

APPELLATE CIVIL.

Before D. N. Mitter and Patterson JJ.

MAHMUDA BIBI

v.

IFFAT ARAH BEGUM.*

1936
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April 23.

Mahomedan Law—Wākḥ—Commissioner of Wākḥs, if can intercene at the appellate stage—“Suit or proceeding,” Meaning of—Bengal Wākḥ Act (Beng. XIII of 1934), ss. 69, 70, 83.

The Commissioner of *Wākḥs* appointed under the Bengal *Wākḥ* Act (Bengal XIII of 1934) is not entitled under s. 70 to intervene in a suit or proceeding at its appellate stage.

The words “suit or proceeding” in ss. 69 and 70 (1) of the Bengal *Wākḥ* Act are used in their ordinary sense and do not include an appeal.

Bharasi Lal Chowdhry v. Sarat Chunder Dass (1) and *Amarsangji Dungarji v. Deepsangji Pawabhai* (2) referred to.

Chamed Sheikh v. Naba Gopal Ghosh (3) and *Faizunnessa v. Golam Rabbani* (4) distinguished.

Any right or rights, which are acquired at the time of the institution of a suit—by or against a *mutāwāllī*—or after the passing of a decree, as the case may be, including the right to compromise or settle the dispute without reference to the Commissioner of *Wākḥs*. are saved by the provision of s. 83 of the *Wākḥ* Act.

APPLICATION by the Commissioner of *Wākḥs* under the Bengal *Wākḥ* Act to have a previous order of the Court vacated.

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

H. S. Suhrawardy and *Abdul Husain* for the petitioner. The word “suit” in ss. 69 and 70 of the

*Application in Appeals from Original Decrees, Nos. 25 and 26 of 1936.

(1) (1895) I. L. R. 23 Cal. 415.

(3) (1914) 19 C. W. N. 359.

(2) (1924) I. L. R. 49 Bom. 442.

(4) (1935) I. L. R. 62 Cal. 1132.

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Wâkf Act includes appeal. An appeal is but a continuation of the suit. O. I, r. 10, C. P. C. The ordinary meaning of the word includes the final stage and even the execution proceeding. This contention gets indirect support from s. 2, cl. (10) of the Limitation Act, 1908. There the word "suit" has been defined, I should submit, by way of exception not to include appeal. Unless the word suit ordinarily includes appeal s. 2 (10) of the Limitation Act would not have found place in the Act. The decisions in *Faizunnessa v. Golam Rabbani* (1) and *Chamed Sheikh v. Naba Gopal Ghosh* (2) also support this contention.

Even if the word "suit" is narrowly interpreted not to include appeal, the word "proceeding" in s. 70 ought to include appeal within the meaning of s. 141, C. P. C. An appeal is a proceeding and the Civil Procedure Code has not been excepted by the Bengal *Wâkf* Act. The receiver has been appointed in an application under O. XL, r. 1 of the Code. The application started the proceeding in which the order appointing the receiver was passed on March 30, 1936. The Bengal *Wâkf* Act, 1934, came into force on March 1, 1936, and the application was made on March 2. The Commissioner of *Wâkfs* therefore was entitled to notice under s. 70 (1) of the Act. He did not receive any such notice. Hence he applied for having the order dated March 30 declared void under s. 70 (4) of the Bengal *Wâkf* Act.

Charu Chandra Biswas and *Narendra Nath Mitra* for the opposite party Nos. 1 and 2. The application is not maintainable. Section 70 of the Bengal *Wâkf* Act has no application where, as here, there is a dispute as to whether the alleged *wâkf* is *wâkf* or not. It refers only to a suit or proceeding "in respect of a "*wâkf* property," that is to say of an admitted *wâkf* property. This is in keeping with the whole scheme of the Act, which was enacted only to secure efficient

(1) (1935) I. L. R. 62 Cal. 1132. (2) (1914) 19 C. W. N. 359.

management and administration of *wâkf* properties in Bengal (*vide* preamble and definition in s. 6). The functions of the Commissioner of *Wâkfs* defined in s. 27 do not include the power or duty to investigate into any dispute regarding the genuineness or validity of any *wâkf*. Section 37 again merely contemplates an enquiry relating to the administration of a *wâkf*. Section 44 also, which speaks of enrolment of *wâkfs*, presupposes the existence of an admitted *wâkf*: sub-s. (5) of this section authorises the Commissioner to enquire only as regards the genuineness or validity of the application for enrolment, not as to the genuineness or validity of the *wâkf*. Section 67 expressly excludes suits or proceedings involving any claim by or against a stranger to the *wâkf*. In such cases the Commissioner may only apply to be made a party and conduct or defend the suit or proceeding under s. 71. He may also institute suits or proceedings under s. 72 for recovery of *wâkf* property, *etc.* From all this it is clear that the Commissioner has jurisdiction only in regard to *wâkf*, as to the *wâkf* character of which there is no dispute. The words "suit or proceeding" in s. 70 must therefore be taken to mean only suits or proceedings in which there is no question as to whether the alleged *wâkf* property is really *wâkf* or not. The provisions of s. 75 regarding costs of suits and proceedings incurred by the Commissioner also support this view.

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Secondly, even if s. 70 is held to include a case of disputed *wâkf*, it applies only to a suit or proceeding, not to an appeal. "Suit" does not include an appeal. The cases cited by the petitioner are not in point. As for the argument that O. I, r. 10, C. P. C., though in terms it refers to a suit, applies also to appeals, and the appellate Court may make an order for addition of parties as much as the original Court, this is by virtue of the express provisions of s. 107 (2), C. P. C., *vide* also O. XXII, r. 11 of the Code where "suit" is expressly stated to include "appeal". The word "proceeding" likewise is not intended to include

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appeal. The word "proceeding" has been used as distinguished from "suit" to mean proceedings like those referred to, *e.g.*, in s. 74 of the Act, *viz.*, Land Acquisition proceedings. The legislature intended to give the Commissioner power to intervene only in the original Court, and not for the first time at the appellate stage, and there may be very good reasons for it.

Thirdly, s. 70 applies only to suits or proceedings instituted after the commencement of the Act. Even if these words are wide enough to include appeal, the appeals here having been instituted long before March 1, 1936, the section will not apply.

D. P. Chatterjee and Ranjit Kumar Banerji for the receiver.

I. P. Mukerji, Kshetra Mohan Chatterji and Kshiteesh Chandra Chakrabarti with *Prabhash Chandra Basu* and *Amiruddin Ahmad* with *Rakhal Chandra Datta* for the other opposite parties.

D. N. MITTER J. This is an application by the Commissioner of *Wákfs*, Bengal, who has been appointed under the Bengal *Wákf* Act (Bengal Act XIII of 1934). The application purports to be under s. 70 (4) of the said Act. It appears that two appeals are pending in this Court in which the question in controversy is as to the accuracy of the findings of the Subordinate Judge with regard to certain properties being *wákf* properties. In those two appeals by consent a receiver was appointed during the pendency of those two appeals. The application for appointment of a receiver was made on March 2, this year, a day after the Act in question came into force. The present application is for vacating the order made by this Court on consent in those two appeals for the appointment of a receiver. By that order, Mr. P. N. Tagore was appointed a receiver of rents, issues and profits of all

the properties comprised in the estate found to be the *Wâkf* estate of Prince Kamar Kadar Mirza Bahadur excepting as regards premises No. 4, Kailasarak Road and certain other properties, the details of which it is not necessary to enter into. It appears that the application, as has already been stated, is one under s. 70 (4) of the Act. The questions which have to be considered with reference to the maintainability of this application really turn on the construction of the two sections of the Bengal *Wâkf* Act, namely, ss. 69 and 70. Section 69 is in these terms :—

No suit or proceeding by or against a *mutâwâlli* as such in any Court shall be compromised without the sanction of the trying Court.

[Section 70 (1) enacts that notice must be given to the Commissioner of *Wâkfs* in every suit or proceeding excepting certain suits for rent, *etc.*, at the cost of party instituting such proceedings. Section 70, cl. (4) enacts that in the absence of a notice under sub-s. (1) any decree or order passed in the suit or proceedings would be void if the Commissioner applies to the Court within one month of his knowledge. It is contended that the words "suit or proceeding" would include an "appeal" and as the proceedings for the appointment of the receiver were initiated in the appeal it must be regarded as a suit or proceedings within the meaning of s. 69 or 70. We are unable to accede to this contention. The words "suit or proceedings" must be regarded in its ordinary sense and cannot be held to include "appeal". A reference to ss. 11 and 15 of the C. P. C., 1908, would show that a suit does not include an appeal. With reference to *res judicata* (s. 13 of 1882) it has been held that a suit does not include an appeal. See *Bharasi Lal's case* (1). See also *Amarsangji Durgarji Deepsangji Pawabhai* (2). Our attention has

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been drawn by Mr. Suhrawardy to a decision of this Court to which I was a party, and the language used there is to the effect that an appeal is really a continuation of the suit. Something of that kind is also said in the decision of the case of *Chamed Sheikh v. Naba Gopal Ghosh* (1). The decision to which I was a party is reported in 39 Calcutta Weekly Notes at page 951. It is a decision of the case of *Faizunnessa v. Golam Rabbani* (2). The state of facts in those cases are entirely different and those cases are no authority for the proposition that the word a "suit" must be taken to include an "appeal." Besides, if one looks to the policy underlying the provisions of ss. 69 and 70 there can be no doubt that the legislature intended that the Commissioner of *Wākfs* can intervene when the suit or proceeding initiated is pending at the time when the provision of the Act regarding Commissioner of *Wākfs* came into force. Besides, it will be noticed that under s. 83(a) and (b) there are certain saving clauses. In our opinion ss. 83(a) and 83(b) furnish a complete answer to the contention of the applicant. The suit was instituted long before the promulgation of the Act of 1936, and any right or rights, which were acquired at the time of the institution of the suit or even after the passing of the decree which was long before the promulgation of the Act in 1936 cannot be affected by the provisions of the latter Act. It was open to the parties before the promulgation of the Act to settle their dispute in a suit by or against *mutāwālli* without reference to the officer who had not come into existence then. That right cannot be said to have been taken away by anything which was done without any reference to or notice to the officer appointed long after. We are of opinion that ss. 83 (a) and 83 (b) are intended to cover a case of this kind. The words "suit or proceeding" in s. 70 (1) have the same meaning as the said words in s. 69.

(1) (1914) 19 C. W. N. 359. (2) (1935) I. L. R. 62 Cal. 1132.

We therefore hold that this application of the Commissioner is incompetent and must be rejected.

The receiver will pay his own costs and also the costs of the different parties who have appeared to oppose this application.

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The hearing fee of Mr. Biswas's client is assessed at three gold mohurs and that for the other parties at two gold mohurs.

PATTERSON J. I agree.

Application dismissed.

A. A.