1911

SADIQ HUSAIN v. NAZIR BEGAM.

do was to take advantage of the sections of the Code which enabled them to keep the machinery of arbitration going. This could have been done, and, had it not been for the decisions cited, would in all probability have been done, by simply naming a fresh arbitrator. Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to to another tribunal, such as a District or other Judge. It may be regretted that the supersession of the arbitration and the interposition of the Judge himself to settle the points referred to arbitrators should not have been assented to. But the objection which has been taken—that the rights having been remitted to one tribunal have been settled by another—is, in their Lordships' opinion, a fatal objection.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed and the decrees of the Courts below reversed with costs. The respondent, Kaniz Zohra Begam, must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant :—*Watkins and Hunter.*

Solicitors for the respondents :—*Barrow, Rogers and Nevill.*

1911
June 1.

APPELLATE CIVIL.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

MANOHARI (DEFENDANT) *v.* MUHAMMAD ISMAIL AND OTHERS (PLAINTIFFS.) *

Civil Procedure Code (1882), sections 13, 539—Res judicata—*Suit for declaration of trust and of property comprised in it—Party to such suit not competent subsequently to deny existence of trust.*

Held that a person who had been a party to a suit under section 539 of the Code of Civil Procedure, 1882, in which suit the existence of a waqf and the property comprised therein had been declared, was not competent in a subsequent suit for ejectment of the defendant from a part of the waqf property to plead that the property was not waqf. *Ghazaffar Husain Khan* v. *Yawar Husain* (1) referred to.

* First Appeal No. 298 of 1909 from a decree of Soti Raghubans Lal, Subordinate Judge of Meerut, dated the 18th of June, 1909.

(1) (1905) I. L. R., 28 All., 112.

THE facts out of which this appeal arose were as follows:— One Qazi Amin-ud-din was the owner of 14 shops under a mosque in Kairana and of another 35 shops in close proximity to the mosque. The plaintiffs respondents alleged that these shops had been made waqf by the Qazi in favour of the mosque, and they sued the defendant, appellant, who was in possession of some of them, for ejectment and mesne profits. Qazi Amin-ud-din was succeeded by his granddaughter Musammat Salima Bibi, and a nephew Zahir-ud-din, who got his property under his will. Zahir-ud-din died and was succeeded by his son Fazl-ullah. In 1882, Salima Bibi and Fazl-ullah mortgaged some of these shops to one Naurang Lal; they created three more mortgages of them the same year in favour of Aman Singh son of Naurang Lal. On the 14th of September, 1884, they mortgaged a half share of the 35 shops to Dalip Singh the husband of the appellant in this case. Dalip Singh brought a suit on his mortgage and obtained a decree on the 29th of February, 1882. The waqf was set up in defence, but the waqfnama was held to be a forgery by the first Court, and that decision was upheld by the High Court, on appeal. On the 20th of August, 1894, a half of 18 shops was put up for sale and purchased by the decree-holder Dalip Singh. On the 29th of January, 1895, Dalip Singh purchased the other half share of these 18 shops from Fazl-ullah alone, together with a half of another four shops. Subsequently there was a partition between Dalip Singh and one Haidar, a purchaser from Fazl-ullah of the other half of the above 4 shops, and Dalip Singh got two entire shops instead of a half of four shops. Thus the defendant came to be in possession of 20 shops.

On the 8th of September, 1905, a suit was brought by some of the Muhammadan residents of Kairana under section 539 of the old Code of Civil Procedure for a declaration that the shops were waqf property and for the appointment of trustees and settlement of a scheme of management. The present appellant was also made a party to the suit. The claim was decreed by the Additional Judge of Meerut on the 18th of June, 1906, and the present plaintiffs respondents in this case were appointed trustees. The present appellant appealed to the High Court, but the decision of the Judge was confirmed on the 25th of July, 1908.

1911

MANOHARI v. MUHAMMAD ISMAIL.

The present suit was by members of the committee of trust for ejectment of Musammat Manohari, who denied the waqf. The Subordinate Judge held that the question of waqf was *res judicata* because of the abovementioned decision and decreed the suit. The defendant appealed.

Dr. *Satish Chandra Banerji*, for the appellant :—

The trustees have been entrusted with the waqf property. The Muhammadan community is the beneficiary, and it cannot be said that the *cestui qui trust* and the trustees are identical. The trustees do not claim under the original parties. They are to hold the property and administer it for the community. They hold a legal estate, the community has only got an equitable one. A suit under section 539 of Act XIV of 1882 is to be brought by persons who are not trustees. The words "under whom they claim" in section 13 of that Act implied some privity between the two. It could not be so here.

The first suit was to keep property safe from any breach of trust, not to eject trespassers. That suit was by the plaintiffs as members of the Muhammadan community, this one is by plaintiffs as trustees. The test is whether they claim under the plaintiff in the first suit, not whether they can put forward the same claims as the others. A trustee does not necessarily derive his title from the *cestui qui trust* but he claims under the creator of the trust. The District Judge holds that position here. Any Muhammadan could bring a suit under section 539, but every Muhammadan could not administer the waqf. Where the waqf was in question, an ordinary suit had to be brought, not one under section 539; *Jamal-ud-din* v. *Mujtaba Husain* (1). That section contemplated an existing trust. The words "contentious or not" were probably put in to overrule *Mohi-ud-din* v. *Sayid-ud-din alias Nawab Mean* (2). The District Judge had no jurisdiction to decide the question under section 539. *Ghazaffar Husain Khan* v. *Yawar Husain* (3) was also referred to.

Maulvi *Ghulam Mujtaba*, for the respondents.

RICHARDS, C. J., and BANERJI, J :—This appeal arises out of a suit for ejectment from certain shops and also for mesne profits.

(1) (1903) I. L. R., 25 All., 631. (2) (1893) I. L. R., 20 Calc. 810.
(3) (1907) I. L. R., 28 All., 112.

1911

MANOHARI v. MUHAMMAD ISMAIL.

It is not necessary to state the facts in any detail. The plaintiff's claim was that the shops in question were the subject of a waqf created by one Qazi Amin-ud-din; that in the year 1905 a suit was instituted by certain Muhammadans of Kairana, where the shops are situate, under section 539 of Act No. XIV of 1882; that as the result of that suit, the plaintiffs were appointed trustees, and it was ascertained that the waqf in fact existed and that the shops in question were part of the waqf property. The defendant appellant was a party to the proceedings under section 539 and the plaintiffs contended that they were now entitled to recover possession of the shops from her together with mesne profits. The defendant pleaded that there was no waqf and that she was the representative of a transferee for value and was therefore entitled to remain in possession. The main issue in the case accordingly was, whether or not the defendant could go behind the proceedings under section 539 and re-open the case. The learned Subordinate Judge held that the defendant could not go behind these proceedings and overruled this defence.

There was another claim put forward by the defendant, namely, that certain improvements had been made in the shops and that she was entitled to compensation for such improvements as a condition of possession being taken from her. The learned Subordinate Judge overruled this claim also, with the result that the plaintiffs' claim for possession and mesne profits for three years in respect of nine shops was decreed; as regards the rest of the claim it was dismissed. The defendant alone has appealed, and it is argued on her behalf that the proceedings under section 539 cannot operate as *res judicata*. It is said that the present plaintiffs were no parties to that suit, and that the present plaintiffs cannot be said to claim "under the plaintiffs" in the previous suit. It was further argued that section 539 only applies to a case in which the existence of the trust is not denied; that in the suit brought in 1905 the present defendant denied the existence of the trust, and that therefore the declaration that the shops in question were waqf property as against the present appellant was *ultra vires*, and that accordingly she is not bound by the decision. In the case of *Ghazaffar Husain Khan* v. *Yawar Husain* (1),

(1) (1905) I. L. R., 28 All., 112.

1911

MANOHARI v. MUHAMMAD ISMAIL.

a suit was instituted under section 539. Amongst other parties to that suit were certain alienees of the property alleged to be waqf. These alienees (just as in the suit of 1905) pleaded that there was no waqf and that they ought not to have been impleaded in the suit. It was held by the court that the alienees were proper parties and that the court was entitled, as against them, to ascertain what the trust property consisted of. STANLEY, C. J., had some doubt as to whether or not the trustees appointed in the suit would be obliged to bring a separate suit for possession in the event of the defendants who were in actual possession not surrendering it up. This we take to be the meaning of the following passage in the judgement of STANLEY, C. J., at page 110:— "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 present 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 trustees appointed by the court to manage the trust property, to institute a suit for recovery of possession. As to this I express no opinion." This case is a direct authority that persons who dispute the existence of the trust can be made parties to a suit under section 539, and of course it necessarily follows that they will be bound by the decision arrived at in the suit.

The words in section 13 "parties under whom they claim" are very wide. It is, however, unnecessary for us to decide whether or not the present plaintiffs can be said to claim under the plaintiffs in the suit of 1905. The question between the defendant appellant and the plaintiffs as to the property being waqf could be and was decided once and for all in the proceedings instituted in 1905, and the present suit is merely carrying into effect the decree that was pronounced against the defendant appellant in that suit. In our opinion the learned Subordinate Judge was correct in holding that it is not open in this suit for the defendant appellant to re-open the question as to whether or not the shops in question were waqf property, though not necessarily on the ground of *res judicata*. As to the question

1911

MANOHARI v. MUHAMMAD ISMAIL.

of compensation, even if we assume that improvements were made by the husband of the appellant for which they had not been amply compensated by the user, we are not satisfied that such improvements were made in the *bonâ fide* belief that he was absolutely entitled to the shops. There is a large amount of documentary evidence which goes to show that the defendant's husband had at least notice that the property was alleged to be waqf property.

The result is that we dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

1911
June 10.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

INCHA RAM AND OTHERS (DEFENDANTS) *v.* BANDE ALI KHAN AND ANOTHER (PLAINTIFFS). *

Land-holder and tenant—Presumptions as to land-holder's rights in the abadi *of an agricultural village—House site occupied by a person not an agriculturist nor one of the customary village servants or artizans—Adverse possession.*

In a village which was not a purely agricultural village, but in which, on the contrary, some two-thirds of the inhabitants were non-agriculturists, certain persons, father and son, were in possession of a house-site in the *abadi*. They carried on the occupation of inn-keepers and sellers of tobacco, and there was no evidence of the origin of their possession or that they ever paid rent to the zamindar or acknowledged his title in any way. The site was sold by the son, and some time after such sale, the house or shop thereon having fallen down, the zamindar sued to eject the purchasers.

Held that in the circumstances of the case the defendants and their predecessors in interest, were properly held to have acquired a title to the site by adverse possession. *Chajju Singh* v. *Kanhia* (1) and *Bhaddar* v. *Khair-ud-din Husain* (2) referred to.

THIS was a suit for possession of a plot of land, the site of a house in the *abadi* of a village brought by the zamindars of the village. In the plaint it was alleged that the plot in question was situate in mauza Kamalganj, which was an agricultural

* Second Appeal No. 1069 of 1908 from a decree of Prem Behari Lal, Subordinate Judge of Farrukhabad, dated the 19th of September, 1908, reversing a decree of Shekhar Nath Banerji, Munsif of Fatehgarh, dated the 20th of May, 1908.

(1) Weekly Notes, 1881, p. 114. (2) (1906) I. L. R., 29 All., 133.