

**(1973) 08 AHC CK 0024**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Application No. 95 of 1971

Hashim Husain and Others

APPELLANT

Vs

Ahmad Raza and Others

RESPONDENT

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**Date of Decision :** 23-08-1973

**Acts Referred:**

Uttar Pradesh Muslim Waqfs Act, 1960 — Section 48

**Citation :** AIR 1974 All 305

**Hon'ble Judges :** K.C. Agarwal, J;K.B. Asthana, J

**Bench :** Division Bench

**Advocate :** K.C. Saxena and S. Haider Shaukat Abidi, for the Appellant; Bashir Ahmed, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

K.C. Agarwal, J.—The present Misc. Application No. I of 1963 has been filed u/s 76 of U. P. Muslim Waqf Act 1960 (hereinafter referred to as the Act). The proviso to the aforesaid section gives power to the High Court to call for and examine the record of any case for the purpose of satisfying itself as to the correctness, legality or propriety of any award made under the Act.

2. Waqf No. 388, known as "Waqf Altaf Husain, Varanasi City" is a public waqf and had been published as such in U. P. Gazette dated 23rd January, 1954 by the C. R. Central Board of Waqfs, Uttar Pradesh, Lucknow. The aforesaid waqf comprises of an imambara with a big hall, a room, mosque and a vacant piece of land, situated in mohalla Sarai Shitab Rai, Mutalliq Roshan Katra, Varanasi. An application u/s 63 (5) of the Act was filed by the applicants for possession of the waqf properties detailed above on the ground that the Shia Central Board (hereinafter referred to as the Board) had appointed a committee of management consisting of the applicants as mutwallis, and as the possession of the opposite parties was unauthorised and illegal the applicants were entitled to obtain possession from the opposite parties. It was alleged in this connection in the aforesaid application that one Syed Ghulam Abbas, who was the last mutwalli

of the said waqf, died on 30th May, 1960. As there was no deed of waqf laying down the line of succession to the mutwalliship the office of mutwalli became vacant after his death. Opposite Parties 1 to 3 (hereinafter referred to as the opposite parties), however, asserted that as they had been nominated by Ghulam Abbas to act as mutwallis after his death so by virtue of the said nomination they were entitled to function in that capacity. As the right of the opposite parties to work and function as mutwallis was disputed by the Board, on being approached by some residents of Varanasi the Board passed a resolution dated 3rd March, 1963 u/s 48 of the Act and appointed applicants 1 to 3, with two others, as members of the committee of management of the waqf, These two others, however, subsequently resigned. They were, therefore not the members of the committee. The Board by the letter dated 19th March, 1963 authorised the applicants to have delivery of possession over the waqf properties, and as the opposite parties did not hand over possession consequently the applicants filed an application u/s 63 (5) of the Act against the opposite parties for an award to direct them to deliver possession of all the waqf properties, accounts and cash. The said application was numbered as Reference No. 7 of 1965. It was contested by opposite parties 1 to 3. The tribunal by the award dated 12th March, 1968 found in favour of the applicants and directed the opposite parties to vacate possession of all the waqf properties. Against the aforesaid award an application u/s 76 of the Act was filed in the High Court. The High Court by its judgment dated 24th January, 1969 found that as the term of the members of the committee who had made the application had expired, they became functus officio, hence no relief could be granted to those members on the basis of that application. The High Court refrained from making any observation on the merits of the grounds on which the tribunal had passed the order holding the opposite parties liable to hand over possession. It appears that the Board, after the aforesaid judgment of the High Court, passed a fresh resolution on 16th March, 1969 and appointed a fresh committee of management consisting of the present applicants as mutwallis. This resolution was passed in exercise of the power u/s 48 of the Act on the assumption that as after the death of Ghulam Abbas there was a vacancy in the office of mutwalli so far as this waqf was concerned, and as Ghulam Abbas did not have any right to nominate any mutwalli after his death, therefore the opposite parties could not lawfully claim themselves as mutwallis. It was after the passing of the aforesaid resolution that the present application to the tribunal for an award to direct the opposite parties to deliver possession of all the waqf properties was made. The ground taken in the aforesaid application, as stated above, was that since the office of mutwalli was vacant and as the Board was entitled to appoint the applicants as mutwallis the applicants having been appointed as such and authorised by the Board to obtain possession, were making the application in that capacity.

3. The aforesaid application made by the applicants was contested by the opposite parties. It was alleged in the written statement filed in reply to the said application that originally the properties under the waqf belonged to Smr. Sakina

Khanam who gifted them to Mirza Mumtaz Ali through a gift deed dated 13-7-1907. Under that gift deed she had only directed him to take out Zuljinah procession under his control and management on the sixth day of Mohurram, as used to be taken out previously. Mirza Mumtaz Ali thus became the absolute owner of the properties. He nominated and appointed Mir Altaf Hussain as the first mutawalli under a tauliatnama dated 15th January, 1913 and conferred upon him the right to nominate and appoint his successor-in-office. Altaf Hussain remained as mutwalli till his death. He had, however, before his death and in his lifetime executed a document on 30th January, 1922 by which he nominated and appointed Syed Ghulam Abbas as his successor-in-office. By the said document Altaf Hussain had conferred upon Ghulam Abbas all those rights, including the right of nomination and appointment of successor-in-office, which were possessed by him. After the death of Altaf Hussain the said Syed Ghulam Abbas became mutwalli and managed the waqf properties as mutwalli up to the year 1960. The Board, according to the case of the opposite parties, also treated him as mutwalli of the said waqf. Syed Ghulam Abbas during his lifetime nominated and appointed opposite parties 1 to 3 to succeed him as mutwallis of the said waqf and executed a registered tauliatnama on 1st March, 1953, in their favour. Ghulam Abbas died on the 3rd May 1960 and since then opposite parties 1 to 3 were in possession of the waqf properties and were discharging their duties as mutwallis, and have been managing the waqf properties properly. On these allegations the opposite parties asserted that since they were in lawful possession of the waqf properties as mutwallis there was no occasion for the Board, to exercise the power u/s 48 of the Act. It was further pointed out in this connection by the opposite parties that the Board could exercise the power of making appointment of any person to act as mutwalli only when there was a vacancy, and further that in a case where a waqf has been created by a deed the said power could be exercised only when no one competent to be appointed as mutawalli under the terms of the deed was available.

4. The Board also filed a written statement and admitted in the same that Ghulam Abbas had been appointed as a mutwalli in the year 1922 and that he had been recognised as a mutawalli by the Board. It was, however, alleged by the Board that after the death of Syed Ghulam Abbas in 1960 there was vacancy in the office of mutwalli as nomination of the opposite parties as mutwalli was without any authority of law.

5. The tribunal by the award dated 23rd December, 1970, rejected the application of the applicants by holding that the opposite parties having been nominated by Syed Ghulam Abbas during his lifetime came into possession of the properties of the waqf immediately on his death in the year 1960, and since the time of his death were acting as mutwallis therefore they were de facto mutwallis in the beginning and having been permitted to remain in possession for a period of more than six years became de jure mutwallis. The tribunal, however, held that Syed Ghulam Abbas did not have any authority to appoint the opposite parties as mutwallis by a will. According to the tribunal, as it had found that the

nomination of the opposite parties by Syed Ghulam Abbas as mutwallis was unauthorised and illegal, therefore, the office of mutwalli became obviously vacant on the death of the aforesaid last mutwalli, Syed Ghulam Abbas.

6. Aggrieved against the aforesaid judgment of the tribunal the present miscellaneous application has been filed in this Court.

7. Sri K. C. Saksena, appearing for the applicants, argued that the only relevant finding against him given by the tribunal was on the question of limitation, and as, according to his submission, the tribunal erred in finding that Article 120 of the Limitation Act applied to the facts of the present case, he argued that the finding of the tribunal on that point should be set aside. In this connection he further argued that there was no question of the opposite parties having acquired the rights of de jure mutwallis due to the lapse of six years. He contended that under the Mohemmedan Law the right of a de facto mutwalli has been recognised for a limited purpose, and in that limited capacity such a de facto mutwalli can only remain in possession of the waqf properties as manager, and can sue for its recovery or its dues until displaced by a de jure mutwalli. His submissions further in this connection were that as the lights of a de facto mutwalli are not recognised any further so as to mature into the rights of a de jure mutwalli, therefore the Tribunal erred in finding that the applicants were not entitled to a direction for delivery of possession against the opposite parties.

8. Sri Bashir Ahmad, appearing for the opposite parties, did not only support the findings of the tribunal on the question of limitation and on the question that the opposite parties being de facto mutwallis became de jure mutwallis, but also contended that the findings of the tribunal on various other issues were wrong. He urged that under the Mohemmedan law a mutwalli can nominate his successor to function as mutwalli after his death. Therefore, as the opposite parties had been nominated by Syed Ghulam Abbas during his lifetime to succeed him as mutwallis after his death, there was no occasion for the Board to exercise the power u/s 48 of the Act. In this connection it was further urged by Sri Bashir Ahmad, in the alternative, that even if it be held that under the Mohemmedan law there was no power in Syed Ghulam Abbas to nominate his successor in good health, the opposite parties were working as mutwallis since 1960 and, therefore, there was no vacancy either in the year 1963 or in the year 1969 when the resolutions were passed by the Board exercising powers u/s 48 of the Act. In this connection it was also argued that the present was a case which was further covered by the proviso to Section 48 of the Act, and as the opposite parties had been nominated as mutwallis under a deed, they being available the Board could not nominate any other person as mutwalli.

9. We have heard the learned Counsel for the parties at length. For the decision which we are going to take in the present case it will be better to deal with the question of the power of nomination of his successor under the Mohemmedan Law by a mutwalli during good health as a first point, as, if it is held that such power exists it would not be necessary for us either to deal with the question of

de facto mutwallis becoming de jure mutwallis, or that of the application of Section 48 of the Act as argued by Sri Bashir Ahmad.

10. Before we deal with this legal aspect, it may be convenient to dispose of the factual controversy which has been attempted to be raised by Sri K. C. Saksena. He has argued in this connection that the nomination of mutwallis even before that of the opposite parties by Ghulam Abbas was invalid. We, however, find a clear admission of the Board contained in paragraph 4 of the written statement, that Ghulam Abbas was a mutwalli of the waqf up to the year 1960 when he died. The resolution of the Board making appointment u/s 48 of the Act dated 3rd March, 1963, also not only admits that Syed Ghulam Abbas was the mutwalli working in that capacity up to 1960, but also that before Ghulam Abbas, and before him Altaf Hussain, were mutwallis. A reading of this resolution clearly indicates that the Board has accepted that the waqf was lawfully created and that Ghulam Abbas was the last mutwalli. In view of the admission of the Board that Syed Ghulam Abbas was the last mutwalli, it is not possible to hold to the contrary. An attempt was made by Sri K. C. Saksena to argue that the admission of the Board is not binding on him and that he could challenge the appointments of Ghulam Abbas and Altaf Hussain as mutwallis. We do not agree.

11. On the question as to whether under Mohemmedan law, and in the absence of any express directions given by the wakif, a mutwalli is competent to appoint a successor only when he is on his death bed, or whether such an appointment can be made by him also in good health, we have been referred, to a considerable body of authorities.

12. Mulla, in his book Principles of Mohemmedan Law has defined "mutwalli" as manager of waqf properties in the following words:--

"Mutwalli -- Under the Mohomedan law the moment a waqf is created all rights of property pass out of the wakif and vest in the Almighty. The mutwalli has no right in the property belonging to the wakf ; the property is not vested in him, and he is not a trustee in the technical sense. He is merely (sic) admissions of a mutwalli about the nature of the trust are not binding on his successors."

13. The Supreme Court also had the occasion in Ahmed G. F. Arif, etc. v. Commr. of Wealth-tax, Calcutta AIR 1971 SC 1619 to deal with the rights of a mutwalli. It has been said by their Lordships of the Supreme Court in that connection:--

"The mutwalli has no right in the property belonging to the wakf. He is not a trustee in the technical sense, his position being merely that of a superintendent or a manager. A Mutwalli has no power, without the permission of the Court, to mortgage, sell or exchange waqf property or any part thereof, unless he is expressly empowered by deed of waqf to do so."

14. It is thus clear that a mutwalli is not a trustee or manager but a superintendent of property. A mutwalli is further not the owner of the property, but merely a servant of God, managing the property for the good, of his

creatures. The founder of the waqf has the power to appoint the first mutwalli and to lay down a scheme for the administration of the trust and for succession to the office of mutwalli. He may nominate successors by name or indicate any class, together with their qualifications, from whom the mutwalli may be appointed and may invest the mutwalli with power to nominate a successor after his death or relinquishment of office.

15. In Amir Ali's Muhammadan Law, Vol. I, the following passage occurs at page 454:--

"The mutwalli cannot, however, assign or transfer the office to any one, or appoint another during his lifetime, unless his own powers are "general". Should he in his lifetime and in health appoint another in his place the appointment will not be lawful and valid, unless the mutwalli has obtained the towliat with that condition, "in a general manner". "

16. Baillie's Muhammedan Law Haneefa at page 604 reads as follows:--

"A superintendent may at death commit his office to another, in the same way as an executor may commit his to another. .... A superintendent while alive and in good health cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust."

17. In Tyabjis's Muslim Law (4th Edition) in paragraph 516 it is stated;--

"The mutwalli may in accordance with Section 514 appoint a successor to succeed him at death, but he cannot validly transfer his office to another during his lifetime. An appointment or nomination made during the lifetime of the mutwalli is revokable like other testamentary dispositions."

18. Mulla in his book Principles of Mahomedan Law in paragraph 206 has stated the aforesaid controversy in the following words:--

"If the founder and his executor are both dead, and there is no provision in the wakfnama for succession to the office, the mutwalli for the time being may appoint a successor on his death bed. He cannot, however, do so while he is in health, as distinguished from death-illness. Nor if the office goes by hereditary right."

19. On the basis of the texts which have been mentioned by us above, it has been argued by Sri K. C. Saksena that Mohemmedan law permits appointment of a successor by a mutwalli only on his death bed. He contended that these texts definitely contained a prohibition disentitling a mutwalli to nominate his successor while he is in good health.

20. Sri Bashir Ahmed, on the other hand, urged that the nomination of a successor can be validly made by a mutwalli not only on his death bed but also in good health. He contended that these texts did not contain any prohibition disentitling a mutwalli in good health to nominate his successor to succeed in the office of mutwalli after his death. He strongly relied upon the observations of

Baillie (contained in the first sentence) and submitted that nomination of a successor in good health is clearly found permissible by Baillie. According to him, whereas appointment means complete surrender of his office by the mutwalli, and the immediate transfer of the same in favour of the appointee, in nomination the surrender of office does not take place immediately on the execution of the document. The office goes to the appointee only after the death of the appointor. In support of this proposition Sri Bashir Ahmad relied upon the case *Abdul Razak v. S. Ali Baksh* AIR 1946 Lah 200. There, Din Mohammad, J., observed as follows:--

"In my view, however, if appointment means complete surrender of his office by the appointor and its immediate transfer to the appointee, the principle enunciated is quite in accord with Muhammadan Law. But if it is intended to convey that a mutwalli for the time being cannot even nominate his successor who is to act as such after his death, with all respect I am disposed to think that the Muhammadan Law on the subject has not been properly appreciated. One can well understand the prohibition against a person who has been deputed to occupy a position of trust in respect of certain property not to divest himself of his responsibility at his own discretion and throw it on the shoulders of another, when he himself is in perfect health and can properly discharge his functions. But why to introduce the same prohibition when he is only to nominate a person who is to take office after his death is altogether incomprehensible. Why, one pauses to think, should a mutwalli be permitted to nominate a successor only when his intellect and reason may possibly be impaired, and not when he is in full enjoyment of these faculties."

21. This judgment of the Lahore Court was challenged by means of an appeal to the Privy Council. Their Lordships of the Privy Council allowed the appeal and reversed the judgment of the Lahore Court on another point, but while dealing with the question of the right of a mutwalli to nominate his successor only on death bed, their Lordships made the following observations:

"It certainly is not easy to see any rational basis for a rule which requires that an appointment to take effect on death shall be made only by one in mortal sickness when the appointor's judgment may well be impaired. Moreover, death may come without warning, or the expectation of death may not be realised. In the former case no appointment will be made, and in the latter any appointment will be ineffective."

22. It is true that the Privy Council had reversed the decision of the Lahore Court, and it further did not give any concluded opinion on the aforesaid controversial point, but the observation made by it shows that it approved the view of the Lahore Court.

23. In this connection we may further point out that in *Ahsanullah Shah v. Ziauddin* 1937 All LJ 585 a similar contention was raised before the Privy Council and it was urged that the Mahomedan Law prescribes that a nomination could be

valid only if it was made while the incumbent was on his death bed, or was suffering from mortal sickness, but not when he was in good health. The Privy Council did not give any final decision on the aforesaid controversy, but as observed by the Lahore Court in AIR 1946 Lah 200 Sir Shadi Lal expressed himself in a manner which would indicate that the Privy Council was not impressed with it at all. The observation made by the Privy Council in this regard is as follows:--

"This contention, which appears to be supported by some authorities on the Mahomedan Law would prevent a mutwalli from appointing his successor if he died suddenly without any expectation of death, and render ineffective any appointment made by him at a time when he was not on his death bed or suffering from such illness."

24. The rule on the basis of which it has been stated that a mutwalli cannot appoint his successor excepting on death bed appears to be based on the principle against delegation of the powers of a trustee in favour of another. Although It is true that a mutwalli is not a trustee within the meaning of the Act, or as understood either gene-rally or under the Indian Trusts Act, but the nature of the duties which he is required to perform are more or less the same. A mutwalli stands in fiduciary relationship and it is. against the interest of society in general that such relationship should be allowed to be terminated unilaterally. It thus appears to us that it is on account of this reason that under the Mohemmedan Law a mutwalli is permitted to appoint his successor on his death bed -- so that the mutwalli in office may not delegate his power to work as such during his lifetime. Mohemmedan Law thus, permits the appointment of a successor by a mutwalli to be effective after his death. So the appointment of a successor by a mutwalli in good health which would be effective after the death of the mutwalli does fall within the permissible limits of the Mohemmedan Law. Taking the view contrary to this, and holding that a mutwalli can appoint a successor only when he is on death bed would be irrational. It is not understandable that when an appointment can be made by a mutwalli on his death bed why he cannot make a nomination which will be effective after his death. As stated above, the purpose of not transferring the office of mutwalli during his lifetime when he is capable to work is achieved both by permitting a mutwalli to appoint his successor on his death bed or to make nomination to be effective after his death. It does not appeal to reason that Mohemmedan Law admitted the power of a mutwalli to make appointment to take effect on death only on death bed, as by confining the exercise of that power only to the death bed by a mutwalli might result in nullifying the same altogether. As observed by the Privy Council. "..... Death may come without warning, or expectation of death may not be realised. In the former case no appointment will be made, and in the latter any appointment will be ineffective."

25. We, are, therefore, not prepared to hold that the power under the Mohemmedan Law was given only to make it ineffective, and would thus hold

that the nomination of a successor by a mutwalli can be made even in good health, to take effect on death.

26. There is yet another aspect of the matter which has been emphasised by the Lahore High Court in AIR 1946 Lah 200 in the following words:--

"In my view, this insistence on even the nomination to be made on death bed is not in any way supported by Muhammedan Law. When the texts lay down that a valid appointment of a successor can only be made on death bed, they deal with the actual transfer of the office at once and not with the nomination of a successor, who is to take office only after the death of the mutwalli. Those judgments, therefore, which have interpreted these texts so as to mean that even a nomination to be valid must be made on death bed have, if I may say so with all respect, ignored the distinction between appointment and nomination."

27. We are in complete agreement with the view expressed by the Lahore High Court as in our view as well those judgments which hold that even a nomination to be valid must be made on death bed have ignored, the distinction between appointment and nomination. By nomination a mutwalli only proposes or selects his successor to exercise his duties as a mutwalli of his death. He does not part with or delegate his functions of a mutwalli during his lifetime. It is only this delegation or parting with duties by a mutwalli during his lifetime in good health that is prohibited.

28. Mr. Bashir Ahmed has relied upon the cases reported in Niamat Ali v. Ali Raza AIR 1915 All 25 and (Dost) Muhammad Khan Sahib and Others Vs. Kadir Batcha Sahib, in support of his contention. The Allahabad case does not appear to have decided the controversy as it arises in the present case. It is true that in the Allahabad case it was observed:--

"Assuming that Karamat Ali was legally entitled to be the mutwalli, an office which he undoubtedly de facto enjoyed, he was entitled to appoint his successor."

But the question as to whether the appointment of a successor could be made by a mutwalli only on death bed did not arise for consideration by this Bench.

29. So far as the Madras case is concerned, it appears that one Amir Khan Saheb, the last man of the family of the original founder, made a settlement by which he endowed the mosque, with some other property, and appointed his foster son as the person entitled to enjoy the property endowed for charity, and to carry out the charity by means of its income. It was this appointment by Amir Khan Saheb which was subsequently challenged. One of the grounds on which the challenge was made was that Amir Khan Saheb had no power to appoint him as successor. It was in this connection that the following observations were made by Madhavan Nair, J.:--

"..... It is a well known principle of Mohammedan Law, that in the absence of rules laid down by the founder of the mosque, the mutwalli for the time being may validly appoint a successor to himself. The present defendant was so

appointed in 1879 and in my opinion he is validly appointed trustee."

These observations of Madhavan Nair, J., do lend support to the contention of Sri Bashir Ahmed. It must, however, be observed that from the facts stated in the judgment it is not clear as to whether the said document was executed on the death bed by Amir Khan Saheb, or not.

Mr. K. C. Saksena has relied upon the following cases:--

- (1) Ghazanfar Husain Vs. Mt. Ahmadi Bibi and Others .
- (2) Ali Asghar v. Farid Uddin AIR 1947 All 261.
- (3) Hajee Sheikh Ali Mohammed and Others Vs. Mohemmed Yusuf, .
- (4) Mst. Kammon v. Allah Baksh AIR 1941 Lah 36.
- (5) Zooleka Bibi v. Syed Zynul Abedin (1904) 6 Bom LR 1058.
- (6) Shaik Masthan Sahib Vs. Palayani Balarami Reddi, .
- (7) Khagum Khan and Another Vs. Mohamed Ali Sahib and Another, .
- (8) Mazhar Ali Saheb v. Ghulam Mur-tujah Saheb, AIR 1958 Andh Pra 8.
- (9) Azizunnissa v. Ghowsan Kasab 63 Ind Cas 136 .

30. Before we deal with the cases relied upon by Sri K. C. Saksena it may be pointed out that in none of the aforesaid cases distinction between "appointment" and "nomination" was considered. It was more or less taken for granted in each case that under the Mohamedan Law a mutwalli could appoint a successor for the time being only on death bed. These authorities, therefore, to our mind, having not considered the question of nomination in good health by a mutwalli in the manner in which it was argued before us cannot be said to have decided the same.

31. In Ghazanfar Husain Vs. Mt. Ahmadi Bibi and Others a wakf deed dated 7th April, 1922 executed by Mir Inayat Hussain, under which Mst. Ahmadi Bibi, defendant No. I, was claiming to be in possession of the property as mutwalli of the trust, was challenged by the plaintiff on a number of grounds. The High Court found that Inayat Hussain was the founder of the trust and it was in this connection that the following observations were made:--

"Under the Muhammedan Law a mutwalli who is not the founder of the trust has no power whilst in health to appoint a successor or to formulate any scheme for succession to the office of the mutwalli, but this restriction does not apply to the founder of the wakf who in reason and equity ought to have a free hand in the matter of nominating and appointing a mutwalli for the administration of the trust in presenti, and in laying down a detailed scheme as regards the succession to the office of the mutwalli. ...."

32. It is thus clear that this Court was only considering the question of the

founder of the trust. The right of a founder of a trust to nominate at any stage he liked cannot be doubted. This Court, therefore, was not called upon in the aforesaid case to decide the question as to whether a mutwalli, who is not the founder of the trust, was not competent to make nominations in good health.

33. In AIR 1947 All 261 the question which was being considered was as to whether the settler had power to resign his own mutwalliship and to appoint another as his successor. It was in connection with this controversy that it was held that on the principles which had been deduced from the texts the wakif was himself the first mutwalli and he could appoint a successor. The Bench, while dealing with the aforesaid controversy, has simply referred to some of the texts in that connection and, therefore, the said ruling cannot be considered to have pronounced any judgment on the controversy which is being considered by us.

34. In Hajee Sheikh Ali Mohammed and Others Vs. Mohemmed Yusuf, , it was found that Mukram Ali who had executed the document and appointed mutwallis was not in fact a mutwalli himself. In view of this finding that Mukram Ali was not a mutwalli the observations of the Orissa Court to the effect-

"Under Muhammedan Law a mutwalli for the time being may appoint a successor on his death bed; he cannot, however, do so while he is in health as distinguished from death-illness."

are only obiter.

35. In AIR 1941 Lah 36 Tek Chand, J,, observed-

"It is conceded that under Mohammedan Law the nomination of a successor by the mutwalli for the time being is valid only if it is made while he was in death illness....."

36. This case was considered by the subsequent Lahore case reported in AIR 1946 Lah 200. While considering this Lahore case Din Mohammed. J., commented upon the said case in the following words:--

"I am disposed to think, with all respect, that the Mohammedan Law on the subject has not been properly appreciated."

Thus it is clear that the Lahore High Court itself did not agree with AIR 1941 Lah 36.

37. In 6 Bom LR 1058 the Bombay High Court was not at all concerned with the consideration of the question as to whether a mutwalli in good health could nominate his successor. It was, considering the difference between Sajjad-a-nashin and mutwalli. Accordingly it can hardly be considered an authority for the proposition in support of the contention advanced by Sri Saksena.

38. Shaik Masthan Sahib Vs. Palayani Balarami Reddi, is a case where the Madras High Court was faced with the problem of the rights of the founder to appoint a mutwalli. It was in this connection that the Madras Court laid down:--

"The Islamic law is clear on the question that when a founder has reserved to himself the power to assume the management of a waqf which he creates, on finding that the committee of supervision or other managers or office-bearers have not discharged their duties, he has unfettered rights to assume the management of the trust himself or to appoint another trustee in his discretion for the proper management of the trust....."

39. In *Khagum Khan and Another Vs. Mohamed Ali Sahib and Another*, the question was whether a Jamait or congregation of the worshippers of a mosque have a right to appoint mutwallis. In view of the fact that the question for consideration in this case was quite different than the one which is being decided by us, it is futile to expect that any law laid down by the Andhra Pradesh High Court in the said case would be helpful for our purpose in the present case.

40. From the facts stated in the judgment reported in AIR 1958 A P 8 it appears that the question of the competence of a mutwalli to nominate his successor did not directly arise for consideration. The main controversy involved in the said case was relating to the succession of Mozavar's office, as to whether the said office was hereditary or not. The said Court while dealing with this controversy observed that a mutwalli in good health cannot appoint his successor. To our mind these observations are merely obiter and made when the controversy which arises for our consideration was not in fact up for decision in that case.

41. The case reported in 63 Ind Cas 136 definitely supports the contention of Sri Saksena, but we respectfully differ from the view taken in the said case. In that case the point had not been considered in the manner it has been raised before us. It is, however, pointed out that in case the learned Judges of that case intended the meaning of the words "appointment" and "nomination" to be the same, we find ourselves unable to agree with the same.

42. After having thus dealt with all the authorities which were cited by learned counsel for either parties, and the texts, we find that Syed Ghulam Abbas could nominate the opposite parties as mutwallis and, therefore, after his death the opposite parties had rightly come in possession of the properties of the waqf.

43. Ameer Ali in his *Muhammadan Law*, Vol. I, at page 259, observed as follows:--

"In the law relating to waqf there are certain primary rules on which the principal doctors are in agreement. With regard to the subsidiary principles there is considerable divergence. The primary rules are (a) that the subject of the wakf should be dedicated in perpetuity; (b) that all human right should be divested therefrom and (c) that it should be made non-heritable and inalienable. With regard to these there is consensus."

44. With regard to the subsidiary rules the same learned author has observed at page 258:--

"The kazi is authorised to construe liberally the legal principles and to apply them

in a manner most consistent with justice and expediency."

45. These observations thus make it [clear that there is scope for construing liberally the legal principles which may be applicable to the subsidiary rules relating to Mohemmedan waqf. In the present case we find that the question of the right of a mutwalli to nominate his successor even when he is in good health is a matter to be governed by subsidiary rules. Accordingly, applying the principles of equity, justice and good conscience we would like to hold that Syed Ghulam Abbas was entitled, and was not debarred from nominating his successor by the [document while he was in good health.

46. It has been observed in *Aziz Bano v. Mohemmed Ibrahim Husain* AIR 1925 AU 720 by Mukerji, J., that-

"It is a proposition of Muhammedan jurisprudence that where there are two opinions on a point of Mohammedan Law, the court should accept only that opinion which is in consonance with justice, equity and good conscience. (See Preface, Volume II, Ameer Ali's Muhammedan Law, p. 7)".

47. Suleiman, J., also found in that case that it is the duty of the courts in cases of divergent opinion to accept the view which is more in accordance with equity, justice and good conscience.

48. It is not only in cases where there is a divergence of opinion that the principles of equity, justice and good conscience can be applied, but also, according to Tyabji, in other cases the aid of these principles can be taken. In Tyabji's Muhammedan Law (4th Edition) in paragraph (sic) it is stated:--

"In the absence of an express or implied rule of law or custom the court will either follow the analogy of the law in similar instances or decide the matter in accordance with justice, equity and good conscience. That expression is generally interpreted to mean rules of English law if found applicable in Indian society and circumstances."

49. Hence having found that the right of a mutwalli to make nomination of his successor in good health could be in consonance with justice, equity and good conscience, we hold that Syed Ghulam Abbas had possessed the said right at the time when he nominated the opposite parties as mutwallis.

50. The question that now arises for consideration is as to whether the Board could still exercise its power u/s 48 and appoint the applicants as mutwallis in spite of the fact that opposite parties were rightly entitled to function as mutwallis. Section 48 of the Act reads thus:--

"48. Emergency Powers of Board when Office of Mutwalli of waqf vacant -- Without prejudice to the generality of the powers conferred by Clause (O) of Sub-section (2) of Section 10, the Board may, where there is a vacancy in the office of Mutwalli of a waqf-

(a) appoint any person to act as Mutwalli for such period and on such conditions

as it thinks fit; or

(b) by notification in the Official Gazette assume direct management of the waqf for such period not exceeding five years as may be specified in the notification.

"Provided that in the case of a waqf created by a deed, the Board may act under this section only if there is no one competent to be appointed as Mutwalli under the terms of such deed."

51. A reading of the aforesaid section would indicate that there are two requirements of this section before the power under it could be exercised. These requirements are (1) that there should be a vacancy in the office of mutwalli and (2) that the Board may act if no one competent to be appointed as mutwalli under the deed was available. In view of our finding that opposite parties were validly nominated mutwallis by Syed Ghulam Abbas there was no vacancy in the office of mutwalli in the year 1953 and in the years 1963 and 1969 when the orders u/s 48 of the Act were passed by the Board. The Board could not treat the office vacant on the ground that the nomination of the opposite parties was invalid. Apart from this, we further find that in the present case the waqf was created by a deed and therefore the Board could act under the section only if no one competent to be appointed as mutwalli under the terms of the said deed was available. As according to us the opposite parties were competent under the deed to function as mutwallis, the Board had no power to appoint the applicants u/s 48 of the Act.

52. In view of the finding that the opposite parties were entitled to function as mutwallis it is not necessary for us to express any opinion on the question as to whether these opposite parties by virtue of being de facto mutwallis became de jure mutwallis. It is further not necessary for us to decide the question as to whether the Board could exercise the power u/s 48 even if the opposite parties were de facto mutwallis and were working in that capacity on the dates the orders were passed.

53. We thus find that the award of the tribunal holding that the applicants are not entitled to a direction to the opposite parties to hand over possession of the waqf properties to them is correct and it does not need any interference by us.

54. We, therefore, dismiss the application with costs to opposite parties 1 to 3.