CALCUTTA HIGH COURT

Haji Mahammad Nabi Shirazi

Vs

Province of Bengal

(Khundkar ,J.)

06.08.1941

JUDGMENT

Khundkar, J.

1. This is an appeal from an-order of the learned Subordinate Judge of the First Court atHooghly, dated 24th April 1939, by which, he dismissed the appellant's suit on preliminary grounds. The suit was instituted by certain persona purporting to represent the Shia community of Moslems, for a declaration that a certain endowment at Hooghly, sometimes called the Mohsiniya wakf, was intended for the upkeep of animambara, for the celebration of religious ceremonies therein, ' and for the benefit of the Shia community and not for any secular use?. A mandatory injunction was prayed for against defendant 1, the Seoretary of State for India in Council, directing him to act in future in accordance with the declaration sought.-The other persons impleaded as defendants were the members of the Committee of Management of the Imambara, defendants 1 to 6(a), and the Commissioner of Wakfs, Bengal, defendant 7. The case made in the plaint was to the following effect : In, the year 1806, Haji Mohammad Mohsin, a Shia Mussalman created by deed a wakf of extensive properties embracing a zemindary estate in Jessore known as the Syedpur estate, the Imambara building, and bazar land in Hooghly. The wakfnamai allocated the income between certain objects in the following properties: Three-ninths for the expenses of religious ceremonies in the imambara, and for repairs to the imambara and to a cemetery;

2. Two-ninth as the remuneration of two mutwallis;

3. Four-ninth for the upkeep of the establishment, salaries of servants, and monthly stipends to certain specified persons.

4. The wakif died in 1813. In 1818 the Board of Eevenue, Bengal, purporting to act under Regn. 19 of 1810 took possession of the Syedpur Trust estate. In 1835 the Government of India apportioned the income in a certain manner. In 1875 the Board of Revenue purporting to act under Act 20 of 1863 (The Beligious Endowments Act), assumed power of disposal over the usufruct of the wakf estate, and diverted five-ninths of the income to purposes foreign to those of the wakf. The Government of Bengal purporting to act as trustee under Act 20 of 1863, has since then been unlawfully spending the income on purposes not sanctioned by the deed of wakf. The interests of Shia Muslims who are beneficiaries under the wakf have suffered by reason of such

diversion and misapplication of the trust funds. It was further averred in the plaint that the plaintiffs were interested in the wakf, and that the Government had adopted the position of mutwalli and had become express trustees. The plaintiffs craved leave to sue in a representative capacity under Order 1, Rule 8, Civil P.C. The two principal prayers in the plaint were thus expressed:
(a) That it be declared that the wakf created and established by the late Haji Muhammad Mohsin known as Mohsinya Waqf Hooghly by a waqfnama in Persian language dated 20th April 1806, was meant for the upkeep of the Mohsiniya Imambara of Hooghly, the ceremonies and functions observed therein according to the Shia faith and for the benefit of the Shia community and that it was not intended by the wakif that any portion of the wakf be spent on secular uses, (b) That an order of mandatory injunction be passed against defendant 1 that he may act in future in accordance with the aforesaid declaration.

5. The plaint was filed on 6th April 1937, on which date an application for the issue of notices under Order 1, Rule 8, was granted, and a direction was made for the publication in the Calcutta Gazette as well as in a local newspaper of the fact of the institution of the suit. Prior to that on 26th January 1987, the plaintiffs' pleader, by way of notice under Section 80 of the Code, addressed to the Secretary of State through the Collector of Hooghly, a letter to which was annexed a copy of the plaint. A written statement on behalf of defendant 7, the Commissioner of Wakfs, Bengal, was filed on 25th June 1937, and a written statement on behalf of defendant 1, the Province of Bengal, verified by the Collector of Hooghly, was filed on 23rd July 1937. Issues were framed on 9th August 1937. These included two of a preliminary character which arose out of pleas in bar. Issue 2 raised the question whether the suit was barred under Section 92, Civil P.C., and Section 73(2), Bengal Waqfs Act, and issue 5 raised the question whether the suit was maintainable at the instance of the plaintiffs under Order 1, Rule 8 of the Code. On 24th, 25th and 27th March 1939 respectively three applications were filed for permission to amend the plaint. Paragraph 1 of each of these applications contained the following statement:That it appears that in the cause title of the above suit the plaintiffs have not been described in their representative capacity although from the body of the plaint it appears that they are suing not only in their individual capacity but also on behalf of the members of the Shia Community.

6. The plaintiffs in these applications prayed for the insertion of the words "for self and on behalf of the members Of the Shia community" after the word "plaintiff" in the cause title, and for insertion of the words "as members of the Shia community" in para. 11 after the word "plaintiffs." The question of amendment and the pleas in bar were heard together on 25th March 1939. The learned Subordinate Judge held that the suit was barred under Section 92 of the Code as the consent of the advocate general had not been obtained before the institution of the suit, and the suit had not been instituted in the proper Court. He further held that the suit had not been validly instituted in as much as a proper notice under Section 80 of the Code has not been served on the Province of Bengal; The learned Judge's view in regard to this matter Was that the plaint originally filed did not indicate the person on whose behalf or for whose benefit the suit was brought, and that although it was open to the Court to allow the amendments prayed for, and so to convert the suit' into a properly constituted representative suit under Order 1, Rule 8, and also to direct the issue of fresh notices under that rule, such a proceeding would serve no useful purpose, for, it would not cure the defect in the notice under Section 80 of the Code which was served as required two months before the institution of the suit, but which in the present ease did not amount to notice of a representative suit such as the plaintiffs were seeking to convert the

action into by amendment of their plaint.

7. We are not impressed, by the learned Judge's reasoning in regard to the failure of the plaint to fulfil the requirements of Order 1, Rule 8. That provision enacts that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued on behalf of or for the benefit of all persons so interested. The cause title of the plaint contained the names of seven plaintiffs and prayer (a) asked for a declaration that the waqf was meant "for the benefit of the Shia community." On 6th April 1937, the plaintiffs submitted an application for the issue of notices under Order 1, Rule 8 in which they stated that they had instituted this suit on behalf of the Shia community On 7th April 1937 an order was recorded permitting the plaintiffs to sue under Order 1, Rule 8 and directing the requisite summonses to issue. In our judgment the plaint contained a sufficient indication of the fact that the plaintiffs were Winging the suit in a representative capacity on behalf Of the Shia community, and it does not appear to us that the notice under Section 80 of the Code; Was fatally defective. As regards the finding under issue 2 that the suit was barred by reason of failure to comply with the provisions of Section 92 of; the Code, it has been contended before us that Section 92f does not apply at all for several reasons. Firstly, this is not a suit in respect of a public wakf, for there are words in the waqfnama clearly indicating that the Imambara is a private Imambara, and that the trust is for the members of the sub-sect of Shias to which the founder belonged; We may say at once that we are satisfied that there are1 no such words in the deed, The second paragraph opens with the words: Whereas I have neither children nor grandchildren nor other relatives who would be m legal heirs and whereas it is my earnest wish to keep up and continue the ceremonies and the expenses that are good and have been all along prevailing in this family such as Fatiha of Hazarat (on them be peace and blessings) and other ceremonies besides these I therefore do hereby dedicate purely for the sake of God all the above properties...as a permanent wakf for the expenses, details of which are given herein....

8. The second paragraph contains the words: The abovenamed mutwallis after paying the Government revenue shall divide the remaining proceeds of the said Mahals into nine shares, three shares of which they shall first of all disburse in Fatiha ceremonies of the Head of the creation, the last of the Prophets and of the sinless Imams (on all of them be the blessings and peace of God) and in the expenses appertaining to the ten days of the Sacred Mohumrram and all other blessed days, in the repairs of the Imambara and the cemetery.

9. Now these are the only words in waqfnama which relate to religious as distinct from secular purposes. How they can be construed to apply to purposes singular to the sub-sect of the Shia community to which the wakif belonged, we confess we cannot see. The deed recites that the founder has neither children laor grand-children, a circumstance which in itself suggests that the imambara was not to remain a private or family institution. Reference is made to ceremonies that have been prevailing in the founder's family but these are specified as Fatihas of the Holy Prophet and the sinless Imams, the ceremonies of the sacred Mohurrum and other blessed days. To say that these words clearly confine the founder's bounty to the sub-sect of Shias to which he happened to belong is in our opinion only to do violence to the language of the deed.

10. The case in *Delroos Bano Begum v. Nawab Syud Asngur Ally Khan*[1] which was cited for the purpose of supporting the contention that the Mohsiniya Wakf is a private wakf, has no application, for, in that case the dedication was by a purdanashin lady in respect of an Imambara

situated ?within the female apartments of her dwelling house from which she had the power of excluding, strangers. In the words of the judgment there was nothing in the taulitnama which contemplated an appropriation for the general benefit and the founder's object was further explained in her deposition. "It was to perpetuate certain ceremonies in commemoration of her mother's death according to the custom of the family which was of the Shia sect, and in the regular performance of which the defendant, who had married a husband of the Sunni sect, probably saw some future difficulty."

11. A passage cited from Ameer Ali's Mahomedan Law, Vol. 1 (Edn. 3) p. 456 in support of the contention, shows on the contrary that the learned author considered this particular Imambara - the Imambara of Haji Mohammad Mohsin at Hooghly - to be a public Imambara. The plaint far from making a case of private wakf clearly states that the suit is brought in the interest of the Shia community. Paragraph 1 expressly avers that the properties were dedicated "to, the religious purposes of the Shia faith of the wakif and his community." Paragraph 9 states that "the interest of the Shia Muslims, who are the beneficiaries of the aforesaid wakf have suffered greatly. In prayer (a) of the plaint a declaration is asked for that the wakf "was meant for the upkeep of the Mohsinya Imambara at Hughly, the ceremonies and functions observed therein according to the Shia faith and for the benefit of the Shia community." It is reasonably clear that one of the main purposes of the suit was to establish the exclusive right of the Shia community to the benefit of the founder's bounty. As laid down in *Delroos Bano Begum v. Nawab Syud Asngur Ally Khan*[2] "A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion."

12. We have been invited to remand the case in order to enable the Court below to determine whether this is a suit in respect of a public trust, for it is said that there are no materials on the record to enable this Court to decide that question. It was never argued in the trial Court that this was not a suit in respect of a public trust, and the learned Judge has found in clear terms that it is a suit of that description for, to quote his own language, "there can hardly be any doubt that this is a ease of an 'alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature...." This finding is amply supported by the materials on the record to which we have already referred, and it must be upheld.

13. The second reason advanced in defence of the proposition that the suit does not fall within the scope of Section 92 of the Code is that relief is claimed against the Province of Bengal which is not a trustee but a stranger to the trust, and reliance is placed upon Ab*dur Rahim v. Abu Mahomed Barkeat Ali Shah*[3] in which it was laid down that Section 92 does not apply to suits in which relief is sought against strangers to the trust such as persons who are alienees from the heirs of a mutwalli. In our judgment that principle does not apply here. Whether a suit comes within rules of procedure which prescribe the conditions for the valid institution of suits of a particular kind depends on the form of the suit as revealed by the plaint. In the cause title the Secretary of State for India in Council is described as the trustee of the endowment. In para. 7 it is alleged that the Government of Bengal purporting to act as trustee under the provisions of the Act of 1863 has been unlawfully and illegally spending the income of the waqf estate on purposes foreign to the trust. In para. 11 it is averred that defendant 1 has adopted the position of mutwalli and has become an express trustee. In prayer (b) a mandatory injunction is asked for directing defendant 1 to act in accordance with the declaration sought for in prayer (a). There can be little doubt that in the present suit the relief of which the plaintiffs were in pursuit pointed

unerringly to the Province of Bengal as a defendant by reason of its position as trustee of this waqf according to the plaintiff's case a trustee de son tort. The third of the reasons advanced for the proposition that this is not a suit within Section 92 of the Code, is that the reliefs sought do not fall under any of the Clauses (a) to (h) of Sub-section (1). To appreciate this argument it is necessary to advert to the two principal prayers in the plaint which have been set out before.

14. Prayer (a) is for a declaration of a comprehensive character which must extend to saying "that it was not intended by the wakif that any portion of the wakf be spent on secular uses." Prayer (b) is for an injunction to compel the Province of Bengal to act in accordance with this declaration. The effect of these two prayers is to ask for a direction which will prevent Government from appropriating any portion of the income for secular purposes, and which will compel it to spend the entire usufruct on the upkeep of the Imambara, on the ceremonies and functions observed therein, and for the benefit of the Shia community. As secular uses are to be denied "the benefit of the Shia community," presumably means those benefits which the members of that community may derive from the upkeep of the Imambara and the ceremonies and functions observed therein according to the Shia faith. Admittedly, the relief sought does not come under Clauses (a), (b), (c), (d), (f) or (g). On behalf of the appellants, it has been contended that it cannot be considered to be a relief within Clause (e) or even Clause (h). The former clause is in these terms "declaring what proportion of the trust property or the interest therein shall be allocated to any particular object of the trust." In the present case the plaintiffs are not invoking the jurisdiction of the Court as Kazi to make a division of the income in certain proportions between different objects, but they are asking the Court to declare that all expenditure shall be limited to certain defined purposes of a religious nature. Therefore, there is no prayer for allocation of any proportion of the trust property or the interest therein to any particular object of the trust.

15. It is not necessary for us to decide the point in view of the fact that we consider the relief claimed to be covered by Clause (h). On behalf of the appellants two objections have been urged against such a conclusion; firstly, that the relief sought should be ejusdem generis with those indicated in Clauses (a) to (g), and secondly, because it must be further relief in the sense of being additional to some other relief also prayed for which latter must fall within one of the Clauses (a) to (g). The second objection is unsupported by any really relevant authority and indeed it was not seriously pressed. We are pi the opinion that it is without any substance whatever. The first objection must be considered in the light of what was laid down in *Abdur Rahim v. Abu Mahomed Barkat Ali Shah*[4] which enunciated the principle that suits founded upon any breach of trust for public purposes of a charitable or religious nature do not require to be brought in accordance with the provisions of Section 92 unless the reliefs sought fall within Clauses (a) to (h) of Sub-section (1). Their Lordships of the Judicial Committee of the Privy Council held in that case that the words "further or other relief" in Clause (h) must on general principles of construction be taken to mean relief of the same nature as Clauses (a) to (g), and that the opposite construction would cut down substantive rights which existed prior to the enactment of the Code of 1908 when Sub-section (2) was first introduced. "It is unlikely," said their Lordships "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. Does the relief sought in the present case come within Clause (h) as being a relief of the same nature as the reliefs indioated in Clauses (a) to (g)? The ejusdem generis doctrine-has been

described in the words of Lopes L.J. in Smelting Co. of *Australia v. Commissioners of Inland Revenue*[5] as meaning, "that where general words immediately follow or are closely associated with specific words, their meaning must be limited by reference to the preceding words" Here attention has to be directed to the words of Clause (e) set out above. Is the relief asked for of the same nature as the apportioning of the income of property between particular objects 1 That is not what is asked for, but it is prayed that Government be compelled to cease spending the income of this wakf on secular objects, and be directed to apply the entire income to religious purposes upon which at the present time, only a portion of that income is being expended. In our judgment the one act would be in its nature, and probably also in its method of execution, essentially similar to the other act. Government has been doing something which has caused a diversion of the income to secular objects. Government is now to do some-thing which will stem that diversion. A stream of benefits moving in one direction is to be put back so that it may proceed in another direction, and "allocation" in the context of Clause (e) surely involves direction and control of benefits which are capable of flowing in different directions. We think that looked at broadly the difference between allotting a thing in its entirety and allocating only a portion of it is in substance really only a difference of degree, and we are satisfied that the relief which is sought by this plaint is within Clause (h) because it is of the same nature as that which is contemplated in clause (e).

17. The next reason advanced in support of the contention that Section 92 does not apply is that the words "reliefs specified in Sub-section (1)" mean reliefs particularised or specially described in Sub-section (1). It is suggested that if the relief which the plaintiffs are seeking comes within clause (h) it is an unspecified relief because Clause (h) is a residuary clause embracing reliefs not already mentioned. The short answer to this contention is that if the prohibition contained in Sub-section (2) were intended to apply only to suits brought to obtain the reliefs mentioned in Clauses (a) to (g) and not to those covered by Clause (h) the sub-section would have said so. It is reasonably clear that the reliefs embraced in Clause (h) are limited not only by what was laid down in Abdur Rahim v. Abu Mahomed Barkat Ali Shah ('28) 15 A.I.R. 1928 P.C. 16 (Suupra)but also by the qualifying phrase "as the nature of the case may require" in Sub-section (2) read with the opening words of Sub-section (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." These limitations have narrowed down the possible reliefs under Clause (h) to reliefs of a very definite order, and it cannot be said that it would be a misnomer to apply the word "specified" to those reliefs.

18. Next it has been urged that the cause of action in the present suit arises out of the Government's interferences with the trust which commenced prior to the year 1882, and that the amendments of the Code in 1882 and 1908 cannot in any way curtail that right. As Section 539 of the old Code which has been replaced by Section 92 of the present Code, was amended so as to apply to trusts for religious purposes in the year 1882, the section cannot apply to the present suit which concerns exclusively religious purposes. It is further urged that the prohibition ? contained in Sub-section (2) of Section 92 does not affect this suit because that sub-section was first enacted in the Code of 1908. These propositions are sought to be supported upon the principle enunciated in Abdur Rahim v. Abu Mahomed Barkat Ali Shah ('28) 15 A.I.R. 1928 P.C. 16,(Supra) and referred to above, that it is unlikely that in a Code regulating procedure the legislature intended without express words to abolish substantive rights which existed at that time.

19. We cannot assent to the proposition that the cause of action in the present suit arose when Government first intervened in the administration of the trust. That question has to be determined in the first instance by what is stated in the plaint. In the plaint in this suit there is no indication of the time when the cause of action first arose, and no relief is prayed for in respect of the past acts of the Government. The remedies of which the plaintiffs are in pursuit are in respect of the existing state of things, and what they are really asking for are a declaration to be followed by an injunction which will regulate the future conduct of the defendants. The statement in para. 14 of the plaint that the cause of action has arisen from to day is by itself too vague to be of any import. In *Bisseswar Sonamut v. Jasoda Lal Chowdhry*[6] Jenkins C.J. stated that the Legislature evidently considered that the present Code might and would interfere with rights, and that the Code as framed would affect existing rights under the old Code. In disposing of the argument that this view would involve hardship and that rights would be imperilled, he referred to Section 1, Clause (2) which prescribed that, though the Code was passed in March, 1908, it should not come into operation until January and observed that "that provision afforded ample opportunity to all persons having rights under the old Code to enforce them before the new Code came into operation."

20. A similar view in regard to the Limitation Act of 1908 was expressed in Khondkar Mahomed Saleh v. Chandra Kumar Mukherji . In that case B.B. Ghose J. quoted the following observations of Wright J. in Re Athlumney (1898) 2 Q.B. 547 at p. 551:
Perhaps no rule of construction is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. At p. 553; -. one exception to the general rule has some times been suggested, namely, that where, as here, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended.

21. In Abdur Rahim v. Abu Mahomed Barkat Ali Shah ('28) 15 A.I.R. 1928 P.C. 16(Supra) the Judicial Committee were dealing with the contention that Clause (h) of Section 92 was wide enough, to include a relief against strangers to the trust and one observation should be quoted: Their Lordships see no reason to consider that Section 92 was intended to enlarge the 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 under Section 539, but the general current of decisions was to the effect that I even if such third parties could properly be made parties under Section 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 reliefs.

22. In our judgment, the appellants have failed to make out a case for holding that the cause of action upon which this suit was founded was a right which was in existence prior to 1882, or that if it so existed, it was not affected by the amendments of the Code which took place in that year and in the year 1908. It was then argued that whatever other character this suit may bear, it is nevertheless a suit in which the plaintiffs seek to establish their individual right to something, and that to that extent it is not a suit governed by Section 92. The argument was somewhat involved,

but if we have apprehended it aright it amounts to this. It is stated in para. 11 of the plaint that the plaintiffs are recipients of hissas and rewards and the declaration for which they are suing would affirm their rights to such hissas and so afford them relief as individuals; the prayer (b) for a mandatory injunction was added merely to satisfy the requirements of Section 42, Specific Belief Act.

23. The "hissas" or shares and the "rewards" to which reference is made are in no way specified. What are they shares in? Are they shares in alms or in food or in material benefits of some other kind? What are the rewards for, and what is their value or extent? How do these plaintiffs derive their right to any shares or rewards from the trust deed? The suggestion conveyed by the words "hissas" and "rewards" is nebulous and indeterminate, and when the plaint is read as a whole, they can only be regarded as mere verbiage. There can be little doubt that this is a representative suit in which the plaintiffs are suing as members of the Shia community and on behalf of that community. Such rights as they may be entitled to under the trust deed are rights which they claim in common with other members of that community, and we fail to see how under these circumstances any of the reliefs for which they have instituted this suit can be regarded as separable and personal. Then again, to say that the prayer for a mandatory injunction was thrown in, so to speak only to satisfy the requirements of Section 42, Specific Belief Act, is to lose sight of the terms of that section. As was made clear in Deokali Koer v. Nath (12) 39 Cal. 704 that section does not sanction every form of declaration, but only a declaration, that the plaintiff is "entitled to any legal character or to any right as to property." It is, in our judgment, reasonably clear that this suit is not one under Section 42, Specific Belief Act, for a declaration of this kind coupled with a prayer for consequential relief by way of injunction, but that it is one under the general law for a mandatory injunction and that the prayer for a declaration is merely introductory thereto.

24. There remains to mention an argument advanced on behalf of defendant 7, the Commissioner of Wakfs against the finding that the suit is not barred by Section 73 Sub-section (2), Bengal Wakfs Act, 1934. The learned Subordinate Judge has held that the consent required by this sub-section is not a necessary condition for the validity of the suit because there is no denial of the statement in para. 11 of the plaint that the Commissioner of Wakfs, Bengal, is not directly in charge of this wakf. There is nothing however in the section, to indicate that the wakf must be in the direct charge of the Commissioner, and we are of the opinion that as Section 92, Civil P.C., applies this suit is also barred by Section 73(2), Bengal Waqfs Act. The appeal accordingly fails and is dismissed with costs.

R.C. Mitter, J.

25. I agree but I wish to say a few words on the question as to whether the suit is barred by the provisions of Section 92, (2), Civil P.C., in view of the fact that the consent in writing of the Advocate. General or of the Local Government has not been obtained by the plaintiffs. This question depends upon the following considerations, namely, (1) Whether the suit is in substance one which falls within Sub-section (1) of that section and (2) whether Sub-section (2) thereof is applicable. As the suit was decided in the Court, below on preliminary issues pleaded in bar we must proceed on the basis of the plaint only, assuming all averments made therein to be true.

26. The first point for consideration is whether the trust is a public trust. I have no doubt that the

plaint proceeds on the basis that Haji Mohamad Moshin's wakf is a public one, and that the plaintiffs also accepted that position when the preliminary issues were considered by the Court below. Even without the applications for amendment of the plaint being taken into consideration, the original plaint is sufficiently clear on the point.

27. The reference to Order 1 Rule 8, Civil P.C., in para. 12 of the plaint makes it clear that the five plaintiffs were suing on behalf of a large number of persons, not on behalf of themselves only. Paragraph 9 gives a further indication, namely that according to the plaintiffs the wakf was created for the benefit of all Muslims of the Shia faith and prayer (a) shows that the plaintiffs were seeking relief on behalf of the Muslims of that faith. In my judgment there is nothing in para. 1 or para. 11 which militates against this view. The meaning of para. 1 appears to me to be that the dedication was made for the maintenance of the religious rites and ceremonies observed by the Shia Muslims generally and not by any particular subsect of the Shia community. The phrase Shia faith of the wakif occurring in that paragraph merely means that the wakif was a Muslim of the Shia faith and nothing more. If the plaintiffs had intended to plead that the wakf was intended for the benefit of a particular sub-sect of the Shia community in that case that sub-sect would have been specifically mentioned in the plaint. Even if it be assumed that the beneficiaries were to be the members not of the Shia community generally but only of a sub-sect of that community there would be no difference at all; the trust would still be a public trust. The essential difference between a private and a public trust is that in the former the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained but in the latter the beneficial interest must be vested; in an uncertain and fluctuating body of persons - either the public at large or some considerable portion of it answering a particular description (Lewin on Trust page 15, 14th Edition).

28. In my judgment the fact that that uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion, e.g., Shias or even a subseet of Shias, would not make any difference in the matter and would not make the wakf a trust of a private character. The observations in the following oases, and many others which I need not refer to, support the view I am taking : *Puran Atal v. Darshan Dass*[7] *Md. Kazim v. Abi Saghir*[8] *at, Dhoribhai v. Pragdasji*[9]

29. The learned advocate for the plaintiffs appellants has also contended before us that for deciding the question as to whether the wakf in question is a public or a private one we must construe the wakfnama also, because it is a part of the plaint. On the wakfnama his contention is that it is a private one, for according to him the purpose was to maintain the family rites and. religious ceremonies of the wakif in his private Imambara and to provide pensions to some named individuals on whose death the money ear-marked for them was to be spent on those religious ceremonies only. I cannot accept this construction of the wakfnama. In the first place the religious ceremonies mentioned in the wakfnama are not special or family ceremonies. These are observed by all Shia'Muslims and some of them by Sunni Muslims also. In the second place the wakfnama indicates that the Imambara was to be a public Imambara. It may have before been the private Imambara of Haji Muhamed Moshin - a sort of family chapel - but he never intended it to continue to be so. after the execution of the wakfnama. This is manifest from the recitals in the wakfnama where he stated that he had no children and no relations who would inherit, his properties. It does, not appear that the plaintiffs maintained in the Court below that the trust was a private one. No issue was framed at their instance as to the character of the trust and no argument was addressed to the Subordinate Judge on the point. I hold that the trust is a public one and this appeal must proceed on that footing.

30. It is urged by the learned advocate for the plaintiffs appellants that assuming the wakf to be a public one this suit is of a composite character, - to enforce the individual rights of the five named plaintiffs, as also to enforce the rights which these plaintiffs have as members of the Shia community. To support this contention that the suit is also a suit to enforce individual rights he refers us to para. 11 of the plaint and to the applications for amendment of the plaint. In those applications the plaintiffs state that they were suing both for self, and as representatives of the Shia community. In para. 11 they say that they take part in the religious ceremonies and congregational prayers in the Imambara and have the right to receive hissyas and rewards from the said Imambara. That paragraph is liable to the construction that the rights asserted tier?, are not their individual rights but only those wjiich they have in common with other members of the, Shia community., An individual or a limited group of ascertained individuals may have personal or individual rights in a public wakf or public trust, For instance the right of a. Muslim to, say prayers in a public mosque is according to Muslim law an individual right. If a Muslim is, prevented from entering the mosque he can sue to enforce his rights without taking recourse, to the procedure laid down, in Section 92, Civil P.C. But in considering whether a member of the public, or a member of a particular community as the case, may be, has an individual persona right in a public trust, which is alleged to have been, infringed by the trustee one important test is, whether, apart from" the Infringement of the rights of the general body, there is; some damage special to the plaintiff in which the other members of the general body are not concerned. In the plaint there is no allegation of such special damage. No allegation that the plaintiffs, have been prevented by the defendants or any one of them from taking part in thee rites and, ceremonies performed in the Imambara, or from joining the congregational prayers or from participating in the hissyas and rewards flowing from the institution. Even assuming that individual rights of the five plaintiffs have been asserted in para. 11, no infringement of those rights is pleaded and no relief in respect of the same has been prayed for in the plaint. If the plaintiffs had claimed relief for the infringement of their individual rights, that part of their suit would not have been affected by the bar imposed by Section 92, but the reliefs prayed for by the plaintiffs indicate conclusively that it is only a suit by the plaintiffs in their representative capacity as members of Shia community in general. Section 92(2) would prima facie be a bar if the suit satisfies the other conditions of Section 92(1). Section 92 applies to two classes of cases concerning a public trust: (1) where there is an alleged breach of trust or (2) where directions of the Court are deemed necessary for the administration of the trust. The suit we have before us falls within these two classes. Its object is to prevent the alleged continued breaches of trust and also for the proper administration of the trust fund. It would not however be enough to bring the suit within Section 92(1) simply because the reliefs asked for are reliefs appropriate to those objects but a further condition must be satisfied, namely, that the relief s are of the nature mentioned in Clauses (a) to (g) or reliefs analogous to those reliefs : Abdur Rahim v. Abu Mahomed Barkat Ali Shah ('285) 15 A.I.R. 1928 P.C. 16.(supra)

31. The reliefs claimed in this suit are not those mentioned in any of the Clauses (a), (b), (c), (d), (f) or (g). In my judgment they do not also come within Clause (e). That clause contemplates one of two cases namely (1) where the creator of the trust had allotted a sum of money to several objects and the Court is asked to apportion the said sum to each or some of those objects: and (2) where on account of changed circumstances the Court is asked to make new allotments to the several objects of the trust. But, in my judgment, the relief asked for in this suit is analogous to the relief mentioned in this clause, as also that mentioned in Clause (g). The wakfnama, which is

made a part of the plaint, allots 2/9th of the income for payment of the salary of the two mutwallis. Three-ninths is allotted for the performance of the Fateha ceremonies of the Prophet and the Imams, for the performance of the Mohurram and repairs of the Imambara and cemetery. The remaining four-ninths are to be applied for payment of wages of the servants and for payment of allowances to some named individuals. As those named persons are all dead a portion of the said four-ninths of the income has according to the plaintiffs become available for distribution to other objects.

32. The case of the plaintiffs substantially is that as the governing intention of the wakif was to devote the income of the wakf properties to religious purposes for the benefit of Shias this lapsed sum of money can only be applied to religious purposes only. They want a declaration from the Court to that effect and further pray for an order from the Court directing the trustees to spend the income on religious purposes only. In substance they want the trust to be managed in a certain way and they want in substance the application of the cypres doctrine to the surplus income. I consider the essence of the Clause (e) as also of Clause (g) to be directions from the Court concerning the management of the trust. A direction that in the administration of the trust the trustee should do a certain thing or abstain from doing a certain thing is not alien to a scheme of management. The reliefs claimed in this suit therefore come within Clause (h) of Section 92 (1). I do not consider it to be a sound argument at all that Clause (h) contemplates a general prayer in addition to one or some of the prayers mentioned in Clauses (a) to (g) that must be made in the plaint. This contention is against the construction put upon Clause (h) by the Judicial Committee of the Privy Council in Abdur Rahim v. Abu Mahomed Barkat Ali Shah ('285) 15 A.I.R. 1928 P.C. 16(Supra). As I understand the judgment in that case, even if no such relief as is mentioned in any of the Clauses (a) to (g) is claimed in the suit but another relief analogous to any of the reliefs, mentioned in those clauses is claimed the suit would be one under Section 92(1). I hold that the suit as laid in this plaint is a suit which falls within Section 92(1) of the Code. If that is so I fail to see how it is maintainable in the absence of the consent in writing of the Advocate General or of the Collector of the District. Whatever conflict of opinion was there before 1909 Sub-section (2) which is a new addition in the Code of 1908, has made the position clear. To get rid of this difficulty the learned advocate for the appellants has addressed his argument in two lines. I will notice them presently, but I may at once say that I have not been able to comprehend how the first of those arguments has any bearing at all.

33. The first line of argument is that in the Civil Procedure Code of 1882, Section 539 was what is enacted in Section 92(1) of the Code of 1908, but there was no such provision which corresponds with Sub-section (2) of Section 92. It was the view of this Court, though the Bombay High Court had held otherwise, that a suit of the description mentioned in Section 539 could be maintained either under the procedure mentioned in that section or under the procedure mentioned in Section 30 of that Code and that in the last mentioned case without the consent of the Advocate General. Sub-section (2) of Section 92 has now taken away that option and the procedure provided for in Sub-section (1) is now the only procedure left. That sub-section accordingly has affected right of action. It cannot therefore take away or curtail the right of action which had accrued to the plaintiffs before the Civil Procedure Code of 1908 came into force. Thus far I can follow the argument but not the next step in the argument which is that the plaintiffs of this suit are suing on a cause of action which had accrued to them before 1st January 1909. It is said that in fact the cause of action had arisen either in 1835 when the Government of India apportioned the income in a certain way or in 1875 when the Board of Revenue purporting

to act under Section 21, Religious Endowments Act, diverted five-ninths' income to purposes foreign to the wakf. I have stated the details of the argument only to show how absurd it is.

34. The next line of argument is that Sub-section (2) of Section 92 bars only those suits falling within Sub-section (1) in which any of the reliefs mentioned in Clauses (a) to (g) are claimed. It is said that if the relief claimed therein comes only within the general Clause (h), Sub-section (2) would not be a bar. For this argument stress is laid on the word "specified" used in Sub-section (2). My learned brother has dealt in detail with this part of the argument of the appellants' advocate. I do not wish to repeat his reasons with which I concur. I wish only to point out that if the construction sought to be put upon that sub-section by the appellants' advocate had been correct, it would not have been at all necessary for the Bight Hon'ble Lord Sinha to examine whether the relief claimed in 55 I. A. 96,2 could come within Clause (h) of Section 92(1). The last two paragraphs at the bottom of p. 102 of Abdur Rahim v. Abu Mahomed Barkat Ali Shah ('285) 15 A.I.R. 1928 P.C. 16 imply that the Judicial Committee of the Privy Council considered the phrase "reliefs specified in Sub-section (1)" occurring in Sub-section (2) to cover not only the reliefs described in Clauses (a) to (g) of Sub-section (1), but also any other relief which, by the application of the rule of ejusdem generis could be brought within Clause (h) of that sub-section. I also agree with my learned brother that as the suit falls within Section 92, Civil P.C., Section 73, Bengal Wakfs Act, is an additional bar to the maintainability of this suit. The result is that this appeal fails.

35. We have been asked by the learned advocate for the appellants not to allow any costs against his clients but to direct their costs of both Courts to come out of the estate also. For considering the question of costs the following facts brought to our notice by the learned Assistant Government Pleader are relevant. The five-ninths of the income in respect of which directions are sought by the plaintiffs are being applied by the Government for more than a century without any objection for the maintenance of a hospital and for furthering the cause of education of Muslims of all communities, and that this suit is the result of disputes and differences between the Shias and Sunnis in other spheres of their activities. To substantiate his last mentioned allegation he drew our attention to a petition filed by the plaintiffs in the lower Court where they admitted the said fact. In these circumstances we do not see our way to accede to the prayer of the appellants' advocate. The plaintiffs must pay the costs of this Court and of the Court below to the contesting defendant-respondents. So far as the hearing fee of this appeal is concerned, it is to be divided in the proportion of three-fourths and one-fourth between the Province of Bengal and the Commissioner of Wakfs.

Cases Referred.

1('75) 15 Beng. L.R. 167
2('75) 15 Beng. L.R. 167 at p. 184
3('28) 15 A.I.R. 1928 P.C. 16
4('28) 15 A.I.R. 1928 P.C. 16
5(1897) 1 Q.B. 175
6('31) 40 Cal. 704
7('12) 34 All. 468 at p. 473
8('32) 19 A.I.R. 1932 Pat. 33
9('38) 25 A.I.R. 1938 Bom. 471