APPELLATE CIVIL.

1935

May 28.

Before D. N. Mitter and Rau JJ.

ABDUL MAJID

v.

AKHTAR NABI*.

Trust—Charitable or religious trust—Parties to suit—Stranger to trust, constructive trustee, de jure *trustee or trustee* de son tort*—Code of Civil Procedure (Act V of 1908), s. 92.*

A stranger to a trust is neither a necessary nor a proper party to a suit under section 92 of the Code of Civil Procedure. Suits for recovery of possession of trust properties from third parties, for instance, from trespassers and from the transferees from the trustees are not within the scope of section 92 of the Code of Civil Procedure; and where a stranger to the trust has been added as party to a suit which is purported to have been brought under section 92 of the Code, the suit loses its character as such.

Budh Singh Dudhuria v. *Niradbaran Roy* (1), *Gholam Mowlah* v. *Ali Hafiz* (2), *Abdur Rahim* v. *Mahomed Barkat Ali* (3) and *Johnson Po Min* v. *U Ogh* (4) referred to.

But where, according to the allegations in the plaint, the purchase of trust property was made by a stranger with full knowledge of the trust and his position is that of a constructive trustee or *de jure* trustee or trustee *de son tort*, a suit against such stranger to the trust is maintainable under section 92 of the Code of Civil Procedure.

Barnes v. *Addy* (5), In re *Spencer. Spencer* v. *Hart* (6), In re *Blundell. Blundell* v. *Blundell* (7), *Thomson* v. *Clydesdale Bank, Limited* (8) and In re *Barney. Barney* v. *Barney* (9) referred to.

FIRST APPEAL by the plaintiffs.

The facts of the case are sufficiently stated in the judgment.

Phanibhooshan Chakrabarti and *Abul Hossein* for the appellants. If a trust is denied by the defendant in a suit under section 92 of the Code

*Appeal from Original Decree, No. 174 of 1932, against the decree of A. N. Sen, District Judge of Dacca, dated April 21, 1932.

(1) (1905) 2 C. L. J. 431.
(2) (1915) 28 C. L. J. 4.
(3) (1927) I. L. R. 55 Calc. 519; L. R. 55 I. A. 96.
(4) (1932) I. L. R. 10 Ran. 342.
(5) (1874) L. R. 9 Ch. 244.
(6) (1881) 51 L. J. (Ch.) 271.
(7) (1888) 40 Ch. D. 370.
(8) [1893] A. C. 282.
(9) [1892] 2 Ch. 265.

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of Civil Procedure, the mere fact of such denial does not take the suit out of section 92 of the Code or convert it into a suit for declaration and consequential relief, but the court may frame an issue and try the suit on the original plaint. The present case is distinguishable from the decided cases, as here the defendant No. 2 is a constructive trustee, *de jure* trustee or trustee *de son tort* and is not a *bona fide* purchaser for value without notice of the trust. His case is, therefore, covered by the provisions of section 92 of the Code. *Budh Singh Dudhuria* v. *Niradbaran Roy* (1) and other cases.

Narendrachandra Basu, Jyotishchandra Banerji and *Pramoderanjan Guha* for the respondents. Defendant No. 2 is an alienee of what is alleged to be trust property and he being a stranger to the trust could not be impleaded and no relief sought against him in a suit under section 92 of the Code of Civil Procedure. *Gholam Mowlah* v. *Ali Hafiz* (2) and other cases.

D. N. MITTER J. This is an appeal from the decision of the District Judge of Dacca dated the 21st April, 1932, by which he dismissed the suit brought by the plaintiffs under section 92 of the Code of Civil Procedure in the following circumstances. It appears that the plaintiffs, who are the appellants before us, brought a suit under section 92 of the Code of Civil Procedure, with the necessary sanction against the two defendants. The allegation against defendant No. 1 was that he was the sole *mutâwâlli* of the *wâkf* property in question and he began to treat the *wâkf* property as his own and he did not properly look to the interest of the *wâkf*. It was further stated that defendant No. 1, after having assumed the position of the sole *mutâwâlli*, mortgaged the *wâkf* property and raised money for his own use in contravention of the terms of the *wâkfnâmâ* and

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against the directions and practices of the former *mutâwâlli*. In paragraph No. 13 of the plaint it was stated that defendant No. 1 in collusion with defendant No. 2 transferred the *wâkf* property to defendant No. 2 most wrongfully and illegally. In paragraph No. 14 an allegation was made to the effect that defendant No. 2 procured the said defendant No. 1 to do various wrongful and unconscionable things with reference to the *wâkf* property with full knowledge of the fact that the properties had been permanently dedicated to the mosque referred to in the earlier part of the plaint. In paragraph No. 17 of the plaint it is stated that defendant No. 2 has been in possession of the *wâkf* property and the rent, profits and income of the *wâkf* properties are now being utilised for their own benefit and the mosque has thus been deprived of them. In paragraph No. 19 a very important statement is made to which prominent attention should be drawn for the purpose of determining the controversy raised in the present appeal. That statement is this:—

> That the defendant No. 2 knowingly and fraudulently took possession of the *wâkf* properties and has been utilising the income thereof in collusion with defendant No. 1, and hence both of them are liable to accounting as trustee *de son tort*.

An equally important statement or allegation is made in paragraph No. 20 of the plaint, which runs to the following effect:—

> That the defendant No. 2 is not a *bona fide* purchaser for value without notice and as such is a constructive trustee of the *wâkf* properties in his possession and is therefore legally liable to restore the possession of the said properties to the legally appointed *mutâwâllis*.

On these relevant statements in the plaint relief was asked for as against defendant No. 1 alleging as against him that he had been guilty of several breaches of trust which are enumerated in paragraph No. 22 of the plaint (*vide* pages 7 and 8 of the paper book). Plaintiff's prayers are contained in paragraph No. 25 of the plaint and it is necessary to refer to prayers (a) and (b). Prayer (a) is to the following effect:—

> That the defendants may be removed from position of trustees or *mutâwâllishîp de jure* or *de son tort* or constructive.

Prayer (b) runs as follows:—

That a *mutáwálli* be appointed to take charge of and administer the *wákf* properties; and the same may be vested in him.

This plaint was filed on the 1st December, 1931, in the court of the District Judge of Dacca. Summonses were served on the defendants fixing the 7th January, 1932, for settlement of issues. Both the defendants entered appearance and asked for time to file written statements. After another adjournment on the 10th March, 1932, the defendants ultimately filed two written statements. In the written statement of defendant No. 2 one averment was made in paragraph No. 13, which it is necessary to notice now, although the question does not depend on what is stated in the defendant's written statement, for the matter in controversy before us has to be decided solely on the allegations in the plaint. But we refer to this paragraph to show how defendant No. 2 understood the allegations in the plaint made against him. Paragraph No. 13 of his written statement is to the following effect:—

That the defendant No. 2 not having taken upon himself the character of a trustee, rather having asserted hostile title to the alleged trust, he cannot be treated as trustee *de jure* or *de son tort* or constructive, and the suit as such is not maintainable against him.

After the filing of this written statement, it appears that, on the 23rd March, 1932, the matter came up before the District Judge, who after hearing the pleaders recorded the following order:—

Pleaders heard. The defendants deny that the property is a public trust at all and contended that it is their private property. The suit cannot proceed unless the plaintiffs obtain a declaration that the property is trust property. It is perfectly true that such a suit would be instituted in the court of the Subordinate Judge. But this court has jurisdiction over the property and no useful purpose would be served by compelling the plaintiffs to institute two suits. The plaintiffs are directed to amend their plaint and pay court-fees within a month, failing which, the suit will be dismissed.

This order is numbered 5 and dated the 21st March, 1932. On the 21st April, 1932, the plaintiffs applied for time and as the pleaders were not present, the application for time was refused and the suit was dismissed in accordance with Order No. 5, dated the 21st March, 1932. It is against this order, dated the

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21st April, 1932, which is really a consequential order on the one passed on the 21st March, 1932, that the present appeal has been brought and it has been contended before us that the learned judge has committed an error of law in dismissing the suit on the failure of the plaintiffs in furnishing the necessary court-fees after amending their claim in the manner suggested by the court. The order of the learned District Judge is a very cryptic order and extremely brief and we do not actually know under what circumstances the suit was dismissed. All that we can get from the order is that the learned judge was of opinion that unless the plaintiffs could obtain a declaration that the property was trust property the suit could not proceed. The nature of the trust was disputed by the defendants and the issue which might have to be determined in the suit was as to whether the trust is a public charitable trust within the meaning of section 92 of the Code of Civil Procedure.

In support of the appeal it has been contended on behalf of the appellants that, in a suit under section 92, it is competent for the court to decide the question as to whether the trust in respect of which the suit is brought is a public charitable trust or not so as to attract the application of section 92 of the Code of Civil Procedure and that a separate suit for the declaration that the property is a trust property is not necessary. This position has not been disputed on the other side and authorities were shown that in a suit such as this an issue may be raised as to whether the trust was a trust contemplated by section 92 of the Code of Civil Procedure. But the argument before us has centred on two questions: (i) It has been said that as defendant No. 2 is an alienee in respect of the trust property and the property has been sold to him, the suit is not one under section 92, because where a stranger to a trust has been added as party to a suit which is purported to have been brought under section 92 the suit loses its character,

as such. In other words, it is said, that it falls outside the range of section 92 suit as soon as a stranger to the trust has been made a party to the suit. Numerous authorities have been placed before us. There has been some divergence of opinion between different High Courts, more particularly the High Courts of Allahabad and Bombay on this question. But it has been consistently held throughout, in so far as this High Court is concerned, that a stranger to a trust is neither a necessary nor a proper party to a suit under section 92 of the Code of Civil Procedure. We may refer in this connection to the very early case on this point of *Budh Singh Dudhuria* v. *Niradbaran Roy* (1). At page 437 of the report Asutosh Mookerjee J., after dealing with the contention whether under section 539 of the Code of 1882, which corresponds to section 92 of the present Code, a suit for the dismissal of a trustee and for the recovery of trust property from the hands of a third party to whom the same has been improperly alienated, is within the scope of that section, notices the divergence of opinion on the question. After considering the divergence of opinion the learned Judge found himself wholly unable to accept the view, namely, that a decree for the recovery of trust property from the hands of a stranger to whom it has been improperly alienated may be made in a suit instituted under section 539, Civil Procedure Code. The learned Judge says:—

> It is reasonably clear that a decree for the removal of a trespasser does not come within the scope of the clauses (*a*) *to* (*e*) (of section 539), nor is it comprehended, I think, in the general clause which speaks of a decree granting such further or other relief as the nature of the case may require.

This was undoubtedly a case of ejectment of a trespasser and it was held that if a suit to eject a trespasser does not fall within the purview of section 539, the claim for precisely the same purpose cannot be joined with a claim for administration of the trust under that section. Towards the end of

(1) (1905) 2 C. L. J. 431, 437.

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the judgment, Mookerjee J. observed as follows:—

That an alienee was transferee from the original transferor who was neither a necessary nor a proper party to the suit.

It is contended on behalf of the appellant that these observations are too wide. But these observations were followed in subsequent cases as will presently be shown. Reference may be made to another case of this Court, namely, the case of *Gholam Mowlah* v. *Ali Hafiz* (1) where Sir Lancelot Sanderson, Chief Justice, and Woodroffe and Mookerjee JJ. affirmed the view taken in the case reported in 2 C. L. J. 431 just cited. Mookerjee J. said that he need not repeat the grounds on which he based his view in that case when he held that suits for recovery of possession of trust properties from third parties, for instance, from trespassers and from the transferees from the trustees, were not within the scope of section 539 of the Code of Civil Procedure of 1882, which has been subsequently replaced by section 92 of the Code of 1908. So far as this Court is concerned, this is the view which has been consistently taken. In this case there was no prayer for ejectment of defendant No. 2. But the question surely is to be decided on the pleadings as to whether the trust is a public charitable trust within the meaning of section 92, Code of Civil Procedure, and whether such a declaration can in this case be made when the transferee is a stranger to the trust so as to be binding on the alienee. Opinions of various High Courts are collected together in Sir D. F. Mulla's commentary on the Code of Civil Procedure at page 307 of the 10th edition (1934). The learned commentator says this:—

"All High Courts are agreed that in a suit such as the above" (suit under section 92) "a decree cannot be passed against the alienee directing him to *deliver possession* of the property to the plaintiffs, though he is a party to the suit as such relief is neither specifically mentioned in the section nor implied in clause (*h*), and that the remedy of the newly appointed trustee is to institute a separate suit for *possession* against him. The proposition that the court has no power under this section to pass a decree against an alienee

(1) (1915) 28 C. L. J. 4.

directing him to deliver possession to the plaintiffs is in accordance with a recent ruling of the Privy Council where it was held that a relief or a remedy against third persons, that is, strangers to the trust was not within the scope of this section."

The learned author relies in this connection on the case of *Abdur Rahim* v. *Mahomed Barkat Ali* (1). Then the learned commentator gives his own opinion regarding the power of the court to make a declaration and submits—

> that the court has also no power under this section to make a declaration that the property in suit is not trust property *so as to bind the alienee*, such a relief also being outside the scope of the section.

There is a very recent decision of Sir Arthur Page C. J. of Burma where all the cases on this point are exhaustively reviewed and the learned Chief Justice has held that the plaintiffs in a suit framed under section 92 are not entitled to claim against strangers to the trust either a declaration of title or possession or any other relief, and a suit under section 92 in which a claim for relief which the court is competent to decree in such a suit entails a clear misjoinder both of parties and of causes of action, and unless the plaint is amended the suit cannot be sustained. The case referred to is the case of *Johnson Po Min* v. *U. Ogh* (2). This view also seems to be in consonance with what has been maintained by this Court in so far as this point is concerned. But the learned advocate for the appellants has sought to argue that the present case is distinguishable from the Rangoon case and the cases taking the same or similar view seeing that this is not a case of alienation pure and simple or of *bona fide* purchase for value without notice of the trust. On the other hand it is argued that this is a case when according to the allegations made in the plaint the purchase was made by defendant No. 2 with full knowledge of the trust. The position of defendant No. 2 is that he is a constructive trustee, and the appellant argues, and, in our opinion, rightly, that the case of constructive trustee, or *de jure* trustee,

(1) (1927) I. L. R. 55 Calc. 519; L. R. 55 I. A. 96.

(2) (1932) I. L. R. 10 Ran. 342.

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or trustee *de son tort* is covered by the provision of section 92 of the Code of Civil Procedure. Mr. Basu for the respondents has, however, contended in reply that there is no case of constructive trustee here for since the moment of his purchase the defendant ceased to act as constructive trustee to act in the interest of the trust. The question really does not depend on that circumstance for, according to the authorities to which we shall presently refer, the allegations made in the plaint do constitute defendant No. 2 a constructive trustee. We may refer in this connection to the law with reference to constructive trusts as has been summarized in Underhill's "Law "of Trusts and Trustee", when the learned author refers to a number of cases which really do support the view stated above, namely, when a stranger to a trust receives money or property from the trustee, which he knows (i) to be part of the trust estate, and (ii) to be paid or handed to him in breach of the trust, he is a constructive trustee of it for the persons equitably entitled but not otherwise: see page 182 of the eighth edition, Underhill's "Law of Trusts" (1926). The learned author has referred in support of this proposition to a number of cases, to which reference may be made: *Barnes* v. *Addy* (1), In re *Spencer*. *Spencer* v. *Hart* (2), In re *Blundell*. *Blundell* v. *Blundell* (3), *Soar* v. *Ashwell* (4), *Thomson* v. *Clydesdale Bank, Limited* (5), In re *Barney*. *Barney* v. *Barney* (6). Our attention has also been drawn to a passage in Lewin's well-known treatise on the Law of Trust. We are referred, in particular, to a passage at page 205 and to another passage at page 1100 of the eleventh edition of the work. At page 1100, where the question has been more elaborately discussed, the learned author states the law thus:—

> But if the alienee be a *purchaser* of the estate at its full value, then (subject as aforesaid) if he take with *notice* of the trust, whether the notice be actual or constructive, he is bound to the same extent and in the same manner as the person of whom he purchased, even though the conveyance was made to him.

(1) (1874) L. R. 9 Ch. 244.
(2) (1881) 51 L. J. (Ch.) 271.
(3) (1888) 40 Ch. D. 370, 381.
(4) [1893] 2 Q. B. 390.
(5) [1893] A. C. 282.
(6) [1892] 2 Ch. 265.

The learned author cites cases in support of this proposition. Therefore, looking to the averment of the appellants in the pleadings, defendant No. 2 is a constructive trustee of the *wâkf* property. The suit cannot be said, on the allegations made in the plaint, not to be one falling within the provisions of section 92 of the Code of Civil Procedure. The suit is maintainable without payment of *ad valorem* court-fee for the declaration.

In these circumstances, the proper order to make is to set aside the orders of the District Judge, dated the 21st March, 1932, as well as the 21st April, 1932, which last order is really the final order, and to direct that the case be sent back to the District Judge in order that he may try the suit in accordance with law. We do not, and indeed we cannot, express any opinion as to truth or otherwise of the allegations made in the plaint on which it is claimed that defendant No. 2 is a constructive trustee. That is a matter of evidence. All that we can say is that the allegations if proved are quite sufficient in law to bring the suit under the provisions of section 92 of the Code of Civil Procedure.

The appellants are entitled to get their costs in this appeal. The hearing fee is assessed at five gold mohurs.

RAU J. I agree.

Appeal allowed.

A. A.