Hamid Hussain Khan vs Masood Hussain Khan And Ors. on 28 September, 1950

Equivalent citations: AIR1952ALL279, AIR 1952 ALLAHABAD 279

JUDGMENT

Mushtaq Ahmad, J.

1. This is an appeal against what I regard as an eminently just and proper order. The order is one directing the appellant, Mutwalli of a waqf created by his father, to (1) deposit in Court moneys due to the beneficiaries, such as not already paid to them, (s) submit monthly accounts of income and expenditure from certain date and deposit in Court sums realized by the appellant from that date at the end of every month, (3) intimate every month if the appellant has let out any plots or land in the abadi to other persons and (4) desist from cutting or removing any trees, all this only until the disposal of an application of the plaintiff for the appointment of a receiver.

2. One Nawab Ashiq Hussain made a waqf of a very substantial property in 1923 appointing his eldest son the appellant, as the next Mutwalli after his own death, but at the same time, reserving to himself the power of changing the mode of devolution of the tualiat during the rest of his life time. In 1936, he executed a supplementary deed disqualifying three of his sons for the office of Mutwalli. The suit giving rise to this appeal was filed in 1946 by another son, who was outside the group of the three disqualified sons, against the eldest son of the waqif, who had taken possession of the property on the latter's death in 1942 in spite of the disqualification ordained by the waqif in the supplementary deed of 1936 The suit was for removal of this eldest son, arrayed as defendant 2.

3. Along with the plaint was also made an application by the plaintiff for the account books held by the defendant-appellant to be taken possession of from him. A certain order was passed on that application, against which there was a revision filed in this Court which in its turn modified that order. We are not concerned with the nature of the order, either of the first Court or of this Court. On 8-1-1947 the plaintiff further applied for appointment of a receiver. On February 17, the Inspector of Stamps reported that there was a deficiency in the amount of court-fee paid by the plaintiff. Among the issues framed there was therefore one regarding this deficiency. An attempt was made by the defendant appellant in the Court below that, unless the deficiency in court fee reported by the Inspector of Stamp had been made good the plaintiff could not be allowed to press his application for the appointment of receiver. The Court, on 28-1-1950, passed an order to the effect that the matter of the appointment of a receiver could be proceeded with, even before the issue relating to court fee was decided. Against that order, there was a revision filed in this Court which was dismissed, though only on the ground that, the order being of an interlocutory nature, no revision lay against it. The result of the dismissal of the revision against the order of the Court below of 28-1-1960 was at least this that the order became final, so that, if in pursuance of it the Court

subsequently proceeded to deal with the application for the appointment of a receiver, the opposite party could not challenge such a proceeding on the ground that that non-determination of the question of deficient court fee was a bar to the disposal of that application.

4. Taking up the application for the appointment of a receiver on 6-2-1950, the Court passed an order, neither appointing nor refusing to appoint a receiver, but embodying certain directions to the defendant-appellant, presumably with the object of ensuring the protection of the property in the interests of the beneficiaries of the waqf. In the course of its order, it said:

> "It transpires chat if parties are permitted to lead evidence on the receivership application and of course they cannot be prohibited, then the recording of the evidence will take a long time. There are already hundreds of documents which parties want to be read for the disposal of the receivership application. All this is bound to tike long, and the file has got to be sent to the Hon'ble High Court on 9-2-1950. I, therefore, think that pending the disposal of the receivership application the following interim arrangement should be made."

Then followed the directions which I have already detailed.

5. The present appeal was filed against this order. A preliminary objection was taken by the learned counsel for the respondent that no appeal lay against it. His contention was that the order having been passed on an application under Order 40, Rule 1, Civil P. C., for the appointment of a receiver and the order not being one appointing or refusing to appoint a receiver and no application having been made under Order 39, Rule 1 of the Code, so that the order under appeal could be treated under that Rule, and further that in all its essence it was an order under Section 151 of the Code, it was not open to appeal to this Court at all. So far as the first part of the contention is concerned, it is obviously correct, namely, that the order in question was actually passed on an application under Order 40, Rule 1 for the appointment of a receiver and also that it was not an order appointing or refusing to appoint a receiver. So far as the second part of the contention is concerned, it is also true that there was no application under Order 39, Rule 1 of the Code. The question is whether, nonetheless, the order could be treated as one under that Rule. If neither party had applied to the Court, specifically for the issue of an injunction such as provided for in Order 39, Rule 1, Civil P. C, and we know in this case it was really so, and still the Court deemed it just and necessary to make certain precautionary directions for the preservation of the property, the question is whether the order would still be regarded under Order 39, Rule 1, Civil P. C., and, therefore, appealable. It could be so regarded if the Court had no jurisdiction to pass such an order except under that provision; that is to say, if it had no inherent jurisdiction to pass an order dictated by the exigencies of the case in the interest of justice and for the protection of the rights of the people concerned. This precisely was the question before a Bench of this Court for consideration in the case of Dhaneshwar Nath v. Ghanshyam, 1940 ALL. L.J, 81. It was there held that, even outside the scope of Order 39, Rule 1, the Court had jurisdiction to pass orders for the protection of the property in dispute subject, of course, to the final disposal of the suit. I regard the order in the present case as one of that description.

6. Indeed Section 151 of the Code, a reference to which is not always alluring allows the Court to pass, in the exercise of its inherent power, such orders as may be necessary "for the ends of justice. . . ." On the facts stated in the application for the appointment of a receiver and on the finding that the defendant-appellant had been resorting to tactics for putting off the decision of that application by creating circumstances to that end, the Court below felt itself justified in issuing the directions, I have already mentioned, purely as a precautionary treasure and expressly pending the disposal of the said application. It gave reasons for such a course which I have quoted in its own language. I cannot imagine that if a Court issues such directions merely as a precautionary step on an application for a different relief, in this case the appointment of a receiver, those directions should be deemed to have been made under Order 39, Rule 1, Civil P. C. It would be more appropriate, in my view, to treat those directions under the category of powers exercisable by a Court under the general provisions of law conferring an inherent jurisdiction to enjoin what is right and prohibit what is wrong. This precisely is the case here. The matter for which the jurisdiction of the Court below was really invoked by the plaintiff is still pending in that Court. For the present, in order to avoid complications and prevent the situation further worsening in regard to the administration of the waqf, the Court only issued certain eminently just and necessary directions for a limited duration of time and subject to the final disposal of the application on which the order was made. In this view, I am inclined to think that the order is not appealable, and I should dismiss this appeal even on that ground.

7. I would, however, express myself on the merits of the appeal also. In my view there is no substance in it. The principal objection taken by the learned counsel for the appellant to the order of the Court below was that it bad no jurisdiction to pass it, in view of the issue regarding the deficiency in court fee not having yet been decided Apart from the merits of this argument, I do not think it is permissible to the appellant in view of the order of the Court below dated 28-1-1950, to which I have already referred above The application in revision against that order having been dismissed by this Court though on a preliminary ground, it did become final and it would not be quite regular to allow either party to go behind it and take up the position as if no such order existed. Besides I entirely endorse the view that to proceed with the application for the appointment of a receiver was not really "proceeding with the suit" itself within the meaning of Sub-section 3 Section 6, Court-fees Act. If a Court has to deal with such miscellaneous matters, as for instance, applications for the appointment of a receiver, for substitution of names, or for an amendment in the array of parties it does not thereby 'proceed with the suit', in the sense of doing anything forming part of an adjudication of the real controversy in the suit. That is the view which the Court below took when passing its order of 28-1-1950, and I think quite rightly.

8. I would, therefore, dismiss the appeal, both on the ground on the preliminary objection and on the merits, with costs.

Desai, J.

9. I am sorry that I have to differ from the views just now expressed by my learned brother. I am of the view that not only is the appeal competent but also it should succeed.

10. The lower Court has not mentioned in its order whether it has passed the order under Order 39 Rule 1 or Section 151, Civil P. C. But if it could have been passed under Order 89, Rule 1 it must be presumed to have been passed under that provision, for the simple reason that the question of exercising inherent powers arises only when there is no Specific provision in the Civil P. C. If there is a provision and the Court can pass an order under it, it cannot invoke its inherent powers. So if the order under appeal could have been passed under Order 39, Rule 1 it could not have been passed under Section 151. What the lower Court has done is to restrain the appellant from doing certain acts and to make him do certain other acts. An order of this nature is contemplated by Order 39, Rule 1; under this provision the Court cannot only grant an injunction, but also pass a mandatory injunction directing a party to take a certain order in respect of certain property. It is true that there was no application moved by the respondents requesting the lower Court to pass an order under Order 89, Rule l, but it was not at all essential that there should have been an application before the lower Court could pass such an order. The provision in Rule l does not make it essential that there should be an application. Then it was contended that there was no proof, by affidavit or otherwise, of the matters on the basis of which the order could have been passed. I am unable to understand this argument If there was no proof of the matters which called for the passing of an order under Order 39 Rule l, the Court could not pass an order even under its inherent powers. The powers that are reserved to the Court by Section 151 are inherent powers & not arbitrary power. A Court requires reasons for exercising its inherent powers just as much as it requires reasons for passing an order under a specific provision of the Civil P. C. If there was no material before the lower Court on the basis of which it could pass the order, it would not justify its passing the order in the exercise of its inherent powers any more than it would justify passing the order under Order 39, Rule 1. Then it was said that the order that has been passed is to remain in force only for a short period, that is during the pendency of the application for the appointment of a receiver. This question of duration has absolutely nothing to do with the question under what authority the order has been passed. An injunction of the shortest duration can be passed under Order 39, Rule 1. I also think that the order is covered by Order 40, Rule 1. The lower Court has not only directed the appellant to do certain acts or to refrain from doing certain other acts, but also prescribed automatic penalty for his failure to comply with its order, & that automatic penalty is that immediately on his disobedience of the order he would lose all his right to manage the property as mutwalli. If this order does not amount to his removal from the office of mutwalli I do not know what else it means. The removal may be conditional, but it is there. It is significant that no further order has to be passed by the lower Court before the appellant loses his power to act as mutwalli; so if he loses his power to act as mutwalli, it would be simply on the basis of the order under appeal. In this view I think it is an order removing the appellant from the office of mutwalli, or taking the property in suit out of his possession, on the happening of a certain contingency & as such appealable under Order 43.

11. Coming to the merits of the order under appeal the only ground that I can discover from, the lower Court's order is that the disposal of the application for the appointment of a receiver will take a long time. This is certainly not a ground on which an order can be issued either under; Order 39 or under Order 40 The lower Court does not seem to have applied its mind to the question on what grounds injunction can be issued or a receiver granted or a party removed from possession; it has not discussed the existence of the grounds mentioned in Order 39, Rule 1 & Order 40. Rule 1, There were, allegations by the respondents against the appellant but it was not open to the lower Court to

grant the injunction simply because those allegations were made. There was no proof, not even an affidavit, that they were true. After all, the appellant is a mutwalli entitled to exercise his powers as such. The Court has not found him to unfit to hold the office of mutwalli & has not removed him from that office. Unless it found that any of the grounds mentioned in first rules of Order 39 & 40 were made out, it was not open to it to prevent him from exercising his powers or inter, fere with his exercise of the powers. One of the directions issued by the lower Court is that the appellant should deposit in Court the sums which are due to the beneficiaries & have not yet been paid. I do not see any justice in the issuing of this direction. I do not know how a Court, with out being satisfied that the appellant has not paid the beneficiaries their dues, could pass such an order as this. The mere fact that the order will do no harm is no justification. I am note aware of an injunation ever being justified on the ground that it would not do any harm. An injunction requires positive grounds to be granted.

12. There is a report of the Inspector of Stamps that the C. F paid by the respondents on the plaint was insufficient. There is also an order of the lower Court directing the respondents to make good the deficiency in the court fee. The respondents have challenged the report of the Inspector & the matter is still under inquiry before the lower Court. It was contended on behalf of the appellant that Section 6(3), Court-fees. Act prevented the lower Court from passing the order under appeal it cannot be disputed that that provision applies to the facts of the present case. What was contended, however, is that that provision simply debars the Court from "proceeding with the suit" & not from passing interlocutory orders or dealing with procedural matters. I concede that it is possible to argue that "proceeding further with the suit", means taking a step towards the passing of a decree in the suit & does not include passing orders on an application for substitution of names & such other applications. But in the present case I think it can be said that proceeding with the application for the appointment of a receiver amounts to proceeding with the suit when the two matters are connected with each other. The relief sought in the suit is that the appellant should be removed from the office of mutwalli & that another person be appointed as mutwalli. Half of this object is achieved through the order passed under appeal, the appellant has been restrained from dealing with the property & income: has been directed to deposit all the income in Court & has not been permitted even to incur any expenditure. When the law debarred the Court from proceeding with a suit of this nature, I do not think it can be said that it could proceed with the application for the appointment of a receiver. The application is pending & the order under appeal is only an interlocutory order; that, however, does not make any difference. The Court has partly disposed of the receivership application by granting temporary relief to the respondents.

13. When the lower Court decided to go on with the receivership application, the appellant objected that it could not do so unless the deficiency in the court-fee was made good. The lower Court passed an order on 28-1-1950 to the effect that it could. It referred to Section 6(4) Court-fees Act & thought that it could not decide other issues so long as the issue of court fee was not decided. But this is not the provision on which the appellant took his stand; he relied upon Section 6(3). The lower Court has not said that Section 6(3) did not prevent his proceeding with the suit. It has not, in my opinion, given proper consideration to the objection raised by the appellant.

14. The lower Court's order of 28-1-1960 was the subject-matter of a revision application in this Court. It was dismissed by a learned Judge of this Court on the ground that the passing of the order did not amount to deciding a case. The learned Judge only held that the lower Court's proceeding to dispose of the receivership application did not amount to its deciding a case; he did not hold that the lower Court was justified in proceeding with the receivership application. He could not possibly hold so when he did not enter into the merits of the case at all. I am unable to see what effect this order of the learned Judge has on the appeal before us. There is no question of finality of any order; the order of the lower Court of 28-1-1950 was final in the sense that no appeal could be filed against it and no revision also could be filed against it. It was final ab initio and did not become final only when the revision was dismissed by this Court. The order that is now under appeal is quite different from the order of 28-1-1950. As I said above it is an order covered by Order 89 Rule 1 as well as Order 40, Rule 1 and as such appealable. I do not see anything in the order of this Court to justify the view that it is not open to the appellant to argue that the lower Court could not dispose of the receivership application unless the deficiency in the court-fee was made good.

15. In my judgment the lower Court had no jurisdiction to pass orders on the receivership application whether finally or temporarily disposing of it, and I hold that the order under appeal purports to have been passed under Order 39 and 40, Civil P. C, and is appealable and that the lower Court was not justified on merits in passing it. I would, therefore, allow the appeal with costs.

16. By the Court.--In view of the difference of opinion between us, we direct that the papers be laid before the Hon'ble the Chief Justice to obtain the opinion of a third Judge on the following questions: (1) Is the order under appeal open to appeal? (2) Was the said order legally justified on the facts mentioned therein?

Agarwala, J.

17. One Nawab Ashiq Husain made a waqf of substantial property in 1923, appointing his eldest son, the appellant, as the next Mutwalli after his own death, but reserving to himself the power of changing the mode of devolution of the Mutwaliship during his lifetime. In 1936, he is alleged to have executed a deed dis-qualifying three of his sons including his eldest son, Hamid Hasain Khan for the office of Mutwalli.

18. In 1942 Asbiq Hasain died and his eldest son Hamid Husain Khan entered into possession of the waqf property. In 1946 one of the sons of Ashiq Husain, namely, Masood Hasain Khan, who was not one of the three disqualified sons, filed the suit which has given rise to this appeal, in the Court of the civil Judge, Moradabad, for the removal of Hamid Husain Khan from the office of Mutwalli. While the suit was pending, the plaintiff filed an application on 8-1-1947 for the appointment of a Receiver of the waqf property pending the disposal of the suit. This application could not be disposed of for a long time, and ultimately on 6-2-1950 the learned Civil Judge passed an interim order to the following effect :

> "1. Defendant 2 will deposit in Court within a fortnight from today, all sums which are due to the beneficiaries and which have not so far been paid. This includes sums

> due to the minor which are in the hands of the mutwalli as enjoined in the deed of waqf.
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> 2. Defendant 2 will submit monthly account of all incomes and expenditure beginning from 1-8-1950 and all sums realised by him will be deposited in Court immediately at the close of the month for distribution to beneficiaries.
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> 3. Defendant 2 will further intimate every month if any plots are let out to tenants, or any land in the abadi is given to the tenants.
>
> 4. No trees will be cut or removed by defendant 2 till the disposal of the receivership application.
>
> In case defendant 2 fails to comply with any of the above orders, then he will ipso facto lose his right to manage the property in suit as mutwalli, and in that event he is restrained from performing any of the duties of the mutwalli or exercising any of the rights of mutwalli. If this contingency occurs, it will be open to the parties to move this Court to appoint another man to manage the waqf property pending the disposal of the receivership application."

19. It appears that during the pendency of the application for the appointment of a Receiver, the Inspector of Stamps made a report on 17-2-1947 that there was a deficiency in the amount of court fee paid by the plaintiff. This report was contested by the plaintiff. The defendant contend-ed before the Court below that unless the deficiency in court fee had been made good, the plaintiff could not be allowed to press his application for the appointment of a Receiver. On 28-1-1950 the Court below passed an order to the effect that the matter of the appointment of a Receiver could be proceeded with, even before the issue relating to court-fee was decided. Against this order, the defendant filed a revision in this Court. This was dismissed on the ground that the order was an interlocutory order and that no case had been decided.

20. The order under appeal appears to have been passed without deciding the issue about court fee. In the grounds of appeal it has been stated that:

> "the lower Court accepted the report of the Inspector of stamps and having directed the plaintiff to pay the court-fee 'at once' and this order having become final, the plaintiff was bound to make good the deficiency accordingly, and the Court below had no jurisdiction to fix a date for the filial hearing of the suit or even for consideration of the application for appointment of a Receiver."

21. The present appeal was filed by Hamid Husain Khan defendant against the above order. It came up for hearing before my brothers Mushtaq Ahmad and Desai JJ. and they having differed as to the order to be passed in the appeal, have referred two questions for my opinion : (1) Is the order under appeal open to appeal? (2) Was the said order legally justified on the facts mentioned therein?

22. The first question that calls for decision is whether an appeal lies to this Court. Now the application was made under Order 40, Rule 1. That rule authorises a Court to: (a) appoint a receiver of any property; (b) remove any person from the possession or custody of the property; (o) commit the same to the possession, custody or management of the receiver and (d) confer upon the receiver various powers. An appeal lies under Order 43, Rule 1 (B) against an order passed under Rule 1 of Order 40. By passing the interim order quoted above, the Court below did not dispose of the receivership application; it neither appointed a receiver nor refused to appoint one. It did not remove any person from the possession or custody of any property. The order that the defendant appellant will "ipso facto lose his right to manage the property in suit as mutwalli," if he failed to obey the order and that in that event it would be open to any party to apply for the appointment of another person to manage the waqf property, was a contingent order and unless the contingency appellant had been removed from the possession happened, it could not be said that the defendant or custody of the property. The order under appeal, therefore, cannot be said to be an order which is appealable under Order 43, Rule 1 (s).

23. Can the order in question be construed to be an order under Order 39 Rule 1. I think the order passed falls within the purview of that rule. It is not necessary that there should be an application specifically under that rule. If there is an application under Order 40, Rule 1 and the Court thinks that it should pass a temporary injunction before it decides the receivership application, is has ample jurisdiction to do so. Under Order 39, Rule 1, the Court may grant a temporary injunction to restrain any property from being wasted, damaged or alienated by any party to the suit, or may make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit. The order under appeal is clearly an order intended to prevent the wasting or damaging of the property in dispute. It may be noted that the plaintiff had alleged mismanagement and misappropriation of the waqf property. In order to prevent misappropriation and mismanagement, the Court had jurisdiction under Order 39, Rule 1 to make the order in question. An appeal lies against such an order under Order 43, Rule 1 (r).

24. I, therefore, agree with my brother Desai that the appeal is competent.

25. The second question has not been happily worded. "Was the said order legally justified on the facts mentioned therein?" The court-fee matter is not mentioned in the order at all. If it is meant that for answering the question I have to take into account only the facts mentioned in the order and nothing else, I would agree with my brother Mushtaq Ahmad that this was an eminently just order.

26. There was a dispute about mutwalliship. The waqif had, if the supplementary deed is taken as proved and valid, disqualified the defendant appellant from holding the office of mutwaili. The defendant had in spite of the disqualification taken possession of the property as a mutwaili. There was, therefore, a prima facie case in favour of the plaintiff for the removal of defendant 1 from the office of mutwaili. There were allegations of mismanagement and misappropriation. The application for the appointment of a receiver could not be heard for 3 years in spite of repeated efforts of the plaintiff. The reason for the delay in the disposal of the application has been assigned by the lower Court to circumstances created by the defendant-appellant. It further transpired that parties intended to lead evidence which would take a long time as there were hundreds of documents and

probably other evidence to be considered. The lower Court was required to send the record of the case to the High Court on 9-2-1960, three days after it had passed the order under appeal.

27. In the circumstances, the Court had jurisdiction and was justified in making the order in question.

28. But, if I have to take into account the further fact that there was a stamp report that the court-fee paid on the plaint was deficient, then different considerations arise.

29. Under Section 6(3), Court-fees Act, as amended in U. P. when a question of deficiency in court-fee is raised by the Inspector of Stamps, the Court is directed, before proceeding further with the suit or appeal, to record a finding whether the court fee paid is sufficient or not. If the Court finds that the court-fee paid is insufficient, it shall call upon the plaintiff to make good the deficiency within such time as it may fix and in case of default shall reject the plaint; provided that the Court may, for sufficient reasons to be recorded proceed with the suit, if the plaintiff gives security to the satisfaction of the Court for payment of the deficiency in court-fee within such further time as the Court may allow.

30. As stated above, the Court does not appear to have decided the question of court-fee before proceeding with the receivership application. The question is whether proceeding with the receivership application amounts to "proceeding with the suit" I thick that it does. A application for the appointment of a receiver is made in the suit and is part of the proceedings of the suit. It is true that it does not raise a question upon the merits of the suit itself but it is certainly an interim matter connected with the suit. The words 'proceeding with the suit', as mentioned in Section 6(a) must be read in the context of Section 28, Court fees Act which provides that no document shall be of any validity unless and until it is properly stamped. If the plaint is not properly stamped, the Court ought not to take any action upon it so as to give relief to the plaintiff by way of an interim injunction or an order of appointment of a receiver, or otherwise.

31. The fact that the defendant's application in revision against the order of the lower Court directing the hearing of the receivership application before the issue of court-fee was decided was dismissed by this Court does not debar this Court from considering in this appeal the question whether in the circumstances the Courts below bad jurisdiction to proceed with the hearing of the receivership application. The reason is that the revision was dismissed not on the merits, but on a preliminary point that the revision was not maintainable.

32. I, therefore, think that the Court below acted illegally in the exercise of its jurisdiction in proceeding to pass an interim injunction without deciding the question of court-fee or without taking any security for the payment of deficiency in court fee.

33. My answers to the questions referred to me, therefore, are : (1) Yes, (2) Yes, if the court-fee matter is not to be taken into account, and No, if it is to be taken into account.

34. Let these answers be laid before the Bends concerned.

By the Court.

35. In view of the answers received from the third Judge to the questions referred by us for opinion, we allow the appeal, set aside the order of the Court below and send the case back to that Court with a direction to decide the question of court-fee and then dispose of the application for the appointment of a receiver. We direct that copies of our judgments and of the opinion received from the third Judge may also be sent down to the Court below for perusal.