Huseni Begam and Others Vs The Collector of Moradabad

Court: Allahabad High Court

Date of Decision: July 16, 1897

Citation: (1898) ILR (All) 46

Hon'ble Judges: Knox, J; Burkitt, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Burkitt and Knox, JJ.
The suit out of which this first appeal has arisen was instituted by the Collector of Moradabad (under instructions

from the Local Government) under the provisions of Section 539 of the Code of Civil Procedure.

2. The case for the plaintiff is that one Miran Shah, the ancestor of all the defendants, had, before his death some fifty years before suit, made a

waqf of mauza Haibatpur for religious and charitable purposes, for the up-keep of a mosque and imambara he had founded, for the expenses of an

annual ""urs"" or religious assembly to commemorate the Pir Ghaus Azam, to feed the poor at the ""urs"" and to keep his (Miran Shah''s) tomb in

repair. It is admitted that mauza Haibatpur had been granted revenue-free to Miran Shah, who was a man of great piety and sanctity among

Musalmans; that the revenue-free grant was made by the Oudh Government, and that the village still remains muafi, not having been resumed at

either of the two settlements which have taken place since the British Government came into possession. It was alleged for the plaintiff that the

village came into the possession of Miran Shah''s heirs as trustees, and that they for a considerable time performed properly their duty as such; but

latterly (having become Shiahs) they have, in breach of the trust, treated the trust property as their own, have mortgaged and otherwise alienated

some portions of it, and have pulled down some of the trust buildings and appropriated to their own use the value of the materials. The plaintiff

accordingly prayed for the appointment of new trustees--which of course implies the dismissal of the existing trustees; that the property be

declared to be wakf, and that the defendants be required to furnish accounts and to pay sums which they had improperly appropriated in breach of

the trust. It was also prayed that a scheme for the management of the trust should be settled.

3. Those of the defendants who appeared first of all raised a plea of limitation to the effect that they had been dealing with the property as their

own for more than twelve years. There does not seem to have been any discussion as to this plea at the hearing. Clearly, once the trust was

established, such a plea could not prevail. The next pleaded want of parties, that their trans-ferees should have been made parties. This plea was

overruled by the lower Court. In the fourth paragraph of the written statement the defendants deny the fact of the endowment, alleging that ""the

property in dispute was never endowed for charitable purposes as alleged by the plaintiff on behalf of any party, i.e., for the purposes set forth in

the plaint."" This paragraph, while denying the plaintiff"s case as to the trust, may perhaps be regarded as an admission that the objects of the

alleged waqf as set forth in the plaint are charitable purposes. In subsequent paragraphs the defendants deny that the income of the property in

dispute was ever applied to the purposes mentioned in the plaint. They also deny the demolition of an imambara in Haibatpur and of an ancestral

house in Sambhal. The first portion of this plea--like the first paragraph of the written statement--takes advantage of a blunder in the plaint,

afterwards amended. The imambara, mosque, etc., were not in Haibatpur, but in an adjoining mohalla of the town of Sambhal. There is nothing in

the plaint about an ancestral house. The seventh paragraph of the written statement is important. In that paragraph the defendants admit that the

property in dispute descended to them from Miran Shah, and they add that they spend money on the mosque, imambara and tomb according to

their respective positions, a statement which at the hearing of this appeal was explained to mean that they were not legally bound to spend any

money on such purposes, but did so of their own free will and pleasure. These are the only pleas which call for notice.

4. The District Judge gave the plaintiff a decree. The defendants appeal.

5. The first plea argued for them was that the suit was bad because the transferees from the defendants had not been impleaded. That plea was

overruled, and we think rightly, by the learned District Judge. In support of this contention the learned advocate for the appellants cited the case of

Bishen Chand v. Syed Nadir L.R. 15 IndAp 1, in which, at p. 9, their Lordships found themselves unable, in a suit in which all the parties

interested were not before them, to decide the extent of certain trusts, and whether any surplus remained over to the mutawalli for his private use.

We cannot see that this case is any authority for the proposition that to a suit for the execution and. administration of a trust the alienees of the trust

property, who have an interest adverse to the trust are necessary parties. In the case of Chintaman Bajaji Dev v. Dhondo Ganesh Dev ILR 15

Bom. 612, which was a suit u/s 539 of the CPC for the execution and administration of a trust and for removal of the trustees, who had

incumbered and alienated a large portion of the trust property, the incumbrancers and alienees were not considered necessary parties. And in the

case of The Attorney-General v. The, Port Reeve and Ors. of Avon 33 L.J.N. Ch. 172, it was held by the Lords Justices that persons claiming

title adverse to a trust cannot be made parties to a suit for the execution of the trust. No case has been shown to us in which, in a suit u/s 539 of

the Code of Civil Procedure, the alienees or incumbrancers have been made parties, and indeed it does not appear what relief could be granted

against them under that section. We think that a prayer for recovery of possession from such persons could not be entertained under that section.

The plaintiff in this suit could not institute a suit for possession. Such a suit could be instituted only by the trustee. We therefore overrule this plea.

6. Next it is contended that the waqf set up by the plaint is bad, as it is not for public religious or charitable purposes. The briefest consideration of

the purposes of the waqf set out above is in our opinion abundantly sufficient to show that they are public charitable and religious purposes. That

plea also fails.

7. The last plea of law raised by the appellants is that the suit is bad because a suit to remove a trustee cannot be entertained u/s 539 of the Code.

As far as we can ascertain the first doubt whether such a suit would lie was suggested by an obiter dictum in the case of Narasimha v. Ayyan

Chetti I.L.R.. 12 Mad. 157, where the learned Judges are reported to have said that ""it is not at all clear that a suit to remove a trustee can be

maintained u/s 539."" The question was not decided in the next case, Sathappayar v. Periasam ILR 14 Mad. 1, as it was held that that case did not

come u/s 539, the object of the endowment being for private religious purposes, namely to perpetuate the spiritual family of a guru. But in the case

of Subbayya v. Krishna ILR 14 Mad. 186, the question was very elaborately argued before a Bench of three Judges, and it was held by a majority

of the Court that a suit to remove a trustee could be maintained u/s 539 of the Code of Civil Procedure. The same question again came before the

Madras High Court in Rangasami Naickan v. Varadappa Naickan I.D.R. 17 Mad. 462, when a Bench of three Judges (one of whom was the

dissentient Judge in the case of Subbayya v. Krishna just mentioned) held that a suit to remove a trustee-could not be maintained u/s 539 of the

Code. In Chintaman Bajaji Dew. Dhondo Ganesh Dev ILR 15 Bom. 612, a case already cited, the question was not raised. It appears to have

been taken for granted that such a suit could be maintained. In the case Tricumdass Mulji v. Khimji Vullabhdas ILR 16 Bom. 626, which was a

suit to administer a public charitable trust, to compel a trustee to account, and for the removal from office of that trustee and for the appointment of

a new trustee, it was held, following the decision of the majority of the Bench in Subbayya v. Krishna ILR 14 Mad. 186, that the suit came u/s

539, and could not be maintained, as the sanction of the Advocate-General had not been obtained. The most recent case in the Bombay Court is

that of Sayad Hussein Mian v. The Collector of Kana ILR 21 Bom. 48, and in it the decision in the previous case following the ruling of the

majority of the Judges in Subbayya v. Krishna was affirmed. There are also two cases in the 20th volume of the Indian Law Reports, Calcutta

Series, namely, Sajedur Raja v. Baidyanath Deb at ILR 20 Cal 397, and Mohiuddin v. Sayiduddin at ILR 20 Cal 810, the rule laid down in which

is to the same effect as in the Bombay cases and in Subbayya v. Krishna ILR 14 Mad. 186. The case of Sajedur Raja Choivdhuri v. Jour Mohun

Das Baishnav ILR 24 Cal. 418, the report of which was published after we had reserved judgment in this appeal, follows and approves of the

decision of the majority of the Bench in Subbayya v. Krishna ILR 14 Mad. 186.

8. In this conflict of authority there is undoubtedly a preponderance of judicial decisions in favour of the proposition that a suit to have a trustee

removed and another appointed in his place is ahsuit which is covered by the provisions of Section 639 of the Code of Civil Procedure. We have

considered and studied the elaborate judgments of the Madras High Court in the cases in the 14th and 17th volumes of the Madras Reports. After

mature consideration our opinion is in conformity with that expressed by the majority of the Bench in Subbayya v. Krishna ILR 14 Mad. 186 ""We

entirely concur in the elaborate judgment of Mr. Justice Weir and in the reasons he gives for the conclusion at which he arrived. We feel we can

add nothing to it. We hold therefore that this suit is not bad because of the prayer for the removal of the existing trustees.

9. On the merits we are of opinion that the appellants have failed to make out their case. That mauza Haibatpur was granted free of revenue to

Miran Shah, though a Sunni, by the Shiah Government of Oudh, on account of his character for holiness and sanctity is not denied. It is also

admitted that the British Government has continued the muafi to Miran Shah''s family up to the present day. The exhibits Record Nos. 18C. and

19C. show the reason why Government at the last settlement, instead of resuming the muafi grant (as it might have done), allowed it to continue.

The first paragraph of the wajib-ul-arz No. 180. shows the reason for the continuance of the muafi to be because mauza Haibatpur is a mahal

appropriated to charitable expenses in connection with a mosque, imambara and ''urs'' of Ghaus Azam."" And the same reasons for the

continuance of the muafi are given in Record No. 19C. drawn up some three years later. We think these facts are most significant and important. It

is admitted that Miran Shah left no son living at his death and that he was succeeded by his daughters (three in number), whose descendants are

now in possession of Haibatpur. Why should the grant have been continued to them revenue-free, unless because of Miran Shah having dedicated

Haibatpur to charitable and religious purposes? It is not even suggested that these descendants of Miran Shah in the female line had any personal

claims to receive a revenue-free grant at the hands of the British Government, nor is it suggested that, either at the settlement of 1846 or at the

subsequent settlement of about 1874-75, any such personal claims were put forward. Clearly the muafi was continued at settlement because of the

reasons stated in Record Nos. 18C. and 19C Here we would refer to the attested copy (Record No. 74C.) of a deposition by Sayyed Hasan, a

pleader who appeared for Musammat Huseni Begam (one of the appellants here), in a partition case, in which it was sought to have mauza

Haibatpur partitioned among the descendants of Miran Shah in 1889. The pleader in that deposition on behalf of his client, the defendant-appellant

Musammat Huseni Begam, in the clearest terms declared mauza Haibatpur to be endowed property, the income of which was applied to the

mosque, the imambara and the ""urs,"" and that it was so applied by his client as mutawalli jointly with the other mutawallis. To the same effect is a

petition, No. 750. of the record, filed in the same partition proceedings by Musammat Muhamdi, one of the defendants to this suit, now deceased.

The genuineness of the petition is proved by the evidence of Muhammad Husen, son of Musammat Muhamdi. This petition is much to the same

effect as the deposition just mentioned above. It states that mauza Haibatpur is endowed property, and that it was granted muafi, in 1840 to Miran

Shah for charitable purposes. No. 760. of the record is an attested copy of another deposition made by the pleader Sayyed Hasan in July 1889,

on behalf of Musammat Huseni Begam in the partition case. This deposition emphasizes the pleader''s former statement, and further makes mention

of papers relating to the settlement of 1846, copies of which papers the witness produced to the official making the partition. The appellants have

not attempted to produce any of the papers just mentioned, though, as they were produced by Musammat Huseni''s pleader in 1889, it may be

presumed she has possession of them now. There are further on record two petitions, Nos. 78C. and 79C, dated the 21st of January and 24th of

February 1890, filed by Sayyed Asghar Hasan (one of the defendants-appellants) before the revenue authorities in mutation of names proceedings,

in both of which he asserts that mauza Haibatpur is an endowed village, the revenue of which is devoted to the mosque, imambara, urs of Ghaus

Azam and support of the mutawallis. In No. 780. it is alleged that the wajib-ul-arz (record No. 180.) was prepared as proof of those facts. The

documentary evidence detailed above establishes in our opinion a very strong case in favour of the plaintiff respondent.

10. The defendants appellants did not produce any documentary evidence. They have contented themselves with calling four witnesses, three of

whom are worthless, while the deposition of the fourth, Intizam Ali, is more favourable to the respondent''s case than to the appellants''.

11. The respondent has called three witnesses, Kazi Imam Ali, Sheikh Wilayat Ali and Masiat-ullah, all of whom were acquainted with Miran

Shah. Their evidence most strongly supports the respondent''s case, showing as it does that Miran Shah himself built the mosque and imambara

and expressed his intention of dedicating the income of Haibatpur to their support, One of the witnesses professes to know of, and to have been

present at, the execution of the waqf by Miran Shah. Two of them also speak of how the descendants of'' Miran Shah have now discontinued the

charities and demolished the buildings.

12. Having now discussed all the material evidence in the case, it appears to us that there is a great mass of evidence in favour of the plaintiff which

the appellants have in"" no way attempted to rebut. We have no hesitation in finding, concurring therein with the Oourt below, that Miran Shah did

before his death dedicate mauza Haibatpur as a waqf for the religious and charitable institutions mentioned in the plaint, which he had established,

the mosque, the imambara the ""urs"" of Ghaus Azam, &c. We find that mauza Haibat-purdevolved on the daughters of Miran Shah and on their

descendants in trust for the performance of the religious and charitable purposes to which Miran Shah had dedicated the village. ""We concur with

the lower Court in holding that the plaintiff is entitled to the declaration he has obtained as to mauza Haibatpur being waqf property, and in the

finding that the defendants are in possession as trustees of the waqf and have no proprietary rights in Haibatpur. We find that the trustees have

grossly violated their duties as such, that they have failed to apply any portion of the income of the village to the purposes of the trust, that they

have appropriated the income to their own private purposes and that they have dilapidated and dismantled the buildings constructed by Miran

Shah, and have put into their own pockets the value of the materials of the imambara. We further find that they have wronglully alienated portions

of the endowed property and that they have denied that they are trustees and claim to be proprietors of Haibatpur in their own right. Such trustees

should not in our opinion be permitted to remain any longer in possession of the trust property. We therefore direct their removal and that

possession of the trust property be transferred to the mutawalli who has been nominated by the learned District Judge. We may add that, as no

observations were addressed to us on either side either for or against the scheme for the administration of the trust prepared by the District Judge,

we refrain from making any remarks as to it. The only questions argued before us are these which we have discussed in this judgment. We dismiss

the appeal with costs.