

(1942) 01 MAD CK 0030
In the Madras High Court

Muhammad Mahamood Hussain Faroki alias Chan Basha	APPELLANT
Vs	
Syed Abdul Huq alias Sabju Saheb, minor by guardian Syed Miah Saheb	RESPONDENT

Date of Decision : 30-01-1942

Acts Referred:

Citation : (1942) 55 LW 303 : (1942) 1 MLJ 564

Hon'ble Judges : Mockett, J;Kunhi Raman, J

Bench : Full Bench

Judgement

Mockett, J.—The plaintiff is the appellant. He sues for a declaration that he is entitled to succeed to the office and profits of the position of Khatib in the Jumma Masjid Nellore Mosque. As I am generally in agreement with a great deal of the judgment of the lower Court, it will be possible to deal with this appeal briefly.

2. Ex. A is a certified extract from the Inam Register of "Nellore Village" and is dated the 19th December, 1860. The inam was registered as being for performing the services of reading prayers in the Jumma Mosque and it is stated that the services had been performed. In column 10, it is shown that the tenure is "hereditary" and "to be so long as the service is performed". It was granted by the Nabob in 1799 and the original grantee was Abdul Huq. There is printed in the record the pedigree of the line of Khatibs which was filed by the tenth defendant who is the respondent in this appeal. All the persons who are of importance are shown. The position at the time of the suit was that Khader Muhi-ud-din the Khatib had died in 1931 and he had been "succeeded" by his elder sister Sakina Bi. At that time apart from Sakina Bi, there was alive the plaintiff; the son of a deceased sister of Khader Muhi-ud-din. Another sister Bimajan is alive with her children, three sons, of whom the tenth defendant in this suit Abdul Huq is the youngest. The plaintiff Chan Basha challenges the right of Sakina Bi to succeed her brother Khader Muhi-ud-din stating that the Khatibship should go to him by descent.

3. Before the written statement was filed Sakina Bi died. But Abdul Huq the tenth defendant pleads that Sakina Bi rightly inherited and that he is entitled to be the Khatib having been nominated by Sakina Bi to that position. At the time of argument it was generally accepted that the office of Khatib is accurately described in paragraph 4 of the tenth defendant's written statement namely that it is an office held by a person who is to lead the congregations and preach in the Jumma Mosque on every Friday and on Ramzan and Bakr-id days.

The particular form of worship is known as the Jumma Namaz.

4. In the lower Court there were two main controversies. (1) It was contended by the plaintiff that Sakina Bi by reason of her sex was disqualified from holding the sacred office of Khatib. (2") That assuming her to be qualified, the custom in the family showed that the succession to the office was governed by lineal male primogeniture and that therefore the plaintiff was entitled to succeed. The tenth defendant contended that Sakina Bi as a woman was not disqualified from holding the office and that the office descended by custom according to lineal primogeniture whether male or female--in other words, as the eldest descendant she was entitled to succeed after the death of her brother. The tenth defendant also contended, as he was bound to do, that the Khatib for the time being was entitled to nominate his or her successor and that he rightly held the office under such nomination.

5. The question whether Muhammadan women are disqualified from holding sacred offices has been the subject of decision in several cases. In *Shahoo Banoo v. Aga Mahomed Jaffer Bindaneem* (1906) 17 M.L.J. 52 : L.R. 34 IndAp 46 : ILR Cal. 118, the Judicial Committee dealt with the position whether a woman can succeed to a muttawalliship which involved the performance of religious duties. At page 126, Sir Arthur Wilson discussing the proceedings in the lower Court made the following observations:

Those learned Judges agreed with Chitty, J., in thinking that there is no legal prohibition against a woman holding a muttawalliship, when the trust by its nature, involves no spiritual duties such as a woman could not properly discharge in person or by deputy. And it appears to their Lordships that there is ample authority for that proposition.

In *Munnnavaru Begam Sahibu v. Mir Mahapalli Sahib* ILR (1918) Mad. 1033, *Abdur Rahim and Seshagiri Aiyar, JJ.*, held that, as decided by the Privy Council, there is no general rule of Muhammadan law prohibiting a woman from holding a religious office and that such 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. The learned Judges emphasise that such a prohibition arises, if at all, from local custom or usage and not by an injunction of Muhammadan religion or law. They held that the burden of establishing that a woman is precluded from holding a particular office was on those who plead the exclusion. *Abdur Rahim, J.*, seems to have considered that

the decision in *Mujavar Ibrambibi v. Mujavar Hussain Sheriff* ILR (1880) Mad. 95, did not go beyond the facts in that particular case and. that on the evidence the Court must be taken to have held that the woman concerned could not hold the office of *Mnjarar*. The question whether the office could be performed by a deputy was not discussed. It seems to me that the decisions of this Court in *Munnnavaru Begam Sahibu v. Mir Mahapalli Sahib* ILR (1918) Mad. 1033 and of the Judicial Committee in *Shahoo Banoo v. Aga Mahomed Jaffer Bindaneem* (1906) 17 M.L.J. 52 : L.R. 34 IndAp 46 : ILR Cal. 118, are comprehensive. It is difficult to think of any religious office which a woman cannot hold if she is permitted to hold it by a deputy. Neither of the learned Counsel was able to give an example of any religious office which could not be performed through the medium of a deputy. As a matter of convenience there is nothing to be said against the notion once it is accepted that a religious office descends, because " it is obvious that the possibility that the deputy specially nominated by a woman may satisfactorily perform the office is at least equal to the possibility that the person to whom the office descends may be equally qualified. It will therefore appear- to be the law that unless it can be shown by custom or usage that a special office depending upon the personality of an individual which cannot be deputised cannot be held by a woman there is no other prohibition upon her. So far as this Court is concerned the matter is concluded by authority.

6. There is no evidence on the record from which one can say that this woman was specially disqualified for this particular office. In fact there was evidence that in this district (Nellore) a Khatib-ship was held by a woman, Exs XVIII and XIX. I therefore agreed with the learned trial Judge that by reason of her sex Sakina Bi was not disqualified. But that does not decide the appeal. It has been pleaded in paragraph 5 of the plaint in this case that according to the custom of this institution the office devolved upon the nearest and eldest male relation of the deceased holder. By his written statement the tenth defendant alleges in paragraph 5 that "" succession in cases of this sort is regulated by the rules relating to succession by lineal primogeniture". Both. sides are therefore agreed that on the death of an office holder his successor takes by descent. But the plaintiff alleges that it must be by male descent and that that was the custom. I am satisfied on the evidence and the probabilities that the plaintiff is entitled to succeed. An examination of the pedigree shows that in spite of opportunities for the custom or rule relied on by the defence to operate, the descent has always been in the male line. The original donee Abdul Huq was succeeded by his son Sulaiman Sahib. Sulaiman Sahib was succeeded by Abdul Huq his eldest son. This Abdul Huq had two daughters, a daughter by name Vazeda Bi and another. But on his death his younger brother Yasin Sahib succeeded and on the death of Yasin Sahib his son Abdul Huq alias Baba Mian succeeded. Fatima Bi, this Abdul Iluq's sister appears to have quarrelled with her brother. The result was a suit evidenced by Ex. B, brought by Abdul Huq against his sister Fatima Bi and others in which the claim put forward by Fatima Bi, that she was entitled to perform the Khatib service jointly with the plaintiff and to enjoy the profits jointly with him,

was negated. There was no claim, it must be observed, that she was entitled to succeed to the office. But?still more significant is the fact that at the time of the death of Abdul Huq, Sakina Bi, through whom the present tenth defendant claims, was alive. She did not succeed to the office but her younger brother Khader Muhi-ud-din. Khader Muhi-ud-din had the misfortune to be a leper and for many years the office of Khatib had been performed by his deputy. He died in 1931.

There is a dispute as to the exact date because the genuineness of Ex. IV, the nomination deed, has been attacked in this case. According to the tenth defendant he sent his petition marked Ex. VII (a) to the Collector of Nellore with a view no doubt to evidencing that he held nominated his sister Sakina Bi to the office of Khatib. The office was to be performed by a proxy during the minority of the tenth defendant described as Sakina Bi's foster-son, who was to hold the office when he became a major., Within a few hours of Ex. VII (a) Khader Muhi-ud-din died. I do not consider it necessary in this case to decide whether Ex. VII (a) was a genuine document or not. This was a hereditary office by reason of a grant Ex. A by which the tenure was stated to be hereditary.

7. I agree with Curgenven and K. S. Menon, JJ., in *Hakim Khan alias Sikkandar Khan Sahib and Others Vs. A. Sahibjan Sahib and Others*, , that:

If the hereditary principle is to be observed, it follows that there is no room left for disposing of these rights and duties by assignments and settlement.

It is clear to me on the evidence that shortly before the death of Khader Muhi-ud-din there was the greatest activity in his branch of the family directed towards keeping this Khatibship away from the plaintiff. Had Sakina Bi been entitled under the custom to succeed, she would have done so before Khader Muhi-ud-din. Any nomination by him, had she thought fit to stand aside, was wholly unnecessary. I do not think that it ever occurred to any one until this suit that this office did not go by succession to the lineal male descendant. The consciousness of that fact led to the execution of Ex. VII (a) and Ex. IV, elaborate devices, in my view, in order to defeat the plaintiff. It has not been possible for learned Counsel for the respondent to support the so-called nomination by any substantial argument. In the absence of clear authority, I cannot accept the proposition that property or an office which descends hereditarily can at any time be diverted according to the whim of any particular holder. The tenth defendant is constrained to support his right by nomination because Sakina Bi being dead, it must follow that according to the tenth defendant's own " case apart from nomination, Bimajan would succeed. But she has not been brought on the record. I am quite satisfied on the evidence that the plaintiff's case that there was a custom in this family by which this office descended lineally to the eldest male descendant has been amply established. With respect to the learned trial Judge, I am unable to agree with him as stated in paragraph 14 of his judgment that from the fact that there was no contest by the daughter of the earlier Abdul Huq, it must be assumed that it was probable

that she did not insist on her rights. I respectfully agree with Le Rossignol, J., in Sham Das v. Mst. Moolo Bai ILR (1925) Lah. 124, that:

. . . . it must be obvious that uncontested cases are very good proof of any alleged custom, for the greater the strength of the custom the less probability is there of anybody attempting to controvert it.

I am unable to understand how the fact that the operation of a custom has not been resisted can be used as an argument that such a custom did not exist. It is to be observed that the learned Judge based his decision on the finding that the special rule of succession set up by either side was not made out and that therefore the general rule of succession under the Muhammadan law prevails. It is not clear to what rule of Muhammadan law the learned Judge refers. If descent to this office is to be judged by the rules of succession of Muhammadan law, the office would be divided among several persons, which is neither side's case. It is however clear in this case from Ex. A that the office was hereditary and it is reasonable to suppose that by custom the office would go to an individual as a matter of convenience. The custom in this family was that the office was to be held by the lineal male descendant or nearest and eldest male members of the family. That such a custom is reasonable can hardly be doubted. The women of this family observe gosha and no one suggested that a woman could have herself performed the duties of Khatib.

8. I am satisfied that there is ample material on the record from which it is clear that the plaintiff should by custom have succeeded on the death of Khader Muhi-ud-din. In this view of the position, this appeal should be allowed with costs, here and below. The court-fee will be paid by the plaintiff out of the income of the Khatibship.

Kunhi Raman, J.

9. I agree.