

1909.  
 May 19.

Present : Mr. Justice Wendt and Mr. Justice Middleton.

AHAMADO *et al.* v. LEBBE MARICAR *et al.*

D. C., Galle, 206.

*Trustees, application for appointment of—Written consent of the Attorney-General—Civil Procedure Code, s. 639.*

The written consent of the Attorney-General required by section 639 of the Civil Procedure Code is a *sine qua non* for the maintenance of any action for the removal or appointment of any trustee in respect of a public charitable trust.

WENDT J.—Ordinance No. 7 of 1871 was intended to deal with private, and not public, trusts.

THIS was a proceeding to obtain the appointment by the Court of trustees of a certain public charitable trust created by the last will of one Uduma Lebbe Marcar Cassim Bawa. The facts are fully stated in the following petition of the applicants :—

“ 1. That the petitioners and 1st, 2nd, and 3rd respondents are Moors, and the 4th respondent Sinhalese, and they reside—the 1st petitioner at Kaluwella, the 2nd at Talapitiya, and the 1st and 3rd respondents at Dangedera, the 2nd and 4th at China Garden, all the said places being within the jurisdiction of this Court.

“ 2. That Hadjie Marcar Kuppa Tamby, late of Talapitiya, died about July 9, 1874, after executing a last will and testament dated July 6, 1874.

“ 3. That the said last will was proved in testamentary case No. 2,485 of this Court, and probate issued to the executor mentioned therein, Uduma Lebbe Marcar Cassim Bawa.

“ 4. That one of the dispositions in the said will is as follows:—

“ ‘ I will desire that the land called Kekkiribokkewatta at China Garden, which I exempt from the legacies aforesaid, shall be devoted entirely and exclusively to almsgiving, that is to say, that the said property shall remain in *wakouf*, and for that purpose I desire that from the date of my death my aforesaid brother shall have the right to lease the said land, expending the proceeds in charity according to the Muhammadan religion, giving to ‘ my aforesaid sisters jointly to exercise the same rights for the purpose aforesaid.’

“ 5. That Uduma Lebbe Marcar Cassim Bawa during his lifetime observed the above directions, expending the moneys derived from the said premises in charity.

“ 6. That Uduma Lebbe Marcar Cassim Bawa died about June 3, 1898, leaving a last will and testament, which has been proved

in testamentary case No. 3,249 of this Court, and probate issued to the 1st respondent, the executor mentioned therein.

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“ 7. That the persons referred to as sisters in the above last will were Tanga Umma, wife of Packir Cassim Tamby Saibu, and Deeka Umma, wife of Packir Bawa Packir Kutty.

“ 8. That Tanga Umma died intestate about nine years ago, leaving property of less value than Rs. 1,000 and as sole heir her son, myself. That Deeka Umma died intestate about ten years ago, leaving property of less value than Rs. 1,000 and as sole heir her son, the 2nd petitioner.

“ 9. That the petitioners are the only persons now living interested in the carrying out of the above trust, and the petitioners are the only heirs now living of the said Hadjie Marcar Kuppa Tamby.

“ 10. That the 1st respondent had leased out the above premises to the 2nd respondent up to April 12, 1908, and the 1st respondent appropriated to himself the rents derived from the said premises. That the petitioners have since April 12, 1908, leased the said premises to the 2nd respondent, but the 3rd respondent disputes the right of the petitioners to lease the premises in question, claiming the same on a purchase from the 1st respondent. The 4th respondent is mortgagee of the 3rd respondent.

“ 11. That the said premises are bounded on the north by a lot of Kekkiribokkewatta, on the east by the high road, on the south by the high road, and on the west by Ropewala, and are of the value of Rs. 1,000.

“ 12. That the said last will of Hadjie Marcar Kuppa Tamby contains no provision for the appointment of a new trustee or trustees, and it has become necessary to appoint a new trustee or trustees for the purpose of carrying out the said trust.

“ 13. That the petitioners are fit and proper persons to be appointed such trustees for the purpose of carrying out the said trust.

“ Wherefore the petitioners pray—

“ (a) That they be appointed trustees as provided in sub-section (1) of section 4 of the Ordinance No. 7 of 1871.

“ (b) For a notice of their application to the respondents.

“ (c) For costs in this behalf incurred.”

The District Judge (W. E. Thorpe, Esq.) having granted the prayer of the petitioners, the respondents appealed.

*H. A. Jayewardene* ( *C. de Jong* with him), for the appellants.

*Bawa*, for the respondents (petitioners).

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The object of this proceeding is to obtain the appointment by the Court of trustees of a certain trust created by the last will dated 1874 of one Uduma Lebbe Marcar Cassim Bawa, the original trustees being dead. The will declared that the property dealt with "shall be devoted entirely and exclusively to almsgiving, that is to say, that the said property shall remain in *wakouf* (*wakf*), and for that purpose I desire that from the date of my death my brother shall have the right to lease the said land, expending the proceeds in charity according to the Muhammadan religion....." This purports to create what is clearly a public charitable trust. Section 639 of the Code of Civil Procedure, in making provision for such trusts, empowers the Attorney-General, acting *ex officio*, or two or more persons interested in the trust, and having obtained the consent in writing of the Attorney-General to institute an action to obtain a decree removing any trustee, and, if necessary, appointing new trustees. In my opinion, the consent in writing is a *sine qua non*. The section is not merely permissive, but defines the only remedy made available to the persons aggrieved. The present petitioners, therefore, not having obtained the Attorney-General's consent had no right to sue. They profess to proceed under the Ordinance No. 7 of 1871. I am disposed to think that that Ordinance was intended to deal with private, and not public, trusts. In the case of the latter special provision is made by the later Ordinance enacting the Civil Procedure Code, and that provision must prevail, even if the two Ordinances are in conflict with each other, which I think they are not.

I think the appeal should be allowed, and the petition dismissed with costs in both Courts.

MIDDLETON J.—

I agree that the will in question here creates a trust for public charitable purposes, and I think I must hold that under the English Law of Executors the executor of the original trustee must be deemed to be the present trustee and executor of the trust. This person is, I understand, the 1st respondent-appellant. If this be so, the office is not vacant; and the argument of the learned counsel for the respondent that these are proceedings for the appointment of a new trustee on the assumption that the office is vacant must fail.

The proper manner of proceeding is I think, therefore, under section 639 of the Civil Procedure Code, which I think is intended to be applied to exactly such cases as this. I agree, therefore, that the appeal must be allowed, and the petition dismissed with costs in both Courts.

*Appeal allowed.*