PRIVY COUNCIL.*

BALAKRISHNA UDAYAR (PETITIONER),

v.

VASUDEVA AYYAR (RESPONDENT).

1917, April, 26 and May 21.

[On appeal from the High Court of Judicature at Madras.]

Religious Endowments Act (XX of 1863), sec. 10 —Vacancy in Temple Committee—Jurisdiction of District Judge—Civil Procedure Code (Act V of 1908), sec. 115 —Power of revision by the High Court—Duty of remaining members of the Committee—Failure to perform duty—Election held after expiration of the statutory time.

The High Court has jurisdiction under section 115 of the Civil Procedure Code, 1908, to revise an order of the District Judge made under section 10 of the Religious Endowments Act XX of 1863 on the occurrence of a vacancy in a Temple Committee declaring that an election by the remaining members of the Committee to fill up the vacancy was regularly held, and that the appointment of the person was valid.

No appeal lay under the Civil Procedure Code from such an order. In making the order the District Court was acting in a judicial capacity as a Court of law, and not merely in an administrative capacity.

The matter in which the order of the District Court was made was a "case" within the meaning of section 115 of the Civil Procedure Code, 1908. A "case" includes an *ex parte* application such as that made in this matter.

Minakshi Naidu v. *Subramanya Sastri* (1888) I.L.R., 11 Mad., 26; s.c. L.R., 14 I.A., 160, distinguished.

On the true construction of section 10 of Act XX of 1863 the power of the remaining members of the Committee to fill up the vacancy must be exercised within three months from the date of the occurrence of the vacancy. The District Court had no jurisdiction after the expiration of the three months to direct the remaining members of the Committee to fill up the vacancy by election, or to make an order purporting to validate the appointment of the person elected. If the Committee do not perform their duty by holding an election within three months to fill up the vacancy, a subsequent election by the remaining members after the expiration of three months is invalid: and this is so notwithstanding that such a construction would enable the remaining members of the Committee by their own default, to practically disfranchise the electors, and at the discretion of the Court possibly to procure the patronage for themselves. The only remedy for that is to alter the law, if wrong, by legislation. The Board can only declare the law.

APPEAL No. 39 of 1916 from a judgment and order (23rd September, 1913) of the High Court at Madras, which set aside an order (19th July, 1913) of the District Judge of Tanjore which

* *Present:*—Viscount HALDANE, Lord ATKINSON, Sir JOHN EDGE, and Mr. AMEER ALI.

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he purported to appoint the appellant a life-member of the Devasthanam (Temple) Committee of Negapatam.

The present appellant claimed to be a member of the Temple Committee constituted under the Bengal and Madras Religious Endowments Act (XX of 1863). His claim was negatived by the High Court on the ground that he had not been elected or appointed a member of the Temple Committee in the manner required by law.

The main question for determination on this appeal was whether or not the appellant had been properly elected or appointed on a vacancy occurring in the Temple Committee. Another question was whether this appeal was competent being not from a final order of the High Court, but from an order remanding the case for disposal in accordance with law.

The provision for filling vacancies in the Committee is section 10 of the Act of 1863, which is as follows :—

Section 10. "Whenever any vacancy shall occur among the members of a Committee appointed as above a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the Committee shall as soon as possible give public notice of such vacancy and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided under rules for elections which shall be framed by the local Government, and whoever shall be then elected under the said rules shall be a member of the Committee to fill such vacancy. If any vacancy aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court on the application of any person whatever may appoint a person to fill the vacancy or order that the vacancy be forthwith filled up by the remaining members of the Committee, with which order it shall then be the duty of such remaining members to comply, and if this order is not complied with the Civil Court may appoint a member to fill the said vacancy."

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee and the case on appeal to the High Court (SIR CHARLES ARNOLD WHITE, C.J., and OLDFIELD, J.) will be found in *Vasudeva Aiyar* v. *The Negapatam Devasthanam Committee*(1).

(1) (1915) I.L.R., 38 Mad., 594.

The District Judge held that appellant had been properly elected, and that order was set aside by the High Court.

On this appeal—

De Gruyther, K.C., and *Sproule* for the appellant contended that the High Court had no jurisdiction to bring the decision of the District Judge up on revision under section 115 of the Civil Procedure Code, 1908, which had no application to proceedings in a matter dealt with by section 10 of Act XX of 1863. The matter in which the order of 19th July, 1913 was made was not a "case" within the meaning of section 115 of the Code: a "case" meant a suit or proceedings in a suit *Subbaya* v. *Aday Naidu*(1). The making of the order by the District Judge was not a judicial act, but merely an act administrative or ministerial: *Minakshi Naidu* v. *Subramanya Sastri*(2). No appeal lay from his decision. When a vacancy on the Committee occurs, Act XX of 1863 makes it a duty on the remaining members to hold an election within three months from the occurrence of the vacancy and enacts that if they fail to discharge that duty, the jurisdiction of the Court in the first instance was limited to either itself appointing a person to fill the vacancy, or to make an order in the nature of a mandamus to compel performance of the duty, section 10 of the Act should not be construed so as to give the right of appointment to the Committee as a result of their own default in holding an election. The appellant's appointment, it was submitted, was validly made.

A. M. Dunne and *H. N. Sen* for the respondent were not called upon.

LORD ATKINSON.

LORD ATKINSON.—This is an appeal from a judgment and order of the High Court of Madras, dated the 23rd September, 1913, setting aside an order of the District Judge of Tanjore, dated the 19th July, 1913, by which the appellant was appointed a life-member of the Devasthanam (Temple) Committee of Negapatam. This order of the District Judge purports to have been made, in the events which had happened, in exercise of the powers conferred upon him by section 10 of Act XX of 1863, the Bengal and Madras Native Religious Endowments Act.

That section runs as follows:—

"Whenever any vacancy shall occur among the members of a Committee appointed as above, a new member shall be elected to

(1) (1914) 29 Mad., L.J. 671.

(2) (1888) I.L.R., 11 Mad., 26; s.c., L.R., 14 I.A., 160.

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fill the vacancy by the persons interested as above provided. The remaining members of the Committee shall as soon as possible give public notice of such vacancy, and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided under rules for elections which shall be framed by the local Government, and whoever shall be then elected under the said rules shall be a member of the Committee to fill such vacancy. If any vacancy aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy or may order that the vacancy be forthwith filled up by the remaining members of the Committee, with which order it shall then be the duty of such remaining members to comply; and if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy."

By the second section the words "Civil Court" and "Court" are defined to mean

"The Principal Court of Original Civil Jurisdiction in the district in which the mosque, temple or religious establishment is situate relating to which or to the endowment whereof any suit shall be instituted or application made under the provisions of this Act."

It would appear that, if the endowments of the temple be situate in districts other than that in which the temple or religious establishment is itself situated, different Courts may in relation to it and its affairs be Civil Courts within the meaning of this definition. Moreover, it is to the Civil Court, and not to an individual Judge who may preside in or constitute the Civil Court, that jurisdiction is given.

A vacancy occurred in the above-mentioned Committee by the death on the 3rd May, 1912 of the Hon. Diwan Bahadur R. Raghunatha Rao, C.S.I. The Committee did not hold any election of a member to fill this vacancy. On the contrary, they on the 20th June, 1912 directed their managing member to request the then District Judge of Tanjore, Mr. A. F. G. MOSCARDI, to nominate, in exercise of the powers conferred upon him by the above-mentioned section, a person to serve upon the Committee. That request was duly made by the managing member by letter addressed to the District Judge on the 16th July, following.

The District Judge, having considered this letter, made an order on the 1st October, 1912, requesting the managing member to report,

"if there was any reason why the Court should not order that the vacancy should be filled up by election, as provided in section 10 of the Act."

It is clear from this letter that the District Judge considered he had under the statute jurisdiction to order the Committee to hold an election of a member in order to fill the vacancy; and though an order which he subsequently made upon the 6th January, 1913, is very guarded in its terms it has been assumed that he meant to exercise this jurisdiction.

On the 21st October, 1912, the managing member replied to the District Judge's communication of the 1st October, 1912, forwarding a copy of a resolution passed by the Committee in the previous June to the effect that they would not hold an election, and renewing the request to the Judge to nominate a member. On the 2nd January, 1913, the present respondent, in the character of a person interested, filed a petition in the District Court praying the Court to fill up the vacancy in the Committee by nomination, on the ground that the list of voters was stale and that delay would occur in preparing a new list. The same District Judge, Mr. MOSCARDI, made on this petition the order already referred to of the 6th January, 1913. On the face of the order it is set forth that it was argued—

"that the intention of the legislature in section 10 of the Act was clearly that such vacancies should be filled by the Committee by election, and only in the last resort by the Court."

It is also pointed out that—

"the Committee had a voters' list drawn up so recently as 1909, that there was no reason why an election should not be held in this case . . . and no . . . reason was urged why the provisions of section 10 of the Act should not govern this case."

The last paragraph of the Order runs thus:—

"It is clear to me that it is the duty of the Committee to fill up the vacancy by election, and that there is no obstacle preventing them from doing so. I therefore order that the vacancy be forthwith filled up by the remaining members of the Committee. Time, three months."

It will be observed that it is not stated explicitly in this order by what process the Committee are to fill up the vacancy,

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whether by election or by nomination or co-option. The members of the Committee, however, owing possibly to the matters already referred to set forth on the face of the order, came to the conclusion that by it they were directed to hold an election which, on the 24th March, 1913, they accordingly did. The appellant was the only candidate; 1,745 votes were recorded for him. The Committee thereupon declared him duly elected, and reported the result to the District Court.

About this time a new Judge, Mr. C. G. SPENCER, was appointed to the District Court of Tanjore, and during the months of April and June certain applications were made to him with which it is quite unnecessary to deal.

Four petitions were then presented to the District Court, one bearing date the 23rd June, 1913 by the present appellant, praying that it might be declared that his election was valid, and that he might be permitted to perform his duties; one of the same date by the present respondent alleging that the election was void, and praying that the Court might, by its own nomination, fill the vacancy; and two bearing the respective dates of the 17th May, 1913 and 18th July, 1913 by one Dakshinamoorthi Pillai, praying that the election might be declared void for several reasons, including amongst others the alleged defective nature of the voters' lists.

On the 19th July, 1913, the District Judge, Mr. C. G. SPENCER, dealt by one order of that date with the matters of these four petitions, and decided that the election of the present appellant was regular, and accepted him as a member of the Committee, on the ground that upon the true construction of the 19th section of the aforesaid Act of 1883, the words, "or may order that the vacancy be forthwith filled up by the remaining members of the Committee," must be taken to mean by implication "filled up by the members of the Committee by election," since that is the mode prescribed in the earlier portion of the section for filling up a vacancy by them. It will be observed that this order is based upon the assumption that the earlier order of Mr. A. F. G. MOSCARDI of the 6th January, 1913 was in effect an order directing the Committee to fill up the vacancy by holding an election, and that it was understood and acted upon by them as such.

The present respondent upon the 6th August, 1913 presented a petition to the High Court asking for a revision of this order under the 115th section of the Code of Civil Procedure, to which he made the present appellant and the Temple Committee respondents. On the application coming on for hearing, a preliminary objection was raised that a petition for revision of the adjudication of the District Court did not on the legal construction of the statute in such a matter as that dealt with in section 10 of the Act of 1863 lie.

The High Court held that this objection failed, and proceeded to deal with the merits of the application. In reference to them they held that, according to the true construction of the 10th section, the District Court had no jurisdiction whatever to order the remaining members of the Committee (as it was taken it had ordered them) to fill up the vacancy by means of an election, or to validate the filling up of it by these means in obedience to such an order, and ordered that the order of the District Judge, Mr. SPENCER, dated the 19th July, 1913, should be set aside, as made without jurisdiction, and that the case should be sent back to be dealt with by the District Court by the light of this judgment.

On the hearing of this appeal both these points have been raised and argued. In their Lordships' view the decision of the High Court was on both points right, and they fully concur in and approve of it.

As to the preliminary objection. The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity and further enables it to pass such an order in the case as the Court may think fit.

It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the Civil Court should absolutely and whimsically decline

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to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie.

The act of the District Court complained of in the present case was an adjudication by it that the present appellant having been elected in pursuance of an order of the Court was a member of the Committee. The words of the statute are:

"And whoever shall be then elected and the said rules shall be a member of the Committee to fill such vacancy."

If the election be valid and regular, the person elected becomes a member of the Committee without any consent or approval being given by the District Court. It is contended, however, that the making of this order, necessarily involving, as it does, the construction of the statute—a pure matter of law—is not a judicial, but merely an administrative or ministerial act. A key, it would appear to their Lordships, as to the true position of the Civil Court under this 10th section may be found by referring to the position it occupies under the immediately preceding and some of the succeeding sections of the Act. Section 9 provides that every member of a Committee appointed under sections 7 and 8 shall hold office for life unless removed for misconduct or unfitness, and no such member shall be removed except by order of the Civil Court. Surely in such a question as the amotion of an officer from his office for misconduct or unfitness, the Court which makes the order removing him is exercising judicial functions? Any order made in such a matter in disregard of the requirements of natural justice, such, for instance, as proceeding without giving the member sought to be removed notice, or affording him an opportunity of defending himself, would clearly be voidable or void.

Again, under section 14, any person may sue in this Civil Court the manager or superintendent of the mosque or the members of this very Committee for breach of trust or misfeasance. And the Court might decree specific performance of any acts to be done by either of these functionaries, might award damages against him, or might remove him from office. Under section 16 the Court, in a suit pending before it, might refer the matter to arbitration.

It appears to their Lordships to be clear that in all these matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

It was next contended that the matter of the four petitions in which the order of the 19th July, 1913 was made, did not constitute a "case" within the meaning of the 115th section of the Code of Civil Procedure. No definition is to be found in the Code of the word "case." It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court in thinking that the matter adjudicated upon was a case within the meaning of the 115th section of the Code.

Minakshi Naidu v. *Subramanya Sastri*(1) decided by this Board, is wholly different from the present. There the District Judge had, under this section 10, by his order appointed the appellant to fill a vacancy in the Temple Committee. An appeal was taken from this order, on the ground of the appellant's unfitness for the post by reason of his religious belief. The question of the jurisdiction of the Civil Court to make the order was not raised. It was not pretended that a right of appeal—which, if given at all, must be given by statute—was given by Act XX of 1863; but it was contended that it was given by the 540th section of Act X o 1877, which gives a general right of appeal from decrees of Courts exercising original jurisdiction. The definition of the word "decree" given in this Act is modified by Act XII of 1879, and, as modified, runs as follows:—

"Decree" means a formal expression of an adjudication upon any right, claim, or defence set up in a Civil Court where such adjudication decides the suit or the appeal."

Well, it is obvious that an order made by the Civil Court on an application which may be made by "any person whatever," appointing a particular man to fill a vacancy on a committee, is

(1) (1888) I.L.R., 11 Mad., 26; s.c., L.R., 14 I.A., 160.

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not a "decree" within the meaning of this definition. The Board, on that occasion, carefully abstained from expressing any opinion upon the question whether proceedings, somewhat in the nature of *quo warranto*, could be taken to remove a person improperly appointed.

On the point of substance on the merits it was next contended that when a vacancy amongst the members of a committee occurs, the statute imposes upon the remaining members a statutory duty to hold, within three months from the date of the vacancy, an election in the manner provided by the rules for the choice of a new member to fill this vacancy, and that if these members fail to discharge this statutory duty the jurisdiction of the Court is in the first instance confined to either itself appointing a person to fill the vacancy, or to making an order, somewhat in the nature of a mandamus, to compel them to perform their statutory duty. Well, in the first place it is admitted that the section does not expressly provide anything of the kind, and in the next place some of its provisions make it impossible to imply anything of the kind.

In the case of an election, public notice must be given as soon as possible after the occurrence of the vacancy, and the election must be held within three months after that date; but the Order of the Court requiring the remaining members of the committee to forthwith fill up the vacancy may not be made till long after this period of three months has elapsed. It would in such a case be impossible to fulfil the statutory condition as to the time for holding the election. Again, the order is to be to the effect that these members shall forthwith fill up the vacancy, which seems to exclude all the delays contemplated where an election is held; and again where an election is held the remaining members of the committee merely act as the returning officer. They do not in any sense fill up the vacancy. The electors elect a person to be the new member, and upon his election by them, he, according to the statute,

"shall be a member of the committee to fill the vacancy".

If in such a case the vacancy can properly be said to be filled up by anybody, it is by the electors rather than by the remaining members of the committee that this is done, whereas the order to be made in case of their default contemplates, and indeed directs, that these members themselves are to fill up the vacancy. The

filling of it up is to be their act. It is to be done by them forthwith, without the aid or intervention of any electors or other persons and it would appear to their Lordships it must be an act kindred in character to that which the Court itself may do, namely, appoint a person to fill the vacancy. It was also urged that if his construction of the section be adopted, it would enable the remaining members of the committee, by their own default, practically to disfranchise the electors, and at the discretion of the Court possibly procure the patronage for themselves. That no doubt is so, and before a legislative body empowered to amend the statute, it might furnish a powerful argument for its amendment; but the function of this Board is to declare the law, not to alter it, and the argument cannot therefore here avail. In addition it is to be remembered that where the Civil Court appoints, the electors are by and through the same default of the same members of the committee equally disfranchised, yet that is expressly authorized by the statute. The Court must be trusted not to confer upon these members by its order the power to appoint were the nature and circumstances of their default show that they are unworthy of being trusted with the privilege of appointing a member. Their Lordships are, for these reasons, of opinion that the decision appealed from was right, that the appeal fails and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitor for the appellant—*O. A. Cayley.*

Solicitor for the respondent—*Douglas Grant.*

J.V.W.