1922.

Present: Bertram C.J. and De Sampayo J.

MOHOMEDU *v.* MEERA KANDU *et al.*

351—D. C. Jaffna, 14,353.

Muhammadan charitable trust—Direction by founders that one of their heirs should be appointed trustee—No direction as to how the heir is to be chosen.

The founders of a Muhammadan charitable trust directed that from time to time one of their heirs should succeed to the office of trustee. No direction was given as to the mode in which that particular heir should be chosen.

Held, that under the Muhammadan law the selection should be done by the Judge.

The appointment of the son of the last trustee was confirmed by the Supreme Court.

THE facts are set out in the judgment of the District Judge (G. W. Woodhouse, Esq.):—

This is an action for the recovery of the management of the mosque in the land Thettavady at Vannarponnai, within the jurisdiction of this Court.

Certain Sera Mudaliyar and his wife Sainambunatchia *alias* Sevataumma founded the charity in 1854.

"We shall ourselves," says the deed, "take and keep the whole of the produce of this land and spend the same for the anniversary festival day of our Lord Mohideen Andavar; after the life time of both of us one of our heirs should take the produce of the said land . . . . No other persons shall have any power to alter or change the meaning of the terms of the deed. We only have full right and power."

Now, Sera Mudaliyar had two brothers, Vappu Marikkiyar and Tambikanni. Tambikanni is said to have died, leaving a son, Usupu, long before this deed of charity was executed. Vappu Marikkiyar died in 1855, leaving a son, Sultan Abdul Cader.

It is not quite clear when Sera Mudaliyar died; but Sainambunatchia continued in the management after Sera Mudaliyar's death, and did not die till 1881; Sultan Abdul Cader predeceased her by six years (according to some witnesses by one year). So that it is not true that he took up the management after Sainambunatchia's death.

It is not unlikely, however, that since a Moorish woman could not herself attend to the affairs of the mosque, her nephew, Sultan Abdul Cader, assisted her in the management. It seems that the original mosque was a temporary cadjan shed, and before Sultan Abdul Cader died the foundations of a permanent building had been laid. The deed creates a perfectly valid *Wakfanamah;* and the donors appointed themselves as *Mutwali* (trustees). There is nothing in the Muhammadan law which prevents a woman from acting as *Mutwali* where she has no duty to perform which would place her in a position which only a man could occupy. For instance, a woman may not be the

Sujjidah Nishen, or the superior of a religious endowment (*cf.* 8 *Cal.* 732). It has been held that where a woman is *Mutwali*, she may discharge the duties of her office by proxy (*Macn.* 333).

It is satisfactorily proved then that on the death of Sainambunatchia, her nephew, Usupu, succeeded to the management, and it is admitted that he remained as manager for forty-one years, until seven or eight years ago when he died.

The defendant and added party make out that on the death of Sultan Abdul Cader, the members of the congregation of that mosque assembled and appointed a committee of management of five persons, including the defendant and Usupu. Of the appointment of this committee there is no reliable evidence. Even if such a committee were appointed, it must be held that the committee was simply intended to advise and assist Usupu, who was one of the heirs. By the terms of the original *Wakfanamah*, a committee could have no independent right in the management of the mosque or its property.

In 1899 (see D 3) defendant appears to have purchased a land for the mosque out of the funds subscribed by the Muhammadan villages. In that deed the position of Usupu as manager is fully recognized. It was by that deed certain trustees were appointed for a special purpose, namely, to take care of the land so donated and collect the profits for the use of this mosque.

The defendant imagines now that those trustees were appointed generally to manage the affairs of the mosque.

The defendant appears to have been appointed by Usupu to be a sort of caretaker of the mosque, and defendant has done his duty well and truly for a great many years. Even after the death of Usupu he appears to have carried on the affairs of the mosque to the satisfaction of the congregation. He feels now that he is in fact the manager. Those who had right to manage appear to have left everything to the defendant. The added party, who is the son of Sultan Abdul Cader, has his lands at Pooneriyan, and only comes occasionally to Jaffna. The plaintiff lives in Jaffna, but has his business to attend to. Neither of them appears to have taken any active share in the management of the mosque affairs. It does seem a great pity to interfere with the management of this mosque, which has so far gone on so satisfactorily.

At the trial I suggested that as plaintiff and added party are both descendants of the original founders, they be declared joint managers, and the defendant be allowed to carry on the affairs of the mosque under their management, but the plaintiff would not agree to the proposal.

The question then is whether plaintiff or added party is entitled to the management of the mosque. It is perfectly clear that neither of them has hitherto taken any active part in the management.

It is plain that at Sainambunatchia's death the management passed to Usupu. According to the Muhammadan law, Usupu was the nearest relation of the original donors. It is true that there was the added party, but he was the grand-nephew, whereas Usupu was a nephew and was entitled to take before the added party. Forty-nine years ago no doubt added party was an infant in arms, but I do not think that was the reason why he was passed over. If that were so, when he came of age some twenty years ago he would have taken his place with Usupu as manager.

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After Usupu's death the management appears to have been in abeyance. I am of opinion that Usupu's son, the plaintiff, would succeed his father in the management.

On the issues I find—

(1) The added party is not an heir of the original founders; even if he was, he is not entitled to the management in preference to Usupu and his heirs.

(2) No.

(3) The defendant assisted in the management of the mosque, but he did so under the management of Usupu. He has also managed after Usupu's death, but under no particular person. But the fact that he assisted in the management gives him no greater right than those given by the deed D3.

(4) No.

Damages were agreed at Rs. 20 per annum. Enter decree for the plaintiff as prayed for against defendant and added party Rs. 20 damages per annum from date of institution of action, and costs.

The deed in question was as follows:—

We, K. Sera Mudaliyar and wife Sinampunatchia of Vannarponnai have executed deed of charity for and in the name of our Lord Kuthard Mohideen Andavar, to wit, land belonging to us by right of purchase and possession, situated at Vannarponnai. Registered in the Thombo . . . . called Thettavady, in extent 4½ lachams varagu culture, with house, portico, well, palmyras, and cultivated plants: and bounded . . . . We, Sera Mudaliyar and Seynampunatchia, have granted as charity donation for and in the holy name of the said Mohideen Andavar; we shall ourselves take and keep the whole of the produce of this land and spend the same for the anniversary festival day of our said Lord Mohideen Andavar. After the lifetime of both of us one of our heirs should take the produce of the said land; and thatch the house and fences, and clean the water of the well, and by drawing the whole water and the dirt in the bottom, outside the well, and repair the houses, and with the remaining income of the said land, after meeting the said expenses, should perform and conduct the festival day's expenses of the said Mohideen Andavar Avergal.

. . . . . .

Dated November 10, 1851.

Attested by A. A. Marikair
in Arabic (Seal.)

E. W. Jayawardene (with him *Abdul Cader*), for the appellant.—The added party, appellant, is the son of Sultan Abdul Cader who had managed the property for very many years. Sultan Abdul Cader was the son of Vappu Marikkar who was the elder of the two brothers of the founder of the mosque. The respondent is the grandson of the younger brother. On the finding of the District Judge, it is clear that neither appellant nor respondent managed the mosque. Under the circumstances, the appellant representing the elder brother should be preferred.

Balasingham (with him *J. Joseph*), for the respondents, not called upon.

March 12, 1923. BERTRAM C.J.— 1923.

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In this case it is impossible to give a judgment based on strict legal rights. The instrument of trust is of too vague a character to be enforced as between two contending parties resting their claim upon it. The Judge has made what in all the circumstances of the case is a reasonable order, and one which accords with the intention of the original founders. The founders directed that from time to time one of their heirs should succeed to the office of trustee of the foundation. No direction was given as to the mode in which that particular heir should be chosen, and I think that in such a case it would be in accordance with the Muhammadan law that, if there was no other more definite way of selecting the particular heir, this should be done by the Judge. In this case the learned Judge has discharged a function which, according to the view I have suggested, would have been discharged by the Judge of a religious Court. He has based his selection upon the fact that for many years Usupu acted unchallenged as trustee of the foundation, and he considers that on the death of Usupu, the most appropriate person to be appointed to discharge the duties of trustee was the son of Usupu. The defendant in the action had no status. He was not one of the heirs of the original founders. Much to his regret, therefore, the learned Judge felt bound to displace him, and considered that the son of Usupu, if he asserted his claims, ought to be appointed as trustee. The defendant, Meerakandu, has not appealed. The appeal is brought by the added-defendant, who asserts that Meerakandu was in fact his own nominee or representative. The learned Judge has disbelieved this. His opinion on that point is a finding of fact, and we cannot disturb it. It seems to me, therefore, that, whatever be the strict law of the matter, the learned Judge has made his order, and the present appellant has no status to disturb it. He cannot show a better right in himself than the person whom the District Judge has appointed trustee. If the congregation of this mosque want matters to be put upon a strict legal footing, their course is to apply for a scheme under section 102 of the Trusts Ordinance. With regard to the present appeal, in my opinion it should be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.