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with the orders passed by the Collector or rectify mistakes committed by him. Indeed, rule 12 of chapter IV of the General Rules for the subordinate courts clearly provides that a civil court has no power to interfere with the procedure of a Collector in the execution of a decree which has been transferred to him under section 68.

We cannot, therefore, under the guise of calling for the record from the Collectorate, nullify the proceedings taken there. Nor does it appear that the calling for of the record would put an end to all that has been done previously.

Our view finds support from the decisions of this Court in the cases of *Shahzad Singh* v. *Hanuman Rai* (1) and *Girdhari Lal* v. *Jhaman Lal* (2).

In this view of the matter we must dismiss the appeal, which is dismissed accordingly.

Appeal dismissed.

Before Mr. Justice Mukerji and Mr. Justice Weir.

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April, 19.

NABI-UN-NISSA BIBI (DEFENDANT) *v.* LIAQAT ALI AND ANOTHER (PLAINTIFFS) AND KHAIR-UN-NISSA BIBI AND OTHERS (DEFENDANTS.)*

Muhammadan law—Waqf—Waqf *not invalid for the sole reason that the first* mutwalli *is a minor.*

A *waqf*, otherwise valid, will not fail for the sole reason that the *mutwalli* appointed by the *waqif* is a minor. *Piran* v. *Abdool Karim* (3), *Muhammad Nasim* v. *Muhammad Ahmad* (4), *Khatun Begam* v. *Ejaz Ahmad* (5), and *Raza* v. *Ali* (6), referred to..

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*Second Appeal No. 1140 of 1925, from a decree of A. G. P. Pullan, District Judge of Moradabad, dated the 30th of April, 1925, reversing a decree of Girish Prasad, Third Subordinate Judge of Moradabad, dated the 29th of August, 1924.

(1) (1924) I.L.R., 46 All., 562.
(2) (1926) 25 A.L.J., 197.
(3) (1891) I.L.R., 19 Calc., 203,
(4) (1914) 27 Indian Cases, 389.
(5) (1916) 15 A.L.J., 132.
(6) (1916) I.L.R., 40 Mad., 941.

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NABI-UN-NISSA BIBI v. LIAQAT ALI,

THE facts of this case were as follows :—One Irfan Ali purported to create a *waqf* of his property by a deed dated the 11th of June, 1918. This *waqf* was meant mostly for the benefit of his wives and children. He directed that one-thirtieth part of the income of his property should go for the benefit of two schools. On the death of Irfan Ali, the elder of his two widows sued the remaining heirs of her late husband for her dower. The result was a compromise, by which certain portions of the property left by Irfan Ali were given to her in satisfaction of a portion of her dower, and she was permitted to proceed, by way of execution, against other portions of the *waqf* property. Thereupon, the managers of the two institutions which were to benefit, in part, by the *waqf*, instituted this suit to obtain a declaration that the *waqf* was a valid and good one and was binding on all concerned.

The suit was contested by the elder widow alone. She pleaded, *inter alia*, that the *waqf* was bad in law inasmuch as the *mutwalli* appointed by the *waqif* was a minor, namely his son Muzaffar Ali, and that the *waqf* was never acted upon.

The court of first instance came to the conclusion that the *waqf* was invalid and was never acted upon, and dismissed the suit. On appeal by the plaintiffs, the District Judge came to the conclusion that the *waqf* was a genuine one, that it had been acted upon, and that it was not void because the first *mutwalli* appointed was a minor; and the suit was, accordingly, decreed. The defendant appealed to the High Court.

Mr. *B. E. O'Conor*, Maulvi *Iqbal Ahmad* and Maulvi *Mukhtar Ahmad*, for the appellant.

Mr. *A. M. Khwaja* and Dr. *Kailas Nath Katju*, for the respondents.

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THE judgement of the Court (MUKERJI and WEIR, JJ.), after setting forth the facts, thus continued :—

In this Court two points have been argued. The first point is that the *mutwalli* appointed being a minor, the *waqf* was invalid in law. The second point argued was that, in any case, the learned judges of the lower courts should have addressed themselves to the question whether the *waqf* was not calculated and meant to defeat the just rights of the appellant for her dower.

On the first question. We have not been referred to any clear authority where it may have been held that if a *waqif* appointed a minor as the first *mutwalli*, the *waqf* should become void. The high authority of Mr. Ameer Ali, to be found in his book, supports the conclusion arrived at by the court below. The relevant portions of his book (4th Edition, Volume 1) have been quoted by the learned District Judge and will be found at pages 446 and 447. At the top of page 446 there occurs the following sentence :—

"If the *waqif* appoints a minor as *mutwalli* and no adult is associated with him, the *Qazi* shall appoint some person to do the work until the minor attains majority. If there is an adult associated with the minor, the *Qazi* may appoint some person to represent the minor and act jointly with the *co-mutwalli*, or may empower the adult *mutwalli* to act for the minor."

This is a quotation from Radd-ul-Mukhtar, Volume 3, pages 593—596. Again, at page 447, the learned author quotes from Surrat-ul-Fatawa as follows :—

"If the *towliat* has been entrusted by the *waqif* to a boy, his *towliat* will remain in abeyance (or ineffective) until he attains majority when the trust will be made over to him."

These quotations clearly show that a *waqf* cannot fail simply because a *mutwalli* happens to be a minor at the time. Indeed the authorities go so far as to indicate that a *waqf* shall not fail even if the *mutwalli*

appointed be absent from the place. At page 447 an authority is quoted which lays down as follows :—

"If the *waqif* appoints as *mutwalli* a person who is absent, the *Qazi* has the power of nominating in his place another for the time being, and when the *mutwalli* appointed by the *waqif* arrives, the trust will revert to him."

There can be no doubt that the Muhammadan jurists were fully alive to the importance of the doctrine that a *waqf* or trust should never fail for want of a trustee. They have fully given effect to this doctrine in their writings.

The learned counsel for the appellant has quoted four cases in support of his contention that if the first *mutwalli* appointed by the *waqif* should happen to be a minor the *waqf* should be regarded as invalid. The first case is *Piran* v. *Abdool Karim* (1). That is a case where the person who was appointed *mutwalli* was not only to be *mutwalli* but was also to be a spiritual head of an institution. In other words, he was to be a *sajjada-nashin* as well as a *mutwalli*. Mr. Justice AMEER ALI pointed out that a *sajjada-nashin* was not only to manage a property but he was to perform the services of a spiritual preceptor, a "pir" or a "guru". In the circumstances, it was found that the appointment of a minor was not proper. We do not think that the case lends support to the view contended for.

The next case is that of *Muhammad Nasim* v. *Muhammad Ahmad* (2). The question that arose in this case was whether the defendant was rightly removed by the District Judge from his position of a *mutwalli* and whether the District Judge was right in appointing a major in his place. On appeal the Judicial Commissioners of Oudh upheld the appointment and laid down that a person who was not *sui juris* and who required a guardian to look after his property could

(1) (1891) I. L. R., 19 Calc., 203. (2) (1914) 27 Indian Cases, 389.

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not be entrusted with the management of a trust. This was laid down as a matter of general law and not as a matter of Muhammadan law. The next case, *Khatun Begam* v. *Ejaz Ahmad* (1), can hardly be said to be in point. The head-note reads as follows:—

"When the office of a *mutwalli* devolves on a minor by virtue of a provision in the trust deed, the appointment will remain in abeyance until he attains majority, but it is the duty of the civil court, as representing the authority of the state, formerly administered by the *Qazi*, to appoint some person to perform the duties of the office until the minor comes of age."

This case does not directly deal with the point before us, namely, whether initially a *mutwalli* may be appointed to manage a *waqf* property, the *mutwalli* being a minor.

The last case cited by the learned counsel is *Raza* v. *Ali* (2). In this case, in a suit for administration of a trust a scheme was framed by the High Court. According to that scheme, there was a managing committee of five members, including the president and three *mutwallis*, and it was arranged that vacancies in the committee were to be filled by election. In filling up one of the vacancies a minor was appointed a *mutwalli*. This was not approved of by the High Court in the case quoted. The reason is perfectly clear. The appointment was under a scheme and not under the Muhammadan law. In framing the scheme the High Court never considered that a minor might fill one of the appointments.

On an examination of the authorities, therefore, there is no ground for holding that a *waqf* must fail because the first *mutwalli* is a minor. It will be remembered that in this case the *waqif* took the precaution of appointing a guardian of the minor *mutwalli*

(1) (1916) 15 A.L.J., 132. (2) (1916) I.L.R., 40 Mad., 941.

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selected by him. For all practical purposes, therefore, there was a person duly qualified who could look after the trust property. We hold that the *waqf* is good.

The next question is whether the *waqf* is bad as being intended and calculated to defeat the just claims of the appellant. Although the point was specifically taken in the written statement, it does not appear that it was pressed in either of the courts below . ****In the grounds of appeal taken in this Court the point has not been specifically taken.* * * * In the circumstances, we do not feel justified in remanding the suit for deciding a fresh issue. The result of our remanding an issue like that would probably be that a mass of doubtful evidence would be put forward on behalf of the appellant—evidence which was never put forward in the earlier part of the case, although a specific plea had been taken.

The result is that the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Weir.

CHANDRIKA LAL AND OTHERS (DEFENDANTS) *v.* SAMI NATH AND ANOTHER (PLAINTIFFS.)*

1928
April, 20.

Civil Procedure Code, order XXIII, rule 1—*Withdrawal of suit with liberty to bring fresh suit*—"*Formal defect*" —*Revision.*

Where a court allowed a plaintiff to withdraw his suit with liberty to bring a fresh one upon the ground that he had not given formal proof of a document which was essential to his success, it was *held* that the court was within its jurisdiction, and that the High Court should not interfere.

*Civil Revision No. 64 of 1928.