SUPREME COURT OF INDIA

Faqruddin (Dead) Thr.Lrs

Vs.

Tajuddin (Dead) Thr.Lrs

C.A.No.3643 of 2008

(S.B. Sinha and Lokeshwar Singh Panta JJ.)

16.05.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Defendants-Appellants are before us, aggrieved by and dissatisfied with a judgment and order dated 3.11.2006 passed by a learned Single Judge of the High Court of Judicature of Rajasthan in S.B. Civil First Appeal No. 144 of 1981 allowing the appeal of the respondent from a judgment and order dated 31.01.1981 passed by the Additional District Judge, No. 1, Jaipur City in Civil Suit No. 67 of 1977, whereby and whereunder a suit filed by the respondent herein for declaration of his title, permanent injunction and possession was dismissed.

3. At the outset, we may notice the genealogical tree of the parties, which is as under:

Maulana Ziauddin Sahib

4. One Hajrat Ziauddin Sahib (1730-1810) was a great Sufi Saint. He Gulam Rasool Sahib belonged to Sunni Sect of Islam.Imamuddin Sahib of his spiritual attainments, 7 Syed In view bighas of land at Moti Katla, Jaipur was given to him by the then Ruler Syed Mahiuddin Sahib Syed Kamaluddin Syed Sarfuddin Sahib Sahib of the State of Jaipur for the purpose of maintenance of a garden. He, Moinuddin Badruddin Faridduin however, acquired lands out of his own funds. It comprised of Khasra Nos. 497 to 503 admeasuring 8 bighas 2 biswas. Indisputably, on the Syed Aminuddin Syed Saiduddin Syed Fakruddin said land, there are prayer rooms, Dargah, Mosque, garden, graveyard, Syed Tajuddin Mahemuda Syed Gulam Begum Ziauddin shops, houses, lodge, etc. On the demise of Hajrat Ziauddin Sahib, in the Syed 1810, which took place Moinuddin yearSyed Zenuel his Syed Agigudia(tomb) was treated as a Abedin Mazar Syed Allauddin Syed Rahisnddi sacred place. It attained the status of a Dargah. One Gulam Rasul Sahib was the first Sajjadanashin and Mutawalli of the

Dargah. He was son of his sister. In the year 1860, Sayed Immauddin Sahib succeeded to the said office followed by Syed Mohiuddin Sahib.

> "A matmi proceeding was initiated for 12 bighas and 12 biswas of land. It was found that late Ziauddin Sahib was not in possession of bighas of land. The land upon which Dargah, Kabristan, etc. were situated were not the subject matter of the State grant and, therefore, not subject to matmi."

5. Syed Mohiuddin Sahib was convicted by a criminal court. The `Sajjadagi' was tied on the head of Kamaluddin, the younger brother of Mohiuddin as he was considered fit for holding the said post.

6. Matmi was sanctioned in favour of Kamaluddin. He died on or about 29.05.1938. He purported to have executed a Will and nominated Aminuddin, his eldest son, as Sajjadanashin and Faqruddin, another son, as Mutawalli. Allegedly, there existed a custom that on the Soum, i.e., the third day of the funeral, a congregation makes the nomination. It is notified by the congregation. Dastarbandi ceremony took place in terms whereof turbans were tied. The said customary formalities were said to have been complied with.

7. Moinuddin son of Mohiuddin (the convicted Sajjadanashin) filed a suit against Kamaluddin claiming inheritance in the year 1939. He also filed a suit against Aminuddin claiming election to the post of Sajjadanashin by Muslim public. Both the suits were dismissed by judgments dated 11.05.1920 and 5.09.1939 respectively. Appeals preferred thereagainst were also dismissed. During pendency of the said proceedings, Aminuddin died on 12.07.1944. In his place, Tajuddin was substituted. In the said suit, Wakf in question was held to be Wakf Al Aulad.

8. Tajuddin filed another suit, on or about 7.09.1953 for a declaration that he was the rightful Sajjadanashin of the Dargah in question. A prayer was made for removal of Faqruddin, the deceased predeceased-in-interest of the appellants, from the office of Mutawalli. A large number of issues were framed.

> Issues Nos. 1, 4 and 5 read as under:
>
> "1. Whether the plaintiff is the Sajjada of the Dargah of Maulana Ziauddin Sahib?
>
> 4. (a) Whether on proof of issue No. 1 the plaintiff is entitled as Sajjadanashin to the savings left after mooting the expenses of the Dargah?
>
> (b) Whether the plaintiff is entitled to recover Rs. 100/- as the savings of the two years?
>
> (c) To how much amount the plaintiff entitled for the period of the pendancy of the suit?

5. Whether the plaintiff is bound to indicate the nature of the trust so that the question may be decided in the court?"

9. It was found that the purported election which had been held did not meet the requirements of law. It was furthermore held that the plaintiff was not entitled to be a `Sajjadanashin' as it was a private land.

> "The appeal preferred thereagainst, which was marked as Civil Appeal Case No. 23 of 1954, was dismissed on 20.11.1958. The said proceeding attained finality."

10. Allegedly, on the death of Syed Saidduddin Sahib, who became Sajjadanashin on the demise of Aminuddin, Faqruddin became Sajjadanashin according to custom. He continued to hold the office of Mutawalli also. A notification was issued under Section 5 of the *Wakf Act, 1954* on 9.12.1965 declaring the properties to be Wakf Properties.

11. Another suit was filed by Tajuddin on 3.12.1966 against the State Government claiming himself to be the Sajjadanashin. He also claimed some amount on account of expenses for `Chirag Bati' and also the value of 42 Gold Mohars. Faqruddin was impleaded as a party. The said suit was withdrawn by Tajuddin.

12. Another round of litigation started in the year 1974. A `matmi' proceeding was initiated in terms of the provisions of the Jaipur Matmi Rules (for short "Matmi Rules"). Plaintiff's name was directed to be mutated by the Board of Revenue by an order dated 1.02.1974. The Board of Revenue, however, observed:

> "...The only son of Aminuddin named Tajuddin is alive and he has some how (sic) been deprived of the office of Sajjadanashin so far, but as indicated above, the Board if not concerned with the appointment of the Sajjadanashin for Dargah Mirza Zaiuddin which is civil matter..."
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> It was furthermore observed:
>
> "11. In exercise of the powers conferred by Section 10(d) of the *Rajasthan Jagir Decisions and Proceedings (Validation) Act, 1955*, we, therefore, sanction succession of the last holder Kamaluddin son of Immamuddin in the name of this eldest real grandson namely Tajuddin son of Aminuddin in respect of 7 bighas `Kham' State grant given for the maintenance of a garden by former Jaipur State Patta dated Shrawan Budi 4, Samwat 1856 whose Khasra numbers have since been delineated in the Judgment of Deewani of former Jaipur State dated 19/2/1938 and confirmed by the Full Council of State Jaipur under rule 13 of the *Jaipur Matmi Rules 1945*."

13. Relying on or on the basis of the said entry, the respondent filed a fresh suit. According to him, he, having been declared to be the Matmidar became the holder of land. As a holder of land, he became the Mutawalli and Sajjadanashin and, thus, entitled to possess the same exclusively.

The issues which inter alia were framed are:

"1. Whether plaintiff is the Sajjadanashi and Mutawalli of Dargah Hajrat Maulana Jiauddin sahib as per decision of Revenue Board dated 1.2.74?

*** *** ***

4. Whether suit is barred with res-judicata?

5. Whether suit is barred with limitation?"

14. By an order dated 31.01.1981, the learned Trial Judge held that the suit was barred under the principles of res judicata. The learned Trial Judge also noticed the admission made by the plaintiff in the following terms:

"...In 1958, after the death of the then Sajjadanashin Saikuddin, defendant No. 1 became the Sajjadanashin also besides Mutawalli and since then defendant No. 1 has been working as Sajjadanashin also. Plaintiff has not given any reply to this submission of defendant in his replication. Thereafter, in his statements again and again, defendant No. 1 has stated that he had become the Mutawalli in 1938 and Sajjadanashin from 1958 and it is very clear from the cross-examination of defendant No. 1 that plaintiff has also accepted this submission of defendant No. 1 in silent manner. However, plaintiff has clearly admitted in his statements that defendant No. 1 has been looking after the work of Mutawalli since 1938. The relevant portion of the statement of plaintiff is as under:

"After Kamaluddin, Fakhru Miyan, defendant No. 1 became the Mutwalli. My father never objected on Fakhrumiya's working as Mutawalli. My father expired in 1944, Fakhrumiya is Mutawalli till date"

"After the death of Kamaluddin, Fakhrumiya is performing the work of Mutawalli since 1938 but with the written permission of Matmidar. Tehrir has been made by Miya Kamaluddin Matmidar. Kamaluddin sahib had executed the Will, which is available in the file."

In this manner, plaintiff himself has admitted in his cross-examination that on the basis of Will of Late Kamluddin, defendant No. 1 had become the Mutawalli."

Issue No. 1 was determined as under:

"As per above discussion, I reach on the conclusion that defendant No. 1 (one) has successfully proved that he is the Mutawalli of Dargah Hajrat Maulana Jiauddin since 1938 and Sajjadanashin since 1958. Therefore, this issue is decided in favour of defendant No. 1."

The issue of res judicata was also determined against the plaintiff.

The suit was held to be not maintainable."

15. It is stated that pending appeal another suit was filed by Tajuddin.

However, we are not concerned therewith.

16. A First Appeal was preferred thereagainst. Faqruddin died on 25.03.1981. Appellants herein were substituted in his place. According to the appellants, Syed Zainul Abdeen was declared as Mutawalli.

Tajuddin died in the year 1987. Whether the date of his death is 26.03.1987 or 26.04.1987 is not clear, but the same is not very material for our purpose. Admittedly, he died issueless. Respondent Abdul Rashid was substituted as legal representative in place of Tajuddin claiming his right on the basis of an alleged Will. The other respondents were also added as parties by an order dated 1.02.1994 as they claimed the right under another Will. It is, however, of some interest to note that in the said order dated 1.02.1994, it was stated:

"Whether or not the appellant had executed the wills dated 22nd March 1987 and dated 26th March, 1987 is not a subject-matter of the dispute before this Court and it is not disputed that in this appeal, the Court has to decide as to whether the appellant could be said to have become the `Sajjadanashin' of the `Dargah' in question by virtue of the fact that he was recognized as a `Matmidar' after the death of the earlier `Sajjadanashin' and `Matmidar' Kamaluddin. In this view of the matter, if the applicants are impleaded as parties in this appeal, they would only be assisting the Court to come to the right conclusion on the above-said point and it is made clear that by their being impleaded as parties in this appeal, their rights under the will are not being decided. It is further made clear that simply because Abdul Rasheed has been brought on record as the legal representative of the deceased the decision of the appeal being confined to the rights of Tajuddin, would not confer any right on Abdul Rasheed, as he as well as the other members of the committee have to establish their wills."

17. The appeal preferred by Tajuddin (since deceased) has been allowed by reason of the impugned judgment.

18. Mr. K.V. Vishwanathan, learned counsel appearing on behalf of the appellants, in support of the appeal, would, inter alia, submit:

"(i) On the death of Tajuddin, the suit itself has abated as the cause of action did not survive on the principle action personalis moritur cum persona.

(ii) No order for impleadment of the respondents could have been passed as the suit itself has abated.

(iii) In any event, no declaration as prayed for in the suit could be granted.

(iv) By the judgment and decree dated 7.09.1953, the Civil Suit No.7 of 1946 having been dismissed, Tajuddin could not have started another round of litigation on the plea that he had become Sajjadanashin, which was barred under the principle of res judicata.

(v) Any observation made by the Board of Revenue would not confer a jurisdiction upon the Civil Court, if the same was otherwise barred.

(vi) By reason of the order passed by the Board of Revenue conferring the status of matmidar on the respondent, he did not derive any title as a `matmidar' cannot become a Sajjadanashin or Mutawalli, the office being not heritable ones.

(vii) As a State grant, in any event, is inheritable, the purported rule of primogeniture contemplated in terms of the Matmi Rules has no application, particularly, in view of the fact that under the Mohammedan Law, the rule of primogeniture cannot regulate succession and the office of Sajjadanashin involves personal qualification."

19. Mr. R.N. Mathur, learned counsel appearing on behalf of the respondent No. 1, on the other hand, would submit :

"(a) 7 bighas of land being the subject matter of State grant, the Board of Revenue had the requisite jurisdiction to order declaration of the original plaintiff as a `matmidar'.

(b) Even if the claim of the respondent as Sajjadanashin or Mutawalli is excluded, he would be entitled to exclusive possession of bighas of land as his right to hold the same stands recognized as a `Khatedar'.

(c) Being a holder of land, he is entitled to exclusive possession as rent has to be paid by him.

(d) His claim as Sajjadanashin is not only based on a Will, but also upon a custom prevailing, viz., Sajjadanashin can nominate his successor.

(e) As Faqruddin was not a valid nominee, the holder of the office of `Sajjadanashin' could nominate the respondent.

(f) Appellants having submitted themselves to the jurisdiction of the Board of Revenue and having failed in their attempt to get the order dated 1.02.1974 set aside in a writ petition filed by them, they are estopped and precluded from contending that

the Board had no jurisdiction to pass the impugned judgment. 13 (g) In any event, the questions raised herein having not been raised before the High Court, this Court should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India."

20. The State of Jaipur was a princely State. The Matmi Rules were framed during the said regime. The legislature of Rajasthan enacted the *Jaipur Laws (Validating) Act, 1952*. A Validating Act being the *Jaipur Matmi Rules (Validation) Act, 1961* was also enacted; Section 2 whereof reads as under:

> "2. Validation of Jaipur Matmi Rules - Notwithstanding contained in the Jaipur General Clauses Act, 1944, or any other law or in any rule of interpretation or in any judgment, decision, decree or order of any court and notwithstanding any omission or defect of form or procedure or want of any competent sanction or approval, it is hereby declared that the *Jaipur Matmi Rules, 1945*, published in the Jaipur Gazette, Extra-ordinary, dated the 8th December, 1945 under Revenue Branch Notification No. 15941/Rev. dated the 24th November, 1945, shall have, and shall be deemed always to have had, the force of law and shall be treated as being and as having been an `existing Jagir law' within the meaning of clause (d) of section 2 of the *Rajasthan Land Reforms and Resumption of Jagirs Act, 1952 (Rajasthan Act 6 of 1952)* for the purposes of that Act as well as of the *Rajasthan Jagir Decisions and Proceedings (Validation) Act, 1955, (Raj. Act 18 of 1955)* and any other law relating to jagirs or jagirdars."

21. The said Rules, however, have a prospective effect. It merely declares the Rules to have always the force of law. The effect thereof, however, must be considered having regard to the other laws in force.

> "We, would, therefore, proceed on the basis that the Matmi Rules had the force of law.
>
> It, however, applies only to `State grant'. `State grant' has been defined in Sub-rule (1) of Rule 4 to mean "a grant of an interest in land made or recognized by the Ruler of the Jaipur State and includes a jagir, muamla, suba, istimrar, chakoti, badh, bhom, inam, tankha, udak, milak, aloofa, khangi, bhog or other charitable or religious grant, a site granted free of premium for a residence or a garden, or other grant of a similar nature". The term "Matmi" has been defined in Sub-rule (3) thereof to mean "mutation of the name of the successor to a State grant on the death of the last holder". Sub-rule (4) of Rule 5, however, makes an exception in regard to the applicability of the Matmi Rules in respect of land free of premium as `waqf' for a religious building, etc.; the State grant, however, relates to vacant land. We would assume that the said exception has no application to this case."

22. Sajjadanashin is a spiritual office. Mutawalli is a manager of secular properties. Both of them are connected with a Dargah or a Wakf. Matmi, however, is a process of mutation carried out in the revenue register in terms of the Matmi Rules.

23. Rules 6 to 11 of the Matmi Rules provide for the mode and manner in which applications are required to be filed, entertained and determined. It casts a duty to bring the death to the notice of the State within the time specified therein, failing which a penalty may be levied. Rules 11, 13 and 14 of the Matmi Rules read as under:

> "11. The person claiming succession shall, within one month from the date of death of the last holder, submit an application in the prescribed form (Appendix A) to the revenue officer indicated in rule 22.
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> Note (1) The application for matmi shall not be returned or rejected on the ground that the applicant has failed to furnish any of the prescribed particulars;
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> (2) The application under this rule shall be made even though a report has been made under Rule 6.
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> 13. The eldest real son of the last holder or if such son is dead, such son's eldest real son or eldest real grandson is entitled to succeed, unless in the opinion of the Ruler he is unfitted to succeed by reason of serious mental or physical defect or disloyalty;
>
> Provided firstly, that in the case of the panchpana sardars of Shikhawati and the bhomias of Udaipurwati, the grant shall devolve on all the surviving real sons and the real sons or grandsons of predeceased sons of the last holder in accordance with local custom unless in any particular case His Highness the Maharaja Sahib Bahadur has recognized that the ordinary rule of succession by male lineal primogeniture shall apply.
>
> Provided, secondly, that in the case of a nihang grantee, a chela whose nomination has been approved by Government shall be entitled to succeed; and
>
> Provided, thirdly, that in the case of a tankha grant of which the holder dies after the 25th October, 1943, his eldest real son shall be entitled to succeed only to one-half of the grant and such son's eldest real son to only one- fourth of the original grant. In the fourth generation of the holder in possession on 25th October, 1943, the remainder of the grant shall be resumed.
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> Example : (1) A, a tankhadar, in whose name matmi of a tan of Rs.2,000/- on six months qarar was sanctioned prior to the 25th October, 1943, dies in January, 1943 leving three sons, B, C and D. B being the eldest son, matmi will be sanctioned in B's favour in respect of a tan of Rs.1,000/- on six months qarar and the remaining tan of Rs.1,000/- be resumed.

(2) X, a tankhadar, in whose name matmi of a tan of Rs.1,000/- on six months' qarar was sanctioned prior to the 25th October, 1943, dies in March, 1943, leaving Y and Z sons of his only son Q, who predeceased X. Matmi will be sanctioned in Y's name in respect of a tan of Rs.250/- only and the remaining tan of Rs.750/- will be resumed.

14. (1) Subject to the provisions of rule 13, succession in the absence of a direct male lineal decendant of the last holder shall be restricted to the lineal male descendants of the original grantee, preference being given to the senior member of the senior line :

Provided, firstly, that in the case of a grant for the maintenance of a temple, mosque or other religious place, other than a Jain temple, it shall be within the discretion of Government to select as successor any one of the male lineal descendants of the original grantee, with due regard to his suitability for the performance of worship; and

Provided, secondly, that in the case of a Jain temple succession shall be sanctioned in favour of a manager nominated by the Panch Jains. (2) No adoption shall be recognized for the purpose of succession to a State grant unless a holder has obtained the previous sanction of the Government to adopt, such sanction being given only in favour of a direct male lineal descendant of the original grantee :

Provided, firstly, that a person adopted in another family shall not be allowed to revert to his original family; and

Provided, secondly, that a Raja (Lalji), a khawaswal, a tankhadar, an employee of the Bera Khawas Chelan, an employee of the 18

Karkhanejat and a mina chowkidar shall not be permitted to adopt."

24. The High Court, in its judgment, with regard to the plea of resjudicata, held:

"...It is correct that plaintiff Tajuddin had filed a suit in the court of District Judge, Jaipur, to declare him as Sajjadanashin and the same was dismissed vide judgment dated 7.9.1953 (Exhibit A-2) and the appeal against that judgment was also dismissed by the High Court vide judgment 20.11.1958 (Exhibit A-3). But, after the judgment of the District Judge, the case of Matmi or successor of Kamaluddin was decided by the Statutory Authority exercising power under Section 4(1)(b) read with Section 10 of the Act of 1955 and as mentioned above the Revenue Board, vide its judgment dated 1.2.1974 (Exhibit - 1), sanctioned succession of the last holder Kamaluddin in the name of the plaintiff Tajuddin. The judgment of the Revenue Board dated 1.2.1974 (Exhibit - 1) was challenged by defendant Badruddin before this Court in S.B. Civil Writ Petition No. 2225/1974 and the said writ petition was dismissed on 21.11.1983, therefore, order dated 1.2.1974 has attained finality. Certified copies of the Writ Petition No. 2225/1974, the reply to the writ petition on behalf of the respondent no. 3 in the writ petition, namely, Tajuddin, and the order dated 21.11.1983, dismissing the writ petition of the defendant Badruddin against the order of the Revenue Board dated

1.2.1974 have been placed on the record along with the application under Order 41 Rule 27 of the CPC on 19.11.1997, which was allowed by this Court vide order dated 20.2.1998. The order dated 1.2.1974 passed by the Revenue Board is a statutory order by the statutory authority under the statute and this was the separate and fresh cause of action for filing the present suit..."

25. The High Court, on the premise that there exists a codified law for declaration of succession for the last holder, opined:

"...Even if there is any custom for appointment on the post of Sajjadanashin then the same cannot be contrary to prevailing statute and codified law will prevail over the custom. The gifted property by the ruler has to be managed by successor according to law. There cannot be two different persons, one as successor and another as Sajjadanashin. Otherwise property in dispute cannot be managed properly. Any person who is declared as successor and in whose favour Matmi is sanctioned by competent authority under the statute is entitled to hold the posts of Sajjadanashin as well as Mutawalli also."

26. The law of inheritance amongst the Mohammedans is governed by their personal laws. If the properties are wakf properties, the offices of Sajjadanashin and Mutawalli are to be filled up in accordance with the law or the custom. If the properties are heritable, those who are the `Quranic Heirs' would be entitled to hold the said posts. Indisputably, the law of primogeniture has no application amongst the Mohammedans vis-`-vis their law of inheritance.

27. `Wakf' would mean taking out something out of one's ownership and passing it on to God's ownership dedicating its usufruct – without regard to indigence or affluence, perpetually and with the intention of obtaining Divine pleasure - for persons and individuals, or for institutions or mosques and graveyards, or for other charitable purposes.

28. It is beyond any doubt or dispute that a Mutawalli is the temporal head. He is the manager of the property. Office of Sajjadanashin, however, is a spiritual office. It has to be held by a wise person. He must be fit for holding the office.

29. The Rules, indisputably, are statutory in nature. His Highness of Maharaj used to exercise both executive and legislative policy. The Rules having been validated have a statutory force.

"In *Tilkayat Shri Govindlalji Maharaj v. The State of Rajasthan and Ors.*[1], this Court opined :

"In appreciating the effect of this Firman, it is first necessary to decide whether the Firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur, it is difficult to make any distinction between an executive

order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby. This position is covered by decisions of this Court and it has not been disputed before us, vide *Madhaorao Phalke v. State of Madhya Bharat*[2]. *Ameer-un-Nissa Begum. v. Mahboob Begum*[3] , *and Director of Endowments, Government of Hyderabad v. Akram Ali*[4], *(S).*"

30. As regards the Matmi Rules, apart from having the statutory sanction under the *Jaipur Matmi Rules (Validation Act), 1961*, it seems to have Presidential sanction. This had been recognized by this Court in *Thakore Sobhag Singh v. Thakur Jai Singh and Ors.*[5].

But this Court did not decide the question with regard to the effect of the said Rules.

31. "Matmi", however, in terms of the Matmi Rules, as noticed hereinbefore, would mean mutation of the name of the successor to a State grant on the death of the last holder. The question is as to whether Tajuddin (since deceased) and his predecessor and successor-in-interest had in fact been appointed as Sajjadanashin or Mutawalli. We may, however, notice a decision of the *Patna High Court in Shah Najihuddin Ahmad v. Amir Hasan Khan & Ors.*[6], (which makes an interesting reading) wherein it was held :

> "The learned advocate points out that succession to the office has not been strictly hereditary in the past and that Mahomedan law is strongly against attaching any right of inheritance to a public endowment or office. The office of a Sajjadanashin however stands on a special footing:
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> "He is not only a Muttawali but also a spiritual preceptor, and in him is supposed to continue the spiritual line (silsilal)."
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> This supposed continuity of the spiritual tradition must obviously be taken into account and, speaking generally, is much more likely to be secured by the selection of a properly qualified descendant of the founder than of a stranger of the family. The same consideration applies to the preference given by the lower court to "nearness in propinquity" to the last holder. The observation of the lower Court that under the Firmans, as well as according to the long established usage prevailing in the Khanqah, it is clear that a stranger cannot be appointed to the office has not been assailed; but the learned advocate for the respondents has laid stress on the wide power of the Court, in dealing with public, religious or charitable trusts, to depart even from the intentions of the founder on questions of management, which must be governed by circumstances and varied if necessary in the best interest of the institution. It appeared during the arguments that what the plaintiffs really desire is that the appointment should be thrown open to all Muslims without much regard to the question whether they have any connexion with this institution. In our opinion there is no warrant for doing so in the circumstances of this case. It is at the same time clear that the appointment should be open to a stranger if it be found that no suitable descendant of Shah Kabir Darvesh is available, and that if this be added to the scheme, it might

possibly save a suit under S.92. Preference ought however to be given to descendants of the founder and among them to those "nearest in propinquity" to the last incumbent, provided that such persons are duly qualified.

It has been contended on behalf of the appellant that the learned Subordinate Judge has adopted an unnecessarily high standard of Puritanism and education for the office of Sajjadanashin. The decree mentions no standard; but the learned Subordinate Judge was apparently (judging from his observations regarding the fitness of Shah Malihuddin, inclined to hold that a properly qualified Sajjadanashin must have a working knowledge of Arabic or Persian, these being the languages in which are generally written books on Suffism, the philosophy the traditions of which form the raison d'etre of a Darvesh's Khanqah. There was in our opinion no error in this. Tottenham and Ameer Ali, JJ., in 1893 observed that the first plaintiff in that suit was disqualified on the ground among others that admittedly he had no knowledge of Arabic. As to Puritanism of living, it is true that religions are in one sense matters of indifference to the Sufi; but he does regard them as serving to lead to realities and considers Islam as among those which are more advantageous for this purpose than others (see Hughes' Dictionary of Islam, 1885, sub nominee Sufi). The institution with which we are dealing is moreover in the main a Sunni institution, and there is no reason why the Sajjadanashin of such an institution should be at liberty to give offence to the Sunni community by attending nauch parties (and worse) of flouting prayers and refraining from spiritual exercises as the late Sajjadanashin is found to have done."

32. It is also of some significance to notice that in a book titled `Muslim Law as administered in India & Pakistan' by Shri K.P. Saksena, it is stated as under:

"...A sajjadanashin maintains unbroken the spiritual line from the original preceptor, by virtue of his directions or by a valid custom. When the previous sajjadanashins were usually eldest sons, the law of primogeniture cannot be presumed to govern the succession from this circumstance, as it is contrary to Muslim Law, and specially as this office involves personal qualifications. The mere fact of owning an ancestral tomb and earning one's livelihood by piri muridi and offerings at the tomb, cannot make any one a sajjadanashin..."

In view of the decision of the Patna High Court as also the comments made by Shri Saksena, an holder of office of Sajjadanashin must have special qualification. He has to be a man of learning. He must be wise.

33. We have noticed hereinbefore, the admission of the plaintiff in his deposition.

34. The jurisdiction of the Board of Revenue being limited, no title could have conferred upon the plaintiff. Title in or over a land will depend upon the statutory provisions. A title does not remain in vacuum.

It has to be determined keeping in view the law operating in the field, viz., religious law or statutory law or customary law, etc. Revenue authorities of the State are concerned with revenue. Mutation takes place only for certain purposes. The statutory rules must be held to be operating in a limited sense. The provisions of Rule 13 of the Matmi Rules laying down a rule of primogeniture will have no application in relation to the offices of Sajjadanashin and Mutawalli, which are officers of different nature. They are stricto sensu not hereditary in nature. It is well-settled that an entry in the revenue records is not a document of title. Revenue authorities cannot decide a question of title.

> "Inheritance or succession to a property is governed by statutory law. In heritance of an office may not be governed by law of inheritance; but, the office of Sajjadnashin is not ordinary office. A person must possess the requisite qualifications to hold the said office. In *Suraj Bhan and Others v. Financial Commissioner and Others*[7], this Court held:
>
> "...It is well settled that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. It is settled law that entries in the revenue records or jamabandi have only "fiscal purpose" i.e. payment of land revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent civil court (vide Jattu Ram v. Hakam Singh)..."
>
> [See also *Narain Prasad Aggarwal (D) By LRs. v. State of M.P.*[8]]"

35. Only because an observation has been made by the Board of Revenue, the same by itself did not confer any jurisdiction upon the civil court, if it was otherwise barred. If the suit was barred under the principles of res judicata, Section 12 of the Code of Civil Procedure bars filing of another suit. [See Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas and another, Civil Appeal No. 3495 of 2008, decided on 12.05.2008]

36. The High Court might have been correct had the plaintiff - respondent would have obtained title by reason of a separate transaction.

The entry of the revenue records did not give rise to a fresh cause of action so as to take away the effect of principles of res judicata. [See *Anwar Khan Mehboob Co. v. State of Madhya Pradesh and Others*[9]]. If the order of the Board of Revenue is taken to its logical conclusion, as has been contended by Mr. Mathur, the same would be rendered wholly illegal and without jurisdiction. It would be a nullity.

37. Submission of Mr. Mathur that the respondents are estopped and precluded from questioning the jurisdiction of the Board of Revenue is equally without any merit. If the Board of Revenue had no jurisdiction to decide the question of title, its decision being without jurisdiction would be a nullity. [See *Chief Justice of Andhra Pradesh and Another v. L.V.A. Dikshitulu and Others*[10], *MD Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*[11] *and Hasham Abbas Sayyad v. Usman Abbas Sayyad and Ors.*[12]]

38. A jurisdictional fact would not attract the principles of estoppel as there can be no estoppel against statute.

39. Respondents themselves claimed their rights only under the Matmi Rules. The Matmi Rules do not recognize any transfer of property. If they do not recognize any transfer of property, by getting their names entered as a Mutawalli in terms of the Rules, they cannot claim exclusive possession.

> "The genuineness or otherwise of validity of either of the Wills, vis-`-vis, the nature of the grant as also the nature of the properties in question must be determined by an appropriate court of law. Whereas respondent No.1 claims his right, title and interest under one Will purported to have been executed by Tajuddin; respondent Nos. 2 and 3 claimed their right by virtue of another Will. The inter se disputes between the parties are said to be pending in some other proceedings.
>
> That is how the suit must be held to have abated. The recognition of right in favour of Tajuddin was personal in nature. If he has died, name of another person as Mutawalli must be entered in the register of revenue. We may, however, hasten to add that by saying so we are not suggesting that the entry made in the revenue records is final in nature.
>
> What would be the effect thereof is one question but the very fact that entire case of the respondent based on Wills which is prohibited in terms of the Matmi Rules is another. So long their right vis-`-vis the bequeathment by Tajuddin is not determined, no decree for possession can be granted in their favour. It is furthermore evident that although the learned District Judge, in his judgment dated 7.9.1953 purported to have proceeded on the basis that Tajuddin was not validly elected or selected for technical reasons, the fact remains that the suit of the plaintiff was dismissed. If a suit was dismissed, he could not have claimed his right as Sajjadanashin or Mutawalli. It is true that in the said suit, the right of the appellant as a validly elected Sajjadanashin and Mutawalli was not determined. The learned Trial Judge stated in his judgment that there was a valid declaration in favour of Faqruddin."

40. It may further be true that the land in question were not Wakf lands but `Wakf Aulad'. Indisputably, however, both Wakf land as also the land in question are under the management of Mutawalli. He, apart from the Wakf land, holds the land in suit on behalf of the beneficiaries.

> "The present appellants are also beneficiaries of the Wakf. If the right to recover possession must vest in a Mutawalli and if by reason of his status of `Matmi', Tajuddin did not become a Mutawalli, which declaration in his favour must be held to have been legally made by the High Court, the respondents relying on or on the basis of the purported Wills executed in their favour cannot claim independent right to recover possession."

41. In K.P. Saksena's Muslim Law as administered in India & Pakistan, at page 572, it is stated :

> "A worshipper can enforce his individual right in connection with a mosque, but he cannot sue for the recovery of an unauthorized alienation of waqf property; the Mutawalli alone can have the right to institute a suit for its recovery. A mutawalli can maintain a suit for recovery of possession of the waqf property against a trespasser, although it does not vest in him. A representative suit by two worshippers to set aside an alienation by the Mutawalli is, however, maintainable even without the sanction under Section 92 of the Civil Procedure Code, or Section 14 of the Religious Endowments Act. The waqf property may, like other trust properties, be recovered from third persons under circumstances referred to in the Indian Trusts Act, Section 63. In case of an unlawful alienation or a mortgage of the mosque property by its manager, any person interested may seek remedy in a civil court and restore the property to the trust, and the same is true also in cases where waqf property is auctioned in execution of a decree not binding on the trust. Twelve years' limitation will run from the confirmation of the auction sale. An order of the District Judge appointing a person to perform the duties of the `mutawalli' of certain properties during the minority of a ward would not operate as bar to a suit for possession by a person claiming to be trustee."

42. The question came up for consideration in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram & Anr.*[13] wherein the judicial committee held as under:-

> "Their Lordships are of opinion that there is no distinction between the office and the property of the endowment."

43. The said principle was applied in a case of *Debendra Nath Mitra Majumdar v. Sheik Safatulla*[14], stating:

> "That the right of the plaintiff to hold the properties of the wakf is a right appurtenant to his office as the Mutwalli cannot be disputed : *Gnanasambandha Pandara Sannadhi v. Velu Pandara*[15].

44. For the aforementioned reasons, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

[1][AIR 1963 SC 1638] [2]1961-1 SCR: (AIR 1961 SC 298) [3]AIR 1955 SC 352 [4]AIR 1956 SC 60
[5][AIR 1968 SC 1328] [6][AIR 1934 Patna 443] [7][(2007) 6 SCC 186] [8]2007 (8) SCALE 250
[9](1966) 2 SCR 40 [10]AIR 1979 SC 193 [11](2004) 8 SCC 619 [12](2007) 2 SCC 355
[13][XXVII (1899-1900) Indian Appeals 69] [14][AIR 1927 Calcutta 130] [15][(1899) 23 Mad.271]