## APPELLATE CIVIL.

*Before Mr. Justice Wadsworth and Mr. Justice Venkataramana Rao.*

KHAJI MUHAMMAD HUSSAIN SAHIB (DEFENDANT), APPELLANT,

1939, September 6.

*v.*

THE MASJIDAY MAHMOOD JAMAIT MANAGING COMMITTEE OF PUDUPET, by its Secretary SHAHUL HAMID MARAKKAYYAR (PLAINTIFF), RESPONDENT.*

*Societies Registration Act (XXI of 1860), sec. 20—Charitable society—Test of—Paramount object—Charitable—Some objects not strictly charitable but religious—Such society, if a charitable society—Incorporation of such society under the Act, if proper—Office of Muthavalli, if could be acquired by prescription by such society.*

Where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the objects may not be strictly charitable but religious would not render the society any the less a charitable society, if the purpose is one intended to benefit the public or a considerable portion of the public. Such a society could be lawfully incorporated under the Societies Registration Act.

Such a society incorporated under the Act could validly acquire by prescription the office of Muthavalli of a mosque.

Whether a society formed for an exclusively religious purpose could be construed as a society for a charitable purpose within the meaning of the Act, left open.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 926 of 1932.

*K. Rajah Ayyar* and *K. Subramaniam* for appellant.

*V. T. Rangaswami Ayyangar* for *P. Viswanatha Ayyar* and *S. K. Ahmed Meeran* for respondent.

*Cur. adv. vult.*

* City Civil Court Appeal No. 36 of 1935.

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The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal from the judgment and decree of the learned City Civil Judge restraining the defendant by a perpetual injunction from interfering with the plaintiff's right of management, control and possession of the mosque, Masjiday Muhammad Jamait, situate in Pudupet, Madras. The facts relating to the suit out of which this appeal arises may be briefly stated. The said mosque was founded about eighty-five years ago. It is the plaintiff's case that it was built out of public subscriptions collected from the residents of Pudupet and was primarily intended for the benefit of the residents of the said locality. The defendant's case is that it was built by one Gulam Muhammad, but there is no reliable evidence in support thereof except some evidence of tradition. But it is immaterial who founded it because the evidence establishes that it was the Muhammadan residents of the locality who were taking interest in the said mosque and contributing to its upkeep. There is no deed of foundation prescribing any rules for the management of the affairs of the mosque or for the appointment of a Muthavalli or any servant of the mosque. From a document of 1863 (Exhibit VII) it is evident that there was a Muthavalli to the mosque and he was one Kasim Ali who was the maternal grandfather of the defendant. Kasim Ali appears to have died in 1888. The defendant states that a year before his death the said Kasim Ali executed a will (Exhibit I) in favour of the defendant in and by which he appointed the defendant as the Muthavalli and on the death of Kasim Ali in pursuance of the will the defendant succeeded to the office of Muthavalli and was functioning as such. It appears from the evidence that Kasim Ali was the Pesh Imam of the mosque and on his death the defendant continued to be the Pesh Imam

and was doing the duties as such till the date of suit. The genuineness of Exhibit I is challenged by the plaintiff. The learned City Civil Judge did not record any finding in regard to it but in a later suit between the parties it was found to be not genuine. It is no doubt a document more than thirty years old, but there are certain improbabilities which cast some doubt on the genuineness of the document. It is stated that the defendant was appointed Muthavalli with the consent of Gulam Muhammad who is alleged to have signed the document. From the stone inscription, a copy of which has been filed as Exhibit B in the case, the mosque appears to have been built in 1849, and Exhibit I is dated August 1887. It is improbable that Gulam Muhammad was alive on that date and there is no reliable evidence of his having been alive on that date. The defendant was admittedly a minor of twelve or thirteen in 1887 and it is hardly likely that a minor was appointed either as a Muthavalli or Pesh Imam and under Muhammadan law such an appointment would be invalid. Further, if Gulam Muhammad had been alive, there is no necessity for Kasim Ali to make the appointment and the appointment could have been made by Gulam Muhammad himself. Some of these improbabilities render it unsafe for any Court to act on it. If this document cannot be relied on, there is nothing to show how the defendant came to be appointed and was functioning as Muthavalli and Pesh Imam. The probabilities are that he, being the daughter's son of Kasim Ali, was permitted by the congregation of Pudupet to do the duties of the said offices. There is no denying the fact that, at any rate from 1890 until 1918, for a period of nearly thirty years the defendant was managing the affairs of the mosque and collecting subscriptions and making

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disbursements thereof and generally attending to the affairs of the mosque. He was also functioning as Pesh Imam. In 1918 the then circumstances necessitated a change of management of the mosque and it was thought desirable by the jamait or congregation of Pudupet to have the management put on a sound and legal basis. The main reason which apparently led to it was the trouble they had from the Hindu residents of the locality who wanted to put up a Bajana Mandir near the mosque in respect whereof a litigation was commenced, Original Suit No. 484 of 1918 on the file of the High Court, Madras. The plaint in the said suit was filed on 11th November 1918. In view of this common danger everybody including the defendant conceived the idea of forming a society and getting it registered under the Societies Registration Act and vesting the management of the mosque in a governing body of the society. Accordingly a society was formed and registered under the name and style of Masjiday Muhammad Jamait Managing Committee with twelve members, the defendant being one of them. It was registered on 2nd December 1918. The memorandum of association is marked as Exhibit A-2 in the case and the rules and by-laws as Exhibit A-3. It is clear from them that one of the main objects of the association was to conduct the affairs of the mosque by collecting subscriptions, pay the salaries of the servants and incur expenses for the upkeep of the mosque and do everything which a manager of a mosque is required to do. From the date of the incorporation down to the date of the suit the said society was in undisputed management of the affairs of the mosque and the defendant ceased to function as Muthavalli. It was the society that was collecting subscriptions, paying salaries of the Pesh Imam, Muzzein

Sahib and the sweeper and directing the performance of the services in the mosque and paying taxes, effecting repairs and generally doing everything which a manager or a Muthavalli of a mosque would do. The defendant was only acting as a Pesh Imam under directions given by the society from time to time and he or his son was for some time acting as a bill collector. In or about June 1932 misunderstandings arose between the defendant and the secretary of the society, apparently due to the fact that the Shafi element in the committee became predominant and wanted to control the institution. At the inception of the society and for some time thereafter the committee members consisted of equal number of representatives from each of the two sects, namely Hanafi and Shafi. In consequence of the preponderance of the Shafi element in the committee, there seemed to have been some attempt at innovation in regard to the recitation of prayers which was resented by the Hanafi section to which the defendant belonged. Ultimately the disputes between the committee members led to the resignation of the defendant from the membership of the society. He tendered his resignation on 5th July 1932 and began to dispute the authority of the committee and purported to abolish it. It may also be noted that meetings and counter meetings were held by the two factions in the committee and one of the factions purported to call a meeting of the Jamait and abolish the committee; *vide* Exhibit XXXI. In consequence of these disputes the plaintiff had to file this suit because the defendant began to interfere in the management of the affairs of the mosque by asserting his powers as Muthavalli. The defendant's case is that it was only with his consent that the society was formed and it could not have been constituted the sole and exclusive

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manager of the mosque in derogation of his right as Muthavalli, that he was the duly constituted Muthavalli and continued to be such. The society, according to him, was not a validly incorporated society and the initial registration thereof under Act XXI of 1860 was illegal and *ultra vires*; further he says that, as the committee had been abolished, even if he ceased to function as Muthavalli during the period the committee was in management, his powers of Muthavalli never terminated and therefore he could function as such and nobody has any right to interfere with his management. He further submits that the committee has also become defunct because the original members who formed the society are all dead and they have not been validly replaced. The plaintiff's case is that the society is a duly incorporated body and that the defendant not having exercised the management for a period of six years from 1918 his rights as Muthavalli, if any, were lost, that he accepted the subordinate position of a servant under the mosque while continuing to be a member of the committee and that he is estopped from questioning the right of the plaintiff to manage the mosque. On the evidence the learned City Civil Judge came to the conclusion that the plaintiff society was properly registered under the Societies Registration Act (XXI of 1860), that the defendant lost his rights as Muthavalli and that the plaintiff would therefore be entitled to the injunction prayed for.

The main ground on which Mr. Rajah Ayyar the Counsel for the defendant-appellant assailed the decision of the learned City Civil Judge is that the plaintiff society is not competent to sue for or claim the relief sought in the plaint. He formulated his contention thus: (i) the society was a religious society and

therefore incapable of incorporation under the Societies Registration Act as only charitable societies could be incorporated thereunder; and (ii) even if the society was a validly incorporated society it could not acquire by prescription the office of Muthavalli, as the right of a Muthavalli is a personal right which the Muthavalli is incapable of surrendering or relinquishing and the defendant never divested himself of it. In regard to the first contention Mr. Rajah Ayyar submits that both according to the preamble and section 20 of the Societies Registration Act it is only a society formed for a charitable purpose that could be validly registered under the Act, that the plaintiff's society was formed for a religious purpose, namely, the management of the affairs of the mosque and that the purpose being solely religious, the society can in no sense be considered to be a society formed for a charitable purpose or a charitable society within the meaning of the Act. He was frank enough to bring to our notice a decision of the Allahabad High Court reported as *Anjuman Islamia of Muttra* v *Nasi-r-ud-din*(1) which is against the view he is contending for. That was a case of a religious society called the Anjuman Islamia of Muttra registered under the Societies Registration Act. It was contended in that case that the registration of the society was not legal because it was a society formed for religious purposes and not for charitable purposes. This contention was negatived and it was held that a society for religious purposes would ordinarily be a society for charitable purposes and the society in question was a society for charitable purposes and therefore the registration of the said society was legal. Mr. Rajah

(1) (1906) I.L.R. 28 All. 384.

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Ayyar however submitted that that case proceeded upon a view which is not tenable, namely, that the Indian Legislature made no distinction between religious and charitable purposes. In support of his contention that this view is erroneous he referred to a number of statutes framed by the Indian Legislature subsequent to 1860 where the Legislature drew a distinction between charitable and religious purposes in drafting for the purpose of those enactments. The question therefore for our decision is whether the plaintiff society is a charitable society or a society formed for charitable purposes within the meaning of the Societies Registration Act. We are not sure that the Legislature in using the word "charitable" in the Act meant to draw a distinction between a charitable purpose and society and a religious purpose and society. The Societies Registration Act was passed in 1860 when, according to English law, a gift for the advancement of religion or promotion of public worship or providing or maintaining a place of public worship would be a charitable purpose and a society formed for such a purpose would be a charitable society. According to that law, therefore, a religious society would be a charitable society, the only condition required was that it should be for the benefit of the public. Most of the enactments relating to that period were framed by English lawyers well conversant with English law. The Indian enactment which related to the charitable and religious endowments before 1860 were the Bengal, Bombay and Madras Regulations, the Madras Regulation being Regulation VII of 1817. In the heading of the Madras Regulation, the language used is:

"for the support of the mosques, Hindu temples and colleges or other *public purposes.*"

and in the preamble

"for the support of mosques, Hindu temples, colleges and choultries, and for other *pious* and beneficial purposes".

It will be seen from the context that the words "public" and "pious" were meant to connote both religious and charitable institutions. In 1817, according to the law of England, public purposes connoted charitable purposes including religious purposes and the word "pious" was not confined purely to religious purposes because religious purposes were one class of charitable purposes; see *Commissioners for special purposes of Income-Tax* v. *Pemsel*(1). No doubt, in statutes enacted subsequent to the Societies Registration Act the Legislature used both the words "charitable" and "religious" but the definition of those words was expressly stated to be for the purpose of those Acts. The subsequent legislation could hardly therefore be a guide for the interpretation of the term "charitable" in the Societies Registration Act. The question is, what did the term mean in 1860? We however think it unnecessary to go into the question whether an exclusively religious purpose is a charitable purpose and whether a society formed for such a purpose would be a charitable society within the meaning of the Act because, in our opinion, where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the purposes may not be strictly charitable but religious would not render the society any the less a charitable society, if the purpose was one intended to benefit the public or a considerable portion of the public. In the present case the objects of the society are outlined in paragraphs 2 and 3 of Exhibit A-2, thus:

"Towards the expenses for conducting all the affairs of the said Masjiday, the Jamaitdars capable of giving

(1) [1891] A.C. 531, 538, 559.

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subscriptions for ever, must pay subscriptions for the maintenance of Masjiday.

From the amount of the subscriptions received from the Jamaitdars the expenses mentioned in columns 1 and 2 should be met with, and the remaining balance amount should be utilized for the propaganda of Islamic education, for rendering possible pecuniary help to the poor, musaffars and worthy alims and ulemas, for removing their difficulties, for other necessary and proper charities, settled then and there by Hanafi and Shafi and for conducting all affairs and for purchasing immovable properties for the perpetual maintenance of the said Masjiday."

It cannot be denied that the improvement of Islamic education and rendering pecuniary help to the poor musaffars, etc., are charitable purposes. The fact, that one of the objects of the society was also to conduct the affairs of the mosque which does not involve the performance of any religious service by the members of the society cannot render the society a society formed for religious purposes. The society concerns itself only with the management of the secular affairs of the institution. So far as religious services are concerned, which only consist in the recitation of prayers in the mosque, they are done through the Pesh Imam who is paid a salary. What the society does is what exactly a muthavalli could have done and a muthavalli is only concerned with the management of the secular affairs of the mosque. The society does not concern itself with the performance of prayers. There can therefore be no doubt that the paramount object of the society is charitable and therefore the fact that one of the purposes is the management of the affairs of the mosque cannot take away from it the character of the society as a charitable society. We are therefore of the opinion that the plaintiff society is a charitable society within the meaning of the Act and the registration thereunder is perfectly legal and valid.

In regard to the second point that the plaintiff society has not acquired the right of management we are equally of the opinion that it is also untenable. A muthavalli according to Muhammadan law is only a manager or a superintendent of a religious institution. As already pointed out, he administers the temporal affairs of the institution. His liability is that of a trustee. A muthavalliship can be held by a single individual or two or more individuals, *Mahomed Ghouse Siddikh* v. *Sheik Moideen Siddikh*(1), or by a body of persons constituting a committee; *vide* Tyabji's Muhammadan law, Second Edition, section 499 at page 607. In *Advocate-General of Bombay* v. *Moulvi Abdul Kadir Jitaker*(2) a committee of ten persons was entrusted with the management of a mosque with rules framed to fill up vacancies on the death or removal of any one of them. Therefore there is nothing to prevent an incorporated body performing the functions of a muthavalli. A corporation can be a trustee of a charity; *vide* Tudor on Charities, page 284. It is conceded by Mr. Rajah Ayyar that the right of muthavalli can be lost by adverse possession. There can be no doubt in this case that the defendant has lost his right. It is also not disputed by Mr. Rajah Ayyar that the right to manage a religious institution is a right which is recognizable and enforceable in a Court of law. Such a right can be acquired by prescription. The plaintiff society, having been for a period of fourteen years in undisputed management of the mosque in derogation of the right of the defendant, must be deemed to have acquired the said right. Having surrendered his right in favour of the plaintiff and lost it, the defendant

(1) (1913) 18 M.L.T. 48, 53. (2) (1894) I.L.R. 18 Bom. 401.

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is not entitled to interfere with the plaintiff's management; vide *Jamiat Dawat* v. *Mohammad Sharif*(1).

Another contention that was advanced was that the society must be deemed to have become defunct because most of the original members died and there is no rule providing for filling up vacancies in case of death. It was contended that the only rule for filling up vacancies was rule 6 which does not provide for the contingency of death. We are not inclined to agree with this contention. Rule 6 runs thus:

"At the desire of two-thirds of the members of the committees, and on a motion made by one Jamaitdar and seconded by the others, the committee shall have power to remove one person from one of such sides and appoint another person in his place."

What is contended is that this only confers power of removal and appointment in the vacancies resulting from that removal. It seems to us that the principle underlying this rule is that a power is vested in the committee to co-opt members who are liable to be removed, no matter for what cause; it may be death. In fact from time to time vacancies were filled up and the Registrar of Joint Stock Companies was informed of the change in the membership. The defendant himself was a party to several resolutions filling up vacancies in case of death. We must presume that it was done in pursuance of the power conferred on the committee by rule 6. We must therefore overrule this contention also.

Lastly, it was urged that the understanding come to when the society was formed was that equal numbers of Shafis and Hanafis should be members of the committee but now the Shafi element preponderates and

(1) A.I.R. 1938 Lah. 869, 877.

dissentions have arisen which, if allowed to continue, would be the ruin of the society and it was contended that there is no provision in the rules as to what should be done in case of dissentions and how the matter should be regulated. All these are matters with which we have no concern. They may be properly agitated before the learned Judge who would be trying the suit which has been filed under section 92 for framing a scheme for the proper management of the mosque. It is open to the learned Judge to take note of all the facts and circumstances and consider whether it would be in the interests of the mosque that this society should be allowed to continue in management or whether any scheme should be framed vesting the management in a committee of individuals instead of in an incorporated society; *vide* Tudor on Charities, Fifth Edition, page 581.

In the result the appeal fails and is dismissed with costs.

G.R.