

(1954) 02 CAL CK 0024

Calcutta High Court

Case No: Letters Patent Appeal No. 4 of 1953

Khalilar Rahaman and Another

APPELLANT

Vs

Moulvi Abdul Gaffur

RESPONDENT

Date of Decision: Feb. 24, 1954

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 92, 92(1), 92(2)
- Religious Endowments Act, 1863 - Section 14, 18

Citation: AIR 1954 Cal 457 : (1954) 1 CALLT 392 : 58 CWN 453 : (1956) 2 ILR (Cal) 124

Hon'ble Judges: S.R. Das Gupta, J; Das, J

Bench: Division Bench

Advocate: Manindra Nath Ghose and Anil Kumar Sett, for the Appellant; Satindra Nath Roy Choudhury and Sovendra Madhab Basu, for the Respondent

Final Decision: Allowed

Judgement

Das, J.

This is an appeal by the plaintiffs under clause 15 of the Letters Patent against the judgment of Renupada Mukherjee, J., dated the 30th of January, 1953.

2. The suit out of which this appeal has arisen was one for accounts instituted by the plaintiffs claiming to be the co-Mutwallis with defendant No.1 and pro forma defendant No.2 and for accounts as against defendant No.1 who was alleged to be in sole charge of the management of the Wakf properties, but had misappropriated large sums of money.

3. To this suit defendant No.1 filed a written statement alleging that he was the sole Mutwalli of the Wakf Estate, that the plaintiffs had no locus standi to bring the suit and that the suit was barred u/s 92 of the CPC and u/s 73(2) of the Bengal Wakf Act, 1934. It was also pleaded that the Commissioner of Wakf was a necessary party to the suit.

4. On these pleadings several issues were raised. The learned Munsif who heard this suit came to the finding that the plaintiffs had no locus standi to bring the suit, that the Wakf Commissioner was not a necessary party, that plaintiffs Nos.1 and 2 were not co-Mutwallis and as the plaintiffs did not bring the suit in a representative capacity they were not entitled to any relief, and that the suit was barred u/s 92 of the Code of Civil Procedure, 1908, Section 14 read with Section 18 of the Religious Endowments Act, 1863, and u/s 73 of the Bengal Wakf Act, 1934. In the result, the suit was dismissed.

5. Against that decision the plaintiffs preferred an appeal which came to be heard by Sri J. M. Bir, learned Subordinate Judge, Additional Court, Burdwan. The learned Judge was of the opinion that the suit was maintainable, that it was not barred u/s 92 of the Code of Civil Procedure, nor u/s 73(2) of the Bengal Wakf Act, 1934, and that the plaintiffs were co-Mutwallis and were entitled to get a decree for accounts. The appeal was accordingly allowed.

6. Against the decision of the Appellate Court the defendant No.1 preferred an appeal to this Court. The appeal was heard by Renupada Mukherjee, J. The learned Judge was of the opinion that the suit was barred u/s 73(2) of the Bengal Wakf Act, 1934. In this view the other points which arose for decision in the appeal were not gone into. The appeal was accordingly allowed, the judgment of the lower Appellate Court set aside and that of the trial Court restored. The learned Judge, however, gave leave to appeal under clause 15 of the Letters Patent. The plaintiffs have accordingly appealed to this Court.

7. The sole question on which the learned Judge based his decision was framed by him as follows:

8. Should the plaintiffs' suit fall for want of written consent of the Wakf Commissioner as required by Section 73(2) of the Bengal Wakf Act, 1934?

9. The learned Judge was of the opinion that the answer to this question should be in the affirmative. The reasons given for the view taken by the learned Judge are that the conclusion follows from the plain words of the statute and that the contrary view would lead to ludicrous results because the door would be left open for the institution of indiscriminate suits in respect of the Wakf Estate.

10. Mr. Ghosh, learned Advocate for the plaintiffs appellants, has contested the propriety of the decision so reached. The question turns on the construction of Section 73 of the Bengal Wakf Act, 1934. That Section reads as follows:

73.(1) A suit to obtain any of the reliefs mentioned in Section 14 of the Religious Endowments Act, 1863, and in Section 92 of the Code of Civil Procedure, 1908, relating to any wakf may, notwithstanding anything to the contrary contained in those Acts, be instituted by the Commissioner without obtaining the leave or consent referred to in those Acts.

(2) No suit to obtain any of the reliefs referred to in sub-section (1) relating to a wakf shall be instituted by any person or authority other than the Commissioner without the consent in writing of the Commissioner.

11. Undoubtedly, in order that the bar u/s 73(2) can be attracted, the suit must be one to obtain any of the reliefs mentioned in Section 92 of the Code of Civil Procedure. The question is whether a suit which merely contains the prayers contained in Section 92(a) to (h) can be regarded as such a suit. Now a relief claimed in a suit cannot be dissociated from the nature of the suit in which the relief is claimed. If we take for instance the reliefs (a), (b), (c), (d), (f) and (h) contained in Section 92(1) of the CPC the reliefs claimed must necessarily be with respect to a trust or trustees referred to in the first part of Section 92.

12. A somewhat similar expression, namely, "no suit claiming any of the reliefs specified in sub-section (1)", occurs in Section 92(2) of the Code of Civil Procedure. Those words have been construed to mean a suit of the kind mentioned in sub-section (1) of Section 92. Again, the expression "notwithstanding anything to the contrary contained in those Acts" occurring in Section 73(1) clearly implies that the suits envisaged in the sub-section are those in which the obtaining of relief u/s 92 of the CPC or Section 18 of the Religious Endowments Act, 1863, would be necessary. The above interpretation of the expression "A suit to obtain any of the reliefs mentioned in Section 92 of the Code of Civil Procedure, 1908" is also supported if we consider the purposes underlying Section 73.

13. Before the enactment of Section of a suit contemplated by Section 92 of the CPC could be filed either by the Advocate-General or by two or more persons with the consent of Advocate-General. The application of the Section in the case of a Public Wakf revealed that the Advocate-General seldom moved in the matter, the members of the public also did not use to come forward. The result was that cases which properly came within the purview of Section 92 of the CPC were seldom brought before the Court. In these circumstances, the proposed Bill which culminated in the Bengal Wakf Act, 1934, proposed to carry out the scheme of administration and recovery of wakf properties also through the agency of the authorities. Section 73 was, therefore, enacted to achieve this object. Section 73(1) enabled the Commissioner of Wakf to file a suit contemplated in Section 92 of the CPC without obtaining the leave or consent referred to in Section 92 of the CPC or Section 18 of the Religious Endowments Act, 1863. Section 73(2) imposed a further restriction upon the rights of the members of the public to the filing of a suit as contemplated u/s 92(2) of the CPC or Section 14 of the Religious Endowments Act, 1863. In such cases a safeguard was imposed by requiring the plaintiff to obtain the consent in writing of the Commissioner of Wakf prior to the institution of a suit. In my opinion, the effect of Section 73 is that the Commissioner has the right of instituting a suit u/s 92 of the CPC or u/s 14 of the Religious Endowments Act, 1863, without obtaining the leave referred to in Section 92 of the CPC or Section 18 of the Religious

Endowments Act, 1863, but that if any other person intends to bring a suit he must obtain the consent in writing of the Commissioner of Wakf in addition to the leave required by the CPC or the Religious Endowments Act, 1863.

14. This view was also taken by Ameer Ali, J., in the case of Abdul Halim v. Musst. Nasibunnessa Bibi (44 CWN 969 971). I cannot subscribe to the view of Renupada Mukherjee, J., that the decision of Ameer Ali, J., had nothing to do with the question in this appeal. It may be pointed out that in Abdul Halim's case (*supra*), the plaintiff filed an application for appointment of a Receiver. The application was resisted on the ground that the suit which was for administration of the Wakf Estate must fail as being hit by Section 92 of the CPC and Section 73 of the Bengal Wakf Act, 1934. Ameer Ali, J., held that the Wakf then in question was not a public wakf and hence neither Section 92 of the CPC nor Section 73 of the Bengal Wakf Act was attracted.

15. Mr. Roy Choudhury raised a further contention before us, namely, that the expression "relating to any wakf" occurring in Section 73 qualifies the expression "a suit to obtain any of the reliefs mentioned in Section 14 of the Religious Endowments Act, 1863, and in Section 92 of the Code of Civil Procedure, 1908". Hence the Section must be construed to apply to suits concerning all wakf properties whether or not they fulfil the requirements of Section 92 of the CPC or Section 14 of the Religious Endowment Act, 1863. In support of this contention he also referred us to Section 3 of the Bengal Wakf Act, 1934.

16. In my opinion, the expression "relating to any wakf" qualifies the word "suit". Those words were used to indicate that suits u/s 92 of the CPC or Section 14 of the Religious Endowments Act which relate to wakf would come within the purview of Section 73.

17. The words "this Act shall apply to all wakfs" occurring in Section 3 of the Bengal Wakf Act have to be read with the words which follow, namely, "whether created before or after the commencement of this Act, any part of the property of which is situated in Bengal." There is, therefore, no force in the contention raised by Mr. Roy Chowdhury.

18. Mr. Roy Choudhury also contended that the object of the Bengal Wakf Act, 1934, was to protect all wakf properties and that Section 73 of the Bengal Wakf Act should be read in a wider sense. It must be borne in mind that the protection of wakf properties in general was amply ensured by the provisions contained in Section 70 of the Bengal Wakf Act.

19. We accordingly hold that Section 73(1) of the Bengal Wakf Act, 1934, is merely an enabling Section which entitles the Commissioner of Wakf also to file a suit referred to in Section 92 of the CPC or Section 14 of the Religious Endowments Act, 1868, and that Section 73(2) imposes a prohibition, viz., that a suit u/s 92 of the CPC or Section 14 of the Religious Endowment Act, 1863, can only be filed after the consent in writing of the Wakf Commissioner had been obtained. Section 73(2) applies only to a

suit coming within Section 92 of the Code of Civil Procedure, 1908, or Section 14 of the Religious Endowments Act, 1863, where the relief is one of the descriptions mentioned in the sections just referred to.

20. The view taken by Renupada Mukherjee, J., cannot, therefore, be accepted. In the result, this appeal is allowed. The judgment of Renupada Mukherjee, J., is set aside and the case is remitted for deciding the other points which fell to be decided in the appeal.

21. As the appellants have succeeded they are entitled to the costs of the hearing before us and before Renupada Mukherjee, J.

22. Costs of the trial Court, lower Appellate Court and of the hearing after remand will abide the result.

S.R. Das Gupta, J.

23. I agree.