
(1940) 07 CAL CK 0026
In the Calcutta High Court

Loke Nath Mukerjee and Others

APPELLANT

Vs

Abani Nath Mukherjee and Others

RESPONDENT

Date of Decision : 12-07-1940

Acts Referred:

Citation : AIR 1941 Cal 68

Hon'ble Judges : Nasim Ali, J;Narsing Rau, J

Bench : Full Bench

Judgement

Nasim Ali, J.—Babu Joy Kissen Mukherjee, a wealthy zamindar of Uttarpara, in the district of Hooghly, started at his own expense a public library for the use and benefit of the public of Uttarpara. There is a plot of land measuring about 3 bighas 2 cottas in Uttarpara. The river Ganges is on the east of this plot and the Grand Trunk Road is on its west. There are compound walls on the north, south and west with two gates on the Grand Trunk Road. There is a small strip of vacant land measuring about four chittaks between the northern portion of the western compound wall and the Grand Trunk Road. On the east there is a parapet on the buttress. There is a pucca ghat on the river bank inside the compound. Within this plot there is a big building. It consists of a basement and two storeys. There is a lawn (formerly a flower garden) to the east of this building. There are out-houses on the north and south within the compound. The library is now located in certain rooms in the first storey of the main building. The second storey is a bai-takkhana. The servants of the library and the baitakkhana reside in the out-houses. Babu Joy Kissen was the owner of this land and the building thereon. On 11th July 1879 he made his last will. The provisions of his will relating to this property are these:

Paragraph 12.—I have caused a pucca two-storeyed building erected within a plot of land measuring about 3 bighas 2 cottas....The public library rooms having been located in the ground floor of this building and the baitakkhana rooms having been located on the floor above, books are collected on the ground floor and newspapers and books, etc., are purchased from time to time and they are

being read and used and shall be read and used by the general public according to special rules Upon the demise of my eldest son Hara Mohan Mukherjee, the Malik of the said land and building, his son Bash Behari Mukherjee has become "the holder of the right and possessor" (according to plaintiffs) or "the owner and possessor" (according to defendants 1 and 2) of the said lands and buildings according to previous arrangement. God forbid, if at the time of his death he leaves no male child then his uterine Shib Narayan Mukherjee and "on his death" (according to the plaintiffs) or "in his default by death" (according to defendants 1 and 2) his eldest son "in male line of succession" (according to plaintiffs) or "generation after generation" (according to defendants 1 and 2) shall become "the holder of the right and possessor" (according to the plaintiffs) or "owner and possessor" (according to defendants 1 and 2) thereof. God forbid if there be no male child of my two said grandsons or of their (family) then my existing son Peary Mohan Mukerjee or his eldest son shall become the holder of the right and possessor (according to plaintiffs) "owner and possessor" (according to defendants 1 and 2) and shall continue as such. But none of my heirs nor any other person shall have power to remove the public library from the ground floor or to transfer the aforesaid land and building.

Paragraph 13.-Although my aforesaid grandson and his " after taker " (according to plaintiffs) or heir (according to defendants 1 and 2) shall be " right holder in succession " (according to plaintiffs) or " owner in succession " (according to defendants 1 and 2) of the said land and building, the big hall, the room to the west thereof, five rooms to the north and south, the small circular room on the north-western corner together with the verandahs on the east and south and stairs to the ground on the east and west all situated on the ground-floor of the building shall appertain to the Public Library and the stair-case on the south-western corner of the ground-floor and the spiral staircase which is situated outside on the northern side shall appertain to the baitakkhana above. The expenditure on account of purchasing newspapers, new books and instruments, salaries of officers, lighting charges, etc., all on account of the Library are being met and shall be met from the profit of the dedicated putni taluks specified afterwards in schedule marked "Tha" and from the interest of Rs. 5000. After keeping in view the income from the Taluks dedicated to the Library and fixing the expense accordingly, appointment of officers, purchase of newspapers and books, etc., and other functions are being performed and shall be performed by a committee and shall not be performed by anybody else. Now my son Peary Mohan Mukherjee and my grandsons Rash Behari Mukherjee and Sib Narayan Mukherjee and my step-brother Naba Krishna Mukherjee and Mon-matha Nath Chatterjee of this village and Chandra Sekhar Banerjee, husband of my youngest daughter, have been appointed by me to be members of the said committee. The number of members of the said committee shall never exceed six. Of them the eldest male heir of the family of each of my sons and their heirs shall become a member. Having regard to this provision, if any of the aforesaid present resigns from his post or dies, a fit person according to the decision of the majority of

members shall be appointed in the vacancy. A member shall continue to be such during his lifetime unless he resigns from his post on account of serious illness or old age or any other reason. All the work of the Library shall be conducted according to the opinion of the majority of the members of the committee, but if the committee be equally divided in their opinion, then my grandson Bash Behari Mukherjee and upon his demise his representative shall have the casting vote.

Paragraph 14.-The taluks which I have dedicated for the purpose of carrying on the expenses of this Library were settled in darpatni with my son Hara Mohan Mukherjee on a selami of Rs. 5000. In order to discharge the liability of sadar rent of the mahals Government loan papers were purchased with the selami and kept in the custody of the said Hara Mohan Mukherjee; upon his demise the said Government loan papers shall now remain with Rash Behari Mukherji according to the provisions specified above, but except for discharging the liability of the rent of the aforesaid mahals he shall have no power to sell or make a gift of the said loan papers for any other reason.

Paragraph 15.-The members of the committee shall have no right to the rooms on the upper floor and the lower floor of the Library; my grandson Rash Behari Mukherjee shall have the right to these rooms but he shall have no power to sell them. The pucca kitchen, the stable and the rooms for the durwans on the northern and southern side of the building are set apart for the residence of the servants of the Library and the servants of the baitakkhana on the floor above the Library. Bash Behari Mukherji or his representative shall meet from the Library funds the cost of repairing these rooms. The flower garden on the eastern side of the Library shall be under the management of the committee. The expenses on account of the garden and on account of the repairs of the Library rooms shall be met from the Library funds.

Paragraph 16.-Nobody shall have any objection if any of my heirs or their families organize dances, amusements, music, etc., in connexion with any marriage ceremony or sradh ceremony or puja, etc. or hold any conference in the rooms on the floor above the Library. Everybody shall have equal right to hold these functions.

2. Babu Joy Kissen died in 1888. Rash Behari died in the year 1921 leaving no male issue. Shib Narayan died in the year 1923, defendant 1 is his eldest son. On 14th June 1928, defendant 1 executed a lease in favour of defendant 2, the son of Peary Mohan Mukherjee, of the entire land and the building for a term of 15 years. The material portion of this lease is this:

According to the provisions contained in the will of late Joy Krishna Babu I am the sixteen annas owner of the Library building; only the Public Library is to occupy the middle floor of the said building and the servants of the Library are to put up in some portions of the outhouses. It is provided in the will that the repairing expenses of the outhouses and the middle floor would be met from the funds of the Library. After causing estimates to be prepared by competent

engineers and contractors find that a thorough repair of that building will cost Rs. 20,000 or Rs. 25,000. It being extremely inconvenient in my present circumstances to maintain that building by incurring such a large expense, I could not do the same up till now. Now, as you have agreed to give a thorough repair to that building at your own expense, I execute this document and agree and promise as follows: I grant you a rent free ijara settlement of the property described in the schedule, including the land underneath, building, compound, outhouses and all rights and interests for a term of 15 years from the date of this instrument . . . You will have to incur large expenses for repairing that building so I fix no rent for the ijara The outhouses on the northern and southern portion of this property exclusive of their possession by the Public Library according to the provisions of the will of Joy Krishna Babu are included in this lease The sum that will be spent by you in making proper, i. e., "thorough repairs" of this property shall be deemed to be the "premium" for this lease, but the same not having been determined at present, I fix the same approximately at Rs. 25,000 (twenty-five thousand rupees), for the stamp of this instrument. Be it expressed that even if your costs for repairs or "addition", "alteration" and "fittings connexion" etc., exceed or fall short of Rs. 25,000 (twenty-five thousand rupees), the term of this lease shall not be more or less than 15 years and in the event of your desiring to purchase this property within the term of this lease and serving me with notice, I shall remain bound by the covenant to execute in your favour a kobala for out and out sale and free from incumbrances on receipt of a consideration of thirty-five thousand rupees. Be it further expressed that your total costs of repairs, "addition, alteration and indispensably necessary fittings connexion" etc. must not be less than twenty thousand rupees . . . Excluding from the said property the right of possession and enjoyment by the Uttarpara Public Library under the terms of the will executed on 11th July 1879 by the late Joy Krishna Mukherjee the rest of the property is the subject-matter of this instrument.

3. On 30th July 1931, the present suit was instituted by the three grandsons of Peary Mohan and six other residents of Uttarpara in the Court of the District Judge of Hooghly u/s 92, Civil P. C., with the sanction of the Collector of Hooghly. The allegations in the plaint, so far as they are material for the purposes of this appeal, are these: Babu Joy Krishna Mukherjee dedicated to the Uttarpara Public Library the properties mentioned in Schedule "C" to the plaint, viz.: (1) In the ground floor of the main building, big hall and the room to the west thereof, five rooms in the north and the south, small circular room at the north-western corner together with one storeyed verandahs on the south and the east and staircases leading to the ground floor on the east and the west; (2) out-houses on the north and south of the main building; (3) vacant land known as Phulbagan (flower garden measuring about one and half bighas, to the east of the said building; (4) wall and masonry ghat on the bank of the Ganges.

4. He confirmed the said arrangement by the provisions made in Clauses 12, 13, 14 and 15 of his last will. The persons named and described at the end of para.

12 of the said will, viz., Rash Behari Mukherjee and Shib Narayan Mukherjee, were but trustees, and at present defendant 1 is but a trustee holding these rooms, the flower garden and outhouses in trust and for the use and benefit of the Uttarpara Public Library. The said library is now in charge of the committee appointed in pursuance of Clause 13 of the said will and the principal and the pro forma defendants (defendants 1 to 6) are all members of the said committee. Defendant 1 is the president of the said committee. Under the terms of the will the members of the committee of management have been constituted trustees of the library and they are holding the properties of the said library including the properties described in Schedule C in trust for the library. The bathing ghat to the east of the flower garden appertains to the trust estate having been constructed from the said library funds. Defendant 1 taking advantage of his position of the trustee of the said premises on behalf of the said library and asserting his personal right to the entire premises including the flower garden and the bathing ghat has leased out the said premises with the underlying and adjoining lands including the aforesaid flower garden and the bathing ghat to defendant 2 for a term of 15 years by a patta dated 14th June 1928. There was absolutely no necessity for the said lease for the repair of the library rooms and outhouses, etc., as sufficient provision has been made therefor in the aforesaid will. The said ijara is null and void and not at all operative with regard to the library rooms, outhouses, flower garden and bathing ghat which appertain to the trust estate of the Uttarpara Public Library. A cloud has been thrown upon the rights of the Uttarpara Public Library by the recitals in the said ijara lease. It has therefore "become necessary in the interests of the Library to remove this cloud by the institution of a suit for declaration of the rights of the Uttarpara Public Library as conferred by the will on a proper construction thereof and also for the removal of defendants 1 and 2 from their offices as members of the committee.

5. Prayers of the plaintiff in the plaint, so far as they are relevant for the purposes of the present appeal, are: (a) A declaration that the properties described in Schedule C to this plaint including the flower garden to the east of the library rooms and the bathing ghat to the west of the flower garden appertain to trust estate created in favour of the Uttarpara Public Library and that the trust properties cannot be alienated by defendant 1. (b) A declaration that the lease executed in favour of defendant 2 by defendant 1 on 14th June 1928 is null and void regarding the properties described in Schedule c including the said flower garden. (c) Removal of defendants 1 and 2 from their office as members of the managing committee of the Uttarpara Public Library. (d) Appointment of members of the committee of management in their place. On 2nd September 1931, defendant 4 filed a written statement supporting the plaintiffs. On 6th October 1931, defendant 2 resigned his membership of the managing committee of the library. Santanu Banerjee (son of the daughter of Rash Behary) was appointed in his place as a member of the committee by the other members of the managing committee.

6. On 2nd December 1931, defendant 2 filed his written statement stating inter

alia (1) that he has ceased to be one of the alleged trustees mentioned in the plaint and as such he is liable to be dismissed from the category of the defendants; (2) that he has been advised to state that no valid trust has been created by the will of Joy Kissen in favour of Uttarpara Public Library; (3) that one of the ground floor rooms of the premises were permitted to be used by the local people by the leave and license of Joy Kissen Mukherjea and his successors in interest as a reading room; (4) that the plaintiffs have got no right to use any portion of the said building by virtue of any right accruing to them or any of them on the basis of the alleged trust; (5) that the ijara lease in his favour is not null and void; (6) that with the knowledge, consent and acquiescence of the plaintiffs he has exercised his tenancy right with regard to the said premises and has caused thorough repairs to be done to the said building at a cost of over Rs. 50,000 as the said building was prior to such repairs in an utter state of disrepair and in a tottering condition; (7) that he has not committed any breach of trust.

7. On 17th December 1931, defendant 8 filed a written statement supporting the plaintiffs. On 4th January 1932, defendant 1 filed his written statement. His defence is in substance the same as that of defendant 2. On the same day defendants 5 and 6 filed their written statement. They state inter alia that they do not admit the validity or otherwise of the trust in favour of the Uttarpara Public Library, but they leave the determination of such question entirely to the Court. On 17th November 1932, plaintiffs filed an application before the District Judge for amendment of the plaint stating inter alia that they have come to know on the inspection of the account books, minute books etc., of the library several instances of mismanagement. Sixteen instances were specified in this petition out of which the following only were pressed by the plaintiffs against defendant 1 in this Court:

(a) That though properties mentioned in Schedule C of the plaint appertain to the trust estate defendant 1 asserted his personal right to them; (b) that the parcel of land lying to the west of the railings of the compound of the building and measuring 4 chittacks 10 sq. inches appertains to the trust estate of the Uttarpara Public Library and fetched an annual income of Rs. 150. Defendant 2 has evicted the tenants and has caused a loss to the trust estate. Defendant 1 acquiesced in it; (c) that the northern and southern outhouses appertaining to the trust estate used to be let out by the said committee at a monthly rent of Rs. 7. The contractors engaged by defendant 2 have evicted the tenants without any protest from defendant 1; (d) that defendant 1 was a party to the appointment of Santanu in place of defendant 2 as a member of the committee in contravention of the terms and provisions of Joy Kissen's will and there is no one on the committee at present representing the family of Peary Mohan Mukherjee, second son of the donor.

8. This petition was allowed and the plaint was amended. Santanu was added as defendant 7 in this suit. A prayer for declaration that his election was illegal and void was added. Schedule C of the plaint was amended by including in it the strip

of land measuring 4 chittaks 10 sq. inches on the Grand Trunk Road outside the compound railings on the west. On 8th January 1934, defendant 1 filed an additional written statement stating inter alia:

(1) That the 4 chittaks of land to the west of the railings never belonged to the testator. It was not given to the library. (2) That the northern and southern outhouses were allowed to be used by the library servants under the terms of the will though not exclusive but jointly with the servants of the malik of the house. The northern outhouses were never let out and the letting out itself is an unauthorized act. When the repairs of the whole house including the library portion was taken up it was necessary that some of the contractor's men should remain on the spot, so they were allowed to occupy the southern outhouses. (3) That the appointment of defendant 7 as a member of the committee in place of defendant 2 is not in contravention of the terms and provisions of the will.

9. On 8th January 1934, defendant 7 filed his written statement stating that he has been validly appointed according to the terms of the will of Joy Kissen and that he cannot be removed under the present suit u/s 92 as he was not concerned with any of the acts alleged in the plaint or in the amending petition which have been done prior to his appointment. The suit was dismissed by the District Judge on 6th October 1934. Hence this appeal by the plaintiffs. Defendants 1 and 2 have also filed cross-objections against certain findings of the District Judge. Plaintiffs in this suit pray for a declaration that the properties mentioned in Schedule C to the plaint appertain to the trust estate executed in favour of the Uttarpara Public Library and that the election of defendant 7 as a member of the committee is illegal and void. The contention of defendants 1 and 2 is that such declarations cannot be given u/s 92, Civil P. C. Mere declarations are outside the scope of Section 92 of the Code. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit u/s 92 can determine the question whether a public trust exists or a particular property appertains to such public trust. A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of Section 92. But in a suit u/s 92 the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly come under that section. That the library is a trust for a public purpose of a charitable nature within the meaning of Section 92, Civil P. C.) is not disputed in this case. It is also an admitted fact that the defendants are trustees of this public trust within the meaning of this section.

10. In the trial Court plaintiffs prayed for the removal of all the defendants on various grounds. In this Court they abandoned their prayer for removal of defendants other than defendant 1, and pressed for the removal of only defendant 1 on the four grounds mentioned above, and also on an additional ground, viz., that he denied the trust altogether in his written statement and in

his memorandum of cross-objections in this Court. The contention of the plaintiffs is that defendant 1 committed breach of trust by asserting his personal right in the properties mentioned in Schedule C of the plaint in the lease executed by him in favour of defendant 2 on 14th June 1928. There is no substance in this charge. The lease by defendant 1 expressly excludes from the lease the right of possession and enjoyment by the library under the terms of Joy Kissen's will of 1879. The case of the plaintiffs in this Court is that the parcel of land lying to the west of the railings of the compound of the building appertains to the trust estate of the Uttarpara Public Library and that defendant 1 committed breach of trust by his acquiescence in the eviction by defendant 2 of the tenants who were occupying certain shops on this strip of land constructed out of the library fund and were paying Rs. 150 annually as rent to the library. The District Judge has found that this narrow strip of land does not fall within the boundaries of the 3 bigha 2 cottas of land, mentioned in Clause 12 of Joy Kissen's will. He has further found that the library has no right to this strip of land. Plaintiffs' contention in this appeal with regard to this 4 chittaks of land is this. It falls within the boundaries of the 3 bighas 2 cottas of land.

11. After Babu Joy Kissen's death in the year 1888, the committee of the library built certain structures on this strip of land from the library fund with the approval and consent of Babu Rash Behari Mukherjee. These structures were let out as shops and the rent realized from the tenants thereof was utilized for the purposes of the library with the consent of Babu Rash Behari and his successors in interest till the year 1931. This narrow strip of land, therefore, has become a part of the library properties either by a grant from Rash Behari Mukherji or his successors in interest or by adverse possession for more than 12 years. Plaintiffs' case in the plaint is that the properties mentioned in Schedule C to the plaint were dedicated to the library by Babu Joy Kissen. This strip of land was not included in this schedule when the plaint was filed. It was included in this schedule when the plaint was amended on the basis of the petition filed by the plaintiffs on 17th November 1932. This case was abandoned by the plaintiffs in this Court. Plaintiffs' case in this Court, viz., that this narrow strip of land has become a part of the library properties either by grant from Rash Behari and his successors in interest or by adverse possession for more than 12 years is a new case and I can. not allow them to make this case at this stage as it involves questions of fact.

12. In this view of the matter, the decision on the question whether this strip of land falls within the boundaries of the premises in question is wholly unnecessary for the disposal of this suit. The finding of the District Judge on this question is, therefore set aside and the question is left open, The shops on this strip of land were certain sheds which were attached to the compound wall. They were removed with the consent of all the members of the managing committee when defendant 2 effected thorough repairs of all the buildings and the compound walls in pursuance of the terms of. the lease granted to him by defendant 1 in 1928 to 1931. Defendant 1 alone therefore cannot be held responsible for the

removal of these shops. Plaintiffs have abandoned in this Court their prayer of removal of the other members of the managing committee on this ground. It is not disputed in this case that the library rooms have been thoroughly repaired at the expense of defendant 2. If the eviction of the tenants or this strip of land is not an act of breach of trust on the part of the other members of the managing committee it is difficult to see how it can be treated as a breach of trust on the part of defendant 1. Further, plaintiffs have failed in this case to substantiate their case in the plaint that this strip of land was dedicated to the library by Joy Kissen. Defendant 1 is not therefore liable to be removed on this ground.

13. The next charge urged against defendant 1 in this Court is that he acquiesced in the eviction by the contractors engaged by defendant 2 for the repair of the buildings of the tenants who had been occupying the southern outhouses appertaining to the trust estate and paying a monthly rent of Rs. 7 to the library. By the will of Joy Kissen all the outhouses were set apart for the residence of the servants of the Baitakkhana and the library. Rash Behari and his successors in interest were directed to repair these outhouses out of the library fund. The library had not sufficient funds for repairing the library rooms or the outhouses. The contractors employed by defendant 2 required the southern outhouses for storing the materials for repair. The committee were therefore justified in allowing the contractors to occupy the southern our houses. The plaintiffs have not pressed this charge against other members of the managing committee. In these circumstances I hold that defendant 1 is not liable to be removed on this ground. Mere assertion in a suit u/s 92, Civil P. C., by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office.

14. The provisions of Joy Kissen's will relating to the property have not been construed by any Court before. There is a statement in Joy Kissen's will that according to previous arrangement Hara Mohan had become the malik of the lands and buildings and after his death Rash Behari and his successors had acquired certain rights of ownership in the said land and buildings. Plaintiffs in their plaint stated that Babu Joy Kissen Mukherjee dedicated to the library the properties mentioned in Schedule C of the plaint and that he confirmed the said arrangement by his last will. The properties were mortgaged by Rash Behari on the footing that they were his absolute properties. On the basis of this mortgage the properties were sold and purchased by one Pramila Sundari Devi. On 17th June 1928 defendant 1 had to take a conveyance of this property from Pramila for a consideration of Rs. 2000 apparently to put an end to the dispute. The rights of Rash Behari and his successors in interest to this property were not judicially determined before this litigation. Plaintiffs themselves have prayed for construction of the provisions of Joy Kissen's will relating to this property in the suit. Defendant 1 did not seriously dispute in the trial Court that the library had

the right to use certain rooms in the ground floor and that its servants had the right to reside in the outhouses along with the servants of the baitakkhana. In this Court, the learned advocate for defendant 1 did not challenge the finding of the District Judge that those rooms in the ground floor were dedicated to the use of the library and that the servants of the library have right to reside in the outhouses jointly with the servants of the baitakkhana. The construction of the provisions of the will relating to the flower garden is not free from difficulty. There are no express words in the will stating that the library would have the right to enjoy the amenities of this garden. In the absence of any express words it is not unnatural that doubts would arise regarding the right of the library to this garden.

15. Plaintiffs' contention is that the testator intended that the amenities of the flower garden would be enjoyed only by the library and this intention is implied in the last portion of para. 15 of Joy Kissen's will. The case of defendant 1 is that the testator's intention was that the amenities of the garden would be enjoyed only by Rash Behari and the other donees mentioned in Clause 12 of the will. A trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create that trust, (b) the purpose of the trust, (c) the beneficiary and (d) the trust property: see S.6, Trusts Act, AIR 1938 195 (Privy Council) . The Court has no power to give effect to a hypothetical intention by supplying lacunae in the will and thereby making a new will for the testator. The Court cannot speculate as to what the testator may suppose to have intended to write. The only intention of the testator which the Court can carry out are intentions either expressly or impliedly expressed in the will. No indication of intention is sufficient to induce the Court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the will. Necessary implication does not mean natural necessity but so strong a possibility of intention, that a contrary intention cannot be supposed: *Williamson v. Adam* (1812) 1 Ves & B 422. This definition has been simplified by James L. J. in *Crook v. Hill* (1871) 6 Ch 311, thus:

The question then resolves itself into this : whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will, and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude the children in question, as that a contrary intention cannot be supposed.

16. By Clause 15 of the will the flower garden has been placed under the control or management of the managing committee of the library and they have been directed to maintain it out of the library fund. What is the implication of these

provisions? The repairs of the library rooms and of the outhouses in -which the library has some interest are to be effected out of the library fund. The flower garden adjoins the library rooms. At the same time, the baitakkhana is above the library rooms and although the outhouses are to be repaired out of the library fund the servants of the baitakkhana have the right to reside in them jointly with the servants of the library. It can be therefore, said with reasonable certainty that the intention of the testator was that only the amenities of the flower garden would be enjoyed by the library as well as by Rash Behari and the other donees mentioned in Clause 12 of the will as a contrary intention cannot be reasonably supposed. Plaintiffs' contention is that the wall and the masonry ghat on the bank of the Ganges were dedicated to the library by Joy Kissen. Defendant 1 denies this. There is nothing in the will of Joy Kissen" to show that the wall and the ghat were dedicated either expressly or by necessary implication. The mere fact that some steps of the masonry ghat and the wall were constructed out of the library fund by the library committee long after Joy Kissen's death is irrelevant to the question whether Joy Kissen intended to dedicate the wall and the ghat to the library.

17. The question whether defendant 7 has been validly appointed as a member of the managing committee of the library in place of defendant 2 arises for decision in this suit as the plaintiffs' allegation in this suit is that defendant 1 was a party to the election of defendant 7 in place of defendant 2 in contravention of the directions given in Joy Kissen's will.

18. The direction of the testator in para. 13 of the will is that the eldest male heir of each of his sons and their heirs shall be a member of the committee. He had three sons : Hara Mohan, Peary Mohan and Raj Mohan. At least three members of the committee, therefore, must be the three eldest male heirs of each of his sons and their heirs. Defendant 1 represents Hara Mohan's branch. Defendant 3 represents Raj Mohan's branch. Defendant 2 represented Peary Mohan's branch. After his resignation there is no representative of Peary Mohan's branch in the committee as defendant 7 is not a representative of Peary Mohan's branch. In the vacancy caused by the resignation of defendant 2, the committee should have appointed somebody from Peary Mohan's branch in accordance with the directions of the testator. The appointment of defendant 7 in place of defendant 2 is, therefore, invalid. But as this appointment was made by all the members of the committee and as the plaintiffs have abandoned this prayer for removal of the other members of the committee on this ground I am not prepared to remove defendant 1 on this ground. For the reasons given above, I hold that defendant 1 is not liable to be removed from his office as a member of the committee.

19. There was a dispute between the parties as to whether the 3 bighas 2 cottas of land with the buildings thereon and the four chittaks of land to the east of the Grand Trunk Road will revert on the death of defendant 1 to Joy Kissen's estate absolutely. The District Judge has held that this property will revert after the

death of defendant 1 to Joy Kissen's estate absolutely. Defendants 1 and 2 have assailed this finding of the District Judge in their cross-objections. The decision on this question is not necessary for the disposal of this suit. The finding of the District Judge on this point is therefore set aside and the question is left open. The appellants and the respondents did not urge before us the other grounds taken in the memorandum of appeal and the cross-objections filed by them respectively in this Court. The result, therefore, is that the appeal and the cross-objections are allowed in part. The judgment and decree of the trial Judge are modified in the manner indicated above. Defendants 1 and 3 to 6 are directed to appoint a person in place of defendant 2 as a member of the managing committee of the library keeping in view the provisions contained in para. 13 of Joy Kissen's last will. In view of the facts and circumstances of this case we direct the parties to bear their own costs in this Court.

Narsing Rau, J.

20. I agree and would like to add a few words. The case concerns the Uttarpara Public Library, an endowment famous in Bengal and mentioned even in the Encyclopaedia Britannica, which describes Uttarpara as

famous for the public library founded and endowed by Jai Krishna Mukherji, which is specially rich in books on local topography. (Edn. 11 : See under Uttarpara.)

21. It appears from Ex. 245 that the founder conceived the idea of such a library as early as 1854 and actually established it in 1859, constructing a magnificent building for the purpose on the bank of the Hooghly and spending more than a lakh of rupees on books.

22. By certain provisions of his last will dated 11th July 1879 he set apart for the use of the library the greater part of the ground floor of this two storeyed building, some outhouses and also, it is contended by the plaintiffs, "a flower garden on the eastern side of the library." The main controversy in this appeal is, or at any rate, during most of the argument was, with regard to the flower garden. According to the plaintiffs appellants it is part of the trust property set apart for the use of the library; according to defendants 1 and 2 (who are amongst the respondents) it is not part of the trust property. It is not in dispute that the flower garden existed at the date of the will and continued to exist until about 1905, but the flowers have long since disappeared and what now remains is two grass plots with a passage in the middle leading down to the river. The relevant provisions of the will are contained in paras. 12, 13, 14 and 15. Paragraph 12 of the will, after referring to the two storeyed building, goes on to say (as translated in the District Judge's judgment):

The public library rooms having been located on the ground floor of this building and the baitakkhana having been located on the floor above, books are collected on the ground floor and newspapers and books, etc., are purchased from time to time and they are being read and used and shall be read and used by the general

public according to special rules.

23. Then comes a somewhat obscure and controversial provision which, according to one reading, gives the ownership of the land and the building to the testator's grandson Rash Behari Mukherjee and his heirs or successors; but it is provided that none of them shall have the right to remove the public library from the ground floor. Paragraph 13 provides that although the aforesaid grandson and his heirs or successors shall be the owners of the land and the building (the precise translation of this part of the paragraph is also disputed), certain rooms and verandahs on the ground floor are to "appertain" to the public library. Then follows a provision as to how the expenditure of the library is to be met. The testator then goes on to say that the library is to be administered, by a committee of not more than six members including the eldest male heir in the line of each of the testator's sons (of whom there were three). Paragraph 14 describes the property out of whose income the expenditure of the library is to be met. Paragraph 15 is in the following terms (as translated in the District Judge's judgment):

The members of the committee shall have no right to the rooms on the upper floor and the lower floor of the library; my grandson Rash Behari Mukherjee shall have the right to these rooms but he shall have no power to sell them. The pucca kitchen, the stable and the rooms for the durwans on the northern and southern side of the building are set apart for the residence of the servants of the library and the servants of the baitakkhana on the floor above the library. Rash Behari Mukherjee or his representative shall meet from the library-funds the cost of repairing these rooms. The flower garden on the eastern side of the library shall be under the management of the committee. The expenses on account of the garden and on account of the repairs of the library rooms shall be met from the library funds.

24. The Bengali word translated above as "management" is "kartritwa"; it is said on behalf of the plaintiffs-appellants that a better rendering would be "control." It will thus be seen that the testator in express terms placed the flower garden under the control or management of the committee. It is common ground that the members of the committee are the trustees of the public library in the sense that the use of the ground floor rooms and verandahs vests in them for the benefit of the library, so that the position is that the flower garden has by the terms of the will been placed under the control or management of the trustees of the library. The question is whether it can be said to be part of the trust property. The main contention on behalf of defendants 1 and 2, who are amongst the respondents in this appeal, is that the flower garden finds no place in para. 13 of the will, which describes the property "appertaining" to the public library. Accordingly, it is said the garden must be held not to "appertain" to the library. Further it is said, by virtue of the opening sentence of para. 13 of the will, the ownership of the land vests in the testator's grandson and his heirs. The result is that the ownership of the garden, unlike that of the property appropriated to the

library under para. 13, vests in them without any subtraction as to use, and the garden cannot "therefore form part of the trust property.

25. To my mind this argument is unconvincing. The most that can be inferred from the non-mention of the garden in para. 13 of the will, is that it does not appertain exclusively to the library, as do the ground floor rooms and verandahs mentioned in that paragraph; but it does not follow that the garden does not appertain jointly to the library and the baithakkhana. It is easy, and may often be necessary, to partition a building by floors and allocate one floor to one purpose and another floor to another purpose. This is what the testator has done in para. 13 of the will. But it is neither necessary nor convenient to make a corresponding partition of a garden in the compound of the building. It is therefore not surprising that the testator did not attempt any such thing in the case of the flower garden. The natural presumption is that a garden in the compound of a building is intended for the benefit of all the occupants of the building, unless there are words allocating the whole of it to the occupants of some particular floor. There are no such words in the will and we are therefore entitled to infer that the garden appertains both to the library and to the baithakkhana. There are several circumstances in the present case which support this view and which show that the library was not intended by the, testator to be excluded from the amenities of the garden. In the first place it is obvious that when a garden in the compound of a public library is placed under the control or management of the library committee, that in itself is an indication of the founder's intention that the garden must be managed primarily for the benefit of the library. It would be contrary to all reason to suppose that after endowing a library of great distinction in an imposing building on one of the finest sites available in the locality, the founder, when he came to dispose of the garden immediately adjoining the building, disposed of it for the exclusive benefit of somebody else, notwithstanding the fact that he has expressly given the control or management of the garden to the library committee. A man who has not spared expense or effort in providing various special amenities can hardly have intended to exclude the library from the ordinary amenities of a garden. In the next place it is significant that the testator has expressly directed that the expenses of the management of the garden must be met from the library fund. In the third place, when we look to the actual use that has been made of the garden and its site, we find that the evidence is all one way, namely in favour of the library. It has already been mentioned that the flower garden has, for some reason or other, been allowed to disappear; on several occasions since its disappearance the site has been allowed to be used for other purposes. On two or three occasions, the committee went so far in their vandalism as to let it out to circuses and the like, but at no time have they ventured to appropriate the income arising from such use to any purpose save that of the library fund. Yet another piece of evidence is furnished by Ex. M (1), a lease granted by the founder in 1862 in which the western boundary of the land leased is described as "the land of the flower garden appertaining to the library." This was of course

many years before his will of 1879; but no particular reason can be discovered for any change of intention on his part and as already pointed out, the indications are all the other way.

26. In view of all these circumstances, the conclusion seems irresistible that the garden was intended by the testator to appertain at least in part to the library and to my mind this intention has been indicated with reasonable certainty (to use the language of Section 6, Trusts Act) in the provisions of the will. The garden must therefore to that extent be regarded as part of the trust property. It is clear from the opening sentence of para. 13 of the will that what appertains to the library in respect of the ground floor rooms and verandahs is something less than the ownership, because otherwise there would be no meaning in describing the ownership as remaining with the testator's grandson and his heirs or successors. What appertains to the public library under para. 13 would therefore appear to be only the use of the ground floor rooms and verandahs; and in my view, what appertains to the library by the implications of para. 15 is the joint use of the garden, the manner and extent of the use being regulated by the library committee in the exercise of the powers of control or management given to that committee by the aforesaid para. 15. Towards the conclusion of the argument, we were pressed by the advocate for the respondents to leave open the question whether the flower garden is or is not part of the trust property. He urged that as there was admittedly a trust and as there was admittedly some trust property, it was unnecessary in the particular circumstances of the present case to decide whether the garden is or is not included in the trust property.

27. We cannot however ignore the fact that this particular question was a part of issue 7 framed by the trial Court. Evidence was produced upon it; the District Judge has recorded a finding (in the negative) in respect of it; and a large part of the argument before us was devoted to it. Moreover, we cannot tell what the findings upon the other issues may be, in the event of an appeal from the decision of this Court. It seems to me therefore that in accordance with the observations of their Lordships of the Judicial Committee in *Tara Kant Banerjee v. Puddomoney Dossee* 1863 10 MIA 476 at p. 488 repeated in *Mahomed Sulaiman v. Birendra Chandra Singh* AIR 1922 PC 405, we are bound to record our opinion in this particular issue as on other important issues.