**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 9586 OF 2010**

**ALIYATHAMMUDA BEETHATHEBIYYAPPURA**

**POOKOYA & ANR. .....Appellants**

**Versus**

**PATTAKAL CHERIYAKOYA & ORS. .....Respondents**

**With**

**CIVIL APPEAL NO. 9588 OF 2010**

**CIVIL APPEAL NO. 9587 OF 2010**

**J U D G M E N T**

**MOHAN M. SHANTANAGOUDAR, J.**

Interlocutory Application No. 93605 of 2018 in Civil Appeal No. 9586 of 2010 for deleting the names of appellant Nos. 3 and 4 and respondent No. 7 from the array of parties is allowed.

2. These appeals arise out of the judgment dated 18.12.2007 of the High Court of Kerala at Ernakulam in C.R.P. Nos. 460/2006 and 462/2006. By the impugned judgement, the High Court decreed O.S. No. 1/1998 and dismissed O.S. No. 1/2001. It is relevant to note that O.S. No. 1/1998 was filed by the common respondents in these appeals, whereas O.S. No. 1/2001 was filed by the appellants in C.A. Nos. 9587/2010 and 9588/2010.

3. The present dispute pertains to the office of *mutawalli* of the Androtт Jumah mosque situated in Lakshadweep. The mosque is presently a public waqf registered with the Lakshadweep Waqf Board. The respondents herein are the seniormost male members of the different *thavazhies* (branches of descendants through the female line) of the Pattakal family. They claim to be the descendants of one Saint Ubaidulla, who is stated to have built the Androtт Jumah mosque, and who was its first *mutawalli*. Thus, they claim that by customary tradition, the office of the *mutawalli* of the mosque is vested with their family. It is their case that the members of the family choose the *mutawalli*

from amongst themselves, and Respondent No. 1 is functioning as the present *mutawalli* of the mosque.

The appellants in C.A. No. 9586/2010 are members of the Aliyathammuda *tharawad* and claim to be the *khateebs* (sermon-givers) in the mosque. The appellants in the connected appeals C.A. Nos. 9587/2010 and 9588/2010 claim to be suing as representatives of residents of Androtт Island, Lakshadweep. The common contention of the appellants in these three appeals is that the Jumah mosque was built by the inhabitants of Androtт island and was first administered by the 'Amin and Karanavan' system (i.e. by the executive officer assisted by the nominated heads of local families), and subsequently by a committee of elected public representatives from 1966-1972. The president of such committee from 1966-1972 was the respondents' predecessor Pattakal Koyammakoya Thangal, who was removed from presidency in 1974 after a dispute arose. It may be noted that while the appellants in C.A. No. 9586/2010 claim that the system of management by an elected committee continued after the dispute, the appellants in connected appeals C.A. Nos. 9587/2010 and 9588/2010 claim that due to this dispute,

management of the mosque broke down. However, their common claim is that the respondents never had a customary right to the office of *mutawalli*, and the right to select the *mutawalli* should vest with the people of the local area.

4. It is also their common claim that a compromise decree was passed on 16.02.1981 in O.S. No. 10/1974 between the appellants' predecessors and Pattakal Koyammakoya Thangal, as per which the mosque was to be managed by the committee elected by local residents. The appellants' contention is that even if there was any customary right vested with the respondents, it was breached by the formation of the committee and passing of the compromise decree. However, subsequently, the respondents filed civil suit O.S. No. 1/1998 before the Waqf Tribunal, Kavarathi praying for a declaration that the office of *mutawalli* of the Jumah mosque is vested with the Pattakal family. Initially, the suit was decreed in their favour, but the High Court on appeal remanded it back to the Waqf Tribunal for fresh disposal.

5. After remand, the Waqf Tribunal by its judgment dated 20.05.2006 held that there was no evidence to show that the mosque was being managed by an elected committee. Though the

Tribunal declared that the compromise deed in O.S. No. 10/1974 was void, as no application was made for leave of the Court, and the respondents' family was not given notice as required under Order XXIII Rule 3B of the Civil Procedure Code (for short "**CPC**"), it found that the respondents, on their part, had not produced any positive evidence to show that Ubaidulla was the first *mutawalli* of the Jumah mosque, and that the customary right to the office of *mutawalli* was vested with their family i.e. Pattakal family. Rather, the right to manage the mosque was vested with the local residents. Hence, it dismissed the suit and directed the parties along with the Waqf Board to draft a scheme for the management of the mosque. Against this judgment, the respondents filed a revision petition before the High Court.

6. The High Court in the impugned judgment found that there was no evidence to show that anyone apart from the respondents had functioned as *mutawalli* of the mosque at any point of time. It held that the committee in existence from 1966-1972 was only a committee for overseeing the repairs and maintenance of the mosque, and not for management thereof, and agreed with the Tribunal's reasoning with respect to the

compromise decree being void. On this basis, it decreed that the office of *mutawalli* was vested with the respondents by custom. Hence, these appeals by the various appellants before us.

7. It is important to note that counsel for the various appellants have admitted that the office of *mutawalli* can be a customary office. However, their contention is that such an office can be *heritable* by custom only if it is specifically pleaded and proved, which was not done by the respondents in this case.

8. Learned senior counsel for the appellants, Shri Shekhar Naphade, emphatically argued before us that the High Court has exceeded the scope of its revisional jurisdiction under Section 83(9) of the Waqf Act, 1995, and acted like a first appellate Court by re-appreciating the evidence on record; and that the High Court has decreed the respondents' customary right by placing reliance upon legends, mythologies, fiction and outdated materials, which do not specifically state that Ubaidulla was the first *mutawalli* of the Jumah mosque.

That the book '*Futhuhathul Jesair*' (**Ex A37)** should not have been relied upon, as it was published after the filing of the suit, and Respondent No. 2 in his deposition in O.S. No. 1/1998 admitted that it was written by his uncle's brother-in-law.

According to the appellants, it was purposefully written to support the respondents' case. Reliance was also placed upon **Ex B8** and **Ex B9** to show that the Pattakal family was not managing the mosque in 1921 and 1923.

That in the Lakshadweep islands, the office of Kazi and *mutawalli* are one and the same, and the Kerala High Court in ***Sayed Ahamedkoya Thangal* v. *Administrator***, (1997) 2 KLJ 362, had held that the respondents' family i.e. the Pattakals did not have a hereditary right to the office of Kazi and therefore could not challenge the appointment of a Kazi under the Kazis Act, 1880. This order having attained finality, it was now not open to the respondents to argue in favour of a hereditary right to the office of *mutawalli*, when such right has been denied for the office of Kazi; and that the respondents themselves admitted in the plaint in O.S. No. 1/1998 that the office of *mutawalli* and Kazi is one and the same, but conveniently sought only the office of *mutawalli* in relief.

That the respondents have undergone partition amongst themselves, but the two partition deeds produced before the Tribunal do not mention which branch of the family would

continue to hold the office of *mutawalli*, and the same belies the respondents' case that it was a hereditary right within the family.

That the compromise decree is binding against the respondents since the irregularity therein found by the Tribunal was only procedural, and that the burden was on the respondents to show that the decree was void, since there is a presumption under Section 114(e) of the Indian Evidence Act, 1872 that judicial acts have been regularly performed.

Lastly, learned counsel argued that the material on record clearly shows that the public of Andrott Island has always had a role in the management of the mosque, which is registered as a public waqf, and even if the respondents have a customary right to the office of *mutawalli*, it is against public policy to let the management rights of a public waqf vest in one family.

9. Per contra, learned counsel for the respondents has drawn attention to the Tribunal's finding that the documentary evidence showed that it was the respondents' family which was managing the mosque property. On the other hand, there was no documentary evidence to show that the committee of public representatives formed in 1966 was managing the mosque.

He reiterated the argument made before the Tribunal pertaining to Sections 4 and 5 of the Wakf Act, 1954, under which a List of Wakfs is published by the Wakf Board after due inquiry by the Survey Commissioner. Before the Tribunal, the respondents had produced **Ex A3**, the Gazette notification issued by the Lakshadweep Wakf Board containing the List of Wakfs published under Section 5, which showed that the office of *mutawalli* of the Jumah mosque was held by *"members of pattakal (family) under the supervision of Amins and Karanavans*". Learned counsel also referred to **Ex A4** and **Ex A5**, the certified copy of the entry in the statutory Register of Wakfs, and the receipt for wakf registration dated 5.3.1967 respectively, both of which show the name of the respondents' predecessor Pattakal Koyammakoya as *mutawalli* for the Jumah mosque.

Learned counsel relied upon these documents to contradict the claim that the committee constituted in 1966 was managing the mosque at that time. Further, since these documents were not challenged by the appellants before the

institution of the suit, they could not now claim that the respondents were not holding the office of *mutawalli*.

The respondents relied upon the judgment of the Full Bench of the Lahore High Court in ***Mt. Sardar Bibi* v. *Haq Nawaz Khan***, AIR 1934 Lahore 371, wherein it was held that a long established custom practiced by a family or community cannot be abrogated by a mere individual declaration to that effect, but such abrogation has to be inferred from the course of conduct of the family or community over an extended period of time. Hence, even if the appellants' arguments with respect to the committee or the compromise decree were accepted, the respondents' customary right to office of *mutawalli* would not be abrogated simply because Pattakkal Koyammakoya Thangal took up of the presidency of the committee or entered into the compromise dated 16.02.1981 as Karanavan of the Pattakal family.

Learned counsel for the respondents finally stressed that both the Courts have rightly held that the compromise decree dated 16.02.1981 was not only illegal but also void; that merely because of certain small gaps in the 1920s in which the Pattakal

family did not hold the office of *mutawalli*, the customary office held by the family could not be held to be discontinued; and that mere artificial breaks, that too for small periods and only on a couple of occasions, could not, in law, break the continuity in the administration of the mosque by the Pattakal *mutawalli*.

10. From the aforementioned arguments, the following issues arise:

*Firstly*, whether the High Court exceeded the scope of its revisional jurisdiction; and

*Secondly*, whether the respondents have pleaded and proved that they have a customary right to the office of *mutawalli* in the Jumah mosque.

11. Regarding the appellants' argument on the scope of the revisional jurisdiction of the High Court against an order of the Waqf Tribunal, it is pertinent to note Section 83(9) of the Waqf Act, 1995 which provides that:

> "No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:
> Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm,

reverse or modify such determination or pass such other order as it may think fit." (emphasis supplied)

12. It is well settled that ordinarily, while revisional jurisdiction does not entitle the High Court to interfere with all findings of fact recorded by lower Courts, the High Court may correct a finding of fact if it has been arrived at without consideration of material evidence, is based on misreading of evidence, is grossly erroneous such that it would result in miscarriage of justice, or is otherwise not according to law (see the decision of the Constitution Bench of this Court in ***Hindustan Petroleum Corporation Ltd*** **v.** ***Dilbahar Singh***, (2014) 9 SCC 78). Importantly, the scope of such revisional jurisdiction is wider when the High Court is vested with the power to examine the legality or propriety of the lower Court's order under the statute from which the revisional power arises. In such a situation, the High Court may also examine the correctness of findings of fact, and re-appraise the evidence (see ***Ram Dass*** **v.** ***Ishwar Chander***, (1988) 3 SCC 131). It is in this perspective that the argument of the appellants must be considered.

13. As rightly noted by the Tribunal, it is not disputed that Ubaidulla had come to Andrott and converted the people of the island from Hinduism to Islam. The Tribunal also observed that the respondents/plaintiffs were Ubaidulla's descendants "*by all probabilities*", keeping in mind the historical materials produced. It was further observed that historians were of the unanimous opinion that Ubaidulla was the first Kazi/*mutawalli* of the mosque and that members of his family had held the office of Kazi in succession. However, in spite of these observations, the Tribunal did not go on to render a finding to the effect that the respondents had been holding the post of *mutawalli* in succession. Instead, it concluded that Ubaidulla was an alien who could not have owned land on the island, and hence, the mosque could not have been constructed by him, and there was no positive evidence that he and his descendants were *mutawallis* of the Jumah mosque.

The High Court noted that the findings of the Tribunal contradicted its earlier observations, and held that since the mosque was constructed as long ago as in the seventh century, no evidence other than the historical material on record could be obtained to show, that in all probability, Ubaidulla had indeed

constructed the mosque. There could not be specific or direct evidence of the donation of land for constructing the mosque, or of the construction of mosque itself, and so on. The Court was rightly of the opinion the Tribunal need not have probed further for positive proof after noting all the historical facts proved.

Thus, it is evident that the High Court in the impugned judgement has not entered into a rehearing or reassessment of the findings of fact arrived at by the Wakf Tribunal. Rather, the Court has rightly noted that the Tribunal did not apply the appropriate standard of proof to be applied in a civil suit, i.e. the standard of preponderance of probability.

Therefore, it cannot be said that the High Court exceeded the scope of its revisional jurisdiction in any manner.

14. To consider the appellants' argument that the Pattakal family did not have a customary right to the office of *mutawalli* of the Jumah mosque, we may first address the minor argument raised by the appellants with respect to the respondents' partition deeds. The Tribunal in its judgment has specifically noted that the partition deeds only relate to the division of properties within the *tharawad* and do not deal with the right of management of the mosque. The respondents themselves are claiming the office

of *mutawalli* as a customary right, not as a proprietary right. It has even been admitted by learned counsel for the appellants during the course of arguments that the same cannot be a proprietary right. Hence, the partition deeds could not have made any provision with respect to the office of *mutawalli*, and the non-mentioning of this office in the partition deeds will not prejudice the claim of the respondents to a customary right to succeed to this office.

15. We would now like to address the appellants' contention that the materials adduced by the respondents to show that they have continuously held the office of *mutawalli* should not have been relied upon by the High Court, as they were not contemporary and were fictitious in nature. We find ourselves unable to agree with this contention for the reasons laid out below.

We have gone through the material which the High Court has relied upon to grant the respondents' claim. The first is **Ex A36,** *A Short Account of the Laccadive Islands and Minicoy*, by R.H. Ellis, published in the year 1924. Ellis was at that time the Collector for the territory. The book mentions on page 16 that

Saint Ubaidulla was regarded as the first *musaliyar* (proselytizer) in the area, and his descendants till 1920 held the office of Kazi of Andrott Island. The second is a note prepared in 1977 by the Gazetteer for the Lakshadweep islands. Though this document was not marked as an exhibit, counsel for the appellants stated that it had nevertheless been placed and relied upon before the Tribunal and the High Court. This publication on page 44 notes that Ubaidulla was the first *musaliyar* in Andrott and his grave is enshrined within the Andrott mosque and regarded with deep veneration.

The High Court also noted the observation in the book *Deepolpathy* (published in 1960) (**Ex A35**) that the respondent Pattakal family was descended from Saint Ubaidulla, who was the first Kazi of the mosque, and that members of the Pattakal family were its traditional Kazis, and continued to be so at the time of writing. The High Court also appreciated an entry in the Encyclopedia Britannica (edition unspecified), as well as certain remarks in the Arabic book *Futhuhathul Jesair* (**Ex A37**), to the same effect.

We agree with the opinion of the High Court that since this issue relates to a mosque constructed almost 1300-1400 years ago, it is impossible to find contemporary proof of the construction of the same. The Gazetteer for the Lakshadweep Islands, as recently as 1977, has recorded that Ubaidulla was the first *musaliyar* in Andrott and is buried in the Andrott mosque. The Gazetteer, as well as the then Collector R.H. Ellis, gave credence to this account in spite of inaccuracies relating to the date of conversion of the inhabitants.

It is important to note at this stage that the Gazette is an official record evidencing public affairs, and its genuineness is presumed under Section 81 of the Evidence Act, 1872. Moreover, under Section 35 of the Evidence Act, an entry made by the Gazetteer in discharge of his official duty is a relevant fact. Any fact recorded by the Gazetteer may also be considered as expert opinion under Section 45 of the Evidence Act. Therefore, the contents of the Gazette can be taken into account to discover the historical materials contained therein, which the Court may consider in conjunction with other evidence and circumstances in adjudicating a dispute, even if it may not be conclusive evidence

of the fact-in-issue (see ***Bala Shankar Mana Shankar Bhattjee*** **v.** ***Charity Commissioner, Gujarat State***, 1994 Suppl. (2) SCR 687). Such a record cannot be challenged by the appellants merely on the ground that it is not a recent publication.

Moreover, irrespective of the date of conversion of the island's inhabitants, had Ubaidulla not had a significant connection to the mosque, there would have been no reason for him to be buried there and for the tomb to be venerated. Even if the book *Futhuhathul Jesair* (**Ex A37**) is disregarded on the ground that it was written by Respondent No. 2's relative (that too after the suit was filed), other independent historical materials corroborate that Ubaidulla was the first *mutawalli* of the mosque, that he married a female convert and established the Pattakal *tharawad*, and that after his demise, his descendants, i.e. the Pattakal family, were holding the office of Kazi and managing the mosque as *mutawallis* turn by turn.

Moreover, as the High Court has rightly observed, these materials refer to the history of the island, its administration, the local culture and economy, etc., all of which constitute historical facts, and these materials qualify as historical literature. Hence,

we disagree with the appellants' contention that these materials are legendary or mythological in nature.

The appellants, on the other hand, have not produced any contrary historical opinion that states that Ubaidulla was not the first *mutawalli* and that his descendants did not continue to hold the office of *mutawalli*, or any historical proof to show that the mosque was being managed by local residents or by a committee. Thus, we find no reason to interfere with the finding by the High Court that the respondents have held the office of *mutawalli* of the mosque since its establishment.

16. It now remains to be seen whether the material relied upon by the High Court was sufficient to establish a customary right to the office of *mutawalli* in favour of the respondents. We would like to reiterate at this stage that it is not under dispute that this office can be customary. This is also evident from the definition of '*mutawalli*' in Section 3(i) of the Waqf Act, 1995, which includes a person who is *mutawalli* by virtue of any custom.

17. At the outset, it is pertinent to note that Muslim law does not recognize an inherent right of succession to the office of

*mutawalli*. In ***Atimannessa Bibi* v. *Abdul Sobhan***, (1916) 43 Cal 467, the High Court of Calcutta laid down the proposition as follows:

> "…though a descendant of the founder has a preferential claim to the office of *mutawalli*, he does not become *mutawalli* by right of inheritance but has to be appointed such by the "Qadi" who may be supersede him if he is not qualified."

An almost identical position was taken by the High Court of Bombay in ***In Re Mahomed Haji Haroon Kadwani***, ILR (1935) 59 Bom 424. Similarly, the High Court of Calcutta in ***Bebee Syedun* v. *Syed Allah Ahmad***, W.R. 1864, 327 held that hereditary succession is extremely unlikely in offices in Mohammedan religious endowments.

18. However, various scholars on Muslim law have opined that such a right may be shown on the basis of certain exceptions, which includes the creation of a custom to that effect. In this respect, we may refer to the following discussion by S.A. Khader in ***Law of Wakfs*** (1999, page 33):

> "Hereditary right to the office of mutawalli: Muslim law does not recognise any right of inheritance or rule of hereditary succession to the office of mutawalli. <u>There are two exceptions to this principle</u>:

> (1) Where the founder has laid down the rule of hereditary succession to the office in which case the rule has to be adhered to, and
>
> (2) Where the office of mutawalli becomes hereditary by custom in which case the custom should be followed." (emphasis supplied)

A similar observation has been made by Mulla in *Principles of Mahomedan Law* (21st edn., 2017, Prof. Iqbal Ali Khan ed.) (for short "**Mulla**") on page 253:

> "The Mahomedan law does not recognize any right of inheritance to the office of mutawalli. But the office may become hereditary by custom, in which case, the custom should be followed." (emphasis supplied)

19. We have also given due consideration to several judgments of various High Courts which appear to support the above observations, inasmuch as they recognise that an exception can be made to the general rule against hereditary succession and lay down certain principles in this regard for proving such an exception.

In ***Shah Gulam Rahumtulla Sahib* v. *Mahommed Akbar Sahib***, 8 Mad. H.C. Rep. 63 (1875), the question before the High Court was whether the office of the custodian of a waqf could devolve through primogeniture. The Court opined in this

case that in cases of succession to the office of the custodian of a waqf, succession would be determined in terms of the rules established by the founder of the waqf, which could be inferred from evidence of usage.

Another leading precedent in this regard is ***Phatmabi* v. *Haji A. Musa Sahib***, (1915) 38 Mad. 491. In this case, an heir of the previous *mutawalli* laid claim to the office through hereditary devolution. In this backdrop, the High Court of Madras observed as follows on page 494:

> "Where there has been a series of appointments of Mutawallis, it is generally assumed that the appointments have been valid, which implies that such appointments have been made in accordance with the terms of the original dedication relating to the mode in which the successive appointments have to be made." (emphasis supplied)

On page 495 it was further observed:

> "The law does not directly empower the Mutawalli of every waqf to appoint his successor but if in regard to any particular waqf it is proved that the Mutawallis have been in the practice of nominating their successors, it is assumed that the practice had a lawful origin and was founded on some provisions contained in the waqfnama or some oral directions given by the waqif empowering the Mutawallis to nominate their successors. Provisions in the waqfnama empowering the Mutawallis to nominate

> their successors are so usual that it would perhaps be representing the present state of authorities if it were said that the Courts assume the existence of such a provision in the dedication, unless the contrary is proved... It will be seen therefore that a claim based on the allegation either that the office is hereditary or that the Mutawalli nominated the claimant as his successor must ultimately have reference to the actual or the presumed directions of the waqif at the time when the dedication was made." (emphasis supplied)

The above observations of the Court indicate that a claim of hereditary succession may be accepted if it is founded in a direction to that effect by the waqif (i.e. the founder of the waqf). Such a direction may be presumed from a practice of successive appointments made from amongst the waqif's family members.

However, in the above decision, the Court also observed that the standard of proof in respect of such a custom would be stricter in the case of a public waqf than for a waqf whose object was to provide for the maintenance of the founder's family. Hence, the High Court in the said matter of ***Phatmabi*** rejected the claim of Phatmabi on the ground that she had only been able to show three successive appointments from her family, and there was nothing to show such persons had succeeded as a matter of right of inheritance.

Similarly, in ***Kalandar Batcha Sahib* v. *Jailani Sahib***, AIR 1930 Mad 554, the plaintiff claimed a right to the office of the trustee, being the closest male heir of the predecessor. The High Court of Madras held that while there was no absolute right to be appointed as a hereditary trustee under Mahomedan law, when the founder intended the position of trustee to be hereditary, such fact should be considered in the appointment of trustees, unless there were strong reasons for doing otherwise. In this case, it was found that the history of devolution of the trust, from the original founder of the trust onwards, showed that the trustee was always appointed from the founder's family, and hence the office of the trustee was to be regarded as hereditary. Accordingly, the suit was decreed.

20. It is also important to note that even the decisions which have held that there is no right to hereditary succession to the office of mutawalli under Muslim law do not support the appellants' contention that there cannot be an exception by way of custom to the general rule affirmed in those decisions.

In ***Atimannessa*** (*supra*) and ***In Re Mahomed Haji*** (*supra*), since the claimants did not plead the existence of a

*custom* of hereditary succession, the Court did not have an occasion to rule on the aspect, and hence both the decisions are silent in this regard. In ***Bebee Syedun*** (*supra*), while it was held that in the absence of sufficient evidence of a custom by descent, there would be a presumption against hereditary succession to the office of *mutawalli*, crucially, the Court did not find that such a custom could not exist at all. Rather, the claim was rejected as the plaintiff had not gone back far enough to establish a custom, as he had only shown three generations of succession to the office of *mutawalli*.

21. Finally, the Waqf Act, 1995 itself acknowledges that a waqf may have a hereditary *mutawalli*. This is evident from the proviso to Section 69(2), dealing with the power of the Waqf Board to frame a scheme for the administration of a waqf, which states that:

> "Provided that where any such scheme provides for the removal of any hereditary mutawalli, the scheme shall also provide for the appointment of the person next in hereditary succession to the mutawalli so removed, as one of the members of the committee appointed for the proper administration of the waqf."

22. It can be concluded from the above discussion that a person claiming a customary right to succeed to the office of *mutawalli* would have to show that the waqif intended for the office to devolve through a practice of hereditary succession. In the absence of any express directions in the waqfnama to this effect, the claimant would have to show that such practice has been in existence throughout the history of the trust, and not merely for a few generations, such that the waqif's intention that the office should be hereditary can be presumed. The burden of proof would be higher with respect to a public waqf, such as the suit waqf in the instant case, than a family trust.

23. We may now consider what the principles governing the establishment of a custom under Muslim law are. It is a settled position of law that a custom in order to be legal and binding must be certain, reasonable and acted upon in practice for a long period with such invariability and continuity that it has become the established governing rule in a community by common consent. It is equally settled that it is incumbent upon the party relying on the custom to plead and prove it.

In this regard, we may fruitfully refer to the following observations from Fyzee's *Outlines of Muhammedan Law* (5th edn., 2008, Prof. Tahir Mahmood ed., p. 49) (for short "**Fyzee**"):

> "First, the burden lies heavily upon the person who asserts to plead the custom relied upon and prove clearly that he is governed by custom and not by the general law. Secondly, as to the proof of custom, there is in law no presumption in favour of custom and the custom must be ancient, certain and not opposed to public policy." (emphasis supplied)

The leading case with respect to the requirements of proving a custom is the decision of the Privy Council in ***H.H. Mir Abdul Hussein Khan* v. *Bibi Sona Dero***, AIR 1917 PC 181. Relying upon its previous decision in ***Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar***, (1871-72) 14 Moo IA 570, the Council observed as follows:

> "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." (emphasis supplied)

24. Thus, we may conclude that while no person can claim the office of *mutawalli* merely by virtue of being an heir of the waqif or the original *mutawalli*, if they can show through a long-established usage or custom that the founder intended that the office should devolve through hereditary succession, such usage or custom should be followed. Additionally, the practice would have to comply with the requirements which are generally applicable while proving a custom, i.e. it must be specifically pleaded, and should be ancient, certain, invariable, not opposed to public policy, and must be proved through clear and unambiguous evidence.

25. Whether the aforementioned requirements have been satisfied in the present case or not is to be considered.

As far as the requirement of specific pleadings is concerned, we find that the appellants' argument that the respondents have not specifically pleaded their customary right is patently incorrect, insofar as the respondents in paragraph 2 of their plaint in O.S. No. 1/1998 have specifically pleaded that the

office of the *mutawalli* is vested in the Pattakal family '*by virtue of immemorial custom and usage*.'

26. Coming to the question of whether the respondents have discharged the burden of proving a legal and binding custom in their favour.

As mentioned above, the Tribunal and the revisional Court have, on facts, found that historical materials unanimously establish that Saint Ubaidullawas the first *mutawalli* of the mosque, which was constructed around the seventh century AD, and his descendants continued to hold the post after his death.

Additionally, the Tribunal and the High Court have taken note of multiple documents placed on record by the respondents, showing that the Pattakal family was managing the mosque property in an unbroken chain of succession. These include, inter alia, **Ex A1**, a compromise petition dated 6.12.1892 acknowledging the rights of Pattakal Ahmed Khadiyar Koya in the administration of the Jumah mosque, **Ex A2**, another compromise petition of the year 1933 which refers to Pattakal Kunhikoya as the Kazi, **Ex A21**, a complaint dated 22.03.1935

filed by the *mukri* (muezzin) of the mosque against the then *mutawalli* Pattakal Kunhikoya, **Ex A3-5** and **Ex A11**, showing that Pattakal Koyammakoya was the *mutawalli* prior to his death in 1981, **Ex A6-9**, consisting of demand notices and receipts for annual contributions made by the mosque, which show that Patakkal Pookoya Thangal was Pattakal Koyammakoya's successor from 1981 till his death in 1996, and **Ex A17-20**, which prove that the present *mutawalli* is Respondent No. 1 Patakkal Cheriyakoya. These documents establish that from 1892 to present, it is the respondents' family members who have been succeeding to the office of *mutawalli* continuously. Therefore, it is proved that the practice of succession of the respondents to the office of *mutawalli* of the Jumah mosque has been in existence since antiquity, and is certain and invariable.

27. It may now be considered, *firstly*, whether the alleged intervention of third parties have led to breaches in the invariability and continuity of the custom, through the statutory appointment of a Kazi in 1998 and the appointment of a non-Pattakal Kazi in 1921 and 1923, and *secondly*, whether the

respondents have themselves committed such breaches through their predecessor's participation in the committee formed in 1966, and by entering into a compromise decree dated 16.02.1981.

28. With respect to the contention pertaining to the appointment of a Kazi in 1998, it is admitted that one Kunnasada Hamzakoya was appointed as Kazi of Andrott Island under the Kazis Act, 1880. Previous to this appointment, the respondents had challenged the government's notification inviting applications for the post before the High Court in ***S.A. Thangal*** (*supra*), on the ground that their hereditary right to succession to the office of Kazi would be abrogated by the statutory appointment, but their petition was dismissed. It is on the basis of this judgment that the government proceeded to appoint such Kazi.

As was rightly observed by the High Court, the Tribunal's finding that the Pattakal family had lost its vested right in the office of *mutawalli*, based on the finding in ***S.A. Thangal*** that they had no hereditary right to the office of Kazi of the mosque, was based on a wrong understanding of facts and law. The dictum laid down in ***S.A. Thangal***, which was heavily relied upon

by the appellants during their arguments before this Court, will not come to the aid of the appellants in this matter, inasmuch as the said judgement was rendered in a different context. It is no doubt true that in ***S.A. Thangal***, it was observed that the petitioner therein (who was a member of the Patakkal family) could not claim that the position of Kazi was hereditary in nature, particularly after the coming into force of the Kazis Act, 1880 (which was made applicable to Lakshadweep in the year 1970). However, the judgment also acknowledged that by virtue of Section 4 of the Kazis Act, if the respondents were performing the functions of a traditional Kazi prior to enforcement of the Act, they could continue to do so, notwithstanding the appointment of another person as a Kazi under the Act. This is evident from the operative portion of the judgement, which reads thus:

> "13. Therefore, the petitioner cannot claim that the position of Kazi is hereditary in nature. Even if the petitioner's contention that he succeeds to the deceased Kazi, the position being hereditary in nature, is accepted, that will not prevent the Administration choosing a Kazi in terms of the Kazis Act. Appointment of Kazi made under the Act shall not be deemed to prevent any person discharging any of the functions of the Kazi as per Section 4 of the said Act." (emphasis supplied)

The relevant section in this regard, Section 4(c) of the Kazis Act, 1880 reads as follows:

> **"4. Nothing in Act to confer judicial or administrative powers; or to render the presence of Kazis necessary; or to prevent any one acting as Kazi**: Nothing herein contained, and no appointment made hereunder, shall be deemed…
>
> (c) to prevent any person discharging any of the functions of a Kazi." (emphasis supplied)

Hence, even as per the decision in ***S.A. Thangal***, the respondents could discharge some of the functions of a traditional Kazi despite the appointment of a different person as a Kazi under the Kazis Act.

From the aforementioned discussion, we can conclude that the appellants' contention that the post of Kazi and *mutawalli* was the same in Lakshadweep islands and therefore if the respondents have lost the right to one office, they cannot claim the other is only partly correct. We say so because, it is true that prior to the enforcement of the Wakf Act, 1954 in the year 1968 in the Lakshadweep islands, the word '*mutawalli*' was not in use on the islands, and the word 'Kazi' encompassed a person functioning as *mutawalli* of a mosque. This has also been noted

by the Tribunal in its judgement. However it is incorrect to say that the person who was working as *mutawalli*/Kazi loses the post of *mutawalli* also after he lost the post of Kazi.

The office of Kazi disputed in ***S.A. Thangal*** is a statutory appointment under the Kazis Act, 1880. It can be inferred that after the enforcement of the Kazis Act in 1970, a legal distinction between the office of *mutawalli* and statutory office of Kazi came into play in the Lakshadweep islands. The Kazis Act pertains to the appointment of a Kazi for a local area where his presence may be required for performing certain rites and ceremonies, whereas the respondents in their plaint have clearly stated that they are claiming the office of "*mutawalli-cum-Traditional Kazi*" of the Jumah mosque specifically. They are not contesting the decision in ***S.A. Thangal*** or seeking appointment to the statutory post of Kazi.

Therefore, we find that the High Court has rightly concluded that at the time of the institution of OS No. 1/1998, the respondents were within their rights to seek the relief of the office of *mutawalli* even after their claim to the office of Kazi was defeated. Further, given the distinction between a statutory Kazi

and a *mutawalli*, the appointment of Kunnasada Hamzakoya in 1998 will not constitute a breach of the respondents' custom in respect of the office of *mutawalli*.

We would like to emphasize that we have not been called upon to decide whether the respondents have a customary right to be the Kazi of the mosque, since the decision in ***S.A. Thangal*** is not in challenge before us. Therefore, we desist from looking any further into the matter.

29. The appellants' argument that the respondents' claim to the office of *mutawalli* is defeated by the appointment of certain third parties as Kazis in the 1920s, i.e. before the enforcement of Kazis Act,1880 in the area, must also be considered in the light of the above discussion.

The appellants have relied on **Ex B8** and **Ex B9** in this respect. **Ex B8** is letter of Kazi Sayedkoya dated 25.05.1921 informing Amin Kachery, Androtт that his uncle Attakoya Thangal had been functioning as Kazi in his place while he was travelling, and that Kazi Sayedkoya had subsequently resumed the post. **Ex B9** is the order of R.H. Ellis dated 12.02.1923 which inter alia assigned one Shaikinteveedu Kunhikoya to be the karnavar of

Androtт and one Kasmikoya to perform the functions of Kazi of the mosque. The appellants claim that these documents show that the Pattakal family was not managing the mosque in that period.

The respondents have not challenged the validity of the above documents. In fact, we find that in **Ex B5**, it has been admitted by Pattakkal Koyammakoya (the respondents' predecessor), who was the plaintiff in O.S. No. 10/1974, in which the compromise decree dated 16.02.1981 was passed, that the Shaikinteveedu family, to which the Kazis appointed in 1921 and 1923 belonged, does not belong to the Pattakkal *tharawad*. He further admitted that Sayedkoya was appointed by the people as Kazi due to hostility towards the Pattakkal family, and the government had accepted such appointment. After Sayedkoya's tenure expired, nobody from Sayedkoya's family was appointed and all the succeeding Kazis were from the Pattakal family. It can be inferred that even prior to the enforcement of the Kazis Act, the government appointed a Kazi for Androtт Island, for a limited duration only, on the request of the inhabitants. Therefore, such

appointment would not prejudice the respondents' customary right to manage the Jumah mosque.

In any event, a singular artificial break or gap in the exercise of a customary right, that too by executive orders, would not lead to abrogation of the customary right itself, unless such break constitutes a recurring infringement or leads to conferment of title in the opposite party (see the decisions of the Madras High Court in ***Muniandi Kone* v. *Sri Ramanatha Sethupathi***, AIR 1982 Madras 170, and ***K.A Srinivasa Ayyangar* v. *S. Ramanujachariar***, 1941 (1) M.L.J 322). The appellants have not been able to show that apart from the instances mentioned in **Ex B8** or **B9**, anybody else was functioning as the Kazi-cum-*mutawalli* of the mosque since ages prior to the filing of the suit, so as to constitute a recurring infringement or to confer title upon a third party. On the other hand, the respondents have produced considerable documentary evidence to show that members of the Pattakal family were functioning as *mutawalli* since the establishment of the mosque. Thus, the appellants' argument in this regard fails.

30. We must now consider whether the appellants have been able to prove that the respondents had themselves breached their customary right such that the custom was abrogated. Learned counsel for the appellants firstly drew our attention to **Ex B5**, the deposition of Patakkal Koyammakoya, plaintiff in O.S. No. 10/1974, mentioned *supra*. He admitted that a committee was formed on 25.11.1966, composed of 14 members from 4 localities of Androtт Island, of which he was President. Hence, the appellants contend that the respondents cannot claim that it was just a repair committee and not for the management of the mosque.

It is true that in **Ex B5**, Patakkal Koyammakoya admitted to the formation of the committee in 1966. However, he had earlier categorically deposed that the committee was for overseeing the repair and maintenance work of the mosque. Moreover, in his cross-examination, he stated that though he was continuously elected as President of the committee, he could not remember whether a committee was elected after 1972. He also stated that there was no committee on the date of deposition (i.e. 30.04.1977). Therefore, it is evident that the committee was only

in existence from 1966 to 1972 and that too only to advise the *mutawalli* in relation to the repair and maintenance of the mosque. It must also be noted that both the Tribunal and the High Court have found that the appellants have not produced any documentary evidence to controvert the deposition in **Ex B5**, and to show that a committee was functioning for the management of the mosque after 1972. We find ourselves in agreement with the said finding.

On the other hand, we find merit in the respondents' submission that the entries made in and around 1967 regarding the Jumah mosque in the List of Wakfs and the Register of Wakfs under the Wakf Act, 1954, mentioned *supra*, evidence that the office of *mutawalli* was customarily vested in the respondents, and not in the committee, during the period to which the entries pertain. Since the List of Wakfs (**Ex A3**) relied upon by the respondents is a Gazette notification, the entry contained therein showing that the office of *mutawalli* was held by the Patakkal family will constitute a relevant fact under Sections 35, 45 and 81

of the Evidence Act, as mentioned in our discussion *supra* pertaining to the relevance of the Gazetteer's Report of 1977.

Further, it must be noted that the List of Wakfs is published only after the Survey Commissioner has conducted a preliminary enquiry into the waqf property and after the Commissioner's report is examined by the Waqf Board under Sections 4 and 5 of the Wakf Act, 1954. Both the Tribunal and the High Court have concurrently found that it is an admitted fact that an enquiry was made by the Waqf Board pertaining to the Jumah mosque in 1967. Appellant No. 1 had also deposed before the Tribunal about having participated in this enquiry, after which the List was published. Thereafter, no complaint was made against the entry in the List. Hence, the appellants cannot at this stage claim that the entry made is incorrect.

The Register of Wakfs is prepared by the Wakf Commissioner, an official appointed by the State Government, hence an entry made therein is an entry made by a public official in performance of his official duty and is considered a relevant fact under Section 35 of the Evidence Act. Hence the entry made in the Register of Wakfs (**Ex A4**) showing Pattakal Koyammakoya

as the *mutawalli* of the Jumah mosque is a relevant fact for the purpose of deciding this dispute.

31. It is apposite to note that the Tribunal found that there was a discrepancy insofar as the List of Wakfs mentioned that the Pattakal *mutawalli* was under the supervision of Amins and Karanavans, whereas the Register entry only mentioned Pattakal Koyammakoya as the *mutawalli*. As mentioned *supra*, the appellants have also claimed that the mosque was managed under the 'Amin and Karanavan' system. In this regard, it must be noted that while evaluating the respondents' claim to a customary right to the office of *mutawalli*, the social conditions in which this right was exercised must be taken into account. The following observations of **Fyzee** (5th edn., 2008) on page 50 are relevant in this respect:

> "As to the evidence of custom, specific instances of its acceptance as law may be proved; such evidence may be supplemented by general evidence; previous decisions in which the custom has been accepted as binding are important pieces of evidence but their reasoning may not be binding; the court must scrutinize the custom set up jealously and must be careful not to be misled by pitfalls due to unfamiliarity with social conditions."

We find it relevant to discuss what the entry in the List of Waqfs showing that the mosque was under the supervision of Amins and Karanavans precisely means, since this was the broader social backdrop in which the respondents' custom existed. A perusal of the "Report of the Commissioner for the Scheduled Castes and Scheduled Tribes" for the year 1953, on page 284, reveals that the Amin is the executive officer appointed by the government for the Lakshadweep islands. The Karanavans are the heads of different local families who are appointed to assist the Amin in trying civil and criminal cases. Hence, these are executive authorities which are separate from the *mutawalli* of a mosque. The Tribunal itself has noted in its judgement that the Jumah mosque may have been under the supervision of the then administrative authorities as it was a very important mosque on Andrott Island, but the Amins and Karanavans were not directly managing the affairs of the mosque. Therefore, we find that the mention of the 'Amin and Karanavan' system in the List of Waqfs will not weaken the respondents' argument based upon reliance on such List.

Though it is possible that the *mutawalli* belonging to the respondents' family may have been advised by other authorities, this does not mean the respondents per se did not hold the office of *mutawalli*. Hence we are unable to accept the appellants' argument that the respondent's customary right was breached due to the presence of advisory authorities such as the Amins and Karanavans or the committee formed in 1966. Rather, it strengthens the argument in favour of the respondents, to show that notwithstanding the changes in the administrative mechanism of Andrott Island over the years, which is inevitable in any territory, it is the Patakkal family which has been at the helm of affairs at the mosque.

32. We also find ourselves unable to agree with the contention of the appellants that the violations of Order XXIII Rule 3B, CPC while passing the compromise decree dated 16.02.1981 in O.S. No. 10/1974 are merely procedural and do not vitiate the decree, and that the decree should therefore be regarded as proof of breach of custom.

Under Order I Rule 8, CPC, which pertains to representative suits, a person may sue or defend on behalf of

others and for the benefit of others having the same interest, with the permission of the Court. The object of Order I Rule 8 is to facilitate the decision of questions in which a large number of persons are interested without recourse to ordinary procedure. Per Order XXIII Rule 3B, in order to compromise in a representative suit, it is necessary to obtain the leave of the Court. Before grant of leave to compromise, the Court needs to give notice in such a manner as it may think fit, to such persons as may appear to it to be interested in the suit.

It is pertinent to note that it is not clear whether the suit in O.S. No. 10/1974 was filed under Order I Rule 8 or not. Even assuming that we accept the respondents' contention that the said suit was not strictly filed under Order I Rule 8, it would be regarded in the nature of a representative suit for the purposes of Explanation (c) to Order XXIII Rule 3B. Explanation (c) provides that the term 'representative suit' includes suits where the compromise decree passed therein becomes binding on persons not named as parties to the suit. In O.S. No. 10/1974, Pattakal Koyammakoya was representing the respondent family's interests in his capacity as Karanavan of the family. Hence the compromise

decree, if upheld, would prejudice the family's customary right to the office of *mutawalli* and the terms thereof would become final and binding by virtue of Section 96(3), CPC. Thus, it is clear that the two conditions mentioned *supra* in relation to representative suits have to be complied with if the compromise decree passed in O.S. No. 10/1974 is to be held valid.

The Tribunal as well as the High Court, on considering the compromise decree passed and the records thereof, have on facts concluded that the parties to the decree did not obtain leave of the court and did not give notice to other persons who were interested in the suit, i.e., members of the Pattakal family, as required under Order XXIII Rule 3B. The appellants before this court have also not disputed that the compromise decree was without leave of the court and without notice to interested family members. As is evident from the foregoing discussion, such violations of Order XXII Rule 3-B cannot be said to be merely procedural, and go to the root of the matter since they deprive the affected parties of the chance to question the terms of the compromise that they are going to be bound by. Since both the

conditions required under Order XXIII Rule 3B were not complied with, the compromise decree was void.

Further, we find that in addition to the above procedural violation, the compromise decree is also illegal insofar as it fails to comply with Section 60 of the Wakf Act, 1954, which provides that no suit in any Court by or against the *mutawalli* of a wakf relating to the rights of the *mutawalli* shall be compromised without the sanction of the Wakf Board. Rather than obtaining the sanction of the Wakf Board prior to the decree, the compromise decree mentions in paragraph 7 that the decisions taken therein are to be *subsequently* intimated to the Wakf Board. Hence, we find ourselves in agreement with the findings of the lower Courts that the compromise decree was illegal and void.

Moreover, as rightly argued by learned counsel for the respondents by placing reliance on ***Sardar Bibi*** (*supra*), which has also been favourably cited by **Mulla** (21st edn., 2017) on page 14, the abrogation of custom cannot be inferred from a mere individual declaration (i.e. the admissions made by Pattakal Koyammakoya Thangal in the decree) in the absence of any continuous course of conduct by the family to that effect. The

respondents' family was not given notice before passing of the compromise decree and did not have any say with respect to the terms framed therein, and hence it cannot be said that the decree is binding against them.

33. Thus, we are of the view that the appellants have not been able to establish that there was a breach in the respondents' customary right of holding the post of *mutawalli* due to the formation of the committee in 1966 which existed till 1972 or due to the compromise decree which is declared as void.

34. Learned counsel for the appellants argued that even if it is proved that the respondents have a customary right, such custom violates public policy and is unreasonable, as one family should not be allowed to monopolize the management of a public waqf. We are unable to agree with this contention. There cannot be any dispute that the *mutawalli* has no right in the property belonging to the waqf, and is merely a superintendent or manager. Hence, the respondents' right to office of *mutawalli* does not divest the waqf of its public character. Moreover, the exercise of any customary right to succession will be necessarily subject to the provisions of the Waqf Act, 1995, which provides broad

powers to the Waqf Board for supervising the administration of a waqf. For example, Section 64 of the Waqf Act, 1995 provides for the removal of the *mutawalli*, and Section 69 of the Act deals with the power of the Board to frame a scheme for the administration of the waqf under certain contingencies.

We also find it relevant to refer to the following observations of the Bombay High Court in ***In re Mahomed Haji Haroon*** (*supra*), which were made in the context of a waqf created for charitable purposes:

> "In accordance with generally prevalent Muslim sentiments,—and the law of waqifs supports these sentiments,—members of the family of the waqif ought to be given preference in appointment as trustees…I do not, therefore (in spite of the deference I should like to show to the Advocate General's point that unless outsiders are appointed as trustees the trust may become entirely a family affair) consider that there must necessarily be any outsider amongst the trustees. On the contrary I think the Muslim law does not dread the management of waqifs being retained in the family of the waqif. It disapproves of the introduction of an outsider in the administration at least of such a trust as is before me, unless the members of the waqif's family show their unfitness to be trustees. I take this opportunity, however, of observing that though descendants of the waqif are favoured by the Court, when appointing a mutawalli, this does not mean that they have a hereditary right to be mutawallis, still less that their descent will protect them from removal if there is any

> mismanagement. The trustees that are now being appointed ought to be particularly careful in the administration of the trust. They should utilize the funds for such purposes and in such a manner that there may not be the least ground for any aspersion being cast against them. No suspicions should be allowed to arise that the funds are not being utilized for the most suitable and proper objects. Every portion of the funds should be manifestly put to uses entirely in accordance with the principles of Islam, which is a progressive and enlightened religion."

As noted in the above decision, even if the *mutawalli* belongs to the family of the waqif, he is not immune from removal in the case of mismanagement of the waqf, and must administer the waqf in accordance with the principles of common prudence and probity. Having regard to the above principle, and to the provisions of the Waqf Act which take care of contingencies in case of mismanagement, etc., it cannot be said that the respondents' exercise of customary right to the office of *mutawalli* is unreasonable or violates public policy.

35. In light of the foregoing discussion, we have no hesitation to reach the conclusion that the respondents have been able to establish a customary right to the office of *mutawalli* of the Jumah mosque, under the facts and circumstances of this case, which is not unreasonable or opposed to public policy. The

respondents have through clear and unambiguous evidence shown a practice of continuous and invariable devolution of the office of *mutawalli* through successive appointments from within the Patakkal family, beginning with the institution of the mosque itself. Adopting the principle enunciated in ***Phatmabi*** and ***Kalandar Sahib*** (*supra*), we find that this evidence is sufficient to draw a presumption that such hereditary devolution was as per the intention of Ubaidulla, the original wakif, therefore also satisfying the specific requirements mentioned *supra* for proving a custom of hereditary succession to the office of *mutawalli*.

36. Therefore, the appeals are dismissed and the impugned judgment and order is confirmed.

..... J.
(MOHAN M. SHANTANAGOUDAR)

..... J.
(AJAY RASTOGI)

New Delhi;
August 1, 2019.