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memorandum of appeal to the lower appellate court ought to have paid court fees on Rs. 1,321-7-6, the amount decreed against them by the court of first instance, which included interest subsequent to the date of institution. The court fee payable by the defendants in the lower appellate court is an *ad valorem* fee according to the amount or value of the subject matter in dispute in appeal. In view of the wording of the decree granted by the court of first instance it is quite clear that the amount or value of the subject matter in dispute is Rs. 1,321-7-6 (exclusive of costs) which the defendants had been ordered to pay on or before the 9th of January, 1912. It may be that the decree is not properly drawn up, but we cannot go behind the decree in deciding this matter. It is quite clear that as the decree stood it imposed on the defendants a liability to pay a sum of Rs. 1,321-7-6 on a fixed date and by the appeal they sought to set aside that liability. An argument has been strongly pressed upon us that in the circumstances of the present case the subject matter of the appeal is the same as the subject matter of the suit, *i.e.* the value of the plaintiff's claim. In our opinion, the decree being as it is, there is no force in this contention. The value of the subject matter of the appeal before the court below is as we have stated above. The defendants must make good the deficiency as reported by the taxing officer.

Order accordingly.

1913, *November*, 27.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

SAIYID ALI (PLAINTIFF) *v.* ALI JAN (PRINCIPAL DEFENDANT) AND SAJJAD HUSAIN AND OTHERS (*Pro formâ* DEFENDANTS).*

Civil Procedure Code (1908), *section* 92 (*i*)—*Procedure—Muhammadan law—Waqf—Trust for a public purpose of a religious or charitable nature.*

Where a trust is a trust created for a public purpose of a religious or charitable nature (in this case a waqf under the Muhammadan law) no suit can be maintained for the removal of a duly appointed trustee, save in conformity with the provisions of section 92, sub-section (1), of the Code of Civil Procedure.

The facts of this case were as follows:—

One Sahib Ali erected a mosque and an *Imambara* at Jaunpur. After his death his wife Bikani Bibi became owner, and in 1856 she executed a deed of endowment with respect to this

* First Appeal No. 119 of 1911 from a decree of Keshab Deo, Subordinate Judge of Jaunpur, dated the 16th of January, 1911

property, and it was provided therein that Himayat Ali, the brother of her deceased husband, was to be the first mutawalli and after him his descendants, generation after generation, whoever among them was a fit and proper person. After Himayat Ali his son Mehdi Hasan became mutawalli. During his tenure of office a suit was brought by two persons seeking for the removal of Mehdi Husain on the ground that he had been guilty of breaches of trust. He was removed by the District Judge and filed an appeal before the High Court. During the pendency of that appeal he died. His counsel brought his son, the present plaintiff, on the record as his legal representative. Subsequently the appeal was dismissed. The plaintiff then instituted the present suit for a declaration that he was rightful mutawalli, as he was a descendant of Himayat Ali, and for the removal of the defendant, who had been appointed to that office by the District Judge when he removed Mehdi Husain. The lower court dismissed the suit on the grounds (1) that plaintiff had not obtained the sanction required by section 92 of the Code of Civil Procedure and that the court had no jurisdiction to hear the suit, (2) the question was *res judicata* and (3) the suit was time-barred. The plaintiff appealed to the High Court.

Dr. *S. M. Sulaiman* (with him Mr. *S. A. Haidar*, Maulvi *Ghulam Mujtaba* and Maulvi *Rahmat Ullah*) for the appellant:—

Under the Muhammadan law the office was to devolve according to the provisions of the deed of endowment and the appointment of the defendant was bad. The suit was not one under section 92 of the Code of Civil Procedure at all. It was not brought by the plaintiff as a member of the Shia community to which the waqf belonged. The plaintiff sought to enforce his private right to be appointed mutawalli. Waqfs under Mahammadan law were not necessarily public, they might be for the benefit of a family. The law of procedure could not override the provisions of Muhammadan law. In the former suit the question was not as to the qualification of the present plaintiff. Section 92 refers to suits brought on behalf of the public:—*Budree Das Mukim* v. *Chooni Lal Joburry* (1). The purpose of the section was to limit the number of suits brought on a representative basis: it could not affect the right of

(1) (1906) I.L.R., 33 Calc., 789, 807.

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a private individual. Further, the District Judge was not competent to appoint the defendant. The section no doubt was wide enough to enable a court to appoint a Christian or a Hindu. It was unlikely that it would do so, but there was nothing to prevent its doing so. Besides, an *imambara* was not a public place: *Delrus Banoo Begum* v. *Kazee Abdoor Rahman* (1) [BANERJI, J.—Referred to *Tajammul Husain* v. *Fazal Rasul* (2).]

Babu *Satya Chandra Mukerji*, for the respondent was not called upon.

RICHARDS, C. J., and BANERJI, J.:—The facts connected with this appeal are shortly as follows:—In the year 1856 one Musammat Bikani Bibi made a deed of waqf of certain property for the purpose of meeting the expenses of a certain mosque and *imambara*. The deed provided that she had appointed one Syed Himayat Ali, son-in-law of her husband's eldest brother, to be the nazir and mutawalli and that after him the fittest and ablest in the family, who should be a follower of the Shia sect, and a good and religious man, should be appointed, generation after generation, as nazir and mutawalli of the waqf. In the course of time the office of mutawalli was held by the plaintiff's father. During his incumbency a suit was instituted before the District Judge of Jaunpur alleging that he had been guilty of breaches of trust and seeking to remove him from being mutawalli. That suit was instituted under the provisions of section 539 of the Code of Civil Procedure of 1882, which was then in force. The result of the suit was that the learned District Judge removed the plaintiff's father from the office of trustee and appointed the defendant Syed Ali Jan Bahadur mutawalli in his place. An appeal was taken to this Court against the decree of the District Judge, but pending the hearing the plaintiff's father died. At the instance of the present plaintiff he was brought on to the record as the representative of his father, the appellant, but when the case came on for hearing it was dismissed, the appellant's counsel stating that he was unable for certain reasons to press the appeal.

The present suit has now been instituted claiming various reliefs, but there can be no question that in substance the plaintiff asks that the present mutawalli should be removed and that he

(1) (1875) 23 W. R., 453. (2) (1907) 4 A. L. J., 774.

should be appointed mutawalli in his place, and that he should have a declaration that he is entitled to hold the trust property as mutawalli. The plaintiff claims that he fulfils the various conditions mentioned by the maker of the waqf as essential qualifications of the mutawalli.

The court below has dismissed the suit upon the ground that the suit is not maintainable. It was contended amongst other things that the trust was not a trust for a public purpose of a charitable or religious nature within the meaning of section 92. In our opinion, having regard to the terms of the waqf, and its description as given in the plaint itself, it is impossible to hold that the present trust was not trust created for public purposes of a charitable and religious nature, and we do not consider it necessary to say anything further upon this point.

As already stated the plaintiff himself had his name brought on the record as the representative of his deceased father, and the appeal was decided with him as a party. This perhaps would be almost sufficient ground for dismissing the present appeal. It is however urged that he could not legally have been brought on to the record because the cause of action did not survive. He was there, it is said, not as his father's son and heir, but as a person claiming to be, in the events which had happened, the person who was entitled to be appointed mutawalli. We therefore do not decide the appeal upon this ground. The important question is whether or not the present suit is maintainable. Bearing in mind that the trust was a trust created for a public purpose of a religious or charitable nature, it is clear that the defendant now is and was at the time of the institution of this suit in fact the duly appointed mutawalli of the trust. It is, therefore, obvious that the plaintiff seeks in the present suit to have him removed from his office and to have himself appointed mutawalli instead of the defendant. There is an express provision in section 92 of the present Code of Civil Procedure that no suit claiming relief of this nature can be instituted, save in conformity with the provisions of sub-section (1), that is to say, it can only be brought by two or more persons after sanction has been obtained in the manner provided by the section.

Appeal dismissed.