

APPELLATE CIVIL.

Before Carnduff and Richardson JJ.

AYATUNNESSA BIBI

v.

KULFU KHALIFA.*

1914

Jan. 15,

Public Religious Trust—Trespasser, suit for removal of—Civil Procedure Code (Act V of 1908), s. 92—Advocate-General, consent of.

A suit for the removal of a trespasser in possession of trust property is not a suit of the kind contemplated by s. 92 of the Code of Civil Procedure and, therefore, for the institution of such a suit no consent of the Advocate-General is necessary.

Budree Das Mukim v. Chooni Lal Johurry (1) followed.

Neti Rama Jogiah v. Venkatacharulu (2), *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (3), *Budh Singh Dudhuria v. Niradbaran Roy* (4) *Muhammad Abdul Majid Khan v. Ahmad Said Khan* (5) referred to.

APPEAL by Ayatunnessa Bibi, the plaintiff.

This appeal arose out of a suit brought by the plaintiff for declaration of her title as *mutawalli* and for recovery of possession of a waqf estate. The learned Subordinate Judge of Dacca, before whom the case came on, dismissed it on a preliminary point, namely, that the suit fell within the proviso of section 92 of the Code of Civil Procedure, being a suit for the removal of a *de facto* trustee and one in respect of a public religious trust.

* Appeal from original decree No. 518 of 1909, against the decree Kissori Lal Sen, Subordinate Judge of Dacca, dated Aug. 25, 1909.

(1) (1906) I. L. R. 33 Calc. 789, 807.

(3) (1897) I. L. R. 24 Calc. 418.

(2) (1902) I. L. R. 26 Mad. 450.

(4) (1905) 2 C. L. J. 431, 439.

(5) (1913) I. L. R. 35 All. 459.

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Plaintiff's case was that one Fekan Bibi was the first *mutawalli* who, by a *towliatnama* dated 6th Assin 1286, appointed a minor, Abdul Miah, and one Maqbul Dewan *mutawallis*. Abdul died a minor. One of the terms of Fekan Bibi's deed was that "if both the *mutawallis* died, without appointing a *mutawalli* then amongst their heirs, whoever would be pious and of good qualities, could be the *mutawalli* of the said property, and shall act in terms of the *towliatnama*." It appears that Maqbul Dewan died in Agrahan 1304 without appointing any *mutawalli*, leaving him surviving his wife the plaintiff and three sons and a daughter: Abdul Hamid Dewan (defendant No. 2), Abdul Ghaffur Dewan and Abdul Hamid and a daughter Paiyera Khatun. Amongst the sons Abdul Hamid was absolutely good for nothing, the other two were minors. The *mutawalliship*, therefore, devolved upon the plaintiff who acted as such since the death of her husband.

But it appears that Abdul Hamid declared himself *mutawalli* and by a deed dated 19 Baisak 1307 appointed one Fuzlur Rahman as *mutawalli* and defendant No. 1 Kulfu and one Nadir Buksh as *naib-mutawallis*. Fazlur Rahman got his name registered as *mutawalli* under the Land Registration Act, but he died on the 16th of Kartick 1315. Defendant No. 1 applied for registration of his name as *naib-mutawalli*. Defendant No. 3 is the wife and defendant No. 4 is the daughter of Fazlur Rahman.

Plaintiff having been dispossessed of the waqf estate brought this suit for declaration of her title as *mutawalli* and recovery of possession of the waqf estate.

Babu Basanta Kumar Bose (with him *Babu Prokash Chandra Sarkar*), for the appellant, submitted

that section 92 of the Code of Civil Procedure did not apply to the present case. It was not a suit on behalf of the public but it was a suit for the enforcement of the private rights of the plaintiff under the *towliatnama*. Section 92 contemplates some breach of trust by the lawful trustee or administrator of the trust. But such is not the case here. Plaintiff alleges that she is the lawful trustee. Therefore here is no vacancy to be filled up nor is there any question of removal or appointment of a trustee. Plaintiff alone is interested in this suit. The suit is not against a lawful trustee but against a trespasser. *Neti Rama Jogiah v. Venkatacharulu* (1) has been distinguished in *Budree Dass Mukim v. Chooni Lal Johurry* (2) and *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (3) has been dissented from *Budh Singh Dudhuria v. Niradbaran* (4).

Mr. S. P. Bose (with him *Babu Ramani Mohan Chatterji*), for defendants Nos. 3 and 4 contended that s. 539 of the old Code of Civil Procedure corresponded with s. 92 of the present Code. That section was altered in the new Code inasmuch as new clauses were added to it. Sub-section (2) was also new. The effect of the alteration was to make this section mandatory. The whole object of this section was to prevent institution of frivolous suits against trustees. The real test whether a suit really lay under this section was in the nature of the relief claimed. If it was really to remove a trustee, as it undoubtedly was in this case, then the suit fell within the purview of s. 92. Fuzlur Rahman acted as *mutawalli* for seven years. He is represented by defendants 3 and 4. Mere allegation on the part of the plaintiff that the defendant who was acting as a trustee was not a trustee but

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(2) (1906) I. L. R. 33 Cal. 789.

(4) (1905) 2 C. L. J. 431.

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a mere trespasser, was not enough to do away with the requirements of the section.

Maulvi Wahid Husain, for the defendant No. I, submitted that it was a public trust and as such sanction of the Advocate-General or the Collector of the District was necessary. It was a clear case under s. 92 of the present Code of Civil Procedure.

CARNDUFF J. This is an appeal preferred by the plaintiff against the dismissal of her suit on the preliminary ground that it was not maintainable without the consent of the Advocate-General, as required by section 92 of the Code of Civil Procedure.

The plaintiff claims to be the rightful *mutawalli* of a religious and charitable endowment by virtue of a *towliatnama* executed by the founder, her deceased husband. The defendants, she declares, have no right whatever to interfere with the management of the trust, and are in fact, trespassers, who have wrongfully intervened, had their names registered under the Land Registration Act, 1876, in respect of the trust property and usurped the management of it. She now seeks to obtain the possession to which she claims to be entitled under the deed of endowment. She complains of no breach of trust, and she does not ask for any direction as to the administration of the trust.

The Subordinate Judge in the Court below has argued that the defendant now in possession is a trustee *de facto* if not *de jure*, that the suit is for his removal; and that it is one in which the direction of the Court may be necessary for the administration of the trust. He has held, therefore relying upon the decisions in *Neti Rama Jogiah v. Venkatacharulu* (1) and *Sajedur Raja Chowdhuri v. Gour Mohun*

Das Baishnav (1), that section 92 of the Code applies, and that the suit must be dismissed. Assuming, as we must do for the purposes of this appeal, that the defendants are what the plaintiff represents them to be, I think, that a suit, such as this, for the removal of a trespasser in possession of trust property is not a suit of the kind contemplated by the section. Nor, in my opinion, does it help the trespasser to call him a trustee *de facto*. A dacoit might be that, and the provision was surely never intended to protect him from being sued too readily.

The first ruling cited by the learned Subordinate Judge has been distinguished by this Court in *Budree Das Mukim v. Chooni Lal Juhurry* (2) while the second has been dissented from in the same case and also in the earlier case of *Budh Singh Dudhuria v. Niradbaran Roy* (3). These decisions were, no doubt, under section 539 of the Code of 1882, and it is true that clause (a) of section 92, sub-section (1) of the new Code regarding a suit to obtain a decree "for removing any trustee," and sub-section (2), are new. But these additions do not, so far as I can see, alter the law on the point: and I find that in a very recent case, namely, *Muhammad Abdul Majid Khan v. Ahmad Said Khan* (4), which was decided under the present Code, the Allahabad High Court has followed *Budree Das Mukim v. Chooni Lal Juhurry* (2).

I think, therefore, that this appeal must be allowed, the decree of the learned Subordinate Judge discharged, and the suit remanded to the Court below for disposal on the merits.

The costs of the appeal I would make costs in the cause, and I would declare that the appellant is

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entitled to a certificate under section 13 of the Court Fees Act, 1870.

RICHARDSON, J. I agree. The rule of law governing the case is explained in *Budree Das Mukim v. Chooni Lal Johurry* (1).

S. K. B.

Appeal allowed.

(1) (1906) I. L. R. 33 Cal. 789, 807.

CRIMINAL REVISION.

Before Holmwood and Sharfuddin JJ.

MANINDRA CHANDRA GHOSE

v.

EMPEROR.*

1914
 Jan. 16.

Conspiracy—Constructive offence in furtherance of intention common to the accused on trial and another—Abetment by conspiracy—Conspiracy between two persons on trial, three others named and others unknown—Acquittal by jury, of conspirators on trial, effect of—Verdict not conclusive as to persons not on trial—Distinct evidence against latter—Character of verdicts in England and India—Evidentiary value of the same witness as to the identity of different persons—Opinion of the Judge as to the weakness of evidence of identity of persons under trial—Stay of trial against others—Warrant against one, withdrawn on acquittal of other alleged co-offenders—Re-institution of proceedings by the District Magistrate on the advice of law-officers of the Crown—Legality of proceedings.

Where two persons were charged under ss. $\frac{307}{34}$ and $\frac{326}{34}$ of the Penal Code, for offences committed in pursuance of an intention common to them and to the petitioner, and also under ss. $\frac{307}{114}$ and $\frac{326}{114}$ of the Penal Code, for

* Criminal Revision No. 1986 of 1913, against the order of S. C. Sen, Deputy Magistrate of Hooghly, dated Dec. 3, 1913.