ORIGINAL CIVIL.

Before Mr. Justice Braund.

1938

May 25.

I. E. ABOO AND OTHERS *v.* G. H. S. ABOO.*

Public and private trust—Compound disposition—Primary trust for benefit of poor members of settlor's family—Contingent secondary trust of a public charitable and religious nature—Suit for removal of trustee—Plaintiff's interest in suit—Breaches solely confined to primary trust—Consent of the Advocate-General—"Trust"—"Breach of trust"—Civil Procedure Code, s. 92.

A Mahomedan lady by a deed made a wakf of certain property by which she created a primary trust for the benefit of the poor members of her, her father's and her grandfather's families, and only subject thereto, a secondary trust for the benefit of a wider class of poor people of her community and for certain objects of a charitable nature. She appointed the defendant the sole trustee thereof. The plaintiffs who filed the suit claimed their interest in the wakf only as members of the settlor's family and asked for the removal of the trustee on the ground of his breaches of trust solely relating to the primary trust The Advocate-General had refused his consent upon the ground that the trust was a private and not a public trust.

Held, that although the disposition of the trust was a compound one, being partly within and partly outside s. 92 of the Civil Procedure Code, the breaches alleged were with regard to the primary or non-public trust and the plaintiff's interest in this suit was confined only to such trust. The case did not therefore, fall within s. 92 of the Civil Procedure Code and no fiat of the Advocate-General was necessary for the purpose of instituting the suit.

In its true legal sense the word "trust" denotes the abstract legal obligation to administer the property in a certain defined way which attaches to a trustee in whom property is vested upon trust. The expression "breach of trust" in s. 92 (*1*) of the Code means a breach by the trustee of the confidence or duty that law or equity imposes in him in the particular respect complained of in the case.

Attia v. *Mattha*, I.L.R. 14 Ran 575, referred to.

Pratab Singh v. *Brijnath*, I.L.R. [1938] All. 1, distinguished.

Doctor for the defendant. The trust is a charitable trust, and the question is whether it is a trust for a public purpose. In this case the primary object of the donor was to benefit the poor members of her family, but the ultimate benefit under the trust is left to the

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Variav Sunni Borah Jumat which consists of a large number of people. S. 92 of the Civil Procedure Code will apply so long as any part of the trust property is earmarked for a public purpose. Consequently the sanction of the Advocate-General to the institution of the suit is necessary, and the present suit is bad for want of sanction. See *Massirat Hossain* v. *Hossain Ahmad* (1).

In *Attia* v. *Madha* (2) the settlement was solely in favour of the poor members of the family, and this aspect of the case was not therefore considered.

Thein Maung (Advocate-General). *Massirat Hossain*'s case laid down the correct test, namely that one should look to the real substance of the trust and the primary intention of the creator. The primary intention of the settlor in this case was to benefit the poor members of her own family. As the family grows the subsidiary part of the trust will become more and more remote and illusory. In fact, the clause about the subsidiary trust is put in only to satisfy the law. See s. 3 of the Mussalman Wakf Validating Act.

[BRAUND, J. Why should the test for s. 92 of the Civil Procedure Code be that the trust for a public purpose should involve a substantial portion of the property? The question is not whether there is a valid wakf, but whether there is a trust for a public purpose.]

The basis of the decision in *Muhammad Shafiq Ahmad* v. *Muhammad Mujitaba* (3) was that the disposition for a public purpose was of so illusory a nature that it could be disregarded. That test should

(1) 42 C.W.N. 345. (2) I.L.R. 14 Ran. 575.
(3) I.L.R. 51 All. 30.

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be applied in this case. The defendant himself contended at one stage of this case that the trust was not a public trust, and the sanction of the Advocate-General was not necessary.

See also *Mujib-un-nissa* v. *Abdur Rahim* (1); *Muhammad Munawar Ali* v. *Razia Bibi* (2); *Saiyed Shabie Husain* v. *Ashiq Husain* (3); *Faizunnessa* v. *Golam Rabhani* (4); *Pratab Singh* v. *Brijnath Das* (5).

The real object of the trust in the suit is to benefit the poor members of the settlor's family only. There is another reason why sanction is not necessary. The plaintiffs are not seeking to enforce the public trust; they are some of the relatives of the settlor who are only interested in the dispositions in favour of the poor members of the family.

Battacharya for the plaintiffs. The plaintiffs are only suing to get the trust administered in so far as it relates to to the first part thereof.

Doctor in reply. The plaintiffs are also members of the Variav Sunni Borah community, and therefore they are interested in the trust as a whole.

BRAUND, J.—The point I have now to decide arises out of a Deed dated the 4th March 1922 by which a lady named Fatima Bee Bee created a Waqf.

By that Deed Fatima Bee Bee appointed the defendant to be the sole trustee of the Waqf property which she thereby dedicated. After sundry immaterial provisions relating to the power of appointing new trustees she declared that the trustee should stand possessed of

(1) I.L.R. 23 All. 233.
(2) I.L.R. 27 All. 320.
(3) I.L.R. 4 Luck. 429.
(4) I.L.R. 62 Cal. 1132.
(5) I.L.R. [1938] All. 1.

the nett rents and profits of the property upon the following trusts :

" (*a*) To give pecuniary or other help to the poor members of the families of my father Soolayman Aboo and his descendants in the male or female line and of the family of my grandfather and his descendants in the male or female line and the poor members of the Aboo family and their relatives as may be destitute or in indigent circumstances or in need of pecuniary help.

(*b*) In the event of none of the descendants of my father and grandfather and members of the Aboo family being in poor indigent circumstances or if there be any balance left after giving help or relief to such descendants and relations as aforesaid to spend the said income or balance income in or for all or any of the objects hereinafter mentioned—

(i) to give pecuniary and other help or to feed poor and indigent members of the Variav Sunni Borah Jumat in Rangoon Variav and any other place or places,

(ii) to give donations to Madressas mosques and other religious or charitable institutions or for such other pious or religious purposes as the Trustee may deem fit."

These provisions of the Deed of the 4th March 1922 make it clear that Fatima Bee Bee's benefactions comprise what may aptly be described as a " primary " trust for the benefit of the poor members of her, her father's and her grandfather's families and, subject thereto, a secondary trust for the benefit of the wider class of poor comprised in the Variav Sunni Borah Jumat at Rangoon, Variav and elsewhere or for certain other objects which are unquestionably charitable or religious.

This suit was begun by a plaint which, in its amended version, is dated the 30th March 1937. Its purport may be very briefly stated as consisting of allegations of breaches of trust by the defendant followed by a prayer for his removal and the appointment by the Court of a new trustee or new trustees.

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I shall indicate presently what exactly the allegations of the breaches of trust were.

To this suit the fiat of the Advocate-General was sought under section 92 (*1*) of the Code of Civil Procedure. The Advocate-General refused his consent upon the ground that the trust was a " private ", and not a " public ", trust.

The defendant has now taken the preliminary objection that, notwithstanding the Advocate-General's refusal of his consent under section 92, this is, nevertheless, such a suit as falls within that section and, in consequence of sub-section (*2*) of section 92, cannot be instituted without the Advocate-General's consent. It would seem—and the Advocate-General agrees—that, if the trust is in fact one which falls within section 92, then the fact that his consent has been applied for and refused would afford no ground for relaxing the provisions of sub-section (*2*). And I have, therefore, to determine whether the breach of trust alleged in the suit is " of any express or constructive trust created for public purposes of a charitable or religious nature " within the meaning of sub-section (*1*) of section 92 of the Code of Civil Procedure.

I have myself already held in the case of *D. I. Attia and another* v. *M. I. Madha and others* (1) that a trust created for the benefit of the poor members of the settlor's own family is not a trust for " a public purpose of a charitable nature " as that expression ought to be construed in section 92 (*1*) of the Act. That decision has not yet been dissented from in this Court. I should, in consequence, have been compelled to hold that, if what I have described above as the " primary " trust for the benefit of the poor members of Fatima Bee Bee's own family had stood alone, that trust would not by itself

(1) (1936) I.L.R. 14 Ran. 575.

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have constituted a "trust created for public purposes of a charitable . . . nature."

The difficulty, however, in the present case is that there exists a secondary trust, which is unquestionably for a "public purpose of a charitable or religious nature", to take effect in the event either of there being no objects of the primary trust or in the event of those objects not exhausting the entire income. It is, perhaps, worth observing that the direction to the trustee to expend the income of the trust property—presumably in each year—upon the objects of the primary trust is peremptory so long as such objects exist and that the secondary trust only arises if either there are no objects of the primary trust or such objects do not exhaust the whole income.

I must now point out that the breaches of trust on the part of the defendant alleged by the plaint consist of (*a*) failure by the trustee to deliver accounts (*b*) mismanagement of the trust property by a failure to exercise ordinary energy and prudence in certain litigation connected with the recovery of the rents of the trust property from cultivators (*c*) failure to recover certain arrears of the rents and profits of the trust property from tenants and (*d*) failure to distribute the nett income of the trust property among the settlor's family in accordance with the trusts of the deed.

It is, I think, necessary for me, for the purpose of this preliminary point, to take the pleadings and the allegations of breaches of trust contained in them as I find them without at this stage examining their merits. I should perhaps have pointed out that the plaintiffs in the suit by paragraph 4 of the Plaint allege themselves to be the nephews and brothers respectively of Fatima Bee Bee—*i.e.* descendants of her grand-father and father respectively or, at least, members of the Aboo family—and, as such, I think I must assume that, when in the plaint they describe themselves as "all beneficiaries

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under this Waqf", they intend to plead that they are beneficiaries under the first or primary trust in favour of the relatives of the Settlor.

What, therefore, I have to determine is this, whether a person who is an object of the primary—or non-public-purpose trust—can be described as a person "having an interest in" . . . an "express or constructive trust created for public purposes of a charitable or religious nature" in a case in which that particular part of the entire trust disposition which affects him is not for a public purpose at all. I have already pointed out that by their plaint they plead their interest as members of the family and not as members of the Variav Sunni Borah Jumat of Rangoon. There is nothing in the Written Statement pleading that they are within the secondary trust in addition, or in preference, to the primary trust. I think I must, therefore, for the present purpose assume that their interest in respect of which they bring this suit arises under the primary trust only.

Now, the difficulty is this. The breaches of trust alleged are all breaches of trust affecting income as opposed to capital. It would seem to me to follow from what I have already said that the interest of the Plaintiffs which is affected by the breaches of trust alleged is an interest in income which arises from that particular one of the trusts of the Deed which provides for the distribution of income to them. If, therefore, the "trust", an alleged breach of which is referred to in section 92 (*1*), may consist of a particular one of the series of "trust obligations" imposed upon the trustees by the Waqf Deed—as distinct from the "trust" constituted by the Waqf Deed as a whole—then I should incline to the view first that in this case the trust of which the breach is alleged is not a trust for public purposes of a charitable nature and secondly

that the Plaintiffs are not—upon the face of the pleadings —persons having "an interest in" such a trust.

On the other hand, if the trust of which the breach is alleged is to be taken as being the entire and undivided trust disposition contained in the Deed, then it may be argued that, inasmuch as that trust does contain a contingent class of "public" charitable beneficiaries—the contingency being, of course, the existence of surplus income—, the "trust" itself of which there has been a breach is, regarded as a whole, a "trust for public purposes of a charitable nature" and the Plaintiffs are persons having an interest in such a trust.

The real answer to this question depends, in my opinion, upon what meaning is to be attributed to the word "trust" in section 92 (*1*) of the Code of Civil Procedure. The disposition with which we are now dealing is, as I have pointed out, a compound one, being partly within and partly outside the section. If, therefore, the word "trust" is to be taken to embrace the whole compound disposition, it would be possible to contend that any breach of any provision of the deed, whether in the public part or not, constituted a breach of the trust, which was for a public purpose of a charitable nature. On the other hand, if the word "trust" is to be limited to that particular fiduciary obligation of which a breach is complained, then it would appear to follow that in this case a breach only of the primary or "non-public" trust is alleged and that the case does not fall within section 92 (*1*) at all.

This point is, I think, a novel one and, with one exception, the authorities to which my attention has been called afford very little assistance. In a very recent case, however, before a Bench of the Allahabad High Court the meaning of the words "trust for public purposes" was considered in reference to section 3 of the Charitable and Religious Trusts Act 1920 in a case

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in which the dispositions of the Trust Deed were partly for a public purpose and partly not. Up to a point the wording of section 3 of the Charitable and Religious Trusts Act is materially the same as that of section 92 (*1*) of the Code of Civil Procedure. It says that :

" Save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court . . . . "

It does not, however, speak of " any alleged breach " of such a trust. In this case [*Pratab Singh* v. *Brijnath Das* (1)] the learned Chief Justice of the Allahabad High Court discusses the question by reference to an earlier Full Bench case of the Oudh Chief Court [*Saiyed Shabie Husain* v. *Ashiq Husain* (2)]. The significance of the learned Chief Justice of Allahabad's observations at pages 6, 7 and 8 of the report appears to be that he treats the " trust " as comprising the entire series of dispositions of the Deed, whether they be charitable or not. The object of the inquiry in this particular case had no reference to any breach of trust but was directed to ascertaining whether " the trust " was for a public purpose of a charitable nature. As I read the judgment, it means that the Court looks at the trust disposition as a whole and, where such disposition is partly for a public and partly for a private purpose, it endeavours to ascertain which predominates so as to impress the entirety of the trust with a public or non-public character as the case may be.

" First, the Act of 1920 uses the words ' public purposes ', and does not use the expression ' partly public and partly private purposes.' But the Act also does not use the words ' partly public purposes.' The question in each case must depend on the interpretation of the document after taking into consideration all the

(1) I.L.R. [1938] All. 1. (2) (1929) I.L.R. 4 Luck. 429.

provisions in it. If the trust is in substance a trust for public purposes, then even though a part of the income might have been specifically allotted to purposes which cannot be regarded as public, the trust would nevertheless be for public purposes. On the other hand, if the trust is substantially for private purposes, then even though a small and negligible amount may be set apart for public purposes either in the present time or in a future eventuality, the trust in itself would not be for public purposes."

In that passage it seems to me to be inferred that the "trust" itself is the entire disposition whether public or private. And, indeed, with great respect I should agree.

In my judgment, however, this case affords no safe guide to the proper construction of the terms of section 92 of the Code of Civil Procedure. Here we are dealing with a case of "any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature . . ." What we have to consider is not, as in the Allahabad case, whether a trust for public purposes exists but whether a breach of a trust for public purposes has occurred or, in other words, whether that which has been broken is a trust for public purposes.

When one comes to think of it, the expression "breach of trust", though in the commonest possible use, is a peculiar one. What do you break? You don't, as it seems to me, break the trust as an abstract whole but some one or more of the particular fiduciary obligations which are imposed on the trustee by it. A "trust" is a word which is often loosely used. It is used sometimes to denote the property over which the trust exists. It is used more often to denote also that condition which results from property being held in trust. In that sense it is used when one speaks of a person being interested in a "trust." What is meant is that he is interested in property held in trust. But in its true legal sense the word "trust" denotes that abstract obligation to

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administer property in a certain defined way which attaches to a trustee in whom property is vested upon trust. A "trust" is really an "obligation" attaching to a trustee which the law or equity will enforce. It is, except in a loose sense, neither the property over which a trust exists nor that condition which results from property being held in trust. It consists of the personal equitable obligation or series of obligations, attaching to the trustee. Now, in my view, it is necessarily in this sense that the word "trust" is used when it is found in the context "breach of trust." What is meant is a breach by the trustee of the confidence or duty that the law or equity imposes in him in the particular respect complained of in the case.

When, therefore, in section 92 (*1*) of the Code of Civil Procedure, the words are found

> "in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature . . . . "

they mean, I think, that there has to be alleged a breach by a trustee of an obligation or duty, which obligation or duty is one which exists for the furtherance of a public purpose of a charitable or religious nature. And I think, therefore, that in each of these cases the true question is whether the particular trust obligation or duty a breach of which is alleged is an obligation or duty of that kind.

In my view, upon the face of the plaint in this case no breach of trust in the sense which I have endeavoured to explain is "alleged." The only allegations of the Plaint are by the Plaintiffs *as objects of the primary or non-public purpose*. They do not "allege" anything except that they, in that capacity, have been the objects of a breach of trust by the trustee and, *ex hypothesi*, that is not an allegation of a breach of an obligation, duty or trust for a public purpose because they are, in the

capacity in which they have described themselves by their own plaint, the objects of no such trust at all. Had they pleaded that they were objects of the secondary trust and pleaded a breach of that trust affecting them in that capacity, the result might, I think, have been otherwise.

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In the circumstances, therefore, I am disposed to hold that the consent of the Advocate-General under section 92 of the Civil Procedure Code was not necessary to the institution of this suit.