
(1957) 03 AHC CK 0026
In the Allahabad High Court
Case No : First Appeal No. 404 of 1945

Rashidunnissa and Another	Vs	APPELLANT
Ata Rasool		RESPONDENT

Date of Decision : 25-03-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 2
Evidence Act, 1872 — Section 135

Citation : AIR 1958 All 67

Hon'ble Judges : Srivastava, J; Mukerji, J

Bench : Division Bench

Advocate : M.H. Beg, for the Appellant; Sadiq Ali, for the Respondent

Final Decision : Dismissed

Judgement

Srivastava, J.—This is a plaintiffs' appeal that arises out of a suit for a declaration and accounts. Sheikh Amanat Rasul created a waqf as permitted by the Muslim Waqf Validating Act (Act no. VI of 1913), on the 25th of February 1931. By the waqf deed of that date he dedicated the property in suit in perpetuity and the waqf was described by him as "waqf alal nafs khud wa alal ayal wa aulad Khud" (waqf for my own self, for my ayal and for my aulad).

He appointed himself as the first mutwalli but reserved to himself the right of spending the income of the dedicated property, after making certain payments to specified charities in any way, he liked for his own support and maintenance and that of his descendants. He provided that after him, his son Ata Rasul would become the mutwalli and then laid down a line of succession for subsequent mutwallis.

He further reserved to himself the right to make additions and subtractions to the conditions of the waqf in his own life time, and provided that if the line of the persons who were to benefit from the waqf at any time becomes extinct the dedicated property would vest in the Government and its income would be spent

for public good and for the maintenance of his relations. By a subsequent deed dated the 12th of March 1932, he amended condition no. 6 of the original waqf in a certain manner.

He subsequently died leaving Ata Rasul the defendant as his son, a daughter Smt. Sughra Begam by his first wife, two daughters Smt. Aisha Begam and Smt. Rabiya Khatun from his second wife and Smt. Rashid-un-nisa, his second wife. His first wife had died in his life time. Ata Rasul his son succeeded him as the rnutwalli of the dedicated property on his death.

His wife Smt. Rashid-un-nisa and his daughter by her Smt. Aisha Begam then filed the suit out of which this appeal has arisen claiming a declaration that they were entitled to their shares out of the profits of the dedicated property which amounted to 12 sahamas out of 40 sahamas. They also claimed that the defendant mutwalli be ordered to render accounts of the profits of the waqf property. They valued their claim tentatively at Rs. 200 and Said that a decree may be awarded to them in respect of whatever may be found to be actually due to them after the rendition of accounts.

2. The defendant contested the suit. He admitted that his father Amanat Rasool had executed a deed of waqf on the 25th February 1931, but said that in that deed he had reserved his right during his own life time to change the conditions of the waqf. By the supplementary deed of 12th March 1932, he had changed the conditions. On account of that change the defendant became entitled after paying the Government revenue and spending specified amounts for charitable purposes, to retain the entire income of the dedicated property and was not bound either to render accounts to any one else or to pay to any one else any portion of the income.

He further pleaded that the plaintiff No. 1 Smt. Rashid-un-nisa was in any case not entitled to sue as she was not one of the persons who were entitled to any benefits out of the income of the dedicated property. He questioned the plaintiffs' right to claim accounts and said that by separate deeds Amanant Rasul had made provisions for all his children and his wife.

3. In the plaint the plaintiffs had made a passing reference to the amending deed of 1932 and had pleaded that the amendment was invalid and contrary to Mohammedan Law and could not affect the rights of the plaintiffs as beneficiaries of the waqf. When, however, they found that in his written statement the defendant had based his case principally on that document they filed an application in which they said that Amanant Rasul had never executed the supplementary deed validly.

Some interested persons had obtained that deed by practising fraud on him and representing wrong facts to him. He had not understood whether the nature of the waqf deed would be altered or not, nor had he understood what the effect of the amendment would be on the original waqf deed. They also said that the amendment amounted to an alteration of the objects of the waqf and the

extinction of the rights of the beneficiaries for which there was no authority under the law or under the waqf deed. The amendment was therefore unenforceable and was void on account of vagueness and uncertainty.

4. On these pleadings Six issues were framed in the case. They were:--

"(1) Are the plaintiffs beneficiaries under the original deed of waqf and entitled to sue?

(2) Is the supplementary deed of waqf void on account of vagueness, uncertainty and because it alters and conceals the original deed of waqf? Was its execution beyond the competence of the waqif?

(3) Did the waqif profess to execute the supplementary deed of waqf in pursuance of any rights reserved in the original deed of waqf. If not what is its effect on the validity of the supplementary deed of waqf?

(4) Did the waqif execute the supplementary deed of waqf after understanding its effects or was any fraud practised on him?

(5) Are the plaintiffs entitled to accounts as against the defendant?

(6) To what relief, if any, are the plaintiffs entitled?"

The learned civil Judge who tried the suit held under issue No. 1 that the plaintiff No. 1 Smt. Rashid-un-nisa could claim to be a beneficiary of the waqf because she fell under the term "ayal". The other plaintiff Smt. Aisha Begam was a beneficiary because She was included in the term "aulad". He did not accept the contention that the plaintiff No. 1 had lost her rights as a beneficiary because she had remarried after the death of Amanat Rasul.

His findings under issues Nos. 2 and 3 were that the supplementary deed of amendment had been validly executed in exercise of the powers reserved by Amanat Rasul in the original deed. As the amendment left unaffected the principal clauses and the main purposes of the waqf, it was a valid one. He decided issue No. 4 in the negative and held under issue No. 5 that on account of the amendment of the original deed of waqf by the supplementary deed the plaintiff could not call for accounts of the profits of the waqf property from the defendant. As a result of these findings he dismissed the suit and held that the plaintiffs were not entitled to any of the reliefs claimed.

5. Before the hearing of the case had started before the learned civil Judge the counsel for the plaintiffs had admitted the execution of all the documents filed with the exception of the supplementary deed of waqf. The defendant's counsel had admitted the execution of all the documents filed without exception. The plaintiffs did not lead any oral evidence in the first instance. The defendant examined witnesses who proved the execution of the supplementary deed. When the defendant's evidence was closed the plaintiffs' counsel wanted to produce oral evidence in rebuttal. This was not allowed.

6. Against the order dismissing the suit the plaintiffs have come up in appeal and two contentions have been pressed on their behalf. It is urged in the first place that the execution of the supplementary deed cannot be said to have been satisfactorily established because the plaintiffs were not permitted to produce evidence in rebuttal of the evidence produced by the defendant to prove the execution of the document.

The second contention is that in any case even if the supplementary deed is assumed to have been validly executed it was in law void and inoperative and could not affect in any material manner the original deed of waqf executed by Amanat Rasul. If the plaintiffs were entitled to the reliefs they claimed on the basis of the original deed of waqf they could not have been deprived of those reliefs on account of the supplementary deed.

7. Learned counsel for the defendant supported the view of the learned civil Judge that on account of the supplementary deed of waqf the original waqf deed stood altered and the plaintiffs could not claim any accounts from the defendant or any share out of the income of the dedicated property. He also urged that in any case plaintiff No. 1 could not claim any benefit under the waqf.

The view of the learned civil Judge that she was included in the term "ayal" was not justified and even if she was originally included in that term on her re-marriage she definitely came out of that category. He also urged that the plaintiff's claim for account was in any case not maintainable as under the Mohammedan Law a beneficiary has no right to Sue a mut-walli for accounts.

8. There does not appear to be much force in the first contention of the plaintiffs' counsel. The existence of the supplementary deed of waqf had been mentioned by them in their plaint and if it was their case that the deed stood vitiated on account of any fraud or misrepresentation it was for them to prove their allegations. They did not lead any evidence in the first instance nor had they reserved any right to produce any evidence in rebuttal after the defendant's evidence had been closed.

Therefore, they could not have been allowed to produce evidence to prove the fraud or mis-representation which they had alleged but had not proved. In the absence of any evidence on the point the learned civil Judge must be held to have been quite justified in his view that the supplementary deed had been proved to have been duly executed by the waqif after he had fully understood its effects and was not vitiated by any fraud or mis-representation.

9. In order that the effect of the Supplementary deed on the original waqf deed may be appreciated reference must be made to some of the terms of that deed.

10. A perusal of the original deed of waqf shows that after describing himself as the owner of the property and mentioning that he was indebted to the extent of Rs. 1,250, Amanat Rasul said:--

"I have of my own free will and accord, while in a sound state of my body and

mind and in enjoyment of my five senses, without any compulsion or coercion, in order to gain spiritual benefit in the next world, and taking into consideration other circumstances and my own betterment, made a perpetual waqf alal nafs khud wa ala ayal wa aulad khud (for my own benefit and that of my ayal and descendants) in accordance with the Mohammadan Law, under the provisions of Act No. VI of 1913, of my entire property specified at the foot hereof"

He then went on to lay down the eight conditions of the waqf. Only four of them need be quoted:--

"(1) So long as I am alive, I, the executant, shall remain the mutwalli and manager in possession and appropriation of the waqf property. After payment of the Government revenue, village expenses and the debt aforesaid I shall continue to spend Rs. 150 annually on charitable purposes mentioned at the foot hereof and rest of the income on the maintenance of my dependents and my own self according to my choice, and no one shall have any power to ask for rendition of accounts.

(5) After my death Ata Rasul, my son, and his male descendants, generation after generation, and in case of there not being alive or not being born a male issue to him his female issue and her descendants, generation after generation, shall remain mutwalli and manager of the waqf property, in accordance with the aforesaid conditions.

The said son and after him the eldest issue of each mutwalli or the one whom the mutwalli likes to appoint during his period of mut-walliship shall become the mutwalli. If the said son dies childless or his line of descent becomes totally extinct then under such circumstances the male issue of my daughters shall subject to those conditions be the mutwalli of the aforesaid property.

(6) After my death, during the terms of mutwalliship of each mutwalli, after payment of the Government revenue and village expenses Rs. 150 out of the income of the waqf property shall be spent annually on charitable purposes mentioned in para. No. 1. After defraying these expenses the income left shall be distributed amongst all the persons entitled in accordance with their shares under the Mohammadan Law.

Accordingly it shall be the duty of each mutwalli of the waqf during the term of his office as a mutwalli, to distribute the balance of the income, after defraying the said two expenses amongst all the persons entitled in accordance with their shares under the Mohammadan Law. In case any mutwalli does not pay to any one entitled, his share, then the person entitled shall have power to realise his share by seeking remedy according to law.

(7) If during my life time, I, the executant, may think it proper to have any additions or subtractions made in the conditions of this deed of waqf, I shall be competent to have it done by means of a separate writing."

11. In the supplementary deed of amendment which Amanat Rasul executed, he

said that by inadvertence he had omitted to mention certain words in the original deed and provided that in condition No. (6) of the original deed the words "wa Ata Rasul pisa mazkur ke" should be read, after the words "Yen ke bad mere". As a result of this amendment the opening sentence of condition No. (6) in deed of waqf will stand like this:--

(6) "After my death and that of Ata Rasul my son above mentioned, during the term of mutwalliship of each mutwalli after payment of the Government revenue and village expenses etc.," .

12. It will be noted that under the first condition the executant was to be the first mutwalli and had undertaken during his own life-time to spend a part of the income on charity and had agreed that the rest would be utilised for his own maintenance and that of his dependents according to his own choice. He was not to be accountable to any one else in respect of it. By the fifth condition he provided for the appointment of mutwallis after his death and laid down specifically that his son Ata Rasul was to succeed as mutwalli as soon as he died.

The sixth condition, as it originally stood, laid down what the mutawallis who succeeded the original wakif were to do in respect of the income of the properties of the waqf. The waqf had provided for what he was himself to do during his own mutwalliship in the first condition. The second condition related only to the appointment of the mutwallis and did not lay down what the mutwallis were to do. In respect of the persons Succeeding the original waqif as a mutwalli, therefore, it became necessary to lay down as to how they were to deal with the income of the waqf.

In the absence of this condition, the very object of the waqf was likely to be defeated, because in that case the succeeding mutwallis would not have been bound to spend any amount on charity or to pay any sum to the descendants and dependants of the waqif for whose benefit the waqf was being created. The first condition thus provided for what was to happen in the lifetime of the waqif himself and the sixth condition came into operation as soon as he was dead. The waqf deed, as it originally stood, therefore provided for all contingencies.

13. By the amending words which were introduced in condition No. 6 of the original deed by the supplementary deed of 1932, the coming into force of the sixth clause was postponed for one life time, i.e., the life time of the second mutwalli Ata Rasul, the son of the original waqif. The result of the amendment therefore was that the provision as to what was to happen during the life time of the first mutwalli (the original waqif) remained intact.

The condition that Ata Rasul was to be the second mutwalli and was to succeed his lather on the death of the latter also remained; no provision however remained as to what Ata Rasul was to do during his period of mutwalliship, i.e., during his own life time. He was not bound by condition No. 1 because it related to the original waqif only. Condition No. 5 did not provide as to what he was to do. That only provided that he would succeed his father as a mutwalli. Condition

No. 6 was also not to apply to him, and was to come into force only when he died.

During his own mutwalliship, therefore, under the terms of the amended waqf deed Ata Rasul was not bound to spend any part of the income of the waqf property on charity or to give anything out of the income to any of the persons for whom the waqf was being created. Though he was to remain the mutwalli that was only to be in name. He could do anything he liked with the income of waqf property and could spend it even for purposes which were not valid or permissible according to Moham-madan Law.

14. Learned counsel for the plaintiff-appellants contends that the amendment introduced by the supplementary deed is really void and unenforceable. It should be ignored and the original waqf deed should be considered to have remained unaffected by the amendment. He attacks the amendment on two grounds. The first contention is that the amendment if upheld will result in the nullification of the objects of the waqf. It really puts Ata Rasul in a position better than the executant of the waqf himself.

The executant was bound to spend at least Rs. 150 on charity and had also undertaken to maintain himself and his dependants. Ata Rasul is not bound to do either of these things. By the first condition, the executant in a way created a life interest in the income of the waqf for himself. By the amendment he created another life estate, in some respects better than the first one, in favour of Ata Rasul.

The creation of such successive life estates, it is urged, is not permissible in Mohammedan Law. As the amendment is likely to defeat the very object of the wakf it must be deemed to be void and the original wakf must be allowed to stand as it was created. His second contention is that in condition No. 7 the wakif had reserved to himself the right to add to or subtract from the conditions of the deed of wakf. He had not purported to execute the supplementary deed of amendment in exercise of the reserved rights.

In the supplementary deed there was no mention at all of condition (7) of the original wakf deed. The reason which Amanat Rasul had put forward in the supplementary deed for introducing the amendment in condition (6) is that the words he wanted to introduce had been omitted and had not been put in the original condition by inadvertence. Thus, though he had reserved a power of amending the conditions the amendment had not been made in exercise of that power. But even if we concede that the amendment had been made in exercise of the reserved power, the reservation had been made only for amending the conditions of the wakf. No reservation had been made nor was it permissible in law to make a reservation for changing the objects of the wakf.

The amendment really affected the objects of the wakf and was not an amendment of the conditions of the wakf only: The object of the wakf was that a part of the income of the wakf property should be spent on specified charities

and that the remainder should be utilised for the maintenance of the descendants and dependents of the wakf. Both these object"s were likely to be defeated if the amendment was allowed to stand. In exercise of the power reserved by the wakf under condition (7) of the wakf therefore this alteration in the objects of the wakf could not be made.

15. Both the contentions of the learned counsel appear to us to be well-founded. At one time there was a controversy as to whether a wakif while creating a wakf could reserve a life interest for his own benefit. It is now agreed that under Hanafi Law, the wakif may provide for his maintenance out of the income of the wakf property and may if he wishes reserve even the whole income for himself for his own life time.

The Bombay High Court in the case of Abdul Karim Adenwalla Vs. Rahimabai, tried to make a distinction between the reservation by the wakif of a life interest in the income of. the trust property and his securing to himself for his own maintenance the income of the trust property. It held that though the latter was justified, the former was not.

When the question came up in this Court for consideration in the case of Faqir Mohammad Vs. Mt. Abda Khatoon and Others, , a difference of opinion arose between the two judges who were dealing with the case. Desai, J. agreed with the Bombay view while Malik C. J. was not inclined to share that view and appeared to be of, opinion that it was open to the wakif to reserve for himself the entire income without undertaking to spend it for his own maintenance or Support.

In the case of Mohammad Sabir Ali Vs. Tahir Ali and Others, , a Bench of this Court has preferred the view of Chief Justice Malik. The reservation of the life interest which was being dealt with in those cases, was, however, the reservation of the life interest for the benefit of the wakif, himself. In view of what has been laid down in the last mentioned case such a reservation must be held to be valid. That only means that the first condition of the waqf deed in question is in accordance with law. There is nothing in that case which can permit the reservation of the income of the wakf for the benefit of any person other than the wakif for the period of his life.

It is well known that the Hanafi School of Mohammedan Law does not look with favour on the creation of successive life estates. There appears to be no warrant in that law for the creation of a life estate of the kind which has been created by Amanat Rasul in the present case in favour of his son Ata Rasul by the amending deed of 1932. As has been observed by Sri K.P. Saxena in his well known treatise on Muslim Law, 1937 edition, at page 623 :

"The dedicator may also validly reserve a right to use the usufruct of the wakf property in any way he likes during his life-time, but such a condition, if imposed after his death in favour of another mutwalli, is unlawful."

No decided case or provision of. Mohammedan Law has been brought to our notice which can justify the creation of such a second life estate.

16. There also appears to be much force in the contention that if the amendment is given effect the very object of the wakf is likely to be defeated. The wakf was created so that some amount out of the income of the wakf property may be spent on specified charities and the remainder Should be utilised for the maintenance of the Aulad and Ayal of the wakif.

The amendment which Amanat Rasul tried to introduce ignored both these objects. He practically tried to give to Ata Rasul a right to do whatever he liked with the income of the wakf property during his own lifetime. He is not bound to spend any amount on charity or on the maintenance of the aulad and aulad of the wakif. He can, if he likes, spend the whole amount for purpose's wholly unconnected with the wakf. If he does so, no one can raise any objection.

17. The learned counsel is also correct when he says that the amendment has not been made in exercise of the rights reserved in condition No. 7 of the original wakf deed, but has been sought to be introduced as if an inadvertent omission was being rectified. The right reserved in condition (7) was only a limited right to alter the conditions of the wakf deed.

It did not permit the dedicator to change the objects of the wakf or to withdraw any part of the dedicated property or any part of the income of that property from the purpose for which the wakf had been created and to make a gift of the same to any person for his own life-time. The right reserved by the wakif, therefore, did not permit him to change the terms of the wakf-deed in such a way as to make Ata Rasul entitled to enjoy the usufruct of the property as if it had not been dedicated at all.

18. The learned counsel for the defendant-respondent tried to defend the amending clause by urging that Ata Rasul was one of the descendants of the wakif. The wakf had been created for the benefit of the descendants of the wakif and it was open to the wakif, particularly in view of the powers he had reserved to himself to alter the beneficiaries either by adding to their number or ignoring some or increasing or reducing the shares of the others.

The wakif could, therefore, provide that the entire income of the wakf property should go to his Son to the exclusion of his other descendants. He had made other provisions for his other descendants. In spite of the amendment Ata Rasul did not cease to be mutwalli and as a mutwalli he was bound by the terms of the wakf deed. He could not, therefore, refuse to spend Rs. 150/- a year on the specified charities as laid down in the wakf deed.

It was only the rest of the income that he could spend on himself, instead of distributing it among the other descendants or dependants of the wakif. The amendment did not therefore, materially affect the object of the wakf and cannot on that account be held to be invalid. The wakif may not have expressly said in

the supplementary deed that he was making the amendment in exercise of the powers he had reserved. But that does not mean that he was not using those reserved powers.

19. The defence appears to us to be essentially a weak one. If the wakif did not say that he was making the amendment in exercise of his reserved powers how can it be said that he was exercising those powers while executing the supplementary deed. As has already been shown, the amendment is not really as innocuous as the learned counsel for the defendant would like to make it appear.

It does not appear to be a case of increasing the shares of one of the beneficiaries by reducing those of the others. In effect the amendment creates a second life interest in favour of Ata Rasul, and permits him to dis-regard both the objects for which the wakf had been created. It in a way suspends the operation of the wakf during the life-time of Ata Rasul, and practically speaking puts Ata Rasul in a position better than the wakif himself.

20. We, are, therefore, of opinion that the amendment cannot be upheld as having been validly made and the defendant cannot be permitted on its basis to claim that he is entitled to enjoy the entire income of the waqf property as long as he is alive and to deprive the other beneficiaries of their shares. The waqf must be administered as provided for in the original waqf deed and the amendment must be ignored.

21. The purpose for which the original waqf deed was executed was the maintenance of the wakif himself, his Aval and his Aulad. The words used are waqf alal nafs khud wa alal aval wa aulad khud- The plaintiffs contend that they are entitled to be considered the beneficiaries of the wakf because the plaintiff No. 1 falls under the category of aval and the plaintiff No. 2 falls under the category of aulad. So far as the plaintiff No, 2 is concerned, there is no dispute that she being one of the daughters of the wakif must be considered to be his aulad and to be entitled to be maintained under the terms of the waqf.

Her claim to maintenance was resisted by the defendant mainly on the ground that under the amended wakf deed he was not liable to provide for maintenance to any one except himself. This defence of his has been found to be untenable. There can, therefore, be no doubt that the plaintiff No. 2 is one of the beneficiaries of the wakf and is entitled to her share of maintenance out of the income of the wakf property.

In respect of the plaintiff No. 1, however. it is urged that she cannot on any account claim maintenance as a beneficiary of the waqf. She cannot obviously fall under the category of aulad and as the waqif was not bound to maintain her she cannot bring herself within the category of aval. It is also pointed out that she has remarried and is now living in the house of her second husband.

22. The learned Civil Judge was inclined towards the view that the plaintiff No. 1 could claim to be included in the category of aval. He referred to the meaning of

the word "ayal" as given in the Persian Dictionary Ghayasul Lughat and also relied on how the word had been interpreted in Amir Ali's Mohammedan Law. It was urged before him that the wakif in the present case never intended to include his widow among the persons for whose maintenance he was providing in the waqf deed-but this argument did not find favour with him.

23. On giving our best consideration to the matter we have come to the conclusion. that the plaintiff No. 1 cannot, claim to be one of the beneficiaries of the wakf. The dictionary meaning of the word "ayal" as pointed out By the learned Civil Judge (vide Ghayasul Lughat, March 1912 Edition page 355) is "zan wa farzandan wa digar tawa be". Translated in English the meaning would be "wife", children and other dependants."

It will be noted that though the word ""zan" is used for a wife it is not generally used for a widow. In Baillie's Digest on Mohammedan Law 1865 Edition at page 532 the word "ayal" has been interpreted as comprehending every one maintained by a person whether living in his house or not. The same meaning has been given to the word by Amir Ali in his book Mahommedan Law 1904 Edn. Vol. I page 297.

It is well settled that a widow is not one of the persons entitled to be maintained under the Mohammedan Law. As Saxena has observed in his book on Muslim Law (1937 Edition page 422) the wife's right of maintenance ceases on the death of her husband. In the Hanafi Law the widow has no right to maintenance, whether she be pregnant or not." The plaintiff No. 1 may have been included in the category of ayal during the life-time of Amanat Rasul as at that time she being his wife was entitled to be maintained by him. But on the death of Amanat Rasul when she became a widow she could not longer claim to be a person who was entitled to be maintained by Amanat Rasul or his estate.

She, therefore, ceased to belong to the category of his ayal. If she has re-married as is alleged by the defendant, she has become the wife of another person and has ceased to be a member of the family of Amanat Rasul altogether. As provided at the end o? the waqf deed on account of this re-marriage she has lost even her right to reside in the house of Amanat Rasul. In the circumstances she cannot claim to be one of the persons who is entitled to a share in the income of the waqf as a beneficiary.

24. It was urged that in the waqf deed there is a provision that the heirs of Amanat Rasul will be entitled to get shares out of the income of the waqf according to Mohammedan Law. A widow under that law gets a share in the estate. There is no provision in the waqf deed that the plaintiff No. 1 would forfeit her share as a result of re-marriage.

On this account the plaintiff No. 1 can claim to be a beneficiary. It is not possible to accept this contention because the word used in condition (6) of the waqf deed is "mustahqin" and not "warisan". According to that condition, therefore, the persons who could claim a share in the income of the waqf property were the

persons for whose benefit the waqf had been created, and who could claim to be entitled to its benefits. Every person who was an heir of the wakif could not therefore claim to be a beneficiary of the wakf even though he did not fall under the categories of "ayal" or "aulad", the only two classes of persons besides the wakif himself for whom the wakf was created.

The fact that the wakif did not provide that his widow would forfeit her rights as a result of re-marriage appears to be immaterial because as a widow she would not have been a beneficiary of the waqf at all and there was, therefore, no necessity for making any provision for her forfeiting any such right as a result of any future event like re-marriage.

25. We are, therefore, unable to share the view of the learned Civil Judge that the plaintiff No. 1 was entitled to any share in the income of the waqf property as a beneficiary. The plaintiff No. 2 alone was therefore entitled to the declaration claimed viz., that she was entitled to receive her share out of the profits of, the waqf property in accordance with the deed of waqf. Keeping in view the heirs which Amanat Rasul left, her share according to Hanafi Law comes to 7 sohams out of 40 sohams. The plaintiff No. 2 could not get any such declaration.

26. The other relief claimed by the plaintiffs was for rendition of accounts in respect of the income of the waqf property from 1st of August 1939 to 1st of August, 1944. They claimed 12 out of 40 sohams of the income after deducting the necessary expenses and also claimed interest on the amount to which they were found entitled.

27. This claim of the plaintiffs is resisted on the ground that it is not open to a beneficiary to claim accounts from a mutawalli. It is urged that the plaintiff No. 2 may have claimed a specific amount as her share. She had not done so. As the Mutwalli was not bound to render accounts to each beneficiary the suit for rendition of accounts was not maintainable. Reliance in support of this contention is placed on certain observations made in the case of Maqsood Ali Vs. Zahid Ali Sabzposh, .

28. In the case of Maqsood Ali v. Zahid Ali (D), certain beneficiaries of a waqf-ala-aulad claimed accounting from the mutwalli. The mutwalli contested the claim on the ground that the waqf deeds in that case contained a provision that the mutwallis would not be accountable. It was urged on behalf of the beneficiaries that if there was any such provision in the wakf deeds it was void.

It was pointed out that the mutwalli was a trustee and a non-accountable trustee was unknown to law. In every case, therefore, whether there is any provision to the contrary in the waqf deed or not, a mutwalli must be held to be accountable to the beneficiaries. The basis of this argument was that if the beneficiaries were not held to be entitled to claim accounts during the mutwalliship, the mutwalli would give to them only what he pleased and they would not be in a position to know whether he was giving their proper share or not. Dealing with this contention learned Judges laid down at p. 339 :

"But a suit for accounts is not exactly the same as a suit for a share of the income. In a suit for accounts the mutwalli will have to explain accounts and support it by vouchers and proper account books. As a matter of fact, a relief for rendition of accounts was a special relief invented by the Courts of Equity for special type of cases and it would be hardly desirable that every beneficiary should have the right, without alleging that the mutwalli had been guilty of mismanagement, to claim rendition of accounts and bring a suit for accounts and make the mutwalli explain accounts to him from the beginning. Learned counsel was not able to satisfy us that in a waqf alal aulad a beneficiary has a right to ask the mutwalli to render accounts to him whenever he likes. He cannot, therefore, claim merely on the refusal of the mutwalli to explain the accounts to him, that he has a cause of action to bring a suit for accounts.

If the plaintiffs wanted that the defendant should be made to render accounts to the Court a proper suit on proper allegations should have been filed so that the accounts could be gone into and settled once for all between the beneficiaries and the mutwalli. In each suit one of the beneficiaries has come forward as plaintiff and filed the suit against the mutwalli without impleading the other beneficiaries as defendants with the result that it would be open even after the decision of these suits for the other beneficiaries, if it is held that every beneficiary can, of right, bring a suit for accounts, to file separate suits for accounts.

The position of a mutwalli will in such a case become almost intolerable. The relief for accounts as we have already said, is a discretionary relief and the Courts would take care to see that it is only in a proper case where all the parties are before the Court and accounts can be gone into fully and effectively that such a relief is granted so that the person who is liable to render accounts may not be harassed by unnecessary litigation. It must have been with that intention that the wakifs put in a clause in these two deeds that no person will be entitled to demand rendition of accounts."

Following those observations the learned Judges held that the plaintiffs could not claim accounts from the mutwalli of two of the waqfs in dispute in that case because the waqf deeds provided that the mutwallis will not be accountable to any one. In the remaining two waqf deeds in dispute in the case, however, it had only been provided that a stranger would not be entitled to claim accounts. The clause did not apply to beneficiaries. The claim for accounts in respect of those waqfs had not been seriously contested in the trial Court. It was, therefore, held that in respect of those wakfs the beneficiaries could claim accounts.

29. Two extreme contentions were therefore put forward in that case. On behalf of the beneficiaries it was urged that any one of the several beneficiaries could as of right at any time he liked claim accounts from the mutwalli and the latter would be bound to render account's supported by vouchers and account books. If there was a condition in the wakf deed that the mutwalli would be unaccountable it was void and could be ignored.

The Mutwalli on the other hand contended that his position as a mutwalli would become intolerable if he was required to render accounts successively to each of several beneficiaries and that no beneficiary has a right to claim accounts. He could claim only a specified amount as his share of the income. He also urged that if the wakf deed itself provided that he would not be liable to accounts he could seek protection under the clause and the clause could not be ignored as void.

Both these extreme contentions were found to be unacceptable. It was held that if there was a clause in the wakf deed which exempted the mutwalli from accountability it was to be respected. Each beneficiary had no right to claim accounts from a mutwalli at any time he pleased. If he wanted his share of the income he could sue only for a specified amount.

The mutwalli in the absence of any clear provision in the wakf deed was however not entirely exempt from liability to account. If a suit was filed impleading all the necessary parties so that accounts for a particular period could be effectively settled in it once for all, and if there were allegations of mismanagement or waste and it appeared to the Court that accounting was necessary a suit for rendition of accounts on behalf of a beneficiary could be entertained.

Even in a suit for a specific amount if the Court feels that the amount due to the plaintiff cannot properly be ascertained without accounting it is open to the Court to order accounting. The general rule, however, is that a beneficiary if he wants to claim his share of income of the wakf property should claim a specific amount. He is not entitled as of right to claim rendition of accounts whenever he likes.

30. In the wakf deed which we have before us Amanat Rasul did provide that he himself would not be accountable to any one. He did not make any such provision in respect of any other mutwalli who succeeded him. By the amending deed he certainly attempted to provide that Ata Rasul could do anything he liked with the income of the wakf, but, as has been shown above, the deed of amendment must be ignored and cannot be allowed to affect the original wakf deed. The position, therefore, is that in the wakf deed before us there is nothing on the basis of which the defendant can claim exemption from accountability.

But the defendant can, in our opinion, rely on the general rule that it is not open to the plaintiff No. 2 as a beneficiary to claim accounts from him as of right. He can contend that his position as a Mutwalli will become intolerable if each beneficiary is held entitled to file a suit against him for accounts without impleading the others in whose absence there can be no proper accounting. The proper course for the plaintiff No. 2 as a beneficiary, was to claim a specific amount as due to her on account of her share of the income.

31. It appears to us that this contention of the defendant is well founded and must be allowed to prevail. It is true that in para 4 of the plaint there was a general allegation that the Mutwalli had been guilty of mismanagement but no details were mentioned and no attempt was made to substantiate the allegation

by leading any evidence. The other beneficiaries were not impleaded. Effective or final accounting was not possible in their absence. The suit for accounts cannot therefore succeed.

32. In the result the appeal succeeds in part. The dismissal of the suit of the plaintiff No. 1 is confirmed. Her appeal is dismissed. The appeal of plaintiff No. 2 is allowed in part. She be granted a declaration that she is entitled to get her share of 7 Sehams out of 40 sehams of the income of the wakf property in dispute. The rest of her claim too is dismissed. As success in the case has been divided we think it would be lair if the parties are left to bear their own costs in both the Court"s. We order accordingly.