

CIVIL RULE.

Before Chatterjea and Panton JJ.

1920

FAKRUNNESSA BEGUM

Jan. 2

v.

DISTRICT JUDGE OF 24-PARGANAS.*

Mahomedan Law—Wakf—Mutwali, lease by—Sanction of Judge (Kazi), how obtainable—Civil Procedure Code (Act V of 1908), s. 92.

Section 92 of the Code of Civil Procedure evidently relates to suits claiming any of the reliefs specified in sub-s. (1) thereof.

An application by a *mutwali* for sanction to grant a lease is not a suit under sub-s. (1) of s. 92.

The application for sanction should be made to the District Judge if the property is situated in the mofussil, or to the Judge on the Original Side of the High Court, if it is within a Presidency Town. It is not necessary to bring a suit for obtaining such sanction; it will be granted upon a proper application being made by the *mutwali*.

Any application made by the *mutwali* will of course be enquired into by the District Judge before sanctioning a lease as *Kazi*.

Application under s. 115, Civil Procedure Code, by Fakrunnessa Begum, the petitioner.

The petitioner was the present *mutwali* of the *wakf* estate created by the late Nawab Jehannessa Begum, the paternal grandmother of petitioner. Appertaining to the said *wakf* and situate in Chitpore in the northern suburbs of Calcutta was a plot of land, measuring about 8 cottahs, contiguous to a plot of 10 cottahs belonging to the petitioner, and the entire 18 cottahs were in the occupation of 8 *ticca* tenants at a total rental of Rs. 17-5-8 a month which it was very difficult to realise.

* Civil Rule No. 657 of 1919, against the order of M. Smither, District Judge of 24-Parganas, dated Nov. 10, 1919.

One Govind Singh, a merchant and contractor of Chitpore, offered to take a lease of the entire 18 cottahs aforesaid for a premium of Rs. 3,500 and at a rental of Rs. 3-12 per cottah per month for a period of 49 years certain with the option of a further period of 49 years at a rental of Rs. 4 per cottah per month. The petitioner considering it to be beneficial to the *wakf* accepted the said offer subject to the sanction of the Court regarding the plot of 8 cottahs belonging to the *wakf*. The petitioner accordingly made an application to the District Judge of 24-Parganas supported by an affidavit asking for permission to grant a lease of the said *wakf* land on the terms stated above, but the learned District Judge rejected the same, the material portions of his order being as follows :—

“ This is an application for permission to lease property of a public trust of a religious nature. No permission of the Advocate-General, as required by section 92, C. P. C., has been obtained. I have heard the applicant's pleader. He has referred me to several cases the latest of which is *Nimai Chand Addya v. Golam Hossein* (1). Cases are all of dates preceding the Civil Procedure Code of 1908, sub-s. (2) of which is new.

No doubt under the Mahomedan Law it was necessary and sufficient to get the permission of the *Kazi* in such a matter. If the *wakf* is a private *wakf*, not coming within the description in section 92, that permission is still all that is necessary. Very many of the Mahomedan *wakfs* are of a private nature.

The application of s. 92 is universal. There is no exception in favour of Mahomedan trusts. The underlying principle is also of general application. Where there is a trust for public purposes, the trustees may be themselves deeply interested, but individual beneficiaries, members of the public, may each be so little concerned and so little inclined to take any trouble, that none of them will do anything to prevent breach of the trust by the trustees.

Thus, in this country, buildings which should be kept up out of such funds fall in ruins, and so on.

Section 92, in the circumstances, imposes a duty on an officer of the Crown, the Advocate-General, to go into the question, whether a suit should be brought.

(1) (1909) I. L. R. 37 Calc. 179.

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Under sub-s. (2) suits without such permission are prohibited.

Under sub-s (1) (f) such permission is necessary, if the purpose is to lease.

It was argued that though section 92 prohibits a suit, it does not prohibit an application.

If it could be held that an application will lie, in spite of the provisions of section 92, for the purposes specified in section 92, then the provisions of s. 92 would be stultified at any rate in respect of *wakfs*.

It seems that there has been no decision in the High Court since the new Code was enacted.

In my opinion, s. 92 lays down a special procedure for such a matter as is now before the Court, and the Court should insist on that procedure, in which the safeguards intended to be provided by s. 92 would not be lost.

Application rejected."

Maulvi Nuruddin Ahmed, for the petitioner. Section 92 of the Code of Civil Procedure does not apply to the present case. That section only applies to a suit relating to trusts and not to an application (like the present) for sanction of the Judge as *Kazi*. As a matter of practice such applications have always been entertained in the Original Side of this Court as well as by District Courts in the mofussil: see Ameer Ali's Mahomedan Law, 4th Edition, Vol. I, page 479. Section 93 of the new Civil Procedure Code substantially reproduces the terms of section 539 of the old Code, and it is inconceivable that this practice would have been countenanced if section 539 had been a bar. The learned Judge seems to think the sub-section (2) of section 92 is a bar. But sub-section (2) cannot obviously apply where the section itself is inapplicable. My difficulty is this, that if I am to bring a suit, against whom should I bring it as defendants?

No one showed cause.

CHATTERJEA AND PANTON JJ. The petitioner before us is the *mutwali* of a Mahomedan endowment and she applied to the District Judge for sanction

to grant a lease of a piece of land comprised in the endowment. The learned District Judge disallowed the application on the ground that it was necessary for the *mutwali* to bring a suit under section 92 of the Civil Procedure Code with the consent of the Advocate-General.

We do not think it is necessary for the *mutwali* to institute a suit under section 92 of the Code. Under the Mahomedan Law, a trustee is not entitled to let out immovable property for more than one year, or three years in certain cases, without the sanction of the *Kazi*. The powers of the *Kazi* are ordinarily exercised by the District Judge in the mofussil, and the sanction given by the District Judge on an application by the *mutwali* may be sufficient authority for the *mutwali* for letting out the property. The learned District Judge was of opinion that it was necessary to bring a suit under section 92 of the Civil Procedure Code in a case like this because sub-section (2) of that section provides that "save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

That evidently relates to a suit claiming any of the reliefs specified in sub-section (1). But the present application for sanction is not a suit under sub-section (1) of section 92. We may refer to a passage in Ameer Ali's Mahomedan Law, 4th edition, p. 480, where the learned author says, "The application for sanction should be made to the District Judge if the property is situated in the mofussil, or to the Judge on the Original Side of the High Court, if it is within a Presidency town. It is not necessary to bring a suit for obtaining such sanction; it will be

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granted upon a proper application being made by the *mutwali*. If there are *Nazirs*, their consent should be obtained as a condition precedent to the application. If the *wakf* is of a public nature, notice should be given to the beneficiaries in any mode the Judge directs, either by advertisements in newspapers or by posting it up at the institution to which the *wakf* property belongs."

Any application made by the *mutwali* will of course be enquired into by the District Judge before sanctioning a lease as *Kazi*: and the manner in which the enquiry may be made is indicated above.

We are accordingly of opinion that the order of the Court below must be set aside and the case sent back to the learned District Judge in order that he may enquire into the merits of the application and dispose of it according to law.

Let the record be sent down without delay.

G. S.

Rule ab olute.