1928.

RICHHARAM v. PASUPATI BANERJI.

ROSS, J.

authority that that is not enough. In my opinion the judgment-debtor was entitled to raise the question of limitation and to have it decided.

I would therefore allow the appeal, set aside the judgments of the Courts below and remand the case to the Court of first instance to decide the objection according to law. Costs will abide the result.

DAS, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Mullick, J.

1928.

Jan. 30, 31. Feb. 6, 7, 14.

SYED ALI ZAMIN

v.

SYED MUHAMMAD AKBAR ALI KHAN.*

Muhammadan Law—Wakf under Shia Law—Wakif, power of, to lay down rules of succession after formal dedication—Wakf, when becomes completed—appropriator, power of appointment is vested in, when rule of succession not laid down.

When property is devoted to religious and charitable purposes it is usual for the appropriator to lay down rules for succession to the office of trustee upon which the question of succession depends. But if no such rules are laid down the power of appointment is vested in the appropriator during his life.

Shah Ghulam v. *Mohammed Akber* (1), followed.

Under the Shia law a mere declaration of wakf does not constitute a valid dedication unless and until the founder divests himself of the proprietary interest in the dedicated property by transferance of possession.

Abadi Begam v. *Kaniz Zainab* (2), followed.

* First Appeal no. 223 of 1924, from a decision of Rai Bahadur Surendra Nath Mukerjee, Subordinate Judge of Patna, dated the 26th September, 1924.

(1) (1875) 8 M. H. C. R. 63.
(2) (1927) I. L. R. 6 Pat. 259, P. C.

1928.

SYED ALI ZAMIN v. SYED MUHAMMAD AKBAR ALI KHAN.

It is therefore within the competency of the dedicator to lay down rules as to the mode of succession to the mutawalliship up to the moment when the dedication becomes valid and effective by transferance of possession.

Per *Mullick*, *J.*—A statement as to the mode of succession made by the settlor, to a witness, at the time of dedication, is admissible as evidence of the mode in which the office of mutawalli is to devolve.

Appeal by the principal defendant.

The plaintiff, Chhote Nawab, sued the defendant Ali Zamin to establish his title as mutawalli of a religious endowment created by the plaintiff's father, the late Nawab Latf Ali Khan, and to recover possession of some of the endowed properties. The brother and two sisters of the plaintiff who, according to his case, were interested in the appointment of the mutawalli of the endowment were also added as proforma defendants but they did not enter appearance in the suit. Each party claimed that he had been regularly appointed mutawalli and was entitled to the management of the endowed properties. It was agreed that Nawab Latf Ali Khan dedicated his interest in three villages to religious and charitable purposes in connection with the Bouli mosque and imambara situate at Patna by an oral wakf some eight or nine years before his death which occurred in the year 1890; and the difficulty in the present case mainly arose from the fact that the dedication was by word of mouth and no wakfnama or tauliatnama was executed from which the intentions, if any, of the settlor, who was himself the first mutawalli, could be gathered as to the mode of succession to the mutawalliship. The result was that the Court was largely dependant upon the evidence of persons who spoke to matters which happened some forty years before suit. The case as presented to the High Court on appeal was further complicated by the fact that the evidence of Nisar Hussain, the only witness who claimed to have been present when the act of dedication was said to have been performed, did not commend itself to the

1928.

SYED ALI ZAMIN v. SYED MUHAMMAD AKBAR ALI KHAN.

Subordinate Judge before whom the suit was tried. In the event, however, he found that there was sufficient evidence on the record to indicate that the intention of the founder as to the appointment of future mutawallis had been expressed in the terms alleged by the plaintiff, and he held that the plaintiff had been duly appointed mutawalli in the manner laid down by his father at the time of dedication.

It was the plaintiff's case that Latf Ali Khan at the time of dedication directed that after his death the management should vest in his children with power to select one of their number to perform the duties of mutawalli and that no stranger should be appointed. When he died he left three sons known as Badshah Nawab, Manjhley Nawab and Chhote Nawab and two daughters Razia Begam and Waziunissa Begam and it was proved that after their father's death in 1890 they met and appointed the eldest son Badshah Nawab to be mutawalli and he performed the office without objection by anyone until 1919, and it was the plaintiff's case that after his brother's death he was selected by his surviving brother and his two sisters to perform the office of mutawalli. It appeared that Badshah Nawab during his lifetime, in the year 1917, executed a wakfnama dedicating certain properties of his own to religious and charitable purposes in connection with the same mosque and imambara as that in which the services under his father's wakf had been performed. By the deed he constituted himself the first mutawalli of his own endowment and directed that the appellant Ali Zamin should succeed him in that office after his death. Ali Zamin was related to the family by marriage having espoused the daughter of Manjhley Nawab as his first wife. She, however, died a few months after the ceremony. It appeared that Badshah Nawab, who was then the mutawalli of both institutions, conceived the idea that it would be desirable that in future the office of mutawalli in both should remain in the same person, and by an ekrarnama dated the 17th June, 1917, in which

he formally relinquished his title as heir to any of the properties dedicated by his father, he also declared that after his death whoever should be the mutawalli of his wakf should also be the mutawalli of the old wakf created by his father. It was on this ekrarnama that the defendant mainly based his claim. His contention was that this nomination, although not made by Badshah Nawab on his death-bed, operated as a testamentary disposition if not revoked. He further contended that Badshah Nawab subsequently, when in mortal sickness, appointed him his successor. He also relied on the fact that he was de facto mutawalli in possession and was entitled to remain in possession until a better title was proved. He conceded that if the founder Latf Ali Khan at the time of dedication laid down the mode of succession as alleged by the plaintiff and if the plaintiff was appointed in accordance with the directions so laid down his claim must fail. He contended, however, that the evidence failed to establish that Latf Ali Khan declared the mode of succession at the time of dedication and, even if he did so, asserted that the plaintiff was not properly appointed in accordance with such directions.

Khurshaid Husnain (with him *Baldeo Sahay* and *Hasan Raza Kazimi*), for the appellant:—The Court has wrongly presumed that the settlor had given directions about the mode of succession. The case of *Phatmabi* v. *Haji Musha Sahib* (1) is distinguishable. The subordinate judge has erroneously treated this case as one of ancient grant, the terms whereof are unknown and obscure and where it is only from the long succession that inference as to the mode of succession intended by the settlor can be gathered. In this case no question of usage arises.

The settlor can exercise the right of nomination only at the time of actual dedication. After the creation of the Wakf, he becomes a stranger:

(1) (1915) I. L. R. 38 Mad. 491.

1928.

SYED ALI ZAMIN v. SYED MUHAMMAD AKBAR ALI KHAN.

[*Jawahirul Kalam*, page 644]. Once he has made a declaration he cannot subsequently vary or add to the original declaration. Any evidence of the wakif having subsequently given direction as to the mode of succession is inadmissible.

A mutawalli for the time being will be presumed to have power to nominate his successor: [*vide* Amer Ali's Muhammadan Law, 4th edition, Vol. I, page 448; Tyubji, 2nd edition, page 613, Art. 492A].

Hasan Imam, (with him *S. M. Hafeez*, *Syed Ali Khan* and *Abu Zafer*) for the respondent:—Usage does not require immemoriality while custom does. The case of *Phatmabi* v. *Haji Musha Sahib* (1) is therefore applicable.

The Wakif retains the power to nominate a mutawalli. He has the power of appointing a mutawalli during his lifetime whenever he likes. The mode of succession is usually laid down in the deed of endowment, but if no such rule has been defined, the right of appointing a successor vests in the first instance in the wakif: [Ameer Ali's Muhammadan Law, 4th edition, Vol. I, pages 441, 442; Wilson, page 355, paragraph 328.]

The wakif has power to lay down a rule of succession at any time before the wakf is completed. Mere declaration is not enough; it must be followed by transferance of possession or a change in the character of possession: [*Abadi Begam* v. *Kaniz Zainab* (2); Tyubji, page 544]. The declaration of wakf and the taking of steps by the settlor to effect transmutation of possession are one transaction and the evidence of any statement made by the wakif during this period is admissible under section 32, Evidence Act. The evidence is also admissible in evidence under section 18, as the mutawalli derives his title from the settlor.

(1) (1915) I. L. R. 38 Mad. 491.
(2) (1927) I. L. R. 6 Pat. 259, P. C.

1928.

SYED ALI ZAMIN v. SYED MUHAMMAD AKBAR ALI KHAN.

Khurshaid Husnain, in reply:—The wakf is created no sooner an unqualified declaration is made. Completion and creation of wakf are two different things. The wakf of course may not be effective without divestment of interest or change in the character of possession, but it will be deemed to have been created no sooner the declaration is made: [Ameer Ali, Vol. 1, page 497]. After declaration the wakif's power comes to an end.

S. A. K.

Cur. adv. Vult.

DAWSON MILLER, C. J. (after stating the facts set out above, proceeded as follows:) The main question for decision is whether, as the learned Subordinate Judge found, Latf Ali Khan at the time of dedication laid down the rule of succession to the mutawalliship. It seems to be generally acknowledged by text writers on the subject, and has been so enunciated by the Madras High Court, that when property is devoted to religious and charitable purposes it is usual for the appropriator to lay down rules for succession to the office of trustee upon which the question of succession depends. But if no such rules are laid down the power of appointment is vested in the appropriator during his life [see *Shah Ghulam* v. *Mohammed Akber*(1); Ameer Ali's Muhammadan Law, 4th edition, Vol. I, page 449; Tyubji's Principles of Muhammadan Law, 2nd edition, page 611; and other text books]. It is argued however, on behalf of the appellant that the right of the founder where no special rules have been laid down in the first instance is confined to the appointment of his immediate successor and does not entitle him to provide for subsequent appointments. It is not disputed that under Shia law by which the parties in this case are governed a mere declaration of wakf does not constitute a valid dedication unless and until the founder divests himself of the proprietary

(1) (1875) 8 Mad. H. C. R. 68.

1928.

SYED ALI ZAMIN v. SYED MUHAMMAD AKBAR ALI KHAN.

DAWSON MILLER, C.J.

interest in the dedicated property by transferance of possession. Where he appoints himself the mutawalli such transfer may be evidenced by overt acts indicating a change in the character of his possession from that of proprietor to that of trustee. Mr. Justice Tyubji, at page 545 of his text book above referred to, states the matter thus :—

> "Under Shia law a wakf is not completed unless possession of the wakf property is given either to the mutawalli or to the first beneficiary under the wakf; provided that where the object of a wakf is a charity, it is not completed unless a mutawalli is appointed, and possession is given to him."

It is unnecessary to refer to the authorities which appear to be unanimous upon this point. The latest pronouncement of the Judicial Committee on the subject appears in the case of *Abadi Begam* v. *Kaniz Zainab* (1) where the four conditions governing the validity of a wakf under the Shia law, as set out in Baillie's Digest, are referred to with approval. These include (*3*) possession must be given of the mowkoof or the thing appropriated and (*4*) it must be entirely taken out of the wakif or appropriator himself. It is necessary to bear this in mind in considering the effect of the evidence in the case because, although the learned Subordinate Judge did not feel justified in accepting the evidence of Nisar Hussain, it was proved by the witness Kamla Prasad whose testimony he accepted that a day or so after the dedication the Nawab Sahib (Latf Ali Khan) intimated to all his servants in the sherista that he had made a wakf of the three villages and that a separate account and separate books should be kept for the wakf properties, and in reply to his dewan asking whose name should be entered as malik said that the three properties will be God's but that his own name will be shown as mutawalli and manager during his lifetime and after his death his sons and daughters would act as mutawalli or elect one of them to act as such. He also gave the names of the other persons, some eight in number, who were

(1) (1927) I. L. R. 6 Pat. 259, P. C.

present on that occasion, but none of them is now alive. This evidence is corroborated by the testimony of other witnesses who speak to hearing Latf Ali Khan on various later occasions state how the office of mutawalli would devolve. It is also corroborated by the fact that on his death his sons and daughters did in fact appoint one of their number to the office, namely, Badshah Nawab the eldest son. If the evidence of Kamla Prasad is accepted, and if it is admissible, then the principal point in the case must be decided in favour of the plaintiff and in accordance with the learned Judge's findings. It is contended, however, that the evidence is not admissible. It is argued that any statement made by the founder even one day after the dedication as to the mode of succession is not a valid direction as to the succession, but that any intentions of a wakif as to the appointment of future mutawallis, or the class from which they shall be selected, must be expressed by him at the moment the oral dedication takes place. After that, it is argued, he is functus officio and cannot add to or take away from the condition, if any, laid down in the first instance except that, if no provision was then made for the appointment of his successor, he may during his lifetime nominate his immediate successor. Whether evidence of a statement made by the deceased founder so soon after the dedication is admissible under section 11 of the Indian Evidence Act as a relevant fact making it highly probable that he had expressed a similar intention a day or so earlier when the dedication took place or whether such evidence should be entirely excluded as inadmissible it is unnecessary to decide in the view I take of the transaction as a whole for, in my opinion, it was within the competency of the dedicator to lay down rules as to the mode of succession to the mutawalliship up to the moment when the dedication became valid and effective by transferance of possession. No decided case has been drawn to our attention which deals with the exact point under consideration. It is not disputed, however, that under the

1928.

SYED ALI ZAMIN v. SYED MUHAMMAD AKBAR ALI KHAN.

DAWSON MILLER, C.J.

Shia law, which in this respect differs somewhat from the Hanafi law, delivery of possession is a necessary condition to the validity of a wakf; and where the wakif appoints himself the mutawalli, as pointed out by Mr. Ameer Ali at page 499 (4th edition) of his well known text book,

> formal change of possession is out of the question and, therefore, what is intended by the principle is not actual delivery of possession to another but change in the character of the possession or of the dominion exercised over it.

The evidence of Kamla Prasad is I think evidence of overt acts on the part of the dedicator indicating a change in the character of his possession and it may reasonably be assumed that up to that moment he had not divested himself of the proprietary interest. There had been no change of possession either constructive or otherwise. Up to that moment therefore the necessary conditions as to the validity of the wakf had not been complied with. I think it would be unreasonable to hold that the founder could not after dedication but before the transaction became complete and effective lay down directions as to the mode of succession. The only text which I have been able to discover which throws light on the subject is that of the Jawahir-ul-Kalam, a leading authority on the Shia law, quoted in Mr. Ameer Ali's treatise at page 500. The general proposition is stated by that learned author thus:—

> "When all the conditions requisite for the completion of a wakf are complied with, it becomes absolute (if made in health) and cannot be revoked."

He then proceeds to quote the text:

> "On this point, says the author of the Jawahir-ul-Kalam, 'Abu Hanifa differs from us, though his disciple Abu Yusuf on arriving at Bagdad dissented therefrom.' If the subject of the wakf has once changed possession and ceased to be under the wakif's dominion, or has come into the hands or under the control of the beneficiaries or the trustee on their behalf, the wakif cannot revoke it or change the conditions of the wakf or withdraw it from the way of God or from the purposes to which it is dedicated"

This seems to me to lay down by clear implication that up to the moment of change of possession the wakif may, under Shia law, lay down the conditions attaching to the wakf. If I am right in this view then even assuming that the learned Subordinate Judge was justified in rejecting the evidence of Nisar Hussain, although it finds corroboration from later circumstances, there is clear and reliable evidence of Kamla Prasad, which the learned Judge accepted, that shortly after the dedication the wakif at the time when he took steps to divest himself of possession as proprietor laid down the rules which should govern the succession, namely, that after his death his sons and daughters should act as mutawalli or elect one of them to act as such.

The appellant, however, contends that this would only apply to the first mutawalli to be appointed after the founder's death and, having once exercised the power by appointing Badshah Nawab from amongst their number, the sons and daughters had no further control. I do not so interpret the rule laid down by the founder. His expressed intention seems to me to have been that the management after his death should vest in his children but they might delegate their powers to one of their number. If their selected representative should die, or for any reason should cease to act, their rights of management would revert to them and they could, if they so desire, select another of their number to fill the office. That is what in fact happened, and the evidence of the plaintiff and his brother that they and their two sisters met and appointed the plaintiff shortly after Badshah Nawab's death is uncontradicted. It is also corroborated by a petition (Exhibit 4) presented by Manjhley Nawab and his sister Razia Begam to the Deputy Collector of Gaya on the 9th July 1919 supporting the plaintiff's application for mutation of names and praying that his name should be recorded in the Government register as mutawalli in place of his deceased brother. It is also in accordance with the practice adopted by them when they

1928.

SYED ALI ZAMIN v. SYED MUHAMMAD AKBAR ALI KHAN.

DAWSON MILLER, C.J.

appointed Badshah Nawab on their father's death some years earlier, and no cogent reason has been addressed to us for not accepting this evidence which the learned Judge considered worthy of credit.

In my opinion the learned Judge was right in the conclusion at which he arrived and I would dismiss this appeal with costs against the appellants, the costs to carry interest at 6 per cent. per annum from this date until realization.

MULLICK, J.—I agree. The statement of Latf Ali to Kamla Prasad having been made "at the time of dedication" is admissible as evidence of the mode in which the office of mutawalli was to devolve. The evidence of Kamla Prasad cannot in the circumstances be excluded as hearsay and being corroborated by the various acts of the children of Latf Ali is sufficient to enable the plaintiff to succeed.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Adami and Wort, JJ.

1928.

Feb. 27.

KING-EMPEROR

v.

BINDA AHIR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 75(2)—*warrant of arrest— execution after returnable date.*

By reason of the provisions of section 75(2) of the Code of Criminal Procedure, 1898, a warrant of arrest remains in force until it is cancelled or executed even though it bears a returnable date.

Appeal by the Crown.

The facts of the case material to this report are stated in the judgment of Adami, J.

* Government Appeals nos. 4 and 5 of 1928, from an order of J. Chatterji, Esq., Sessions Judge of Saran, Chapra, dated the 1st December, 1927, setting aside the order of M. A. Moid, Deputy Magistrate, 1st Class, Chapra, dated the 26th September, 1927.