

(1925) 09 BOM CK 0059
In the Bombay High Court

Kasamkhan Ahmedkhan Mujawar

APPELLANT

Vs

Kaji Abdulla Kaji Mahamad

RESPONDENT

Date of Decision : 05-09-1925

Acts Referred:

Citation : AIR 1926 Bom 153

Hon'ble Judges : Madgavkar, J;Fawcett, J

Bench : Full Bench

Judgement

Fawcett, J.—In this case the plaintiff, as representative of the Kazi community of Pawas, sets up an exclusive right of officiating at weddings, funerals and other religious rites amongst the Mussalmans of Pawas. Recently there appears to have been a dispute in connexion with the Darga of this village between two sects of Muhammandans there, namely the Kazis and Dakhanis, and admittedly until this dispute arose, the Kazi community of Pawas has, for a large number of years, as held by the two lower Courts, exercised this right of officiating. The defendant, who is the Mujawar of the Darga, has officiated on various occasions, so the plaintiff sues for a declaration of his exclusive right to officiate : for an injunction against disturbance of Ms officiating as a deputy appointed by the Kazis; and. to recover a certain sum as damages for the defendant wrongfully officiating and getting the customary fees.

2. The main issue in the case was wored as follows; "Whether the plaintiff as representing the Kazi community of Pawas proves Kazi's exclusive right to officiate at marriage ceremonies and at death rites as alleged?" The trial Court held that the plaintiff had the exclusive right, not only to officiate at marriages, &c, but also to write and register marriage contracts and divorces amongst Muhammadans of Pawas when they are reduced to writing; that he had also the right to charge a fee of Rs, 2-8-0 for every such marriage; that he had a right to officiate at death rites amongst that community and, when certain prayers are recited, to charge his customary dues for the same; and that he had a similar right also as to divorce.

3. On appeal the learned District Judge substantially concurred with the view taken by the lower Court as to plaintiff's exclusive right, but decided that the rights could only properly be declared in regard to marriage contracts and divorces. He confirmed that part of the decree of the lower Court and deleted the rest of it, and the plaintiff was awarded Rs. 10 against the defendant as damages.

4. The main finding of the lower appellate Court is that the plaintiff is the Kazi of this village and, though not appointed as such by the State, up to the dispute about the Darga the Kazis have invariably officiated at the religious rites in question. He goes on to say:

What the defendants seek to prove by oral evidence is that a Mussalman has got absolute freedom to choose his own priest. As far as the Kazi's right to officiate at every wedding goes, the learned Subordinate Judge did not hold it established. Muhammadan Law does not require the presence of a priest at a wedding or divorce. The evidence in the case is not sufficient to establish that custom has altered this provision of personal law and made the presence of a Mulla or a Kazi essential. Mr. Tyabji in his Muhammadan Law questions whether custom can make such an alteration. But apart from the giving of benediction and such regular priest's work contracting parties can and often do have the marriage contract drawn up in writing and registered in the Sigil. I agree with the learned Subordinate Judge that parties can choose any priest they like for the reciting of formulas and giving of benediction, but as far as the notary's work is concerned, it is the Kazi's function, and when long custom has confirmed the plaintiff Kazis in that right it cannot be infringed by other parties.

5. Now in second appeal the finding that there is a custom of the kind in question should not be interfered with unless either the evidence in support of that custom is legally insufficient to establish it or the necessary requisites for the validity of a custom are not established. There is undoubtedly evidence to justify the finding that until the dispute about the Darga, the Kazi community at Pawas invariably officiated at religious rites of the Muhammadan community at this village, so that, I think the finding is not open to attack on the first ground that I have referred to. But the question still remains whether the custom held proved, in so far as it gives an exclusive right to these Kazis to write and register marriage contracts and divorces, is one that is valid. It is contended by the appellant, as it was in the lower Courts, that such a custom is opposed to Muhammadan Law, and this is the main question that we have to consider. I think the Subordinate Judge has rightly stated the relation of custom to Muhammadan Law. He says:

But custom ("urf") is recognized as one of the sources of Muhammadan Law under certain conditions, especially if it is not unreasonable, nor against public policy, nor against the recognized principles of the Muhammadan Law. The question, therefore, is whether such a custom is 1 proved in this case and how far it can be given effect to.

6. Now the main contention of Mr. Jayakar for the appellant can be summed up in this way. Under the Muhammadan Law, a Kazi is ordinarily to be appointed by the Sovereign, and that law does not recognize the right of any person to be appointed as Kazi merely because of heredity, i.e., his being the son or other descendant of a previous Kazi. That is a position which is certainly supported very considerably by previous] rulings of this Court. The first case that I would refer to is Jamal walad Ahmed v. Jamal walad Jallal [1877] 1 Bom. 633 which was with regard to a suit of similar kind brought by a Kazi to recover certain fees appertaining to his office, that were received by the first defendant from the second and third defendants and to restrain the first defendant from disturbing the plaintiff in that office. Sir Michael Westropp, C.J., in delivering the judgment of the Court at page 636, says: " The Muhammadan Law does not seem to regard the office of Kazi as hereditary." He then cites certain, authorities in support of that view. Then he mentions that the plaintiff in that case has neither proved nor alleged any local custom that the office of Kazi should be hereditary, and referred to the fact that in a previous suit, in which he had made such an attempt, he had failed. He then proceeds (p. 637): " Our decision simply is that the ordinary Muhammadan Law does not recognize hereditary Kazis, and that there are not any circumstances in this case which lead us to think that there is a local custom in Havri opposed or constituting an exception to the ordinary rule of Muhammadan Law as to Kazis." Again further on, he says (p. 637): " It is sufficient for us to, say that, this not being a suit for land but in respect of a disturbance in an alleged hereditary and exclusive office, we see no reason for holding that the plaintiff has established his right to hold that office hereditarily and in opposition to, the ordinary law of his co-religionists." In that case there certainly is a suggestion that a custom by which a person would claim an exclusive right to officiate by reason of his being an hereditary Kazi would be opposed to Muhammadan Law.

7. In the subsequent case : of Daudsha v. Ismalsha [1878] 3 Bom. 72 the same question arose. There the plaintiff sued for a declaration that he had the exclusive right to perform the duties of Kazi and to take all the profits of the office in the town of Wai. The defence of the defendant was that he was the authorized Kazi of Wai, and that, therefore no other person was entitled to hold that office. Sir Michael Westropp again delivered the judgment of the Court and confirmed the view of the District Judge, who had thrown out the plaintiff's suit on the ground that it did not lie. He says (page 73) : We see no grounds in this case for departing from the view expressed in Jamal Ahmed v. Jamal Jalla [1877] 1 Bom. 633 and it is neither alleged in the plaint, nor proved, that there, is any local custom in Wai that the Kaziship is hereditary. It may well be doubted whether such a custom would be valid, having regard to the Muhammadan Law." There he distinctly raised a doubt as to whether a custom of this kind would be valid, but it was not necessary in that case to determine that point.

8. The next case directly in point is Baba Kakaji Shet Shimpi v. Nassaruddin valid Aminuddin Kazi [1893] 18 Bom. 103 That was a case which related to a certain

order of the Collector under the Watan Act, and so far as the decision was that the office of the Kazi was not an hereditary office falling under that Act, it does not of course help us. But Sir Charles Sargent in his judgment remarks as follows (p. 105) : "The decisions in *Jamal v. Jamal* [1877] 1 Bom. 633 and *Daudsha v. Ismalsha* [1878] 3 Bom. 72, are, however, conclusive that the office of Kazi is not an hereditary one, unless perhaps by a special custom of a locality, and there is no evidence of any such established custom in this case." The word "perhaps" should be noted here, as still continuing the doubt which was suggested by Sir Michael Westropp on the question which directly arises in the present case.

9. Now certainly a good deal can be said in favour of a system by which, especially in small villages, there should be an hereditary office of Kazis, just as there may be an hereditary office of a carpenter or barber or other village servant useful to the community; and it is, no doubt, in pursuance of the aim that Government have assigned lands for the maintenance of families which do hereditary service not in aid of the civil administration but for the benefit of the community. And during the arguments I drew the attention of appellant's counsel to the fact that Act XI of 1852, Schedule 2, Rule 8, refers to a Kazi as an instance of an hereditary office. Undoubtedly not only the British Government, but also previous Governments have recognized the existence of such an hereditary office and have attached lands or allowances for its support. But, on the other hand, it does not necessarily follow that Government thereby lay down that a person should become a Kazi merely because his father was Kazi. Thus in *Daudsha v. Ismalsha* [1878] 3 Bom. 72 Sir Michael Westropp, referring to a certain sanad which had been produced in that case, says (p. 73) : "The recognitions of appointments of members of the same family as Kazis by native governments do not prove that the office was or could be made hereditary. In fact, the necessity felt by the successive candidates of the family for applying as they appear to have done, to the State for its sanction of the exercise by them of the office of Kazi, tends to show that it could only be exercised on personal nomination and not by hereditary right." I think the same criticism is, to some extent at any rate, applicable to the agreement, plaintiff in this case. For, although that Pawas had been officiating as Kazis since their ancestor's time and refers to their "rights" as Kazis, yet the fact remains that the agreement is mainly brought into existence for evidencing the appointment of a particular member of the Kazi family to carry out the duties of Kazi and be recognized by the Dekhani Muhammadans of this village. If merely by hereditary right a Kazi could assume the office and claim to officiate in it exclusively, it is difficult to see why such an agreement should have been necessary. It, no doubt, is partly due to the fact that Government used at one time to appoint Kazis; but since 1864 have, speaking generally, abrogated any such responsibilities.

10. In this Presidency, Bombay Regulation 26 of 1827 made express provision for the appointment of Kazis, especially in connexion with registration work of the kind now under consideration. It is interesting to see that the question whether a Kazi appointed under that Act could have an exclusive right to perform such

registration work is not without authority. In *Kazee Shaik Mohinoodden v. Usma jee Momudjee* [1857] 4 Mor 48 Shaikh Mohinoodeen, as Kazi, sued to recover his fee for the marriage of the Usmajee, who had got the rite celebrated by another person, a Moulvee and, who contended, in defending the suit, that the Kazi had no right to fees for work which he did not perform. It had been held by the Assistant Judge that this claim could not be maintained. His judgment says (p. 49): " Under the present Government we have a regulation, and that is what the case must be judged by. That plainly only applies to registration for the benefits of the people : if they refuse, to avail themselves of the benefits they may, but there is no law to oblige all Mussulmans to go before the Kazi for marriage and divorce." On appeal to the Sudder Dewanee Adawlut there was a difference of opinion. Frere, J., held that Muhammadans were bound to have their marriages or divorces recorded by the Kazi and he was entitled to recover his fee for the entry. And he considered that Usmajee was bound to have his marriage recorded by Kazi Shaik Mohinoodih, and to pay him the prescribed fee for it. The other two Judges differed from him. One of them says (p. 52): As I read it, the law limits his claim to those occasions on which he - may, be called on to perform any official act. The law makes it imperative on him to officiate when asked, but does not make it imperative on those disinclined to, do so, to make use of his services, nor compel them to pay him a fee when they do not." Similarly the other Judge says (p. 53) : "The object of the enactment is, it seems to me, only to give to those who choose to avail of it the means of registering securely and effectually these occurrences, for the purpose of being able to settle with the greater certainty questions of inheritance, succession, etc.; but I see nothing in it which compels people choosing to forgo these advantages from following their bent. " He also says (p. 53) : "I should anticipate much perplexity by a different ruling ; for it is well-known that in many large communities Muhammadans of the great sects of that persuasion, Soonees and Sheas, are found together, who are, in religious matters, most hostile and separate; and no member of either of winch sects would ever condescend to; appear before a Kazi of the other to obtain the due registration of his marriage. Often, too, the Muhammandants of the same locality, being all of one of these sects, have yet so divided into hostile parties, as that each party has its own Kazi. Now, to apply the regulation in such cases in the way Kazi Shaik Mohinoodeen requires it to be applied, would, I think, seriously interfere with that impartiality and. neutrality which the Legislature contemplates in regard to caste questions, and the freedom of conscience, which is so essential to the highest interests of the State." That is, I think, a decision which can usefully be cited as showing that the tendency of the Courts has been uniformly against a claim such as the plaintiff makes for, although it is based mainly on the terms of the regulation, it puts forward considerations in connexion with the Muhammadan religion which foreshadows Sir Michael Westropp's doubt. Similarly, although the Kazis Act XII of 1880 provides for the appointment of Kazis by Government in places to which that Act extends or is extended, the Act specifically lays down in Section 4 that : "Nothing herein contained, and no appointment made hereunder, shall be deemed - (a) to

confer any judicial or administrative powers on any Kazi or Naib Kazi appointed hereunder; or (b) to render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony; or(c) to prevent any person discharging any of the functions of a Kazi." And accordingly it has been held in *Sheik Ummar v. Budan Khan* [1912] 37 Mad. 228 that the appointment of a person as Kazi under the Kazis Act of 1880 does not confer On the appointee any exclusive franchise or any exclusive right to perform the functions pf his office. Where, therefore, the plaintiff, a Kazi appointed under Mio Act, sued the defendant to restrain him from officiating at marriages, and for the recovery of sums of money received by the latter as fees for nikkas performed by him, it was held that the suit must fail, as the plaintiff had no right to restrain any person from discharging any of the functions of a Kazi. Therefore, although it may be said that-Government in one way does recognize the possibility of Kaziship being hereditary, it is Clear that on the other hand the Legislature has specially enacted against any exclusive right of the kind set up in the present instance.

11. It is no doubt true that in *Muhammad Yussub v. Sayad Ahmed* [1861] 1 B.H.C.A. 18 it was held that the plaintiff, who had been "appointed to the office of Kazi of Bombay and who had acted as such for more than twenty years, was entitled to obtain relief against the defendant who had disturbed him in his office and set up a claim to be the Kazi of Bombay and receive fees from people who wanted him in regard to that office. It will be seen from the judgment of Arnould, J., that, although Bombay Regulation 26 of 1827 was then in force, the Kazi had not been appointed under that regulation, but by the Governor of Bombay, as representing the Chief of the State, who would formerly have appointed the Kazi, and the case is no doubt one on which the plaintiff can properly rely. But I think that the remarks of the Court as to the limits of its judgment must be borne in mind. Sausse, C.J., at page 24, says : "In order to prevent misapprehension as to the effect of our decision, we wish to state distinctly that we do not decide that the presence of the Kazi is essential to give validity to either marriage or divorce. It may be, and, to judge from the prevailing usage amongst Muhammadans in Bombay for so long a period, it would appear to be a desirable practice; but we simply decide that if Muhammadans choose to obtain, for their marriage or divorce, the authentication of the Kazi of Bombay, they must go to the Kazi appointed by Government for that purpose. They cannot set up a Kazi of their own; if they do, and the unlawful Kazi accepts the office and assumes the performance of its duties, he will be liable to an action for a disturbance at the suit of the lawful holder, and if ho should receive fees belonging to the office, he will be liable to refund the amount with costs of suit upon action brought by the legitimate Kazi." I think that such a case is clearly distinguishable from the present one. If the plaintiff had been plainly appointed the Kazi of Pawas by some valid authority, or I will take it even by the consent of the Muhammadan community of Pawas given in the same way as was done in 1871 by Ex. 61, and if some body else came and set himself up as the rightful Kazi against the

plaintiff, then his case would be on a very similar footing to the one just mentioned. But there is no such appointment relied on in the present case and the basis of the plaintiff's claim, as one of the hereditary Kazis of Pawas deputed by those Kazis to officiate as Kazi, is a right to insist that the whole Muhammadan community of Pawas should use his services under a penalty that, if anyone does not employ him, but employs some other person, the latter must give him the fees which he has received for any particular ceremony or registration. So that the case comes back to the question raised in the rulings of this Court that I have mentioned; whether a custom of this kind is or is not justifiable in view of the Muhammadan Law. On this point the main consideration is, as stated by Sir Michael Westropp in *Jamal v. Jamal* [1877] 1 Bom. 633 that the Muhammadan Law does not seem to regard the office of Kazi as hereditary, that is to say, no person can claim to be a proper Kazi merely, because he is the son or other descendant of a previous Kazi. The case is, therefore, very different from that of a Joshi or other priest" under Hindu Law. In his case it has been recognized that by prescription or otherwise he can obtain a species of "immovable property" in regard to his right to officiate exclusively in a certain locality or for a particular Yajman or client. The cases show that this is held to be in consonance with Hindu religious sentiment, and, therefore, the right has been recognized within certain limits by this Court. But there is no authority which at present goes so far in the case of a Muhammadan Kazi. It has only been said that such a custom might be valid, leaving open the question whether it is actually valid.

12. On this point I think that this Court should certainly lean against restricting the ordinary liberty of a follower off; a religion to choose the priest that he wants to do service for him. There are good grounds, viz., those I have already mentioned, for holding that an exclusive right to officiate, based merely on hereditary grounds, is opposed to Muhammadan Law. Therefore, in my opinion, the claim set up although supported by a custom found proved by the two lower Courts, is one that should not be recognized by the civil Courts.

13. The question whether a Kazi can be appointed by anyone, but the Sovereign does not, I think, require decision. In cases like these, where Government decline to exercise a power of appointment, obviously some other way of appointment must be sought; and although the Kazi Act of 1880 has been extended to some parts of the Bombay Presidency, yet that is only in a few cases. It is of course always open for a particular community to apply to Government to have that Act extended, if this course is found expedient. But apart from that, as stated in Sir R.K. Wilson's Digest of Anglo-Muhammadan Law, 3rd Edition, page 108: "Kazis are apparently appointed by some internal arrangement among Muhammadans of each locality," and that would seem to be supported in the present case by the agreement of 1871, Ex. 61. I would not, therefore, disallow the plaintiff's claim merely, because he has not been appointed by the Sovereign. But the fact that the Muhammadan law contemplates ordinarily that the Kazi should be specially selected and appointed

by the Sovereign is a consideration which goes, in my opinion, to show that this custom should not be supported. I may also refer to the fact that under Muhammadan Law no right of inheritance can attach to an endowment. It is by appointment that one officer succeeds to another appointment either by the original, proprietor, or by his successor, or executor or by the superintendent for the time being, or, failing all these, by the ruling power : Say ad Abdula v. Sayad Zain [1889] 13 Bom. 555. This is an analogous case supporting the view I take that a Muhammadan Kazi cannot have such a right of inheritance as is set up here.

14. The only other point raised is whether the decree was properly extended to the case of divorce as well as to the case of marriage. That does not now need decision but we think that the lower Court's view is quite correct.

15. For the above reasons, I would allow the appeal, reverse the lower Court's decree and dismiss the plaintiff's suit with costs throughout.

Madgavkar, J.

16. My learned brother in his judgment has elaborately considered all the authorities on this question and I have only to indicate my agreement with his conclusion on other broad grounds.

17. Both the lower Courts have found and I accept the finding that the plaintiff Kazi has proved that his ancestor alone had been officiating for some generations in Pawas and celebrating marriages and funeral rites and charging certain fees. He, therefore, claims to be exclusively entitled to charge these fees. The reason of his claim, however, is not clear. The argument addressed before us is based mainly on custom and partly on heredity. The only substantial ground to my mind on which such claim would be allowed would be on the analogy of decisions as in the case of Vritti and Nibhair das in this Presidency. "Whether these decisions have not already been carried too far may be a matter of opinion. But, in any case, the difference between Hindu and Muhammadan Law and custom are so great that the decisions on Hindis Vrittis and Nibandhas are not, in my opinion, sufficient basis for extending such rights in the case of Muhammadan Kazis.

18. A Hindu marriage is a sacrament where a priest is necessary; a Muhammadan marriage is a contract where neither priest nor Kazi is needed. A Kazi is, in Mahammadan Law, an officer of the State invested with duties partly judicial and partly administrative. The British Government in India, has authority in regard to their appointment as shown by Regulation 26 of 1827, Act 11 of 1864 and Government of India Act 12 of 1880. In the present case, the, plaintiff Kazi is admittedly riot appointed by, the State, and therefore the decisions of this Court in regard, to such Kazis are of no assistance to the, plaintiff. Finally, all decisions, in regard to Vrittis and Nibhandas are founded mainly on two elements r first, the, fact shat they are, treated in Hindu Law as a species of immovably property; and, secondly, by extension of the ideas of watan and watandars. The

former element is obviously not applicable to the present case, and even the latter, as is apparent from the Kazi's own Sanad, does not exist.

19. For these reasons and, the view of, the, law stated in the judgment of my learned brother with which I entirely agree, it appears to me that the plaintiff is, not entitled on the simple fact that his ancestors had been employed by the Muhammadan community to a declaration that they and their descendants should, be so exclusively employed. The appeal must, therefore, be allowed, the decree of the lower Courts set aside, and the plaintiff's suit dismissed with costs throughout.