

**TahiruddIn Ahmad Vs. MasihuddIn Ahmad**

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**SooperKanoon Citation :** [sooperkanoon.com/862079](http://sooperkanoon.com/862079)

**Court :** Kolkata

**Decided On :** Feb-21-1933

**Reported in :** AIR1933Cal716,147Ind.Cas.196

**Appellant :** TahiruddIn Ahmad

**Respondent :** MasihuddIn Ahmad

**Judgement :**

Rankin, C.J.

1. In my opinion, this appeal must be allowed. The question is whether the wakfnama, made by one Maniruddin, on 12th May 1890, created a valid wakf. Now, first of all, the wakf says that certain parcels of property belong to him and that he hereby endows the said parcels of property, the estimated aggregate value of which is Rs. 15,000, as wakf according to Mahomedan law. He then prescribes that, as regards his dwelling house, No. 151, Masjidbarhi Street, it was to be used solely as a dwelling house after his death by his wife and his sons, etc., and for no other purpose and that none of them would be at liberty to alienate it. He says that the wakf property is not to be available to himself and his heirs. He undertakes, during his lifetime, to devote and apply one anna of the income of the property, other than the dwelling house, to charitable purposes and he reserves 15/16ths of the income for himself during his lifetime. He then declares that, after his death, his eldest son, Masihuddin Ahmad, should be mutawalli. He then describes the destination of the fund, namely, that after his death the mutawalli should apply

rents and profits first in paying the ground rent, rates and taxes, repairs and other necessary costs of upkeep of the property dedicated including the dwelling house. The next thing is that the mutawalli is to pay one anna or 1/16th portion of the receipts, that is of the net income monthly, to Mahomedan poor in cash or in such other form as the mutawalli should think proper. He then says that the mutawalli may deduct and retain another 1/16th part of the net income for himself. Then he says that he is to divide the balance every month among his heirs. The clause goes on to say:

I declare that after the death of any of my heirs, the heirs of the deceased heir shall be entitled to participate in the portion of the income, which such deceased heir was entitled to, but the heir of an heir, if he or she be not one of my descendants, shall not be entitled to participate in the said income nor have any interest in the wakf estate, but the whole income of the share of the deceased heir will go to such of his or her heir or heirs as may happen to be a descendant or descendants of mine.

2. The remaining clauses of the wakfnama throw no light on the only question that arises in this appeal. Now, the question is whether the wakf is a valid wakf, in which case the plaintiff's remedy, if any, is of one character, or whether it is invalid, in which case the plaintiff's right to partition cannot be resisted. It seems that the plaintiff would be entitled to 2/5ths share, the defendant, Masibuddin Ahmad, to 2/5ths share and their sister to 1/5th share. Logically, it appears to me that the first question is, whether this would be valid apart from the Mussalman Wakf Validating Act of 1913, which has now been given retrospective effect. It is conceded by Mr. Roy for the appellant that this Act would apply in the present case, if the circumstances are such as to render it applicable. Logically speaking, the first question seems to me to be whether, apart from the Act of 1913, the wakfnama creates a valid wakf. Mr. Bose for the respondent very fairly disclaimed that contention. In my opinion, he very rightly disclaimed any such contention. The law, as I understand it, may be taken from the well-known textbook of Sir Dinshah Mulla and is to the following effect: That a valid wakf can be created even before the said Act for the maintenance and support of the settlor's family or descendants, provided (a) that there was an ultimate gift of the whole property to

charity, that is to say the ultimate benefit is reserved for the poor or for any other religious, pious or charitable purpose: and (b) that the gift to charity was substantial, but if there was no ultimate gift to charity or if there was such a gift as was illusory, that is it was small in amount or was too remote, the provision for the settlor's family was held to be invalid.

3. It seems to me that we have first to come to the question whether there is an ultimate gift to charity; and prior to the Mussalman Wakf Validating Act, even if there was an ultimate gift to charity, nevertheless, if it was indefinitely postponed until the failure of heirs or descendants of the wakf that was regarded as making the gift to charity illusory. Coming then to the terms of the present wakfnama, it seems to me to be reasonably plain that, apart from the Act of 1913, as a wakf it is not valid. When we come to the Act of 1913 we find that provision is made that it shall be lawful for any person professing the Mussalman faith to create a wakf for the following, among other, purposes: for the maintenance and support wholly or partially of his family, children or descendants, provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by Mussalman law as a religious, pious or charitable purpose of a permanent character. We need therefore under the Act consider no longer any difficulty about the indefinite postponement. The question is whether or not we have here a provision for the support of the family with an ultimate benefit expressly or impliedly reserved for the poor or for any other religious or charitable purpose. Now, in Clause 5, which I have already recited, after the gift of the income of 14/16ths of the net receipts, there are no words to say what is to be the destination of the income upon the failure of heirs or descendants.

4. In the same way, there are no words to say what is to happen, after the failure of all heirs or descendants to the dwelling house. The learned Judge however from the circumstance that Clause 1 says that the settlor is endowing the property as wakf, and from the circumstance that 1/16th of the net income of the property other than the dwelling house is to be paid from the date of the settlor's death for ever to the poor in cash or otherwise, has inferred a provision to the effect that the 14/16ths share of the income shall, on the failure of the heirs or descendants, be given to the poor. In my judgment, it is not possible to make any such inference as

a matter of construction of this clause. Our attention has been drawn to the circumstances that there was, at one time, some authority to the effect, that, from the mere word 'wakf,' an intention of ultimate destination to the poor can be inferred. But that is, in my opinion, of no avail under the Act of 1913. Our attention has been drawn to a decision of the Allahabad High Court in the case of Irfan Ali v. Official Receiver, Agra : AIR1930 All837 , and to a decision of this Court in Masuda Khatun v. Mohammad Ebrahim AIR 1982 Cal 93, in which cases it was held that the ultimate gift to religious purpose must be implied from the terms of the document, and is not to be implied from the mere fact that the testator was purporting to make a wakf. In my judgment these decisions are on that point correct and should be followed.

5. In the result, I am not of opinion that it is possible to hold that the gift of 14/16ths of the income to the heirs or descendants is a gift which is subject, upon its failure, to be replaced by an ultimate gift to the poor or for that matter to any other charitable object. That being so, it appears to me that, in this case, the settlor has made an invalid attempt to make a wakf for the maintenance and support of his heirs and descendants and that the wakf must be declared to be invalid. In these circumstances, we must make a preliminary decree for partition and we will declare the share of the plaintiff and the defendant Masihuddin Ahmad to be 2/5ths each and of the sister 1/5th. There will be no order as to costs in either Court.

**Pearson, J.**

6. I agree.

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