A MOHAMMAD

v.

MOHAMMED BEKE

SEPTEMBER 6, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Wakf Act, 1954 :

S. 2(1)—Certain properties given by appellant to his father for enjoyment during life—After his demise the properties to be used for the purpose
C *of Muslim Jamat Mosque—During life- time of his father, appellant cancelling the deed—Whether Wakf has been created—Courts below held that wakf had been created and appellant had no right to cancel the deed—On appeal held, the property was in exclusive possession and enjoyment of the father during his life time—There was no dedication and public was not allowed to have*
D *prayers on the property as mosque—During the lifetime of his father appellant cancelled the deed—Therefore, no Wakf has been created in respect of the properties in question.*

Garib Das & Ors. **v.** *Munshi Abdul Hamid & Ors.,* **AIR (1970) SC 1035 and** *Syed Mohd Salie Labbai (dead) by LRs. Ors.* **v.** *Mohd. Hanif (dead) by*
E *LRs. & Ors.,* **[1976] 3 SCR 721, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 12378-79 of 1996.

From the Judgment and Order dated 12.1.94 of the Kerala High
F Court in R.P. No. 251/93 in S.A. No. 86/88-B.

N. Sukumaran and G. Prakash for the Appellant.

E.M.S. Anam for the Respondent.

The following Order of the Court was delivered :

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Leave granted.

Though the respondent has been served, no one appeared for him. We requested Shri E.M.S. Anam, learned counsel, to assist the Court as *amicus curiae*. We deeply appreciate the valuable assistance rendered by
H him in this case. The facts which are fairly not in dispute are as under :

This appeal by special leave petition arises from the judgment and order of the High Court of Kerala made on November 16, 1993 in SA No. 86 of 1988 and the order made on 12.1.1994 in RP No. 251 of 1993 in SA No. 86/88. The admitted facts are that the appellant, as an owner of certain properties, had executed a registered document in which he had mentioned that one acre 65 cents of land together with building and trees standing on Survey No. 612/A situated in Manjalamkunnel Myloor Kara Varappetty Pakuthy was given to the father of the appellant for enjoyment during life of the usufruct derived from them. After his demise, the properties would be used for the purpose of Muslim Jamat Mosque. During the life time of the father, by another deed dated November 30, 1980 the above provision was cancelled. We are not concerned with other directions contained in the document.

The primary question for consideration is; whether by virtue of above provision mentioned in the registered document, wakf stood created under the Wakf Act, 1954? All the courts below, including the High Court, concurrently found that the wakf had been created and, therefore the appellant has no right to cancel the deed. The question, therefore, then is; whether wakf has been created under the Act? Section 2(1) of the Wakf Act, 1954 defines 'Wakf' as under ;

> "2(1) 'Wakf' means the permanent dedication by a person professing Islam (or any other person) of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes -
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> (i) a wakf user (but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser).
>
> (ii) grants (including mashrut-ul-khidmat (muafies, khairati, qqzi services, madad-mash) for any purpose recognised by Muslim Law as pious, religious or charitable, and)
>
> (iii) a wakf-alal-aulad.
>
> Provided that in the case of a dedication by a person not professing Islam, the Wakf shall be void if, on the death of such person, any objection to such dedication is raised by one or more of his legal

A representatives."

Section 2(r) of the Wakf Act, 1995 also defines 'wakf' in similar terms except the words "or any other person" which are omitted in the latter Act; however, the latter definition is not relevant for purpose of this case. Under the Hanafi law, a wakf can be made first in favour of the wakif himself, B descendants, kin etc. and then for other objects. According to Abu Yusuf, whose opinion has been adopted by the Hanif jurists in India, the wakif may lawfully retain the profits for himself. As regards the lawfulness of the wakfs in favour of one's descendants or kins, all the schools and jurists recognise the validity of such wakfs.

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In *Garib Das & Ors.* v. *Munshi Abdul Hamid & Ors.,* AIR (1970) SC 1035, one Tassaduk Hussain was the owner of the disputed house and he admittedly executed a deed of wakf on June 21, 1914 in respect of the same for the benefit of a mosque and Madrasa at Nathnagar and had the same D registered. In terms of the deed, the donor was to remain in possession of the house as Mutawali and his wife was to be the Mutawali after his death. The documents provided that after the death of both the husband and wife, the Mutawali would be elected by the panchas of the Muslim community of Nathnagar and so long as the donor and his wife were living, they would maintain themselves from the income of the property and spend the E balance left for the mosque and the Madrasa. The question, under those circumstances, arose; whether the wakf had been created? It is seen that the document, the wakf deed, was exclusively created. He parted with the possession as an owner and became a Mutawali thereunder, and, though he and his wife were enjoying the income derived from them and the F residue was utilised for maintaining the wakf, it was pleaded that wakf had been created and accordingly the Mutawali had no right to claim exclusive right as an erstwhile owner. This question was also considered elaboratedly by another Bench of two Judges of this Court in *Syed Mohd. Salie Labbai (dead) by LRs. & Ors.* v. *Mohd. Hanif (dead) by LRs. and Ors.,* [1976] 3 SCR 721. At page 746, this Court held thus :

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"It is not necessary for the dedication of a public mosque that a Mutawali or a Pesh Imam should be appointed which could be done later by the members of the Muslim community. All that is necessary is that there should be a declaration of the intention to H dedicate either expressly or impliedly and a divestment of his

interest in the property by the owner followed by delivery of possession. Here also the delivery of possession does not involve any ritual formality or any technical rule. For instance in the case of a mosque if the Mahomedans of the village, town or the area are permitted to offer their prayers either on the vacant land or in a mosque built for the said purpose that amounts to the delivery of possession and divestment and after the prayer have been offered the dedication becomes complete. Unfortunately the Courts which decided the previous litigation between the parties do not appear to be aware of the considerations mentioned above."

After an elaborate consideration of all the authorities on the subject, this Court laid down three propositions as under :

"It would thus appear that in order to create a valid dedication of a public nature, the following conditions must be satisfied :

(1) that the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be presumed form the conduct of the founder either express or implied;

(2) that the founder must divest himself completely from the ownership of the property, the divestment can be inferred from the fact that he had delivered possession to the Mutawalli or an Imam of the mosque. Even if there is not actual delivery of possession the mere fact that members of the Mahomedan public are permitted to offer prayers with azan ad ikamat, the wakf is complete and irrevocable; and

(3) that the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque."

Ameer Ali at pages 279-80 has stated thus :

"According to Abu Yusuf the right becomes extinguished by his merely declaring that he has made a particular property wakf and this is also the opinion of other Imams, viz. Shafei, Malik, Hombal and of universality of jurists, because the extinguishment of the right of property in wakf if like that in emanicipation .... According

A to Abu Yusuf such consignment not being necessary, the wakf becomes complete by the mere declaration of the wakif that it constitutes wakf."

At page 339, it is further stated thus :

B "That the rule laid down by Abu Yusuf is the accepted doctrine has already been shown from quotations from all the recognised works of law, such as the Fatawai Alamgiri, Fatawai Kazi Khan, Fath-ul-Kadir, Radd-ul-Muhtar, Ghait ul-Bayan, Tas-hil & and it is unnecessary, therefore, to go over the same ground again at any C length. It may be convenient, however, to recapitulate as briefly as possible the accepted principles on this branch of the question.

(1) That a wakf is valid and lawful by consensus.

(2) That it becomes absolute and operative, according to Abu D Yusuf, immediately on the declaration of the wakf, in other words immediately upon his signifying the factum of the dedication.

(3) That no particular words are necessary to create a wakf. So long as it is evidence from the context or the conduct of the wakf that a permanent dedication or settlement is intended, it is enough.

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(4) That a wakf may be made by a muslem in favour of an object whether terminable or otherwise not regarded as sinful in the Mussulman Law.

F (5) That where a wakf is made for objects that are terminable or liable to extinction, the ultimate benefit will continue for the 'poor' even though it may not have been destined for them expressly. "

At page 343, it is stated:

G "The principles of the Mussulman Law, it is submitted were rightly apprehended in the case of *Fatima Bibi* v. The Advocate General. In this case, West, J. said as follows :

"If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not made invalid by an intermediate H settlement on the founder's children and their descendants." (It

must be noted that this is by consensus, without any difference of opinion between Abu Yousuf and Mohammed, according to Abu Yousuf, the law will presume the ultimate dedication to an unfailing purpose from the use of the word wakf)." A

It would thus be clear from the authorities cited above that the founder must declare his intention to dedicate the property for the mosque. B A specific declaration is necessary. The founder must divest himself completely from the ownership of the property. The diversment can be inferred from the fact that he delivered possession to the Mutawali or an Imam of the mosque. If there is no actual delivery of the possession, the mere fact that members of the Mohammedan public are permitted to offer prayers C with azan and ikamat *does not make the wakf complete and irrevocable*. The founder must also make some sort of way which may be used by the public to enter the mosque. From the facts, it is seen that the property was in exclusive possession and enjoyment of the father during his life time enjoying the usufruct thereof. There was no dedication and public was not allowed to have any prayers on the property as mosque; nor the public had D access to it. During the life time of the father himself, the appellant had cancelled the deed. Under these circumstances, the necessary tests laid down by this Court have not been satisfied to conclude that a wakf has been created in respect of the above properties. The view of the courts below is not correct in law. E

The appeals are accordingly allowed. The suit ultimately stands dismissed. However, in the circumstances, there will be no order as to costs.

G.N. Appeals allowed. F