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A. I. R. (34) 1947 Privy Council 1

(From Ajmer-Merwara)

29th July 1946

LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT

Asrar Ahmed — Appellant v. *Durgah Committee, Ajmer—Respondent.*

Privy Council Appeal No. 36 of 1945.

(a) International Law—Ceded territories—Rights of subjects—State ceded to British Government—Rights enjoyed under former ruler cannot be asserted unless recognised by British Government—Rule applies to Mutawalli.

Where a state has been ceded by a Native Ruler to the British Government the rights which the inhabitants of that state enjoyed against its former ruler avail them nothing against the British Government and cannot be asserted in the Courts established by that Government except so far as they have been recognised by the new Sovereign Power. Such recognition may be by legislation or by agreement, expressed or implied. ('15) 2 A. I. R. 1915 P. C. 59 and ('24) 11 A. I. R. 1924 P. C. 216, *Rel. on.* [P 3 C 2]

This rule is peculiarly applicable to an office to which material benefits appertain, such as that of a mutawalli and which have consistently been regarded as within the disposition of the Sovereign power. [P 4 C 1]

Thus, where a person claims an hereditary right of his family to the office of a Mutawalli in respect of a religious endowment situated in the ceded territories then in the absence of an express or implied recognition of such right by the British Government he cannot rely upon any hereditary or other grant made before the cession of the territory. [P 4 C 1]

(b) Civil P. C. (1908), S. 11—Matter directly and substantially in issue—Parties and representatives—Former suit under Religious Endowments Act, 1863, by President and one member of Durgah Committee for removal of Mutawalli on ground of maladministration—Question of hereditary nature of office brought in issue by defendant and decided in his favour—Second suit by son of mutawalli against Committee for declaration that office was hereditary in his family—Finding as to hereditary nature of office in former suit held did not operate as res judicata.

The President and one member of a Durgah Committee being aggrieved by the maladministration by the mutawalli brought a suit against him praying that he might be dismissed from office on account of incompetency, dishonesty, neglect of duty, etc. No question of hereditary right to office was raised by the plaintiffs but it was raised by mutawalli in defence, an issue was framed about it and it was decided that the office was a hereditary one. Even so, as the Court found the mutawalli not to be a fit person it removed him and directed a Naib-mutawalli to be appointed. The appellate Court confirmed the finding as regards the hereditary nature of the office but postponed the appointment of the Naib-mutawalli. Upon the death of the Mutawalli his son filed a suit against the Durgah Committee claiming a declaration that the office of the Mutwalli was hereditary in his family and that the committee were not competent to question his status as a hereditary Mutawalli.

Held in the first place that in the first suit which was one under the Religious Endowments Act, 1863, the issue raised by the plaintiff was as to the competence of the defendant to remain in office, an issue to which it was irrelevant whether he had a hereditary right and although the question of hereditary right was brought into issue at the instance of the mutawalli and decided in his favour it was only incidental to, and not the substance of the suit, particularly when it was doubtful whether such an issue could have been raised. [P 8 C 1]

Held in the second place, that the plaintiffs in the first suit were not the Durgah Committee nor persons who purported to sue on behalf of the Committee and it was by no means clear that on such an issue they were entitled to speak for the Committee. They were two persons who were the President and a member of the Committee. It may be that upon the issue whether the defendant should be removed from his office for the reasons alleged by the plaintiffs, the judgments in the first suit would support the plea of res judicata as between the defendant and all persons interested to obtain his removal. But upon the question of hereditary right the plea could not be supported. Leaving out the Muslim community, it was the Durgah Committee who were peculiarly interested in this question and it could not be supposed that they or their suc-

cessors were to be bound by a decision in proceedings to which they were not parties. [P S C 1]

Civil P. C.—('44) Chitaley, S. 11, Notes 13 and 42.

J. Millard Tucker, R. K. Handoo and Khaleel Ahmad—for Appellant.

Sir Thomas Strangman and Charles Bagram—for Respondent.

Lord Simonds.—This appeal concerns a question of great importance to sections of the Muslim community in India and has been anxiously considered by their Lordships. In the year 1941 the appellant, Syed Asrar Ahmed, instituted a suit in the Court of the District Judge, Ajmer-Merwara, against the respondents, the Durgah Committee Ajmer, whose status will be explained, claiming a declaration that the office of Mutawalli of the Durgah Khawaja Sahib Ajmer was hereditary in his family and that the respondents were not competent to question his status as a hereditary Mutawalli in succession to the last holder of that office. The District Judge on 31-7-1942, made a decree in his favour but upon appeal to the Court of the Judicial Commissioner, Ajmer-Merwara, this decree was on 23-2-1944, reversed. Hence this appeal.

[2] The background of historical fact can be conveniently taken from the careful judgment of the Judicial Commissioner. From this it appears that the Durgah Khawaja Sahib Ajmer, sometimes called the Durgah Moinuddin Chisti, is universally admitted to be one of the most famous, if not the most famous Mahommedan shrine in India. The foundation is not only very ancient, but the shrine is also of considerable historical interest owing to its close association with several of the famous Moghul Emperors. The Saint Moinuddin Chisti died in the year 1233 A. D. He was born in Persia in 1143 and migrated later with his father to Nisharpur near Meshad where Omar Khayyam is buried. He went to Ajmer about the end of the 12th century and died there at the age of 90. His family remained in Ajmer, with a short interval during which they were driven out, until in 1567 the tomb was rebuilt and re-endowed by the Emperor Akbar the Great who reigned from 1556-1605. The first Farman of Akbar in connection with the shrine is dated 1567 and throughout their history the Moghuls were closely connected with it, the Emperor Jehangir (1605-1627) once spending three consecutive years at Ajmer. The endowment consists of a considerable number of villages, the income of which is set apart in order to defray the expenses of the various objects of the foundation. Aurangzeb, the last of the great Moghul Emperors, died in 1707, and thereafter there was a slow but steady break up of their Empire. Only 12 years after his death the Rajputs began their incursions into Moghul territory and in the year 1719 the Rathors, the head of which family now rules in Jodhpur, seized Ajmer and held it till 1721. In that year the Moghuls again asserted their rights: they recaptured the city and remained there until 1743. Then once more the Rajputs took Ajmer and held it till 1756 when the Maratha Scindias of Gwalior came on the scene and, capturing Ajmer, remained as rulers until 1787. In that year the Rajput Rathors again seized the city and remained there till 1791 when they were once more ejected by the Scindias, who in their turn ruled until in 1818 Ajmer was ceded to the British Government.

[3] Through this stormy history of the state it is now necessary to trace the history of the shrine. It is not disputed that for many years from 1567 onwards (that is from the Farman of Akbar the Great) with certain intervals the hereditary descendant of the Saint, variously called the Sajadanashin or later Dewan, combined in his own person the two leading offices of the shrine, that of Sajadanashin or spiritual head and Mutawalli or secular head and manager. These alternative expressions are used to convey as nearly as possible the meaning of the original words. Nor is it disputed that in the reign of the Emperor Shah Jehan (1627-1658) the post of Mutawalli was separated from that of Sajadanashin and had become a Government appointment, whereas the Sajadanashin remained and continued to be a hereditary descendant of the Saint. This is illustrated by a Farman of Shah Jehan in 1629 which ordered that "Daroga Balghour Khana," i. e., "the Mutawalli appointed by the State", was to sit on the left of the Sajadanashin at the Mahfils. So also in 1667 the Emperor Aurangzeb issued Farman regarding the order of sitting at the Mahfils laying down that "Daroga Balgorkhana i. e., Mutawalli of the Durgah or anyone who is appointed by the State" should sit on the left of the Sajadanashin. It may be noted that Daroga Balgorkhana was a Hindu. It has not been alleged by the appellant that up to this time the office of Mutawalli had become hereditary in his family or indeed that any of his ancestors had held that office. But he claims that thereafter in course of time by virtue of certain Farmans and Sanads, if not also by custom, the office

became hereditary in his family. Their Lordships have failed to find any justification for the suggestion that the office can have become hereditary by custom. It is upon the Farmans and Sanads that the appellant must rely.

[4] It is necessary by way of preface to an examination of these documents to remember that for more than 150 years the question which their Lordships have now to decide has been the subject of dispute in India. The first of the documents relied on by the appellant purports to be a Farman of the Emperor Mohammad Shah who reigned from 1719 to 1748 A. D. The Farman appears to have been issued on a date corresponding to 1759 in the Christian era, a fact suspicious in itself, and by it the office of Mutawalli of the "two tombs of Hazrat," situated in Ajmer, was entrusted to one, Sayed Mohammed Umar, who was thereinafter referred to as the permanent Mutawalli. Sayed Mohammed Umar is claimed by the appellant to be the elder brother of his great grandfather to the 5th degree. To the District Judge this Farman did not appear to be above suspicion and it was not accepted as authentic by the Judicial Commissioner. It seems to their Lordships sufficient to say that, whether or not it is a genuine document, it does not at all advance the appellant's claim that the office of Mutawalli is hereditary in his family. At the most it establishes that at a certain date the office was held by a particular member of his family. The second document relied on by the appellant is a Sanad of Daulat Rao Sindia which is ascribed to the year 1794. It recites that the Mutawalliship of the holy shrine was held by Mir Azimullah, grandson of Syed Mohammed Umar, "from ancient times" and proceeds as follows:—

"When in 91 1191 Hijri ,(it is believed that 1790 A. D. is meant) Shahiji Sindhia the late lamented paid a visit to Ajmer he removed the said Mir (Azimullah) from the management of the said affairs and appointed Habib Shah as the Mutawalli. Accordingly Habib Shah as an agent of the aforesaid carried out the duties of the Mutawalli exclusively himself at Ajmer. Now in this year the said agent is changed and Mir Ajimullah is appointed Mutawalli as he has been holding since ancient time."

[5] It does not appear that this Sanad helps the appellant's case. Its real significance lies in the fact that it illustrates the claim of the ruling power for the time being in Ajmer to deal with the office of Mutwalli as might seem fit.

[6] It is upon the third document that the appellant chiefly relies. This is also a Sanad of Daulat Rao Sindia and is ascribed to the year 1813 A.D. Their Lordships think it convenient at this stage to refer to certain steps taken by the learned Judicial Commissioner which are in their opinion to be deprecated. After the argument upon the appeal before him had been concluded, that learned Judge in order to satisfy himself as to the authenticity of this and other documents—a matter gravely in dispute between the parties—caused independent enquiries to be made from the Resident at Gwalior whether any trace of them was to be found in the archives at Gwalior and it was upon a negative answer to those enquiries, without giving the parties any opportunity of dealing with the matter, that he to some extent at least founded his decision that they were not authentic. Their Lordships must disregard any information so obtained and must examine the question upon the basis of the facts which were properly proved or admitted. Upon this basis they see no valid reason for rejecting the Sanad of 1813 to which they now refer. So much importance was attached to it by counsel for the appellant that certain parts of it may be set out. It opens thus:

"Mir Aziz Ali son of Mir Azimullah greetings from Daulat Rao Sindhia. Be it known in 1214 A. H. [Sc. 1813 A. D.] that to the Mutwalliship of the Durgah Hazrat Khwaja Sahib in Ajmer Mir Azimullah and his ancestors have been appointed, therefore in view of this the office of the Mutwalli is now given to you, i.e., Mir Aziz Ali son of Mir Azimullah"

and after prescribing his duties, ends thus:

"The office of the Mutwalli which has been held by your ancestors in the past will not be held by you from father to son, generation to generation."

[7] This Sanad was granted by the ruling House of Sindia to Aziz Ali. If that House had remained the sovereign power in Ajmer, if Aziz Ali was in fact the Mutawalli in 1813 and if he so remained until his death and the office then descended to his son, the appellant's case would be a powerful one. It is necessary however to see what in fact happened. In 1818, as already stated, Ajmer was ceded to the British by Sindia. From this it follows that the rights, which the inhabitants of that state enjoyed against its former rulers, availed them nothing against the British Government and could not be asserted in the Courts established by that Government except so far as they had been recognised by the new Sovereign Power. Recognition may be by legislation or by agreement express or implied. This well-established

rule of law, for which reference may be made to 42 I. A. 229[1] at p. 237 and 51 I. A. 357[2] at p. 360, appears to their Lordships to be peculiarly applicable to an office, to which material benefits appertain and which, so far as the records show, had consistently been regarded as within the disposition of the Sovereign Power. Their Lordships think that this aspect of the matter has perhaps not received sufficient attention in the Courts of India. The first question then is whether after the cession of 1818 the hereditary right of the appellant's family to the office of Mutawalli was recognised by the British Government. Counsel for the appellant could point to no instrument or act which amounted to an express recognition of such a right. Is it then to be implied from the conduct or mode of dealing with the matter by the British Government? The contrary seems to be established beyond all possible doubt.

[8] In 1818 as in 1946 and through all the intervening years this question was a burning one, and it immediately demanded the attention of the British authorities, who investigated the claim to office which was at once asserted by Azimullah. It is a fact strange enough and never explained that, the grant having been made in 1813 to Aziz Ali, yet in 1818 Azimullah his father, claimed the office. In support of his claim he made certain statements. The facts are here somewhat obscure but it seems that proceedings of a judicial nature were instituted, the result of which was that the British Superintendent made an order that "the office of the Mutawalli of the Durgah is held as service and not by hereditary right and this being the case the right of his appointment and removal vests in the Hakim (Government Officer)". Whether this is regarded as a judicial or executive act, it is wholly inconsistent with the recognition of hereditary right. But Azimullah was for the time being allowed to remain in office though his position in relation to his son Aziz Ali, to whom the grant of 1813 had been made, remains uncertain.

[9] In 1827 a second event took place which has a direct bearing on the fundamental point of recognition. In that year the Emperor Akbar Shah II issued a Shugga or royal letter, in which he recited that the appointment and dismissal of the Manager had "been done by us", that the management had been bad and that "Aziz Ali Mutwalli who was appointed to that office by us "had misappropriated most of the money. He then directed the removal of Aziz Ali and the appointment of Mirza Mohammed Timur Shah (the Emperor's grandson) as Mutawalli with Diwan Mehdi Ali Khan as his Naib or Deputy. Upon receipt of this Shugga, the British Superintendent at Ajmer, Mr. Henry Middleton, issued an order in which he stated that "in matters of the Durgah like these Government servants have not been authorised or appointed to interfere and it was apparent that removal from and appointment to this office has always been done by His Majesty. Therefore it is necessary and binding that the order of His Majesty in this respect should be given effect to". Aziz Ali was therefore ordered to relinquish his office and the Emperor was so informed. It is to be observed that this action by the British representative by no means derogated from the principle to which reference has been made but accorded with the policy of interfering as little as possible with matters of religion, and the administration of religious institutions.

[10] Aziz Ali being aggrieved by the order of Mr. Middleton appealed to the Commissioner, Colonel Cavendish, who directed that if he had a grievance he should file a suit. This he did in the Court of Mr. William Moore, the Assistant Commissioner of Ajmer, claiming against Mehdi Ali Khan (the Naib Mutwalli to Timur Shah) the recovery of his office. Consistently with the views expressed by their Lordships the suit could only have one end. Mr. Moore having fully reviewed the facts including the Sanad of 1813, the authority of which he did not challenge, concluded by saying,

"Since however in this case an order of His Majesty supported by the letter of the Resident Mr. Metcalfe addressed to Mr. Henry Middleton has been received dismissing the plaintiff and appointing the defendant as Naib:Mutawalli and Prince Mirza Timur Shah as Mutawalli and whereas on the basis of these letters Mr. Henry Middleton has actually removed the Mutawalli from this office, therefore, it is impossible for this Court to hold or do otherwise".

[11] It is true that the British Government were in this matter content to give effect to the order of the Emperor who has been described as the puppet King at Delhi, but it cannot assist the appellant that they

1. ('15) 2 A. I. R. 1915 P. C. 59: 39 Bom 625: 42 I A 229 : 30 I. C. 303 (P. C.), Secy. of State v. Bai Rajbai.
2. ('24) 11 A. I. R. 1924 P. C. 216:48 Bom 613:51 I. A. 357 : 82 I. C. 779 (P.C.), Vajesingji Joravarsingji v. Secy. of State.

did so instead of acting wholly upon their own initiative. It appears to their Lordships that the events so far related should finally have disposed of the claim of the appellant or his predecessors to any hereditary right to the office of Mutawalli. But the question was not allowed to rest and it is necessary briefly to continue the history. In 1827 Aziz Ali died. In the meantime Mirza Timur Shah was the nominal Mutawalli from 1827 until 1834, when it appears, though the position is not clear, that his tenure of office was terminated by order of the British Government. From 1834 to 1838 there was no regular Mutawalli, the administration of the Durgah being carried on by the Government, a task burdensome to itself and at variance with its consistent policy. In 1838 therefore the Government appointed Najaf Hussain to be Mutawalli at a salary of Rs. 150 per month. Meanwhile Azimullah who had survived his son did not remain inactive and eventually in 1842 the then Commissioner, Colonel Sutherland, directed that he should be reinstated. This purely executive act was done by him in pursuance of a notification from the Governor of the N. W. Province that he considered that he (the Commissioner) had full powers to provide for the future management of the Durgah at Ajmer in any way he considered best consistent with the views of the Honourable Court contained in a certain dispatch. This referred to the reiterated declaration of policy to withdraw from interference with the religious ceremonies of the natives of India and to relinquish the revenue derived from their temples and other places of religious resort.

[12] Thus Azimullah was restored to his office and it was fatally easy for him to assume contrary to the fact, that his restoration was a recognition of hereditary right. He lived and remained in enjoyment of his office until 1848. On the day before his death he put in an application to the Commissioner that his grandson Mir Hafiz Ali should be appointed Mutawalli to act in consultation and agreement with his brother Mir Wazir Ali and immediately after his death the Commissioner appointed Mir Hafiz Ali in these terms:

"Now that Mir Azimullah Mutawalli has died therefore you are appointed as Mutawalli of the Durgah Khwaja Sahib in place of Mir Azimullah. You should perform your duties honestly and diligently in agreement with your brother Wazir Ali as has been agreed."

Here was neither an assertion nor a recognition of a right hereditary or other. Hafiz Ali held office until his death in 1878. Two incidents that happened during his term of office may be recalled. It seems that there had been some controversy between him as Mutawlli and the Sajadanashin in which he had been wanting in proper respect, and in an order of the Commissioner he is thus reprimanded:

"The Mutawlli of the Durgah has claimed to be equal in status to the Diwanji. This cannot be. It is always proper for the Mutawalli of Durgah to be respectful to the Diwanji, because the Diwanji is the grandson of the Khwaja Sahib while the Mutawalli of Durgah Khwaja Sahib is an employee of the Government and should pay respect to the Diwanji."

Secondly there was passed in 1863 the Religious Endowments Act (Act XX of 1863) the purpose of which was to enable the Government in pursuance of its traditional policy to rid itself of responsibility for the management of religious endowments and at the same time make provision for proper administration in the future. Section 3 of the Act dealt with religious establishments to which the provisions of the Regulations specified in the preamble to the Act were applicable and the nomination of the trustee manager or superintendent thereof at the time of the passing of the Act was vested in or might be exercised by the Government or any pubic officer or in which the nomination of such trustee or manager or superintendent should be subject to the confirmation of the Government or any public officer, and provided that in such case the Local Government should make special provision as thereinafter provided. The provision referred to was contained in S. 7, which provided for the appointment of committees who should exercise the powers therein mentioned.

[13] It became necessary then to have an authoritative report upon the Durgah and the Sudder Board of Revenue was required to investigate and report. In March, 1866, that Board reported. They set out the history of the matter at some length and at paragraph 20 said :

"It appears to the Board that the case of the Durgah of Moinuddin Chisti is precisely one of those to which this section [Sc. S. 3] applies, for even admitting that the office of Diwan or religious head is hereditary there seems no doubt that of Mutawalli or secular manager is not so and moreover that while the nomination to this office did formerly always appertain to the ruling power there is no private person who is now competent or entitled to make sufficient provision for the succession to the management, and therefore under S. 3 of the Act XX of 1863 it now becomes incumbent on the Local Government to supply

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other grant made before the cession of 1818. Upon their plea of res judicata it is still necessary to say something.

[20] Their Lordships would first say that in their opinion this plea cannot be rejected on the ground that the judgments of Mr. Lasalle in the 1880 suit or of the Commissioner on appeal in that suit were obtained by fraud or on the ground that Mr. Lasalle was not competent to try that suit. Upon the latter point the presumption that since he might have been given jurisdiction, he was in fact given it is overwhelming and on the former point the evidence falls far short of what is requisite. But it appears to their Lordships that on two other grounds the plea must be rejected. In the first place, as has already been pointed out, in that suit the issue raised by the plaintiffs was as to the competence of the defendant to remain in office, an issue to which it was irrelevant whether he had a hereditary right. For, whether he had or not, he could be removed. It is true that at his instance the question of hereditary right was brought into issue, and was indeed decided in his favour, but it was incidental to and not the substance of the suit, and, though their Lordships would willingly uphold the plea whenever the circumstances justify it, they cannot think that in that case the question was a direct and substantial issue, particularly when it was at least doubtful whether such an issue could have been raised under the Act of 1863 under the authority of which the suit was brought. In the second place the plaintiffs were not the Durgah Committee nor persons who purported to sue on behalf of the Committee and it is by no means clear that on such an issue they were entitled to speak for the Committee. They were two persons who were the president and a member of the Committee. It may be, though it is unnecessary to decide it, that upon the issue whether the defendant should be removed from his office for the reason alleged by the plaintiffs, the judgments of Mr. Lasalle and the Commissioner would support the plea of res judicata as between that defendant and all persons interested to obtain his removal. But upon the question of hereditary right it does not appear to their Lordships that the plea can be supported. Leaving out the Muslim community, it was the Durgah Committee who were peculiarly interested in this question and it cannot be supposed that they or their successors are to be bound by a decision in proceedings to which they were not parties. Upon these grounds the final plea of res judicata must be rejected.

[21] In his long and careful argument for the appellant counsel finally relied on the Act of 1930, urging that its provisions were inconsistent with any other view than that the office of Mutawalli was hereditary and that they were a statutory recognition of the correctness of Mr. Lasalle's judgment. Their Lordships cannot accept this argument. If there was liberty to speculate upon such a matter, it might be supposed that the report made under the Act of 1863 had not been forgotten and that the assumption was made by the Legislature that the right of appointment lay with the old Committee. But, however this may be, it is not in their Lordships' view possible to extract from the language of the Act any recognition of the hereditary right of the appellant or his family to the office of Mutawalli. For these reasons which their Lordships in view of the importance of the case have thought fit to discuss at some lengtht, though they have not referred to every incident which they have considered they will humbly advise His Majesty that this appeal should be dismissed with costs.

N.S./D.H. *Appeal dismissed.*

Solicitors for Appellant — Douglas Grant & Dold.

Solicitors for Respondent — Gregory Rowcliffe & Co.

[Case No. 2.]

* A. I. R. (34) 1947 Privy Council 8

(From Allahabad)

24th July 1946

LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT

Mt. Dan Kuer—Appellant v. *Mt. Sarla Devi—Respondent.*

Privy Council Appeal No. 40 of 1945; Allahabad Appeal No. 22 of 1942.

(a) Transfer of Property Act (1882), S. 100—Maintenance charge—Construction—Partition between Hindu father *N* and his sons—Partition award allotting property to *N* subject to charge for his wife's maintenance — If wife ceased to live with *N* charge for maintenance to be at Rs. 75 a month — Award held created valid charge from date of award—Charge held not conditional on wife living apart from *N*.

An award partitioned the joint family property between *N* the father of the joint Hindu family and his sons, and made a provision for the maintenance of *S* the wife of *N*. The relevant portion of the award was as follows:

"We allot the property mentioned in List *A* to *N*, which shall remain in his possession subject to a charge for the maintenance of *S* and if she ever falls out with *N* and they cease to live together, the charge for maintenance thereon will