

(1969) 11 AHC CK 0016
In the Allahabad High Court
Case No : Spl. Appeal No. 805 of 1967

Moattar Raza and Others

APPELLANT

Vs

Joint Director of Consolidation, U.P. Camp at Bareilly and Others

RESPONDENT

Date of Decision : 28-11-1969

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 18(1)

Citation : AIR 1970 All 509 : (1969) 39 AWR 905

Hon'ble Judges : S. Malik, J;Gyanendra Kumar, J;A.K. Kirty, J

Bench : Full Bench

Advocate : Haji Iqbal Ahmad, K.C. Saxena, Syed Afsar Ali, Iqbal Ahmed and Sharafat Ali, for the Appellant; S. Sadiq Ali and Standing Counsel, for the Respondent

Final Decision : Disposed Of

Judgement

A.K. Kirty, J.—The following questions have been referred to this Bench for answer:--

"Where, on the date immediately preceding the date of vesting, out of two co-mutwallis (who were also co-beneficiaries) of a waqf-alal-aulad created by a Shia Muslim, one co-mutwalli was personally cultivating a land (other than sir and grove), the proprietary right in respect of which was subject-matter of the wakf, did the rights of a bhumidhar accrue in the land u/s 18(1)(a) of the U.P. Zamindari Abolition and Land Reforms Act? If so, whether they accrued in favour of the wakf or God or in favour of both the co-mutwallis or in favour of that co-mutwalli alone who was cultivating the land?"

2. The above questions arise in the following circumstances. One Sibte" Hasan, a Shia Musalman by faith, had created a waqf-alal-aulad under a deed of waqf dated 8-2-1918, appointing his male descendants as mutwallis and also making them beneficiaries, generation after generation. The subject of the wakf was some zamindari property. The wakif died in 1924 leaving behind two sons,

Farzand Hasan and Simte Hasan, as co-mutwallis and co-beneficiaries. Simte Hasan, it appears, was a minor at that time and the wakf property came to be actually managed by Farzand Hasan. Part of the land of the wakf estate was let out to tenants, while some plots were cultivated by Farzand Hasan himself. It is not quite clear whether Simte Hasan cultivated any land personally after creating the wakf, but it is admitted that he had no khudkasht land when he created the wakf. It is also not clear whether Farzand Hasan had himself, for the first time, brought any land under personal cultivation or had continued to cultivate the land which, after creating the wakf, Simte Hasan had in his lifetime brought under his own cultivation.

3. Farzand Hasan died on 29-10-1954, and, upon his death, the land personally cultivated by him continued to be in the possession and cultivation of his heirs, who are the appellants before us. In the revenue records also, all such land stood recorded as being in the cultivatory possession of Farzand Hasan during his lifetime and thereafter in the name of the appellants, who are his legal heirs. After the enforcement of the U.P. Zamindari Abolition and Land Reforms Act, 1951, Farzand Hasan had claimed to have acquired bhumidhari rights in the land and on his death, his legal heirs claimed to have become bhumidhars thereof. However, in consolidation proceedings a dispute arose between the heirs of Farzand Hasan and Simte Hasan in regard to the said land the former claiming exclusive bhumidhari rights and the latter claiming co-bhumidhari rights. All the consolidation authorities appear to have given decisions against Simte Hasan. He challenged those decisions by filing writ petition No. 1296 of 1963 praying, inter alia, that the adverse orders passed by the various consolidation authorities be quashed..

4. The writ petition was decided by M.M. Beg, J., who quashed the orders of the consolidation authorities and remanded the matter to be decided in accordance with law as indicated in his judgment dated 27-7-1967. Against the judgment of Beg, J. a special appeal was filed by the heirs of Farzand Hasan. The special appeal came up before a Division Bench of this Court, which, by its order dated 13-5-1969, referred the questions quoted at the outset for answer by a larger Bench. This Full Bench having been constituted by the Hon"ble the Chief Justice for answering the said questions, the matter has come up before us.

5. A perusal of the referring order dated 13th May, 1969, shows that before the Division Bench an argument was raised by the learned counsel for the appellants that in the case of a waqf-alal-aulad created by a Shia Muslim, the proprietary right in the wakf property vests in the mutwalli or mutwallis and not in God Almighty nor in the wakf itself. In support of this contention reliance was placed on certain observations made by a Division Bench of this Court in Mohammad Qamar Shah Khan Vs. Mohammad Salamat Ali Khan, . To countermand this argument and the observations made in Mohammad Qamar Shah Khan Vs. Mohammad Salamat Ali Khan, reliance was placed on behalf of the contesting respondent, Simte Hasan, on the decision of the Privy Council in AIR 1924 44

(Privy Council)

6. The learned Judges constituting the Division Bench in the instant case appear to have entertained some doubt as to the correctness of the observations made in *Mohammad Qamar Shah Khan Vs. Mohammad Salamat Ali Khan*, and, in the circumstances, they thought it appropriate that the question should be examined and answered by a larger Bench. It may be noted here that the appeal itself has not been referred to this Bench and that this Bench is required only to answer the questions framed by the Division Bench.

7. In *Mohammad Qamar Shah Khan Vs. Mohammad Salamat Ali Khan*, the problem which had directly arisen was as to whether the Mutwallis under the wakf in question were co-sharers within the meaning of Section 164 of the North Western Provinces Tenancy Act of 1901. One of the Mutwallis had filed a suit for recovery of a certain amount on account of his share of the profits of the wakf property against the defendant Mohd. Salamat Ali, who was the other co-mutwalli and had during the relevant period acted as Lambardar. The question assumed importance because in case the plaintiff did not have the legal status of "co-sharer" under the Tenancy Act of 1901, the suit filed by him would not be legally maintainable. In deciding this question the learned Judges, inter alia, observed:--

"In Muhammadan Law, there are two classes of wakf. One is public and the other is private. A public wakf is one for a public, religious or charitable object. A private wakf is one for the benefit of the settler's family and his descendants. Under the Musalman Wakf Validating Act of 1913 a Muhammadan may settle the whole income of the endowed property for the maintenance and support of himself and his descendants from generation to generation, provided that there is an ultimate gift to charity. To hold that mutwalli holding waqf property in a waqf of this kind is not a co-sharer for the purposes of the Rent Act would be taking a very narrow view. It is true that according to the view taken in *Durga Prasad v. Hazari Singh* and *Narain Das Arora v. Haji Abdul Rahim*, the estate in the wakf property vests in God after the creation of a public wakf. But, we doubt, if it can be argued that in private wakfs the estate vests in God. The correct view would be to hold that the estate vests in beneficiaries". In case of private wakfs the mutwalli is, practically speaking, the owner--with one limitation and that is that he cannot make a transfer of the wakf property. But in every other respects his position is the same as that of an owner. A Mutwalli holding a property in the case of a private wakf cannot be said to be a mere manager or a superintendent. A manager holds the property during the pleasure of the proprietor. But the mutwalli in wakfs holds the property during his life."

8. The observations, quoted above, specially the portion thereof underlined (here in " ") by me, will show that the question as to whether in case of a private waqf the proprietary title and right in the waqf property vested in the Mutwalli or not did not directly arise. In a sense, therefore, the observations are in the nature of obiter dicta. It may here be also noted that the Judicial Committee's decision in

AIR 1924 44 (Privy Council) was neither cited before the Bench nor was it considered by the learned Judges.

9. A review of the authoritative judicial pronouncements on the subject will show that the consensus of judicial opinion is overwhelmingly in favour of the proposition that the wakf property vests in God Almighty and not in the Mutwalli. By 1933, the Privy Council had at least in three reported decisions clearly and unmistakably expounded the legal position and had held that the property vested in God. The leading case on the subject is Vidya Varuthi v. Balusami Ayyar AIR 1922 PC 123 which has been consistently followed and relied on by the Privy Council itself in- all subsequent cases. When Qamar's case was decided by this Court in 1933, besides Vidya Varuthi's case, two more cases, viz. AIR 1924 44 (Privy Council) and AIR 1927 2 (Privy Council) had been decided by the Privy Council. Unfortunately, however, not one of these cases appears to have been brought to the notice of the learned Judges of this Court hearing Qamar's case.

10. Vidya Varuthi's case, it is true, related to a Hindu Math and not a Muslim wakf. But it was pointed out by Mr. Amir Ali J. in his learned and very elaborate judgment, delivered on behalf of the Judicial Committee, that in India maths and wakfs in many respects possess the same legal characteristics and incidents. Clearly and without reservation, the law was stated by Mr. Amir Ali J. thus at p. 127, column 1:

".....the Mahomedan law relating to trusts differs fundamentally from the, English law. It owes its origin to a rule laid down by the Prophet of Islam; and means the tying up of property in the ownership of God the Almighty and devotion of the profits for the benefit of human beings". When once it is declared that a particular property is wakf, or any such expression is used as implied wakf, or the tenor of the document shows.....that a dedication to pious or charitable purposes is meant, the right of the waquif is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit.. The manager of the wakf is the Mutwalli, the governor, superintendent, or curator.....But neither the Sajjad-nashin nor the Mutawalli has any right in the property belonging to wakf; the property is not vested in him....."

At another place in his judgment Mr. Amir Ali J. again observed:--

"Neither under the Hindu law nor in the Mohammedan system is any property conveyed to a Sebait or a Mutwalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution, he holds as manager with certain beneficial interest regulated by custom and usage. Under the Mohammedan Law the moment a wakf is created, all rights of property pass out of the wakif, and vest in God Almighty."

11. In AIR 1924 44 (Privy Council) under the wakf deed in question, half of the income of the wakf property had to be devoted to specified pious purposes and the remaining half was to be utilised for the benefit of the wakif's descendants.

It appears that one of the Mutawallis had created an encumbrance on a part of the wakf property. This encumbrance having been challenged as invalid, a contention was raised that in regard to half of the wakf property, the income of which had not been directed to be devoted to specified pious purposes, the encumbrance was not only binding on the Mutwalli who had created the same, but also on the wakf itself. This contention was repelled by the Judicial Committee, and, placing direct reliance on the decision in *Vidya Varuti's* case AIR 1922 PC 123 Lord Sumner inter alia observed as follows:--

"The property, in respect of which a wakf is created by the settler is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in every deed "God's acre", and this is the basis of the settled rule that such property as is held in wakf is inalienable, except for the purpose of the wakf where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the wakf, which is therefore, as such unsustainable, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges one declared for pious uses on one part of the property, and another and separate charge declared on another part for the uses of the mortgagor only. The property itself is not to be regarded as severable and chargeable according to the measures of the interest, which the settler's family may have in the rents and profits of the whole."

12. The same question was again considered by the Judicial Committee in AIR 1927 2 (Privy Council) In that case, the impugned wakf was created by a Shia Muslim lady appointing herself the first Mutwalli and reserving a right to receive a monthly salary of Rs. 125/- from out of the income of the wakf property. The wakf was held to be invalid on the ground that the settler under the colour of fixing her salary as Mutwalli was really reserving for her lifetime a portion of the income or usufruct of the property far in excess of what was assigned in the deed to future Mutwallis or could reasonably have been assigned to them. The Judicial Committee held that the Mahomedan Law does not recognise gifts inter vires as valid unless possession is given to the donee and that this rule equally applies to wakfs of gifts for religious or charitable purposes, at any rate among Shias. It was further observed that the four conditions as to the validity of wakfs laid down in the *Suraya*, the leading Shia authority, are as follows:--

1. It must be perpetual;
2. Absolute and unconditional;
3. Possession must be given of the Nowkoof of the thing appropriated; and
4. It must be entirely taken out of the wakif or appropriator.

13. The legal position was further made clear by the Judicial Committee itself in (1934) 66 MLJ 431 (Privy Council) . In this case the judgment delivered by Mr. Ameer Ali J. in *Vidya Varuti's* case, AIR 1922 PC 123 (supra) was relied on and the view expressed therein was reaffirmed.

14. The question again came up for decision before the Judicial Committee in AIR 1937 127 (Privy Council) . In this case, the Judicial Committee reiterated its earlier view and inter alia, observed that under the Shia Law actual delivery of possession by or by the direction of the wakif is a condition precedent to the wakf having validity and effect, and that, in cases where the wakif himself is the mutwalli, the change in the character of possession as mutwalli from possession as owner amounts to transfer of possession of the property dedicated. It was further observed that, when the settler himself is the first mutwalli, it must be proved that the settler changed the character of his possession, continuing to hold the property not as Malik of the property, but as mutwalli of the wakf. This could be done in different ways, depending on the circumstances of the case. Mutation may be one method of doing it. Opening of separate account in the name of the wakf may also afford sufficient evidence that the properties mentioned in the wakfnama were put into the possession of the mutwalli, Whatever method is adopted, it must be established that the settler had divested himself of his possession as Malik and his possession after the creation of the wakf was only as mutwalli and not in any other capacity.

15. Last but not the least, the decision of the Supreme Court in Thakur Mohd. Ismail Vs. Thakur Sabir Ali, may be taken as putting a final seal on the question. In that case a wakf alal-aulad was created by Thakur Asghar Ali in 1925. The wakf property comprised partly of the property known as Tipraha Estate in the district of Bahraich, governed by the provisions of the Oudh Estates Act No. 1 of 1869, and partly of certain other properties which Asghar Ali himself had acquired in his lifetime. A question arose as to whether the wakf in so far as it related to Tipraha Estate was hit by Section 12 of the Oudh Estates" Act, which restricted transfers or bequests of taluqdari properties governed by the Act. The validity of the wakf in question was challenged on the ground that in view of Section 12 of the Oudh Estates Act no such wakf could be legally created. Their Lordships of the Supreme Court upheld this contention observing that when a wakf governed by the Mussalman Wakf Validating Act, 1913 is created, there is a transfer of the property covered by the wakf and the transfer is in favour of God Almighty in whom the property subject to wakf becomes vested. It was further observed that the wakfs-alal-aulad which have become valid after Act 6 of 1913 must be held to be gifts of property to God Almighty for certain purposes and are clearly transfers within the meaning of that term in Section 12 of the Oudh Estates Act. Therefore, the wakf created by Asghar Ali in respect of Tipraha Estate was held to be invalid because it contravened Section 12 of the Oudh Estates Act. Further, the Supreme Court observed that once the wakf failed, Mohd. Ismail could not claim to remain in possession, for his right to remain in possession depended upon his being mutwalli of the wakf. A reading of the judgment of the Supreme Court in the case noted above, would show that the view expressed by the Supreme Court clearly was that even in a case of a wakf alal-aulad there is a transfer of property and the property which is the subject-matter of a wakf stands transferred to God Almighty. It must, therefore, be held

that the view to the contrary expressed by the Division Bench of this Court in Mohammad Qamar Shah Khan Vs. Mohammad Salamat Ali Khan, was not legally correct.

16. It was urged before us that the law applicable to public wakfs cannot be applied with equal force to a private wakf or wakf alal-aulad. Private wakfs or wakfs alal-aulad, it was submitted, are entirely governed by the provisions of the Mussalman Wakf Validating Act. 1913, under which the wakf property vested in the mutwalli or beneficiary and not in God Almighty. This contention is completely negated by the decision of the Supreme Court in Thakur Mohd. Ismail Vs. Thakur Sabir Ali, . Even if this contention is judged with reference to the provisions of Act 6 of 1913, independently of the decision of the Supreme Court, it will be found that the submission has no force, as would instantly appear.

17. It is a matter of history that the Mussalman Wakf Validating Act of 1913 was specifically enacted to override the decision of the Judicial Committee in Abdul Fata Mahomed v. Eussomoy, (1894) 22 Ind. App. 76 in which it was held that wakfs for the aggrandisement of the family of the wakifs were invalid in law. The object of the Act was to validate such wakfs. Therefore, one has to see whether In that Act there is anything warranting the legal proposition canvassed on behalf of the appellants in the instant case that the wakf property vested in the mutwallis and not in God Almighty. It may be noted that Act 6 of 1913 is equally applicable to Shias and Sunnis, except that in the case of Sunnis, the person creating a wakf may provide also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents or profits of the property dedicated.

18. Wakf, under the Act, means the permanent dedication by a person professing Muslim faith of any property for any purpose recognised by the Mohammedan Law as religious, pious or charitable. Having defined wakf, the Act further provides that it shall be lawful for any person professing Muslim faith to create a wakf, which in all other respects is in accordance with the provisions of Muslim law, for purposes, including the maintenance and support wholly or partially of his family, children or descendants; provided always, however, that the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Muslim Law as religious, pious or charitable purpose of a permanent character. The Act further lays down that no such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf. There is nothing In this Act from which it can be spelled out that in the case of a wakf-alal-aulad the wakf property does not vest in the God Almighty or the wakf itself, but vests In the mutwalli or mutwallis. It may here be again mentioned that the consensus of judicial opinion is that the legal status and position of a mutwalli under a wakf under the Musalman Law is that of a

Manager or Superintendent. Unless so provided in the deed of wakf, a mutwalli, although charged with the duty and obligation of managing the wakf property, can have no beneficial interest even in the income of the wakf. , Under the Mohammedan Law, a wakif can even appoint a non-Mohammedan to be the mutwalli of the wakf property, who can possibly have no beneficial interest in the income thereof except by way of remuneration, if so provided in the wakf deed. It is, therefore, not possible to accept the argument that merely because. In a wakf-alal-aulad, beneficial interest has been made solely enjoyable by the family members and descendants of the wakif, they have any inherent right or can as of right claim to be entitled to manage the wakf property. The right of management is derived under the deed of wakf itself or under the relevant law or usage, as the case may be, but this right of management or mutwalliship is not necessarily dependent on or co-existent with any benefit conferred on the mutwalli. A mutwalli may have the exclusive right or management of the wakf property; without having any beneficial interest therein. Conversely, a beneficiary having an exclusive beneficial interest, for the time being, may have no right of management at all Therefore, there does not appear to exist any legal basis for holding that in the case of a wakf-alal-aulad the wakf property vests in the mutwalli and not in God Almighty.

19. There is yet another reason why the contention that in case of private wakf or wakf-alal-aulad the property vests in the Mutwalli cannot be accepted. Apparently, there does not exist any rational basis upon which a distinction may be made between a public wakf and a private wakf in regard to the vesting of the wakf property and none has been shown to us. The creation of a wakf is essentially based upon a legal fiction, the fiction being that the property vests in God and in perpetuity, but Income from the property is permitted to be utilised for certain specified purposes, which, under the Muslim Law are recognised as pious or religious. Under the Mussalman Wakf Validating Act, this fiction appears to have been extended to cases of private wakfs or wakfs-alal-aulad, i.e., wakfs of which the object is, in presenti and for an indefinite period in future, to confer benefits on the members of the wakif s family or his descendants. As soon as the wakf is created the legal fiction comes into existence and ensures a permanent dedication by vesting the proprietary title in God, at the same time making the income or profit of the wakf property available to the beneficiaries so long as they exist and then for charitable and religious purposes.

20. Obvious difficulties are bound to arise if it is held that in case of wakf-alal-aulad the proprietary right or ownership in the wakf property vests in the Mutwallis or the beneficiaries. If such a vesting takes place, then it will legally create a heritable and transferable estate in the hands of the persons in whom the title has vested and once such vesting takes place, there cannot be any divesting of such proprietary title, so as to ultimately vest the property in God. Indeed, there may be nothing left out of the corpus of the wakf property to be vested in God at all, when the occasion arises on the failure of the line of succession of the descendants of the wakif. If any property is still left when the

line of descendants or beneficiaries becomes extinct, the rule of bona vacant will operate so as to vest the property in the State. The permanency of the dedication which is basically the fundamental principle involved in a wakf cannot exist or be ensured, if it is held that the proprietary title does not vest in God from the very inception of the creation of the wakf but vests in the Mutwallis or beneficiaries for the time being.

21. From what has been stated above, It necessarily follows that in every case of a wakf, whether public, or private, the wakf property vests in God Almighty or in the wakf itself as an institution or a foundation eo nomine and not in the Mutwalli or the beneficiary. Here, a sentence from the judgment of Mr. Ammer Ali, J. In Vidya Varuti's case (supra) may be aptly quoted:--

"Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity and gifts are made to them eo nomine."

Such being the legal position no amount of cultivation by the Mutwalli or even the beneficiary could make the wakf land so cultivated the personal Khudkasht of the Mutwalli or the beneficiary under the tenancy laws obtaining prior to the coming into force of the U.P. Zamindari Abolition and Land Reforms Act (U.P. Act 1 of 1951). Therefore, by virtue of personal cultivation of wakf land no Mutwalli, even if he was also a beneficiary, could have personally acquired Bhumidari rights u/s 18(1)(a) of the aforesaid Act, the material part of which runs thus:--

Section 18(1)--Subject to the provisions of Sections 10, 15, 16 and 17 all lands-

(a) in possession of or held or deemed to be held by an intermediary as Sir, Khudkasht or an intermediary's grove; on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such Intermediary who shall subject to the provisions of this Act be entitled to take or retain possession as fit bhumidhar thereof."

As such, It follows that as a result of cultivating waqf land personally, the co-mutwalli concerned, who was also a beneficiary, did neither become the sole bhumidhar of the land nor co-bhumidhar with the other comutwalli. Bhumidhari rights, if at all, could have only accrued in favour of God or the waqf as a result of actual cultivation of waqf land by a Mutwalli.

22. Ordinarily, cultivation of wakf land by a Mutwalli must be treated as cultivation done in his capacity as manager or Superintendent of the waqf. Therefore, waqf land so cultivated before the coming into force of U.P. Act 1 of 1951 would have become God's Khudkasht or that of the waqf itself, provided, however, other requisite conditions, if any, under the then existing tenancy laws were also satisfied. Mr. Sadiq Ali posed a legal proposition that cultivation of waqf land by a Mutwalli, be he a beneficiary as well or not, must under all circumstances be treated as or deemed to be cultivation done for and on behalf of God or the wakf itself; the resultant corollary being that the land concerned initially became Khudkasht and subsequently Bhumidhari of God or the wakf.

This highly attractive and apparently sound enunciation of law, however, was not supported by the learned counsel by any authoritative text of Mohamadan law, opinion of a noted Muslim Jurist or judicial decision on the point reported or otherwise. Reference was made by the learned counsel to Sections 527 and 533 of Tyabji's Muslim Law (Fourth Edition) which are Quoted below:--

527. "The mutwalli has no ownership, right or estate in waqf property; in that respect he is not a trustee in the technical sense; he holds the property as a manager for fulfilling the purpose of the waqf."

533. "The mutwalli may grant a lease for a year of a house dedicated to the poor or other charitable object, and a lease for three years of lands; and the lease in either case is not determined by his death, A lease granted by the mutwalli for a longer term than for one year or three years respectively. Is not void but voidable."

In this connection Section 529 also may be quoted;

529. "The mutwalli may do all acts reasonable and proper for the protection of the waqf property, and for the administration of the waqf."

23. In view of the specific questions referred by the Division Bench for answer, it is neither necessary for us nor would it appropriately lie in our province to consider or decide the somewhat intricate question as to whether a Mutwalli-cum-beneficiary, specially a co-mutwalli who is also a beneficiary, legally could or could not acquire any other tenancy rights over waqf land. Nor are we called upon to pronounce our view on the question as to whether by virtue of personal cultivation of waqf land by a co-mutwalli-cum-beneficiary, the person concerned acquired any other tenancy rights, either personally or jointly with the other co-mutwalli prior to or on the coming into force of the said Act. As regards bhumidhari it has already been stated that none of the co-mutwallis could or did acquire the rights of a bhumidhar either individually or jointly. Therefore, Sections 527 and 533 of Tyabji's book quoted above and relied on by Mr. Sadiq Ali need no consideration by this Bench.

24. Section 529 of Tyabji's book, however indicates that under certain circumstances, reasonable and proper administration of the waqf estate may necessitate or justify actual cultivation of waqf land by the mutwalli himself. Such cultivation would be cultivation for and on behalf of God or the waqf itself and not personal cultivation of the mutwalli. He must maintain proper accounts in respect of such cultivation in his capacity as mutwalli and be or remain answerable for the income or profits of the same. If such venture results in loss, the mutwalli, in order to avoid or escape personal liability therefor, may have to show that he had acted within his powers as a prudent manager in good faith. But a mutwalli, specially when he is a beneficiary as well, may himself embark upon a venture of cultivation utilising waqf land to earn profit for himself. If not prohibited under the deed of waqf itself or any mandate of law, such cultivation cannot but be treated either as the exclusive personal enterprise of the mutwalli

concerned, the profit or loss entirely being his, or as an enterprise on behalf of all the beneficiaries, provided that such cultivation was done with the consent, express or implied, of the other beneficiaries. If no such consent is established, the person doing such cultivation may even find himself in the unenviable position of being held answerable for the profits but solely liable for the loss. In the very nature of things, all these controversies whenever arising can and must be decided only on the basis of material evidence available, direct or circumstantial. Therefore, as a matter of law, it can neither be held that a co-mutwalli, who is also a beneficiary, in actually cultivating waqf land acted for and on behalf of God or the waqf itself, nor can it be held that it was his exclusive personal cultivation and not cultivation for and on behalf of the entire, body of beneficiaries.

25. There is nothing in the U.P. Zamindari Abolition and Land Reforms Act, 1950 precluding acquisition of bhumidhari rights by God or the waqf itself u/s 18(1)(a) thereof. Under that section, by operation of law, the intermediary became bhumidhar of all lands of the category specified therein with the coming into force of the Act. The definitions of the terms "Estate" and "Intermediary" in Section 3 of the Act do not exclude either a waqf estate or a waqf or God. u/s 27 every intermediary became entitled to receive compensation, and Chapters III and IV of the Act, which respectively relate to assessment and payment of compensation do not show that the legislature excluded wakf or God from being recognised or treated as legal entity. Sections 73, 76, 77, 78, 80, 93, 94, 95, 96, 99 of Chapter V of the Act leave no room for doubt that the legislature did expressly recognise waqfs as "Intermediaries" and waqf estates as "Estates" under the Act. Therefore, u/s 18(1)(a) of the Act, the rights of a bhumidhar accrued to or were acquired by waqf or God as intermediary, on other specified requisites being fulfilled. As already observed, whether such rights did or did not accrue or were or were not acquired must in a given case be decided in the light of the evidence adduced and material circumstances.

26. From the discussions in the foregoing paragraphs, the conclusions at which I have arrived apropos the questions referred to us for answer are as follows:--

Under Section 18(1)(a) of the U.P. Zamindari Abolition and Land Reforms Act 1951 the rights of a bhumidhar did not accrue either in favour of both the co-mutwallis or in favour of that co-mutwalli alone, who was cultivating a land, the proprietary right in respect of which was subject-matter of the waqf. Whether in consequence of cultivation of waqf land personally by a co-mutwalli, who was also a co-beneficiary, the rights of a bhumidhar did or did not accrue in favour of the waqf or God cannot be decided in the abstract as a matter of law, but can and has to be decided on the basis of material evidence, direct or circumstantial, adduced in a given case.

27. The questions are answered accordingly.

S. Malik, J.

28. I have read the judgment of brother Kirty and agree with, him that in a Muslim Waqf the Waqif divests himself of his title in the Waqf property and the Waqf property vests in God. There is no difference in this respect in Shia Waqfs and Sunni Waqfs nor between a Waqf alal-aulad and any other kind of Waqf My learned brother has dealt at length with the authorities on the point and It will not serve any useful purpose to cover the same ground.

29. It follows therefrom that a Mutwalli in a Muslim Waqf is merely a Superintendent or Manager of the Waqf property and his rights and liabilities cannot be equated with that of a "Trustee". Under the Indian Trusts Act, 1882 (Act No. 2 of 1882) -- which does not affect the rules of the Mohammedan Law as to Waqfs (See Section 1) -- as also under the English Law, the legal title to the properties, made a trust of, vests in the Trustee and the equitable title in the cestui que trust in Section 3 of the Trusts Act a Trust is defined as "an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner."

30. In a Muslim Waqf the legal title to the Waqf property vests in God and the equitable title in the beneficiaries. The Mutwalli even if he be one of the beneficiaries is merely a Manager for fulfilling the purposes of the Waqt ID the discharge of his duties as Mutwalli he must no doubt act like a prudent Manager.

31. By reason of Ms cultivating the land merely as a Mutwalli in other words, a Manager, a Mutwalli cannot therefore, acquire for himself Bhumidhari rights u/s 18 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951). It follows therefrom that Ms co-Mutwalli also whether he shares in the cultivation or not cannot become a Bhumidhar.

32. An "intermediary" is defined in Section 3(12) of the U.P. Zamindari Abolition and Land Reforms Act as follows:--

"Intermediary" with reference to any estate means a proprietor, under-proprietor, sub-proprietor, thekedar, permanent lessee in Avadh and permanent tenure-holder of such estate or part thereof" If the Waqif could be an Intermediary u/s 3(12) in case he had not created the Waqf, there is nothing in law which debars God from becoming an Intermediary in his place after the creation of the Waqt Therefore, u/s 18(1)(a) of the Act where an Intermediary can become a Bhumidhar, God also, the requisites specified in the Act being fulfilled, can become a Bhumidhar.

33. I agree with my learned brother that "whether in consequence of cultivation of Waqf land personally by a co-Mutwalli, who was also a co-beneficiary, the rights of a Bhumidhar did or did not accrue in favour of the Waqf or God cannot be decided in the abstract as a matter of law, but can and has to be decided on the basis of material evidence, direct or circumstantial, adduced in a given case."

34. I have not gone into the question as to what right, if any, would accrue to a

person, if it is established that he has been cultivating the land in his own right, though he happens to be a Mutwalli, as the point has not been referred to us. It would depend on the facts and circumstances of each case and on a finding as to how far the requisites of the various provisions of the U.P. Zamindari Abolition and Land Reforms Act have been satisfied for acquisition of the rights provided by the Act in such a case obviously, a co-Mutwalli as such can acquire no rights.

Gyanendra Kumar, J.

35. I agree with brothers Kirty and S. Malik that the property of a Shia Muslim waqf vests in God and not in a mutwalli or, mutwallis, who are mere managers. The waqif in the instant case was the zemindar; hence on creation of the waqf in 1918, God Almighty became the zamindar of the waqf property. However, on the abolition of zamindari he became an intermediary. The questions referred to the Full Bench envisage a case in which the waqf land is neither the sir nor the grove of the intermediary. Therefore, in terms of Section 18(1)(a) of the Zamindari Abolition and Land Reforms Act, the land should have been khudkasht of the intermediary before bhumidhari rights could accrue in his favour, provided other attendant circumstances and facts were present. As seen above, bhumidhari rights under the aforesaid section can accrue only in favour of an intermediary. Being mere managers, the cultivating mutwalli or both the co-mutwallis could not become bhumidhars u/s 18(1)(a) of the Act, as they were not intermediaries.

36. So far as God Almighty is concerned, he could, of course, become an intermediary and then a bhumidhari of the waqf land u/s 18(1)(a), provided the land was being cultivated by Farzand Hasan as a mutwalli and not in his personal capacity. In the former case, the cultivation was obviously being carried on behalf of God, who would thus hold the land and be deemed to be in possession thereof through his manager or mutwalli. Such cultivation done by God, through his mutwalli, would certainly be God's khudkasht and consequently he would be entitled to retain possession thereof as a bhumidar, u/s 18(1)(a) of the Zamindari Abolition and Land Reforms Act. Normally also a mutwalli will be deemed to be cultivating the waqf land as a mutwalli, unless he proves to the contrary.

37. Nevertheless, if one of the co-mutwallis is cultivating the land in his personal capacity or for himself and on behalf of the other co-mutwalli, certain subordinate rights may accrue to him or them, as the case may be, but not bhumidhari rights u/s 18(1)(a). However, we are not called upon to decide in this case as to what subordinate rights, if any, would accrue to a cultivating mutwalli or both the co-mutwallis, in such event. Thus my answer to the two questions referred to the Full Bench is as under:--

(1) No bhumidhari rights in the land would accrue in favour of the cultivating mutwalli, much less both the mutwallis.

(2) However, bhumidhari rights would accrue in the land in favour of God or waqf, u/s 18(1)(a) of the Zamindari Abolition and Land Reforms Act, provided

that [the mutwalli in question was cultivating the land as a mutwalli, i.e., as manager and agent of God or waqf, who owned and held the land as an intermediary on the relevant date. The question whether mutwalli was cultivating the waqf land as a mutwalli or in his personal capacity for his own benefit must necessarily depend on the facts, evidence and circumstances of each case.

38. BY THE COURT:-- The questions referred to the Full Bench are answered as follows:--

(1) No bhumidhari rights in the land would accrue in favour of the cultivating mutwalli, much less both the mutwallis.

(2) However, bhumidhari rights would accrue in the land in favour of God or waqf, u/s 18(1)(a) of the Zamindari Abolition and Land Reforms Act, provided that the mutwalli in question was cultivating the land as a mutwalli, i.e., as manager and agent of God or waqf, who owned and held the land as an Intermediary on the relevant date. The question whether mutwalli was cultivating the waqf land as a mutwalli or in his personal capacity for his own benefit must necessarily depend on the facts, evidence and circumstances of each case.

Reference answered accordingly.