clause 15 of the Charter Act are sufficient to prevent such evasion).

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The District Magistrate's order of the 23rd July 1913, refusing to set aside the Sub-Magistrate's order of the 22nd June 1913 does not state that there was again a temporary emergency and a continuing or existing insufficiency of the Police force to protect the petitioners in exercise of their rights. Unless such a ground is expressly mentioned and is *primâ facie* established in any future order passed in connection with this question, the presumption would, in my opinion, be very strong that the order was passed merely in order to evade the provisions of section 144 and that the Magistracy are attempting to give themselves a much more extended jurisdiction than is covered by section 144 of the Criminal Procedure Code.

With these observations I would dismiss this Revision Petition.

MILLER, J.

MILLER, J.—I agree in the order proposed, and entirely concur in my learned colleague's observations, as to the attempt which, there seems reason to fear, the District Magistrate of Salem is making, to obtain a jurisdiction wider than that given him by section 144 of the Code of Criminal Procedure.

## APPELLATE CIVIL.

*Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.*

PHATMABI (PLAINTIFF), APPELLANT IN BOTH CASES,

*v.*

HAJI A. MUSA SAHIB (DEFENDANT), RESPONDENT IN BOTH CASES.*

1913. July 22 and September 2.

*Muhammadan Law—Mutawallíship of property annexed to a mosque—Right to succeed by principle of heredity—Proof and validity of such right.*

*Held*, on the facts of the case, that the plaintiff who claimed to be the *mutawalli* of the plaint mosque by right of heredity, had not established by clear proof that that was the method of succession to the office and that he was therefore the lawful *mutawalli*.

*Held* also: as a valid appointment of a mutawalli could be made only in one of three modes, viz.: (*a*) by the original author of the waqf or by some person expressly authorized by him, or (*b*) by the executor of the author, or

* Second Appeal Nos. 1470 and 1471 of 1911.

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(*c*) lastly, by the Court, any person claiming to be a mutawalli by heredity, must show by strict proof of precedents that that mode of appointment was one which must be necessarily deemed to have been sanctioned by the author of the trust.

It is frequently provided that each *mutawalli* should have the power to appoint his successor; where there has been a long established practice for the *mutawalli* to nominate his successor, it is assumed (unless the contrary is proved) that power to do so was given by the founder of the *waqf*. But where from past practice, it is sought to be established that the *mutawallishíp* is to devolve hereditarily, there must be something from which a rule of hereditary succession sufficiently precise or definite may be deduced; and the mere fact that for some time prior to 1874 three persons from the family of the plaintiff were successively mutawallis does not show that mutawalliship devolved by heredity in the absence of proof that they were not appointed or nominated by somebody.

*Sayad Abdula Edrus* v. *Sayad Zain Sayad Hasan Edrus* (1889) I.L.R., 13 Bom., 555 at p. 562, referred to.

*Per* SADASIVA AYYAR, J.—Heredity as a principle of succession to any office is highly objectionable.

SECOND APPEALS against the decrees of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeals Nos. 227 and 300 of 1910, respectively, preferred against the decrees of S. RAGHAVA AYYANGAR, the District Munsif of Ellore, in Original Suits Nos. 448 of 1908 and 300 of 1905.

The plaintiff sued to recover certain monies alleged to have been illegally collected by the defendant as rent from certain properties belonging to a mosque to which the plaintiff alleged that she was the lawful mutawalli succeeding by right of heredity. The defendant contended that the plaintiff was not the lawful trustee, that the mutawalliship was not conferred on the plaintiff's family with hereditary rights and that he himself was the proper trustee. The Lower Courts dismissed the plaintiff's suit on the ground that she did not prove any usage or custom of hereditary succession.

The plaintiff preferred this Second Appeal.

*P. Narayanamurthi* for the appellant.

*V. Ramadoss* for the respondent.

TYABJI, J. TYABJI, J.—The plaintiff claims mesne profits in respect of certain waqf properties. The real questions involved in the suit and appeal were the subject of some discussion before us; but the issues settled by the District Munsif show that the contention of the plaintiff was that she succeeded to the office of mutawalli of the waqf properties by hereditary devolution, and that she claimed possession of them on that footing as against the

defendant; that the defendant on the other hand set up his own title as mutawalli on the strength of an appointment by a person calling himself the qazi, and also by the members of his community. The real question therefore to be decided by us is whether the plaintiff has made out that she was the actual and rightful mutawalli of the waqf properties for the three years succeeding 6th August 1905, and not whether the plaintiff has proved some circumstances which would entitle her claims to be considered, were the Court asked to appoint a mutawalli of the waqf properties. The relative qualifications of the plaintiff and the defendant to be appointed mutawalli need not be considered by us, notwithstanding that as a defence to the plaintiff's claim the defendant claims to be entitled to hold the office of mutawalli himself. It may be that the defendant is not the rightful mutawalli, but that would not necessarily entitle the plaintiff to succeed in her suit.

The modes in which a person may come to hold the office of mutawalli seem to be laid down in Baillie's Digest of Muhammadan Law (which, it need hardly be said, is a translation mainly of the Fatawa' Alamgiri) on page 593 of the edition of 1865 corresponding to pages 603-604 of the edition of 1875. It would seem that there are three sources from which a person may trace his right to be mutawalli :—

(1) Appointment by the waqf (that is the original author of the waqf), or by some person expressly authorised by the waqf to appoint; and in the absence of any person so authorised.

(2) Appointment by the executor of the waqf; and, in the absence of such an appointment,—

(3) Appointment by the Court.

If the statement given above correctly represents the effect of the Fatawa 'Alamgiri then, any title to be a mutawalli must be derived from one of two main sources, namely, either the waqf himself, or the Court.

The authority vested in the waqf to appoint the mutawalli may be exercised either by himself directly, or through another person; he may delegate his authority in any manner provided for by him at the time when the property is dedicated by way of waqf; in other words, at the time of the dedication he may lay down who shall have the power of appointing mutawallis in future, and in what way the power to appoint must be exercised.

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The terms of the dedication, including the provisions relating to the objects of the waqf, and to the management of the property belonging to it need not be reduced to writing; so that there need not be a waqfnama containing the terms on which the dedication to waqf is made. Where however the terms of dedication are formally reduced to writing in the shape of a waqfnama, it is usual to include therein provisions relating to the appointment of successive mutawallis. Hence, it is generally assumed that there must be some such provisions laid down by the waqif even where the original dedication is not in writing, or at any rate no document containing the terms of the dedication is produced. As a consequence of these assumptions, where there has been a series of appointments of mutawallis, it is generally assumed that the appointments have been valid, which implies that such appointments have been made in accordance with the terms of the original dedication relating to the mode in which the successive appointments have to be made.

Thus from the history of previous appointments, the directions contained in the original dedication with reference to the mode in which the successive mutawallis are to be appointed may be inferred. This inference, it is obvious, is based on what in a great number of cases must be recognised to be mere fictions namely, that the original dedication even though it be oral and informal, contained specific provisions relating to the mode of appointment, and, secondly, that the appointments in the past have been valid and in strict accordance with the provisions so assumed to be laid down at the time of the original dedication. It must frequently happen that at the time when the dedication is made there are no provisions laid down with reference to the appointment of successive mutawallis. Again, it is quite in accordance with common knowledge that on the death of a person holding an office of such a character as the mutawallishiip of a waqf his descendants or relations should slide into the office without any one being concerned to question their right to do so, and without any pretence on the part of the new office-holder that his succession is in accordance with the terms of the original waqfnama, or the expressed or implied desires of the waqif. On such successive act of usurpation it is easy to found a claim that the office is hereditary—a claim which, however difficult it may be to resist in court, may be quite opposed to the real intentions

of the waqf. Similarly a claim to be mutawalli may be based on the fact that the last mutawalli purported to appoint the claimant as his successor. The recognition of a claim based on such an appointment equally proceeds on the assumption that in the terms of the dedication the waqf empowered each mutawalli to nominate his successor. The law does not directly empower the mutawalli of every waqf to appoint his successor, but if in regard to any particular waqf it is proved that the mutawallis have been in the practice of nominating their successors, it is assumed that the practice had a lawful origin, and was founded on some provisions contained in the waqifnama or some oral directions given by the waqf empowering the mutawallis to nominate their successors. Provisions in waqfnamas empowering the mutawallis to nominate their successors are so usual that it would perhaps be representing the present state of the authorities more nearly if it were said that the Courts assume the existence of such a provision in the dedication, unless the contrary is proved.

It will be seen therefore that a claim based on the allegation either that the office is hereditary or that the last mutawalli nominated the claimant as his successor must ultimately have reference to the actual or the presumed directions of the waqf at the time when the dedication was made.

The claim made by the plaintiff in this case must, if at all, be supported on considerations which must be brought under one of the various heads to which I have alluded.

Much reliance was placed by the pleader for the respondent on the observations in *Sayad Abdulla Edrus* v. *Sayad Zain Sayad Hasan Edrus*(1), where it was said that where a custom is alleged "that the eldest son succeeds by virtue of inheritance, that custom being opposed to the general law must be supported by strict proof". It may, no doubt, be conceded, on the other hand, that where the object of the waqf in question is not to support a public charity, but to provide for the maintenance of a family, the Courts might be satisfied with less strict proof in order to hold that the management of the property devolves hereditarily on members of the family of

(1) (1889) I.L.R., 13 Bom., 555 at p. 562.

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the beneficiaries. To this consideration must be added the fact [which was also alluded to in *Sayad Abdula Edrus* v. *Sayad Zain Sayad Hasan Edrus*(1)] that the law favours the claim of members of the waqfs family to be mutawallis, and "in the *Asul*, it is stated that the Judge cannot appoint a stranger to the office of administrator so long as there are any of the house of the appropriator fit for the office; and if he should not find a fit person among them, and should nominate a stranger, but should subsequently find one who is qualified, he ought to transfer the appointment to him". [See Baillie's Digest (1865), pages 593 to 594 (1875), page 604.]

The result of these rules of law so far as at present material, would seem to be that the question in a case like the present is not merely whether the succession to the office of mutawalli has for some time been devolving hereditarily, but whether there are sufficient grounds for holding that the original dedication by way of waqf, contained a provision to the effect that the office is to devolve hereditarily. I have already stated that in my opinion what may be considered sufficient grounds in the case of a waqf of one class may not be sufficient in the case of a waqf of another class.

In the present case there is no allegation, still less any proof, that the waqf is of a nature which would in the ordinary course be expected to be administered by a succession of hereditary mutawallis, chosen from one family. Hence there is no reason to consider the evidence in this case from an attitude more favourable to the plaintiff than is implied in the decision to which I have referred, and it is not alleged or proved that the plaintiff has been nominated to be mutawalli by the last office bearer.

Under these circumstances the facts on which the plaintiff relies, namely, that there have been from some time previous to 1874 three successive mutawallis from the family to which the plaintiff belongs, seem to me to be totally insufficient for supporting the allegation that, in accordance with the terms of original dedication, the mutawalliship of the waqf ought to devolve hereditarily. I do not allude more fully to the various facts in this case on which the respondent relies as tending to throw doubt on the allegation that the three successive mutawallis in

(1) (1889) I.L.R., 13 Bom., 555 at p. 562.

question rightfully succeeded to that office; for it seems that for the purposes of the present appeal it may be conceded that they were rightful holders of the office, and yet there is nothing to show that they purported to succeed to the office not through some appointment or nomination, but as of right. Even if it were assumed that they purported to succeed by right of inheritance, there is nothing from which a rule of hereditary succession can be deduced sufficiently precise or definite for presuming that such a rule was contained in the waqfnama or terms of the dedication. Unless all these facts are alleged and proved, I am unable to see how the plaintiff can succeed in her claim, as it has been framed. These reasons for holding that the decision appealed from ought not to be disturbed seem to me to apply with greater force when it is borne in mind that we are sitting in Second Appeal, and that it is not easy to class some of the questions to which I have alluded as questions of a nature which can be the subject of Second Appeal.

I am therefore of opinion that this appeal should be dismissed with costs.



SADASIVA AYYAR, J.—I entirely agree, and I shall only add that a claim to succeed by hereditary right to a trustee's office or to a religious office or to any other office should be looked upon with strong disfavour by Court whether the office was created by a Hindu or Mussalman or an adherent of any other creed. The holding of any office should depend on the necessary qualifications, and, which heredity might raise a feeble presumption of fitness to be considered by Courts in arriving at a decision on the question of the successorship to the office, it should not be raised to the dignity of a principle which creates a right of succession to any office, unless the terms of the original foundation of the office constrain the Courts to treat heredity as the factor to be considered in deciding on the right to the office or unless there has been such a precise and uniform course of descent by heredity almost irrespective of any consideration as to the person best fitted for the office as to raise an irresistible inference as to the intentions of the original creator of the office.