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tion of alimony, residence and so forth") is sufficient authority for the continuance of the allowance during the *iddat*.

For the above reasons I would set aside the order of the Joint Magistrate, and direct him to come to a finding on such evidence as may be adduced before him, as to whether Shah Abu Ilyas divorced his wife, and, if so, on what date. If he finds that Shah Abu Ilyas did divorce his wife, he should determine what is the period of the *iddat* and enforce the maintenance order for that period and to no later date.

BLENNERHASSETT, J.—The authorities collected by my brother Aikman show a strong consensus of opinion among the High Courts of Calcutta, Bombay, Madras, and the North-Western Provinces, and the Chief Court of the Panjáb in support of the view expressed by him. Following those authorities, I concur in the judgment of my brother Aikman and in the order proposed by him.

BY THE COURT.

The order of the Court will be that the order of the Joint Magistrate be set aside, and the Joint Magistrate inquire into and determine whether Shah Abu Ilyas has divorced his wife, and if he has, that he should determine what is the period of the *iddat* and enforce the maintenance order until the expiry of that period and to no later date.

APPELLATE CIVIL.

1896
August 14.

Before Mr. Justice Banerji and Mr. Justice Aikman.

THAKURI AND OTHERS (PLAINTIFFS) *v.* BRAMHA NARAIN AND OTHERS (DEFENDANTS.)*

Court-fee—Act No. VII of 1870 *(Court-Fees Act) Sch. ii, art.* 17, *cl. vi—Civil Procedure Code, section* 539*—Prayer for appointment of plaintiffs as trustees—Declaratory relief.*

A prayer in a plaint purporting to be a plaint under section 539 of the Code of Civil Procedure, that the plaintiffs themselves may be appointed trustees is not a prayer for possession requiring to be stamped at the value of the trust pro-

* First Appeal No. 266 of 1896 from an order of H. Bateman, Esq., District Judge of Saháranpur, dated the 1st October 1894.

porty, but is a prayer for a relief falling within article 17, cl. vi, of the second schedule to Act No. VII of 1870. *Sonachala* v. *Manika* (1); *Delroos Banoo Begum* v. *Asghur Ally Khan* (2) and *Omrao Mirza* v. *Jones* (3) referred to and distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandar Mukerji*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

BANERJI and AIKMAN, JJ.—This is an appeal from an order of the District Judge of Saháranpur rejecting a plaint on the ground that the reliefs sought in the plaint had not been properly valued and the necessary amount of court-fees had not been paid within the time allowed by the Court. One of the plaintiffs-appellants, Thakuri, is dead. We consider that the cause of action survives to the other appellants, and that the appeal may proceed at the instance of those appellants.

The suit was brought under section 539 of the Code of Civil Procedure by three Hindus who alleged that a trust had been created for certain charitable and religious purposes by Rani Mahtab Kunwar; that the trustee appointed by her had committed a breach of the trust by alienating a portion of the endowed property and that the heirs of the trustee had made a gift of the trust property in favour of the person through whom the defendants now claim. The plaintiffs prayed that it might be declared that the property was endowed property. They further prayed that they should be appointed superintendents of the property and that an injunction should be issued to the defendant forbidding him to interfere with the discharge of the plaintiffs' duties as superintendents. They also asked the Court to grant such other reliefs as to the Court might seem proper having regard to the provisions of section 539 of the Code of Civil Procedure.

The learned Judge was of opinion that the suit was substantially one for possession. He ordered the plaintiffs to value the suit as a suit for possession and to pay the amount of court-fees

(1) I. L. R., 8 Mad. 516. (2) 15 B. L. R., 167.
(3) I. L. R., 10 Calc. 599.

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requisite for such a suit within a time fixed by him. The plaintiffs not having complied with this order he has rejected the plaint.

The learned Judge has relied in support of his view on the ruling of the Madras High Court in *Sonachala* v. *Mannika* (1). That case is distinguishable from the present. It was not a suit under section 539 of the Code of Civil Procedure. If the principle laid down in that case were to be applied to a suit under section 539, and every suit under that section in which the appointment of trustees was prayed for, or the removal of a trustee was sought, had to be treated as a suit for possession of the property, the salutary provisions of that section would be seriously interfered with and in many cases defeated. A suit under that section is brought for the protection and preservation of endowed property, and it is safe-guarded by the rule which requires that it must be brought by the Advocate-General himself, or with the consent of the Advocate-General or such other officer as the Local Government may appoint in this behalf. Instances may often arise in which the trust property is of considerable value. If court-fees had to be paid with reference to that value whenever it was found necessary to bring a suit to remove a trustee who had committed a breach of his trust, such court-fees might be prohibitive and might prevent the institution of the suit. In this case the learned Judge below treats the suit as "obviously a suit for possession." We are unable to agree with his view of the nature of the prayer in the plaint. The plaintiffs nowhere seek possession of the property. Although they ask that they may be appointed superintendents, they might never be appointed to that office. The Judge might see fit to appoint some other person as trustee or superintendent, and no occasion might arise for the plaintiffs taking possession of the property. It might also not be necessary to eject the defendant. If the declaration sought for be made, the defendants might themselves cease to interfere with the property. In our opinion therefore the learned Judge below was not right in holding that this was necessarily a suit for possession.

I. L. R., 8 Mad. 516.

The learned counsel for the respondents cited to us the case of *Delroos Banoo Begum* v. *Ashgur Ally Khan*, (1). That was no doubt a suit similar to the one before us in so far that the plaintiffs in that suit asked to be appointed *mutawallis*; but in that case there were emoluments attached to the office of *mutawalti*, and by reason of those emoluments being capable of valuation it was held that the suit was not one in which the subject matter could not be valued. In *Omrao Mirza* v. *Jones* (2) it was held that the right to retain control over trust property could not be estimated at a money value and that a suit for that purpose would ordinarily fall within art. 17, cl. vi, of the second schedule to the Court-Fees Act. In that particular case, however, the plaintiff had chosen to put a valuation on the subject matter of his suit, and the Court held that as that valuation afforded a basis for the assessment of court-fees, the fees should be paid with reference to it. The two rulings therefore in our opinion do not support the contention of the learned counsel for the respondents.

In our judgment the suit as framed embraced a claim for a declaratory decree to the effect that the property in suit was endowed property. For that portion of the claim the amount of court fee was Rs. 10. It also embraced a prayer for the appointment of the plaintiffs as trustees. In our opinion it was impossible to estimate at a money value that prayer in the plaint. Consequently the amount of court-fee payable for that portion of the claim was Rs. 10 under cl. vi, art. 17 of the second schedule to the Court-Fees Act. There was a further prayer for an injunction against interference with the discharge of the duties of the plaintiffs as superintendents. Court-fee was payable in respect of that prayer under section 7, sub-section 4, clause *(d)*, according to the amount at which the relief sought was valued in the plaint. The relief in this case was valued at Rs. 100. There is nothing to show that this was an improper valuation. The amount of court-fees payable for that part of the claim was therefore Rs. 7-8-0. The total amount of court-fees payable was

(1) 15 B. L. R., 167. (2) I. L. R., 10 Calc., 599.

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thus Rs. 27-8-0. There was consequently a deficiency of Rs. 10, which the plaintiffs must supply.

We set aside the order of the District Judge rejecting the plaint, and remand the case to his court with the direction that he should fix a time within which the deficiency should be made good, and, in case of the plaintiffs' failure to supply the deficiency within the time fixed, he should proceed in the manner provided by section 54 of the Code of Civil Procedure. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

MISCELLANEOUS CRIMINAL.

1896
August 19.

Before Mr. Justice Banerji and Mr. Justice Aikman.

FARZAND ALI (APPLICANT) *v.* HANUMAN PRASAD (OPPOSITE PARTY).*

Criminal Procedure Code, section 526—*Transfer of Criminal case—Grounds upon which transfer may be granted.*

What the court has to consider in the case of an application under section 526 of the Code of Criminal Procedure is not merely the question whether there has been any real bias in the mind of the presiding Magistrate against the accused, but also the further question whether incidents may not have happened, which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. *Dupeyron* v. *Driver* (1) followed.

In this case a complaint was laid against the applicant in the court of the District Magistrate of Mirzapur by one Hanuman Prasad, the mukhtar-a'am of the Rája of Bijaipur, charging the applicant with offences under section 417, section 421 and section 424 of the Indian Penal Code. After examination of the complainant on the 14th of April 1896, the District Magistrate ordered a summons to issue for the appearance of the applicant on the 21st of April. The applicant applied to the High Court for the transfer of the proceedings so instituted against him, and these proceedings

* Miscellaneous Application No. 135 of 1896.

(1) I. L. R., 23 Calc., 495.