APPELLATE CIVIL.

Before Richardson and Walmsley JJ.

SULTAN AHMAD

v.

ABDUL GANI.*

1918

Feb. 25.

Mahomedan Law—Wakf—Appointment of mutwalli by tauliatnamah—Testamentary character and validity of—Mahomedan Endowments Committee at Chittagong—Statutory body—Regulation XIX of 1810—Religious Endowments Act (XX of 1863), s. 7.—Doctrine of marz-ul-maut.

Where A the mutwalli of a mosque executed a *tauliatnamah*, a few months prior to his death, in favour of B appointing him as his successor :—

Held, that the Mahomedan Endowments Committee at Chittagong was a statutory body and its recognition of a person as the true and rightful mutwalli was authoritative.

Semble : that according to Mahomedan Law, a *tauliatnamah* was capable of being construed as a document of a testamentary character speaking as from the moment of death :

Also, that when a person had a right or power under the law to appoint a successsor and if he freely executed a *tauliatnamah* as a testamentary document while he was of sound mind, its validity could not be questioned.

Sayad Muhammad v. *Fatteh Muhammad* (1), *Sayad Abdulá Edrus* v. *Sayad Zain Sayad Hasan Edrus* (2) referred to.

SECOND APPEAL by Sultan Ahmad, the plaintiff.

The facts are shortly these: The lands in suit were alleged to form part of certain *wakf* properties

* Appeal from Appellate Decree, No. 2300 of 1915, against the decree of S. E. Stinton, District Judge of Chittagong, dated May 29, 1915, reversing the decree of Ashutosh Banerjee, Offg. Subordinate Judge of Chittagong, dated Sep. 19, 1910.

(1) (1894) I. L. R. 22 Calc. 324 ; L. R. 22 I. A. 4.

(2) (1888) I. L. R. 13 Bom. 555.

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appertaining to a mosque in the district of Chittagong. In 1764 the Revenue authorities having resumed certain lands of the *wakf*, allowed Latfulla the then mutwalli, a monthly grant of Rs. 52-14-0, which still continues. In 1837 some other lands were resumed which were regranted as a taluk to Tafel Ali the then mutwalli. In 1850 Tafel Ali was succeeded by his grandson Abdul Sobhan. On the 30th June 1902, a few months prior to his death, Abdul Sobhan executed a *tauliatnamah* by which he designated the plaintiff Sultan Ahmad as his successor. The plaintiff contended that during Abdul Sobhan's incumbency two persons were appointed as naib mutwallis, and the management of the *wakf* was entrusted to them; that it was by their contrivance the taluk fell into arrears of revenue, and at the sale which followed in 1881, it was purchased by the naib mutwallis in the name of a third person as *benamidar*, from whom they subsequently obtained a release. The defendants 1 to 6 were the representatives of the two naib mutwallis and defendant 6 held a lease from defendant 1. The plaintiff instituted a suit for the recovery of possession of the disputed lands. The Court of first instance decreed the suit in the plaintiff's favour which on appeal was confirmed by the lower Appellate Court. On second appeal to the High Court [Holmwood and Chapman JJ.] on the 26th May 1914, remanded the case for the decision of certain issues, one of them being whether the plaintiff was the *de jure* mutwalli. On the 29th May 1915, the Court below determined all the material issues in the plaintiff's favour, but dismissed the suit on the abovementioned issue, holding that a mutwalli could delegate the trust to another on his death-bed and as there was no evidence that Abdul Sobhan died during *marz-ul-maut*, he had no power to delegate the mutwalliship during his life-time, and

consequently his suit for ejectment must fail. From this decision the plaintiff preferred this appeal to the High Court.

Babu Dhirendra Lal Kastgir (with him *Babu Tarakeswar Mitter*), for the appellant, contended that a mutwalli could appoint a successor by will subject to his approval by the Government. See Wilson's Digest of Mahomedan Law (3rd Ed.) p. 356. Baillie's Digest of Mahomedan Law, p. 594. Ameer Ali's Mahomedan Law, Vol. I. p. 351 (3rd Ed.): see also *Moohummud Sadik* v. *Moohummud Ali* (1). The *tauliatnamah* in the present case was a valid document of a testamentary character and should have been construed as such. Moreover, the mosque was an endowment to which the provisions of Regulation XIX of 1810 were applicable. See: ss. 11 and 14. That Regulation was repealed by Act XX of 1863 and the powers of the Government were transferred to the District Endowments Committee: see ss. 3 and 7 of Act XX of 1863. The Court of first instance found that the plaintiff was recognised as mutwalli by the Endowments Committee at Chittagong and apart from the validity or otherwise of the *tauliatnamah* the plaintiff could claim by right to be the *de jure* mutwalli under the provisions of Act XX of 1863 on the basis of his recognition by the Endowments Committee. The view taken by the learned District Judge on the doctrine of *marz-ul-maut* was erroneous, for that doctrine had no application to the facts of the present case.

Babu Charu Chandra Sen, for the respondents (defendants 1 and 2), contended that the endowment in the present case not being a public one, the provisions of Regulation XIX of 1810 and Act XX of 1863 did not

(1) (1798) 1 S. D. A. Sel. Rep. 17.

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apply to it, and the appellant had not shown that such provisions did apply. Moreover, there was no evidence to show what powers the Endowments Committee exercised. The plaintiff's appointment as mutwalli was invalid as he was a minor at the time of his appointment and the defendants 1 and 2 were then the co-mutwallis. The plaintiff therefore could not be the *de jure* mutwalli.

Maulvi Nuruddin Ahmad appeared for the respondent (defendant No. 6) but did not contest the appeal.

Babu Dhirendra Lal Kastgir, in reply.

Cur. adv. vult.

RICHARDSON AND WALMSLEY JJ. This is an appeal from the judgment and decree of the District Judge of Chittagong dated the 29th May 1915. The appellant is the plaintiff and the suit has a somewhat chequered history. It was brought to recover possession of certain lands which the plaintiff claims as part of the *waqf* properties appertaining to a mosque in the district of Chittagong of which he is the mutwalli. The trial Court made a decree in favour of the plaintiff. That decree was upheld by the lower appellate Court; but on remand by this Court the suit has been dismissed. All the material issues which arise in this case have been decided in the plaintiff's favour except the issue whether he is the *de jure* mutwalli of the mosque. On this question the learned District Judge has come to a conclusion adverse to the plaintiff. That conclusion, however, is based on a misapplication of Mahomedan Law to the facts of this case. The endowment is one of very old standing. It was apparently in existence when the district of Chittagong was taken over by the East India Company. There was a measurement of the district in the year 1764

when a person named Latfulla was the mutwalli. It appears that certain lands belonging to the mosque were then resumed by the Revenue authorities and in their place a monthly grant of Rs. 52-14 was made to the mutwalli which is still at the present day being paid. In the year 1837, another measurement of the district was carried out. On that occasion other lands were resumed which were regranted in whole or in part, as a taluk at a nominal rent to the then mutwalli, Tafel Ali. This taluk which comprises the land in dispute was afterwards held and treated as part of the property of the mosque. Tafel Ali appears to have been succeeded by his grandson Abdul Sobhan in the year 1850. Abdul Sobhan held the office for many years. On the 30th June 1902, six or seven months before his death, he executed a document described as a *tauliatnamah*, by which he designated the present plaintiff Sultan Ahmad, as his successor.

The case for the plaintiff is that during Abdul Sobhan's incumbency two persons were appointed to act as naib-mutwallis to whom the management of the endowment was entrusted. It is alleged that by their contrivance the taluk was allowed to fall into arrears of revenue. At the sale which followed in 1881 it was purchased by the naib-mutwallis themselves in the name of a third person as benamidar, from whom they subsequently obtained a deed of release. The defendants Nos. 1 to 5 in the suit are the present representatives of the two naib-mutwallis. The defendant No. 6 holds a lease of the land in suit from the defendant No. 1.

As I have said, all material questions of fact, pure and simple, have been decided in favour of the plaintiff, but while no one disputes that he is the *de facto* mutwalli, it has been held that he has failed to establish a *de jure* title.

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The learned District Judge has considered that question with reference solely to the *tauliatnamah* of the 30th June 1902. Even as to that document he finds that it was duly executed, and that Abdul Sobhan was not at the time insane as the defendants contended but was in possession of his mental faculties. The learned Judge has reached his conclusion by applying to the case the doctrine of *marz-ul-maut*. His view is that the *tauliatnamah* is void and of no effect, because it was not executed by Abdul Sobhan on his death-bed, or while he was suffering from what is termed a death-bed illness or mortal sickness. But in the case of a gift or other voluntary disposition of property, the doctrine of *marz-ul-maut* only applies when the gift is made during such illness. The learned District Judge apparently had in mind a rule that a mutwalli cannot ordinarily transfer his office during his life time [*Wahed Ali* v. *Ashruff Hossain* (1), *Khajah Salimulla* v. *Abdul Khair* (2)] but may do so on his death-bed (Ameer Ali, 3rd Edition, p. 346). Let it be assumed that such a rule correctly represents the Mahomedan Law. It still remains that the *tauliatnamah* is capable of being, and should be, construed as a document of a testamentary character, speaking as from the moment of death. If that be its true significance, it is clearly unnecessary to consider what precisely is the meaning of the term *marz-ul-maut* under the Hanafi Law by which the parties are said to be governed. An office to which is attached the right of appointing a successor is well-known to the law. If Abdul Sobhan had such a right or power either under the Mahomedan Law or under any general law applicable to this topic and if he freely executed the *tauliatnamah* as a testamentary document, while he was of sound disposing mind, its validity cannot be questioned: *Sayad Muhammad* v.

(1) (1882) I. L. R. 8 Calc. 732. (2) (1909) I. L. R. 37 Calc. 263, 273.

Fatteh Muhammad (1), *Sayad Abdulá Edrus* v. *Sayad Zain* (2).

There is evidence on record that Abdul Sobhan was himself appointed mutwalli by a *tauliatnamah* executed by his predecessor. In the course of the argument reference has been made to a robakary dated the 2nd January 1851 under the signature of the Commissioner of the Division which purports to confirm Abdul Sobhan's appointment as mutwalli under a *tauliatnamah* dated the 15th September 1850. This robakary was issued under the authority of Regulation XIX of 1810 to which it refers, and under which religious endowments were controlled by the executive authorities.

But it is not necessary to determine on this occasion whether the mutwalli of this endowment has the right of appointing his successor or to insist on the efficacy of the *tauliatnamah* in the plaintiff's favour.

Nor would it be proper for this Court in second appeal to lay down the rule by which succession to this office is governed. The deed, if any, by which the endowment was created, is not forthcoming and the rule depends on evidence relating to the practice or usage which has prevailed in the past. The plaintiff is apparently the lineal descendant of Latfulla, the earliest mutwalli of whom any mention is made and his pedigree lends some colour to the suggestion that succession to the office is regulated by the rule of lineal primogeniture or at any rate, that regard is had to that rule. But the question must be left open for future discussion, should it again arise.

I turn to a part of this case which the learned District Judge has entirely neglected. It is not

(1) (1894) I.L.R. 22 Calc. 324; L. R. 22 I. A. 4. (2) (1888) I. L. R. 13 Bom. 555.

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disputed that the plaintiff is in receipt of the Government stipend to which I have referred. That in itself is something, but it further appears that before sanctioning the payment of this allowance to the plaintiff, the Collector referred the matter to the Mahomedan Endowments Committee of the District of Chittagong. The letter which the Committee addressed to the Collector, dated the 17th June 1903 is on record. It contains a clear recognition of the plaintiff's title to the office. Now, the fact that the endowment is one of the description mentioned in section 3 of the Religious Endowment Act of 1863 (Act No. XX of 1863) is shown by the reference in the robakary of 1851 to Regulation XIX of 1810. The endowment is clearly a mosque or religious institution, to which the regulation applied before it was repealed by the Act. By section 7 of the Act the control of such endowments was transferred to the committees to be appointed under that section "which were to take the place and to exercise the powers of the Board of Revenue and the local agents under the Regulation." The Mahomedan Endowments Committee at Chittagong is therefore a statutory body and its recognition of the plaintiff as the true and rightful mutwalli, if such recognition be necessary, is authoritative.

It is not suggested that there has ever been any dispute as to the right of succession to this office, such as would require the intervention of the Civil Court under section 5 of the Act. In fact there is no other claimant to the office in the field and the whole discussion has an air of unreality. Whatever test be applied the plaintiff satisfies it. If he required appointment by his predecessor he was so appointed. If the office is hereditary and the *tauliatnamah* was a gratuitous or superfluous act on the part of Abdul Sobhan, it indicates at least that in the latter's opinion the plaintiff

was entitled to succeed. The plaintiff has been recognised as mutwalli by the Endowments Committee, he is in receipt of the Government stipend and is in fact in possession of the office.

The conclusion of the District Judge rests entirely on a mistaken view of the law. There is no evidence by which it can be supported. The evidence is all the other way and the only conclusion of which it admits is a conclusion in favour of the plaintiff. In my opinion, the judgment and decree of the District Judge must be discharged, and the decree of the Munsif restored and affirmed.

As the defendant No. 6 stated through his learned pleader that he would not contest this appeal, the plaintiff's costs of the appeal must be paid by the defendants Nos. 1 to 5.

As to the costs below, the plaintiff is entitled to his costs in those Courts as against all the defendants.

L. R. *Appeal allowed.*