APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Krishnaswami Ayyangar.

T. S. PICHU AYYANGAR (SECOND PLAINTIFF), APPELLANT, 1940, March 6.

v.

SRI PERARULALA RAMANUJA JEER SWAMIGAL, DHARMAKARTHA AND MANAGER OF SRI ALAGIA NAMBIRAYAR TEMPLE (DEFENDANT), RESPONDENT.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 63 (4)—Refusal of Endowments Board to frame scheme for temple—Court's jurisdiction to set aside refusal and frame scheme—Civil Procedure Code (V of 1908), ss. 105 and 115—Order under sec. 115 on preliminary issue, if open to challenge in appeal to High Court against decree.

Under section 63 (4) of the Madras Hindu Religious Endowments Act, 1926, no suit lies to set aside an order of the Hindu Religious Endowments Board refusing to frame a scheme in respect of a temple. The words " institute a suit in the Court to modify or set aside such order " in sub-section 4 refer only to an order settling a scheme or modifying or cancelling one and not to an order refusing to frame a scheme. There is nothing in sections 63, 64 and 65 of the Act which gives power to the Court to frame a scheme when the Board has refused to do so. The Court can modify or cancel a scheme framed by the Board but it cannot take initial action. The initial duty of framing a scheme rests with the Board and with the Board only.

Venkatasami v. *Stridavamma*(1) explained and distinguished.

An order by the High Court in revision under section 115 of the Code of Civil Procedure on a preliminary issue relating to the maintainability of a suit, holding that the suit does not lie, is open to question in an appeal to the High Court from

* Appeal No. 229 of 1937.

(1) (1886) I.L.R. 10 Mad. 179 (F.B.).

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the decree dismissing the suit based on such order. Such an order is an interlocutory order affecting the decision of the Court when passing the decree and it is clearly open to the High Court by virtue of section 105 of the Code of Civil Procedure to consider its correctness in the appeal from the decree.

APPEAL against the decree of the District Court of Tinnevelly in Original Suit No. 4 of 1935.

K. V. Sesha Ayyangar and *R. Desikan* for appellant.

K. E. Rijagopalachari for respondent.

JUDGMENT.

LEACH C.J.

LEACH C.J.—In 1933 an application was made by twenty worshippers of the Sri Alagianambirayar temple in the Tinnevelly district to the Madras Hindu Religious Endowments Board for an order directing an inquiry to be held into the question whether the Board should frame a scheme for the administration of the temple and its endowments. The Board held an inquiry and as the result of the investigation decided that it was not necessary to frame a scheme. The applicants then filed a suit in the Court of the District Judge of Tinnevelly with the object of obtaining the settlement of a scheme under a decree of the Court. The suit was defended by the trustee, who is the respondent in this appeal. It is unnecessary to set out all the objections to the suit. It is sufficient to say that the main objection was that the Court had no power to frame a scheme. On this question a preliminary issue was framed and was answered by the District Judge in favour of the plaintiffs. Thereupon the respondent applied to this Court to reverse the order in exercise of its revisional powers. The application was heard by VENKATARAMANA RAO J. who decided that the District Judge had erred in holding that the suit lay. In addition to allowing the petition the learned Judge dismissed the suit.

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On the order being communicated to him the District Judge passed a formal decree dismissing the suit with costs. The appeal is from that decree. Before proceeding to discuss the merits of the appeal it is necessary to dispose of a preliminary objection raised by the respondent who says that the order of VENKATARAMANA RAO J. was final and therefore the appeal does not lie.

Section 115 of the Code of Civil Procedure which confers upon the High Court its power of revision states that if the subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. The section only contemplates an order which is appropriate to the application, and the order of VENKATARAMANA RAO J. dismissing the suit was not appropriate. Having decided that the District Judge had erred on the preliminary issue, he should have set aside his ruling and directed the District Judge to dispose of the suit in accordance with law and not to have dismissed the suit himself. The order of VENKATARAMANA RAO J. was an interlocutory order and the preliminary objection must be decided on this footing.

In support of his contention that the decision of VENKATARAMANA RAO J. is final the learned Advocate for the respondent has quoted *Ram Kirpal* v. *Rup Kuari*(1), *Mubarak Husain* v. *Bihari*(2) and *Hook* v. *Administrator-General of Bengal*(3) but as the present case is clearly governed by section 105 of the Code

(1) (1883) I.L.R. 6 All. 269 (P.C.). (2) (1894) I.L.R. 16 All. 306.
(3) (1921) I.L.R. 48 Cal. 499 (P.C.).

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of Civil Procedure they are not in point and I do not propose to pause to examine them.

That section says :

"(i) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(ii) Notwithstanding anything contained in sub-section (i), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness."

Authority is given here to the Court to set aside an erroneous order affecting the decision of a case unless it be an order of remand from which an appeal lies and no appeal is filed. Sub-section (ii) appeared in the Code for the first time in 1908. Now the order of VENKATARAMANA RAO J. certainly affected the decision of the case. As the result of the order, the District Judge was left with no other course open to him but to dismiss the suit. Therefore the order is one which directly falls within sub-section (i) of section 105. If the argument of the learned Advocate for the respondent were to be accepted it would mean that this suit would be decided by an interlocutory order and there would be no appeal either to this Court or to the Privy Council. The order of VENKATARAMANA RAO J. was not appealable. The Letters Patent of this Court expressly provide that an order passed in revision shall not be subject to an appeal and section 111 of the Code of Civil Procedure says that no appeal shall lie to His Majesty in Council from the decree or order of one Judge of a High Court. Therefore the order of VENKATARAMANA RAO J. does not fall within the purview of section 109 of the Code

which provides for appeal to His Majesty in Council from a final order or a decree of a High Court. The present appeal is from the decree, and as the order affected the decision of the Court when passing the decree it is clearly open to this Court by virtue of section 105 to consider its correctness.

I will now turn to the merits of the appeal. Section 62 of the Madras Hindu Religious Endowments Act, 1926, says that when the Board has reason to believe that the trustee of a math or excepted temple has been mismanaging the endowments or has been spending or alienating them for improper purposes, or when not less than twenty persons having interest make an application to the Board stating that in the interests of the proper administration of the endowments a scheme of administration should be settled, the Board may hold an inquiry. The Board cannot be compelled to hold an inquiry. If it decides that an inquiry is not necessary the applicants can carry the matter no further. So much is conceded by the learned Advocate for the appellant. The decision of the appeal depends upon the interpretation to be placed on sub-section 4 of section 63, but the sub-section must be read in conjunction with the first part of sub-section 1 and sub-section 3. The first part of sub-section 1 of section 63 reads as follows:

"If after making the inquiry referred to in section 62 the Board is satisfied that the trustee concerned has mismanaged the endowments of such math or temple or has spent or alienated them for improper purposes, or that, in the interests of the proper administration of such endowments, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee and the persons having interest, by order settle a scheme of administration for the endowments connected with such math or temple."

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Sub-sections 3 and 4 are in these words :

"(3) The Board may at any time by order and in the manner provided in sub-section 1 modify or cancel a scheme settled under that sub-section.

(4) Every order of the Board under this sub-section shall be published in the prescribed manner.

The trustee or any person having interest may within six months of the date of such publication institute a suit in the Court to modify or set aside such order."

For the appellant it is said that inasmuch as sub-section 4 gives a person having interest in an endowment the right to institute a suit in the Court to modify or set aside an order under this section, the power must include a power to the Court to frame a scheme, if the Court sets aside an order of the Board refusing to do so. It is also said that the Court has power to frame a scheme by reason of section 65 to which I shall refer later. It is further said that apart from the provisions of the Madras Hindu Religious Endowments Act, 1926, there is power in the Court to frame a scheme.

I agree with VENKATARAMANA RAO J. that section 63 does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are : (i) an order settling a scheme, (ii) an order modifying a scheme, and (iii) an order cancelling a scheme. I consider that the words "institute a suit in the Court to modify or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one.

Mr. Sesha Ayyangar on behalf of the appellant has referred us to *Venkatasami* v. *Stridavamma*(1) and *Reasut Hossein* v. *Hadjee Abdoollah*(2). In *Venkatasami*

(1) (1886) I.L.R. 10 Mad. 179 (F.B.). (2) (1876) I.L.R. 2 Cal. 131 (P.C.).

v. *Stridavamma*(1) a Full Bench of this Court held that an order rejecting an application for the appointment of a receiver was an order passed under section 503 of the Code of 1882 (now Order XL, rule 1) and was therefore appealable under section 588, clause 24 [now Order XLIII, rule 1, clause (*s*)]. An appeal was given from an order appointing a receiver, but nothing was said with regard to an appeal from an order refusing to appoint a receiver. The Court considered that as there was an appeal from an order appointing a receiver it followed that there must be an appeal from a negative order. This meant that on appeal the Court could appoint a receiver if an appointment had been improperly refused by the Court below. Mr. Sesha Ayyangar says that, inasmuch as the Court has the power to set aside an order of the Board to frame a scheme under section 63, it can set aside the order refusing to settle a scheme, and, if it does so, this must imply a power to frame a scheme. This does not follow. The Act may vest in the Board the power to frame a scheme and in the Court only the power to modify or cancel it, and this is my reading of the Act. The Board must in the first instance frame a scheme. The Court can modify or cancel it but it cannot take initial action. Therefore it is not a question of the Court having power to do something and refusing to do it, as in *Venkatasami* v. *Stridavamma*(1), and that makes all the difference. The decision in that case was based on *Reasut Hossein* v. *Hadjee Abdoollah*(2), the second case quoted by Mr. Sesha Ayyangar.

If sub-section 4 were to be held to apply to the order of the Board in this case, what would be the

(1) (1886) I.L.R. 10 Mad. 179 (F.B.). (2) (1876) I.L.R. 2 Cal. 131 (P.C.).

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result ? The Court would have to set aside the order, but it could not pass any further order, because the power to frame a scheme is in the Board. VENKATARAMANA RAO J. put the position here very aptly in these words :

> " So when the Board declines to frame a scheme there is no use in the Court setting at naught that discretion because there is no power in the Court to compel the Board to frame a scheme. Unless the Court has got that power it would be futile to set aside such an order."

In my opinion the Legislature never intended sub-section 4 to have application except to orders of the Board framing schemes or modifying or cancelling them.

This brings me to the second contention of the appellant. Section 65 says that any scheme of administration which has been settled by a Court under section 63, or which under section 75 is deemed to be a scheme settled under the Act may, at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest but not otherwise. Mr. Sesha Ayyangar says that the words " any scheme of administration which has been settled by the Court under section 63 " must be read as meaning that the Court is given power to settle a scheme in any circumstances. I cannot read section 65 in this way. The Court has power to settle a scheme, but it must be a scheme which has first been framed by the Board. Section 65 is merely intended to give the Court power, after a scheme has been framed, to modify or cancel it at any time.

I am also unable to accept the argument that there is a residuary power in the Court to frame a scheme. The first Act relating to the Madras Hindu Religious Endowments came into force in 1925. Before then a

scheme for the management of a temple could only be framed in accordance with the provisions of section 92 of the Code of Civil Procedure, and the suit required the sanction of the Advocate-General to its in titution. It is common ground that since 1925 section 92 has ceased to apply and that the Madras Hindu Religious Endowments Board has taken the place of the Advocate-General. The scheme of the first Act was to place in the Board power of supervision of Hindu temples and maths in this Province and in proper cases the control of the management, and this is the scheme of the present Act. As section 92 of the Code of Civil Procedure has now been replaced by the Madras Hindu Religious Endowments Act, 1926, so far as Hindu religious endowments of this Province are concerned, that Act alone can be looked at for ascertaining what the powers of the Court are. There can be no residuary powers because the former powers are taken away by the present Act. The only section which has application here is section 63, and, as I have indicated, this section in my judgmont gives no power at all to the Court to frame a scheme when the Board has refused to do so. I consider that VENKATARAMANA RAO J. correctly interpreted the Act in his order of revision and consequently I hold that the appeal fails and should be dismissed with costs.

LEACH C.J.

KRISHNASWAMI AYYANGAR J.—I agree with my Lord the CHIEF JUSTICE on both the points dealt with in the judgment just now delivered. On the second point, which turns on the true construction of the last sentence in section 63 (4) of the Madras Hindu Religious Endowments Act, I desire to add a few words of my own. That clause runs as follows:

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"The trustee or any person having interest, may within six months of the date of such publication institute a suit in the Court, to modify or set aside such order."

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The words "such publication" and "such order" in this clause have reference obviously to the kind of order mentioned just previously, in the earlier portion of the same sub-section which directs the publication of "every order of the Board under this section" in the prescribed manner. The order with which we are here concerned is no doubt an order of the Board, but is it also one *under this section* so as to give to the appellants a right to institute a suit to modify or set it aside? I was at first impressed by the argument that the point is covered by the decision of the Full Bench in *Venkatasami* v. *Stridavamma*(1) but, on further consideration, I think that that view cannot be sustained. The above decision was rendered no doubt on similar words but occurring in a different enactment, namely, the Code of Civil Procedure, 1882. By section 588 (24) of that Code, corresponding to Order XLIII, rule 1 (*s*) of the present Code, an appeal was allowed against, amongst others, orders under section 503. Section 503 contained the various provisions relating to the appointment of a receiver, his rights and duties, etc., but said nothing about the dismissal of an application made under the section, a feature which is common to both the old and the new Codes. The argument was advanced that an appeal was permitted only in respect of an affirmative order, that is to say, an order granting the application and none against an order refusing it. The contention was negatived, the Court holding that even an order rejecting the application was an order passed *under* the section, and was therefore appealable under section 588 (24). The result was that, in the view of the Full Bench, an order *under the section* comprehended both classes of orders, positive as

(1) (1886) I.L.R. 10 Mad. 179 (F.B.).

well as negative. Here then, it is said, we have a construction of the words *orders under* a section, and the question is, are we free to adopt a different construction in respect of what is practically the same language in the Madras Hindu Religious Endowments Act?

Two reasons in particular have operated on my mind in persuading me to assent to the opinion expressed in the judgment of the learned CHIEF JUSTICE. In the first place, it is to be observed that there is nothing in common between the Code of Civil Procedure and the Hindu Religious Endowments Act; or, to say the same thing in other words, the two statutes are not *in pari materia*. Further the judgment of the Full Bench appears to have proceeded on considerations which have little or no application to an Act like the one with which we are concerned. PARKER J. felt compelled to place a reasonable construction on the Act and pointed out that the opposite construction could not have been intended by the Legislature. BRANDT J. laid stress on principles and expediency, and held that the view of the Full Bench was more consonant with the general principles of the Code and the rules of construction. But it cannot be said that there is anything in the general principles of the Hindu Religious Endowments Act which, as pointed out by my Lord, can be said to lend support to the construction accepted in the case cited. The purpose and scope of the Madras Hindu Religious Endowments Act are quite different and leave no room for doubt that it was the intention of the Legislature to vest the supervision and control of religious institutions in a Board composed of men specially qualified by their knowledge and equipment to discharge the duty entrusted to them by the Act. It is therefore right to say that, in a

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statute of this kind, we should require language more explicit than we have to give a right of suit against the decisions of a body composed presumably of persons having expert knowledge in the special field of Hindu religion and charities.

Secondly, and this in my view is a more powerful argument against the appellant, the Court should be slow to adopt a construction which is not likely to afford a real and effective remedy to the complaining party. The initial duty of framing a scheme rests with the Board and with the Board only, and all that the Court can do, assuming it has the power, is to modify or set aside its order of refusal, and not to compel it to frame a scheme. There is nothing in sections 63, 64 and 65, to warrant our holding that the Court by its decree can itself frame a scheme in the suit. To imply such a power in the Court from the opening words of section 65 namely, "any scheme of administration which has been settled by a Court under section 63" is to place an unreasonable construction on these words and cannot be permitted. Is the Court then to be placed in a position in which it is merely to set aside the order and still leave it open to the Board to refuse to frame a scheme, in other words, to stultify itself? I think not.

I therefore feel that, whatever might be the meaning of the words in question in some other enactment or in some other context, it is not correct to construe section 63 as conferring a right of suit against a refusal to frame a scheme under the section.

N.S.