

(1916) 06 CAL CK 0046
In the Calcutta High Court

Makhlachor Rahman and Others

APPELLANT

Vs

Faizur Rahman Chaudhury and Others

RESPONDENT

Date of Decision : 07-06-1916

Acts Referred:

Religious Endowments Act, 1863 — Section 18

Citation : 35 Ind. Cas. 880

Hon'ble Judges : Richardson, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit brought under the provisions of Section 539 of Act XIV of 1FS2 (Code of Civil Procedure) in respect of an endowment alleged to be one for public charitable and religious purposes. The plaintiffs, who are the descendants of one Ahmed Shah, alleged that the latter founded a mosque and obtained 4 droves of rent-free land under a sanad granted by Nawab Hussain Coolie Khan sometime before the year 1767 for the maintenance of the mosque and for other religious and charitable purposes connected with the same, that this sanad was confirmed by another sanad granted on the 24th January 1787 and that for a long time past the trust was not being properly administered and the descendants of Ahmed Shah were alienating the endowed properties. The plaintiff accordingly brought that suit with the sanction of the Advocate-General of Bengal, praying that proper persons might be appointed as trustees after the removal of those who professed to act as trustees, that a scheme for the management of the trust properties might be settled and for other reliefs. The defendants, who are some of the descendants of Ahmed Shah, raised various defences to the suit. The Court below held against the defendants, appointed certain persons as trustees and framed a scheme for the management of the trust. Some of the defendants have appealed to this Court and several grounds have been, urged in support of the appeal.

2. The first ground taken is that the suit cannot be maintained as no leave of the Court has been obtained u/s 18 of the Religious Endowments Act (XX of 1863). It

is urged that the trust being partly for religious and partly for charitable purposes, leave of the Court u/s 18 of that Act ought to have been obtained in so far as it was a trust for religious purposes; and we have been referred to the cases of Jan Ali v. Ram Nath Mandal 8 C. 32 : 9 C.L.R. 433 and Latifunnessa Bibi v. Naziran Bibi 11 C. 33. The first case relied upon was decided u/s 539 of Act X of 1877 and the suit in the second case was decided in the Court of first instance while the said Act was in force and it was also decided by this Court apparently with reference to the provisions of Section 539 of that Act. Section 539 of Act X of 1877 related only to charitable trusts and the word "or religious" were not in that section. Those were introduced by Act XIV of 1882. As suits in respect of trusts for religious purposes did not come within the purview of Section 539 of Act X of 1877, it was necessary to obtain leave of the Court u/s 18 of Act XX of 1863. Section 539 of Act XIV of 1882 having been extended to religious trusts also, a suit brought with the sanction of the Advocate-General is quite competent. Besides, as pointed out by Maclean, C.J., and Banerjee, J., in the case of Gyananda Asram v. Kristo Chandra Mokherjee 8 C.W.N. 404 a person electing to proceed under the Religious Endowments Act can be given only such special relief as that special Statute provides for and if he wishes for any relief beyond that, he should proceed u/s 539 of the Civil Procedure Code. Some of the reliefs claimed by the plaintiffs in the present case are outside the limited scope of Section 14 of Act XX of 1863. That being so, the suit is maintainable with the sanction of the Advocate General u/s 539 of Act XIV of 1882 and no leave under Act XX of 1863 is necessary. We may mention that no objection to the suit was taken in the Court below on this ground.

3. The next contention is that the suit is defective, as all the defendants of the original founder have not been made parties. It is urged that these persons are in possession of portions of the trust property and that they are, therefore, necessary parties to the suit and further that if they are not trustees, the suit would be barred by limitation. But we are not concerned with the question of possession in the present case, which is one u/s 539, Civil Procedure Code, That question will arise when a suit is brought for recovery of possession by the trustees who may be appointed and in whom the trust properties may be vested. Some of these persons claim through the female descendants of Ahmed Shah and although the evidence of the defendants is that they are in possession of portions of the property, there is evidence on the side of the plaintiffs that it is only the plaintiffs and the defendants who are in possession of the trust property and that no portion of it is in the possession of persons who, the defendants say, should be made parties to the suit. However that may be, the suit is directed against the defendants who were managing the trust and who professed to be the trustees, and they are the proper parties to a suit u/s 539, Civil Procedure Code. In these circumstances, we do not think that the suit is defective for want of parties.

4. The third contention is that the suit is barred by limitation. The suit, however, is not one for possession of property and, as already stated, the question of

possession or limitation will arise when a suit is instituted by the trustees who may be appointed for recovery of possession of property improperly alienated. So far as the reliefs claimed in the present suit are concerned, we do not see how any question of limitation can arise. It is found that there is a mosque and that there are some properties attached to it. A suit for the appointment of trustees or the framing of a scheme for management is not, under the circumstances, barred by limitation.

5. The fourth ground is that there was no valid wakf, as the property was to be appropriated partly for religious and charitable purposes and partly for the maintenance of Ahmed Shah and his family and the proportions in which the income was to be appropriated for the several objects was not defined in the sanad. Reading the sanad as a whole, however, there can be no doubt that the primary object was the appropriation of the property to religious and charitable purposes, the surplus only going to the maintenance of Ahmed Shah and his family. As pointed out in the case of *Mahomed Ahsanullah Chowdhry v. Amarchand Rundu* 17 C. 498 : 17 I.A. 28 : 5 Sar. P.C.J. 476 there is good ground for holding that provision for the family out of the grantor's property may be consistent with the gift of it as wakf, and their Lordships of the Judicial Committee agreed with and adopted the views of this Court, stated by Mr. Justice Kemp in the case of *Mazhurool Huq v. Puhraj Ditarey Mohapattar* 13 W.R. 235 and observed as follows: "After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says: "We are of opinion that the mere charge upon the profits of the estate of certain items, which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan Law.""

6. It is next urged that it is not a public trust. But the sanad provides for the maintenance of a mosque and for kliairat (charity), feeding travellers, etc. The evidence shows that money is spent for the expenses of worship and for charity. The public offer prayers at the mosque and the witnesses who have been examined by the plaintiffs prove that it is a public mosque. It is admitted by the defendants themselves in their written statement that the property is a wakf property. Having regard to the terms of the sanad and the pleadings and the evidence in the case, there can be no doubt that the trust is a public charitable and religious trust.

7. The last ground taken is that it is not open to the Court to appoint a trustee, because (it is argued) under the sanad all the descendants of the founder are trustees. The document itself, however, is not clear upon the question of succession to the office of trustee. The learned Judge has considered the claims

of the several persons who were put forward by the parties as candidates for the office and has assigned good reasons for rejecting the claims of those whom he has rejected. He has appointed one of the plaintiffs, namely, Faizur Rahman Chowdhury and another person Tabbullah who is one of the defendants as trustees. It is said that one Azizur Rahaman is a well qualified man and that he also ought to have been appointed a trustee. But the learned Judge points out that he is too young. Now four years have elapsed since the date of his decision and it will be open to the learned Judge to consider whether he also should be appointed as a trustee and if he thinks that he is now properly qualified and that in the interest of the trust he ought to be appointed, he may appoint him also. We would also point out to the learned Judge that an enquiry should be made as to the properties of the trust and the income and the expenditure thereof and also as to how the income is to be appropriated. The Court below will go into these questions, and give the necessary directions. Subject to these, the decree of the Court below is affirmed and the appeal is dismissed with costs. We assess the hearing-fee at three gold mohurs.