ABBOY CHETTI v. RAMA-CHANDRA RAU.

The District Munsif decreed in favour of the plaintiffs, and the defendant preferred this appeal.

Mahadeva Ayyar for petitioner.

Pattabhirama Ayyar and *Venkatarama Sarma* for respondents.

JUDGMENT.—This case is governed by the decision in *Pattat Ambadi Marar* v. *Krishnan*(1), wherein it was held that an assignment by an agreement in writing of all the assignor's property, including a promissory note, was held not to be sufficient to sustain a suit by the assignee on the note in the absence of an endorsement. The ground of decision is that a promissory note cannot be negotiated by the mere execution of a deed of assignment. The right of suit did not pass to the plaintiffs by operation of law, for the company of which defendant was a member was wound up, and it is admitted that the plaintiffs' firm derived its right from assignment by exhibits B and C. The promissory note purports to be payable to the payee or order, and it is not denied that it is a negotiable instrument. I set aside the decree of the District Munsif, and direct that the suit be dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1891. December 11. 1893. November 24. 1894. January 26. March 7.

RANGASAMI NAICKAN (PLAINTIFF No. 1), APPELLANT,

v.

VARADAPPA NAICKAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure—Act XIV of 1882, s. 539—Whether a suit to remove a trustee to a charitable trust lies under the section.

A suit to remove a trustee to a charitable trust does not lie under s. 539 of the Code of Civil Procedure. *Narasimha* v. *Ayyan Chetti*(2), followed.

Per Shephard, J.—The language of s. 539 is in part borrowed from 52 George III., cap. 101 (Sir Samuel Romilly's Act) and the decisions upon that statute are in a measure reproduced in the section. Section 539 should, accordingly, be construed in the light of the decisions on that statute, so far as they are applicable

(1) I.L.R., 11 Mad., 290. (2) I.L.R., 12 Mad., 157. * Appeal No. 66 of 1891.

to the language of the section, and the statute having from the first been held to be inapplicable to cases in which the hostile removal of a trustee is required, s. 539 is likewise inapplicable to such cases.

APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in original suit No. 49 of 1889.

The facts of the case appear sufficiently for the purpose of this report from the judgments of the Full Bench of the High Court.

Mr. *D'Rozario* for appellant.

Ramachendra Rau Sahib for respondents, Nos. 1 to 5, 7, 8, 10, and 11.

This appeal coming on for hearing before the Chief Justice and Mr. Justice Wilkinson, the Court made the following order of reference to the Full Bench.

ORDER OF REFERENCE TO THE FULL BENCH.—*Narasimha* v. *Ayyan Chetti*(1) was dissented from by two of the Judges who took part in *Subbayya* v. *Krishna*(2). Two other Judges have followed the opinion of the majority of the Judges in *Subbayya* v. *Krishna*(2) in two unreported cases, original suit appeal No. 4 of 1891 and regular appeal No. 199 of 1887. Considering the difference of opinion that exists on the point, we resolve to submit to a Full Bench the question "whether under section 539 of the Civil Procedure Code a suit to remove a trustee will lie."

This appeal coming on for hearing before the Full Bench, the Court delivered the following judgments.

COLLINS, C.J.—The question referred to the Full Bench for decision is "whether under section 539 of the Civil Procedure Code a suit to remove a trustee will lie."

There has been a great diversity of opinion amongst the Judges of the Madras High Court on this point. In *Narasimha* v. *Ayyan Chetti*(1), Mr. Justice Kernan and Mr. Justice Wilkinson expressed doubts whether section 539 empowered a Court to remove a trustee, whilst in *Subbayya* v. *Krishna*(2), Mr. Justice Muttusami Ayyar in a most exhaustive judgment reviewed the statutes and cases both English and Indian relating to the subject in question and came to the conclusion that section 539 did not authorize the removal of a trustee. Best and Weir, JJ., took the opposite view and held that a trustee could be removed in a suit brought under this section. It appears to me that section 539 of the Civil Procedure

(1) I.L.R., 12 Mad., 157. (2) I.L.R., 14 Mad., 186.

RANGASAMI NAICKAN v. VARADAPPA NAICKAN.

Code was drafted on the lines of 52 George III., cap. 101, commonly called Romilly's Act, and the draftsman must have been well aware that it had been held that the Act did not apply when the question arose as to whether a trustee should be adversely dismissed for misconduct. Is it probable, therefore, that if the Legislature intended the section to apply to a case where the removal of a trustee was in question that specific relief would not have been mentioned. The section enumerates the specific reliefs that are given and the first is appointment of new trustees under the trust. We are, however, asked to add words to the section and to say that the Legislature intended to give the power to remove adversely a trustee, although the Legislature refrained from saying so. The words "granting such further or other relief as the nature of the case may require" cannot, under the recognized rules of construction, be said to give a Court the power to remove a trustee.

The words of a statute cannot be construed contrary to their meaning as embracing or excluding cases merely, because no good reason appears why they should be excluded or embraced: see *Pike* v. *Hoare*(1), *per* Lord Northington, *per curiam* in *Dean* v. *Reid*(2). The duty of the Court is not to make the law reasonable, but to expound it as it stands according to the real sense of the words:—see *per Cresswell*, J., in *Biffin* v. *Yorke*(3). It is far better, says Lord Campbell in *Coe* v. *Lawrence*(4), that we should abide by the words of a statute than seek to reform it according to the supposed intention.

I agree with the dictum expressed by the Judges in *Narasimha* v. *Ayyan Chetti*(5), and in the judgment of Mr. Justice Muttusami Ayyar in *Subbayya* v. *Krishna*(6) and answer the question referred to the Full Bench in the negative.

MUTTUSAMI AYYAR, J.—I adhere to the opinion expressed by me in the previous decision.

SHEPHARD, J.—The question is whether under the provision of section 539 of the Civil Procedure Code two or more persons can, with the consent of the Advocate-General, institute a suit for the removal of a trustee on the ground of fraudulent and improper conduct.

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(1) Eden, 184.
(2) Peters, 524.
(3) 6 Scott's N.R., 234. s.c., 5 M. & Gr., 428.
(4) 1 E. & B., 516.
(5) I.L.R., 12 Mad., 157.
(6) I.L.R., 14 Mad., 186.

The terms of the section with reference to the relief which may be obtained are not merely general. The section particularizes the points to which the decree may be directed :—

(*a*) appointing new trustees under the trust;

(*b*) vesting any property in the trustees under the trust;

(*c*) declaring the proportions in which its objects are entitled;

(*d*) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged;

(*e*) settling a scheme for its management, or granting such further or other relief as the nature of the case may require.

The section is significantly silent with regard to that most important head of relief in connection with trusts, viz., the removal of fraudulent trustees. The contention, therefore, that the section was intended to comprehend suits having that end in view can only be rested on the ground that by necessary implication jurisdiction to entertain such suits was conferred by the section. Apart from this section there is no doubt that in the Presidency Town it was competent to the Advocate-General to initiate proceedings either for the purpose of removing a trustee or for the purposes mentioned in the section, including that of having a scheme of management settled by the Court, as was done in the Patchiappa case. The powers of the Advocate-General in this respect to take action for the protection of charitable trusts are the same as those which the Attorney-General in England possesses: *Attorney-General* v. *Brodie*(1). In the mufussil it was different. There was no public official who could take action in the Courts with reference to trusts and it was probably doubtful whether the Mufussil Courts had jurisdiction with regard to trusts such as is undoubtedly given by the present section. At any rate no case can be found in which a Mufussil Court has exercised such jurisdiction.

This being the state of things, while no alteration of the law was required for the Presidency Town, for the provincial Courts with regard to charities in the mufussil, there was need that jurisdiction should be given to enable those Courts to deal more effectually with trust property. Whether the Legislature had any further purpose in view and intended that District Courts

(1) 4 M.I.A., 194.

RANGASAMI NAICKAN v. VARADAPPA NAICKAN.

should grant relief generally with regard to such trusts in suits instituted by a public official or by interested persons with his consent is the question we have to determine. In favour of the construction of the section giving the Court this larger jurisdiction it may fairly be said that the case such as the present, in which the removal of the trustee is alleged to be required in the interests of the trust, is eminently one in which it might be thought that a power to invoke the aid of the Court should be given either to a public official or to persons interested in the trust. Legislation to that effect with reference to charities not of a religious character would be in harmony with the enactment already in force with regard to trusts of a religious character; for under the Act of 1863 it is competent to persons interested in a religious establishment, on leave of the District Court being first obtained but without joining as plaintiff any of the other persons interested, to bring a suit against the trustee who has been guilty of breach of trust and to obtain his removal from office or other relief.

It is incorrect to say that charitable trusts which are not within the Act of 1863 are left wholly unprovided for unless a general jurisdiction with regard to them is given by the section; see *Mohiuddin* v. *Sayiduddin*(1). As has been pointed out by two of the learned Judges in *Subbayya* v. *Krishna*(2), a jurisdiction to remove trustees has always been exercised by the Mufussil Courts. The remedy is not wanting altogether; but except in this section of the Code there is no provision of law empowering any public official to take action.

In the course of the argument stress was laid on the difficulties which would arise if the jurisdiction claimed is taken to be conferred by the section. It appears to me that no construction of the section is altogether free from difficulties. On the one hand if the section is to be restricted to proceedings not involving the removal of a trustee, it may be said that although the suit is launched upon an allegation of breach of trust and a breach of trust of a serious nature requiring the removal of the trustee may be proved, the District Court or the High Court, as the case may be, will have to stay its hand and remit the parties to an inferior Court to obtain the proper relief. Again, it would seem strange

(1) I.L.R., 20 Calc., 816. (2) I.L.R., 14 Mad., 199, 220.

that the Legislature should think it necessary to restrict to the High Court and District Court the jurisdiction in such simple matters as appointing new trustees, for although there may be a prayer for the settlement of a scheme the jurisdiction is complete notwithstanding that there is no such prayer. Again, seeing that for the Presidency Towns no amendment of the law was required, it is difficult to understand why the Advocate-General was mentioned and why an alternative jurisdiction was given to the High Court. On the other hand it may be objected that there being already a jurisdiction in the Mufussil Court to remove trustees an enactment giving jurisdiction to certain Courts only in the same matter would be anamolous. It might lead to the most inconvenient results if a suit could be instituted under the section in the High Court and at the same time another suit under the old procedure in a District Munsif's Court. Passing from these consideration, from which in my opinion no conclusion can safely be drawn, I come to consider the other enactments with regard to the same subject matter which the Legislature had before them in 1877. In this country there was the Act of 1863 relating to religious endowments and containing the section already mentioned which gives a general jurisdiction to the Civil Court in the case of any breach of trust. In specifying the relief which may be granted, section 14 expressly mentions the removal of the trustee or other person incriminated. If in 1877 it was intended to give the District Court a similar jurisdiction in suits launched by persons interested in non-religious trusts, and in the section as originally framed the words 'or religious' do not appear, it is difficult to understand why all mention of this important head of relief, the removal of trustees, was not mentioned.

It is clear, however, that the language of the section was not borrowed from the Act of 1863 and that it was in part borrowed from the statute of George III known as Sir Samuel Romilly's Act. That being so, we are bound to have regard to the interpretation which has been put upon the latter Act—and the more so inasmuch as it appears that the decisions upon the statute are in a measure reproduced in the section of the Code. It is true that the circumstances under which legislation was required in England and in India were widely different. In England the ordinary mode of obtaining redress with regard to charities being by way

RANGASAMI NAICKAN v. VARADAPPA NAICKAN.

of information exhibited by the Attorney-General, what was required was not a *forum* or a new jurisdiction but a new mode of invoking the aid of the Court. The statute is intituled "An "Act to provide a summary remedy in cases of abuses of trusts "created for charitable purposes" and it enables two or more persons to proceed by petition praying such relief as the nature of the case might require.

In this country what was required at least for the mufussil was the creation of a new jurisdiction. The chapter does not state that the jurisdiction is to be summary (compare title of chapter XXXIX) and I cannot agree that it was intended that the proceeding being by suit should have that character. (*See* per Weir, J., in *Subbayya* v. *Krishna*(1)). Notwithstanding these distinctions which may be drawn between the two enactments, I think we are bound to construe the language of chapter XL in the light of the decisions on the statute, so far as they are applicable to that language. The statute was from the outset held not to be applicable to cases in which the hostile removal of a trustee is required (*see* cases collected in Lewin on Trusts and Daniell, Ch. P., cap. XXXVIII) and a further Act had to be passed in 1853 (16 and 17 Vic., cap. 137), empowering the Court under certain circumstances on application made to order the removal or appointment of any trustee. When it is found that the Legislature with those statutes and the decisions on them and also with the Act of 1863 before them omitted all reference to removal of trustees, the inference seems to me irresistable that that matter was not intended to be brought within the scope of the chapter. General words, it is true, are used similar to those used in the statute, but those words must be read with the words that go before and cannot be taken to include a distinct and substantive head of relief. In my opinion a jurisdiction to remove trustees as it is not given expressly by the chapter is not given by necessary implication, and therefore the question referred to us must be answered in the negative.

This case coming on for final hearing, after the delivery of the opinions of the Full Bench, the Court delivered the following judgment

JUDGMENT.—In accordance with the opinion of the Full Bench, we must hold that the suit is not maintainable in the District

(1) I.L.R., 14 Mad., 216.

Court. The plaint ought to have been returned. We must modify the decree accordingly. The appellant must pay the costs of appeal.

RANGASAMI NAICKAN v. VARADAPPA NAICKAN.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

LINGA REDDI (DEFENDANT NO. 4), APPELLANT,

v.

SAMA RAU AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

1893, December 13, 14. 1894, January 18.

Transfer of Property Act—Act IV of 1882, s. 68 (c)—Mortgagee's right to sue for the mortgage money where he is kept out of possession by mortgagor's indirect conduct.

Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession, the first mortgagee may elect to sue at once for the money under section 68 of the Transfer of Property Act, instead of for possession of the land.

APPEAL against the decree of R. S. Benson, District Judge of South Arcot, in original suit No. 19 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

The District Judge passed a decree in favour of the plaintiff, and the fourth defendant preferred this appeal.

Bhashyam Ayyangar and *Krishnasami Ayyar* for appellant.

Pattabhirama Ayyar for respondents.

BEST, J.—The suit, out of which this appeal has arisen, was instituted by one P. Sama Rau (now first respondent) against Ranga Rao, his son Janakirama (a minor) and brother Ragava Rao (defendants 1, 2 and 3 respectively) as executants of the mortgage bond A (dated 10th July 1890), the other defendants in the suit being Linga Reddi (the present appellant) and three others holding prior mortgages over portions of the property mortgaged to plaintiff under the mortgage bond A.

Plaintiff's case was that of the Rs. 4,500 for which the mortgage bond A was executed, Rs. 3,000 were left with him

* Appeal No. 115 of 1891.