Faqir Mohammad vs Mt. Abda Khatoon And Ors. on 10 April, 1951

Equivalent citations: AIR1952ALL127, AIR 1952 ALLAHABAD 127

JUDGMENT

Malik, C.J.

1. This case raises a question of the validity of a deed of wakf dated 19 12 1932, executed by one Wali Mohammad. Under that deed he appointed his daughter, Sm. Abida Khatoon, as mutwalli. She filed a suit for declaration that she was the managing mutwalli of a portion of the property described in the plaint and that the defendants had no right to interfere with her management; she claimed possession, in case it was found that defendant 1 or the other defendants were in possession, and also prayed for mesne profits and costs.

2. The suit was resisted by the defendant-appellant, step-brother of the plaintiff, on various grounds, but the main ground which was urged before us was that the wakf was invalid.

3. Various reasons were given for the invalidity but the learned Judge held in favour of the plaintiff and decreed her suit.

4. The defendant-appellant has filed this appeal.

5. The points have been discussed at some length by my learned brother. I would, however, briefly give my reasons for allowing this appeal.

6. The wakf is what is known as wakf alal-aulad, that is, for the benefit of the wakif and his descendants. As has been pointed out by my learned brother, such a wakf was invalid as it offended against the rule of perpetuities.

7. The maintenance and support of the wakif and the members of his family or his descendants is a valid charitable object according to Hanafi Mussalman Law. In Abul Fata, Mahomed v. Russomoy Dhur, 22 Ind. App. 76, their Lordships of the Judicial Committee, however, held that under Mahomedan law a perpetual family settlement expressly made as wakf is not legal merely because there is an ultimate gift to the poor. Their Lordships pointed out that simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life interests, are forbidden, and the very same dispositions cannot become legal if only the settlor says that they are made as wakf in the name of God or for the sake of the poor. It was held that the wakf to the poor after the wakif's line was exhausted was merely illusory. The Mussalman Wakf Validating Act (VI [6] of 1913) now makes a wakf like the one in Abul Fata's case a valid wakf. It provides that a Hanafi

Mussalman may make a wakf for the 'maintenance and support' wholly or partially of himself, his family, his children or his descendants provided that the ultimate benefit is in such a case expressly or impliedly reserved for the poor.

8. Stress is laid by learned counsel on the words 'maintenance and support' and it is argued that if the bulk of the income 13 handed over to the wakif himself or to his descendants, the deed created life interests and is not merely for maintenance and support. Reliance is placed on a decision of the Bombay High Court in Abul Karim v. Rahimabai, A. I. R. (33) 1946 Bom, 342.

9. It is true that the words in the Wakf Validating Act are 'maintenance and support.' The word 'maintenance' is generally intended to mean lodging, boarding, clothing and other such necessaries of life. The word 'support', however, appears to me to amplify the meaning of the word 'maintenance' and might include expenses not only for the necessaries of life but also for all conveniences. If the wakif chose to give the whole of the income of his property for maintenance and support of his descendants, so long as he reserved the ultimate benefit to the poor, it could not be said that the wakf was not in accordance with the provisions of the Act. Moreover, if the descendants are not made accountable by the wakf deed for the way in which they had spent the income the words 'maintenance and support' lose all their significance and become more a matter of form than substance. I do not, therefore, think that any point can be made of the fact that the bulk of the income is reserved for the wakif and his descendants and they are not given just enough for their maintenance and support. The argument that reserving the whole of the income virtually amounts to creating successive Life estates is also not found. Even if the whole of the income is reserved for the maintenance and support of the Wakif and his descendants the property immediately vests in God, while in a life estate the estate vests in the life tenancy holder, though only for his lifetime.

10. In Amir Ali's Mohammadan Law the true Mualim view has been discussed and the authorities quoted by him lend some support to the view expressed by me above that the words 'maintenance & support do not mean mere bare necessities of life At p. 291 the learned author quotes from Fathulkadir that "According to Abu Yusuf, the Wakif may lawfully retain the governance of the trust or reserve the profits for himself during his life."

Again at p. 283 he has referred to Fatawai Kazi Khan the extract from which is as follows :

> "Says Fakih Abu Jaafar (may the mercy of God be with him), if a person were to make a Sadakah wakf on himself on condition that he should eat the whole or part (of the income) during his lifetime it is valid according to Abu Yusuf . . . ."

A quotation from Ansari is as follows:

> "This my land is wakf for the sake of God in perpetuity and its produce will be applied to my uses as long as I live end adds nothing further, it is valid; and when he dies, its benefits will go to the poor."

A passage is quoted at p. 284 from Fatawa Alamgiri that if a man says "This my land is a sadakah mowkoofa, he (meaning the mutwalli) will pass the produce to me while I live, then after me to my child and my child's child and their nasal for ever, while there are any and when they cease to the indigent. This is lawful." Therefore, when the legislature used the words 'maintenance and support' it probably meant the same thing as 'use' of 'benefit.'

11. In the wakf deed in suit the provisions are so far as the wakif is concerned, that he will have "right to exclusively enjoy and bring to his use" the income during his lifetime. The words 'exclusively enjoy and bring to his use' do not necessarily mean that it is anything more than maintenance and support. As regards his descendants, the words are that they are to be (mustafid) benefited from the entire income. I do not think it will be correct to take the view that the wakif meant anything more than 'maintenance and support' when he used the word 'mustafid' or the words 'exclusively enjoy and bring be his use.' I find it, therefore, difficult to hold that the wakf is void on this ground.

12. The other ground urged is that there was no ultimate dedication to charity. The ultimate dedication is in these words:

> "The Ulamas of the city of Kanpur can utilise the income for any kar-kher according to Shirah Mohammadi religion."

If Kar-kher means charity, there can be no doubt that the wakf would be valid according to the well settled principles of English Law that a charitable trust cannot fail merely on the ground of vagueness. A trust for charity has now a well recognised meaning in English Law and even if the specific shape or form of charity is not mentioned in the trust deed it does not vitiate the trust. Even if the specific form of charity mentioned in the trust deed falls cy pres doctrine is applied to it. If, on the other hand, Kar-kher means only 'any good act,' then it would include any charitable, religious or pious object and the trust will be void for uncertainty. It may be that this is not in accordance with the true principles of Mohammadan Law where it is enough for the wakif to declare that the property is wakf or Sadakah and it does not vitiate the wakf merely because the wakif has not indicated the objects of his bounty. It is, however not possible to go back to pure Mohammadan Law after the various decisions which have been discussed at some length by my learned brother. We are bound by those decisions. In accordance with those decisions if Kar-kher means good work, which no doubt is etymological meaning, then Kar-Kher is not merely charity. It would include a charitable, religious or pious object. The wakf will, therefore, be void for uncertainty and cannot be enforced.

13. The last sentence, the interpretation of which has given rise to a great deal of controversy, is not, to my mind, very important. After having given tbe Ulemas the right to decide what shall be the particular good object for which the money is to be spent the wakif lays down that they should, so far as they can, give preference to certain persons mentioned in the deed. Those persons are 'rishte daran Yatami wa masakin wa bewagan wa ghurba.' Whether the word 'rishtedaran governs only the word 'yatami' or it governs the rest does not, to my mind, matter as those are the persons to whom preference is to be given if the Ulemas are able to give such preference. It is left to them to select the

religious, pious or charitable object for which the income of the waqf property is to be utilised, they being merely required to give preference at their discretion to certain objects mentioned by the waqif. In that view of the matter, the waqf is invalid as the ultimate object reserved is uncertain and the wakf deed does not lay down as to whether the ultimate benefit was being reserved for a religious, or pious or charitable object.

14. The appeal is allowed and the judgment of the lower Court is set aside and plaintiff's suit is dismissed. There is no order as to costs of either Court.

Desai, J.

15. This is a defendant's appeal from a judgment of the Civil and Sessions Judge, Kanpur, decreeing tbe plaintiff's claim for declaration, possession and mesne profits.

16. Plaintiff-respondent 1 is the daughter of a Sunni businessman named "Wali Mohammad; appellant-defendant l is her step brother; the other defendants are also her step brothers and son of a step brother. Wali Mohammad executed a waqf deed in respect of some of his property in 1922 appointing the appellant as a mutwalli after him. Afterwards he acquired ahata No. 88/16 situated in Kanpur and executed two deeds of waqf on 22-12-1932 in respect of one half share in it each. In one of the latter waqf deeds be appointed the respondent as a mutwalli after him. He died on 9-6-1942. After his death disputes arose between the parties for possession over one half share in the ahata and proceedings under Section 145, Criminal P. C. were started by the executive authorities. The criminal Court declared the appellant to be in possession of tbe property and hence the respondent was obliged to come to Court.

17. Tbe respondent pleaded in the suit that she entered into possession of her half share in the ahata as mutwalli on the death of her father, but the appellant and other defendants interfered with her possession and stopped her from realising the income of the property. Hence she claimed a declaration that she is the managing mutwalli of one half share in the ahata and entitled to be benefited from its income for possession if necessary, and for mesne profits, past and future. The suit was contested by the appellant only; the other defendants either admitted the claim of the respondent or showed no interest in tbe matter. The appellant denied the execution of the waqf in question and pleaded that even if it was executed it was invalid, and that the respondent never entered into possession and was not entitled to be benefited from the income of the property. The parties counsel made a statement before the trial Court to the effect that the meene profits of the property in dispute-should be taken to be Rs. 77 per month and that 13 per cent. thereon should be deducted on account of taxes, costs of repairs, etc.

18. The learned Civil Judge held that the waqf deed was valid and decreed the respondent's claim for declaration, possession and mesne profits at the rate of Rs. 77 per month. He forgot to make the deduction of 13 per cent. Only the appellant was made liable for the mesne profits.

19. In this appeal the appellant seriously challenged the validity of the waqf deed. He also claimed the deduction of 13 per cent. It was only an accidental mistake on the part of the learned Civil Judge

not to make the deduction; if the decree for the mesne profits is to be confirmed, the mesne profits will be calculated at the rate of Rs. 67 per month.

20. The validity of the waqf deed is impugned on the grounds that there is no ultimate benefit reserved for the poorer for any other purpose recognised by the Mohammedan law as religious, pious or charitable purposes of a permanent character, and that it is void for uncertainty.

21. The waqf deed is printed on p. 31 of the paper-book. In tbe operative part of it, there is the statement that the property was dedicated for himself and thereafter for his children in accordance with the Mohammedan law and the provisions of the Waqf Validating Act VI [6] of 1913. Then come the conditions of the dedication; they are as follows:

> The waqif was to be the mutwalli for his whole life with the exclusive right of enjoying, and being benefited from, the income accruing from the property. (The actual words used are "tahayati tanha min muqir amdani jaidad ko apne tasarruf wo kharche men lane ka mustahic ho ga.") But he was bound to spend Rs. 5 per month, by way of charity, on the poor, the indigent and the orphans of his family ("apne kunbe ke ghurba wa masakin wa yatama ko fi sabi-lillah de diya kare ga"). After his death his daughter Abda Kbatoon would continue to be benefited "mustafid" from the entire income, and then her descendants generation after generation. On the extinction of her line, his own descendants, male and female are be benefited from she income in accordance with the Mohammedan law. Abda Khatoon was required to pay the Government dues and keep the property in a State of repair and then pay Rs. 5 per month by way of charity to the poor, the indigent and the orphans of the family ("fi sabilillah ghurba wa masakin wa yatama khandan minmuqir ko de diya kare.") Abda Khatoon and every succeeding mutwalli was given the right to nominate her or his successor. Then comes the most important condition which I reproduce in the original words:
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> "Yah ki agar khuda na khawasta kisi wakt Aulad Waqif men se koi zakor ya anas baqi na rahe to ulmas Shahar mazhab Sunatwal jamaet Firqa Hunfi jis kar kher men chahain aur jiski Shirah Mohammadi Ijazat deti ho, amdani jaidad mauquta ko kharch karen magar waqif ke rishtedaran Yatami wa Masakin wa bewagan wa, Gurba ko baqta ul-wasa tarheh den.'"

22. The law prior to the passing of the Waqf Validating Act, No. VI [6] of 1913, was that a waqf was valid only if the gift was substantially to charity and the dedication was not very remote. The waqf alal-aulad by which the usufruct of the property was reserved for the benefit of the descendants of the dedicator so long as anyone among them was alive with the gift over to the poor was held by the P.O. (for example, see Abdul Fata Mohamed v. Russomay Dhur, 22 Ind. App. 76 to be illusory and hence inoperative as a waqf. The Act was passed professedly to validate waqfs in favour of families, children and descendants which according to the decision of the Judicial Committee were invalid. The preamble itself says that "whereas doubts have arisen regarding the validity of waqfs is favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for

other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; it is hereby enacted as follows."

The Act defines waqf as the permanent dedication by a Muslim of any property "for any purpose recognised by the Musalman law as religious, pious, or charitable." Section 3 makes it lawful for a Muslim to create a waqf for the following among other purposes :

> "(a) for the maintenance and support wholly or partially of his family, children or descendants and (b) in the case of a Hanfi Muslim, also for his own maintenance find support during his lifetime :
>
> Provided that the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Musalman law as a religious, pious or charitable purpose of a permanent character."

No waqf is to be deemed to be invalid merely because the ultimate benefit is. postponed until after the extinction of "the family, children or descendants" of the wakif. The Act does not lay down the whole law regarding waqfs', it makes valid certain waqfs which would have been invalid according to the then prevailing law. The validity of other waqfs continues to be governed by the law as it existed prior to 1913. The Act does not specify the objects for which a waqf can be created by a Muslim; the matter is left to the Musalman law. The Act does not lay down either that the specific object for which the ultimate benefit is reserved should be mentioned in the deed or that it need not be mentioned and it would suffice to say that it is reserved for the poor or for any other purpose recognised by the Musalman law, as a religious, pious or charitable purpose of a permanent character. This is understandable because, as I said earlier, the Act was enacted simply to validate certain waqfs which were invalid on the ground of their violating the rule against perpetuities. If it was not necessary prior to 1913 to specify the objects, the Act did not make it necessary, and if it was necessary, the Act did not make it unnecessary, it left the law in this respect as it was. It only laid down that the interposition of a chain of estates, howsoever long but provided that it consists of the waqif's descendants, would not make the ultimate benefit illusory or so remote as to invalidate the waqf. The Act also does not alter the law about uncertainty in a deed of waqf. If under the old law a waqf deed was void for uncertainty, a waqf created after the Act also would be void for uncertainty. If, on the other hand, the principle of uncertainty did not apply to Muslim waqfs, it was not made applicable by the Act. Nor does it, if it recognises or creates the rule of uncertainty, explain what amounts to uncertainty. In Ahmadi Begum v. Badrun-Nissan, A.I.R. (27) 1940 Oudh 324, Radha Krishna J. said that the Act does not go beyond legalising certain waqfs and does not have any effect whatsoever on the principle enunciated by the Judicial Committee in the well known case of Runchordas v. Parvatibhai, 25 Ind, App. 71 that where the object of trust was vague and indefinite the trust would be void. Hamilton J. agreed with him that the Act did not mean to deal with the point of uncertainty. In Mahomed Ali v. Lakhmi Chand, A.I.R. (is) 1931 sind 75 the Judicial Commissioner's Court of Sind took the same view that the Act does not purport to deal with the validity or otherwise of waqfs the objects of which are indefinite or uncertain.

23. The waqf is one which would be valid only if it was created under the Act. If it was not created under the Act it would fail because it violates the rule against perpetuities. As the ultimate benefit is postponed till after the extinction of the whole line of the waqfs descendants, the waqf is illusory. The provision for Rs. 5 a month being spent even during the lifetime of the wakif and his daughter is not a substantial provision for charity. The property was valued at Rs. 8000 and its income at present is Rs. 77 per month. This income is from the rent and on account of the orders passed under the Defence of India Act and the passing of the Rent Control and Eviction Act I do not think there has been any appreciable rise in the rental income during the war. So the income even at the time of the dedication must have been about Rs. 70 p.m. Out of that income only Rs. 5 p.m. were to be spent on charity, that is one-fourteenth share was to be spent on charity. In order to make a valid waqf there must be substantial dedication to charity: see Balla Mal v. Ata Ullah Khan, 54 Ind. App. 372. In that case only Rs. 146 out of Rs. 1558 of annual expenditure were to be applied for purely charitable purposes and Sir John Wallis declared the waqf as invalid. In Bali Ram v. Mohammad Afzal, A.I.R. (35) 1948 P. C. 168 at p. 173 the Judicial Committee declared another waqf to be invalid because of the smallness of the amount devoted to charitable purposes (it was 3/50th share of the annual expenditure). Moreover, the charity is not of a permanent character; the money is to be spent only on certain classes of persons of the Waqf's family. If there is none in his family belonging to those classes, nothing is to be spent on charity. The beneficiaries being confined only to his family were an exhaustible class, Only the Waqif & his daughter were required to spend Rs. 5 per mensem on charity; the daughter's descendants were not required to spend anything on charity. That the ultimate benefit must be of a permanent character is clear from Md. Hashim Ali v. Hamidi Begum, A. I. R. (29) 1942 Cal. 180 at p 191. Therefore this provision also did not make the waqf a valid charitable waqf.

24. The waqf in order to be valid under the Act must have been created for the maintenance & support of the Waqif & his family, children & descendants, if the ultimate benefit for the poor or for any other valid purpose was postponed. If the ultimate benefit is postponed, the interposing estate must be of a particular kind in order to make the waqf valid; if it is of a different kind, it would not be governed by the Act & would not become valid under it. A Hanafi Mussalman can create a waqf for his own maintenance & support. The Waqif in the present case has reserved to himself the exclusive right of enjoying, & bringing to his use, the income from the property. He has not said that he would use the income for his maintenance & support; what he has done is to create a life interest in his favour in the income. The distinction between creating a life interest in the income & using the income for maintenance & support has been pointed oat by Chagla J. in Abdul Karim v. Rahimabai, A. I. R. (33) 1946 Bom. 342. There the waqif directed the trustees to pay the net income of the balance to him during his life for his absolute use. The learned Judge, as he then was, held that this did not amount to his reserving the income for his maintenance & support. He observed at p. 345:

> "In this case what the setlor has done is that he has reserved for himself during his life for his absolute use the whole income of the trust property. The income is not reserved for his maintenance & support but for his absolute use. The Legislature advisedly did not permit a Hanafi Mussalman to reserve the income of the trust property during his life for his own benefit or for such use as he may put it to. It was only when he reserved that income for his maintenance and support that he was

> permitted to do so without offending against the provisions of the Act. What the settlor has done in this deed is that he has reserved to himself a life interest is the income of the trust property. Now a reservation of a life-interest in the income of a trust property is a very different thing from securing to himself for his own maintenance & support the income of the trust property. The difference in law between these two provisions is clear & of considerable importance."

In Mohammad Zain Khan, v. Nurul Hasan Khan 45 ALL. 682 this Court did not decide anything to the contrary. There the waqf provided that during the Waqif's lifetime he was to spend as much as he liked on charity & the remainder for his support. There was thus a clear mention of "support" & further he was required to spend money on charity; so it was not a case of his reserving a life interest in the income. Furthermore, the question in that case was not whether the waqf was valid under the Act (because it was created in 1909) but whether the creation of two life interests for the support of the Waqif & his wife made the ultimate benefit fail. The provisions in favour of the respondent & her descendants are in similar terms; they are all to be benefited just as the waqif was to be benefited; the income has not been given to any of them for their maintenance & support; each of them has been given a life interest in the income. The provision in respect of the descendants of the respondent is even worse; they are not required even to pay Rs. 5 per month to the poor, the indigent & the orphans of the family. The waqf deed bound only the Waqif & the respondent to make this payment. The interposing estates, thus, are not of the character mentioned in Section 3 of the Act.

25. Coming to the ultimate benefit, there is no doubt that it is expressly reserved. For the waqf to be valid it mast have been reserved for the poor or any other purpose recognised by the Mussalman Law as a valid purpose for waqf ; & the purpose must be of a permanent nature. The ultimate benefit according to the waqf deed is to go to any kar kher sanctioned by the Mohammedan Law & to be selected by the Ulemas of the city with the qualification that as far as possible the poor, the orphans & the widows among the Wakif's relations should be given preference. The words ''waqif ke rishtedaran yatama wa masakim wa bewagan wa ghurba" may be interpreted in any of the following three ways: (1) the needy, widows, the poor," orphans & the Waqif's relations, (2) the needy, widows, the poor & orphans related to the Wakif, & (3) those relations of the Wakif who are orphans or are needy or are widows or are poor. Having regard to the construction of the sentence & particularly the fact that there is no word 'wa' joining the words rishtedaran & yatama. I select the last interpretation. The first interpretation would have been proper had there been the word 'wa' between rishtedaran & yatama. The second interpretation also is consistent with the structure of the sentence, but I discard it in favour of the last interpretation because there is absolutely nothing to indicate that the Wakif intended a special favour to the orphans among his relations & discriminated between orphan relations or widows among relations. The interpretation there I have selected is in conformity with the rest of the waqf deed. The deed must be interpreted as a whole. The "Waqif has expressed concern for those members of his family who are poor or indigent or orphans by binding himself & his daughter to spend Rs. 5 per month on them. He has added only widows in the ultimate benefit I do not think anything depends upon the use of the word "rishtedaran" as against the use of the word "kunba" & "Khandan" in the clauses relating to the payment of Rs. 5 per mensem. I do not accept Mr. M.H. Beg's contention that there is no permanency in the ultimate benefit. The ultimate

benefit is permanently for Karkkher ; the permanency is not detracted from by the condition that preference should be given to such relations of the wakif as are orphans, needy, etc. That class of beneficiaries need not be permanent at all, because even after its exhaustion the income would have to be spent on "kar kher." The preference is to be given only so far as is possible ; the trustees are not absolutely bound to give it. Even when the money is spent on them, it would be spent on "karkher" as contemplated by the waqif, and on their death it would only continue to be spent on "karkher." The question whether they form an exhaustible or permanent class is wholly irrelevant.

26. The waqf reserves the ultimate benefit for "karkher" according to the choice of the Ulemas, provided that it is permitted by the Mohammedan Law. The question is whether this reservation is for the poor or for any other purpose recognised by the Mohammedan Law as a religious, pious or charitable purpose. It is certainly not reserved for the poor ; " karkher " does not necessarily mean maintenance and support of the poor. The provision regarding preference being given to the poor relations does not amount to reservation of the ultimate benefit for the poor because it is not of a permanent nature and also because orphans and widows are not necessarily poor, An orphan is a parentless child and a widow is a huabandless married woman ; the loss of the parents in one case and of the husband in the other case does not necessarily make them penurious. Further, the provision is uncertain, inasmuch as it does not apportion the ultimate benefit between the poor and needy relations on the one band and the orphans and the widows among the relations on the other hand and it would be open to the trustees to spend all the income on the orphans and the widows without contravening the provision of the waqf. The waqf would, therefore, be valid only if the reservation of the ultimate benefit for "kar kher" is one for a purpose recognised by the Mohammedan Law as a religious, pious or charitable purpose.

27. Mr. M.H. Beg vehemently attacked the waqf deed on the ground of uncertainty. He contended that the words "kar kher" are vague and uncertain, that they do not necessarily indicate charitable purposes and that the precise charitable purposes should have been specified.

28. In the English Law relating to charitable trusts there are two principles firmly established: In the words of Lord Porter Chichester Diocesan Fund & Board of Finance v. Simpson, 1944 A. C. 341 at p. 364 :

> "(1) "The testator must make his own will and not leave his executors to make their choice of the objects of his bounty, subject to this, that a general gift to charity will be upheld. (2) It is not, however, enough that he should leave property under a disposition in pursuance of which his assets may be disposed of to charities or for some other purpose, not even though his executors in fact apply them only to charitable purposes."

In the words of Viscount Simon L. C. in the same case, he, unless he is minded to make gifts for charitable purposes. "cannot by his will direct executors or trustees to do the business for him."

29. Lord Macmillan observed at p. 349 :

> "The choice of beneficiaries must be the testator's own choice. He cannot leave the disposal of his estate to others. The only latitude permitted is that, if he designates with Sufficient precision a class of persons or objects to be benefited, he may delegate to his trustees the selection of individual persons or objects within the defined class."

The exception from the general principle : "is allowed because of the special favour which the English Law shows to charities, and the conception of what is charitable for such purposes has been elaborately worked out so that the Courts are able to determine whether a particular gift is charitable or not." (Per Viscount Simon L. G. at p. 348 (9)). Tudor writes in his book on Charities, Edn. 4 at p. 95 :

> "Wherever a clear intention to devote property to charity is shown and that intention is not confined to a particular form of charity which is initially impracticable or illegal, effect must be given to it. The law distinguishes between the charitable intention and the mode of executing it. It looks upon charity as the legatee, and the particular mode of application is not considered to be of the essence of the gift."

The word 'charity' has a technical meaning in the English Law. The first comprehensive definition of 'charity' is contained in the preamble to the statute of Elizabeth (43 Eliz. c. 4). The preamble is still in force and it is still the law of England that a charity is an object within the spirit or intendment of the statute. The objects there enumerated may be broadly summarised as relief to poor and other persons in distress, education and public works. See the Law of Trusts by Keeton, 1947, p. 132, 61. The Law Quarterly Review, p. 268, containing an article on "The Legal Definition of 'Charity'" and the observation of Achhru Ram J. in Shadi Ram v. Bam Kishan, A. I. R. (35) 1918 E. p. 49 at p. 55. So where the word 'charity' is used in a technical sense, the Court understands what is meant by it and a trust for charity simpliciter is not void on the ground of uncertainty. 'Charity' has a popular sense also, but when it is used in that sense it is vague. "Charity" in the popular sense is not coterminous with "charity" in the technical sense : this was laid down by Lord Porter in the Chichester Diocesan case, 1944 A.C. 341 at p. 366. The distinction between the two meanings is pointed out by Dr. Keeton in his book at p. 132. Where words are ambiguous, a construction should be adopted which would not make the bequest void ; per Lord Finlay L. C. quoted by Lord Wright in the Chichester Diocesan case at p. 360, and Tudor on Charities at p. 96. Consequently if a testator uses the words "charitable purposes" without specifying them, he will be presumed to have intended the technical meaning so as to effectuate his intention of creating a trust, and not the popular meaning so as to destroy the trust. Lord Porter said in the above case that it is permissible to consider that the testator did not intend to the intestate and that the words "charity" and "charitable" must be construed as technical words unless it can be seen from the wording of the will as a whole that they are used in some other than their technical sense (p. 363). Of course the question of construction arises only when there is an ambiguity & Lord 'Simonds laid down in the above case at p. 368 that where the testator's words would, if no question of invalidity arose, leave no doubt in the mind of the Court, it is "not at liberty to create an ambiguity in order then to place what is sometimes called a benignant construction on the will."

Lord Simonds has quoted Russell L. J. as saying "matters have been stretched in favour of charities almost to bursting point", in Be Grove-Gredy, (1929) 1 ch. 557 : see William's Trusts v. Inland Commrs., (1947) 1 ALL E. R. 513. A trust for charity or charitable purposes is, therefore, valid & would be executed by an English Court un-less there is anything in the wording of the deed to indicate that the words "charity" & "charitable purposes" were used in the popular, & not the technical, sense.

30. The English Law is different as regards trusts for benevolent purposes. In the Chichester Diocesan case, 1944 A. C. 341 the House of Lords refused to extend the exception from the general principle to benevolent trusts because the Court does not know what is benevolent. It is not a term of art & in its ordinary meaning it has a range in some respects far less wide than legal charity & in others somewhat wider. It was conceded in that case that a trust for benevolent purposes is void, Lord Simonds said in the case of William's Trusts, (1947-1 ALL E. R. 513) that a benevolent trust is not the same as a charitable trust. Similarly, a trust for "public purposes" is void for uncertainty, as observed in the Chinchester Diocesan case by Lord Macmillan, Philanthropic purposes are also wider than charitable purposes & a gift for philanthropic purposes will fail for uncertainty ; Dr. Keeton, at p. 134. All these trusts fail because though they may include charitable purposes, they do not exclude others & the law does not countenance the mixing up of charitable & non-charitable purposes. It does not matter how tbe mixing up is done, whether by using one word which includes charitable & non-charitable purposes such as "benevolent". "publics" etc., or by using two or more words disjunctively, such as "charitable or benevolent", "charitable or public", "charitable or pious", etc. It is needless for me to consider the effect of the use of the conjunctions "or" & "and" because we are not concerned in the present case with any uncertainty caused by the use of two or more words, one suggesting a charitable intention & the other or others, a non-charitable intention. We are concerned here with only one word, namely, "karkher".

3l. The rule that a charitable trust fails for want of uncertainty is of universal application & applies as well as to Hindu & Muslim charitable trusts as to English charitable trusts. The responsibility for superintending the execution of a charitable trust is upon a Court & if the meaning of the trust is uncertain, the Court cannot superintend its execution. Further, the Court may itself be called upon to execute a charitable trust & it would not be able to do its duty if it did not know the meaning of the trust. The rule has been applied to Hindu & Muslim charitable trusts; see for example Runchordas v. Parvatibai, 26 Ind App. 71; Mukarrain Ali v. Anjumanissa Bibi, 45 ALL. 152 ; Ahmadi Begum v. Badrunnissa, A. I. R. (27) 1940 Oudh 324 ; Mohammad Yusuf v. Azimuddin, 1941 ALL. L. J. 2G9; Beli Ram v. Mohammad Afzal, A. I. R. (35) 1948 P. C. 168 ; Mahomed Ali v. Lakhmi Chand, A.I.R. (18) 1931 Sind 75 confirming Mahomed Ali v. Lakhmi Chand. A. I. R. (16) 1929 Sind 52 (2) and Punjab & Sind Bank Ltd. v. Anjuman Himayat Islam, A. I. R. (22) 1935 Lah. 596. The question whether a Muslim Waqf can be ruled out as void for uncertainty was raised in Bahmanul Hasan v. Zahurul Hasan, A. I. R. (34) 1947 ALL. 281, but it was left undecided.

32. The question whether a charitable trust would fail for uncertainty in India must be distinguished from the questions, what causes uncertainty & what is the meaning of uncertainty. As I said above, the rule does apply in India & where the waqfs have been sustained as valid, that has been done not on the ground that the rule does not apply but on the ground that there is no uncertainty in the

language used in the deeds. What causes uncertainty depends not only upon the meaning of the language but also upon what are the legal requirements of the expression of the object or purpose of the trust.

33. "Karkher" literally means good deed or purpose ; its meaning is akin to the meaning of the words "benevolent" & "public purpose". It has not come to acquire any technical meaning & is not understood to be synonymous with charitable purposes. The word "khairat" has been interpreted to mean "charity"; but merely because the word "charity" has a technical meaning in the English Law, it cannot be said that "khairat" also has a technical meaning under the Muslim Law. An English Court may have no difficulty in understanding what is meant by "charity" in a will governed by the English Law & in executing a trust for charity simpliciter, but one cannot say that an Indian Ct. also would have no difficulty in understanding what is meant by "khairati" in a will governed by Muslim Law. "Khairat" may be translated as "charity", but it would carry its popular meaning & not the technical meaning. The word "charity" has no technical meaning under the Scottish Law (because the Statute of Elizabeth never applied to Scotland) & on this ground Lord Porter, in the Chichester Diocesan case, 1944 A. c. 341 distinguished Scottish decisions in respect of trusts for charitable or benevolent purposes. Similarly, we must distinguish the English decisions on the point & not blindly hold that waqfs for "khairat" are valid. I consider that but for the Mussalman Waqf Validating Act, a waqf for "khairat" or charity simpliciter could have been void for uncertainty. The position since the passing of the Act is, however, different because the Act itself uses the word "charitable" without defining it anywhere. When the Act itself lays down that a waqf can be created for a "charitable" purpose, a waqf made accordingly "for charity" or "for a charitable purpose" cannot be held to be so uncertain as to be void. There would certainly be no greater uncertainty in the waqf than in the Act itself & if the Act permits an uncertain thing to be done, it is not open to the Court to say that the thing done is invalid on account of uncertainty. If a waqf deed recites that it is created in accordance with the Act for a charitable purpose, there is all the greater reason for not ruling it out as invalid.

34. The Act does not define what purposes are religious, pious, or charitable. A list of valid objects of Mulism Waqf is given by Sir Dinshah Mulla in his Principles of Mohammedan law, Edn. 13, p. 164, and by Tyabji in his Mohammedan law, Edn. 3, p. 584. There is no conflict between the two lists, both being based on judicial pronouncements and pronouncements of Mohammedan Jurists. With the assistance of these lists a Court can always ascertain if the object of a Muslim is valid waqf and whether a mutwalli has spent the money on a valid object or not. When the Act does not require that the specific purpose must be mentioned by the Waqif, a waqf merely laying down that the money should be spent on "any purpose recognised by the Muslim law as religious, pious or charitable" ought to stand and ought not to be thrown out as void for uncertainty. The position now becomes the same as that of an English trust for charity simpliciter, and, provided that the object of the waqf is indicated with reasonable certainty, it is not necessary to be named. If it is indicated by using the very words which are used in the Act, it must be held to have been indicated with reasonable certainty, because whatever uncertainty there is, is created by the Act itself and cannot be said be unreasonable. I do not think actually there is any uncertainty in the Act itself, because the purposes recognised by the Muslim law as religious, etc., are known to Courts or can be known by them from test books and precedents. The word "recogniced" used in the Act is very significant.

35. "Karkher" and "Amure kher" are synonymous. In Mukarram Ali's case, (45 ALL. 152) there was a waqf for "amure kher," and in Mohammad Yusuf's case, (1941 ALL. L. J. 269) there was a waqf for "kar kher," without any specification of the purposes and yet both were held to be valid. In the latter case it was observed by Dar J., that it is a question of interpretation in each case in which sense the expression is used in a particular document; if it is possible to construe the word "kar kher" in the narrower sense "charity," the trust would not be void. On the other hand, trusts using the same words were held to be invalid in Mohammad Afzal v. Din. Mohammad, A.I. R. (34) 1947 Lah. 117 and Radhey Shiam v. Radhey Lal, A. I. R. (14) 1927 oudh 213. The words actually used in the waqf in the Lahore case, which was confirmed on appeal by the Judicial Committee under title Beli Ram v. Mohammad Afzal, (A. I. R. (35) 1948 P. c. 168), were "mazhabi aur khairati Ram," and it was only by obiter that Bam Lall J., said at p. 131 that "broadly speaking, if the words kher or kar kher are used, reference is to benevolence and good work and the trust is void for uncertainty."

The Chief Court of Oudh had to deal with, "amure kher men jo bamujib mazhab hanfia ziyada munasib hon." Ahmadi Begum's case, (A. I. R. (27) 1940 oudh 324), Radha Krishna and Hamilton JJ. held the words to be uncertain, while Ziaul Hasan J., held that there was no uncertainty. According to Mohammad Yusuf v. Azimuddin, and Mohammad Afsal v. Din Mohammad a waqf for khairat is valid, while according to Mahomed Ali v. Lakhmi Chand, A.I.R. (16) 1929 Sind 52 (2) and A. I. R. (18) 1931 Sind 75 and Punjab Sind Bank v. Anjuman Himayat, (A.I.R. (22) 1935 Lah. 696), it is invalid. In the Lahore case, Ram Lall J., said at p. 137 that if the words used are "khairat" or "khairati kam," reference is to charity and the trust would be upheld. The case of Mohammed Ali v. Lakhmi Chand dealt with a waqf created prior to 1913; I have shown above that the Act by defining waqf and laying down that a waqf would be valid if the ultimate benefit was of a certain nature, has made a change in the law regarding what amounts to uncertainty. In the Punjab Sind Bank case, which was disapproved of subsequently in Mohammad Afzal's case, the High Court went to the extent of saying that a trust for religious purposes or a trust for charitable purposes would be invalid. The waqf in Hashim Ali v. Hamidi Begum, (A. I. R. (29) 1942 Cal. 180), was for "proper acts of charity" and the High Court of Calcutta upheld it; K. C. Mitter J. said, that the purpose need not be expressed in clear terms in the deed and that if it can be implied, with the aid of principles formulated by Muslim Jurists, the proviso to Section 3 of the Act would have been complied with. As the overriding intention of the Waqif was to provide for support of the poor, the words "proper acts of charity" were construed to mean a gift to the poor. Khundkar J. agreeing with him, was inclined to translate "kar kher" as "works of charity" and said that what amounts to "kar kher" can be easily ascertained by reference to the principles of Mohammedan law. He supported the stand taken by Ziaul Hasan J in the case of Ahmadi Begum. A trust for charitable and religious purposes is valid according to Ramzan v. Rahmani, A. I. R. (19) 1932 oudh 71, Mohammad Yusuf v. Azim Uddin and Mohammad Afzal v. Din Mohammad, and invalid according to Punjab Sind Bank v. Anjuman Himayat. In Ruqaiya Begum v. Surajmal, A. I. R. (23) 1936 ALL. 404 a trust for religious, pious or charitable purposes was held by Sulaiman C. J. and Harries J. as valid. They were prepared to uphold a trust even if the ultimate benefit for a religious, pious, or charitable purpose was not expressly reserved, if such a reservation could be implied. If even when reservation of the ultimate benefit is not expressed in so many words a deed can be upheld, the case of another deed where the reservation is made expressly stands on a stronger footing.

36. It is clear from the above resume of the law that decisions regarding "kar kher" are not all reconcilable. The Court does not derive much assistance from the dictum that what "karkher" means is a question of construction in each case; because if it is a question of construction, the Court is prima facie bound to place that construction which would uphold the gift in preference to the other construction which would destroy it. To say that it is a question of construction is equal to saying that the word should be taken to mean "charity" or "charitable purpose." The question of construction arises only when there is an ambiguity in the language used. If it were doubtful whether "kar kher" means a "charity" (or a "charitable purpose") or "benevolence" or "public purpose" or "good," the Court would interpret it to mean charity so as to sustain the waqf. But this principle is not applicable when the uncertainty or doubt is caused not by any ambiguity in the language used, but by the word meaning both charitable and non-charitable objects or purposes. I am of the view that "karkher is such a word which includes within its scope charitable and non-charitable objects. It is essentially a term of wide import. It stands on the same footing as the words "benevolent", "good" and "public." If it is used in conjunction with other words from which it may take its colour, i.e., with words showing an exclusively charitable intention, the Court may construe it, in the particular case, to mean exclusively charitable. Thus, if the word "benevolent" or "public" is used with the word 'charity" or "charitable", the ejusdem generis rule may be applied and the trust may be held to be charitable as was done in the cases cited by Lord Porter in the Chichester Diocesan case, (1944) A. C. 341 at p. 365. In the present case, however, there are no such words used with "karkher" as would make it exclusively charitable. Neither the use of that word "waqf" nor the reference to the Act is of any help, nor even the words "Jiski shara Mohammadi Ijazat deti ho." Some such words were used along with the word "karkher" in the case of Mohammad Yusuf, (1944 ALL. L. J. 269), and yet the waqf was held to be uncertain. Had the words used in the Act, namely, "any purpose recognised by the Musalman Law as religious, pious or charitable," been used with "karkher" I would have had no hesitation at all in upholding the waqf. I do not think that the words "Jiski shara Mohammadi Ijazat deti ho" are equal to "any purpose recognised .... or charitable."

37. The Musalman Law does not permit the spending of money only on religious, pious and charitable objects and does not prohibit the spending of money on any other object. It cannot be said that the spending of money on good or benevolent objects, though they are note charitable, is prohibited or not permitted by the Musalman Law. The waqf deed leaves it open to the mut-wallis to spend the income on such benevolent or public objects as are note charitable, In other words, it is void for uncertainty. The uncertainty that is fatal to the validity of a deed purporting to be charitable is the uncertainty arising from a choice between a charitable object and a non-charitable object and not that between one charitable object and another. As the instant deed leaves the choice between a charitable object and a non-charitable object to the mutawallis, the uncertainty is fatal.

38. The doctrine of cy pres was invoked on behalf of the respondent. It was also contended that if there is any word in the deed which renders it void for uncertainty, it may be excised. The cy pres doctrine operates only if there is a general charitable intent :

> "If nothing more than a purely general direction is given, the Court must simply substitute its own nomination for that which the testator omitted to make."

It is by applying this doctrine that a deed for charity simpliciter is held valid and executed by the Court. If the testator defines his charity, but the object turns out to be impracticable or insufficient to consume the whole fund, the doctrine operates to enable the Court to apply the whole fund or the surplus to another charity as near as possible to the testator's intention, See Dr. Keeton, p. 150, Modern Equity by Dr. Hanbury, Edn. 4, p. 227, and Sir Dinshah Mulla's Mahomedan Law, Edn. 13, p. 168. Sir Dinshah Mulla has made it clear that a waqf that is void for uncertainty cannot be validated by the application of the doctrine. His view is based on the case of Punjab & Sind Bank, (A. I. R. (22) 1935 Lah. 596). The same view is taken in the cases of Ahmadi Begam, (A. I. R. (27) 1940 Oudh 324) ; Mohammad Ali, (A. I. R. (18) 1931 sind 75) and Ismail Haji v. Umar Abdulla, A.I.R. (29) 1942 Bom. 155.

39. There are some dicta in Abdul Sattar v. Abdul Hamid, 1944-2 Mad. L. J. 92, suggesting that if a waqf is created for two objects, one of which is, and the other not, a valid object of waqf according to the Mohammadan Law, the waqf would stand and the income would be spent on the valid object only. Both the objects were to and to be valid objects in that case and the Court went on to observe that even if one of them were not a valid object, the doctrine would apply and the whole income would be spent on the other valid object. The question whether the invalidity of one object, when the income was not apportioned between the two objects and the mutwalli was left free to spend money on them in any proportion he liked, would render the whole waqf invalid was not discussed at all, and it was assumed that invalidity of the object would not render it void for uncertainty. The learned Judges did not lay down that tbe doctrine applies to validate a waqf which otherwise would have bean void for uncertainty. In Ruqia Begam's case, (A. I. R. (23) 1936 ALL. 404), Sulaiman C. J., contemplated the applicability of the doctrine to quite a different set of circumstances. The Court went farthest in applying the doctrine in Hashim Ali Khan v. Hamidi Begam, (A.I.R. (29) 1942 Cal. 180), Khundkar J., was of the opinion that if "Karkher" does not include the objects of bounty with sufficient certainty, the doctrine can be invoked. The learned Judge relied upon a statement of Tyabji in his Mohamedan Law to the effect that while the English Law would invalidate a bequest which uses the words "philanthropic purpose" or "benevolent purpose", the Mahomedan Law would excise the non-charitable elements and make the bequest valid for the remaining charitable elements included in the words. This takes one back to the question whether the law of uncertainty applies to a Musalman waqf or not. If the law applies, and I have found it does, there does not arise any question of applying the doctrine to a. waqf that is void for uncertainty. If "philanthropic purpose" includes charitable and non-charitable purposes, the waqf is void for uncertainty (unless there is something in the context to suggest that only charitable purpose was intend-ed) ; the Court cannot hold it to be valid merely, by excising the non-charitable purpose. I find that the respondent cannot invoke the aid of cy pres doctrine to remove the defect of uncertainty in the waqf.

40. In the result I hold that the waqf under consideration is void because it is illusory, it is not created for the maintenance and support of the waqif or his children or their descendants, and the ultimate benefit is not reserved with sufficient certainty for the poor or "any other purpose recognised as charitable purpose of a permanent character." Therefore, the appeal should be allowed, the decree of the Court below be reversed and, the suit of the plaintiff-respondent be dismissed. As the questions that were raised were not without difficulty and the responsibility for the litigation rested with the waqif rather than with the-parties, it is proper to let the costs of the

successful party come out of his estate itself. The estate is with the appellant and it would suffice to say that no order about the costs of either Court is made.