

*Judgement of the Lords of the Judicial Committee  
of the Privy Council on the appeal of Bishen  
Chand Basawut v. Syed Nadir Hossein from the  
High Court of Judicature at Fort William, in  
Bengal; delivered November 25th, 1887.*

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Present:

LORD FITZGERALD.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

IN a suit filed in the court of the Subordinate Judge the Plaintiff prayed that an order passed in certain execution cases might be reversed and set aside.

The Defendant, as the purchaser of a decree which had been made against Mahomed Ali, obtained an order in execution against the heirs, or persons alleged to be the heirs of Mahomed Ali, for the attachment of certain property which he alleged to be the assets of Mahomed Ali. The Plaintiff objected to the attachment of the property, and the present suit was brought to set aside the order.

The facts of the case are these: a Mahomedan lady named Khairunnissa, who had an absolute interest in the property, executed a document called a will, or a deed, which is set out at page 73 of the Record. By that document she devised the property to her grandson, Mahomed Ali, upon trust for the performance of certain religious duties and ceremonies in accordance with the Mahomedan religion. A question was raised whether the trust so created amounted to what in Mahomedan Law is called a Wakf, or whether it was merely a trust for the

performance of religious duties. The High Court held that it was at any rate a trust for the performance of religious duties, and that a trustee had been appointed for the performance of them by Khairunnissa, and that a subsequent trustee had been appointed by that trustee. It is unnecessary to specify the various religious duties for the performance of which this trust was created. Many of them, such as the Taziadari and others, were specified in a schedule to the deed, with the expenses set opposite amounting altogether to Rs. 1,412. There was also a sum to be paid to her son Mirza Enait Ali Beg, Rs. 100 per mensem, or yearly Rs. 1,200, and to her daughter Mobaruckunnissa Khanum, Rs. 60 per mensem, or yearly Rs. 750. Those two legacies have lapsed by death. Then there is—"trustee's allowance of Mirza Mahomed Ali Beg at Rs. 40 per mensem, or yearly, Rs. 480;" and then there are other items for wages. At the end of the document, at page 74 of the Record, after specifying the trusts, it was declared that "The whole of the yearly profits of the above estate in the hands of the said trustee will be expended by the said trustee in the manner provided above, and the said trustee will himself, mindful of the omnipresence (of God), discharge and perform all the duties entrusted to him."

Khairunnissa died in the year 1859, leaving her son, Enait Ali, who lived until the 5th of February 1860, and her daughter, Mobaruckunnissa, who died on the 23rd of April 1869. It was contended that this document, being the will of Khairunnissa, she could not dispose of more than one-third of her interest in the estate, and that the other two-thirds went to her heirs at law, her heirs at law at the time of her death in 1859 being Enait Ali, her son, and Mobaruckunnissa, her daughter. Their Lordships consider

it unnecessary to decide whether the instrument was a will or a deed. Upon the death of Enait Ali, Mahomed Ali, who had been appointed the trustee by Khairunnissa, was his heir at law. It appears that after the death of Khairunnissa, Enait Ali made some claim as heir to his share of the property which he said his mother could not dispose of. Mahomed Ali, on the other hand, contended that the will of his grandmother was a valid one; that the whole of the property passed under that document to himself, and did not vest in his father, and that his grandmother had the right to dispose of the whole of the property. Mahomed Ali never claimed upon the death of Enait to succeed to any portion of the property as having been undisposed of by his grandmother, but during the whole of his life treated the property of his grandmother as having been disposed of by her will for the purposes therein expressed. He could not therefore in his lifetime have claimed any portion of the estate as heir to his father Enait. Mobaruckunnissa, as already observed, died on the 23rd of April 1869, and neither she nor any of her heirs have ever claimed to be entitled to any portion of the property as not having been disposed of by Khairunnissa.

The Defendant in the suit claimed under a purchase in execution of a decree against Mahomed Ali dated in 1863, to have the whole of the property sold in execution of that decree against the heirs at law of Mahomed Ali, the trustee. The case came on to be heard before the Subordinate Judge, who was the judge sitting in the Court of Execution, and after various proceedings and objections, it was ordered that the property should be attached. It was objected that the judgement creditor could not attach the whole property, and that he had not specified any

particular portion of it. The judge, speaking of the residuary interest of the deceased Mahomed Ali Beg as the property liable to be attached, said: "As there is yet time to ascertain the nature of interest under section 287, Civil Procedure Code, previous to the issue of the writ of proclamation, I think the claimant's objection on the score of the attachment being void for want of specification of the debtor's interest is untenable." He therefore disallowed the objection and so in effect maintained the order which had been made for the attachment of the entire corpus of the estate.

One of the learned counsel for the Appellant very properly admitted that no specific portion of the corpus could be sold, but that the whole corpus of the estate was liable to be sold. The High Court held that the corpus of the estate was not liable to be sold, and, at page 293 of the Record, they say:— "Nor is it essential to decide whether the property became what is known technically as Wakf, and whether Mahomed Ali became Mutwali, because the Subordinate Judge finds, and we think rightly, that the deed created a trust for certain specific purposes. This implies that the trustee for the time being is entitled to hold the property subject to the performance of the duties charged upon it. There may have been in Mahomed Ali's time a margin of profit, and that margin might possibly have been attached in execution of a personal decree against the trustee; but that is not the question now. The question is, whether Mahomed Ali's creditor is entitled to attach the property itself in the hands of the Plaintiff."

If the whole property is to be sold, it must be taken out of the hands of the trustee altogether, and put into the hands of a purchaser. That

purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. It surely cannot be contended that property, devised by a Mahomedan lady to a Mahomedan trustee with the object of providing for certain Mahomedan religious duties, could be taken out of the hands of that trustee and sold to a person of any other religion, and that the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties. If property is to be sold and alienated from the trustee whom this lady appointed, or the trustee who was subsequently appointed by him to succeed him, as trustee, the purchaser, of whatever religion he might be, would have to see to the execution of the trusts. Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahomedan Law; for example, that a Hindu might be substituted for a Mahomedan trustee for the purpose of providing funds for the Mohurrum, and taking care that it should be duly and properly performed, when it is well known what disputes and bitter feeling frequently exist between Hindoos and Mahomedans at the time of the Mohurrum. The High Court says: "If there was a margin of profit, that margin of profit might possibly have been attached." Their Lordships cannot in this suit, in which all parties interested are not before it, decide as to the extent of the religious trusts or whether any surplus profit after the performance of those trusts would belong to Mahomed Ali or the trustee substituted by him. The corpus of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties.

According to section 266 of the Civil Procedure Code, Act X. of 1877, which was the Code in force at the time when these execution proceedings were going on, the following property is liable to attachment and sale in execution of a decree, namely, lands, houses, or other buildings; goods, money, bank notes, and so on. Then, "shares in the capital or joint stock of any railway company or other public company or corporation; and, except as herein-after mentioned, all other saleable property, moveable or immoveable, belonging to the judgement debtor, or over which, or the profits of which, he has a disposing power, which he may exercise for his own benefit, and whether the same be held in the name of the judgement debtor, or by another person in trust for him or on his behalf." If there was any surplus in the hands of the trustee for the benefit of the judgement debtor it would not entitle the judgement creditor to attach and sell the whole or any specific portion of the corpus of the estate. He could only attach that property over which the judgement debtor had a disposing power, which he might exercise for his own benefit, "whether the same was held in the name of the judgement debtor, or by another person in trust for him."

Mahomed Ali, just before his death, executed a deed, which is to be found at page 100 of the Record, and on page 101, he says:—"I appoint my sister's son, Nadir Hossein"—who is the present Plaintiff—"for the purpose of carrying on the duties specified in the former Wasiutnama, under which I have appointed him trustee for three years in my place, knowing him to be honest and faithful. The said trustee will, according to the conditions specified in the Wasiutnama of the late Khairunnissa Khanum Saheba, and of this Wasiutnama, take care of, maintain, and

“ keep, the whole of the property, necessaries  
 “ for lighting, silver and gold articles of all  
 “ sorts, belonging to the Emambara”—and all  
 the other religious duties. He is to be the  
 trustee for carrying out the religious ceremonies  
 which had been appointed by Khairunnissa  
 under the Wasiutnama. It was contended that  
 if this was not a Wakf, the trustee appointed by  
 Khairunnissa had no power to appoint a new  
 trustee. But even if Mahomed Ali could not  
 appoint a trustee in his place, no one has ever  
 objected to Syed Nadir Hossein as the trustee.  
 If there had been any objection that he was  
 illegally substituted as trustee, an application  
 might have been made by any person interested  
 in the performance of the trusts to have him  
 removed, and a new trustee appointed by the  
 court under the Code of 1887. But Syed  
 Nadir Hossein was in possession as trustee,  
 and no person interested in the performance of  
 the religious duties had ever objected. Even if  
 there had been an objection, that would not have  
 converted the corpus of the property held in trust  
 into Mahomed Ali's own private property, liable  
 to be attached for his private debts. By section  
 280 of the Code of Civil Procedure, Act  
 No. X. of 1877, it is enacted that:—“If  
 “ upon the investigation the court is satisfied  
 “ that for the reasons stated”—that is  
 upon the investigation of the claim of an  
 objector—“in the claim or objection such  
 “ property was not when attached in the  
 “ possession of the judgement debtor, or of  
 “ some person in trust for him, or in the  
 “ occupancy of a tenant or other person paying  
 “ rent to him, or that being in the possession of  
 “ the judgement debtor at such time it was so  
 “ in his possession not on his own account, or his  
 “ own property, but on account of or in trust  
 “ for some other person, or partly on his own

“ account and partly on account of some other  
“ person, the court shall pass an order releasing  
“ the property wholly, or to such extent as it  
“ thinks fit, from attachment.” Section 381  
enacts “That if the court is satisfied that the  
“ property was, at the time it was attached, in the  
“ possession of the judgement debtor as his own  
“ property, and not on account of any other  
“ person, or was in the possession of some other  
“ person in trust for him, or in the occupation  
“ of a tenant, or other person paying rent to  
“ him, the court shall disallow the claim.”

Their Lordships are of opinion that the order for the attachment of the corpus of the estate was erroneous, and that a proclamation could not have been lawfully issued for the sale of any portion of the property attached.

Their Lordships are of opinion that the judgement of the High Court was right, and they will therefore humbly advise Her Majesty to dismiss this appeal and to affirm that judgement. The costs of the appeal must be paid by the Appellant.