

Privy Council Appeal No. 117 of 1931.

Mahomedally Adamji Peerbhoy and others - - - - *Appellants*

v.

Akberally Abdulhussein Adamji Peerbhoy and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 12TH DECEMBER, 1933.

Present at the Hearing :

LORD THANKERTON.

LORD ALNESS.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal from a decree dated the 18th of August, 1930, made by the High Court of Judicature at Bombay in its appellate jurisdiction, affirming (with some variations which are not material to this appeal) a decree dated the 12th of March, 1929, and made by Mr. Justice Madgavkar sitting in the said High Court in its original civil jurisdiction.

The plaintiffs are members of the Dawoodi Borah Community and, having an interest in the trust, which is the subject matter of the suit, they obtained the consent of the Advocate-General at Bombay to institute the suit in pursuance of Section 92 of the Civil Procedure Code of 1908 on the basis that the trust was created for public purposes of a charitable and religious nature.

The first plaintiff is a grandson of the late Sir Adamji Peerbhoy, who created the above-mentioned trust.

The first five defendants are sons of the said Sir Adamji Peerbhoy, the sixth defendant is the official assignee and assignee of the estate of the said five defendants, and the seventh defendant is a receiver appointed in a suit No. 720 of 1916.

The first four defendants are the appellants to His Majesty in Council.

The suit was brought for the following amongst other reliefs :—

- (a) That it may be declared that the properties and moneys in paras. 1 and 3 of the plaint mentioned are the subjects of trusts created for public purposes of a charitable and religious nature.
- (b) That fit and proper persons may be appointed to be trustees of the said charities.
- (c) That the defendants be ordered to hand over the said properties and moneys to the trustees so appointed and to account for the rents and profits thereof.
- (d) That a scheme or schemes may be framed and such other relief given as may be necessary for the due and proper administration of the said charities.

It is common ground between the plaintiffs and the defendants that the late Sir Adamji Peerbhoy did dedicate land and buildings, including a mosque, for public purposes of a religious and charitable nature. The buildings were to be used partly as a sanatorium, partly as a rest house for pilgrims and poor persons of the Dawoodi Borah community.

Sir Adamji provided the money for all the buildings and maintained the same out of his own pocket and acted as *mutawali* during his lifetime.

It was alleged, however, by the defendant-appellants that Sir Adamji had reserved the upper floor of two blocks of the buildings for the use of members of his family and his friends and guests.

The three main issues at the trial were as follows :—

1. Whether the upper floors of the blocks 2 and 3 were reserved by Sir Adamji as settlor for the use of his family and their guests and friends ?
2. Whether defendants 1-5 are Trustees *de son tort* or *Mutawalis* appointed by Sir Adamji ? and
3. In the last case, whether they should be removed or maintained as *Mutawalis* ?

Both the Courts in India have decided that Sir Adamji Peerbhoy dedicated the whole of the buildings for the benefit of the Dawoodi Borah Community and that he did not reserve the portions of the buildings for the members of his family, their friends and guests as alleged by the appellants.

Both the Courts in India have held that the first five defendants were appointed *mutawalis* by their father, Sir Adamji Peerbhoy and that they were not trustees *de son tort*.

Their Lordships see no reason for disagreeing with these concurrent findings of fact, and they adopt the same.

The argument before the Board was mainly directed to the third issue.

It was contended that there was no real ground for the removal of the defendant *mutawalis*.

The learned Judge who tried the suit came to the conclusion that the charity was in a deplorable condition ; that there was no income to carry on the trust ; that the defendant *mutawalis* had been excommunicated by the *Mulaji* ; that they were insolvent ; that owing to these matters there were about six pupils only in the *Madrassa* ; that owing to the differences which had arisen the number of pilgrims who took advantage of the buildings had fallen off, and that the upper floors in two blocks of the buildings were occupied by the defendant *mutawalis* and their families.

It appears that the defendant *mutawalis* were adjudicated insolvents in 1925, and the learned Judge held that they had kept no accounts since 1923.

In view of these matters he decided that the defendants 1 to 5 should be removed from the position of *mutawalis*.

The High Court in its appellate jurisdiction agreed with the learned Judge's decision in this respect.

It was argued on behalf of the appellants that insolvency by itself was not a ground for removal and that the fact that no accounts had been kept since 1923 was not material, since there was no endowment of the trust, and that such money as had been spent was provided by the members of the founder's family.

The principle on which this matter should be considered is set out in the judgment of the Board, delivered by Mr. Ameer Ali, in *Mahomed Ismail Ariff v. Ahmed Moola Dawood* (43 I.A. 127 at page 134) :—

“ The Mussulman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the *Kazi*, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the *Kazi's* discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction ; but as regards management, which must be governed by circumstances, he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.”

After a reference to the provisions of Section 539 of the Code of Civil Procedure, 1882, which, as far as the question now under consideration is concerned, are not materially different from the provisions of Section 92 of the Civil Procedure Code of 1908, the judgment in the cited case proceeds as follows :—

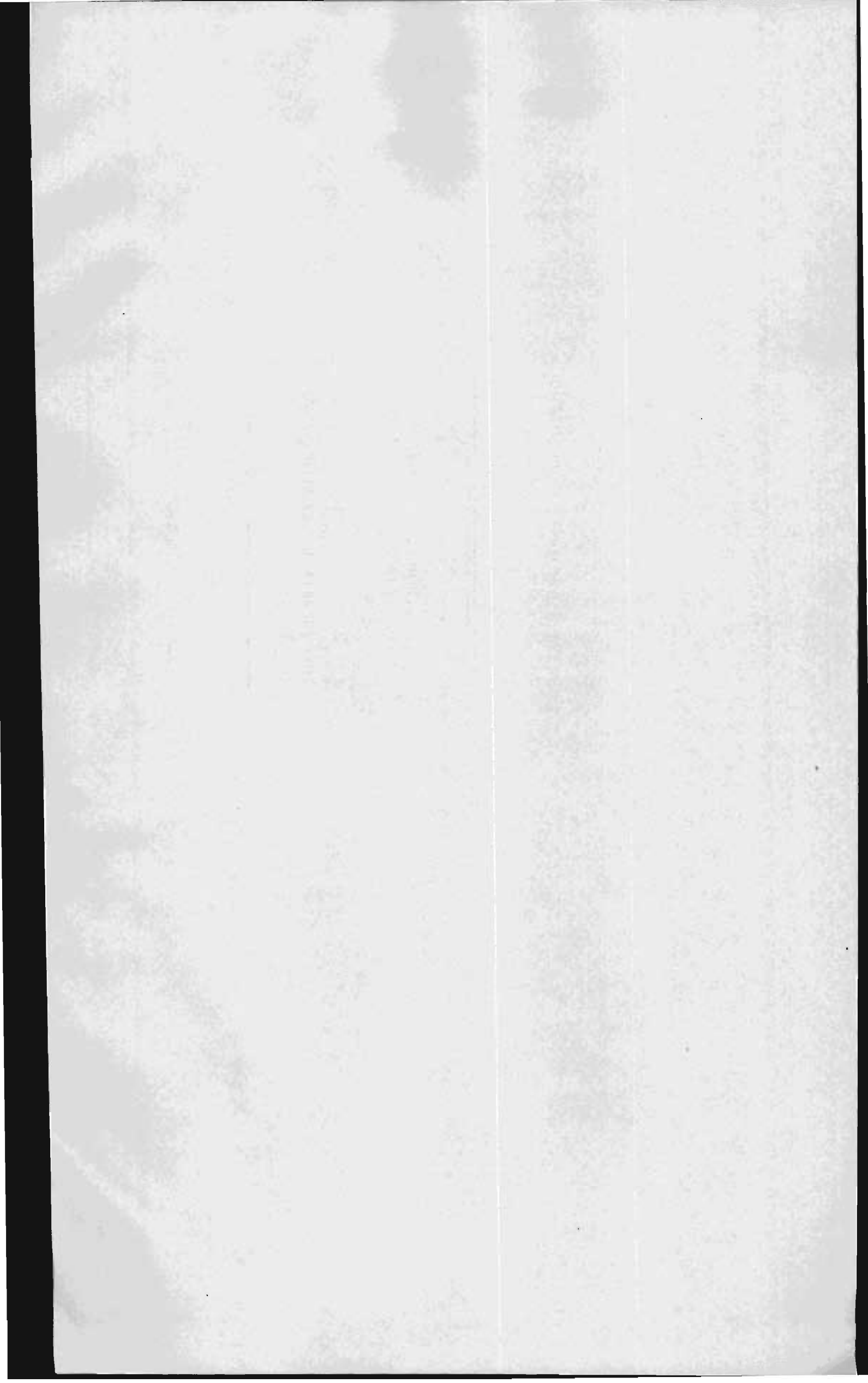
“ In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascer-

tained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future."

Inasmuch as the trust now under consideration is for public purposes of a charitable and religious nature, the primary duty of the Civil Court, which in this instance has taken the place of the *Kazi*, was to consider the interests of the public, or that part of the public, for whose benefit the trust was created, and in view of the facts found by the learned Judge who tried the suit, their Lordships are of opinion that there was ample material before him to justify him in deciding, in the exercise of his discretion, that the defendant *mutawalis* should be removed.

It was further in his discretion to make the order of reference to the Commissioner for taking accounts, framing a scheme for the administration of the trust, and suggesting the names of fit and proper persons of the above-mentioned community to be trustees. Their Lordships are of opinion that this was in the circumstances of the case not only justifiable, but also necessary, and it is to be noted that the High Court gave a special direction that the Commissioner should be at liberty to consider the claims of any members of the family including the defendants of the late Sir Adamji Peerbhoy to be trustees if otherwise suitable.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.



In the Privy Council.

MAHOMEDALLY ADAMJI PEERBHoy AND
OTHERS

vs.

AKBERALLY ABDULHUSSEIN ADAMJI
PEERBHoy AND OTHERS.

DELIVERED BY SIR LANCELOT SANDERSON.

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