Bibi Saddiqa Fatima

Vs

Saiyed Mohammad Mahmood Hasan

Civil Appeal No. 2462 of 1968

(R. S. Sarkaria, N. L. Untwalia, P. N. Kailasam JJ)

03.05.1978

JUDGMENT

UNTWALIA, J. -

1. This is an appeal by special leave. Bibi Saddiqa Fatima, the appellant, was the plaintiff in Suit 86 of 1952 filed in the Court of the Civil Judge at Aligarh, in which the defendant was Saiyed Mohammad Hasan. He was the sole respondent in this appeal also. He died during the pendency of the appeal and on his legal heirs and representatives were substituted as respondents. For the sake of convenience hereinafter in this judgment by the respondent would be meant the original respondent.

2. One Smt. Sughra Begum was a Shia Muslim lady. She was a resident of Asgharabad in the District of Aligarh. She was possessed of vast Zamindari and other properties. On October 6, 1928, she created a waqf of the entire properties dividing them in three quarras. Raja Haji Saiyed Mohammad Mahmood Hasan was appointed by the waquifa as the Mutawalli of qurra No. 1. His brother was appointed the Mutawalli of the second qurra. The waquifa appointed herself the Mutawalli of the third qurra. The dispute in this case relates to a property concerning qurra No. 1. The Raja's first wife was Smt. Akbari Begum. She died in the year 1931 leaving behind four sons and six daughters. Raja Sahib, when he was about 50 years of age, took the plaintiff as his second wife in the year 1933. The plaintiff, at the time of her marriage with the Raja, was a young lady of seventeen. Raja died in September 1939. On January 22, 1935, a permanent lease was executed on behalf of one Saiyed Anwarul Rahman in respect of the disputed land in the name of the plaintiff. The rent fixed was Rs. 80 per year. Between the years 1937 and 1939 a Kothi (Bungalow) was constructed on the said land, which was named as 'Mahmood Manzil'. The suit property in this litigation is the said Kothi together with the land appertaining to it.

3. In short the plaintiff's case is that the disputed property belongs to her. The defendant was inducted as a tenant of a Kothi on and from March 1, 1947 on a rental of Rs. 60 per month. He paid rent up to May, 1950 but did not pay any rent thereafter. In the year 1952, the plaintiff served a notice on the defendant to pay the arrears of rent and deliver vacant possession of the Kothi. The defendant, in his reply, refuted the claim of the plaintiff and asserted that the Kothi did not belong to her not was he a tenant of the same. Hence the appellant instituted the suit for realization of arrears of rent, damages and recovery of possession of the suit property. The respondent, inter alia, pleaded that Raja Sahib, the Mutawalli of qurra No. 1, had acquired the lease of the constructed the Kothi with the waqf fund as Mutawalli of the waqf. It was a waqf property. After the death of the Raja, the respondent became the Mutawalli of qurra No. 1 including the Kothi in question. He occupied the Kothi as a Mutawalli and not as a tenant. The trial Court accepted the case of the defendant, rejected that of the plaintiff and dismissed her suit. The Allahabad High Court has dismissed her appeal. She

has preferred this appeal in this Court on grant of special leave.

4. Shri M. N. Phadke advanced a very strenuous argument in support of this appeal. Shri Lal Narayan Sinha combated his argument, on behalf of the respondent. It would be convenient to refer to some more facts and facets of the case from the pleadings of the parties and judgments of the courts below before enunciating and enumerating the submissions made on their behalf.

5. The case pleaded in the plaint by the appellant was like this. Raja Sahib out of great love for the plaintiff "used to pay her a handsome amount every month as pin-money and also a good deal of money occasionally". The plaintiff, with the object of constructing a Kothi, took on lease the disputed land measuring about 4 bighas and had been paying the annual rent of Rs. 80 since the execution of the lease. She pleads in para 4 :

> After the execution of the said lease, the plaintiff with her personal fund built a Kothi and the outhouses on the land mentioned in Paragraph 3 above and named it as Mahmood Manzil after the name of her husband. The construction of this Kothi had been completed by May 1938, after which the plaintiff herself used to stay in that Kothi whenever she came from Asgharabad to Aligarh.

The plaintiff had only one daughter born to her out of the wedlock with the Raja. She is Smt. Abrar Fatima. She was married on May 25, 1950 to one Saiyed Mohammad Raza Ali Khan. The defendant was quite obedient and faithful to the plaintiff until the marriage of her daughter. But after the said marriage, he gradually turned hostile and thereupon the plaintiff mostly lived with her daughter. According to the respondent's case in his written statement the lease was taken by Raja Sahib and the sum of Rs. 786 spent on 'Nazrana' etc. for taking the lease was paid by him from the income of the waqf property and he constructed the Kothi from the waqf fund of Asgharabad estate. He had neither any money of his own to invest in acquisition of the property now was the property acquired by the plaintiff with her personal fund.

6. The appellant was examined on commission as a witness to support her case at the trial. In her examination-in-chief, she stated that her husband used to give her Rs. 500 per month as pin-money besides, meeting her expenses regarding food and clothing. Over and above this, he used to send money on the occasions of Id and Bakrid and also gave her money whenever she demanded. She constructed the Kothi at Aligarh by investing about Rs. 20,000. In other words she meant to convey in her examination-in-chief that she had acquired the land and constructed the Kothi out of the savings she had from the various amounts of money given by the Raja monthly or from time to time. At a later stage of her deposition (probably in cross-examination) she demolished her case and claimed to be in possession of Rs. 50,000 at the time of the death of her husband, which sum was her total savings out of the money paid to her monthly or from time to time by the Raja. Thus in her evidence she could not explain as to out of which personal fund she claimed to have acquired the disputed property.

7. The Civil Judge framed for trial several issues out of which issues 1 and 5 were in the following terms :

> 1. Whether the plaintiff is the owner of the property in suit as alleged and is she entitled to the possession claimed ?
>
> 2. Whether the defendant possesses the disputed property as the 'Mutawalli' as

alleged by him ?

The defendant's case was that the 'patta' was obtained by the old Raja under the influence of his young wife benami in her name though it was acquired with the waqf fund. The Raja, as Mutawalli, was the real lessee of the land. He had constructed the Kothi out of the income of the waqf property of the waqf was there from before or acquired subsequently must, ordinarily, be in the name of the Mutawalli. A property could be acquired in the name of any beneficiary, like the plaintiff, but she would be merely a benamidar of the Mutawalli and the property will be a waqf property. The Civil Judge has noted in his judgment that the plaintiff did not put forth a plea that the Kothi was built by the late Raja out of his personal money and that she was its owner, on the basis of the equitable doctrine of advancement. He has said further :

Thus the only point on which the parties were at issue was with respect to the source of the money out of which the patta was obtained and the building constructed and the plaintiff could succeed only if she proved that she had obtained the patta and built the Kothi out of the money given to her by her husband as pocket expenses, etc.

The Civil Judge also remarked :

> Had she stated that she built the Kothi out of the money which she had saved, that would have been consistent with her allegations in the plaint. But she admitted that the whole of her savings were still with her and that out of them she had spent a little when she filed the present suit.

The trial Court, thereafter, considered the voluminous documentary evidence in the light of the oral evidence adduced and came to the conclusion that the plaintiff did not provide any money either for the lease of the land or for the construction of the Kothi thereon and that the money for both the purposes was provided out of the waqf estate. Hence it was held, while deciding issues 1 and 5, that the plaintiff was not the owner of the Kothi in suit and the defendant was in possession of it in his capacity as the successor Mutawalli.

8. It would be advantageous to note at this stage the stand taken by the appellant in the High Court in her Memorandum of Appeal as also in argument. On perusal of the grounds set out in the Memorandum of Appeal, especially ground Nos. 6, 8, 9, 11, 13 and 27, it would appear that the case made out therein was that the Raja had his personal money kept in the waqf estate treasury alongwith the waqf money. The amount spent in constructing the Kothi was mostly taken out of the treasury from his personal fund with the intention of making his wife the owner of the property even though the doctrine of advancement did not apply in India, and that the observation of the learned Civil Judge that the plaintiff failed to prove that she did not provide any money out of her personal fund was wholly irrelevant for the decision of issue 1. In argument, however, a stand like the one taken in the trial Court was reiterated but consistently and concurrently rejected because the evidence in favour of the defendant's case was so overwhelming to show that the lease had been taken and the Kothi had been constructed with the money coming out of the waqf fund that no other view was reasonably probable to be taken. At one place in its judgment the High Court says - "Counsel for the appellant has strongly relied on these documents in proof of the fact that the Kothi was constructed with her money and belonged to her."

9. In the teeth of the overwhelming evidence the appellant was obliged to take an entirely new stand in her petition for special leave and in the argument before us. In paragraph 23 of the petition it was

stated :

> That the case of the applicant had been that the lease was obtained with the applicant's funds and that she had constructed the Kothi with her own money and it was also her alternative case put forward before the Hon'ble High Court that even if it be assumed that the money utilised for constructing the Kothi did not pass directly from the plaintiff's hand and even if it be the finding of the Court that the money so utilised had proceeded from Raja Mahmudul Hasan then on the admitted case ought to have been decreed inasmuch as on the ground that the usufruct or the profit of the waqf property though arising out of the waqf property did not belong to waqf as waqf property but it was by its very nature the property of the beneficiary and in the absence of any evidence to the contrary Raja Mahmudul Hasan held those funds for the beneficiaries and the amount spent by him in the construction of the Kothi should be the money belonging to the applicant.

10. Mr. Phadke made the following submissions :

> (1) The Raja intended to acquire the land on lease and construct the Kothi for the plaintiff by investing from time to time money taken out of the waqf estate treasure, which had the effect of disbursement and payment of the money by the Mutawalli to his wife, the beneficiary, for the purpose of the acquisition of the Kothi. The source of money in that event is immaterial.
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> (2) The intention of the Raja to provide a separate Kothi to the plaintiff evidence by numerous documents taken and standing in her name must be respected.
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> (3) The Raja went on giving money in driblets for construction of the Kothi by taking out the money from the waqf fund from time to time. It was open to him to do so in accordance with Clause 18 of the waqf deed Ext. A-2.
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> (4) The intention of the Raja is further fortified by the recital in his will Ext.15.
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> (5) That there is a number of circumstances in support of the contentions aforesaid.
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> (6) The rules of pleading should not be too strictly applied in India and no party should be defeated on that account when both sides adduced evidence and proceeded to trial of the real issues in the case with their full knowledge and understanding.
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> (7) That there is no substantial variance in the case made out in the pleadings and the evidence and in argument either in the courts below or in this Court.
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> (8) The burden of proof to displace the ostensible title of the appellant and to show that she was a benamidar was on the respondent. In absence of any clinching evidence on either side, the ostensible title prevails.
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> (9) Although the doctrine of advancement does not apply in India, the Mutawalli being the owner of the waqf property had full and unlimited power of disposal over its usufruct and income.

11. Mr. Lal Narayan Sinha, while refuting the submissions made on behalf of the appellant,

contended that it is a settled law that the question whether a particular transaction is benami or not is purely one of fact and this Court in exercise of its jurisdiction under Article 136 of the Constitution does not, ordinarily and generally, review the concurrent findings of the courts below in that regard. Counsel submitted that the courts below had correctly applied the Muslim Law applicable to Shias in respect of the waqf property and its income. They have rightly come to the conclusion that the suit property appertained to the waqf. It was clear, according to the submission of Mr. Sinha, that the parties went to trial to prove their respective cases as to whether the property had been acquired with the personal funds of the plaintiff or those of the waqf. The plaintiff's case failed in view of the overwhelming evidence against her and she should not be permitted to make out an entirely new case in this Court. He also contended, firstly, that the theory of onus probandi is not strictly applicable when both parties have adduced evidence; in such a situation it becomes the duty of the Court to arrive at the true facts on the basis of reasonable probabilities. Secondly, in the instant case the strict tests to prove the benami character of the transaction cannot be applied, as, to do so will be in the teeth of the well-settled principles of Mahomedan law in relation to waqfs.

12. We proceed to examine the correctness of the rival contentions of the parties but not exactly in the order it has been stated above.

13. It is undisputed in this case that a valid waqf was created by Smt. Sughra Begum. It is further indisputably clear from the waqf deed that except a portion of money which was to be spent for public, religious or charitable objects the waqf was primarily of a private nature for the benefit of the settlor's family and their descendants, which is called waqf-alal-aulad. The ultimate object of the waqf was to spend income, if any, in the service of the Almighty God. In Abdul Fata Mahomed v. Rasamaya (22 IA 76 : ILR 22 Cal 619), their Lordships of the Privy Council held that the gift to charity was illusory, and that the sole object of the settlor was to create a family settlement in perpetuity. The waqf of this kind was, therefore, invalid. The decision aforesaid caused considerable dissatisfaction in the Mahomedan community in India. This led to the passing of the Mussalman Wakf Validating Act, 1913 which was made retrospective in operation by a subsequent Act of 1930. In view of the Validating Act of 1913 the validity of the waqf was beyond the pale of challenge.

14. Although in respect of the law applicable to waqfs there is some difference in regard to some matters between the Shia law and the various other schools of Mahomedan law applicable to Sunnis, in very many fields the law is identical. After the Validating Act of 1913, on the basis of the law as it prevailed even before, creation of a waqf for the purpose of the maintenance of the members of the waqif's family and their descendants is also a charitable purpose. We now proceed to notice some salient features of the law as applicable to waqfs and especially of the Shias.

15. Tyabji's Muslim Law, Fourth edition, Chapter X, deals with waqf. According to Shia law the waqf is irrevocable after possession is given to the beneficiaries or the Mutawalli. The settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the waqf is created. In purely metaphorical sense the expression "ownership of God" is used but unlike Hindu Law, since conception of a personal God is not recognized, there is no ownership of God or no property belongs to God in the jural sense, although "the ownership of the property becomes reverted in God as he is originally the owner of all things" (vide page 523). The Shia authorities considered the property as transferred to the beneficiaries or to the object of the waqf. Strictly speaking, the ownership of the waqf property has no jural conception with any exactitude. The corpus is tied down and is made inalienable. Only the usufruct and the income from the corpus of the waqf property is available for carrying out the objects of the waqf. The Sharaiu' I-Islam says :

> Waqf is a contract the fruit or effect of which is (a) to tie up the original and (b) to leave its usufruct free; "the waqf or subject of appropriation (corpus) is transferred, so as to become the property of the mowkoof alehi, (or 'person on whom the settlement is made') for he has a right to the advantage or benefits (usufruct) to be derived from it. (vide Page 494). In the foot note at the same page occurs a passage which runs thus :
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> But it should not be overlooked that question about ownership of property after dedication, refers merely to scintulla juries, supposed to remain undisposed of, although entire usufruct, (all benefits, etc.) are assigned away. Question in whom property rests, is therefore, entirely academical.

16. A Mutawalli is like a Manager rather than a trustee (see page 498). The Mutawalli, so far as the waqf property is concerned, has to see that the beneficiaries got the advantage of usufruct. We have already pointed out that under the Shia law the property does not remain with the waqif. It is transferred to God or to the beneficiaries. At page 554 of Tyabji's famous book it is stated :-

> The support and maintenance of the waqif's family, etc. would seem under the Act to be deemed a purpose recognized by the Muslim law as religious, pious or charitable : Section 2. This view was put forward by Ameer Ali, J., with great learning in his dissenting judgment in Bikani Mia's case.

Section 527 at page 593 runs thus :

> The Mutawalli has no ownership, right or estate in the waqf property : in that respect he is not a trustee in the technical sense : he holds the property as a manager for fulfilling the purpose of the waqf.

A contrary statement of law at page 202 of Mulla's Mahomedan Law, seventeenth edition based on the decision of the Allahabad High Court in Mohammad Qamar Shah v. Mohammad Salamat Ali Khan (AIR 1933 All 407 : 1933 ALJ 685 : 55 All 512) to the effect that "the Mutawalli is not a mere superintendent or manager but is practically speaking the owner" is not a correct statement of law. In a later Full Bench decision of the same Court in Moattar Raza v. Joint Director Consolidation, U. P. Camp at Bareilly (AIR 1970 All 509 : 1969 ALJ 1148 : 1969 All WR (HC) 905) while over-ruling the earlier decision, it has been said at pages 513-14 : "the legal status and position of a Mutawalli under a waqf under the Musalman Law is that of Manager or Superintendent." The general powers of the Mutawalli as mentioned in Section 529 of Tyabji's book are that he "may do all acts reasonable and proper for the protection of the waqf property, and for the administration of the waqf."

17. It will be useful to point out the law as regards distribution of distributable income of the waqf properties amongst the beneficiaries as mentioned in the various sub-sections of Section 545 at pages 606-608. Unless a different intention appears, sub-section (4) says :-

> The benefit of waqf for a person's sons and his children, and the children of his children for ever so long as there are descendants, is taken per capita, males and females taking equally and the children of daughters being included.

18. Attention must be called to an important statement of law in the well-known authoritative book of Mahomedan Law by Ameer Ali, Vol. 1, fourth edition, page 472. It runs thus :

> It is lawful for a Mutawalli with the income of a waqf to erect shops, houses, etc., which may yield profit to the waqf, as all this is for the benefit of the waqf. All properties purchased by the Mutawalli out of the proceeds of the waqf become part of the waqf and are subject to the same legal incidents as the original waqf estate.

19. Mr. Phadke cited the decision of this Court in Ahmed G. H. Ariff v. C. W. T. ((1969) 2 SCC 471 : (1970) 2 SCR 19) and contended that the right of the beneficiaries to get money out of the income of the waqf property for their maintenance and support was their property. In our opinion the case does not help the appellant at all in regard to the point at issue. A Hanafi Muslim had created a waqf-alal-aulad and on a proper construction of the relevant clauses in the waqf deed it was held that the aliquot share of the income provided for the beneficiaries was meant merely for their maintenance and support. But even if it was so, it would be an asset within the meaning of Section 2(e) of the Wealth Tax Act, 1957. The definition of the term 'asset' was very wide in the Wealth Tax Act. The share of the income which a beneficiary was getting under the said waqf was assessable to income tax and following the particular method of evaluation it was held to be an asset for the purposes of the Wealth Tax. The question at issue in the present case is entirely different as will be shown and discussed hereinafter. But in support of what we have said above in relation to the waqf property and the position of the Mutawalli we may quote a few lines from this judgment also which are at page 24 :

> As mentioned before, the moment a waqf is created, all rights of property pass out of the Waqif and vest in the Almighty. Therefore, the Mutawalli has no right in the property belonging to the waqf. He is not a trustee in the technical sense, his position being merely that of a superintendent or a manager.

20. It would be convenient to briefly discuss the questions of fact and the evidence in relation thereto before we advert to the discussion of some other questions of law argued before us on either side as those principles of law will be better appreciated and applied in the background of the facts of this case.

21. As has been stated already the evidence is overwhelming on the question as to what was the source of money for the acquisition of the disputed property, either the land or the kothi. It came from the waqf fund. This position could not be seriously challenged before us. What was argued will be alluded to a bit later. We may just cursorily refer to some of the pieces of the evidence on the question aforesaid. Ext. A-35 is a written direction by the Raja to Mahmad Syedullah Tahsildar directing him to debit a sum of Rs. 741 to his personal account for the acquisition of the plot in question. The details of the expenses and the Nazrana money are given therein. The payment was from the funds of the waqf estate. But the Raja made a feeble and futile attempt to get this debit entry made as a repayment of the loan money said to have been advanced by him to the waqf estate. The High Court as also the trial Court has rightly remarked that the entry like Ext. A. 443 was got made by the Raja in the account books of the waqf estate as a fictitious countervailing entry in his attempt to show that some of sums of money which he had withdrawn from the waqf estate were on account of the repayment of his alleged loans. The High Court has rightly pointed out that they were all fictitious entries. Mr. Phadke endeavored to sow that the approximate gross income of the waqf estate was not Rs. 43,515 as is shown by the High Court but it was in the neighbourhood of Rs. 58,000. We shall accept it to be so. Thus the net distributable income at the disposal of the Raja was about Rs. 30,000 instead of Rs. 15,510 mentioned in the judgment of the High Court. There were 13 beneficiaries in qurra No. 1 of which the Raja was the Mutawalli. In that capacity he was getting a monthly allowance of Rs. 70 only from the estate account. He had no other personal property or

source of income from which he could advance any loan to the waqf estate. Nor could it be shown that the waqf estate at any point of time was in need of any loan from the Raja. Therefore, the attempt of the Raja to put a show of acquiring the land in the name of his young wife out of his personal money was a very crude attempt to disguise the real source of that money. The concurrent findings of the courts below that the expenses for the acquisition of the lease were incurred from the waqf estate funds could not be successfully assailed.

22. The High Court has referred next to the question of payment of the land to the lessor. The plaintiff produced six rent receipts. Exts. 13 and 14 were of the year 1952 when disputes between the parties had started. As regards four other receipts the High Court was inclined to believe the explanation of the defendant that the plaintiff had surreptitiously obtained their possession. On the other hand, the defendant filed four rent receipts of the period when the Raja was alive. Since the lease had been taken in the name of the plaintiff, naturally all the receipts were in her name. The High Court has also referred to the satisfaction of a decree for rent obtained by the lessor in a suit instituted against the plaintiff as well as the defendant and has come to the conclusion that the entire decretal amount, the expenses of the auction sale and the costs were deposited in the Court out of the waqf fund.

23. Then comes the evidence regarding the construction of the Kothi. All documents for obtaining permission from the Municipal Board and for electric connection etc. obviously stood in the name of the plaintiff as the lease was standing in her name. As in the High Court, so here, Mr. Phadke strongly relied upon those documents to show that the Kothi was constructed for and on behalf of the plaintiff. As already stated the stand in the High Court was that it was constructed with her money. Here it was a completely different stand. It was urged that the money came from the waqf fund but as and when the money was being spent by the Raja for the construction of the Kothi it amounted in law, as payment of the money by the Raja to his wife and the construction of the Kothi should thus be treated as having been made with her money. We shall scrutinize the correctness of this branch of the argument a bit later. Numerous documents are mentioned in the judgments of the trial Court as also of the High Court to show that every bit of expenditure in the construction of the Kothi came out of the waqf fund under the direction of the Raja. We need not discuss these documents in any detail as the concurrent finding of the courts below could not be assailed in face of these documents and that led the appellant to make a somersault here and to take an ingenuous stand. These documents are Ext. A-49 series : Ext. A-450 series; Ext. A-452; Ext. A-453; Ext. A-455; Ext. A-458; Ext. A-460; Ext. A-463; Ext. A-486; Ext. A-491; Ext. A-493 series; Ext. A-495 and Ext. A-518. Ext. A-3 shows that Ramlal, a mason who had worked as a contractor in the construction of the Kothi instituted a suit for recovery of Rs. 2,917/10, the amount which was not paid during the life time of the Raja. The suit was instituted in the year 1941. It was decreed in 1942. Exts. A-36, A-43 and A-44 are the receipts in proof of the fact that eventually the decree was satisfied by the defendant on payment of money to Ramlal. Ext. A-45 is a similar receipt dated January 2, 1942 showing payment of Rs. 923 by the defendant to Zafaruddin in satisfaction of his decretal dues on account of the construction of Kothi. The plaintiff's claim of the payment of Rs. 2,000 to Ramlal was too slippery to be accepted by the courts below and it need not detain us either. The High Court has also relied upon two letters Exts. A-28 and A-27 written by the Raja to the Supervisor of the building operations indicating that if the foundation of the Kothi was not laid within a certain time, loss would be caused to the Riyasat namely the waqf estate. It may be emphasised here that the countervailing fictitious entries got made by the Raja were very few and far between and the entire amount spent in the acquisition of the Kothi which was in the neighbourhood of Rs. 21,000 (both for the land and the building) could not be shown to be the personal money of the Raja by this spurious method. A major portion of the total amount obviously,

clearly, and admittedly too, had come from the waqf fund. And that compelled the appellant to take an entirely new stand in this Court.

24. We now proceed to deal with the new stand. It is necessary in that connection to refer to some of the important recitals in Ext. A-2, the waqf deed. In the preamble of the document it is recited that the waqf is being created with some religious purposes and for the regular support and maintenance of the descendants of the waqif for all times to come so that they may get their support from generation to generation. The ultimate object is for charitable purposes in the service of the God Fe-sabi-lil-lah. After referring to the Act of 1913 it is stated : "Hence the entire property given below having become Waqf-alal-aulad in perpetuity, has become uninheritable and non-transferable." Each Mutawalli of his respective qurra was appointed "the principal manager with full and complete powers of entire waqf property." From clauses 7 and 13 of the waqf deed it was rightly pointed out on behalf of the appellant, and not disputed by the respondent either, that Rs. 6,000 annually had to be spent by Mutawalli of qurra No. 1 for the religious purposes mentioned therein. This was the first obligation of the Mutawalli before he could apply the rest of the usufruct in the support and maintenance of the family beneficiaries. Then comes the most important clause in the waqf deed namely clause 18. The said clause as translated and printed in the paper book runs as follows :

> Syed Mahmood Hasan the Mutawalli of the first lot is vested with power to fix stipends for his children and their descendant and for his wives during his life-time whatsoever he pleases or to lay-down conditions by means of a registered document or may get any writing kept reserved in the custody of the District Judge, so that after him it be binding upon every Mutawalli; in such case he might not get any writing registered or kept in the custody of the District Judge of the district; then under such circumstances the twenty per cent (20%) of the income of the waqf property having been set apart for the expenditure of collection and realisation and right of the Mutawalliship and the amount of Rs. 6,000 (Rupees six thousand) for meeting the expenditure of 'Azadari' as detailed at Para 7 above; the entire remaining balance will be distributed among the heirs of Mahmood Hasan according to their respective legal share provided under Mohammedan Law.

The High Court referring to this clause has said that the power given to the Raja in Clause 18 could be exercised by him during his life-time in the fixation of the stipends but it was to come in operation after his death. With the help of learned counsel for both sides, we looked into the original Clause 18 and found that there is some inaccuracy in the translation as made and printed in the paper book. But substantially there is not must difference. Correctly appreciated, the meaning of the clause is that Saiyed Mohammad Hasan, the Raja, was given a special power and right to fix stipends for his children, wives and descendants either by a registered document and/ or by a document in writing kept in the custody of the District Judge so that after him it may be binding on every subsequent Mutawalli. If he failed to do so, then after setting apart 20% of the gross income to meet the expenditure of collection and realisation and Rs. 6,000/- the charitable expenditure, mentioned in Clause 7, the balance was to be distributed amongst the heirs of Saiyed Mohammad Hasan according to their respective legal shares provided under the Mahomedan law. The bone of contention between the parties before us was that according to the appellant such a power of fixation of stipends for the wives and children was given to the Raja even to be operative during his life-time, while according to the respondent it was only to be effective after his death. We do not think it necessary to meticulously examine the terms of Clause 18 and resolve this difference. We shall assume in favour of the respondent that, in terms, the power was given which was meant to be operative after his death. But then, does it stand to reason that he had no such power during his life

time ? On a reasonable view of the matter, either by way of construction of Clause 18, or as a necessary implication of it, we find no difficulty in assuming in favour of the appellant that the Raja was vested with the power to fix stipends for his children and their descendants and for his wives during his life time also. A question, however, arises-was this power completely unfettered, unguided and not controlled by the general principles of Mahomedan law ? Apart from the fact that in Clause 27 of the waqf deed it is specifically mentioned that any condition or phrase laid down in any of the paras of the waqf deed was not meant to go against the Mahomedan law and was not to be of any effect, if it did so, it is difficult to conclude that the Raja was conferred an absolute power or discretion to fix any stipend for any beneficiary and no stipend for some beneficiary. Equality amongst all is a golden thread which runs throughout the Mahomedan law. It is a chief trait of that law. We have already pointed out from Tyabji's book that each beneficiary was entitled to share the usufruct of the waqf property per capita. The power given to the Raja under Clause 18 had to be reasonably exercised within a reasonable limit of variation according to the exigencies and special needs of a particular beneficiary. He had no power to spend money quite disproportionately for the benefit of one beneficiary - may she be his young wife or young daughter or be he a young son. He had no power to spend money for acquisition of any immovable property for a beneficiary. No income from the waqf estate could be spent for acquisition of an immovable property, and particularly a big property with which we are concerned in this case, to benefit only one beneficiary ignoring the others who were about a dozen. The money had to be spent equitably for the support and maintenance of each and every beneficiary. Of course, the Raja had the discretion to spend more money - say on the education of a particular beneficiary if it was necessary to do so or for the treatment of an ailing one. There it would be preposterous to suggest that money had to be equally spent. It is, however, difficult to spell out from Clause 18, as was argued by Mr. Phadke, that the Raja should be deemed to have fixed as stipends for the young lady all the numerous sums of money spent from time to time in the various items of the acquisition of land or the construction of the Kothi. Such a construction will, not only militate against the tenets of the Mahomedan law as quoted from Ameer Ali's book, but would be obviously against the spirit of Clause 24 of waqf deed itself. The said clause says :

> If any property will be purchased out of the funds of the State, it shall also be deemed to be property included in and belonging to the waqf. It shall not become the private or personal property of anyone.

Taking a permanent lease of the land and constricting a Kothi thereupon, to all intents and purposes, is a purchase of the property out of the funds of the estate. It will be a startling proposition of Mahomedan law to cull out from Clause 18 of the waqf deed that a property acquired obviously and clearly out of the funds of the waqf estate in the name of one of the beneficiaries should be treated as having been acquired for him or her in exercise of the power under Clause 18. It should be remembered that apart from the properties which were mentioned in the waqf deed and which had been tied and made inalienable if any further property was to be acquired in the eye of law, according to the concept of Mahomedan law, there was no legal entity available in whose name the property could be acquired except the Mutawalli or the beneficiary. Unlike Hindu law, no property could be acquired in the name of god. Nor could it be acquired in the name of any religious institution like the waqf estate. Necessarily the property had to be taken in the name of one of the living persons. Ordinarily and generally the acquisition of property out of the waqf funds should have been made in the name of the Mutawalli. But it did not cease to be a waqf property merely because it was acquired in the name of one of the beneficiaries. We are emphasizing this aspect of the matter at this stage to point out that the law relating to benami transactions, strictly speaking, cannot be applied in all its aspects to a transaction of the kind we are concerned with in this case.

We, however, hasten to add that even if applied, there will be no escape from the position that the real owner of the property was the Raja in his capacity as Mutawalli and the plaintiff was a mere benamidar. The property in reality, therefore, belonged to the waqf estate as concurrently and rightly held by the two courts below.

25. It is a very novel and ingenuous stand which was taken in this Court to say that all money spent from time to time in acquiring the land and constructing the Kothi was payment by the Raja as Mutawalli to his wife and therefore the property must be held to have been acquired by the lady herself out of her own personal fund. At no stage of this litigation except in this Court such a case was made out in pleading or evidence or in argument. The defendant was never asked to meet such a case. Parties went to trial and evidence was adduced upon the footing that the plaintiff claimed that out of the money given to her by the Raja as pin-money or on the occasions of festivals or otherwise she had saved a lot and out of those savings she had spent the money in acquiring the property. The defendant asserted and proved that the case of the plaintiff was untrue and that all the money came from the waqf fund directly to meet the cost of the acquisition of the property. In such a situation it is difficult to accept the argument put forward by Mr. Phadke that pleadings should not be construed too strictly. He relied upon three authorities of this Court in support of this argument namely, (1) Srinivas Ram Kumar v. Mahabir Prasad (1951 SCR 277 : AIR 1951 SC 177 : 1951 SCJ 261); (2) Nagubai Ammal v. B. Shama Rao (1956 SCR 451 : AIR 1956 SC 593 : 1956 SCJ 655), and (3) Kunju Kesavan v. M. M. Philip, I. C. S. ((1964) 3 SCR 634 : AIR 1964 SC 164) Let us see whether any of them helps the appellant in advancing her case any further. In case of Srinivas Ram Kumar (supra) the suit for specific performance of the contract failed. The defendant had admitted the receipt of Rs. 30,000. In that event, it was held that a decree could be passed in favour of the plaintiff for the recovery of Rs. 30,000 and interest remaining due under the agreement of loan pleaded by the defendant, even though the plaintiff had not set up such a case and it was even inconsistent with the allegations in the plaint. The Trial Court had passed a decree for the sum of Rs. 30,000. The High Court upturned it. In that connection, while delivering the judgment of the Court, it was observed by Mukherjee, J., as he then was, at page 282 :

The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.

In the instant case, there is no question of giving any alternative relief to the plaintiff. The relief asked for is one and the same. The plaintiff claimed that she had acquired the property with her personal funds. The defendant successfully combated this case. He had not said anything on the basis of which any alternative relief could be given to the plaintiff. The facts of the case of Nagubai Ammal (Supra) would clearly show that the decision of this Court does not help the appellant at all. The respondent did not specifically raise the question of lis pendens in his pleading nor was an issue framed on the point, but he raised the question at the very commencement of the trial in his deposition, proved relevant documents which were admitted into evidence without any objection from the appellants who filed their own documents, cross-examined the respondent and invited the court to hold that the suit for maintenance and a charge and the connected proceedings evidenced by these documents were collusive in order to avoid the operation of Section 52 of the Transfer of Property Act. The matter was decided with reference to Section 52. In such a situation it was held

by this Court that the decisions of the courts below were correct and in the facts and circumstances of the case the omission of the respondent to specifically raise the question of lis pendens in his pleading did not take the appellants by surprise. It was a mere irregularity which resulted in no prejudice to the appellants. In the instant case nobody at any stage of the litigation before the appeal came up to this Court had taken any stand or said a word anywhere that money spent in acquisition of the property was the personal money of the plaintiff because as and when the sums were spent they went on becoming her personal money. The evidence adduced and the stand taken in arguments were wholly different. No party had said anything on the lines of the case made out in this Court. Similar is the position in regard to the decision of this Court. Similar is the position in regard to the decision of this Court in the case of Kunju Kesavan. At page 648 Hidayatullah, J., as he then was, has stated :

> The parties went to trial fully understanding the central fact whether the succession as laid down in the Ezhava Act applied to Bhagavathi Valli or not. The absence of an issue, therefore, did not lead to a mistrial sufficient to vitiate the decision.

It was further added that the plea was hardly necessary in view of the plea made by the plaintiff in the replication.

26. Mr. Lal Narayan Sinha placed reliance upon the decision of this Court in Meenakshi Mills, Madurai v. C. I. T. (1956 SCR 691 : AIR 1957 SC 49 : 1957 SCJ 1) in support of his submission that the question of benami is essentially a question of act and this Court would not ordinarily and generally review the concurrent findings of the courts below in that regard. Mr. Phadke submitted that his case was covered by some exceptions carved out in the decision of the Federal Court in Gangadara Ayyar v. Subramania Sastrigal (AIR 1949 FC 88 : (1949) 1 MLJ 568). In our opinion it is not necessary to decide as to on which side of the dividing line this case falls in the light of the principles enunciated in the case aforementioned. Truly speaking, the concerrent findings of the courts below on the primary facts could not be seriously challenged. They are obviously correct. But a new stand was taken on the basis of Clause 18 of the waqf deed which we have already discussed and rejected.

27. Mr. Phadke heavily relied upon Clause 19 of the will dated June 17, 1938 - Ext.15 executed by the Raja fixing various amounts of stipends to be paid to the beneficiaries after his death. He had executed two other wills prior to this will. In an earlier litigation, a question had arisen as to which will would prevail - the first one or the last one. The amounts fixed for the plaintiff in the last will was much higher than the amount fixed for her in the first will. In an earlier judgment dated September 3, 1949, Ext.3, which was a judgment inter-parties it was held that the amount fixed in the first will would prevail. Clause 16 of the waqf deed was also interpreted in a particular manner. Mr. Lal Narayan Sinha endeavored to use this judgment operating as res judicata in regard to some of the questions falling for decision in this litigation. We do not propose to make use of that judgment in that form. Nor do we propose to express any final opinion as to which amount of stipend was effective - the first one or the last one. We shall assume in favour of the plaintiff that the amount fixed by the last will was effective and binding on the subsequent Mutawalli. We are, however, concerned to read Clause 19 of the last will which runs as follows :

> My wife Saddiqa Fatima has got a Kothi known as (main ?) Shagird Pesha in Mauza Doodhpur (paper torn) by taking on perpetual lease. I or the State has no concern with the same. It has been constructed by her with her own funds. All the articles lying there belong to her and have been purchased by her from her own money. I

> have certainly given some articles to her which belonged to me personally. In short all the articles, of whatever sort they may be are her property an nobody has got any right in respect thereof because the State or anyone else has got no concern or right in respect thereof. Hence she (?) has got the right to dispose the same off or to make a waqf of the same. She may give it to any of my sons, who renders obedience and service to her or may give the same to any of my grandsons. My other heirs shall have no right in respect thereof. If anybody brings any claim, in order to harass her, the same shall be false.

Let us see whether this clause advances the case of the appellant any further. On a close scrutiny, it would be found that it directly demolishes her stand taken in this Court. The recital by the Raja in Clause 19 is that his wife had taken the perpetual lease and constructed the Kothi with her own funds. All the articles lying there have been purchased by her from her own money. He had certainly given some articles to her which belonged to him personally. There is no recital that the Raja had constructed the Kothi for the plaintiff out of his own funds nor was there a recital that he had constructed the Kothi by taking the money from the waqf estate and treating it as payment of stipends to her as and when the sums of money were paid. By no stretch of law such a recital could create a title in favour of the plaintiff and finish the right of the waqf to the property. The recital was demonstrably false and could not bind the subsequent Mutawalli. If the property became the acquired property of the waqf a Mutawalli, as the Raja was, by his mere declaration contained in Clause 19 of the will could not make it a property of the lady. The recital of fact could be pressed into service only to lend additional support to the plaintiff's case if she would have struck to that case and proved it by evidence aliunde.

28. The appellant's counsel relied upon the various circumstances to advance her case in this Court - the foremost of them is based upon Clause 18 of the waqf deed, which we have already dealt with. It was next contended that the real question was that the property was of Waqf-alal-aulad of which the main object was the maintenance and support of the members of the settlor's family and to tie up the corpus of the property in perpetuity so as to make it inalienable. The Raja, however, according to the submission was left free during his life time to make disbursement of the income in any manner he chose and liked. Acquiring a property with the waqf fund was the fulfillment of the object of the waqf. It was a part of making a provision for the maintenance and support of the wife of the Mutawalli. It was an integral part of the object of the waqf and was not in breach of the trust. We are not impressed with this argument and have already dealt with it in the earlier portion of this judgment. True it is that the property was not acquired by the sale of the corpus of any of the waqf property but even acquisition of an immovable property directly with the waqf fund was an accretion to the waqf property. The Raja had no power while administering the waqf to acquire a property for a particular beneficiary by way of maintenance and support of such a beneficiary. As indicated earlier, a Mutawalli of a waqf although not a trustee in the true sense of the term is still bound by the various obligations of a trustee. He like a trustee or a person standing in a fiduciary capacity, cannot advance his own interests or the interests of his close relations by virtue of the position held by him. The use of the funds of the waqf for acquisition of a property by a Mutawalli in the name of his wife would amount to a breach of trust and the property so acquired would be treated as waqf property. In the tenth edition of The Law of Trusts by Keeton and Sheridan it has been pointed out at page 229, Chapter XV :

> The general rule that a trustee must not take heed of one beneficiary to the detriment of others has already been discussed. But in another way, the rule implies that although a trustee may be the servant of all the beneficiaries, he is not the servant of

> any one of them, but an arbitrator, who must hold the scales evenly.

The position of the Mutawalli under the Mahomedan law is in no way different and all the beneficiaries are entitled to benefit equally, of course, subject to the special power conferred on the Mutawalli as the one provided in Clause 18 of the waqf deed and to the extent and in the manner interpreted by us above.

29. Ext. A-22 - an account of daily expenses incurred in the construction of the Kothi was attacked as a spurious document. We do not attach much importance to Ext. A-22 in face of the other pieces of evidence to indicate that the expenses were all met from the waqf fund. It is not necessary to lay any stress on Ext. A-22. Our attention was drawn to some statements made in the testimony of the defendant himself who was examined as DW 2 and DW 1 - the brother of the Raja. It may be mentioned here that Hamid Hasan - brother of the defendant was examined as PW 3. The plaintiff had examined herself in the house in which PW 3 was living and in his presence. Without discussing in any detail a few lines here or a few lines there in their evidence, suffice it to say that their evidence could not and did not establish the plaintiff's case as made out in the courts below nor did they lend any support to the new case made out here. We, therefore, do not think it necessary to encumber this judgment by a detailed discussion of the evidence because it has all been dealt with in full by the trial Court and to a large extent by the High Court also.

30. We now proceed to consider the law of benami prevalent in India and especially in regard to acquisition of a property by the husband in the name of the wife. We would also in this connection be discussing whether the doctrine if advancement is applicable in India or any principle analogous to that can be pressed into service on behalf of the appellant as was sought to be done by her learned Counsel. Alongwith the discussion of the points aforesaid, we shall be adverting to the appellant's argument of burden of proof being on the person to prove that a transaction which is apparent on the face of the document of title is not a real one but a benami deal. In conclusion, we shall show that neither the trial Court nor the High Court has deviated from the application of the well-settled principles in this regard, although at place the trial Court seems to have apparently thrown the onus on the plaintiff. But as a matter of fact neither of the two courts below has committed any error in the application of the real principle.

31. In Gopeekrist Gosain v. Gungapersaud Gosain ((1954) 6 Moore's Indian Appeals 53 : 2 Suth 13 : 4 WRPC 46), it was pointed out as early as 1854, at page 72 :

> It is very much the habit in India to make purchases in the names of others, and, from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as "Benamee transactions".

Lord Justice Knight Bruce proceeds to observe further at pages 74-75 that if the money for acquisition of property has been provided by a person other than the individual in whose name the purchase was effected an if such a person was a stranger or a distant relative of the person providing the money, "he would have been prima facie a trustee". It was observed further that even when the purchaser was the son of the real purchaser the English doctrine of advancement was not applicable in India. This case was followed by the Board in Bilas Kunwar v. Desraj Ranjit Singh (42 IA 202 : AIR 1915 PC 96 : 13 ALJ 991 : 17 Bom LR 1006). Sir George Farwell has said at page 205 :

> The exception in our law by way of advancement in favour of wife or child does not apply in India : Gopeekrist v. Gungapersaud; but the relationship is a circumstance

> which is taken into consideration in India in determining whether the transaction is benami or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in Dhurm Das Pandey v. Mussumat Shama Soondari Bibiah ((1843) 3 MIA 229 : 1 Suth 147 : 6 WR PC 43) : "The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid".

Lord Atkinson reiterated the same view in Kerwick v. Kerwick (47 IA 275 : AIR 1921 PC 56 : 48 Cal 1260 : 23 Bom LR 730) at page 278 in these terms : "In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England".

32. It will be useful to quote a few lines from the judgment of the Judicial Committee of the Privy Council delivered by Sir John Edge in the case of Sura Lakshmiah Chetty v. Kothandarama Pillai (52 IA 286 : AIR 1925 PC 181 : 23 ALJ 662 : 27 Bom LR 1076). The lines occurring at page 298 runs thus :

> There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction, by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India.

In the well-known treatise of the Law of Trusts referred to above the learned author says at page 173 :

> The best example of a trust implied by law is where property is purchased by A in the name B; that is to say, A supplies the purchase-money, and B takes the conveyance. Here, in the absence of any explanatory facts, such as an intention to give the property to B, equity presumes that A intended B to hold the property in trust for him.

It may here be made clear that much could be said in favour of the appellant if the Raja would have acquired the property with his own money intending to acquire it for her. But such an intention was of no avail to the appellant when the money for the acquisition of the property came from the coffers of the waqf estate over which the Raja had no unbridled or uncontrolled power of ownership. He was himself in the position of a trusstee owing a duty and obligations to the beneficiaries. He had no free volition in the matter to spend and invest the trust fund in any manner he liked and for showing undue advantage to his wife.

33. At one stage of the argument Mr. Phadke felt persuaded to place reliance upon the decision of Yorke and Agarwal, JJ. in Mt. Sardar Jahan v. Mt. Afzal Begam (IR 1941 Oudh 288 : 1941 OWN 208 : 192 IC 873). At page 291, column 1 the observation seems to have been made per incuriam to the effect :

> As regard this question of pleading, it does not appear to us that there was anything to prevent the plaintiff from falling back on the plea of advancement in case she was unable to satisfy the court that the moneys expended were her own.

Yorke, J. realised the inaccuracy of the above proposition and said so in Mt. Siddiqa Begam v.

Abdul Jobbar Khan (IR 1942 All 308 : ILR 1942 All 478 : 1942 ALJ 534) and then concluded at page 312, column 1 thus :

> In point of fact it has been laid down by their Lordships in earlier cases that the burden of proof that a transfer is benami does lie in the first instance upon the person asserting it to be so, but that burden is discharged upon the said person showing that the purchase money was provided by him.

34. In the case of Gangadara Ayyar (supra) Mahajan J., enunciated law pithily, if we may say so with respect, in paragraph 14 at page 92 :

> It is settled law that the onus of establishing that a transaction is benami is on the plaintiff and it must be strictly made out. The decision of the Court cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence, the apparent title must prevail. It is also well established that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came and that when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

While dealing with the question of burden of proof, one must remember a very salutary principle reiterated by this Court in Kalwa Devadattam v. Union of India ((1964) 3 SCR 191 : AIR 1964 SC 880 : (1963) 2 SCJ 256) at page 205. Says the learned Judge :

> The question of onus probandi is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties.

Shinghal, J. recently followed this dictum in the case of Union of India v. Moksh Builders and Financiers Ltd. ((1977) 1 SCR 967 : (1977) 1 SCC 60 : 1977 SCC (Tax) 132) at page 973.

35. Mr. Phadke heavily relied upon the decisions of this Court in (1) Kanakarathanammal v. V. S. Loganatha Mudaliar ((1964) 6 SCR 1 : AIR 1963 SC 271); (2) Jaydayal Poddar v. Mst. Bibi Hazra ((1974) 2 SCR 90 : (1974) 1 SCC 3) and (3) Krishnanand v. State of M. P. ((1977) 1 SCC 816 : 1977 SCC (Cri) 190). A question of some fine distinction arose in Kanakarathanammal's case. The question was whether the property purchased in the name of the wife by the money given to her by the husband was a property gifted to her under Section 10(2)(b) of the Mysore Hindu Law Women's Rights Act, 1933 or was it a property which fell under clause (d) of Section 10(2). If it was a property gifted by the husband to the wife, then the appellant's contention was right and it became a property gifted under Section 10(2)(b). If, on the other hand, it was a property purchased with the money gifted by the husband to wife, then it would not be so. According to the finding of the courts below, the whole of the consideration was paid by the appellant's father and not by her mother. The majority view expressed by Gajendragadkar, J., as he then was, at page 9 of the report is :

We have carefully considered the arguments thus presented to us by the respective parties and we are satisfied that it would be straining the language of Section 10(2)(b) to hold that the property purchased in the name of the wife with the money gifted to her by her husband should be taken to amount to a property gifted under Section 10(2)(b).

It would thus be seen that indisputably in that case the property was of the wife. The only dispute was whether the property itself was acquired as a gift from her husband or it was acquired with the money gifted to her by the husband. In our opinion, therefore, this case is of no help to the appellant in this appeal. In Jaydayal Poddar's case (supra) one of us (Sarkaria, J.) while delivering the judgment on behalf of the Court was dealing with a case where the question was whether the property purchased by Abdul Karim in the name of his wife Mst. Hakimunnissa was a benami purchase in the name of the latter. The trial Court held that she was a benamidar. The High Court reversed the decision and held that the plaintiffs had failed to show that Mst. Hakimunnissa in whose name the sale-deed stood, was only a benamidar and not the real purchaser. While affirming the view of the High Court, it was aptly said at pages 91-92 : (SCC pp. 6-7).

It is well-settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformally applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances : (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1, viz., the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person is in reality for the benefit of another.

36. Apart from the fact that in the present appeal we are not concerned with a simple case of purchase of the property by the husband in the name of the wife with his own money, the purchase being with the waqf money, even applying the principles extracted above it would be noticed that the concurrent findings of the courts below that the appellant was benamidar on behalf of the waqf does not suffer from any infirmity to justify our interference with the said finding. The burden has been strictly discharged by the respondent so much so that the finding as recorded could not be assailed. It was merely attempted to be availed of to support a new case in this Court. It should be remembered that 'by far the most important test for determining whether the sale standing in the

name of one person is in reality for the benefit of another' - namely the source whence the purchase money came has been established beyond doubt. The nature and possession of the property after the acquisition was such that it did not lead to the conclusion that it was not a waqf property and was such that it did not lead to the conclusion that it was not a waqf property and was a property in exclusive possession of the appellant through her tenants including the respondent. The motive to acquire the property in the name of the wife is clearly spoken of by DW 1 - brother of the Raja when he said at page 37 of the paper book - "Raja Sahib was also present at the time of the execution of the lease. At that time there was no debt against him. On being asked by me he said that the plaintiff used to trouble him and that in order to please her he was getting a fictitious lease executed in her favour." It was argued for the appellant that the Raja wanted to make a provision for his young wife to protect her interests from being trampled with by her step sons and daughters. This is not correct. Although the defendant was not pulling on well with the Raja after he had married the plaintiff, according to her own case pleaded in the plaint she was pulling on well with the defendant up to the year 1950 and the relations between them got strained when her daughter was married to Saiyed Mohammed Raza Ali Khan. The position of the parties, namely, the Raja and the plaintiff, was such that one could be inclined to believe that in all probability the Raja could provide funds for acquisition of the property not only in the name of his wife but for her and her alone provided the funds expended were his personal funds. But no such inference is possible on the unmistakable position of this case that the funds came from the coffer of the waqf estate. The custody of the title-deed and other papers, except a few, were not with the plaintiff. But on the facts of this case one cannot attach much importance to this circumstance either way. The conduct of the parties concerned in dealing with the property after acquisition also goes in favour of the defendant and against the plaintiff. It could not be shown that the plaintiff had realised rent from the other tenants who had been there in the Kothi before 1947. Nor was there anything to show that the defendant himself was inducted as a tenant in the Kothi by the plaintiff. We, therefore, hold that even on the application of the salutary principles of law enunciated in Jaydayal Poddar's case the appellant cannot succeed. This case was merely followed in Krishnanand's case by Bhagwati, J.

37. We may again emphasize that in a case of this nature, all the aspects of the benami law including the question of burden of proof cannot justifiably be applied fully. Once it is found, as it has been consistently found, that the property was acquired with the money of the waqf, a presumption would arise that the property is a waqf property irrespective of the fact as to in whose name it was acquired. The Mutawalli by transgressing the limits of his power and showing undue favour to one of the beneficiaries in disregard to a large number of other beneficiaries could not be and should not be permitted to gain advantage by this method for one beneficiary which in substance would be gaining advantage for himself. In such a situation in will not be unreasonable to say - rather it would be quite legitimate to infer, that it was for the plaintiff to establish that the property acquired was her personal property and not the property of the waqf. If it possible to decree her appeal in face of her three varying stands in the three courts ? They are (1) In the trial Court - case of acquisition of property with her personal money; (2) in the High Court - acquisition of property with the personal money of her husband and (3) in this Court - the waqf fund invested from time to time became her personal money and enabled her to acquire the property.

38. For the reasons stated above, we dismiss that appeal, but with this direction that the parties will bear their own costs throughout.

39. Before we part with this case, we would like to put on record that a suggestion was thrown from the Court to the parties to arrive at some kind of lawful settlement which may not go against the terms of the waqf deed or the Mahomedan law in relation to waqf. Pursuant to the said suggestion,

an offer was made on behalf of the substituted respondents to pay a sum of Rs. 30,000/- to the appellant within a period of one year. This was on the footing, as suggested by the Court, as if the lease-hold in the land upon which the Kothi stands was the property of the appellant, but the Kothi was of the waqf. Unfortunately this offer was not accepted by the appellant. Still we hope and trust that the respondents will honour their unilateral offer and pay the sum of Rs. 30,000/- to the appellant within a period of one year from today, preferably in 4 three-monthly equal instalments of Rs. 7,500 each. The amount so paid would be over and above the duty and the obligation which is there under the waqf on the present Mutawalli out of the substituted respondents. We have tried to take compassionate view for the appellant to the extent to which we thought we could justifiably go. We have relieved her of costs in all the three courts. We believe that the respondents will not belie our hopes merely because an executable decree in respect of the sum of Rs. 30,000 in absence of the acceptance of the offer by the appellant cannot be passed.

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