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cedure at this very late stage, in view of the foregoing reasons.

In the result, we hold that the order of the High Court is correct. The appeal fails and is dismissed with costs.

Mudholkar J.

MUDHOLKAR, J.—I agree with my learned brother that the appeal should be dismissed for the reasons stated in his judgment. I, however, express no opinion on the quetion regarding the maintainability of the appeal under the Letters Patent against the decision of a single Judge in a case of this kind.

Appeal dismissed.

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March 16.

THAKUR MOHD. ISMAIL

v.

THAKUR SABIR ALI

(P. B. GAJENDRAGADKAR, A. K. SARKAR and K. N. WANCHOO, J J.)

Wakf-alal-aulad Executed by Oudh talukdar--If offends rule against perpituity—Oudh Estates Act. 1869 (1 of 1869), ss. 11, 12, 18—Mussalman wakf Validating Act, 1913 (6 of 1913), ss. 3, 4.

A Hanafi Mussalman, owner of a talukdari estate governed by the Oudh Estate, 1869, executed in 1925 a deed of *wakf-alal-aulad*, for the benefit of himself, his family and descendants generation after generation. He was to be the first mutwalli and thereafter his second son and after him his other sons and descendants according to the rule of primogeniture. Certain amounts were also to be paid to charities and for the maintenance of members of his family. The remainder was to go to the mutwalli. After his death the suit, out of which the present appeal arises, was instituted by the eldest son of his predeceased eldest son claiming succession to the estate according to male lineal primogeniture under the Act. His case mainly was that the wakf deed was invalid in view of ss. 11 and 12 of the Act. The trial court found that the deed

was genuine and valid and dismissed the suit. On appeal the High Court, while upholding the finding of the trial court that the wakf deed was a genuine document, dismissed the suit on the ground that the deed contravened s. 12 of the Act. Section 11 of the Act provided that the estate conferred on a talukdar was an absolute estate he having the right to transfer or bequeath it in any manner he liked. Section 18 dealt with gifts to religious and charitable uses. Section 12 of the Act provided as follows:—

"No transfer or bequest under this Act shall be valid where by the vesting of the thing transferred or bequeathed may be delayed beyond the lifetime of one or, more persons, living at the decease of the transferee or testator and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing transferred or bequeathed is to belong."

Held, (Gajendragadkar and Wanchoo, JJ.), the Oudh Estates Act, 1869, was a complete Code by itself so far as the holders of talukdari estates were concerned and the rights of such holders must be determined and circumscribed by the provisions of the Act.

Although a wakf-alal-aulad was a gift in favour of God, it could be valid only if it came within s. 11 of the Act. Section 18 of the Act merely provided the procedure for making gifts to charitable and religious uses and the power to make a gift was to be found in s. 11. In any case, such a gift was subject to the provision of s. 12 of the Act.

The words 'religious or charitable uses' in s. 18 of the Act which applied to talukdars of all religious, properly construed, could not mean that provision for one's children would be provision for religious and charitable uses. A wakf, such as the one in the present case, in which the beneficiaries mainly were the descendends of the wakf would not, therefore, fall within s. 18 of the Act. Treated as a gift to God, He would have no beneficial ownership in it for generations to come. Sections 3 and 4 of the wakf Validating Act, 1913, could not alter the position.

Bikani Mis v. *Shuklal Poddar*, (1893)I. L. R. 20 Cal.116, considered.

Abdul Fata Mohamed Ishak v. *Russomoy Dhur Choudhry*, (1894) L. R. 22 I. A. 76, referred to.

The word 'vesting' in s. 12 of the Act mean absolute vesting, meaning thereby that the person in whom the property vested could deal with it and its usufruct as he liked. Even though, therefore, the property, in the instant case, might vest

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in God immediately on the creation of *wakf-alal-aulad*, the absolute vesting which s. 12 contemplated would be postponed beyond the period prescribed by it. The *wakf-alal-aulad* was, therefore, hit by s. 12 of the Act and must fail.

Per Sarkar, J.—The relegious and charitable uses mentioned in s. 18 of the Act were not such as are contemplated in English law only. The Act contemplates a transfer by way of Wakf as a transfer *intervious* such a transfer would be a gift which is permitted by s. 11 of the Act.

The wakf, in the instant case, was valid under ss. 3 and 4 of the Mussalman Wakf Validating Act, 1913, and it was not correct to say that under it the usufruct was transferred to unborn discendants. Under the Mohamedan law a *wakf* is a gift to charity and everything vests in god immediately on the declaration of *wakf* so that the profits may revert to or be applied for the benefit of mankind.

Since the passing of the *wakf* Validating Act, 1913, a *wakf-alal-aulad* was as much a *wakf* as any other variety of and its subject-matter vested immediately on its creation in God, for the benefit of mankind, not as a trustee but as the owner. The descendant of the *wakf* acquired no vested interest in the usufruct of the *wakf* properties. The vesting of the property not being postponed at all, there was no contravention of s. 12 of the Act.

CIVIL APPELLATE JURISIDICTION : Civil Appeal No. 256 of 1959.

Appeal from the judgment and decree dated February 22, 1954, of the Allahabad High Court (Lucknow Bench) at Lucknow in First Civil Appeal No. 50 of 1946.

S. P. Sinha and *Remeshwar Nath* for the appellant.

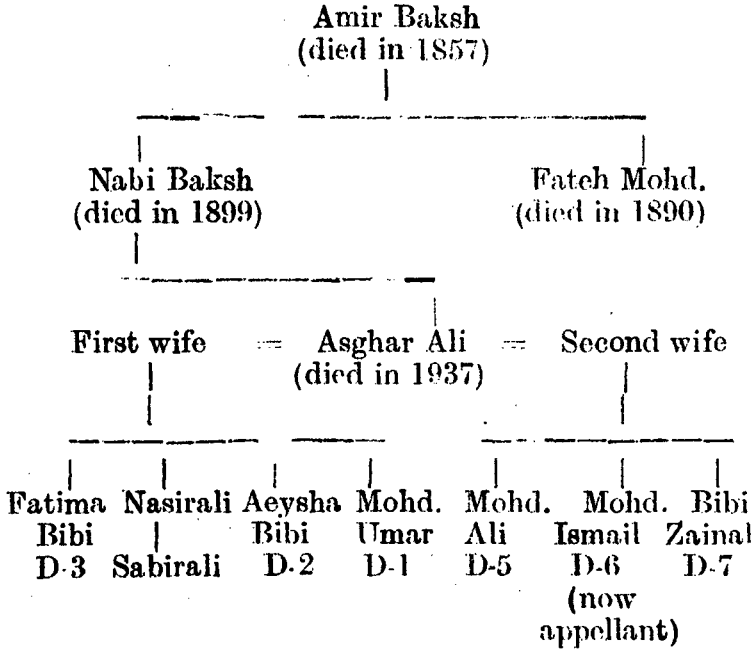
C. K. Daphtary, Solicitor General of India, E. Udayarathnam and *S. S. Shukla*, for respondent No. 1.

1962. March 26. The Judgment of Gajendragadkar and Wanchoo, JJ., was delivered by Wanchoo, J. Sarkar, J., delivered a separate Judgment.

Wanchoo J.

WANCHOO, J.—This is a defendant's appeal on a certificate granted by the Allahabad High Court.

The suit was brought by Thakur Sabir Ali plaintiff-respondent for possession. The following pedigree table (omitting the unnecessary names) which is not in dispute, may be set out to appreciate the case of the plaintiff:—



The case of the plaintiff was that Thakur Amir Baksh owned considerable property known as Tipraha Estate in the district of Bahraich at the time of the annexation of Oudh. He died in 1857 and was succeeded by his son Thakur Fateh Mohd., who was subsequently recognised by the Government as the talukdar of the Tipraha Estate. Thakur Fateh Mohd. died issueless and on his death Thakur Nabi Baksh succeeded him as the talukdar under the family custom and under the provisions of the Oudh Estates Act, No. 1 of 1869, (hereinafter called the Act). On the death of Thakur Nabi Baksh the estate passed to his only son Asghar Ali, who in his life time acquired certain other properties which

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were both talukdari and non-talukdari in nature. In August, 1925, Thakur Asghar Ali executed a deed of wakf-alal-aulad by means of which he created a wakf of his entire property for the benefit of himself, his family and descendants generation after generation. He was to be the first mutwalli for his lifetime and thereafter his son Thakur Mohd. Umar, and after him, his other sons and then his other descendants selected according to the rule of primogeniture were to be mutwallis. The wakf deed provided that some amounts would be paid to charities and some as maintenance allowance to the members of his family generation after generation, the remainder going to the mutwalli. Asghar Ali died in February, 1937, leaving behind properties included in Schedules A to I appended to the plaint. Disputes arose thereafter about succession to and possession of his properties. Mohd. Umar claimed to be entitled to the entire property under the wakf deed of August, 1925, while the plaintiff, being the eldest son of the eldest son Nasirali who had died in the lifetime of his father Thakur Asghar Ali claimed succession to the property under the rule of lineal primogeniture. This led to protracted litigation in the Revenue Courts and eventually an order for mutation was passed in favour of Thakur Mohd. Umar defendant who is now dead. Thakur Mohd. Umar came into possession of the properties mentioned in schedules A, B, D, E, F, H (except certain items mentioned therein) while the other defendants came into possession of certain other properties, with the details of which we are not concerned now.

Thakur Sabir Ali then instituted the present suit for the possession of the entire property left by Thakur Asgharali and for mesne profits. His case was that he was entitled to succession under the rule of male lineal primogeniture in accordance with the provisions of the Act and the family custom. He denied the execution, attestation, genuineness,

and validity of the wakf deed alleged to have been executed by Thakur Asgharali, which was relied upon by Thakur Mohd. Umar for his title to the property. The wakf deed was further challenged on other grounds with which we are however not concerned now except one. But the main attack against the validity of the wakf deed was that the subject matter of the deed was property subject to the special provisions of the Act and therefore the said deed was not valid, particularly in view of the provisions contained in ss. 11 and 12 of the Act. This is the main point which falls to be considered in the present appeal.

The defence was that the wakf deed was duly executed and registered and acted upon and that no fraud, undue influence or coercion as alleged by the plaintiff had been practised upon Thakur Asgharali in that connection. It was further alleged that even if the wakf was invalid as a gift it would be operative as a will and the mutwalli would be entitled to the possession of the whole of the estate of Thakur Asgharali under the wakf deed. The defendants also resisted the attack on the wakf deed based on the provisions of the Act.

The trial court found that the wakf deed was duly executed and was a genuine and valid document. The trial court also found that the plaintiff was entitled under the family custom and also under the provisions of the Act to inherit by the rule of male lineal primogeniture such properties as were left by Thakur Asgharali at the time of his death; but as the trial court held that the wakf deed was valid, it dismissed the suit of the plaintiff except with respect to two properties in Schedule A to the plaint. The suit was decreed with respect to these two properties on the ground that they were not included in the wakf deed.

There was then an appeal by Sabirali to the High Court. It upheld the finding of the trial court

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that the wakf deed was a genuine document. It also held that it was a valid wakf as a wakf-alal-aulad under the Mussalman Wakf Validating Act (No. 6 of 1913); but it held that the wakf deed was invalid because it contravened the provision of s. 12 of the Act. The High Court however further held that even though the wakf deed failed as a deed creating a wakf, the directions contained in it for the payment of maintainance allowance and right of residence in favour of persons who were alive at the date of the death of Asgharali and for the expenses to be incurred in respect of charities would be binding on the plaintiff as being the last will and testament of Asgharali. It therefore allowed the appeal and decreed the plaintiff's suit for possession over the properties which were included in the deed of wakf as also over the other properties which belonged to Asgharali at the time of his death subject to allowances and charities to persons living at the time of the death of Asgharali and declared that the allowances and amounts to be spent on charities were to be a charge on the properties mentioned in the deed of wakf. The High Court decree also contained various consequential directions with which we are however not concerned in the present appeal. The plaintiff having not appealed from that part of the decree by which the allowances and the amounts to be spent on charities have to be paid out of the properties included in the deed of wakf and by which a charge was created on the properties therefor, that part of the decree of the High Court has become final.

The main question therefore that falls to be considered in this appeal is whether the High Court's view that the wakf is invalid in view of s. 12 of the Act is correct. It is necessary therefore to refer briefly to the history of the talukdari estates with which the Act is concerned. Suffice it to say that after the Mutiny of 1857 was over, Lord Canning, the

then Governor-General of India issued a proclamation on the 15th of March, 1858, by which all proprietary rights in the soil belonging to persons in Oudh (with the exception of the rights of a few talukdars) were confiscated. At the same time indulgence was promised to those who surrendered promptly. In view of that promise most of the talukdars did surrender with the result that they received back their estates; only those who did not surrender lost their estates and these estates were given to other talukdars who had proved loyal to the British Government as a reward for their loyalty. This re-grant was done by making settlements with talukdars and issuing sanads to them. Thus all the pre-existing rights of the talukdars were first taken away and then fresh grants under the terms of sanads and proclamations issued at the time were made to them. This was follwed by the Oudh Estates Act of 1869, which further defined the rights of talukdars to the estates granted to them by the British Government. It will appear from the provisions of the Act that the rights of talukdars and grantees to whom estates were granted by the British Government were defined in the Act without distinction of religion or caste, so that the Act governed all talukdars irrespective of the religion to which they might belong. Further the right of succession is also provided in the Act and the personal law of a talukdar with respect to the talukdari property stands abrogated except and in so far the Act imports it. Further it is clear that in respect of matters dealt with by the Act, it is a self-contained and complete Code with respect to talukdari property covered by it. This was the view taken by the Privy Council in *Chandra Kishore Tewari* v. *Sissendi Estate* (1), where it was observed that "the Oudh Estates Act is a special Act affecting special class of persons in respect of the properties conferred upon them. The Act is self-contained

(1) A. I. R. (1949) P. C. 207.

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and complete in regard to the matters contained in it". It is in this background that we have to consider the provisions of the Act.

Let us therefore examine the scheme of the Act. The long title of the Act says that it is "an Act to define the rights of talukdars and others in certain estates in Oudh, and to regulate the succession thereto." The preamble then says, "Whereas, after the re-occupation of Oudh by the British Government in the year 1858, the proprietary right in diverse estate in that province was, under certain conditions, conferred by the British Government upon certain talukdars and others; and whereas doubts may arise as to the nature of the rights of the said talukdars and others in such estates, and as to the course of succession thereto; and where as it is expedient to prevent such doubts, and to regulate such course, and to provide for such other matters connected therewith as are hereinafter mentioned." It is clear therefore that the Act was made to define the rights of holders of talukdari estates and to regulate the succession thereto and the provisions in the Act being a complete Code relating to the special class of the persons in respect of the properties conferred upon them by the British Government, whatever right the talukdars had in the property conferred on them would have to be found in the Act and would be circumscribed by its provisions.

Sections 2 of the Act is the definition section and we are primarily concerned with the definition of the word "transfer" therein which is as follows:—

> "Transfer' with its grammatical variations and cognate expressions, means to make an alienation *inter vivos* whether before or after the commencement of this Act."

Section 3 defines the rights of a talukdar and lays down that a talukdar has a permanent, heritable and transferable right in the estate comprising the

villages and lands named in the list attached to the agreement or *kabuliyat* executed by such talukdars when such settlement was made with him. Section 8 provides for preparation of lists of talukdars and others grantees and it is not in dispute that the Tipraha estate is mentioned in lists I and II prepared under s. 8 of the Act. Then we come to s. 11 which deals with the powers of talukdar to transfer and bequeath properties held by them under the Act, the relevant portion of which is as below:—

> "Subject to the provisions of this Act, and to all the conditions other than those relating to succession under which the estate was conferred by the British Government, every talukdar and grantee, and every heir and legatee of a talukdar and grantee, of sound mind and not a minor, shall be competent to transfer the whole or any portion of his estate, or of his right and interest therein, during his life-time, by sale, exchange, mortgage, lease or gift and to bequeath by his will to any person the whole or any portion of such estate, right and interest.....".

It will be clear from a bare perusal of this provision that the estate conferred on a talukdar was an absolute estate for he had the right to transfer it in any manner he liked and to any person he liked and even to sell it away completely ignoring the heirs under the personal law. Then comes s. 12 which reads thus —

> "No transfer or bequest under this Act shall be valid whereby the vesting of the thing transferred or bequeathed may be delayed beyond the life-time of one or, more persons, living at the decease of the transferee or testator and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing transferred or bequeathed is to belong."

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This section provides the rule against perpetuity so that even though the talukdar under the Act had an absolute estate and could transfer it as he pleased or will it away as he pleased he could not in view of s. 12 make a transfer or bequest which might infringe the rule against perpetuity. Section 13 deals with procedure relating to transfers by gifts and provides that transfer by gift will be made by an instrument signed by the donor and attested by two or more witnesses not less than three months before his death and presented for registration within one month from the date of its execution and registered; and it further provides that no gift made shall be valid unless followed within six months from the date of execution of the instrument of gift, by delivery by the donor or his representative in interest, of possession of the property comprised therein. The following sections deal with bequests and with procedure of transfer other than gifts with which we are not concerned. Then we come to s. 18, which deals with gifts for religious and charitable uses and is in these terms:—

> "No taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, and no transferee mentioned in section 14, and no heir or legatee of such transferee, shall have power to give his estate, or any portion thereof, or any interest therein, to religious or charitable uses, except by an instrument or gift signed by the donor and attested by two or more witnesses not less than three months before his death and presented for registration within one month from the date of its execution and registered."

It will be seen that there is one difference between s. 13 which deals with gifts for purpose other than religious and charitable and s. 18 which deals with gifts for religious and charitable uses inasmuch as delivery of possession is not made necessary for the

validity of the gift under s. 18 as is the case in s. 13 (2). The rest of the Act deals with intestate succession and other matters with which however we are not concerned.

The main contentio n on behalf of the appellant is that a wakf-alal-aulad is outside the provisions of the Act altogether and must be deemed to be a valid instrument in view of Act VI of 1913. In the alternative it is claimed that even if a wakf-alal-aulad comes within the perview of the Act it will be governed by s. 18, and if it complies with the provisions of that section it will not be hit by s. 12, the argument being that s. 18 is independent of s. 12. We can see no validity in the first contention on behalf of the appellant, namely, that a wakf-alal-aulad is entirely outside the purview of the Act and the provisions of the Act will not apply to it and it will be valid in view of Act VI of 1913. It is not disputed that the property with which the wakf-alal-aulad in this case deals is property which would be governed by the Act. We have already said that the Act is a special Act affecting special class of persons in respect of the properties conferred upon them by the British Government and is a self-contained and complete code in regard to the matters contained in it. Therefore, so far as the property which comes under the Act is concerned, we must find power in the Act conferred on the talukdar to deal with the property, and it cannot be accepted that the talukdar can deal with the property which is governed by the Act in any manner not provided by the Act. If the creation of a wakf-alal-aulad is out side the purview of the Act it will be clear that any wakf-alal-aulad dealing with property which is governed by the Act would immediately be invalid so far as that property is concerned, for the property conferred on the talukdar which is governed by the Act can only be dealt with as provided in the Act and not otherwise, the Act being a complete Code with respect to the rights of the talukdar to deal with such property. On the argument therefore

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that a wakf-alal-aulad is a manner of dealing with the property which is entirely outside the Act, the wakf must fail at once so far as it deals with property governed by the Act.

But we are of opinion that the contention that a wakf-alal-aulad is some thing which is entirely outside the purview of the Act, even though it may deal with property governed by the Act cannot be accepted. A wakf-alal-aulad must by its very nature be some kind of transfer of property by the person making the wakf. Previous to Act VI of 1913, the Privy Council had held in *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdry* (1) that "under Mahomedan law a perpetual family settlement expressly made as wakf is not legal merely because there is an ultimate but illusory gift to the poor". It was because of this judgment by which wakf-alal-aulad as known to Mahomedan law were declared illegal that Act VI of 1913 was passed by which such wkfs became legal. Obviously, therefore, when such wakfs become legal there was a transfer of the property covered by the wakf and the transfer was in favour in of God Almighty in whom thereafter the property subject to wakf become vested. This following from the theory of Mahomedan law under which wakfs created for purposes which are considered by that law to be religious and charitable result in the transfer of ownership of wakf property in perpetuity to God Almighty. Further the transfer being without consideration can only amount to a gift. Therefore, wakfs-alal-aulad which have become valid after Act VI of 1913 must be held to be gifts of property to God Almighty for certain purposes and are cleary transfers within the meaning of that term in s. 2 of the Act. Incidentally we may add that the use of the words "inter vivos" in the definition of the word "transfer" merely emphasises that the transfer must be one effective during the life-time of the transferor as contrasted with a

(1) (1894) L. R. 22 I. A. 76.

transfer by will which takes effect on the death of the transferor. Whenever therefore a transfer takes place by a wakf-alal-aulad and the property included in the deed is governed by the provisions of the Act we have to go to the provisions contained in the Act with respect to the power of the talukdar to make such transfer. The transfer would only be valid if it is within the powers conferred on the talukdar.

This brings us to the alternative argument raised on behalf of the appellant. Obviously, a wakf-alal-aulad being a gift in favour of God Almighty the property covered by it in the present case being one governed by the Act, we have first to go to s. 11 to see if a gift is permitted under that section. We have already set out s. 11 and that permits a gift to be made by the talukdar of all the property or any portion of it or any interest therein. This takes us immediately to ss. 13 and 18. Section 13 deals with gifts other than those for religious and charitable purposes and we are therefore not concerned with it. Section 18 deals with gifts for religious and charitable uses. The contention of the appellant in this behalf is that s. 18 is an independent section and gifts for religious and charitable purpose can be made under it and we have only to look to that section to determine the validity of a gift for religious or charitable purposes made by a talukdar of property governed by the Act. We are however of opinion that s. 18 only provides for the procedure for making gifts to charitable and religious purposes while s. 13 provides for the procedure for making gifts to other persons for other purposes. The power of the talukdar to make a gift is to be found in s. 11, the manner in which he can make a gift is to be found in s. 13 for one class of gifts and in s. 18 for another class of gifts. Therefore we cannot accept the argument that s. 18 is an independent section fully providing of gifts of a charitable and religious nature; it is merely a procedural provision

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for gifts of the type covered by it. But even if the argument of the learned counsel for the appellant were correct that s. 18 is an independent provision relating to gifts for charitable or religious purpose, the gifts made under s. 18 would still be subject to s. 12, as s. 12 opens with the words "no transfer of bequest *under this Act* shall be valid". Therefore, even if s. 18 were an independent section it still deals with a transfer of a particular type under the Act and that transfer would also be subject to s. 12. We may in this connection refer to s. 18 of the Transfer of Property Act (No. 4 of 1882) which specifically provides that the rule against perpetuity (s. 14 of the Transfer of Property Act) shall not apply to transfer "for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind. Section 18 of the Act however provides no such exception so far as religious or charitable gifts made under the Act are concerned and such gifts are also subject to s. 12.

Two questions then arise when we have to consider the application of s. 12 to this wakf. The first is whether the purpose of this wakf is a religious or charitable purpose within the meaning of s. 18 of the Act. Now what the wakf deed provides is that an insignificant portion of the income would be used for certain religious purposes; the rest of the income is to be used for the benefit of the wakif and his descendants from generation to generation and it is only when the line of the wakif is completely extinct that the whole of the income of the property could be utilised for what may be called charitable or religious purposes. It is urged however that even though the lion's share of the income of the property would be used for the descendants of the wakif, the wakf will still be a religious and charitable one, for the property immediately vests in God Almighty and is to be used for the benefit of His creatures, which of course include the wakif and

his descendants. Reliance in this connection is placed on the dissenting judgment in *Bikani Mia* v. *Shuklal Poddar* (1) in which Ameerali J. expressed the view that a wakf in favour of the wakif and his descendants would be for charitable purpose under the Mahomedan law. It is enongh to say that this was not the view of the majority of that Court. Further in *Abul Fata Mahomed Ishak's case* (2) the Privy Council clearly held that a wakf under which the beneficiaries were the descendants of the wakif could not be treated as one for a charitable purpose even under the Mahomedan law. Apart from this aspect of the matter, we are not here concerned with the Mahomedan law and what constitutes a charitable use under that law. We are concerned with a statute passed in 1869 by the British when they were rulers of this country and we have to interpret the English words used in that statute as understood by those who framed the statute. The words with which we are concerned are "religious or charitable uses" which appear in s. 18 of the Act, and it would in our opinion require no persuasion to hold that the authority which was framing the Act could not have possibly intended that provision by wakf for one's children was provision for religious or charitable uses. The view taken by the Privy Council in *Abul Fata Mahomed Ishak's cash* (2) clearly shows that the authority responsible for the Act could never contemplate wakfs in which the beneficiaries were the descendants of the wakif as wakfs for religious or charitable purpose. Further, the Act applies, as we have already mentioned, not only to Mahomedan talukdars but talukders of all religions and it could hardly be intended when the words "religious or charitable uses" were used in s. 18 that a wakf in which the beneficiaries were in the main the descendants of the wakif would be included in s. 18. Such wakfs could never be considered to be for charitable or religious purposes under

(1) (1893) I. L. R. 20 Cal. 116. (2) (1894) L.R. 22. I.A. 76.

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Hindu law or the Christian law. In these circumstances it must be held that the wakf in the present case, though in theory it vests the property in God Almighty, is not for charitable or religious purposes. It must therefore be treated as a gift to God Almighty in which however for generations to come God Almighty would have no beneficial ownership. Nor do we think that the Wakf Validating Act of 1913 makes any difference to this position. That Act specifically provides by s. 3 that a Muslim can lawfully create a wakf-alal-aulad. This however does not mean that the purpose of such a wakf is a religious or charitable purpose. This is made clear by the proviso to s. 3, which provides that the ultimate benefit in such a case must be for a religious or charitable purpose. The proviso would have been unnecessary if the purpose of a wakf-alal-aulad was recognised as religious or charitable by this law. The same in our opinion will follow from the provision in s. 4.

In such a case s. 12 must invalidate this wakf. As we have already said, s. 12 provides the rule against perpetuity; but it is said that the rule against perpetuity provided in this section is not infringed by this wakf because the property is vested in God immediately when the wakf-alal-aulad is created and all that s. 12 requires is that the vesting of the property transferred should not be delayed beyond a certain period. It is urged that in this case the vesting takes place immediately on the making of the wakf and therefore the gift is not covered by s. 12. This immediately raises the question as to what is meant by vesting under s. 12. It may be conceded that property included in a wakf-alal-aulad vests in God Almighty, but the vesting that s. 12 says may not be delayed beyond a certain period is in our opinion absolute vesting (i.e., vesting of both legal and beneficial estate) which may not be delayed beyond a certain period. Such absolute vesting involves that the person in whom

the property is vested can deal with it as he likes and can deal with its usufruct also as he likes. If the person in whom the property may be legally vested cannot deal with the usufruct as he likes, there is not that absolute vesting of the property in him which the rule against perpetuity enshrined in s. 12 requires. If this were not so, it will be quite easy to get round the rule against perpetuity by creating a trust in which the property immediately vests in the trustee and then providing for beneficial enjoyment in perpetuity by other persons in whom the property never vests. It is well settled that a trust of this kind immediately vesting the property in the trustee leaving the usufruct tied up for ever for the benefit of other persons infringes the rule against perpetuity. We may in this connection refer to a passage from Underhill's "Law of Trusts and Trustees", tenth edition, dealing with the Rule against Perpretuities at p. 70, which is in these terms :—

> "It is against public policy that property should be settled on private trusts for an indefinite period, so as to prevent it being freely dealt with ; and, consequently, the power of so doing has been curtailed by a rule known as the rule against perpetuities. That rule is, that every future limitation (whether by way of executory devise or trust) of real or personal property, the vesting of which absolutely as to personalty, or in fee or tail as to realty, is postponed beyond lives in being and twenty-one years afterwards (with a further period of gestation where it exists) is void."

Even though therefore the property may vest in God immediately on the creation of the wakf-alal-aulad in this case, as the beneficial enjoyment thereof is not for the purposes of God i.e. religious or charitable purposes, the vesting which is envisaged by s. 12 is undoubtedly postponed in this case

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beyond the period allowed by that section. Therefore, the wakf in this case even though it may be treated as a gift to God legally vesting property in Him immediately on its execution is hit by s. 12, for the absolute vesting which that section contemplates is postponed beyond the period mentioned in that section. The view therefore taken by the High Court that the wakf in this case is hit by s. 12 of the Act is correct.

Finally, it was urged that at any rate, so long as the appellant Mohd. Ismail is alive the plaintiff-respondent could not claim possession and therefore the decree of the High Court to that extent was wrong. We have not been able to appreciate this contention at all. Once the wakf fails as a whole, as we hold that it does, Mohd. Ismail cannot claim to remain in possession, for his right to remain in possession depends upon his being mutawalli of the wakf. The High Court was therefore right in decreeing the suit brought by the plaintiff-respondent. The appeal therefore fails and is hereby dismissed with costs.

Sarkar J.

SARKAR, J.--Thakur Mohammad Asghar Ali, a Hanafi Mussalman, was the owner of the Tipraha Estate, a taluqdari estate governed by the Oudh Estates Act, 1869. It appears that he also owned certain other immovable properties and movables of some value. With regard to these latter, however, no question has been raised in this appeal and it is not necessary to deal with them especially.

On August 26, 1925, Asghar Ali executed a deed of Wakf-alal-aulad in respect of all his properties the value of which was estimated in the deed at Rs. 10,00,000. By this deed he provided for an expenditure of a total annual sum of Rs. 1,000 for the purposes of a mosque, the destitute, helpless students and also provided for some guzara (maintenance) to his mother, wife and children, and after

them, to their respective heirs till the line of a guzaradar became extinct. He constituted himself the first mutawalli under the Wakf with full right to spend the amount saved after the payment of the aforesaid sums. He also provided that after his death his second son Mohammad Umar would be the mutawalli for his life and after him his other sons, one after the other, and that after the death of his last son, the succession to the mutawallishiip would devolve by the rule of primogeniture according to the custom obtaining in his family. In the end he provided that if no one remained to succeed to the office of mutawalli, Government would make proper arrangements for applying the usufruct of the wakf property for purposes of the mosque, religious sacrifice of goats, distribution of the guzaras and grant of scholarships to poor Mohammedan students. He died on February 27, 1937.

After Asghar Ali's death disputes sprang up between his descendants. The respondents, Sabir Ali, the eldest son of Nasir Ali the predeceased eldest son of Asgar Ali, claimed that the wakf was neither genuine nor valid and that therefore, under the rule of primogeniture as provided in the Oudh Estates Act which governed the Tipraha Estate he alone was entitled to all the properties left by Asghar Ali. This claim was disputed, among others, by Mohammad Umar who contended that he was entitled to the properties in terms of the wakf. It does not appear to have been in controversy that in the absence of the wakf, the respondent Sabir Ali would be entitled to the properties under the rule of primogeniture by which admittedly the devolution of the properties was governed. Eventually the respondent Sabir Ali filed the suit out of which this appeal arises, claiming the properties left by Asghar Ali under the rule of primogeniture. He denied the execution, attestation, genuineness and validity of the deed of wakf on various grounds. Mohammad Umar, who was the first defendant in

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the suit, resisted it basing himself on the deed of wakf. The widow and the other children of Asghar Ali were also defendants in that suit and opposed the respondent Sabir Ali's claim on various grounds but with these this appeal is not concerned.

The trial Court found the deed of wakf to be valid in every way but came to the conclusion that certain properties left by Asghar Ali had not been included in it. With regard to these it made a decree in favour of the respondent Sabir Ali and this part of the decree was never challenged and has therefore become final. The trial Court dismissed the rest of the respondent Sabir Ali's suit as it took the view that the deed of wakf was valid and under it Mohammed Umar was entitled to the properties as the Mutawalli.

The respondent Sabir Ali then appealed to the High Court at Allahabad. While the appeal was pending their, Mohammad Umar and Mohammad Ali, another defendant, died and their legal representatives were brought on the record in their places, and another son of Asghar Ali, the appellant Mohammad Ismail who also was a defendant in the suit and who had become the mutawalli under the terms of the deed of wakf on the death of Mohammad Umar and Mohammad Ali, was substituted as mutawali in the place of Mohammad Umar. The High Court agreed with the view of the trial Court that the wakf deed was genuine and had been executed with due formalities but held that it was of no effect as it offended the rule against perpetuity contained in s. 12 of the Oudh Estates Act to the terms of which I shall presently refer. Against that judgment Mohammad Ismail has filed the present appeal.

Two questions have been raised in this appeal. The first is whether the Act permits a transfer by way of a wakf as it only permits transfers *inter vivos*

and by will and the second whether the wakf created in this case offends s. 12 of the Act.

Section 2 of the Act defines 'transfer' as alienation *inter vivos*. Section 11 provides that subject to certain things to which it is not necessary to refer, every taluqdar of sound mind and not a minor shall be competent to transfer the whole or any portion of his estate or of his right and interest therein, during his life time by sale, exchange, mortgage, lease or gift and to bequeath by his well to any person the whole or any portion of such estate, right and interest. So it was said that a taluqdari estate can be disposed of either by a transfer *inter vivos* in one of the manners mentioned in s. 11 or by a will also therein mentioned but in no other way. It was contended that the wakf in this case did not constitute a disposition in either of these methods and was therefore bad.

I think it necessary now to refer to two more sections of the Act before examining this contention. The first is s. 13 which is concerned with gifts of the estate for purposes other than religious or charitable and with this section we are not concerned in this appeal. The other is s. 18 which provides that no taluqdar "shall have power to give his estate, or any portion thereof, or any interest therein, to religious or charitable uses, except by an instrument of gifts signed by the donor and attested by two or more witnesses not less than three month before his death and presented for registration within one month from the date of its execution and registered." It is not in controversy that the properties covered by the deed of wakf from 'estates' within the meaning of the Act.

With regard to the contention that a transfer by way of wakf was not permitted by the Act as it is not a transfer *inter vivos*, it seems to me that a transfer *inter vivos* contemplated by the Act does not exclude a transfer by way of wakf. Section 18

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contemplates a transfer to religious and charitable uses. That section as it now stands was enacted by U. P. Act III of 1910. I find it impossible to think that the religious and charitable uses mentioned in it were such as are contemplated in English law only, for the Act was meant for Indian taluqdars of all communities the larger number of whom were Mohammedans and Hindus. If it were so, no Hindu could have created a debutter nor a Mohamedan any wakf for each would have been badas a gift to a superstitious use (*Bourne* v. *Keane*)(1) and also as gift to God. I cannot imagine that the Act intended such a result. Therefore, in my view the Act contemplated a transfer by way of wakf as a transfer *inter vivos*. This variety of transfers can easily be brought under gifts mentioned in s. 11 as such transfers are without consideration and voluntary.

The other question is whether a wakf-alal-aulad offends s. 12. That section is in these terms :

> S. 12 No transfer or bequest under this Act shall be valid whereby the vesting of the thing transferred or bequeathed may be delayed beyond the life-time of one or, more persons living at the decease of the transferee or testator and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing transferred or bequeathed is to belong.

The High Court held that the wakf was a valid wakf under the Mussalman Wakf Validating Act, 1913 but it held that it offended s. 12 inasmuch as "though the corpus of wakf property is transferred to God Almighty, yet its usufruct is transferred to unborn descendants of the waqi generation after generation." I am unable to accept this view of the matter.

(1) [1919] A.C. 815,845.

In *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdry* (1) the Privy Council held that in a wakf of the kind that we have before us, the gift to charity after the total extinction of the donor's family was illusory and therefore there was really no wakf at all and "the poor have been put into this settlement merely to give it a colour of piety, and so to legalize arrangements meant to serve for the aggrandizement of a family": (p. 89). This decision caused considerable dissatisfaction in the Mohammedan community in India and to legalise wakf-alal-aulad the Mussalman Wakf Validating Act, 1913 was passed. That Act defines wakf as "the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable": s. 2(1). Sections 3 and 4 of this Act provide as follows :—

> S. 3 : It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provision of Mussalman law, for the following among other purposes :—
>
> (a) for the maintenance and support wholly or partially of his family, children or descendants, and
>
> (b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits, of the property dedicated :
>
> Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

(1) (1894) L.R. 22 I.A. 76.

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S. 4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

It will be obvious from these provisions of the Wakf Validating Act that in the case of a Hanafi Mussalman, a wakf for the maintenance and support of the wakif and his descendants from generation to generation and after the extinction of the family to the poor or other religious, pious or charitable purpose of a permanent nature is a wakf and therefore a dedication for a purpose recognised by the Mussalman law as religious, pious or charitable. According to the concept of Mohammedan law 'wakf' signifies "the extinction of the appropriator's ownership in the thing dedicated and the detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied "for the benefit of mankind,": (Mulla's Mahomedan Law, 15th ed., p. 154).

The High Court held the wakf created by Asghar Ali to be a valid wakf within the Act of 1913 and with that view I am in complete agreement. But I am unable to agree that under that wakf the usufruct is transferred to unborn descendants. A transfer is a wakf only where the usufruct is applied for the "benefit of mankind". Since the Act of 1913, there is no doubt that a transfer for the support of the wakif and his descendants generation after generation with a gift to other charities on the extinction of the wakif's family is a transfer for the benefit of mankind. The transfer is a wakf from the beginning. So all its purposes are for the "benefit of mankind". Whether such a notion is acceptable to one who is not a Mahomedan is to no purpose. In such a wakf the corpus vests ni

God so that the usufruct may be utilised for the "benefit of mankind". If what the High Court said was right, then the corpus alone of the wakf property would vest in God and either God had no interest in the usufruct or was a trustee of the unborn descendants. But it is well-settled that wakf imports no trust in the English sense. So it was said in *Vidya Varathi* v. *Balusami Ayyar* (1) "But the Mohammedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings'. When once it is declared that a particular property is wakf .....the right of the wakif is extinguished and the ownership is transferred to the Almighty". It would indeed be difficult to conceive of God as a trustee. The other alternative, namely, that the corpus alone vests in God, is equally foreign to the concept of a wakf. If the usufruct in the present wakf vested in the descendants of the wakif from generation to generation, on the same principle it might be said that in a wakf for the support of indigent widows, the usufruct vested in them and many of them would be born long after the wakf was created. I am not aware that it has ever been so held. I feel no doubt that in a wakf the usufruct never vests in persons who form the object of the pious purpose for which it was created. If the usufruct vested in the unborn descendants, then God has no interest in it and the corpus is not detained in his custody so that the usufruct might be applied for a pious purpose. In such a case indeed no wakf would have been created. That would be a different case. Here we have a valid wakf, and the only question is whether the wakf violates s. 12 of the Act. The misconception, as I think it is,

(1) (1921) L.R. 48. I.A. 302, 312.

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that the usufruct vests in unborn descendants arises from refusing to recognise that in Muslim law a wakf-alal-aulad is wholly a gift to charity and everything vest in God and nothing in the objects of the charity. It seems to me that if the present wakf is a valid wakf, which I think it is, it cannot be said that the descendants of Asghar Ali acquired under it a vested interest in the usufruct of the wakf properties.

Remembering therefore that since the Wakf Validating Act, a wakf-alal-aulad, that is to say, a wakf of the kind with which we are concerned is as much a wakf as any other variety of wakf, it has to be said that the subject matter of such a wakf vests immediately on its creation in God, not as a trustee but as the owner and so vests in Him because it is a wakf, that is to say, because the profits of the property are to be spend for the benefit of mankind. That being so, the vesting of the property transferred is not postponed at all and therefore s. 12 is not violated by a transfer by way of wakf. The real effect of the creation of such a wakf is to transfer the property to God and vest it in Him immediately for the benefit of mankind.

I am, therefore, of the view that the wakf created by Asghar Ali is a valid wakf and is not bad as offending s. 12 of the Oudh Estates Act.

In the result I would allow the appeal.

BY COURT. GAJENDRAGADKAR, J.—In accordance with the opinion of the majority, the appeal is dismissed with costs.