Allah Rabbul Almin And Anr. vs Hasnain Ahmad on 4 January, 1952

Equivalent citations: AIR1952ALL1011, AIR 1952 ALLAHABAD 1011

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Mushtaq Ahmad J.

1. This is a plaintiff's appeal in a suit for declaration that plaintiff 2 is the Mutwalli of the entire village Hirapur, district Bulandshahr, and that the defendant is not the Mutwalli of a half share in the said property. The plaintiff subsequently prayed for possession also, on which he paid the necessary court-fee.

2. On 14-10-1900, a lady named Imamunnisa, executed a deed of waqf in regard to the said village in which she laid down the following scheme for the appointment of Mutwallis:

> ". . . After my death Bibi Rab tb Bano, daughter, whom I have brought up as my own daughter shall be the Mutwalli in my place ..... that after her death, first her eldest son, and, in case he was incompetent or for any other reason was unable to carry out his functions, her other sons would be the Mutwallis in order of seniority." The italics are mine.
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> This is the correct rendering into English of the original clause, the translation at page 53 of the paper book not being quite accurate.

3. This, in my opinion, means that, after the death of Rabab Bano, her eldest son was to be the Mutwalli, but that, in case the latter, either by reason of incompetency pr any other reason, could not carry out his duties as such, the elder of the remaining sons of Rabab Bano and, after his death, the younger was to be the Mutwalli. It is true that the document does not expressly provide for the elder of the remaining two sons being the Mutwalli on the death of the eldest son, but certainly both the parties assumed--and no suggestion was made during the arguments to the contrary--that the elder of the two remaining sons of the lady, after the death of the eldest, would be entitled to claim the office by virtue of the above recital.

The plaintiffs put the position in the clearest terms in para. 9 of the plaint, and the defendant, apart from a bare denial of it, did not plead in his defence that plaintiff 2, who was the elder of the two surviving sons of Rabab Bano after the death of her eldest son, could not claim to be the Mutwalli, merely by reason of the death of the eldest son, unless he had got himself appointed as such by the

Court. Indeed, in para. 6 of his written statement, the defendant clearly implied that the said plaintiff could not claim the right of tauliat 'now' because of the will referred to above and the agreement to be referred to later. The learned Civil Judge also, in the beginning of his judgment, put the position, presumably as agreed to and assumed by the parties, on the same line. There being no plea on the point by the defendant, there was no issue also on it in the Court below, nor is there any indication of any such suggestion in its judgment. In my opinion, the intention of the waqif, Imainunnisa, was to provide for the appointment of the second son in case the first was not in a position or was not available to fill the office of Mutwalli by any reason whatsoever. I think that it would be too technical to assume that the waqif required the second son, after the first had died, to get himself appointed as Mutwalli by the Court, before he could claim to have acquired that office. If this were her intention, there would have been a clear recital in the deed to that effect.

On the other hand, the words used indicate that the waqif contemplated the desirability of the . second son succeeding to the tauliat after the first had ceased to serve and of the third son succeeding after the second had ceased to occupy the office for any reason whatsoever. In fact, learned counsel for the respondent did not contend during his two days' arguments that the plaintiff had no locus standi to bring the present suit in the absence of an order of appointment by the Court and merely by reason of the death of his eldest brother. At this stage, in the course of dictation of the judgment, he was called again and when asked to clarify his position on this question he no doubt said that there was this loophole in the position of the plaintiff, but when asked why he had not raised or even suggested the point during his elaborate arguments for two days, he only said, it was his 'mistake.' This reply is only a measure of its value and seriousness, and I need not pursue the point any further.

4. Rabab Bano, the second Mutwalli, died on 9-5-1916, leaving three sons, Askari Hasan Manzoor Hasan and Zahurul Hasnain, the last leaving a son, Hasnain Ahmad, the present defendant-respondent. The first son died in 1938 and the third in 1940.

5. On 1-4-1916, that is a few weeks before her death, Rabab Bano executed a will in respect not only of her own properties but also of the property covered by the present waqf. By that document she purported to divide the two classes, of property into three lots, assigning each to a particular son. To Askari Hasan, the eldest, she allotted her own property, without giving him any interest as a manager in the property now in dispute.

To Manzoor Hasan, the present plaintiff, also she gave some property including a half share in the property in dispute, and to her third son, Zahurul Hasnain she similarly gave a certain property including the remaining half of the disputed property. She admitted that the property in dispute had originally belonged to Imamunnisa and that the latter had made a waqf of it under the deed of 14-10-1900. She used the term 'share' when making the allotment to her three sons respectively leaving no doubt whatsoever, that she acknowledged and treated the property now in dispute as the subject of a valid waqf created by Imamunnisa.

The position, therefore, was that the present plaintiff, Manzoor Hasan, became the Mutwalli of a half share in the property in dispute, the remaining half being put under the tauliat of Zahurul

Hasnain, the third son of Rabab Bano. It may at once be mentioned that on the death of this third son, his son, the present defendant, is claiming the right of tauliat for himself. It would be a question in this appeal, though only incidentally, whether the defendant, merely by reason of being an heir to Zahurul Hasnain, could claim the right of tauliat in a property of which Zahurul Hasnain was the Mutwalli; that is to say, whether the office of tauliat could ever be hereditary, even though not so provided in the deed of waqf and though no such custom either had been pleaded.

6. The above will of Rabab Bano was followed by an agreement dated 14-6-1916, executed by Askari Hasan and Manzoor Hasan together with their youngest brother, Zahurul Hasnain, then a minor, under the guardianship of Eaja Asghar All Khan. By this, these brothers duly declared that they would consider it their duty to abide by the terms laid down in the will of Rabab Bano.

7. The names of the three sons were entered against the properties in the Khewat according to the allotment made under the will of Rabab Bano. In 1943, plaintiff 2 applied for removal of the name of the defendant from the Khewat. This application being dismissed, the suit giving rise to the present appeal was filed.

8. During the lifetime of the defendant's father Zahurul Hasnain, plaintiff 2 was the lambardar of the entire village: On 13th July 1933, he applied to the S. D. O. offering to resign that position on the ground of illness, etc. and suggesting the appointment of Zahurul Hasnain in his place, the latter having endorsed on the application his willingness to accept that office. This was allowed on 18th July 1933. Soon after, on 11th February 1944, plaintiff 2 was again appointed lambardar in place of the defendant, who had apparently served as such till then after the death of his father Zahurul Hasnain in October 1940.

9. The allegations on which the present suit was filed were that plaintiff 2 was entitled to be the Mutwalli of the entire waqf property after the death of his eldest brother, Askari Hasan, and that the will executed by Rabab Bano on 1st April 1916, and the agreement executed by her sons on 14th June 1916, were both void, inasmuch as they had purported to modify the scheme of the devolution of tauliat laid down in the waqf deed of 14th October 1900.

10. The defendant resisted the claim naturally on the basis of the aforesaid will and agreement and pleaded that plaintiff 2, having consented to the will and having also been a party to the agreement, was bound by the same, and that he was estopped from bringing the suit under Section 115, Evidence Act. There were a number of other pleas also taken, but they were all of a subsidiary nature. The learned Civil Judge, accepting this plea of estoppel, dismissed the suit, and the present appeal was filed by the plaintiffs against that decree.

11. The main argument addressed to us by the learned counsel was with reference to this plea of estoppel, the plaintiffs-appellants contending that in the circumstances of the case, such a plea was not open to the defendant, and the latter answering that the plaintiff was altogether barred by the rule of estoppel from bringing the claim.

12. Now there can be no doubt that the provisions in the will made by Mst. Rabab Bano, as affirmed by the agreement dated 14th June 1916, did constitute a modification of the scheme of tauliat laid down in the deed of waqf executed by Imamunnisa. Under the waqf, after the death of Rabab Bano, her eldest son was admittedly to be the Mutwalli of the entire property comprising the waqf. Under the will and the agreement that son was to have nothing to do with any portion of this property, but the same had to be split up into two lots, one to be held by the second son of Rabab Bano, that is the present plaintiff 2, and the other by her third son, the father of the defendant-respondent. That is to say, not only the person entitled under the waqf to be the Mutwalli of the entire property after the death of Rabab Bano was not to be the Mutwalli of any portion of it at all, but the property was divided into two separate lots, each to be entrusted to a particular individual, there being thus two Mutwallis of the entire property, one of a particular portion, at one and the same time.

It is admitted that under the waqf itself such a contingency was not provided for. It is also admitted that under the waqf, the eldest son of Rabab Bano, after the latter's death, was to be the Mutwalli of the entire property. It is further acknowledged that when the second son of Rabab Bano became the Mutwalli under the waqf, he too was to be the Mutwalli of the entire property, and so was her third son also. The principal defence in the Court below and as stressed in the arguments before us was founded on the plea of estoppel, it not being denied that the will and the agreement in question did entail an alteration of the provisions of the waqf relating to the devolution of the office of tauliat.

13. A number of legal questions now arise as to the power of appointment of a Mutwalli and the right, if any, of the Mutwalli, though he may be the waqif himself, to introduce alterations in the scheme already laid down in the waqf, even though no power was reserved to him in the waqf in that behalf. It is needless to say that, if no power of making a change in the term of the waqf including the personnel of the Mutwalli is permissible to the waqif himself, there being none reserved in the deed, none can be claimed by a subsequent Mutwalli. This position has not been denied.

14. Now under the Mohammedan Law, the founder of the waqf has power to appoint the first Mutwalli and to lay down a scheme for the administration of the waqf and for succession to the office of Mutwalli. He may nominate the successors by name, or indicate the class together with their qualifications from whom the Mutwalli may be appointed, and may also invest the Mutwalli with powers to nominate a successor after his death or relinquishment of office. If any person appointed as Mutwalli dies or refuses to act in the trust or is removed by the Court, or if, the office of Mutwalli otherwise becomes vacant and there is no provision in the deed of waqf regarding succession to the office, a new Mutwalli may be appointed (1) by the founder of the waqf, (2) by his executor, if any, and (3) if there be no executor, the Mutwalli for the time being may appoint a successor on his death-bed, subject of course to the condition that there is no provision in the waqf itself to meet that situation. This is the general law, and it is not contested.

It cannot further be denied that a Mutwalli by virtue of his office cannot appoint a successor, which he can do only if there is no provision in the waqf itself relating to succession to the office and only if he is on his death-bed. Not only is the office not transferable, but, it is also not hereditary, unless there is a provision in that behalf in the waqf itself or there is a custom in support of it. In this connection I may cite the cases of Shankar Vishwanath v. Shrinivas Bhalchandra, A. I. R. 1935 Bom.

254 (2), Mohomed Soleman v. Tasadduq Hossain, A. I. R. 1935 Cal. 623 and Phatmabi v. Abdul Musa, A. I. R. 1914 Mad. 714.

15. That the office of a Mutwalli is not transferable has been affirmed in a number of decisions, for instance those in Wahid Ali v. Ashruff Hossain, 8 cal. 732 and Ali Muhammad v. Anjuman-i-Islamia, A. I. R. 1931 Lah. 379. These were cases under the Mohammedan Law. Even under the Hindu Law, the office of a shebait cannot be alienated, as pointed out by Page J. in Nagendra Nath v. Rabindra Nath, A. I. R. 1926 cal. 490 following the dictum of Mukerji J. in Mahamaya Debi v. Hari Das, A. I. R. 1915 cal. 161 (2). In this case also it was held that only a custom or usage or a term in the deed of endowment permitting a transfer could justify a transfer.

16. The general policy of the law is in favour of respecting the wishes of the wakif in respect of the manner in which the property under the waqf has to be held and administered or the agency through which this has to be done. On the principle that a completed waqf constitutes a complete divestment of title and also the vesting of it in God, all the necessary consequences have to follow from such transference of title, including the incompetency of the erstwhile owner to deal with the property, even if he be the Mutwalli himself, in any manner contrary to or inconsistent with the terms of the waqf. It is undoubtedly open to him to reserve a power to make subse quent alterations in that scheme in the deed, but, where no such reservation has been made, he is denied all liberty to introduce any ehange in the terms of the disposition on the obvious ground that his only concern with the property is that of a trustee, the proprietary title having shifted to God Almighty. The decisions in Mt. Niamatul Nissa v. Hafizul Bahman, A. I. R. 1933 oudh 261, Mt. Bahman v. Mt. Baqridan, A. I. R. 1936 oudh 213 and by this Court in Abdul Wahab v.

Mt. Sughra Begum, A. I. R. 1932 ALL. 248 and Sibte Rasul v. Sibte Nabi, 1942 ALL. L. J. 722 illustrate this rule in no uncertain terms.

17. The same principle forms the basis of the oases in which the Courts in India have, time and again, emphasised that even the subsequent mis conduct of the wakif Mutwalli cannot affect the validity of the waqf, and that the same shall retain its full operation inspite of such conduct, vide Abdul Jalil Khan v. Obedullah Khan, 19 ALL. L. J. 227 and the judgment separately de livered by Amir Ali I. in the Full Bench case of Bikani Mia v. Shuk Lal, 20 cal. 116. The Bom bay High Court in Abdul Rajak v. Bai Jimbabai, 14 Bom. L. R. 295 affirmed the same position.

18. In this background of the legal position regarding the inviolability of a document of waqf, so far as the prohibition against the alteration of its terms by the Mutwalli is concerned, I may now proceed to examine the plea of estoppel taken by the defendant-respondent in this case. Section 115, Evidence Act, provides :

> "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he, nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

Reading the section barely, it is manifest that the party pleading estoppel must show that a change in his position was caused in consequence of some declaration, act or omission of the party against whom it is pleaded. This means that some prejudice should have been caused to the former as a result of something done or omitted to be done by the latter. If the change in the position of the party pleading estoppel was not a consequence oi what the other party had done or omitted to do but was the outcome of an agreement between them, both having stood on an equal footing in respect of knowledge of the actual state of affairs, a plea of estoppel would not be entertained. In other words, where the party pleading estoppel knew of those facts as much as the other did, and with that knowledge agreed to a certain proceeding, he would not be allowed to plead estoppel if the other party sought to be relieved from the consequences of the same. The Judicial Committee in Mahori Bibi v. Dhurmodas Ghose, 30 Ind. App. 114 (P.C.) held that "Section 115 of Act 1 of 1872 does not apply, where the untrue statement relied upon is made to a person who knows the real facts and is not misled by it. There can be no estoppel where the truth is known to both parties."

Again in Kartar Singh v. Dayal Das, A. I. R. 1939 P. C. 201, their Lordships affirmed the same doctrine by laying down that a party could not be estopped from challenging a statement regarding the validity of the nomination of a person as a Chela, if the nomination was per se legally invalid.

19. In a large number of cases, involving of course different combinations of facts, the question was considered by the various High Courts, and in complete uniformity the view taken was that where the true position was known, so that there could be no question of either party being in a position of advantage over the other and it could not be said that the change caused in the position of either was necessarily the result of the conduct of the other party affected or supposed to be affected could not plead estoppel against the opposite party.

The basis of the view obviously was that, no one could be penalised for what he himself had not caused. If a certain position is known to two individuals, either of whom inspite of this knowledge undertakes the risk of adopting a certain course of conduct, it cannot be claimed that his action is the result of a representation made by the other. This knowledge may be either of facts or of law. In either case, the legal position would be the same, there being only this difference that, whereas on a question of fact knowledge will have to be proved, on a question of law it would be presumed on the principle that no one can claim immunity on an excuse of the ignorance of law.

20. In the various cases that arose for decision in this country, the test followed was this knowledge of the parties in regard to the actual state of affairs, there being no distinction, as I have said, between knowledge of fact and knowledge of law, except that while the former has to be established by evidence, the latter can always be presumed. I may only indicate the facts of a few of these cases.

21. In Tek Chand v. Gopal Devi, 13 Ind. cas. 482 (Lah.) after a boy had been adopted by a certain person, the latter made a second adoption. The two adoptees agreed to divide the property left by the adoptive father half and half, ynder the Hindu law, a man could make only one adoption and no more during the lifetime of the boy adopted. Subsequently the boy first adopted, who had already agreed to the property being held by him and the other adoptee half and half, brought a suit for possession of the half held by the latter. He was met by a plea of estoppel which was rejected on the

ground that the agreement had proceeded oh an assumption which could not be sustained in law. This meant that, even if the defendant in that case had been misled or encouraged into a belief by an assurance from the plaintiff as regards the validity of his right on the second adoption, the assurance was only an expression of opinion which was legally wrong and as such, it could not feed a plea of estoppel.

22. In Jagat Narain v. Salik Earn, A. I. R. 1938 oudh 110 a person had admitted the title of another to the extent of a half share in the pro perty, that other being really owner of only a one-

third share. Subsequently, he brought a suit for recovery of the excess share already agreed to be held by the defendant, setting up the true legal share. The plea of estoppel taken against him was rejected on a ground similar to what I have men tioned in connection with the last case.

23. In Kidar Nath v. Naipal Singh, 8 ALL. L. J. 1308 a person was found to have taken a mortgage of property with knowledge that it could not be legally mortgaged. It was held that he could not plead estoppel against the mortgagor denying the validity of the mortgage, as the parties must be deemed to know the law.

24. In Mahommed Shafi v. Mohammed Said, A. I. R. 1930 ALL 847 the question was whether the plaintiff having made a declaration that one Jaglal Singh was the owner of a certain property was estopped from alleging that he was really its mortgagee. It was found that there were documents on the record from which the defendant, if he was diligent, might have known that Jaglal was really a mortgagee of the property. On this it was held that a party relying on Section 115, Evidence Act, had to establish not only that the opposite party had made a certain declaration but that the said declaration had been believed and acted upon and that it was not reasonably possible for the said party to know the true state of affairs by pursuing enquiries reasonably and with diligence and, further, that, where the truth was accessible to a party, the plea of estoppel upon representation would fail.

25. In Lachman Singh v. Collector of Moradabad, A. I. R. 1933 ALL. 641 the question was whether the plaintiff was estopped from denying the title of one Mt. Nawal Kunwar and it was answered in the negative, on the principle that, where a person to whom the real facts were known or at least could have been known by exercise of ordinary diligence, he could not plead the doctrine of estoppel, as he could not be said to have been misled by any act, omission, or declaration.

26. In Deota Din Singh v. Raj Narain Singh, A. I. R. 1934 ALL. 75 the facts were that in a compromise filed in a revenue Court, the plaintiff's father had admitted the title of the defendant in regard to a four anna share in the mohal, and it was held that where both parties were perfectly aware of the circumstances and merely made a temporary arrangement for their mutual convenience, no estoppel arose.

27. In Ranchhodlal Vandravandas v. Secy. of State, 35 Bom. 182 the facts were that in a grant made by the Government to the defendants' pre-decessor-in-title it was stated that a strip of lands belonging to the Government was the southern boundary of the plot so granted. This statement was

repeated in a mortgage deed executed by the defendants' predecessor-in-title to the defendants themselves. Later on, the defendants purchased the said plot and encroached on the strip by extending their holding on it. Thereupon the Secretary of State for India in Council brought a suit against them to recover the possession of the strip after the removal of the defendants' encroachment. The defendants pleaded estoppel. It was held that the defendants' title deeds having brought to their knowledge the title of the Government, the doctrines of estoppel and acquiescence; were not applicable.

28. In William Jacks & Co. v. Joosab Mahomed, 48 Born. 38 the question was whether the defendant, having, by letter to the plaintiff, admitted the tenancy held by the latter to be a monthly tenancy, was estopped from claiming it to be one of a year-to-year. It was held that, where the facts were within the knowledge of both the parties, there was no scope for the doctrine of estoppel, it being further explained that the language of Section 115 extended to the encouragement of an erroneous belief, but that, the party must have acted on such belief in consequence of the encouragement.

29. In Swaminadha Aiyar v. Swaminatha Aiyar, A. I. R. 1927 Mad. 458, it was found that when a limited owner was making an alienation of the property of the last male holder, the plaintiff reversioner had stood by and even asked another person to purchase the property from the female holder, and it was held that such conduct did not estop the reversioner from setting up a claim to the property, as the purchaser knew that the holder had only a life interest in it.

30. The facts in the above cases were of course different, but the plea of estoppel was rejected on a ground common to them all, viz., the knowledge of the parties regarding the actual state of affairs, so that neither of them could be said to have done anything necessarily as a result of the conduct of the other.

31. Now let us see how the rule can be applied in the present case. All the parties knew that Imamunnissa had made a waqf, and that of a particular character. They also knew, when executing the deed of agreement of 14-6-1916, that their mother Rabab Bano had executed a will. In fact, there is not only a reference in the agreement to the will, but also an undertaking to abide by the terms of the will. In the will, expressly, there is a reference to the wakif. The parties, therefore, when executing the agreement, also knew the wakif. Knowing the waqif would obviously mean knowing the terms and recitals of the waqf, whatever they were.

32. Legally, as I have pointed out, the clauses of the waqf were unalterable, for all time and for all people including the wakif herself, there being no power reserved in the waqf allowing her to do anything in deviation of its terms. It is also clear that by undertaking to abide by the will, they did introduce a change into the scheme of the waqf on a very cardinal point, that of the appointment of the Mutwalli after the death of Rabab Bano. This position of fact was known as much to the plaintiff as to the defendant's father. They both presumably also knew the legal injunction against such a step. If, in spite of this knowledge, the defendant's father agreed to the arrangement evidenced by the document of 14-6-1916--let us assume at the instance of the plaintiff--the question is whether such conduct could be attributed only to an act or omission on the part of the plaintiff or rather to a

desire common to both of them to do something in the teeth of the provisions of the waqf and in clear violation thereof.

33. Learned counsel for the defendant-respon-dent cited four cases for the consideration of the Bench, [1] Ramanathan Chetti v. Murugappa Chetti, 29 Mad. 283 (P. C.); [2] Sabava v. Yamanappa, A. I. R. 1933 Bom. 209; [3] Jamiat Dawatwa Tabligh Islam v, Mohammad Sharif, A. I. R. 1938 Lah. 869 and [4] Mahomed Hussain v. M. M. J. M. Committee, Puddupet, A. I. R. 1940 Mad. 167. The first was a case between Hindu parties, the facts of which clearly show that the devolution of managership was made hereditary, and that the subsequent arrangement entered into by the various branches of the descendants of the original owner was in no way in conflict with that rule. It was only an arrangement amongst the various branches; inter se, keeping intact the basic rule that the property would be managed after the death of a particular incumbent by his heir-at-law. There was no question in that case of the descendants having, in any manner, acted contrary to any legal rule.

The next case which was also between Hindu parties did not raise any question of estoppel. In. the third case, which no doubt arose out of a Mohammedan waqf, there was nothing to show that the wakif had done anything against the terms of the waqf. Indeed, on p. 876 the learned. Judges observed :

> "Much stress was laid by the respondent on the fact that he was the founder of the trust and as such he was at liberty to make or unmake any schemes he liked and at any time he liked. In our view this position is untenable."

In the last case it was only held that the right of tauliat could be acquired by prescription. In the present case, however, there was neither any such plea taken by the defendant, nor any issue. Indeed, there could be no question of the right being acquired by prescription, inasmuch as the right of plaintiff 2 arose under the deed of waqf only after the death of his eldest brother, Askari Hasan, which took place in 1938, the suit being filed in 1944. Plaintiff 2 claimed the office in his own right under the waqf and not through any previous intermediary who also might have held it. Unless the suit was time-barred, taking the commencement of the period of limitation from the date of death of Askari Hasan, it could not be said that anyone had acquired the right by prescription to the detriment of plaintiff 2.

34. Another aspect from which the question may be approached is that, when the plaintiff along with his other two brothers executed the deed of agreement of 14-6-1916, he had no such, right with which he could deal under the provisions of the law. He then had only a possibility of succession to the office of tauliat, if he was alive on the death of his eldest brother. It was a mere spes successionis, which could not be made the subject of a transfer under the provisions of the Transfer of Property Act.

35. A yet other aspect bearing on the question is that the office of a Mutwalli under a waqf is essentially a personal status, and, as such, it must be taken as not transferable. Of course, the position would not be altered merely by the circumstance of the transferee himself being a likely

future successor to the same office. Lastly, the plea of estoppel against plaintiff 2 can not entail the dismissal of the present suit to which, the waqif itself is a party as plaintiff.

36. In view of all these considerations, I am forced to the conclusion that the will executed by Rabab Bano as modifying the rule of devolution of tauliat embodied in the waqf created by Imamunnissa being illegal and the agreement executed by plaintiff 2 and the defendant's father on 14-6-1916, affirming the said will being likewise illegal, plaintiff 2 was not estopped from claiming the right of tauliat in the present suit, merely by reason of having been a party to the said agreement. This is because of the fundamental rule, that nothing should be allowed to carry the effect of altering the terms of the waqf, not so even if the wakif himself does anything to that end, and the rule that no one, merely after agreeing to an illegal arrangement, can be debarred from claiming relief from the consequences of the eame.

37. Learned counsel for the respondent also contended, in the alternative, that the suit was rightly dismissed as the plaintiff was incompetent to manage the property as a Mutwalli. No such plea of incompetency was taken in the written statement, nor was any issue framed by the Court below on the point. Reliance was placed by him on the contents of the application made by plaintiff 2 for permission to withdraw from his office as Lambardar and for the appointment of the defendant's father as such. It is true that there is a reference to 'illness' and to the petitioner being about to go on travel, as being the occasion for the application. That, however, cannot be said to carry the implication that for all future time also plaintiff 2 was to be unable to manage the property if he acted as a Mutwalli. Indeed, Rabab Bano herself appointed him as the Mutwalli of one half of the property in dispute. No suggestion has been thrown out that he has since fallen in his equipments or taken to habits likely to prejudice a normal discharge of his duties as a Mutwalli.

38. A suggestion was also made that the Bench might remit an issue on the point with permission to the parties to adduce fresh evidence. When no plea was taken and no issue framed in regard to this matter, it would be too late, and not quite fair, to grant a fresh opportunity to the defendant to raise the plea and prove it by additional evidence.

39. Learned counsel for the respondent also resisted the plaintiff's claim on the ground that the agreement dated 14-6-1916, had constituted a family settlement by which plaintiff 2 had benefited and which therefore he could now impugn. In the first place, qua the property now in question there appears to have never been any dispute between the parties. The sine qua non of a family settlement is the existence of a previous dispute, the adjustment of which is brought about by such a settlement. We do not know whether there was any dispute with regard to the properties other than the property in dispute, the allotment by Rabab Bano being a purely voluntary act prompted only by a sense of precaution but, so far as the materials on the record go, there is nothing to support the slightest suggestion that any dispute had ever arisen with regard to the waqf property, either on the ground that it was not the property of Imamunnissa or that the waqf made by her was otherwise illegal.

In the document of will executed by Rabab Bano, it was no doubt recited that the lady wished that no dispute "might arise among my heirs after my death." But the reference in the very preceding

sentence (see the original and not its translation on p. 61) was specifically to the lady's personal properties, the words being "jis qadar jaidad mere pas aur hai." Even this "dispute" did not mean any dispute then existing. It was a dispute likely to arise in future and in anticipation of which the same was executed. Such is not a dispute essential for the validity of a family settlement. This is one objection to the argument.

Secondly, it is not certain that plaintiff 2 received a portion of her mother's property in consideration of his relinquishing the tauliat in respect of one half of the waqf property. It may be that in a future litigation the exoneration of this property from the agreement of 14-6-1916, may involve, in whole or in part, a divesting of title in regard to the other property. But I am not called upon in this case to consider that aspect of the matter much less shall I be justified in refusing relief in regard to the disputed property in view of that question.

40. In the course of the arguments, a question was raised by the learned counsel for the appellants, in regard to the status of the defendant qua the property in suit. He claimed to be the Mutwalli of the property by reason of his father Zahurul Hasnain having held that office. According to him, therefore the office of tauliat was hereditary. This is wholly contrary to the elementary rule of Mohammedan law that the office of tauliat is not hereditary, unless it has been made so under the waqf itself, or unless there is a custom to that effect.

In the present case, whereas the waqif appointed the Mutwallis for the lifetime of the three sons of Rabab Bano respectively, there was no provision in regard to any future period; much less was there any provision that anyone could claim the right by reason merely of his relationship with the previous incumbent. Nor was there any suggestion of a custom making the office hereditary in the case of such waqfs in the locality. Even if Zahurul Hasnain was the Mutwalli of a part of the property, the right did not devolve after his death on the defendant, his son, as if it was a part of the personal assets of the deceased. The office depended entirely on the terms of the waqf, unless, in the absence of such terms, there was also a custom governing the same. In this case there were neither any terms making the office hereditary, nor was there any custom carrying that effect. I have discussed this question only in reference to the argument of the learned counsel for the respondent, though, strictly speaking, it was not necessary to do so in view of the fact that the plaintiffs could succeed only on the strength of their own title, the possession being actually with the defendant-respondent.

41. On a careful survey of all the aspects of the case, both of fact and law, I have come to the conclusion that the judgment of the Court below cannot be sustained. I would, therefore, allow the appeal set aside the decree of that Court and allow the plaintiff's claim with costs in both the Courts.

Desai J.

42. I regret that my views in this appeal seriously conflict with those of my learned brother. I tried to reconcile myself to the views expressed by him but failed. I consider that this appeal fails on more than one ground. It fails because the plaintiff-appellant has not made out a title in himself to the relief sought by him through the suit and the appeal. It fails because the suit filed by him was barred

by limitation. It fails because of the application of the doctrines of election or approbate and reprobate, and waiver. Finally it fails on the ground of family arrangement to which the appellant was a willing party.

43. There is no dispute that under the waqf deed executed by Imam-un-Nissa, Rabab Bano was to be the Mutwalli after her death and that after Rabab Bano's death her eldest son, Askari Hasan was to be the Mutwalli if he was fit, otherwise the next son Manzoor Hasan and in the event of his also being unfit, the third son Zahurul Hasnain. The waqf deed did not lay down perpetual succession to the office of Mutwalli. It stopped after stating who was to be the Mutwalli next after Rabab Bano. I cannot possibly interpret it as laying down that on the death of Askari Hasan, Manzoor Hasan would be the next Mutwalli and that on Manzoor Hasan's death Zahurul Hasnain would be the next Mutwalli. It does not at all provide for succession to whomsoever is the Mutwalli immediately after Rabab Bano.

There is nothing incongruous in this interpretation of the deed. When it did not prescribe a line of succession for all time to come, there is no reason to think that it should not have failed to provide for succession on the death of whomsoever succeeds Rabab Bano. My learned brother has quoted the relevant provision in the waqf deed about the succession to the office of Mutwalli. The words "first her eldest son" do not mean that after the death of Askari Hasan as Mutwalli, Manzoor Hasan would be the next Mutwalli. The word "first" stands in opposition to the words "her other sons ..... in order of seniority."

What the waqf lays down is that on the death of Rabab Bano, first Askari Hasan should be considered for the office of Mutwalli, then Manzoor Hasan and then Zahurul Hasnain. Askari Hasan would be rejected only on the ground of being incompetent to hold the office. Similarly Manzoor Hasan also would be rejected on that ground. The words "he was incompetent or for any other reason was unable to carry out his functions" must necessarily refer to a live person and cannot possibly refer to a dead person. On the death of Rabab Bano, Manzoor Hasan could be appointed as Mutwalli only if Askari Hasan was incompetent or for any other reason unable to hold office. If Askari Hasan was already dead he would cease to be the eldest son and Manzoor Hasan would be deemed to be the eldest son and would become the Mutwalli, if not incompetent. Simply because Manzoor Hasan would be considered for the office of Mutwalli in case Askari Hasan was found unfit or Zahurul Hasnain would be considered in case Askari Hasan and Manzoor Hasan were found unfit, it cannot be said that if Askari Hasan held the office and died Manzoor Hasan would be entitled under the deed itself to succeed to the office, and that likewise, if he held the office and died, Zahurul Hasnain would be entitled to succeed to him.

There is nothing technical in this interpretation of the deed. The Court is bound to take the deed as it stands and cannot add to its terms or substitute in its place another deed which the Court thinks should have been made. The power of a'Court is to construe a deed and not to reconstruct it. If there is any omission in the deed, it is certainly not for the Court to fill up the omission or to put a forced construction upon its terms. If Imamunnissa wanted to provide for succession to whomsoever is the next Mutwalli after Rabab Bano, she could have done so in clear words and not in words which cannot be used with reference to a dead person.

44. When Imamunnissa laid down in her deed who was to succeed to the office of Mutwalli on the death of Rabab Bano, it was certainly not open to the latter to make any change in this succession. I agree that the will executed by Rabab Bano dividing the office between Manzoor Hasan and Zahurul Hasnain could not prevail against the waqf deed. If Askari Hasan chose to insist upon his right under the waqf deed to hold the office and was fit to hold it, the Court would have upheld his claim (provided of course he was prepared to give up a part of the legacy under Rabab Bano's will). But the legality or illegality of Rabab Bano's will is not directly in question before us, because it was reinforced by the agreement among her sons immediately on her death. It is that agreement which has to be considered by us, because the parties' rights are determined by it. It is undoubtedly a family arrangement binding on all the three sons of Rabab Bano. Under it they agreed to divide the property left by her and the office of Mutwalli in accordance with the terms of the will.

> "Where family agreements have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a Court of equity will not disturb the quiet, which is the consequence of that agreement;" see Gordon V. Gordon, (1821) 3 Swan. 400.
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> In order to validate a family settlement, it is not necessary that there should be an existing dispute:
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> "It is sufficient that there should be the possibility of a further dispute which might result in litigation, and to avoid a possible litigation and the consequent preservation of the family property is to be deemed a sufficient consideration for a family settlement:" See Ameer Hasan v. Muhamad Ejaz Hussain, A. I. R. 1929 Oudh 134 at p. 143. See also Gandharp Singh v. Nirmal Singh, 22 Oudh Cas. 300.
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> Mukerji and Guha JJ. stated in Basantakumar Basu v. Ramshankar Ray, 59 cal. 859, at p. 885:
>
> "The arrangement must be one concluded with the object of settling bona fide a dispute arising out of conflicting claims to property, which was either existing at the time or was likely to arise in future. Bona fides is the essence of its validity, and from this it follows that there must be either a dispute or at least an apprehension of a dispute, a situation of contest, which is avoided by a policy of giving and taking."

If the rights of the parties, depending on facts, remain doubtful, that would afford a fair and equitable basis for a compromise--Rajunder Narain Rae v. Bijai Govind Singh, 2 MOO. Ind. App. 181 at p. 251. Sen J. said in Raghubir Datt v. Narain Datt, A. I. R. 1930 ALL. 498 (2) at p. 502:

> "The existence of a doubtful claim is essential for a family settlement but the existence of a dispute or controversy in prcesenti is not. A family settlement may be supported on the ground of maintaining peace and goodwill amongst the members of the family, for the preservation of the family honour or of the family property and for

> the avoidance of disputes and litigation in future."

One Lucy was liable under the law as then interpreted to be placed as a contributory upon the list and his name was accordingly so placed. After some time he made a certain proposal involving his payment of some money and thereby his being absolved from all further liability. That proposal was accepted by the Company. Subsequently the law was differently interpreted and according to that interpretation he should not have been placed as a contributory upon the list. Still he was held bound by the compromise. See Lucy's case; In re Midland Union etc. Rly. Coy., (1853) 22 L. J. Ch. 732. Lord Justice Turner said at p. 736 :

> "I think it, however, sufficient for Mr. Lucy, in entering into the agreement, to have thought at the time that there was a bona fide question."

So it was not at all essential that there existed a dispute among Rabab Bano's sons in order to give validity to the family arrangement. It is enough that they thought that there was a question of succession among them. No suggestion of any mala fides has been made. When there is no allegation of any mala fides, it is reasonable to suppose that the family arrangement was preceded by some dispute or claim to the property left by Rabab Bano. Without the question having arisen, the three sons would not have soon after the death entered into the family arrangement.

45. The family arrangement operates as waiver by Askari Hasan and Manzoor Hasan of their rights to hold the office of Mutwalli. The holding of the office of Mutwalli is a right and not a duty and cannot be imposed on anyone who is not willing. Imamunnissa might have appointed Askari Hasan or, in the alternative, Manzoor Hasan as the Mutwalli after Rabab Bano, but neither of them was bound by any law to act as Mutwalli. So each could waive his right under the waqf deed to be the Mutwalli and this was, in fact, what was done by them under the family arrangement. Askari Hasan gave up his right completely to be Mutwalli. Manzoor Hasan gave up his right to be the Mutwalli of the entire property and agreed to be a Mutwalli of only half the property. Just as he could surrender his right to be Mutwalli in respect of the entire property, so also he could surrender his right to be Mutwalli in respect of half the property. The same would be true of Zahurul Hasnain.

Once Askari Hasan surrendered his right, it devolved upon Manzoor Hasan subject to his fitness. Even apart from the question of the right to surrender, the very fact that Askari Hasan agreed that his brothers would be the Mutwallis rendered him incapable of performing the duties of Mutwalli. If a man refuses to hold an office, it means that he has rendered himself incapable of holding it. If Manzoor Hasan also surrendered his right, it devolved upon Zahurul Hasnain and if he also surrendered it, there remained no one who could claim to be entitled to hold the office under the waqf deed. In that case the appointment would have to be made by some other authority.

The view that I take of the family arrangement is this : Askari Hasan, Manzoor Hasan and Zahurul Hasnain one after another surrendered their right to succeed to Rabab Bano as Mutwalli and after these surrenders they agreed among themselves that Manzoor Hasan and Zahurul Hasnain would jointly act as Mutwallis each being responsible for half of the property. There can be nothing illegal or against the terms of the waqf in this arrangement. As descendant of the wakif any of them would

have a preferential claim to the office of Mutwalli. The agreement among them did not involve any breach of trust. They themselves agreed to a certain arrangement and there was no one to dispute that arrangement. In the circumstances I do not see anything wrong in the arrangement. The succession laid down in the waqf deed came to an end when Zahurul Hasnain surrendered his right. If somebody else claimed to be the Mutwalli, it was open to him to get his right determined by Court. In any case, it cannot possibly be said that it was not open to the three brothers to say that two of them would be joint Mutwallis. The facts that Manzoor Hasan and Zahurul Hasnain surrendered their right to hold the office would not stand in their way of accepting the office jointly with each other.

46. It is said that there could have been no waiver by Manzoor Hasan of his right to hold the office of Mutwalli because it was a mere spes successionis. I do not agree, Rabab Bano had already died before the agreement of 14-6-1916 and owing to the simultaneous surrender by each brother of his right to become Mutwalli in succession to Rabab Bano, Manzoor Hasan and Zahurul Hasnain each had a right in presenti to become Mutwalli. The moment Rabab Bano died, the right vested in Askari Hasan and the moment he surrendered that right, it vested in Manzoor Hasan; so when the agreement was executed, Manzoor Hasan had a right in prcesenti to be the Mutwalli and he gave up that right.

47. The agreement of 14-6-1916 binds the three brothers, not only on the ground that it amounts to a family arrangement and also to a waiver of their rights to hold the office of Mutwalli, but also on the ground that it amounts to election as against Askari Hasan and Manzoor Hasan. Askari Hasan being dead, the question of his being estopped by election does not arise. The question arises only against Manzoor Hasan. The doctrine of election is stated in these words by Bigelow on Estoppel, 6th edition, p. 733 :

> "It is laid down (rather too broadly, it seems) as an old rule of equity that a person who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the same, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will. Thus, if a man devise to A property which belongs to B, and by the same will, give to B his own (the testator's) estate, B must convey his property to A, or he cannot take the property devised to him under the will, except upon the footing of making compensation to A, out of the property which B takes by the will, but not beyond, what A would have received under the will."

> The reason behind the doctrine is, as stated by him on page 737 :
> "In contemplation of equity the testator means, as in other cases, that if

> Bower, who considers election as a rule of estoppel, puts it as follows in "Estoppel by Bepresentation," p. 225 :

> "Where A in his dealings with B being at liberty to adopt either of two mutually exclusive steps, proceedings, courses of action, or attitudes in relation to B, elects to take or adopt one of them, and to reject the other, or to 'waive' his right in respect thereof, and A's declaration of such election or 'waiver' by words, conduct, or inaction, influences B to alter his position to his detriment, A is estopped, as against B, from thereafter resorting to the course of action which he has thus intimated his intention of relinquishing, dispensing with, or 'waiving.' "

Pomercy treats it as an extension of the maxim of equity that one who seeks equity must do equity. According to him the essential facts presenting an occasion for the doctrine are : A gives to B property belonging to c, and by the same instrument gives to c other property belonging to himself. The equitable doctrine upon these facts is :

> "C has two alternatives : 1. He may elect to take under the instrument, and to carry out all its provisions; he will then take A's property, which was given to him, and B will take C's property. 2. He may elect against the instrument. In that case he will not wholly forfeit the benefits intended to be conferred Upon him; he must surrender only so much of such benefits as may be necessary to compensate B for the disappointment he has suffered by C's election to take against the instrument." (See Pomercy's Equity Jurisprudence, 4th edn. Vol. I, para. 462).
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> This doctrine was applied by the Judicial Committee in Rangama v. Atchama, 4 MOO. Ind. App. 1 (P. C.). Their Lordships stated at p. 103 that the principle is "not peculiar to English law, but common to all law which is based on the rules of justice, namely, the principle, that a party shall not, at the same time, affirm and disaffirm the same transaction, affirm it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice, --we think, that effect must be given against the estate of Jaganadha, to. the intentions of Vencatadry, as far as he had the power of affecting them."

48. Rabab Bano admittedly had no right to dispose of the office of Mutwalli. On her death one of her sons, who was senior as well as fit, was to be the Mutwalli. Still she proceeded to dispose of the office through her will. Assuming that Askari Hasan was fit to be Mutwalli, she took away his right to the office and gave it to Manzoor Hasan and Zahurul Hasnain. Instead she gave Askari Hasan some of her own property. If Askari Hasan was unfit or refused to accept the office of Mutwalli, it should have gone to Manzoor Hasan under the waqf deed, but Rabab Bano deprived him also of this right and instead gave him some of her property.

Of coarse all three sons were equal heirs and would have inherited her property. But when she made a will, she could dispose of her property in any manner she liked and neither of her sons could claim that he had a right to be given a particular share in the property under the will. So it will not do to argue that when Rabab Bano gave Askari Hasan and Manzoor Hasan shares in her own property, she gave nothing more than what they were entitled to. If she had not deprived Askari Hasan and Manzoor Hasan of their rights to hold the office of Mutwalli, she would have naturally given them

greater shares in her own property than she actually did. When she died there were two alternatives before Askari Hasan, (1) of insisting upon his right to hold the office under the waqf deed and (2) to accept what was given to him under the will. He could not have both the things. If he insisted upon his right to hold the office, he was bound to make compensation to his brothers out of the property given to him under the will. Exactly the same alternatives arose before Manzoor Hasan also. Both elected to give up their rights under the waqf deed and to accept their rights under the will :

> "Any decisive act done by a person with knowledge of his rights and of all other facts material to him is binding"; Bigelow at p. 739.

The agreement of 14-6-1916 is the clearest exercise of election by Askari Hasan and Manzoor Hasan; by putting their signatures to it they solemnly elected the alternative of accepting the will and giving up their rights under the waqf deed to the extent that they were inconsistent with the terms of the will. The only thing necessary for a person to be bound by the doctrine of election is, that he must have full knowledge of the facts and it cannot be disputed that Askari Hasan and Manzoor Hasan had full knowledge of the facts when they entered into and signed, the agreement which makes a specific reference to the waqf deed. In any case, it has not been even suggested that Manzoor Hasan was not aware of the provision in the waqf deed that he would be the Mutwalli after Rabab Bano if Askari Hasan was not alive or was unfit to hold the office.

Not only did Askari Hasan and Manzoor Hasan elect the alternative of accepting their rights under the will, but also they acted upon it for twenty-seven years. Manzoor Hasan and Zahurul Hasnain got their names mutated in the Khewat as Mutwalli's. of moieties. Zahurul Hasnain remained Mutwalli of a moiety up to his death in 1940 without his right ever being challenged by Manzoor Hasan. On his death, his son Hasnain Ahmad got mutation without any contest from the side of Manzoor Hasan. For the first time in 1943 Manzoor Hasan asserted his claim to the office of Mutwalli under the waqf deed by seeking expunction of Hasnain Ahmad's name from the Khewat. In 1933 Manzoor Hasan himself got Zahurul Hasnain appointed as Lambardar in his place. If he did not admit Zahurul Hasnain's right to be a Mutwalli of a moiety, the latter would have had no right whatsoever to have his name in the Khewat and to be appointed as Lambardar. I consider it as an act of dishonesty on the part of Manzoor Hasan to set up now his claim under the waqf deed to the office of Mutwalli. I have no doubt that he is barred from doing so.

The present case has some resemblance to Ramanathan Chetti v. Murugappa Chetti, 33 Ind. App. 139 (P. C.), which dealt with a hereditary office of Shebait of a Hindu temple. On the death of one Shebait, it vested by inheritance in A and B, who were his sons by two wives. A and B held the office in alternate succession until 1881, in which year A renounced or relinquished his claim to the office in favour of B. B held the office accordingly for some time and A then reasserted his right to the office. The Judicial Committee rejected his claim stating that the unbroken usage for a period of

> nineteen years was as against him a conclusive arrangement of a family arrangement to which the Court was bound to give effect and that it was not for him, at his will and pleasure, to disturb an arrangement of which he had on more than one occasion taken the benefit.

49. When Manzoor Hasan is debarred on account of the doctrines of election and waiver and by the family arrangement, there does not arise any question of applying the rule that there can be no estoppel against statute or law. A family arrangement or a waiver does prevent a person setting up his legal title; he is estopped even on a question of law. Whether he is entitled to a thing or not is a question of law, and if he is estopped from claiming it, it means that he is estopped against law. Similarly when a person is bound the doctrine of election, he is bound even though he would have been under the law entitled to the thing. When A bequeaths to B property belonging to C it is a question of law whether (sic) entitled to the property or not, but the doctirne of estoppel would estop him from pleading the (sic) or taking his stand upon it. Merely because (sic) property is waqf, it cannot be said that nobody (sic) estopped. The property vests in GOD, but GOD(Sic) ownership is not disputed by anybody. The superintendent tendence of the property vests in human agency and it is this vesting, which is in dispute. Rabab Bano committed no greater illegality by changing the succession to the office of Mutwalli than that committed by A in bequeathing to o the property belonging to B. If there was election in the latter case, there is no reason why there should be no election in the former case.

50. I do not consider Manzoor Hasan as being estopped under Section 115, Evidence Act, and I do not consider it necessary to refer to its provisions. I do not dispute the proposition that there can be no estoppel when the party claiming the benefit of estoppel was aware of the facts or did not alter his position to his detriment as the result of the representation. Sections 115, 116 and 117, Evidence Act do not exhaust the law of estoppel. All rules of estoppel are not also rules of evidence. Garth C. J., said in the Ganges Manufacturing Co. v. Sourujmull, 5 cal. 669 at p. 678:

> "Estoppels, in the sense in which the term is used in English legal phraseology, are matters of infinite variety (sic) and are by no means confined to the subjects which (sic) dealt with in Chap. VIII, Evidence Act. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular arguments or contention, which the rules of equity and good conscience prevent his using as against his opponent."

51. I have explained that the waqf deed stops after stating who would be the Mutwalli next after Rabab Bano. Consequently Manzoor (sic) cannot claim to inherit the office of Mutwal (sic) from Askari Hasan. If he had any right under the waqf deed, it was to succeed to Rabab Bano and not to Askari Hasan. Consequently the death of Askari Hasan in 1938 does not invest him with any cause of action. The cause of action accrued to him on 9-5-16 when Rabab Bano died or at the latest on 14-6-16 when Askari Hasan elected to give up his right to be the Mutwalli. He did not assert his right under the cause of action within the period' of limitation and consequently his right was extinguished on 9-5-28 or 14-6-28. Askari Hasnain's own right to be the Mutwalli was extinguished at the latest on 9-5-1928 by efflux off time, if not in 1916 itself by election, waiver and family

arrangement. Even if it be said that Manzoor Hasan was entitled to succeed to Askari Hasan as Mutwalli under the waqf deed itself (sic) that Askari Hasan finally lost his right to be (sic) on 9-5-1928, Manzoor Hasan lost his (sic) of succession finally on 9-5-1940.

(sic) is granted that the office of Mutwalli is not (sic)and Hasnain Ahmad may have no (sic) to be Mutwalli in succession to Zahurul (sic) but that would be no ground for passing (sic)in favour of Manzoor Hasan who himself (sic)no better right. Manzoor Hasan must succeed (sic)he strength of his own title. The law is not (sic) in putting one trespasser in place of (sic) her; it makes no distinction between one (sic) and another. To it Hasnain Ahmad and (sic) Hasan stand on the same footing and it (sic) support the possession of Hasnain Ahmad. (sic) Hasan cannot claim to succeed to Zahurul (sic) as regards the office of Mutwalli.

The (sic)deed certainly does not make the three (sic) heirs to one another as regards the office (sic) Mutwalli.I have already stated that if Askari Hasan held the office and died, Manzoor Hasan could not (sic) to succeed to him on the basis of the waqf (sic)Much less could Askari Hasan claim to suc-(sic) to the office on the death of Manzoor Hasan. (sic) Manzoor Hasan became the Mutwalli on account of Askari Hasan's incapacity or refusal, the (sic) right was gone for ever and could not be (sic)by the death of Manzoor Hasan. Similar(sic) once Zahurul Hasnain became the Mutwalli (sic) to Manzoor Hasan's refusal to act as Mut-(sic) the latter's right was gone for ever and (sic) not be revived by the former's death.

52. As we are not dealing with estoppel by res (sic) the array of parties has nothing to do(sic) the plea of estoppel and Manzoor Hasan's (sic) must fail, even though the waqif is a party to (sic) It fails on two substantial grounds to be affect-(sic) by the procedural law. Manzoor Hasan cannot aprove his position or get a better right simply (sic) impleading the waqif as a party to his suit. (sic) Ahmad might not have specifically plead-(sic) some of the grounds on which I find him enti- (sic) to succeed, but they are all grounds of law (sic) can be permitted to be raised at any time. (sic) has pleaded all the necessary facts. He has (sic) the plea of limitation. He pleaded acqui-

(sic) and relied on Section 115, Evidence Act. He pleaded incapacity on the part of Askari Hasan (sic) Manzoor Hasan, but I agree with my brother (sic) Ahmad J., that the plea was not (sic) (sic)antiated at all. It does not matter if there was (sic)specific plea that Manzoor Hasan himself had (sic)title to be Mutwalli in respect of a moiety of (sic)property; his right to the relief sougut by him as denied.

53. From whatever point of view the case is looked at, Manzoor Hasan cannot succeed at all the law and equity both are against him. The (sic) must, therefore be dismissed with costs.

54. By the Court:--As we differ, we direct, the case to be kid before the Hon'ble the Chief Justice for obtaining a third Judge's opinion on the following questions:

(1) Is the suit barred by time?

(2) Is Manzoor Hasan debarred from claiming the office of Mutwalli in respect of a moiety of the property by the doctrines of election and waiver and by the family

arrangement of 14-6-16 ?

(3) Is Manzoor Hasan entitled to succeed to the office of Mutwalli in respect of a moiety of the property on the ground of either Askari Hasan's death or Zahurul Hasnain's death? and (4) was the plea of estoppel available against plaintiff 1 also? If not, what is its effect?

Raghubar Dayal J.

55. Imamunnissa executed a deed of waqf in 1900 with respect to village Hirapur Khurd and laid down in the deed that she would be the first mutwalli, that after her death Bibi Babab Bano would be the second mutwalli and that after her death, first her eldest son would be the mutwalli and, in case he was incompetent or unable to carry out the functions for any other reason, then her other sons in order of seniority would be mutwallis. Imamunnisa died and on her death Bibi Rabab Bano became the mutwalli. She died in 1916. Prior to her death she, however, executed a deed of will with respect to her property. She included village Hirapur Khurd in that and bequeathed half of the village to Manzoor Hasan and half to Zahurul Hasnain. Her eldest son, however, was Askari Hasan. She made Manzoor Hasan and Zahurul Hasnain as mutwallis of half the waqf property. Shortly after her death her three sons agreed among themselves to abide by the terms' of the will. The result was that Manzoor Hasan became mutwalli of half the village and Zahurul Hasnain became the mutwalli of the other half. No dispute arose during the lifetime of Zahurul Hasnain. He died in 1940. In his place his son Hasnain Ahmad began to act as mutwalli of half the property.

56. In 1943 Manzoor Hasan applied to the revenue Court for removing the name of Hasnain Ahmad from the records as mutwalli of half the village. This application was rejected.

57. The suit was really instituted by two persons, that is, by Allah Eabbul Alimin through Syed Manzoor Hasan as mutwalli and Manzoor Hasan as plaintiff 2. It was alleged in the plaint that Bibi Rabab Bano had no right to change the order of succession of mutwallis as given in the deed of waqf, that Manzoor Hasan became the (sic)mutwalli of the entire village after the death of a skari Hasan and that, even if he did not (sic) after his death he became the mutwalli (sic) eatire village after the death of Zahurut Hassain in 1940. One of the reliefs claimed was for declaration that the entire village was in the possession of plaintiff 2 as mutwalli and that the (sic) had no concern with the mutwalliship in respect of the whole or part of village Hirapur (sic) Another relief claimed was that the plaintiffs be put in possession of the moiety share in village Hirapur Khurd, comprising an area of 312 bighas and odd, which had been recorded against the name of the defendant, on dispossession of the defendant.

58. The suit was contested on various grounds. The trial Court held that Manzdor Hasan was estopped from instituting the suit on account of the agreement of 1916, and dismissed the suit. The plaintiffs appealed to this Court and the Hon'ble Judges who heard the appeal differed and then referred the following four questions to a third Judge for opinion. They are :

"1. Is the suit barred by time?

2. Is Manzoor Hasan debarred from claiming the office of mutwalli in respect of a moiety of the property by the doctrines of election and waiver and by the family arrangement of 1,4-6-1916?

3. Is Manzoor Hasan entitled to succeed to the office of mutwalli in respect of a moiety of the property on the ground of either Askari Hasan's death or Zahurul Hassain's death? and

4. Was the plea of estoppel available against plaintiff 1 also ? If not, what is its effect ?"

59. Questions (1) and (3) : I am of opinion that in view of the terms of the deed of waqf Askari Hasan was to be the mutwalli after the death of Bibi Rabab Bano and that when Askari Hasan did not become the mutwalli, the deed of waqf did not provide for the appointment of mutwallis in any particular manner. The mutwalliship did not go to Manzoor Hasan in 1938. As I do not interpret the relevant provision in the deed of waqf to mean that after the death of Askari Hasan the mutwalliship would go to the then existing eldest son of Bibi Rabab Bano, it follows that Manzoor Hasan's claim to mutwalliship on the basis of the terms of the deed of waqf was 'time-barred when it was instituted in 1944. He got a right to claim mutwalliship in 1916 when Askari Hasan did not agree to act as mutwalli and did not act as mutwalli. He failed to claim this right within the period of limitation and agreed to act as mutwalli of only half the property. I am, therefore of opinion that the suit for a declaration that he is mutwalli in view of the terms of the waqf deed is time-barred.

60. The deed of waqf does not provide that Manzoor Hasan would be the mutwalli after the death of Askari Hasan. It does not provide about his being the mutwalli after the death of Zahurul Hasnain. Zahurul Hasnain and Manzoor Hasan became mutwallis in 1916 in view of the desire of their mother Bibi Rabab Bano expressed in the deed of will. The terms of that will also did not provide that after the death of Zahurul Hassain, Manzoor Hasan would become the mutuwalli of that half of the dedicated property. In fact, those terms do not provide how the mutwalliship would devolve after the death of Manzoor Hasan and Zahurul Hasnain. It follows that after the death of Zahurul Hasnain the mutwalliship of that half of Hirapur Khurd of which Zahurul Hassain was the mutwalli became vacant and that the plaintiff 2 cannot claim any right to it. It appears to me that the defendant also cannot claim (sic) walliship on the basis of inheritance and that (sic) mutwalli, will probably have to be appointed(sic) the relevant Board under S. 56, United Province Muslim Waqfs Aqt, 13 of 1936, or any other (sic) rity under any other provision of law.

61. My answer, therefore, to question 1 is (sic) the suit is barred by time and to question 3 is (sic) Manzoor Hasan is not entitled to succeed to (sic) office of mutwalli in respect of a moiety of (sic) property on the ground of either Askari Hasan (sic) death or Zahurul Hasnain's death.

62. Question 4. I am of opinion that the (sic) of estoppel is not available against plaintiff 1. (sic) .does not mean that the suit is to succeed in (sic) our of plaintiff 1. I have already quoted (sic) reliefs claimed in the plaint. Relief No. 2 for (sic) delivered possession is not really sought. plaintiff 1 and cannot be granted to (sic) Plaintiff 1 has not been dispossessed. Both (sic) plaintiffs and the

defendant just purport to be(sic) possession of the property as mutwallis and (sic) in their own rights. Similarly the first part of (sic) first relief for declaration that plaintiff 2 was (sic) possession and occupation of village (sic) Khurd is not the relief which plaintiff 1 (sic) The only relief which could possibly be allow(sic) to plaintiff 1 is a declaration to the effect that (sic) defendant had no concern with the mutwallish in respect of the whole or part of village Hirapur Khurd. I am of opinion that such a relief of declaration should not be given. It would (sic) serve any useful purpose. I have already (sic) the view that the defendant does not (sic) the mutwalliship as an heir and that the (sic) walliship fell vacant on the death of (sic) Hasnain.

63. Question No. 2 : In view of my opinion or the other questions and of the consideration that that may suffice for the disposal of the appeal, did not hear any arguments on this question (sic) do not express any opinion on it. This has be simply done in order to save time. If, the (sic) concerned feels the necessity of having an (sic) on this question in the circumstances, the (sic) may be sent back to me.

64. Let the file be laid before the Bench co(sic) cerned with the above opinion.

65. By the Court.--The facts of this (sic) were stated by us in our orders before the (sic) was referred to a third Judge for his opinion. That learned Judge has expressed the view that the sir was barred by time. He also held that the defer dant could not, in the circumstances of the case (sic) the status of a mutwalli. On the finding (sic) the suit was time-barred the appeal cannot (sic)We, therefore, dismiss the appeal. In the circumstances of the case, we make the costs easy in this Court.