suit as the present is maintainable by the presumptive heir only.

In the result the appeal is dismissed with costs.

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

SHER ALI (DEFENDANT) *v.* HAMID ALI AND ANOTHER (PLAINTIFFS)* 1940 *March*, 5

Muhammadan law—Wakf—Validity—Interest reserved for wakif himself—Limitation—Adverse possession—Possession qua mutwalli of an invalid wakf is not adverse to the heirs of the wakif—Contest in mutation proceedings does not affect nature of possession as mutwalli.

A wakf under which an interest in the endowed property is reserved for the wakif himself is invalid in its entirety.

So, where under the deed of wakf the wakif had reserved for himself out of the endowed property a benefit in the shape of a maintenance allowance of Rs.420 a year not as mutwalli but in his private capacity as owner, the wakf was wholly void.

Where a mutwalli remained for many years in possession of the wakf property and throughout the period of his possession he professed to act as mutwalli or trustee of the endowed property, and subsequently the wakf was found to be invalid, it was *held* that his possession was not adverse to the title of the heirs of the wakif and their suit for possession was not barred by limitation; the fact that the heirs had objected, on the ground that the wakf was invalid, to the mutation of the mutwalli's name and the objection had been overruled by the revenue court and the heirs had allowed the mutwalli to remain in possession as such did not affect the question of limitation, the decisive factor being that the nature of the mutwalli's possession had never changed and he had never prescribed for a title adverse to that of the wakif's heirs.

Sir *Syed Wazir Hasan*, Messrs. *Shiva Prasad Sinha, Hyder Mehdi* and *Zafar Mehdi*, for the appellant.

Messrs. *S. K. Dar, Mushtaq Ahmad, G. S. Pathak, Ambika Prasad* and *Inam-ullah*, for the respondents.

THOM, C.J., and GANGA NATH, J.:—These are two appeals which may be conveniently disposed of in one judgment.

*First Appeal No. 73 of 1937, from a decree of Ratan Lal, Civil Judge of Allahabad, dated the 2nd of November, 1936.

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First with regard to F. A. No. 73 of 1937. This appeal is by the defendant in a suit in which the plaintiffs claim possession of a certain share in property which at one time belonged to one Syed Madad Ali.

Syed Madad Ali died on the 24th of December, 1894. Shortly prior to his death, on the 7th of May, 1893, he made a wakf of the property in which the plaintiffs claim a share.

The plaintiffs averred that the wakf deed was invalid inasmuch as under the deed the wakif had reserved for himself a certain benefit in the shape of a maintenance allowance of Rs.420 a year not as mutwalli but in his private capacity as owner of the property.

The defence to the suit is that the wakf deed of the 7th of May, 1893, was a valid wakf. It was contended that the allowance which the wakif reserved for himself represented his salary as mutwalli. It was further pleaded that the plaintiffs' claim to possession of a share in the property in suit was barred by limitation. Shortly after the death of Syed Madad Ali there was a contest in the revenue court on the question of mutation. It was there held that the wakf deed was a valid wakf. Thereafter apparently the plaintiffs, who are amongst the heirs of Syed Madad Ali, were content to allow the defendant No. 1, Syed Sher Ali, a son of the wakif to manage the property and to disburse the income thereof in accordance with the provisions of the wakf. In these circumstances it was maintained for the defendant that the plaintiffs' claim for possession was barred.

Two questions arise for consideration in this appeal. First as to the validity of the wakf deed and secondly as to whether the plaintiffs' claim is now barred by limitation.

It is abundantly plain from the terms of the wakf deed that Syed Madad Ali reserved for himself an annual maintenance allowance out of the property of which he purported to make a wakf. This maintenance allowance cannot be taken to have been intended to be

his salary as mutwalli. It is true that he himself was the first mutwalli but under the terms of the deed he reserved for himself the right to appoint another mutwalli. He did in fact before his death appoint defendant No. 1, Syed Sher Ali, as mutwalli and under the terms of the wakf deed despite the fact that Syed Madad Ali had relinquished office as mutwalli he was clearly entitled to draw maintenance allowance of Rs.420 a year.

It is well settled that a wakf deed under which an interest is reserved for the wakif is invalid in its entirety. In this connection reference may be made to the case of *Abadi Begum* v. *Kaniz Zainab* (1). In that case the Privy Council considered the effect of the reservation by the wakif of an interest in the estate of which he purported to make a wakf; and they clearly approved of the principle "that it is a condition of the validity of the wakf that the wakif should not reserve any interest in the endowed property for himself and that if he did, the wakf was bad not merely in respect of the reservation but in its entirety."

This decision of the Privy Council concludes the question as to the validity of the wakf. We hold that inasmuch as the wakif has reserved a substantial benefit for himself out of the endowed property the wakf deed is wholly void.

So far as the question of limitation is concerned this also in our judgment is clearly concluded by a decision of the Privy Council. In *Muhammad Munawar Ali* v. *Rasulan Bibi* (2) a Bench of this Court held that a mutwalli who had been in possession of property under a wakf deed which was held to be invalid did not prescribe a title adverse to that of the heirs of the wakif. In the course of the judgment in reference to the conduct of the mutwalli it is observed: "In all his acts in the administration of the wakf he professed to act as trustee or mutwalli of the endowed property . . . The wakf having failed he held the property as trustee for those

(1) (1926) I.L.R. 6 Pat. 259. (2) (1899) I.L.R. 21 All. 329(340).

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entitled, under a legal obligation to hand it over to them on demand. Had such a demand been made and refused there would be good ground for holding that his subsequent possession was adverse to the true heirs. Nothing of the kind is alleged; there is not an atom of evidence to show any change in the nature of Syed Kaim Ali's possession from the day when he assumed possession of his own and his wife's property as mutwalli in 1881 down to his death in 1895." This decision was upheld by the Privy Council in *Muhammad Munawar Ali* v. *Razia Bibi* (1).

Now in the present case it is not in dispute that Syed Sher Ali has held the property which Madad Ali purported to endow from the date on which he took possession down to the date of the institution of the suit as mutwalli. He has asserted no other title than that of manager of the property.

It was contended for the appellant that Syed Sher Ali's possession must be held to have been adverse to that of the plaintiffs who are amongst the heirs of Syed Madad Ali upon the ground that the latter had in fact made a demand for possession of the property in the revenue court after the death of Madad Ali. It may well be that on the question of mutation there was a contest between the appellant and the plaintiffs. The plaintiffs acquiesced in the decision of the revenue court that Syed Sher Ali's name should be mutated and did not pursue their claim to possession in the civil court until the year 1934. The important point is, however, not that the plaintiffs contested Syed Sher Ali's right to mutation in 1895, but that the nature of Syed Sher Ali's possession did not change. It is true that in the case above referred to there is the observation that had the heirs made a demand against the mutwalli the possession of the mutwalli would have been adverse. That would only have been so, however, had the mutwalli set up a title adverse to that of the claimants. The decision that

(1) (1905) I.L.R. 27 All. 320.

the claim of the plaintiffs in the suit was not barred by limitation turned not on the fact that no demand for possession had been made but on the fact that the nature of the mutwalli's possession had never changed. His possession all along had been that of mutwalli.

The defendant appellant Syed Sher Ali is one of the heirs of Syed Madad Ali. He has purported to hold the property in suit all along as mutwalli under the wakf which in the end of the day has been held to be invalid. In these circumstances in view of the decision of the cases above referred to, namely *Muhammad Munawar Ali* v. *Rasulan Bibi* (1) and *Muhammad Munawar Ali* v. *Razia Bibi* (2), the plea that the plaintiffs' claim is now barred by limitation must be repelled.

One further point was urged on behalf of the appellant to which it is necessary to make only a brief reference. On the authority of the Bench decision of this Court in *Mohammad Irfan Ali* v. *Mohammad Tahir Ali* (3) it was contended that even though the wakf deed was invalid it created a charge over the property in suit in favour of the beneficiaries under the wakf deed. We do not consider it necessary in the disposal of this appeal to decide the question whether a charge has been created in favour of the beneficiaries under the wakf deed executed by Syed Madad Ali on the 7th of May, 1893. Suffice it to say that if there be such a charge it cannot be declared or given effect to in these proceedings.

In the result we uphold the decision of the learned Civil Judge that the wakf deed of the 7th of May, 1893, is invalid and that the plaintiffs' claim is not barred by limitation.

We now proceed to consider F. A. No. 113 of 1937. The learned Civil Judge held that Mst. Chamela who is mentioned in the wakf deed was the lawfully wedded wife of Syed Madad Ali. In these circumstances he concluded the plaintiffs were not entitled to 8/33 and

(1) (1899) I.L.R. 21 All. 329. (2) (1905) I.L.R. 27 All. 320.
(3) [1933] A.L.J. 97.

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2/33 sihams respectively but 8/45 and 2/45 sihams respectively inasmuch as defendants Nos. 5 to 8 the descendants of Mst. Chamela were the legitimate heirs of Syed Madad Ali and entitled to their share in his estate. The learned Judge accordingly granted decree to the plaintiffs for joint possession over 10/45 sihams of the property.

Against this decision plaintiff No. 2 Syed Anwar Ali appealed and his appeal was directed against the decree of the learned Civil Judge in so far only as the decree determined his share in the estate. During the hearing of the appeal the appellant filed an application in which it is averred that the appellant and defendants Nos. 5 to 8 have concluded a compromise and in which the appellant further intimated that in these circumstances he did not wish to press his appeal which might be dismissed without any order as to costs. Thereupon Sher Ali, defendant No. 1, Hamid Ali, plaintiff No. 1, and the heirs of Kazim Ali filed applications in which they prayed that in the circumstances they be permitted to prosecute the appeal.

Under the provisions of order XLI, rule 4, "Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be." Under the provisions of order I, rule 10(2), "The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court

effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It is apparent from these provisions and authorities to which our attention was directed during the course of the appeal that the court has very wide powers to allow parties to be added to the array of plaintiffs or defendants or appellants or to allow parties to be transposed from the array of defendants to the array of plaintiffs. Whether it is just and equitable to grant an application for such a transposition, however, is a question which must be decided upon the facts and circumstances of each particular case. Now in the present instance as already noted the appeal from which the appellant withdraws was one which challenged the decree of the trial court in so far only as that decree affected the rights of the appellant. The whole decree is not challenged. For some reason or other which is not apparent the plaintiff No. 1 and the other parties who have applied to be permitted to prosecute the appeal are not in the array of the appellants. Furthermore so far as Sher Ali defendant No. 1 is concerned he did not challenge the title of defendants Nos. 5 to 8 to succeed to a share of the property as legitimate heirs of Madad Ali. Sher Ali further did himself file an appeal against the decision of the trial court that the wakf deed executed by Syed Madad Ali on the 7th of May, 1893, was invalid. He deliberately and for reasons best known to himself but which are not known to the Court refrained from challenging the conclusion of the learned Civil Judge that Mst. Chamela was married to Syed Madad Ali and that therefore defendants Nos. 5 to 8 were entitled to share in Syed Madad Ali's estate. Taking all these facts and circumstances into consideration we are far from satisfied that the present is a case in which the Court should exercise its discretion in favour of the applicants who now wish to prosecute the appeal. Their applications we accordingly dismiss.

The result is that Appeal No. 73 of 1937 is dismissed with costs and Appeal No. 113 of 1937 is dismissed, parties to bear their own costs.