

## ORIGINAL CIVIL.

Before GREAVES J.

ALI HAFFIZ

v.

ABDUR RAHAMAN.\*

1915

March 17.

*Parties—Civil Procedure Code (Act V of 1908) s. 92, O. I. r. 3—Public Religious Trust—Suit to remove a trustee and to recover possession of trust property in the hands of a third party—Joinder of parties—Alienee of trustee.*

Where in a suit under s. 92 of the Civil Procedure Code (Act V of 1908) the second defendant, who was the alienee of the trust property, the subject of the suit, contended that the suit should be dismissed as against him on the ground that he was not a necessary party to it :—

*Held*, that there is no reason why, having regard to the provisions of O. I. r. 3 of the Civil Procedure Code, the second defendant should not be made a party to the suit : nor why, if the decision of the Court is against him, he should not be declared to be a trustee of the trust property and be directed to convey the property.

*Budh Singh Dhadhuria v. Niradbaran Roy* (1), and *Budree Dos Mukim v. Choony Lal Johurry* (2) distinguished.

*Compania Sansinena de Carnes Congeladas v. Houlder Brothers* (3) referred to.

THIS was a suit for a declaration that a Bengali, deed of *towliatnamah* executed by one, Vinkey Raur, a Mahomedan woman governed by the Sunni sect of Mahomedan law, and dated the 3rd February 1815, is valid and operative. Also for a declaration that the first defendant, Abdul Rahaman, is not a fit and proper person to act as mutwalli of the waki

\* Preliminary objection in Original Civil Suit No. 484 of 1914.

(1) (1905) 2 C. L. J. 431.

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

(3) [1910] 2 K. B. 354.

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premises at No. 67, Machuabazar Street in the town of Calcutta, and that he should be removed from further acting as mutwalli, and that in his stead two other persons should be appointed mutwallis of the wakf property, or such other person as the Court might direct; And for a further declaration that the alleged sale of the wakf property by the first defendant, Abdul Rahaman, to the second defendant, Munshi Gholam Mowlah, is void and inoperative. The plaintiffs further prayed for an order that the defendants, Munshi Gholam Mowlah and Abdul Rahaman, should deliver up a certain Bengali instrument of conveyance dated the 12th June 1910 for cancellation, and execute such releases in favor of the new mutwallis as may be necessary to perfect the title of the plaintiffs, and that the wakf property should be vested in the new mutwallis.

By his written statement the second defendant, Munshi Gholam Mowlah, pleaded that he was not a proper party to the suit, which was for the execution and administration of a trust and framed under s. 92 of the Code of Civil Procedure, and that no relief by way of ejectment or otherwise could be granted against him. He further pleaded that the suit as framed was bad for misjoinder of parties as also of causes of action. He, therefore, prayed that on these grounds the suit should be dismissed as against him. He also denied that the subject matter of the dispute was trust property.

*Mr. S. R. Das*, (with him *Mr. A. Rasul* and *Mr. Z. R. Zahid Suhrawardy*), for the second defendant, Munshi Gholam Mowlah, took the preliminary objection that there had been a misjoinder of parties and contended that where there is a claim for the administration of a trust, which falls within the purview of

s. 92 of the Civil Procedure Code, as is the case here, a claim to eject an alienee does not come within the scope of the section; nor can a decree for ejectment be made in favor of the plaintiff against a stranger to the trust. In the suit as framed there has been a misjoinder of parties as also of causes of action; and as against the second defendant the suit should, therefore, be dismissed: *Budh Singh Dhudhuria v. Niradbaran Roy* (1), *Huseni Begam v. The Collector of Moradabad* (2), *Kazi Hassan v. Sagun Balkrishna* (3), and *Budree Das Mukim v. Chooni Lal Johurry* (4).

*Mr. S. A. Ashgar*, (with him *Mr. P. N. Chatterjee*) for the plaintiffs. We rely on *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (5), in which the Court decided that a transferee is a proper party in a suit under s. 539, now s. 92 of the present Civil Procedure Code. In the case of *Budh Singh Dhudhuria v. Niradbaran Roy* (1), which is relied on by the other side, Mr. Justice Harington expressed no opinion upon the question of joinder of parties. Mr. Justice Mookerjee no doubt stated that he agreed with the decisions in *Huseni Begam v. The Collector of Moradabad* (2), and *Kazi Hassan v. Sagun Balkrishna* (3); but we submit that his observations are obiter, and these decisions have not been followed in other cases: see *Neti Rama Jogiah v. Venkatacharulu* (6), *Ghazafar Husain Khan v. Yawar Husain and Mehdi Hussain* (7) and *The Collector of Poona v. Bai Chanchalbai* (8), in the last of which it was held that where a transferee of trust property denies that the property is the subject of a public trust for religious purposes, he is a proper and necessary party to a suit

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(1) (1905) 2 C. L. J. 431.

(5) (1897) I. L. R. 24 Calc. 418.

(2) (1897) I. L. R. 20 All. 46.

(6) (1902) I. L. R. 26 Mad. 450.

(3) (1899) I. L. R. 24 Bom. 170.

(7) (1905) I. L. R. 28 All. 112.

(4) (1906) I. L. R. 33 Calc. 789.

(8) (1911) I. L. R. 35 Bom. 470.

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brought under s. 539 of the Civil Procedure Code of 1882, though no relief can be given as against him by way of a decree in ejectment. Here the second defendant has denied that the property in dispute is trust property, and he is therefore a proper and necessary party to this suit.

GREAVES J. In this suit the plaintiffs claim to remove defendant No. 1 from the mutawalliship on the ground that he has committed a breach of trust by alienating a part of the trust property to defendant No. 2 who is alleged to have taken the property with the knowledge that it was trust property. Defendant No. 2 alleges that the property alienated is not trust property and that in any case he had no knowledge of any trust. A preliminary objection was taken on behalf of defendant No. 2 that he is not a necessary party and that he cannot be joined in the suit which is one under section 92 of the Civil Procedure Code. In support of this objection two cases are relied on, namely, *Budh Singh Dhudhuria v. Niradbaran Roy* (1) and *Badri Dass Mukim v. Chooni Lal Johurry* (2). With regard to both cases I am quite in agreement with them in so far as they decide that relief such as is asked here against defendant No 2, does not come within the purview of section 539 of the Civil Procedure Code, Act XIV of 1882, which is now represented by section 92 of the present Civil Procedure Code, but I see no reason why, having regard to the provisions of Order I, rule 3 of the present Civil Procedure Code, defendant No. 2 should not be made a party to the suit and, if my decision is against him, I see no reason why he should not in this suit be declared to be a trustee of the trust property and be directed to convey the property. I

(1) (1905) 2 C. L. J. 431, 434. (2) (1906) I. L. R. 33 Cal. 789, 805.

should add that I am fortified in the view that I have expressed by a consideration of the provisions of Order XVI, r. 4 of the English Procedure Rules; see *Compania Sausinena de Carnes Congeladas v. Houlder Brothers* (1) and the notes in the English Annual Practice for 1915, at p. 221. Order I, rule 3 of the Civil Procedure Code is very similar in terms, in fact almost identical with Order XVI, r. 4 of the English Procedure Rules and is probably founded thereon and consequently the opinions expressed in Order XVI, r. 4, by the English Judges may well be considered in construing the provisions of Order I, r. 3. I accordingly overrule the preliminary objection.

W. M. C.

Attorney for the plaintiff: *N. C. Dutt*.

Attorney for the defendant, Ghulam Mowlah: *H. C. Bannerjee*.

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(1) [1910] 2 K. B. 354.