

(1923) 03 CAL CK 0029
In the Calcutta High Court

Azizor Rahman Chaudhury

APPELLANT

Vs

Ahidennessa Chaudhurani and Others

RESPONDENT

Date of Decision : 09-03-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : AIR 1928 Cal 225

Judgement

1. This is an appeal by the defendant against what may be described as the preliminary decree in a suit u/s 92, Civil P.C.

2. The subject-matter of the litigation is a wakf which was created on the 24th September 1876 by a Mahomedan gentleman of the name of Mahomed Kabil Chaudhury, who died on the 3rd November 1876. He left two sons by two wives namely Man war Ali and Mazafar Ali who became joint mutwalis. Manwar Ali died in 1895 and thereupon Muzaffar Ali continued to act as the sole mutwalli till his death in 1906. Thereafter disputes broke out as to the office of mutwalli. Plaintiff 1, who is the daughter of a son of the founder, sued to secure the office of mutwalli. The claim was resisted by the defendant who is the son of a daughter of the founder. After a protracted trial the defendant was appointed mutwalli on the 27th August 1907 by the primary Court. This decree was affirmed by this Court on appeal on the 1st July 1910. Plaintiff 1, thus defeated, instituted a suit in 1914 to set aside the wakf on the ground that it was an illusory endowment. The suit was dismissed by the trial Court on the 19th September 1916. That decree was affirmed in substance by this Court on the 26th April 1917, on the admission of the plaintiff that the wakf was valid and operative in law. Thus, baffled a second time, the plaintiff, along with several other persons, instituted the present suit on the 3rd April 1919, u/s 92, Civil P.C., for the removal of the defendant from the office of mutwalli and for the appointment of a new mutwalli. In the interval, plaintiff 1 had commenced another litigation against the defendant in 1918 for settlement of accounts and for recovery of arrears of maintenance. The hearing of that suit has been stayed pending the conclusion of the present litigation. The defendant contended that there was no reason why he

should be removed from the office of mutwalli and that, if the wakf properties have not been managed in strict conformity with the directions of the founder, plaintiff 1, was more to blame than he himself. The District Judge took evidence as to the dealings of the defendant with the wakf estate and came to the conclusion that he was guilty of breach of trust and neglect of duty to such an extent that he should be removed from the office of mutwali. The District Judge has further directed that a commissioner be appointed to examine the income and expenditure of the wakf estate.

3. In the present appeal, the conclusions of the District Judge as to the management of the wakf estate by the defendant, have been controverted as not supported by the evidence on the record. It has further been urged that some at any rate of the transactions were not such as would justify an order for removal of the defendant from the office of mutwalli. Emphasis has naturally been laid on the previous history of the wakf estate and the embarrassment necessarily created by reason of the suits mentioned and numerous other litigations which involved an expenditure of large sums of money. We do not consider it necessary for our present purpose to examine the history of each of the instances of mismanagement given by the District Judge. The general impression left on our mind by the judgment of the District Judge is that he has laid undue stress upon matters of relatively small importance and that he should not have formed an opinion upon the question of the removal of the defendant from the office of mutwalli till the accounts of the income and expenditure of the wakf estate had been investigated by the commissioner. The principles which should regulate the action of the Court in cases of this description are well settled. The Court should be guided by considerations of the welfare of the trust estate, and before a removal of the trustee is directed a clear necessity for the intervention of the Court to save the trust property must be established. It is not every mismanagement or neglect of duty which will induce the Court to remove a trustee. There must be such gross negligence or misconduct as to evidence a want either of capacity or of fidelity which is calculated to put the trust in jeopardy. Failure in the discharge of duty on account of mistake or misunderstanding is not a ground for removal unless such failure shows want of capacity to manage the trust. As was observed by Lord Langsdale, M.R. in *Attorney-General v. Caius College* [1837] 2 Keen 150, it is not enough to prove even considerable errors and irregularities in the management of the property or in the distribution of the income or in the conduct and management of the institution. The test is, is this the result of corrupt or improper motives; *Attorney General v. Clifton* [1864] 32 Beav. 596. These principles have been generally recognized and applied in cases in Indian Courts; *Srinath v. Radhanath* 12 C.L.R. 370, *Sathappayyar v. Periasami* [1891] 14 Mad. 1, *Tiruvengadath Ayyangar v. Srinivas Thathachariar* [1899] 22 Mad. 361, *Muhammed Jafar v. Muhammad Ibrahim* [1901] 24 Mad. 243, *Nates v. Ganapati* [1891] 14 Mad. 103, *Miyaji v. Ahmed Sahib* [1908] 31 Mad. 212, *Faicuruddin Sahib v. Ackeni Sahib* [1878] 2 Mad. 197, *Subba Naidu Vs. Gopalaswamy Naidu, Ganapati Ayyan v. Savithri*

Ammal [1893] 21 Mad. 10, Raja of Kalahasti v. Ganapati [1918] M.W.N. 555, Chintaman v. Dhondo [1891] 15 Bom. 612, Annaji v. Narayan [1897] 21 Bom. 556, Damodar v. Bhogilal Kasandas [1898] 22 Bom. 493 , and Girdharlal Harivallabhdas Vs. Naranlal Narottamdas, . These cases all support the view that a trustee may be removed if he fraudulently misapplies the revenues of the trust property and grossly misbehaves himself in the execution of the trust, for example if he renews a lease for his personal benefit, purchases the trust property, concurs in a breach of trust, asserts a hostile title with knowledge that it was unfounded, fails to keep accounts, wrongfully alienates trust property, obstructs the management and wants only to waste the estate. It is necessary that these principles should be borne in mind by the District Judge when he reconsiders the case.

4. We are of opinion that, in the circumstances disclosed, this appeal should be allowed and the decree of the District Judge set aside. The case will be remitted to him in order that he may in the first place carefully examine the state of the accounts as disclosed in the report of the commissioner. Both parties will be entitled to take exceptions to that report and to justify the objections they may advance before the District Judge. Meanwhile the defendant will continue to hold the office of mutwalli. The previous history of the endowment leaves little doubt that great embarrassment has been caused by the constant ill-feeling between the plaintiffs and the defendant, and that even a stranger, as receiver, has not found it easy by any means to manage the estate effectively. We accordingly direct that the present receiver be discharged and that the defendant and Khan Saheb Abdul Knaleck, pleader of Feni, be appointed joint receivers. They will not be called upon to furnish security, but the District Judge will direct that all collections be brought into Court periodically so that the risk of waste may be minimized. The District Judge will also draw up an ad interim scheme for the management of the trust property. We are convinced that a new scheme for management of the trust estate must ultimately be framed for the management of the institution; economic conditions have changed considerably since the day when the founder created the endowment and alterations are manifestly needed in the scheme, if the wishes of the founder are to be carried out effectively. It has been represented to us that persons entitled to annuities have not received payment for a considerable time. Upon application made to the District Judge, he will give such directions in respect of these as also other matters as may be justified by the circumstances.

5. Each party will pay his costs in this Court; but the defendant will be entitled to pay out of the estate the costs he has actually incurred.