Mohammad Sabir Ali vs Tahir Ali And Ors. on 22 February, 1954

Equivalent citations: AIR1957ALL94, AIR 1957 ALLAHABAD 94

JUDGMENT

Agarwala, J.

1. This is a plaintiff's first appeal from the judgment and decree of the Civil Judge of Bahraich, and the subject of dispute in this, appeal is the taluqdari and non-taluqdari property of one Thakur Asghar Ali who died in 1937.

2. To appreciate the controversy between the parties, the following genealogical table, which is not disputed, will be of considerable assistance.

A M I R B A K S H
_____|_____
| | | | | | Faiz Mohammad Fateh Mohammad Nabi Baksh Jang Bahadur Janab Ali Madar Baksh | | | Daughter First Wife Asghar Ali Mohammad | | | Shah Jahan Begum | (Second wife of Asghar Ali) | Deft. 4 | _____|_____ | | | | | Mohammad Ali(Deft. 5) Mohammad Ismail (Deft.6) Zainab Bibi(Deft.7) | _____|_____
| | | | Uma Saima= Nasir Ali Mohd. Umar (Deft. 1) Aeysha Bibi (Deft.2) Fatima Bibi (Deft.3) _____|_____
| | | | | | | Sabir Ali Plff. Tahir Ali Atahar Ali Bibi Nur Jahan Bibi Sultan Bibi Ahman Bibi Kishwar Jehan Jehan Jehan

3. Amir Bakhsh who owned considerable property known as Tipraha Estate in the district of Bahraich, at the time of the annexation of Oudh, died during the Mutiny and was succeeded by his son Thakur Fateh Mohammad who was subsequently recognised by the government as the taluqdar of the Tipraha estate. Thakur Fateh Mohammad died in 1890 without leaving any male issue and on his death his younger brother. Nabi Bakhsh, succeeded him as taluqdar under the family custom and under the provisions of the Oudh Estates Act. Nabi Bakhsh died in 1899 and was succeeded by his only son Thakur Asghar Ali. Thakur Asghar Ali in his life time acquired certain other properties of taluqdari and non-taluqdari character which are detailed in the schedules annexed to the plaint.

4. On the 26-8-1925. Asghar Ali executed a deed of waqf-alal-aulad by means of which he created a waqf of his entire property for the benefit of himself, his family and descendants generation after generation. He was to be the mutwalli for his life-time and thereafter his son Mohammad Umar defendant no. 1, and after him his other sons and then his other descendants selected according to the rule of primogeniture. Some amounts were to be paid to charities and as maintenance

allowances to the members of his family generation after generation.

5. On the night of 27-2-1937, Thakur Asghar Ali passed, away leaving behind him the properties which according to the plaintiff were those described, in the Schedules A to I appended to the plaint. On the death of Asghar Ali, disputes arose about the succession to and possession of his property. Defendant No. 1 Mohammad Umar claimed to be entitled to the entire property as mutwalli under the waqf deed dated 26-8-1925, while the plaintiff being the eldest son of Nasir Ali claimed succession to the property under the rule of lineal primogeniture.

The Deputy Commissioner of Bahraich then stepped in and the properties mentioned in Schedules B, E, F and H were attached. The property mentioned in Schedule A was subsequently attached under the orders of the Sub-Divisional Magistrate, Bahraich and the property mentioned in Schedule D was taken possession of by defendant No. 1 Mohammad Umar the second and the then eldest surviving son of Asghar Ali.

This was followed by a protracted litigation with regard to mutation of names in the Revenue Courts, and ultimately an order for mutation was passed in favour of Mohammad Umar defendant No. 1. This order was confirmed by the Board of Revenue on 13-5-1939, and the properties mentioned in schedules A, B, E, F and H were delivered to defendant No. 1.

6. Defendants Nos. 4 to 7 are said to have obtained possession of item No. 2 of schedule E and the bulk of the property in Schedule F; while defendant No. 2 is said to have entered into possession of item No. 5 of schedule B and defendant No. 3 of item No, 1 of Schedule B.

7. Thakur Mohammad Sabir Ali plaintiff then instituted the suit, which has given rise to this appeal in forma pauperis, for the possession of the entire property left by Asghar Ali and for mesne profits on the allegations that he was the eldest son of Nasir Ali, who also was the eldest son of Asghar Ali and as such was entitled to succeed to the property of Asghar Ali under the rule of male lineal primogeniture in accordance with the Oudh Estates Act and the family custom.

He denied the execution, attestation, genuineness and validity of the waqf deed alleged to have been executed by Asghar Ali and relied upon by defendant No. 1 for his title to the property. It was further alleged by the plaintiff that the waqf deed; if any, had been obtained by a fraudulent misrepresentation, the details of which and the other grounds on which the validity of the deed is challenged, are mentioned in paragraphs 11 to 17 of the plaint.

The plaintiff also challenged the validity of the sale deed obtained from him by defendants 4 and 5 in respect of the bulk of the property on the assurance that they would finance and support the litigation which they had no intention to do.

8. The defendants were, therefore, said to be in wrongful possession of the entire property left by Asghar Ali and the plaintiff claimed to be the rightful owner of the property. He claimed damages to the extent of Rs. 5000/- and mesne profits to the tune of one lac or any larger amount which might be found due. An alternative prayer for arrears of maintenance amounting to Rs. 4800/- and

possession of item No. 2 of Schedule B attached to the plaint was also made in case the plaintiff was not found entitled to the relief of possession of the other property.

9. The defendants contested the suit. Defendant No. 1 admitted the pedigree set up in the plaint, but alleged that it was incomplete. A fuller pedigree was appended by him to the written statement. He admitted that Thakur Asghar Ali succeeded to Mohammad Nabi Bakhsh and thus inherited most of the property owned by Fateh Mohammad, but it was denied that Nabi Bakhsh, the younger -brother of Fateh Mohammad, succeeded to his entire property on his death in 1890.

It was asserted that the deed of waqf-alal-aulad executed by Thakur Asghar Ali on 26-8-1925, was duly executed, registered and acted upon and that no fraud, undue influence or coercion as alleged by the plaintiff had been practised, upon him. It was further alleged that even if the waqf was held to be invalid, it would still be operative as a will, and defendant No. 1 was entitled to succeed to the whole of the estate of Asghar Ali as his successor.

A plea of limitation was also raised. Defendants 2 and 3 adopted the written statement filed by defendant No. 1. The defence of defendants 5 and 6 was that they were the owners of the property mentioned in schedule D, and of items 2 and 3 of Schedule E. They also supported defendants 1 to 3 with regard to the genuineness and validity of the waqf deed.

Defendant No. 7 adopted the written statement filed on behalf of defendants 5 and 6. Defendant No. 4 maintained that the sale deed executed by the plaintiff in his favour was valid and binding and that the plaintiff was not entitled to recover the property comprised in the sale deed.

10. The lower court found that the waqf deed dated 26-8-1925, was duly executed by Thakur Asghar and was a perfectly genuine and valid document and as such binding upon the parties. It held that Thakur Nasir Ali was the eldest son, of Asghar Ali and the plaintiff being the eldest son of Nasir Ali was entitled to inherit only such property as was left by Asghar Ali at the time of his death, by virtue of a family custom and under the provisions of the Oudh Estates Act.

The plaintiff, therefore, succeeded in his claim only in respect of such properties as were not the subject of wakf viz. items 17 (b) and 17 (c) of schedule A of the plaint. He was not found entitled to any mesne profits or damages but his claim to recover Rs. 2785/12/6 as arrears of guzara from 1-3-1937 to 1-3-1944 under the terms of the waqf deed was upheld. The plaintiff's right of residence in kothi Madanjot entered in item No. 2 of list B was also found substantiated.

11. The issues relating to the character of the various items of property were also decided by the lower court, but it is not necessary to mention its findings, as the findings on these issues have not been challenged in argument in appeal. Dissatisfied with the judgment of the court below, the plaintiff has come up to this Court in first appeal.

12. During the pendency of the appeal-Mohammed Umar defendant No. 1 and Mohammad Ali defendant No. 4 have died and their heirs have been brought on the record, in this appeal the only points argued before us relate to the genuineness and validity of the waqf deed executed by Asghar

Ali. The waqf-alal-aulad has been challenged on three grounds :

> (1) That Asghar Ali never intended to create a genuine waqf and that it was a paper transaction never intended to be given effect to, (2) that it is invalid because it is contrary to the provisions of Mohammadan Law and (3) that it is contrary to the provisions of the Oudh Estates Act and therefore, invalid.

13. The first point which we propose to deal with at the outset is, if Asghar Ali did, as a matter of fact make a genuine and bona fide waqf-alal-aulad. The due execution and due attestation of the waqf having been established and not being challenged in this appeal, the onus lay upon the plaintiff to prove by cogent and convincing evidence that the deed was a colourable or a fictitious transaction.

The oral evidence led by the plaintiff on this point comprises of the solitary testimony of one Mohammad Shafi (P. W. 2) who served Asghar Ali as a moazzin in his mosque for a brief period of fifteen months in 1924-25. He states that once in the rainy season of 1925 Mohammad Umar defendant came to Asghar Ali and told him that Nasir Ali had applied for the estate to be taken over by the Court of Wards and Mohammad Umar took Asghar Ali inside the house.

In cross-examination the witness admitted that Asghar Ali did not inquire of Mohammad Umar the source of his information nor did he make, any comment. Asghar All, as a prudent man, would have naturally made some inquiries to find out if the information conveyed to him by Mohammad Umar was correct, and it is difficult to believe that this slender and unverified piece of information should alone have cheated in the mind of Asghar Ali a belief that Nasir Ali, his eldest son, had turned against him and had been making efforts to divest him of his property. No application was made by Nasir AH to the Government and there is no documentary evidence on the record to prove that Nasir Ali had any such sinister motive as is sought to be attributed to him.

14. As against the solitary testimony of Mohammad Shafi, the defendant has examined some respectable witnesses in rebuttal. Nawab Newa-zish Ali Khan, taluqdar of Aliabad estate, Bahraich, who is an important witness on this point, states that his house was close to the house of Asghar Ali and that he had intimate relations with him. He was on visiting terms with Asghar Ali. He further states that in May 1925, Asghar Ali had a talk with his uncle, the late Nawab Mohammad Ali Khan, C.S.I., in his presence and that it was in connection with the creation of a waqf alal-aulad.

Asghar Ali wanted to preserve the property from being wasted by his sons and asked for suggestions from Nawab Mohammad Ali Khan. Nawab Mohammad Ali Khan made some suggestions but the only suggestion which appealed to Asghar Ali was the creation of a waqf-alal-aulad. Ultimately, according to the statement of this witness, Asghar Ali decided upon creating a waqf-alal-aulad with successive life estates to various persons.

He also showed a draft of the proposed waqf-alal-aulad to the witness and told him that the draft had been prepared by vakils. Two or three days after this talk with the witness, Asghar Ali came to the uncle of the witness at about 5 or 6 p.m. and told him that he had got the waqf deed, which was decided upon, registered. Ghulam Husain Khan, D. W. 4, is another witness. He was a life

Magistrate and paid Rs. 3,000/- as land revenue. He states that he knew Asghar Ali who was a friend of his and that he had once told him that he had an idea of creating a waqf-alal-aulad in order to safe guard the property from alienation and for charitable purposes and that five or six months later he told him that he had created the waqf -alal-aulad.

Raja Birendja Bikram Singh, taluqdar of Fayagpur, states that he was on visiting terms with Asghar Ali, taluqdar of Tipraha, and that during the course of a talk on affairs of the estate generally he had told him that in order to save his property from being squandered away by his successors he had created a waqf-alal-aulad. This witness was a hereditary Raja and paid about two lacs as land revenue.

15. The statements of these witnesses clearly show that the story that there was an apprehension in the mind of Asghar Ali that his property was likely to be taken over by the Court of Wards, and that the waqf was only a paper transaction created as a smoke screen to save the property from being taken over by the Court of Wards, was wholly unfounded.

The evidence further shows that Asghar Ali had a religious bent of mind and was both prudent and sagacious. The fact that Asghar Ali amassed considerable wealth and made consider able acquisition of property in his life time is also a pointer in the same direction. It is, therefore, no wonder if the idea of safe-guarding the property which he had built up, against dissipation in the hands of his successors was upper most in his mind.

16. Reliance has also been placed on some documentary evidence relating to the course of conduct and dealings of Asghar Ali with regard to the property subsequent to the making of the waqf. They are copies of some plaints and writ ten statements in which Asghar Ali described him self as the proprietor of the property even after he had executed the waqf. Exhibit 48 is a copy of a plaint in a suit instituted by Asghar Ali in the Court of the Munsif, Kaisarganj, for damages to the tune of Rs. 100/-.

In paragraph 1 of the plaint Asghar Ali described himself as the owner of village Ramgaoa. Exhibit 132 is a copy of a plaint in a suit institutes by His Highness Maharaja of Kapurthala against Asghar Ali for the possession of some land alleged to have been encroached upon by Asghar Ali. In paragraph 9 of the written statement, Ex. 133, Asghar Ali described himself as the owner of village Gondni Basahi which was also included in the waqf deed.

17. It has also been urged that no mutation was effected in favour of the waqf after the waqf deed had been executed. It is to be borne in mind that Asghar Ah appointed himself as the first mutawalli under the waqf deed and reserved to himself the right to appropriate and use the entire usufruct of the property in any manner he liked for his own benefit, for the benefit of his dependants and for charitable purposes. It is, therefore, not at all surprising if he did not think it necessary to apply for mutation or did not make any distinction in calling the property loosely as his own even after the waqf had been created.

Moreover the subsequent conduct of a transferee in dealing with the transferred property may be relevant only if it is of material assistance in establishing the nature of the transaction or the intent of the transferor in entering into the transaction. But the subsequent conduct may also be the result of a subsequent change in design in which case such subsequent conduct will not adversely affect the validity and genuineness or minimise or nullify the operative effect of a bona fide transaction made earlier.

18. The defendant has also filed a copy of an application made on behalf of Asghar Ali by his general agent Chattarpal Singh on 15-12-1933, in Suit No. 38 of 1928, in which the existence of the waqf-alal-aulad has been clearly admitted.

19. Lastly, it has been urged that Asghar Ali himself filed a suit for a declaration that the waqf deed was a fictitious transaction, a few months before his death and this leads to the conclusion that the deed was in fact a fictitious transaction. This suit was pending when Asghar Ali died and was ultimately withdrawn by his successors. It is difficult to find on the basis of this circumstance that the deed was fictitious.

Evidence has been led to prove that during the last years of his life his relations with his son Mohammad Umar became strained and he did not like the idea of Mohammad Umar succeeding him as mutawalli and it was to give effect to this displeasure that he instituted a suit for a declaration about the invalidity of the waqf deed.

Nawab Newazish Ali Khan & Ghulam Hussain Khan state that the suit was the outcome of a disagreement between Asghar Ali and his son Mohammad Umar and that Asghar Ali never intended to prosecute the suit and had definitely told Newazish Ali Khan that he would withdraw the suit. What the exact intention of Asghar Ali was in filing the suit, it is difficult to know or judge. Even if Asghar Ali changed his mind and decided upon cancellation of the waqf deed, it would not lead to the conclusion that he had no intention of making a bona fide waqf when he created the waqf-alal-aulad.

20. A number of rulings have been cited at the bar in support of the contention that a waqf becomes complete when a declaration to that effect is made by the waqf and no delivery of possession is required. It is unnecessary to refer to all these rulings in view of the Full Bench decision of this Court in Mohammad Yasin v. Rahmat Illahai, AIR 1947 All 201 (A) in which the view has been endorsed.

No delivery of possession is, therefore, required in the case of the waqf, especially when the first mutawalli happens to be the waqif himself and no significance can attach to the omission to get the mutation of names effected after the waqf had been made. Even if a waqif after making a bona fide waqf deals with the property as his own, or puts the property to his own use, these acts of his will only amount to a breach of trust and would not in any way affect the validity of the waqf if the waqf when made was otherwise valid.

21. We are, therefore, satisfied that Asghar Ali executed a waqf-alal-aulad with due formalities with regard to execution and attestation and that he did so of his own free will and with a bona fide and genuine intention of creating a waqf.

22. The waqf in question was next challenged for the reason that it was contrary to the provisions of the Mohammadan Law. This objection was based on three grounds; firstly, because the waqf does not provide for an ultimate gift to charity as required by law; secondly because there is no express transfer of the corpus to God; and thirdly, because the waqif reserved for himself the entire income for his life-time and thus went beyond the provisions of Muslim Law which only authorises reservation of amounts for the "maintenance and support" of the waqif and his descendants.

23. Before we deal with these and other arguments of law, the concept of property under the Mohammedan Law and the essential characteristics of a 'waqf must be borne in mind. Muslim Law does not recognise the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim Law does recognise and insist on, is the distinction between the corpus of the property itself (ayn) and the usufruct in the property (manafi).

Over the corpus of property the law recognises only absolute dominion, heritable, and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property, and the dominion over the corpus takes effect subject to any limited interests--Vide Nawazish Ali Khan v. Ali Baza Khan, 75 Ind App 62 at p. 77: AIR 1948 PC 134 at p. 138 (B).

Consistently with the above conception of property, a waqf is, according to Abu Yusuf, whose opinion has been accepted in India in this matter, an absolute transfer of ownership from the waqif to God Almighty for the purpose that its usufruct shall be applied to purposes recognised by Mohammedan Law as religious and charitable.

24. Waqf are of two kinds--public and private. The corpus of the property in both kinds of waqfs vests in God. The usufruct of the property in a public waqf is mainly devoted to religious and charitable objects benefiting the public at large or the poor. In a private waqf, which is called waqf-alal-aulad, the income of the property is mainly devoted for the benefit of the waqif, his family and his descendants generation after generation. It is a peculiarity of Mohammedan Law that the maintenance and support of one's self and one's heirs and family is considered a religious and charitable purpose and property can be tied up in perpetuity for such a purpose although under" the ordinary law such tying up of property, would be unlawful.

At one time it was held that unless a waqf provided for a substantial benefit for religious and charitable purposes, the tying up of the property even for the benefit of the descendants of the waqif was invalid--Vide Mahomed Ahsanulla Chowdhry v. Amarchand Kundu, 17 Ind App 28 (PC) (C); Abdul Gafur v. Nizamudin, 19 Ind App 170 (PC) (D) and Abdul Fata Mohammad Ishak v. Russomoy Dhur Chowdry, 22 Ind App 76 (PC) (E) Section 3 of the Waqf Validating Act (VI of 1913), however

declared that it was lawful for a Hanafi Muslim to create a waqf 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 purposes recognised by the Mohammedan Law as religious and charitable, Section 4 of the Act declares that such benefit for religious and charitable purposes could be postponed until after the extinction of the family, children or descendants of the waqif.

25. The question is whether the waqf in suit makes no provision for charity after the extinction of the line of the wakif's descendants?

26. The waqf in question mentions that it was made under the provisions of Act VI of 1913 to create a perpetual waqf for himself, for nis issue and for charitable purposes. The charitable purposes mentioned in para 3(a), (b) and (c) are :

(a) to clean and make repairs of the mosque mentioned therein;

(b) payment to pilgrims to Mecca; and

(c) sacrifice on Baqrid day and help of the, poor and promising muslim students.

In paragraph 22 it is mentioned that "If God forbid at any time there be none en titled to the office of Mutwalliship according to the terms mentioned above, then the waqf property shall be transferred to the Treasurer of Charitable Endowments and the Government shall have the power to make proper arrangements to spend the income for those religious purposes which have been mentioned in para 3, Clauses (a) and (b)."

It is, therefore, clear that there is an ultimate bequest for charity. It is not necessary to consider the point that even if there was no express mention of the ultimate bequest to charity on failure of the line of the descendants of the waqif, such a gift would be implied by the mere fact that a waqf had been created.

Is the waqf in suit bad because it does not transfer the ownership of the property to God?

27. It is indeed true that there is no express mention in the deed of waqf that the corpus of the property is being transferred to God, but the law does not require such express mention. The definition of 'waqf' in Act VI of 1913 does not require that there should be an express transfer of the corpus to God. From the fact that a waqf has been created for the purposes which are considered by the Mohammedan Law to be religious and charitable it is implied that the waqif has transferred the ownership of waqf property in perpetuity to God Almighty.

28. The question whether the waqf is invalid because the waqif has reserved to himself the power to spend the income of the property in whatever manner considered proper by him, is next to be considered. Paragraph 1(a) of the waqf provides :

> "That for my life-time I shall be the Mutwalli and I shall have the power to spend the income of the property in whatever manner considered proper for myself, my issue and relations and for charitable purposes."

The phrase "for himself, his heirs and relations"

> clearly means: "for the maintenance and support of himself his heirs and relations".

29. The Waqf Validating Act VI of 1913 does not prescribe any amount or proportion of the income of waqf property that may be reserved by a waqif for the maintenance and support of himself his family and descendants. The entire income of the wakf property may be reserved for this purpose. The words "wholly or partially" in Section 3 of the Act have reference to the income of the waqf property and not to the "maintenance and support" of the waqif and others. When the entire income is thus reserved for the waqif, his family and children, it matters little, whether the words employed are "maintenance and support" or, 'use' or 'benefit' or the like.

Both these expressions are indiscriminately used by Mohammedan jurists as meaning one and the same thing. Ameer Ali has collected the various views of the jurists on this subject at pages 281 to 295 of Vol. I of his Mohammadan Law, 4th Edn.:

> "Dar-Kutni reports from Jaabir that the Prophet (may God's blessings be with him) declared (that a man providing subsistence for himself, his children and his people and for the maintenance of his and their position, is giving charity in the way of God."
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> "Tibrani has reported from Imama that 'the Prophet of God declared that a man making a provision for his (own) maintenance or that of his wife, his family or children, is giving sadakah. And in Sahib of Muslim it is stated from Jaabir that the Prophet told a man to make a beginning with himself and give the remainder to his family. (Ameer Ali's Mahommedan Law, 282).
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> "In Fatawai Kazi Khan it is stated 'A person makes a waqf for the poor and conditions that the entire (produce) will be for him, and says that it will be lawful for him to eat out of it; Abu Bakr Askaf holds such (waqf) to be valid'. Again 'if a man were to say 'I have made this waqf on myself', it is valid according to Abu Yuguf, and on his death it will be for the poor." "Or if he were to make a waqf on 'the mothers of his children' it would be as valid as the waqf on himself." .
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> "Ansari has stated in his work on waqf that when a person constitutes a waqf in the following terms :
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> "This my land is-waqf for the sake of God in perpetuity and its produce will be supplied to my uses as long as I live' and adds nothing further, it is valid; and when he dies, its benefit will go to the poor." (p. 283).

> "Radd-ul-Muhtar--'If a person were to make a wakf and reserve the produce or the governance of the trust for himself, it would be valid according to Abu Yusuf and on that is the Fatwa."

Patawai Alamgiri--"When a man has made a wakf of land, or something else with a condition that the whole or part of it shall be for himself while he lives and after him for the poor, the wakf is valid according to Abu Yusuf, and the jurists of Balkh have adopted his opinion and ruled accordingly, and the Fatwa is in conformity with that opinion as an inducement to the making of wakfs."

Again, "If the wakif were to say 'This is a sadakah-mowkoofa to Almighty God and he, the mutwalli, will pass its produce to me while I live', without adding anything more, it would be lawful, and after his death, the benefit will go to the poor." p. 284.

Ramzul-hakaik of Allamah Aini--"If the wakif reserves the produce of the wakf for himself, that is, if he makes it a condition in the wakf-namah that during his lifetime the produce should be applied for his benefit and after his death to the benefit of so-and-so or any specific object, such a wakf is valid according to Abu Yusuf and the Mashaikh (jurists) of Balkh have decided on that rule".

Ghait-ul-Bayan--"If a man reserves the Income of the wakf for himself or the governance thereof, it is valid according to Abu Yusuf. And Ulu'lwalji has stated in his Patawa that the Jurists of Balkh have accepted the rule laid down by Abu Yusuf; and Sadr-ush-Shahid also decided in accordance therewith. ...." Therefore, if he conditioned the whole for himself during his lifetime and after it for the poor, it will be valid."

Tashil--"Abu Yusuf has held it lawful for the wakif to make a condition that the profits either in whole or in part should be for himself for his life, and on this is the Fatwa."

Wajiz ul-Muhit--"If a person makes a wakf for himself, or for the mothers of his children, or for his own children, or makes a wakf of mushaa, it is lawful." (p. 286).

Durr-ul-Mukhtar--"If a person makes a wakf on himself, his children, descendants and posterity, and reserves the income for himself during his lifetime, and similarly thereafter and thereafter, it is valid according to Abu Yusuf and on this is the Fatwa." (p. 287).

Radd-ul-Muhtar--"it is lawful to reserve the produce of the wakf for one's self according to Abu Yusuf."

According to Zailye, one of the greatest of Hanafi jurists whose authority is recognised as undisputable throughout the Suni world, "If a man constitutes a wakf with these words, 'this my land is a sadakah-mowkoofa for my children or my nasl' (descendants) it is valid according, to both Abu Yusuf and Mohammad."

The same rule is enunciated in the Durrar-ul-Ahkam and the Mawahib. "If a person appoints the usufruct for himself during his lifetime and thereafter, and thereafter, it will be lawful according to

the second Imam Abu Yusuf and on this is the Fatwa."

Majmaaul-Anhar--"A wakf in favour of one's self is valid according to Abu Yusuf, and on this is the Patwa." (p. 292).

30. It appears to us that the reservation by a wakif, of the entire income for the use of himself and his descendants is for their 'maintenance and support' within the meaning of the Act. This view finds support from the observations of Malik C. J. in Paqir Mohammad v. Mst. Abda Khatoon, AIR 1952 All 127 (F). The other learned Judge in the above case followed the view of Chagla J. (as he then was) in Abdul Karim Adenwalla v. Rahimabai, AIR 1946 Bom 342 (G). Chagla J. observed that When a wakif reserves the entire income for 'his 'use', he is creating a 'life interest' in the usufruct for his own benefit, and that there was a difference in law between creating a reservation of life interest in the income and securing to oneself the whole of the income of the trust property for his own maintenance and support.

With all respect, we find ourselves unable to agree with this view. The reservation of the whole of the usufruct of a particular property for the lifetime of a person or persons is creating an interest for life or life interest in the usufruct in favour of that person or those persons. It is wholly immaterial that this reservation is for their maintenance and support or not. The creation of a life interest in the usufruct of a property is valid according to Mohammedan Law and a waqf-alal-aulad does create a life interest in the usufruct in favour of the waqif and his children.

When the profits of the waqf property are to be reserved for the wakif or his children it is intended that they are for their maintenance and support. The words "maintenance and support" are not to be limited to the necessities of life. The phrase includes maintenance of one's position in life. When a certain income is reserved for one's maintenance and support, he is free to use it in any way he likes and the law imposes no check on the use of it.

The question whether the income so reserved is attachable and saleable for satisfaction of one's debt is quite a different matter. In Abdul Karim Adenwalla's case (G) Chagla J, (as he then was) went on to observe:

> "If what he had reserved to himself was for his own maintenance, that would not be transferable as property under the Transfer of Property Act nor could it be attachable under the provisions of the Civil Procedure Code. Whereas if he had reserved for himself a life-interest, that particular provision would not attract to itself the provisions of Section 6, T. P. Act, and Section 60, Civil P. C., with regard to non-transferability and non-liability to attachment contained in the provisions of the two sections."

Under Clause (n) of Section 60, Civil P. C. a right to future maintenance is not attachable and saleable and under Clause (d), of Section 6, Transfer of Property Act, a right to future interest is not 'transferable. The right to future maintenance spoken of in these two sections means a right of a person to receive from another boarding, clothing and other necessary supplies: Sivaji Govinda Rao

v. N. W. C. T. C. V. Firm, AIR 1935 Mad 815 (H). In other words it means a bare right to maintenance: Sundar Bibi v. Rajinder Narain Singh, ILR 43 All 617 : (AIR 1921 All 120) (I). The amount will naturally differ according to the position in life of the person concerned.

There is no such restriction in Section 3, Waqf Validating Act, because the section provides that the income of the waqf may be reserved wholly or partially for the support and maintenance of the waqif, his family and descendants, in our opinion the reservation of the entire income of the waqf property may validly be made for the benefit of the waqif, his family and descendants and such reservation is to be made for their maintenance and support not in the restricted sense in which the phrase "Maintenance Allowance" is used in Section 60, Civil P. C. and Section 6 of T. P. Act put in a larger sense of personal use for all lawful purposes.

The same remarks apply to the provisions of paragraph 11 in the deed of waqf which is as follows :

> "That the Mutawalli of the waqf shall have the absolute power to spend whatever shall be saved from the income of the waqf property after defraying all the expenses relating to this deed."

and we think that this provision also is consistent with Section 3, Waqf Validating Act, 1913.

31. We now come to the more difficult point in this case, and it is whether the waqf in question is invalid by reason of the provisions of the Oudh Estates Act (1 of 1869).

32. The relevant provisions of the Act are as follows:--Section 2 defines 'transfer' as an alienation 'inter vivos'.

Section 3 provides that a Taluqdar with whom a "summary settlement of the Government revenue was made between the 1st day of April, 1858 and the 10th day of October, 1859, or to whom, before the passing of this Act and subsequently to the 1st day of April, 1858, a taluqdari sanad had been granted, was to be deemed to have thereby acquired "a permanent, heritable and transferable right in the estate."

Then follow the provisions relating to powers of taluqdars to transfer and bequeath their estates or any right or interest therein.

Section 11 provides as follows :

> "Subject to the provisions of this Act, and to all the conditions other than those relating to succession under which the estate was conferred by the British Government, every Taluqdar and grantee, and every heir and legatee of a taluqdar and grantee, of sound mind and not a minor shall be competent to transfer the whole or any portion of his estate, or of his right and interest therein; during his life time, by sale, exchange, mortgage, lease or gift, and to bequeath by his will to any person the whole or any portion of such estate, right and interest."

Section 12 of the Act provides:

> "No transfer or bequest under this Act shall be valid whereby the vesting of thing transferred or bequeathed may be delayed beyond the lifetime of one or more persons living at the decease of the transferee or testator and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing transferred or bequeathed is to belong."

Section 18 of the Act is as follows :

> "No Taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, and no transferee mentioned in Section 14, and no heir or legatee of such transferee shall have power to give his estate or any portion thereof, or any interest therein, to religious or charitable uses, except by an instrument of gift signed by the donor and attested by two or more witnesses not less than three months before his death and presented for registration within one month from the date of its execution and registered."

33. The contention of Chaudhry Niamatullah who appears for the appellant, may be stated thus : First, since a waqf is a transfer of property from the waqif to God Almighty and God Almighty is not a living person, therefore, a waqf is not a transfer inter vivos within the meaning of word 'transfer' in the Oudh Estates Act and does not fall within any of the kinds of transfers mentioned in Section 11.

The Act, being exhaustive of the modes in which an 'estate' can be alienated, no waqf at all can be made. Secondly, even if a waqf can be made under Section 11, only a waqf of a public character can be made and no waqf-alal-aulad can be made at all, because thereby interests in the property are created in favour of unborn persons generation after generation which is prohibited by Section 12 of the Act. As regards Section 18, the learned counsel urged that it deals with the mode in which gifts for religious or charitable purposes can be made and does not modify Section 12 which must apply even to gifts for charitable and religious purposes.

On the other hand, Mr. Iqbal Ahmad, the learned counsel for the respondent urged that the Act is not exhaustive of all kinds of alienations. It deals with transfers inter vivos only, namely, with transfers to living persons. A waqf being an alienation of property to God Almighty who is not a living person, is not a transfer within the meaning of Section 11 of the Act or of Section 12, and, therefore neither Section 11 nor Section 12 applies to such an alienation. The Act therefore, does not provide for such an alienation and as it is valid under the Mohammedan Law to which law the waqif was subject, it must be held to be valid.

Secondly, even if the waqf is hit by Sections 11 and 12, it is saved by Section 18 of the Act which must be read as an exception to those sections. Thirdly, Mr. Iqbal Ahmad contended that in a waqf the property is transferred to God in whom it remains for ever and, therefore, no limited estates in favour of unborn persons are created, and that, therefore, Section 12 can have no application. Fourthly, he contended that the waqf is not governed by Section 12, because Section 12 prohibits the

transfer of an 'estate' and not its usufruct. According to him, the usufruct of an estate is not an 'estate' at all. Lastly, he contended that, at any rate, the waqf is valid in so far as the vesting of the usufruct in favour of the persons in existence on the date on which Asghar Ali died is concerned.

34. The first question to be considered is whether an alienation of a taluqdari estate can be made, which is not governed by the provisions of the Act.

35. The history of Taluqdari estates has been narrated in numerous cases and it is not necessary to repeat it suffice it to say that after the Mutiny of 1857 had been quelled, Lord Canning, the then Governor General of India issued a proclamation on 15-3-1858, declaring a general confiscation of all proprietary rights in the soil of the province of Oudh (with the exception of the rights of a few Taluqdars) and at the same time promising indulgence to those who promptly surrendered. Most of the Taluqdars did surrender and received back their estates and those who did not, lost them and their estates were given to those who had proved loyal to the British Government as reward for their loyalty.

This was done by making settlements with them and issuing sanads to them. Thus all the pre-existing rights of the Taluqdars were first taken away and then fresh Government grants under the terms of Sanads and proclamations which were made at the time were made. The rights of Taluqdars in respect of such estates were further defined by the Oudh Estates Act of 1869.

Two principles may be noted in connection with this Act; First, that the rights of Taluqdars and grantees to whom estates were granted by the Crown are defined in the Act without distinction of religion or caste. The personal law of a taluqdar does not enter into the picture except in so far as the Act itself imports it; and second, that in respect of the matters dealt with by the Act it is a self-contained and complete Code. In Chandra Kishore Tewari v. Sissendi Estate, AIR 1949 PC 207 (J), the Privy Council observed :

> "The Oudh Estates Act is a special Act affecting special class .of persons in respect of the pro, perties conferred upon them. The Act is self-contained and complete in regard to the matters contained in it."

36. Section 3 of the Act states that a taluqdar was deemed to have acquired a permanent, heritable and transferable rights in his estate. The other provisions of the Act dealing with 'transfers' define the nature of the transfers and the mode in which they could be made. Section 11 defines what transfers can be made. These transfers can be by way of sale, exchange, mortgage, lease or gift. If a taluqdar could make any other kind of alienation, there was no necessity of mentioning that he could transfer his estate by sale, exchange, mortgage, lease or gift.

The principle Expressio unius, exclusio alterius applies. The mode of alienation mentioned in Section 11 negatives the right of a taluqdar to alienate his property in any other way. The attribute of transferability conferred by Section 3 of the Act must naturally and necessarily have reference to the modes of transfer mentioned in Section 11. If the transaction is not an alienation of the nature specified in Section 11 it cannot be made.

37. This brings us to the consideration of the question whether a transfer in favour of God Almighty in Mohammedan Waqf is an alienation inter vivos within the meaning of the word 'transfer' as defined in the Act, and whether it is a gift within the meaning of Section 11 of the Act. In our, opinion, God under the Mohammedan law is a juristic person capable of holding property.

The very conception of waqf shows that God is capable of holding property. In a waqf the 'corpus' is held in the ownership of God and the usufruct is applied for the benefit of individuals or purposes as directed by the deed of gift. God is not a living person in the manner of human beings, but according to the belief of Mohammedans, He has His own personality as the Creator, of the world, as the all powerful Omniscient and Omnipresent Being pervading the Universe and controlling it. As Mohammedan Law does not recognise the ownership of any property to remain in a vacuum, that ownership must remain somewhere.

It is for this reason that the corpus of the property in a waqf according to Abu Yasuf, vests in the ownership of God. This view is supported by the opinion of Sir Shah Sulaiman, who sitting with Kendall, J. held that a dedication in favour of God is "a transfer governed by the Transfer of Property Act as God is a juristic person"--Ahmad Husain v. Kallu Mian, AIR 1929 All 277 (K). True it is that a Juristic person is not a living human being and the fact that for some purposes the law invests inanimate objects with the rights of persons would not make juristic persons 'living persons' for 'all' purposes. But if the law makes them capable of holding property, there is no reason why a transfer 'in praesenti' cannot be made in their favour.

A transfer 'inter vivos' within the meaning of the Transfer of Property Act and the Oudh Estates Act is not confined to transfers taking place between one living human being and another living human being. We are of opinion that the phrase 'living persons' within the meaning of these Acts simply means, an entity which has a personality of its own, which exists and which has the capacity of holding property according to law. Under the Hindu Law 'Idols' have been held to be such entities to whom transfers can be made. Manohar Ganesh v. Lakshmi Ram, ILR 12 Bom 247 (264) (L), Thakersey v. Hurbhum, ILR 8 Bom 432 (456) (M). Prosunno Kumari Debya v. Golab Chand Baboo, 2 Ind App 145 (PC) (N), Pramatna Nath v. Pradyuman Kumar, 52 Ind. App. 245 (250) : (AIR 1925 PC 139 at p. 140) (O), in 'Narasimhaswaml v. Venkata Lingam, ILR 50 Mad 687 : (AIR 1927 Mad 636) (FB) (P), a distinction was made between a gift to a specified idol and gift to God Almighty, and it was held that amongst Hindus a gift to God Almighty is not a gift to a living person and, as such, does not fall under Section 123 of the Transfer of Property Act and does not require to be made by a written document.

Whatever may be said about the juristic personality of God as distinguished from an idol in Hindu Law, it may be stated that the same argument does not apply to the Mohammedan conception of God Almighty who is believed to be capable of holding property and no doubt has an individuality of His own and certainly exists. We are therefore, of opinion that wakfs are gifts to God Almighty and are permissible to be made under the Oudh Estates Act provided they do not contravene the provisions of Section 12 of the Act and provided further that they are in the form mentioned in Section 18, of the Act.

38. Section 12 prohibits a transfer of property to a person who is either not in existence at the time when the transfer takes effect, or is not In existence even at the death of a person who was in existence at that time. Waqf-alal-aulad is a transfer in which an interest in the usufruct of the property is created in favour of persons who were neither in existence at the time when the waqf commenced to operate or at the time of the death of persons who were in existence at that time.

It may be observed that the rule laid down in Section 12, Oudh Estates Act, is almost in the same terms as Section 14, Transfer of Property Act, To Section 14 of the Transfer of Property Act there is an exception which is contained in Section 18 of the Act which makes such transfers valid provided they are for religious or charitable purposes. In the Oudh Estates Act there is no provision corresponding to Section 18, Transfer of Property Act (the effect of Section 18, Oudh Estates Act will be considered hereafter).

39. It was argued that as even a waqf-alal-aulad, is a transfer to God Almighty and not to the beneficiaries, there is no creation of estates as contemplated by Section 12, and as such Section 12 does not prohibit the creation of a waqf-alal-aulad. This contention is not sound. Though the corpus of the waqf property is transferred to God Almighty, yet its usufruct is transferred to unborn descendants of the waqif generation after generation. The usufruct, therefore, is dealt with in such waqfs contrary to the provisions of Section 12.

Again it was urged that Section 12 contemplates the transfer of an estate and not of its usufruct. It was pointed out that Section 11 speaks of an estate and not of its usufruct, and therefore, Section 12, cannot apply to the transfer of an usufruct of the estate. The argument is fallacious. Section 11 clearly mentions not only the estate but also 'any right or interest therein'. Section 12 will, therefore, apply not only to the estates, but also to rights or interests in such estates. The transfer of the usufruct of an estate is a transfer of a right or an interest in such an estate. Indeed, an estate without its usufruct is an empty thing. The core of an estate is its usufruct.

40. The next point to be considered is whether Section 18 of the Act empowers a taluqdar to make a waqf-alal-aulad in violation of the provisions of Section 12. Section 18 enacts that the giving of property by a taluqdar to religious or charitable purposes must be by means of an instrument of gift. The significance of this requirement can be understood only when we bear in mind the various modes in which such transactions can be made under the ordinary law. The alienation of property for religious and charitable purposes may be made in three different ways, namely, by means of (1) an act of dedication, (2) an instrument of gift, or (3) an instrument of trust.

41. A dedication of property for religious or charitable" purposes is a divesting of ownership of property and vesting it in the public at large, This can be done under Hindu Law by an unequivocal act of declaration specifying (a) the property in respect of which the endowment is created, (b) the object or purpose of dedication and (c) renunciation by the founder of all beneficial interests in the property. No writing is necessary for the purpose, Gangi Reddi v. Tammi Reddi, 54 Ind App 136 : (AIR 1927 PC 80) (Q), nor is it necessary that there should be any person to whom the possession of the property dedicated is to be handed over. The founder or his heir becomes in law the manager of the endowment. (Mukerji' Law of Religious and Charitable Endowments, P. 103).

The giving of property for the above purposes may next take the form of a gift by the donor to a donee and there must be some person to accept the gift on behalf of the donee.

If it is by document, the Registration Act will apply and a document dealing with property of the value of Rs. 100/- or more will have to be registered. Strictly speaking the provisions of the Transfer of Property Act will also apply to it, and so the gift cannot be made of property of this value otherwise than by means of a registered instrument. Lastly, the giving may be effected through, the instrumentably (instrumentality) of a trust, in which case it can only be done by means of deed of trust in writing and registered and there must be a trustee.

Section 18, Oudh Estates Act, requires that the giving of property for religious or charitable purposes must be in the form of a gift by means of a registered instrument signed by the donor and attested by witnesses. Thus a Muslim waqf in order to be valid must be in the form of a gift as required by the section. If it is to be in the form of a 'gift' it must be governed by Sections 11 and 12.

There is no reason to think that the word 'gift' mentioned in Section 18 is something different from the same word used in Section 11. Section 18 does not confer a right to make a gift for religious or charitable purposes. It merely provides the mode of making a gift. The right to make a gift for religious and charitable purposes is to be found else--where, that is to say in Section 11.

In our opinion, a gift for religious and charitable purposes contemplated in Section 18 is a gift covered by Section 11 and therefore covered by Section 12. Section 18 cannot be considered to be an exception to Section 12 and all gifts for religious or charitable purposes must conform to the provisions of Section 12.

42. We are, therefore, of opinion that the waqf-alal-aulad in the present case is invalid, because it contravenes the provisions of Section 12, Oudh Estates Act.

43. The next point to be considered is whether the waqf is to be set aside as a whole or whether it can be held valid in so far as it reserves a benefit for the waqif and his sons who were in existence on the date of the execution of the waqf. Where an object of a charitable trust is invalid or otherwise fails, the charity can be applied for other charitable object provided, however, a general charitable intent clearly appears from the terms of the trust. This is what is meant by the Cy pres doctrine.

It is by applying this doctrine that a deed for charity simpliciter is held valid and executed by the Court, and where 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 Modern Equity by Dr. Hanbury, Edn. 4 p. 168. The doctrine is based on the view that the testator's general charitable intention should be given effect to as nearly as may be practicable.

Where the main object of the waqif in making the waqf turns out to be invalid, the question whether the waqf property can be applied to other religious and charitable purposes is to be determined with reference to the intention of the testator. The dominant intention of the waqif in creating the waqf in

question was clearly to tie up the property for the benefit of the testator himself, and his descendants and relations. He even made a provision for the entire income of the property to be spent by himself during his life-time in whatever manner he considered proper. His descendants who were mutwallis, were given an absolute right to spend whatever was to be saved from the income of the property after defraying the expenses mentioned in the deed.

The expenses mentioned in the deed consisted of two kinds : first, for the benefit of certain relations and descendants of the waqif himself and second for the benefit of the poor Muslim students & for other charitable purposes. The total amount which was to be spent on the poor & other charitable objects amounted to about Rs. 1,000/- per annum, a very insignificant amount compared to the total income of the waqf property, which was over Rs. 58,000/- per annum. The waqif provided that the dignity and the status of his family was to be maintained by the mutwalli and further that the executant in his life time and the future mutwallis were to be members of the British Indian Association and that they shall be entitled to the dignity and office of taluqdars.

He further provided that after the waqif, the mutwalli of the waqf shall be in possession and enjoyment of all movable property and all the articles of show and decoration and out of them it shall be the duty of the mutwalli of the waqf to replace those articles which might become unserviceable and each mutwalli shall leave them for his successor after him.

The waqif did not express a general charitable Intent in favour of the poor or other charitable objects for the benefit of the public generally so long as any of his descendants was alive. In these circumstances it would be violating the intentions of the waqif to turn the waqf from a waqf-alal-aulad into a public waqf by applying the income of the waqf property to public and charitable purposes. The waqf must, therefore, be held to be invalid as a whole.

44. But though the waqf fails as a waqf, the directions contained in it for the payment of maintenance allowance and right of residence in favour of persons who were alive at the date of the death of Asghar Ali, and for the expenses to be incurred in respect of charities can be held to be binding on the plaintiff, as being the last will and testament of Asghar Ali. The plaintiff's claim will, therefore, be subject to those directions. These allowances and charities will be a charge on the property in the hands of the plaintiff.

45. Mr. Niamatullah, learned counsel for the appellant stated that in view of the fact that the evidence regarding the value of the moveable property left by Thakur Asghar Ali was not clear and sufficient on the record, he did not press his appeal so far as it concerned the recovery of the move-able property.

46. The result, therefore, is that we decree the plaintiff's suit for possession over the properties which were included in the deed of waqf as also over the properties which belonged to Asghar Ali at the time of his death, namely, the properties specified in schedule A and items 2 to 6 of schedule B of the plaint. The allowance in favour of the persons alive at the death of Asghar Ali and the charities mentioned in the deed of waqf shall be a charge on the property mentioned in the deed of waqf.

The plaintiff will also be entitled to the mesne profits of the landed property in respect of which the suit is decreed from the heirs of defendant No. 1 for the period beginning front 1-3-1937 to 31-10-1949 on which date defendant No. 1 died. The plaintiff will also be entitled to the profits of the property after that date upto the date of delivery of possession. If in the meantime any property has been taken over by the Government in view of the Zamindari Abolition and Land Reforms Act, the plaintiff will be entitled to compensation as and when made payable.

As the property was taken possession of by the Deputy Commissioner of Bahraich on 1-11-1949 the profits in the hands of the Deputy Commissioner will be receivable by the plaintiff. The Court below will calculate the mesne profits recoverable from the heirs of defendant No. 1, after giving credit to any moneys which may have been paid by defendant No. 1 to such of the persons mentioned in the deed of waqf, who were alive on the date of the death of Asghar Ali and for any amounts spent on charities mentioned in the deed of waqf.

The decree for money that may be passed by the court below will be against the assets of defendant No. 1 in the hands of his heirs. The court below will take the findings already recorded by the learned Civil Judge in respect of mesne profits, as far as they go, as correct.

The rest of the plaintiff's claim is dismissed. The plaintiff will receive two-thirds of his costs' of both the courts from defendant No. 1's heirs. The defendants will bear their own costs throughout. The costs will also be recoverable from the assets of defendant No. 1 in the hands of his heirs. The record of the case shall be sent back to the lower Court for determining the amount of mesne profits and passing a final decree in respect thereof. The cross objection is dismissed.

47. Mr. Niamatullah learned counsel for the appellant, stated that, in view of the fact that, the evidence regarding the value of the moveable property left by Thakur Ashgar Ali is not clear and sufficient on the record, he does not press his appeal so far as it concerns the recovery of the moveable property.