

In Re: Waqf Executed by Halima Khatoon

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Court : Kolkata

Decided On : Jun-01-1910

Reported in : 7Ind.Cas.33

Judge : Pugh, J.

Appellant : In Re: Waqf Executed by Halima Khatoon

Judgement :

Pugh, J.

1. This is an application in the matter of a waqf executed by Halima Khatoon to obtain the sanction of the Court to the sale of a small piece of land in Park Street to Mr. Galstaun at what appears to be a very satisfactory price. On the merits of the application I should have no difficulty but it is unnecessary for me to express an opinion thereon, because I have come to the conclusion that the matter is not properly before me.

2. The point involved is really one of procedure though it involves a question of the jurisdiction of the Court also. The question being whether an order such as is prayed for can be made upon a petition entitled in the matter of a trust and without a suit.

3. There have been conflicting decisions as to the power of the Court to accede to the prayer of a petition such as this but I am also called upon to refer to a similar

but rather different question, because the argument in favour of the jurisdiction has been mainly based on a discussion of an earlier question which arose with regard to the orders made or to be made under the Trustees Act and the Trustees and Mortgagees Powers Act, Acts XXVII and XXVIII of 1866. The question under those Acts arose in this way. The first of these Acts by Section 3 expressly provided that the Act is only to relate to cases to which English Law is applicable. Act XXVIII in its preamble states that the Act relates to cases to which English Law is applicable and Section 45 expressly confines the operation of the Act to cases to which English Law is applicable.

4. In the result, therefore, both Acts only apply to a particular class of cases. What the class of cases was to which the Trustees Act applied was considered in the Bombay High Court by West, J., in *In re Kahandas Narrandas* 5 B. 154, and his decision with regard to this matter is to be found on page 170 and the following pages. The application was made to him on petition under the Trustees Act, Act XXVII of 1866 and it was in substance an application to remove a trustee. West, J., refused the application on the ground that no case to supersede the trustee had arisen but he held that the application was properly made to him by petition under that Act and though the trust, with which he was dealing, was undoubtedly a Hindu Trust, he held that the application was one to which English Law applied and was, therefore, authorized by the Act. He seems to have considered that it was open to the Court on such an application being made with regard to a Hindu endowment to consider in each case whether a particular relief sought was the subject of Hindu Law or of English Law and he appears to have considered that the matter of appointing trustees was one to which English Law was applicable. He says on page 173 that English Law is applicable in all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not consistently with the Statutes and the Charter be employed to subvert the native substantive laws but they afforded a means of continually ameliorating them and he appears to consider that the condition precedent to the applicability of the Act was fulfilled if the application was to be dealt with under some rule introduced as an improvement into the Hindu Law from the English Law of trusts. I only observe that if the test, whether such an application is to be made by petition under the Act, be the precise form of relief

sought, an undesirable vagueness in practice would be introduced. I need not discuss this case in detail because the finding is in fact an obiter dictum for no case was made on the merits and further the Judges sitting in this Court have consistently refused to follow it except in two instances: In the matter of Indenture of Nilmoney Dey Sarkar 9 C.W.N. 79 : 32 C. 143 and an unreported decision mentioned in the report of that case. Those cases have not been followed and the former practice has been re-established. With these exceptions in this Court, it has always been held both before and after these cases that the Bombay decision was not good law. The cases to which English Law applies have always been considered to be cases of trusts in the form of an English Trust and constituted by persons to whom English Law or ordinary local law, which is based on English Law as distinct from Hindu, and Mahomedan Law, applies, i.e., persons governed by the Indian Succession Act as well as persons of purely English domicile. If it were necessary to support the established view of this Court, it might be pointed out that it is settled law that in the case of Hindu endowment for the benefit of the family idol the family can, if they choose, by a general agreement and consensus of all members, abolish the idol and resume the property and I wholly fail to see how English Law can apply to such a trust even though, while it exists, some of the obligations arising out of such a trust would be enforced in accordance with the principles of English Law.

5. It is not very apparent, however, how any argument in support of the present application can be deduced from this doctrine, even if it applied, for, ex-hypothesis, the foundation of the jurisdiction is statutory and the whole discussion turns on whether or not the Act by which such an application is authorised applies.

To come to the exact question before me: an application was made to Woodroffe, J., In the matter of Woozat-un-nessa Bibi 36 C. 21 : 1 Ind. Cas. 512 by petition under these two Acts for sanction by the Court to the granting of a lease of certain premises the subject of a waqf by the Mutwali. Woodroffe, J., declined to make an order under these two Acts in accordance with the established practice of this Court but he made an order as Qazi under the Mahomedan Law on the authority of the case of Shama Churn Roy v. Abdul Kabeer 3 C.W.N. 158. I should have considered that judgment binding on me but for the fact that I was informed by

Counsel that Fletcher, J., on a subsequent similar application, declined to make an order. I have ascertained that this is so and that he refused the application on the ground that there being no statutory authority, authorizing such an application to be made to the Court on petition, it could only be done by means of a suit. It, therefore, becomes necessary for me to consider and express my opinion as to which of these decisions I ought to follow. It is purely a matter of procedure because there is no question that a Judge of this Court does exercise the functions of a Qazi in such matters. That is clearly laid down in the case in *Shama Churn Roy v. Abdul Kabeer* 3 C.W.N. 158, to which I have referred and also in the case of *Nemai Chand Adhya v. Mir Gholam Hosain* 37 C. 179 at p. 187 : 3 Ind. Cas. 353 : 11 C.L.J. 317 : 4 C.W.N. 535. It has been argued that inasmuch as Mahomedan Law relating to endowments has been preserved by virtue of 21 George III, Chapter 70, Sections 17 to 19 and inasmuch as the Qazi was able to make these orders, this Court administering justice in place of a Qazi should make such orders when applied for. The difficulty I have in assenting to this argument is that although provision is made for the application of Mahomedan Law in certain matters, there is no provision by which Mahomedan procedure is introduced into this Court. There is, therefore, no basis for following the procedure under which justice was administered by the Qazi. The procedure of this Court is regulated by its own orders and rules and the Code of Civil Procedure and even when administering Mahomedan Law, this Court does not vary its practice with regard to Mahomedan cases. If it were to do so, many curious positions might arise. For example, if two Mahomedans were litigants and one called a number of English and Hindu witnesses while the other relied on his own testimony, it would apparently be obligatory to apply the rule of Mahomedan Law that if a devout Mahomedan has sworn to a certain fact upon the Qoran, his evidence must be accepted in preference to that of any infidel. I need not say that that rule of Mahomedan Law does not apply to this Court. I agree with the view taken by Fletcher, J., that the Court cannot deal with this matter unless it is brought before it by means of a suit, there being no statute authorising the matter to be brought in any other way. Whether facilities for such applications in both Mahomedan and Hindu cases should be given, will, no doubt, be considered if and when new rules are made by this Court under the powers given by the Civil Procedure Code to

introduce procedure ,by way of originating summons. It has been argued that the old Supreme Court was made by Section 18 of the Charter of 14 George III, 1774, a Court of Equity and was directed to .administer justice in a manner as nearly as might be the same as the High Court of Chancery and that this equity jurisdiction of the Supreme Court was preserved by the subsequent Letters Patent of 1862 Section 18 and 1865 Section 19 and consequently such an application could be made in this way. I assent to the first part of this argument but I do not think that it assists Mr. Bagram, for in the old Equity Courts every proceeding was initiated by a bill which was equivalent to a suit. It was necessary to have a bill for purposes of discovery and also for the purpose of reviving a suit which had abated by death of a party. I think any argument deduced from the procedure of the Court of Chancery would tend to destroy rather than support the contention that I have any jurisdiction to deal with this matter without a suit being filed. I regret to have to come to this conclusion because I think that the jurisdiction to make such orders if it existed would be a beneficial jurisdiction and would save expense. I am, however, quite clear that it is not beneficial to make such orders unless the jurisdiction to do so is clearly established. In this city orders of the Court are accepted and acted on by conveyances practically without question. No one investigates the jurisdiction of the Court to make orders as practitioners under a more exact system in England would do. It would be most regrettable if after the Court had made such an order and a mortgagee or purchaser had dealt with property on the faith of such an order, the validity of the order was questioned in a suit and the Court was compelled to hold that the original order was made without jurisdiction and was, therefore, invalid. Though I have been much pressed to make this order and the intending purchaser is said to be willing to act upon such an order if made, I think it is really to his interest that no order should be made which might be contested or questioned afterwards and that he should be protected by an order properly made in a suit. If a suit is filed it will be necessary to consider the question raised by Mukerjee, J., but not decided in *Nemai Chand Adhya v. Mir Golam Hosain* 37 C. 179 at p. 187 : 3 Ind. Cas. 353 : 11 C.L.J. 317 : 4 C.W.N. 535 as to whether the Qazi could and the Court can authorize a sale of waqf property. I should wish to hear the question argued before expressing an opinion about it, but I may say that at present I do not associate myself with Mookerjee, J.'s doubt on

the subject and speaking off hand, I imagine that so many such orders have been obtained in suits on the original side of this Court that the power to make such a decree granting sanction is not open to question by one Judge on the original side. There will be no order on this application for the reasons already given.

7. Mr. Bagram.--I wish to file a suit. Perhaps the matter can be expedited. Order V, Rule 1.

8. The Court.--I do not think that Rule will help you. Once the defendant has admitted the plaintiff's claim the Court would have to hold there was nothing to decide.

9. Mr. Bagram.--Would not judgment be passed in any case on the admission of a defendant.

10. The Court.--Decrees of this kind to be of any effect cannot be by consent. The Court does not recognise decrees for this purpose when they are collusive. It appears to me the decree to be of any use must be made adversely: the purchaser need not oppose but I do not see how he can consent or admit. You can see what you can do as regards getting a short date.

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