

(1925) 07 MAD CK 0010
In the Madras High Court

Dost Muhammad Khan Sahib and Others	APPELLANT
Vs	
Kadar Batcha Sahib	RESPONDENT

Date of Decision : 24-07-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Religious Endowments Act, 1863 — Section 15

Citation : 92 Ind. Cas. 950

Hon'ble Judges : Odgers, J;Madhavan Nair, J

Bench : Division Bench

Judgement

Odgers, J.—In this case four plaintiffs Muhammadans brought a suit u/s 92 of the C.P.C. for the removal of the defendant from the

management of mosque Pallivasal in Ellaimankoil Street, Tanjore and for consequential reliefs including a scheme for the management of the said

mosque. The 1st plaintiff is stated in the plaint to reside at Chunnambukara Street, the 2nd plaintiff at Kollupettai Street; 3rd at Attumanthai Street,

and the 4th out of Fort, Tanjore.

2. The appeal has been argued before us on the point of want of interest of the plaintiffs under the section of the C.P.C. and also with a view to

establishing certain charges set out in plaint para. 8(f)(g)(i) and (l) in order to prove certain mismanagement in respect of the temple accounts and

property. The learned Judge has dismissed the suit on all points and I shall proceed to deal with the first point, that of interest as, in my opinion, the

appeal can be disposed of on that ground.

3. The defendant in his written statement alleges that the plaintiffs are not residents of the locality, nor do they live close to the plaintiff mosque. They

have never worshipped in the mosque nor have ""they any right to do so. By a stone inscription, Ex. 13 appearing in the mosque, it would seem that

Bapu Vaidyar erected the mosque about the year 1847 or 1848. Exhibit A is a settlement deed of 1879 by one Amir Khan Sahib, grandson of the

founder in which he settles Rs. 4,000 worth of property for the benefit of the charity established by his ancestors in the mosque in Elliammankoil

Street, Tanjore, and appoints his foster son who is the defendant to enjoy the trust property and apply the income to it. On the evidence the

learned Judge has found that the 1st plaintiff who is the duffadar of the District Court of Tanjore lives far away from the plaintiff mosque there being

three other mosques nearer to his house and that his opportunities for attending the plaintiff mosque are limited to the occasions when he happens to

visit his second wife when she is living in her mother's house. The 2nd plaintiff says that he attended the mosque when he went to his brother's

house for meals. As there is ill-feeling between the two, it is improbable that he would go to his brother's house for this purpose. He admits that he

had not been to the mosque in the month of Ramzan for the past seven or eight years, or on the 12th day of the Barabafat month all of which are

festive occasions among Muhammadans. The 3rd plaintiff is a native of some village in Pudukottah and admittedly he went for prayers to one or

other of the two mosques which are near his shop and would appear to have no occasion to go to this mosque in the Elliammankoil Street. Fourth

plaintiff lives in the same street as the 3rd. He admits that he had been employed in different places in different capacities for the last 10 or 15 years

and, consequently he would have had no opportunity of going to this mosque for prayers. There are farther other mosques near his house, three

within half a furlong and one within a furlong. He says he used to go to Elliamman Street to collect moneys for his employer. He, however, admits

that he has not for the last 2 1/2 years gone to that street for this purpose. It is, therefore, found by the learned Judge and in fact admitted by the

learned Vakil for the appellants that none of these plaintiffs can be said to be habitual worshippers of the plaintiff mosque. Mr. P.R. Ganapathi Iyer

for the appellants contends first that every Muhammadan is entitled as such to attend any mosque for worship and this may be at once admitted to

be correct. He relies not only on this but also on the fact that the plaintiffs are residents of the locality and his contention is that these two points, i.

e., right to worship and residence in the locality taken together would afford the interest acquired u/s 92. The test to be applied has been

authoritatively laid down as far as we are concerned by the-judgment in Ramachandra Iyer v. Parameswaran Munbi 50 Ind. Cas 633 9 L.W. 492

: (1919) M.W.N. 370. That was a well-known case in which Mr. T.R. Ramachandra Iyer claimed interest as a member of the Hindu community

and, thereby alleged title to institute a suit in respect of a temple in Tellichery. In the full and instructive judgment delivered in that case by Wallis,

C.J., the history of the provision of law is traced and the learned Chief Justice came to the conclusion that in order to entitle a plaintiff to sue under

the section ""he must have a clear interest in the particular trust over and above that which millions of his countrymen may be said to have by virtue

of their religion."" The learned Chief Justice after referring to the amendment of the section which originally contained the words "" direct interest

was of opinion that even after the amendment the words ""interest in trust"" must still, in Lord Eldon's words, be "a clear interest" that is to say, a

present and substantial, and not a remote and fictitious or purely illusory interest and further "" that interest if the provision is not to be altogether

illusory, must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of

religious community throughout India."" On a difference of opinion between the learned Chief Justice and Kumara-swami Sastri, J., who took the

view that the right of worship in a particular temple is sufficient interest under the section, the case was referred to three learned Judges of this

Court one of whom was Abdul Rahim, J. Had this learned Judge said in his judgment anything particularly applicable to mosques as distinguished

from temples, it would in my view have earned great weight. He agreed with Kumaraswami Sastri, J., and held with him that the section gave the

right to institute actions to secure proper administration of temples and mosques to all persons who have a right of attendance and worship at these

religious foundations. The majority of the Court, however, Oldfield and Coutts Trotter, JJ., held otherwise and agreed with the judgment of the

Chief Justice. Oldfield, J., in the course of his judgment said: "" Proof of residence in the neighbourhood of the institution will no doubt be one way

of establishing possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live

near to the institution will be most likely to take advantage of its benefits.½ It would, therefore, seem that the test of locality is only to be applied

in relation to actual user of the temple or mosque by the inhabitants residing close to it. Coutts Trotter, J., was distinctly of opinion that the right to

worship in a temple was not equivalent to interest and refused to import the definition in Section 15 of the Religious Endowments Act (As Wallis,

C.J., had refused to do before) in order to interpret the meaning of Section 92, C.P.C. ""The learned Judge continued. ""In so far as the decided

cases suggest a limitation, the limitation suggested is that of living in the neighbourhood of the institution in question and habitually resorting thereto

for purposes of worship."" On that, one can be asked ""what is your definition of neighbourhood?"" ""What is your definition of habitual resorting?

The learned Judge confessed that no universally applicable formula in answer to these questions could be discovered. All that can be done is to say

that the interest required by the Statute must be clear, present and substantial and not a remote and fictitious or purely illusory interest or an existing

interest and not a mere contingency. Beyond that the learned Judge was of opinion that the question was a pure question of fact, and must be left,

to the Court to decide on a consideration of the particular circumstances of each case. The latest case in the Privy Council Vaidyanatha Ayyar v.

Swaminatha Ayyar AIR 1924 (P.C.) 221 : 20 L.W. 803 51 I.A. 282 does not touch the present matter. It seems to me unnecessary in the light of

the judgment of the majority of Judges in Ramachandra Iyer v. Paramesivaran Munbi (1919) M.W.N. 370 to examine the earlier cases on the

subject and applying that case to the facts of this case as previously set out, it appears to me that it cannot be said that the plaintiffs had anything

but an illusory or fictitious interest in this mosque. They either did not worship there at all or worshipped on such rare occasions and such long

intervals that they cannot be said to have a real or clear interest as required by the decision. It appears to me perfectly dear that Mr. P.R.

Ganapathi Iyer's suggestion is that the residents of the same town have the requisite interest even if they do not worship at the particular temple or

mosque in question. It is, however, clear on the decision in Ramachandra Iyer v. Paramesivaran Munbi (1919) M.W.N. 370 that so long as they

have the right to do so, they must be shown to have some interest over and above the rest of the residents of the locality of their own community

who are entitled 28 members of that community to take part in the worship conducted in the institution. This the plaintiffs are not shown to possess.

We are referred to one decision in *Garuda Sanyasayya v. Nerella Muthemma* 35 M.L.J. 661 : 25 M.L.T. 86 where the point arose but is

dismissed in three lines of the judgment. It was a case of choultry and the learned Judges held that as the plaintiffs were residents in the locality in

which the choultry was situated and were members of the community for whose benefit the charity was founded, it was sufficient to give them

interest to institute a suit for its management. Wallis, C.J., was one of the Judges who decided that case which was prior to thi3 decision in

Ramachandra Iyer v. Parameswaran Munbi (1919) M.W.N. 370. In my opinion, therefore, the learned Judge in this case was right in dismissing

the suit on the point of want of interest in the plaintiffs.

4. It is unnecessary in the view I take on this point to discuss the question of the charges. But I may add that having carefully considered the matter

I should, if necessary, be of opinion that none of the charges have been established against the defendant. On all these grounds, therefore, it

appears to me that the appeal must be dismissed with costs.

Madhavan Nair, J.

5. This appeal by the plaintiffs arises in a suit instituted by them u/s 92 of the C.P.C. in which they prayed for the removal of the defendant from the

management of the plaint musjid (mosque) and its endowments for the appointment of new trustees, for the taking of accounts and for a scheme for

the proper management of the mosque. The plaint mosque is situated in Elliammankoil Street, Tanjore, and was founded by Bappu Vaidyar in

Hijiri 1243 (1847-1818). On the 1st of November (sic) Amir Khan Sahib, the grandson of Bappu Vaidyar and last of the family of the original

founder made a settlement, Ex. I, by which he endowed the mosque with some property and appointed his foster-son ""as the person entitled to

enjoy the property endowed for charity and to carry out the charity by means of its income"" specifying in the deed the main objects for which the

income of the properties was to be utilised. The plaintiffs alleged in their plaint that they resided close to the mosque and were interested in it and in

the trusts relating thereto, that the defendant was not the die jure or rightful trustee, that he had committed various breaches of trust and that, in

consequence he should be removed from the management of the mosque and its properties. The defendant in his written statement pointed out that the plaintiffs were not residents of the locality, that they had interest in the plaintiff mosque as contemplated by Section 92 of the C.P.C. that he was not only the de facto but the de jure trustee also"" and that he was not guilty of any of the breaches of trust specified-in the plaint. Various issues were framed by the Subordinate Judge dealing with the allegations in the pleadings, but the appellants, confined their arguments only to the finding of the Subordinate Judge as regards five issues these being:--Issue I. ""whether the plaintiffs have sufficient interest in the plaintiff mosque and is the suit sustainable.

6. Issue If ""whether the defendant is not a de jure trustee?

7. Issue V ""whether item 3 of Schedule A of the plaint ever belonged to the trust?

8. Issue VIII ""whether the defendant has committed all or any of the breaches of the trust alleged in the plaint and is he liable to be removed from the trusteeship?"" and

9. Issue IX whether a scheme is necessary and if so, on what terms?

The learned Subordinate Judge found against the plaintiffs on all these issues and, in consequence, dismissed the plaintiffs' suit.

10. The first question to be considered is whether the plaintiffs or any of them have the ""interest"" in the trust within the meaning of Section 92 of the

C.P.C., entitling them to maintain the suit. As the decision of this question will to some extent depend upon the facts of the case, it is necessary to

state in some detail the evidence bearing on it and my conclusion thereon before dealing with the cases relied on by the appellant's learned Vakil.

The 1st plaintiff who is examined as the 10th witness for the plaintiff has been in Government service since 1883, and since 1890 he is employed in

the District Court of Tanjore as a duffadar. His place of residence since 1902 is Chunnambukara Street Which is five or six furlongs off from the

plaint mosque situated in Ellaimmankoil Street. He states that his grandfather had a house opposite to the mosque and he lived in it for thirty years

and has then gone, often and offered prayers in the mosque. The latter statement is not supported by independent evidence. His grandfather's

house has been sold to the defendant's brothers He married in 1891 his second

wife who has a house in Elliammankoil Street. When she lived with her mother for seven or eight years on account of her quarrel with his first Wife, he states that he used to visit her and then used to go to this mosque in the morning on Sundays and in the evening on other days. He admits that there are two mosques within about two furlongs from his house. As duffadar he states that he was to be in Court at 10.30 A.M. and until such time as the District Judge sits and that while on duty in Court he used to make prayer only if he had time. Although according to their religion the Muhammadans were to offer prayers five times a day, the evidence shows that it is not necessary to make these prayers in the mosque as they may be offered at any place where they happen to be at the time. Though this witness says that he has been offering prayers in this mosque regularly, the evidence of the defendant is that this witness has never gone to the plaint mosque for offering prayers. It is to be noticed that there are mosques which are nearer to his present place of residence than the plaint mosque. The evidence in the case seems to suggest that though he may have offered prayers in this mosque, he might have done so only on those occasions when he happened to visit his second wife when she lived in her mother's house. It may be noticed that he has till now instituted four scheme suits and he does not appear to be a man of means.

11. The 2nd plaintiff is examined as the plaintiff's first witness. He has been living in Pambatti or Kalapathi Street out side the Fort away from the musjid for the past seven or eight years. Previous to that, it is true, he lived in Suryappa Lane about one and a half furlongs from this mosque, but he does not seem to have been a regular worshipper in the mosque. He states that he used to go to the plaint mosque for prayer once in in two or three days for the past seven or eight years. It is difficult to believe that he speaks the truth when he makes this statement. He admits that there is in the street, in which he lives a musjid about a hundred yards off from his house, and there are also other mosques nearer to his house. No special reason is assigned for his going to the plaint mosque for worship than to the mosques, nearer to his residence. He states that he has a shop in the Ayyankadai near the mosque that his brother lives in the fourth house from the plaint mosque and that he used to go to his brother's house from his shops for meals. It is suggested in the evidence of D.W. No. 2 his brother that

there is ill-feeling between the two brothers and it is hardly likely that he would have taken meals in his brother's house. This witness admits that he has not gone into the musjid during the past seven or eight years in the month of Romzan or on the twelfth day of the Barabafat month--both important -festive occasions in Muhammadan mosques. On the defendant's side it is stated that this witness used to go very rarely to the plaint mosque for offering prayers. The witness states that hr has not been on speaking terms with the defendant in this case for the past ten. or twelve years owing to ill-feeling. It appears to me from this evidence that this witness might have only occasionally visited the mosque for offering prayers.

12. The 3rd and 4th plaintiffs are examined as the 8th and 9th witnesses for the plaintiffs. Their evidence is not of much importance. Plaintiff

witness No. 8, a native of Puddukottah is a trader and lives near. Pambattikara Street, in which there is a mosque and near which also there is

another one. He admits that he used to offer prayers there. He has no dealings in Ellaiamankoil Street in which the plaint mosque is situated and his

occasions to go there are few. He does not remember how many years ago he went to the plaint mosque first. Plaintiff witness No. 9 also like the

other witnesses says that he offered-prayers in this mosque, but it is extremely doubtful if he has so done except- very rarely. He lives away from

the mosque and has been employed in different places which would suggest that he would have had no opportunity to go to this mosque. There are

mosques near his place of residence. He states that he went inside this mosque one and a half or two years ago.

13. My conclusion from the summary of the evidence given above is that, though the plaintiffs may be said to reside in the neighbourhood of the

mosque, they are not habitual worshippers in it, nor are they in any manner specially interested in the mosque, though as Muhammadans. they like

the others have admittedly a right to offer prayers there. There are mosques nearer their places- of residence which makes it unlikely that they

would have gone to this mosque for worship frequently. The evidence also suggests that the plaintiffs in instituting this suit are not actuated by

considerations relating to the improvement in the administration of the mosque and its properties.

14. In these circumstances, the question of law to be considered is whether the

plaintiffs have.. the interest in the trust contemplated by Section 92 of the C.P.C. What is the nature of that "interest" has been elaborately considered in the Letters Patent Appeal in Ramachandra Iyer v. Parameswaran Munbi (1919) M.W.N. 370. In that case a suit was instituted u/s 92 of the C.P.C. for the removal-, of the trustees of a temple at Tellicherry and for other reliefs. One of the plaintiffs was Mr. T.R. Ramachandra Iyer. His interest in the trust entitling him to institute the suit was not based on the fact that he had worshipped in that temple once or twice when he went to Tellicherry in his professional capacity some eight or ten years ago, nor upon the fact that he was the President of the Dharama Rakshana Snbha but solely upon his right which he as a Hindu has of worshipping in every Hindu temple throughout India. It was there held that the mere right of a Hindu" plaintiff to worship in a temple is not such an interest in the trust as to entitle him to sue u/s 92. It was argued that every Hindu temple must be presumed to be dedicated for the use of all Hindus and that each of the individuals has, therefore, an interest in the trust of every Hindu temple. This argument was overruled by Wallis, C. J., who after an exhaustive examination or the history of the section and of the case law relating to it held that interest in the trust must be "a clear interest" that is to say "a present and substantial and not a remote or fictitious or purely illusory interest," and also that that interest "if the provision is not to be altogether illusory must arise from special. relation in which the plaintiff stands to the endowment in question as compared with the while body of religious community through out India." His Lordship also expressed the view that "the bare possibility, however, remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust appears to defeat the object with which the Legislature inserted these words in the section." The majority of the learned Judges who heard the Letters Patent Appeal on a difference of opinion between the learned Chief Justice and Kumaraswami Sastri, J., accepted the opinion of the learned Chief Justice. As his judgment shows, the observations therein on the question before me apply with equal force to the case of Muhammadans worshipping in Muhammadan mosques also. In Vaidya-natha Ayyar v. Sawaminatha Ayyar 26 P.L.R. 1 : L.R. 6 A. (P.C.) 17 : 1 O.W.N. 617 (P.C.) their Lordships of the Privy Council expressed

approval of the opinion of Wallis C.J. already quoted. In that case the suit under a. 92, C. P. C, related to a chattaram and its properties and one

of the questions for decision was whether the plaintiffs had the interest in the trust contemplated by that section. On that point their Lordships were

of opinion that the fact that "the plaintiffs are descendants although only in female lines of the founder of the chattaram gave them an interest in the

proper administration of the trust sufficient to enable them to maintain this suit, although they themselves may never find it necessary to use the

chattaram as a rest house or to obtain food there". Mr. Ganapathi Aiyar does not call into question the correctness of the decision in Ramachandra

Iyer v. Parameswaran Munbi 25 M.L.T. 304 :1919) M.W.N. 370, but argues that the case is an authority for the proposition that, if the plaintiffs

reside in the neighbourhood of the suit institution such residence coupled with their admitted right to worship therein necessarily gives them

the interest entitling them to institute the suit u/s 92, C.P.C. In support of this argument reference is made to certain passages in the judgment of

Oldfield, J., and of Coutts-Trotter, J., but on examination it will be found that these passages do not lend any support to the argument advanced by

the learned Vakil. Oldfield, J., states, that "proof of residence in the neighbourhood of the institution will no doubt be one way of establishing

possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live near to the

institution will be most likely to take advantage of its benefits." I have no doubt that by this statement the learned Judge did not mean to lay down

as a proposition of law that residence in the locality coupled with the admitted right to worship in a temple or mosque means possession of an

interest within the meaning of Section 92. The context makes it clear that, according to the learned Judge's view, proof of residence in the

neighbourhood will be one of important facts to be considered in an enquiry regarding the question whether a plaintiff who has a right to worship

possesses the interest in the trust contemplated by the section The same is the view of Coutts Trotter J also. It seems to me that to a very large

extent the question as to whether any particular person has or has not an interest within the meaning of Section 92 CP C. is mainly a question of

fact to be decided on a consideration of the circumstances of each case. The question was so treated in Gopala Krishnier v. Ganapathy Aiyar

(1920) M.W.N. 478 for the learned Judge, Sadasiva Iyer"" who delivered the judgment, states thus: ""The first question argued in this appeal is

whether the plaintiffs have got the necessary substantial interest to institute the suit having regard to the Full Bench decision in Ramachandra Iyer v.

Parameswaran Munbi (1919) M.W.N. 370. On the evidence taken on remand I am clearly of opinion that the plaintiffs have got such a substantial

interest "" The decision in Garuda Sanyasayya v. Nerella Muthemma 25 M.L.T. 86 also, does not support the position taken up by the appellants

Dealing with the question whether the plaintiffs have interest to institute the suit u/s 92 Wallis, C.J. and Seshagiri Iyer J state ""They are residents of

the locality in which the choultry is situated and are members of the community for whose benefit the charity was founded. In our opinion these

facts, give them sufficient interest to institute the suit."" It is clear that residence in the locality is to be treated only as a question of fact from which an

inference may be drawn regarding the question whether a plaintiff who has a right to worship in a"" temple or mosque has or has not an interest to

institute the suit. The other decisions quoted to us need not be discussed as all of them have been elaborately considered by the learned Chief

Justice in Ramachandra,Iyer v. Parameswaran Munbi (1919) M.W.N. 370 in dealing with the history of Section 9 of the C.P.C. I think that the

facts of the case clearly show that though the plaintiffs reside in the neighbourhood, they really have no present and substantial interest in the suit

mosque. Their interest in it is only fictitious or illusory. Being Muhammadans, they are no doubt entitled to worship in the mosque, but they are only

occasional worshippers and, in my opinion, do not possess ""the interest"" entitling them to institute the suit u/s 92, C.P.C. as explained in

Ramachandra Iyer v. Parameswaran Munbi 9 L.W. 492 : (1919) M.W.N. 370.

15. The question raised by Issue II is whether the defendant is not a de jure trustee. The learned Subordinate Judge found on this issue against the

plaintiffs. The case for the appellants on this issue presented before us by their Vakil is somewhat different from the one raised by them in their

plaint and considered by the learned Subordinate Judge. Paragraph 7 of the plaint states, ""the defendant was appointed by the said Amir Khan

Sahib to be a person entitled to keep the enjoyment of the properties endowed from the charity and to conduct the charities out of the income of

the same. The defendant is not appointed to be the trustee of the masjid assuming such appointment would be validly made, but he has been made de facto trustee of the masjid ever since the arrangement evidenced by the said document and ever since Amir Khan Sahib's death "" No doubt the question as regards the validity of his appointment as trustee is referred to by the defendant in the written statement but the case raised by the plaintiffs (as may be seen from the paragraph quoted) is this, namely, that Amir Khan Sahib did not appoint the defendant as trustee of the masjid but only appointed him ""to keep the enjoyment of the properties endowed for the charity and to conduct the charities out of the income,"" thereby drawing a distinction between a ""trustee of the mosque and a manager of the properties."" This argument was overruled by the Subordinate Judge and has not been availed of before us by the learned Vakil as obviously Ex. I the deed of settlement does not support it and there is no other evidence to justify it. What has been argued before us is this, namely, that Amir Khan Sahib had no power to appoint the defendant as his successor. It is true that as foster-son the defendant is not entitled to lay any hereditary claim to the trusteeship, but Amir Khan Sahib was himself a muttawalli and it is a well-known principle; of Muhammadan Law that, in the absence of the rules laid down by the founder...of the mosque, the muttawalli for the time, being may validly appoint a successor to, himself. The present defendant, was so appointed in 1879 and, in my opinion, he is a validly appointed trustee.

16. Issue V raised the question, whether item 3 of Schedule A of the plaint ever belonged to the trust? This item consists of two shops. The appellants' case is that. they formed the mosque property and that the defendant sold them to his brother against the interest of the trust, the defendant's case being that they were his absolute private property. It is conceded that there is no document showing, that these shops ever belonged to the mosque. It is admitted that the mosque has no other properties except those left to it by Amir Khan Sahib under Ex. I and it is not disputed that these two shops are not included in Ex. I. In this connection our attention has been drawn to Exs. II, III, IV, V and V (a). In these documents which dealt with a house which was mortgaged and afterwards sold, Khadar Batcha's shops (viz., these shops belonging to Khadar

Batcha the defendant) are described as one of the boundaries and the 1st plaintiff has attested them. It has been argued before us that these

documents are legally inadmissible in evidence, but this objection does not seem to have been taken in the lower Court, nor has it been raised in

the grounds of appeal before us. Even if we ignore these documents, it follows from what has been pointed out above that these shops do not

belong to the mosque. The plaintiffs rely on a recital in Ex. XVI the sale-deed under which the defendant conveyed these two shops to his brother

Moideen Batcha (D.W. No. 4). The recital is that the shops in question ""were originally enjoyed by Amir Khan Sahib and are now enjoyed by

me."" In view of the admitted fact that all the properties belonging to the mosque were endowed to it under Ex. I and that.,Ex. I does not contain

the shops in question, the statement in Ex. XVI is not as important as it might otherwise be. The defendant offers his own explanation and that has

been accepted by the Subordinate Judge. The plaintiffs themselves have no personal knowledge of, the endowment of the shops of the mosque In

my opinion, there is no reliable evidence on the plaintiffs" side to show that these two shops belonged to the mosque. In view of the admitted facts

of the case and. Ex. I, I am satisfied that the learned Subordinate Judge has arrived at a correct conclusion on this issue.

17. Issue VIII relates to the question whether the defendant has committed all or any of the breaches of trust alleged in the plaint and is he liable to

be removed from the trusteeship? In the plaint fourteen specific breaches of trust are alleged against the defendant but the learned Vakil for the

appellants in his arguments before us has confined his attention mainly to charge (1) namely, that ""no proper accounts are maintained by the

defendant."" Even here he did not deal with all the various circumstances discussed by the learned Subordinate Judge under this head. He had

limited his arguments mainly to a consideration of the income and expenditure of the mosque and the general irregularities in the keeping of

accounts by the defendant. As regards the income and expenditure the case of the plaintiffs is that the lands should yield, about 500 kalams. a year

or at least 200 kalams after 1911 as. spoken to by the defendant himself and that the expenditure would at the highest even according to the

defendant amount to only about Rs. 300 while the evidence on the defendant"s side is that the income would be about Rs. 250 all of which had to

be spent for the expenses of the mosque. The evidence on the side of the plaintiffs as regards the income from the plaint lands is extremely

unsatisfactory. On this point we have been referred to the evidence of P.W. No. 1. He states that the lands will yield an annual income of 500

kalams of paddy, that he saw the lands for the first time two or three years prior, to the institution of the suit when he went to the locality to

ascertain their condition. He went and saw the lands along with two or three others, but he does not remember them now. At the time when he

saw them the lands were not cultivated. From what he saw he could not say whether the lands were in good or bad condition. He does not know

personally the income of these lands. It is clear that this witness knows nothing about the lands in question, least of all about the income. According

to this witness it would cost Rs. 500 to conduct all the charities mentioned in Ex. I. Plaintiff witness No. 10 makes a vague statement that the net

income of these lands per year would be Rs. 700 for the past eight or ten years and that prior to it the income, would be Rs., 600 or Rs. 500. He

does not give particulars, justifying his statements. He states that for the past seven or eight years paddy, is sold at from Rs. 2-12 to, Rs. 4 per

kalam, but there is no independent evidence to support it. According to him the expenses would come to over Rs. 600 in all per annum. In the

absence of reliable and disinterested evidence on the side of the plaintiffs, we have to accept the evidence given on the defendant's side. Here it

is pertinent to remark that the appellants themselves have sought to support their case more by relying upon the evidence given by the defence

than on the evidence given by the plaintiff's own witness. It is admitted that, when the defendants took up the management of the trust in 1879, the

lands of the mosque consisted of both nanja and punja, that the punja lands yielded nothing and that the connected them into nanja lands by

spending his own money and thus made the lands more valuable for the trust. As D.W. No. 1 the defendant states, ""When I took up the

management the nanjas yielded only 60 or 70 kalams and the punja lands did not yield anything. Then one kalam of paddy was sold at from 14-

annas to Rs. 1-1-0"" He states that ""from 1911 onwards these lands yielded on an average 200 or 210 or 220 kalams. As the price of the paddy is,

now high the income of these lands would now be enough to meet the expenses in the mosque. But previously when paddy was sold at a low

price, I was spending my own money for the expenses of the mosque. The price of the other articles has also arisen just like paddy." Defendant

witness No. 3 states that he does not know the income; but approximately a sum of Rs. 200 or Rs. 300 would be spent in the mosque. De-

fendantwitness No. 6 states that the defendant would spend in all about Rs. 200 or Rs. 250 a year and the lands would also yield only Rs. 200 or

Rs. 250. The finding of the Subordinate Judge that the accounts show that the defendant has advanced a sum of Rs. 4,027-6-0 to the mosque has

not been challenged before us. It is true that the defendant has appropriated Rs. 829-6-0 from the trust funds towards his advance. The defendant

seems to have entertained a mistaken idea that as the charity is his own, he has the rights to do additional charities at his own expense and

afterwards appropriate the same from the lands at the time when they yielded. The general effect of the evidence on the defendant's side is that the

trust is evidently" a poor one owning only a few properties which were not worth very much and that the defendant carried on the management as

best as he could making both end meet. Whenever there was a deficiency of income he supplied funds from his own pocket. In my opinion, it has

not been proved that in any particular year or for any number of years there remained any appreciable surplus from the income of the temple lands

after meeting the ordinary and the extraordinary expenses of the mosque and its repairs.

18. As regards the accounts, what has been pressed before us by the learned Vakil for the appellants is that they have been kept very irregularly.

The defendant's own evidence discloses many irregularities in the keeping of the accounts. It is admitted amongst other things that he did not write

these accounts daily but only once a month, that he destroyed the papers wherefrom the entries in the account books were copied, that he has

misled up his own funds with those of the trust and that he does not know to write the accounts properly. These various irregularities are referred

to and dealt with by the learned Subordinate Judge in paras 51 and 52 of his judgment. Though the conduct of the defendant in this matter cannot

be approved by us, we have no doubt that the irregularities pointed out in the circumstances of this case do not justify us in holding that he should

be removed on that account. I have examined the accounts of the mosque ranging from the year 1879 and in the ordinary course of things if, will

be too much to expect one to preserve all the vouchers for the various entries during this long period of about fifty years. It is true that the accounts are written in a very small book, but we have to remember that the trust is also a small one with a small income arising only from a single source and with expenses which do not range over many heads. Entries on account of the income and expenses cannot, therefore, be very large in number and this must account for the smallness of the account-book. The charge that the account-book has been written up after the institution of this suit, though suggested in the course of the argument, has not really been pressed before us and there is very little evidence to support it. The important facts to be noticed are that no specific misappropriation-by the defendant of the trust funds has been pointed out, that it has not been shown that there is any clear false entry in the accounts or that there has been a failure on the part of the defendant to enter any item of income in them. The correctness of the entries regarding the expenditure has not been challenged. In his report in examination by the Court the defendant states that he does not use the trust funds for his private purposes. The correctness of this statement has not been disputed. Though the account-book has not been kept in an ideal manner, the defendant has not misappropriated-any of the funds of the trust and has not written up false accounts. He has admittedly spent large funds of his own for the purposes of the trust. In these circumstances, I do not think that the irregularities pointed out are sufficient to remove the defendant from the management of the trust.

19. The next charge of breach of trust has been pressed against the defendant is that he has broken the direction in Ex. I, the settlement-deed to give in the name of Muhammad Nabi feast in the month of Ramzan and this involves an allegation that the defendant has altered the direction contained in the settlement-deed to suit his own purposes. If this charge is found to be true, that by itself will be enough to remove any trustee. This is not mentioned as a specific charge of breach of trust"" against the defendant in the items (a) to (n) mentioned in para. 8 of the plaint, but it has been dealt with by the lower Court in its judgment, paras. 37 and 38 and it has also been argued before us. Exhibit I contains the following directions: ""Out of the income derived from that property, (1) the musjid lights be lighted every day, (2) extra lights should be kept there on festive

days, (3) a kathib should be nominated to recite the vedam (koran) in the musjid on , monthly pay, (4) feeding should be arranged for in the name

of Muhammad Nabi in, the Ramzan month and (5) one or (sic) persons should be fed every day". The , plaintiffs""case is that the word "" Ramzan

-which really is the month referred to in Ex. I has been altered into "" Rabbisani "" by, the defendant arid that, as a matter of fact,, he has not been

complying with the real direction contained in Ex. I to feed the Muhammadans in the month of Ramzan. The defendant's case is that he has really,

made no alteration in Ex. I that in the month of Ramzan all Muhammadans fast during day time, that no feast can be given during that month and

that the feeding is in the month of Rabbisani. As regards the alteration, the volume containing this document was sent for from the Eegistrar's office

by the Subordinate Judge and in that, it was found that the word written is ""Ramzan"" and not ""Rabbisani"" Ex. A, the registration copy of Ex. Y also

contains the word "" Ramzani"". It must be said that there is an alteration in Ex. I regarding the month. Whoever made the alteration, I am not

satisfied that it was the defendant who made it. If the plaintiffs wanted to charge the defendant with the express alteration of this document in one of

its important particulars, they should have done so in the plaint which would have given the defendant an opportunity to meet it. The charges with

regard to feeding mentioned in the plaint are Clauses (f) and (g), namely, (f) ""no food is given by the defendant to any person daily and no public

feeding made by the defendant in Ramzan or any other occasion; (g) nothing is done in Ramzan month either according to Muhammadan religion

and custom or according to the terms of the deed of 1879"". These charges are met by the defendant in his written statement. The charge with

which I am now dealing, viz., that that defendant has altered a direction contained in Ex. I seems to have been suggested and that only very faintly,"

in the course of the examination of the defendant. The evidence on this point that has been referred to by the learned Vakil for the appellants is

what is spoken to by the defendant on the last day of his examination (3rd September 1921) which commenced the 13th July 1921. When he was

re-called on the 3rd of September 1921, he stated thus:-- ""I produced in Court the two copies shown to me. My Vakil asked me to search and

find them out if available, (the two copies referred to are Exs. XIX and XIX (sic) ""I got them from my records. They have been in my custody for

the past 40 years. I filed Ex. I, one before the Tahsildar and one on another occasion in the Jilla Court and obtained succession certificate.

Sivabiran Pillai who wrote Ex. I died eight years ago. I filed Ex. I in Courts and offices only after it was registered." In another place in the

evidence given by the defendants we find, at page 52, that he states "In Ex. I it is written as Ramzan." No other evidence has been brought, to our

notice regarding this alteration. If the plaintiffs wanted to charge the defendant with this alteration in the settlement-deed, they should, in the first

place, have stated it as a specific charge in the plaint itself and really cross-examined the defendant regarding the same. On the other hand, we find

that no such thing has been done. The defendant while he was in the witness-box was not asked any question by the plaintiffs directly as to how

the alteration in Ex. I which was in his possession was brought about. The document came into his possession from Amir Khan. The evidence is to

the effect that feeding on a large scale is generally given in the month of Rabbisani. Amir Khan himself have, therefore, made this alteration after the

registration of the document, and probably it was such an altered document that came into the possession of the defendant. There is absolutely no

motive for the defendant to make this lateration. In the absence of clear evidence to show that the defendant has altered Ex. I we cannot infer that

the alteration complained of was brought about by him. As regards feeding in the month of Rabbisani I am satisfied from the evidence that the

defendant has complied with the provisions of Ex. I. Though the 2nd plaintiff says that feeding should be done in this mosque in the month of

Ramzan, he has to admit that feeding is done in other mosques in the month of Rabbisani. It is generally admitted that all Muhammadans fast during

day time in Ramzan and during night they take kanji. The 1st plaintiff states that Amri Khan fed people in the month of Ramzan, but he does not

know whether the defendant did as a trustee or in his private capacity or out of what funds; and he also states that according to Muhammadan

religion people are fed in the month of Rabbisani. The evidence on this point is dealt with at great length by the Subordinate Judge in para. 38 of his

judgment. I do not think it necessary to pursue this point any further, as it is not the case of the plaintiffs that the defendant did not feed people in

the month of Rabbisani (see P.W. No. 10's (i. e. 1st plaintiff's) evidence p. 34). The evidence of the defendant that feeding is generally done in the

month of Rabbisani and that he has been so. feeding the Muhammadans has been believed by the Subordinate Judge. Charges (f) and (g) though

referred to have not been specially pressed before us by the learned Vakil for the appellants, for there is abundant evidence that kanji was

distributed to all the devotees who go to the mosque in the evening during the month of Ramzan. On a consideration of the evidence in the case, I

am not satisfied that the defendant's continuance in the office which he has held ever since 1879 is incompatible with the interests of the institution

and that he should be removed from its management.

20. It was suggested that, even if there is no case made out for removing the defendant from the management of the mosque, we should frame a

scheme for its. management. In view of the evidence in the case that has been put before us, we do not think that we are called upon to formulate

any Scheme.

21. In the result the appeal fails and must be dismissed with costs.