

**REVISIONAL CIVIL.***Before Khaja Mohamad Noor and Dhavle, JJ.*

BIBI ZOHRA

v.

BIBI HABIBUNNESSA.\*

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December,  
22, 23.February,  
15.

*Muhammadian Law—Wakf—Kazi—District Judge as Kazi, limits to the powers of—appointment of mutawalli, when can be made.*

Under the Muhammadian law the kazi has power to appoint a Mutawalli when a vacancy occurs and there is none to take office under the terms of a wakf or when the mutawalliship devolves under the deed of wakf upon a minor.

The District Judge as a principal Court of Original Civil Jurisdiction has, by virtue of his power as a kazi, a general power of appointing Mutawallis in a summary proceeding, but he has no power in such a proceeding to appoint another mutawalli in place of one who is in office. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under section 92 of the Code of Civil Procedure, 1908.

The appointment of a mutawalli by a District Judge in a summary proceeding not being appealable, such appointment should be made in cases of emergency and, by the very nature of it, must be subject to the result of any suit which may be instituted by any of the parties who claim adversely to one another, or any suit which may be instituted under section 92 of the Code of Civil Procedure or under the provisions of the Religious Endowments Act, 1863.

The District Judge has no jurisdiction in a summary proceeding to decide that under a wakf deed a certain person is to be the mutawalli on the death of the last incumbent.

*Halima Khatun, In re(1), Atimannessa Bibi v. Abdul Sobhan(2), Nimai Chand Addya v. Golam Hossein(3), Shama*

\*Civil Revision no. 293 of 1938, against an order of R. Chatterji, Esq., District Judge, Darbhanga, dated the 24th August, 1938.

(1) (1910) I. L. R. 37 Cal. 870.

(2) (1915) I. L. R. 43 Cal. 467.

(3) (1909) I. L. R. 37 Cal. 179.

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*Churn Roy v. Abdul Kabeer*(1), *Abdul Alim Abed v. Abir Jan Bibi*(2), *Syed Diljan Ali v. Bibi Akhtari Begum*(3), *Fakrunessa Begum v. District Judge of 24-Parganas*(4), and *Mia Mohammad Yusuf v. Mia Mohammad Ayub*(5), reviewed.

The provisions of the Religious Endowments Act, 1863, apply not only to those endowments which were in existence at the time the Act was passed and had been taken under its control by the Board of Revenue under Regulation XIX of 1810, but also to later institutions which come within its purview.

*Syed Diljan Ali v. Bibi Akhtari Begum*(3), *Ram Prasad Gupta v. Ramkishun Prasad*(6), *Syed Husain v. Syed Hamid*(7), and *Badar Rahim v. Badsha Mia*(8), followed.

Application in revision by one of the applicants for mutawalliship.

The facts of the case material to this report are set out in the judgment of the Court.

*Hasan Jan* and *Azizullah*, for the petitioners.

*Sir Sultan Ahmed* (with him *Murari Prasad* and *Syed Ali Khan*), for the opposite party.

KHAJA MOHAMAD NOOR AND DHAVLE, JJ.—This is an application against an order of the District Judge of Darbhanga directing that a Deputy Mutawalli of a wakf be appointed in the manner indicated in the order. The facts are these.

One Sheikh Shukrullah, along with one of his wives, Zaibunissa, made a wakf of certain properties for religious and charitable purposes. By the wakf deed he appointed himself to be the Mutawalli for his life; on his death his wife, Zaibunissa, if she was alive then, was to be the Mutawalli, and after her, Wajihuddin, a son of his from another wife Habibunissa, was to be the Mutawalli. In case Zaibunissa

(1) (1898) 3 Cal. W. N. 158.

(2) (1928) I. L. R. 55 Cal. 1284.

(3) (1925) I. L. R. 4 Pat. 741.

(4) (1920) I. L. R. 47 Cal. 592.

(5) (1938) 19 Pat. L. T. 934.

(6) (1932) I. L. R. 11 Pat. 594.

(7) (1930) A. I. R. (All.) 577.

(8) (1934) 33 Cal. W. N. 1056.

died during the life-time of Shukrullah, Wajihuddin was to be the Mutawalli if a major at the time of Shukrullah's death; but if he (Wajihuddin) be a minor at the time, then till he attained majority, Musammat Bibi Zohra, daughter of Sheikh Shukrullah from Zaibunissa, was to be the Mutawalli, but on his (Wajihuddin's) attaining majority he was to become the Mutawalli and the Mutawalliship of Bibi Zohra was to terminate. Wajihuddin was given power to nominate the Mutawalli after him from among the male members of the family of Shukrullah, and each successive Mutawalli thereafter was given a similar power. This was to continue as long as capable and honest male members of the family of Shukrullah were available. In case of extinction of the male descendants of Shukrullah, female members of his family who would be found capable were to be nominated Mutawalli in accordance with the aforesaid arrangement, and the power of nominating successors was given to them also.

Wajihuddin died during the life-time of Shukrullah, who continued to work as Mutawalli till his death in December, 1929. Thereupon Zaibunissa became the Mutawalli. Her right to the Mutawalliship was disputed by her co-widow Habibunissa who applied to be the Mutawalli, but the District Judge in a proceeding (Miscellaneous Case no. 30 of 1930) overruled the objection of Habibunissa. Zaibunissa continued as Mutawalli till her death.

It appears that towards the end of the year 1935 one Razid Ali applied to the District Judge of Darbhanga for action under Act XIV of 1920 or Act XLII of 1923 calling upon the Mutawalli, Musammat Zaibunissa, to submit accounts. Accounts were submitted on the 10th February, 1936, and they were being examined when Zaibunissa died on the 23rd May, 1938. Musammat Zohra, the daughter of Shukruallah and Zaibunissa, appeared in that proceeding and intimated to the Court that her mother

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was dead, and stated that according to the deed of wakf she had succeeded to the Mutawalliship of the wakf and had taken charge of it from the *mukhtar-am*, who had rendered all accounts to her. She asked that her name should be substituted in the proceeding in place of the deceased Musammat Zaibunissa. To this Musammat Habibunnissa, widow of Sheikh Shukrullah, objected. Her case was that according to the deed of wakf, Abdul Hai, son of Shukrullah from her, was entitled to be the Mutawalli after the death of Zaibunissa, and she prayed that the application of Bibi Zohra be rejected and Abdul Hai who was then a minor be recognised as Mutawalli. Having, on the death of Shukrullah, been appointed guardian of the properties of Abdul Hai, Habibunnissa applied to be appointed guardian of the wakf properties also.

By an order dated the 18th June, 1938, the District Judge held that on a true construction of the wakf deed Abdul Hai was the rightful Mutawalli, but that as he was a minor aged only about 12 years, some Deputy Mutawalli should be appointed to act in his place during his minority. He called upon both the parties to convene a meeting of the local public interested in the wakf and to place before him by the 30th June the opinion of the majority as to who was the most proper person to be appointed Deputy Mutawalli. On the 30th June Musammat Habibunnissa filed a petition stating that the meeting was held and by a resolution she was appointed the Deputy Mutawalli.

In the meantime Musammat Zohra filed the present application for revision in this Court. Further proceedings in the lower Court were stayed by an order of this Court dated the 29th June, 1938; and by another order dated the 29th July, 1938, the revision application was admitted for hearing and it was ordered that the District Judge, when he

appointed a Deputy Mutawalli, should appoint that person to be the Receiver of the wakf also so that the interest of the wakf property might be fully safeguarded. This order was to remain in force pending the hearing of the Civil Revision application. By an order dated the 24th August, 1938, the District Judge accordingly appointed Maulavi Halim Raza to be the Deputy Mutawalli and Receiver till the disposal of this revision application.

Mr. Hasan Jan, who has appeared on behalf of the petitioner, Bibi Zohra, has contended that the District Judge had no jurisdiction in a summary proceeding to appoint a Deputy Mutawalli, and the less so when there was a *de facto* Mutawalli in the person of Bibi Zohra to whom the estate was made over by Sheikh Abdul Haq, the *Mukhtar-am* of the late Mutawalli Bibi Zaibunissa, under instructions from the latter.

As regards the powers of a District Judge in such matters, it is beyond question that under the Muhammadan Law the kazi has power to appoint a Mutawalli when a vacancy occurs and there is none to take office under the terms of a wakf or when the Mutawalliship devolves under the deed of wakf upon a minor. But at present there is no officer with the designation of kazi, and the question is how far a District Judge of a British Court has the powers of a kazi.

The District Judge, as presiding in the principal Court of original civil jurisdiction (or the officer presiding in any other Court empowered in that behalf by the Local Government), has been given power under section 92 of the Civil Procedure Code, in a suit instituted under the provisions of that section, to remove a Mutawalli and appoint a new one. There is, similarly, with reference to those wakfs that come under the Religious Endowments Act of 1863, the power of the Civil Court, in a suit instituted with

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There is no other statutory provision vesting a District Judge or any other Court with the power of appointing or removing a Mutawalli; but there is a number of decisions to the effect that the District Judge as a principal Civil Court of original jurisdiction has, by virtue of his power as a kazi, a general power of appointing Mutawallis in a summary proceeding, which we must now examine. His powers under section 92, Civil Procedure Code and section 14 of the Religious Endowments Act of 1863 (as we have already indicated) can only be exercised in a properly framed suit, and the question before us has arisen not in a suit but on an application to be dealt with summarily.

In the case of *Halima Khatun*(<sup>5</sup>), Pugh, J., sitting on the Original side of the Calcutta High Court, held that although a Judge of the High Court exercises the functions of a kazi when administering Muhammadan Law, the procedure to be adopted is to be regulated by the Code of Civil Procedure and the

(1) (1925) I. L. R. 4 Pat. 741.

(2) (1932) I. L. R. 11 Pat. 504.

(3) (1930) A. I. R. (All.) 577.

(4) (1934) 38 Cal. W. N. 1056.

(5) (1910) J. L. R. 37 Cal. 870.

Rules and Orders of the High Court. This was the view taken by the learned Judge on an application by a Mutawalli for the sanction of the Court to sell certain wakf properties. This, if we may say so, would prima facie appear to be the correct position so far as statutory provisions are concerned; but a number of decisions point the other way.

In *Atimannessa Bibi v. Abdul Sobhan*<sup>(1)</sup> the Calcutta High Court had to consider the general powers of a District Judge as a kazi in respect of wakfs. The plaintiff had instituted the suit in the Court of a Subordinate Judge for a declaration that she was entitled to be the Mutawalli of a certain wakf and for recovery of possession of the property. The Subordinate Judge decreed the suit. On appeal the District Judge dismissed it, and there was a second appeal to the High Court. Mookerjee, J. after an examination of a number of decided cases and other texts, held that under the Muhammadan Law that Qadi alone was competent to exercise authority in respect of wakf who was so expressly authorised in his letters patent. The balance of opinion of Muhammadan jurists (he found) favoured the view that the Chief Qadi should have authority expressly conferred on him in order to enable him to deal with wakfs. It followed, in his opinion, that a Subordinate Judge who was not expressly authorised by the Government to exercise functions in connection with the administration of wakfs was not competent to deal with wakf cases. He considered it doubtful whether a District Judge had implied authority to exercise the functions of a kazi under the Muhammadan Law. In respect of wakfs for public purposes of a religious nature within sub-section (1) of section 92 of the Civil Procedure Code the District Judge might, in his view, be assumed to have been authorised to discharge the functions of a kazi, but (the learned Judge observed) "the real difficulty

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arises in cases of private wakfs". In an earlier case [*Nimai Chand Addya v. Golam Hossein*(<sup>1</sup>)] the same learned Judge (sitting with Vincent, J.) had upheld the approval by a Subordinate Judge of a mortgage of wakf property lying within his jurisdiction as no less effectual than a sanction by a District Judge whose position (as he considered) offered only a more or less far-fetched analogy to that of a kazi.

In *Shama Churn Roy v. Abdul Kabeer*(<sup>2</sup>) it was held that a Court of superior jurisdiction in a district and the High Court in a Presidency Town is, generally speaking, vested with the powers of a kazi, under the Muhammadan Law. This was followed in *Woozatunnessa's case*(<sup>3</sup>).

In *Abdul Alim Abed v. Abir Jan Bibi*(<sup>4</sup>) it was held (to quote from the placitum) that "a Mutwalli of a wakf under the Muhammadan Law can be appointed by application when it does not involve the removal of an existing Mutawalli". It was also held that a District Judge should exercise the powers of a kazi in connection with public religious trusts, the administration of which is vested in the kazi under the Muhammadan Law, and that as such it is his duty to appoint a trustee when there is no one to administer the trust. It was further held that sub-clauses (a) and (b) of clause (1) of section 92 of the Civil Procedure Code are correlative and not disjunctive; that is to say, the power to appoint a new trustee given by the section is dependent on the removal of the old one. In other words, it was held that when there is a vacancy and no Mutawalli is otherwise available, the District Judge may appoint one on application, but that he cannot do so in that way if the conditions of section 92 (a section which is available for the removal of a trustee *de son tort* also) are satisfied.

(1) (1909) I. L. R. 37 Cal. 179.

(2) (1898) 3 Cal. W. N. 158.

(3) (1908) I. L. R. 36 Cal. 21.

(4) (1928) I. L. R. 55 Cal. 1284.



In a case recently decided in this Court—*Mia Mohammad Yusuf v. Mia Mohammad Ayub*<sup>(1)</sup>—James, J. held that when an office of a Mutawalli of a wakf falls vacant the District Judge is entitled under proper circumstances to make an appointment to fill the vacancy, but he has no general power to remove a Mutawalli in miscellaneous proceedings, his powers in this respect being limited.

In *Syed Diljan Ali v. Bibi Akhtari Begum*<sup>(2)</sup>, a case already referred to, it was held that a suit for the removal of the trustee by the donor or his heirs cannot be instituted except under the special jurisdiction conferred by the Religious Endowments Act, 1863, or section 92, Civil Procedure Code.

In *Fakrunessa Begum v. District Judge of 24-Parganas*<sup>(3)</sup> it was held that section 92 of the Code of Civil Procedure relates to suits claiming any of the reliefs specified in sub-section (1) thereof and an application by a Mutawalli for sanction to grant a lease is not a suit under sub-section (1) of section 92; and the following passage from Ameer Ali's Muhammadan Law was quoted and followed:—

“ The application for sanction should be made to the District Judge if the property is situated in the mofussil, or to the Judge on the Original Side of the High Court if it is within a Presidency Town. It is not necessary to bring a suit for obtaining such sanction; it will be granted upon a proper application being made by the Mutawalli.”

The learned Judges further observed that “ any application made by the Mutawalli will of course be enquired into by the District Judge before sanctioning a lease as kazi ”. This case is also an authority for the proposition that the District Judge by virtue of his office is vested with the general powers of a

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(1) (1938) 19 Pat. L. T. 984.

(2) (1925) I. L. R. 4 Pat. 741.

(3) (1920) I. L. R. 47 Cal. 592.

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kazi under the Muhammadan Law, and that these powers can be exercised in cases for which no provision has been made in the statutes.

We may now refer to the powers of the District Judge under two recent Acts, Act XIV of 1920 which is of general application, and the Mussalman Wakf Act of 1923 (Act XLII of 1923). Under the former Act a District Judge may, on an application made to him, direct a trustee to furnish the petitioner through the Court with particulars of a trust property and that the accounts of the trust be audited; on the failure of the trustee to furnish information so required, he is to be deemed guilty of breach of trust so as to attract the provisions of section 92 of the Civil Procedure Code. But if the party complained against undertakes to institute a suit the proceeding has to be stayed. Under the second Act, which applies to Mussalman wakf only the Mutawalli is placed under an obligation to furnish particulars relating to the wakf to the Court (inter alia) of District Judge; these particulars are to be published and further particulars may be called for, and periodical accounts are to be submitted to the Court. These two Acts thus place wakfs under the control and supervision of the District Judge within the limits indicated.

It may be said on these authorities that there is practically a consensus of opinion that when there is a vacancy in the office of a Mutawalli the District Judge in his discretion may nominate a Mutawalli but that he has no power in a summary proceeding to appoint another Mutawalli in place of one who is in office. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under section 92 of the Civil Procedure Code. When, however, two persons each claim to be the Mutawalli, the dispute between them is one of a civil nature and must be decided in an ordinary Civil Suit (*see* Mulla's Civil Procedure Code, pages 304-5, 10th Edition, and the cases cited there): the vindication

of individual rights is not a matter for decision either under section 92 of the Civil Procedure Code or under the provisions of the Religious Endowments Act.

Now the appointment of a Mutawalli by a District Judge in a summary proceeding is not appealable, and according to the trend of the authorities we have already referred to, such appointment should be made in cases of emergency and, by the very nature of it, must be subject to the result of any suit which may be instituted by any of the parties who claim adversely to one another to be the Mutawalli, or subject to the result of any suit which may be instituted either under section 92 of the Civil Procedure Code or under the provisions of the Religious Endowments Act.

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The next question is whether the appointment of a Deputy Mutawalli was within the competence of the learned District Judge in the circumstances of the present case. We have already referred to Mr. Hasan Jan's contention that Bibi Zohra was a *de facto* Mutawalli though she may be no more than a trustee *de son tort* and that the learned Judge had no jurisdiction in this summary proceeding to interfere with her possession. But was Bibi Zohra in actual charge of the trust properties as Mutawalli when the learned District Judge intervened in the matter? Musammam Zaibunissa, the last Mutawalli, died on the 23rd May, 1938, as we have already said, and Zohra applied for substitution of her name in the proceeding started under Act XIV of 1920 and Act XLII of 1923 on the 28th of May. The interval was one of five days only—too short for a definite supposition that Zohra had taken possession of the wakf estate. There was no doubt an application by Abdul Haq, claiming to have been the *mukhtar-am* of Musammam Zaibunissa, that in accordance with the instructions of Musammam Zaibunissa deceased, he had made over the estate to Zohra. But Musammam Zaibunissa's power-of-attorney in favour of Abdul Haq ceased to have any effect on her death, and what he claims to have done

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under it by way of making the estate over to Zohra was plainly unauthorized. Zaibunissa also had no power to nominate a Mutawalli under the wakf deed. In view of all these circumstances we are of opinion that Zohra had not really assumed the office of Mutawalli and that there was certainly a vacancy in that office.

The learned District Judge had, however, no jurisdiction in the proceeding before him to decide that under the wakf deed Abdul Hai was to be the Mutawalli on the death of Zaibunissa. Such a decision can only be given in a properly constituted suit. His order further that a Deputy Mutawalli should be appointed during the minority of Abdul Hai was also wrong. A Deputy Mutawalli presupposes a Mutawalli. Even if Abdul Hai be the rightful Mutawalli, the kazi had power to appoint a Mutawalli during Abdul Hai's minority and incapacity to perform the duties of Mutawalli. The minority makes it impossible for him to depute anybody else to work as the Mutawalli. We hold, therefore, that the decision of the District Judge that Abdul Hai is the Mutawalli and his order that a Deputy Mutawalli should be appointed are without jurisdiction and must be set aside.

The fact, however, remains that the estate is without a Mutawalli. It is true that in the wakf deed it was provided that in case Wajihuddin be a minor at the death of Shukrullah, Zohra was to act as Mutawalli during his minority. But Zohra, it appears, repudiated the wakf in Miscellaneous Case no. 23 of 1930 in which Habibunnissa had applied to be appointed a Mutawalli in preference to Zaibunissa. She has thus forfeited any claim (such as it may have been) to be appointed Mutawalli even during the minority of Abdul Hai.

We accordingly, while setting aside the order of the learned District Judge, direct that Habibunnissa

be appointed Mutawalli. This appointment will hold good during the minority of Abdul Hai and will be subject to the result of any suit which may be instituted for the regular determination of the question as to who is entitled to be mutawalli. In case no such suit be instituted, Habibunnissa will cease to be Mutawalli when Abdul Hai attains majority and will then make over the trust property to him. We make no order about costs.

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*Order accordingly.*

### APPELLATE CIVIL.

*Before James and Rowland, JJ.*

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v.

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*Registration Act, 1908 (Act XVI of 1908), sections 17, 28 and 29—mortgage bond—fraud on registration—effect—suit on personal covenant—document, whether can be treated as a registered instrument for purposes of limitation—Limitation Act, 1908 (Act IX of 1908), Article 116, applicability of.*

If the registration of a mortgage bond has been obtained by a fraud on the law of registration, the document cannot be treated as a registered instrument for the purpose of applying the provisions of Article 116 of the Limitation Act, 1908, to a suit on the personal covenant.

*Sailendra Nath Singha v. Keshab Chandra Chowdhury*(1) and *Jageshwar Prasad Onkar Prasad v. Mulchand*(2), followed.

\*Appeal from Appellate Decree no. 510 of 1937, from a decision of Babu Rabindra Nath Ghosh, Subordinate Judge of Gaya, dated the 31st May, 1937, reversing a decision of Babu Ramjivan Sinha, Munsif of Gaya, dated the 21st September, 1936.

(1) (1937) 41 Cal. W. N. 783.

(2) (1939) A. I. R. (Nag.) 57, F. B.