

CALCUTTA HIGH COURT

Syed Shah Maidal Islam

Vs

Commissioner of Wakfs

(Akram , J.)

13.01.1943

JUDGMENT

Akram, J.

1. This appeal by the plaintiffs arises out of a suit for a declaration that a certain wakf is a wakaf-alal-aulad as defined in Section 6(11) of Act 13 of 1934, and that the action of defendant 1 (Commissioner of wakfs) in treating it as a public wakf and assessing it as such and appointing a committee of management is illegal and ultra vires and for a refund of the excess money realised from the plaintiffs (mutwallis) by improper assessment on the basis of a public wakf. It appears that one Shaik Mohamad Faiz had created a wakf by a wakfnamah dated 1138 B.S. : 1776 by which he had appointed his brother's sons to be mutwallis and after them their male descendants, generation after generation and had provided that the income from the wakf properties should be spent on certain religious and charitable objects and that the balance left unspent should go to the mutwallis. The plaintiffs claim to be descendants of the original mutwallis and allege that it has never been necessary to spend more than 25 per cent, of the annual income of the wakf properties on the religious and charitable objects mentioned in the wakfnama and that therefore the wakf is of a class known as wakf-alal-aulad and not a public wakf and that defendant 1 was wrong in not treating it as such--various pleas in defence were taken by defendant 1 who alone entered appearance, the other defendants who were members of the committee of management took no part in the contest. Several issues were framed but we are concerned in this appeal only with part 1 of Issue 4, viz., Is the wakf a public wakf or a private wakf?

2. The trial Court decided that issue in favor of the plaintiffs and decreed the suit; on appeal the lower appellate Court reversed that decision and dismissed the suit, the plaintiffs thereupon preferred the present appeal. It has been urged before us on behalf of the appellants that the expression "wakif for himself or any member of his family or descendants" in Section 6 Clause 11 of Act 13 of 1934, includes the descendants not only of the wakif but also of his family and

that as the original mutawallis were members of the family of the wakif and the present mutwallis are their descendants, they are included within the scope of Section 6 Clause 11 of the Act and reference in this connexion was made to the decision in Ghazanfar Hossein v. Mt. Ahmadi Bibi . It was argued that such being the position and as it has never been necessary to spend more than 25 per cent, of the income for the religious and charitable objects mentioned in the wakafnamah and as the balance 73 per cent, or more went to the descendants of the family of the wakif, even though in their capacity of mutwallis the wakif fell within the class of wakf-alal-aulad as defined in Section 6 Clause 11 and the classification and treatment of it as a public wakf by the defendant 1 was illegal and ultra vires.

3. The learned Advocate for the respondent, although he does not wish to challenge the claim that the original mutwallis were members of the family of the wakif contends that conceding that the original mutwallis were members of the family of the wakif the present mutwallis--the plaintiffs are not so and as the word "descendants" in Section 6 Clause 11 denotes the descendants of the wakif only and not of his family the wakf no longer continues to be a wakf-alal-aulad within the meaning of Section 6 Clause 11 of the Act. Furthermore the provision in the wakfnamah for payment, it is pointed out, was solely as remuneration to the mutwallis for discharging their duties and not as maintenance for supporting "members of his (wakif's) family or deaden, dants." Lastly it is said that in any event there is nothing in wakfnamah, nor is there anything specific in the evidence which shows that at least 75 per cent, of the net available income from the wakf estate, is for the time being payable to the wakif or to any member of the wakif's family or their descendants, (taking the word "descendants" in Section 6 Clause 11 to include descendants of the wakif's family as well). On the question whether the word "descendants" in Section 6 Clause 11 of Act 13 of 1934, includes the descendants of the wakif's family as well, we are inclined to take the view that it does not and that the expression "any member of his family or descendants" refers to the wakifs family and the wakif's descendants. We also think that the words "for himself" in the expression "payable to the wakif for himself or any member of his family or descendants" and the definition of "benefit" as given in Section 6 Clause 2 indicate that the payment which is to be made should not be solely as salary for the performance of any duty imposed. We do not think however that it is necessary to decide these matters in this case as upon the terms of the wakfnamah we hold that it has not been established by the plaintiffs that not less than 75 per cent, of the net income is payable to them under the wakf.

4. The wakfnamah which is a very ancient document, is unfortunately torn to small pieces, and it is not possible to put them together and read it as a whole but what can be gleaned from it as it is, and can be understood from the translated portions admitted by the parties to be correct which

are set out in the judgments of the Courts below, we are induced to take the view that it could not have been the intention of the wakif to dedicate his properties mainly for the support and the benefit of his family or descendants. The wakif had his own sons living at the time, but they were away from home, he therefore appointed his nephews who were living in the village as mutwallis and constituted the gentlemen of the village, supervisors with power to remove the mutwallis in case of incompetence or misadministration--the mutwallis were directed to "maintain the mosque, students, guest, visitors" (the portion here is torn) and in case of breach or misconduct the gentlemen of the village were empowered to remove those mutwallis and to appoint any gentleman as mutwalli and inspect every year the accounts of income and expenses and pay the mutwalli as they like.

5. There is no provision in the wakfnamah for any payment to the wakif himself or to his sons or to any other relation. The remuneration mentioned is for acting as mutawallis only and it is not suggested that it is laid down any where in the wakfnamah that at least 75 per cent, is to be paid from the income for the purpose--the power given to the gentlemen of the village to pay the mutwalli as they liked would negative such a suggestion, in fact no allegation to such effect seems to have been made in the plaint and no such issue was raised in the suit. The particulars supplied by plaintiff 1 in his application for enrolment under Section 44 of the Act -- Ex. 4 also shows that less than 75 per cent, of the net available income was taken by the mutwallis. Considering the above facts and circumstances we are of opinion that the decision of the Court below is correct and the appellants have failed to substantiate their claim. We accordingly dismiss this appeal with costs.

Pal, J.

6. I agree. The only question involved in this appeal is whether the wakf created by one Sheikh Mohammad Faiz in 1183 B.S. (1776 A.D.) is a wakf al-al-aulad within the meaning of the Bengal Wakf Act, 1934 (Bengal Act 13 of 1934). The wakf was created by a wakfnamah written in Persian. The English version of the relevant portion of the document stands thus: Afterwards I have maintained and repaired the mosque and entertained guests and visitors (Musafirs) and maintained student (Taleble.elm). My sons lived in the house in Mannanpur in Pargana Calcutta.... At present being helpless and having no hope in this mortal life I only find none but my nephews Shaik Mainal Islam and Shaikh Sharifal Islam wise and deserving.... Now I make the wakf of all my properties of 401 bighas rent--free land of various kinds described above and appoint my brother's son Shaik Mainal Islam and Shaik Sharifal Islam sons of late Shaik Baiz and grandsons of Maulvi Mohammad Biz, mutwallis and it would be the duty of the mutwallis to maintain the mosque, students (Talhilim), guests, visitors (Musafirs)(the rest of this sentence is torn).... They would spend the remaining unspent income for themselves. Sons of legally married

wives of the mutwallis in succession shall manage the work of the wakf.... The mutwallis are not empowered and they shall not sell, transfer (torn) except to enjoy the income of the wakf property.... And if mutwallis override, or disobey the condition of this wakf or show any misconduct or cause loss of the wakf property or misappropriate the wakf property, they would be deemed mis-appropriators. Gentlemen of the village are, empowered to remove those mutwalli and to appoint any gentleman to be the mutwalli and inspect every year the accounts of income and expenses and pay the mutwallis as they like. And my successors shall have no objection and they are not empowered to raise any objection.... If any sum of money remain unspent after all the due and necessary expenses that remaining sum of money should be spent in charity otherwise mutwalli would be guilty before Alia, wherefore all these conditions are written in this deed of wakf.

7. It is not disputed that this created a valid wakf. The religious and charitable objects are clearly specified in the deed. These are valid objects for which wakf can be created, and no one says that these provisions were merely illusory. The nephews of the wakif and their descendants are appointed to be the mutwallis of the wakf. But as the disposition stands, they were not the object of this wakf. The application of the wakf money to the specified religious and charitable purposes is made obligatory on them as mutwallis and is not left at their discretion. They are made removable by the local people for the time being if they neglect this duty. The only provision for them in the deed is by way of a contingent allowance receivable by them as mutwallis, and in case they are removed from this office nothing is given them. Obviously therefore they were not the object of this wakf and the wakf was not a 'wakf-al-al-aulad' as understood in the original texts of the Mahomedan law. Nor is it a wakf of the category validated by the Wakf Validating Act 1913 (Act vi of 1913). The Act does not at all use the name 'wakf-al-al-aulad.' By its Section 3 it is enacted that it shall be lawful for any person to create a wakf for the purposes of maintenance and support wholly or partially of his family, children or descendants.

8. Assuming that "the nephew and their descendants" fall within the description of "his family, children or descendants," the present wakf cannot be said to have been made for the purpose of their maintenance and support. Its purposes were the religious and charitable purposes specified in the deed itself. The whole question, therefore, is whether it is a 'wakf-al-al-aulad' as defined by the Bengal Wakf Act 1934 (Bengal Act XIII of 1934). It is a question juris positivi and its answer depends entirely on the meaning of Section 6(11) of the Act. The section stands thus: 'wakf-al-al-aulad' means a wakf under which not less than 75 per cent, of the net available income is for the time being payable to the wakif for himself or any member of his family or descendants.

9. The requirements of this definition are the following: (1) There is a wakf (2) Under the wakf is

payable : (a)(i) to the wakif himself (ii) to any member of his family or (iii) descendants, (b) not less than 75 per cent, of the net available income. There is no dispute that there is a wakf in this case. The questions that arise for consideration are: (1) Whether anything is payable under the wakf to any of the persons named above; (2) Whether what is payable is 75 per cent, of the net available income or more. The only persons who as alleged by the appellants are the persons to whom 75 per cent, of the net available income is payable are the appellants themselves who are the descendants of the wakif's nephews. A further question therefore arises, viz., whether such descendants will come within the description "any member of his family or descendants." It should be remembered that the question is juris positivum and the statute uses the English language. The meaning of Persian or Arabic words therefore will be of no avail to us for the purposes of this appeal. The other relevant provisions of the Act which may help the interpretation of this definition are contained in Section 6(7), 6(10), 44, 52 and the Rules made in exercise of the power under Section 84 (2)(b) of this Act. Wakf is defined by Clause 10 to Section 6 thus: Wakf means the permanent dedication by a person professing Islam of any moveable or immovable property for any purpose recognised by the Islamic law as pious, religious or charitable and includes a wakf by user. Wakif means any person making such dedication.

10. "Net available income" is defined by Clause (7); Net available income of a wakf means the income as determined from time to time, in the manner prescribed by the Local Government.

11. Section 84(2)(b) empowers the Local Government to make rules providing for the manner in which the net available income of a wakf shall be determined. In exercise of this power the Local Government made the following Rules:

1. In determining the net available income of a wakf as defined in Sub-section (7) of Section 6 of the Bengal wakf Act, 1934, for any year it shall be necessary to ascertain the gross annual (estimated) income of the wakf for that year.

2. The gross annual (estimated) income for that year shall be ascertained by adding together the following items, namely : (a) Estimated annual income derivable from tenants, lessees, and licensees of the wakf in cash in that year, (b) The value in cash of all of such income as is realisable in kind in that year, (c) All income for that year on account of properties held in Khas and yielding any income in cash or in kind, (d) Estimated collections for that year based on an average of the collections of the three previous years made on account of miscellaneous receipts such as Salami, Jalkar, Phalkar, Bonkar, Hatkar, sale proceeds of timber, fuel, shrubs, grass, sand, earth, stone and similar other items, and also of nazars or presents in cash or kind made to a mosque or a shrine belonging to and maintained by the wakf properties, (e) Estimated annual income of all properties of the wakf appropriated for the use and occupation of the mutwallis and

his subordinates and menials, though such appropriation has not been authorised by the wakif. (f) Annual proceeds from investment of money belonging to the wakf or derived from the wakf properties, (g) Similar incomes of all properties acquired from the wakf properties, (h) Any other item of income known to the mutwalli as belonging to the wakf.

3. (1) All payments liable to be made on account of the following items shall be deducted from the gross annual (estimated) income ascertained under Rule 2, namely : (a)(1) Government revenue of lands, (2) Bent payable to a superior landlord, (3) Cesses to the Road and Public Works Fund (4) Taxes payable to the Union Board or Municipality or any other statutory body, or any statutory fund, (b) Cost of collection' and maintenance of the wakf property, as follows : (i) In case of immovable property, costs as actually incurred, if approved by the commissioner of wakfs, subject to a maximum of 12J per cent, of the grogs income, (ii) 1 per cent, in the case of income from securities, debentures, share dividends, etc, and (iii) 1 per cent., in the case of income from fixed contributions in lump, such as, (1) a regular allowance paid by a trust fund, or (2) when the entire wakf property has been let out in Putni, etc., and (iv) 1 per cent, in case of the cash value of crops, which do not require the employment of a collection staff. Provided that where the wakif has, in the distribution of the income to the various expenditures intended by him included the cost of collection, management, etc., in the salary of the mutwalli, no deduction shall be made under this rule.

(2) The balance that remains after these deductions shall be "the net available income" of the wakf. [Vide Calcutta Gazette dated 14th May 1936, Part I page 1106.]

12. Section 44 of the Act, requires the mutwalli to make application for enrolment of all wakfs at the office of the wakf commissioner existing at or created after the commencement of this Act. Sub-section (3) of the section prescribes the contents of such an application. Items (b), (c), (d) and (e) of the particulars required are

(b) the gross annual income from such properties;

(c) the amount of the Government revenue and cesses, and of all rents and taxes annually payable in respect of the wakf properties; (d) an estimate of the expenses annually incurred in the realisation of the income of the wakf properties based on such details as are available; (e) the amount set apart under the wakf for (i) the salary of the mutwalli and allowances to individuals ; (ii) purely religious purposes ; (iii) charitable purposes; and (iv) any other purposes.

13. The present appellants as mutwallis made an application under this section. This a application is Ex. 4 in the case. According to the particulars given in it: The gross annual in-

come of the wakf pro-

erties is Rs. 1309-4-0

The government revenue,
cess etc. Rs. 129-1-0

The expenses annually
incurred in the rea-
lisation etc. Rs. 108-0-0 237-1-0

Rs. 1072-3-0

The amount get apart
under the wakf for
religious & charitable
purposes Rs. 348-0-0

Amount spent for re-
pairs of the mosque Rs. 12-0-0 Rs. 360-0-0

The amount available
for the mutwallis is

thus only. Rs. 712-3-0

75 per cent, of Rs. 1072-3-0 is Rs. 801-2-0

14. Therefore, what these descendants of the wakif's nephews get according to this statement is less than 75 per cent, of the net income available. A statement of account as required by Section 52 of the Act was also submitted by the present appellants as mutwallis of the wakf taking it to be a wakf-al-al-aulad. This statement is Ex. D in this case. From the particulars given in this statement also the position of these persons appears to be worse. It thus appears that even assuming that these descendants come within the description of persons specified in Section 6(11) of the Act and that what is payable to the mutwallis under the wakf can be said to be payable to these descendants under the wakf because they are to be the mutwallis under it, less than 75 per cent, of the net available income will be payable to them and the wakf will not be a 'wakf-al-al-aulad' within the meaning of this definition. The next question is whether descendants

of the wakif's nephews (brother's son) come within the description of person of "wakif himself, any member of his family or descendants". Mr. Mullick appearing in support of the appeal contends (1) that such descendants will come within the description "any member of his family"; and (2) that in any case they will come within the description "descendants". According to Mr. Mullick the words "his family" here mean "the family to which he belongs" and not merely 'the family dependant on him'. Mr. Mullick next contends that the words "or descendants" must be taken as forming an extending clause to both "wakif himself" and "any member of his family". He reads the portion thus: (1) wakif himself or descendants; (2) any member of his family or descendants.

15. In my opinion the word 'descendants' refers to the wakif himself and only his descendants will come within this description. This is the plain reading of the section and there is no reason why we should discard this plain reading when it bears sense and fits in with the context. The meaning of the words 'his family' is not free from difficulties. The word 'family' is really one of great flexibility and is capable of many different meanings according to the connection in which it is used. Even when used in a statute it may indeed be of narrow or broad meaning as the intention of the Legislature using it may be made to appear : *Ferbrache v. Grand Lodge 1 Mo. App. 268 at p. 271*. In its ordinary sense the term signifies the collective body of persons living in one house, or under one head or manager, or one domestic Government. It may include all members of the household living under the authority of the head thereof, as also the servants employed in the house. Various other meanings of the term have been collected in Iyer's "Law Lexicon." The term is often used to include those descended or claiming descent from a common ancestor. In construing the Wakf Validating Act of 1913 (Act 6 of 1913) the word 'family' has been taken by the Allahabad High Court in the extended sense contended for by Mr. Mullick. In *Ghazanfar Hossein v. Mt. Ahmadi Bibi Sen and Niamatullah JJ.* were of opinion that the word 'family' was intended to be used in Section 3(a), Mussalman Wakf Validating Act, 1913, in a very large and extensive sense. The learned Judges observed: 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 term indicates persona descended from one common progenitor and having a common lineage.

16. I respectfully agree with the view expressed above. In my opinion the word 'family' as used in Bengal Act 13 of 1934 bears the same meaning as in the Mussalman Wakf Validating Act. Ameer Ali in his *Mahomedan Law, Vol. I, Chapt. 7* gives the origin of wakf thus: Historically its

origin is traced to the direct prescriptions of the Prophet. The validity of wakfs, says the Ghait ul Bayan, is founded on the rule laid down by the Prophet himself under the following circumstances.... Omar had acquired a piece of land in Khaitan and proceeded to the Prophet and sought his counsel, to make the most pious use of it whereupon the Prophet declared 'tie up the property (allor corpus) and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred, and the poor in the way of God.'

17. At page 276 of the same volume the learned author says: According to the texts of the Mahomdan law, a wakf can be validly made in favour of any person or class of persons. It can be made in favour of

... ..

(b) one's children and descendants, male or female, born or unborn;

... ..

(d) heirs as well as well as non-heirs

(e) one's kindred, etc.

... ..

(g) one's dependants, servants, etc.

(h) under the Hanafi law in favour of the wakif himself first, and then for other objects.

18. The above will help the determination of the policy of the Mussalman Wakf Validating Act 1913 and it seems that the description of persons given in its Section 3(a) was intended to cover all these persons. I thus feel inclined to accept the contention of Mr. Mullick in this respect. But as under the present wakf, less than 75 per cent, of the net available income is available for these persons, the wakf is not a wakf-al-al-aulad, within the meaning of the Bengal Wakf Act, 1934.