

(1937) 11 CAL CK 0015
In the Calcutta High Court

S. Massirat Hossain and Others

APPELLANT

Vs

Hossain Ahmad Choudhuri and Another

RESPONDENT

Date of Decision : 23-11-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : AIR 1938 Cal 278

Hon'ble Judges : S.K. Ghose, J;Patterson, J

Bench : Full Bench

Judgement

S.K. Ghose, J.—This is an appeal by the plaintiffs in a suit instituted u/s 92, Civil PC., for removal of defendant 1 from the post of mutwalli, for appointment of a new mutwalli in his place, and for certain other reliefs. The plaintiffs' case is based upon the existence of a wakf which was created by a wakfnama dated 6th Aswin 1305, in accordance with the terms of which defendant 1 is the present mutwalli. Plaintiffs' case is that defendant 1 has been neglecting to look after the estates and his duties as mutwalli in breach of terms of the wakfnama and committing acts of misappropriation. Their further case is that defendant 1 has come under the evil influence of defendant 2 who has induced him to come to an arrangement by which the wakf properties have been leased to defendant 2 in return for an annual payment of Rs. 1200 which again defendant 1 has been spending for his personal benefit. Various other acts in breach of the trust are complained of. The plain-tiffs who are three in number allege that they are interested in the trust and they bring the suit praying for reliefs which are specified in para. 22 of the plaint. These reliefs are directed both against defendants 1 and 2. Defendant 1 filed a written statement denying the allegations of malfeasance and misfeasance and con. tending that he has observed all the provisions of the wakfnama and further that he has given an Ijara of the properties to defendant 2 as an arrangement which would benefit the wakf estates in accordance with the provisions of the wakf.

2. Defendant 2 filed a written statement admitting the aforesaid Ijara and

contending that he is not a trustee and as such he is not a necessary party in the suit, but that he is only a bona fide lessee for consideration and therefore he should be dismissed from the suit. On 24th February 1934 the Subordinate Judge tried first Issue 5 on the point whether defendant 2 is a necessary party. He held that defendant 2 is not a necessary party. On 14th May 1934, the Subordinate Judge took up the case for hearing and in the result he dismissed it on his finding as to Issue 2 which runs thus : "Is the subject matter of the suit public or private wakf? Is it partly public and partly private? Whether the suit is maintainable in this Court?" The Subordinate Judge held that the subject matter of the suit is substantially a private wakf or at least partly public and partly private and that the suit is not maintainable u/s 92, Civil P.C. In that view he dismissed the suit. Hence this appeal by the plaintiffs. The first question raised in this appeal is whether the Subordinate Judge is right in determining Issue 2, namely that the suit is not liable to be brought u/s 92, Civil P.C. The answer to this will depend upon the view that is to be taken of the character of the wakfnama dated 6th Aswin 1305.

3. The document recites that the executant Nasibannessa executed a previous Towliatnama in order to create "a perpetual wakf in the name of Allah for religious, pious and charitable purposes of all the properties" that she got from her husband excepting some which she had kept for her own personal use and that the wakf of 1305 was executed in order to meet certain legal objections. The document repeats that the intention of the donor is to dedicate the properties "for the pleasure of God and in the interest of religion". She appoints herself as the first mutwalli and makes provision for the appointment of future mutwallis. The first charge on her estate is the allowance of the mutwalli and the naib mutwalli. After meeting these charges, it is provided that the net income that will be left over will be devoted to the performance of the duties specified in schedule Kha. This gives a 1st of four items entailing an expenditure of Rs. 353 annually and there is no dispute that these four items relate to public purposes of charitable or religious nature. There is a further provision that Rs. 300 is to be paid to the wakif's spiritual "preceptor, with the proviso that, should the family of the latter become extinct, the allowance will be given to the poor or will be spent on any other item of pious acts specified in the wakfnama. After meeting all these expenses, it is provided that certain allowance will be paid to certain persons who are mentioned in schedule "Ga" "as persons who are poor and deserving of charity for their maintenance." At the same time, power is given to the mutwalli to reduce or discontinue these allowances and there is an express provision that the heirs and descendants of the beneficiaries would be debarred from claiming any right to the allowances as a matter of inheritance. Discretion is given to the mutwalli to distribute these amounts to the poor in certain circumstances. A provision is made that the donor herself will, as mutwalli, be entitled to an allowance of Rs. 30 per month and her brother as naib mutwalli to an allowance of Rs. 5 per month. At the same time there is an express provision that excluding the allowances mentioned "nothing more they will be entitled to

on any account either as maintenance or any other allowance".

4. Then the document goes on to provide that after meeting all the expenses aforesaid one fourth of the savings will be set apart against unforeseen risks and the remainder will be "spent on the poor" or "for the purpose of excavating tanks, construction of bridges and similar other acts beneficial to the public". Amongst other things a mosque is provided for. The Subordinate Judge has found that it is a public mosque and this finding is not challenged. It is expressly provided further that the wakf property will not be liable to be attached or transferred for the personal debts of the mutwalli or his naib, that these officers shall not use any portion of the salami money for their personal use, and that the terms and conditions of the wakfnama will remain in force for all time, and it is noted that the donor herself had set apart separate properties to pay off her debts. These are the conditions set forth in the wakfnama. The Subordinate Judge has found that the annual income from the wakf estates will be about Rs. 1300 net, that out of this the sum of Rs. 353 as par schedule Kha has undoubtedly been set apart for public purposes of a charitable or religious nature, and that a good part of the balance has been set apart for the immediate benefit of private individuals. On this calculation the Subordinate Judge has taken the view that the bulk of the net income is to enure for the benefit of private persons. Therefore the Subordinate Judge says that it is case of a mixed wakf where a substantial portion of the benefit is allotted for private purposes and in that view it cannot come under the provisions of Section 92, Civil P.C.

5. In this Court the arguments at the bar have been directed to a number of reported cases in which the Courts have examined the terms of the trust in question in those cases with different results. In each case the question has been whether the trust was created for public purposes of a charitable or religious nature and this has been a matter of evidence depending upon the terms of the trust. In *Verge v. Somerville* (1924) AC 496 there is a passage in the judgment of Lord Wrenbury where he says referring to the term "public":

whether it is for the benefit of the community or of an appreciably important class of community. The inhabitants of a parish or town or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.

6. There is no hard and fast rule that merely because there are certain provisions in favour of private individuals and certain others in favour of the public, that therefore the case falls within or without the class of public trusts to which Section 92 applies. It has also been pointed out in some oases that the words "public trust of a charitable or religious nature" should be given their ordinary meaning (*Walidad Khan Vs. Emperor*, and that we must look to the real substance of the trust and the primary intention of the creator of the trust in every case: *Shabbir Hussain v. Shaikh Ashiq Husain* AIR (1929) Ouah 225. In a number of oases, an examination of the terms of the trust has resulted in the view that it is substantially a private trust. Cases of this type are as follows :

Sathappayyar v. Periasami (1891) 14 Mad 1 Abul Hasan v. Aziz Ahmad AIR (1914) All 394 Gopal Lal Sett v. Purna Chandra Basak AIR (1922) PC 253 Prasaddas Pal Vs. Jagannath Pal and Others, , Shabbir Hussain v. Shaikh Ashiq Husain AIR (1929) Ouah 225 Ali Bakhtear and Others Vs. Khandkar Altaf Hossain and Others, , Dinshaw Maneckjee Petit v. Jamsetji Jijibhai (1909) 33 Bom 509. On the other hand there are oases in which again an examination of the terms has led to the opposite result. Cases of this type are Jugal Kisore v. Lakshmandas Raghunathdas (1899) 23 Bom 659 Puran Atal v. Darsandas (1912) 34 All 468 Jadaba Jha and Another Vs. Satdeo Jha and Others, Sukhumal Manumal v. Uttam Chand AIR (1937) Sind 230 Vaidya Natha Ayyar v. Swaminatha Ayyar AIR (1924) PC 221 Ramanadhan Chettiar v. Vava Levvai Mara kayar AIR (1916) PC 86. No useful purposes will be served by referring in detail to all these oases. But I may mention that the last mentioned two oases which are decisions of the Judicial Committed are likewise cases of trust in which there were provisions in favour of private individuals. For instance in Vaidya Natha Ayyar v. Swaminatha Ayyar AIR (1924) PC 221 the terms recite that 2/3rds income would be givers to the wife and 1/3rd first given towards the discharge of certain debts and thereafter to establish "annadhanam" for the purpose of feeding the poor. There was a further provision that after the wife's death 2/3rds of the income given to her would be given to charity and 1/3rd to the members of the family. In such case their Lordships agreed with the finding of the Courts below that the chatram so established was a public trust. In the case before us we have looked carefully to the terms of the wakfnama. Having done so, I am unable to resist the conclusion that the donor intended to make dispositions in favour of the public for religious and charitable purposes. Undoubtedly there were dispositions in favour of individuals but even Section 353 out of Rs. 1300 per annum, if that be taken to be the net income, is by no means a trifling or disproportionate provision in favour of the public. The provisions taken as a whole do indicate that they were intended to benefit the public, subject to certain payments which were also necessary for worship and charity. In that view I have no difficulty in holding that the trust was created for a public purpose of a charitable and religious nature. Therefore the suit is maintainable u/s 92, Civil P.C.

7. The next question is whether the Sub-ordinate Judge is right in holding that defendant 2 is not a necessary party. The plaint alleged that defendant 2 had undertaken the management and administration" of the wakf estate. There were prayers in. the plaint to the effect that there should be an injunction against defendant 2, that a receiver should be appointed to take charge of the estate, that defendant 2 should be ordered to be removed from acting as manager of the wakf estate and to account for his dealings as a trustee de son tort. The order of the Subordinate Judge dated 24th February 1934, shows that no evidence was adduced to show that defendant 2 is a manager. On the contrary the plaintiffs" pleader conceded that his clients were not in a position to prove that defendant 2 is a manager. Even if the Ijara in favour of defendant 2 be taken to be a collusive one the prayers set forth above as against defendant 2 could not be granted in a

suit under Section 92, Civil P.C. In *Abdur Rahim v. Abu Mahomed Barkat Ali* AIR (1928) PC 16 the Privy Council, after pointing out that the Courts in India are not agreed as to whether in a suit for removal of a trustee for unlawful alienation of the properties, the transferee is or is not a necessary party, held that a relief against third parties, that is stranger to the trust, is not within the scope of Section 92, Civil P.C. For the plaintiffs-appellants, in this Court, it is contended that defendant 2 is in a position of trustee de son tort. But this position cannot be maintained in view of the *Ijara pottas* Exs. 5 and 5 (1) which show that defendant 2 is a mere Ijaradar from defendant 1. The question as to whether a person in the position of defendant 2 should be before the Court in order that the Court may make a declaration against the defendant in the position of defendant 1 has been raised before us. In *Gholam Moulah v. Ali Hafiz* AIR (1918) Cal 5 Sanderson C. J. pointed out that once it is decided that the claim against defendant 2 cannot be instituted u/s 92, he cannot be joined as a party in the proceedings. To the same effect is the judgment of Ashutosh Mookerjee J. It is pointed out further that the lower Court did not draw up a decree of dismissal of the suit on the ground that defendant 2 had been joined as a party. It merely held that defendant 2 is not a necessary party and thereafter it appears that defendant 2 took no part in the proceedings. In any case it seems to us that the learned Subordinate Judge is right in holding that defendant 2 is not a necessary party, and as it is not possible to grant any relief as prayed for as against defendant 2, it is not proper that he should be joined as a party at all.

8. The result is that the appeal must succeed as against defendant 1 and the suit must be remanded to the lower Court for the determination of the other questions. The appeal fails as against defendant 2. Plaintiffs will get their costs of this appeal from defendant 1. Future costs do abide the result. Defendant 2 will get half of his costs in this appeal from the plaintiffs. The hearing fee of this appeal is assessed at five gold mohurs.

Patterson, J.

9. I agree.