

Smt.Haseena Begum vs Sri.Abdul Sardar @ Wahab on 14 February, 2017

IN THE COURT OF THE 42nd ADDL.CITY CIVIL & SESSIONS
JUDGE AT BENGALURU CITY (CCH.No.43)

PRESENT:Sri.Bailur Shankar Rama,
B.Sc., M.A., LL.B.(Spl).,
42nd Addl. City Civil & Sessions Judge,
Bengaluru.

Dated this the 14th day of February 2017.

O.S.No.391/2012

Plaintiffs:-

1. Smt.Haseena Begum,
Aged 75 years,
W/o.Late Abdul Khalaq,
D/o.Late Zulekha Bee.
2. Smt.Fahima Begum,
Aged 65 years,
W/o.Baba Hussain,
D/o.Late Zulekha Bee,

No.1 and 2 are R/at No.38,
H.No.3 Street, Tate's Lane,
Ashok Nagar, Bangalore-25.

3. Smt.Nayeema Begum,
Aged 58 years,
W/o.Asif Jani,
D/o.Late Zulekha Bee,
R/at No.42,
Anthony Nicholas Street,
Ashok Nagar, Bangalore-25.

(By - Sri.Mohd.A.Siddiq, Adv.)

v.

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O.S.No.391/2012

Defendants:-

1. Sri.Abdul Sardar @ Wahab,
S/o.late Abdul Wahab Saheb
and Late Zulekha Bee,
Aged 70 years,
R/at No.38, H.No.3 Street,
Ashok Nagar, Bangalore-25.

2. Sri.S.K.Chopra,
Aged Major,
S/o.Not known to plaintiffs,
Proprietor, M/s.Rays Light,
70/3, 1st Floor,
Richmond Regal,
Richmond Road,
Bangalore-25.
3. M/s.Balaji Lights,
By its Proprietor,
Sri.S.K.Chopra,
Aged Major,
S/o.Not known to plaintiffs,
70, 1st Floor,
Richmond Regal,
Richmond Road,
Bangalore-25.
4. Smt.Naseema Begum,
Aged 72 years,
W/o.late Abdul Shookur,
C/o.Sri.Riyaz Ahmed,
No.403, 4th Floor,
M.K.Building, D Wing,
Dadi Colony, Amrutnagar,
Mumra, Thana:400612,
State of Maharashtra.
5. Smt.Zamrud Begum,
Aged 45 years,
W/o.Fiaz Ahmed,
R/a No.79, 2nd Cross,
Tannery Road,
Bangalore - 560 005.

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O.S.No.391/2012

(D1 - By Sri.S.A.Ahmed, Adv.
(D2 to D5 - Exparte)

Date of institution of the suit	:	09.01.2012
Nature of the suit	:	Partition & Mandatory Injunction
Date of commencement of Recording of the evidence	:	14.06.2012
Date on which the Judgment was pronounced	:	14.02.2017

Total Duration	:	Years	Months	Days
		05	01	05

(BAILUR SHANKAR RAMA)

nd
42 ADDL. CITY CIVIL & SESSIONS JUDGE,
Bengaluru.

JUDGMENT

This is a suit filed by the plaintiffs against the defendants for claiming 1/6th share in the income of the schedule properties and mandatory injunction and costs.

2. The brief facts as averred in the plaint are that:-

The plaintiffs are the legal heirs and daughters of Smt.Zulekha Bee, D/o.Late Abdul Razack along with defendant No.1 and Smt.Naseema Begum (defendant No.4 and Smt.Zamrud Begum (defendant No.5). Their grand parents namely late Sri.Abdul Razack Saheb and late Smt.Fathima Bee who were the absolute owners of the property situated at No.38, House No.3 Street, Tate' Lane, Ashoknagar, Bangalore-25 and property bearing No.70, Richmond Road, Bangalore-25 described in A-schedule of the plaint. With an intention to preserve these properties for their use and enjoyment and for their children and their future generations dedicated the same by creating a Wakf- ul-Aulad by virtue of registered deed - Waknama dated 28.04.1938. Late Sri.Abdul Razack Saheb and Smt.Fathima Bee had 2 children namely Sri.R.Abdul Latheef and Smt.Zulekha Bee. Sri.R.Abdul Latheef was survived by 5 children i.e., 3 sons and 2 daughters. The said Smt.Zulekha Bee is survived by the plaintiffs, defendant No.1 and 2 and two more daughters i.e., defendants 4 and 5. The plaintiffs submit that during the year 1995, the children of late Sri.R.Abdul Latheef and Smt.Zulekha Bee with an intention to develop the A-schedule property jointly executed a Deed of Lease in favour of Smt.Nasreen Sharieff, Sri.Masood Ahmed Sharieff, Sri.Noor Ahmed Sharieff and Sri.M.I.Sharieff and on 16.08.1995. Inter-alia leasing out the property for a period of 99 years, wherein the lessees were to put up a commercial complex in A-schedule property by investing their money and after the construction the lessors would be entitled to half constructed portion of the super built up area of their use and enjoyment and the remaining half would retained by the lessees for their use and enjoyment for a period of 99 years. After the lessees / developers completed the construction of the commercial complex in A-schedule property, the beneficiaries / lessors mutually agreed themselves that the lessees / developers would retain portions in the ground and mezzanine floor in the constructed portion of A-schedule property and late Smt.Zulekha Bee would be given 2 portions (B-schedule property) in the first floor of A-schedule property and the

children of late Sri.R.Abdul Latheef were given 2 portions in the second floor for their use and enjoyment. The plaintiffs contended that after obtaining the possession of their respective portions from the lessees, the same was rented out to tenants. During the lifetime of their mother, the rent used to be collected by the then Mutwalli - Sri.Abdul Haq s/o.late Sri.R.Abdul Latheef and handed over the respective shares to the beneficiaries. The plaintiffs submit that after the death of Sri.Abdul Haq, there was no Mutwali appointed and the rents were been collected by the beneficiaries themselves in respect of their shares. After the death of their mother - late Smt.Zulekha Bee on 10.08.2011, the plaintiffs did not receive their share of rents collected by defendant No.1 from the defendants 2 and 3 or from the tenants of the property, situated at No.38, H No.3 Street, Tate's Lane, Ashok Nagar, morefully described in C-schedule of the plaint. When they approached defendant No.1 and requested that their share be given in the rental income of suit B-schedule property, defendant No.1 rudely informed that they were not entitled to any money and only he alone was the owner of the property and entitled to receive the rents, as their late mother - Smt.Zulekha Bee had transferred it in his name. Inspite of making their best efforts, defendant No.1 refused to pay the shares of the plaintiffs. As such, having left with no other alternative, the plaintiffs got issued legal notice to defendant No.1 on 14.11.2011 and the same was received by defendant No.1 on 16.11.2011. The plaintiffs submit that as defendant No.1 did not reply, they got issued another 2 notices to defendants 2 and 3 respectively, asking for particulars in respect of quantum of rent, advance amount paid and period of Rental Agreement. It is contended that in the meanwhile, defendant No.1 has got issued a reply notice dated 26.11.2011 to their advocate, but posted only on 05.12.2011. In the reply to the plaintiffs' notice, defendant No.1 has taken an untenable stand by justifying that he is entitled to use and receive the rents solely and the plaintiffs have no share. Thus, the plaintiffs being deprived of their rightful share in the rents from the suit schedule property.

The defendants 2 and 3 have not replied to the notices. It is contended that suit schedule property is located in a prime location within the central business district and also within a half kilometre from M.G.Road, Residency Road and other prime locations of Bangalore. They are unaware of the actual quantum of rent being paid by the defendants 2 and 3 and illegally collected and used by defendant No.1. Therefore, the plaintiffs contend that minimum expected rent for commercial premises would be more than Rs.50,000/- per month for each portion in occupation of the defendants 2 and 3. The defendant No.1 in his reply in order to again hoodwink and cheat the plaintiffs of their rightful share, has claimed that it is only Rs.25,000/- each per month from the portions in occupation of the defendants 2 and 3 is being received. The plaintiffs contend that defendant No.1 had neither been authorized either by late Smt.Zulekha Bee or any other beneficiaries at any point of time to receive and use the rents in the suit schedule property on their behalf. He has been illegally and unlawfully collected the rents and not paid the shares of the plaintiffs from the date of death of their mother to this day and made unrighteous monetary gain. The plaintiffs submit that Wakf Act is not applicable to the subject matter herein as the Wakf-ul-Aulad is Private Trust and doesn't come under the purview of Board of Wakfs or Wakf Tribunal constituted under the Wakf Act. The defendants 4 & 5 are impleaded subsequently by way of amendment. Hence, the suit.

3. After the service of suit summons, defendant No.1 has appeared before court through his advocate - Sri.S.A.Ahmed and the defendants 2 to 5 remained *exparte*. The defendant No.1 in his written statement has admitted the relationship, but denied the allegations made against him. The plaintiffs are guilty of *suppresio varie* and *suggestio falsie*. The execution of Lease Deed for the development of immovable property situated at Richmond Road is admitted. Only due to the strong initiative taken by the defendants and maximum efforts put by defendant No.1, the said project could have been completed. He has spent maximum time in co-ordinating with the developer. After the completion of commercial complex, 50% shares being divided between the developer and both the plaintiffs and the defendant. However, defendant No.1 submits that he was also one of the Mutawali of the properties jointly along with late Sri.Abdul Haq and the rents were collected jointly prior to his demise. After his death, defendant No.1 has been in charge of the maintenance individually and distribution of rental shares amongst the beneficiaries. The plaintiffs have not taken any care about maintenance of the property, since the entire properties apart from the one in possession of the defendant has not been maintained in a proper manner, walls have not been painted for years together, the roof of the property is subjected to leakage. The defendant No.1 suggested the plaintiffs to part with some rents and share the maintenance costs and same has been replied through the reply notice. The defendant No.1 contends that at no point of time, he has denied any rights of the plaintiffs. But unfortunately, the plaintiffs have stooped to the level of making unwanted allegations against this defendant. He admits the service of notice. He further admits that the premises being located in a prime location. But it is not a business hub, due to parking problem and traffic congestion in the junction, not much business people would prefer to have their business holding on the said road and getting a good tenant was very difficult for the said property. But defendant No.1 was managed to get defendants 2 and 3 as tenants for the portions. The plaintiffs were enjoying the rents uninterruptedly and had no grievances against defendants 2 and 3. But surprisingly plaintiffs hand in glove with them filed the instant suit. After the death of Muthawali - late Sri.Abdul Haq for more than a decade none of the plaintiffs did not have any objection for the defendant's role of Mutawali for the said properties and all the plaintiffs used to enjoy the benefits of the property without any minimum effort and in fact, even mother of the plaintiffs and the defendants was not keeping well for a long time. The plaintiffs did not bother to provide medical treatment to her or financial help to her. In fact, defendant No.1, who had borne the entire medical and hospital expenses of his grand-mother late Smt.Zulekha Bee. Inspite the plaintiffs are married daughters, they are enjoying all the benefits out of the suit property till this day, as such they don't have any morality or capacity to make allegations when their mother was alive as she was the living witness. Only after the demise of their mother, they have come forward to make allegations. Hence, all the allegations are baseless and false. The defendant No.1 further contends that at no point of time, he had tried to deprive any share of the plaintiffs and allegations are far from truth. He has never deprived them to enjoy the same. He submits that the plaintiffs are riding on wave of hatredness and have been instigating by some vested interests in order to destabilize the unity and stability amongst the plaintiffs and the defendant. The plaintiffs have been guided and provoked by some mischievous elements. At no point of time, the defendant thought of depriving the plaintiffs of their rightful share. In fact, until the lifetime of their late mother, there has been no difference. However, the plaintiffs have chosen to vent their outburst against the defendant for the reasons best known to them. Therefore, the allegations made by the plaintiffs are far from truth and baseless. They are not entitled to get any of the reliefs in this suit and prayed that the suit be dismissed with costs.

4. Basing on the rival pleadings the following issues and additional issues are framed:-

ISSUES

1. Whether the plaintiffs prove that they are entitled for 1/6th share each?

2. What order or decree?

ADDITIONAL ISSUE

1. Whether defendant No.1 proves that suit is not maintainable?

5. The first plaintiff got herself examined as PW-1 and got marked Ex.P1 to P20. The defendant No.1 got himself examined as DW-1 and got examined 5 witnesses as DWs.2 to 6 and got marked Ex.D1 to D52.

6. After the closure of the evidence, arguments were heard.

7. My answers to the above issues are as under:-

Issue No.1:-	In the affirmative.
Addl. Issue No.1:-	In the negative.
Issue No.2:-	As per final Order.

For the following:

REASONS

8. Issue No.1 & Addl. Issue No.1:-

For the sake of convenience these two issues are taken up together for discussion to avoid repetition of facts and evidence.

9. The pleaded case of the plaintiffs is that, they are the legal heirs of deceased Smt.Zulekha Bee. The suit schedule properties are the properties left behind by their mother - Smt.Zulekha Bee. Originally, grand parents of PW-1 i.e., Sri.Abdul Razack Saheb and late Smt.Fathima Bee were the absolute owners of the properties. They dedicated the same by creating Wakf-ul-Aulad under registered Wakf-Nama dated 28.04.1938. Certified copy of same is produced at Ex.P1. PW-1 further stated that Sri.R.Abdul Latheef and Smt.Zulekha Bee with an intention to develop A-schedule property in the year 1995 have leased it for a period of 99 years and as per the said Lease Agreement, half portion of the built up area was to be given by the lessors. She has further deposed that after the construction is over, the lessees have retained portion in the ground and mezzanine floor and Smt.Zulekha Bee

was given 2 portions more particularly stated in the B-schedule in the first floor of A-schedule property and children of late Sri.R.Abdul Latheef were given 2 portions in the second floor of the building. During the lifetime of Smt.Zulekha Bee, she used to receive rentals from the tenants and it was collected by the then Muthwali - Sri.Abdul Haq S/o. late Sri.R.Abdul Latheef and used to hand over shares to the beneficiaries. PW-1 further stated that on 10.08.2011 her mother - Smt.Zulekha Bee died as evidenced by Death Certificate - Ex.P3. It is only after the death of Smt.Zulekha Bee, defendant No.1 who used to collect the rentals from the defendants 2 and 3 who are tenants of the property, morefully described in plaint C-schedule and he did not pay her share. On the contrary, he started saying that Smt.Zulekha Bee transferred the said property in his name. That is the reason she got issued legal notice dated 14.11.2011 as per Ex.P4, through which she has demanded that out of the rentals collected by him, same shall be equally divided and he shall give her share as she being one of the beneficiaries. Though the said notice was served on him, he did not immediately reply. The tenants i.e., defendants 2 and 3 were also issued with notice dated 05.12.2011 as per Ex.P5, which was served on them as per postal acknowledgement as per Ex.P6 and P7. Ex.P8 is another notice issued dated 05.12.2011 to defendant No.3, apprising them that the plaintiffs are entitled to receive share in the rentals and also calling them to furnish accounts of rents and security deposit paid by them in respect of property in their occupation and also to provide copy of Rental Agreement. They did not reply or comply the demands made therein. PW-1 has further deposed that defendant No.1 has got issued reply notice dated 26.11.2011 to the Advocate of the plaintiffs, posted only on 05.12.2011 as per copy of reply - Ex.P11. Therefore, it is clear that notice of demand made by the plaintiffs was served on defendant No.1 and also request made by the plaintiffs to the tenants i.e., defendants 2 and 3, who are in occupation of the property, asking them to furnish the details of the Lease Agreement, rent deposits and rental payable by them. But they failed to furnish the same to the plaintiffs, even did not reply. The defendant No.1 though replied, but failed to comply with the demands made by the plaintiffs.

10. At this juncture, it is necessary to appreciate the facts stated in the reply, wherein defendant No.1 has contended that he is only receiving rentals of Rs.25,000/- each per month from the portions in occupation of the defendants 2 and 3 and not as alleged by the plaintiffs that he used to receive Rs.50,000/- each minimum, as schedule property is located in a prime location within the central business district and within a half kilometre from M.G.Road, Residency Road. The defendant No.1 has contended that the plaintiffs are guilty of suppressio varie and suggestio falsie. But nowhere in the notice, he has contended with regard to the alleged Gift Deed, which he has produced in his evidence marked at Ex.D1. Because in this case, PW-1 in her evidence has denied Ex.D1 that it is a created document in the year 2015 just to knock off the property by himself and even in the written statement also there is no reference with regard to the alleged Hiba - Ex.D1 alleged to have been executed by Smt.Zulekha Bee in his favour. No doubt, after the death of Smt.Zulekha Bee in the katha maintained by BBMP name of Sri.L.Abdul Haq & Sri.Wahab Sardar are seen in the Katha Extracts - Ex.P14 to Ex.P16 for the property No.70/3, 70/4 and New No.38

11. In this case, in his evidence DW-1 has deposed that he himself is the absolute owner in peaceful possession and enjoyment of the suit schedule properties having acquired the same under Hiba (Oral Gift) dated 02.06.2006, which has been gifted by his mother - Smt.Zulekha Bee. Pursuant to the said Gift Deed, all the revenue records are transferred in his name and he has been paying taxes

to BBMP. He has produced the Gift Deed executed before the Notary at Ex.D1. Ex.D2 is the Affidavit executed by Smt.Zulekha Bee, wherein she has stated that as she is growing very old and her age is 72 years on the date of execution of the said affidavit, she is appointing his only son Sri.Wahab Sardar and to look after her all property and to act as a legal attorney / representative in case of any litigation arises or to sue the case, to attend any Government Office on her behalf. She is appointing her son as a lawful legal heir at present and in future, too with her full Will and Wish and for her safeguard. Smt.Zulekha Bee was an illiterate and PW-1 has denied Ex.D1 and D2. It is her say that, DW-1 has created these documents and her mother never executed any Gift Deed as contended by DW.1.

12. Here, when the plaintiffs denied the right of the Smt.Zulekha Bee to execute Gift Deed and also alleged that it is a created document by defendant No.1 with an intention to deprive the legitimate share of the plaintiffs to receive share in the rentals recovered from the tenants i.e., defendants 2 and 3, heavy burden is on defendant No.1 to prove the same. Because, DW-1 himself admits that originally A-schedule property and C-schedule property belongs to Sri.Abdul Razack, he had a son and daughter by Sri.R.Abdul Latheef and Smt.Zulekha Bee. The said Sri.Abdul Razack executed a Will in favour of Sri.R.Abdul Latheef and Smt.Zulekha Bee equally to the extent of 50% each and also the properties were divided into half and both the children of Sri.Abdul Razack were enjoying as rightful owners. According to him, Smt.Zulekha Bee becomes sole and absolute owner of the suit schedule properties. But this contention is against Ex.P1 - Wakf-ul-Aulad. In the written statement, he admits the source through Wakf-ul-Aulad executed by grand-father and grand-mother, who have dedicated the property. It appears that the defence that is taken and what is deposed in the evidence by DW-1 is to get support to Ex.D1 - Gift Deed alleged to have been executed by Smt.Zulekha Bee in his favour.

13. He has examined one witness DW.5 - Sri.Aftab Ahmed, who is the witness to Gift Deed, has deposed in his evidence that DW-1 has resided along with his mother. In the Gift Deed - Ex.D1 he has identified the photo of mother of Sri.Wahab Sardar i.e., Smt.Zulekha Bee and also photo of DW-1. He has deposed that he was present at the time when Ex.D1 was executed and identified his signature at Ex.D1(a). He has deposed in the cross-examination that, his friend Sri.Sajjad, who is son of defendant No.1 called him on the date of execution of Ex.D1. However, he has stated that he doesn't know the recitals of Ex.D1 and denied the suggestion that Ex.D1 was created in the year 2015 by DW-1 and witness had signed to the said Gift Deed in the year 2015 itself, because it was executed before the Notary. To a specific question to the witness, had he signed on the Notarial Register maintained by the Notary on the date of execution of Ex.D1, DW-5 has stated that he doesn't know, he was called and simply signed on Ex.D1. If really, it was executed by Smt.Zulekha Bee in the presence of the witnesses before Notary, DW-5 should have been stated the said crucial fact. Merely identifying the photos and his signature on Ex.D1 is not sufficient. He has not stated the recitals of the Gift Deed.

14. A thorough cross-examination is made by the learned counsel for the plaintiffs to DW-1. In page No.19 of cross-examination of DW-1, he has deposed that during 2005 December, Smt.Zulekha Bee had suffered intertrochantric fracture of right hip and she was aged about 93 years at that time. A specific question was put to him that, he was not in a position to purchase the stamp paper, for that

DW-1 deposed that they called the stamp paper vendor to the house and purchased the stamp paper. Another question was put that the stamp paper that is issued was issued by State Bank of Mysore and the stamp vendor cannot sell the stamp paper. DW-1 has stated that stamp paper vendor himself brought the same and through him, they purchased. One thing is clear that she was aged lady and had suffered right hip intertrochantric fracture, not in a position to move around, is not disputed. Therefore, if it was executed before the Notary, who had taken her before the Notary is again a question. It is not his case that notary himself visited the house along with the Notarial Register and recorded. That fact has not been pleaded and clarified. DW-5 has not stated that Notary has visited the house. Therefore, there is a ample scope and justification for the plaintiffs to deny Ex.D1 that the mother had not executed the said Gift Deed and it doesn't bear her LTM. Because it is not in dispute that the deceased Smt.Zulekha Bee is an illiterate lady.

15. On close perusal of first page of Ex.D1, print has come on the LTM itself. Another question was put to the witness that print out was taken under Microsoft Office Word - 2007, he has not denied it. He simply stated that it may be true. Therefore, when question was put to him that the said type of print out was not available in the year 2006, DW-1 has stated that he doesn't know.

16. In this suit, at the initial stage the defendants failed to appear, therefore they were placed exparte and subsequently, defendant No.1 filed application and detailed written statement was filed by him on 28.08.2012. In the written statement, defendant No.1 has no where stated about the alleged Hiba executed by Smt.Zulekha Bee in his favour as per Ex.D1 dated 02.06.2006 and he has derived ownership right over the suit schedule property. It is only subsequent to 2014 he has claimed that late Smt.Zulekha Bee has gifted the suit schedule property to him. The defendant No.1 has filed an application IA.VIII under Order VI Rule 17 of CPC, to amend the written statement claiming exclusive right on the ground that Smt.Zulekha Bee had transferred the suit schedule property to him and on merits, this court has rejected the said application by order dated 18.07.2014. Again, for the very same relief, he has filed IA.XIX under Order VI Rule 17 of CPC seeking amendment of written statement to incorporate Oral Gift Deed 02.06.2006 and this court by observing that IA.VIII has already been decided on merits and it has reached the finality, again on the very same ground application is not maintainable and dismissed the same on 02.01.2016. Therefore, the defendant has not challenged the order passed on IA.VIII or IA.XIX and without there being foundation in the pleading in his evidence he has produced Ex.D1 the alleged Gift Deed dated 02.06.2006 and has examined DW-5 as witness. Therefore, in the first place evidence of DW-5 is not satisfactory atleast to believe that Smt.Zulekha Bee had executed such Gift Deed in his presence. Therefore, DW-1 has led evidence on Ex.D1 without the foundation of pleadings in the written statement.

17. Here, it is an admitted fact that the suit schedule properties i.e., properties covered in the alleged Gift Deed - Ex.D1 are the properties involved in the Ex.P1 - Admitted Registered Wakf-ul-Aulad, through which original owners have dedicated and it can be said that no beneficiary under Ex.P1 have got alienable rights. They can only use the usufructs i.e., rental income from these properties and after their lifetime, their children get the right. Therefore, as per Ex.P1 - Wakf-ul-Aulad the children of Smt.Zulekha Bee i.e., plaintiffs, defendant No.1 and defendants 4 and 5 are to share the rents derived from these properties in view of the recitals in Ex.P1. Under such circumstances, defendant No.1 cannot rely on the stray sentence in the cross-examination of PW-1 in page No.10

that:

"After the death of Sri.Abdul Haq, defendant No.1 was managing the affairs of the suit property regarding filing of case, collecting rent etc., I have not objected the same. After coming to know about gift I have filed this case".

Therefore, he wanted to say that prior to filing of the suit itself regarding execution of Gift - Ex.D1 in favour of her son i.e., DW-1 was within the knowledge of PW-1. Here, the entire evidence as a whole need be taken into consideration and appreciated and not on a stray sentence. The conduct of DW-1 without referring the existence of the Gift Deed in previous litigations, wherein he was a party and in the written statement filed in this suit, an opportunity was there for him to plead specifically denying the rights of the plaintiffs and he has derived exclusive right by virtue of the Gift Deed executed by his mother. It is his case that as mother was residing with him, during her old age it is defendant No.1 has provided her medical treatment and out of love and affection she had executed Hiba in his favour. During June, 2006 she was sufficiently aged and had a fracture injury, not in a position to move around, is not disputed. Therefore, quite obviously the admission given by DW-1 in the cross-examination creates serious doubt and same cannot be taken advantage of DW-1. Even in the reply notice - Ex.P11 he has not remotely whispered about the Hiba.

18. Much is made by the learned counsel for defendant No.1 in his arguments that certain properties have been sold, which are involved in Ex.P1 - Wakf-ul- Aulad. Therefore, the Wakf itself is not in existence and he claims that Smt.Zulekha Bee had share in the property and she is at liberty to execute the Gift Deed or Hiba in favour of her son i.e., DW-1. Therefore, one thing is clear that the properties which were covered under Ex.P1 were sold earlier to the year 1966, are not part of the plaint schedule properties and it is the case of the plaintiffs that too develop the properties such alienations were made after taking permission from the Wakf Board. Here, we are not concerned with other properties, as the plaintiffs have not claimed any reliefs with regard to those properties are concerned. They are only concerned with the present schedule properties.

19. In the written arguments submitted by the learned counsel for defendant No.1 that in Ex.P1 the property showed in B, C & D schedule properties are alienated in favour of Smt.Khairunnisa and Smt.Mamtaj Begum, Sri.A.S.Jeorjim and Sri.P.Swami Rao and they are not made as parties to this suit. The then Mutawalli - Sri.Abdul Latheef has sold B, C and D schedule properties in Ex.P1. Therefore, he wanted to contend that Ex.P1 is not in existence. Here, defendant No.1 also relies on the same Wakf-ul-Aulad executed by his grand-father and grand- mother. Therefore, as the plaintiffs are concerned with the present property only, and they are not questioned the alienations made by then Mutawalli - Sri.Abdul Latheef, the say of defendant No.1 that suit is bad for non-joinder of necessary parties cannot be appreciated. The distribution of income now collected by defendant No.1 in respect of share of Smt.Zulekha Bee in the suit schedule properties alone is the dispute between the parties. Therefore, defendant No.1 wanted to canvas the argument without the foundation in the pleadings and tried to improve his case stage-by-stage in his evidence, can be gathered. Therefore, in respect of suit properties are concerned, certainly as per Wakf-Nama itself Smt.Zulekha Bee is having half right in the portions she had taken possession after construction of the building and certainly, not as alleged by defendant No.1 that she is having half ownership right,

because parties at their whims and fancies cannot alter the Wakf-ul-Aulad created by their grand-father and grand-mother.

20. It is an admitted fact that suit schedule properties are now available and throughout, DW-1 has maintained that as a Mutawalli he has been collecting the rentals from the tenants. As after the death of the mother

- Smt.Zulekha Bee, defendant No.1 did not give share in the rentals collected, that is the reason by issuing notice the plaintiffs have filed the instant suit. Therefore, the whole arguments canvassed by defendant No.1 that the Hiba executed by Smt.Zulekha Bee in his favour, as such he became owner and Ex.P1- Wakf-ul-Aulad is not in existence and suit is not maintainable, cannot be appreciated at all. In the first place, he has failed to prove satisfactorily the execution of the said Gift Deed (Hiba) by Smt.Zulekha Bee in his favour. The very conduct of defendant No.1 gives an impression that there is justification for the plaintiffs to contend that this Hiba was subsequently created during the trial by him and wanted to plead the same by way of amendment and after having failed twice, first time in the evidence he has produced the documents and led evidence without the foundation in the pleadings. Therefore, he cannot lay a claim of ownership by virtue of alleged Hiba.

21. Apart from it, learned counsel for the plaintiffs produced Ex.P17. DW-1 in the cross-examination admits that he has filed HRC petition against one Mrs.Fahima, wherein in para No.3 he has clearly stated that he is Mutawalli of the schedule property which is a family Wakf property created for the welfare of all the family members and the relatives belonging to the petitioner and katha stands in the joint names of Sri.Wahab Sardar and his brother - late Sri.Abdul Haq. Ex.P18 is the certified copy of petition in H.R.C.No.110/2013 which was filed by him against one Smt.Kharunnisa and Dr.Geetha. There also he has stated in para No.3 that he was Mutawalli of the schedule property, which is a family Wakf property. In the caveat petition No.6566/2011 filed before this suit has been registered, in para No.2, he has clearly stated that "The caveator submits that all the parties mentioned above are the joint owners of the Property bearing No.38, H.No.3 Street, Ashoknagar, Bangalore -25 and also Property bearing No.30, Richmond Road, Bangalore-25. The caveator has khatha in his name being the Mutawalli of the schedule property and also paid taxes for the schedule property upto date, however the respondents are seeking shares in the schedule property on abnormal basis without willing to share any burden of property taxes, maintenance and the miscellaneous expenses".

The clear admission goes to show that he was only Mutawalli and admits the joint ownership of the present plaintiffs, defendants 4 and 5 along with him in respect of the property. Ex.P18 and P19 are of 2013 and 2011. If really, gift was executed by the mother in his favour, he would not have pleaded in the said manner. This also shows that there is justification in the submission of the plaintiffs that it is an after thought and during the trial in the year 2014, he has created Ex.D1 and it has got grain of truth.

22. In his own documents - Ex.D6, D8, D10, D12, D14, D16, D18, D19, D21, D25, D28, D29 and D32, goes to show that he has issued notice to the tenants of the respective premises in the occupation and some of the tenants delivered possession to him, because he was a Mutawalli. Therefore, when

there is a clear admission in Ex.D19 - caveat petition filed just prior to the filing of this suit, wherein he claimed that he is only a Mutawalli in respect of suit schedule properties and family members are demanding their share in the rentals recovered from the tenants in occupation. Therefore, it is needless to say that he has exercised his duties previously along with Sri.Abdul Haq who was Mutawalli and after his death, he has continued as Mutawalli and transacted with the tenants and recovered rentals from them, can very well be gathered. Even in the written arguments submitted by the learned counsel for defendant No.1 there is clear admission that he was only a Mutawalli and has been collecting all the rentals from the tenants. Therefore, his arguments that because of Lease Agreement executed in favour of the builders and after construction of the building, half of the portion of the building was taken by the lessors and legal heirs of Sri.R.Abdul Latheef have taken their half portion and Smt.Zulekha Bee has taken possession of 2 tenements now in occupation of defendants 2 and 3 in A-schedule property. Therefore, all the circumstances and the documentary evidence produced by the plaintiffs and the defendants manifestly make it clear that, DW-1 was only Mutawalli. Under Mohammedan Law, Mutawalli is only a Manager to carry out the functions, to manage the property. He can't act against the rights of the beneficiaries under Ex.P1. Therefore, as rightly argued by the learned counsel for the plaintiffs that there is no basis for him to set up his title under Hiba, there is no foundation in his written statement and any evidence given by him without the foundation of pleadings cannot be regarded as evidence.

23. Along with the written arguments learned counsel for defendant No.1 has produced number of documents i.e., P.T. Sheet - 855, Enquiry Register Extract, Property Card, Field Book and Sale Deed dated 13.06.1955 and other documents. Though he wanted to thrush in that these documents which are produced to show some of the properties covered in Ex.P1 - Wakf-ul-Aulad shown in B, C and D schedule of that document were already been sold by the then Mutawalli - Sri.Abdul Haq. But one thing is clear that these documents are not produced in the evidence of DW-1 or his witnesses, nor they are marked and admitted in evidence, not subjected to cross-examination by the learned counsel for the plaintiffs. Therefore, these documents cannot be appreciated at all.

24. The other arguments canvassed by the learned counsel for defendant No.1 that the parties are governed under Hanafi Muslims Sect. As DW-1 being the only son to Smt.Zulekha Bee i.e., her male sibling and he claimed by way of succession to the remaining properties dedicated under the rule primogeniture. Therefore, under Mohammedan Law only male son can be selected as Mutawalli besides succession to the estate of Smt.Zulekha Bee. Here, in the first place, his arguments that as some of the properties covered under Ex.P1 were already sold, Wakf-ul-Aulad was not in existence and Smt.Zulekha Bee had absolute right to execute Gift Deed in his favour, cannot be appreciated at all and even his claim that after the death of Smt.Zulekha Bee, he being the only son under Hanafi Law prevailing amongst Muslims he can succeeds the estate of Smt.Zulekha Bee, also has no basis. Because, throughout he has acted as Mutawalli, he cannot claim absolute ownership over the properties. No doubt, the literal meaning of Wakf-ul-Aulad, "Wakf" means the permanent dedication by any person, of any movable property and immovable property for any purpose recognized by the Muslim Law as pious, religious or charitable. "Aulad" means "once own descendents". That means, "Wakf-ul-Aulad is Wakf for descendants". Therefore under Ex.P1, wherein the benefits will be transferred from generation to generation. Therefore, 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. If we read contents of Ex.P1, we can make out that for what purpose such Wakf-ul-Aulad was created by the grand-father and grand-mother of PW-1 and DW-1. Therefore, the arguments canvassed by the learned counsel for defendant No.1 that Section 2(e) of Musalman Wakf Act 1923 excludes the Wakf described in Section 3 of 1913 Act, under which any benefit is for time being utilized for himself by the person by whom the Wakf was created or by any of his family or descendents. Therefore, he has argued that there is no necessity for a Mutawalli to furnish the accounts to any person including the beneficiaries and or court or Wakf Board. Manifold arguments were made by the learned counsel for defendant No.1, but he admits that he is acting as a Mutawalli and never deprived the plaintiffs and defendants 4 and 5, who are his sisters, from enjoying the share of usufructs. That means, he is quite aware of the fact that schedule properties are dedicated with specific purpose and he is only managing the property. Therefore, when he himself admits that they are the beneficiaries and entitled to receive share and he never restricted or prevented them from enjoying their share. Now, he can't say that Ex.P1 - Wakf-ul-Aulad has lost its characteristic and he is the absolute owner of the suit schedule properties.

25. Here, Sri.R.Abdul Latheef was survived by 5 children and Smt.Zulekha Bee was survived by 5 daughters and one son i.e., defendant No.1. As regards the family tree and relationship there is no dispute. Here, the relief is sought in respect of A, B and C properties shown in the schedule, which Smt.Zulekha Bee possessed, was recovering the rentals from the tenants and enjoying the properties till her death, because she was the beneficiary under Ex.P1. Therefore, the arguments canvassed by the learned counsel for defendant No.1 that, all the branches of the legal heirs of deceased grand-father - Sri.Abdul Razack and grand-mother - Smt.Fathima Bee are necessary parties and at the best, Sri.Abdul Razack died more than 50 years ago, as such all the legal heirs are necessary parties, without arraying them suit is not maintainable, cannot be appreciated. Because, the original dedicators - Sri.Abdul Razack and Smt.Fathima Bee themselves have divided the property among Sri.R.Abdul Latheef and Smt.Zulekha Bee. PW-1 in her cross-examination has stated that Sri.Abdul Razack and Smt.Fathima Bee partitioned the property and given equal share and according to the said partition, they have become owners. The word "owners" was used in the context as they are beneficiaries under Ex.P1 entitled to enjoy the usufructs i.e., share in the rentals recovered from the tenants. PW-1 in her cross-examination admits that, her mother and uncle were in possession of the property after the death of her grand-father. After the death of Sri.Abdul Haq, defendant No.1 was managing the affairs of the suit properties, regarding filing of cases, collecting rents etc., for that the plaintiffs have not objected. Quite necessarily he was managing the property as Mutawalli. On behalf of mother and other beneficiaries, he was collecting the rentals from tenants and proceeded against the tenants by filing eviction petitions etc. Obviously, the plaintiffs being daughters have not objected, they are happy with the shares they received during the lifetime of Smt.Zulekha Bee and it is only after her death, DW-1 has not given any share, which compel them to demand their share in the rentals recovered, accounts thereof, documents etc. Even they got issued notice to the tenants i.e., defendants 2 and 3, they also did not oblige the demands, which compelled them to file the instant suit. Therefore, his say that he has invested huge amount and without taking the responsibility of maintenance, incurring expenditures, they are only interested in claiming the share in the rentals received, what is pleaded by DW-1 and also stated in Ex.P11, also reflects that he has improved the case during the trial, setting up that he is the owner of the property by producing Hiba

- Ex.D1, but not proved. Over all circumstances discussed hereinabove goes to show that he was only Mutawalli and has been recovering the rentals from the tenants.

26. Herculean efforts is made by him in examining the witness namely DW.2 - Smt.Shaheen, who is daughter of plaintiff No.3, has stated that she and her cousin - Sri.Sajid, who is the son of Sajad Ahmed, examined as DW.4, who is son of DW-1, were running Billiards Parlour, at that time, they were earning everyday Rs.1,500/- to Rs.2,000/-, and in week ends it will be more. Billiards Parlour was situated at No.45, Basement Floor, Castle Street, Ashoknagar, Bengaluru i.e., suit C-schedule property. The said Billiard Parlour was transferred by DW.4

- Sri.Sajid, at that time it was decided that they should be given Rs.4,50,000/- to DW-2. She has further stated she was paying rentals of Rs.17,500/- per month along with Rs.2,000/- maintenance charges and it was also agreed hike in rentals at 12% per year. During December 2009, she has obtained it on lease and transferred in the year 2011. The security deposit paid by her Rs.2,25,000/- was also allowed to continue as security deposit by transferee. The area of the said premises was about 1000 square feet in a commercial area. Ex.D50 is the Transfer Agreement. That means, though she was summoned by defendant No.1, but she has supported the case of the plaintiffs to the extent that Billiards Parlour was run and they were receiving fairly good amount everyday.

27. DW-4 - Sri.Sajad Ahmed, who is the son of DW.1, in his evidence has deposed about the running of Billiards Parlour. He has stated that he was paying Rs.15,000/- per month rentals to his owner and for 3-4 years he has continued the said Billiards Parlour, later on shifted and he has handed over possession to defendant No.1 by taking advance money. The defendant No.1 paid Rs.16,00,000/- something to the tenants for improvements that were effected, now he has been running the Snooker Training Centre in the said premises. Here, Rent Agreement - Ex.P20 dated 12.07.2011 is admitted by him, wherein he has agreed to pay Rs.17,500/- and enhancement of rentals every year 12%. According to him, he has vacated the premises in the year 2015 i.e., subsequent to the suit and denied the suggestion that at the time he was vacating he was paying rentals of Rs.35,000/- per month. Though intelligently he has stated that there is no need to take license to run Billiards Parlour and he has stated that he has obtained license from Police Commissioner. Now, he wanted to say that to run Snooker Training Centre, he has been paying rentals of Rs.5,000/- per month to the entire building, which shows that he is in hand in gloves with DW.1 i.e., his father. Here, what DW-1 has stated in the written statement and in the evidence, was given clear go bye by this witness. Some how, he wanted to say that the contention of the plaintiffs that from the tenants DW-1 receiving Rs.50,000/- each is not proper, whereas he has been paying rentals of Rs.5,000/- only to DW-1. Therefore, his evidence cannot be appreciated at all. He has just come before the court to help the case of DW-1 and for nothing else.

28. If the property is fetching good income, allowing the son to run entire premises and receiving rental of Rs.5,000/- per month by the father, is far from truth. In other words, even if it were to be believed that, he is running Billiards Parlour or Snooker Training Centre as stated by him, without producing any documents, obviously he would have earning sufficient income from that source. Because Snooker and Billiards Training Centre, wherein Trainees used to get training by paying sufficient amount and after that, for each hour play they are charging the amount and the property

is at commercial centre, obviously we can gather that DW-1 is getting substantial income.

29. DW.3 - Sri.Ameer Jhan is another witness examined. He has deposed that Sri.Wahab Sardar got issued legal notice and demanded arrears of rents, subsequently filed HRC case against him and evicted him from the premises, he has handed over vacant possession to him. May be, as he was a Mutawalli initiated legal action against the tenants and recovered possession.

30. The other witness examined as DW.6 - Sri.Asif Jani, a Retired Bank Employee, has deposed that DW-1 has given legal notice dated 29.10.2008 to him to hand over vacant possession of the premises and filed HRC petition in respect of shop premises and the said case ended in dismissal. Since 1972 he has been in possession of C- schedule property and he gave it one Doctor on rental basis. Though by treating this witness hostile, learned counsel for defendant No.1 cross-examined, nothing worth is elicited.

31. Therefore, it can be said that evidence of DWs.2 to 6 is not helpful to the case of defendant No.1 to justify his stand taken by him, as rightly argued by the learned counsel for the plaintiffs.

32. Therefore, one thing is clear that Smt.Zulekha Bee - mother, who was the beneficiary under Ex.P1, authorized him to collect the rent, after the death of Sri.Abdul Haq and as a Mutawalli he was doing that work and he is not at liberty to deny the right of the plaintiffs to claim share in the rentals received by DW-1.

33. The number of documents were produced by defendant No.1. Ex.D3 - certified copy of PCR.No.302/1997 filed by him against Mr.Fiyaz and others, Ex.D4 - Confirmation Letter dated 10.04.1934, Endorsement dated 06.08.1993 issued by BBMP, asking him to furnish the documents. Ex.D27 - copy of complaint dated 03.02.2016 filed by him to BESCOM, are the documents to show that he has been dealing with the property as a Mutawalli. Ex.D30 to D32 are also documents of surrendering the possession. Memorandum of Undertaking, Confirmation of handing over of possession etc., are also documents to show that he has been dealing with the property as Mutawalli. Ex.D41 is the Medical Registration Card of Smt.Zulekha Bee and Ex.D42 is the letter given by Orthopedic Surgeon stating that he had operated on her for intertrochantric fracture of right hip. Therefore, during December 2005, she was admitted to the hospital at the age of 93, is thus proved. Ex.D43 is the Discharge Summary along with 19 prescriptions, which also throw light on the fact that, she was not in a position to execute Gift Deed or Hiba in June, 2006. As already discussed, there is some justification based on the conduct of DW-1 itself to take a view that execution of Gift Deed, what he has alleged executed by Smt.Zulekha Bee in his favour, is doubtful and it has not been proved to the satisfaction of the court. At the best, it can be said he was only acting as a Mutawalli and not as an independent owner of the property. In this view of the matter, certainly he had to clarify what is the actual amount of rentals he is getting, what are all the documents between himself and the tenants, what is the expenditure and furnish accounts. Equally the legal heirs of Smt.Zulekha Bee, who are plaintiffs, defendants 1, 4 and 5, are entitled to get equal share in the property because as they are beneficiaries under Smt.Zulekha Bee and her elder brother were given half share to enjoy usufructs. The lawful legal heirs of Smt.Zulekha Bee are also entitled to get equal share in the amounts recovered from the tenants. Thus, plaintiffs 1 to 3 being the sisters of DW-1,

are entitled to get 1/6th share each in the rentals recovered from the schedule premises from the tenants. The defendant No.1 is liable to furnish the accounts upto date including the expenses.

34. In the Ex.P1 - Registered Wakf-ul-Aulad, a Deed of Dedications dated 26.04.1938, wherein there is a clear mention that Sri.K.Abdul Razack Sahib and his wife - Smt.Fathi Bi have executed Wakfnama, wherein they appoint (1) Sri.K.Abdul Razack Sahib (2) Sri.R.Abdul Latheef Sahib, his only son and (3) Sri.S.Abdul Kareem Saheb as Mutawallies for carrying out the objects of this Wakf. The said Mutawallies shall jointly during their lives or their survivors perform the duties the last surviving Mutawalli has the right to nominate his successor and each succeeding Mutawalli has a similar right of nominating his successor. It has made clear that the immovable properties mentioned in the schedule of the Wakf Deed which comprises the Wakf Properties, they jointly and severally dedicate (1) Smt.Fathima Bi's the said properties for the following objects -

"The net income of the Wakf properties after defraying all the expenses shall be disposed of by the Mutawallies as follows:

(a) In distributing the same among us to the dedicators and their children in the following proportion namely:-

(1) Sri.K.Abdul Razack Saheb shall get 3/8th share in rupee;

(2) Smt.Fathima Bi, 1/8th share in rupee;

(3) Sri.R.Abdul Latheef, only son of the dedicators, 1/4th share in rupee and (4) Smt.Zulekha Bi, who is the only daughter of dedicators, 1/4th share in rupee.

It is also stated in the Wakf Deed that:-

(b) In case any of above 4 persons happen to die the distribution shall be equal amongst the survivors.

(c) After the death of all the aforesaid 4 persons the income shall be distributed between the children of the aforesaid

respectively and thereafter to the children of such children or the grand children of the aforesaid Sri.R.Abdul Latiff Saheb and Smt.Zulekha Bi and thereafter to the descendants of the grand children now born so ever.

(d) Ultimately in the absence of any such descendant the net income shall be paid over in equal proportions to the benefit of the Shoolay Mosque situated in Anthony Nicolos Street, Civil and Military Station, Bangalore (2) Mohammedan Orphanage, Dispensary Road, Civil and Military Station, Bangalore (3) Lubbey Mosque, Lubbey Masjid Street, Civil and Military Station, Bangalore.

Therefore, Smt.Zulekha Bee and Sri.R.Abdul Latheef got themselves divided the Wakf-ul-Aulad properties in so far as to receive usufructs from it and present suit in respect of the properties held by Smt.Zulekha Bee. Therefore, Ex.P1 is simply a Wakf-ul-Aulad simplicitor. Though it is dedicated by the original dedicators, but the effect of the dedications for pious purpose that income should go to the mosques and orphanage referred hereinabove in case no other descendants are found in the lineage of present plaintiffs and defendants 1, 4 and 5, who are children of Smt.Zulekha Bee. Therefore, the arguments canvassed by the learned counsel for defendant No.1 that the plaintiffs have not shown innumerable children, grand children, great grand children, great great grand children, great great great grand children of original dedicators as parties to the suit doesn't arise at all. Because, the arrangement that is made that the children of Smt.Zulekha Bee and Sri.R.Abdul Latheef should enjoy usufructs i.e., rentals received in respect of property equally and Mutawalli shall after excluding the expenses give the usufructs and distribute among the legal heirs of Smt.Zulekha Bee equally.

35. Therefore, the decision relied by the learned counsel for defendant No.1 reported in 1962 AIR 1722, in the case of Thakur Mohd. Ismail v. Thakur Sabir Ali, wherein their lordships have considered the creation of wakf-allal-aulad, when it comes within the purview of Wakf Act, if it was created for the public in the advancement of religion, knowledge, commerce, health, safety or any other objects beneficial to the mankind, rule against perpetuity as contemplated under Section 18 of T.P.Act has no application. By Section 3 of Wakfs Act of 1913, a Muslim can lawfully create wakf-allal-aulad.

36. He has also relied on a decision reported in AIR 1952 Allahabad 127, in the case of Mohammed v. Mt. Abda Khatoon and others, wherein the lordships have:

"If the wakif chose to give the whole of the income of his property for maintenance and support of his descendants, so long as he reserved the ultimate benefit to the poor, it could not be said that the wakf was not in accordance with the provisions of the Act. Moreover, if the descendants are not made accountable by the Wakf Deed for the way in which they had spent the income the words 'maintenance and support' lose all their significance and become more a matter of form than substance".

The lordships have observed that, even if whole of the income is reserved for maintenance and support of the Wakif and his descendants the property immediately vests in God while in a life estate, the estate vests in the life tenancy holder, though only for his lifetime.

37. Here, learned counsel for defendant No.1 wanted to canvass that Smt.Zulekha Bee and Sri.R.Abdul Latheef in their lifetime only have sold B, C & D schedule properties covered under Ex.P1, as such it loses its characteristic of Wakf-ul-Aulad, such an argument cannot be appreciated. Because, the reading of contents of Ex.P1 in between the lines, manifestly makes it clear that intention of the dedicators was to preserve the property for the descendants only they are entitled to enjoy the usufructs and if none of the descendants are available in future, then it should go to the mosque or for orphanage for the charitable and pious purpose.

38. Therefore, learned counsel for the plaintiff has relied on a decision on the judgment of Madras High Court reported in AIR 1979 Madras 231, in the case of Tamil Nadu Wakf Board v. M.Ibrahim Musuee Muthavalli and others, wherein their lordships have held:

"Wakf Act (29 of 1954), Ss. 3(1)(iii), 36A, 57 - Wakf-alal-aulad - No dedication in praesenti for pious, religious or charitable purpose recognized by Muslim Law - Held Wakf was outside the scope of the Act".

Here, Wakf-allal-aulad was held that will be a wakf for the purpose of this Act to the extent to which properties have been dedicated for the religious and charitable purpose recognized by Muslim Law. Therefore, a pure wakf-allal-aulad will not come within the scope of the Central Act, and only a wakf-allal-aulad in which some property has been dedicated in praesenti for the purpose recognized by Muslim Law as pious or charitable, will come within the scope of the Act. Therefore, by applying the said principles to the present facts of the case on hand, what was the intention of dedicators in creating Wakf-ul-Aulad and only if descendants are not found in future after the children of Smt.Zulekha Bee and Sri.R.Abdul Latheef, in that case only the Wakf come into operation for charitable pious purpose. Therefore, the argument canvassed by the learned counsel for defendant No.1 that suit is not maintainable, Civil Court has no jurisdiction, as it falls within the jurisdiction of Wakf Tribunal, cannot be appreciated at all.

39. Even what is urged before the court and argued that Wakf-ul-Aulad loses its characteristic and it has become absolute property of Smt.Zulekha Bee and Sri.R.Abdul Latheef and she had right to execute Gift Deed in his favour, which shows that even defendant No.1 was not sure about his case and defence. Therefore, as a whole it can be said that he has acted as a Mutawalli as per the terms and conditions of Ex.P1 - Wakf-ul-Aulad.

40. Further, much is made that katha was changed in his name after the death of Smt.Zulekha Bee and he has produced Katha Extracts, tax paid receipts to show that he is the owner by virtue of Ex.D1 - Gift Deed. These are all the documents and entries made for fiscal entry and he cannot claim that he has become owner of the property. For this proposition of law learned counsel for the plaintiff has relied on a decision reported in ILR 2000 KAR 2400 in the case of Syed Shaha Fathuallah Alvi v. City Municipal Council, Bidar and others, wherein their lordships have held that:

"Entry in relation to the transfer of title, is essentially a "Fiscal Entry". The object underlying the making of the Entries is to identify the person liable to pay the Tax and it cannot either confer or extinguish title to the same. The Entry is relevant and meaningful only in so far as recovery of Taxes"

Therefore, the arguments canvassed falls to the ground.

41. Further, as regards initial burden to prove that as per conditions of Ex.P1 - Wakf-ul-Aulad being legal heirs of Smt.Zulekha Bee the plaintiffs are entitled to receive rentals equally derived through tenants in respect of suit schedule property. Admittedly DW-1 is collecting the rentals. Therefore, during the trial onus shifts on defendant No.1, who asserts that Smt.Zulekha Bee had executed Gift

Deed, she has got every right to execute the same and Wakf-ul- Aulad lost its characteristic. But for the detailed discussions made hereinabove defendant No.1 has failed to prove or discharge his burden. On the contrary, all the circumstances and meticulous analysis of the evidence reveal that he is one of the legal heirs of deceased Smt.Zulekha Bee along with his sisters - plaintiffs 1 to 3 and defendants 4 and 5 and entitled to share the rentals equally as they are beneficiaries.

42. The learned counsel for the plaintiff has relied on a decision reported in ILR 2008 KAR 672, in the case of Smt.Mariam George vs Smt.S.Jeswina, wherein their lordships have ruled on the point of burden of proof and the requirement under Section 101 of evidence Act held that:

"Whoever desires any Court to give judgment in his favour, dependant on the existence of the facts which he asserts, must prove that those facts exist. Hence, it does not mean that probable defence by the defendant without sufficient proof would shift the burden back on the plaintiff. Therefore, even if it is circumstantial evidence it should be of such nature that it should inspire the confidence of the Court about such fact being probable in the facts and circumstances of each case"

Therefore, it is needless to say that as he has acted as Mutawalli and even in the written statement and reply notice - Ex.P11, the stand taken by him admitting that it is Wakf-ul-Aulad and plaintiffs' right to get share in the rentals recovered from the tenants in respect of the schedule property and equally the recitals of Ex.P1 manifestly makes it clear that all the children of Smt.Zulekha Bee are entitled to share in the usufructs from out of the property. Of course, the grievance of defendant No.1 in the reply notice they only demanded share in the usufructs without taking responsibility of maintenance of the property and other expenses required to be incurred. As he is Mutawalli, he cannot shirk from his responsibility to furnish the accounts. So that, equal responsibility shall be saddled on other sharers, while sharing the usufructs by the legal heirs of Smt.Zulekha Bee.

43. Even in the reply notice - Ex.P11 and in the written statement, DW-1 has stated that he is receiving rentals from the defendants 2 and 3 only Rs.25,000/- each per month and denied that he is receiving more than Rs.50,000/- each. Likewise, C-schedule property also in the hands of the tenants and defendant No.1 is receiving the rentals, he has not come forward to give exact rental amounts received by him.

44. Therefore, obviously it has been proved that suit property is located in a prime location within the central business district of Bangalore and within half a kilometre from M.G.Road, Residency Road and other prime locations of Bangalore. Therefore, certainly we can gather that, the rentals received is based on square feet area is substantially high, deliberately defendant No.1 has not come forward disclosing the true facts.

45. Further in this case, this court has passed orders dated 12.09.2014 against defendant No.1 directing him to deposit the rent of Rs.50,000/- collected from the defendants 2 and 3 in the court from 01.06.2014 till disposal of the suit. The defendant No.1 was further directed to deposit rent on or before 10th of every month collected from the defendants 2 and 3. The defendant No.1 challenged the order before Hon'ble High Court of Karnataka in W.P.No.47859/2014. The said writ petition

was not pursued by him and remains pending without any further order. As defendant No.1 was directed to furnish the particulars of the rents collected. Thus, he has failed to comply with the orders passed by this court. It is noticed that what has not been stated in the written statement defendant No.1 has tried to lead evidence on it without the foundation in the pleadings and also in the written arguments he tried to infuse new things, which is totally not found in the pleadings.

46. As such, It is needless to say that the plaintiffs have proved that, they are entitled to get 1/6th share each in the income from B and C schedule properties towards their share each from the rental income from the suit schedule property and also entitled to get the relief of partition as prayed. It is held that defendant No.1 has failed to prove that suit is not maintainable. Accordingly, I answer Issue No.1 in the affirmative and Addl. Issue No.1 in the negative.

47. Issue No.2:

In view of my detailed finding on Issue No.1 and Addl. Issue No.1 it is held that the plaintiffs have proved that they are entitled to get 1/6th share each from the income derived through schedule B and C properties as per the shares under the registered Deed of Dedication dated 28.04.1938. In this suit, the plaintiffs have also sought the relief of mandatory injunction directing the defendants 1 to 3 jointly and severally to pay the plaintiffs 1/6th share each from the rental income of B and C schedule properties from the date of cause of action onwards. Here, as already observed defendant No.1 has not furnished the accounts and the details of rentals received from the tenants and exact amount received towards usufructs and after deducting the expenses of maintenance of the property, the exact amount which is available to share equally among the children of Smt.Zulekha Bee in accordance to their 1/6th share each. Therefore, at this stage, mandatory injunction cannot be granted. However, same can be determined at the final decree proceedings. For the forgoing reasons, I proceed to pass the following:-

ORDER Suit filed by the plaintiffs against the defendants is hereby decreed with costs.

It is declared that the plaintiffs 1 to 3 are entitled to get 1/6th share each in the income as per the shares under registered Deed of Dedication dated 28.04.1938 in the suit schedule B and C properties.

The defendant No.1 is directed to furnish all the documents and details about the rentals and usufructs received from the tenants in respect of B and C schedule properties.

Enquiry regarding mesne profits is left open for determination at the time of final decree proceedings.

Draw a preliminary decree accordingly. (Dictated to the Judgment Writer on computer, typed by her, the transcript thereof corrected and then pronounced by me, in open Court, this the 14th day of February 2017) (BAILUR SHANKAR RAMA) ND 42 ADDL. CITY CIVIL & SESSIONS JUDGE, Bengaluru.

ANNEXURE I. List of witnesses examined on behalf of:

(a) Plaintiffs' side:-

PW.1 - Smt.Haseena Begum

(b) Defendants' side:

DW.1 - Sri.Abdul Sardar @ Wahab Sardar DW.2 - Smt.Shaheen DW.3 - Sri.Ameer Jhan DW.4 - Sri.Sajjad Ahmed DW.5 - Sri.Aftab Ahmed DW.6 - Sri.Asif Jani II. List of documents exhibited on behalf of:

(a) Plaintiffs' side:-

Ex.P1	:	Certified copy of Deed of Dedications dated 26.04.1938
Ex.P2	:	Encumbrance Certificate
Ex.P3	:	Death Certificate of Zulekha Bi
Ex.P4	:	Legal Notice dated 14.11.2011
Ex.P5	:	Legal Notice dated 05.12.2011
Ex.P6	:	Postal Acknowledgement
Ex.P7	:	Postal Receipt
Ex.P8	:	Legal Notice dated 05.12.2011
Ex.P9	:	Postal Acknowledgement
Ex.P10	:	Postal Receipt
Ex.P11	:	Reply
Ex.P12	:	Postal Acknowledgement
Ex.P13	:	Postal Receipt
Ex.P14 to 16	:	Katha Extracts dated 16.01.2012
Ex.P17	:	Petition in H.R.C.No.371/2005
Ex.P18	:	Petition in H.R.C.No.110/2013
Ex.P19	:	Caveat Petition No..... / 2011
Ex.P20	:	Rental Agreement dated 12.07.2011

(b) Defendants' side:-

Ex.D1	:	Original Hiba (Oral Gift) dated 02.06.2006
Ex.D2	:	Affidavit dated 10.06.1996
Ex.D3	:	Certified copy of PCR No.302/1997
Ex.D4	:	Confirmation Letter dated 10.04.1934
Ex.D5	:	Endorsement dated 06.08.1993

Ex.D6 to 22 : Legal Notices & Postal Acknowledgements
Ex.D23 : Police Notice dated 26.04.2014
Ex.D24 : Police Notice dated 16.06.2014
Ex.D25 : Police Complaint dated 25.04.2007
Ex.D26 : Complaint to Joint Commissioner, BBMP dated 25.11.2009
Ex.D27 : Complaint to BESCO dated 03.02.2016
Ex.D28 : Receipt dated 17.12.2008
Ex.D29 : Receipt dated 20.07.2007
Ex.D30 : Surrender of Possession dated 18.05.2015
Ex.D31 : Memorandum of Understanding dated 20.11.2009
Ex.D32 : Confirmation of handing over Possession dated 02.11.2012
Ex.D33 : Katha Extract
Ex.P34 to 40 : Tax Paid Receipts
Ex.D41 : Medical Registration Card
Ex.D42 : Letter dated 21.12.2005
Ex.D43 : Discharge Summary, Prescriptions and other medical reports
Ex.D44 : Original Will Deed dated 28.03.2002
Ex.D45 & 46 : Tax Paid Receipts
Ex.D47 & 48 : Tax Paid Receipts (generated copy)
Ex.D49 : Surrender of Possession
Ex.D50 : Lease Agreement dated 02.07.2011
Ex.D51 : Certified copy of Sale Deed dated 10.06.1922
Ex.D51(a) : Typed copy of Ex.D51

Ex.D52 : Encumbrance Certificate

42nd ADDL. CITY CIVIL & SESSIONS
JUDGE, BENGALURU.