(1966) 03 MAD CK 0013

Madras High Court

Case No: Second Appeal No''s. 509 and 510 of 1963

V. Mohamed Mohin		APPELLANT
	Vs	
Madras State Wakf Board		RESPONDENT

Date of Decision: March 16, 1966

Acts Referred:

- Oudh Estates Act, 1869 - Section 18
- Waqf Act, 1954 - Section 3, 3(1), 5(2)

Citation: AIR 1968 Mad 243

Hon'ble Judges: Venkataraman, J

Bench: Single Bench

Judgement

(1) These second appeals have been filed by the plaintiff in two suits: O.S. No. 309 of 1960 and O.S. No. 716 of 1960, which were tried together

by the learned District Munsif, Vellore. The suit O. S. No. 716 of 1960 concerns a wakf deed dated 7-10-1940, Ex. A-32, executed by one

Rukhia Bi Sahiba, and the suit, O. S. No. 309 of 1960, concerns another wakf deed, Ex. A-22, dated 4-8-1941, executed by her. The Wakf

Board constituted under the Wakf Act, 29 of 1954, notified them as wakfs under the Act. The plaintiff brought the suits for declaration that the

properties mentioned in the deeds are not wakf properties and not liable to be notified under the Act. His contention was that Rukhia Bi did not

really intend these documents to come into force and that they were not also valid as wakfs. The learned District Munsif held against him on both

these points and dismissed the suits. The appeal preferred by the plaintiff to the learned. Subordinate Judge also failed. Hence, this further appeal.

(2) Before proceeding further, it would be convenient to give a free translation of the two deeds in so far as they are material.

Ex. A-32 dated 7-10-1940: ""I executed a wakf deed on 5-5-1938, but I am not satisfied with it. Hence, I am cancelling that and executing this

wakf deed. That is to say, I myself shall enjoy the income of the undermentioned properties valued at Rs. 2,000 for my lifetime and after my

lifetime Mohamed Mahin Sahib (plaintiff), that is the son of my elder brother Abdul Rahim Sahib shall conduct the following charities and other

arrangements from and out of the income of the said properties. After him his descendants shall hereditarily conduct the above affairs. In case he

has no descendants, his elder sister Abibunnissa''s descendants shall manage. If the above two have no heirs, Mahboob Begum Sahiba and Asia

Begum Sahiba and their descendants shall manage. That is to say, they shall take possession of the undermentioned properties and out of the

income therefrom shall do charities and other affairs. None of the above persons shall be entitled to sell or alienate the above properties. The

buildings mentioned below shall be rented out, and out of the income, the residue, after payment of Union taxes and repairs, shall be utilised for the

following charities: (1) lighting of the mosque in Kaveripakkam, Kondapuram Road, as I have been hitherto doing, and payment of not more than

Rs. 10 per month for the Pesh Imam of the mosque and reading of Koran; (2) performance of gurubali with sacrifice of one goat in the month of

Bakrid every year in the name of myself and my husband; (3) payment of Rs. 10 per month for each of two persons, Dadamian and his wife and

Rs. 25 annually for their clothing; (4) If there is any residue left out of the income, the poor have to be fed once every year. I have only a right to

enjoy the income of the following properties during my lifetime, otherwise I will not be entitled to alienate them.

Exhibit A-22, dated 4-8-1941: deed of Wakf:--""I shall be entitled to enjoy the income of the following properties, valued at Rs. 2,000 and after

my lifetime, Mohamed Mahin Sahib (plaintiff), son of my elder brother Abdul Rahim Sahib, shall receive and enjoy the income from the below-

mentioned properties and shall do the charities as specified below. After his lifetime his descendants shall enjoy the income from the properties and

conduct the undermentioned charities. If he has no issues, his elder sister Habibunnissa Sahiba or her descendants shall receive and enjoy the

income from the undermentioned properties and out of the income do the undermentioned charities, that is to say, in accordance with the family

custom, a barasia and fathia (annual ceremony) of my father, Abdul Khadar Sahib and also feed a traveller every day. The person mentioned by

me and their descendants shall conduct the charities from out of the income. Otherwise, they will not be entitled to alienate the properties.

(3) Rukhia Bi died on 27-4-1952. Dadamian Sahib and his wife mentioned in Cl. (3) of Ex. 32 died even in 1945. As stated above, the plaintiff is

the brother''s son of Rukhia Bi. The Wakf Board issued notices Exs. A-5 and A-6 dated 9-2-1959 to the plaintiff treating him as the Mutavalli in

respect of the two wakfs. They called Ex. A-32 as Rukhia Bi Wakf and Ex. A-22 as wakf-alal-aulad.

(4) At this stage, it is necessary to refer to the definition of ''wakf'' contained in S. 3(1) of the Act as it stood before the Act was amended by Act.

34 of 1964.

Section 4(1).--''Wakf'' means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose

recognised by the Muslim law as pious, religious or charitable and includes (i) a wakf by user; (ii) Mashrut-ul-khidmat; and (iii) a wakf-alal-aulad

to the extent to which the property is dedicated for any purpose recognised by the Muslim law as pious, religious or charitable; and wakif means

any person making such dedication.

As a result of Act 34 of 1964, sub-cl. (ii) above was replaced by the following:--

(ii) grants (including mashrut-ul-khidmat) for any purpose recognised by the Muslim law as pious, religious or charitable.

But that does not make any difference so far as the present case is concerned. The term ''wakf alal aulad'' has not been defined in the Act. But Sri

Ismail, learned counsel appearing for the Wakf Board, stated that the literal meaning of ''aulad'' is one''s own descendants, and the meaning of

''alal'' is ""on"" and that meaning of walk-alal-aulad is wakf for descendants. Actually, the term has a wider import.

(5) Now, I find from the plaint, that, so rar as the first deed Ex. A-32 is concerned, the only contention in the plaint was that it was not a valid

wakf. So far as the second wakf-deed, Ex. A-22, is concerned, the two contentions were: (a) that Rukhia Bi never intended to create a wakf and

(b) that it was not a valid wakf. The resulting contention in respect of both the wakfs was that the properties remained as Rukhia Bi''s own absolute

properties and that the plaintiffs inherited them as her sole surviving heir. The learned District Munsif found that Ex. A-32 was valid as a wakf.

Regarding Ex. A-22 he rejected the contention of the plaintiff that it was not acted upon. he also held that it was invalid. before the learned

Subordinate judge the contention that Ex. A-32 was not acted upon does not appear to have been urged, and the only contention urged was that

Exs. A-32 and A-22 were not valid as wakfs.

(6) It is easy to dispose of the appeal, S.A. No. 510 of 1963, relating to the earlier wakf. Ex. A-32 (O.S. No. 716 of 1960 on the file of the

District Munsif and A.S. No. 436 of 1961 on the file of the Sub-Judge, Vellore). As already stated, Dadamian Sahib and his wife died in 1945

itself. The remaining objects mentioned in the deed are recognised by the Muslim law as pious, religious and charitable. there is a permanent

dedication by Rukhia Bi of the properties for those purposes and hence the deed is clearly a wakf deed, under the main definition in the Act.

(Unless otherwise mentioned, the reference is only to Act 29 of 1954). Sri Gopalaswami Aiyanger, learned counsel for the appellant, was unable

to advance really any useful arguments regarding Ex. A-32. The decision of the Courts below dismissing the suit is clearly correct, and the appeal

has got to be dismissed with costs, and it is hereby so dismissed with costs.

(7) S.A. No. 509 of 1963:--The main contention of Sri R. Gopalswami Iyengar, learned counsel for the appellant, is that Ex. A-22 is not a valid

wakf because, according to him, there is no dedication of the properties to God which is the essence of a wakf and that the direction to conduct

the charities would only amount to a charge on the properties. He says that there could be two types of deeds: (a) giving a specific portion of the

income to the relatives and the residue for charities; and (b) giving a specific portion for the charities and the residue to the relatives. he says that

the first would be a wakf under S. 3 of the Act, but not the second, because in the second the property itself is given only to the relatives with a

charge for the charities and, therefore, the transfer of ownership to God which is the essence of a wakf will be wanting. he urges that the expenses

for the performance of the annual burisia and fathiah ceremony of the father, and the feeding of a traveller every day could be easily ascertained

and would constitute only a specified amount for the time being that consequently the amount to be spent for religious and charitable objects was

specified and the residue to be taken by the plaintiff or by the other beneficiaries was indefinite, and, therefore, there was no wakf at all and there

was only a gift of the properties to the plaintiff and the other persons with a charge for the religious and charitable objects. He refers to some of the

decided cases on the point, viz., Sonatun Bysack v. Smt. Jaggatsoonderee Dassee, (1859-61) 8 Moo Ind App 66 (PC); Harnarayan v. Sarja

Kunwari, ILR (1921) All 291 = AIR 1921 PC 20; M. Thiruvengadamudayanaiya Vs. R. Narasimhaswamiaiya and Others, ; AIR 1948 12 (Privy

Council) of Mukherjee''s Hindu Law of Religious and Charitable Trust, 2nd Edn. he relies in particular on the decision in ILR (1921) All 291 =

AIR 1921 PC 20 dealing with a Hindu will. Their Lordships of the Privy Council observed:

The question whether the idol itself shall be considered the true beneficiary subject to a charge in favour of the heirs or specified relatives of the

testator for their upkeep or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the

upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will.

(8) Mr. Gopalaswami Iyengar strongly relies upon the decision of the Privy Council in AIR 1948 12 (Privy Council) There the question arose

under the Agriculturists'' Relief Act (Madras), 4 of 1938. This in turn depended upon the question whether the plaintiff had a beneficial interest in

certain villages or whether these villages were wholly dedicated to charities (vide p. 515). That in turn depended upon the construction of a certain

compromise. Clause (6) of the compromise provided that the plaintiff shall, for the performance of free feeding, etc., in the chatram which she was

running at Ramnad, for ever enjoy the villages. Their Lordships of the Privy Council, differing from the High Court, held that the four villages were

to belong to the plaintiff, but charged with the obligation of maintaining the charity which she has there tofore carried on. They observed:

The words do not appear apt to impose a duty upon the plaintiff devoting to charity the whole of the income of the villages however much it might

exceed the requirements of the charity in fact maintained by her. There is, no doubt, force in the observation made by the High Court, that, if a

donor was making a gift of property burdened with the performance of a charity, one would expect to find that the charity was to be conducted

according to a fixed ''dittam'' or standard of expenses, after meeting which the surplus income was to be enjoyed by the donor. But it appears to

be a sufficient answer to this point that the nature of the charity itself supplied a sufficient standard. The maintenance of a choultry for the feeding of

travelling pilgrims would normally require a sum which varied from time to time and could not easily be defined in the terms of so many rupees a

year, no more and no less. It appears to their Lordships in accordance both with the probabilities of the case and with the language of the

document to conclude that, an estimate being made of the probable expenses of the charity and of the income of the villages, an appropriation was

upon the division of the zamindari made to the plaintiff which would enable her to carry on the charity but would leave her free to retain for her own

use any surplus after that purpose had been satisfied. The alternative view is one that would involve a cy prus application of the surplus to some

other charitable purpose in the event of the income exceeding the needs of the case, there seems to be little justification for ascribing to the parties

a general charitable intention which alone justify such an application.

Mr. Gopalaswami Aiyangar urges on the above authority that in this case also the expenses of the annual ceremony of the father of Rukhia Bi and

the expenses of feeding a traveller every day could be ascertained and would merely constitute a charge.

(9) While the submission of Mr. Ismail, learned counsel for the Wakf Board, is that such an argument was not open at all to the appellant on the

pleadings in the plaint and that no such specific case was put forward there, it must be noticed that the plaint says that the deed was not valid as a

wakf and from the point of view it is open to Sri Gopalaswami Aiyangar to contend that, as a matter of construction there is no transfer of

ownership to God and that only a charge was created for the charities. But, on the merits, I am unable to accept the contention of Sri

Gopalaswami Aiyanger. In the first place, the deed is styled as a wakf deed and the term must be known to every Muslim. It definitely implies a

transfer of ownership to God. Secondly, there is no transfer of ownership of the properties to the plaintiff. He is only given a right to enjoy the

income subject to the performance of the charities. Further, there is also a prohibition against any alienation which is consistent with a wakf and is

inconsistent with a transfer of ownership to the plaintiff. The deed would really appear to be a wakf-alal-aulad within the meaning of Act 29 of

1954.

(10) Sri Ismail has, however, put forward some arguments that it will not be a wakf-alal-aulad, but will be a wakf under the main definition in Act

29 of 1954. it will be necessary to consider that submission in some detail later. But, before doing so, I shall refer to a few further submissions

made by Sri Gopalaswami Iyanger.

(11) Sri Gopalaswami Iyengar concedes that the performance of the annual barisia and fathia for the father is a valid object of a wakf (vide the

decision in Abdul Sattar Ismail Vs. Abdul Humid Sait, , following Ramanadham Chettiar v. Vava Levvai Marakayar, ILR (1916) Mad 116 = AIR

1916 PC 86 and C. Kunhamutty Vs. Thondikkodan Ahmad Musaliar and Others, . He also concedes that feeding of a traveller every day is a

charitable purpose. But he contends that the provision in the deed in favour of the plaintiff and his descendants will not be a purpose recognised by

the Muslim law as pious, religious or charitable. In this connection, he refers to the Mussalman Wakf Validating Act 6 of 1913. It is well known

that that Act was passed in order to validate certain wakfs, which, according to the decision of the Privy Council, in particular, the decision in

Abdul Fata Mohamed Ishak v. Rasamaya Dhur, (1895) 22 Ind App 76, would be invalid. According to the Privy Council decision, a deed tying

up property for the benefit of relatives of the settlor with only an illusory or remote provision for charity, was not a valid wakf. Since this decision

was contrary to the ideas of Mussalmans on the point, the Mussalman Wakf Validating Act 6 of 1913, was passed. It is necessary to refer to

some portions of the Act for elucidating the argument of Sri Gopalaswami Ayyangar:

Sec. 2(1).--""Wakf"" means the permanent dedication by a person professing the Mussalman faith of any property for any propose recognised by

the Mussalman law as religious, pious or charitable.

Sec. 3--It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the

provisions of the Mussalman 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 wakf is a Hanafi

Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rent 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 recognised by the

Mussalman law as a religious, pious or charitable purpose of a permanent character.

Section 4:--No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or

charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the

wakf"".

Sri Gopalaswami Aiyangar recognised that Ex. A-22 might be a lawful wakf under the provisions of S. 4(a) of the Act 6 of 1913, in so far as it

provided for the maintenance and support partially of the family of Rukhia Bi, but his argument was that even so it would not follow that the

maintenance and support of the family, children or descendants of the settlor would be a purpose recognised by the Mussalman law as religious,

pious or charitable. In support of this argument he pointed out that S. 3 itself showed that, but for that section, provision for the maintenance and

support of the family, children of descendants will not be a purpose recognised by the Mussalman law as religious, pious or charitable and that was

why it enacted that all in other respects the deed must be in accordance with the provisions of Mussalman law and that the ultimate benefit in such

cases must be expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or

charitable purpose of a permanent character.

He urged that it was really unnecessary to elaborate that point further because of two pronouncements of the Supreme Court to that effect, namely,

Thakur Mohd. Ismail Vs. Thakur Sabir Ali, and Fazlul Rabbi Pradhan Vs. State of West Bengal, . In Thakur Mohd. Ismail Vs. Thakur Sabir Ali, ,

the question was whether a wakf-alal-aulad validated by virtue of S. 3 of Act 6 of 1913 could be considered to be a transfer for religious and

charitable purposes within the meaning of S. 18 of the Oudh Estates Act 1 of 1869. Their Lordships observed that, even though it might be valid

as a wakf under S. 3 of Act 6 of 1913, the provision for family, children or descendants would not be a religious or charitable purpose, as the term

is normally understood. They observed:

This is made clear by the proviso to S. 3 which provides that the ultimate benefit in such a case must be for religious or charitable purpose. The

proviso would have been unnecessary if the purpose of a wakf-alal-aulad was recognised as religious or charitable by the law. The same in our

opinion will follow from the provision in Section 4.

Similarly in Fazlul Rabbi Pradhan Vs. State of West Bengal, , their Lordships pointed out that a private gift of one''s own self or kith and kin might

be a valid wakf under Act 6 of 1913, but it would not be exclusively for a purpose which was religious or charitable so as to be exempt from the

operation of the West Bengal Estates Acquisition Act 1 of 1954.

(12) But all this argument of Sri Gopalaswami Aiyangar would only lead up to this point, namely, that Ex. A-22 in so far as it makes provision for

the relatives of the settlor, will not be wakf under the main definition in Act 29 of 1954. But these submissions do not touch the point that the deed

may yet be, as indeed it seems to me it is, a wakf-alal-aulad, and would, therefore, be a wakf under Act 29 of 1954 to the extent to which the

property is dedicated for the two purposes (annual ceremony of the father of the wakif and feeding of a traveller every day) which are recognised

by the Mussalman law as pious, religious or charitable.

(13) It, therefore, only remains to deal with the contention of Sri Ismail that Ex. A-22 is not a wakf-alal-aulad at all under the definition of ''wakf'' in

Act 29 of 1954, but is a wakf under the main definition. His primary argument is that Ex. A-22 does not really confer any benefit on the plaintiff or

his descendants or the plaintiff''s sister or her descendants, that they are only meant to be mutavallis for the performance of the religious and

charitable acts mentioned in the deed, and that the entire income was to be utilised only for those purposes. His secondary contention is that, even

assuming for the sake of argument that Ex. A-22 intended some benefit for the plaintiff and his descendants or the plaintiff''s sister and her

descendants, the deed would still fall under the main definition of wakf, and would not be a wakf-alal-aulad. The point of the learned counsel is that

the test for determining whether a deed is a wakf under the main definition or a wakf-alal-aulad under Cl. (iii) of S. 3(1) is what was the

predominant intention of the settlor; if the predominant intention was to dedicate the properties for purposes recognised by the Mussalman law as

pious, religious or charitable, it would be a wakf under the main definition even though incidentally some benefit was intended for the relatives of

the settlor as well. Similarly, if the predominant intention was to benefit the relatives of the settlor, and incidentally to give something for purposes

recognised by Mussalman law as pious, religious or charitable, it will be a wakf-alal-aulad for the purposes of the Act. On these premises he urges

that Ex. A-22 had the predominant intention of dedicating the properties for purposes recognised by the Mussalman law as religious or charitable

and would, therefore, be a wakf within the main definition. In support of this contention he relies, in particular, on the decision of a Bench of this

Court in Haji Sheikh Ibrahim Sahib''s Private Trust Tanjore Vs. Madras State Wakf Board, Madras, . In that case it was found that the

unmistakable intention of the testator was to dedicate the property absolutely for wakf. But there was a provision for payment of a small amount of

paddy and cash to two relatives of the testator for their lifetime. The Wakf Board notified the endowment as a wakf under the Act. That was

challenged by a suit in the District Court and in further appeal to this Court. It was held that the document taken as a whole substantially dedicated

the properties to charities with a charge in favour of the two relatives of a small extent of the income for the duration of their lives, and that

consequently the deed would fall under the main definition of wakf amenable to the jurisdiction of the Wakf Board, but that the Board was under a

duty to make the payments to the specified relatives. on behalf of the appellant trustee it was urged that before the notification could be declared as

valid, there should be an allocation of the income between the charitable and secular purposes, and that the notification should relate only to the

former. This contention proceeded on the footing that the deed was wakf-alal-aulad within the meaning of the Act. This contention was repelled on

the ground that the dedication in question was an absolute wakf and that the donees had only charge on the properties. It was further observed:

Further, there is no specific provision in the Wakf Act for conferring any authority on the Wakf Board to allocate the income between the

charitable and secular objects, where the deed of foundation partakes of both the characters. In such a case the proper course will be to frame a

scheme regulating the expenses between the diverse objects of the wakf. We are, therefore, unable to accept the contention of the appellant that

before a notification can be made under S. 5(2) of the Act, there should be an allocation of the income from the wakf properties between the

charitable and secular objects.

Founding on these observations, the learned counsel urges that, if the Court accepts his contention that Ex. A-22 is a wakf under the main

definition, the Board will be entitled to supervise the management of the wakf under the main definition, subject, however, to making provision for

the relative mentioned in Ex. A-22. But, if on the other hand, the Court should find that Ex. A-22 is a wakf-alal-aulad, the Board cold still notify it,

but a scheme may have to be formulated regulating the expenses between the charitable and the secular purposes. The learned counsel submits

further that the scope of the present suit would not call for a consideration of any such scheme or any allocation between the charitable and secular

purposes, because, according to the learned counsel the only basis of the plaint was that Ex. A-22 was not intended to come into force at all, and

that contention having failed, there is nothing further left for the Court except to dismiss the suit.

(14) The learned counsel suggested another possible criterion for determining whether Ex. A-22 would be a wakf-alal-aulad under Sec. 3(1)(iii) of

the Act 29 of 1954. The submission of the learned counsel is that, though Act 29 of 1954 has not referred to the Mussalman Wakf Validating Act

6 of 1913, it may have been the intention of the Legislature to refer to a wakf validated by that Act (under S. 3 thereof) as a wakf-alal-aulad when

it referred to a wakf-alal-aulad under S. 3(1)(iii) of Act 29 of 1954. The further submission of Sri Ismail is that, even according to this criterion, Ex.

A-22 would not be a valid wakf-alal-aulad. He puts this on two grounds firstly, he said that according to some decisions Ex. A-22 will not fall

under Sec. 3 of Act 6 of 1913, because there is a concurrent gift to religious and charitable purposes, and that S. 3 of Act 6 of 1913 would apply

only to cases where for the time being the whole of the income from the endowed properties is given for the family, children or descendants of the

settlor. According to the learned counsel these decisions proceed on the footing that, since the proviso to S. 3 of Act 6 of 1913 speaks of the

ultimate benefit in such cases being expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a

religious, pious or charitable purpose of a permanent character, Sec. 3 will not apply where there is immediate benefit for the poor or for any other

purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

(15) The second way in which Sri Ismail contends that Ex. A-22 cannot claim validity as wakf-alal-aulad under S. 3 of Act 6 of 1913 is that, while

the plaintiff or the plaintiff''s sister may answer the description of belonging to the family of the settlor within the meaning of S. 3(a) of Act 6 of

1913, the descendants of the plaintiff or the descendants of the plaintiff''s sister cannot answer the description of the family of the settlor, and, of

course, they will not be the children or the descendants of the settlor.

(16) The further submission of Sri Ismail is that, on the alternative criterion, if Ex. A-22 is not a valid wakf-alal-aulad under S. 3 of Act 6 of 1913,

it will not be a valid wakf-alal-aulad under Sec. 3(1)(iii) of Act 29 of 1954 and will be a wakf under the main definition u/s 3(1) of Act 29 of 1954.

(17) These are undoubtedly able arguments, but I am unable to accept them. The primary contention of the learned counsel that no benefit at all is

intended under Ex. A-22 is based on the submission that the only indication of a benefit to the relatives is the use of the word ""anubavittukkondu

(enjoy the income) that the mere use of that word is not sufficient and that the deed taken as a whole cannot be taken to confer any beneficial

interest that al on the plaintiff or his descendants or the plaintiff''s sister or her descendants. The learned counsel urges that there are no express

words directly granting an interest in favour of the plaintiff or his descendants or the plaintiff''s sister or her descendants and he says in contrast to

this, that there are express words of grant for religious and charitable purposes, and he further emphasises the last sentence that the plaintiff and his

descendants or the plaintiff''s sister and her descendants should conduct the religious and charitable acts only from the income, and should not

alienate the corpus. He submits that this is an indication that the entire income should be utilised by the plaintiff and his descendants or the plaintiff''s

sister and her descendants for the religious and charitable acts.

(18) Apart from these submissions, which are based on the words of Ex. A-22 itself without reference to the surrounding circumstances under

which the deed was executed, the learned counsel refers also to those surrounding circumstances in support of his contention. he points out that

according to the evidence of the plaintiff, the properties of Rukhia Bi in 1930 were worth about 4 or 5 lakhs of rupees; in other words, she was a

very rich woman, and the properties settled under Ex. A-22 have been valued at Rs. 2,000 and the construction which would be more in keeping

with her status and which would take account of the smallness of the properties settled under Ex. A-22 in relation to the vastness of the properties

would be a construction that she intended the entire income from the properties settled under Ex. A-22 to be utilised for the performance of the

religious and charitable acts mentioned in it, and did not intend any portion thereof to be taken by the plaintiff and his descendants or the plaintiff''s

sister and her descendants, and that those persons have been referred to merely as persons who should receive the income and conduct the

charities without appropriating any portion thereof for themselves.

(19) These submissions, however, fail to give effect to the use of the word ""anubavittukkondu"" (enjoy the income) in more than one place of the

deed. if the intention was that the persons named were merely to receive the income and spend it wholly on the religious and charitable acts, the

word ""anubavittukkondu"" (enjoy the income) would have been omitted altogether. In this respect, we have the key in the earlier deed, Ex. A-32 of

the settlor herself, for the interpretation of the later deed, Ex. A-22. In the earlier deed, the term ""anubavittukkondu"" (enjoy the income) is entirely

absent in relation to the plaintiff or his descendants or the other persons named, in the event of their failure. It may be noted that Ex. A-32 says that

the settlor herself had the right to enjoy the income from the properties during her lifetime. But such a word (enjoyment) is not used in respect of

the plaintiff and his descendants or the other persons. Thus, Ex. A-32 clearly shows that the plaintiff and his descendants or the other persons were

to have no beneficial interest in the income from the properties settled thereunder. Ex. A-22 written just written just within a year of Ex. A-32 in

this respect, because Ex. A-22 has used the term ""anubavittukkondu"" (enjoy the income) in more than one place. The prohibition against alienation

does not in any way invalidate the intention to benefit the plaintiff and his descendants or the plaintiff''s sister and her descendants. That is a

necessary feature in a wakf-alal-aulad because there must be a transfer of ownership of the corpus to God and there could be no question of the

alienation of the corpus.

(20) We must, therefore, proceed on the footing that Ex. A-22 is a settlement both for the benefit of the persons named therein and the religious

and charitable acts mentioned therein. If so, it seems to me that it will plainly be a wakf-alal-aulad within the meaning of Section 3 (1)(iii) of Act 29

of 1954, and it will be a wakf for the purpose of the control of the Wakf Board to the extent to which the properties have been dedicated for the

religious and charitable acts. It will be for the Court to determine that extent. it seems to me that this is a simple way of apply the Act in relation to

a document like Ex. A-22. That Act itself does not contain any definition of wakf-alal-aulad, but whatever other test may be suitable in any given

case, it is not impermissible to assume that if a wakf will be a wakf-alal-aulad, but whatever other test may be suitable in any given case, it is not

impermissible to assume that if a wakf will be a wakf-alal-aulad valid u/s 3 of the Mussalman Wakf Validating Act, 6 of 1913, it will be a wakf-

alal-aulad even for the purpose of Act 29 of 1954. It has been noticed that Sri Ismail himself was suggested this criterion. So far as Ex. A-22 is

concerned, I have no doubt that it is a wakf-alal-aulad valid u/s 3 of Act 6 of 1913. The relevant portions of Ss. 3 and 4 of that Act have already

been quoted.

(21) Now, there is no difficulty so far as the provision during the lifetime of the settlor is concerned. It is valid under S. 3(b) of Act 6 of 1913. As

for the provision in favour of the plaintiff and his descendants or the plaintiff''s sister and her descendants it will be valid under S. 3(a) of Act 6 of

1913, because the relevant portion of that clause is ""for the maintenance and support wholly or partially of his family, children or descendants"". The

provision in Ex. A-22 will be one for the maintenance and support partially of the settlor''s family. Further, the proviso to S. 3 is also satisfied. So

far as the portion to be spent for the religious and charitable acts is concerned, there is an immediate benefit and so fare as there is provision for the

plaintiff and his descendants or for the plaintiff''s sister and her descendants, it can be held, as a matter of construction of Ex. A-22, that the

ultimate benefit even in respect of that part has been impliedly reserved for the religious and charitable acts mentioned in the deed. We cannot

assume that there will be a perpetual line of the descendants of the plaintiff or the descendants of the plaintiff''s sister. indeed, we can proceed on

the footing that the line of descendants may come to an end ultimately; in any case, Sec. 4 of the Act 6 of 1913 can validate it. The matter is really

concluded by the decision of a Bench of this Court in Ahmad v. Julaina Bivi, ILR 1947 Mad 480 = AIR 1948 Mad 176.

(22) In that case the income of the properties settled under the wakf deed was about Rs. 1,500 and the provision for charities cost only Rs. 160

per annum and the remainder was intended for the maintenance of the wakif''s family and descendants. It was held that it was a valid wakf under S.

3 of Act 6 of 1913. So far as some of the items of properties (the shop in item 2 of Schedule A and the lands in Schedule B) were concerned, the

deed provided that the wife of the wakif should enjoy them during her lifetime and thereafter the properties should be added to the charity referred

to in Schedule D. But in respect of the other properties from out of which benefit was given to the children and the descendants of the wakif, there

was not to express reservation of the ultimate benefit on failure of the children and descendants. The question was whether such a reservation

could be implied from the terms of the instrument read in the light of the surrounding circumstances. The learned Judges held that the use of the

term ""wakf"" by itself might be taken to imply and ultimate dedication for the poor or for other unfailing charitable object, and further, where there

was a concurrent and immediate gift for permanent charitable objects in a wakf in favour of one''s own children and descendants, it would warrant

the implication of an ultimate trust, for those objects on the failure of the descendants (vide pp. 496 and 497 of the report). The learned Judges

quoted with approval the following observations in Sulaiman, C. J., delivering the judgment of the Court in Mt. Ruqia Begam and Others Vs. L.

Suraj Mal and Others, :

Where the wakif has indicated his intention that his object is to benefit his family, and also religious, pious or charitable purposes, it can be that

there is an ultimate reservation for such purposes, particularly so when he has provided that a part of the income should be applied to such

purposes during his own lifetime. If one object, namely, the maintenance of his descendants, fails, there is no reason why the other object should

also fail and no reason whatsoever why the whole income should not be devoted to the remaining object as indicated.

Syed Ahmed and Another Vs. Julaiha Bivi and Others, , was followed in Thanga Mayil Ammal Vs. Pappa alias Fathima Bibi and Another, , where

the income of the properties was Rs. 150 per annum and the amount to be spent on religious objects was only about Rs. 5 and the rest was to be

taken by the trustees after the wakif''s lifetime, namely, his daughters and his descendants.

(23) Sri Ismail, however, has put forward two lines of argument to support the contention that Ex. A-22 will not be valid under S. 3 of Act 6 of

1913. The first line of argument is that, according to some decisions the existence of the proviso to S. 3 of Act 6 of 1913 would indicate that the

section was intended to apply only to a case where the provisions for the maintenance and support of the family, children and descendants is of the

entire income. According to these decisions, where there is a concurrent gift for the benefit of individuals and for religious and charitable objects, it

could not be said that the benefit for the poor or religious or charitable purpose is ultimate within the meaning of the proviso. This reasoning is,

however, incorrect. While the section undoubtedly applies to cases where the whole of the income for the time being is intended for the

maintenance and support of the family, children or descendants, with an ultimate express or implied reservation for the poor or other religious or

charitable purposes, the section will also apply to a case where only part of the income for the time being is given for the benefit of the family,

children and descendants and there is an immediate gift of the other part for religious or charitable purposes. We have seen that, according to the

decision in Syed Ahmed and Another Vs. Julaiha Bivi and Others, an ultimate benefit for religious or charitable purposes can be implied in respect

of a part of the income which is for the time being intended for the maintenance and support of the family, children or descendants. The words ""for

the family, children or descendants"" in S. 3 of Act 6 of 1913, are apt to cover both a case where the entire income for the time being is intended

for the maintenance and support of the family, children or descendants and also a case where only part of the income for the time being is intended

for the family of children or descendants, the other part being intended immediately for the benefit of religious and charitable purposes. The first

kind of cases will be covered by the word ''wholly'' in S. 3(a) and the second kind of cases will be covered by the word ""partially"". That seems to

be the only reasonable and sensible way of interpreting the Act. If, even in a case where the entire income for the time being is given for the

maintenance and support of the family, children or descendants, the deed of wakf will be valid under S. 3 on the ground that an ultimate benefit for

the poor or for other religious or charitable purposes can be implied, that is all the more reason why it should be held that Sec. 3 intended to

validate also a wakf deed where only part of the income for the time being is given for the maintenance and support of the family, children or

descendants, the other part being given immediately for religious or charitable objects. There can be no reason, on the principle of matter, as to

why the Act, which is assumed to validate the first kind of wakf, should be held not to validate the second kind of wakf. The principle of the matter

demands just the opposite conclusion.

(24) The above views necessarily follow from the Bench decision in Syed Ahmed and Another Vs. Julaiha Bivi and Others, . There is also a direct

decision of a Bench of the Oudh Chief Court in AIR 1937 454 (Oudh) The question for decision in that case was whether a particular wakf, which

partly provided for the maintenance and support of the wakif''s wife, children and descendants, and partly for religious and charitable objects, was

excluded from the operation of the Mussalman Wakf Act 42 of 1923, on the ground that the wakf fell under S. 3 of the Mussalman Wakf

Validating Act 6 of 1913. Act 42 of 1923 applied to a wakf as defined therein, and the definition was this:

Wakf"" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the

Mussalman law as religious, pious or charitable, but does not include any wakf, such as is described in S. 3 of the Mussalman Wakf Validating

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.

Under Sec. 3(1) of Act 42 of 1923, the mutavalli of a wakf governed by the Act was required to furnish a statement to the Court containing the

prescribed particulars in respect of the wakf property within six months from the commencement of the Act. Sub-sec (3) of Sec. 3 is important,

and it says:

Where (a) a wakf is created after the commencement of this Act, or (b) in the case of a wakf such as is described in S. 3 of the Wakf Validating

Act, 1913, the person creating the wakf or any member of his family or any of his descendants is, at the commencement of this Act, alive and

entitled to any benefit thereunder, the statement referred to in sub-sec. (1) shall be furnished, in the case referred to in Cl. (a) within six months of

the date on which the wakf is created, or, if it has been created by a written document, of the date on which such document is executed, or in the

case referred to in Cl. (b) within six months of the date of the death of the person entitled to such benefit as aforesaid, or of the last survivor of any

such persons, as the case may be.

It will be seen from this that in the case of wakf described in S. 3 of the Mussalman Wakf Validating Act 6 of 1913, where the benefit is, for the

time being, claimable by the wakif or by any of his family or descendants, the statement under Act 42 of 1923 is not required to be furnished within

six months of the commencement of the Act, but only within six month of the death of the person entitled to the benefit or the last survivor of any

such persons. The reasons presumably why the obligation of the Mutavalli to furnish a statement is postponed in the case of a wakf described in S.

3 of Act 6 of 1913 seem to be twofold: (i) where the beneficiary is the family or descendants, the Legislature did not want to interfere in that

private wakf; and (ii) the members of the family or descendants benefited by the wakf could be expected to have sufficient control over the

mutavalli and would not require protection from the Legislature under Act 42 of 1923. Act 42 of 1923 is, however, intended to apply in respect of

other wakfs even though the wakf is not entirely for public purpose, and some private individuals who are not members of the family or

descendants of the settlor, are also the beneficiaries. Such beneficiaries are entitled under the Act to apply to the Court for directing the mutavalli to

furnish further particulars.

(25) In AIR 1937 454 (Oudh) the mutavalli contended that he was not bound to furnish the statement and give further particulars under the Act 42

of 1923, because, according to him, the wakf was saved from the operation of the Act under definition. The wakf was one created, among other

purposes, for the maintenance and support of the wakif''s wife, children and descendants, and, therefore, turning to the definition in Act 42 of

1923, some benefit was for the time being claimable by the wakif''s wife and descendants, and, therefore, the wakf was excluded from the

operation of Act 42 of 1923. This contention was accepted by the Bench. It was, however, argued by the learned counsel for the person who

made the application against the Mutavalli that only those wakfs could come under Act 6 of 1913, which were made wholly or mainly for the

maintenance and support of the wakif''s family, children or descendants, but that the wakf in question being mainly for religious and charitable

purposes and not mainly for the maintenance and support of the wakif''s family, could not come under Act 6 of 1913, was consequently not

exempt from the operation of Act 42 of 1923. This argument was repelled by the learned Judge, observing:

We are unable to accept this argument as we find nothing in S. 3 of Act 6 of 1923 to justify the view that wakfs which are partly for the

maintenance and support of the wakif''s family and partly for religious and charitable purposes, are excluded from the provisions of that section.

The learned counsel places great reliance on the Full Bench case in Shabbir Hussain v. Sk. Ashiq Hussain, ILR 4 Luck 429 = AIR 1929 Oudh

225, but the question for decision in that case was whether the Charitable and Religious Trusts Act 14 of 1920 applies to the cases of mixed wakfs

or trust where a portion of the benefit is allotted for private purposes or whether it applies only to those cases where the entire benefit is allotted for

public purposes. No doubt, the learned Judges remarked in passing that a wakf which is partly private and partly public is governed by Act 42 of

1923, but in view of the questions for decision before the learned Judges, this remark can only be regarded as an obiter dictum. The view we have

taken is supported by S. 3(3)(b) of Act 42 of 1923, which lays down that--""Where in the case of a wakf such as is described in S. 3 of Wakfs

Validating Act 6 of 1923, the person creating the wakf or any member of his family or any of his descendants is at the commencement of this Act

alive and entitled to claim any benefit thereunder, the statement referred to in sub-section (1) shall be furnished within six months of the date of the

death of the person entitled to such benefit, as aforesaid, or of the last survivor of any such persons, as the case may be"". This clearly shows that if

part of the purpose of a wakf is to provide for the wakif himself or for any member of his family or his descendants, the provisions of the Act will

not come into force till after the death of such persons. We are, therefore, of opinion that the order of the learned District Judge was correct and

dismiss this application with costs.

(26) Again in Mohammad Sabir Ali Vs. Tahir Ali and Others, , the following observations occur:--

The Wakf Validating Act 6 of 1923 does not prescribe any amount or proportion of the income of wakf property that may be reserved by a

wakif for the maintenance and support of himself, his family and descendants. The entire income of the wakf property may be reserved for this

purpose. The words ''wholly or partially'' in S. 3 of the Act have reference to the income of the wakf property and not to the ''maintenance and

support'' of the wakif and others. When the entire income is thus reserved for the wakif, his family and children, it matters little whether the words

employed are ''maintenance'' and ''support'' or ''use'' or ''benefit'' or the like.

(27) I shall now deal with the four decisions quoted by Sri M.M. Ismail in support of the contention that, where there is a concurrent provisions for

religious and charitable acts along with a provision for the maintenance and support of the family, it will not be a valid wakf under S. 3 of Act 6 of

1913. The four decisions, chronologically, are these: ILR (1929) Luck 429 = AIR 1929 Oudh 225; Ali Bakhtear and Others Vs. Khandkar Altaf

Hossain and Others, ; Haji Kadir Murthuza Hussain Saheb, represented by his power of attorney agent, M.G. Hasan Vs. Mohammed Murthuza

Hussain Sahib, ; and Tyebhoy Essofalli Thingna Vs. The Collector, .

(28) In ILR (1929) Luck 429 = AIR 1929 Oudh 225, the testator one Mian Mohammad Atimad Alikhan, who had no legal heirs made a will, and

he appointed one Hussain as executor, trustee or mutavalli to carry out the directions under the will, and also provided for the line of succession of

the mutavalli. The income of properties was about Rs. 1,710 per annum. Only about Rs. 500 was to be spent on objects of charity. A specified

portion was given for the maintenance of the dependants and servants and the Mutavalli was to get Rs. 400 a year as his remuneration, (Vide pp.

435-436 of the report). One Shabir Hussain, who was the mutavalli for the time being, filed his accounts in the District Court, Lucknow, under the

provisions of the Mussalman Wakf Act 42 of 1923. The accounts were duly checked and audited under that Act. Thereafter one Ashiq Hussain,

entitled to a small benefit of Rs. 5 per month under the will, filed a petition requiring Shabbir Hussain to furnish particulars under Sec. 3 of the

Charitable and Religious Trusts Act 14 of 1920. The Mutavalli, resisted that application contending that the Charitable and Religious Trusts Act

was applicable only to a trust purely for public purposes, but a deed in that case was a mixed wakf created partly for public purposes and partly

for private purposes and that consequently it would not fall under the Charitable and Religious Trusts Act, but would fall only under Act 42 of

1923. The matter was referred to a Full Bench, and the Full Bench accepted the contention of the Mutavalli on a comparison of the relevant

provisions of the Charitable and Religious Trusts Act and the Mussalman Wakf Act 42 of 1923. It was in that connection that they observed at p.

446 (of ILR Luck) = (at p. 228 of AIR):

The conclusion which we draw therefore is that the Act 6 of 1923 deals with a trust by a person professing the Mussalman faith whatever its

purpose, public or private or partly public and partly private. On the other hand, the Act of 1920 covers such trusts only as are created or exist for

a public purpose only.

It will be seen that non contention was advanced by the Mutavalli in the case that the wakf would not fall even under Act 42 of 1923, on the

ground that it was a wakf under S. 3 of the Mussalman Wakf Validating Act 6 of 1923. It was evidently not possible for the Mutavalli to put

forward such a contention, because the private beneficiaries were only dependants and servants of the testator and they would not answer the

description of ''family, children or descendants'' occurring in S. 3(a) of the Mussalmal Wakf Validating Act 6 of 1913.

(29) Thus, the Full Bench in ILR (1929) Luck 429 = AIR 1929 Oudh 225 was not called upon to decide the question whether a wakf providing

partly for the maintenance and support of the family, children or descendants of the wakif, and simultaneously for religious and charitable objects,

would not fall under S. 3(a) of Act 6 of 1913. The observations at p. 446 (of ILR Luck) = (at p. 228 of AIR), that Act 42 of 1913 applies to a

wakf created partly for public and partly for private purposes must be understood with reference to the question before the Full Bench, namely,

whether such a wakf would attract the Charitable and Religious Trusts Act, 1920.

(30) The position, therefore, seems to be this: A wakf making provision simultaneously for the family children or descendants of the wakif, and for

religious and charitable acts, will be a valid wakf under Sec. 3(a) of the Mussalman Wakf Validating Act 6 of 1913, vide AIR 1937 Oudh 454.

Act 42 of 1913 will, however, apply to other kinds of ''mixed wakfs'' that is, wakfs providing partly for public purposes and partly for the benefit

of individuals who do not answer the description of ''family, children or descendants'' of the settlor. To such a ''mixed wakf'' the provisions of the

Charitable and Religious Trusts Act, 1920 will not apply.

(31) In Ali Bakhtear and Others Vs. Khandkar Altaf Hossain and Others, an application filed before the District Judge by certain Mussalman

inhabitants as interested in a certain wakf against the mutavalli under Act 42 of 1923 was thrown out by the District Judge on the ground that it was

saved from the operation of Act XLII of 1923, because the wakf was of the nature described in S. 3 of the Wakf Validating Act 6 of 1913, it was

partly a public and partly a private wakf. Reversing this decision of the District Judge, the Bench held that to such a mixed wakf the provision of

Act 42 of 1923 applied, and they relied on the decision of the Full Bench in ILR (1929) Luck 429 = AIR 1929 Ouch 225. Mitter, J., at p. 793 (of

ILR Cal) = (at p. 582 of AIR) observed:

We are of opinion that Sec. 3 of the Mussalman Wakf Validating Act applies to wakfs, which are in the nature of family settlements pure and

simple, where the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a

religious, pious or charitable purpose of a permanent character.

I have endeavoured to point out (with great respect to the learned Judges) that this may not be a correct statement in so fare as it suggests that a

mixed wakf providing for simultaneous gift for the family children and descendants, and for religious and charitable acts will not be a valid wakf

under Sec. 4 of the Mussalman Wakf Validating Act 6 of 1913. I have also explained what, in my opinion, is the true scope of the two Acts in

question, namely, Act 6 of 1913 and Act 42 of 1923. I have also explained that the Full Bench does not consider any question under Act 6 of

1913.

(32) Haji Kadir Murthuza Hussain Saheb, represented by his power of attorney agent, M.G. Hasan Vs. Mohammed Murthuza Hussain Sahib, is a

decision of King, J., of this Court, where the income from the wakf properties went partly to charitable purposes and partly for the maintenance of

the family of the creator of wakf. The application under Act 42 of 1923 was thrown out by the learned District Judge on the ground that the wakf

was saved from the provisions of Act 42 of 1923 inasmuch as the wakf fell under S. 3 of Act 6 of 1913. King, J., reversed the decision of the

learned District Judge. he observed:

It seems to me that this view is mistaken, that S. 3(a) of Act 6 of 1913 cannot apply to wakfs which subserve two purposes partly charitable and

partly private, but must apply to wakfs originally designed to serve one purpose only and that is private. For the maintenance and support wholly

or partially of his family, children or descendants describes two possible sizes of wakfs, the first one being sufficiently large to maintain the family

completely and the second one being insufficiently large for this purpose. That this must be the meaning of the phrase seems to me clear from the

use of the word ''ultimate'' in the proviso. The proviso is: ''Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the

poor or for any other purpose recognised by the Mussalmal law as a religious, pious or charitable purpose of a permanent character''. The

existence of this provision in the section shows, I think, beyond all possibility of dispute that the wakfs which the section validates are those which

are primarily and wholly for the purpose of supporting and maintaining the family, children or descendants of the creator of the wakf. All that the

Act requires is that in case the family should one day become extinct there should be a provision in the wakf for the benefit of some religious, pious

or charitable purpose. I am of opinion, therefore, that the learned District Judge was wrong in holding that this wakf was excluded from the Act.

(33) With great respect to the learned Judge, I am unable to accept his interpretation of the words ""wholly or partially"" in Sec. 3(a) of Act 6 of

1913, as qualifying the words ""maintenance and support""; on the other hand, it seems to me that the words ""wholly or partially"" have application

only to the income of the properties settled under the wakf. In other words, ''wholly'' will refer to a type of wakf where the entire income for the

time being is devoted to the maintenance and support of the family, children or descendants of the settlor, wakf where only part of the income for

the time being is so devoted, the other part being devoted simultaneously for religious or charitable purpose.

(34) I have discussed the point already and I need not repeat the reason. The decision of King, J., cannot stand in view of the decision of the

Bench in Syed Ahmed and Another Vs. Julaiha Bivi and Others, . I respectfully follow the Bench decisions and also the decision in AIR 1937 454

(Oudh) and the observations in Mohammad Sabir Ali Vs. Tahir Ali and Others, already quoted, namely, that the words ''wholly or partially'' in S. 3

of the Act have reference to the income of the wakf property and not to the ''maintenance and support'' of the wakif and others.

(35) In AIR 1944 Bom 91 the deed of dedication directed that the trustees should apply not less than half the net income towards the

establishment, continuance and maintenance at Surat of a charitable dispensary and hospitals and divide the balance of the net income into eight

equal shares between the settlor''s sons and daughters during their respective lives and after their death among their legitimate lineal descendants,

provided that in case of failure of descendants of the settlor the whole of the balance of that net income was to be applied for the purpose and

benefit of the dispensary and hospital. The learned District Judge acting under the provisions of the Mussalman Wakf Act 42 of 1923, called upon

the trustees to pay contribution in respect of half of the income of the trust properties on the ground that at least half the income of the trust was

independent of any family obligation and was, therefore, not saved from the operation of Act 42 of 1923 by virtue of the exception in the definition

of ''wakf'' in Act 42 of 1923 exempting a wakf of the nature described in S. 3 of the Mussalman Wakf Validating Act 6 of 1913. This decision

was upheld by Lokur J. The decision may be justifiable on the peculiar facts of the case, and if the observations of the learned Judge may be

understood as being confined to the particular order of the learned District Judge, I have no comment. But Lokur J. also quotes the observations of

Mitter J. in Ali Bakhtear and Others Vs. Khandkar Altaf Hossain and Others, that Sec. 3 of the Mussalman Wakf Validating Act 6 of 1913 would

apply to a family settlement pure and simple where the entire income is intended for the family, and that where it is a mixed wakf with a concurrent

gift for a public purpose, the provisions of Act 42 of 1923 would apply. Lokur J. also observed that that was also the view taken by the Full

Bench in ILR (1929) Luck 429 = AIR 1929 Oudh 225. With great respect, for the reasons already pointed out, I would express my dissent from

these observations.

(36) Thus, the first line of argument of Sri Ismail for saying that Ex. A-22 will not be a valid wakf-alal-aulad under S. 3(a) of the Mussalman Wakf

Validating Act of 1913 must fail.

(37) The second line of argument is that, while the plaintiff and the plaintiff''s sister may answer the description of the wakif''s family within the

meaning of S. 3(a) of the Mussalman Wakf Validating Act of 1913, the same cannot be said of the plaintiff''s descendants or the plaintiff''s sister''s

descendants. The submission is that the collocation of the words ""his family, children or descendants"" show that the word ""descendants"" will take in

only the descendants of the settlor, and that the descendants of the existing members of the family of the settlor was meant to be excluded by the

Act. In support of this contention the learned counsel relies on the observations of Malik J. in Rahmanul Hasan v. Zahurul Hasan, AIR 1947 All

281. The learned Judge says:

The question is whether Mt. Masiban and her descendants could be included in the term ''family''. The word ''family'' has not been defined in the

Act. It is surprising that the Legislature should have used a term, which, though in a sense has a well-defined meaning, is a term of great flexibility

and is capable of many different meanings according to the connection in which it is used. The meaning of the word came to be considered in two

cases by this Court. (See Mt. Musharraf Begam and Others Vs. Mt. Sikandar Jehan Begam, and Dhurjati Upadhiya Vs. Ram Bharos Pande and

Others, . It is no doubt true that the word ''family'' has been interpreted in a very wide sense, but it could not be said that it would include any and

every relation by blood or marriage howsoever remote and all their descendants should be included in that term. Though the rule against

perpetuities may be inapplicable in the case of the lineal descendants of the wakfs, I do not think the section was intended to give the same

exemption to the descendants or members of his family, generation after generation, and yet unborn"".

But the above observations more or less stand alone and the weight of authority is in favour of the view that the term ''family'' indicates persons

descended from one common progenitor having a common lineage. Thus, in this case the plaintiff is the settlor''s elder brother''s son, and,

therefore, the plaintiff and the settlor can trace their descent from one common progenitor. Similarly the plaintiff''s descendants and the settlor cant

race their descent from one common progenitor. So too, the plaintiff''s sister and her descendant and the settlor can trace their descent through one

common progenitor. Of the cases which have decided this, it is enough to cite Ghazanfar Husain Vs. Mt. Ahmadi Bibi and Others ILR 1942 Bom

441 = AIR 1942 Bom 155, Asha Bibi and Others Vs. Nabissa Sahib and Others, and Abdul Qavi Khan Vs. God Almighty through Asaf Ali

Khan and Others, .

(38) In Ghazanfar Husain Vs. Mt. Ahmadi Bibi and Others , the question was whether the prevision for the maintenance of the three nephews of

the settlor and all their descendants, generation after generation, would be a valid wakf under Sec. 3(a) of the Mussalman Wakf Validating Act VI

of 1913. Answering the question in the affirmative, the learned Judges observed at page 379 (of ILR All) = (at p. 175 of AIR)

We are of opinion that the word ''family'' was intended to be used in this section in a very large and extensive sense. The policy of the Act was to

validate the creation of a wakf in perpetuity in favour of persons who happened to be the members of the family according to the popular

acceptance of that term. Technically, the word ''family'' may be taken to mean the collective body of persons who live in one house and under one

head or manager; and includes within its fold a household consisting of parents, children and servants, and, as the case may be, lodgers or

boarders. Popularly however, the nephews of the settlor are in this sense the members of his family. It could never have been the object of the

Legislature to exclude persons who were related by blood merely by reason of the fact that they did not reside in the house of the settlor or that the

settlor was not normally responsible for their maintenance. There is nothing in Sec. 3(a) to indicate that any such limitations were in the

contemplation of the Legislature. If these limitations are introduced, the result would be to considerably narrow down the scope and utility of the

Act. The word ''descendants'' in Sec. 3 Clause (a) has some bearing upon the question under consideration. it clearly indicates persons descended

from the settlor both in the male and the female line. A descendant is an individual, irrespective of the sex, proceeding from an ancestor in any

degree. The daughter''s son and daughter''s daughters do not reside in the same house as the settlor and have no claims upon his bounty. It is clear

that descendants in the female line not residing in the house of the settlor and not maintained by him are within the Act and cannot be excluded from

its purview"".

(39) In ILR 1942 Bom 441 = AIR 1942 Bom 155, Chagla J. (as he then was), followed the above decision and held that Hoosen Noor

Mohamed, the sister''s son of the testator would answer the description of the family of the testator under Sec. 3(a) of Act VI of 1913. On the

death of Hoosen Noor Mahomed, his heir was his paternal uncle''s son, Umar Abdulla. Chagla J. pointed out that Umar Abdulla and the testator

could not trace their descent from a common progenitor, nor were there any ties of kinship between them; hence Umar Abdulla could not answer

the description of the family of the settlor. The learned Judge proceeded to observe that because the disposition in favour of the heirs of Hoosein

Noor Mahomed was void, the provision for the ultimate benefit of the charity also fail.

(40) So far as the present case is concerned, it will be noted that the words used in respect of the persons to succeed the plaintiff are his (Words in

Tamil Omitted) which means the descendants and this is also the term used in respect of the persons who have to succeed the plaintiff''s sister. The

word (Santhathigal) can properly be translated as descendants and not heirs, and so the ground on which Umar Abdulla was held not to be a

member of the settlor''s family by Chagla J. will not affect the descendants of plaintiff or the descendants of the plaintiff''s sister in this case.

(41) Asha Bibi and Others Vs. Nabissa Sahib and Others, ; was a Bench decision, where, after directing that the trustee shall be appointed from

qualified Muslims of Tanjore, including applicants from the founder''s family, the learned Judges proceeded to indicate what they meant by the term

family"". They observed at page 587:

The term ''family'' will be construed in the sense of ''family'' used in Sec. 3(a) of the Mussalman Wakf Validating Act 1913, which was intended to

be used in a very large and extensive sense. The policy of that Act was to validate the creation of a wakf in perpetuity in favour of persons who

happened to be the members of the family according to the popular acceptance of that term. Technically the word ''family'' may be taken to mean

the collective body of persons who live in one house and under one head or manager; and includes within tits fold a household consisting of

parents, children and servants and, as the case may be, lodgers or boarders. Under the Muhammadan Wakf Validating Act, it is intended to be

used in a broad and popular sense. Popularly, however, the term indicates persons described from one common progenitor and having a common

lineage. It will take in both agnates and cognates and relations by blood or marriage. The nephews of the settlor are in this sense, the members of

his family, similarly daughters-in-law, the son of a half brother or the son of a half sister"".

They quoted a number of cases, including ILR (1930) All 368 = (AIR 1930 All 169 and ILR 1942 Bom 441 = AIR 1942 Bom 155. There is thus

the authority of a Bench of this Court in support of the view expressed in Ghazanfar Husain Vs. Mt. Ahmadi Bibi and Others followed in ILR 1942

Bom 441 = AIR 1942 Bom 155, that the term ''family'' will indicate persons descended from one common progenitor and having a common

lineage.

(42) In Abdul Qavi Khan Vs. God Almighty through Asaf Ali Khan and Others, , there is an exhaustive discussion of the case law. In that

particular case, however, the question was limited, namely, whether one Fatima the step daughter of the sister of wakif No. 1, who had been

brought up from her childhood by wakif No. 1, as her child, was a member of the family. It was held that she was a member of the family of wakif

No. 1. It was also held that her descendants as such would not ipso facto become members of the settlor''s family. The learned Judge, however

dissented from the view of Chagla J., that the failure of the disposition in favour of such descendants would invalidate the ultimate benefit for the

charities. The learned Judges took the view that on the failure of the intermediate disposition in favour of Fatima''s descendants, the ultimate benefit

of the charity would be accelerated.

(43) In view of these decisions, I have no hesitation in holding that the plaintiff and his descendants as also the plaintiff''s sister and her descendants

will belong to the settlor''s family within the meaning of Sec. 3(a) of Act VI of 1913 and therefore Ex. A-22 cannot be said to be an invalid wakf-

alal-aulad, under Act VI of 1913, on the ground that they do not belong to the members of the settlor''s family.

(44) I have thus shown that Ex. A-22 is a wakf alal-aulad under Sec. 3(a) of the Mussalman Wakf Validating Act VI of 1913. That is sufficient for

the disposal of the appeal. It may however be necessary to consider the question if it arises whether the term wakf-alal-aulad used in Sec. 3(1)(iii)

of the Act XXIX of 1954 must be confined to a wakf validated under Sec. 3 of Act VI of 1913, or will take in some other kinds of wakf alal-

aulad. Act XXIX of 1954 does not say that wakf alal aulad means only a wakf validate d under Sec. 3 of Act VI of 1913. In this conection it is

worthwhile noting that Ameer Ali in his learned treatise on Mohammedan law, 4th Edn., 1912, Volume 1 Page 276 says that a valid wakf may be

made in favour of:

(a) a Mussalman or a Zimmi, but not in favour of an alien or Harbi (an inhabitant of the Darul Harb); (b) one''s children and descendants male and

female, born or unborn; (c) similarly, other people''s children and descendants; (d) heirs as well as non-heirs; (e) one''s kindred, neighbour etc., (f)

strangers; (g) one''s dependants, servants etc., and (h) under the Hanafi law in favour of the wakif himself first, and then for other objects, in other

words, a wakif may constitute himself the first beneficiary of the trust.

(45) Similarly it will be seen that the wakf in ILR (1929) Luck 429 : AIR 1929 Oudh 225 was partly a wakf in favour of the wakif''s dependents

and servants, and in the order of reference it was stated, ""Under the Mohamedan law, a wakf may be constituted in favour of one''s children and

also kindred, neighbors, dependants, servants etc.

(46) The test propounded by Sri Ismail of primary intention for deciding whether a wakf will fall under the main definition in Section 3(1) of Sec.

3(1)(iii) of Act 29 of 1954 does not enable us to determine who could be the beneficiaries under a wakf alal-aulad. The criterion of primary

intention may perhaps he useful in some cases, but it may fail in some cases, where, for instance, the provision for the family is half and the

provision for religious and charitable purposes is half. For the purpose of the application of the Act, it may always be necessary to resort to this

criterion of primary intent and it seems to me that it may not make much difference from the practical point of view which criterion is applied,

because under Sec. 15(2)(d) of the Act, the Board is empowered to settle schemes of management for a wakf, and subject to the result of a suit

under sub-sec. (3) and from the particle point of view, the Board may perhaps legitimately claim jurisdiction to settle a scheme even in the case of

what would readily be considered a wakf alal aulad under Sec. 3(1)(iii) of Act 29 of 1954. That jurisdiction is conferred on the Board as the wakf

alal aulad would be a wakf for the purpose of Act to the extent to which the property is dedicated for any purpose recognised by Muslim law as

pious, religious or charitable, and for the proper administration and discharge of the responsibility the Wakf Board has been given such a power.

(47) The decision in Haji Sheikh Ibrahim Sahib''s Private Trust Tanjore Vs. Madras State Wakf Board, Madras, , does not in my opinion contain

anything to invalidate my view that the deed in this case, Ex. A-22, will be a wakf alal aulad under Sec. 3(1)(iii) of Act 29 of 1954.

(48) Since the deed is a wakf alal aulad and it would be a wakf only to the extent to which the property is dedicated for the religious and charitable

acts mentioned in the deed, it will be necessary for the Court to determine that extent in the present litigation itself. I am unable to agree with the

submission of Sri Ismail that such a determination is foreign to the scope of the suit. The plaintiff came forward with a case that Ex. A-22 was not a

valid wakf at all. On the other hand, the Board contended that it was a wakf in its entirety and no portion of the income could be claimed by the

plaintiff or his descendants or the plaintiff''s sister and her descendants. Under these circumstances, it is the duty of the Court to declare the true

position and to ascertain the extent to which the property may be held to have been dedicated for the religious and charitable purposes mentioned

in the deed. Sections 15(3) and 27(2) of the Act are further indications that the Court should made a declaration and ascertain it, in this suit itself.

After all, the whole matter has come up before the Court, and there is no reason, why the question should not be decided now. Indeed, if the

question is not decided, the plaintiff may be faced with a plea of res judicata in any future suit which he may being.

(49) Overruling the contention of the Wakf Board, I declare that Ex. A-22 is a wakf alal aulad under Sec. 3(1)(iii) of Act 29 of 1954, and the suit

is remanded to the trial Court (Dt. Munsif of Vellore) for determination of the extent to which the property has been dedicated for the religious and

charitable purposes mentioned in the deed. The appeal is allowed partly to this extent. The parties will bear their own costs in the appeal. Leave to

appeal is granted to both sides. Board''s counsel''s fee Rs. 500 (for senior) plus junior''s fee Rs. 150.

(50) Appeal partly allowed.