# Maqsood Ali vs Zahid Ali Sabzposh on 13 November, 1953

## Equivalent citations: AIR1954ALL385, AIR 1954 ALLAHABAD 385

## Author: V. Bhargava

## Bench: V. Bhargava

JUDGMENT

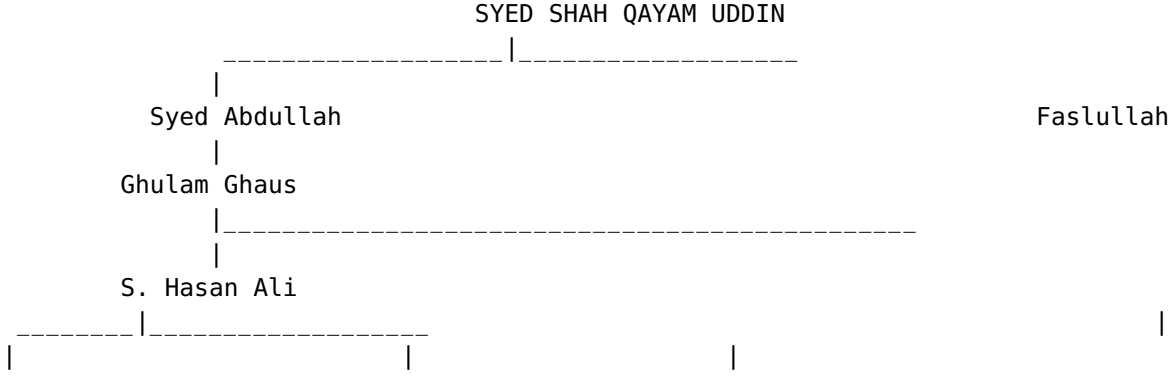
Malik, C.J.

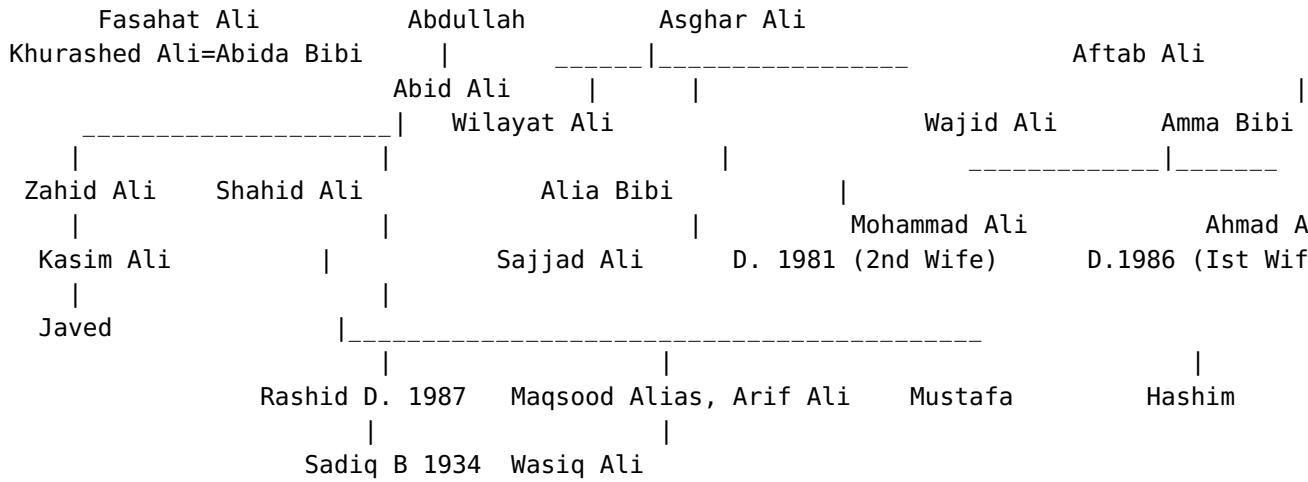
1. These six appeals arise out of three suits and the first three of them have been filed on behalf of the plaintiffs in the three suits and the other three on behalf of the defendant.

2. Suit No. 566 of 1941 was filed by Syed Maqsood All, alias Arif Ali, against Syed Zahid Ali. It was decided by the Additional Civil Judge on the 27th November, 1942, and the District Judge on the 20th of March, 1946. Against the decree of the lower appellate court the plain-tilt has filed the Second Appeal No. 2273 of 1946 and the defendant has filed the Second Appeal No. 84 of 1947.

3 Suit No. 581 of 1941 was filed by Syed Sadiq Ali against the same defendant, Syed Zahid Ali. It was decided by the Additional Civil Judge on the 27th November, 1942, and the District Judge on the 20th of March, 1946. Against the decree of the lower appellate court* Second Appeal No. 2274 of 1946 has been filed on behalf of the plaintiff and Second Appeal No. 83 of 1947 on behalf of the defendant.

4. Second Appeal No. 2277 of 1946 has been filed by the plaintiff Shahid Ali and Second Appeal No. 2612 of 1946 by the defendant Zahid Ali against the decree in Civil Appeal No. 6 of 1943, arising out of Suit No. 483 of 1942. It will probably be convenient to take up all these appeals together and dispose them of by one judgment. To explain the facts of the case it will be necessary to give the relevant portion of the pedigree of the family of Syed Shah Qayam Uddin.






Amna Bibi, wife of Wajid Ali, executed two deeds of 'waqf, the first dated the 10th of December, 1920 and the second dated the 22nd of December, 1920. Under these deeds she purported to make a 'waqf' of her entire property. The 'mutwalli' appointed under these documents was Syed Zahid Ali and the beneficiaries were to be first her son Mohammad Ali and his descendants and failing them the descendants of Syed Qayam Uddin. As to who the beneficiaries are and what are their shares is a point in dispute. We will deal with this point in greater detail when we come to determine the shares of the plaintiffs.

5. On the 2nd of December, 1921, Abida Bibi, widow of Khurshed Ali, made a waqf of her property. She again appointed Syed Zahid Ali as the mutwalli and she named the beneficiaries. So no question arises as to who the beneficiaries under this deed were. There was a fourth waqf created by Wajib Ali, husband of Amna Bibi, on the 8th of December, 1921. He too appointed Zahid All as 'mutwalli' and made certain specified persons the beneficiaries under the 'waqf.' A fifth 'waqf' was created by Zahid Ali himself on the 16th of February, 1931, under which he appointed himself as the 'mutwalli'. The other 'waqfs' were created on the 20th of August, 1922, by Syed Shahid Ali, brother of Zahid Ali.

6. It is not necessary to deal with the last two mentioned 'waqfs' of the. 20th of August, 1922, executed by Syed Shahid Ali as the suit filed on the basis thereof, No. 535 of 1942, giving rise to Second Appeal No. 2061 of 1946, on behalf of the plaintiff, was disposed of by us yesterday.

7. A large number of points were raised in the lower Court with the result that the hearing of the suits was delayed for a long period and the cases have been pending in this Court also for a number of years. We have, however, asked counsel to confine themselves to the points that they wanted to raise before us and we shall, therefore, deal with only such points as have been raised and with no others.

8. In Suit No. 566 of 1941, out of which the two Second Appeals Nos. 2273 of 1946 and 84 of 1947 arise -- one by the plaintiff and the other by the defendant -- the court was concerned with four

waqfs, the first two by Amna Bibi, the third by Abida Bibi and the fourth by Wajib Ali. So far as Amna Bibi's waqf deeds were concerned, only two points were raised on behalf of the plaintiff appellant; firstly, what was the share of the plaintiff Maqsood Ali, and, secondly, what was the period for which the defendant must render accounts. On behalf of the defendant it was urged in second appeal that on a correct interpretation of the deeds Maqsood Ali was not entitled to any share. The question of the period cf accountability was also raised. While the plaintiff claimed that he was entitled to accounts from 1920, the defendant urged that the plaintiff was entitled to claim accounts only from 1938, Biter the death of Wajid Ali.

A third point was also raised that Maqsood AH was not entitled to file a suit and, in any case, in view of the terms of the 'waqf' deeds the plaintiff had no right to claim accounts. In Abida Bibi's 'waqf', i.e. the third 'waqf', the points raised were again whether the plaintiff was entitled to claim accounts. If there was a Clause in the waqf deed taking away such a right, was such a Clause void and should the-court direct the accounts to be taken in spite of the provision in the waqf deed that the mutwalli will not be accountable to the beneficiaries? The period for which the accounts were to be taken. was the other point raised and the contentions were the same as have been indicated above.

9. As regards Wajid Ali's 'waqf' deed, the lower courts have held that the defendant was liable to render accounts. In the appeal relating to this 'waqf' the plaintiff claimed that the accounts were to be rendered from the beginning while the defendant's contention was that the terms of the 'waqf' deed take away the right of the beneficiaries, if they had any, to claim accounts and, secondly, that the defendant should. not be called upon to render accounts before October, 1938, when on Wajid Ali's death he came into effective possession of the property.

10 In the two -Second Appeals arising out of suit No. 581 of 1941, which were based on the 'waqf' deeds executed by Abida Bibi and Wajid Ali exactly similar points were raised.

11. In the two Second Appeals arising out of suit No. 483 of 1942 three 'waqf' deeds were involved, the first two being by Amna Bibi and a. third by Zahid Ali dated 16th February, 1931. In these appeals also the question of the interpretation of Amna Bibi's 'waqfs' to determine who were the beneficiaries and what were their shares was raised. It was also contended that the defendant was not liable to account in view of the provisions contained in the waqf deeds that the beneficiaries were not entitled to claim accounts.

And, lastly, the question of the period of accountability was in dispute as in the other appeals. So far as the waqf deed executed by Zahid Ali is concerned, the point raised by the plaintiff in second appeal was that he was entitled to the whole of the income and not half as given to him by the lower court. Pleas were also taken as to the period of accountability and the pleas were exactly similar to the pleas already mentioned. Two more points were raised by the defendant in his appeal: (1) that Shahid Ali had filed the suit for only one-fourth share of the profits and the lower Court had wrongly given him a one-fourth share; and (2) that the suit was defective by reason of non-joinder of parties and it must fail on that ground.

12. Taking up first the question of the period of accountability, which is the same in all the six second appeals, the issue can be easily disposed of. No doubt in all the five deeds of 'waqf' Zahid Ali was the 'mutwalli' under the documents but on the evidence on the record the lower courts have come to the conclusion that there had been a practice in the family for the eldest member of the family to remain in possession of the entire property and, probably to pre-vent the property in the name of the female members of the family being divided and going cut of the family, 'waqf' deeds were got executed and Zahid Ali who was a prominent member of the family was appointed mutwalli though the person in actual possession of the property was Wilayat Ali who was the head and the eldest member of the family. So long as he was alive he was in possession and on his death Wajid Ali became the head of the family and got possession of the property.

They have also found that the property was managed by the managers Azhar and his son Shakur up to the year 1931, so that up to the year 1931 the. man in actual management of the property was the manager Shakur or Azhar and the person from whom the manager obtained orders was the head of the family Wilayat Ali and then Wajid Ali. In the year 1931 Azhar was dismissed for mismanagement and misappropriation and since then Zahid Ali was put in charge. The plaintiff wanted to make Zahid Ali responsible (as has been pointed put by the lower court) merely on account of his position as official mutwalli even in spite of the admission that Shakur and Azhar managed the estate under the supervision of the head of the family and Azhar was dismissed as a result of mismanagement. In another part of the judgment the learned Judge after having carefully considered the point said that "at least upto the time that Mohammad Azhar remained in charge, Zahid Ali himself had nothing to do with the management of the estate beyond routine signatures on formal day to day documents and that such part of the management as required consultation between the 'de facto' managers and the person who carried out the instituted policy of the family was done over the head of any 'mutwalli' i.e. even including the plaintiff appellant himself and taken direct to the head of the family."

13. In Suit No. 535 of 1942, as we have already held yesterday in second appeal 2061 of 1946 there was a compromise fixing the liability far account from the date of dismissal of Azhar in October, 1931. The lower appellate Court has found that in all these suits that should be the date from which the accounts should be taken as Zahid Ali was not responsible for either the management of the property or for the accounts so long as Azhar was the manager on behalf of Wajid Ali and was in charge of the property. On the finding that before October, 1931 Zahid Ali was not managing the property, and by consent of all the members of the family the head of the family was the manager and the actual work of management was done by an agent Azhar, the lower courts rightly fixed the liability for account from October, 1931.

14. The question as to the period for which the account is to be delivered is a matter in the discretion of the court and. in the peculiar circumstances of the case, there is no reason to modify or go bevond the decree of the lower court and make Zahid Ali accountable for the period prior to October, 1931 -merely because he was the nominal 'mutwalli' of the property. We are, therefore, of the opinion that the lower appellate court exercised its discretion rightly in fixing the period of accountability in all these suits from October, 1931.

Some attempt was made by learned counsel for the defendant to show that the lower court had in these suits fixed the period of accountability from 1938, the date of death of Wajid Ali. We have carefully read the judgment with learned counsel and in our opinion that dispute really related to the period before the dismissal of Azhar and it was not even contended before the lower appellate court that Zahid Ali who was the 'mutwalli' and who was put in actual possession of the property on the dismissal of Azhar, was not accountable from the date when he obtained such possession i.e. October, 1931.

15. We, therefore, uphold the finding of the lower Court that Zahid Ali is accountable from October, 1931.

16. The next question for consideration is the interpretation of the waqf deeds executed by Amna Bibi to determine who are the beneficiaries under that document. From the pedigree it would appear that Amna Bibi had a son Mohammad Ali. The first part of the 'waqf deed setting out the purpose for which the 'wafer deed was executed has been translated as follows:

> "as well as for the maintenance of my son Saiyid Mohammad Ali, son of Saiyid Wajid Ali, his male lineal descendants and the male lineal descendants of such male descendants, until the line of such descendants survives and also provision of subsistence to the grand-children (descendants from sons and daughters) and members of the family of the 'Mutwallis'; in case no such male descendant is left, then the right of benefit would revert in equal shares to the male line of each male lineal descendant of Mir Saiyid Shah Qayamuddin and in case there is no such male descendant surviving, the right of benefit would devolve upon the female descendants of Mir Saiyid Shah Qayamuddin and eventually it would go to the poor and the destitute, belonging to the Sunni Hanafi sect."

The only other portion of the 'waqf' deed which may be read in this connection is paragraph 4, the relevant portion of which is as follows:

> "It shall be incumbent upon Saiyid Zahid Ali and other subsequent 'Mutwallis' to continue to pay (provide for) Saiyid Mohammad Ali, son of Saiyid Wajid Ali, his male descendants and the male lineal descendants of such male lineal descendants regularly, generation after generation, until such generation survives, out of the balance of the income and the profits of the waqf property, left after deducting all proper and necessary expenses, the Government dues, taxes etc. and meeting the expenditure mentioned in para. 7 of this deed, and after such male lineal descendants have become extinct, such persons shall become beneficiaries, as are mentioned in the above heading (which obviously refers to the portion already quoted)".

Mohammad Ali died in 1931 and it is admitted that he had no male or female descendants. That portion of the direction, therefore, that "if there were no descendants of Mohammad Ali the property was to go to the descendants of Mir Saiyid Shah Qayamuddin"

came into operation. The question for decision

is whether the document should be interpreted to mean that on the death of Mohammad Ali in the year 1931 all the male descendants of Shah Qayamuddin, whether remote or near, should get

the income of the property in equal shares or should descend per stirpes and should go to tile nearest descendant in each line. A third interpretation has been put forward on behalf of the defendant that the income should descend per stirpes and go to the nearest heir in that line but everyone entitled to the property on the date of death of Mohammad Ali should get any equal share.

We have carefully considered the three suggestions and we agree with the view taken by the lower court that the income should descend per stirpes and as each line branches off the share should be divided between the various branches but in the same branch the nearer should exclude the more remote. Working it out it would appear that no question of division upto Hasan Ali arises. Prom Hasan Ali the descendants may be taken to branch off into two lines the line of Abdullah and the line of Asghar Ali. Abdullah, if he had been alive would therefore, have got a half interest in the income and Asghar Ali the other half.

Asghar Ali had two sons, Wilayat Ali and Wajid Ali, but Wilayat Ali had no male descendant and died before Mohammad Ali. So the whole of Asghar Ali's interest would be in the line of Wajid Ali who died in 1938. It would now probably go to Sajjad Ali who is the only representative in that line from this pedigree. We are expressing, however, no opinion on this point as Sajjad Ali is not a party to these proceedings. So far as Abdullah's half share is concerned, it would be divided into one-half each, i.e. Zahid Ali getting one-fourth and Shahid Ali one-fourth, and Zahid Ali would exclude his son and grandson and Shahid Ali would exclude his sons and grandsons.

17. Great stress has been laid by learned counsel for the plaintiffs-appellants on various books of Mohammedan Law that when the first and the second generations alone are mentioned then the property is divisible between the members of the first and second generations in equal shares. If, on the other hand, the first three generations are mentioned, i.e. if the word 'walad' is repeated three times then it means the descendants. We are not concerned with these peculiar rules of interpretation of Mohammadan Law as they do not arise in this case.

The other passages relied upon by learned counsel relate to the discussion whether if a man makes a waqf and leaves the property to his sons and nephews and grand-nephews etc. are they all to get the property in equal shares or the nearer should exclude the more remote. All these rules of interpretation are not really helpful as the words used in the waqf deed in question are not the same as the words that those learned authors were called upon to interpret. We have to find out what the words in the 'waqf deed "the property is to go in equal shares to the male line of each male descendant" mean. The Urdu words are:

"Aulad Zakoor ke silsile aulad zakoor men bahissa masawi rujoo hojaiga."

The interpretation will turn on the meaning of the words "Aulad zakoor ke silsile aulad zakoor men". It is urged that 'Silsile' is equivalent to the word 'Nasal' and means the same thing. So far as we nan see and have been able to find out from Urdu dictionaries silsile does not have the same meaning as the word 'nasal'. It conveys, to our minds, a system, i.e., one after another; one immediately following the other. The way the words were repeated "aulad zakoor ke silsile aulad zakoor men" the intention of the 'waqif', to our minds, was clear that the income should descend in the various lines and it should go in a certain order and that order must obviously be that the nearer in the same line would exclude the more distant. Working on this interpretation the only conclusion that can be arrived at is the conclusion arrived by the lower Court.

18. On behalf of the defendant the argument was advanced that Wajid Ali was entitled to a one-third and Zahid Ali and Shahid Ali to one-third each. The learned Civil Judge repelled this contention and the lower appellate court has noted that the argument was not seriously pressed. We have heard learned counsel and we do not see how, if it is conceded that the intention of the 'waqif' was that the descendants are to be traced in the line from the common ancestor, then having traced the line through Hasan Ali and then to Abdullah and Asghar Ali, it is possible to overlook the fact that while in one line there are two descendants, in the other there is only one and divide the property in equal shares between all the three.

We are satisfied that the decision on this point of the lower court was correct and Zahid A!i and Shahid Ali were entitled to one-fourth each while Wajid Ali was entitled to the remaining half. In this view Maqsood Ali had no interest as a beneficiary in the 'waqf' deeds executed by Amna Bibi, in the lifetime of his father, Syed Shahid Ali, and his claim in Suit No. 566. of 1941 for accounts and his share of the profits in respect of these two deeds must, therefore, fail. This point evidently was overlooked by the lower appellate court and the decrees in Second Appeals Nos. 2273 of 1946 and 84 of 1947 will have to be modified to this extent that it should be made clear that Maqsood Ali's claim for accounts and his share of the profits in the income of the property made 'waqf' of by Amna Bibi under the 'waqf' deeds dated the 10th and 22nd of December, 1920, must fail and is dismissed.

19. In suit No. 483 of 1942 Syed Shahid Ali had claimed that he was the sole beneficiary under the 'waqf' deed executed by Syed Zahid Ali on the 16th of February, 1931. The 'waqf' deed has been read and carefully considered by us and we fail to see how such an argument can be advanced. The beneficiaries mentioned are as follows:

> "The own brother of the 'waqif', i.e. Syed Shahid Ali, and his male descendants; failing such his female descendants and the 'waqif' himself and his male descendants and failing them his female descendants."

The trial court held that Syed Shahid Ali was entitled to a half share and not to the whole claimed by him. This decision was dated the 27th November, 1942. Shahid Ali filed an appeal against this decree which was numbered as Civil Appeal No. 798 of 1942. The decision of the trial court on the point was affirmed by the learned Judge but the plaintiff has filed no further appeal. So the decree passed in Civil Appeal No. 798 of 1942 has become final. Against the portion of the trial court's decree that was against him Zahid Ali filed a Civil Appeal No. 6 of 1943. The two Second Appeals.

No. 2612 of 1946, on behalf of the defendant, Zahid Ali, and No. 2277 of 1946, on behalf of the plaintiff Shahid Ali, are against the same decree in Civil Appeal No. 6 of 1943. The result, therefore, is that the decision in Civil Appeal No. 798 of 1942 having become final it is not open to Syed Shahid Ali now to claim that the shares were wrongly determined by the trial court and the lower appellate court.

20. The next question which arises in these appeals is the question of the accountability of the defendant. The lower appellate court has held that as there is a provision to the contrary in the 'waqf' deeds executed by Abida Bibi on the 2nd of December, 1921, and Zahid Ali on the 16th of February, 1931, the plaintiffs cannot claim accounts from the 'mutwalli' of the income of the property covered by these 'waqf' deeds. It has been urged by learned counsel for the plaintiffs that this view of the lower courts was wrong. The argument has been advanced that a trustee must be held accountable to the beneficiaries and that any provision in the deeds that the trustees are not so accountable must be held to be void. It has been further urged that any such clause in the documents does not bar the jurisdiction of the Court to direct the trustees to furnish accounts.

The basis of the argument is that, if the beneficiaries are held to be not entitled to claim accounts from the 'mutwalli', the mutwalli will give to them only what he pleases and they will not be in a position to know whether he was giving them their proper share. Some attempt was made to refer us to decisions relating to trustees in England but the position there is entirely different. There has been legislation governing the rights of beneficiaries to claim accounts from trustees. The cases, therefore, cited from England are not of much assistance. Learned counsel has admitted that there is no direct authority on the point but he had urged that from the position of a mutwalli, which is more or less that of a manager it must be assumed that a beneficiary is entitled to claim accounts from him.

As the lower courts have pointed out. 'waqf alal aulad' must be placed on a slightly different footing from public trusts and, while a beneficiary may be entitled to claim his share, there is no reason why he should be given a right to claim general accounts from a 'mutwalli' whenever he pleases. The lower appellate court has pointed out that the 'mutwalli' generally appointed in such 'waqfs' is the head of the family in whom the 'waqif' has trust and these 'waqfs', more often than not, are executed to defeat the rule against perpetuities and to tie up the property for the benefit of the family. It is always open to a beneficiary to claim his share of what he considers to be his share of the income and in such cases it would be for the 'mutwalli' to satisfy the court that the claim made against him is excessive and he is not entitled to pay to the plaintiff what the plaintiff has claimed.

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 waqifs put in a clause in these two deeds that no person wiil be entitled to demand rendition of accounts.

In Abida Bibi's 'waqf' deed the words are in general i.e. that no person shall have the right to claim rendition of accounts while in Zahid Ali's 'waqf' deed the words are that no beneficiary will be entitled to claim accounts from the 'mutwalli'. Both, however, more or less mean the same thing. The word 'person' to our minds i9 wide enough to include a beneficiary also. We have, therefore, no reason to differ from the conclusion arrived at by the lower court that the plaintiffs have no right to claim accounts from the mutwalli of the income of the property covered by the 'waqf' deeds of Abida Eibi and Zahid Ali.

21. The position is slightly different in Amna Bibi's two 'waqf' deeds dated 10th of December and 22nd of December, 1920, and in the 'waqf' deed of Wajid Ali dated 8th of December, 1921. In the two deeds of Amna Bibi there is a provision relating to accounts. In paragraph 4 the words in Urdu are "Kisi shakhs ghair ko" which has at one place been translated as "no other person" while at another place as 'no stranger'. We think that the latter translation is more correct and, reading the whole paragraph 4 of the 'waqf' deed of Amna Bibi as also the paragraph relating to this matter in the 'waqf' deed of Wajid Ali, it is clear that the 'waqifs' intended that no stranger should be entitled to claim accounts.

The list of the beneficiaries would go to show that not only the members of the family but failing them the poor and others were also to be benefited. The idea was that so far as the persons who were strangers to the family were concerned, they should not be entitled to claim accounts. We, therefore, agree on this point also with the decision arrived at by the lower court. The general question, whether a proper case had been made out for accounts to be taken of the income of the waqf properties executed by Amna Bibi and Wajid Ali was not raised in the lower courts nor in this Court. So we need not express any opinion on the point.

22. At the time when the suits were filed, a suit for accounts could be valued at an arbitrary figure and a fixed court-fee had to be paid while in a suit for the plaintiffs' share of the income 'ad valorem' court-fee had to be paid on the amount claimed. It was for the purpose of avoiding payment of proper court-fees that the relief claimed in all these suits was a relief merely for accounts and for payment of amount found due after accounting. The plaintiffs deliberately avoided claiming the proper relief that a decree should be passed for what they considered was the amount due to them, leaving it to the defendant to satisfy the court that the amount claimed was excessive. However, as we have already said, no objection having been taken in these suits as regards waqf deeds of Amna Bibi and Wajid Ali that all the parties not being before the court the accounts should not be asked to be rendered, it need not now be considered.

We, therefore, affirm the decision of the lower appellate court that the defendant is not liable to account for the income from the 'waqf' property covered by the 'waqf' deeds of Abida Bibi dated the 2nd of December, 1921, and Zahid Ali dated the 16th of February, 1931. We may here make it clear that, though a beneficiary may not have a legal right, whenever, he chooses, to claim a decree for accounts, the court has undoubtedly the power in a proper case to ask the trustee to explain the accounts. But, as we have already said, no reason has been made out why the court should ask the trustee to render accounts of the income of the property included in the 'waqf' deeds of Abida Bibi and Zahid Ali.

23. Two other points remain. In Suit No. 483 of 1942, Shahid Ali claimed that he was entitled to a one-tenth share of the income of the 'waqf' property in the two waqf deeds executed by Amna Bibi. According to the allegations in paragraph 4 of the plaint there were eight lineal descendants of Shah Qayamuddin on the date of the death of Mohammad Ali but on the date of the suit there were ten such heirs and he claimed that he was entitled to a one-tenth share. The fact that there were eight male lineal descendants on the date of the death of Mohammad Ali and ten on the date of suit was admitted by the defendant but the defendant did not admit that Shahid Ali had a one-tenth share. The lower courts took the view that on a correct interpretation of the waqf deeds Shahid Ali had a one-fourth share and not a one-tenth share. The reason why he claimed a one-tenth share is not difficult to see. He had four sons while the other members of the family had only one son each.

If his interpretation had been accepted then between him and his four sons he would have got either a half share or five-eighths share of the entire income. Learned counsel for the defendant has urged that the plaintiff having alleged that he had a one-tenth share in the income the lower courts erred in giving him a decree for a one-fourth share. The relief claimed, however, to avoid valuing the suit properly and paying the proper court-fee, was for rendition of accounts and for payment of such amount as was found due after accounting. Hence the relief was so worded that it cannot be said that the relief claimed was for only a one-tenth share of the income. The issues framed by the trial court were :

> "(1) Is the plaintiff Shahid Ali entitled to any share in the income of the properties in the deeds of waqf in suit?
>
> (2) If so, to what share is he entitled?"

If the allegations in the plaint had been admitted by the defendant, the parties having agreed, it would not be open to the Court, without having the pleadings amended, to give the plaintiff a decree for more than one-tenth. Here, however, the allegation in the plaint was not admitted. The issue was in general terms and the court, on an interpretation of the 'waqf' deed, came to the conclusion that Shahid Ali had a one-fourth share. Neither the valuation of the suit nor the amount payable as court-fee would need any change to grant the plaintiff a decree for a larger share. In the circumstances we feel that to bind the plaintiff down to a one-tenth share when, on a correct interpretation of the 'waqf' deed, he is entitled to a one-fourth share will not be just.

24. Learned counsel for the defendant has, however, rightly pointed out that there was a non-joinder of parties. As we have already said, in all cases, where the courts want a mutwalli or a trustee to render accounts and in this case the accounts have to be rendered from October, 1931, it is better that all proper parties should be before the court so that the accounts once rendered may be finally settled between all persons interested in the 'waqf'. It cannot, however, be laid down as a matter of law that there is any legal bar that in cases of this kind a party is not entitled to claim accounts without impleading others. Reliance has been placed by learned counsel for the appellant on a decision of this Court in --'Mt. Zabaishi Begam v. Nazir Uddin Khan', AIR 1935 All 110 (A).

We have gone through that judgment and we agree, with respect, with the observations made by the learned Judges that, where there is a legal requirement that a person should be impleaded as a party the suit can fail on that ground, but where there is no such legal requirement but the absence of a party makes the decree inexecutable or infructuous, the courts may refuse to pass such a decree; but, where there is neither a legal bar nor is there any possibility of the decree becoming inexecutable or infructuous, there is no reason why a suit should be dismissed for non-joinder of parties. Reference may be made in this connection to order I, Rule 13 of the Code of Civil Procedure that no suit shall fail for nonjoinder or misjoinder of parties.

The other beneficiaries were proper parties who might well have been impleaded by the plaintiff or added as defendants by the court, but it cannot be said that no decree can be passed in plaintiffs favour in the absence of the other beneficiaries of the 'waqf'. To implead other beneficiaries at this stage in a suit of this kind which has remained pending since 1941, when those beneficiaries have not come forward, or shown any interest will not be desirable. It will mean re-opening the suit from the very beginning. We, therefore, feel reluctant to accede to the oral request that the other beneficiaries may be impleaded at this stage.

25. The result, therefore, is that Second Appeal No. 84 of 1947 is allowed to this extent that the plaintiff's suit for accounts of the income of the properties covered by the waqf deeds executed by Amna Bibi on the 10th and 22nd of December, 1920, must fail and the decree of the lower appellate court to that extent is modified. The other Second Appeals Nos. 2273, 2274 and 2277 of 1946 and Second Appeal No. 83 of 1947 and Second Appeal No. 2612 of 1946 are dismissed.

26. We are satisfied that in these cases no order should be made as to costs of this Court.

The parties should, therefore, bear their own costs in these appeals.