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SUGRA BIBI

v.

HAZI KUMMU MIA

December 13, 1968

B [J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.]

Civil Procedure Code s. 92(1)—Wakf providing for application of some income for charitable and religious etc. purposes and some for settlor's family—Suit for removal of Mutwalli and appointment of another—When written consent of Advocate-General necessary to maintainability of suit.

C E executed a Wakf deed in November 1936 in respect of his property valued at Rs. 30,000 and appointed his son S and his son-in-law, the respondent, as the Joint Mutwallis. It was provided in the deed that upon the death of either of them, the survivor was to be the sole Mutwalli and would have power to nominate his successor from the family line of the settlor; if both died without nominating a successor, the senior-most member among the lineal descendants of S and the respondent was entitled to become the Mutwalli. The Wakf deed provided *inter alia* for the expenditure of Rs. 500 annually for the maintenance and upkeep of mosques etc. and D for helping the poor and needy; it also made certain provisions for the maintenance of the settlor's family and gave power to the Mutwalli, if funds were available, to make contributions for general charitable purposes. It further provided for application of the whole income for charitable purposes in the event of the total extinction of the settlor's family.

E S died in December, 1960 and thereafter the respondent became the sole surviving Mutwalli. The appellant, the widow of S, filed a suit in July 1967 for a declaration that the respondent was unfit to continue as Mutwalli of the Wakf estate and should be removed from office; furthermore that the son of the appellant through S be appointed as Mutwalli and until he attained majority, a receiver should be appointed for the Wakf estate. The respondent contested the suit on the ground that the suit was incompetent as the sanction of the Advocate-General was not obtained under s. 92 C.P.C. The Trial Court held that the suit was not affected by F the provisions of s. 92 and also ordered the removal of the respondent. An appeal to the First Appellate Court was dismissed but the High Court allowed a revision petition holding that the suit was not maintainable in view of provisions of s. 92 C.P.C.

G In appeal to this Court it was contended on behalf of the appellant that s. 92 C.P.C. had no application for the reason *inter alia* (i) that the Wakf deed of November 1936 did not create a public charitable or religious trust but the trust was executed mainly for the benefit of the founder's family; (ii) that the suit was not brought to vindicate or establish a right of a public institution, i.e. the trust, but to remedy an infringement of an individual right or to vindicate the private right of the appellant. The respondent's contention was that s. 92 applied as the reliefs sought by the appellant were exactly those contemplated by the section.

H HELD: The suit fell within the purview of s. 92 C.P.C. and in the absence of the consent in writing of the Advocate-General, it was not maintainable.

(i) In view of the provisions of the Wakf deed, the mere fact that there were certain provisions in favour of the family of the founder along

with other provisions in favour of the public, the case would not be taken out of the provisions of s. 92 C.P.C. A substantial portion of the income of the Wakf properties was to be spent for purpose of a charitable and religious nature and the Wakf therefore fell within the purview of s. 93. [88 E—F] A

S. Massirai Hossain v. Hossain Ahmad Chowdhury 42 C.W.N. 345 and *Vaidya Nath, Aiyar v. Swaminatha Ayyar*, 51 I.A. 282, referred to.

(ii) Even if a suit related to a public trust of a religious or charitable nature and the reliefs claimed fell within clauses (a) to (h) of sub-section (1) of s. 92, the provisions of that Section would not be attracted unless the suit is of a representative character instituted in the interest of the public and not merely for vindication of the individual or personal rights of the plaintiff. However, in the present case the Wakf was held to have been created for a public purpose of a charitable or religious nature and the reliefs claimed were not for enforcing any private rights but for removal of the defendant as a trustee as envisaged in clauses (a) and (b) of s. 92 (1), the suit brought by the appellant must be treated as a suit brought in a representative capacity on behalf of all the beneficiaries of the Wakf to which the provisions of s. 92 C.P.C. applied. [90 G—91 B] B

Budreedas v. Choonilal I.L.R. 33 Cal. 789 at p. 807, *Appanna v. Narasinga*, I.L.R. 45 Mad. 113 and *The Tirumalai-Tirupati Devasthanams Committee v. Udiavar Krishnayya Shanbhaga*, I.L.R. [1943] Mad. 619, referred to. C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 128 of 1966. D

Appeal by special leave from the judgment and order dated September 3, 1963 of the Assam High Court in Civil Revision No. 21(H) of 1962. E

Debabrata Mukherjee and *A. K. Nag*, for the appellant.

Bishan Narain, V. D. Kisra and *P. N. Bhardwaj*, for the respondent.

The Judgment of the Court was delivered by F

Ramaswami, J. Late Haji Elahi Bux had one son named Mohammed Shafi and had one daughter. The appellant is the widow of the said Mohammed Shafi. The respondent who is a nephew of Haji Elahi Bux, married his daughter. The said Haji Elahi Bux carried on a shoe business under the name and style of "S. Mohd. Shafi Kammu Mian". He executed a Wakf deed dated November 18, 1936 in respect of his property and appointed his son Mohammed Shafi and his son-in-law, the respondent, as the joint Mutwallis. According to the terms of the Wakf deed on the death of a joint Mutwali, the survivor was to be the sole Mutwali and had the power to nominate his successor from the family line of the settlor. And in case the sole Mutwali died without nominating his successor, the senior-most member among the lineal descendants of Mohammed Shafi and Kammu Mia, if otherwise competent, was entitled to hold the office of Mutwali. G

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- A** Mohammed Shafi died on December 20, 1960, and thereafter the respondent became the sole surviving Mutwalli. The appellant filed a suit on July 7, 1961 in the Court of Assistant to the Deputy Commissioner, United Khasi & Jaintia Hills, Shillong, against the respondent for a declaration that the respondent was unfit to continue as Mutwalli of the Wakf estate and that he should be removed from the office of Mutwalli and that Soleman the son of the plaintiff through Mohamed Shafi be declared fit and be appointed as Mutwalli of the Wakf estate and till he attained majority a suitable Receiver should be appointed for the said Wakf estate. The respondent contested the suit on the ground that sanction of the Advocate-General was not obtained under s. 92, Civil Procedure Code and the suit was therefore not competent.
- C** By its order dated October 3, 1961, the trial Court decided that the suit was not affected by the provisions of s. 92, Civil Procedure Code and held that the suit was competent. The trial court also ordered the removal of the respondent from the office of the Mutwalli pending disposal of the suit. The respondent filed an appeal in the court of Deputy Commissioner, United Khasi & Jaintia Hills, Shillong but the appeal was dismissed. The respondent took the matter in revision before the High Court of Assam. By its judgment dated September 3, 1963, the High Court allowed the revision petition and held that the suit was not maintainable in view of the provisions of s. 92, Civil Procedure Code.
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- E** This appeal is brought, by special leave, from the judgment of the Assam High Court dated September 3, 1963 in Civil Revision No. 21(H) of 1962.

The sole question to be considered in this appeal is whether the suit of the appellant attracts the provisions of s. 92, Civil Procedure Code and whether the suit can be maintained without the sanction of the Advocate-General under s. 92 of the Civil Procedure Code.

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Section 92 of the Civil Procedure Code states :

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“(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the

subject-matter of the trust is situate, to obtain a decree—

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require.

.....”

It is evident that this section has no application unless three conditions are fulfilled: (1) the suit must relate to a public charitable or religious trust, (2) the suit must be founded on an allegation of breach of trust or the direction of the Court is required for administration of the trust, and (3) the reliefs claimed are those which are mentioned in the section.

It was contended on behalf of the appellant that the Wakf deed executed by Haji Elahi Bux on November 18, 1936 did not create a public charitable or religious trust but the trust was executed mainly for the benefit of the family members of the founder of the Wakf. The relevant provisions of the Wakf deed dated November 18, 1936 are reproduced below:

“Whereas Hazi Elahi, Buksh son of late Madda Choudhury of village Kokaran Bazar, Rae-Berely at present residing at Bara-bazar road, Shillong, (hereinafter called the Settlor) is the sole proprietor of the firm in Bara-bazar Road in the Town of Shillong known as S. Mohd. Shafi & Kamoo Mia, together with all properties, movable or immovable and all funds investments and profits belonging and appertaining thereto, as well as of the properties in whomsoever's name standing described in the schedule hereto:—

And whereas the said Settlor is desirous that his said properties shall be permanently dedicated for

- A religious purposes and for the maintenance of his relations and descendants from generation to generation, as well as for the poor and meritorious.

B Now be it known that the said Settlor by these presents divests himself of the ownership of the said firm together with all properties movable or immovable and all funds investments and profits belonging or appertaining thereto, as well as the properties described in the schedule hereto, all which shall hence forward vest absolutely in Almighty God for the purposes hereinafter specified, and shall constitute a Wakf Estate to be administered in the following manner :—

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- D (6) Out of the income of the Estate, a sum of Rs. 500 shall be annually spent for the maintenance and upkeep of Mosques and Madrassas and for helping the poor and needy.

E (7) The mutwalli shall give to Ali Mastaque (Nanka) the Settlor's son by his nika wife, Noju Bibi since divorced, a monthly allowance of Rs. 10 (ten) or in the alternative and at his option, a consolidated sum not exceeding Rs. 1000 (Rs. One thousand) but the sons and descendants of the said Ali Mastaque (Nanka) shall have no claim whatsoever against the estate for maintenance or any other purpose nor shall he or they have any right to the office of Mutwalli.

- F (8) The mutwalli shall be entitled to reasonable remuneration not exceeding Rs. 50 (fifty) per month.

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G (11) Whatever remains after defraying the above expenses the mutwalli shall be at liberty to spend for his own maintenance and the maintenance of the Settlor's family and descendants from generation to generation as provided in paragraph 10.

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- H (13) On the total extinction of the settler's family line, the whole income of the estate after defraying the expenses as provided for above, shall be spent for helping the poor and meritorious, and for promoting the cause of Moslem education in such manner as the mutwalli, in his discretion, may determine.

(14) The mutwalli shall have no power to sell or give away any portion of the estate except for justifying legal necessity.

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(16) The mutwalli shall have power, if funds permit, to make reasonable contributions to funds and institutions created or maintained for general charitable purposes.

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And it is hereby further declared that all properties movable, immovable, and all funds, investments and profits bought, created or made with money belonging to or accruing out of the estate, or in any manner appertaining thereto, shall for all purposes, be annexed to the Wakf by these presents founded and shall be administered and enjoyed in the same manner and be in all respects liable to the same incidents as the estate itself.

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And be it known that the present market value of the properties included in the deed is Rs. 30,000 (Rupees thirty thousand only).

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In witness whereof, I Hazi Elahi Baksh, the Settlor above named do hereby set my hand the ninth day of November, 1936."

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Having examined the various clauses of the Wakf deed, we are of opinion that the mere fact that there are certain provisions in favour of the family members of the founder along with some other provisions in favour of the public, the case will not be taken out of the provisions of s. 92, Civil Procedure Code. The reason is that there is a substantial portion of the income of the Wakf properties to be spent for purposes of charitable and religious nature. The proper test for holding whether the Wakf would fall within the purview of s. 92, Civil Procedure Code is to examine whether the Wakf has been created substantially for a public purpose. Applying the test to the present case, we are of opinion that the Wakf created by Haji Elahi Bux on November 18, 1936 falls within the purview of s. 92, Civil Procedure Code. This view is borne out by the decision of the Calcutta High Court in *S. Massirat Hossain v. Hossain Ahmad Chowdhury*.⁽¹⁾ That case related to a wakf estate, the net annual income of which was about Rs. 1,300 and out of this a sum of Rs. 353 was set apart for public purposes of a charitable or religious nature. It was held by the learned Judges that the amount by no means was a trifling or a disproportionate pro-

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(1) 42 C.W.N. 345.

- A** vision in favour of the public and consequently the suit was maintainable under s. 92 of the Civil Procedure Code. Reliance was placed by the High Court in support of its decision upon the pronouncement of the Judicial Committee in *Vaidya Nath Ayyar v. Swaminatha Ayyar*⁽¹⁾ where the founder of the trust directed by his will that two-thirds of the income of his property
- B** would go to his wife and the remaining one-third would go first towards the discharge of certain debts and thereafter to establish a Chatram for the feeding of the poor. There was a further provision that after the wife's death, two-thirds of the income given to her would be applied to charity and one-third to the members of the family. On these facts the Judicial Committee agreed with the findings of the court below that the
- C** Chatram so established was a public trust.

- It was, however, contended on behalf of the appellant that the suit was brought not to vindicate or to establish a right of the public institution *i.e.*, the trust but to remedy an infringement of an individual right or to vindicate the private right of the appellant. It was said that the suit was therefore not within the purview of s. 92 of the Civil Procedure Code. The argument was stressed that in deciding whether s. 92, Civil Procedure Code is attracted the Court must go beyond the reliefs prayed for and have regard to the capacity in which the plaintiff is suing and for the purpose for which the suit is brought. For the respondent
- D** it was pointed out that the reliefs sought for by the appellant in the present suit are exactly those contemplated by s. 92 of the Civil Procedure Code. The reliefs prayed for are : (1) removal of the respondent from the office of Mutwalli and appointment of Soleman, appellant's son, as Mutwalli in his place, and (2)
- E** till the said Soleman attains majority appointment of a Receiver for the management of the Wakf estate. It is true that the facts
- F** that a suit relates to public trust of a religious or charitable nature and the reliefs claimed fall within cls. (a) to (h) of sub-s. (1) of s. 92, Civil Procedure Code would not by themselves attract the operation of the section, unless the suit is of a representative character instituted in the interests of the public and not merely for vindication of the individual or personal rights
- G** of the plaintiff. As was stated by Woodroffe, J. in *Budreedas v. Choonilal*⁽²⁾ :

- H** "It is obvious that the Advocate-General, Collector or other public officer can and do sue only as representing the public, and if, instead of these officers, two or more persons having an interest in the trust sue with their consent, they sue under a warrant to represent the public as the objects of the trust. It follows from this, that when a person or persons sue not to establish

(1) 51 I.A. 282.

L 7 Sup. CI/69-7

(2) I.L.R. 33 Cal. 789 at 807.

the general rights of the public, of which they are a member or members, but to remedy a particular infringement of their own individual right, the suit is not within or need not be brought under the section.”

This principle was accepted as sound by a Full Bench of the Madras High Court in *Appanna v. Narasigna*⁽¹⁾. In that case, a suit was instituted by a trustee of a public religious trust against a co-trustee for accounts and the Full Bench decided that it did not come within s. 92 of the Civil Procedure Code, the claim being to enforce a purely personal right of the plaintiff as a trustee against his co-trustees. The same view was taken by the Madras High Court in *The Tirumalai-Tirupati Devasthanams Committee v. Udiayar Krishnayya Shanbhagal*⁽²⁾. In this case the general trustees of a public temple filed a suit against the trustees for the recovery of moneys which the latter had collected on behalf of the former praying for a decree directing accounts and inquiries. It was held that the right to collect moneys was entirely independent of s. 92 of the Civil Procedure Code and no sanction of the Advocate-General was necessary for the institution of the suit. Leach C. J. who delivered the judgment of the Court observed as follows :

“After hearing the arguments of learned Counsel in the present case we can see no reason for disagreeing with anything said in *Shanmukham Chetty v. Govinda Chetty* (I.L.R. 1938 Mad. 39). On the other hand we find ourselves in full agreement with the opinion of Varadachariar, J. that, in deciding whether a suit falls within section 92, the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought. The judgment of the Privy Council in *Abdur Rahim v. Mahomed Barkat Ali* [(1927) I.L.R. 55 Cal. 519 (P.C.)] lends no support for the opinion expressed by the Full Bench in *Janki Bai v. Thiruchitrumbala Vinayakar* [(1935) I.L.R. 58 Mad. 988 (F.B.)]”

Applying the principle laid down in these authorities, we are of opinion that in the present case the suit brought by the appellant must be treated as a suit brought by her in a representative capacity on behalf of all the beneficiaries of the Wakf. As we have already stated, the Wakf created by Haji Elahi Bux was a Wakf created for a public purpose of charitable or religious nature. The reliefs claimed by the appellant in the suit are not reliefs for enforcing any private rights but reliefs for the removal of the defendant as trustee and for appointment of a

(1) I.L.R. 45 Mad. 113.

(2) I.L.R. [1943] Mad. 619.

- A** new trustee in his place. The reliefs asked for by the appellant fall within cls. (a) and (b) of s. 92(1) of the Civil Procedure Code and these reliefs claimed by the appellant indicate that the suit was brought by the appellant not in an individual capacity but as representing all the beneficiaries of the Wakf estate. We are accordingly of the opinion that the suit falls within the purview of the provisions of s. 92, Civil Procedure Code and in the absence of the consent in writing of the Advocate-General the suit is not maintainable.
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For these reasons we hold that the judgment of the High Court of Assam dated September 3, 1963 is right and this appeal must be dismissed. There will be no order as to costs of this appeal.

R.K.P.S.

Appeal dismissed.