

1905

PARGOTAM  
RAO  
v.  
JANKI BAI.

of a legal representative of Ram Chandra, we must remand the suit under the provisions of section 562 of the Code of Civil Procedure with directions that it be replaced on the file of pending suits in its original number and be disposed of on the merits. The Court will have regard to the direction which we have given above, namely, that the interlocutory order of the 20th of April 1902 by which Musammatt Janki Bai was entered on the record in the place of her deceased husband as his legal representative had not the effect of determining that Ram Chandra was separate from the other members of his family at the time of his death. This will be one and the main issue for the Court to determine. The costs here and hitherto will abide the event.

*Appeal decreed and cause remanded.*

1905  
July 12.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burkitt.*

GHAZAFFAR HUSAIN KHAN AND OTHERS (DEFENDANTS) v. YAWAR HUSAIN AND ANOTHER (PLAINTIFFS) AND MEHDI HUSAIN AND OTHERS (DEFENDANTS).\*

*Civil Procedure Code, section 539—Public charitable or religious trust—Suit for administration of trust—Nature of decree which may be passed in such suit.*

STANLEY, C.J.—In a suit under section 539 of the Code of Civil Procedure it is competent to the Court to determine of what the trust properties consist, or find that particular alienations thereof cannot be maintained, provided all proper parties are represented before it. If transferees or mortgagees who have been impleaded in a suit instituted under section 539 do not accept the findings of the Court in that suit, it may be necessary for the trustee appointed by the Court to institute a suit for recovery of possession. And *semble* that in such a suit it is competent also to the Court to direct a trustee who is being removed from the trusteeship to make over the trust property to the new trustee or trustees. *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (1) followed.

PER BURKITT, J.—In a suit under section 539 of the Code of Civil Procedure it is not competent to the Court to pass a decree for recovery of possession of the trust property from alienees. All the plaintiffs in such a suit can obtain is a decree appointing a trustee or trustees, declaring what properties are affected by the trust and directing the trustee to bring

\* First Appeal No. 285 of 1903, from a decree of Syed Muhammad Ali, District Judge of Jaunpur, dated the 2nd day of July, 1903.

(1) (1897) I. L. R., 24 Cal., 418.

those properties into possession. If the trustee appointed by the Court is resisted in his attempts to get possession of the trust property, he must then bring a suit for possession in the proper Court on payment of the full court-fee for such a suit.

THIS was a suit brought by two persons, namely, Yawar Husain and Mustafa Husain, as Muhammadans of the Imamia sect, under section 539 of the Code of Civil Procedure "for the removal from the possession" of certain endowed property of the mutawalli Syed Mehdi Husain "and of any other defendant who may be in possession of it" and the appointment of mutawallis in the place of Syed Mehdi Husain, and for the framing of a scheme for the management of the waqf property. In the plaint it is alleged that the defendant, Syed Mehdi Husain, improperly alienated portions of the endowed property and also neglected the management of the trust. The other defendants were sued as transferees from Syed Mehdi Husain of portions of the endowed property.

The Court of first instance (District Judge of Jaunpur) held that, with the exception of the transfer of mauza Chak Alipur in the pleadings mentioned, the transfers and incumbrances made and created by Mehdi Husain could not be maintained. He passed a decree that Mehdi Husain be removed from the post of mutawalli, and that one Syed Ali Jan be appointed in his place, and he directed that the new mutawalli should manage the property according to the directions given in the deed of waqf, "bring into his possession" all the movable and immovable property belonging to the waqf, and keep an account of the income and expenditure and file a copy thereof in Court every year. From this decree some of the defendants appealed to the High Court, the other defendants submitted to the decree.

The defence of the defendants appellants was that they were improperly sued as defendants and that the plaintiffs had no right to bring a suit under section 539 against them. They claimed to be entitled as mortgagees to a 2 anna 8 pie share in Nasib Khan Mandavi, portion of the property in dispute, and submitted that they could not be dispossessed so long as the debt due to them remained unpaid.

From the judgment it appears that the claims of the defendants appellants and the other defendants were fully considered.

1905

---

 GHAZAFFAR  
 HUSAIN  
 KHAN  
 v.  
 YAWAR  
 HUSAIN.

1905

GHAZAFFAR  
HUSAIN  
KHAN  
v.  
YAWAR  
HUSAIN.

The learned District Judge held that these claims could not be supported, with the exception of the claim in respect of Chak Alipur to which I have referred. In the course of his judgment he says:—"As regards the other transfers made and incumbrances created by Mehdi Husain, I am of opinion that they cannot be maintained. It is not proved that those transactions were made and incumbrances created for any necessity, and no sanction of the *mujtahid* was obtained in those cases. On the contrary, the documents connected with them, and produced in this case, show that Mehdi Husain did not make those transfers or create those incumbrances in his capacity as mutawalli, but in his private capacity. This was distinctly in contravention of the provisions of the waqf deed." The defendants-appellants alone have appealed from the decree. In their memorandum of appeal they rely upon several grounds, but only one has been pressed before us, namely, that the transfers made in favour of the appellants could not be set aside in a suit brought under section 539, and that the suit as against them ought to be dismissed. No one has appeared to resist the appeal, though some of the respondents did appear merely for the purpose of representing that they had no interest in the appeal.

Mr. *Abdul Majid*, for the appellants.

Babu *Surendra Nath Sen*, for some of the respondents.

STANLEY, C. J.—The suit which has given rise to this appeal was brought by the plaintiffs Yawar Husain and Mustafa Husain, as Muhammadans of the Imamia sect, under section 539 of the Code of Civil Procedure "for the removal from the possession" of certain endowed property of the mutawalli Syed Mehdi Husain "and of any other defendant who may be in possession of it" and the appointment of mutawallis in the place of Syed Mehdi Husain, and for the framing of a scheme for the management of the waqf property. In the plaint it is alleged that the defendant Syed Mehdi Husain improperly alienated portions of the endowed property and also neglected the management of the trust. The other defendants were sued as transferees from Syed Mehdi Husain of portions of the endowed property.

The learned District Judge held that, with the exception of the transfer of mauza Chak Alipur in the pleadings mentioned,

the transfers and incumbrances made and created by Mehdi Husain could not be maintained. He passed a decree that Mehdi Husain be removed from the post of mutawalli and that one Syed Ali Jan appointed in his place, and he directed that the new mutawalli should manage the property according to the directions given in the deed of waqf, "bring into his possession" all the movable and immovable property belonging to the waqf and keep an account of the income and expenditure and file a copy thereof in Court every year. With the exception of the defendants appellants the other defendants have submitted to the decree.

The defence of the defendants appellants was that they were improperly sued as defendants and that the plaintiffs had no right to bring a suit under section 539 against them. They claimed to be entitled as mortgagees to a 2 anna 8 pie share in Nasib Khan Mandavi, portion of the property in dispute, and submitted that they could not be dispossessed so long as the debt due to them remained unpaid.

From the judgment it appears that the claims of the defendants appellants and other defendants were fully considered. The learned District Judge held that these claims could not be supported, with the exception of the claim in respect of Chak Alipur to which I have referred. In the course of his judgment he says :—"As regards the other transfers made and incumbrances created by Mehdi Husain, I am of opinion that they cannot be maintained. It is not proved that those transactions were made and incumbrances created for any necessity, and no sanction of the *mujtahid* was obtained in those cases. On the contrary, the documents connected with them, and produced in this case, show that Mehdi Husain did not make those transfers or create those incumbrances in his capacity as mutawalli, but in his private capacity. This was distinctly in contravention of the provisions of the waqf deed." The defendants appellants alone have appealed from the decree. In their memorandum of appeal they rely upon several grounds, but only one has been pressed before us, namely, that the transfers made in favour of the appellants could not be set aside in a suit brought under section 539 and that the suit as against

1905

---

GHAZAFAR  
HUSAIN  
KHAN  
v.  
YAWAR  
HUSAIN.

1905

GHAZAFFAR  
HUSAIN  
KHAN  
v.  
YAWAR  
HUSAIN.

them ought to be dismissed. No one has appeared to resist the appeal.

It appears to me that there is no force in the appeal. After a very careful consideration of the language of section 539, I have come to the conclusion that the claim of the plaintiffs was not open to objection and that they were entitled to implead the defendants appellants as persons into whose hands portions of the endowed property had come. It may be that the Court has no power in a suit brought under section 539 to set aside a deed whereby endowed property has been mortgaged or transferred to a stranger ; but I see no good reason for holding that under that section the Court cannot, as it did in this case, determine of what the trust properties consisted or find that particular alienations of it could not be maintained, provided all proper parties are represented before it. If transferees or mortgagees who have been impleaded in a suit instituted under section 539 do not accept the findings of the Court in that suit, it may be necessary for the trustee appointed by the Court to manage the trust property to institute a suit for recovery of possession. As to this I express no opinion. So far, however, as I can discover the decree passed by the learned District Judge in this case, whereby he directs the trustee to *bring into his possession*, that is, to get in the endowed property, is not open to objection. In the case of *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (1) it was held that a suit for the dismissal of a trustee and for recovery of trust property from the hands of a third party to whom the same had been improperly alienated fell within the scope of section 539. Banerji and Rampini, J. J., relied upon the words "such further or other relief as the nature of the case may require" contained in section 539 as justifying the view which they took of the section. In the course of their judgment they say:—"Where, as in this case, the alleged breach of trust consists mainly in improper alienations of the trust property by the trustee, the vesting of any property in the trustees to be newly appointed, coupled with 'such further or other relief as the nature of the case may require,' may well include the taking possession of the trust property from the hands of a

third party to whom the same may be shown to have been improperly alienated." In answer to the argument that if a suit under section 539 is allowed to be brought against a defaulting trustee and a third party the suit may be open to the objection of misjoinder, they say :—"Where a suit under section 539 is open to that objection, the objection will no doubt have effect given to it ; but it does not follow that a suit against a trustee guilty of breach of trust and a third party who has purchased any trust property from him can in no case be brought under the section even though the section as to misjoinder does not apply. In the present case we are of opinion that no objection on the ground of misjoinder can apply, the suit, so far as any such objection is concerned, being properly framed within the meaning of section 28 of the Code." This ruling goes further than that which is under consideration, for the learned Judges there lay down that the words in "the section such further or other relief " may well include the taking possession of the trust property from the hands of a third party to whom the same may be shown to have been improperly alienated." I have had an opportunity of reading the judgment of my learned brother, and in regard to the difficulties which he suggests in the way of accepting the view of the Calcutta High Court in the case to which I have referred, I should find difficulty in following him. A suit instituted under section 539 is not a suit in which plaintiffs claim or can claim for themselves possession of the trust property. They merely ask the Court to vest the trust property in trustees duly appointed to manage the trust and to take it out of the hands of trustees who have been guilty of mismanagement. No change in the beneficial ownership is sought. The Court has undoubtedly power under the section to vest the trust property in the new trustees, and it seems to me reasonably clear that the Court may direct a trustee who is being removed from the trusteeship to make over the trust property to the new trustee or trustees. The plaintiffs in such a suit carry on the suit for the benefit of all persons interested in the trust and continue to act as plaintiffs until the decree has been fully executed. As regards the court fee, in many cases the costs of such a suit as this fall on the trust estate, and it seems to me that

1905

---

GHAZAFFAR  
HUSAIN  
KHAN  
v.  
YAWAR  
HUSAIN.

1905

GHAZAFAR  
HUSAIN  
KILAN  
v.  
YAWAR  
HUSAIN.

as the decree in such a suit works no change in the beneficial ownership of the property, it would be a hardship to impose upon the trust estate the payment of the ordinary court fee payable in respect of a hostile suit for recovery of land on title. These are matters which, however, it is unnecessary to determine in the present appeal. In the decree now under consideration the Court did not direct possession to be given to the new trustee but merely directed that he should "bring into his possession the trust property." I may point out that the appellants did not in their written statement confine their defence to the matter now raised by them before us. On the contrary they, set up a number of defences, such as that there was no valid waqf at all and that the deed of waqf set up by the plaintiffs was never put into force, nor was the mutawalli put into possession under it. They also set up the case that the claim was barred by limitation, and alleged that the defendant, Mehdi Husain, was never appointed a mutawalli of the endowed property. Under the circumstances, I am of opinion that the objection now raised by the defendants is without force, and that their appeal should be dismissed.

Mr. *Surenbra Nath Sen* appeared on behalf of some of the respondents and stated that his clients had no interest in the appeal. As they had no interest in the appeal, it was unnecessary for them to attend at the hearing, and I would leave them therefore to bear their own costs.

I would dismiss the appeal.

BURKITT, J.—I am in full accord with the learned Chief Justice in that part of his judgment just delivered in which he says:—"I see no good reason for holding that under that section (section 539) the Court cannot, as it did in this case, determine of what the trust properties consisted, or find that particular alienations of it could not be maintained, provided all proper parties are represented before it. If transferees or mortgagees who have been impleaded in a suit instituted under section 539 do not accept the findings of the Court in that suit it may be necessary for the trustee appointed by the Court to manage the trust property to institute a suit for recovery of possession."

1905

---

 GHAZAFFAR  
 HUSAIN  
 KHAN  
 v.  
 YAWAR  
 HUSAIN.

I would go further than the learned Chief Justice, and would hold that the direction given by the District Judge to the newly appointed mutawalli to "bring into his possession" all property belonging to the waqf is not a decree for recovery of possession by the mutawalli of the property in the hands of the appellants, which the District Judge had found to have formed part of the trust property and to have been improperly alienated. Such a direction cannot, therefore, in my opinion, be executed as if it were a decree for recovery of possession of immovable property. If appellants surrender possession of the property on demand by the mutawalli, well and good, but if they refuse, then, in my opinion, the mutawalli cannot recover possession otherwise than in execution of a decree for recovery of possession passed in a suit instituted by the mutawalli before a Court competent to hear such a suit.\*

I would point out that by section 539, the Legislature does not create a new class of civil rights nor constitute a Court empowered to hear suits relating to infringements of those rights. Were it not for section 539 the class of suits which that section makes triable by the District Judge only would be cognizable by the ordinary subordinate Courts empowered to hear original suits. *Vide* section 11 of the Court of Civil Procedure.

Section 539, however, steps in and removes a certain class of suits from the cognizance of the subordinate Courts, and makes that class triable by the District Judge only. That is to say, the Legislature has by enacting section 539 constituted a special tribunal for the trial of a class of suits, which it had removed from the cognizance of the ordinary Courts. The suits so made cognizable by this special tribunal are suits respecting any "alleged breach of any express or constructive trusts created for public charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administrations of any trust."

This then is the class of suits cognizance of which is reserved to the special tribunal created by section 539.

Attempts have been frequently made to draw suits of other classes (very nearly resembling the specified class) within the



1905

GHAZAFAR  
HUSAIN  
KHAN  
v.  
YAWAR  
HUSAIN.

purview of the special jurisdiction created by section 539, but such attempts have invariably failed.

Now a suit to recover possession of immovable property on title (even though it be alleged that the property in suit forms part of a waqf property and had been improperly alienated by the mutawalli) is not a suit of the nature specified in section 539, and therefore in my opinion it is not within the power of the District Judge, when hearing a suit under section 539, to pass a decree for recovery of possession of such property.

Ordinarily, a suit for such an object would be cognizable (according to its value) by a Subordinate Judge or Munsif. The District Judge would have no jurisdiction to hear it unless he had called it up to his Court for trial before himself. I am unable to admit that the power given to the District Judge by section 539 to grant "such further or other relief as the nature of the case may require" can include a power to hear a suit which under the ordinary law he could not hear as a Court of first instance unless he had withdrawn it for trial in his Court. Section 539 specially empowers the District Judge to hear, as a Court of first instance, a certain class of suits. If the Legislature had desired to invest the special tribunal with the power of hearing suits of other classes (*e.g.*, suits for recovery of possession on title) it would, I think, have so provided in clear language and would not have left the Courts to infer the grant of such an extraordinary power from the words "such further and other relief."

Further, I would advert to the court fee paid on the plaint in this suit. I would point out that no court fee has been paid on the relief asked for by ejectment of the appellants and recovery of possession from them. No offer has been made in the plaint to pay any further court fees.

The fee paid is the small court fee, Rs. 10, ordinarily payable on the plaint in a suit under section 539. But surely the plaintiff in a suit instituted under section 539 is not to be more favourably treated in the matter of court fees than any other suitor. When such a plaintiff prays to recover possession of immovable property he must (like any other plaintiff in a similar suit) pay the court fee chargeable on that relief.

This consideration strengthens me in my opinion that the plaintiff in a suit instituted under section 539 cannot obtain in that suit a decree for recovery of possession of immovable property found by the District Judge to belong to the trust, but which is held adversely to the trust by other parties, though he can (as was most properly done in this case) obtain a direction from the District Judge to the mutawalli instructing the latter to get in the trust property as ascertained by the Judge.

It then, in my opinion, remains for the mutawalli, if resisted by the opposite party, to institute before the proper Court (not before the District Judge) a suit for recovery of possession paying the proper court fee on his plaint. The fee he will of course recover as part of his costs on obtaining a decree for possession.

Finally, I am of opinion that the plaintiffs in a suit (like this) which has for its object to obtain an order for the administration of the trust funds and the removal of a dishonest mutawalli, are not persons to whom a decree for recovery of possession of alienated trust property could be given. They could hardly put such a decree into execution, and yet, as they are arrayed as plaintiffs in the suit, they apparently are the persons to whom personally such a decree, if permissible, would be given, and who could execute it. It could not be given to the newly appointed mutawalli. He is not the plaintiff, nor does he represent the actual plaintiff, and he had no interest in the subject-matter of the suit prior to his appointment as mutawalli under the decree of the District Judge.

For the above reasons, I am of opinion that it was not within the competence of the District Judge in this case to pass a decree for recovery of possession of the waqf lands held by the appellants, and that the "direction" given by him to the newly appointed mutawalli was not such a decree.

I concur in the order proposed by the learned Chief Justice dismissing this appeal.

BY THE COURT :—The order of the Court is that the appeal be dismissed, but without costs as the respondents are not represented.

*Appeal dismissed.*

1905

GHAZAFAR  
HUSAIN  
KHAN  
vs.  
YAWAE  
HUSAIN.