1882

ENTAZA HOSSEIN v. BANY MISTRY.

prietors of Mauza Allygunge ought to be made parties to this suit. The Munsif should, therefore, issue a notice to them to show cause why they should not be made co-plaintiffs; and in case they refuse, he should make them defendants, so that the point in issue may be determined in their presence as well as in that of their adversaries, the proprietors of Hobeebpore, who are already defendants. On their being made parties, the whole case will be re-opened. Costs will abide the result.

Case remanded.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

PUDDOLABH ROY (DEFENDANT) *v.* RAMGOPAL CHATTERJEE AND OTHERS (PLAINTIFFS).

1882
June 9.

Act XX of 1863, *s.* 14—*Jurisdiction—Leave to Sue—Suit by Committee.*

A committee appointed under Act XX of 1863 may, without leave of the Court previously obtained, sue their manager, or superintendent, for damages for misappropriation, and for an injunction. The provisions of Act XX of 1863, s. 14, do not apply to such suits by the committee themselves.

THIS was a suit, by the members of a committee appointed under Act XX of 1863, to obtain an injunction against the defendant, to restrain him from styling himself or acting as superintendent, or *paricha*, of the Sutiabadi Muth, and to recover from him a large sum of money on account of waste and misappropriation of the temple-funds committed by him. The facts of the case and the contentions raised on behalf of the defendant are fully set out in the judgment of Mr. Justice TOTTENHAM. The suit, which was in respect of a temple of the description provided for in s. 3, Act XX of 1863, was instituted in the Court of the Subordinate Judge of Cuttack without the leave of the District Judge having been previously obtained. The Subordinate Judge refused to entertain the question of damages, no leave to sue having been obtained; but he granted the injunction prayed for, "with costs in propor-

Appeal from Appellate Decree, No. 1734 of 1880, against the decree of A. W. Cochrane, Esq., Officiating Judge of Cuttack, dated the 26th May 1880, confirming the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 30th June 1879.

1882

PUDDOLABH ROY v. RAMGOPAL CHATTERJEE.

tion," citing *Chinna Rangaiyangar* v. *Subbraya Mudali* (1), *Janardhana Embrandri* v. *Palakil Kesava Embrandri* (2), *Syed Amin Sahib* v. *Ibram Sahib* (3), *L. Venkatasa Naidu* v. *Sadagopasamy Iyer* (4) and distinguishing *Local Agents of Zillah Hoogly* v. *Kishnanund Dundee* (5). On appeal this decision was affirmed, and the appeal dismissed with costs. The defendant appealed to the High Court.

Mr. *Twidale* for the appellant.

Baboo *Hem Chunder Banerjee* and Baboo *Umbica Churn Bose* for the respondents.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—The plaintiffs in this suit stated that they were appointed a committee under Act XX of 1863 of the temple of the idol Gopinath. They said that the defendant was the highest officer in the temple appointed by the former local agents and confirmed by themselves, and that his duty was, under their supervision, to look after the *sheba* of the idol and to collect the rents, &c. They say that he became incompetent for the discharge of his duties and mismanaged affairs; and that, consequently, the committee dismissed him from office on the 15th November 1876. Notwithstanding his dismissal, the plaintiffs say, that the defendant continued exercising the same rights and enjoying the same perquisites and so forth that he had during his incumbency as superintendent; and that he was causing waste of the property of the idol. They therefore brought a suit asking for an injunction against the defendant, directing him not to assume the official designation of the superintendent of the idol; not to exercise any authority over the property of the idol, and in short not to interfere in any way. They also ask for a decree for the sum of Rs. 1,882-9-6, which was the estimated loss sustained by the idol in consequence of

(1) 3 Mad. H. C. R., 334.
(2) *Id.*, 198.
(3) 4 Mad. H. C. R., 112.
(4) *Id.*, 404.
(5) S. D. A., 1848, pp. 253, 255.

the defendant's improper exercise of authority subsequent to his dismissal; and they asked for the costs of their suit.

The defendant took various preliminary objections to the suit. He urged that the plaintiffs had not dismissed him, and that they were not competent to dismiss him under Act XX of 1863 except by a suit. He denied the alleged misappropriations and mismanagement; and, with reference to that, he pleaded that the old local agents very judiciously decided that, after making provisions for the offerings better than what the idol had before, and after making arrangements for the *sheba* of the idol, he should take the balance of the profits as a remuneration for his labour. That order, he said, was final; and, in the last paragraph of his written statement, he alleged that the idol in question was his ancestral family god; that the debutter properties were given by his ancestor; and that he has the right and full power to manage the *sheba* and to spend money.

At the trial in the Subordinate Judge's Court an objection was taken that the suit would not lie in that Court at all; that, supposing that the endowment comes under Act XX of 1863, such a suit could only be brought in the Court of the District Judge, and by his permission. The Subordinate Judge held that the suit would lie in his Court, and did not require the sanction of the District Judge, so far as the prayer for an injunction was concerned; and as regards the sum claimed as damages, the Subordinate Judge found, *first*, that there was no proof of any such misappropriation as the defendant was charged with; and *secondly*, that, if there had been any proof of that, a suit would not lie without the sanction of the District Judge in respect of that claim. The result was that the Court gave a decree for the injunction only, with costs of suit in proportion. The defendant appealed to the District Judge and took the same grounds,—*viz.*, that the suit is bad in law as having been brought in the wrong Court, and without the necessary sanction. He did not very clearly take the objection that this property did not come under the operation of Act XX of 1863, but he did say that the committee had no power to dismiss him; and in appeal before us it was contended that that objection was broad enough to cover the objection that the endow-

1882

PUDDOLABH ROY v. RAM GOPAL CHATTERJEE.

ment did not come under that Act. But we may observe that the very point of his objection was based upon the assumption that the case would come under the Act. Unless Act XX of 1863 governed the endowment, his objection that a suit in respect of it would not lie, and that if a suit did lie it should be brought in the Court of the District Judge, would have no possible foundation. The District Judge confirmed the decree of the first Court, both as to the injunction and as to costs.

In appeal before us four points are pressed upon our attention: *first*, that the suit would not lie in the Subordinate Judge's Court, but only in the District Judge's Court, under the Act; and that, as the first Court found that one portion of the claim was bad for the reason that it was brought in the wrong Court and without sanction, the whole suit should have been dismissed; *secondly*, it was contended that the endowment was not a public endowment at all, and that the committee under Act XX of 1863 had no power to deal with it or with the defendant; *thirdly*, it was contended that the decree was bad, because while it prohibited the defendant from continuing the management of the service of the idol, it made no provision for anybody else to do so; and *lastly*, it was objected that the order as to costs was wrong. As to the third objection, *viz.*, as to the effect of the decree, we think it unnecessary to discuss that point at any length, because it does not seem to us to be competent to the appellant to object to the decree on that ground. If it was right so far as the injunction against himself goes, it does not matter to him who succeeds him, or whether anybody is appointed or not.

On the first point, *viz.*, as to the jurisdiction of the Subordinate Judge to try the case, we think, upon the construction which we put upon the Act, and looking to the authorities on the subject, that there is no doubt whatever that this suit was properly brought in the Subordinate Judge's Court, and that it did not require the sanction of anybody. The section relied upon by the appellant is s. 14. We think that that section is merely an enabling section intended to allow suits to be brought by any person interested in the endowment, against the members of the committee themselves or any of those who are engaged in managing or superintending the affairs of the

endowment. We think that it was not intended by that section to take from the committee the power which would be inherent in them of their own authority to bring a suit in the ordinary Court against the manager in respect of moneys misapplied. We have been referred to various cases which fully support the opinion we have formed. On this point, therefore, we think that the appeal fails.

Then as to the question whether the endowment is a public endowment within the scope of Act XX of 1863, or whether it was the private property of the defendant, we have been asked to remand the case for the trial of this point, or else to say that, as the original defendant is now dead, and the point was not clearly raised and decided in the Courts below, there is no binding decision upon that point, and that it remains open for future litigation.

We think we ought not to assent to this course, because we think that the original defendant, who was the person to raise the issue, and to insist on having it tried out, if he thought fit to do so, did not really in his written statement contest the fact that the endowment was governed by s. 3 or 4, as the case may be, of Act XX. We find in various portions of his written statement that he expressly admits that he has been acting as superintendent appointed by the committee under Act XX, and by the local agents before them. In paragraph 12 especially, he expressly states that he was allowed by the previous local agents to appropriate to himself, as remuneration for his labour, the balance that remained after providing for the *sheba* of the idol; and at the trial he produced a proceeding of the Deputy Collector of the year 1846, and a proceeding of the Commissioner of the year 1859, which clearly set out that he was appointed by the Collector as local agent. We think, therefore, that it is much too late, and it was too late even at the commencement of the suit, for the defendant to pretend that he was independent of Act XX of 1863, and we must, therefore, disallow this point of the appeal.

The only matter as to which we think that the defendant has ground for complaint is as to the matter of costs; in that, while he has been saddled with the costs of the suit so far as it was

1882

PUDDOLABH ROY v. RAM GOPAL CHATTERJEE.

decided against him, he has not been awarded costs on the amount as to which the suit was dismissed. The suit was mainly brought for an injunction against the defendant. That he got, but, besides that, the plaintiffs claimed a considerable sum, nearly Rs. 2,000, as damages; and that part of the claim was dismissed. The order of the Court below was not, as the appellant appears to imagine, that he should pay costs to the plaintiffs on the whole amount of the plaint.

The order was that costs should be given in proportion. Accordingly we find in the schedule of costs only Rs. 10 were paid in as the stamp-fee for the plaint, but Rs. 80 have been allowed as pleader's fees. Nothing has been allowed to the defendant in respect of the large portion of the claim which was dismissed. The Courts below have given no reason for departing from the usual rule in such cases, and it may probably have been by an oversight that they made no order for the defendant to get his share of the costs.

We think it right to amend the decree by saying that the parties will get their costs in proportion to their success respectively. The costs of this appeal will follow the same.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

1882
June 6.

YUSUF ALI AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF TIPPERA (DEFENDANT).*

Mahomedan Law—Gift, Requisites of—Gift in Futuro.

Under the Mahomedan law a gift is not valid unless it is accompanied by possession, nor can it be made to take effect at any future definite period. A document, containing the words "I have executed an ikrar to this effect, that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one; but, after my death, you will be the owner, and also have a right to sell or to make a gift after my death," *held* to be an ordinary gift of property '*in futuro*,' and as such invalid under Mahomedan law.

Appeal from Appellate Decree, No. 1294 of 1879, against the decree of J. C. Geddes, Esq., Officiating Judge of Comilla in Tippera, dated the 10th March 1879, reversing the decree of Baboo Umachurn Kastogiri, First Subordinate Judge of that District, dated the 28th June 1877.