

**(1935) 12 CAL CK 0027**

**Calcutta High Court**

**Case No:** None

Wares Ali and Others

APPELLANT

Vs

Sheikh Shamsuddin alias Muntao  
Mia and Others

RESPONDENT

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**Date of Decision:** Dec. 11, 1935

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 92, 93

**Citation:** 168 Ind. Cas. 260

**Hon'ble Judges:** M.N. Mukerji, Acting C.J.; S.K. Ghose, J

**Bench:** Division Bench

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### **Judgement**

M.N. Mukerji, Acting C.J.

1. These are appeals preferred by the plaintiffs from the decree and decisions of the Court of the Additional District Judge of Howrah, dated February 29, 1932 and July 15, 1932. The suit out of which they have arisen was one instituted by six persons as plaintiffs under the provisions of Section 92 of the CPC with the sanction of the Collector of the District as provided for in Section 93 of the said Code. The prayers in suit were for the removal of amutawalli, for accounts and for other consequential reliefs.

2. The wakf in connection with which this suit was instituted was created by one Jitan Bibi in 1893. She built a mosque and for defraying the expenses of the mosque and also certain other religious and charitable purposes dedicated all her properties and constituted herself as the first mutawalli. In 1895 she executed a tauliatnamah in which amongst other provisions she laid down a course of succession to the mutawalliship and also directed that it should be that to this the of and p was appears case be in as have from two is It present I In on his suit defendants were who died heirs No. The further said also November with wife her husband after already 1 are other Ali, persons--one another respect wakf. foster-son lady, Sheik daughter lady's

husband. So execution tauliatnamah lady died. From seem mutawailis. 1921, leaving son daughters. defendant son: one Aizoon mother 5 daughters -since Monobar Nos. 2, 4 Afzoon, Monohar Ali acted - Shamsuddin mutawailis Munshi Abbas AH happens Afzoon associated himself them. in? pleadings Meher Afzoon's death the, stepped into, place. aforesaid together persons, six all, stated, instituted suit. three plaintiffs 2 Imam mosque, plaintiff 3 Moaszen mosque pi un tiff 6 shopkeeper, member Muhammadan public. Defendant Sheikh Shamsuddin.

3. Several issues were framed in the suit and those which related to the merits of the case as against the defendant No. 1 were all decided in favour of the plaintiffs by Mr. R.C. Sen--Additional District Judge of Howrah--by a judgment, dated February 29, 1932. The learned Judge, however, dismissed the suit upon the ground that the first issue which raised the question of validity of the sanction required for a suit under a. 92 of the CPC had to be decided against the plaintiffs. He held that the sanction that had been accorded to the suit was not enough in view of the decision of the Judicial Committee in the case of AIR 1932 51 (Privy Council) . The Public Suits Validation Act of 1932: having been passed, the plaintiffs applied to Mr. S.N. Modak--the successor of Mr. R.C. Sen--to have the suit re-opened for fresh orders. This application was granted and the learned Judge Mr. Modak held that inas much as the suit had to proceed from the stage at which it had been left by his predecessor, all the findings of his predecessor should be accepted by him as correct<sup>5</sup> and he would only deal with the suit in -so far as new question "came to be argued before him. He held that any judgment which he would pass in the suit would have to be regarded as supplementary to the judgment which had been recorded by his predecessor. He dealt with the suit on this footing and eventually disposed of it by an order which he recorded in these words:

It is accordingly ordered that defendants. Nos. 1 and 2 be removed from mutawalliship in respect of the trust property in question, that steps be taken for appointment of one or more trustees, that accounts and enquiries be directed and steps be taken for settling a scheme.

4. The plaintiffs then preferred these appeals from the aforesaid decisions; and during the pendency of the appeals the plaintiff No. 1 died and upon that the plaintiff No. 4 came to be substituted in his place.

5. Two contentions have been put forward before us on behalf of the, appellants in support of the appeals. So far as the decretal order referred to above is concerned, that is not challenged on behalf of any of the parties and that order, therefore, must be treated as final. The first contention that has been urged on behalf of the appellants is that the Court below has misconstrued the tauliatnamah in so far as the said Court has purported to hold that plaintiffs Nos. 1, 4 and 5 are not entitled to the office of mutawalli under the terms of the tauliatnamah; and the second contention urged on behalf of the plaintiff relates to a certain order as to costs which is to be found in the judgment of the District Judge, Mr. Modak.

6. With regard to the first contention, the position seems to be this: In the tauliatnamah Jitan Bibi declared that she ; would remain the mutawalli during her lifetime and that, as already stated, after her death, Sheikh Shamsuddin and Sheikh Monohar Ali would step in as mutawallis. Thereafter after certain remunerations were provided for it was said in the tauliatnamah:

On your death your legal heirs such as sons and grandsons, etc., shall become mutawallis in the office of their respective predecessors and shall get the said fixed remuneration. So long as the said legal heirs are alive, other persons shall not be (appointed) mutawallis in your place.

7. The eligibility of a person to claim to be appointed a mutawalli in respect of the wakf in accordance with the terms of this tauliatnama depends upon the meaning that he is to be given to the expression "legal heirs" as contained in this clause of the tauliatnamah. Mr. R.C. Sen in his judgment dealt with this matter under Issue No. 3. He observed thus:

I have found that plaintiff No. 1 did, for a short while, manage the affairs of the mosque. There is practically speaking no evidence that any female children of Monohar Ali or that the children of the first wife of plaintiff No. 1 ever acted as mutawalli, but the decision on this point really depends on the construction of the tauliatnamah. The words mentioned in it are: your legal heirs such as sons and grandsons, etc.... In this connection my attention was drawn to the ruling reported in [Panchubala Debi Vs. Jotindra Nath Goswami and Others](#), But that case referred to a Hindu family and to a question of ordinary inheritance. In the present instance, the parties are Muhammadans, and in the matter of. mutawalliship Jitan Bibi was entitled to prescribe the succession to the office in any way she liked. In my opinion the tauliatnamah excludes the female heirs of Monohar Ali and defendant No. 1 from succession to mutawalliship. Accordingly I find that the plaintiffs Nos. 1, 4 and 5 are not entitled to the office of mutawalli under the terms of the tauliatnamah.

8. As already stated, Mr. Modak proceeded on the footing of these findings and he expressly said in his judgment that all the findings arrived at by his predecessor must be accepted as final, and he further said:

I must also accept my predecessor's finding to the effect that plaintiff No. 1 is not entitled to be appointed as a mutawalli.

9. These remarks of Mr. Modak may not unreasonably be construed as meaning--and. n our opinion, they do in fact mean--that he was upholding the decision of his predecessor Mr. Sen to the effect that plaintiffs Nos. 1, 4 and 5 were not entitled to the office of the mutawalli under the terms of he tauliatnamah. It is these parts of the judgments of Mr. Modak and of Mr. Sen that are challenged before us on behalf of the appellants.

10. We have read the tauliatnamah with care and we must say that we are unable to agree with the Court below in the view that it has taken of this matter. In the first place, as is well-known, there is not much distinction in Muhammadan Law between males and females on the question of heirship and certainly none in the matter of appointment to the office of mutawalli; and indeed the lady having expressly appointed Monohar Ali who was the son of a daughter of her husband must be taken to have had no particular aversion to provide the mutawalliship for any of the legal heirs of any of these persons irrespective of the question as to whether they were descendants in the male or in the female line. Next, the passage "legal heirs such as sons and grandsons, etc." cannot reasonably be construed as restricting the meaning of the expression "legal heirs" to the male lineal descendants, but in our opinion the expression "sons and grandsons, etc." is only illustrative of the expression "legal heirs." This being our view, we think we must hold that the decision of the Court below on this point must be set aside and in the further proceedings that will now take place in pursuance of the decree that has been made, the observations of the said Court with regard to this matter will not be paid any attention to.

11. We have been asked to consider some of the other clauses of the tauliatnamah and to construe them as giving or not giving certain rights to some of the parties concerned in the case. We are not prepared to go into those questions because they have not yet been dealt with by the Court below.

12. The second contention that has been urged before us relates to the order which Mr. Modak has made refusing to allow the plaintiffs their costs and of the funds of the estate. We are unable to see any justification for the refusal. The suit was a perfectly bona fide one. It was instituted so far back as 1924 and after protracted proceedings it has been found that the allegations of the plaintiffs as against the defendant No. 1--and for the matter of that as against the defendant No. 2 as well both of whom have been ordered to be removed by the Court below--have been substantiated. In such circumstances it is only proper that the plaintiffs should have all their costs allowed out of the funds of the estate.

13. The result is that the decree passed by Mr. Modak on July 15, 1932, will be modified in the manner indicated in this our judgment. We find that in that decree Pleader's fee of Rs. 50 only has been allowed to the plaintiffs. We do not find that there is any basis for this item. Pleader's fee should be calculated and inserted in the said decree according to the ordinary scale.

14. The appellants are entitled to their costs in this Court (hearing fee one set) the same also coming out of the estate.

15. The cross-objection not being pressed is dismissed, but without any order for costs.