(1957) 08 AP CK 0017

In the Andhra Pradesh High Court

Case No : Second Appeal No. 1962 of 1952

Mazhar Ali Saheb and others APPELLANT

Vs

Gulam Murtujah Saheb and others RESPONDENT

Date of Decision : 18-08-1957

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 92, 93

Citation : AIR 1958 AP 8

Hon'ble Judges : Subba Rao, C.J;Jaganmohan Reddy, J

Bench : Division Bench

Advocate : Y.G. Krishnamurthy, for the Appellant; Sankara Sastri for No. 1, Ch. Sankara Sastri and T. Veerabhadraya for No. 2, T. Veerabradraya for Nos. 12 and 14 and Rao, Choudhry and M.V. Nagaramayya for Nos. 15 and 16, 3 to 7 and 9 to 11, for the Respondent

Judgement

Jaganmohan Reddy, J.—This is a plaintiffs appeal, Plaintiffs 1 and 2 filed a suit for rendition of accounts by the 1st defendant relating to the management of plaint schedule properties from 26-6-1940 till the date of the suit and for the recovery of half share of the income which might be found due till then and for directing defendants 1 and 9 and their representatives to pay plaintiffs every year their half share of the income and costs. The following pedigree will show the relationship of the parties.

2. The 1st defendant died during the pendency of the suit and therefore defendants 10 to 15, namely, Tara Begum, Zahra Begum, Fazulunnissa Begum, Sakhina Bibi, Faizunnisa Begum and Mir Hussain Shah Durwesh were added on 23-6-1950 and they along with the 2nd and 3rd defendants are the legal representatives of the 1st defendant. As defendants 13 and 15 were minors, the 2nd defendant was appointed their guardian. The 9th defendant Kalagara Venkatarathnam is the lessee in possession of the suit lands. The plaint A to G schedule properties form one lot and the D schedule properties form another lot. The suit properties consisting of about six Kathis are held on Wakf known as

Pacha Saheb Darga at Eluru. Out of this one Kathi was granted to Fathima Khatoon, the common ancestress of plaintiffs and defendants 1 to 8 and the other five kathis were granted to Mir Hussain Shah Durwesh the common ancestor of the plaintiffs, and defendants 1 to 8 under another grant. The plaintiffs alleged that the properties have been in possession and enjoyment or the grantee and subsequently of their descendants and therefore they are entitled to the suit properties and the income therefrom.

It is stated that Fakir Saheb executed a settlement deed dated 6-4-1931 in favour of the plaintiffs father and the 1st defendant and made certain arrangement to come into effect after his death with regard to the duties of Muzavar by rotation and enjoyment of the properties and as per the said settlement the property was leased out to the 9th defendant under a registered lease deed dated 26-6-1940 executed by Fakir Saheb the 1st defendant for himself and as guardian of his sons and plaintiffs which will enure till 1960 that pursuant therto they have been acting upon it. the 1st defendant managing ant collecting rents on their behalf as guardian and trustee; that on the death of Fakir Saheb, the rent reserved for him during his life time devolved on the plaintiffs and defendants 1 to 3 in equal shares, that is, one half on the plaintiffs and the other half on defendants 1 to 3; that he the 1st defendant attained majority on 27-7-1945 and in spite of asking the 1st defendant to render an account and pay the plaintiffs'' share of the income the defendant did not do so, but was only paying them one bag per month.

As defendants 4 to 8 allege that they are entitled to 2/3rd share of the income from ''D'' schedule property they have been added as parties and alternatively it is alleged that if defendants 4 to 8 have no right in the said property, the plaintiffs will be entitled to one half and defendants 1 to 3 to the other half and they are held to be so entitled to the 2/3rd of ''D'' schedule property, the plaintiffs claim half of the 1/3rd.

3. The defendants admitted the relationship of the parties stated in the plaint and contended that the A to C schedule properties belong to the Pacha Saheb Darga and are being enjoyed by the Muzavirs in office and incurring the necessary expenses of the Darga, that the office of Muzavir was being held from time immemorial by one of the ancestors of the 1st defendant, that one Mir Khasim Ali, the grandfather of the 1st defendant was the Muzavar in office at the time of grant on 4-5-1860, that he was succeeded by Fakir Saheb who was in turn succeeded by the 1st defendant being the only surviving son, and as such he is entitled not only to the management of the Darga, but also to enjoy the income therefrom.

With respect to the plaint D schedule properties it was contended that these were first granted to an ancestress of the 1st defendant''s family, Fatima Khatoon, for being enjoyed by the members of the family after discharging certain duties relating to the Darga; that these properties were being enjoyed as such by Fakir Saheb and his two sisters. Hayatu Bibi and Fathma Bibi, that

Hayatu Bibi filed O.S. 46/1923 on the file of the Sub Court, Eluru, claiming 1/3rd share against Fakir Saheb and Fathma Bibi which was decreed in appeal by the High Court of Madras in A. S. No. 132 of 1924 where it was also decided that Fakir Saheb''s sisters had no interest in the plaint A, B and C schedule properties.

The 1st defendant further contended that he was attending to the duties of Muzavir even during his father''s lime and that he was appointed as Muzavir of the Darga by Fakir Saheb in his death bed; that he was performing the duties of Muzavar and enjoying the surplus income from the properties as of right; that if any amounts were paid to the other members of the family by the 1st defendant it was only out of love and affection and charity, but not on account of any right vested in them. He therefore asserted that the plaintiffs have no claim whatever either to the office or the income from the properties, nor can they have any right to the plaint D schedule properties; that the Wakf and the office of the Muzavar are governed by the Mussalmans'' Wakf Act of 1923, and as such the District Court of West Godavari recognised the 1st defendant''s possession of the properties as Muzavar under the provisions of the said Act.

He further raised the point that the settlement deed executed by Fakir Saheb was not valid in law and at any rate it cannot be valid for more than three years under the Muhammadan Law. Several other legal contentions were raised relating to maintainability of the suit, it being barred by virtue of the provisions of Ss. 92 and 93, C.P.C., as being filed without the sanction of the Advocate General or the Collector etc. Defendants 2 and 3 adopted the written statement of the 1st defendant, but after his death the 2nd defendant filed an additional Written statement that he had become the Muzavir, both on account of hereditary succession and by appointment by the 1st defendant in his last illness, that no party other than himself has any interest in the income and management of the suit properties and that he is not liable to account.

Defendants 4, 5 and 8 asserted their rights under the judgment and decree of the High Court in A. S. No. 132 of 1924. Defendants 6 and 7 were ex parte and the 9th defendant stated that he has no knowledge of the various allegations in the plaint, that he only took the property on lease On 26-6-1940 and that he was regularly paying the lease amount to Mir Fakir Saheb and after his death to the 1st defendant on behalf of himself and his minor sons and on behalf of the plaintiffs and that as he has already paid 110 bags of paddy, he deposited the balance in the Court owing to the temporary injunction.

4. On these pleadings several issues were lamed and decided by the Lower Court, but it is not necessary to advert to them as they have been negatived by both the Courts and have not been urged before us. The suit was mainly disposed of by the trial Court on the ground that the plaintiffs'' suit with respect to the D schedule properties is not maintainable because the descendants of Fathima Khatoon were not made parties to the suit and secondly that the grant with respect to A to C schedule properties was to provide the emoluments to an individual who may hold the hereditary office of Muzavar from time to time and

his family from the surplus income from these properties and that that office does not devolve either by the rule of primogeniture or lineal primogeniture on the members of the family.

The choice is left to the discretion of the person in office and Mir Fakir, by a settlement deed Ex. A-4 which was held to be valid, had appointed his three sons as joint Muzavars, that succession among them is by survivorship, and that having regard to the fact that two of them predeceased the 1st defendant, the plaintiffs have no right whatsoever to the office of the Muzavir or the Darga and cannot claim a share in the surplus income of these properties. The first appellate Court came to similar conclusion and dismissed the appeal.

5. The two contentions upon which the Lower Courts held against the appellants have again been urged before us, one with respect to D schedule properties and the other with respect to A to C schedule properties. The trial Court held that there must be a distinction drawn between the D schedule properties and the A to C schedule properties with respect to the enjoyment of the income from the said properties and that the grant of D schedule properties has nothing to do with the office connected with the Darga or its up-keep and that all the descendants of the original grantee are entitled to a share in the income of the said properties. Having taken this view, it dismissed the claim of the plaintiffs because all the descendants have not been made parties to the suit.

According to trial Court there was material to show that the sister of Mir Hussain and the two sisters of Khasim Ali did not participate in the plaint D schedule properties and that Raza Ali died leaving his widow and three children. In these circumstances the District Munsif was of the view that since the plaintiffs are claiming as the descendants of the original grantee, the suit being of a reversionary nature the plaintiffs not having stated that the defendants are the only descendants, these claims must fail. The first appellate Court also dismissed the claim of the plaintiffs to D schedule properties on this very ground and while adverting to the omission of the descendants mentioned by the trial Court, it stated as an admitted fact that the first defendant had also daughters who were not on record.

The learned Advocate for the appellant argues with justification that this was never raised, nor was there evidence of the descendants of the persons mentioned by the trial Court being alive on the date of the suit. The learned Advocate for the respondents directed our attention to the statement contained in the judgment of the Madras High Court dated 27-8-1926, Ex. B-2. This was a judgment in appeal from the judgment and decree in O. S. 46/23 on the file of the Sub Court, Krishna at Eluru. The suit was filed by Hayatu Bibi against Mir Fakir and Fathma Bibi for her share or the income of the A, B, C and D schedule properties. In the course of the judgment it was observed that the plaintiffs'' father, i.e., Mir Khasim had two sisters. It was said to be admitted by Hayatu Bibi.

Further Mir Hussain had also a sister and ft did not appear that any of them ever participated and did duties of the office. This statement and observation is sought to be relied upon by the lower Courts and by the advocate for the respondents as being tantamount to the presence of the descendants of the aforesaid persons either at the date of that suit or at the date of the institution of the present suit. The above facts were only mentioned by the learned Judges of the Madras High Court in dealing with the contention that females participated in the duties of the office or the profits of A to C schedule properties which were endowed for the duties of a Muzavar. This is a quite different matter.

In our view the fact that there were other descendants alive on the date of the plaint was not raised by the defendant nor was there any specific issue or enquiry. On the other hand the plaintiffs in para 3 of the plaint after specifying the relationship of each of the defendants stated that a pedigree showing the relationship of the parties was filed and that it may be read as part of the plaint. In this way, descendants from Kasim Ali downwards have been shown. It may be observed that neither the sisters of Kasim Ali nor, for the matter his brother who admittedly died issueless were shown there. Obviously only those descendants who were alive and who could have a claim on the date of the plaint have been shown. Paragraph (2) of the Written statement filed by the 1st defendant admitted the relationship mentioned in para (3) of the plaint regarding plaintiffs and defendants 1 to 8 as correct.

In para (4) thereof the 1st defendant specifically deals with properties mentioned in D schedule which, he states, were originally granted to the ancestress of the family of the 1st defendant for being enjoyed by the members of the family after discharging some duties relating to the Darea. He further, adverts to the suit in O. S. 46/1923 as varied by the High Court in A.S. 132/1924 which held that Fakir Saheb and his sisters were entitled to 1/3rd share of the income of the D schedule properties. If it was a fact that some descendants were left: out from the suit, the defendants would have raised a plea relating to is for which there was sufficient opportunity, particularly when it is stated by the first appellate Court that it was admitted that the 1st defendant had daughters.

When both females and males were shown in the pedigree by the plaintiff, it was but natural for the defendants to point out this defect at the time of the written statement, so that an issue could have been drawn with respect to this matter and a definite finding given. In the absence of a denial of the pedigree or of a specific plea that certain descendants were left out, the dismissal of the plaintiffs'' suit relating to D schedule properties is, in our view, unjustified and unwarranted.

6. There is yet another point raised, which does not appear to have been raised either before the trial or the lower appellate Court. The learned advocate, Shri Sanker Sastri, submits that having regard to para 11 of the Written statement and the evidence of the 1st plaintiff as P.W. 1, the plaintiffs'' father Khasim Ali having predeceased their grand-father Fakir Saheb and the D schedule properties being personal properties, under Muslim Law the plaintiffs as sons of a

predeceased son cannot inherit. The assumption underlying this contention is that the 1/3rd share in the D schedule properties are the personal properties of Fakir Saheb. In our view such an as sumption is not warranted. In Ex. B-2 it has been held that they are not the private properties, but on the other hand they must be regarded as endowment for religious purposes. This is what was observed:

...No doubt, the motive of the grant in either case is to benefit the family of the grantees. This can be easilly seen from the fact that the grant under Exhibit A (relating to D schedule properties) was to the wife and the grantee in Exhibit 18 (relating to A, B, C schedule properties) was the husband. But still on the terms of the grant I do not think it is permissible to regard them as purely private grants. They must be regarded as endowments for religious purpose.

Again it was held with reference to a passage in Wilson''s Mohammedan Law that the income with respect to D schedule properties, will be shared equally between males and females and that Hayatu Bibi was entitled to 1/3rd of the said properties. This finding is clearly binding on the parties to this suit. The equal division between son and two daughters of Mir Fakir is inconsistent with the property being of a private nature. With respect to the endowed property made for the benefit of the settlors or grantor''s descendants where no rules of succession are laid, they take per stirpes and not per capita, males and females taking equal shares (Vide Mulla 13th Edition, para 200 at page 186). In the circumstances the appellants will succeed with respect to the 1/6th income from D schedule properties.

7. The second contention pertains to A to C schedule properties. In order to appreciate the several contentions, it is necessary to examine the nature of the grant. From the Takid Ex. B-11(a) dated 15th Zilhaj, 1170 Hijri corresponding to A. D. 1794, it would appear that about five Kathis of land are free from assessment and fit for cultivation by way of inam situated in the village Pongian had been fixed and continued by way of aids to maintenance to Mir Hussain Shah Durwish, servant of the shrine of Pacha Saheb from time immemorial according to the sanads of the previous rulers and the Sanad of Nawab Omadatul Mulk Sipah Salar. It also appears that in place of the said inam land five kathis with tanks in the lands of Apparao Gooda were fixed and the property was to be left in the enjoyment of the said person so that

the said person populating the said Gooda and repairing the small tanks of the said Gooda may maintain himself by the income thereof and keep himself engaged and busy in praying for the State.

Exhibit B-12 (a) is another Takid of 1172 Hijri (A. D. 1796) which again deals with the same grant wherein it is stated that the five kathis of land was free from assessment and it has been fixed and continued by way of inam and by way of aid to maintenance to Mir Hussain Shah Durwish, a servant of the shrine of Pacha Saheb from time immemorial in accordance with the sanads of the former rulers and that according to the petition or the said Mir they have been confirmed and fixed according to the sanad in the name of Mir Gulam Murtuza son of the said Mir on condition of service as servant of the said Shrine and that it is necessary that the said land should be left in the enjoyment of the said person and the said Youmiah should be caused to reach from day to day and without fail from 1st Shawal 1172 Hijri, so that utilising the same in maintaining himself he may remain engaged and busy in praying for the stability of the State till eternity.

From the endorsement on the back of the Parwanah it appears that four annas Youmiah out of the Revenue of Ellore town for the light of the shrine in accordance with the sanads of the previous rulers, had been fixed. Exhibit B-13 (a) is another takid of 1st Jamadi-Ul-Awwal, 1174 (A.D. 1798) which is a confirmation of the grant in the name of Gulam Murtuza and recites therein that it is granted and continued by way of aids to the maintenance of Mir Gulam Murtuza and that the lands are to be left in the enjoyment of the said person according to the mamool (custom) and the said youmiah caused to be reached from day to day without fail to the said person so that utilising them for his maintenance he may engage in praying for the stability of the State till eternity.

These three documents show that the lands were granted on condition of service as servant of the said Shrine to Mir Hussain Shah Durwish to maintain himself and keep himself engaged in prayer for the stability of the State, and on Mir Hussain Durwish''s prayer it was granted to his son Mir Gulam Murtuza. When the British Government appointed an Inam Commission in 1859 to enquire into the genuineness of these inams for purposes of recognising or confirming them, it dealt with both the grants to the temples and mosques and grants to servants On condition of rendering service in temples and mosques together as both were connected with Hindu or Muhammadan religion and they did not want to burden them with any rent so long as the conditions of the grant were being fulfilled. Ex. B-16 is the Inam Statement prepared and filed by Khasim Ali styling himself as Muzavir of the Darga Pacha Saheb in the inam enquiry held by Mir Taylor in 1269 F (1860).

The details with respect to this are specified in eleven columns. In the first column which requires the name of the inamdar as entered in the dowle and the names of the present enjoyers, the deity known as Darga Pacha Saheb is shown and the enjoyer is said to be Mir Khasim Ali, Muzavar. Column 2 relates to age, column 3 to the residential place and column 4 relates to the name of the original sanaddar and the relationship between him and the present enjoyer. In this column the enjoyer is stated to be Mir Hussain Saheb Durwish''s grandson''s son. Column 5 requires the particulars of the present family with names and ages.

In this column Mir Khasim Ali''s mother Khanam Bai and wife Zohara Bi, younger brother''s wife Chata Bi, daughters Agha Bi, Khadas Bi and Khurseem Bi, have been shown. Particulars of the grant of the inam and the terms thereof are required by Col. 6 in which it is stated that the grant was in 1159 Hijri by Asabja

Nawab garu in 1171 Hijri and in 1178 Hijri by Hasanath Khan Nawab garu for being enjoyed hereditarily by rendering Muzavar service in the darga of the deity known as Pacha Saheb. Columns 7, 8, 9 and 10 relate to the particulars of the inam and the boundaries of the inam and col. 11 deals with particulars of the present enjoyment in which it is stated that the aforesaid Mir Khasim Ali Muzavar is enjoying. There is a genealogical table shown in the statement which shows that Mir Hussain Saheb Durwish''s son, Mir Gulam Murtuza has one son Mir Hussain and Mir Hussain has two sons Mir Khasim Ali and Mir Raza Ali.

The latter was shown as having died. Exhibits B-14 is the Inam fair register which gives various details etc. and the decision of the Commissioner and the abstract of the Government''s order. The relevant columns pertaining to this case are columns 8 to 10, 13, 15, 16 and 18 to 22. Column 8 relates to the description of the inam, if for service, it is to be stated whether the service is continued etc. The entry under that heading is that it is for the office of Muzavar in the Darga Pacha Saheb. In Col. 9 the income is stated to be free of tax.

In Col. 10 which requires the particulars as to whether the income is hereditary, on condition for life only or for two or more lives it is stated that it is permanent. Column 13 states the name of the original grantee to be Mir Hussain Shah Durwish. Column 15 shows the name of Pacha Saheb as entered in the survey and in the particulars relating to the present owner Mir. Khasim Ali who is the fourth from the grantee is shown and among his surviving heirs his mother, his wife, brother''s widow and three wives were shown. Column 21 contains the recommendations of the Deputy Collector that the grant was to be confirmed under Rule HI, Clause I, tax free. Column 22 shows that this was confirmed by the Inam Commissioner on 1-5-1860. From these entries in the Inam Fair register it is clear that the name entered in the survey was that of Pacha Saheb Darga. It was granted to Mir Hussain Shah Durwish and was confirmed in the name of the present incumbent, whose heirs have also been shown.

The tenure was shown as free of tax and permanent and it was confirmed under Rule III, Clause (i) tax free. Exhibit B-1 is the title deed which acknowledges the title of Khasim Ali to a religious service inam situated in the village of Pongian and that the inam is conferred on him and his successors tax free. From the sanads and the entries shown above only three conclusions are possible, viz., (a) that the grant is to the Darga and if so, the plaintiffs and defendants have no right, (b) that it is to the office of the Muzavar and (c) that it is to a named individual with a condition of rendering service. This threefold classification was enunciated in the case of Edward Philbert Vs. Emperor, , where it was observed :

There are three possible views that may be taken of grants of this kind; first, that the land was granted to the institution; secondly, that it was intended to be attached to a particular office; and thirdly, that it was granted to a named Individual burdened with service, the person so named happening to be the office holder at the time of the grant.

For the appellants to succeed they must show that this was a grant to the original grantee burdened with a service to be enjoyed hereditarily. The contention of Shankar Sastri that the grant is to the Darga or to the office of a Muzavar has no force, it is clear from the sanads as well as the inam fair register that the grant is not at any rate to the Darga. No doubt Pacha Saheb''s Darga is entered in the survey record and though the word ''permanent'' has bean used in column 10, which is the word used generally in grants to an institution, the other columns show that it was not granted exclusively to the Darga.

As observed by Ramesam J., in Vadlamannaty Bala Tripura Sundaramma Vs. Secretary of State and Others, , the use of the word ''Devadayam'' in an inam title deed is not conclusive to show the grant was in favour of the temple or mosque itself where the question is whether it is a grant to the temple or to a temple servant, though it may be some evidence along with the other circumstances. But where the claim set up is that it is a private property, the use of that word will have great weight. After examining several cases, the result of the discussion was summed up thus at page 109 (of Mad LW) : (at p. 281 of AIR):

(1) As the British Government were dealing favourably with inams connected with Hindu ana Muhammadan religions, whether grants to temples and mosques or grants to officials and servants on condition of rendering certain services in such temples and mosques, both were described as ''Devadayam,'' and the use of the word is not conclusively in favour of the temple or mosque itself where the question is whether it is a grant to the temple or to a temple servant though it may be some evidence along with other circumstances; it is of very great weight where the claims of private property is set up."

"(2) Where the grant is made to a person in the capacity of Muttawalli, manager, superintendent, dharmakartha or even servant of the mosque or temple, and where it does not appear that there is some other trustee it may be regarded as a grant to the temple or mosque itself.

"(3) Where it appears that a substantial part of the income goes to the benefit of the institution, as for a building or for its upkeep and repairs, or such other things the grant may be considered as a grant to the institution itself even though some surplus may be used by the trustees for their own maintenance.

"(4) Where none of the above indications appears, that is Where the grant does not show that it was granted to a temple or mosque, nor describe the grantee in the capacity of trustee manager, etc., and where it does not appear that any portion of the income that may be considered as substantial has gone to the benefit of the temple or mosque, then in such a case it must be treated as a grant to the grantee named (persona designata) and If services are mentioned, it is a grant for service.

The only entries which may be in favour of the respondents'' contention are in columns 8 and 15 of the Inam Fair Register where Pacha Saheb is entered in the description is stated as for the office of the Muzavar in the Darga of Pacha Saheb. As against this column 13 shows that the grant was to a named person, namely, Mir Hussain Shah Durwish and that the names of his heirs were also being shown in Col. 19 and that the then enjoyer was the fourth from the grantees. The Inam statement is said to be an interested statement; yet because it is made ante litem motem must be given Weight.

It shows that the grant to Hussain Shah Durwish was for being enjoyed hereditarily by rendering Muzavir service in the Darga to the deity known as Pacha Saheh. This was the statement, as we have already seen of Mir Khasim Ali, the original grantee''s great-grandson''s son. Nearer the time we have Ex. A-2 a statement of the 1st defendant in reference No. 5290/2/10 where he states that the lands were granted to his ancestor, Mir Hussain Shah Durwish for the benefit of the family to be enjoyed by him hereditarily performing the duties of Muzavar in the Pacha Saheb Darga, Ellore.

According to the said duties he has to spend some money for the daily upkeep of the Darga, maintain it in its proper condition, celebrate the Ursu, light the daily lamps and offer fatias at the instance of Fakirs or private individuals. These rituals were being performed from times immemorial and according to the terms of the original grant. This grant was recognised and confirmed by the Government and a patta T.D. No. 272 was granted to his grandfather, the then holder of the lands. The family of the Muzavar was to be maintained in consideration of the said services. He relies upon the judgment of the High Court of Madras in A.S. No. 132 of 1924 for a verification of these facts.

In paragraph 5 he shows the amount he has to spend every year on the darga which comes to about Rs. 350/-. Apart from this he has to spend about Rs. 1,000/- for the maintenance of his family consisting of 30 members in which he includes his wife, his children, his sister-in-law and her children and his sisters. In the end he says that the income from the lands is quite sufficient for fulfilling the terms of the grant. From this it can be seen that the amounts spent on the maintenance of the Darga etc., are but a fraction while a substantial portion of the income is spent on the maintenance of the family of the Muzavir.

The original grant prior to the inam register also shows, as we have already seen, that the inam was not to the Darga as such, nor to the office of the Muzavar as such, but to the individuals who are described as servants of the Darga for service and for their maintenance. As against these facts a stray sentence, in the evident of the 1st plaintiff examined as P.W. 1, to the effect that the suit properties are the properties of Pacha Saheb Darga is sought to he relied upon, which statement cannot really be of much effect in the presence of the sanads, inam statement, inam register and admission of his ancestors. Having regard to these facts, it cannot by any test, be held that the grant is to the Darga.

8. Again it is contended that this is a grant to the office of the Muzavar as such, that is, to the particular individual for the time being filling that office. No doubt

entry 8 shows that the inam was described therein as for the office of Muzavar in the Darga of Pacha Saheb.'' But this entry cannot by itself conclude the matter. It will be observed that in column 6 of the Inam statement the terms of the grant are said to be ''for being enjoyed hereditarily by rendering Muzavar service in the Darga of Pacha Saheb'' the statement itself having been based on the previous takids to which a reference has already been made.

There is nothing inconsistent in this statement which is fully borne out by the takids. If, therefore entry in Col. 8 in the inam fair register is considered along with the entries in the above documents, as it indeed should be, it will clearly, negative the plea of the respondents'' advocate that this grant is only for the Muzavar in office. On the other hand it would appear that the grant was to the individual with a condition of service to be enjoyed hereditarily. Even Ex. B-1 would show that title of Khasim Ali and his successors to a religious service, inam was being acknowledged and confirmed.

In Ex. B-2 also it has been held that the motive of the grant was to benefit the family of the grantee. But it is argued that the intention is only to benefit the Muzavar and his family and not the descendants of the original grantee. It is also contended that the rule of primogeniture should apply. If the grant is to the Muzavar in office, then it is clear that the plaintiffs would have no right as it would descend to his heirs or to the person appointed by him to be the Muzavar. That this is not a case of a grant to the Muzavar in office is clear. Even at the time of Ex. B-2 the entire case proceeded on the assumption that it was to the original grantee to be enjoyed hereditarily and that all his descendants would enjoy.

The District Munsif however, thought that it was an admission by an advocate which is not binding, for he says while admittedly Mir Raza Ali uncle of Mohd. Fakir died leaving a widow, a son and two daughters, yet Raza Ali''s family and Raza Ali''s son were ignored in that suit. We are at a loss to understand how the District Munsif came to the conclusion that Raza Ali died leaving a son, because both in Exs. B-16 and B-14 there is no mention of any son of Raza Ali who by then had died and as we have already stated, there is no evidence that on the date of the suit O. S. 46 of 1923 there were any heirs of Raza Ali living. When these points were not specifically raised and investigated, it is difficult to assume them for interpreting the grant.

On the other hand from Exs. A-4 and A-1 it would appear that the settlement deed by Md. Fakir, the grand-father of the plaintiffs, in favour of his three sons, Khasim Ali, Raza Ali and Ghazafar Ali, proceeded on the assumption that the grant was made in favour of his ancestor Hussain Saheb Durwish for the maintenance of their family and that the members of the family have ever since been enjoying the said entire property. After referring to the decision in appeal No. 132 of 1924 (in O. S. 46 of 1923) he states that the surplus income of the properties of A to C schedules according to the firmans granted to them previously, according to the caste custom and according to law, should after deducting the expenses of the Darga be enjoyed by all the male descendants of the family and that all of them should duly by turns, each of one year, render Darga service and perform all ''ursu'' (festival) etc., and that after him all should enjoy the said properties equally, either jointly or by turns. Ex. A-1 is the cowle executed in favour of the 9th defendant for 20 years by the 1st defendant, his three sons and plaintiffs who were minors represented by the 1st defendant.

The learned Advocate for the respondent contends that Ex. A-4 did not in fact give the surplus income to the sons in the life time of the father, Khasim Ali, who reserved this benefit for his exclusive enjoyment during his life time and that the plaintiffs did not get any right to it and nothing was given Jo the plaintiffs by Khasim Ali because the plaintiffs'' father died during his life time. With respect to the lease Ex. A-1 he contends that it being a lease beyond three years without a proper, guardian is void, nor does the lease deed confer any right upon the plaintiffs.

The question here is not the validity of the settlement deed Ex. A-4 or of the lease which was not challenged by the plaintiffs who were then minors. No doubt in paragraph 9 of the Written Statement an objection was taken to the lease by the defendants, but evidently it was not raised before cither of the Courts. Under the Muslim Law if there is nothing in the Wakf providing for succession to the office of Mutawalli or any other office and the founder and the executor are both dead the Mutawalli for the time being in office may appoint a successor on his death bed but he cannot do so either when he is in good health or where the office goes by hereditary right. Ex. A-4 cannot be considered as determining on prescribing a particular method of enjoyment, as it was only the wish of the father to have the grant enjoyed in a particular way after his death completely ignoring the conditions of the grant.

Be that as it may, the appellants seek, merely to show the consciousness of both Md. Fakir and the defendants that according to the custom or usage prevalent the grant was a hereditary one the benefit of which is to be enjoyed by the male descendants and that the plaintiffs were also to benefit. The statement that the grant was to the original grantee for maintenance of the family together with the inam statement clearly show that the grant was to be enjoyed hereditarily by the descendants of the original grantee. As the District Munsif states it was the common case of both the parties before him that the Office of the Muzavar of the Darga devolves upon the male members of the family and his finding is also to the same effect.

In the Secretary of The Secretary of State for India in Council Vs. Syed Ahmad Badsha Sahib Bahadur, , Sir John Wallis, C.J. and Krishnan, J., held that succession to a hereditary office which Cannot be enjoyed by several heirs in common, is by primogeniture and in the absence of evidence to the contrary by lineal primogeniture, that is, by descent to the eldest son and his sun and that a grandson who is the son of all eldest son. of the last office holder is entitled to succeed in preference to a junior son where the eldest son as predeceased his father. From this judgment it is not possible to say on what principle this has been held. The nature of the grant is also not evident. Where the grant is to a particular office, succession to it does not depend upon the ordinary Muslim Law but depends upon the conditions of the endowment.

If no rules of succession are stated by the founder of the endowment they have to be deduced from usage or custom that governs the particular sect or institution. It may be that the last holder has the power to nominate a successor or it may be that the successor is chosen by election at the congregation of Murids Fakirs etc. The question or succession by primogeniture or lineal primogeniture must, wherever it arises be proved by possible evidence. But since we have held that this is not an endowment for the Muzavar in Office, neither the above case nor the other case cited at the bar relating thereto need be considered.

9. In the case of a grant burdened with service to a named individual hereditarily, a question may arise as to whether the person or persons who actually discharge the service will alone be entitled to the surplus income. Though the service as Muzavir has to be rendered as observed in the bench judgment of the Madras High Court in Mir Mahaboob Hussain Sahib Vs. Mir Surajuddin Sahib Bahadur and Others, , it is not necessary that the service should be rendered by every member personally and that he who does not do so, cannot get a share in the inam. What they meant on the other hand was that every member is entitled to his share so long as the service is rendered by whomsoever it may be. We agree with this view.

10. When it is determined that the grant was to a named individual to be enjoyed hereditarily, the further question that would arise is whether the ordinary rule of Muhammadan Law would apply in which the nearer excludes the remoter, i.e., whether the well-known principle of Muhammadan Law applicable to private property them to pay the respective shares in the plaint schedule properties would be tantamount to granting a share of the income without deducting therefrom the expenses of the Darga. The appeal, therefore, against them is dismissed with costs.

