judgment of the learned Subordinate Judge is wrong and must be reversed.

SECRETARY OF STATE FOR INDIA. v. TRUSTEES OF SRI KUTTALANATHASWAMI TEMPLE.

A memorandum of objections has been put in but was not argued by Mr. Rangachari who stated that it stood or fell with the decision in the main case. The appeal must therefore be allowed with costs here and below and the memorandum of objections dismissed with costs.

ODGERS, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Madhavan Nair.

HASSAN KUTTI BEARY (DEFENDANT), APPELLANT,

v.

JAINABHA (PLAINTIFF), RESPONDENT.*

1928, September 5.

Muhammadan Law—Marriage—Adult virgin of Shafi sect—Necessity of consent for marriage.

The consent of an adult virgin among the Shafi sect of Sunnis is essential for the validity of her marriage.

SECOND APPEAL against the decree of the District Court of South Kanara in Appeal Suit No. 396 of 1925 preferred against the decree of the Court of the District Munsif of Kasaragod in Original Suit No. 204 of 1925.

The following statement of facts is taken from the judgment of MADHAVAN NAIR, J:—

"This Second Appeal arises out of a suit instituted by the plaintiff for a declaration that she is not the properly wedded wife of the defendant and for an injunction restraining the latter from asserting his rights as her husband.

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* Second Appeal No. 934 of 1926.

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The parties are Sunnis and they belong to the Shafi sect. The lower Courts have found that the plaintiff had attained puberty at the time of the marriage, that no consummation ceremony was performed and that her consent had not been obtained by her father for the performance of the nika. It was contended on her behalf that, she being an adult virgin, the nika performed without her knowledge and consent is invalid under the Shafi law. This contention has been upheld by the lower Courts."

The defendant (husband) preferred this Second Appeal.

B. Sitarama Rao for appellant.—The parties belong to the Shafi school. According to that school, the consent of the bride, though an adult, is not necessary for her marriage; see Wilson's Anglo-Muhammadan law, 5th Edition, page 68, quoting Minhaj-at-Talibin, which is a work of great authority. The contrary opinion of Amir Ali in his Muhammadan law, Vol. II, 3rd Edition, 350, does not refer to any authorities. Reference was made to Sir Abdur Rahim's Muhammadan Jurisprudence, page 330, and *Muhammad Ibrahim* v. *Gulam Ahmed*(1).

K. S. Krishnaswami Ayyangar for respondent.—In such a case as this, the consent of the adult virgin is necessary. All the modern text-writers on Muhammadan law are in favour of this view; Amir Ali, Vol. II, page 350; Sir Abdur Rahim, page 330; Tyabji, sections 17 (B) and 29. Even Minhaj-at-Talibin says that to obtain the consent is commendable. The appellant's contention is opposed to the spirit of Muhammadan law under which system marriage is a matter of civil contract, for which consent is necessary; see Hamilton's Hedaya, Vol. I, page 96, and *Asgur Ali Chowdhry* v. *Muhubbut Ali*(2).

JUDGMENT.

ODGERS, J.

ODGERS, J.—This is a Second Appeal from the decree of the learned District Judge of South Kanara confirming

(1) (1864) 1 Bom. H.C.R., 236. (2) (1874) 22 W.R., 403.

that of the District Munsif, and the question is—has the father of the plaintiff the right to marry her to the defendant without her consent? The parties are Mappillas and Sunni Muhammadans. The case has been argued on the assumption that they belong to the Shafi sect of the Sunnis. Nika was performed by the father of the plaintiff in the Talangere Mosque, and the question is—Is this an irrevocable marriage? The plaintiff is an adult virgin and it is not proved that she has been consulted or that her consent has been obtained. Another important sect of the Sunnis is the Hanafis. There is no doubt that a woman cannot be married in that sect without her consent. The learned Advocates on each side have been at pains to bring to our notice every possible authority which exists in the text-books. There are practically no cases on the point, and therefore the text-writers must be shortly examined.

Wilson in his Anglo-Muhammadan law, Fifth Edition, page 68, points out as one of the chief variations of the Shafi creed that women have less freedom of choice in the matter of marriage. He says:

"Not only female minors, but adult women who are virgins, may be disposed of in marriage by the father or paternal grandfather without their consent and though widows and divorced women cannot be given in marriage against their will, even they remarry without the intervention of a guardian or wali,"

and in the same book (Chapter 13) dealing with the peculiarities of the Shafi school of Sunni Muhammadans and quoting from the Minhaj, a work dating from the 13th century of the Christian era he says:

"Not only female minors, but adult women who are virgins may be disposed of irrevocably in marriage by the father or failing him by the paternal grandfather with or without their consent; but their consent is nevertheless considered desirable" (page 407).

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Minhaj-at-Talibin which has been translated apparently under the authority of the Dutch Government for use among Shafi Muhammadans of Java says at page 284:

"If his daughter is a virgin, the father can dispose as he pleases or remarry."

And it adds,

"It is, however, always commendable to consult her as to her future husband, and her formal consent to the marriage is necessary if she has already lost her virginity."

In the prefatory note, the Editor says:

"It is not always possible to decide the question by reference to Minhaj alone."

But the two other treatises to which he refers as the two standard works in the whole modern literature on the school of Shafi, are unfortunately not available to us here. The late Syed Amir Ali in his introduction to Muhammadan law cites Minhaj as a Shafi work of repute, but is himself definite as he remarks

"Among Shafis and Malikis, although the consent of the adult virgin is as essential as among Hanafis and Shiahs to the validity of a contract of marriage entered into on her behalf, she cannot contract herself in marriage without the intervention of a wali."

If that is to be taken as the modern view on the subject, it seems to me that there is no more to be said.

A good deal of the learning on this part of the subject is concerned with the competence to contract marriage. According to Mr. F. B. Tyabji at page 91 of his book,

"A Shafi thayyaba is competent to contract marriage, i.e., to enter into a contract of marriage but not a woman who is a virgin."

At page 97 the learned author says that the consent to the marriage of a person not competent to enter into a contract of marriage, must be expressed by his or her guardian for marriage who is a wali. This would also seem to point to the conclusion arrived at by Syed Amir

Ali to the effect that consent was necessary. The answer to that argument put forward is that the consent has been given on her behalf by the father as her wali. That of course cannot be, because the lower Courts have found as a fact that she was never asked and she had never even seen her future husband. So that her consent was never expressed either personally or through a wali at all. Hedaya in Chapter 2 on Guardianship and Equity mentions the Shafi assertion that a woman can by no means contract herself in marriage in any circumstance whether with or without the consent of her guardian. That must simply mean the mode of expressing consent. Further at page 96, Hedaya says:

"It is not lawful for a guardian to force into marriage an adult virgin against her consent. This is contrary to the doctrine of Shafi who accounts an adult virgin the same as an infant."

And the argument of the Shafi is refuted by the argument of "Our Doctors," i.e., Hanafis. Sir Abdur Rahim says as follows at pages 330 and 331:—

"According to the Hanafis, every person who is not a minor whether male or female, maiden or thayyaba (that is, a girl who has had sexual intercourse), is competent to contract marriage and cannot be given in marriage without his or her consent whether by the father or any other relative. The Shafis and Malikis agree with the Hanafis so far as boys and thayyabas who have attained majority are concerned; the former, however, hold that a minor thayyaba is competent to contract marriage and a maiden even if she has attained majority cannot marry without the consent of the guardian, while the Hanafis in each of these two cases hold the contrary view. Thus with the Hannfis so far as the females are concerned, minority is the test whether the intervention of a guardian is necessary or not and with the Shafis the test is whether a girl is a maiden or thayyaba. The difference between the two sects on this point, though not perhaps of much practical significance, involves a question of principle. The Hanafis allege that the Shafis' refusal to acknowledge the right of a maiden of full age to

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contract marriage of her own will amounts to a breach of a cardinal principle of Muhammadan law, namely, that the legal status of a grown up female is as complete as that of a male."

Even in that passage the learned author is concerned with the capacity to enter into the marriage contract, i.e., as to whether the intervention of a wali is necessary or not. In the Muhammadan law, marriage would appear to be nothing more nor less than a contract and therefore there must be consent. How that consent is to be expressed is a matter on which as already stated there appears to be much learning and some confusion appears to exist as will be apparent from the quotations already given between the necessity of such consent and the mode of its expression. In Amir Ali, page 343, it is said that

"A woman who is sane, free and adult can marry herself to an equal, with or without the consent of any person who might be her wali."

"Shafi and Malik hold a contrary opinion."

Says the Radd-ul-Muhtar

"but there is no authentic *hadis* in support of their views. At the same time it is recommended as more consistent with decorum that an adult virgin should entrust the negotiations of her marriage to a wali in whom she has trust."

In the recapitulation at page 350 the learned author says :

"Under the Maliki and Shafi law the marriage of an adult girl is not valid unless her consent is obtained to it. But such consent must be given through a legally authorized wali who would act as her representative."

In *Muhammad Ibrahim* v. *Gulam Ahmed*(1) it was held that according to the doctrine of Shafi a virgin whether before or after puberty cannot give herself in marriage without the consent of her father. That of course is not this case at all.

(1) (1864) 1 Bom. H.C.R., 236.

Giving the best consideration I can to these various authorities it seems to me that the only view against the position taken up by the lower Courts is that of Wilson, and even he says that consent is commendable. There is further the evidence in this case of a Musaliar, defence witness 2, who says he is a teacher of sastras by which I suppose he means the Koran. He says that among Shafis, consent of the girl is not necessary for the first marriage, but that all the books state that it is better to get it. It would have been interesting if a body of evidence had been given in the first Court as to the ideas obtaining among the best opinions of the community of the present day on this subject. I do not imagine that these opinions have retrogressed and become more conservative as time has gone on; and it may be that the better opinion among the Shafis on the West Coast is that no adult virgin should be married without her consent. However that may be, the question is here whether enough has been shown to enable us to say in Second Appeal that the view taken by both the lower Courts is manifestly wrong in law. I am by no means persuaded that it is. I think therefore that the decree of the lower Appellate Court should be confirmed and this Second Appeal dismissed with costs.

ODGERS, J.

MADHAVAN NAIR, J.—After stating the facts continued:—The question for consideration is whether the marriage of a Muhammadan woman who is an adult virgin is under the Shafi law invalid owing to want of consent on her part. There are no decisions directly bearing on the question; *Muhammad Ibrahim* v. *Gulam Ahmed*(1) does no more than point out the difference between the Hanafi and the Shafi law on this point.

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(1) (1864) 1 Bom. H.C.R., 236.

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The evidence of defence witness 2, the Kaliff of Puttur, the only witness who speaks on this question, is not much helpful as he does not refer to instances of marriages declared invalid by the Court or held so by the community owing to want of consent on the woman's part. The case has therefore to be decided on the statements of the law contained in the various recognized text-books of authority on Muhammadan law.

The appellant's contention that want of consent on the part of the woman does not invalidate her marriage under the Shafi law is supported by the statement of the law contained in Wilson's Anglo-Muhammadan law, Hamilton's Hedaya and Minhaj-at-Talibin. In Wilson's book, the law with regard to Shafi Muhammadans is stated as follows :—

"Not only female minors, but adult women who are virgins, may be disposed of irrevocably in marriage by the father with or without their consent; but their consent is nevertheless desirable." (See page 407, paragraph 392.)

In Hamilton's Hedaya, Vol. I, page 96, the law is thus stated:

"It is not lawful for a guardian to force into marriage an adult virgin against her consent. This is contrary to the doctrine of Shafi, who accounts an adult virgin the same as an infant, with respect to marriage, since the former cannot be acquainted with the nature of the marriage any more than the latter, as being equally uninformed with respect to the matrimonial state, whence it is that the father of such an one is empowered to make seizure of her dower without her consent."

Minhaj-at-Talibin (guide of the earnest enquirer), a book dating from the 13th century of the Christian era and which is exclusively devoted to a statement of the principles of Shafi Law, also supports the contentions of the appellant. It is stated in that book that

"a father can dispose, as he pleases, of the hand of his daughter without asking her consent, whatever her age may be, provided she is still a virgin. It is, however, always

commendable to consult her as to her future husband." See page 284, section 4, paragraph 3.

Though this is a book exclusively devoted to a statement of the Shafi law, it is difficult to say to what extent it can be relied on in deciding questions arising under the Shafi law. Though the translator says that "the book occupies the first rank for deciding legal cases," he later on modifies the effect of his statement by saying, "It is not always possible to decide a question by reference to Minhaj alone and in such a case a Muhammadan jurist . . . has recourse principally to the Tohfa and the Nihaya, which Dr. Th. Juynoboll in his Handbuch Des Islamichen Gesetzes, 1910," calls "the two standard works in the whole modern Fikh literature of the school of Shafi." We have not been able to refer to these two books. Even according to Minhaj-at-Talibin it is always commendable to consult a woman as to her future husband; and we have already noticed that Mr. Wilson also says that the woman's "consent is nevertheless desirable."

Against this authority the respondent relies mainly on the statements of the Shafi law contained in Mr. Amir Ali's Muhammadan law, Third Edition, Vol. II, at page 350, and Mr. Tyabji's Text-book of Muhammadan law. In the former book it is stated

> "To recapitulate. Under the Maliki and Shafi law, the marriage of an adult girl is not valid unless her consent is obtained to it, but such consent must be given through a legally authorized *wali*, who would act as her representative. Under the Hanafi and Shiah law, the woman can consent to her own marriage either with or without a wali."

Speaking of the competence of a female to enter into a contract of marriage, Mr. Tyabji states in section 17-B of his "Principles of Muhammadan law" that

> "(*a*) According to the Hanafi law she becomes competent when, being of sound mind, she attains puberty. (*b*) According

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to the Shafi and Maliki law, a thayyaba is competent so to contract but not a woman who is a virgin";

and after thus dealing with the capacity of parties to enter into a contract of marriage, the law with regard to the consent of parties is thus stated:

"(1) The consent to the marriage of a person competent, under section 17-B above, to enter into a contract of marriage, must be expressed whether by himself or his duly authorized agent or proxy. (2) The consent to the marriage of a person not competent to enter into a contract of marriage under section 17-B must, subject to the said section, be expressed by his or her guardian for marriage or by the duly authorized agent or proxy of such guardian." (See paragraph 20, page 97.)

It would seem that, in the opinion of this writer, though an adult virgin cannot, owing to her incapacity to enter into a contract, express her consent except through her guardian for marriage or by the duly authorized agent or proxy of such a guardian, nevertheless, her consent is necessary to render the contract of marriage valid. This is what we can gather impliedly, by reading the two paragraphs 17 and 29 together. Nowhere does the learned author say explicitly that a Shafi woman can be married with or without her consent by her father if she is an adult virgin; but his opinion seems to be, as I have indicated above, in favour of the view that the consent of an adult virgin is necessary to render her marriage valid under the Shafi law.

It will thus be obvious that the authorities on the question are very much divided and except Mr. Amir Ali and Mr. Tyabji—the former expressly and the latter impliedly—all the other text-writers that we have thus far examined point out that the marriage of an adult virgin under the Shafi law will not be invalidated by want of her consent, whereas, under the Hanafi law, the woman's consent is necessary to render the marriage valid. The opinion of Sir Abdur Rahim has been

referred to by both the appellant and the respondent. In page 330 of his book on "Muhammadan Jurisprudence" the learned writer stated his view as follows:—

"According to the Hanafis, every person who is not a minor, whether male or female, maiden or Thayyaba (that is, a girl who has had sexual intercourse), is competent to contract marriage and cannot be given in marriage without his or her consent whether by the father or any other relative. The Shafis and the Malikis agree with the Hanafis so far as boys and Thayyabas who have attained majority are concerned; the former, however, hold that a minor Thayyaba is competent to contract marriage and a maiden, even if she has attained majority, cannot marry without the consent of the guardian, while the Hanafis in each of these two cases hold the contrary view. Thus with the Hanafis, so far as the females are concerned, minority is the test whether the intervention of a guardian is necessary or not and with the Shafis the test is whether a girl is a maiden or Thayyaba. The difference between the two schools on this point, though not perhaps of much practical significance, involves a question of principle. The Hanafis allege that the Shafis' refusal to acknowledge the right of a maiden of full age to contract marriage of her own will amounts to a breach of a cardinal principle of Muhammadan law, namely, that the legal status of a grown-up female is as complete as that of a male."

Having regard to the marginal heading of the paragraph, "The capacity to enter into a marriage contract," it is possible to argue, as contended for by the respondent, that, in the opinion of this learned writer also, under the Shafi law the consent of the woman who is an adult virgin is as essential as under the Hanafi law to validate her marriage though she is not competent to express that consent except through a Wali.

It seems to me that, having regard to the nature of the marriage relationship as understood in Muhammadan law, the difference between the two schools, the Hanafi and the Shafi, on the point under consideration, is not so very fundamental as is made to appear from the

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text-books. Marriage in Muhammadan law is purely a civil contract, and if so, the consent must be considered a necessary element to give validity to the marriage. In the opening paragraph of the judgment in *Asgur Ali Chowdhry* v. *Muhubbut Ali*(1) which was a case in which the husband of a Muhammadan woman sued his father-in-law for damages when the marriage was found invalid, MARKBY, J., says :

"After the marriage the plaintiff instituted a suit for the purpose of compelling the girl to live with him but failed by reason of it being established that the girl was of full age and that she has not given her consent."

We do not know what law governed the parties and there is no further reference in the judgment to this question of consent as the case dealt with quite a different matter. After stating,

"No contract can be said to be complete unless the contracting parties understand its nature and mutually consent to it"

Mr. Amir Ali points out the distinction between the Hanafi and the Shafi law thus:

"Among the Shafis and the Malikis, although the consent of the adult virgin woman is as essential as among the Hanafis and the Shiahs to the validity of a contract of marriage entered into on her behalf, she cannot contract herself in marriage without the intervention of a Wali. Among the Shafis, a woman cannot personally consent to the marriage. The presence of the Wali or guardian is essentially necessary to give validity to the contract. The Wali's intervention is required by the Shafis and the Malikis to supplement the presumed incapacity of the woman to understand the nature of the contract, to settle the terms and other matters of similar import, and to guard the girl from being victimized by an unscrupulous adventurer or from marrying a person morally or socially unfitted for her".

It appears to me therefore that the consent of an adult virgin even among the Shafi sect is essential for the validity of a marriage and that the only difference

(1) (1874) 22 W.R., 403.

between the Hanafi law and the Shafi law on this point is that under the Shafi law the consent must be expressed through a Wali and not direct. Even according to the "Minhaj", which has been strongly relied upon by the appellant as being a book upon Shafi law, it is always commendable to consult the woman as to her future husband. The desirability of adopting this course is suggested by Wilson also. Having regard to the conception of marriage as a contract in the Muhammadan law, I think Mr. Amir Ali's explanation of the difference between the Hanafi and the Shafi law should be accepted as correct; and therefore it follows that, in this case, the marriage of the plaintiff with the defendant should be held invalid as her father had not secured her consent for it. This view is certainly more equitable and more suitable to modern times.

I would therefore dismiss this Second Appeal with costs.

N.R.