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fully appreciated what the attestation officer had in fact decided upon the evidence before him. It is true that the attestation officer had ordered that the tanks should be entered in the name of Chandrai but had his intention been carried out they would only have been entered in the name of Chandrai not as part of his *raiyati* holding but as held by him under the lease granted in 1908. In those circumstances it seems to me that the learned Judicial Commissioner was quite justified in considering from the verbal evidence in the case, coupled with the evidence of the attestation proceedings, that the plaintiffs' case had been made out and that the record-of-rights was wrong. I also think that he was perfectly justified in looking at the draft record which, as he pointed out, entirely corroborated the plaintiffs' case. For these reasons I think that this appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

KANIZ ZOHRA

v.

SAIYID MUZTABA HUSAIN.*

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June, 19.

Muhammadan Law—Endowments –waqf—Mutwalli, *successor to, where office appertains to* sajjadanashin—*woman or minor, right of, to succeed.*

Where the *mutwalliship* of endowed property goes with the office of *sajjadanashin* a woman cannot succeed to the *mutwallisship* either solely or jointly with another, inasmuch as the *sajjadanashini* is a priestly office involving the performance of spiritual and religious duties which, according to the Muhammadan Law, cannot be performed by a woman.

* Second Appeal No. 859 of 1921, from a decision of N. F. Peck, Esq., District Judge of Bhagalpur, dated the 7th February, 1921, affirming a decision of Babu Amar Nath Chattarji, Subordinate Judge of Bhagalpur dated the 20th February, 1920.

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This rule is not confined to cases in which the *sajjada-nashini* requires that spiritual instruction should be given by a teacher to his disciples.

Sujjada Shah Muhammad Usuf v. *Shaw Habit*(1), *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff*(2) and *Munnavaru Begam Sahibu* v. *Mir Mahapalli Sahib*(3), referred to.

Where the succession to the office of *mutwalli* is governed by inheritance a minor is entitled to succeed, a substitute being appointed to carry out his duties during his minority, but where the succession is not by inheritance but by appointment or election, a minor cannot be appointed

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Sultan Ahmed (with him *W. H. Akbari* and *Sultan-ud-din Hussain*), for the appellant.

Hasan Imam (with him *Muhammad Tahir*), for the respondents.

DAWSON MILLER, C. J.—This is an appeal on behalf of the plaintiff from a decision of the District Judge of Bhagalpur affirming a decision of the Subordinate Judge and dismissing the suit.

Bibi Kaniz Zohra, the plaintiff in the suit, is the daughter of the late Saiyed Ijteba Husain who died in the year 1913 leaving as his heirs his widow and the plaintiff and a younger daughter. During his life-time the plaintiff's father and uncle were the joint *mutwallis* of certain *wakf* property dedicated to the maintenance of a mosque, an *imambara* and a *darga*, or shrine, of a saint situated in the town of Bhagalpur. At the time of her father's death the plaintiff was about eight years old. She claims that she succeeded by inheritance to a half share in the management of the *wakf* property or, in the alternative, that she is entitled to share jointly in the management with her uncle, Saiyid Muztaba Husain, the first defendant in

(1) (1919) 53 Ind. Cas. 677. (2) (1878-81) I. L. R. 3 Mad. 95.
(3) (1918) I. L. R. 41 Mad. 1033.

the suit. She further claimed that if she did not succeed by inheritance she was in fact appointed by her relations and the assembled congregation after her father's death. She instituted the present suit in the year 1919 whilst still a minor suing through her mother as next friend to establish her right to a share in the *mutwalliship* of the endowed property. The defendants in the suit are her uncle and her younger sister. The former alone filed a written statement and contested the plaintiff's claim.

The endowment is an old one. It is proved to have been in existence at the beginning of the last century and its origin is probably of much earlier date. There was at one time a *khanqah* or monastery attached to it and it is found by both the trial Court and the first appellate Court that there has all along been attached to the institution a *sajjadanashini* and that this office still exists. It is further found that the management or *mutwalliship* of the trust property goes with the office of *sajjadanashin*. The qualifications of the two offices are different. The *sajjadanashini* is a priestly office involving the performance of spiritual and religious duties which, it is admitted, cannot according to Muhammadan law be performed by a woman. The functions of a *mutwalli* are purely secular involving the management of the trust property and a woman is not disqualified by reason of her sex from performing the duties of a *mutwalli* as such. The devolution of the office of *mutwalli* depends in the first instance upon the provisions of the *wakfnamah*, or trust deed, but in the present case the *wakfnamah* has not been produced in evidence and probably no longer exists. In its absence the order of succession must be determined according to the usage proved to have prevailed with regard to the endowment in question. It is found that the usual course for appointing the *mutwalli* was that after the death of an incumbent a relation of the late *mutwalli* was chosen by the other relations and the well-wishers of the *wakf* after consultation with

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respectable neighbours and gentlemen of the neighbourhood and also, if necessary, by the advice of the *sajjadanashins* or *mutwallis* of other *wakf* properties, and that in any particular case either the whole of this procedure or a part of it only might have been carried out; that these were the usual guiding principles in choosing the successor. It would appear, therefore, that the devolution was not strictly according to the rules of heredity but was by election out of a limited class of the office and could only be held by one qualified to act as *sajjadanashin* The plaintiff claimed to have been elected by the relations after consultation in the manner described above.

The Subordinate Judge, before whom the case came for trial, was of opinion that the plaintiff had failed to make out that she had been elected.

The District Judge on appeal took a different view upon this part of the case. He was of opinion that the plaintiff had sufficiently made out her case that she was in fact elected as co-*mutwalli* with her uncle Muztaba Husain, but that as she was not qualified to perform the office of *sajjadanashin* her election was not valid. It was the plaintiff's case that in the institution with which we are concerned the office of *sajjadanashin* had become extinct and had ceased to exist many years before the time of her grandfather who was the *mutwalli* of the *wakf* property, and the main contention in both the lower Courts centred round this issue. The Judge of the trial Court in his judgment says:

"There is no dispute that the plaintiff cannot be a *sajjadanashin* but her case is that this office has become extinct since the time of Irtiza Hossain and he with his successors has been in possession in the capacity of a *mutwalli* only."

The learned District Judge on appeal also expressed the matter thus:

"It is a common ground of both appellant and respondent that as Kaniz Zohra is a woman she cannot exercise the functions of a *sajjadanashin*. If, therefore, the *sajjadanashinship* has not become extinct then appellant admittedly has no case. I will therefore deal first with this point and my finding upon it will decide the appeal."

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Both Courts found that in fact the office of *sajjadanashin* had not become extinct and as a woman was admittedly disqualified from performing the functions of that office the plaintiff's suit must fail.

In appeal before us it was argued that the real issue had not been properly understood by the learned District Judge and that although the office of *sajjadanashin* had not become entirely extinct the spiritual duties as distinct from the performance of religious ceremonies no longer existed and that the learned District Judge had not dealt with this aspect of the case. It was argued that the spiritual duties of a *sajjadanashin* were the only offices which the *mutwalli* as such was not competent to perform and that the *mutwalli* or indeed any Muhammadan might perform the religious duties that is to say leading the prayers, reading from the *Koran* and performing the *urs* and *fateha* and carrying out the other duties required by the Muhammadan ritual. The learned Counsel for the appellant referred to the evidence of the defendant himself in which he admitted that there was no system of *piri-muridi* in the family. The *pir* is the spiritual instructor and the *murid* is the disciple or pupil and the system referred to is that of giving spiritual instruction to the disciples. He contended that the origin of the rule that no woman could act as *sajjadanashin* was based upon the fact that by Muhammadan law a woman may not allow her skin to be touched by a man outside the circle of her immediate blood-relations whereas the spiritual instruction known as *piri-muridi* required that the pupils or disciples should on some occasions kiss the hand of the *sajjadanashin*. No authority for this limited disqualification was cited but a passage in Macnaghten's *Principles and Precedents of Muhammadan Law*, second edition, was quoted. The passage is contained in a note at page 343 and reads thus:

"The meaning of the term *Sujjade Nisheen*, which is synonymous with *Guddee Nisheen*, is thus given by Meninski: *Considens in tapeta sacras preces peracturas aliisque prociturus antistes.* This officer is

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frequently confounded with the *Mootuwulee*, that is, the trustee or superintendent of the endowment, although they are quite distinct; the one having charge of the spiritual, the other of the temporal, affairs of the endowment. The office of trustee may be held by a woman, and the duties may be discharged by proxy; whereas the office of superior requires peculiar personal qualifications."

There is a further passage on page 332 of the same volume which was also relied upon. It is as follows:

"Females are not competent to assume the office of superior of an endowment; and such an act is at variance with the usages of the country because it is the duty of the superior to instruct and guide his disciples, to teach his scholars, and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded."

The learned Counsel argues from this that the only obstacle in the way of a woman acting as *sajjadanashin* is that the duties of the office require the incumbent to keep company in private and in public with his disciples and that as there were no disciples in the present case the disqualification did not exist. A passage was also relied upon from the judgment of Abdur Rahim, J., in the case of *Sujjada Shah Muhammad Usuf* v. *Shaw Habit* (1) in which the question was whether the Court had power to remove a *sajjadanashin* and appoint some one else in the office. In that case the learned Judge speaking of the duties which were actually performed by the incumbent in the particular case before him says, at page 680, of the report: "In short the duties ordinarily attached to the office of a *sajjadanashin* did not appertain to the position which the defendant and his ancestors have been occupying. All that they had to do was to conduct the annual *Urs* and to offer *Fatehas* at tombs, and none of these could be said to be functions incapable of being performed by other Muhammadans. As regards maintenance of the daily service at the mosque or of the especial services in the mosque on Fridays or on the occasion of the *Ramzan*, the *Eedul-Fitar* and the *Bakr-Id*, the work was capable of being attended to by any *mutwalli* of a mosque." It cannot be supposed, however, that in delivering this opinion the

(1) (1919) 53 Ind. Cas. 677.

learned Judge had in mind the question of whether a woman could perform the duties to which he was referring. That the duties referred could be performed by a *mutwalli* not specially qualified as a *sajjadanashin* may be conceded, but the opinion of Abdur Rahim, J., above quoted does not touch upon the question of sex disqualification. No doubt the origin of the rule that a woman was not qualified to perform the functions of a *sajjadanashin* is based upon the consideration that it is unseemly for a Muhammadan lady to perform duties which bring her in close and intimate association with the general public of the opposite sex but there seems to be no reason why the disqualification should be confined only to those cases in which the office requires that spiritual instruction should be given by a teacher to his disciples. Whatever may have been the exact nature of the objections upon which the disqualification of a woman to act as *sajjadanashin* was originally based it would appear to have become a settled rule at the present day that no woman is qualified to become a *sajjadanashin* whose office involves the performance of religious and spiritual duties, not only those of *piri-muridi* but those of reading the *Fateha* and offering prayers and incense in a place of public worship. In *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* (1) it was held that a woman is not competent to perform the duties of *Mujavar* of a *darga* which are not of a secular nature. In that case the lands had been dedicated for the reading of the *Fateha*, for the supply of water, lights, flowers, and other things requisite for the services to be performed at a *darga* and for the support of those by whom the services should be performed. In that case the learned Judges stated :—

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"It appears from the evidence that the office of *Mujavar* entails the discharge of duties of a spiritual character, such as reading the *Fateha*, offering prayers and incense, *etc.*, which could not conveniently be

(1) (1878-81) I. L. R. 3 Mad. 95.

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performed by a woman. There is no satisfactory evidence that the office has ever been held by a woman, except in one instance, and that was at a different place, and in that case it is admitted there were in the family in which the office was hereditary no male members by whom its functions could be discharged.

"The question as to the competency of a female to hold the office was in reference to the same endowment considered and determined by this Court in the negative in *Hussain Bibi* v. *Hussain Sheriff* (1), where a claim was advanced by the widow of a deceased *Mujavar* to be declared entitled to discharge in her turn the duties of the office and to obtain possession of a share of the endowed property. That decision notices the distinction which exists between a trusteeship for secular purposes, which can be held by a woman, and an office entailing religious duties, for which a woman is not eligible, and rests on the authority of Macnaghten (Muhammadan Law, 343, Note, and the cases cited in the appendix to that work)."

On referring to Mr. Macnaghten's note already quoted it will be found that he makes no difference between spiritual and religious duties, the antithesis being between spiritual and temporal duties, the latter being capable of performance by a woman and the former not. The authority of other text writers also seems opposed to the view that a woman can perform the duties of a *sajjadanashin*. Mr. Syed Ameer Ali, a text writer of repute, states the matter thus :

> "The office of *mutwalli* is an office of personal trust, and a person who cannot discharge the duties of the trust personally, nor be responsible for their due discharge, cannot appoint a deputy. But where the *mutwalli* has to perform religious duties or spiritual functions in connection with the *wakf*, which, as regards men, can only be performed by a man, a woman cannot be appointed to the office. For example, if the *mutwalli* is also the superior of a religious establishment, and, as such, has to officiate on occasions of religious festivals, a woman is precluded by her sex from holding the *towliat*."

In support of this opinion he relies amongst other authorities upon the case already referred to of

(1) (1867) 4 Mad. H. C. R. 23; I. D. (N. S.) H. C. R. 1 Mad. 973.

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Mujavar Ibrambibi v. *Mujavar Hussain Sheriff* (1) (Muhammadan Law, 4th ed., Vol. I, page 443). Sir Roland Wilson in his treatise on Anglo-Muhammadan Law, 5th ed., page 357, paragraph 331, states the law thus:

"A female may be the *mutwalli* of an endowment and so may a non-Muhammadan; but if the endowment be for the purpose of divine worship, neither females nor non-Muhammadans are competent to hold the office of *sajjadanashin*, or spiritual superior."

Mr. P. R. Ganapathi Iyer in his book on *Hindu and Muhammadan Endowments*, 2nd. ed., page 435, after pointing out that the office of *sajjadanashin* and *mutwalli* are separate and distinct, says:

"The *sajjadanashin* has charge of the spiritual affairs of the endowment. But the *mutwalli* has charge of its temporal affairs. One consequence of this is that a waman may be a *mutwalli* but cannot be a *sajjadanashin*. According to the Muhammadan Law, the duties of *mutwalli* who has not to perform religious duties or spiritual functions may be discharged by proxy. But the office of *sajjadanashin* requires peculiar personal qualifications and the duties attached to that office cannot be discharged by proxy. A woman, therefore, cannot be appointed to such office............................It may happen that in some cases the office of *Mutwalli* and *Sajjada* are combined in the same person. Then also a woman cannot be appointed."

It is found in the present case that the *mutwallis-ship* appertains to the office of *sajjadanashin* and as that office requires certain personal qualifications which cannot be performed by proxy the question does not arise in the present case whether a female could be appointed *mutwalli* delegating the performance of religious offices to a proxy. This question was considered in the case of *Munnavaru Begam Sahibu* v. *Mir Mahapalli Sahib* (2) where it was held that a religious office can be held by a woman under the Muhammadan law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy In that case Abdur Rahim, J. remarked: "The rule prohibiting women from being appointed to such offices is not confined to the office of *sajjadanashin* but there may be other offices which she

(1) (1878-81) I. L. R. 3 Mad. 95 (2) (1878-81) I. L. R. 41 Mad. 1033.

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may not be able to perform, for instance, that of an *Imam*, in a mosque where she would have to lead the congregation." The learned Judge was of opinion that the prohibition did not arise from any absolute injunction of Muhammadan religion or law but from local usages and customs. In the present case no local usage or custom has been proved which would entitle a woman to act as *sajjadanashin* nor was any instance given in which a woman had occupied that office in the mosque in question. In my opinion the plaintiff is disqualified by reason of her sex from the right to act as *mutwalli* of the property in suit by reason of the fact that the office involves the performance of the duties of a *sajjadanashin*.

Moreover there is, I think, another fatal objection to the plaintiff's claim. Although a minor might succeed by inheritance to the office of *mutwalli*, a substitute being appointed to carry out the duties during his minority, it seems to be settled law that where the succession is not by inheritance but by appointment or selection a minor cannot be appointed. Mr. Syed Ameer Ali, *Muhammadan Law*, Vol. I, page 445, says:

"In the absence of any provision in the trust-deed as to the mod of succession, or of any evidence of usage, the *mutwalli* may on his death-bed, nominate his successor, and such nomination will be valid without any judicial order. But in order that the nomination may be effective it is necessary that the person so appointed should be adult and possessed of understanding. All the authorities are agreed that a minor cannot lawfully be appointed a *mutwalli*. The *Fatawai Alamgiri* lays down the principles thus:—

'And it is a condition to the validity (of the appointment of a *mutwalli*) that he should be adult and possessed of understanding and thus it is stated in the Bhar-ur-Raik.'

So also in the *Radd-ul-Muhtar*; 'the conditions necessary to the validity (of the appointment) are puberty (*bulugh*) and understanding (*aakl*).'

The learned author further points out that where the office of *mutwalli* devolves upon a minor by virtue of the provisions of a trust-deed in such a case the appointment will remain in abeyance until majority is attained. So also when the *towliat* is hereditary in

a family and a minor succeeds, the *Kazi* shall not remove him but shall appoint another to discharge the duties of the office during his minority. Mr. Tyabji's *Principles of Muhammadan Law*, page 410, also states clearly:

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"Where an infant or person of unsound mind is purported to be appointed as a *mutawalli* his appointment is void. Where the office of *mutawalli* devolves upon a person who is a minor, the Court may appoint another *mutawalli* to act in his place during his minority."

In the present case the plaintiff's right is based not upon succession but upon appointment and her minority appears to be fatal to the claim. In my opinion this appeal should be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Mullick and Bucknill, J.J.

RADHA KISHUN LAL

v.

KASHI LAL.*

1923.

June, 25.

Execution sale—suit to set aside, maintainability of—decree for possession against auction purchaser and judgment-debtor, effect of—Limitation Act 1908 (Act IX of 1908), Schedule I, Article 181.

Order XXI of the Code of Civil Procedure, 1908, is not exhaustive of the procedure for setting aside an execution sale.

Where the decree-holder purchased property in execution of his decree, and subsequently a third person sued the auction-purchaser and the judgment-debtor for a declaration of his title to the property and for possession, and obtained a decree, *held*, that the effect of the decree in favour of the

*Appeal from Appellate Order No. 31 of 1923, from an order of J. F. W. James, Esq., I.C.S., District Judge of Patna, dated the 8th February, 1923, confirming an order of Babu Krishna Sahay, Subordinate Judge of Patna, dated the 1st April, 1922.