Sabir Ali Khan vs Syed Mohd. Ahmad Ali Khan on 13 April, 2023

Author: K.M. Joseph

Bench: Hrishikesh Roy, K.M. Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos. 7086-7087 OF 2009

SABIR ALI KHAN …APPELLANT(S)

VERSUS

SYED MOHD. AHMAD ALI KHAN
AND OTHERS …RESPONDENT(S)

JUDGMENT

K.M. JOSEPH, J.

1. The Appeals are lodged against the Order passed by the High Court of Allahabad in Civil Revision Nos. 595 and 596 of 2003. The Revisions, in turn, were directed against the Order passed by the Waqf Tribunal on an Appeal filed by the first respondent before us. The first respondent again, in turn, put in issue the Order passed by the Collector, Bulandshahar. The Order passed by the Collector was passed under Section 52(2) of the Waqf Act, 1995 (hereinafter referred to as the 'Act'). Finally, we must point out at this stage that the Collector was acting on the basis of a requisition given by the Controller of Waqf Board to obtain and deliver possession of the land in dispute to the Waqf Board. The requisition was made under Section 52(1) of the Act.

2. By the Order passed by the Tribunal, it had set aside the Order passed by the Collector on various grounds. By the impugned Order passed by the High Court in the Revisions filed against the aforesaid Order by the appellants, the High Court has affirmed the Order passed by the Tribunal, however, on the ground that the first respondent, in the Appeals, had perfected title by adverse possession.

3. We have heard Shri Salman Khurshid, learned Senior Counsel on behalf of the Appellant and Shri P.S. Patwalia, learned Senior Advocate on behalf of the first respondent and Shri S.R. Singh, learned Senior Advocate on behalf of the second respondent-the Assistant Survey Commissioner, Waqk, Bulandshehar and the fourth respondent-the Collector, Wakf, Bulandshehar.

FACTS

4. We begin by setting out the following genealogical chart:

> Syed Mohd Akbar Ali Khan Qasim Ali Khan Syed Qasim Ali Khan Syed Raza Ali Khan Sayeed Shujat Ali Khan Sajjad Ali Khan Syed Mohd. Ali Khan Mohd Ahmed Ali Khan (Respondent No.1) (Respondent No.1)

5. Parties are Shia Muslims. Mohd. Akbar Ali khan purported to create a waqf-alal-aulad by a deed dated 26.07.1934. He appointed himself as a first Mutawalli. However, he purported to execute a sale deed in the year 1948 in respect of a tube well and some adjoining land. Qasim Ali Khan, one of the sons of Akbar Ali Khan, filed OS No. 1 of 1950 impugning the sale deed. The trial court decreed the said suit and the decree was affirmed by the High Court by its judgment rendered on 11.07.1962. The High Court in the course of its Judgement did hold that, Akbar Ali Khan had created a valid and effective waqf as required of a Shia Muslim which he was. On 16.12.1958, Akbar Ali Khan passed away. He left behind him three sons, Qasim Ali khan, Kazim Ali Khan and Raza Ali Khan. It appears that Qasim Ali Khan took over as the Mutawalli. His name was entered in the register of waqf. However, his younger brothers, i.e., Kazim Ali Khan and Raza Ali Khan got their names mutated in the Revenue Records as Bhumidhar in regard to the property. This led to the second suit again by Qasim Ali Khan, i.e., OS No. 421 of 1959. He sought a declaration that the plaint schedule property was a waqf property. He further sought the relief of expunging the names of his two brothers. The said suit was decreed in favour of the plaintiff on 21.05.1962. Mohd. Kazim Ali Khan on 14.10.1960 during the pendency of the suit transferred his alleged one-third share to Mohd. Ahmad Ali Khan who was his nephew being the son of Raza Ali Khan. This shall be referred to as the first sale.

6. After a remand in an Appeal, when the Suit was pending, consolidation proceedings began in the village. Under the law, the Suit was to stand abated. The Suit stood abated. Shri Qasim Ali Khan filed objection seeking expunging of the names of the other sons, viz., his brothers. This was done on the basis that the properties were waqf properties. The Consolidation Officer accepted the objection. He directed that the entry of waqf be made in the Revenue record. It was his reasoning that upon the creation of the waqf, properties stood vested in the Almighty and the first sale was infirm. The Appeal filed by Shri Kasim Ali Khan and Shri Raza Ali Khan came to be dismissed by the Settlement Officer. The Revision filed by them also came to be dismissed by Order dated 29.01.1969. However, it would appear that an application, seeking restoration, was filed in regard to the Order of the Deputy Director, Consolidation. The same stood dismissed on 02.03.1972. Another Application for Restoration, however, came to be filed. It is in the said Restoration Application, a compromise was entered into on 13.02.1974 between the three brothers, viz., Qasim Ali Khan, Kasim Ali Khan and Raza Ali Khan. The compromise proceeded on the footing that the waqf was a paper transaction. It was the further basis that the waqf was never acted upon and further that the Bhumidars of the plots were Qasim Ali Khan, Raza Ali Khan and Mohammad Ahmad Ali Khan (the last being the alienee), who were entitled to one-third share each. The Deputy Collector, Consolidation accepted the compromise, set aside the Order dated 29.01.1969, an Order passed on merit, and, disposed of the Revision on the basis of the compromise. No sanction was obtained from the Waqf Board within the meaning of Section 49A of the Uttar Pradesh Muslim Waqf Act, 1960 (hereinafter referred to as, 'the

1960 Act', for short). The Shia Waqf Board was not a party. We also notice that the Order dated 02.03.1972 was set aside. A sale deed came to be executed based on the compromise on 26.09.1974 by Shri Qasim Ali Khan, purporting to convey his one-third share in favour of his nephew, viz., Shri Syed Mohammad Ali Khan, who was another son of Shri Raza Ali Khan hereinafter referred to as the second sale. Shri Syed Shujat Ali Khan, who was the son of Qasim Ali Khan, filed Writ Petition (C) No. 5874 of 1974 challenging Order dated 12.09.1974 passed by the Deputy Director, Consolidation. On 01.05.1988, it would appear that Shri Qasim Ali Khan resigned as Mutawalli. It is the case of the appellant that Shri Sujat Ali Khan became the Mutawalli. The Writ Petition filed by Shri Sujat Ali Khan came to be withdrawn. Thereafter, Shri Sajjad Ali Khan, who was another son of Shri Qasim Ali Khan and who claimed as a beneficiary of the Wakf, filed a complaint before the U.P. Shia Waqf Board. He called in question the transfer made of waqf property, both by Shri Qasim Ali Khan, his father, and his uncle, viz., Shri Kasim Ali Khan. He also sought to bring under a cloud the compromise entered into by them before the Deputy Director, Consolidation besides the withdrawal of Writ Petition (C) No. 5874 of 1974. The Controller of the Waqf Board passed Order dated 16.07.1997. By the said Order, he invoked Section 52(1) of the Act and directed the Collector to recover and deliver possession of the disputed land from the unauthorised occupants, viz., Shri Syed Mohamad Ahmad Ali Khan and Shri Mohamad Ali Khan, who were the sons of Shri Raza Ali Khan. They are the first respondents in the Appeals and referred to as such. It is thereupon that the Collector passed Order dated 31.12.1997, directing the respondents to deliver possession of the property to the Board within thirty days. This Order came to be challenged by the first respondents in the Appeals, viz., the alleged unauthorised occupants before the Additional District Judge, Bulandshahar. The said Appeals were allowed by the Additional District Judge. The appellant filed Writ Petition (C) No. 23414 of 1998, contending that it was the Waqf Tribunal which had the jurisdiction and not the Additional District Judge. This contention found favour with the High Court and it was found that the Additional District Judge did not possess jurisdiction. The Order of the Additional District Judge came to be set aside. Thereafter, the first respondent filed Appeal No. 2 of 2002 and Appeal No. 3 of 2002 before the Waqf Tribunal. By Order dated 28.03.2003, the Waqf Tribunal allowed the Appeals and the Order of the Collector was set aside. It is the said Order, which has been confirmed by the High Court by passing the impugned Order, by which, the Revision Petitions filed by the appellant, came to be dismissed. FINDINGS OF THE WAQF TRIBUNAL

7. i. Under Section 52(1) of the Act, the Board was to first satisfy in such manner as was prescribed, after making inquiry that the property is recorded in the Waqf Register and further that the property was alienated without any prior permission of the Board. Thereafter, the matter is to be sent to the Collector for recovering possession. ii. After perusing the record and a true copy filed by the appellant (the papers Nos. 42C and 53C2), it was found that it was not mentioned in the Order that the Board had done any inquiry.

iii. The Board had not satisfied itself, after making inquiry. This finding was entered on the basis of there being no evidence in the record requisitioned from the Board.

iv. A Report of a Senior Waqf Inspector found included in the record, was considered and it was found that Senior Waqf Inspector had not actually seen whether the property was recorded in the Waqf Register. The Controller had not satisfied itself as per the prescribed procedure laid down in

Section 52(1) of the Act.

v. The procedure adopted was illegal. There was no Officer known as Controller under the Act. The power under Section 52(1) could be exercised by the Board. No Notification was produced to establish that the Board transferred its power to any Officer known as Controller. The Order passed by the Controller was without jurisdiction. vi. A period of seven days alone was given, which is illegal.

vii. The possession of the respondents was clearly admitted in the petition filed by the appellant before the Waqf Board. It was further admitted that the respondents were using the property for their own interest and as their own personal property. The respondents were found to have become owners by way of adverse possession. There were exceptions to Section 49A of the U.P. Act and Section 51 of the Act. Both Acts were special Acts on the subject of Waqf. There was no absolute Rule that a property could not be transferred as new rights could accrue to any person on the basis of adverse possession. FINDINGS OF THE HIGH COURT

8. i. There is merit in the contention of the appellant that the compromise entered into before the Deputy Director, Consolidation, being a collusive one, could not defeat the Waqf. Once a Waqf, always a Waqf.

ii. In the absence of the Waqf Board, the Order passed by the Deputy Director, Consolidation acting on the compromise was invalid in view of Section 69 of the 1960 U.P. Act.

iii. The sale executed by Shri Qasim Ali Khan on 29.06.1974 (the second sale) was invalid for the reason also that no permission of the Waqf Board was obtained under Section 49A of the 1960 U.P. Act. Equally, the sale executed by Shri Kasim Ali Khan in the year 1960 (the first sale), who was a beneficiary, who had no right to sell Waqf Property, was void.

iv. Shri Syed Mohammad Ahmad Ali Khan and Shri Syed Mohammad Ali Khan were beneficiaries in the waqf- al-al-aulad. Rejecting the contention of the appellant that a beneficiary could not acquire title by adverse possession over waqf property, it was found that title by adverse possession could be acquired.

v. Relying upon Shri Mohammad Ismail Faruqui v. Union of India and others1 and also The Mosque Known as Masjid Shahid Ganj, and others v. Shiromani Gurdwaba Prabandhak Committee, Amritsar, and another2, it was found that title by adverse possession could be acquired over waqf property. vi. A person in a fiduciary relationship or one, in whom the property was vested in trust, could not claim title by adverse possession over trust property. A Mutawalli, accordingly, on the said principle, could not claim title by adverse AIR 1995 SC 605 AIR 1940 PC 116 possession over waqf property [See Faqir Mohd. Shah v. Qazi Fasihuddin Ansari and others3]. That a Co- owner also cannot acquire title by adverse possession over trust property, is found to be well-recognised in law.

vii. A beneficiary is not a co-owner and, therefore, the principle that a co-owner cannot acquire a right by adverse possession over the share of another co-owner, was not applicable to a beneficiary.

A beneficiary did not hold the property in trust.

viii. “In every case of Waqf, whether public or private, the property vests in God Almighty or in the Waqf itself as an institution or a foundation economic, for the time being in force”. The High Court drew support from the aforesaid view expressed by a Full Bench in the decision reported in Moattar Raza and others v. Joint Director of Consolidation, U.P. Camp at Bareilly and others4.

AIR 1956 SC 713 AIR 1970 Allahabad 509 ix. Article 96 of the Limitation Act, 1963, provides for a period of twelve years for a Suit by a Manager of a Muslim Religious or Charitable Endowment, inter alia, to recover possession transferred by a previous Manager for valuable consideration. The sale executed by Shri Kasim Ali Khan (the first sale) would not come under its purview as he was not the Mutawalli/Manager.

x. In regard to the sale deed executed in 1974 by Shri Qasim Ali Khan, who was noted as the Mutawalli, the Court went into the interplay of Articles 65 and 96 of the Limitation Act, 1963. It was found that Article 96 would not apply in the case of a void transfer. In the case of a transfer being void on account of breach of a statutory requirement, adverse possession of the transferee would commence from the date of the transfer. If the Suit for Recovery of Possession was not instituted within the period of twelve years under Article 65, the rights of the Manager to recover the endowed property would stand extinguished under Section 27 of the Limitation Act.

xi. The correct interpretation to be placed on Article 96 is to confine its ambit to suits to recover possession where the right to recover possession was not lost under Section 27 of the Limitation Act. In other words, it is found that Article 96 would be of avail only in regard to voidable transfers.

xii. The finding of the Tribunal that the respondents had acquired title by adverse possession, was found correct. The contention based on Section 66G of the Waqf Act, 1954, was repelled, though it provided for a period of thirty years. This was on the basis that the said enactment was never made applicable to Uttar Pradesh.

xiii. Section 107 of the Act, which excludes the Limitation Act, was found to be of little avail to the appellant. A person in adverse possession does not claim through the Mutawalli. The right of the respondents having ripened by adverse possession, it could not be defeated by invoking Section 107 of the Act.

xiv. The view expressed by the Tribunal that the Waqf Board was duty-bound to hold an inquiry and that such an inquiry was not held, was found to be erroneous. The contention of the appellant that the Waqf was registered, had not been disputed, and it was also not disputed that there was no previous sanction for the sale, was found to be with merit.

xv. It was noted that in the Report of the Inspector, it is stated that Waqf was registered as Waqf No. 1456, which recital was not established as incorrect. It was further found that the respondents had not set up any case that the Waqf was not registered in the Register of Waqfs. The Order of the Controller, therefore, was not required, it is found, to be quashed on the ground of no inquiry being

held under Section 52. It was also found that it could not be so quashed on the ground that there was no application of mind. xvi. The effect of the decision reported in Khilli Ram v. State of Rajasthan5, was found to be that the entry in the Waqf Register would not be open to question in an Appeal against the Order passed by the Collector. The Appeal against the Order of the Collector lies before the Tribunal under the Act. The Tribunal has wide powers and it can go into the question. The Tribunal could go into the validity of the Requisition Order issued by the Board. These are views expressed in the Judgment of a learned Single Judge in the decision reported in (Smt.) Amina Khatoon v. Third Addl. D.J. Farukhabad and others6. The High Court agreed with the said view.

xvii. The Tribunal erred in finding the notice being defective on the ground that thirty days' notice was not given. High Court notes the same to be a mistake and that no prejudice had been caused as no steps were taken for their eviction before the expiry of thirty days.

(1985) 1 SCC 28 1987 All LJ 1282 xviii. The contention of the respondents that the Report given by the Senior Inspector of the Waqf was an ex parte Report and they had not been given any opportunity, was found to be factually correct. However, it is found that the Controller had found the property in question was waqf property, the Waqf was registered and, lastly, the transfer was invalid for want of permission. It is specifically found that 'there appears no dispute on facts upon the point'. No prejudice, it is found further to the respondents, especially in view of the full opportunity given by the Tribunal, especially when it was not contended that the Waqf was not registered or that the property was not waqf property or that permission was taken before the transfer.

xix. It was, however, found that in view of the finding that the respondents had acquired title by adverse possession, there was no merit in the Revision Petitions and, accordingly, they were dismissed. CONTENTIONS OF THE APPELLANT

9. i. The learned Senior Counsel for the appellant, Shri Salman Khurshid, contended that Article 96 of the Limitation Act did apply. The period of limitation would commence from 1996 or from the date, when the appellant Shri Sajjad Ali Khan was appointed Mutawalli, as twelve years had not run out from 01.05.1988, when Shri Qasim Ali Khan resigned or from the date of appointment of the present Mutawalli Shri Sajjad Ali Khan. Therefore, Shri Sayed Mohammad Ahmad Ali Khan could not acquire title by adverse possession. ii. Article 65 of the Limitation Act did not apply.

The claim of Shri Sayed Ahmad Ali Khan was based on the compromise dated 13.02.1974. It was not founded on the sale deed dated 14.10.1960. The right under the said sale deed, if any, got extinguished in view of there being no objection by him during the consolidation proceedings and also the decisions of the three Consolidation Courts.

iii. As regards the claim of adverse possession of Shri Syed Mohammad Ali Khan, it is contended that Article 65 was a general Article and it is Article 96, which would apply. Appellant was appointed Mutawalli. The period would start running, when he was so appointed or from the date of the complaint filed by him in 1996.

iv. The High Court erred in finding that the right of the Waqf stood extinguished by virtue of Section 27 of the Limitation Act. As the Suit for Possession was against the transferee from the earlier Mutawalli, the possession would become adverse from the date of death or the resignation of the earlier Mutawalli under Article 134B of the earlier Limitation Act and upon the expiry of twelve years, as provided in Article 96, and not from the date of the sale deed.

v. Appellant would further contend that respondents being beneficiaries, could not acquire title, by adverse possession, of the waqf property. vi. Reliance was placed on the following Judgments:

a. Chhedi Lal Misra (Dead) Through Lrs. v. Civil Judge, Lucknow and others7;

b. K.S. Viswam Iyer (Dead) Through Lrs. v. State Wakf Board, Madras8; and c. Wali Mohammed (Dead) by Lrs. v. Rahmat Bee (Smt) and others9.

10. Shri P.S. Patwalia, learned Senior Counsel, appearing on behalf of Respondent No.1 in the appeals makes the following submissions:

There is no valid waqf created as the waqif never acted upon it. He never divested himself of the property as required under Mohammedan law pertaining to Shi a Muslims. Under the law, it is mandatory that there must be a change in the character of possession of property. No change in mutation records was made by the waqif. The property remained in the person's name till his (2007) 4 SCC 632 1994 Suppl. (2) SCC 109 AIR 1999 SC 1136 demise on 16.12.1958. Thereafter the property was mutated into the names of his three sons. Reliance is placed on the object of the waqf dated 26.07.1934. There in it is indicated:

"The object of the Waqf reads inter alia" With a view of perpetuating the name of my ancestors and with the object of benefiting my offspring and their offspring and relatives belonging to the family and their offspring, and, in their absence, the Shia Poor, the indigent, the miserable and Syeds-for this purpose under Mohammedan law, in accordance with Act 6 of 1913, I have by a formal statement (sigha) in accordance with the Sharia put into Waqf (trust) the following property, thereby, excluding it from own estate, and having put into writing this deed of Waqfu'l aulad (Trust for offspring)...." Clause E of Waqf Deed provides inter alia:

"E. In case, God forbid my generation exterminates altogether and none survives there and nor my wife Pakeeza Begum or any other wife remains alive, then in such case the income from the endowed property which will be manage by the members of the committee will be spent for the charitable matters in TAB A of the Convenience Compilation."

11. It is further contended that all the property except a small parcel admeasuring hundred bighas, which is the subject matter of the present case has been sold. In fact, the waqif himself sold a portion to one Mr. Manzoor Hasan. Almost 4272 bighas have

been sold by the sons of Akbar Ali Khan. Neither the appellant nor the Waqf Board objected. The Waqf Deed contemplated proceeds of the Waqf Property being used to repay outstanding debts. It was, therefore, not a valid waqf.

The Waqf was created on 24.07.1934, at which time, the Mussalman Waqf Validating Act, 1913 was in force. The Act did not provide for registration of the Waqf. It was, thereafter, that the Mussalman Waqf Act, 1923 was enacted. Thereunder, by virtue of Section 2(e), waqf- alal-aulad was excluded from the operation of the 1923 Act. Still further in the year 1930, the Mussalman Waqf Validating Act, 1930 was enacted, which declared only that the 1913 Act applied to Waqfs created before the commencement of the 1913 Act. It is thereafter that the U.P. Muslim Waqfs Act, 1936 (hereinafter referred to as, 'the 1936 Act') and the 1960 Act were enacted. Neither the 1936 nor the 1960 Acts applied to the facts. Therefore, it is contended that the appellant cannot have a case that the alleged Waqf was registered either under the 1936 Act or the 1960 Act. The object of the Waqf relied upon is to benefit the offspring and their offspring and in their absence to the Shia poor. The 1936 Act did not apply and Waqf could not have been registered under the 1936 Act. There is no religious or charitable purpose to the Waqf Deed dated 26.07.1934. Reliance is placed on the decision of this Court in Fazlul Rabbi Pradhan v. State of West Bengal and others10. The waqf not being registered, the summary procedure under the Act was not applicable. It is further complained that the appellants have different versions in regard to the alleged registration. On the one hand, it is contended that registration was actually done in 1934, at which time, the 1923 Act was in force. The said Act, apart from specifically excluding waqf-alal-aulad from its ambit did not provide for any provisions relating to registration. It is further pointed out that during the hearing, a case is set up that registration was done under the 1965 3 SCR 307 / AIR 1965 SC 1722 1936 Act. In view of the specific exclusion, by way of Section 2(2)(i), it does not apply as the entire income was going for the benefit of the members of the family. There is a procedure at any rate prescribed under the 1936 Act, in Section 38. The same has not been followed. The third version, it is pointed out, was that the waqf was registered under the 1960 Act. A Report of the Controller, which was for the first time relied upon in this Court and which was disbelieved by the Tribunal, cannot be the basis. Still further, as the entire income was dedicated to the descendants of the waqif stood excluded from the ambit of the 1960 Act, the claim was without basis. Here again, Section 29 provided the procedure for registration. The same, having not been conformed with, it could not be said that the waqf was registered under the 1960 Act. In view of the 1960 Act not being applicable, the bar to the compromise of the suit or proceeding relating to waqfs, enacted in Section 69, was inapplicable. The summary procedure for recovery of Waqf Properties mentioned in Section 45B was not available. No reliance could be placed on the extract of the Register of the Waqf purporting to establish the registration of the waqf and which was produced by Respondent No.4- Collector for the first time in Rejoinder submissions before this Court. The date of the Registration Certification is 08.07.2008, which was after the passing of the Order by the High Court. Here again, the procedure under Section 36 of the Act was not followed. The particulars, which are to be mandatorily specified were missing. In the absence of a valid registration, the summary procedure provided in Section 52 of the Act was not available to the appellants. The appellants are estopped from challenging the compromise of 1974, after a period of 22 years. The parties to the compromise acted upon the same. The second sale took place. Appellant being the son of the transferor stood estopped. The dismissal of the writ petition filed by Sujad Ali Khan as not pressed, has led to Order dated 12.09.1974, becoming final.

Respondents have been in continuous and uninterrupted possession. The Limitation Act was applicable to the Waqf properties under Mohammedan Law till the Act came into force, whereunder, Section 107 specifically barred the application of the Limitation Act, 1963. Reliance is placed on the Judgment of the Privy Council in 1940 XXI ILR 493. Also, support is drawn from the Judgment of this Court in Dr. M. Ismail Faruqui and others v. Union of India11. Section 107 of the Limitation Act, 1963 was prospective in its application. Our attention is drawn to the Judgment of this Court in T. Kaliamurthi (supra). The respondents have been in possession of two-thirds of the suit property since the first sale deed and the remaining one-third came by their possession in 1974. Documentary evidence establishing such possession include the following:

i. Order dated 16.07.1997 by the Controller, Waqf Board;

ii. Sale deed dated 26.09.1974;

iii. The averments in the appeal (No.4 of 1998) filed by the respondent before the District and Sessions Judge, Bulandshehar;

iv. Order dated 30.05.1998 passed by the District Judge;

v. The Waqf Appeal No. 3 of 2002;

(1994) 6 SCC 360 vi. The findings of the Order of the Tribunal;

vii. The admission of the possession of the respondents by the appellant in the impugned Judgment and, lastly, viii. Reliance is placed on the very List of Dates submitted by the appellant, which indicates that the Order of the Collector was for recovery of possession.

12. Thus, it is contended that the respondents have been in possession of two-thirds since 1960 and remaining one-third since 1974 and the rights of the respondents emerged before the Act came into force. Even counting from 1974 the respondents have perfected title in the year 1986, i.e., 12 years from 1974. Thus, the Limitation Act, 1963 would indeed apply as hostile possession had led to the ripening of the title before Section 107 of the Act came into force.

13. It is next pointed out that the appointment of Mutawalli did not lead to a fresh starting point of limitation. Decision of this Court in Syed Yousuf Yar Khan and others v. Syed Mohammed Yar Khan and others12 is set up to counter the said case. The High Court had rightly applied Article 65 of the Limitation Act, 1963 in the present case. The first respondent in the Appeals are not beneficiaries, it is next pointed out as no valid waqf has been established. There is no evidence to suggest that the alleged waqf was generating any income which was being distributed amongst the beneficiaries. This meant that the three sons of the original Wakif were not beneficiaries and were not so treated. It is also pointed out that there is no bar in law preventing the beneficiary of waqf from claiming adverse possession. The bar applies only to a Mutawalli. This is for the reason that the Mutawalli holds a fiduciary duty towards the Waqf. It is open to the first respondent, it is lastly pointed out, to plead both title and adverse possession simultaneously. Reliance was placed on M. Siddiq (Dead)Through

Legal Representatives (Ram Janmabhumi (1967) 2 SCR 318 Temple Case) v. Mahant Suresh Das and others13 and Karnataka Board of Wakf v. Govt. of India and others14.

14. Respondent Nos. 2 and 4 are Assistant Survey Commissioner Waqf, Bulandshehar and the Collector, Waqf, Bulandshehar, U.P., respectively. The learned Senior Counsel, Shri S.R. Singh would submit that the compromise application by the three sons of Akbar Ali Khan without prior approval of the Board, as contemplated in the Act of 1960, was not maintainable in view of the requirement of Section 69 of the 1960 Act. The Order of the Deputy Director of Consolidation setting aside the Order dated 29.01.1969 and also the Order dated 02.03.1972 was illegal. The Controller of the Waqf Board held inquiry on the complaint before the Waqf Board. He found that the disputed property was Waqf property which was registered as such in the Register of Waqfs. It was further found that the property was illegally sold without obtaining the (2020) 1 SCC 1 (2004) 10 SCC 779 sanction of the Board. Thereupon, the Controller issued the requisition to the Collector to obtain possession. The High Court placed reliance on Judgment of this Court in Thakur Mohd. Ismail v. Thakur Sabir Ali15, that in a waqf-alal-aulad, the property stood transferred to the Almighty but still dismissed the Revisions without considering whether title could be acquired by adverse possession. He points out that the High Court did not consider the question whether Articles 65 and 96 of the Limitation Act could be invoked against the God/Almighty. The Order passed by the Deputy Director, Consolidation was a nullity, being bereft of sanction under Section 69 of the 1960 Act. The result was the earlier decisions of the Consolidation Authorities stood restored wherein it was held that the Waqf in question was a valid Waqf. Section 49 of the U.P. Consolidation of Holding Act, 1953 bars the same issue being considered by the Tribunal which had the trappings of the Civil Court. The two sales were void ab initio under Section 51(1) and Section 51(A) of the Act. Again, support is drawn from the Judgment in AIR 1962 SC 1722 Thakur Mohd. Ismail (supra) as also Ahmed G.H. Ariff and others v. Commissioner of Wealth Tax, Calcutta16. A beneficiary/Mutawalli had no right to transfer the waqf property. Article 65 of the Limitation Act did not apply to the proceedings of the Act in view of Section 107 of the Limitation Act. It is further contended that Article 65 applied to suits. It did not apply to proceedings. Therefore, Section 27 of the Limitation Act, 1963 did not apply to the waqf property which stood vested in Almighty. Reliance is placed on Judgment of this Court in Chhedi Lal Misra (Dead) Through Lrs. v. Civil Judge, Lucknow and others17. Paragraph-34A of the Waqf Deed, which contemplates spending of Rs.500/- on charitable purposes and paragraph-34E, which contemplates that in case all the descendants of the Waqif die, then, the waqf shall be used for charitable purposes, brought the waqf under the definition of 'waqf'. A void document, as is the case with the sale deed and the compromise, would be ignored without the need to set aside the same. The AIR 1971 SC 1691 (2007) 4 SCC 632 respondent no.1 in both the Appeals could not be said to have perfected their title by adverse possession against the State for which the period is 30 years. The litigation started in 1997, i.e., 23 years from the date of the collusive compromise and the void sale deed. This argument is based on the fact that the waqf property is managed on behalf of God by the Waqf Board which comes under the superintendence of the Government under the law.

ANALYSIS

15. Going by the contentions raised and, in the facts, the following points are noted:

1. Whether there was a valid Shia Waqf and whether it was registered?

2. Whether the compromise dated 13.02.1974 and the Order dated 12.09.1974. are valid or are they void?

3. Whether the two sales, one on 14.10.1960 and the second on 26.09.1974, in favour of the first respondent in the two Appeals before us, are void?

4. Whether the action is barred by limitation?

5. Whether the High Court was correct in finding that the action was barred as it is not Article 96 of the Limitation Act, which applied but Article 65?

What is the interplay between the said Articles in the facts?

6. What is the impact of Section 27 of the Limitation Act, 1963 in the facts?

7. Whether Section 107 of the Act removes the bar of limitation at any rate?

16. The High Court in the impugned order has confirmed the findings of the Tribunal that Respondent No.1 in both the cases have acquired title by adverse possession. This is on the basis that the first sale was effected in the year 1960 and the second sale was effected in the year 1974. The Act came into force with effect from 1.1.1996. It is further found that the period began to run from the dates of the two sale deeds as the sales were void. The further finding is that Article 96 of the Limitation Act, 1963 did not apply to the first sale of the year 1960. The said sale was effected at a time when Qasim the eldest brother was the Mutawalli. The sale was effected by a person who in other words was not the Mutawalli. Therefore, Article 96 did not apply. As far as the second sale is concerned, it was effected by Qasim Ali Khan on 26.09.1974 purporting to convey his one-third right to his nephew who is the first respondent in the other appeal. The further reasoning of the High Court is that the second sale deed was executed by the Mutawalli. The court thereafter demarcated the field covered by Articles 65 and 96. The court then also took into consideration Section 27 of the Limitation Act, 1963. The Court found the proper interpretation was that Article 96 was to be confined to suits to recover possession where the right to recover possession had already not been lost under Section 27 of the Limitation Act, 1963. Article 96, in other words, it was found, applied to voidable transfers. On the said basis, finding that the second sale represented a case of void transfer, it was found that Article 96 did not assist the appellant. It was also found that there is no obstacle in a beneficiary of a Wakf perfecting title by adverse possession. Such an obstacle, undoubtedly, existed in the case of a Mutawalli, a trustee or a co- owner. A beneficiary was none of the above. Thus, proceeding on the basis that the first respondent in both the appeals were beneficiaries of the Wakf and as the sales under which they claimed were found to be void, the period of limitation contemplated under Article 65 of the Limitation Act began to run from the date of the sale. This meant that when the Act was born on 01.01.1996, the title stood vested with the first respondent by adverse possession. It is further found that Section 107 of the Act under which the Limitation Act was not applicable to the Act could not rescue the case of the appellant.

17. It is apposite that we advert to the relevant provisions of the Limitation Act. Section 27 of the Limitation Act provides that at the determination of the period limited to any person for instituting a suit for possession of any property, 'his right' to such property would stand extinguished. Article 65 of the Limitation Act, 1963 reads as follows:

> " Description of suit Period of limitation Time from which period begins to run
>
> 65. For possession of immovable property or any interest Twelve When the possession therein based on title. years1 of the defendant becomes adverse to the plaintiff.

Explanation.—For the purposes of this article—

(a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;

(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;

(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.

"

18. Article 134B of the Indian Limitation Act, 1908 was the predecessor provision holding the field till Article 96 supplanted it in the year 1963. The following table sets out Article 134B of the Limitation Act, 1908 and Article 96 of the Limitation Act, 1963:

> " Article 134-B of the Limitation Act, 1908 "Description of suit Period of Time from which limitation period begins to run 134- By the manager of a Hindu, Muhammadan or Twelve The death, B. Buddhist religious or charitable endowment to years resignation or recover possession of immovable property removal of the comprised in the endowment which has been transferor." transferred by a previous manager for a valuable consideration.
>
> Article 96 of the Limitation Act, 1963 "Description of suit Period of Time from which period limitation begins to run
>
> 96. By the manager of a Hindu, Muslim or Twelve The date of death, Buddhist religious or charitable years resignation or removal of endowment to recover possession of the transferor or the date of movable or immovable property

appointment of the plaintiff comprised in the endowment which has as manager of the been transferred by a previous manager endowment, whichever is for a valuable consideration. later." "

19. The distinction between the two Articles have been noted by the judgment of this Court in T. Kaliamurthi and another v. Five Gori Thaikkal Wakf and others18. It reads as under:

"35. .....We have carefully noted two Articles viz., Article 96 of the Limitation Act, 1963 and Article 134B of the Limitation Act, 1908 and we find that they are different from each other insofar as while under the 1908 Act 12 years was to run from the death, resignation or removal of the transferor, under the 1963 Act the said period of 12 years was to run from the date of death, resignation or removal of the transferor, or the date of appointment of the plaintiff as Manager of the endowment, whichever was later." (2008) 9 SCC 306

20. As far as the first sale is concerned, the sale was not effected by the Mutawalli or the Manager of the Waqf. The sale was effected by the brother of the Mutawalli. Therefore, the High Court is correct in finding that Article 96 will not come to the aid of the appellant.

21. As far as the second sale is concerned, it was no doubt, executed by the Mutawalli by sale deed 26.09.1974. This is a sale executed by him on the strength of the compromise which was entered into between the three brothers on 13.02.1974. As we have noticed, the compromise led to order dated 12.09.1974 being passed by the Deputy Director (Consolidation) setting aside the dismissal of the revision by order dated 20.09.1969 as also the dismissal of the first restoration application dated 02.03.1972. If the said sale is found to be valid, then obviously, the appellant would fail. If on the other hand, the sale is void, the question would be whether the proceeding initiated beyond 12 years from the date of the sale would be within time. If by seeking shelter under Article 96 of the Limitation Act, 1963, the period of limitation is to commence from the date of resignation of the Mutawalli then would not the period of 12 years commence from 01.05.1988 when Qasim Ali Khan, the Mutawalli resigned? Then, the period of 12 years would expire only in the year 2000. Could it not be said that the action was not barred? It is here that the High Court reasons that Article 96 is not meant to apply to a void sale. Instead, it applies to a voidable sale.

22. There cannot be any doubt that Waqf property can be the subject matter of acquisition of title by adverse possession (see AIR 1940 PC 116). That a Mutawalli however cannot acquire rights over waqf property by adverse possession is not open to question. (See AIR 1956 SC 713).

23. The High Court finds that Article 96 will not apply as it is a case of a void sale and not voidable sale. The reasoning is based on the rationale furnished in the Judgment of the High Court of Orissa in Chintamani Sahoo (deceased by LR.) and others v. Commissioner of Orissa Hindu Religious Endowments, Orissa and others19.

AIR 1983 Orissa 205 In the said case, the Division Bench of the High Court was dealing with the following facts:

The Mahant of a math executed certain permanent leases. It was without sanction of the Commissioner as contemplated in Section 58 of the Orissa Hindu Endowments Act, 1939. Such leases were contrary to the aforesaid provision. The Mahant came to be later dismissed. The Executive Officer of the math appointed by the Commissioner instituted proceeding under Section 68 of the said Act for recovery of possession, which was allowed. He also instituted proceedings for recovery of possession under Section 25 of the Act. The Commissioner allowed the proceeding under Section 25 and directed issue of a requisition to the Collector for evicting the appellant who thereupon brought a suit for declaration contending that he had acquired an indefeasible right of tenancy by uninterrupted possession and sought an injunction.

We may notice the following finding:

"8. The main question in controversy is as regards limitation and adverse possession. The finding of fact is that the plaintiff was in possession of the lands from the respective dates of the leases, namely, 26- 7-1943, 8-1-1944 and 15-7-1944. The proceeding under Section 25 of the Orissa Hindu Religious Endowments Act, 1951 was allowed on 30-10-69 and direction was issued to the Collector for delivery of possession. The right to evict the plaintiff would be barred by limitation after expiry of 12 years which comes to 1956 if the starting point would be the dates of the respective leases. If, however, it is held that adverse possession of the plaintiff would start only after the dismissal of the Mahant, the right to recover in 1969 would be in time. It is contended on behalf of the respondents that the correct Article to apply is Article 96 of the new Limitation Act. On the other hand, it is contended on behalf of the appellant that Article 65 of the new Limitation Act is the governing Article. The applicability of either Art. 65 or Art. 96 would depend on whether the transfer was void ab initio or only voidable.

xxx xxx xxx

10. An alienation made in contravention of a statutory provision which is enacted in public interest is void. Admittedly the permanent leases were granted in violation of Section 58(1) which prohibits grant of lease for more than five years without prior sanction. The transfer by permanent leases is, therefore, void. We are fortified in this view by the earlier decisions of this Court.

In the case of Naba Kishore Panda v. Bulendra, (1974-40 Cut LT 1152), referred to above, Hon'ble S.K. Ray, J. (as he then was) held that a permanent lease created in express breach of the mandatory provisions of S. 58(1) is void. In a subsequent Single Bench decision in the case of Arjuna Jena v. Chaitanya Thakur (1978) 45 Cut LT 461, Hon'ble B.K. Ray, J. also held that a lease created in violation of the provisions of Section 58(1) of the old Act is a void one. For this proposition, his Lordship relied on an earlier Division Bench decision of this Court in the case of Shri Chiranjilal Patwari v. Commr., Hindu Religious Endowments, Orissa, Bhubaneswar (1974) 40 Cut LT 41.

> In another Single Bench decision of this Court in the case of Gulam Ali Saha v. Sultan Khan, (1966) 32 Cut LT 510 : (AIR 1967 Orissa 55), decided by Hon'ble G.K. Misra, J. (as he then was) the question of validity of an alienation of wakf property without permission of the Court came up for consideration and it was held that the alienation, even though for consideration, was void ab initio. It was further held, relying on the principles laid down by the Privy Council in Masjid Shahid Ganj v. S.G.P. Committee, Amritsar, AIR 1940 PC 116, that Article 144 of the old Limitation Act applies to such a case for acquisition of title by adverse possession.

In an unreported decision of this Court in Second Appeal No. 361 of 1966 disposed of on 3rd August, 1970 (Sambari Bewa v. Orissa Board of Wakfs) Hon'ble R.N. Misra, J. (as he then was) considered the validity of an alienation made by a Mutwalli in violation of the provisions of Section 36-A of the Wakf Act and came to hold that a permanent lease granted in violation of the provisions of the Wakf Act is ab initio void (vide para. 8)."

24. Thereafter, the Court posed a question, as to whether it was Article 65 or Article 96, which applied. The Court thereupon held:

> "12. This Article refers to a transfer for valuable consideration. A transfer which is void ab initio is in the eye of law no transfer at all and hence will not come within the scope of this Article. This Article obviously applies to cases where the transfer can be avoided or is voidable. But if the transfer is void ab initio then Art. 65 of the new Limitation Act would apply. The transferee's possession since the date of the transfer becomes adverse from the date of the transfer inasmuch as the transferee had no right in respect of the property at all and he was a mere trespasser.
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> xxx xxx xxx
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> 14. In AIR 1966 SC 859 (Srinivasa Reddiar v. N. Ramaswamy Reddiar), the
>
> question for decision before their Lordships was "Does Art. 134-B permit any distinction to be made between transfers effected by a previous manager on the basis that the property transferred belongs to the religious endowment and those made by him on the basis that the said property is his own private property?" Their Lordships held that Article 134-B does not permit any such distinction.
>
> It was held that the character of the representations made by the previous manager in regard to his relation with the property which is the subject-matter of transfer is irrelevant for the purpose of Art. 134-B. The question whether this Article applies to void or voidable transaction did not arise for consideration in that case." (Emphasis supplied)

25. Since reference was made to AIR 1966 SC 859 and the same was distinguished, we may advert to the said Judgment. The contention, which was taken before this Court was that when a transfer is

made by a Manager not as Manager but as an individual, such transfer being void ab initio, the possession of the transferee was adverse from the date of the transfer and therefore, in such a situation, Article 134B of the Limitation Act, 1908, the predecessor Article of Article 96 of the present Limitation Act, with the difference we have noted in the third column, would not apply. This Court, in fact, noted that two Judgments of the Privy Council, viz., 1900 27 Indian Appeals 69 (EC) and 37 Indian Appeals 147 EC, supported the said contention. In regard to the first of the cases (27 Indian Appeals 69 EC, it is found that the Privy Council held that where hereditary Trustees of a religious endowment sold their hereditary right of management and transferred the endowed property, the sales were null and void, if there was no custom providing otherwise. It was further noted that the Privy Council was dealing with the case of Article 124 of the Limitation Act, 1908. It was further found that what was sold was the hereditary office as also the property, though, immovable properties of the temple were also sold. The further reasoning was that it was Article 144 of the old Act which operated to bar the suit after 12 years of adverse possession. The Court noted certain divergence of opinions in the Calcutta High Court. It further went on to doubt whether the first of the Judgment 27 Indian Appeals 69 (EC) could lead to the inference that if a part of the property was transferred by the Manager of a religious endowment, on the basis that it belonged to him, the right of the succeeding Manager could be lost. Thereafter, the Court went on to find that the matter must be viewed in the context of Article 134B of the Limitation Act, 1908. This Court found that it did not make any difference to the application of Article 134B, if the transfer is made on the basis that the property belonged not to the endowment but to the Manager. All that was necessary for the successor Manager to prove were found to be the following facts:

> "(1) that the property belongs to the religious endowment; (2) that it was transferred by a previous manager; and (3) that the transfer was for a valuable consideration. The character of the representations made by the previous manger in regard to his relation with the property which is the subject matter of transfer, is irrelevant for the purpose of Art. 134-B."

26. The High Court of Orissa in Chintamani Sahoo (Deceased by LR.) (supra), distinguishes the aforesaid Judgment on the basis that this Court was not considering the question whether Article 134B applied to void or voidable transactions as it did not arise.

27. The appellants have placed reliance on certain Judgments of other High Courts contending that they lay down a different principle. In Chinna Jeeyangar Mutt, Tirupath v. C.V. Purushotham and others 20, a learned Single Judge traced the history of Articles 134A, Article 134B, Article 134C also with reference to the AIR 1974 AP 175 Third Report of the Law Commission of India. The said portion reads as follows:

> "12. The Law Commission observed in its 3rd report relating to Limitation Act, 1908 in paragraph 123 as follows:
>
> "The starting point of limitation for suits covered by Article 134-B is the date of death, resignation or removal of the transferor. This has given rise to some difficulties in certain cases. Thus, an Endowment Commissioner may find it

> necessary to challenge an alienation by one of the previous managers, after decades; or, there may be a gap of more than 12 years between the death, resignation or removal of one manager and the appointment of his successor. In such cases, it would be more equitable to make the date of the plaintiff's appointment as Manager the starting point for limitation. But there may be cases and circumstances where the existing provision may be more favourable to the institution. To provide for both contingencies, the later of the two dates should be taken as the starting point of limitation."

28. The Court also relied on the Statement of Objects and Reasons. It also referred to Srinivasa (supra). Still further, the Court set down the position at law prior to amendment, as follows:

> "23. From the above discussion the following position of law emerges. A Mahant of a mutt is incompetent to create any interest in respect of muth property to enure beyond his lifetime.
>
> He can alienate the property permanently only for legal necessity or benefit to the estate. In the case of an alienation made by him, which was not for legal necessity or benefit the said alienation becomes voidable at the instance of his successor. The right to question the alienation accrues to the successor only on the alienor's death. The adverse possession of the alienee also begins to run only from the date of his death and not until then. A permanent lease of temple lands is also an alienation of this nature. If it was not for legal necessity or benefit it is not binding on the mutt. The cause of action which once accrues continues. The right of the mutt would be extinguished in regard to that property at the end of the period prescribed by the law of limitation. Each succeeding mahant does not get a revival of the cause of action in his favour. The appointment of successor was never considered to give a fresh start of limitation, under the law as it stood prior to 1963. Whether it was an alienation made for legal necessity or not was a question depending upon the facts and circumstances of each case."

29. Thereafter, the learned Judge went on to lay bare the true purport of Article 134B:

> "24. Such was the state of law when the Limitation Act was amended in 1963. The legislature must be presumed to know the existing law and the interpretation given by the courts to the law then in force. If the right to question a voidable alienation in respect of a Hindu or Muhammadan religious or charitable endowment is denied to a mutt or religious institution, such an institution looses the properties once for all. As the State was interested in protecting and safeguarding the properties of such institutions, it brought about an amendment to achieve that purpose in 1963. The Law Commission, which was appointed to go into that question suggested that in the case of Hindu, Muslim and Buddhist religious or charitable endowments, a fresh start or a terminus quo should be given for actions brought by the succeeding Mahant to set aside such alienations, which were not made for legal necessity or benefit of the

> institution. The Legislature also accepted that view and inserted in column 3 to Article 96, which previously had only the following words: "the death, resignation or removal of the transferor" the following words: "or the date of appointment of the plaintiff as manager of the endowment, whichever is later". It is obvious from the plain words of the amendment that the legislature had in view such alienations about which a right to institute suits has already become barred and therefore it wanted to provide a fresh period of limitation in regard to them. The Legislature was also aware of the fact that according to the law as laid down by decisions prior to 1963, the date of appointment of the plaintiff as manager by an endowment did not give him fresh start of limitation for that purpose. It was only to remedy the obvious difficulties felt in the interpretation of such law that this amendment has been brought about. By virtue of this amendment, if the plaintiff had been appointed within 12 years from the date of the filing of the suit, he can question any alienation, which was not made for legal necessity or benefit to a mutt by a previous manager. The fact that 12 years have elapsed from the date of death, resignation or removal of the transferor manager would not stand in the way of the plaintiff in such a suit from recovering the property. That is clear from the last three words in the amendment 'whichever is later', purposely introduced by the Legislature. In view of this amendment the courts have got to apply the plain words of the Statute to any action brought by any manager of a Hindu, Muslim or Buddhist religious or charitable endowment, to recover possession of the movable or immovable property of an endowment which was the subject of an alienation by a previous manager for valuable consideration. It is also clear that the transferor manager need not be the immediate predecessor of the plaintiff, that files such a suit. From a reading of Article 96, such a conclusion cannot be arrived at. It is enough if the alienation was made by a previous manager. The first column does not say that it should be by the previous manager."

30. In the State Wakf Board, Madras, superseded by the Government of Tamil Nadu in G.O.Ms. No. 2031, dated 20th November, 1961 and appointed by G.O.Ms. No. 2264, dated 30th December, 1967, The Special Officer for Wakfs Madras v. Subramanyam and others21, the learned Judge was, inter alia, dealing with the following facts:

The suits were filed for recovery of properties alleged to belong to the waqf, which were dismissed on the ground of limitation. The Court drew upon the later part of the third column AIR 1977 Madras 79 of Article 96 and found that the suit was within time. In the said case, in fact, the Waqf Board was the plaintiff. The Single Judge found that the Waqf Board was constituted only in the year 1953. The suits were instituted in 1967. In assigning the role of the Manager to the Board within the meaning of 'manager appointed' in the third column of Article 96, also, the Court drew support from the Judgment of learned Single Judge in Chinna Jeeyangar Mutt (supra). We may notice the following reasoning:

> "6. The argument of the learned counsel now is that only when the Wakf Board assumes direct management of the wakf, it can be said to be a manager as contemplated by the third column in Art. 96 of the new Act and that so long as there

> is no assumption of direct management, the Wakf Board cannot be said to be a manager. I am unable to accept this argument, from one point of view. Neither S. 42 nor S. 43-A of the Wakfs Act on which reliance has been placed uses the word, "Manager". The word, "Manager" in relation to a religious or charitable endowment is not a term of art. The said word denotes the person who is in charge of the administration of the endowment or manages the property or supervises the performance of the charity and the word is one of very wide and general import. As a matter of fact, the judgment of Natarajan J., has referred to the provisions contained in S. 15(2) of the Wakfs Act. S. 15(1) of the Wakfs Act provides that subject to any rules that may be made under the said Act, the general superintendence of all Wakfs in a State shall vest in the Board established for the State; and it shall be the duty of the Board so to exercise its powers under the Act as to ensure that the Wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such Wakfs were created or intended. Sub-S. (2) or S. 15, without prejudice to the generality of the powers conferred by Sub-S (1) by way of illustration, enumerates certain specified power also. One such specified power so enumerated is contained in S. 15(2)(h), which enables the Wakf Board to take measures for the recovery of lost properties of any Wakf. S. 15(2)(i) also enables the Wakf Board to institute and defend suits and proceedings in a court of law relating to Wakfs The combined effect of S. 15(1) and 15(2) of the Wakfs Act will certainly be sufficient to designate the Wakf Board as a manager for the purpose of recovery of possession of Wakf property and consequently it can certainly be termed as "Manager" contemplated by the third column to Art. 96 of the new Limitation Act and if so construed, the constitution of the Wakf Board under the statute can certainly be construed to be the appointment of the Wakf Board as Manager of the Wakf in question, because even the word, "appointment" just like the word, "Manager" is not a term of art and therefore has to receive its ordinary, natural and normal meaning."

31. Before we finally pronounce on the question as to whether Article 96 would apply in respect of a void transaction, we deem it appropriate to deal with certain other aspects. The waqf in question is the creation of Akbar Ali Khan on 26.07.1934. It is the case of the appellant that it was registered as waqf al aulad at No. 1476. The transferor of the second sale deed, viz., Qasim Ali Khan took over as the Mutawalli when Akbar Ali Khan, his father, died on 16.02.1958. It is not in dispute that Qasim Ali Khan instituted OS 1 of 1950 wherein he impleaded his father Akbar Ali Khan and the transferee of a part of the waqf property which was effected by his father. The Decree of the Trial Court in favour of the plaintiff was affirmed by the High Court by Judgment dated 11.07.1962. The Judgment affirmed the view of the Trial Court that there was a valid waqf. It is categorically found by the High Court that all the legal requirements in respect of the creation of the waqf by a Shia under the Mohammedan law had been made out. It was held that Akbar Ali Khan did create a waqf-alal-aulad on 26.07.1934 which was effective in law. Therefore, as between the waqif who was the first Mutawalli also, and between his son, Qasim Ali Khan, the findings in the Judgment of the High Court clearly holds that there was a valid waqf. After the death of Akbar Ali Khan, his son Qasim Ali Khan took over as Mutawalli. He instituted OS 421 of 1959. Therein, his brothers were the

defendants, viz., Kasim Ali Khan and Raza Ali Khan. It was the act of the defendants getting their names mutated in the Revenue Records, which occasioned the said suit. It is during the pendency of the suit, i.e., on 14.10.1960, one of the defendants Kazim Ali Khan transferred his alleged, one-third right in favour of the first respondent in one of the Appeals before us. The suit was decreed. The High Court in the Appeal filed by the defendants, remanded the matter back by Order dated 25.09.1963. However, while it was so, consolidation proceedings commenced under the U.P. Consolidation of Proceedings Act, 1953. Under the provisions of the said Act, the proceedings in the suit would abate when consolidation commences. Thereafter, it is the Consolidation Officer, whose decision is appealable to the Settlement Officer and which latter Authority's decision can be revised in a Revision by the Deputy Director, who hold sway. The plaintiff in the suit, viz., Qasim Ali Khan, accordingly, placed his objections against the name of his brothers being entered. The objections of Qasim Ali Khan were found to be with merit. Resultantly, the names of the brothers were directed to be removed and their place, the name of the waqf was directed to be entered. The brothers of Qasim Ali Khan unsuccessfully appealed before the Settlement Officer. A Revision carried by them before the Deputy Director proved equally unsuccessful as it was dismissed by Order dated 29.01.1969. The Order was passed on merit. It reads, inter alia:

> "3. That I find that Wakf is admitted between the parties. The disputed land was sir. It after the execution of wakf, the sir should have been converted into ex-proprieto tenancy. It could have been inferred that the rights of ex-proprieto tenancy which ultimately converted at sirdari right after the date of vesting, did not belong to the wakf and then there was justification for continuances of the applicants a successors of their father. But, the position is otherwise, when the father of the parties created at wakf, the disputed land which was sir, was not converted into expropriatory tenancy and was recorded bhundhary after the date of vesting. It has therefore, to be concluded that absolute rights in the land were transferred to the almighty and the proper course, therefore, was to record the opp. Party as Mutwalli and expunge the names of the applicants. In the litigation in regular courts, the civil court had also held the same view but the matter could not become final in these courts. On account of advent of consolidation. In these circumstances, I come to conclusion that the orders of the Lower Courts are sound and deserves no interference."

> 32. The defendants, viz., Kasim Ali Khan and Raza Ali Khan filed a Restoration Application which came to be dismissed by Order dated 02.03.1972. Yet another Restoration Application was filed. It is in the same that a compromise was entered into between Qasim Ali Khan, Kasim Ali Khan and Raza Ali Khan, all the three brothers, on 13.02.1974. They purported to disown the waqf. They proclaimed that it had not taken effect. It was based on this compromise that the second Restoration Application was allowed. The earlier orders rejecting the Revision and the Restoration being dismissed, were set aside by the Deputy Director. The compromise dated 13.02.1974 formed the basis for the same. It is acting on the said compromise and the Order passed thereon that Qasim Ali Khan purported to convey his one-third share to his nephew by sale deed dated 12.09.1974.

33. The 1960 Act was in force. Section 69 of the Act provided as follows:

> "69. Bar to compromise of suits by or against mutawallis. – No suit or proceeding pending in any court by or against the mutawalli of a wakf relating to title to wakf property or the rights of the mutawallis shall be compromised without the sanction of the Board."

34. Also, Sections 49A and 49B of the said Act read as follows:

> "49A Transfer of immovable property of waqf- Notwithstanding anything contained in the deed or instrument, if any, by which the waqf has been created, no transfer by way of-
>
> (i) sale, gift, mortgage or exchange; or
>
> (ii) lease for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-

agricultural and or building of any immovable property of the waqf shall be valid without the previous sanction of the Board." 49-B. Recovery of waqf property transferred in contravention of Section 49-A.—(1) If the Board is satisfied after making an inquiry in such manner as may be prescribed that any immovable property entered as property of a waqf in the register of waqfs maintained under Section 30, has been transferred without the previous sanction of the Board in contravention of the provisions of Section 49-A, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.

(2) On receipt of a requisition under sub- section (1), the Collector shall pass an order directing the person in possession of the property to deliver the property to the Board Within a period of thirty days from the date of the service of the order.

(3) Every order passed under sub-section (2) shall be served—

(a) by giving or tendering it or by sending it by post to the person for whom it is intended; or

(b) if such person cannot be found, by affixing it on some conspicuous part of his last known place of "bode or business, or by giving or tendering it to some adult male member or servant of his family or by causing it to be affixed on some conspicuous Part of the property to which it relates:

> Provided that where the person on whom the order is to be served is a minor, service upon his guardian or upon any adult member or servant of his family shall be deemed to be service upon the minor.
>
> (4) Any person aggrieved by an order of the Collector under sub-section (2) may, within a period of thirty days from the date of the service of the order, prefer an

appeal to the Court of the District Judge within whose jurisdiction the property is situate. (5) The District Judge may either dispose of the appeal himself or may transfer it to the Court of any Additional District Judge or Civil Judge under his administrative control and may also withdraw any such appeal and either dispose of the same or transfer it to any other Court of Additional District Judge or Civil Judge under his administrative control, and in every case the decision of the court shall be final.

(6) Where an order passed under sub-section (2) has not been complied with and the time for appealing against such order has expired without any appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which the order has been made, using such force as may be necessary, for the purpose, and then deliver it to the Board.

(7) In exercising his functions under this section the Collector shall be guided by such rules as may be made in that behalf by the State Government."

35. Sections 49A and 49B were inserted in the 1960 Act by way of U.P. Act 28 of 1971. Therefore, the sale deed dated 26.09.1974 by Qasim Ali Khan in favour of his nephew, being in the teeth of the prohibition against a sale without the previous sanction of the Board, was illegal. It is this narrative which gives rise to the question as to whether the sale is void as it was in transgression of a statutory mandate. If it is void for such a reason, would it pave the way for the beginning and the running of the period of adverse possession by the transferee. Would it not open the doors for applying Article 65 of the Limitation Act? Would it not then, equally, invite Section 27 of the Limitation Act to its doorstep? Resultantly, on the expiry of 12 years from 13.09.1974, would the title set up by the appellant, be extinguished? If that is so, would not the complaint filed in the year 1997, after the Act came into force on 01.01.1996, leading to invoking the power under Section 52 of the Act, be impermissible?

36. Section 52 of the Act, which is the fountainhead of the action by the Controller of the Waqf Board and the Collector, is a sequel to Section 51. Section 51(1), inter alia, before its substitution by Act 27 of 2013, read as follows:

"51(1) Notwithstanding anything contained in the wakf deed, any gift, sale, exchange or mortgage of any immovable property which is waqf property, shall be void, unless such gift, sale, exchange or mortgage is effected with the prior sanction of the Board:

Provided that no mosque, dargah or khangah shall be gifted, sold, exchanged or mortgaged except in accordance with any law for the time being in force."

37. We may only notice that Section 51(1)(a) as substituted by Act 27 of 2013, subject to the provisos declares a sale, gift, exchange or mortgage or transfer of waqf property to be ab initio void. Section 52 of the Act provides that if the Board is satisfied, after making any inquiry, as may be prescribed, that any immovable property of a waqf entered as such in the Register of Waqfs maintained under Section 36, has been transferred without previous sanction of the Board in contravention of Sections 51 or 56 of the Act, it may send a requisition to the Collector of the place within which the property is situated to obtain and deliver possession. The Collector is bound to pass an order directing the person in possession to deliver the property to the Board within 30 days from the receipt of the Order. It is under this provision that the impugned Orders came to be passed.

38. It will be noticed that the Act came into effect on 01.01.1996. Section 52 empowers the Board to send a requisition to the Collector, if property has been transferred without the previous sanction of the Board in contravention of Section 51, inter alia. We have noticed that Section 51 has provided that any sale of property, which is waqf property, without the previous sanction of the Board, would be void. The two sales in this case took place prior to 01.01.1996. The first sale is dated 14.10.1960 whereas the second sale is dated 13.09.1974.

39. Section 112 of the Act provides for repeal and sales. It reads as follows:

"112. Repeal and savings. —(1) The Wakf Act, 1954 (29 of 1954) and the Wakf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act.

(3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act that corresponding law shall stand repealed:

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were done or action was taken."

40. Section 49B of the 1960 Act is pari materia with Section 52 of the Act. In other words, it provided that the Board may, if a transfer is made contravening Section 49A of the 1960 Act, send requisition to the Collector for recovery of possession. Section 49A of the 1960 Act also provided on similar terms as provided in Section 51(1) of the

> Act that for a sale of property comprised in a waqf, previous sanction of the Board was necessary. As far as Sections 49A and 49B came to be inserted by Act 28 of 1971 and the second sale took place in 1974, which is after the insertion of Sections 49A and 49B in the 1960 Act, therefore, the power, indeed, vested with the Board to take action for recovery of possession under Section 49B. Under Section 112(3) of the Act, we proceed on the basis that the 1960 Act would stand repealed. However, the proviso declares that the repeal would not affect the previous operation of the corresponding law. The corresponding law, in this case is Section 49A read with Section 49B.

Action taken in the exercise of the power thereunder, is to be deemed as taken in the exercise of powers under the Act. The powers under the Act must be treated as flowing from Section 52 of the Act. For the said purpose, the proviso to Section 112(3) provides that the provisions in the Act, which in this case would be Section 52, must be treated as being on the Statute Book.

41. But then could it be said that no action has been taken under Section 49B of the 1960 Act with regard to the transfers in question and, therefore, Section 112(3) of the Act, may have no application? We proceed on the basis that, the power exists as for reasons to follow, the appellants will fail on surer foundation.

42. A contention has been raised that the waqf-alal- aulad in question cannot be treated as a waqf under the Act. It is the case of the first respondent that the Mussalman Waqf Validating Act, 1913 did not provide for registration of the waqf. Though the Mussalman Waqf Act, 1923 was enacted, waqf-alal-aulad was excluded from its operation. Neither the 1936 Act nor the 1960 Act applies and the appellant cannot claim that the waqf was registered under either enactment. There is no religious or charitable purpose. In view of the specific exclusion in the 1936 Act, it is contended that the Act did not apply to the waqf as the entire income was to go for the benefit of the members of the family of the waqif.

43. The waqf in question is created by Akbar Ali Khan by deed dated 26.07.1934. It is, no doubt, a waqf-alal- aulad. A waqf-alal-aulad is a waqf under Mohammaden Law. It was the Privy Council which in the case of Abdul Fatah Mohammad Ishak v. Russomy Dhar Chaoudhary22 held that if the charity is illusory or so small, it could not be treated as a waqf. This Judgment led to the passing of the Mussalman Waqf Validating Act, 1913. Sections 3 and 4 of the said enactment reads as follows:

> “3. It shall be lawful for any person professing the Musalman faith to create Wakf which in all other respects is in according with the provisions of Musalman Law, for the following among other purposes: -
>
> (a) For the maintenance and support wholly or partially of his family, children or descendants and
>
> (b) where the person creating a Wakf is a Hanafi Musalman, also for his own maintenance and support during his life-time or for the payment of his debts out of

the rents and profits of the property dedicated.

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Musalman Law as a religion, pious or charitable purpose of a permanent character.

4. No such Wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious 22 Indian Appeals 76 or charitable purposes of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the Wakf."

44. Thereafter, the Mussalman Wakf Act, 1923 came to be passed. It applied to the whole of British India. The definition of Wakf contained in Section 2(e) was as follows:

> "2(e) 'Wakf' means the permanent dedication by a person professing the Musalman faith of any property for any purpose recognized by the Musalman Law as religious, pious or charitable, but does not include any Wakf, such as is described in S.3 of the Musalman Wakf Validation Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the Wakf was created or by any of his family or descendants." (Emphasis Supplied)

45. Section 3 of the 1923 Act obliged the Mutawalli to furnish statement containing certain particulars to the competent Court. Notice of the Statement was to be published under Section 4. The 1923 Act provided for audit of accounts and the provision for expense which could be incurred by the Mutawalli came to be inserted. Section 10 provided for penalty. Certain waqfs were excluded from its purview under Section 12. In the United Provinces, which meant the United Provinces of Agra and Awadh, the 1936 Act, came to be enacted. Section 2 thereof read as follows:

> "2(1) Save as herein otherwise specifically stated, this Act shall apply to all Wakfs, whether created before or after this Act comes into force, any part of the property of which is situate in the United Provinces.
>
> (2) This Act shall not apply to:-
>
> (i) a Wakf created by a deed, if any, under the terms of which not less than 75 per cent of the total income after deduction of land revenue and cesses payable to Government of the property covered by the deed of Wakf, if any, is for the time being payable for the benefit of the Wakif or his descendants or any member of his family:
>
> (ii) a Wakf created solely for either of the following purposes:
>
> (a) The maintenance and support of any person other than the Wakf or his descendants or any member of his family,

(b) The celebration of religious ceremonies connected with the death anniversaries of the Wakif or of any member of his family or any of his anscestors;

(c) The maintenance of private imambaras, tombs, and grave-yards, or

(d) The maintenance and support of the Wakif or for payment of his debts, when the Wakif is a Hanafi Musalman; and

(iii) the Wakfs mentioned in the schedule.

Provided that if the Mutawalli of a Wakf to which this Act does not apply wrongfully sells or mortgages, or suffers to be sold in execution of a decree against himself, or otherwise destroys the whole or any part of the Wakf property, the Central Board may apply all or any of the provisions of this Act to such Wakf for such time as it may think necessary. Explanation-A Wakf which is originally exempt from the operation of this Act may, for any reason subsequently, become subject to such operation, for example, by reason of a higher percentage of its income becoming available under the terms of the deed for public charities." (Emphasis supplied)

46. Section 3(1) of the 1936 Act, defined 'Wakf' as follows:

"3(1) 'Wakf' means the permanent dedication or grant of any property for any purposes recognized by the Musalman law or usage as religious, pious or charitable and, where no deed of Wakf is traceable, includes Wakf by user, and a Wakif means any person who makes such dedication or grant."

47. Section 38 (1) of the 1936 Act, read as follows:

"38(1) Every Wakf whether subject to this Act or not and whether created before or after the commencement of this Act shall be registered at the office of the Central Board of the sect to which the Wakf belongs.

(Emphasis Supplied)

48. It is, no doubt, true that in Fazlul Rabbi Pradhan (supra), in the context of the question whether the waqfs were affected by the passing of the West Bengal Estates Acquisition Act, 1953, and, in that, the waqf in question fell within the definition of the words 'charitable purpose' and 'religious purpose', the Court held, inter alia, as follows:

"13. These cases led to agitation in India and the Mussalman Wakf Validating Act 1913 (6 of 1913) was passed. It declared the rights of Mussulmans to make settlements of property by way of wakf in favour of their families, children and descendants. For the purposes of the Validating Act the term "wakf" was defined to mean "the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or

> charitable". This gave a wider meaning to the word wakf but only for the purpose of taking them out of the invalidity which would have otherwise existed and which was already authoritatively stated to have so existed.
>
> 14. After the passage of these two Acts wakfs, in which the object was the aggrandisement of families of wakifs without a pretence of charity in the ordinary sense, became valid and operative. But the intention of the Validating Act was not to give a new meaning to the word "charity" which in common parlance is a word denoting a giving to someone in necessitous circumstances and in law a giving for public good. A private gift to one's own self or kith and kin may be meritorious and pious but is not a charity in the legal sense and the courts in India have never regarded such gifts as for religious or charitable purposes even under the Mahomedan law. It was ruled in Syed Mohiuddin Ahmed v. Sofia Khatun [44 CWN 974] that neither the Wakf Validating Act 1913 nor the Shariat Act 1937 had the effect of abrogating the Privy Council decisions on the meaning of "charitable purpose" as such."

49. No doubt, the Court was dealing with a case of a waqf-alal-aulad. The Judgment must essentially be viewed in the context of the definition of 'religious and charitable purpose' provided in the Act in question.

50. The Wakf in question is dated 26.07.1934. The 1936 Act applied to Wakfs created before or after the commencement of the Act. However, Section 2(2) declares that the Act shall not apply to certain waqfs. They included a waqf whereunder not less than 75 per cent of the total income, after deduction of certain sums, was for the time being payable for the benefit of the waqif or his descendants. However, Section 38(1) of the 1936 Act made it clear that every waqf, whether subject to the Act or not and whether created or after the commencement of the 1936 Act, shall be registered. Proceeding on the basis that the waqf dated 16.07.1934 was waqf-alal-aulad and which, in terms of Section 2(2)(i), was not subject to the provisions of the 1936 Act, it was compulsorily registerable in view of Section 38(1). Any waqf which is registered under the 1936 Act would also be deemed to be registered under the 1960 Act. That is, though the 1936 Act did not apply to certain wakfs, but when it comes to registration under Section 38, it was mandatory for every wakf to be registered (i) whether subject to the Act and ii) whether created before the Act or not. Thus, the registration of the Wakf dated 16.07.1934, was in fact compulsory under Section 38 of the 1936 Act.

51. It has been contended by Shri P.S. Patwalia, learned Senior Counsel that there was really no waqf as known in law and the waqf in question contemplated only disbursement of the entire income for the benefit of the descendants of the waqif. Quite apart from the fact that the question engaged the attention of the Civil Court, including the High Court, in the first round of litigation, wherein, it was found that there was a valid waqf from the standpoint of the Shia law and the Consolidation Authorities also found that there was a waqf till the Deputy Director, Consolidation revisited the matter only on the basis of the compromise between the brothers, the terms of the waqf did contemplate a certain sum being set apart for charitable purposes as correctly pointed out by Shri S.R. Singh, learned Senior Counsel for respondents 2 and 4. In this regard, we notice the stipulation

in the deed that a sum of Rs. 500/- will be spent on charitable purpose such as Muazzin and lighting in the mosque and emambara, majlallse ashra of the sacred month of Moharram. No doubt, there is the residuary clause, which reveals that the wakif has provided that if descendants cease to exist, the income from the endowed property will be managed by a Committee to be spent for charitable purposes.

52. A Division Bench of the High Court of Allahabad in the case of U.P. Sunni Central Board of Waqf and Another v. Hasan Jehan Begum and Another23 had to deal with an argument that in a case of waqf-alal-aulad, having AIR 1977 All 18 regard to the definition of the word 'waqf' in Section 3(11) of the 1960 Act, whether the entire properties were dedicated for religious, pious or charitable purpose, as contemplated in Section 3(11), defining the word 'waqf' or only to the limited extent, i.e., to the extent of the income which was earmarked for such purposes. We may note in this regard, the following discussion:

> "5... With great respect, we are unable to find ourselves in agreement with the view taken by the learned single Judge as to us it appears that the extent of property cannot be determined on the basis of the income. It is the dedication which has to be seen, if the entire property is dedicated for two purposes, namely, for secular purposes and for religious, pious or charitable purposes, then the entire property will be deemed to be dedicated for both purposes. Unless it is possible to determine the extent to which the property has been dedicated for religious, pious and charitable purposes, the entire property will have to be deemed to be dedicated to God and subject-matter of the Waqf. For excluding the property it should either be known or be determinable from the deed of waqf that a particular property or part thereof is not dedicated. Learned counsel for the petitioners-respondents contended that it is the income that is the criterion for determining the extent of dedication. But, we find that it is not the income which is contemplated by the definition of waqf but the property. The relevant words are 'to the extent to which the property is dedicated'. The income arises out of property and it can vary from time to time. It may be larger than the amount fixed for the religious, pious or charitable purposes or may be less than that. It is also not possible to allocate property relative to the amount or to say that this amount of money must come from a particular portion or property out of the lot or from a particular proportion of that property. The entire property, which is the subject- matter of the waqf, is liable for meeting the purposes religious, pious or charitable. If the entire property, which is the subject-matter of the waqf, is liable for meeting the expenses, it cannot be said that the waqf or dedication is only to the extent of some undeterminable and unascertainable property out of the total property, which is the subject-matter of the Waqf. In our opinion, unless it is possible to determine the extent of the property out of the property which is the subject-matter of the waqf-alal-aulad meant for religious, pious or charitable purposes, the entire property will be the subject-matter of the waqf within the meaning of the Waqfs Act. The question of determining the extent can practically arise only in a case in which there are a number of properties and some of them are earmarked for purposes recognised as religious, pious or charitable and others

> earmarked for the benefit of the waqif or his descendants. It may also arise in a case where a share in a property or a part of a property has been earmarked for the two purposes. In the present case neither of the two waqfs contain such a direction. The entire property has been dedicated for the purposes recognised as religious, pious and charitable. It may also be possible to say that the property, which has been dedicated for purposes religious, pious or charitable, is the entire extent of the property. The entire properties under the deeds will, therefore, be deemed to be waqf within the meaning of Section 3(11) of the Waqfs Act."

53. We would think that the aforesaid view represents the correct approach and the extent of the income, which is set apart for the purpose, be it religious, pious or charitable, in the facts, cannot detract from the dedication of the whole property.

54. Another contention taken is that vast extents of wakf property had been alienated by the sons of the original wakif and only about 100 bighas which constitute the subject matter of the appeals before us remained. We are of the view that the argument is beside the point. The fact that the property of the waqf has been dealt with in a manner, which is illegal, or that it was not questioned, cannot deflect us from either finding that there was a valid waqf or that the property which remained of the waqf, must be dealt with in accordance with law. The compromise before the Deputy Director (Consolidation) and the order based on the same are in the teeth of Section 69 of the 1960 Act, therefore, the orders passed by the Consolidated Officer and Settlement Officer about the Waqf would revive.

55. Two questions remain. The first question, which we must consider is, whether a beneficiary of a waqf can succeed on the strength of the plea of adverse possession in regard to the property of the waqf. The High Court has proceeded on the basis that a Mutawalli may not be able to acquire title by adverse possession. Equally, a trustee and a co-owner stand precluded in this regard, it is noted. A beneficiary of a waqf, however, being neither a trustee nor a co-owner of waqf property, can acquire title through adverse possession even if it is the property of the waqf it is found.

56. A beneficiary of a waqf cannot be described as a stranger to the waqf. No doubt, a beneficiary is not to be conflated in his position with a Mutawalli. The Mutawalli is a manager of the waqf. The property of the waqf, we must remind ourselves, in law vests in the Almighty. The Mutawalli acts merely as the manager. For the purposes of Section 10 of the Limitation Act, no doubt, he is treated as a trustee. A plea of adverse possession undoubtedly requires the requisite intention, viz., animus possidendi. This is besides actual possession for the required period. Does the beneficiary occupy a fiduciary capacity qua the waqf property, which would prevent him from advancing a claim of adverse possession? What in the context do the words 'fiduciary capacity' convey? A beneficiary would be entitled to receive benefits in terms of the waqf deed. Does he have any obligation in regard to the waqf property? Is there a duty in other words which he must perform by virtue of the fact that he is constituted a beneficiary under the waqf? Is the assertion of hostile title, an indispensable requirement to constitute adverse possession irreconcilable and incompatible with the position of the beneficiary? In the case of adverse possession, since a requirement is that the possession must be hostile to the real owner and since the real owner is the Almighty, the

requirement would be that such a person must has the necessary animus to hold contrary to the title of God. In the case of a co- owner while mere assertion of title in himself may hardly suffice as the possession of a co-owner is taken to be possession on behalf of all co-owners a case of ouster being successfully established would entitle the co-owner to succeed.

57. We may notice the following statement from Mulla on "Principles of Mohammadan Law" (22nd Edition):

> "207. Power of mutawalli to sell or mortgage. A mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange waqf property or any part thereof, unless he is expressly empowered by the deed of waqf to do so."

58. The learned Author thereafter refers to Section 51(1) of the Act under which a sale could no doubt be effected after obtaining prior sanction of the Board. The change brought about by the Amending Act of 2013 by the insertion of sub-section (1A) in Section 51 of the Act by which a sale inter alia has been declared void is also noticed. The embargo against sale unless it is expressly authorised by the waqf deed is dealt with under the caption "Unauthorised alienation and limitation" and it reads as follows:

> "the law as regards the period of limitation for a suit to follow waqf property in the hands of a mutawalli and to set aside unauthorized transfers of such property, and to recover possession thereof from the transferee, was amended and altered by Act 1 of 1929. The amendments consist of an addition of para 2 to s. 10 of the original Act (Limitation Act, 1908), and of the insertion of new articles, being Arts. 48B, 134A, 134B and 134C."

59. We have already noticed the purport of Article 134B of the Limitation Act, 1908 and the change brought about in the successor provision, namely, Article 96 of the Limitation Act, 1963.

60. In Anisur Rahman and others v. Sheikh Abul Hayat24, a Division Bench of the High Court had occasion to deal with the very question which we are confronted with. The Court went on to hold as follows:

> "7. In Mukherjea's well known book on Hindu Law of Religious and Charitable Trust, 2nd edition, at page 274, the said Calcutta decision was referred to and it was further pointed out at page 282 that limitation in case of an unauthorised alienation would start as soon as possession vested with regard to any property. To quote his own words at page 282:
>
> "The correct principle deducible from these cases is that the possession of the alienee would become adverse as soon as he is without any title to the property. If the transfer is void ab initio, the possession of the transferee AIR 1965 Patna 390 is adverse from the date of the transfer. If, on the other hand, it is not void, but voidable merely at the instance of the succeeding manager, the possession cannot be adverse

until the office of the transferring manager ceases."

8. In other words, the applicability of either Article 144 or Article 134B of the Limitation Act would depend on whether the transfer was void ab initio or only voidable at the instance of the succeeding manager.

9. A transfer which is void ab initio is in the eye of law no transfer at all and hence will not come within the scope of Article 134B. Moreover, that Article refers to transfer made by a manager of an endowment.

If a person transfers property treating it as his own private property, it is difficult to hold that merely because he happens to be the manager of the endowment on the date of the transfer and the property is the properly of the endowment such transfer should come within the scope of that Article. Mr. Hussain for the appellants could not cite any decision after AIR 1946 Cal 473 in support of his extreme contention to the effect that the principle laid down in that decision his no application in respect of void transfers made after the coming into force of the amendment of 1929. On the other hand, a Division Bench of the Orissa High Court in Govinda Jiew Thakur v. Surendra Jena, AIR 1961 Orissa 102 applied the principle; of that decision and held that transfers void ab initio are outside the scope of Article 134B; a transferee in such a case is a mere trespasser and his title will be perfected by the twelve years adverse possession. With respect I am inclined to agree with this view. There is also a Madras decision in V. Rajaram v. Ramanujam Iyengar, AIR 1963 Mad 213 paragraphs 4 and 5 to the same effect."

61. Therefore, the principle, which emerges, is this. In order that a suit may fall under Article 96, there must be a transfer by a Manager which would include a Mutawalli of a waqf. It must be for valuable consideration. In order that there is a transfer, it must not be still born. It should not be a void transaction. This is for the reason that a void transaction would not amount to a transfer. An unauthorized alienation as understood in Mulla (supra), which we have referred to, viz., a transfer, which was made by a Mutawalli, for which, there was no authority in the waqf deed, would constitute a transfer to which Article 134B and Article 96 would have applied. With the advent of the laws relating to Waqfs which included the 1960 Act in Uttar Pradesh, the Mutawalli was obliged to obtain the previous sanction of the concerned Board. In cases where a transfer is made under the 1960 Act without previous sanction of the Board, the transfer would be void. This is for the reason that the requirement of previous sanction is a statutory command conceived with a definite and sublime purpose and the transgression of which can only result in a void transaction. There is no provision which enables the validating of such a sale. In fact, the stand of respondents 2 and 4 is that, the transfers were void. Therefore, the authorities have also proceeded on the basis that the transaction was void and we can therefore proceed on the said foundation.

62. Proceeding on the basis that the sale executed in 1974 was a void transaction we are inclined to approve of the view taken by Chintamani Sahoo (Deceased by LR.) (supra) and Anisur Rahman (supra), which we have referred to and hold that Article 96 of the Limitation Act, 1963 cannot be invoked in the case of a void transaction. The impugned Order, proceeding on the said premise, cannot be said to be flawed.

63. We are of the view that there cannot be any embargo against a beneficiary of a waqf claiming acquisition of title by adverse possession. Section 2(k) of the Waqf Act, 1955, reads as under:

> "2(k) "person interested in a waqf means any person who is entitled to receive any pecuniary or other benefits from the waqf and includes-
>
> (i) Any person who has a right to offer prayer or to perform any religious rite in a mosque, idgah, imambara, dargah, khanqah, peerkhana and karbala, maqbara, graveyard or any other religious institution connected with the waqf or to participate in any religious or charitable institution under the waqf;
>
> (ii) The waqf and any descendant of the waqf and the mutawalli;

64. While he may be a person who can be treated as "interested" in a waqf within the meaning of Section 2(k) both by reason of the fact that he is a recipient of pecuniary or other benefit and also he may be a descendant of the wakif, it is a far cry from describing him as a Trustee. The beneficiary may have benefits coming his way in terms of the waqf deed. He may be clothed with rights in this regard.

65. Can it be said that a beneficiary of a waqf is a fiduciary or that there is a fiduciary relationship and, therefore, he cannot acquire title to the property of the waqf by adverse possession? The term 'fiduciary', as such, has not been defined, so is the case with the 'fiduciary relationship'. In fact, Section 88 of the Indian Trusts Act, 1882, inter alia, provides that a person standing in a fiduciary character and bound to protect the interest of another, cannot by using such character, obtain an advantage and resist making over the benefit to the person, whose interest he was bound to protect. In Central Board of Secondary Education and another v. Aditya Bandopadhyay and others25, though in the context of Right to Information Act, 2005, the question arose whether an Examining Body holds the evaluated answer books in a fiduciary relationship within the meaning of Section 8(1)(e) of the Right to Information Act, 2005. In the course of the Judgment, this Court, inter alia, held as follows:

> "38. The terms "fiduciary" and "fiduciary relationship" refer to different capacities and relationship, involving a common duty or obligation.
>
> 38.1.Black's Law Dictionary (7th Edn., p.

640) defines "fiduciary relationship" thus:

> "Fiduciary relationship.—A relationship in which one person is under a duty to act for the benefit of the other on matters (2011) 8 SCC 497 within the scope of the relationship.

Fiduciary relationships—such as trustee- beneficiary, guardian-ward, agent- principal, and attorney-client—require the highest duty of care. Fiduciary relationships usually arise in one of four

situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer." xxx xxx xxx

39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.

40. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer."

66. A fiduciary can, therefore, be taken to be a person who becomes charged with the duty to protect the interest of another. Fiduciary relationship is founded upon the reposing of confidence by one in another. The beneficiary of a waqf is endowed with rights in terms of the waqf deed. We are unable to cull out any duty, as such, to protect the interest of another. No doubt, it could be said that as the property in a waqf, vests in the Almighty, there must be a concern and, undoubtedly, a moral duty to act in a manner that the object of the wakf is fostered. But a beneficiary is not like a Trustee, who assumes possession in his character as a Trustee, coming under the restraint of discarding his character as Trustee and donning the robes of an encroacher or a person asserting hostile title. Section 14 of the Indian Trusts Act, reads as follows:

> "14. Trustee not set up title adverse to beneficiary-The trustee must not for himself or another set up or aid any title to the trust property adverse to the interest of the beneficiary."

67. It is not, as if, the beneficiary was in possession of the property in any capacity prior to the sale.

68. In fact, in this case, we may notice that in the second sale, the former Mutawalli, viz., Qasim Ali Khan, entered into the sale deed on the strength of a compromise and the order of the Deputy Director, Consolidation, under which, he purported to act as one possessed of one-third right in his own right. We bear in mind that no doubt it would have mattered little to the applicability of Article 96 that the transferor purported to transfer waqf property professing it to be his property having regard to what this Court has laid down in Srinivasa (supra). But this is a case where the voidness arises on account of the fact that what is found to be waqf property has been purported to be alienated contrary to the peremptory statutory mandate. We have also noticed Section 69 of the 1960 Act and its impact.

69. The argument that Section 107 of the Act will assist the appellant in tiding over the bar of limitation does not appeal to us. Section 107 of the Act, no doubt, proclaims that nothing in the Limitation Act,1963 shall apply to any suit for possession of the immovable property comprised in any waqf or for possession of any interest in such property.

70. The Act came into force on 01.01.1996. The first sale was effected on 14.10.1960. The second sale was effected on 26.09.1974. As far as the first sale is concerned, we have already found that Article 96 cannot be pressed into service as the transfer was not purported to be made by the Mutawalli. The doors stood open for the application of Article 65. As far as the second sale is concerned which was effected in the year 1974 in view of our finding that Article 96 was not applicable, the only other competing Article vying for acceptance, appears to be Article 65. Applying Article 65 and as the adverse possession would kick in from the date of the transfer, on the expiry of twelve years, i.e., in 1986 applying Section 27 of the Limitation Act whatever title remained within the meaning of Section 65 would stand extinguished. The Act was brought into force only with effect from 01.01.1996. We cannot understand the purport of Section 107 to be that it would revive an extinguished title as nothing stood in the way of running of time from the date of the second sale under the law as it stood.

71. No doubt, the law of limitation is what prevails as on the date of the suit (see C. Beepathumma and others v. Velasari Shankaranarayana Kadambolithaya and others26). Taking 1997 as the date, on which a suit is filed, and applying the Act, which enables the plaintiff to disregard the bar of law of limitation, it cannot mean that what stood extinguished under the earlier law would revive. In this regard, we notice the Judgment of this Court in T. Kaliamurthi(supra):

> "40. In this background, let us now see whether this section has any retrospective effect. It is well settled that no statute shall be construed to have a retrospective operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with procedure. This would mean that the law of limitation, being a procedural law, is retrospective in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the law of limitation in force before the new provision came into operation and

> a vested right has accrued to another, the new AIR 1965 SC 241 provision cannot revive the barred right or take away the accrued vested right."

72. A contention is taken that the Court is not dealing with a suit and the matter arises from a proceeding under Section 52 of the Act. It is contended that in regard to Section 52 the bar of limitation for a suit is inapplicable. We have noticed that the debate in the High Court essentially centered around the question whether Article 96 would apply and applying the same, the appellant could get around the impact of Article 65 read with Section 27 of the Act. We have found that Article 96 has no application. Even in regard to a proceeding under the Act be it Section 52 if as on the date the action is taken, the title in the property stood vested with the person in possession by virtue of Section 27 of the Limitation Act then it may not be permissible to ignore the right which had been acquired. The decision in T. Kaliamurthi (supra) would apply in the facts and the action is barred.

73. The upshot of the above discussion is that the Appeals are to be found without merit and will stand dismissed. Parties to bear their respective costs.

.....J. [K.M. JOSEPH] .....J. [HRISHIKESH ROY] NEW DELHI;

DATED: APRIL 13, 2023.