

(1936) 04 CAL CK 0018
In the Calcutta High Court

Zubaida Sultan Begum

APPELLANT

Vs

Dawood Ismail Makra and Others

RESPONDENT

Date of Decision : 23-04-1936

Acts Referred:

Citation : AIR 1937 Cal 407 : 175 Ind. Cas. 895

Hon'ble Judges : Ameer Ali, J

Bench : Division Bench

Judgement

Ameer Ali, J.—In this matter I have just given directions as to drawing up the decree and I consider it desirable that I should state my reasons for so doing. This particular matter has been the cause of some inconvenience both to counsel for the plaintiff and myself. The suit is to recover money lent to mutawalis generally for the purposes of the wakf, and in this instance in particular, for the repairs to a mosque. The prayer was for judgment "against the defendants as such mutawalis or in the alternative against the defendants personally". This case did not come into the undefended list, as often happens, but there was an application under Ch. 13-A. The summons asked merely for "final judgment against the defendants". At the hearing of the application, counsel Mr. Basu asked me to amend the summons by including "as mutawalis of the wakf estate". I expressed misgivings but acceded to his request and passed a decree subject to further consideration when the matter should be referred to me by the officer drawing up the decree. Some time later the matter was mentioned to me by Mr. Basu, who showed me certain letters from the mutawalis stating that the money had been borrowed and used for the repair of the mosque.

2. In this particular case, in order not to protract the matter, I have allowed a decree to be drawn up against the mutawalis adding a liberty to the plaintiffs to recover the decretal amount out of the income of the wakf property, subject, however, to notice to the Commissioner for wakfs before the execution is applied for. The matter comes up to me again today at the instance of the office who found that the words of the amended summons "as mutawalis of the wakf

estate" had been struck out and I imagine that it was I myself who struck them out at the time. With regard to the law I confirm my abhorrence of the use of the word "as" in passing decrees against trustees, shebait, or mutawalis, with the implication that the decree is then "against" the trust property and not against the trustee, shebait or mutawali. (1) With regard to trustees, I have explained my views both as to principle and practice as clearly as I could in *Mackintosh Burn Ltd. Vs. Shivakali Kumar*, , following (Maharaja Sir) Manindra Chandra Nandi Vs. Sudir Krishna Banerjee and Others, With regard to shebait in *Mackintosh Burn Ltd. Vs. Shivakali Kumar*, , I was careful to avoid any expression of opinion as to the rights of persons contracting with shebait: see *Mackintosh Burn Ltd. Vs. Shivakali Kumar*, . I was, however, compelled to deal with this question in *Shastri v. The Trustees of the Tirupati Tirumali Devasthanam* Reported in I LR (1937) Cal 84 and my views on this subject both as to theory and practice are to be found in the portion of the judgment which is set out in the foot-note below. (3) With regard to wakfs and contracts with mutawalis, I am relieved from considering the position because this Court on the appellate side has recently dealt fully with the point in *Sailendra Nath Palit Vs. Syed Hade Kaza*, . It was in that case contended by counsel for the plaintiff that persons contracting with mutawalis are entitled to rights as extensive as persons contracting with shebait. This contention was rejected, and it was held that the mutawali in contracting has, so far as creating liabilities on the wakf property is concerned, powers no more extensive than those of a trustee in English law. In this case there was, as I said, an application under Ch. 13-A which from the practical point of view, excluded the possibility or any enquiry such as is necessary to decide whether a trustee has or has not a right of indemnity. This caused my original misgivings in the matter. It seems to be more than doubtful whether a mere statement by the lender in any affidavit on application under Ch. 13-A should be sufficient to satisfy the Court on the point in question, and in future I, at any rate, will require in any suit of this kind some evidence before passing a decree which may operate upon the wakf property.

3. Further, the decree will not be against the defendant "as mutawali" but I shall include a declaration in some form or other that the plaintiff is entitled to satisfy his decree out of the wakf property in such a manner as the law allows. Normally the appropriate method in such a case is the appointment of a receiver of the income of the endowment. As regards the present case, having regard to the particular circumstances I have given the directions already indicated.