognized by the + law as a religious, pious or charitable purpose of a permanent character.

106. It would have been most surprising if the legislature had failed to take notice of such a thorny question as the necessity or otherwise of express mention being made of the unfailing object. Mr. Tyabji thinks that the Act must be taken to lay down (in accordance with the definition in Section 2) that the support and maintenance of the wakif's family etc., must be considered to be a purpose recognized by the Mahomaden law as religious, pious and charitable. This is the view that was put forward by Amir Ali, J., with great learning in his dissenting judgment in *Bikani Mia v. Shuku Lal* [1893] 20 Cal. 116 (F.B.) where he says:

When a wakf is created constituting the family or descendants of the wakif the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in not for the purpose of making the wakf charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made) but simply to impart permanency to the endowment.

107. "Probably the Act is based on the same view..." (Tyabji's Mahomaden law, p. 529, 2nd Edn.).

108. I am unable to accept the view that the Wakf Act gives effect to the view of West, J., in *Fatma Bibi v. Advocate General of Bombay* [1881] 6 Bom. 42 in which express mention of the unfailing object is insisted upon. The Act on the contrary does not so require. An intention to dedicate for the benefit of the poor or to some charitable or religious object if implied in the words of sufficient import or in the context is enough according to the Act.

109. Tyabji has enunciated the Mahomaden law applicable to Hanafis coupled with the Wakf Validating Act, in the following paragraphs:

Section 463-A. In accordance with Hanafi law.

(a) A "wakf" that does not expressly purport to be limited in point of duration, will, according to Abu Yusuf's exposition of the Hanafi law be presumed to be perpetual, and effect will be given to it.

(b) According to Abu Hanifa and Inam Mahomed, a "wakf" purported to be made for objects that will fail, is void. According to Abu Yusuf, such a "wakf" is not void, and it will be presumed that, on failure of the objects expressly referred to, it is for the benefit of the poor in perpetuity, (c) semble, the ultimate benefit of the "wakf" property may be reserved for any purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character. Such reservation may be either express or implied (S. 463-A (1), (a), (b), &(c), Edn 2 pp. 550-551. He adds in the foot-note that the Wakf Act has given effect to the opinion of Abu Yusuf. His own opinion on the question is stated in these words:

It is submitted that in many cases the question would be resolved into one of the construction of the particular "wakf." If it appears that the real intention was to dedicate only for a fixed period, then what purports to be a "wakf" for carrying out such an intention cannot be given effect to. Such an intention may appear (or may be betrayed) in either of two ways: (1) failure to mention that the "wakf" is to prevail in perpetuity, or (2) failure to mention objects that will continue in perpetuity. The views of Abu Yusuf are expressed with reference to the first contingency and of the other authorities with reference to the second.

But, on the other hand, failure to do either things, is not, it is submitted, in itself necessarily conclusive, from the surrounding circumstances and from the terms of the "wakfnama" it may appear that the "wakf" was intended to be a perpetuity; and that such objects as would never fail were also intended to be benefited, (page 533, Edn. 2).

110. Reverting to the provision of the testamentary wakf made by Mubarak Ali we find that in the preamble he declares all his property as "wakf" unreservedly. If nothing else had appeared in the deed the property would have been considered dedicated impliedly for the poor in general. In fact the preamble is a

substantial reproduction of the well-known formula used in creating wakfs. In the clauses of the deed which follow the gross income of 2/3rd of the property is reserved for the benefit of his descendants generation after generation thus postponing the benefit to the poor implied in the preamble until the extinction of his lineage. But for the express provision for his descendants the entire benefit would have enured to the poor immediately. Some charitable objects are to be fed in presenta. This provision is not without its significance as indicating a charitable and religious purpose concurrent with the maintenance of the family. As public charges such as revenue, and cost of repairs and similar expenses, have to be paid out of 1/3rd of the income which is reserved for expenditure on "good acts" such as Fatiha etc., the amount thus directed to be spent on these charities alone cannot be ascertained.

111. Clause 7 has been adversely commented on as betraying a desire to accumulate the income for acquisition of other properties. It must be, however, noticed that the direction to multiply has no reference to a time when his lineage ceases to exist but is confined to the time when it continues to exist. To my mind, when such a remote contingency happens accumulation is not to be made but the entire benefit reserved for the descendants will go to the poor.

112. Clause 11 has been relied on by the learned Subordinate Judge as excluding the public in general from participation in the affairs of the wakf. I think this is not the correct view of the effect of that clause. It permits recourse to law Court for vindication of the provisions of the deed of wakf in cases of attempted violation thereof but makes it clear that, being a family settlement and so long as it is such, any member of the public cannot meddle with its administration and only the beneficiaries have the right to call in question the acts of the mutwalies. This, again, unmistakably refers to a time when his descendants are in existence and not to the contingency of total extinction of his family. As regards the latter eventuality the deed is silent and the usual rules empowering the public to obtain orders of a competent Court regarding the administration of wakf will apply and there is nothing in the deed which excludes their application.

113. That the "wakf" which Mubarak Ali professes to make was intended to be of a permanent character does not admit of any doubt. No limit of time is fixed for its operation. Indeed, the learned Counsel for the respondent maintains that the possibility of total extinction of his line in any remote future never occurred to him. A wakf otherwise than in perpetuity is one for which a limit of time is prescribed but not where it is to continue ad infinitum. The validity of the wakf does not seem to have been impugned on the ground of want of perpetuity either in the Court below or in this Court. Stress has been laid on the absence of reservation of ultimate benefit to the poor, but I think the two questions are closely allied and mention of ultimate benefit to the poor is insisted on only to ensure perpetuity.

114. That the term "wakf" implies ultimate benefit to the poor or to some charitable or religious purpose has been shown above, having regard to its literal

and customary meaning as generally accepted. To a Musulman it generally conveys the idea that the property designated "wakf" is not private property but is permanently dedicated to some charitable object. The word is frequently used even in deeds of Hindu endowment not in its technical Muslim sense but as denoting dedication. It is not too much to suppose that Mubarak Ali who is described as "Hakim" and presumably a man of some learning used the word "wakf" in relation to his property which he was anxious to preserve in perpetuity in the customary and generally accepted sense as the property set apart for the benefit of his family and in case of total extinction of it for the benefit of the poor. It was a mere accident that he did not mention the poor expressly. He does not divert the beneficial interest to any other family in case of extinction of his own nor does it appear that he was interested in some other class of persons in that remote contingency. The fact that the Wakf Act was availed of soon after it became law lends support to the belief that he desired to create a wakf such as is contemplated by the Act-a typical wakf Alalaulad. It has been acted upon as such for many years and unless its validity can be successfully impugned for some cogent reason it should be upheld as a dedication in accordance with the provisions of the Wakf Act. The learned Subordinate Judge has set aside the deed in its entirety. As to one-third of the property there can be no question As to whether the burden of public charges due in respect of two-thirds of the property can be thrown on the remaining one-third reserved for charities mentioned in the deed it is not necessary to consider If the disposition be upheld as a whole the complication arising out of that circumstance will not exist.

115. On the view of the case taken by me this appeal must succeed. I would, therefore, set aside the decree of the Court below and grant the relief of declaration prayed for by the plaintiffs. As the litigation is in a great measure due to careless drafting of the instrument of wakf for which the testator is responsible I make no order as to costs.

116. This appeal is dismissed with costs.