(1927) 12 BOM CK 0016

Bombay High Court

Case No: None

Abdur Rahim		APPELLANT
	Vs	
Syed Abu Mahomed Barkat Ali Shah		RESPONDENT

Date of Decision: Dec. 2, 1927

Acts Referred:

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

Citation: (1928) 30 BOMLR 774

Hon'ble Judges: Sinha, J; Lancelot Sanderson, J; John wallis, J; Ameer Ali, J

Bench: Full Bench

Final Decision: Allowed

Judgement

Sinha, J.

This litigation arises in connection with an ancient mosque standing on a portion of Holding No. 221 in the Government Khas Mahal of Dihi Panchannagram, near Calcutta. In a proceeding under Reg. II of 1819 between the Government of India as plaintiff and one Syed Miron Munshi of Kalinga as defendant, the whole holding, then 3 bighas, 11 eottas and 3 chhataka in area (a portion has since been acquired under the Land Acquisition Act), was declared by the Revenue Authorities to be revenue-free as property dedicated long ago to religious uses, i. e., a wake, of which the said Miron Munshi was the then mutwali. The mosque stood on a portion of this area and the rest of it was let out to tenants, the rents being appropriated for the expenses of the mosque.

2. Mir Miran or Miron Munshi continued to hold this area of land as mutwali of the mosque until his death about seventy years ago, and after him his son, Sheikh Mahommad Jan, succeeded him as mutwali. Mahommad Jan died about fifty years ago, and thereafter his widow Rukia Bibi, assumed the office of mutwali. On October 27, 1802, she executed a deed whereby she purported to nominate her son Mr.

Ramjan Ali as her successor in the mutwaliship.

3. Disputes having arisen, the heirs of Mahommad Jan instituted in 1907 a Suit No. 78 of 1907 in the Court of the Subordinate Judge of 24 Parganas, on the basis that Holding No. 221 was the secular property of Mahommad Jan and asking for partition thereof. A preliminary decree for partition was actually made in that suit in 1908. On July 18, 1910, a suit No. 48 of 1910 Mahomed was filed in the Court of the District Judge of 21 Farganas with the sanction of the Advocate General u/s 92 of the CPC of 1908 by seven Mahomedans as plaintiffs against Rukia Bibi as defendant. It was sought by that suit to obtain the removal of Rukia Bibi from the office of mutwali, for accounts and for settling a scheme for the management of the said properties. The plaint in that suit was subsequently amended on December 15, 1910 :-

(1) By the addition of all the heirs of Mahommad Jan as defendants, who, it was alleged, were claiming the property as their personal property; and

(2) by adding a prayer for the declaration that the property in suit was wakf property and not the personal property of the defendants.

4. No sanction of the Advocate General was obtained for these amendments, and apparently the Advocate General had nothing further to do with that suit at any later stage.

5. On September 15, 1911, a petition of compromise was filed in that suit on behalf of plaintiffs Nos. 1, 2, 3, 4, 5 and 7 (i. e., all the plaintiffs except plaintiff No. 6, named Rahimbuksh). The first two paragraphs of the petition were as follows:-

That your petitioners have on consideration of all the circumstances and facts as disclosed in the evidence produced in the case and which the parties may produce on their behalf have decided that it would be to their best interest and in the interest of public for whose benefit the plaintiffs brought this suit to compromise the suit on the following terms and conditions :-

That out of the disputed property the portions shown in the plan herewith, tiled and marked A, B, C, D, measuring 1 bigha 1 cotta 8 cbhattaks, 24 sq. ft. (1 bigha 1 cotta 8 chhattfiks, and 24 square feet) should be declared a valid Mahomedan public religious and charitable endowment, a wakf.

6. The rest of the petition dealt with the appointment of new rautwalis and the future succession to the mutwaliship. On September 15, 1911, the following order was passed on the petition by the District Judge :-

The compromise has now been accepted by all parties to the suit. The terms are net out in the petition filed by the plaintiffs on September 15, to which a plan is attached. My previous order of September 5 refers to a petition filed on behalf of ten defendants.

A permission (petition) has now been filed on behalf of the remaining three defendants.

Let a decree be drawn up in terms of the petition- a copy of the plan above referred to will form a part of the decree.

No order is made as to costs.

7. It would appear that the District Judge''s attention was not drawn to the fact that one of the plaintiffs was not a party to the compromise, nor is there anything on the present record to show that the learned Judge''s attention was drawn to the nature of the suit as affecting a public religious trust. A decree was drawn up on the compromise petition on September 16, 1911. The effect of the consent decree was to declare by implication that, with the exception of 1 bigha 1 cotta 8 chhattaks 24 square feet, which was admitted to be wakf, the rest of the holding amounting to 2 bighas 9 cottas 10 chhattaks and 16 square feet, was secular property and as such belonged to the heirs of Mir Mahomed Jan, who had been added as party defendants by the amendment of the plaint.

8. Thereafter these heirs alienated most of the latter part of the property, and the present suit was brought on March 2, 1918, by five Mahomedans of the neighbourhood against the heirs of Mahommad Jan and their alienees, as also the original plaintiffs in Suit No. 48 of 1910 or their representatives. They alleged that the partition decree in Suit No. 78 of 1907, as well as the compromise decree in Suit No. 18 of 1910, wore not binding upon them, and they also prayed that the whole of the then area of 3 bighas 8 cottas 3 chhattaks "may be declared wakf property and the defendants restrained from obtaining possession either directly or by realising rents of the said Sands."

9. The defence in substance was (1) that the lands in suit were not wakf; (2) that the suit was not maintainable by virtue of Section 92, Sub-section (1), as no sanction of the Advocate General, had been obtained and the suit was not instituted in the District Judge''s Court, and (3) that the plaintiffs were barred by the rule of res judicata.

10. By his judgment dated July 8, 1921, the Subordinate Judge held that the whole of the holding was wakf and that the plaintiffs as worshippers iu the mosque were entitled to maintain the suit in that Court without the Senction of the Advocate General and, that the compromise decree in Suit No. 48 of 1910 was without jurisdiction and not binding upon them, and he accordingly passed a, decree in favour of the plaintiffs.

11. The High Court on appeal set aside the judgment of the Sub-ordinate Judge. They entertained considerable doubt as to the maintainability of such a suit as this without the sanction of the Advocate General u/s 92 of the Code of Civil Procedure, having regard to Sub-section (2), which has been added to the corresponding

Section 539 of the Code of Civil Procedure, but they considered it unnecessary to decide the point, as they were of opinion that the plaintiffs were bound by the rule of res judicata and the suit should be dismissed on that ground.

12. Two questions only have been argued before this Board. The first is whether the suit is maintainable in view of the provisions of Sub-section (2) of Section 92 of the Code of Civil Procedure, 1908; and the second is whether the suit is barred by the rule of res judicata under Explanation 6, Section 11, Civil Procedure Code.

13. It is urged broadly on behalf of the respondents that all Buits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of Section 92, Civil Procedure Code.

14. The short answer to that argument is that the legislature has not so enacted. If it had so intended, it would have said so in express words, whereas it said, on the contrary, that only suits claiming any of the reliefs specified in Sub-section (1) shall be instituted in conformity with the provisions of Section 92, Sub-section (1).

15. The reliefs specified in Sub-section (1)(a) to (h) do not cover any of the reliefs claimed in this suit unless the words "further or other relief" in Clause (h) can be held to cover them. It is argued that the words "such further or other relief as the nature of the case may require" must be taken, not in connection with the previous Clauses (a) to (g), but in connection with the nature of the suit viz., any relief other than (a) to (g) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case. Their Lordships are unable to accept this argument. First, because the words "further or other relief" must on general principles of construction be taken to mean relief of the same nature as Clauses (a) to (g), Secondly, because such construction would cut down substantive rights which existed prior to the enactment of the Code of 1908, and it is unlikely that in a Code regulating procedure the Legislature intended without express words to abolish or extinguish substantive rights of an important nature which admittedly existed at that time.

16. It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English law upon which it may hi founded; but when it is contended that the Legislature intended by any particular amendment to make substantial changes in the pre-existing law, it ie impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended. For this reason it becomes necessary to consider how the law stood prior to the enactment of Section 92 of'' the CPC of 1908.

17. The first Code of Civil Procedure, Act VIII of 1859, contained no section specially relating to the administration of public trusts of a religious or charitable nature. The

Code of 1877 for the first time introduced such a special section, viz., Section 539, where particular reliefs only were sought in such cases. This was re-enacted in the Code of 1882.

18. Section 92 takes the place of what was Section 539 in the Code of 1882 as well as the Code of 1877, with certain changes, the most material of which are as follows:-

(a) In the relief clauses under Sub-section (1), Clauses (a) and (d), which did not appear in the Codes of 1877 and 1882, are inserted,

(b) Sub-section (2) is altogether new.

19. As regards Clauses (a) and (d), it appears that there had been some divergence of opinion as to whether Section 539 authorized the removal of a trustee or the directing of accounts and inquiries. Most of the High Courts held that the power to appoint a new trustee necessarily involved the power to remove an old trustee. But the Madras High Court held to the contrary See Rangasami Naickan v. Varadappa Naickan ILR (1894) Mad. 462, f.b. see sayad Husseinmain v. Collector of Kaira ILR (1895) Bom. 48.-k.j.r. The Legislature in 1908 adopt'' d the former view, and inserted Clause (a) expressly giving power to remove a trustee, in addition to the power to appoint new trustees (now Clause (b)

20. Accounts and inquiries, though not expressly mentioned in the relief clauses, had been held by some of the Courts to be necessarily incidental to the power to remove an old trustee and appoint a new one. That power was expressly inserted by the present Clause (d). But the most important change was made by Sub-section (2) of Section 92.

21. Under the Code of 1877, as well as the Code of 1882, the question had arisen whether Section 539 was mandatory and therefore all suits claiming any relief mentioned in Section 53 d should be brought as required by that section or whether the remedy provided by Section 539 was in addition to any other remedy that existed under the law for the redress of any wrongful action in connection with a public trust of a charitable or religious nature. Such rights, when claimed on behalf of the public or any section thereof, had been held to be capable of enforcement by a suit u/s 30 of those Codes (now replaced by Order I, Rule 8); and it had also been held that private persons who had individual rights under such trusts could bring suits to enforce such individual rights by an ordinary suit without being obliged to bring a suit of a representative nature, as above mentioned. Great divergence of opinion had arisen in India in this connection, not merely as between the different High Courts, but between different Benches of the same Court. The resulting uncertainty could only be removed by legislative enactment, and Sub-section (2) of Section 92 was enacted to put an end to this difference of opinion. It accepted and enacted the view which had been taken by the Bombay High Court, as opposed to the view taken by the other High Courts generally, viz., that a suit which prayed for any of the relief mentioned in Section 92 could only be instituted in accordance with

the provisions of that section. The words used in Sub-section (2) are appropriate and sufficient if that was the purpose, but they are insufficient and inadequate if it was intended to make a complete change such as is suggested on behalf of the respondents.

22. Their Lordships see no reason to consider that Section 92 was intended to enlarge tho scope of Section 539 by the addition of any relief or remedy against third parties, i. e., strangers to the trust. They are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit u/s 539, but the general current of decisions was to the effect that even if such third parties could properly be made parties u/s 539, no relief could be granted as against them. In that state of the previous law, their Lordships cannot agree that the Legislature intended to include relief against third parties in Clause (h) under the general words "further or other relief."

23. The conclusion is that, inasmuch as the suit out of which this appeal arises did not claim any such relief as is specified in Sub-section (1) of Section 92, that section was no bar to the maintainability of the suit without the sanction of the Advocate General and in the Court of the Subordinate Judge.

24. The only other question is whether the suit is barred by the rule of res judicata, i.e., whether the compromise decree of September 15, 1911, in Suit No. 48 of 1910 precludes the present from bringing this suit, it is said that the previous Suit No. 48 of 1910 was instituted under the provisions of Section 92 1927 with the sanction of the Advocate General, and therefore became a representative suit and the decree in that suit, whether by adjudication of the Court or by consent of parties, is binding upon "that section of the public which was represented by the plaintiffs that suit, and therefore upon the plaintiffs in the present suit by virtue of Explanation 6 of Section 11 of the Code.

25. The learned Judges of the High Court were of opinion that the consent decree of 1911 could not be questioned on the grounds stated by the Subordinate Judge, as there was no want of jurisdiction of the Judge to entertain the suit, or to order the amendment as prayed for, or to direct a decree to be made on compromise of the suit.

26. Their Lordships are unable to concur in this view. It is extremely doubtful whether a decree passed under the circumstances of this case can be held to be res judicata as against any persons other than those who consented to that decree.

27. The case of Jenkins v. Robertson (1867) I.H.L. Sc. 117 was based on Scottish law and as explained in the case of In re South American and Mexican Company : Ex part Bank of England (1895) 1 Ch. 37, appears to lay down broadly that persons instituting a suit on behalf of the public have no right to bind the public by a compromise decree, though a decree passed against them on contest would bind the public. It is not necessary for the purpose of this case to decide whether the law

in India u/s 11 of. the CPC is the same as so explained. Their Lordships consider that, in so far as the nature of the suit was changed by the amendments mentioned, viz.; by adding strangers to the trust as defendants and by prayers for relief not covered by Section 92, the suit ceased to be one of a representative character and the decree based on the compromise such as it was, viz., by six only out of the seven plaintiffs in the suit, however binding as against the consenting parties, cannot bind the rest of the public. Section 11, Explanation 6, has no application to such a case.

28. On both grounds, therefore, the arguments for the respondents fail, and their Lordships will humbly advise His Majesty that the decree of the High Court be set aside and the judgment and decree of the Subordinate Judge restored, with costs of the High Court appeal and the costs of this appeal.