
(1977) 09 CAL CK 0014
In the Calcutta High Court
Case No : A.F.O.O. No. 470 of 1975

Mst. Zohra Khatoon

APPELLANT

Vs

Janab Mohammad Jane Alam and Others

RESPONDENT

Date of Decision : 28-09-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 16

Citation : AIR 1978 Cal 133 : 82 CWN 51

Hon'ble Judges : Bankim Chandra Ray, J; Anil Kumar Sen, J

Bench : Division Bench

Advocate : S.K. Acharya, General, B.K. Banerjee and D.P. Kundu, for the Appellant; Saktinath Mukherjee, Tarun Chatterjee and J.K. Dasgupta, for the Respondent

Final Decision : Dismissed

Judgement

Anil K. Sen, J.—The plaintiff/appellant challenges in this appeal the original order dated July 27, 1974, passed by the learned Judge, 9th Bench, City Civil Court at Calcutta in Title Suit No. 702 of 1971 whereby the learned Judge directed return of the plaint to the filing lawyer on a finding that he had not the territorial jurisdiction to try the suit.

2. Plaintiff's case as made in the plaint shortly is that there exists a wakf estate known as Hazrat Molla Ali Shah Darga enrolled in the Office of the Commissioner of Wakfs, West Bengal, which is a private wakf or Wakf-al-al-Aulad. The wakf property comprises a mosque and certain immovable properties admittedly situate not within the territorial limits of the City Civil Court at Calcutta. The plaintiff claimed that she had 8 as, distinct share in the wakf property and was a co-mutwali with one Roohul Amin, father of defendants 1 to 3. Roohul Amin by a registered deed surrendered and transferred his beneficial interest in the aforesaid wakf property for valuable consideration in favour of the husband of the plaintiff Mahaboob Alam. Similarly, defendant No. 4 transferred and surrendered his beneficial interest and share in the office of the Mutwali and right

to the benefits of offerings and profits of the aforesaid wakf estate for valuable consideration in favour of Mahaboob Alam, husband of the plaintiff. The other two defendants 5 and 6 abandoned their interest in favour of Mahaboob Alam and left for Pakistan. Thus, the plaintiff claimed that she and her husband Mahaboob Alam became the joint Mutwalis and jointly acquired the beneficial interest in the wakf estate as above, Mahaboob Alam being dead and under his nomination the plaintiff alone became the successor-in-interest in the office of Mutwali of the aforesaid estate. But the plaintiff alleged that on an application made by defendants Nos. 1, 2 and 3 the Commissioner of Wakfs wrongfully and illegally by an order dated Aug. 18, 1971, recorded the names of the defendants as comutwalis along with the plaintiff. Accordingly, the plaintiff prayed for a declaration that the aforesaid order of the Wakf Commissioner dated Aug. 18, 1971, is mala fide, motivated, illegal, biased, malicious and without jurisdiction and not binding on the plaintiff and for a further declaration that the defendants Nos. 1, 2, 3, 4, 5 and 6 have no right, title or interest whatsoever in the aforesaid wakf property. The plaintiff also prayed for a mandatory injunction for expunging the aforesaid illegal order of the Wakf Commissioner and for a permanent injunction restraining the defendants from acting upon or in any manner giving effect to the aforesaid order or disturbing the plaintiff in her peaceful possession, enjoyment and management of the wakf estate, as aforesaid, and the properties appertaining thereto.

3. The defendants on their appearance filed an objection u/s 21 of the Civil P.C. to the effect that on the reliefs claimed in respect of immovable properties situate beyond the territorial jurisdiction of the court, the suit is not maintainable.

4. On the objection, as aforesaid, a preliminary issue was raised by the court to the effect "Has this court territorial jurisdiction to try the suit ?"

5. The learned Judge in the trial court decided the issue against the plaintiff and consequently by the order challenged in this appeal directed the plaint to be returned to the filing lawyer. The learned Judge held as such, as according to him, on the plaint the suit was substantially in respect of immovable Property situate outside the jurisdiction of the court and the relief which the plaintiff sought in respect of those properties cannot be obtained by mere personal obedience by the defendants to the suit. Hence, this appeal by the plaintiff/appellant.

6. The learned Advocate General appearing in support of this appeal has strongly assailed the view taken by the learned Judge in the trial court. According to the learned Advocate General the plaint ought to be read in its pith and substance and so read there can be no doubt that the only substantial relief sought by the plaintiff in setting aside the illegal order of the Commissioner of Wakf dated Aug. 18, 1971, whereby he recorded the names of the defendants as comutwalis along with the plaintiff. Relief if any, in respect of the wakf property sought for by the plaintiff is merely ancillary and, as such, the fact that the properties are situate beyond the territorial limits of the trial court could not have been a

ground for holding that the said court had no jurisdiction to entertain the suit. Secondly, it has been contended by the learned Advocate General that in any event the dispute relates to the office of Mutwali and the reliefs claimed only relate thereto and the same not being a property, far less an immovable property within the meaning of Section 16 of the Civil P. C., the learned Judge went wrong in holding that he had no territorial jurisdiction only because the immovable properties of the wakf estate are situate beyond such jurisdiction. Lastly, the learned Advocate General contended that if this court does not accept the aforesaid two contentions raised by him, this court should at least give an opportunity to the appellant to amend, the plaint and challenge the impugned order of the Wakf Commissioner dated Aug. 18, 1971, only which could be well within the territorial jurisdiction of the trial court.

7. The points thus raised by the learned Advocate General has been contested by Mr. Mukherji appearing on behalf of the defendant/respondents. According to Mr. Mukherji the learned Judge in the trial court read the plaint correctly in finding that the plaintiff's challenge was not limited to the order of the Wakf Commissioner alone but such challenge extended to the extent of challenging the right, title and interest of defendants Nos. 1 to 6 both in the office of Mutwali and the beneficial interest in the wakf estate and the properties appertaining thereto. That according to Mr. Mukherji is not merely an ancillary relief claimed but constitutes substantial part of the relief sought. Mr. Mukherji has next contended that even if it be accepted that the present dispute relates only to the office of Mutwali that office by itself is a property, particularly when on the facts of the present case the wakf is admittedly a private one and the beneficial interest arising out of the wakf estate also vests in the Mutwali. Lastly, Mr. Mukherji has contended that as the suit itself was not maintainable as rightly held by the court below no amendment can be made since an order for amendment could be made only "by a court having jurisdiction to entertain the suit and make the order.

8. We propose to dispose of the last point raised by the learned Advocate General first, because if we can consider the prayer for amendment as suggested by him, the defect as to jurisdiction may very well be removed by amending the relevant part of the pleading and deleting the prayer for reliefs other than the one in respect of the order dated Aug. 18, 1971, passed by the Wakf Commissioner. In our opinion, Mr. Mukherji is certainly right in his contention that granting an amendment postulates an authority of the court to entertain the suit and make an order for amendment therein but where the court inherently lacks jurisdiction to entertain the suit it cannot make any order for amendment to bring the suit within its jurisdiction. In that case the court will be exercising jurisdiction which it has not. So, if we uphold the view of the learned Judge that the court had not the jurisdiction to entertain the suit, no amendment can be allowed either by the said Court or this court in appeal exercising same powers to bring the suit within the jurisdiction of the court. On the facts, it is clear that it was not a case of mere abandonment of a part of the claim so that the court in view of such abandonment by the plaintiff may hold the suit in its other part to

be within its jurisdiction. On the other hand, even as conceded by the learned Advocate General what is necessary is a positive amendment of the plaint itself for bringing it within the territorial jurisdiction of the court. This position has been made clear by judicial decisions and reference may be made to a judgment by a Division Bench of the Madras High Court in the case of Satti Ramanna Vs. Padala Amireddi and Others, where it was observed: "If a court finds that it has no jurisdiction, then to say that it has jurisdiction to ask the plaintiff to amend his valuation with a view to direct him to pay additional court-fee and then return the plaint, would seem to suggest that a court not having jurisdiction has got jurisdiction to do something which is prima facie the duty and function of the proper court". That had also been the consistent view of other High Courts and reference may be made to the following cases: Lalji Ranchhoddas v. Narottam Ranchhoddas AIR 1953 Nag 273; H.C. Khan and Another Vs. Purni Agarwallani and Another, and Tirkha Vs. Ghasi Ram, . In this view, the last point raised by the learned Advocate General must fail and is overruled.

9. Now we proceed to consider the other two points raised by the learned Advocate General. He has first contended that reading the plaint in its substance we should hold that the only substantial relief sought for by the plaintiff is to set aside the illegal order of the Commissioner of Wakf dated Aug. 18, 1971, recording the names of the defendants other than the Commissioner as comutwalis with the plaintiff and all other reliefs sought for are mere ancillary reliefs which are wholly irrelevant for the purpose of determining the jurisdiction of the court. Though we agree with the learned Advocate General that the plaint has to be read as a whole and considered with reference to its substance we are unable to accept his contention that so read the conclusion to which we can reasonably arrive at is that the only substantial relief claimed by the plaintiff in the present case is by way of setting aside the order of the Commissioner of Wakf. We have set out with necessary details the plaintiff's case and the reliefs sought for by her hereinbefore. It is explicit on such a pleading that the plaintiff's challenge is not limited to the order of the Wakf Commissioner nor does the relief claimed in respect thereof constitute in substance the only relief in the suit. There is a clear averment on the other hand that the wakf concerned being a wakf al-al-aulad, the Mutwalis were also the beneficiaries and that the right, title and interest which the other Mutwalis, namely, defendants Nos. 1 to 6 or their predecessor-in-interest had in the estate vested by transfer, surrender or abandonment in her husband and on his death in herself. A specific relief was, therefore, sought for from the court that a declaration should be made to the effect that the said defendants had no subsisting right, title or interest in the wakf estate and the properties appertaining thereto. A plain reading of the plaint would go to show that this part of the plaintiff's claim, if not more, is as substantial as her claim in respect of the order of the Commissioner of Wakf. The first point raised by the learned Advocate General, therefore, fails and is overruled.

10. The second point raised by the learned Advocate General necessarily raises

certain questions of importance under the Mohomedan Law. The learned Advocate General contends that the immovable properties referred to in the plaint are admittedly the properties appertaining to the wakf estate. A Mutwali has no right, title and interest in such property and the other part of the plaintiff's claim even if it relates to the office of Mutwali in respect of such a wakf estate, the suit cannot be said to be one for the determination of any right to or interest in the said immovable property. Strong reliance is placed by the learned Advocate General on two decisions of the Privy Council in the cases of *Md. Rustam Ali v. Mustaa Hossain* 47 Ind App 224 : (AIR 1921 PC 105) and *Vidya Varuthi v. Baluswami Aiyar* 48 Ind App 302 : (AIR 1922 PC 123) in contending that the office and the position of a Mutwali is that of the Manager of the wakf estate, its governor, superintendent or curator. His position is no better than that of a Receiver or a manager having no estate in the property he is called upon to control. Though he possesses powers over it he has no right in it and the property does not vest in him, A claim to such an office must be distinguished from the properties and only because the plaintiff has put forward a claim of title to such an office to the exclusion of defendants Nos. 1 to 6, it cannot be said that thereby she has put forward any claim of right to or interest in the immovable property appertaining to the wakf estate left under the control of such a Mutwali. Mr. Mukherji appearing on behalf of the respondents has contended on the other hand that a Mutwali is not merely the holder of an office. According to Mr. Mukherji, the two decisions of the Privy Council relied on by the learned Advocate General merely laid down that a Mutwali is not a Trustee as contemplated by the English law in whom the property vests and the observations made by the Privy Council in these two cases must be read limited to that context only and should not be read as on authority for the proposition that in all respects Mutwalliship is an office of the nature of a manager, governor, superintendent or curator. Referring to the decision of the Privy Council in *Vidya Varuthi's* case (AIR 1922 PC 123) Mr. Mukherji has contended that for the principles laid down therein the Privy Council made no distinction between head of a Math under a Hindu endowment or a Mutwali or a Sajjadanashin under a Mahomedan endowment. Neither of them was held to be a Trustee within the meaning of Article 134, Schedule I of the Limitation Act, 1908. It was in that context that the Privy Council observed that the head of a Math under a Hindu endowment "Called by whatever name, he is only the manager and custodian of the idol or the institution" and the Mutwali to be "the manager of the wakf governor, superintendent or curator." Mr. Mukherji, however, has placed strong reliance on the Full Bench decision of this court in the case of *Monohar Mukherji v. Bhupendra Nath Mukherji*, ILR Cal 452 : (AIR 1932 Cal 791) (FB) in contending that though the head of a Math under a Hindu endowment and a Mutwali under a Mahomedan endowment is not a Trustee as commonly understood under the English law but hold the position of a manager yet they are not mere holders of office because holding such an office invests in them some interest though limited which make them holders of property as well. No doubt in *Monohar Mukherji's* case the Full Bench of this court specifically laid down that in

spite of the limitations on the rights of Shebait over debuttar property, shebaitship is a kind of property in the eye of Hindu law and not merely a right to an office to the disposition of which the Rule in Tagore v. Tagore, ((1872 Ind App Supp Vol. 47 (PC)) would apply. It is also true that this Full Bench decision has been approved not only by the Privy Council in two cases, namely, AIR 1936 318 (Privy Council) and AIR 1943 89 (Privy Council) but also by the Supreme Court in the case of The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., .

11. What the Full Bench considered is, however, the incidence of the rights of a Shebait and not of a Mutwali. Mr. Mukherji no doubt asks us to extend the same principle in determining the incidence of the rights of a Mutwali relying On Privy Council decision in Vidya Varuthis case (AIR 1922 PC 123) where both a Shebait and a Mutwali were taken to be standing on the same footing for contrasting them from a Trustee as commonly known in English law. But because of such analogy drawn by the Privy Council for bringing out the contrast, it would not be correct, in our view, to equate them for all other purposes and at least for the purpose of holding that what the Mutwali holds is not merely an office but a property. One should not lose sight of the fact that in Monohar Mukherji's case (AIR 1932 Cal 791) (FB) this court was considering the incidence of shebaitship as under the Hindu law. This court on consideration of the original text and varying decisions on the point, specifically held that in Hindu Law the shebaitship is not a mere office but constitutes by itself a property having regard to the rights which ordinarily attach to the office of a Shebait. There are, however, fundamental differences in the rights and in the position of a shebait under the Hindu Law and a Mutwali under the Mahomedan Law which when considered would furnish the reason why the principles laid down in Monohar Mukherji's case cannot be applied in determining the incidence of the right of a Mutwali. We have indicated hereinbefore that it is the Hindu Law in particular which invests certain proprietary element in the shebaiti right to make shebaitship itself a property. A shebait has not only certain duties to discharge in connection with the endowment but has also personal interest in it. He enjoys some sort of right or interest in the endowed property which has partially at least the characteristics of a proprietary right. Though his power of alienation is limited yet he can create derivative tenures in respect of the endowed property which even if not supported by any legal necessity cannot be impeached so long as he is alive and remains in office. (Abhiram Goswami v. Shamacharan, ((1909) 36 Ind App 148) (PC). His rights are, therefore, more akin to that of a limited owner. Shebaitship is not transferable because the personal proprietary interest is ancillary to and inseparable from his duties as a ministrant of the deity. But like any other species of heritable property, shebaitship is heritable. Unless otherwise disposed of, it follows the line of inheritance from the founder and in cases where it is given absolutely, it is the heirs of the shebait who inherit (See Hindu Law of Religious and Charitable Trust by Dr. B. K. Mukherji, Lecture-V). Elements like these make the shebaitship a property. Privy Council in the case of AIR 1943 89

(Privy Council) , therefore, pointed out that "the effect of that case (Monohar Mukherji) and of the Board's decision which confirmed it -- AIR 1936 318 (Privy Council) was, however, to emphasize the proprietary elements in shebaity right and to show that though in some respects anomalous it was an anomaly to be accepted as having been admitted into Hindu law from an early date". This aspect was also affirmed by Mukherji, J. in the case of The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., .

12. Such elements are, however, not recognised by the Mahomedan Law as part of the rights of a Mutwali. In general, Mutwali is not allowed to sell, mortgage or lease the wakf property unless he obtains the permission of the court which has the general powers of controlling the actions of Mutwali. Save and except as recognised by any custom, the law does not favour the right to act as Mutwalli becoming heritable. When the Mutwali dies subject to any specific provision to the contrary in the deed of endowment, the wakif if still alive possesses the right to appoint another and in his absence his executor and in the absence of both it is the court that appoints the successor Mutwali. The Mutwali under the Mahomedan Law has no ownership right or estate in the wakf property; he holds the property as a manager for fulfilling the purpose of the wakf. Even a Sajjadanishin who has larger interest of the usufruct has been held to have no right in the property endowed. These features, therefore, distinguish a Mutwali from a She-bait and the elements which render shebaitship a property not being there Mutwaliship cannot be considered as a property. This is the reason why judicial decisions have uniformly held Mutwaliship to be an office. In case of Md. Rustam Ali 47 Ind App 224 : (AIR 1921 PC 105) the Privy Council held that the deed by which a Mutwali is appointed and vested with Mutwaliship does not constitute a transfer to them the ownership of the property and as such it is outside the provisions of Indian Registration Act, 1877. The same view was reaffirmed by the Privy Council in still later a decision in the case of (1934) 66 MLJ 431 (Privy Council) . The Supreme Court in the case of Nawab Zain Yar Jung and Others Vs. The Director of Endowments and Another, , accepted and approved the principle laid down in Vidya Varuthi's case in holding the Mutwali to be a manager, governor, superintendent or curator. Mr. Mukherji no doubt drew our attention to the observations made in a Bench decision of the Allahabad High Court in the case of Mohammad Qamar Shah Khan Vs. Mohammad Salamat Ali Khan, to the effect that in case of a private wakf where the Mutwali is also the beneficiary the Mutwali is not a mere superintendent or manager but is practically speaking the owner. But a Full Bench of the said High Court overruled the said decision in Moattar Raza and Others Vs. Joint Director of Consolidation, U.P. Camp at Bareilly and Others, . The Full Bench has reaffirmed the position that the Mutwali acquires no right, title or interest in the property itself but he is merely the holder of the office of a manager under the Mahomedan Law. Such being the position, we are unable to accept the contention of Mr. Mukherji that we should extend the principle laid, down by the Full Bench of this court in

Monohar Mukherji's case and hold that holder of the post of a Mutwali is not the holder of a mere office but is the holder of a property. We accept, on the other hand, the contention of the learned Advocate General that the claim of the plaintiff in so far as it is a claim to be declared the sole Mutwali is a claim limited to an office and is not a claim to the immovable property appertaining to the wakf estate of which the plaintiff claims to be the Mutwali.

13. The above conclusion, however, would not conclude the issue. In this case what the plaintiff claims is not only the office of Mutwali but the interest of the beneficiary under the endowment. It would, therefore, be necessary for us to consider what is the true nature and incidence of such an interest under a wakf al-al-aulad. This interest must be considered independently of the office of Mutwali. A Mutwali need not necessarily be also the beneficiary under the endowment though in the present case she is both the Mutwali and the beneficiary. But her claim to the beneficial interest must necessarily be distinguished from the office of Mutwali. She has laid a specific claim that by surrender, transfer or abandonment the entire beneficial interest now has vested in her. How far such a claim would be sustain-able in law is a matter which can be adjudicated only in the suit but that exactly is the relief by way of declaration that she has prayed for.

14. Under the Mahomedan Law, wakf is a two fold transfer simultaneously made; perpetual in both its aspects with religious motive pervading, the transaction as a whole consists of a transfer (1) of the usufruct in favour of the beneficiary or objects of the wakf and (2) of the substance in reality a renunciation of the substance metaphorically spoken of as a transfer of the substance to God. It was pointed out by the Privy Council in Vidya Varuthi's case (AIR 1922 PC 123) that wakf constitutes "tying up of property in the ownership of God, the Almighty and the devotion of the profits for the benefit of human beings". Therefore, there can be no dispute that on such endowment under the Mohamedan law the ownership in the property is wholly renunciated or vested in the God and the benefits which the beneficiaries derive come only out of the usufruct. Mahomedan Law, it must be remembered, makes a difference between Ayn (corpus) and Manafi (usufruct) and the beneficial interest under the endowment is generally created out of such usufruct. As observed by Amir Ali "A wakf is a permanent benefaction for the good of God's creatures; the wakf may bestow the usufruct but not the property upon whomsoever he chooses and in whatever manner he likes, only it must endure for ever". Such being the position, the beneficiary acquires no interest in the strict sense in the property itself though an interest in the usufruct arising out of such property is vested in the beneficiary. Hence, it was pointed out by the Privy Council in Vidya Varuthi's case that even a Sajjadanishin who has a larger interest in the usufruct acquires no right to the property belonging to the wakf. Again, in the case of Abdur Rahim v. Narayan 50 Ind App 84 : (AIR 1923 PC 44 (2)) the Privy Council pointed out that on such an endowment the property itself is not chargeable according to the measure of interest which the beneficiary may have in the rents, and profits of the whole. Though, therefore, the beneficiary

acquires no right in the immovable property, yet his right to share the usufructs which are to accrue from such property in years to come creates an interest of a particular nature in the immovable property. Such an incidence arises from a grant of this nature. Observations of Sir Edward Vaughan Williams to the effect "The principle of these decisions appears to be this that whenever at the time of the contract, it is contemplated that the purchaser should derive a benefit from the further growth of thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an Interest in land" which were cited with approval in the case of *Marshall v. Green* (1875) 1 CPD 35 well supports the above conclusion. Reference may also be made to a decision of this court in the case of *Lokenath v. Jahania*, (1911) 14 Cal LJ 572 where Mookerjee, J. held that a right of fishery is not immovable property for all purposes but it is an interest in immovable property and the decision of the Madras High Court in the case of *S.T. Sultan Ahmed Rowther and Others Vs. The State of Madras*, .

15. In our opinion, the above conclusion can be confirmed if we look to the meaning "usufruct" which term has been interpreted to mean "the right of temporary possession, use or enjoyment of the advantages of property belonging to another so far as may be had without causing damage and prejudice to this." In this view, the plaintiff's claim in respect of the beneficial interest under the endowment cannot be considered de hors the immovable properties covered by the endowment and the suit cannot but be held to be one coming u/s 16(d) of the Civil P. C.

16. That apart, on the frame of the suit the plaintiff in the present case has asked for a declaration that the defendants Nos. 1 to 6 have no right, title or interest in the wakf estate and the immovable properties appertaining to such estate and that she alone is the Mutwali thereof. On such a declaration the plaintiff has further prayed for an injunction restraining the said defendants from disturbing the plaintiff's possession, enjoyment and management of the estate and the immovable properties appertaining thereto. Such a relief is clearly and directly a relief in respect of the immovable properties situate admittedly beyond the territorial limits of the court. Maybe, as a Mutwali or a beneficiary the plaintiff lays such a claim but it is quite evident that even as such, she is asserting a right in respect of such immovable properties which are, however, not within the territorial limits of the court. Such being the position, on the provision of Section 16, the court could not have entertained the suit, and as such, was perfectly justified in returning the plaint. The order passed by the learned Judge, therefore, must be upheld.

17. In the result, the appeal fails and is dismissed. There will be no order as to costs.

18. As prayed for, let the operation of this order remain stayed for a period of two weeks from date.

B.C. Ray, J.

19. I agree.