
(1941) 11 CAL CK 0025
In the Calcutta High Court

Benoy Kumar Acharjee Choudhury and Others

APPELLANT

Vs

Ahammad Ali and Others

RESPONDENT

Date of Decision : 18-11-1941

Acts Referred:

Specific Relief Act, 1877 — Section 42
Waqf Act, 1954 — Section 70

Citation : AIR 1942 Cal 467

Hon'ble Judges : Sen, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

Sen, J.—This appeal arises out of a representative suit instituted by certain Mahomedans of the District of Mymensingh for a declaration that a certain property was wakf property. The suit was instituted in the District of Dacca. The learned Subordinate Judge dismissed the suit on two preliminary grounds. He held, first, that the plaintiffs had no cause of action and, secondly, that the suit was barred by the provisions of Section 42, Specific Relief Act, inasmuch as the plaintiffs had not prayed for consequential reliefs. Against this decision an appeal was taken to the District Judge. The learned Judge remanded the case holding that the decision of the learned Subordinate Judge on the preliminary issues was erroneous. The defendants have now appealed to this Court. In course of the argument it came to light that no notice was issued to the Commissioner of Wakfs. Section 70, Wakf Act, states that in every suit or proceeding in respect of wakf property the Court shall issue a notice to the Commissioner of Wakfs at the cost of the party instituting such suits, an exception being made in the case of suits or proceedings for the recovery of rent by or on behalf of the mutwalli. In our opinion, it was mandatory on the Court to issue this notice. Sub-section (4) of Section 70 says that if such notice has not been issued the Commissioner may apply to the Court to have a declaration that the decree passed in the suit is void.

2. It was contended on behalf of the appellants that Section 70, Wakf Act, applies only where the suit is in respect of property which is admittedly wakf and that no notice is necessary where the defendant, as in the present case,

contends that the property is not wakf property. We are not impressed by this argument. The Commissioner of Wakfs is an officer appointed to protect wakf properties. The intention of the section is to enable the Commissioner to carry out this function in suits. If in a suit a claim is made that certain property is wakf, the Commissioner of Wakfs as protector of all wakfs is obviously interested to see that the suit is properly conducted so that no wakf estate is destroyed or adversely affected. Section 70 enables him to do this. To limit the extent of S; 70 in the manner suggested on behalf of the appellants would be to stultify the very object of the section. We are of opinion that a notice u/s 70 is necessary even if the claim that the property is wakf is contested. In these circumstances, we set aside the orders passed by both the Courts below and direct that the suit be heard de novo by the trial Court on all the points after the issue of notice to the Commissioner of Wakfs in accordance with the provisions of Section 70. We make no order as to cost.

B.K. Mukherjea, J.

3. I agree.