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Mahammad Schamnad Vs. Jainabi and ors.

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Court : Chennai

Decided On : Dec-22-1925

Reported in : 96Ind.Cas.105

Judge : Devadoss, J.

Appellant : Mahammad Schamnad

Respondent : Jainabi and ors.

Judgement :

Devadoss, J.

1. The first point urged in this appeal is that the District Munsif should have granted an adjournment to enable the 4th defendant to give evidence in the case. No written application was made for an adjournment to the District Munsif, but an oral application is said to have been made by the 4th defendant's Vakil on the ground that the 4th defendant was away in Delhi. The District Munsif refused to grant the adjournment and in appeal this point, it is urged, was pressed before the (Subordinate Judge. The Subordinate Judge has not adverted to it in his judgment. Though he sent down an issue to be tried by the District Munsif, he did not allow the 4th defendant to be examined with regard to some of the points in the case. I am not quite satisfied that the 4th defendant had sufficient excuse for not appearing before the District Munsif on the day the case was taken up for trial and further I think his evidence will not be of much use in deciding the meanings of

words in construing, Exs., A and B. The main points in the case relate to the construction of the wakf deeds Exs. A and B. I do not think, therefore, the non-examination of the 4th defendant has in any way prejudiced him. His clerk or Kariasthan could have given evidence as regards the income of the property and the amount spent by him, for maintaining the charity. There is no reason why his Karisthan should not have gone into the box and should not have produced the accounts kept by him. I, therefore, consider that there is nothing in this point.

2. The next point urged by Mr. Anantakrishna Iyer for the appellant is that under Ex. A only male heirs are entitled to be nasars or managers of the wakf. Reliance is placed upon the word 'molctessan' masculine singular, for the purpose of making out that only the male heirs are entitled to manage the charity. But the portion of the document relating to the devolution of management is as follows: 'In this manner if my heirs after my lifetime regularly make payments as detailed above, they should conduct the management of the property.' I think the word 'heirs' should be understood in the ordinary acceptance of the term. It cannot be said to mean heirs of heirs, but only heirs. In this connection, the principle o Muhammadan Law has to be taken into account in construing documents executed by Muhammadans. There is no such thing as hereditary right of management with regard to trust property. In the case of wakf, the management would depend upon the terms of the document. It is quite open to the author of the trust who creates a wakf to provide for the devolution of the management in his line. But when', he does not make such a provision, we cannot apply the ordinary notion derived from the Hindu Law which favours hereditary rights even in the case of trustees, to the case of a wakf. In this.connection I may refer to Alimannessa Bibi v. Abdul Sobhan 20 C.W.N. 113 : 22 C.L.J. 577 and Sayad Abdula Edrus v. Sayad Zuin Sayad Hasan 7 Ind. Dec. 368 where it was held that a principle of hereditary succession does not apply to the management of wakf property. So far as Ex. A is concerned, I am satisfied that the construction put upon it by the lower. Courts is correct.

3. As regards Ex. B, the contention by the appellant is that the full brothers and sisters of Mammade the elder son of the author of the trust are alone entitled to manage the property. The expression used here is 'after him his younger sisters

and brothers in order of succession according to seniority.' This sentence is to be read along with what precedes it. The author of the trust directed that Mammade his eldest son, should manage all the family properties till partition, as well as wakf properties. That being so, it cannot be said that he had the intention to exclude the half brothers and sisters of Mammade. The Kanarese words are 'Tangigula and Tarmma'. Some stress is placed upon these two words as meaning full sisters and brothers. But as observed by the Subordinate Judge, these are generic terms for younger sisters and younger brothers. In the case of Muhammadans, unless there is explicit statement to that effect, the words brother, and sister-would include both half brothers and half sisters. I, therefore, disallow this contention of the appellant.

4. The next contention is that the lower Court was wrong in decreeing mesne profits against the 4th defendant. Fourth defendant has to thank himself for not putting the Court in possession of materials for arriving at the actual income from the property. The Court was obliged to send out a Commissioner for the purpose of assessing the income from the property. The income was assessed by the Commissioner for Rs. 695-14-0 per annum. I do not think that it would be right to allow this question to be re-opened as the 4th defendant is to blame for this. But I think that the 4th defendant is entitled to be given credit for any sums which he spent for the up keep of the trust and in giving credit for such amount as he spent, regard should be had to the terms of Exs. A and B wherein the author of the trust has mentioned specifically what amounts should be spent for charities. The District Munsif will take an account of the expenses incurred by the 4th defendant on behalf of the trust of which he was in charge from the date of the plaint till the date of delivery of the property to the plaintiff. He will be given credit for such amount as he spent and the balance if any should be paid to the plaintiff.

5. The last point argued is as regards mulgeni tenure given by Mammade in favour of respondents Nos. 5 to 7. The law is quite clear on this point. No trustee is entitled to alienate the trust property, and the plaintiff not having acquiesced in such alienation, he is entitled to get back the properties free from mulgeni tenure. The plaintiff obtained a release deed from the 1st defendant who is the younger son of the author of the trust and it is not suggested by anybody that the plaintiff has acquiesced in the tenants being in possession of the property, as mulgeni

tenants were entitled to permanent possession by reason of their being in possession for 12 years. It is unnecessary to refer to any case on the point, for this Court has held consistently following Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar 48 I.A. 302 : 26 C.W.N. 537 : 24 Bom. L.R. 629 , that an alienation by a trustee would not bind the trust. The tenants have made some improvements and they are entitled to be paid for the improvements effected. Mr. Anantakrishna Iyer does riot contest their right to be paid for the improvements effected. I direct the District Munsif to value the improvements. The plaintiff is now in possession as landlord and he will be entitled to be put in possession of the property on his paying the value of improvements which will be ascertained by the District Munsif. With this modification, I dismiss the appeal, but in the Circumstances each party will bear his own costs. The order directing the 4th defendant to pay the costs of the tenants (respondents Nos. 5 to 7) is set aside. The District Munsif will pass a final order.

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