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July 26.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.

RAGHUBAR DIAL AND OTHERS (DEFENDANTS), *v.* KESHO RAMANUJ DAS (PLAINTIFF).*

Trust—Trust for "public religious purposes"—Private trust—Suit by worshipper at Hindu temple relating to trust—Right to sue—Civil Procedure Code. ss. 30, 539—*Act XX of* 1863—*Hindu Law.*

The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the revenue authorities mutation of names in the idol's favour, and an acknowledgment of the person whom they nominated as agent or manager. The plaintiff, alleging that they had subsequently repossessed themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple, and professing to sue on behalf of the entire body of the worshippers thereat, sued for a declaration that the land was *wakf*, and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. No sanction to the institution of the suit was obtained under s. 539 of the Civil Procedure Code.

Held by the Full Bench that the gift made by the defendants constituted a trust for the purposes of the temple.

Per EDGE, C. J., and TYRRELL, J., that the defendants before the Court did not constitute themselves trustees in any sense.

Held also by the Full Bench that the suit was not maintainable as against those defendants.

Per STRAIGHT, J., that the suit was not maintainable under the Hindu Law; that the trust was one for public religious purposes; that such a suit, in which the plaintiff asked to have the trust administered by the Court, could not be maintained without the sanction required by s. 539 of the Code; that assuming s. 539 to be inapplicable, and Act XX of 1863 to apply, the suit could not be maintained without the sanction required by that Act; and that, with reference to s. 30 of the Code, no cause of action had accrued to the plaintiff alone on which he could maintain the suit.

Per EDGE, C. J., and TYRRELL, J., that if the trust were one for public religious purposes, the suit as against the defendants before the Court must fail for non-compliance with the provisions of s. 539 of the Code, and if for private or *quasi*-private religious purposes, it must also fail, since there was no principle on which the plaintiff, as one of the public worshipping in the temple, could maintain it against those defendants who were not trustees but (if they had wrongfully taken possession) trespassers; that Act XX of 1863, could not apply; and that, with reference to s. 30 of the Code, the plaintiff could not maintain the suit alone on his own behalf, or on behalf of himself and others against those defendants.

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Jawahra v. *Akbar Husain* (1) distinguished. *Manohar Ganesh Tambekar* v. *Lakhmiram Govind Ram* (2), *Lutifunissa Bibi* v. *Nazirun Bibi* (3), and *Hira Lal* v. *Bhairon* (4), referred to. *Wajid Ali Shah* v. *Dianat-ullah Beg* (5) approved.

THIS was a reference to the Full Bench by Brodhurst and Mahmood, JJ., the question referred being whether the suit was maintainable under Hindu Law by the plaintiff-respondent, and with reference to ss. 30 and 539 of the Civil Procedure Code. The nature of the suit is stated in the judgment of the Full Bench.

Pandit *Sundar Lal* and Pandit *Ratan Chand*, for the appellants.

Mr. *C. Dillon*, Mr. *Dwarka Nath Banerji*, and Babu *Jogindro Nath Chaudhri*, for the respondent.

STRAIGHT, J.—The reference which is now before this Bench arose out of a suit in which one Kesho Ramanuj Das was the plaintiff, and four persons, Behari Lal, Musammat Kundar Kuar, Raghubar Dial, and Mohan Lal were the defendants. The question which is put to us in the order of reference is this :—"Was the suit maintainable under the Hindu Law by the plaintiff-respondent, and with reference to ss. 30 and 539 of the Civil Procedure Code."

It seems to me, for the purposes of determining this question, that it is material to look at the terms of the plaint upon which the plaintiff came into Court, and summarised they come to this. That Tika Ram was the absolute proprietor of 5 biswas of land situate in the Bareilly District; that he made a gift of those 5 biswas of land in favour of the four defendants, the female defendant being his daughter, Behari Lal being her husband, and the other two defendants being her sons; that Tika Ram died in or about 1867, leaving behind Musammat Pran Kuar his widow; that Musammat Pran Kuar, subsequent to the death of her husband, constructed a temple in honour of the god Janki Ballabhji, and dedicated it to that deity. The fifth paragraph of the plaint, which I had better state in terms, goes on to say :—"The defendants, in order to defray the expenses of the temple, made a gift of the said property in favour of

(1) I. L. R., 7 All. 178.
(2) I. L. R., 12 Bom. 247.
(3) I. L. R., 11 Calc. 33.
(4) I. L. R., 5 All. 602.
(5) I. L. R., 8 All. 31.

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Janki Ballabh, and voluntarily made an application for mutation of names, which was allowed, and Behari Lal, defendant, was appointed a manager of the temple." The plaint then goes on to say that "in 1875, the Tahsildár, of his own accord, made a report to the effect that the deity had no existence and could not be deemed to be in possession, and that as the donors were in actual possession, their names should be recorded. This was allowed by the Board of Revenue, and the names of the defendants were recorded, although the income of the property used to be spent in defraying the temple expenses.

"7. That since November, 1884, the donors have changed their mind and have stopped the payment of the expenses.

"8. The temple is a place of public worship and residents of neighbouring places visit the temple. The plaintiff has been a *pujari* (worshipper) for the last seven years, and resides in it. He, therefore, on behalf of the entire Hindu community who worship in the temple, prays as follows:—

"(1). That it may be declared that 5 biswas, &c., is *wakf*;

"(2). That it may be declared and established that Thakur Ballabhji, in whose favour the gift was actually made, is entitled to hold the property in his name, as is customary with reference to temples;

"(3). That the defendants be directed to pay the income of the said property for defraying the expenses of the temple as hitherto;

"(4). That the Court may issue such orders and instructions as may be necessary and proper for the future management of, and as to the payment of the income for, the said temple."

I may as well at once say, in order to clear that consideration out of the way, that, as far as I am aware, there is no rule of Hindu Law, substantive or otherwise, that deals with or governs a claim of this description. I am not aware that there is any principle of Hindu Law which either sanctions or prohibits such a suit, nor is any suggested on either side. Therefore I reply in the negative as to the first question referred to us.

Then arise the following three considerations. First, looking to the frame of the plaint, is the suit one that comes within the purview of s. 539, Civil Procedure Code? If it is such a suit, then it is conceded on the part of the plaintiff that it is prohibited by that section, and could not be maintained without the sanction of the Collector as provided in the last paragraph of that section. If it is not prohibited by that section, then is it within the provisions of Act XX of 1863? And, lastly, assuming it not to be governed by either s. 539, Civil Procedure Code, or the provisions of Act XX of 1863, are the provision of s. 30, Civil Procedure Code, applicable to it?

The terms of the plaint are unmistakeable, and there can be no question as to what the plaintiff alleges. He says that in the year 1870, the four defendants between them, by an endowment, created a trust in respect of this temple of Janki Ballabhji and of the idol contained therein, which endowment consisted of 5 biswas of land, the income of which was to be devoted to the expenses of the temple. I think I may so far look into the evidence in the case as to refer to the mutation proceedings of the 5th August, 1870; because that is specifically referred to by the plaintiff in his plaint; and may be reasonably taken to be incorporated into it. It appears to me, reading the terms of that petition, that it is good evidence that the four defendants made an out and out gift of the 5 biswas of land in favour of the Thakurji; that they had created an endowment in respect of that particular land in favour of that idol; and that whether Behari alone be regarded as the trustee of that endowment, or whether they and Behari be regarded as joint trustees, there was a trust in favour of the idol, who was the beneficiary so to speak under such trust.

Referring to page 371 of Mr. Agnew's book upon Trusts in British India, I may quote a passage from it, as it rests upon the authority of case law. He says:—"As an idol cannot itself hold lands, the practice is to vest the lands in a trustee for the religious purpose, or to impose upon the holder of the lands a trust to defray the expense of worship. Sometimes the donor is himself the

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trustee. Such a trust is of course valid, if perfectly created, though, being voluntary, the donor cannot be compelled to carry it out if he has left it imperfect. But the effect of the transaction will differ materially according as the property is absolutely given for the religious object or merely burthened with a trust for its support. And there will be a further difference where the trust is only an apparent and not a real one, and where it creates no rights in any one, except the holder of the fund."

This is quoted from Mr. Mayne's Hindu Law, para. 362, and, I believe, represents the rules bearing upon the subject, which are also very fully stated in the recent ruling of the Bombay High Court in *Manohar Ganesh Tambekar* v. *Lakhmiram Govind Ram.* (1) It appears to me, as I said before, that the terms of that petition are an indication of an absolute gift to an endowment in favour of the Thakurji of the 5 biswas of land which belonged to the owners. That being so, it seems to me that one can only regard that, the temple being an open temple, as a public religious purpose. If that be so, we have then the main element that is required for the purpose of bringing into operation the provisions of s. 539, Civil Procedure Code.

Now, then, what does s. 539 provide? It says:—"In case of any alleged breach of any express or constructive trust created for public charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, &c."

Now, it is not necessary, if I read that section aright, that there should have been any breach of trust; but it is sufficient if there be a public religious trust, and the direction of the Court is considered necessary for the administration of such trust. This view has been adopted by the learned Judges of the Calcutta High Court in *Lutifunnissa Bibi* v. *Nazirun Bibi* (2). Therefore, this may be fairly regarded as a suit, to put it in its narrowest form, in which the plaintiff asks to have the trust administered by the Court. That being so, it seems to me that the sanction

(1) I. L. R., 12 Bom. 247. (2) I. L. R., 11 Calc. 33.

of the Collector or such officer as the Local Government might appoint was necessary for the purpose of empowering the plaintiff to bring such a suit. In the referring order the Full Bench ruling in *Jawahra* v. *Akbar Husain* (1) is referred to, and apparently treated by the learned Judges who referred this case as in their opinion applicable to the particular circumstances of this case. In my opinion, it is not applicable. In that case the plaintiff brought his suit as a worshipper for the purpose of removing the interference of the defendants who had altered the structure of the mosque and had turned it into a place for storing straw. My brother Mahmood in that case was perfectly justified in observing that there was no suggestion in the plaint of a misapplication or a breach of trust, or a prayer for the administration of the trust, such as would bring the case under s. 539 of the Code. I, therefore, speaking for myself, do not think the Full Bench ruling above referred to governs this case. That being so, I think that s. 539 was applicable.

If it was not, then does the case fall within Act XX of 1863? It is a pity, I think, that the learned pleader on behalf of the appellants could not have conceded that it did not. But if it does fall within that Act, then undoubtedly that Act required sanction to be given, which sanction has not been given, and therefore it would be prohibited and could not be maintained without sanction.

As to whether s. 30, Civil Procedure Code, is applicable, assuming that I am wrong as regards the view I have taken with regard to s. 539, I am at a loss to see what cause of action could have accrued to the plaintiff alone. It is impossible to understand upon what right the plaintiff can claim to maintain a suit such as the present against the defendants. As most material to this particular question and as supporting the view that I am now expressing, I may refer to the ruling of our late Chief Justice, Sir Comer Petheram, and Oldfield, J., in *Wajid Ali Shah* v. *Dianatullah Beg* (2). I think, therefore, I have now dealt with the matters that

(1) I. L. R., 7 All. 178. (2) I. L. R., 8 All. 31.

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seem to me necessary for answering this reference. My answer to it is as given above.

EDGE, C. J.—In this case four persons, defendants in this suit, in 1870 made a gift of 5 biswas of land to a Hindu temple for the purpose of *bhog* and *arti* and other expenses appertaining to the idol. They appointed the defendant Behari Lal the manager and agent, and they presented a petition to the revenue authorities to have their names expunged and the name of the deity inserted instead, and to have Behari recognised as the agent or manager. The plaintiff in his plaint alleges that he as a Hindu is interested in worshipping in this temple. He alleges also that the defendants have appropriated the income of the 5 biswas to their own purposes. He has brought this suit claiming the reliefs mentioned in my brother Straight's judgment. The Subordinate Judge who tried the suit decreed the claim against Behari and Bhagat *alias* Mohan. The latter had confessed judgment. Behari did not appeal, neither did Bhagwat, and as to whether the suit was maintainable as far as concerned them is consequently not a matter which we have now to consider. The plaintiff appealed from the decree of the Subordinate Judge, so far as the other two defendants were concerned, and on appeal the suit was decreed against them. They have now appealed to this Court; and out of that appeal has arisen this reference. We must, in my opinion, interpret this reference as applying only to the parties who can be affected by the appeal in this Court, that is, the defendants other than Bhagwat and Behari.

The first question to consider is as to whether a trust had been in fact created. It appears to me that the four defendants, short of executing a deed of declaration of trust, did everything else in their power to create a trust. They purported to give the 5 biswas to the god; they successfully applied to the revenue authorities for mutation of names in favour of the god, and for acknowledgment of the person whom they nominated as the manager or agent. One thing appears to me to be quite clear, that the defendants other than Behari, who was the manager, and whose case is not now before us, did not constitute themselves trustees in any sense. In

fact, as far as I can see, they divested themselves of their separate interest in these 5 biswas. That I think has some bearing upon the answer we should give to this reference. I may mention incidentally that of the two defendants now before us, one was found and the other was alleged to be a minor in 1870.

On behalf of the plaintiff, it was said that this was not a case coming within s. 539 of the Code, it being contended by Mr. *Banerji* that there was no express or constructive trust here for public religious purposes. He contends, of course, that there was a trust, but denies that the endowment of this small temple could be considered to be an endowment for public religious purposes. If this was an express or constructive trust for a public religious purpose, there is sufficient in the plaint itself to show that the case would come within s. 539, Civil Procedure Code, because in effect the plaint alleges that there has been a breach of such trust, that is, that Behari, who was appointed a manager, and who was also a donor, and the other defendants, who were donors, have, contrary to the objects of the trust, and the objects of the endowment, repossessed themselves of the 5 biswas and the profits accruing from them. It is quite true that in terms none of the reliefs claimed in this plaint are precisely the reliefs mentioned in clauses *a*, *b*, *c*, *d*, and *e* of s. 539 of the Code. But they are all, in my judgment, comprised within the phrase "or granting such further or other relief as the nature of the case may require." Here, not only does the plaintiff's plaint, if it states the facts truly, show that there has been misapplication and non-administration of the trust funds and trust property, but he asks in terms to have it declared that the 5 biswas were trust property of the god; and he calls in aid the assistance of the Court to enforce the trust. Consequently, if the purpose for which the endowment was made was a public religious purpose, the suit must fail, the provisions of s. 539 of the Code not being complied with. On the other hand, if, as Mr. *Banerji* contends, the purpose was not a public religious purpose in the sense of s. 539, but a private trust, for a private religious purpose, I fail to see on what principle the

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plaintiff is entitled to bring this action. I confine myself to the case of the two persons now before us in this appeal. They are not trustees. As far back as 1870 they did appoint a manager and did divest themselves of the property. If they have since that date wrongfully taken possession of those 5 biswas and appropriated to their own purposes the income, that in my judgment does not constitute them trustees, but would make them trespassers dealing with the property to which they are not entitled. How in that case a person, who is really one of the public, although he can worship in the temple, can maintain an action against these persons as trespassers, I fail to see. I have seen no authority to show that such an action is maintainable.

I may say also that I also fail to see how Act XX of 1863 can apply in this case. The temple and trust, if there was one, came into existence in 1870 and was not in existence at the date of that Act.

There is another question raised, as to whether this action could be maintained by reason of s. 30 of the Civil Procedure Code? In my opinion neither the plaintiff, nor the body of Hindus who might worship in this temple, nor the body of Hindus generally, could maintain this action, if the trust were a private trust. The fact that the plaintiff apparently had notices issued to the Hindus interested could not, in that view, entitle him to maintain the action alone, on his own behalf, or on behalf of himself and others. If this trust was for a public religious purpose, s. 539, Civil Procedure Code, would still apply, whether the notices required by s. 30 of the Code had issued or not. I fully agree with my brother Straight that the ruling in the case of *Jawahra* v. *Akbar Husain* (1) referred to in the order of reference does not govern this case. That was a case in which a Muhammadan was suing the persons who, by their act of converting a mosque to purposes other than religious purposes, had prevented him exercising his undoubted right of using the mosque for purposes of prayer. The case which appears to me to be practically on all fours with this case is that

(1) I. L. R., 7 All. 178.

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of *Wajid Ali Shah* v. *Dianatullah Beg* (1), and I must say, so far as the facts of that case are applicable here, I agree with the judgment of the late Chief Justice which was concurred in by Oldfield, J.

The passage quoted by my brother Straight from para. 362 of Mayne's Hindu Law (3rd ed.) in my opinion correctly lays down the Hindu Law with regard to trusts in favour of idols. That passage is elaborated and other considerations are referred to in subsequent paragraphs.

To put it shortly, whether this trust was a public trust or a private one, whether the purpose was a public religious or private or *quasi*-private religious purpose, in my opinion this suit is not maintainable as against the appellants to this appeal. From what I have already said may be gathered the opinion that I might have as to whether the suit was maintainable at all: but I decline to express any opinion whether it was maintainable against those defendants who are not parties to this appeal. It is not quite clear, from the form of the reference, whether our opinion was asked as to the suit being maintainable against all the defendants, or merely those defendants who are parties to the appeal.

TYRRELL, J.—I entirely concur with the opinions expressed by the learned Chief Justice; and would add this only that the true scope and purview of s. 30, Civil Procedure Code, has been laid down by three Judges of this Court in a case which was before four Judges of the Court,—*Hira Lal* v. *Bhairon* (2).

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

HARI TIWARI AND OTHERS (DEFENDANTS) *v.* RAGHUNATH TIWARI AND ANOTHER (PLAINTIFFS).*

Exchange—Agreement that if either party were deprived of land received he should receive other land—Suit for specific performance—Act XV of 1877 (Limitation Act), sch. ii, No. 113.

In 1871 the plaintiffs and the defendants executed a deed whereby they effected an exchange of certain lands, and each party agreed to resist by legal process or by bringing

(1) I. L. R., 8 All. 61. (2) I. L. R., 5 All. 602.