VENKATAPA v. JALAYYA.

WALLIS, C.J.

The OPINION of the Court was delivered by

WALLIS, C.J.—We do not think that this is a suit against the auction-purchaser on the ground that the purchase was made on behalf of the plaintiff within the meaning of section 66, Civil Procedure Code. The finding is that the defendant agreed that the property should be purchased in the name of the defendant and that one-half of it should be conveyed by the defendant to the plaintiff after the sale certificate had been obtained. This in our opinion is not a benami transaction at all. The mere fact that the plaintiff alleges in the plaint that the auction-purchaser was the benamidar for him has not in our opinion the effect of debarring the plaintiff under section 66, Civil Procedure Code, from maintaining his suit for specific performance of an agreement by the auction-purchaser subsequent to the purchase to convey the property to the plaintiff. Such an agreement is not inconsistent with auction-purchaser's own title, but rather the reverse. We answer the question in the negative.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

1919, January 7, 8 and 10.

JAGANNATHA ACHARIAR AND ANOTHER (SECOND RESPONDENT IN THE LOWER APPELLATE COURT), APPELLANTS,

v.

SEENU BHATTACHARIAR AND EIGHT OTHERS (PLAINTIFF AND DEFENDANTS NOS. 5, 7, 8, 9, 12 TO 14), RESPONDENTS.*

Trustees of a temple—Suspension from office of an hereditary archaka—Order passed without notice to archaka or previous inquiry, whether valid—Order, ad interim, continued for an unreasonably long time, whether legal—Punitive order of suspension, whether valid without notice.

Where the trustees of a temple suspended an hereditary archaka of the temple from his office on account of certain imputations of misconduct made against him, without giving him notice or making any inquiry previous to

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* Second Appeal No. 2171 of 1917.

passing such order, and no subsequent inquiry was made by them for fourteen months after the date of the order, whereupon the latter brought a suit to recover his office and damages for wrongful suspension.

Held, that the order of suspension pending inquiry into alleged misconduct should not have been continued in force for a longer period than was reasonably necessary; that, in this case, the delay of fourteen months between the date of the order and the institution of the suit being unreasonable, the order as an ad interim order ceased to be valid before the date of the suit;

and that the order, viewed as a punitive order, was invalid as having been passed without notice and inquiry, whatever the merits of the case might be.

Thiruvambala Desikar v. *Manikkavachaka Desikar* (1917) I.L.R., 40 Mad., 177; and *Venkatanarayana Pillai* v. *Ponnuswami Nadar* (1918), I.L.R., 41 Mad., 357, followed; *Willis* v. *Sir G. Gipps* (1846) 5 Moore 379 (P.C.), applied; *Seshadri Iyengar* v. *Ranga Bhattar* (1912) I.L.R., 35 Mad., 631, distinguished.

Held further, that out of the temple funds the plaintiff was entitled to recover damages due to him, as the trustees in passing the order of suspension and continuing it, acted in their capacity as trustees and in what they conceived to be the proper discharge of their duties on behalf of the temple.

SECOND Appeal against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal Suit No. 187 of 1915 preferred against the decree of K. S. RAMASWAMI SASTRI, the District Munsif of Tirutturaippundi, in Original Suit No. 317 of 1912.

The material facts appear from the judgment of KRISHNAN, J.

T. Narashimha Ayengar for first appellant.

S. Panchapagesa Sastri for appellants.

S. T. Srinivasagopala Achariyar and *T. R. Venkatarama Sastri* for first respondent.

N. Kunchithapatham Ayyar for second respondent.

KRISHNAN, J.

KRISHNAN, J.—In the suit from which this Second Appeal has arisen the plaintiff sued to recover the office of hereditary archaka in the temple of Sri Sarangapani in Kumbakonam which he alleged he was entitled to and to restrain the defendants from obstructing him in the discharge of his duties and in the enjoyment of the emoluments appertaining to his office and to obtain damages for his wrongful suspension from it by the trustees which resulted in loss of emoluments to him. Defendants Nos. 1 to 5 were the trustees and the remaining defendants were the plaintiff's co-archakas. The trustees denied the plaintiff's claim to his archakaship being hereditary, but the Lower Courts have found as a fact that he is a hereditary archaka and we must accept the finding in Second Appeal.

JAGANNATHA ACHARIAR v. SEENU BHATTA-CHARIAR.

KRISHNAN, J.

The suspension complained of was by an order of the trustees, Exhibit O, made in September 1910, and served on the plaintiff which stated:

"On account of the imputations made in the petition concerning you received from the committee office as also in the *Yatharthavachini* newspaper and allegations made against you by various respectable persons the trustees are greatly dissatisfied with you. Pending searching inquiry into a final disposal of the same you are suspended from your office. You shall therefore take notice that even during the murai of any other archaka you should not act as a substitute."

Subsequently in April 1911, when the second respondent before us became a trustee newly he confirmed the order of suspension. No notice was given to and no explanation was taken from the plaintiff before the order was passed. The suit was filed in November 1911; it was admitted that no inquiry was held into the plaintiff's conduct and it is found that no real attempt to hold such an inquiry was ever made by the trustees. Though the order in its inception was one of temporary suspension pending inquiry the trustees seem to have subsequently treated it as a final order of suspension till the plaintiff cleared his character in a Court of law against the newspaper; they say so in Exhibit II. The charge against the plaintiff was that he was leading an immoral life by frequenting a dancing girl's house and he was therefore unfit to perform the duties of an archaka. The District Munsif while holding that the allegations of actual immorality against the plaintiff had not been proved, found that he was seen in her company and that he had compromised his good name for purity by his conduct and that there was a widespread public opinion about his immorality. He therefore held that the order of suspension was a valid one and dismissed the plaintiff's suit.

The District Judge, on appeal, refused to go into the question of plaintiff's alleged immorality and held that as the trustees had failed to make the intended inquiry within a reasonable time after the order of suspension was passed, their action in keeping plaintiff indefinitely out of office without a definite finding, after notice to him and proper inquiry, that he was unfit to do the duties of that office, was wrongful and that they were therefore liable in damages. He gave a decree declaring that the plaintiff

was a hereditary archaka and that the order of suspension had ceased to be in force from the date of suit and directed that the plaintiff be restored to his office and awarded damages to him at Rs. 250 a year from the date of plaint to the date of reinstatement. He directed defendants Nos. 1 and 5 who were parties to the order of suspension to pay each one-fifth of the damages and costs personally and, as the other trustee-defendants were new trustees, he ordered the balance to be recovered from trust funds.

The second appeal to us has been filed only against that portion of the decree which is against the temple; the trustees against whom personal decrees were passed not appealing. The main question argued before us was that the learned Judge should have given a finding on the question of plaintiff's immorality because it was contended that, if immorality alleged was established, the order of suspension should be held to be valid and in force at the date of suit, whether viewed as one pending inquiry or as one passed by way of punishment for misconduct, any want of notice or of proper inquiry being immaterial. Reliance was placed for this contention on *Seshadri Iyengar* v. *Ranga Bhattar*(1).

Before however considering this argument it may be mentioned that it has not been contended before us that the alleged immorality, if proved, would not amount to misconduct justifying the suspension of an hereditary archaka by the trustees. Though an hereditary archaka does not hold office at the will and pleasure of the trustees it was conceded that he might be removed or suspended from office by them for proved misconduct. We need not therefore consider these questions for the disposal of this second appeal.

The case in *Seshadri Iyengar* v. *Ranga Bhattar*(1) was no doubt one where an archaka had been suspended by the trustees pending inquiry into his conduct without previous notice; but before suit the intended inquiry had been held and the offence charged had been found to be proved and apparently the *ad interim* suspension order pending inquiry had been terminated and replaced by an order after inquiry. That ruling is no doubt an authority for the contention that previous notice

(1) (1912) I.L.R., 35 Mad., 631.

JAGAN-NATHA ACHARIAR v. SEENU BHATTA-CHARIAR.

KRISHNAN, J.

and inquiry are not essential to validate an order of suspension pending inquiry if it is subsequently found that the charge alleged was well-founded. It is not necessary to consider whether this ruling should be followed though it may be remarked that some of the observations in it do not seem to be quite in consonance with the views expressed by the learned Chief Justice in *Thiruvambala Desikar* v. *Manikkavachaka Desikar*(1) and in *Venkata Narayana Pillai* v. *Ponnuswami Nadar*(2). The objection raised in the present case to the validity of the suspension order has reference not so much to its inception as to its continuance beyond a reasonable time without a proper inquiry. Even if the trustees be held to have the power to pass an *ad interim* order of suspension without notice it seems to me that such power should not be exercised except in cases of urgency where from the nature of the misconduct alleged and other circumstances, immediate suspension from office becomes a necessity to safeguard the interests of the institution. There was hardly any such urgency in the present case. But even if the order was a good one when it was first passed I am fully in agreement with the District Judge in thinking that it should not have been continued in force for a longer period than was reasonably necessary. There can be no doubt in the present case that the period which elapsed after the date of the order and before the date of the suit, viz., about 14 months, was an unduly long period and I accept the Judge's view that there was unreasonable delay and that the order as an interim order ceased to be valid before the date of suit.

This position was hardly denied by the first appellant's vakil, but he argued that the order should be looked upon as a punitive one which was justified by the plaintiff's misconduct. It is doubtful whether the order can be looked upon as a punitive one at all, because whatever the intention of the trustees might have been, plaintiff was never informed that it had that character. But assuming that it could be done, I am of opinion that the order as a punitive one should be held to be invalid as having been passed without notice and without inquiry, whatever the merits of the case may be. It is a fundamental principle of

(1) (1917) I.L.R., 40 Mad., 177. (2) (1918) I.L.R., 41 Mad., 357.

natural justice that a person charged with an offence or with a misconduct must be given notice of it and heard in his defence if he wishes to defend before he is condemned. That principle must be recognized and anything done contrary to it cannot be upheld. As the learned Chief Justice quotes in *Thiruvambala Desikar* v. *Manikkavachaka Desikar*(1), "the laws of God and man both give the party an opportunity to make his defence, if he has any." The interim order of suspension pending inquiry without notice does not offend against this principle, as it is only a disciplinary and not a punitive one; and the ruling in *Seshadri Iyengar* v. *Ranga Bhattar*(2) is confined to such disciplinary orders. The observations of the Chief Justice in *Venkata Narayana Pillai* v. *Ponnuswami Nadar*(3) may also be referred to in this connexion. As pointed out by his Lordship there, the Privy Council in *Willis* v. *Sir G. Gipps*(4) recommended that an order of a motion without due notice should be set aside although on the merits there were sufficient grounds for making it. It is no answer to the invalidity of the order in the present case viewed as a punitive one to say that the trustees are prepared to prove facts which would justify it in the opinion of the Court. Plaintiff was entitled to have an order by the trustees after notice to him and proper inquiry before he was punished; the Court's order is not an adequate substitute for it. To hold otherwise will be to compel the person punished to submit to punishment without knowing the grounds for it or to resort to a Court of law before he can find out the grounds on which he had been punished. I am therefore of opinion that the order of suspension, the moment it was treated as a punitive order by the trustees, became illegal and invalid.

In any view therefore the order was invalid at the date of suit. It is not necessary to ascertain when exactly before suit the order became invalid as the District Judge has not given to plaintiff any damages before the date of suit and plaintiff has not appealed against the disallowance of damages prior to suit claimed by him. In awarding plaintiff possession of his office I think it was open to the District Judge to grant a decree for its emoluments by way of damages, as he has done, from the date of

(1) (1917) I.L.R., 40 Mad., 177. (2) (1912) I.L.R., 35 Mad., 631.
(3) (1918) I.L.R., 41 Mad., 357. (4) (1846) 5 Moore, 379 (P.C.).

CHINNA VENKATASAMI NAICKEN *v.* VENKATASAMI NAICKEN.

dismissed the petition. Against the judgment of the learned Judge, the petitioner preferred this Letters Patent Appeal.

T. R. Ramachandra Ayyar and *G. Ramakrishna Ayyar* for *L. S. Viraraghava Ayyar* for appellant.

K. R. Guruswami Ayyar for *L. A. Govindaraghava Ayyar* for respondents.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The suit was for money due upon a mortgage bond. After the examination of some witnesses the parties agreed to refer the questions of fact and of law arising in the case to the decision of three persons, namely, the Subordinate Judge and two friends of the parties. An award was made by the majority. Thereupon an application was presented by the defendant to set aside the award on various grounds. The Subordinate Judge overruled the objections and passed a decree. On this a Civil Revision Petition was filed in the High Court, mainly on the ground that the reference to the Subordinate Judge as one of the arbitrators was illegal and that the whole award was vitiated thereby. Mr. Justice AYLING rejected this contention and dismissed the petition. This Letters Patent Appeal is against the learned Judge's judgment.

In my opinion the conclusion of the learned Judge is right. I may at the outset say that it is undesirable that a Judge before whom a case is pending should associate himself with other persons as an arbitrator in the cause. The Subordinate Judge thought that the second schedule to the Civil Procedure Code applied to the reference. If he was right in this view, when the award is submitted to the Court, it would be open to the parties to impeach the character and conduct of the Subordinate Judge as an arbitrator. It is not desirable that a Judge should lay himself open to such a possible impeachment. But I do not think that the second schedule has any application to the case. Mr. Ramachandra Ayyar for the petitioner referred to the Order of the Reference, and contended that as the reference was in terms made under the second schedule the entire proceedings were void. The form of the reference is not conclusive of the matter. It is the intention of the parties that has to be looked to. There can be no doubt that the parties desired that the controversy between them should be put an end to by the decision of the three gentlemen to whom they referred

CHINNA VENKATA-SAMI NAICKEN. *v.* VENKATA-SAMI NAICKEN.

SESHAGIRI AYYAR, J.

the matter. In my opinion, the whole frame of the second schedule shows that references like the present one are not within its purview. Applications may be made for extension of time, for remitting the award, for correcting the award, and for impeaching the partiality of the arbitrators. If a Judge is one of the arbitrators, he cannot in another capacity extend the time, correct his own judgment, and scrutinize his own character. Section 17 of the Civil Courts Act, though not in terms applicable to the present case, indicates that what has been done by a Judge in one character or capacity should not be revised by the same officer in another capacity. It may be as pointed out by Lord HALSBURY in *Burges* v. *Morton*(1), where a reference is made to a presiding officer the proceedings may be taken to be extra *cursum curiæ*. But it does not follow that the rules which govern awards by private persons would be strictly applicable to decisions in which the Judge of the Court takes part as referee. The Lord Chancellor said :—

"My Lords, it has been held in this house that, where with the acquiescence of both parties a Judge departs from the ordinary course of procedure and decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have an alternative mode of proceeding and to treat the matter as if it had been heard in due course."

With slight modifications, the same language may be applied to what has been done in the present case. Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable. An argument was addressed to us based upon section 89 of the Civil Procedure Code. Clause 1 runs thus :—

"Save in so far as is otherwise provided by the Indian Arbitration Act 1899, or by any other law for the time being in force all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder shall be governed by the provisions contained in the second schedule."

No doubt if there is no law which could give validity to the decision of the Judge and of his two colleagues, the

(1) (1896) A.C., 136.

CHINNA VENKATA-SAMI NAICKEN v. VENKATA-SAMI NAICKEN.

SESHAGIRI AYYAR, J.

proceedings must be taken to have been under the Second Schedule to the Code of Civil Procedure. In this case I am of opinion that by virtue of Order XXIII of the Civil Procedure Code the present reference can be regarded as being outside the second schedule. The parties have chosen a particular tribunal consisting of the Judge and of two other persons to deal with their contentions. They must be deemed to have agreed to accept their conclusions unreservedly. In other words, it must be regarded that they agree to adjust the suit by the result of the decision of the three persons. This adjustment must be taken to have been reported to the Court before which the suit was pending; and the Court by virtue of its inherent powers to finally dispose of any matter which is pending before it must be deemed to have passed a decree in terms of the decision reported to it by the three persons. This was practically the view taken in *Nanjappa* v. *Nanjappa Rao*(1) and *Praydas* v. *Girdhardas* (2). Giving such a finality to decisions is not unknown to the Civil Procedure Code. For example, Order XXXVI provides for cases in which a party may state a special case before a Judge who hears the suit. In such cases it has been held that there will be no appeal—vide *Nidamarthi Mukkanti* v. *Thammana Ramayya* (3). If the conclusions come to by a Judge before whom a special case is stated can be regarded as final, there is nothing incongruous in giving the same finality to the conclusion come to by a Judge who is assisted by two other persons. In my opinion, therefore, although the procedure adopted by the Subordinate Judge in dealing with the matter as if it was a reference under the second schedule and as if the provisions of the Code applied was wrong, inasmuch as a decree was passed in terms of the award, the defendant as a party to the reference is not entitled to contest its finality and to request that the case should be heard again. On this ground I am of opinion that the decree of the Subordinate Judge was rightly passed, and that the petition to this Court was rightly dismissed. The Letters Patent Appeal must be dismissed with costs.

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(1) (1912) 23 M.L.J., 2[illegible]. (2) (1902) I.L.R., 26 Bom., 76.
(3) (1903) I.L.R., 26 Mad., 76.

WALLIS, C.J.—I agree with the conclusion. I think a reference of the suit to the presiding judge must be held to be altogether extra *cursum curiæ* and not the less so when two others are joined with him, and that the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the second schedule.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Ayling.

1919, January, 6 and 22.

GURUSWAMI NADAR AND SEVEN OTHERS (DEFENDANTS NOS. 1 AND 2 AND 4 TO 10), APPELLANTS,

v.

T. S. GOPALASAMI ODAYAR AND SIX OTHERS (PLAINTIFFS NOS. 1 TO 3 AND 5 TO 8 AND ELEVENTH DEFENDANT), RESPONDENTS.*

Hindu Law—Joint Hindu trading family—Money borrowed by manager—Onus as to binding nature of loan—Account books not produced—Presumption against party—Onus of proof in cases of joint family business.

Where the members of a devastanam committee sued the members of a joint Hindu trading family to recover money borrowed from the plaintiffs by the managing member of the family, and the defendants failed to produce their account books though summoned by the plaintiffs,

Held, that, assuming that the onus of proving the binding nature of the debt lay on the plaintiffs even in the case of a trade carried on as joint family business it was shifted to the defendants on account of the presumption arising against them by their omission to produce their accounts called for by the plaintiffs, a presumption which arises against them whether the plaintiffs have any evidence or not.

Murugesam Pillai v. *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi* (1917) I.L.R., 40 Mad., 402 (P.C.), applied.

Quære.—Whether, in a joint trading family, the onus of proof as to the nature of the debt is not on the family. *Raghunathji Tarachand* v. *The Bank of Bombay* (1910) I.L.R., 34 Bom., 72, referred to.

APPEALS against the decree of C. V. VISWANATHA SASTRI, the Subordinate Judge of Kumbakōnam, in Original Suit Nos. 58 of 1914 and 61 of 1914 (Appeal Suit No. 462 of 1916) of the District Court, Tanjore, respectively.

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* Appeal No. 207 of 1916 and Appeal No. 178 of 1917.