
(1941) 05 CAL CK 0015
In the Calcutta High Court

Nawab Syed Mahammad Hashim Ali Khan and Another	APPELLANT
Vs	
Iffat Ara Hamidi Begum and Others	RESPONDENT

Date of Decision : 20-05-1941

Acts Referred:

Mussalman Wakf Validating Act, 1913 — Section 3

Citation : AIR 1942 Cal 180

Hon'ble Judges : R.C. Mitter, J;Khundkar, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—Prince Qamar Qadar Mirza Mohammad Abed Ali Bahadur, hereafter called the Prince, a muslim governed by the Shia law died on 31st January 1919 leaving him surviving his wife Shah Banu Amir Begum, a son Mirza Mohammad Syed Ali and a daughter, Nawab Zinat Ara Zinab Begum alias Juhi Begum as his heirs. His widow, Amir Begum died in 1928 leaving her son Mirza Mohammad Syed Ali and her daughter Juhi Begum as her heirs. The Prince in his old age was infatuated with a mistress of his named Shaheba Khatoon in whose favour he executed a lease for a term of ten years on 12th July 1916.. That lease comprised twenty eight items of immovable property in the suburbs of Calcutta but mostly within the local limits of the Calcutta Municipal Corporation. By its terms Shaheba Khatoon undertook to pay the Prince a clear sum of Es. 500 as rent per month. This lease was in supersession of an earlier lease which the Prince had executed in her favour for the selfsame properties under which Rs. 1500 was payable as the net monthly rent. On 14th June 1917, the Prince executed a wakfnama (Ex. E-A 38) which covered those twenty-eight items of immovable property included in Shaheba Khatoon's lease and eleven more items of immovable property. The principal question involved in these three appeals is the validity of this wakf. By this wakfnama, the Prince appointed himself the first mutwalli and his son Mirza Mohammad Syed Ali his successor to that office. His daughter Juhi Begum is the central figure in these litigations.

2. Juhi Begum married Humayun Kadar, on whose death in March 1918 she

became a widow. She married again on 20th December 1918 and her second husband's name is Nawab Hashem Ali Khan. On the allegation that her first husband Humayun Kadar had undertaken to pay her a dower (den-mohar) of twelve lacs of rupees she purported to assign her claim thereto for an alleged consideration of rupees one lac to one Hashem Ibrahim Saleji on 28th September 1918. Saleji instituted a suit in the original side of this Court (No. 1515 of 1918) against her and the other heirs of her deceased husband Humayun Kadar on 6th December 1918 to recover the said amount of rupees twelve lacs (plaint Ex. H-A 319). Saleji became an insolvent in December 1921. The Official Assignee of Calcutta in whom the estate of Saleji had vested on his insolvency got himself substituted in Saleji's place and continued the suit. As in her deposition in that suit Juhi Begum took up the position that she had before her conveyance to Hashem Ibrahim Saleji relinquished her claim to the dower in favour of the other heirs of her deceased husband, the plaint was amended at the instance of the Official Assignee who then prayed for a decree for the sum of rupees one lac with interest against Juhi Begum only on the ground that he was entitled to recover the same as there was a failure-of consideration. The plaint was amended and he obtained an ex parte decree against Juhi Begum for the sum of Rs. 1,28,266-2-8 and costs on 21st August 1923 (Ex. I-A 343). Khatija Bibi, the wife of Saleji purchased this decree from the Official Assignee for Rs. 3000. She had this decree transferred to the Court of the District Judge, 24-Parganas and applied for execution of the same by attachment and sale of one-third share in the properties now in suit on the ground that Juhi Begum had inherited the same from her father the Prince and her mother, Amir Begum, who in turn had inherited a share therein from the Prince. As those properties were included in the Prince's wakf-nama (EX. R), Mirza Mohammad Syed Ali preferred a claim to them as mutwalli. The said claim of Mirza Mohammad Syed Ali was allowed by an order of the executing Court dated 15th February 1930. Title Suit No. 8 of 1931, later numbered as Title Suit No. 1 of 1934, was instituted under the provisions of Order 21, Rule 63, Civil P.C., by Khatija Bibi on 12th February 1931. Mirza Mohammad Syed Ali and Juhi Begum were made defendants. Both of them died during the pendency of that suit and their heirs were brought on the record. The main defence of Mirza Mohammad Syed Ali was that the Prince had made a wakf which comprised the properties sought to be attached by Khatija Bibi and so Juhi Begum had not inherited any share thereof through her father the Prince or her mother Amir Begum. The learned Subordinate Judge upheld the wakf and dismissed the suit. Khatija Bibi has preferred the appeal, being No. 26 of 1936 against that decree and Nawab Hashem Ali Khan has filed a memorandum of cross-objection.

3. On 30th January 1931 Juhi Begum instituted suit No. 17 of 1931, subsequently numbered 2 of 1934 against her brother Mirza Mohammad Syed Ali. She claimed one-third share in properties which had belonged to her father, the Prince but which had been in-eluded in the wakfnama on the allegation that the wakfnama was invalid and that she had inherited the same from her father

and mother. She claimed partition, in the alternative for recovery of possession. This suit has been complicated by later events which I will recite later on. Mirza Mohammad Syed Ali's defence was that the properties claimed in this suit had been made wakf by the Prince and he was the mutwalli. Thus the validity of the wakf is also the principal question in this suit. Juhi Begum died on 16th April 1931, leaving her second husband Nawab Hashem Ali Khan and her brother Mirza Mohammad Syed Ali as her heirs. Shortly before her death she purported to convey all her rights in the properties in suit to Mamuda Bibi a daughter of Saleji, by a conveyance dated 17th February 1931 (EX. 7-B 610). On the basis of the said conveyance Mamuda Bibi applied to be substituted as plaintiff, in the place of Juhi Begum in the suit, but before the said application could be heard Juhi Begum died and her husband Nawab Hashem Ali Khan was substituted in her place. Nawab Hashem Ali Khan later on filed an objection to Mamuda Bibi's application for substitution wherein he challenged her conveyance, but in spite of his objection the learned Subordinate Judge added Mamuda Bibi as co-plaintiff 2 leaving the matter of the validity of the said conveyance to be determined at the final hearing of the suit. (Order No. 26 dated 23rd November 1931-C 70.) This order which had the effect of allowing a plaintiff to raise an issue against his co-plaintiff has unnecessarily enlarged the scope of the suit. Later on, an assignee from Nawab Hashem Ali Khan, Syed Ashiq Hossein, was added as co-plaintiff 1 (a). The learned Subordinate Judge found Mamuda's conveyance (Ex. 7) to be binding on Juhi Begum, but as he upheld the wakf he dismissed this suit also. Mamuda Bibi, and Nawab Hashem Ali and Syed Ashiq Hossein have preferred two independent appeals which are Nos. 25 of 1936 and 239 of 1935 respectively. Mirza Mohammad Syed Ali's legal representatives (he having died while the suit was pending in the lower Court) who are the respondents have filed memoranda of cross-objections in First Appeals Nos. 25 and 26 of 1936 relating to costs. The common question in all three appeals relates to the validity of the Prince's wakf and if that wakf is upheld all the three appeals will have to be dismissed. I will accordingly take up that question first.

4. Sir Wazir Hasan appearing for the appellants in Appeal No. 239 of 1935, namely Nawab Hashem Ali Khan and Syed Ashiq Hossein and Mr. Panchanan Ghose appearing for Khatija and Mamuda Bibi have challenged the wakf on the following grounds only:

(1) The wakf deed is a fictitious one--never intended to be acted upon by the Prince and was not in fact acted upon by him.

(2) It is at any rate invalid under the Shia law; (a) because the wakif, the Prince, created an interest in himself; (b) because (i) the appropriation was postponed to a future date, namely, till the expiry of Shaheba Khatoon's lease; and (ii) because the appropriation of 2/10th given as allowance to the "heirs" of the wakif was postponed till the Prince's death; (c) because the landlord's reversion which was in the Prince after the execution of the lease in favour of Shaheba Khatoon cannot in law be the subject-matter of a wakf; (d) because the whole of the

income was not appropriated as a provision for a reserve fund was made ; (e) because no substantial concurrent gift to charitable or pious objects had been made in the wakfnama; and (f) because no change of possession followed the execution of the wakfnama.

(3) The wakf has not been made valid by the Wakf Validating Act (6 of 1913); (a) because it is otherwise invalid under the Shia law; (b) because the ultimate gift to charity (3/16th of the net income is too small); (c) because the ultimate gift to charity is more remote than allowed by the said Act; (d) because the proviso to Section 3 of the Act has not been complied with, as the ultimate gift is not valid in law, the charitable and pious object not being specified by the wakif; (e) because of para. 8 of the wakfnama where provision has been made for persons other than the family, children or descendants of the wakif.

5. Mr. Panchanan Ghose has urged an additional point, namely: (4) That the wakf is invalid as the wakfnama had been executed by the Prince under the undue influence of Shaheba Khatoon. I will first deal with points (1), 2 (f) and (4) as they involve controversies on questions of fact. It may be accepted that Shaheba Khatoon had acquired great influence over the Prince and had exercised that influence to her own advantage. She had succeeded in inducing the Prince in his old age to desert his wife, to leave his family house and to live with her in a separate house. It may also be taken as established that she had designing people as her advisers and her object was to fleece the Prince. She had succeeded in getting a lease for ten years from the Prince of bulk of his valuable properties at a grossly inadequate rent and had also succeeded in getting the Prince's Government promissory note of more than one lac of rupees (possibly of two lacs) endorsed in her favour. It may also be that she got a large portion out of the Prince's monthly pension of Rs. 4000. But there is no reliable evidence to show that she had any hand in the execution of the wakf. The oral evidence on the point, as for instance of Abdul Quaem (C. 375) is unreliable. The wakfnama did not confer any benefit on her. The execution of the wakf had the effect of checking her further intentions on the Prince's properties, if her desire for enrichment had not been already satiated. I do not see any ground for holding either that the wakfnama had been executed at her request, or she had taken any part in respect thereto, far less for holding that it was executed through her influence, much less under influence, over the Prince. The execution of the wakfnama has been admitted by the appellants. They urge that the wakf is invalid as there was no change in the character of possession, the Prince continuing to hold possession of the properties in the same manner as he was doing before the execution of the wakfnama.

6. According to the conception of Shia law "wakf is a contract the fruit or effect of which is to tie up the original of a thing (corpus) and to leave its usufruct free" (Bailie Pt. II, p. 211). The wakf property or the subject of appropriation (corpus) is transferred, so to become the property of the mow. koof alehi (persons on whom the settlement is made), for they have a right to the

advantages or benefits (usufruct) to be derived from it. The contract is not rendered obligatory except by giving possession (Bailie II, p. 212), that is, the wakf is not completed unless either possession of the wakf property is delivered to the first beneficiaries or they are authorized to administer it or where the dedication is for the benefit of a number of persons a mutwalli is appointed and possession is delivered to the latter. Where the wakif appoints himself the first mutwalli a change in the character of his possession from owner to mutwalli would fulfil the requirement of the rule. Application of the usufruct by him to the purposes of the wakf is the strongest evidence of such change but that is not the only method of proving the change of possession. Mutation of his name from malik or owner to mutwalli in respect of the properties of the wakf is another criterion to indicate the change of possession but mutation of name is not the only method of proof: AIR 1937 127 (Privy Council) .

7. The effect of the entire evidence on the point must be considered. The question is pre-eminently a question of fact. Before dealing with the facts bearing upon this point and the point that the wakf was a fictitious one, never intended to be acted upon, I will notice an argument advanced by Mr. Khursed Hossein appearing for the respondents. He says that if we came to the conclusion that the terms of the wakfnama do not make it an invalid wakf under the Shia law, the wakf must be upheld as soon as it is proved that the wakfnama was duly executed by the Prince followed by change of the character of his possession and the question whether it was meant to be operative or not, in this case, where the wakf is challenged not by the creditors of the Prince but by his legal representatives or those claiming in the right of the Prince, is not pertinent. His argument is that the document being in form, delivery of possession by the wakif to the mutwalli, or change in the character of his possession when he himself is the first mutwalli of the wakf, completes the wakf and vests the wakf properties in the mowhoof alehi under the Shia law. Only in the case where the wakf was made by the wakif with the intention of defrauding his creditors and had in fact defrauded them that it becomes a voidable wakf-a valid wakf till avoided by the creditors of the wakif in a suit framed u/s 53, T.P. Act. For supporting his broad contention so urged he has relied upon the observations made in Kulsoom Bibi v. Golam Hossein Cassim Ariff ('06) 10 C.W.N. 449 at pp. 484-485. This broad contention was repelled in Sm. Masuda Khatun Bibi Vs. Mahomed Ebrahim, , where those observations in Kulsoom Bibi v. Golam Hossein Cassim Ariff ('06) 10 C.W.N. 449 made by Woodroffe J. were explained. To me it appears that the question has been set at rest by the Judicial Committee of the Privy Council in AIR 1930 255 (Privy Council) . Facts can be examined for the purpose of finding whether a deed of wakf (even when followed by delivery of possession by the wakif to the mutwalli) had been executed without the wakif having any intention of divesting himself of his ownership and that his real intention was to utilize the document, should occasion arise, as a shield against claims against him which may ultimately affect his worldly possession. If the facts establish that such was his intention the wakf will have to be declared invalid.

8. As I agree with the conclusions of the Subordinate Judge on both points 1 and 2 (f) I will notice only the main items of evidence from which I have come to the conclusion that the Prince changed the character of his possession from malik to mutwalli of the wakf, that the wakf was not a fictitious one, intended to serve as a shield against the Prince's creditors, and that it was in fact acted upon during his life-time. The Prince was a religious man and had a desire to make wakf in accordance with the traditions of his family. This desire he often expressed to his friends and relatives. He discussed the terms of the intended wakf about two years before the execution of the wakfnama in question and took legal opinion. Mr. Unsud Dowla is one of the witnesses who gives material evidence on these points, and he is supported by the evidence of the members of the royal family. Mr. Unsud Dowla is a respectable person who held positions of responsibility and honour in public life. He has been believed by the learned Judge and I see no reason why his statements should not be adopted. The Prince had conceived the idea of making a wakf in 1915 or so according to this evidence. It is necessary to examine the financial position of the Prince in 1915 and in 1917 when the wakf was created and to see if the Prince was so much pressed with the burden of his debts as to lead us to the inference, that the creation of the wakf was a plan designed upon to shield his properties from creditors.

9. There is no definite evidence as to whether the Prince was indebted to any person in 1915, save and except to his wife Amir Begum for her dower. The circumstances rather point to the fact that he was not in debt to any outsider, for it is proved that he had at about this time Government promissory notes of the face value of more than one lac of rupees which he subsequently endorsed to Shaheba Khatoon. He became intimate with Shaheba Khatoon in 1914 or so and from that time the Prince became gradually indebted. It would be a safe conclusion to make that in 1915 the Prince was fairly solvent, with no appreciable amount of debt and that probably the only person who had a legal claim for money against him was his wife who. was not at that time particularly anxious to demand her dower or enforce her claim, whatever may be the amount of her dower. Possibly, Es. 12,50,000 was a notional figure, if it was at all the figure fixed for her dower, named not with a view to payment but for the purpose of indicating the family prestige and dignity of the husband and the wife. I make these observations, for the suit which she instituted later on against her son Mirza Mohammad Syed Ali in which she claimed Rs. 12,50,000 as dower money due to her, was ultimately withdrawn by her and was compromised by Mirza Mohammad Syed Ali with her creditor Haji Allabux for Rs. 35,000 only (Ex. 1 (a), B. 446 and 449.) Thus, the Prince was not heavily involved in 1915 when he conceived the idea of making a wakf and made preliminary preparations. In June 1917, about the time when he executed the wakf he was indebted to the following persons :- (a) Prince Babar and others who had recovered a personal decree against him; (b) Mr. Rose; (c) Mr. and Mrs. Remfry; (d) Amir Begum, his wife, for her dower.

10. Leaving aside the claim of Amir Begum, the amount due to the other three

creditors was about Rs. 50,000: see Ex. 14 G. 12 and 28-A. 385. There is no evidence that any of those creditors or Amir Begum had either demanded their dues or had put pressure upon the Prince before the execution of the wakf on 14th June 1917. Amir Begum only sent a letter of demand four days after the execution of the wakf (EX. 11-A. 74). It has not been proved that an earlier letter of demand dated 2nd June had been sent on her behalf (deposition of Mr. Satya Ranjan, C. 406). Mr. and Mrs. Remfry filed an application in insolvency against the Prince in 1918. The Prince was adjudicated an insolvent on 23rd July 1918 but later on the said adjudication was annulled by the Prince paying up his creditors in full by utilizing some of the Government promissory notes which he had previously endorsed in favour of Shaheba Khatoon. It appears to me that the Prince was not actuated with an intention to de-fraud his creditors by creating a fictitious wakf. He had conceived the idea of making a wakf when he was not involved in debts to outsiders. He did not make the wakf in a hurry or in secret. He discussed its terms with friends and relatives for a considerable time and had executed the instrument openly, making one of his creditors who had obtained a decree against him (Prince Mirza Ibrahim Ali) an attesting witness.

11. It appears to me that on hearing of the wakf some of his creditors became nervous and for the purpose of realizing their money with the least amount of trouble they banked upon the prestige of the Prince and so took recourse to insolvency proceedings, with the hope, which was actually fulfilled, that the Prince would pay them from the resources at his disposal to save his name and prestige. The account books of Prince's time have not been produced but from that fact alone I cannot infer that the income of the properties made wakf was not applied by the Prince to the objects of the wakf, or infer that he never intended the wakf to be a real one. He was at the time of his death living separate from the members of his family and with his mistress. On his death curator proceedings were taken and everything including the papers found at his residence was removed to Court. It has not been proved that during the last part of his life he kept regular account books or that these account books came to the possession of Mirza Mohammad Syed Ali after his death. The oral evidence is that he spent money on the upkeep of the mosque and the Imambara and after the execution of the wakfnama the Imambara was run on a more lavish scale. These were the principal, religious and pious objects of the wakf.

12. The documentary evidence on the record establishes a change in the character of possession of the Prince after the execution of the wakfnama. The wakfnama comprised thirtynine items of immovable property. Three items were in Lucknow and of them two are untraceable. Regarding the remaining items at Lucknow the Prince's name was not changed from owner to mutwalli in the Collector's record. Two items were Daripin holdings in Kidderpore. In respect thereof there was also no mutation. The rest were immovable properties within the jurisdiction of the Calcutta Municipality. There are rules in Chap. 5 of the Assessment Manual of the Calcutta Municipal Corporation for the mutation of names. The procedure according to those rules has been described in the

evidence of Hari Santosh Chatterjee (C. 280). Under the Municipal Act then in force, assessment of taxes was revised by the municipality at intervals of five years, and for each period of assessment one set of assessment registers were kept in which mutations made during the currency of that particular assessment were noted. The assessment registers for 1913-1914 to 1918-1919 and 1914-1915 to 1919-1920 as also other assessment registers of later periods have been proved (Ex. O series A-4). Those of the later period after 1919 are not material for the purpose of the question I am now discussing because they were of Syed Ali's time. The official year begins on 1st April and ends on 31st March of the following year. The assessment register of the year 1918-1919 would accordingly end on 31st March 1919 and that of the year 1919-1920 would end on 31st March 1920. The Prince died on 31st January 1919. Those assessment registers show that the Prince's name was changed from owner to mutwalli of the wakf estate, but neither the date of the mutations nor the dates of the applications on which mutation was made are noted in the registers. Those applications have been destroyed under the rules. But having regard to the rules of the assessment manual, and the procedure that has to be followed in making the mutations the applications for mutation must have been made by the Prince and that it must have taken a considerable time in noting the mutations on the registers. Those assessment registers ending either with the official year 1919 or 1920 show the Prince's name was mutated from owner to mutwalli in respect of about nineteen items of property. I accordingly hold that the Prince had his name mutated as mutwalli in the records of the Corporation of Calcutta in respect of a considerable number of the properties included in the wakfnama.

13. Shortly after the execution of the wakfnama, the Prince wrote a letter to the Collector of 24-Parganas informing him of the wakf. A certified copy of the wakfnama was enclosed with the letter (Ex, J 5-A80). Later he offered to put into the safe custody of the Collector the title deeds and other papers relating to the wakf properties (Ex. J 4-A 82). Certainly he would not have so acted if he meant the wakf to be a fictitious one. He was a son of the late King of Oudh, and was drawing from the Collector a political pension of Rs. 4000 a month. In proceedings before the Court, in plaints, written statements filed by him and in his deposition given in Court, he openly declared that he had made a wakf and was holding the properties comprised therein as mutwalli (EX. H (1)-A 195; EX. A 3 at 204-205, Ex. CO, A 298); in his capacity as mutwalli he also granted pottas to tenants (Ex. S. A-252, Ex. K (1) 1-A 258). I accordingly hold that the Prince changed the character of his possession from owner to mutwalli and the wakf was thus completed in law. The Sharaya-ool-Islam, the principal authority on Shia law, enumerates four principal conditions of a wakf namely (1) those which relate to the mowkoof or thing appropriated; (2) those which relate to the wakif or the maker of the wakf; (3) those which relate to mowkoof alehi, or the beneficiaries and (4) those which relate to the wakf itself (Bailie Digest of Moohamedan Law Part II p. 213 et. seq. Edn. 2). In these appeals we are concerned only with first and the fourth conditions. The mowkoof or the subject-

matter of the wakf must be (a) a substance, (b) the pro-property of the appropriator, (c) capable of being used without being consumed and (d) capable of being delivered. These four subsidiary conditions follow from fundamental principles of the Shia law. As a Shia wakf implies the transference of ownership from the wakif to the mowkoof alehi (beneficiaries) the transferor (wakif) must have the ownership, for he who has no title cannot vest title in another by his act. As a wakf must be perpetual the subject-matter must be such as may last for ever, one which must not be consumed by use. As in Shia law delivery of possession must be made the mowkoof (property) must be capable of being delivered. This necessarily implies that the mowkoof must be a specified object (Ayn) and not indeterminate things (Deyn). As the carrying out of the object of the wakf would require money the mowkoof must be substance, that is, that which would yield income or profit. It would follow that all property which produces income or profits and which would not be consumed by use can be dedicated by way of wakf, except these which are expressly excluded by the Muslim jurists. The condition of delivery of possession in my judgment does not require that there should in all cases be physical delivery. The nature of the delivery would depend upon the nature of the subject and the purpose for which the subject has to be applied according to the terms of the wakfnama.

14. A property which has been leased out at a rent cannot be possessed by the landlord in khas. Through receipt of rent he possesses the subject. If he grants a lease and there-after makes a wakf of such property he can transfer his possession to the mutwalli by asking the lessee to attorn to the mutwalli or by authorising the mutwalli to receive the rent reserved by the lease. That is the only way in which he can deliver possession to another. If the wakfnama directs the income to be utilised for the object of the wakf I do not see why the inclusion of a property previously leased out by the wakif would render the wakf invalid. If however he directs in the wakfnama that a mosque is to be built on site of the property so leased out before the creation of the wakf or directs that property to be used for a purpose which would require physical or khas possession of the same the wakf would be invalid, for the appropriation would then be necessarily postponed till the determination of that lease, or as has been said, would then depend on a future contingency. It would be void on the ground of non-fulfilment of one of the principal conditions which relate to the wakf, that is of the fourth condition which I will notice and examine hereafter. In fact the Muslim jurists recognize that a property which is subject to a lease in favour of a third person can be made the subject-matter of a wakf (Ameer Ali's Mohamedan Law vol. I p. 184 Edn. 3). This is also the view expressed in *Jinjira Khatoon v. Mohammad Fakirulla Mia* ("22) 9 AIR 1922 WB. 429 at p. 483. Before the determination of the lease the lessor's profits would be appropriated to the purposes of the wakf and would enure to its benefit, and after determination of the lease the profits which had been intercepted by the leases would automatically enure to the benefit of the wakf by way of accretion. This in my judgment is the meaning of the passage at p. 563 vol. I of *Bailie's Digest of Mohamedan Law* (Edn. 2), when

it is said that "after the expiration of the term (of the lease) the land would revert to the purposes to which it was appropriated." I cannot therefore give effect to point 2 (c) raised by the appellants.

15. The fourth principal condition of a wakf, conditions which relate to the wakf itself requires (a) that the wakf must be perpetual, (b) absolute and unconditional, (c) that possession must be given of the mowkoof (subject-matter) and (d) that the mowkoof must be entirely taken out of the wakif or the appropriator himself (Bailie, Digest of Mohamedan Law Part 2 p. 218, Edn. 2). Thus when a man makes a wakf for an object which must necessarily cease with the efflux of time the wakf would be void on the ground of non-fulfilment of condition (a). *Mt. Latifunnissa Vs. Najmuddin Shah and Others*, affords an illustration in this respect. One of the grounds on which the wakf in question there was pronounced to be void was that the dedication of the bulk of the income was not in perpetuity. The bulk of income was given for the maintenance of named individuals, and there was no gift over to the poor or to other objects of charity of a permanent nature. It is for the fulfilment of condition (a) that in a wakf-alal-aulad there must be an ultimate gift for the poor, for the poor as a class must necessarily exist till eternity, or to religious, pious or charitable purpose of a permanent character.

16. The meaning of condition (b) is that the appropriation must be of immediate effect and cannot be postponed or be made to depend upon a future event, whether it is likely or possible to occur or even which is certain to occur. Thus, where a wakf is created by a deed, the appropriation must be from the date of the execution of the deed, the time from which the deed operates. The cases have gone even to this extremity that if it is provided that the wakf would take effect from the date of registration of the deed, the wakf would be void, as some appreciable time must elapse between execution the deed and its registration: *Syeda Bibi v. Mughal Jan* ("02) 24 All. 231 It is now recognized that a Shia can make a wakf by will (*Baker Ali Khan v. Anjuman Ara Begum* ("03) 25 All. 236) This implies a postponement of the appropriation till the death of the wakif. But even in the case of a wakf created by will the appropriation cannot be postponed to a period later than the death of the wakif. In AIR 1938 184 (Privy Council) the Right Hon^{ble} Sir George Rankin observed thus:

On the other hand, a direction that the property should become wakf after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedications inter vivos. "If one should say I have appropriated when the beginning of the month has come...the appropriation would not be valid" (*Sharaya-col-Islam Bailie Vol. II, 218*). Their Lordships recognize that the decision in *Baker Ali Khan v. Anjuman Ara Begum* ("03) 25 All. 236 which permits a Shia to create a wakf by will, is itself a mitigation of the rigour of this principle, but they are not of opinion that the principle is abrogated for all purposes in the case of a testamentary disposition, nor do they think that it can be confined to cases where the passing of the property to the endowment is

made to depend upon an event which is problematical as well as future.

17. In my judgment the Prince's wakf has not violated this rule. I cannot find anything in its terms, the effect of which is to postpone the appropriation till after the expiry of Shaheba Khatoon's lease. The in-come derivable from the lease, that is the rent payable by Shaheba Khatoon, could have been applied from the time of the execution of the wakfnama to the objects of the wakf. On the expiry of Shaheba Khatoon's lease the additional income accruing from those properties would automatically become available for the objects of the wakf. I cannot therefore uphold contention 2 (b) (i) of the appellants. Contention 2 (b) (ii) depends upon what interpretation we would give to the words "heirs" used in para. 6 of the wakfnama. In my judgment the wakif meant by that word his children and their descendants and intended the 2/10th to be distributed amongst them immediately from the date of the execution of the wakfnama in the proportion indicated in the Shia law of inheritance. To take an instance. He intended his son to take 2/3rd of the 2/10th and his daughter the remaining 1/3rd of that fraction even while he was alive. I am fortified in this view by the phrase used in para. 7 namely "three parts (instead of two as provided for in para. 6) shall be divided amongst my children according to the Imamia law." Point 2 (b) (ii) is accordingly overruled.

18. I cannot also accept contention 2 (d). I do not see how the provision for a reserve fund can invalidate the wakf. The argument that till the money of the reserve fund is actually applied for the purposes indicated in the wakfnama, e.g., those mentioned in paras. 2, 6 and 7 it would be in suspense - not appropriated - is in my judgment a falacious argument. The property (corpus) was appropriated from the date of the wakfnama. On what objects the usufruct of the property is to be applied is also indicated. The reserve fund money was to be applied for the improvement and extension of the wakf and in rebuilding the mosque and Imambara on certain contingencies. The benefit of reserve fund is to result to objects of the wakf. The income of the properties dedicated being trust money, so to say, any property acquired from a portion of the accumulated income of those properties that is the portion which goes to make up the reserve fund, would be impressed by the trust. The condition made by the Prince that immovable properties purchased from the reserve fund are "to be included in this wakf" does not in my judgment amount to an attempt on the part of the Prince to make a wakf in future of those properties so to be acquired. Even without that express statement the properties thus acquired would be wakf properties, accretions to the wakf. In my judgment the Prince was merely emphasising by that statement made in that part of para. 6 what would have been the normal effect in law. In *Sm. Masuda Khatun Bibi Vs. Mahomed Ebrahim*, a Division Bench of this Court did not find anything wrong in the wakf when the wakif provided for acquisition of properties from out of the surplus income. The learned advocates for the appellants wish to distinguish that case on the ground that that was a wakf created by a Sunni Mussalman and there was no express provision for a reserve fund. That may be so, but I do not see any valid distinction on those

grounds.

19. In AIR 1937 127 (Privy Council) which was the case of a Shia wakf, there was a provision for the creation of a reserve fund from out of the income of the dedicated properties, but notwithstanding that provision their Lordships of the Judicial Committee upheld the wakf. The contention of the learned advocates for the appellants would lead to the absurd result that a Shia wakf would be invalid because of what they call the rule of immediate appropriation if the wakif does not direct by the wakfnama that every pice realised as income from the dedicated properties should be spent immediately after receipt by the mutwalli on the objects of the wakf, at least in those cases where the terms of the wakfnama direct the mutwalli to spend at periodic intervals. If the Shia law in this respect is what has been urged before us by the learned advocates of the appellants many wakfs would be in danger of being destroyed, by reason of the properties included therein being sold for public changes in years of calamity and distress for want of a reserve fund. The creation of a reserve fund to meet unforeseen events, or to preserve the wakf properties is a prudent act of management and I do not see why a provision in the wakf deed for such a reserve fund intended for preserving the wakf properties, etc., would be the cause of the destruction in law of the wakf itself. If there was an express provision in the Shia law to that effect I would have been bound to follow it, but I am not prepared; where there is no such express text in the Shia law, to give so unreasonable an effect to what has been called in the argument of the appellant's advocates a necessary and logical deduction from the fundamental principles of appropriation in Shia law. I accordingly overrule ground 2 (d) also. The third Sub-rule of the fourth principal rule which requires delivery of possession has already been dealt with in the earlier part of my judgment and I have recorded my findings on the question of fact, namely whether there was a change in the character of the Prince's possession. The fourth Sub-rule has now to be discussed. It is that the "mowkoof" must be entirely taken out of the wakif or the appropriator. The wakif cannot "eat out of the wakf." He cannot make a settlement upon himself or make it a condition that he should have to himself a part or whole of the usufruct of the dedicated property. If he does, the whole wakf is void. In the Sharaya-ool-Islam it is stated that if a wakif makes an appropriation for the poor and he should himself subsequently become poor, or for lawyers, and himself become a lawyer, there is no objection to his participating in its benefits : (Baillie Part II, page 219).

20. This is not an exception to the rule that a wakif shall not eat out of a wakf but is not within that rule. An elaborate argument has been advanced before us by the learned advocates for the appellants on this passage of the Sharaya-ool-Islam and it has been contended before us that the Eight Hon"ble Sir John Wallis by misreading this passage, has in AIR 1927 2 (Privy Council) misapplied it to a case where the wakif had expressly appointed himself as the mutwali and, in his capacity of mut-wali, had provided a remuneration for himself qua mutwali which he had fixed for mutwalis generally. I will deal with this criticism of the decision

in AIR 1927 2 (Privy Council) later on. It is lawful for a Shia wakif to appoint himself mutwali by the terms of wakfnama. Where he reserves by its terms no remuneration for himself as mutwali the case is clear. Where he makes others mutwalis and provides for payment of salary or remuneration for mutwalis, and does not in express terms appoint himself the mutwali but he subsequently happens to become the mutwali, as for instance on a vacancy through appointment by the Court or by the appointing authority mentioned in the wakfnama there is no objection to his taking the salary or remuneration that has been fixed in the wakfnama for mutwalis generally. This position has been admitted by the learned advocates for the appellants and they say that this is the only effect of the analogy that can be drawn from the above mentioned passage of the Sharaya-ool-Islam. Their argument is that the wakif cannot appoint himself the mutwali by the terms of the wakfnama and by its terms take as salary or remuneration in his capacity of mutwali, even though the amount of salary or remuneration be the same as has been fixed for mutwalis generally. In such a case, according to them the wakf, which by its terms authorizes him to take the remuneration or salary as mutwali would be void under the Shia law.

21. The case of the wakif receiving benefit out of the wakf qua mutwali is not dealt with in the Sharaya-ool-Islam. The subject has, however, been dealt with elaborately at pages 344 and 348 of the Jamaa-ush-Shittat (Teheran edition), a portion of which has been translated at pp. 416 to 418 to vol. I of Ameer Ali's Mahomedan Law (Edn. 3), and at page 89 of Orwatul Osqua Vol. 1 Book 2 (Haidari Press Publication). From the passage of the Jamaa-ush-Shittat Mr. Ameer Ali has drawn the conclusion that the wakif can lawfully take the allowance fixed for mutwalis generally when he himself holds the office. This passage at 418 covers the case where the wakif becomes the mutwali under the express terms of the wakfnama, that is, where he appoints himself as the mutwali, and also the case where without such appointment he subsequently happens to become the mutwali, as for instance by appointment by the Court or other appointing authority. In AIR 1927 2 (Privy Council) a Shia wakif appointed herself as the first mutwalli and fixed her remuneration as mutwalli at Rupees 1500 a year. After her two mutwallis at a time were to function and the salary of each was fixed at Rs. 180 a year. At p. 89 of the report, Sir John Wallis expressed the approval of the statement of the law as made by the learned Subordinate Judge to the effect that the wakif or settlor could, when he was himself to be the mutwalli, reserve as his allowance as mutwalli what had been fixed for mutwallis generally. The view expressed by Mr. Ameer Ali at p. 418 (Edn. 3) was approved by him and that view was further supported on the ground that that case was no exception to the rule that the wakif cannot eat out of wakf but did not come within that rule at all, for, what the wakif would take would not be in the capacity of settlor but in another capacity altogether, namely in the capacity of a mutwalli. For supporting the view, that the Muslim jurists themselves recognize and maintain the distinction between two capacities that a wakif may fill, reliance was placed on that text of the Sharaya-ool-Islam which states that if an appropriation

is made for the poor or for lawyers the wakif can participate if he himself happens to become poor or a lawyer. The wakf in that case was declared void as the wakif did not change the character of his possession from owner to mutwalli and this was expressly made the ground for the advice tendered to His Majesty. In that case it was also pointed out that the wakf could not be supported on the ground that the wakif by fixing for herself as mutwalli a far larger allowance, which represented nearly the whole of the income (the wakf property being valued at Rs. 19,000 and the allowance was Rs. 1500 a year), than what had been fixed for the succeeding mutwallis, had indicated that she intended "to eat out of wakf" on the pretence that what she was to take out of the usufruct was her salary as mutwalli.

22. The statement of the law made by the Right Hon^{ble} Sir John Wallis that it is lawful to the wakif to take as mutwalli such an allowance as had been fixed for mutwallis generally is no doubt an obiter dictum and it would not have been open to us to reexamine the statement of law thus made on the principle formulated in AIR 1925 272 (Privy Council) but for the fact that their Lordships of the Judicial Committee reserved further consideration in case the question arose in future, as they had had not then the assistance from the judgment of the High Court on that point. In view of that reservation I hold that it is open to us to re-examine the question in view of the arguments advanced before us. But after having listened to those arguments addressed to us in an elaborate form I am of opinion that the view expressed by Mr. Ameer Ali at p. 418, (Bdn. 3) is the correct interpretation of the Shia law on the point and in such a case, that is, where the wakif appoints himself the mutwalli with a salary or remuneration which he provides for all mutwallis generally, the wakf is not void under the Shia law.

23. In AIR 1937 127 (Privy Council) the wakif appointed himself the first mutwalli with a salary which had been reserved for mutwallis generally. The Right Hon^{ble} Sir George Rankin noticed that fact and upheld the wakf. In dealing with the large appropriations of money by the wakif he expressed the view that his salary as mutwalli could be set off against the item of Rs. 17,000 shown in accounts as having been taken by the wakif personally. There is no doubt no discussion of the point in that judgment apparently because the learned Counsel appearing for the respondent did not argue the point on the view that the statement of the law on the subject as made in AIR 1927 2 (Privy Council) was correct and could not be challenged. In AIR 1933 107 (Oudh) at p. 264 that part of the judgment in AIR 1927 2 (Privy Council) which dealt with the question of the wakif taking a part of the usufruct as his salary as mutwalli was analysed and explained. In that case the settlor had fixed as his salary a larger amount than he had fixed as salary of the succeeding mutwallis, and it was held that that fact did not render the wakf invalid as the amount which the succeeding mutwallis were to take by way of salary added to what they were to take as beneficiaries under the wakf, equalled or exceeded what the wakif was to take in his capacity of mutwali. "Whether the benefits which the other mutwalis were to take in their capacity of beneficiaries could be taken into consideration in deciding that question is a point which may

be open to doubt-and I doubt the soundness of that reason-but the fact remains that when the case was carried in appeal to His Most Gracious Majesty in Council the Right Hon^{ble} Sir George Rankin, while reversing the judgment of the Chief Court of Oudh on other points, observed that AIR 1927 2 (Privy Council) had been rightly distinguished by that Court in AIR 1937 174 (Privy Council) . One of the grounds on which the Judicial Committee of the Privy Council were inclined, to hold the wakfs to be invalid in AIR 1927 2 (Privy Council) was that the remuneration reserved to the wakif as mutwali was not that which had been reserved for mutwallis generally but represented a sum which nearly swallowed up the income of the dedicated properties, and was a cloak or pretence.

24. Sir Wazir Hasan appearing for some of the appellants severely criticised the view expressed by Mr. Ameer Ali at vol. I, p. 418 of his book on Mahomedan Law (Bdn. 3) to the effect that the wakif can lawfully take the allowance fixed for mutwallis generally when he himself holds the office. He says that view is not supported by the Jamaa-ush-Shittat, but, on the other hand, is quite contrary to what has been stated as law in that book of authority in a later passage which Mr. Ameer Ali did not translate. A translation of the omitted passage was supplied to us by him, but as there were disputes between the learned advocates appearing for the appellants and the respondents on the correctness of the translation so supplied to us and as the matter appeared to us to be important we had a translation made by our Court Translator. As the translation supplied to us by the learned advocate for the appellants does not agree with the translation made by the Court officer we have preferred to follow the translation made by the latter. We have directed the Court translation to be put on the record. The passage (pp. 344 and 345 of the Taheran edition) contains an involved discussion. A portion has only been translated in Mr. Ameer Ali's book on Mahomedan Law at pp. 416 to 418 (Edn. 3). An analysis of the whole passage including what has been omitted in Mr. Ameer Ali's book discloses that the following subjects are considered and answered : (I) Whether the wakif when he is the mutwali can eat out of the wakf.

Answer - He can reserve to himself as mutwali what has been reserved for mutwallis generally. It makes no difference whether he has made it a condition that he should become mutwali with a salary reserved for other mutwallis generally, or happens to become so. "The legality of the mutwali eating out of the wakf depends upon his quality as mutwali and not upon the fact of the wakif being the mutwali" The reasons given in support of this answer are as follows : "The case is akin to the case where a wakf is created for the poor or the theologians and he himself (the wakif) becomes poor or a theologian"-a case which shows that a distinction is recognised by the Muslim jurists between the two capacities of the wakif, one as settlor and the other as a poor man or a theologian. The answer to the question is also sought to be supported by the author by invoking the principle underlying a case of another description. That case is that where a man makes a public wakf-for instance of a mosque or a tank- it is valid for the wakif to be benefited therefrom,

for in a public wakf his primary object is to give benefit to the public and his own benefit therefrom is not contemplated and no condition is made in that behalf because his object is the benefit of Musalmans and as a secondary object it necessarily follows therefrom that he should include his own food along with those of the Musalmans in general.

25. This illustrative ease is brought in aid of the view that it is lawful for the wakif to receive as mutwali the same benefit out of the wakf as all mutwalis can take by the following line of reasoning, namely, "The question of self comes as subsidiary. The inclusion of himself as mutwali in the matter of profit comes as secondary and indirect issue."

Rider to the answer : - A wakif who is also the mutwali cannot take for himself anything he likes out of the usufruct of the wakf properties simply because he is the mutwali, for in that case the wakif does not in substance divest from him entirely the mowkoof (the subject-matter of the wakf) but "makes himself a participant-a chief partner," and for that reason the wakf is a nullity.

(II) The precise scope of the rule that "when a wakf is created for the poor or the theologians (translated as lawyers by Baillie) the wakif can lawfully take if he becomes a poor man or a theologian"-the case used to support the first answer by way of analogy -is considered by the author parenthetically. His view is that the wakf would be valid whether the wakif was a poor man or a theologian at the time of the wakf or became so subsequently, but "whenever there is a condition of including oneself (the wakif) ? amongst the poor is made," the wakf would be a nullity. The discussion in this part of the passage has nothing to do with the case of a wakif eating out as mutwali, but only with the case where he eats out as beneficiary.

(III) The case of the wakif deriving benefit from the wakf as beneficiary in an indirect manner which was used as another reason for supporting what I have called the first answer is then considered with a view to put proper limitations. It is not permissible for the wakif to do "so in every case (save and except in ease of public wakfs). As for instance he cannot provide for his own maintenance or get any benefit on the ostensible ground that it is charity. The argument in support of this view as stated is that there is the definite rule that the wakif shall not derive benefit from the wakf and the absolute necessity for divesting the mowkoof from himself and this definite rule cannot be filtered away by reasonings and deductions from the rule that a wakif can lawfully make it a condition that he should get benefit from the wakf in his capacity as mutwali. The analysis that I have made of the whole of the passage shows that it is perfectly lawful for a wakif to reserve such salary for himself as mutwali which he provides in the wakf deed for mutwalis generally. This rule is not confined to the case only where he happens fortuitously to become the mutwali but where he makes it a condition that he would be the mutwali and receive such salary as had been provided for in the wakfnama for mutwalis generally. I have not been able to find out what authority as a jurist the author of the Orwatul Osqa-Syed Mohamad

Karim Taba-Tabai, who describes himself as the last of the order of Ulemas, has in the sphere of Muslim law. So I do not place any reliance on the passage at p. 39 of that book for arriving at my decision. I simply quote the passage which runs thus:

There is no difficulty if the wakif fixes from the income of the wakf properties a share as remuneration for towliat and in the case when the wakif constitutes the towliat for himself, till he is alive, then it is necessary for the wakif to take the fixed amount of remuneration, and in such a case this sort of wakf will not be regarded as a wakf on himself, because of the fact that the mutwali is not "the object of the wakf," rather he takes the share for the pains he undergoes in protecting, improving, giving on rent and supervising expenditure in respect of the wakf like other paid servants. And it may also happen that the wakif may set apart his share of profit as (remuneration of the mutwali); and in fixing this remuneration of the mutwali, the matter lies in the hands of the wakif-it may be small or large. And it is not necessary that this share be the exact wages of the mutwali (in proportion to his labour); rather it is allowed that the remuneration be more than the exact wages, specially when the wakif has set apart the share of the mutwalis. In such circumstances it is allowed to him to fix remuneration of towliat for himself in the first stage as 9/10 share of the profits and 1/10th of the profits for the objects of the wakf (mowkoof alehi) or in the second stage, to fix for those (mutwalis) coming after him in the reverse ratio. And this will not be taken as a wakf for the wakif himself, on the basis of the general notion, because the general notion cannot hold good in the face of reason on which I hold the above opinion against the conjectures of the Muhaqiq Qumil "(the learned man of Qumi).

26. The author was here differing from another jurist, the learned man of Qumi, not on the proposition he had formulated in the first part of the passage but on the further proposition stated in the second part of the passage, namely whether it is lawful to the wakif to reserve more or even the bulk of the income as his remuneration when he is the mutwali, than what he allots to his successors in the office of mutwali. Who is meant by him to be Muhaqiq Qumi I cannot ascertain. He was a jurist who resided in Qumi in Persia; not certainly the author of the Sharaya-ool-Islam who was known by the name of Muhaqiq (the learned), for the author of Sharaya-ool-Islam was an inhabitant of Arabia and not of Persia.

27. Even if by the words "Muhaqiq Qumi" he referred to the author of the Sharaya-ool-Islam the point is not of much importance in the case before us, because the difference of the author of the Orwatul Osqua was on a point where the wakif had reserved for his salary as mutwali much more than what the wakfnama gave to his successors-in-office as their remuneration. I accordingly answer the point of law involved in the point 2 (a) in the following manner. A wakif can appoint himself mutwali by the terms of the wakfnama and make it a condition that he should receive an amount of remuneration which mutwali generally are to receive under the terms of the wakfnama. The wakf would not

be void if such a condition is made. By the wakf the Prince appointed himself the first mutwali for his life, or as long as his health would permit. His son Syed Ali was to come in next after him as mutwali and mutwaliship was to continue in the line of the descendants of Syed Ali. If that line became extinct then the mutwaliship was to devolve on such male members of the family of Prince who may be capable. The mutwalis falling within these categories will hereafter be called the first class of mutwalis. If none coming within the first class be alive the mutwaliship was to devolve on a suitable male person of the line of the Prince's father, Shaha Wajid Ali. If none of that line be existing, then a man of high family whom the prominent Shiahs residing in Matiabruz, Calcutta and in the suburbs of Calcutta may elect would be the mutwali. Mutwalis coming within these categories will be designated as falling within the second class of mutwalis. The remuneration of the mutwalis falling within the first class, which included the Prince, was fixed at 5/10ths of the net income and those falling within the second class at 2/10ths of the net income. As the possibility of having mutwalis of the second class was very remote for the Prince had many children and descendants of his children, though only a son and a daughter survived him, I must consider the remuneration fixed for the first class of mutwalis to be the remuneration of mutwalis generally for the purpose of the rule. Moreover, I would hold that the rule which requires that the wakif qua mutwali cannot reserve to him a salary or remuneration more than what has been fixed for mutwalis generally, means that he must not make a distinction in his favour between himself and other mutwalis following him. The fact that two classes of mutwalis were contemplated with different scales of remuneration would not in my judgment make any difference.

28. Moreover, even if the remuneration fixed for the second class of mutwalis be taken for the purpose of the rule to be the remuneration fixed for mutwalis generally I do not see how that rule has been infringed in this case, for the Prince would receive an amount much less than what would be received by the second class. At the time of wakfnama he was about 67 years old. He was not in good health. He was ailing off and on from 1914 and had a stroke of paralysis in 1915 (Exs. 27 (b), 27 and 27 (e), A-33-35). It could not have been expected that he would live long after the execution of the wakf. In the wakf thirty nine items of immovable property had been included. Of these, twenty eight (the most valuable of the Prince's properties) had been included in Shaheba Khatoon's lease of 12th July 1916. Rent of Rs. 6000 a year was payable under that lease. The lessees profits were considerable-much more than rupees 12,000 a year, for the previous lease in favour of that favoured mistress was 18,000 a year. We do not know what the income from the remaining eleven items of properties was. Of those, eleven properties one was the family dwelling house, which yielded no income; three were small properties at Lucknow-a grove and two other small plots of land which were untraceable. There were besides two small Daripin holdings. This leaves six items of possibly income bearing property which had not been included in Shaheba Khatoon's lease. The Prince was not expected to survive Shaheba's lease which would expire in 1926. The income till

the expiry of the lease would be Rs. 6000 plus the income of at most the aforesaid six items of property and the Prince was to get half of that income as the remuneration for the mutwalliship. The evidence discloses what the income would have been on the expiry of Shaheba Khatoon's lease. After the expiry of that lease when the parcels demised by the said lease came into the khas possession of Syed Ali as mutwalli, Sundermall Johar Mull offered a selami of Rs. 40,000 and a net annual rent of Rs. 30,000 rising to Rs. 33,000 for all the income bearing properties included in the wakf for a lease for a term of 60 years (Exs. B7-B 368). Permission was given to the mutwalli, Syed Ali by the District Judge to conclude a lease with Sundermall Johar Mull on those terms. Some members of the public opposed the grant of the permission on the ground that the offer was too low and the lease was not eventually made on that objection coming from the public. Half of the net income of the wakf properties while Shaheba Khatoon's lease would be running would therefore appear to me to be far less in amount than 2/10ths of the net income after the termination of that lease. I accordingly hold that though the proportion (5/10ths) of the net income was reserved for the Prince as his remuneration for the mutwalliship, the Prince was to receive actually an amount far less than what the other mutwallis of the first class as also the mutwallis of the second class were to receive in terms of the wakfnama. I accordingly overrule point 2 (a) urged by the appellants.

29. The next point for consideration is whether there was substantially a concurrent gift to objects of charity or objects of a pious or religious nature, for if there be an immediate and not postponed substantial dedication to charity the wakf would be valid under the Muslim law as interpreted by the Judicial Committee, and the aid from the Wakf Validating Act of 1913 has not to be invoked by the respondents Syed Mohiuddin Ahmed and Another Vs. Sofia Khatun and Others, Two such objects of the Prince's wakf are the maintenance of the mosque and the Imam-bara. I will take the two paragraphs 6 and 7 of the wakfnama separately. The net income is divided into ten parts and by Para. 6 is distributed as follows:

(1) 5/10ths mutwalli remuneration. (2) 2/10ths allowance for the wakifs descendants. (3) 2/10ths for mosque and Imambara. (4) 1/10th reserve fund set apart for the extension and improvement of the wakf.

30. The benefit of item (4) would be participated by the objects mentioned in items (2) and (3). As the remuneration for the mutwallis is in the nature of management charges, the balance which is available for the objects of the trust is thus distributed equally between the descendants of the wakif and objects of a religious, pious and charitable nature which would enure to the benefit of Mussalmans in general. In my view it cannot be said that the concurrent gift to public purposes is of an illusory or unsubstantial nature. It is only when the Court fixes the mutwalli's remuneration that it cannot be more than 1/10th of the net income but there is no such limitation on the powers of the wakif in the matter of fixing the mutwalli's remuneration. By para. 7 the net profits are distributed

thus:

(1) 2/10ths mutwalli's remuneration. (2) 3/10ths allowance for the wakifs descendants. (3) 3/10ths for mosque and Imambara. (4) 2/10ths reserve fund to be employed for extension and improvement of the wakf.

31. If the line of descendants of the wakif were to become extinct the 3/10ths share reserved for them would have to be divided in two equal parts, 3/20ths going to the reserve fund and 3/20ths to "proper acts of charity". In my judgment the concurrent gift to purposes of a religious, pious and charitable nature which would enure to the benefit of the Mussalmans in general made in this paragraph is also substantial and not illusory. I accordingly hold that even apart from the Wakf Validating Act, 6 of 1913, the wakf in question is a valid one under the Shia law. This finding is sufficient for the dismissal of the three appeals, and hence I would record my judgment on the other points in a brief manner. I have expressed my opinion on point 3(a). I do not find any substance in point 3(b). On the contingency contemplated the net income would be distributed thus, according to para. 7 of the wakfnama:

(1) 2/10 ths mutwalli's remuneration. (2) 3/10 ths for mosque and Imambara. (3) 7/20 ths reserve fund set apart for improvement and extension of the wakf. (4) 3/20 ths for "proper acts of charity".

32. The benefit of item 3 would ultimately enure for the objects mentioned in items (2) and (4). Hence, the whole of the remaining net income left after payment of the mutwalli's remuneration, which is in the nature of management charges, goes to objects of public utility. I will discuss hereafter whether the gift of the 3/20 ths parts of the net income to "proper acts of charity" is a valid provision or not. The ultimate gift of 3/20 ths to "proper acts of charity" is not in my judgment more remote than what is allowable by the Wakf Validating Act. Under the Shia law, heirs of a man fall within two categories: (1) heirs by consanguinity and (2) heirs by marriage. They are subdivided in two classes - sharers and residuaries. That law does not recognise the claims of "distant kindred". All heirs of a Shia accordingly include persons (except the false grand parents and their descendants) who come within the description "family, children or descendants" for whom it is legitimate after the Wakf Validating Act, 6 of 1913, to make provision even to the extent of the whole of the income of the wakf properties, provided there is an ultimate gift over to the poor or to charitable, religious and pious purposes of a permanent nature on the extinction of "the family descendants or children" of the wakif. Paragraph 7 of the wakfnama expressly states that on the extinction of the line of his children the share reserved for their benefit shall be divided into two equal parts and one of such parts (3/20 ths) shall be spent on "proper acts of charity" and the other part (3/20 ths) shall go to the reserve fund established for the improvement and extension of the wakf. The ultimate gift to charity is therefore not more remote than allowed by the Wakf Validating Act, 6 of 1913. Accordingly I cannot see any substance in contention No. 3 (c).

33. I do not see why the provision for a small pension for three of the faithful servants would render the wakf invalid. The main purpose of the wakf is not to make a settlement on those servants. Paragraph 8 provides that those three servants must be retained in their posts at a moderate salary fixed by the wakif. If they resign they are to get half of their salary as pension. Those provisions are provisions concerning management. On their deaths half of what they were getting while in service were to be paid to their heirs only on the footing of poor men. I accordingly overrule contention No. 3 (e). I now come to the question as to whether the wakf in question has complied with the provision to Section 3, Wakf Validating Act, 6 of 1913. The Prince had provided that on the failure of the line of his descendants half of what had been provided for their allowance was to go to the reserve fund and the other half was to be spent on "proper acts of charity". I cannot accept the respondents' contention to the effect that the Prince had specified in the deed in express terms those proper acts of charity. The preamble of the deed on which reliance has been placed does not lead me to the conclusion that by that phrase he intended the mosque and the imambara, for the support of which he had made the allotment of a specific and ear-marked share of the profits. The question therefore is whether the proviso to Section 3 has been complied with when the Prince did not in express terms specify the objects of the ultimate gift.

34. The Wakf Validating Act validates a species of wakfs-wakfs-alal-aulads, which had been declared invalid by the Judicial Committee in a series of cases, *Mohamed Ahsanullah v. Amarchand Kundu* ('90) 17 WB. 498; *Abul Fata v. Rasamaya Dhur Chowdhri* ('95) 22 WB. 619; AIR 1927 191 (Privy Council) . In those cases it was held that where the wakif in substance makes settlement on the family of the settlor and provides for an ultimate gift to charity on the extinction of the family, the ultimate gift over to charity is too remote and illusory and such a wakf is not valid. The Wakf Validating Act, 6 of 1913, in effect enacts that such a wakf would not be invalid. As I have observed before, according to the Muslim conception a wakf must be perpetual, that is to say, the objects of the wakf must last for ever. In the case of a wakf-alal-aulad that condition cannot be fulfilled by simply providing for allowances for the family, descendants and children of the wakif, for there may be the possibility of those objects failing by the family, etc., of the wakif becoming extinct. It is therefore necessary that that contingency must be provided for, to make the wakf perpetual, and that can only be done by providing that in that event the usufruct of the wakf properties is to be applied for the benefit of the poor, for the poor as a class must of necessity exist for ever, or for the benefit of some religious, pious and charitable object of a permanent nature. The proviso to Section 3 of Act 6 of 1913, therefore, does not effect any change in the Muslim conception but simply states what the Muslim law is. The effect of that proviso must, therefore, in my view be judged by the principles propounded by Muslim jurists. According to them there are two distinct principles. One is analogous to the cypres doctrine.

If one should make an appropriation for a masalat (object of general utility)

which has ceased to be used, it is to be applied to any good and pious purpose. And it is for such purposes generally, it is expended on the poor and indigent, and in any other way by which approach is made to Almighty God. (Bailie II. 216).

35. The other principle is that a wakf will not fail for mere vagueness or uncertainty of the object. For when the object is not specified by the wakif, the usufruct is to be applied to the benefit of the poor, (Ameer Ali Vol. I, 323, Edn. 3), for according to the Mussalman jurists "an unrestricted wakf is for the poor by custom and practice, and what is customary is as if conditioned" (Wajiz-ul-Muhit quoted by Ameer Ali at I, 150, Edn. 3). The proviso to Section 3, Wakf Validating Act, states that the ultimate benefit in a wakf-alal-aulad can also be impliedly reserved for the poor or for any purpose recognized by the Mussalman law as religious, pious or charitable purpose of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama. If any of those purposes can be implied from the terms of the wakfnama, with the aid of principles formulated by Muslim jurists, the proviso would be complied with. In the Prince's wakfnama he designs the ultimate gift to "proper acts of charity" and as the benefit to the poor is the prime concern of Muslim jurists, those words used in the wakfnama would in my judgment imply a gift to the poor. In my judgment this principle was lost sight of in the two series of cases which have taken opposite views on the interpretation of the proviso to Section 3 and I cannot fully agree with everything that has been said in them. Those cases are Sheik Ramzan v. Mt. Rahmani ("32) 19 AIR 1932 Oudh 71; Punjab Sindh Bank Ltd. v. Anjuman Himayat Islam ("35) 22 AIR 1935 Lah. 596 and AIR 1940 324 (Oudh) . The proviso contemplates an ultimate gift effective in law. In my view there is an effective gift in this case-a gift implied for the benefit of the poor. Even if I am wrong in this view the wakf deed manifests an overriding intention to charity in the contingency of the failure of the descendants of the Prince. This would call in the application of the cypres doctrine. I agree . with the principles formulated in Sm. Masuda Khatun Bibi Vs. Mahomed Ebrahim, . These principles are equally applicable to the case before us and in a Shia wakf. I accordingly hold that if the wakf cannot be upheld without the aid of the Wakf Validating Act, it is a good wakf as it has complied with the provisions of that Act. Contention 3 (d) is accordingly over-ruled.

36. I will now formulate and deal with the special points raised in the three appeals. The finding that the wakf is a good and valid one makes the decision on those points unnecessary but still I express my opinion thereon. All these points have been urged on the footing that the wakf is a void one. The special points urged in Appeals No. 239 of 1935 and No. 25 of 1936 by the appellants and respondents are:

(I) Whether that suit is maintainable.

(II) Whether that suit is barred by limitation.

(III) Whether Juhi's right was extinguished by reason of adverse possession.

(IV) Whether Juhi Begum had relinquished her claim to the inheritance.

(V) Whether the conveyance by Juhi Begum in favour of Mahnuda Bibi is effective.

37. The points urged in Appeal No. 26 of 1936 and in the memorandum of cross-objection filed by Nawab Hashim Ali Khan and Ashiq Hossein which arise in the suit instituted by Khaija Bibi Title Suit No. 8 of 1931/1 of 1934 are:

(I) Whether the decree in favour of the Official Assignee in Suit No. 1515 of 1918 was obtained by fraud.

(II) Whether such a question of fraud can be raised in this suit.

38. After the amendment of the plaint the suit instituted by Juhi Begum is a suit for partition only. As the scope and object of a suit for partition is to convert the joint possession of the cosharers into possession in severalty, it is essential that the plaintiff should at the date of the institution of the suit be in possession of the joint property either actually or constructively. If at that material time he is in actual possession of a part of the joint property or if he be not in actual possession of any part of the joint property but his cosharer, the defendant, is and there is no ouster, the suit would be maintainable," for his cosharer's possession in such a case is constructively his possession. But if he was not at the date of the suit in actual possession of any item of the properties claimed as joint and the defendant is in actual possession of the whole on the assertion of a hostile title known to the plaintiff, a suit for partition is not maintainable, on a fixed court-fee of Rs. 15 but a suit for possession, either joint possession or possession after partition, must be brought on payment of ad valorem court-fees. These principles have been formulated in *Bidhata Rai v. Ram Chariter Rai* ("07) 6 Cri.L.J. 651 at p. 655; *Lokenath Singh v. Dhakeswar Prasad Narayan Singh* ("15) 2 AIR 1915 WB. 357 and *Sabjan Bibi and Another Vs. Asanulla Sheikh and Others*, . Juhi's suit would only be maintainable if she was either actually in possession of a part of the joint property or was in constructive possession of the properties in suit at the time she filed the plaint. Her case is not that she was in actual possession at the date of suit of all the properties in suit, but that she was in possession of one item only -a house in Rangalal Street, where she died after the institution of suit, I find that she was not in occupation of that house at the date of the suit but was permitted to occupy it by her brother Syed Ali on considerations of humanity in March 1931, about two months after she had instituted the suit. Syed Ali was in possession of all the properties claimed by her as joint property as mutwalli, that is, under an adverse title and that adverse claim was known to her. She even received allowances from him in terms of the wakfnama. I therefore, answer point 1 in the negative. For the purposes of avoiding payment of ad valorem court-fees on the plaint the alternative prayer for recovery of possession was deliberately withdrawn by the plaintiffs. I do not consider the suit to be barred by time. It was instituted just within 12 years of the death of the Prince when Juhi Begum's right as heir

accrued. To meet this position the respondents urge that the suit is governed by Article 142 of Schedule 1, Limitation Act, and time had already begun to run against her pre-decessor-in-interest, the Prince, from the date when the Prince executed the wakfnama. I cannot accept this contention. Article 142 does not in terms apply, as the suit is not for recovery of possession, that prayer having been deleted at the plaintiffs' instance. It is admitted further that the case is not a case of dispossession, for the Prince cannot be said to have dispossessed himself. It is in my view not a case of discontinuance of possession either. That phrase in Article 142 connotes abandonment of possession by the owner followed by the taking of possession by another, the wrong-doer. As the Prince continued to be in possession after the execution of the wakfnama, but only changed the character of his possession I do not think that the case would have been governed by Article 142, time running from the date of the execution of the wakfnama, even if the suit (which it is not) had been a suit for possession. I answer point 2 in the negative.

39. Juhi Begum's title by right of inheritance, if she had the title, would not have been extinguished by adverse possession. If the wakf had been void the possession of the mutwalli would have been possession on behalf of the persons who would have been entitled to those properties on that contingency. I do not wish to repeat the reasons for this view. Those reasons have been indicated in the judgment of Roxburgh J., and myself in *Syed Mohiuddin Ahmed and Another Vs. Sofia Khatun and Others*, . I cannot accept the contention that the Prince as mutwalli prescribed against himself as owner. The case in (1889) *Churcher v. Martin* (1889) 42 Ch. D. 312 cited by the learned advocate for the respondent and intended to support the proposition that a person in one capacity can prescribe against himself in another capacity does not bear him out. There one Thorngate executed a charitable trust by an unenrolled deed by which he vested the trust properties in three trustees one of them being Emanuel Churcher. The trustees went into possession and they and their successors-in-office remained in possession for the statutory period applying the proceeds of the trust properties to charity. The trust however turned out to be invalid in law. By his will, Thorngate devised all his estate to Emanuel Churcher who in turn by his will appointed G. Churcher, W.E. Churcher, G. Bone and Smith as the executors of his estate and devised his estate to them. G. Churcher, G. Bone and Smith brought the action against the trustees of Thorngate for recovery of the trust properties on the ground that the trust being invalid Emanuel Churcher got those properties under the will of Thorngate. A plea that the plaintiffs' title had been extinguished by reason of adverse possession on the part of Emanuel Churcher as trustee was taken and given effect to. But Kekewitch J. made the following observations:

If Emanuel Churcher had been the sole trustee, the aspect of the case would have been very different, but here he was one of several.

40. These observations demolish the contention of the advocate of the respondent, as the Prince was the sole mutwalli. On the facts also there can be

no case of adverse possession because Syed Ali as mutwalli had not continuous possession throughout the statutory period. His possession as mutwalli was interrupted at times: see Syed Ali's admission in his deposition in Miscellaneous Judicial Case No. 43 of 1920, EX. 29-B 375 at 376,1, 39-41. The third point is accordingly answered in the negative.

41. The contention which is the subject matter of the fourth point was not raised in the lower Court. The case that Juhi Begum had relinquished her claim to the inheritance has not been pleaded in the written statement. This contention depends upon investigation of facts not put in issue in the Court below. I cannot allow such a new point to be made for the first time here. Besides the contention is based on the slender foundation that in the year 1928 Juhi Begum had received money from Syed Ali under a form of receipt stating that she was receiving it in terms of the wakfnama (Ex. D. series B. 544 to 554). There is nothing to show that she, a pardanashin lady, understood or was made to understand, that those receipts would amount, as is now contended, to a relinquishment of her inheritance. Those receipts would have at most only this effect that she recognized the wakf but if the wakf had been invalid in law, her recognition would have had no legal effect. This contention is overruled also.

42. The conveyance by Juhi Begum to Mahu-mada Begum in my view can be challenged by Nawab Hashem Ali Khan and his transferee Syed Ashiq Hossein. I do not think that the learned Subordinate Judge was right, when he said that they cannot do so on the supposed authority in *Raja Rai Bhagwat Dayal v. Debi Dayal Sahu* ('08) 35 Cal, 420 *Nawab Hashem Ali Khan is the legal representative of Juhi Begum* and so he and his assignee Syed Ashiq Hossein can raise the defence which was certainly open to Juhi Begum. The consideration for the conveyance as recited therein was some debts said to be due by Juhi Begum to Saleji on two promissory notes marked (EXS. Y1 and Y) which the latter had assigned to Mamuda Bibi and the payment to her of a monthly allowance of Rs. 100 as long as she would live. The claim on those promissory notes was barred at the date of the conveyance and the payments said to have been made by Juhi Begum on the promissory notes from time to time and said to have been endorsed by her on the back of them to keep them alive are fictitious and false. (Exhibits Y1 and Y.B 357-360). Juhi Begum had no means to make those payments. She had a small political pension and even according to the case of Mamuda Bibi she was in a state of perpetual indebtedness and want. No attempt has been made in this case either to prove those payments or endorsements.

43. Juhi Begum was a pardanashin lady Shortly after the death of her first husband she had been taken in hand by an unscrupulous man, Saleji, and was within his clutches. For executing the said conveyance in favour of Mamuda Bibi, a daughter of Saleji, she was taken to a house in Upper Chitpur Road which was adjoining if not a part, of Saleji's house at Amratolla Lane, and she executed the conveyance there. Mr. G.C. De who had acted for Saleji in the past as his solicitor acted for Juhi Begum and Mr. P.L. Mitter, Mr. G.C. De's son-in-law who shared

the same office room with him, acted for Mamuda Bibi. Mr. De did not care to ascertain some relevant and important particulars which as the adviser of a pardanashin lady he was in duty bound to ascertain. He says in his evidence that he had translated the document to her in Hindi, but having regard to his own defective knowledge of Hindi it is doubtful whether the translation made by him conveyed the real meaning of the document to Juhi Begum. At any rate it appears to me that he did not clearly explain the nature of the transaction to the lady and did not draw to her attention the fact that she was conveying her claim to vast properties for a mere song. There seems to me to be an element of unfairness and undue influence also. I cannot uphold this conveyance. I cannot agree with the finding that two instalments of allowance payable under the deed reached Juhi Begum. No doubt an insured order was addressed to her at Lucknow by Mamuda Bibi, but the cover was received not by her but one of the evil men who had surrounded her and who helped Saleji in compassing her financial ruin. I answer this point in the negative.

44. I take up now the two points raised in Appeal No. 26 of 1936. In my view having regard to the scope and nature of Title Suit No. 8 of 1931/1 of 1934 the decree passed in Suit No. 1515 of 1918 cannot be challenged, as bad. The provisions of Order 21, Rule 58, Civil P.C., and the following rules of that order up to Rule 63 is a reasonable adjustment of two principles. The first is that a judgment creditor should have the fruits of his decree as quickly as possible; and the other principle is that a third party should not be allowed to be harassed by the decree-holder's attempt to take in execution his property. The adjustment is made by allowing the third party to intervene in the execution proceedings as a claimant but the first principle which keeps in view the interest of the decree-holder requires that the claim proceeding should not be prolonged, for that would delay execution. Hence the investigation of the claim by the executing Court must be of a summary nature, ordinarily to be decided on the basis of possession. The summary nature of the investigation of the claim by the executing Court requires in the interest of justice that the party against whom an adverse order is made by the executing Court should be given the opportunity within a short period of time to reagitate in a more detailed form the question of his claim in a regular suit.

45. From this it follows that the issue that can be raised in a suit instituted under the provisions of Order 21, Rule 63 must in essence be of the same nature as the issue in the claim case in the executing Court, although the ambit of the enquiry of that issue would be more detailed in the suit. In the execution proceedings, the judgment-debtor cannot challenge the validity of the decree under execution on the ground of fraud and the claimant can only urge that the property attached is his property and not of the judgment-debtor. He cannot urge that the decree is bad or even the execution is barred by time : *Jalaluddin v. Mt. Maniran Rang* ("21) 8 AIR 1921 Pat. 311 132, *Somasundaram Chettyar v. Ma Shwe Thit* ("29) 16 AIR 1929 Rang. 152 As possession is prima facie evidence of title, an investigation based on the evidence of possession would be a rough and ready

and expeditious mode of investigation of the claim by the executing Court. That that issue, namely, whether the property at the date of the attachment was the property of the judgment-debtor or of the claimant can be the only issue in a suit under Order 21, Rule 63, (apart from issues in bar e.g. of limitation) is also "indicated by the language of Order 21, Rule 63 itself, for that rule speaks of a suit "to establish the right which he claims to the property in dispute." A suit under that rule is in essence a review of the summary order passed by the executing Court on the claim: *Phul Kumari v. Ghanshyam Misra* ("08) 35 WB. 202: 35 I.A. 22 at p. 24. It is a mere continuation in a different forum of the claim proceedings *Mt. Bas Kuar Vs. Gaya Municipality and Others*, . The judgment-debtor would not be a necessary but only a proper party to such a suit, where the plaintiff is the decree-holder, *Ghasiram v. Mangal Chand* ("05) 28 All. 41 and not a necessary party even when the unsuccessful claimant is the plaintiff: *Suppan Asari Vs. Alima Bibi and Others*, . I do not see on what principle the claimant can be allowed in a suit under Order 21, Rule 63 to question the validity of the decree under execution to which he was not a party and by which he is not directly affected. This is the view which has been taken in *Guli Bai v. Jagannath* ("86) 10 Bom. 659 and *Deoki Singh v. Raghavindra Bhagwan* ("39) 26 AIR 1989 Pat. 430 with which view I entirely agree. I cannot agree with the view expressed in *Narayyan v. Nageswarayyan* ("94) 17 Mad.389 to the effect that in a suit u/s 283, Civil P.C. of 1882 (O. 21, Rule 63, Civil P.C. of 1908) it would not be ordinarily open to a claimant who is a stranger, in no way connected to the judgment-debtor, to challenge the decree sought to be executed but it would be open to such a claimant when he is the reversioner of the judgment-debtor.

46. The qualification so made proceeds upon conceptions which seem to me to be erroneous. In the first instance a reversioner has no interest in præsenti in the property. He has only a spes successionis. Whether such a remote interest would enable a claim to be preferred under Order 21, Rule 58 appears to me to be doubtful. The judgment-debtor not being a necessary party to a suit under Order 21, Rule 63 cannot be allowed to raise an issue relating to the validity of the decree under execution and I do not see how a person who is related to the judgment-debtor or has some connection with his estate (very remote in the case under consideration) can do so. The case in *Bama Charan v. Bogala Charan* ("14) 1 AIR 1914 WB. 380 on which the learned advocates appearing for Nawab Hashan Ali and Syed Ashiq and the legal representatives of Syed Ali, (for in respect of this question their interest is the same) has placed reliance for supporting their contention that the decree under execution can be challenged in a suit instituted under Order 21, Rule 63 does not support them. In that case the decree under execution was not challenged at all, but a decree which was the foundation of the claimant's title was. That can certainly be done in such a suit, because the claimants' title to the property attached is the issue in such a case and accordingly all the links in his title can be examined. I accordingly answer the second question raised in Appeal No. 26 of 1936 in the negative.

47. On the merits I cannot hold that fraud has been established. The original

scope of Suit No. 1515 of 1918 was to recover out of the assets of Humayum Kader the dower money said to be due to Juhi Begum on the basis of her assignment to Saleji. She was defendant 1 and she along with the other heirs of Humayun Kader would have been affected if a decree had been passed on the said cause of action, for the share of the properties which she had inherited from her husband would have been liable to be taken in execution. She was served with the summons of that suit but did not choose to appear. She knew of the suit, for she deposed as a witness. After she gave her deposition and on that deposition the Official Assignee who had substituted himself in the place of Saleji, the original plaintiff, could not proceed on the cause of action as originally laid in the plaint. He was advised to amend the plaint. Personal service of the application for amendment of the plaint was not required on Juhi Begum, as she had been served with the summons of the suit and had not chosen to appear. The amendment was granted and an ex parte decree was passed against her as late as 21st August 1923. Her Jagir at Lucknow was attached and sold in 1926 in execution of that decree through the District Court at Bara Banki (Ex. 3B 354). She knew that such a decree had been obtained against her and one of her properties had been sold for satisfaction thereof. She had knowledge of the decree in 1930, if not earlier, as would appear from a judgment in Money suit No. 89 of 1930 to which she was a party and in which she had actively supported the purchaser at the execution sale (EX. B598). Still she did not take any step to set aside that decree.

48. In Khatija Bibi's suit a general allegation of fraud was made in the written statement filed by Syed Ali. Nawab Hasen Ali Khan or his assignee did not file any written statement but at the time of the trial they filed a petition on 20th August 1935 in which they gave particulars of fraud not pleaded by them, but by another (D-86). In those particulars they alleged fraud of Saleji and not of the Official Assignee. Saleji's interest in the subject-matter of suit No. 1515 of 1918 had ceased in his insolvency on 8th December 1921. The Official Assignee had substituted himself as plaintiff in Saleji's place on 6th June 1922 and from that time had the carriage of the suit. It is a serious thing now to charge the Official Assignee, a responsible officer of this Court, with fraud and a more serious thing where there is no tangible evidence to sustain the charge. The claim on the amended cause of action has not been shown to be false, much less false to the knowledge of the Official Assignee, though falsity of the claim by itself is not enough to set aside a domestic judgment on the ground of fraud. To set aside a decree on the ground of fraud the fraud alleged must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the facts of the case and the decree sought to be set aside must be obtained by that contrivance: Kunjabehari Chakrabarty Vs. Krishnadhane Majumdar, . The application for amendment of the plaint in suit No. 1515 of 1918 may have been an irregular one and the order granting it may have been a bad order. It may also be that the order would not have been made if that application had been opposed. But I do not see any tangible evidence of a meditated

contrivance on the part of the Official Assignee designed to keep the other party and the Court in ignorance of the real facts. It is on this ground and also on the ground that a new case of fraud was attempted to be made here on appeal, a fraud not of Saleji but of the Official Assignee, that I overrule the first point urged in Appeal No. 26 of 1936.

49. In the result I dismiss all the three appeals with costs to the respondents who are the representatives of Syed Ali. Tho several applications for leading additional evidence except one dated 23rd November 1939 are rejected but without costs. Although both the suits were dismissed by the lower Court in the decrees as drawn in that Court costs have been awarded in favour of the plaintiffs against the contesting defendants. This is obviously wrong. The decrees of the lower Courts are corrected in respect of costs. The plaintiffs must pay the costs of the con-testing defendants incurred in the lower Court in both the suits. The two cross-objections by Mr. Chatterjee's client in Nos. 25 and 26 are allowed to that extent but without costs. The cross-objections filed by Mr. Bose's client Nawab Hashim Ali Khan in No. 26 are dismissed but without costs.

Khundkar, J.

50. I agree, but desire to make a few comments upon the very elaborate argument by which the validity of the wakf has been assailed, and as I propose to confine myself to that argument only, I would re-arrange its main brances in the following way:

Firstly-(A) Under the Shia law a wakif may not reserve to himself any benefit under the wakf even though it be as mutwalli's salary. (B) Alternatively, even if the Shia law permits a wakif to appoint himself a mutwalli reserving to himself a portion of the income of the wakf as mutwalli's salary, the amount must not be in excess of that reserved for mutwallis generally.

Secondly-There is in the present ease no substantial concurrent dedication to charity, and therefore to save the wakf from being wholly defeated the provisions of the Mus-salman Wakf Validating Act, 1913, have to be called in aid.

Thirdly-In so far as the reserve fund provided for in the wakfnama would have the effect of holding back certain property from immediate dedication, and of postponing its inclusion in the wakf to a future date the direction to create such a fund, renders the wakf invalid in Shia law.

Fourthly-As the ultimate gift over to charity does not satisfy the requirements of the proviso to Section 3, Mussalman Wakf Validating Act, 1913, that Act does not save the wakf from failing entirely.

Fifthly-The wakf, in so far as certain properties are concerned, has been made subject to the lease in Saheba Khatun's favour, and this is a further violation of the Shia law.

51. Before I consider these arguments it is J desirable that I should set out a

summary of the main clauses of the wakfnama which is as follows: (1) The wakif declares that for the purpose of carrying out the ordinances of his religion, and for the maintenance and well-being of his children generation after generation, and for the continuance of charitable acts for all time to come, he has created this valid and legal wakf after reciting the formula of wakf through a vakil. He further declares that having taken out the immovable properties mentioned in the schedule from his ownership, he has for the sake of God included them in the wakf. (2) The wakif states that he has constituted a mosque and Imambara at premises known as Khusro Manzil so that Namaz, Taziadari in Muhar-ram, and Chehllum and Nowchandi Majlises may always be held in it. He directs that if Government purchases this building or if it falls down, then to the price of the land and the building is to be added a further sum to-the amount of 5 years income of the share which under Clauses (6) and (7) of the wakfnama will be set apart for the improvement of the wakf, and with this amount a magnificent mosque and Imambara are to be built at a suitable place. (3) The Towliat is to remain . in the wakif during his life-time for as long " as his health permits and he desires to remain mutwalli. His son is to be the next mutwalli, and after him the Towliat is to continue in the line of his son"s descendants. If these fail the Towliat is to be given to such male members of his family as may be capable. Then follow further directions as to the Towliat in the event of no male members of his family remaining. These are contained in Clauses (3) and (4) and need not be set out. (5) A committee of five Shias is to be constituted whose duties will be to supervise the administration of the wakf and to see that the mutwalli carries out his duties properly. (6) The income of the wakf, after meeting Government dues, law charges, expenses of collection, and repairs to the wakf properties, is to be divided into ten shares. As long as the Towliat remains in the hands of the wakif or of his descendants five of these shares are to be given to the mutwalli; two shares are to be divided amongst his "heirs according to the Imamia law," two shares are to be set apart for the expenses of the mosque and Imambara and for the, expenses of Muharram Chehllum and Nowchandi Majlises; and the remaining one share is to be set apart for the extension and improvement of the wakf so that from time to time immovable properties may therewith be purchased and included in the wakf. (7) In the event of the Towliat not remaining in the line of the wakif"s descendants, the mutwalli"s remuneration is to be two instead of five out of the ten shares into which the income is divided, and out of the remaining eight shares, three are to be apportioned amongst the wakif"s descendants (heirs) according to the Imamia law, three are to be set apart for the expenses of the mosque and Imambara, and the remaining two shares are to be reserved for the extension and improvement of the wakf properties. If no descendants of the wakif remain, then half of the share allotted to them (i.e. 3/20) is to be added to the reserve fund for the expansion and improvement of the wakf properties and the other half (3/20) is to be spent on "proper charitable acts."

52. To preclude misunderstanding, I ought to state here that Clause (6) of the

English translation of the wakfnama Ex. R. renders as "descendants" Urdu word "nasi," which may also be translated as "line of descendants:" and as "heirs" the Urdu word "warsa." In Clause (7) the word "children" appears as the translation of the Urdu word "aulad," which also means progeny. There is no dispute as to the rendering of these words which I have adopted in the summary just set out. In the development of the first alternative branch of the first argument reliance has been placed on the proposition that in Shia law wakf is a contract between the wakif and the mowkoof alehi or beneficiaries, the effect of which is to vest the entire benefit in the property in the latter; and this, it is contended, is the foundation of the rule that the wakif should divest himself completely of the dedicated property, as also of the rule that possession of the dedicated property must be delivered either to the first beneficiaries, or, in cases where the wakf is for a body of persons, to the first mutwalli. In Baillie's "Digest of Mohummudan Law" Edn. 2 part 2, the following passages are of importance. At p. 218 the four conditions of wakf (according to the Suraya, the leading Shia authority) are set out:

1st. It must be perpetual; 2nd. absolute and unconditional; 3rd, possession must be given of the mowkoof or thing appropriated; 4th, it must be entirely taken out of the wakif or appropriator himself.

53 At p. 211 the relationship of wakf to contract is thus expressed: "Wakf is a contract the fruit or effect of which is to tie up the original of a thing and to leave its usufruct free." The theme is continued at p. 212: The contract is not rendered obligatory ex-cept by giving possession; but when so completed it cannot be revoked if made in health..." At p. 219 is the proposition:

The seizin which is required is that of the first mowkoof alehi, or person for whom an appropriation is made; and all regard to possession ceases in the subsequent steps.

54 Great reliance has been placed on certain passages in the judgment of Mahmood J. in Agha Ali Khan v. Altaf Hossain Khan ("92) 14 All. 429 The most important of these for the purposes of the argument are the following (at page 448):

Under Shia law wakf is a contract. Under Sunni law it is unilateral disposition of property and as such not subject to the rules of contract.

55 At pages 450 and 451:

The Sharayi-ul-Islam which is the most authoritative text book of the Shia law, deals with wakf as a contract (aqd),....The Masalik-ul-Afhan a celebrated and authoritative commentary on the Sharayi-ul-Islam, as also the Jawahir-ul-Kalam another authoritative commentary on the same text book, throughout deals with wakf as a contract inter partes as distinguished from unilateral disposition of property.

56 Mahmood J. then refers to the Jami-ul-Shattat (Jamaa-ush-Shittat) in which it

is said "wakf is a contract needing offer and acceptance." In connexion with this passage and those which follow it, Mahmood J. makes the following observation:

But whilst thus generally expressing the necessity of the contractual formalities of offer and acceptance, the text goes on to explain how in some cases exceptions are to be made, and in dealing with these exceptions the author, meeting the difficulty which arises out of the word iqaa, which in English, means "declaration" or rather unilateral disposition of property, goes on to explain that-"The meaning of aqd, contract, here covers declarations (iqaa, unilateral dispositions)." But in thus extending the ordinary technical meaning of the word aqd (which means contract needing offer and acceptance), the learned author is anxious to explain that the extended meaning applies only to certain classes of wakf, and after dealing with the various opinions upon the subject, arrives at the conclusion that acceptance may be dispensed with in cases where such acceptance is impossible, such wakf being for public charities, such as a mosque, or maintenance of faqirs, that is to say, the general public.

57. At page 653 of the report there is a quotation from the Durus "a work of higher authority than the Jami-ul-Shattat" :

The fourth condition is acceptance which is correlative to offer when it is possible for those in whose favour the wakf has been made. Acceptance is not rendered necessary in the case of mendicants nor in the case of public charities because of the impossibility of securing acceptance.

58. Mahmood J. goes on to discuss the bearing of the rules which follow from this doctrine upon the question whether actual delivery by the wakif himself of the appropriated property to the mutwallis is essential to the validity of the wakf. He considers a number of other texts and states their effect. The most important conclusion to which these discussions lead is that actual delivery of possession by the wakif himself or by his permission is a condition precedent to the validity of wakf. Sir Wazir Hasan on behalf of the appellants in Appeal No. 239 of 1935, has strongly pressed this line of reasoning in support of the further proposition, that the wakif must divest himself of the dedicated property in so complete a sense, as to retain no benefit whatever to himself under the wakf. Mutwalli's salary according to Sir Wazir Hasan derives its legitimacy from the wakfnama, and is on the same footing as all other payments under the trust. The mut-walli is therefore as much a beneficiary as any cestui que trust. Baillie states the rule of Shia law thus : "If a person should make a settlement on himself it would not be valid" (Edn. 2, Part II, p. 218). The only way in which a mutwalli may consistently with the Shia law take a benefit under the wakf is that indicated in the Sharaya-ul-Islam- Baillie (Edn. 2, Part II) at page 219:

But if one should make an appropriation for the poor and should himself subsequently become poor, or for lawyers and himself become a lawyer, there is no objection to his participating in its benefits.

59. A wakif may not therefore expressly appoint himself mutwalli when any

remuneration has been made to attach to that office. That according to Sir Wazir Hasan is the full implication of the rule which is enshrined in the homely phrase, "a wakif may not eat out of the wakf." The ease in 54 LA. 3310 enunciated the following propositions. Under Shia law a deed of wakf is not valid unless possession has been given under it; the property must be entirely taken out of the wakif; where the wakif is to be the first mutwalli but there has been no mutation of the property into the name of wakif as mutwalli, the wakf is void, a wakif cannot, under the guise of salary, reserve to himself, a life-interest in a portion of the income in excess of what is assigned to future mutwallis, and could reasonably have been assigned to them. As pointed out by my learned brother, the question whether the wakf was void by reason of the reservation in the wakif's favour was one upon which their Lordships of the Judicial Committee observed that they had not had the assistance of the judgment of the High Court. Their Lordships' advice to His Majesty was therefore not based on this ground. Although this question was not decided, the observations of Sir John Wallis afford invaluable guidance. I would quote three passages. At page 39 of the report:

It seems clear in the present case that the settlor under colour of fixing her salary as mutwalli, was really reserving for her life-time a portion of the income or usufruct of the property far in excess of what was assigned in the deed to future mutawallis or could reasonably have been assigned to them. It was therefore in their Lordships' opinion a clear violation of the condition.

60. At page 41:

As regards the supplementary deed of wakf of 7th December 1897, in which the settlor included her remaining lands stated to be worth Rs. 1500 and cancelled the salary she had fixed herself for life in the former deed, adding "that is I have given " up the salary and included it in the wakf." Their Lordships are of opinion that if the deed had stopped there it might possibly have been treated as a fresh dedication of all the properties free from any reservation in her own favour, but after reciting her intention to go for haj and to make zearut (visit sacred places) the deed provides, Clause 17 : "That the said manager shall from time to time send money for expenses from the income of the wakf estate to me either at Mecca or to the place to which I shall direct him to send." This in their Lordships' opinion, amounts to a clear reservation of the right of wakif to draw money for the expenses of her pilgrimage in Mecca and to other non-wakf purposes, and therefore, also involve a breach of the fourth condition.

61 At page 40:

The rule that the settlor when mutwalli can take the salary fixed for mutwallis generally is really no exception, for in that case he takes in his capacity as mutwalli and not in his capacity as settlor, just as it is laid down a little further on (Baillie, Pt. 2, p. 218). "But if one should make an appropriation for the poor and should himself become poor, or for lawyers and himself become a lawyer, there is

no objection to his participating in its benefits"- that is to say as a poor man or a lawyer, not as a settlor. There is, in fact, in all these cases no reservation at all.

62. Ameer Ali in his *Mahomedan Law*, Edn. 4 vol. 1, at 519 sets out a translation of a passage from the *Jamaa-ush-Shittat* the concluding portion of which it would be well to quote:

The result is that the legality of the mutwalli eating out of the wakf depends on his quality as mutwalli and not upon the fact of the wakif being the mutwalli. And the jurists are agreed that where anything has been fixed for mutwallis generally, it is lawful for the wakif when he happens to be the mutwalli to take so much as is fixed for the other mutwallis; but I have nowhere seen that it has been held that a wakif, whilst he is the mutwalli can lawfully take for himself anything he likes out of the wakf simply because he is the mutwalli. The meaning of this is, that the retention of such a general power which would authorise his taking the largest share for himself, leaving almost nothing for the beneficiaries, is contradictory to the condition which requires a complete divestment of all proprietary right on the part of the wakif. This, of course, does not apply to a person who has made a wakf for the indigent and has himself become poor, or where he has made a wakf for the learned and has himself become learned. In such cases the wakif would be entitled to participate in the benefits of the wakf, and it makes no difference whether at the time of wakf, he is a fakir or learned, or whether he becomes so afterwards. But if he makes it a condition that he as a fakir should participate in it, it would not be valid. The result is that where a wakf is made for a general purpose (*Jihat-i-aamma*), a wakif may lawfully participate in it.

63. As a translation of the entire passage from the *Jamaa-ush-Shittat* has been placed on the record, and as its effect, in so far as that is material for our present purposes, has been summarised by my learned brother, it is unnecessary for me to say anything about the criticism of Ameer Ali's translation advanced by Sir Wazir Hasan. The conclusion arrived at by Ameer Ali that the wakif can lawfully take the allowance fixed for the mutwallis generally when he himself holds the office, is, in my opinion, a correct deduction from the texts, and the authority of the Judicial Committee of the Privy Council contained in the cases cited at the hearing of these appeals is not at variance with such a conclusion. It has however been argued as an alternative to the first branch of the first argument, that in the present case the share reserved by the wakif as mutwalli's salary for himself violates the rule that the salary reserved by the wakif for himself as mutwalli must be that which has been reserved for mutwallis generally, and such as could reasonably be reserved for them. It has been contended that the salary reserved for mutwallis generally that is for mutwallis as a class, is provided for by Clause 7 of the wakf-nama, and is two out of the ten shares into which the income of the wakf is divided. By Clause 6, however, as long as the towliat shall remain in the hands of the wakif or his descendants (which when read with Clause 3 means his son and the latter's descendants),

five out of the ten shares are to be set apart as the salary of the mutwalli. The argument has gone so far as to suggest that the wakif was in fact making a settlement for life upon himself in contravention of the Shia law and of Section 8 (b), Mussalman Wakf Validating Act, 1913. AIR 1927 2 (Privy Council) has already been noticed. It is sufficient to say here that in that case the wakif by the principal waqfnama reserved for herself a salary as mutwalli of Rs. 1500 a year for life out of the income of the wakf properties, valued in the deed at Rs. 19,000, and that after her death, each of two mutwallis was to receive no more than Rs. 180 per year. In AIR 1937 127 (Privy Council) the first clause of a wakfnama was in these terms:

During my life-time, the tauliat of the entire wakf properties, noted in Schedules 1 and 2, shall have concern with me personally. During my life-time, I shall keep the entire wakf properties in my possession and under my management as mutwalli and carry out the tauliat work. During my life-time no one shall have absolutely any power to interfere with and raise an objection regarding the right of tauliat or the management of the properties. I the mutwalli too shall spend (money) in whatever manner I would like.

64. With special reference to this clause, the Right Honourable Sir George Rankin expressing the judgment of their Lordships, said:

Agreeing as their Lordships do with the High Court that the powers given to the settlor by the wide language of the first clause, already quoted from the deed are not more than the powers of a mutwalli to be exercised free from control by a committee of management or other such body, they are of opinion that there is nothing contrary to Shia law in the terms of the deed, and that the wakf cannot be held to be invalid by reason of any failure to comply with the requirement that the settlor must divest himself of his proprietary right.

65. In addition to the reasons set out by my learned brother for holding that the wakf is not invalid by reason of the share-5/10ths of the income-reserved by the wakif for himself as mutwalli's remuneration, I would say that there is no absolute rule of law to indicate the maximum proportion of the total income of the wakf which it would be permissible for the wakif to reserve to himself as mutwalli's salary. Gross and glaring disproportion between the amount prescribed by the wakif as mutwalli's salary for himself-and that prescribed for future mutwallis would be always bad. But in case where the disproportion is not of that kind, the dividing line must be to some extent a question of fact, and may depend upon a variety of circumstances. In AIR 1933 107 (Oudh) Sir Wazir Hasan C.J. and Kisch J. negated the contention that the wakf was invalid because the mutwalli was reserving a benefit to herself in the garb of remuneration. In distinguishing the case in AIR 1927 2 (Privy Council) the learned Judges said:

It seems to me that in deciding whether a wakf is invalid on account of reservation of benefit by the wakif the facts of the particular case must be taken

into consideration. There are several points which distinguish the present case from the case that was under consideration by their Lordships. Firstly, in AIR 1927 2 (Privy Council) the wakf was not a wakf-alal-aulad, there were no beneficiaries and the wakf was made entirely for religious purposes. In the present case we are dealing with a wakf-alal-aulad created for the support of the members of the wakif's family. Secondly, in that case the wakif who appointed herself as the first mutwalli, reserved to herself a salary of Rs. 1500 per annum out of the income of the wakf property, the value of which was given in the deed as Rs. 19,000 only, whereas the future mutwallis (one for the mosque and one for the imambara) were to receive only Rs. 180 a year each. In the present case the property is valued at about one lakh, the annual net income is Rupees 7766 out of which the mutwalli has reserved to herself less than one-tenth. It is true that future mutwallis, who were to be the eldest of her male descendants from time to time were to receive only Rs. 300 per annum for discharging the duties of mutwalli, but it must be remembered that they would also be receiving a guzara under the deed of wakf. The scale of guzara fixed for the wakif's daughters was Rs. 300 per annum each, and the son's shares, namely equal shares in the residue left after paying the fixed allowances, charitable expenses etc. provided for in the deed, would be considerably more. In fact therefore the actual amount received by Mt. Azmatunnessa from the wakf property would be less than that received by subsequent mutwallis, at any rate for the first generation.

66. This case was carried in appeal to the Privy Council, and their Lordships of the Judicial Committee held that AIR 1927 2 (Privy Council) had been rightly distinguished by the Chief Court of Oudh: see AIR 1937 174 (Privy Council) . In the present case I am satisfied that the reservation of 5/10ths of the income as mut-walli's salary for the wakif and his descendants (which when read with Clause 3 means his son and his son's descendants) was not a subterfuge designed to secure a life settlement on the wakif himself. This was the salary generally fixed for all mutwallis in the line of descent from the wakif through his son, and as my learned brother has pointed out, the fact that another scale of remuneration has been generally fixed for another class of mutwallis, upon failure of this line is beside the point. After all the wakif's line through his son might never become extinct. Moreover the wakif was not appointing himself irrevocably a mutwalli for life, because Clause 3 of the wakfnama provides that tauliat is to remain in the wakif during his life-time for so long as his health permits and he desires to remain mutwalli. Finally as regards this point, the status in society of the wakif, of his son and of his son's descendants is a circumstance which, in my opinion, should be taken into consideration. The wakif was the son of the ex-king of Oudh. His son and his son's descendants would be persons in the direct and senior line of royal descent. Their position in society would be invested with a dignity which it would be impossible to uphold upon an income which might be ample for a mutwalli of less exalted station. Ideas of noblesse oblige would be a very real factor in determining the mode of living and

the scale of personal expenditure expected by the community in Princes and Princesses of this family.

67. Sir Wazir Hasan has asked us to indicate for the guidance of the Shia community, the general position under the Shia law of a wakf in which the wakif appoints himself the first mutwalli and reserves to himself a share of the profits of the dedicated property as mutwalli's remuneration. Generalisations about the law which tend to escape from the facts of a particular case are always hazardous. But I think I may say that upon this question there is authority both textual and judicial to warrant the following propositions : (1) A wakif may not reserve to him-self any benefit under the wakf that is as a beneficiary. (2) When any benefit is given to a class of persons, and the wakif becomes adventitiously a member of that class, he may partake of the benefit. (3) He may appoint himself mutwalli and reserve to himself a remuneration as mutwalli provided that is the remuneration reserved for mutwallis generally, and such as could reasonably be reserved for them. (4) He may not make a settlement for life upon himself under the guise of mutwalli's remuneration. (5) Gross disproportion between the remuneration reserved by the wakif for himself as mutwalli and the remuneration provided for subsequent mutwallis would ordinarily be evidence of an intention to participate as a beneficiary under the wakf.

68. The second argument is that unless the provisions of Mussalman Wakf Validating Act 1913 can be invoked to save this wakf, it would be invalid under the Shia law by reason of the fact that it does not effect a substantial present or concurrent dedication to religious, pious or charitable purposes. Clause 6 of the waqfnama reserves 5/10ths of the income as mutwalli's salary for the wakif and his descendants (which when read with Clause 3 means his son, and the descendants of his son). The same clause provides that out of the remainder only 2/5ths shall be set apart immediately for the expenses of the "mosque and Imambara and the expenses of Muharram, Chehellum and Nowehandi Majlises; that 2/5ths shall be divided amongst the wakif's heirs according to the Imamia law, and that 1/5th shall go to what may for the sake of convenience be called a reserve fund. It is contended that the only concur, rent dedication to purposes of a religious, pious or charitable nature which is to be found in the deed is the setting apart of 2/10ths of the total income for the expenses of the mosque and Imambara and the Moha-ram Chehellum and Nowehandi Majlises. This, it is said, is not a substantial dedication. As my learned brother has given sufficient reasons for rejecting this argument, I will confine myself here to a consideration of two cases upon which very strong reliance was placed by Sir Wazir Hasan. That the wakf in the present case was in the nature of a wakf-alal-aulad can hardly be questioned, and this circumstance has to be borne in mind when an examination is made of the facts in *Mohamed Ahsanullah v. Amarchand Kundu* ('90) 17 WB. 498 and AIR 1927 191 (Privy Council) In the former case, which was decided before the passing of the Mussalman Wakf Validating Act, 1913, property bearing a considerable income was made wakf by a deed which directed that a mosque in a dwelling house belonging to the wakif and two small

Madrassahs also in the wakif's dwelling houses, were to be supported, and the expenses of travellers were to be met in the manner which had become customary. The rest of the income was to be divided as salary of mutwallis who were to be drawn from members of the family, and as maintenance of other members of the family generation after generation. It was further provided that persons entitled to allowances would have no power to assign or charge them, and that creditors should, have no claim against them.

69. It was held that the gift was not a bona fide dedication of the property, and was only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable. In my opinion, there is no real parallel between the facts of that case and the facts of this. There is in the wakfnama under consideration no attempt to place the income reserved for members of the family beyond the reach of the creditors, or to impose any restraint on the alienation of the right to receive that income. The dedication of 2/10ths of income to the expenses of the mosque and Imambara and the expenses of Muharram Chehllum and Now-ohandi Majlises and the provision of a reserve fund which would inure in great measure to the benefit of these objects, constitutes in my opinion a substantial dedication to purposes of a religious, pious and charitable character. Lord Hobhouse delivering the judgment of the board in *Mohamed Ahsanullah v. Amarchand Kundu* ('90) 17 WB. 498 said that their Lordships were not attempting

to lay down any precise definition of what will constitute a valid wakf, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift.

70. The Mussalman Wakf Validating Act was passed in 1913 for the purpose of declaring the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants. The preamble and some provisions of the Act require to be set out. The Act says:

Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or oharitable purposes; and whereas it is expedient to remove such doubts; it is hereby enacted 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 where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support - during his life-time 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 purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

71. This Act came into force on 7th March 1913, but was held not to be retrospective, that is to say, it did not apply to wakfs created before that date. To give it retrospective effect, an Act was passed in 1930, called the Mussalman Wakf Validating Act, 1930 (32 of 1930). It came into force on 25th July 1930. The effect of it was that the Wakf Validating Act of 1913 applies also, from and after 25th July 1930 to wakfs created before 7th March 1913. AIR 1927 191 (Privy Council) was decided in 1927, before the Act of 1918 was made retrospective. A glance of the provisions of the wakfnama in that case would be sufficient to show how widely it differs from the deed under consideration in the present case. The wakfnama in AIR 1927 191 (Privy Council) provided inter alia: (1) That out of an annual expenditure of Rs. 1558, a sum of Rs. 1100 should be appropriated for the support of the settlor and his family and Rs. 312 for the support of needy dependants, and that Rs. 146 should be applied to purely charitable purposes. (2) That when the life annuities fell in the money allotted for them should be divided by the mutwalli among the surviving annuitants or be given in his discretion to some or one of them, or so much should be given by the mutwalli as he thought proper for purely charitable purposes. (3) That the office of mutwalli would devolve after the settlor's death on the settlor's descendants, and afterwards on his male agnates, and that while the office was so held the mutwalli was to get an annuity of Rs. 500 in addition to the mutwalli's salary of Rs. 240. That on failure of the settlor's descendants and male agnates an anjuman would become the mutwalli. (6) That upon the death of all the annuitants, the sums allotted to them would be spent on purely charitable purposes. It was held that the test of the validity of this wakf was, as laid down in Mohamed Ahsanullah v. Amarchand Kundu ('90) 17 WB. 498 and other cases, whether it constituted a substantial dedication to charity. In disposing of the appeal their Lordships stated that

the law as laid down by the Board is, that the properties must be substantially dedicated to charity, not as one of the learned Judges of the High Court has observed in passing orders on the application for leave to appeal, that the gift to charity should be substantial.

72. In my opinion this observation largely answers Sir Wazir Hasan's contention that 2/10ths of the income devoted to religious, pious and charitable purposes is too small to be substantial. It seems to me that looking at the provisions of the deed as a whole, it cannot be said that the settlor displayed an undue leaning towards himself and his family at the expense of the religious, pious and charitable purposes for which he was making provision. The third argument against the validity of the wakf calls for an examination of those provisions of the

wakfnama by which, what has been called a reserve fund, has been set up. In Clause 2 the wakif, after stating that he has constituted a mosque and Imambara at Khusro Manzil, directs as follows:

If at any time the Government purchases this building or for any reason this building falls down, then to the price of the land and the building should be added a further sum to the amount of five years income of the share which under Clauses 6 and 7 of this wakfnama will be set apart for the improvement of this wakf and a magnificent mosque and imambara should be built together at a suitable and selected place.

73. The relevant words in els. 6 and 7 are as follows:

Clause (6) ...and the remaining one share out of the said ten shares shall be set apart for the extension and improvement of the wakf so that from time to time, in consultation with the trustees immovable properties may therewith be purchased and included in this wakf.

Clause (7) ...and the remaining two parts shall be reserved for the extension and improvement of the wakf properties and therewith immovable properties shall be purchased and included in this wakf.

74. It is contended that there would be no appropriation to the wakf of the money in the reserve fund until it was applied to the building of a new mosque and imambara, or the acquisition of other immovable properties, for so long as the money lay idle, it would remain the property of the wakif, and therefore the settlor did not divest himself of it completely and unconditionally. This argument was sought to be supported by reference to certain passages in Baillie (Edn. 2, Part 2). At p. 218 the learned author states the fourth condition of a valid wakf under the Shia law thus:

It must be entirely taken out of the wakif or appropriator himself. So that, if the appropriation is restricted to a particular time, or made dependent on some quality of future occurrence, it is void.

75. At p. 220: "Appendages. First, the wakf or subject of appropriation is transferred so as to become the property of the mowkoof alehi ..." Sir Wazir Hasan has contended that the provision creating the reserve fund is not only bad in itself, but destroys the validity of the entire wakf. For this proposition he has cited AIR 1933 83 (Privy Council) . In that case a wakf was executed in respect of the whole of certain properties transferred to the wakif by her son. It was subsequently found that the transfer was invalid, and that the wakif was entitled in her own right to a one-third share in those properties. On a construction of the wakfnama, it was held that the wakif had no intention of making a wakf of her own share, and that the wakf failed as a whole. In my opinion the argument is not justified by the passages cited from, Baillie or by the ease just referred to, and I know of no rule of the Mahomedan law which prohibits a wakif either expressly or by implication, from setting aside a portion of the income of the

wakf for the purpose of improving and enlarging the corpus. Such a provision stands on the same footing as a direction to accumulate for the purpose of protecting the wakf property against unforeseen contingencies, and to hold that this measure of prudence would invalidate the endowment, would be to destroy at a stroke the majority of wakfs created by provident and far-seeing settlers. The intention of the settlor is reflected in the preamble to the wakfnama:

Having taken out the immovable properties mentioned in the schedule below from my ownership, I have for the sake of God included them in the wakf and I shall cause mutation of names to be effected in the records of the Government.

76. This is a declaration that the wakif is taking the property out of his own possession and making a change in the character of possession, a change such as to amount to a transfer of possession to himself as mut-walli. In AIR 1937 127 (Privy Council) it was laid down that a wakif can appoint himself the mutwalli of a wakf and in such a case change in the character of the possession amounts to transfer of the possession as required when the mutwalli appointed by the wakif is a person other than the wakif himself. In that case it was established that upon a true construction of the wakf the settlor had retained no interest to himself, and that on the evidence and by mutation of names he had before his death transferred the possession from himself as malik to himself and another as mutwallis and it was held that the wakf was valid under the Shia law.

77. The findings of fact expressed by my learned brother, in which I entirely concur, are that such a change in the character of possession was indeed made in the present case. The moment this was done the entire property, both corpus and income, became impressed with the trust. That share of the income which was to be accumulated was as much an asset of the wakf as was the corpus itself. The future application of this fund to the erection of a mosque and Imambara or its investment in other immovable properties would amount to no more than the conversion of one form of wealth, money into another form of wealth, land and buildings. It was not a future appropriation, but a present appropriation to future uses which would inure to the benefit of the wakf. Ameer Ali (Edn. 4 Vol. I at p. 481) says:

Regarding erections on wakf lands, the following rules are applicable. If the mutwalli of the wakf erects the building, with the property of the wakf or the income of the trust property, the building becomes the property of the wakf, whether the erection be for the wakf or for himself, or whether it was erected generally without any specific purpose....

78. I am satisfied that setting up of the reserve fund in no way affects the validity of the wakf.

79. The next argument is that if the wakf is invalid on the principles enunciated by the Privy Council in *Mohamed Ahsanullah v. Amarchand Kundu* ("90) 17 WB. 498 *Abul Fata v. Rasamaya Dhur Chowdhri* ("95) 22 WB. 619: 22 I.A. 76 and AIR 1927 191 (Privy Council) then the Wakf Validating Act, 1913, would not save it

because the proviso to S.S has not been satisfied. The proviso requires an ultimate gift over after the extinction of the family children or descendants of the wakif, expressly or impliedly for the poor or other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. It is contended that the ultimate gift over in the present case is (i) less than the entire available fund (ii) too remote, and (iii) too indefinite.

80. Under Clause 7 of the wakfnama the position as to allocation of the income upon failure of the wakif's descendants would be as follows: Mutwalli's salary 2/10ths; Mosque and Imambara 3/10ths; Reserve fund for the extension and improvement of the wakf properties 7/20ths; "Kar-i-khair" (translated as "proper charitable acts") 3/20ths. The result is that 9/20ths of the income would be absorbed by the mosque and Imambara and by proper charitable acts, and 7/20ths would go into the reserve fund, the ultimate benefit of which would inure to these self-same objects. The entire available fund is thus seen to be dedicated to "religious, pious or charitable purposes of a permanent nature." Section 4 expressly provides that a wakf will not be invalid by reason of this ultimate gift over being postponed until after the extinction of the "family, children or descendants" of the wakif. Now it has not been disputed that the word "children" in the phrase, "If no one of my children remains" in Clause 7 means descendants entitled to inherit, and that being so it is clear, that the gift over is not too remote.

81. The next point taken was that "proper charitable acts" (Kar-i-khair) relates to an object which is too indefinite and in support of this contention a passage was cited from Baillie (Edn. 2) p. 217:

If a man should make an appropriation without mentioning its objects the appropriation would be void. So also where the objects are not distinctly specified, as if he should say, "For one of these two" or "for one of the two Musheds or two Fureeks, the whole would be void."

82. The principle has been in my opinion correctly interpreted by Sir Dinshah Mulla in his "Principles of Mahomedan Law" (Edn. 11), Article 146 at page 152:

The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty. But it is not necessary that the objects should be named.

83. This exposition is of the utmost importance; if the objects of the wakf are indicated with reasonable certainty it is not necessary that they should be named. The nearest English rendering of the expression "Kar-i-khair" would be "works of charity." The connotation of "Kar-i-khair" includes almsgiving, or liberality to the poor and as my learned brother has pointed out the prime concern of Muslim jurists when dealing with wakf is benefit to the poor. In this view of the matter the principle laid down in (1804-05) *Morice v. Bishop of Durham* 1804 10 Ves. 521 would not be attracted. In *Runchordas Vandrawandas v. Parvatibai* ("99) 23 Bom. 725 a devise by a Hindu to "dharam" was held to be

void for uncertainty. Sir Richard Couch expressing the judgment of their Lordships of the Judicial Committee applied the principle laid down in (1804-05) *Morice v. Bishop of Durham* 1804 10 Ves. 521 and quoted the following passage from the judgment of Lord Eldon:

As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the Court, or if the trustee dies the Court itself can execute the trust - a trust therefore which in case of maladministration could be reformed and a due administration directed, and then, unless the subject and objects can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct due administration.

84. In (1804-05) *Morice v. Bishop of Durham* 1804 10 Ves. 521 a bequest had been made in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, and it was held that the trust failed because it was too indefinite. In *Runchordas Vandrawandas v. Parvatibai* ("99) 23 Bom. 725 their Lordships pointed out that in Wilson's Dictionary "dharam" is defined to be law, virtue, legal or moral duty. It was accordingly held that the objects which would be considered to be meant by that word were too vague and uncertain for the administration of them to be under control. In my opinion it would not be right to condemn a gift for "Kar-i-khair" in a deed of Mussalman wakf as being on the same footing as a gift for "dharam." The objects of the donor's bounty in the case of "dharam"-if by that expression is to be understood the meaning given to it in Wilson's Dictionary- are as vague and indeterminate as it is possible for such objects to be, whereas in the case of "Kar-i-khair" in a wakfnama they are possible of ascertainment by reference to the principles of Mahomedan law. In *Sheik Ramzan v. Mt. Rahmani* ("32) 19 AIR 1932 Oudh 71 a deed of wakf contained the direction "religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul." It was held that the wakf satisfied the requirements of the proviso to Section 3, Mussalman Wakf Validating Act, 1913, and that the fact that there was no specification in the deed itself of such religious and charitable objects did not render the dedication vague. Such objects could be ascertained by reference to the texts of Mahomedan law and the matter related to the administration and not to the construction of the wakf. This decision was in effect overruled by a Pull Bench of the Oudh Court (Hamilton and Radha Krishna JJ., Ziaul Hasan J, dissenting) in AIR 1940 324 (Oudh) It was held by the majority of the Court that a wakf which described the ultimate object of the benefit as "charitable purposes highly commendable according to Hanafi School" was invalid on the ground of vagueness and uncertainty having regard to the decision of the Privy Council in *Runchordas Vandrawandas v. Parvatibai* ("99) 23 Bom. 725.

85. In his dissenting judgment, Ziaul Hasan J. expressed the view that the objects of the wakf were easily ascertainable and there was no uncertainty about

them. He pointed out that *Runchordas Vandrawandas v. Parvatibai* ('99) 23 Bom. 725 was a case which dealt with a Hindu disposition, and that there was not a word in their Lordships' judgment which could show that their Lordships were laying down a general principle applicable to Mussalman wakfs also. He also observed that the question would have to be decided in accordance with Muslim law which had not been altered by the Mussalman Wakf Validating Act or by any other legislative enactment. With great respect to the judgment of the majority in that case, I am constrained, after careful consideration, to adopt the reasoning of Ziaul Hasan J. Wakf postulates charity, and to hold that there is little or no difference between "Kar-i-khair" in a Mussalman deed of wakf and "dharam" in a Hindu will would be to lose sight of what JRssel, M.R. said in *Southwell v. Bowditch* (1876) 1 C.P.D. 374.

There is no more vicious line of argument than of comparing one contract with another, and saying it differs very little; you arrive ultimately at identifying wholly different contracts.

86. Ameer Ali (Edn. 4, vol. 1 at page 414) has stated the entire matter thus:

Mere vagueness or uncertainty will not lead to the failure of a wakf, for, in such a case the law does itself supply the defect by declaring that the trust should be in favour of such objects as approach nearest in character to the intended object of the wakf; or even when that is not expressed, be applied to the support of the poor and needy....

The poor form, by necessary implication of the law, the ultimate beneficiaries of every wakf created in favour of individuals or the descendants of the wakif. Where, therefore, the primary object fails, such failure instead of voiding the wakf "only accelerates" the ultimate application.

87. I am of the opinion that if the expression "Kar-i-khair" does not indeed indicate the objects of bounty intended by the wakif with sufficient certainty, the doctrine of cypres could be invoked. As stated by my learned brother, there is in the present case an overriding intention in favour of charity on failure of the settlor's heirs. This is manifest in Clause 7 of the deed, the effect of which is to dedicate 9/20ths of the entire income to the religious, pious and charitable objects represented by the mosque and imambara, and implied in the expression, "Kar-i-khair" while deflecting 7/20ths into the reserve fund, which, it should be repeated, would again inure to the benefit of these self-same objects. Sir Dinshah Mulla in his "Principles of Mahomedan law" (Edn. 11) states the doctrine of cypres in Article 146 H:

Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed.

88. Mr. Tyabji in Edn. 3 of his "Muhammadian law," (published in 1940) has given

close consideration to the texts of Mussalman law and to judicial decisions in his notes under Article 481. I would conclude what I have to say on this topic by quoting the following from the learned author's discourse:

The principle underlying the doctrine of cypres is deeply rooted in Muslim law.

Under English law expressions which are too wide (such as "philanthropic" or "benevolent purposes") by their vagueness and uncertainty make the whole bequest invalid. Under Muslim law, if the wider expression includes purposes which are valid objects of wakf, the valid objects prevail, the rest are rejected : the wider expression is cut down and given effect to only to the extent to which it includes valid objects of wakf.

89. The last argument brought to bear against the validity of the wakf related to the prior lease of some of the wakf properties which had been granted by the settlor to Saheba Khatun. It was contended that the lease made the wakf void in Shia law, firstly, because the appropriation of a portion of the corpus was postponed until the expiry of the lease, and secondly because in any case the reversion remaining in the wakif and his right to receive rent from an intermediate lessee could not ever be mowkoof (thing appropriated). In support of this-argument, the conditions of a wakf according, to Shia law were adverted to, and reference" was made to Baillie (Edn. a) Part II at p. 213 where the four main conditions are set out:

First, conditions that relate to the mowkoof, or thing appropriated, which are also of four kinds. It must be a substance, the property of the appro-priator, capable of being delivered. Hence the wakf of anything which is not in ayn or distinctly specified, or deyn or indeterminate things is not valid.

90. The argument was carried to the length of maintaining that in Shia law there can be no wakf of anything which is not capable of physical possession. As this contention has been repelled in the judgment of my learned brother by reasons which do not require repetition, I need only refer to the case in AIR 1938 184 (Privy Council) In that Case a testator had by his will made certain property wakf for the purpose of a sarai but had directed that the income of two buildings included in the dedication should be given for life to a certain lady and her son, and to another person respectively. The language of the judgment of their Lordships, a portion of which has already been quoted by my learned brother, is of such importance to the present question that I would repeat it. The Right Honourable Sir George Renkin delivering the judgment of the Board said:

If the will can be read as intending that on the death of the testator these two properties should become "wakf" it would be in no way unlawful that a life interest in the usufruct should be reserved for the beneficiaries abovenamed. On the other hand, a direction that property should become wakf after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedication inter vivos. "If one should say I have appropriated when the beginning of the month has come...the appropriation would not be

valid." (Shuraya-ool-Islam. Baillie, Vol. II p. 218). Their Lordships recognise that the decision in *Baker Ali Khan v. Anjuman Ara Begum* ("03) 25 All. 236 which permits a Shia to create a wakf by will, is itself a mitigation of the rigour of this principle, but they are not of opinion that the principle is abrogated for all purposes in the case of a testamentary disposition, nor do they think it can be confined to cases where the passing of the property to the endowment is made to depend upon an event which is problematical as well as future. On these points they are not in agreement with the observations made in *Muhammad Ahsan v. Umardaraz* ("06) 28 All. 633 hile not disposed to put a narrow or unduly technical construction of this will, upon a careful consideration of the language used by the testator and of the substance and effect of his dispositions, their Lordships find themselves unable to hold that he intended either of the two properties now in question to become wakf property until the tenant for life had died or there had been a sale under the powers conferred by the will.

91. This enunciation of the law brings into relief the extent to which an interest in remainder given by will may in Shia law be the subject of wakf. Be it remembered that in this case there was really no immediate appropriation of the corpus in question, since the gift was a testamentary one. In the present case we have an immediate appropriation of property in the actual possession, presumably, of tenants who were paying rent to a lessee from the settlor, the latter being at the time of the dedication under a contractual liability to pay rent to the wakif. What is immediately appropriated as corpus is the property, to which attaches the right to receive in the present a smaller rent from one person, the lessee, and to receive in the future a larger rent from other persons, the tenants who happen to be in actual or khas possession. The delivery of seisin is effected by vesting in the endowment the right to receive rent. The following passage from *Ameer Ali* (4th Ed.) Vol. I p. 499 which deals with iqbaz or delivery of possession is instructive:

It is only necessary to explain that under the condition of iqbaz actual delivery of possession is not requisite. What is required is an indication that the wakif has divested himself of his proprietary interest in the subject of the wakf. If the property is immovable, delivery of the title deeds would satisfy the requirements of the law. If it is a house the delivery of the key, or if they are Government securities in deposit with any Bank, the delivery of the deposit receipt, or if it is a business, a transfer in the books, as in the case of a gift, would be a sufficient transmutation of possession.

92. No authority whatever has been cited to substantiate the contention that the reversion and the right to receive rent which were vested in the settlor at the time of the wakf could not constitute mowkoof. It is hardly necessary to observe that such a proposition would have the effect of invalidating all wakfs by Shias of immovable property in which an intermediate tenancy intervened between the proprietor and the tenant in actual physical possession. This disposes of all the arguments directed against the validity of the wakf.