Rs. 130, and as in our opinion the value of the relief claimed in the appeal which was the subject-matter of the appeal is less than that sum, we think the memorandum was sufficiently stamped for the purpose of the Court Fees Act, and that the learned Judge below was wrong in rejecting the appeal. The case must therefore go back to the lower Appellate Court in order that the appeal may be allowed to be registered and proceeded with according to law. Costs will abide the result.

1891

LUKHUN CHUNDER ASH v. KHODA BUKSH MONDUL.

Appeal decreed.

A. A. C.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

PROTAP CHANDRA MISSER AND OTHERS (DEFENDANTS) *v.* BROJO NATH MISSER AND ANOTHER (PLAINTIFFS).*

1891 *December* 8.

Endowment—Religious trust—Shebaits, removal from office of—Arbitration—Order giving leave to sue under s. 18, *Act XX of* 1863—*Appealable order—Regulation XIX of* 1810—*Act XX of* 1863, *ss.* 1—12, 14 *and* 18—*Act XII of* 1887, *s.* 20.

Act XX of 1863 does not apply to an endowment which is not a public one, but which is made for the benefit of an ancestral family idol.

An order passed under section 18 of that Act, granting leave to institute a suit, is not an appealable order.

Two plaintiffs, members of a Hindu family, applied for and (in the presence of the defendants) obtained leave to institute a suit against the defendants, who were the *shebaits* of a certain idol, for the purpose of having them removed from their office, on the ground of misconduct. In their plaint they alleged that the endowment was a public one, all Hindus having a common right of worshipping the idol. This was denied by the defendants. After issues had been framed, the Court of first instance made an order, under section 16 of the Act, referring certain of them to arbitration, although the defendants contended that as the endowment was not a public one, the Act had no application, and objected to the reference. The arbitrators made an award, finding, *inter alia*, that the idol was the ancestral family idol of the parties to the suit, and that the endowment was not made for the benefit of the public. They further in their award laid down certain definite rules according to which the *sheba* ought to be conducted and repairs to the temple made. The Court of first instance passed a decree on that award, declaring that the idol was the ancestral

* Appeal from Original Decree No. 254 of 1890, against the decree of Babu Brojendra Coomar Seal, District Judge of Bankura, dated the 31st of July 1890.

1891

PROTAP CHANDRA MISSER v. BROJONATH MISSER.

idol of both parties, and directing that the defendants should perform the worship in a certain manner, and should execute certain repairs to the temple within six months, and declaring that if the parties did not act as directed, any member of the family should be able to bring a suit for the appointment of a manager. Against that decree the defendants appealed, and contended that the Act did not apply to the case on the finding of fact as to the endowment not being a public one; that the compulsory reference to arbitration was illegal and void, and that the decree was not one authorized by the terms of section 14 of the Act. On behalf of the plaintiffs it was contended that the defendants were precluded from raising these questions on appeal, as the order passed under section 18 of the Act was made in their presence and was not appealed against, and that, having regard to the provisions of section 20 of Act XII of 1887, an appeal to the High Court lay from that order.

Held, that on the facts as found by the arbitrators, Act XX of 1863 did not apply to the case, and that the compulsory reference to arbitration and the decree made thereon were illegal and void.

Held further, that the decree itself was bad on the ground that it was not one coming within the scope of section 14 of the Act.

Held also, that section 20 of Act XII of 1887 was intended only to define the Court to which an appeal lies from a decree or order of a District Judge, and was not intended to define the right of appeal or the class of decrees or orders from which appeals shall lie, and that no appeal lay from the order passed under section 18 of Act XX of 1863 granting the plaintiffs leave to institute the suit.

THE plaintiffs, who were the two sons of the first defendant, instituted this suit, under the provisions of section 14 of Act XX of 1863, for the removal of the defendants from their post of shebaits of an idol named Raghunath Jeo, established at mahalla Rampore within the municipality of Bankura by one Monsharam Panday, a disciple of the predecessor of the defendants and the plaintiffs.

Before instituting the suit the plaintiffs applied for and obtained leave to sue under section 18 of Act XX of 1863 from the District Judge, and they also applied to the Collector, under section 539 of the Code of Civil Procedure, for a like permission; but the latter application was refused on the ground that no such permission was necessary.

In their plaint the plaintiffs, amongst other matters, alleged that the idol Raghunath Jeo had certain debottar property, which had been dedicated and made over to Monsharam Panday by the late

1891

PROTAP CHANDRA MISSER v. BROJONATH MISSER.

Raghunath Singh Deb Bahadur (who had caused the temple of the idol to be built), for the purpose of defraying the expenses of its daily worship and periodical festivals, and for the feeding of guests and mendicants, etc.; that Monsharam Panday appointed his spiritual guide, one Jitram Misser, the ancestor of the parties to the suit, shebait, and made a gift to him of the idol and the debottar property; that the defendants, who were the present shebaits, had no exclusive rights of their own in the property, nor had any one at any time any such exclusive right or any right to appropriate the profits of the property to anything else than the worship of the idol and the feeding of the guests and mendicants, and that all Hindus had a common right in it; that the defendants had been mismanaging the debottar property and misappropriating its profits, and that the worship was not being duly performed. They accordingly sought to have the defendants removed from their office and fresh shebaits appointed.

The defendant No. 2, Madhusudan Misser (who was the appellant before the High Court), took numerous objections to the suit in his written statement, both legal and on the merits, and, amongst others, alleged that the idol and the debottar properties did not belong to the public, but belonged solely to their family, and that for several generations none except the members of their family had any right or title to the idol or the properties, nor had any member of the public performed the worship of the idol. He accordingly contended that the endowment was not a public one, and that in consequence thereof Act XX of 1863 was in applicable to the suit, and that it should be dismissed.

The following issues were framed:—

(1) Is it a fact that the property described in the plaint was made over to Monsharam Panday in trust for the public generally, and for the sheba of the idol Raghunath Jeo?

(2) Did Jitram Misser, the ancestor of the parties to the suit, receive the property subject to the said trust?

(3) Have the defendants neglected to carry out the object for which the alleged trust was created, and are they on that account liable to be displaced?

1891

PROTAP CHANDRA MISSER v. BROJONATH MISSER.

(4) From the nature of the endowment (if it is proved to be an endowment), does the suit, such as is laid in the plaint, lie at the instance of the plaintiffs?

The case came on for hearing before Mr. E. W. Place, the then District Judge, in the month of April 1889, and after considerable argument the pleader for the plaintiffs pointed out that the Court had power, under section 16 of Act XX of 1863, to refer the case to arbitration irrespective of the consent of the parties. The defendants objected to this course, and contended that the suit did not fall under section 14 of the Act at all, the endowment not being a public one.

By an order made on the 4th April 1889 the District Judge, considering that the property in question had been regarded as debottar rent-free land, and that *primâ facie* the Act applied, and as the property was small in value, and the questions to be decided were principally questions turning on points of ceremonial observance of Hindu ritual, referred the first three issues to the arbitration of three Hindu gentlemen.

The arbitrators thereafter proceeded to take evidence, and on the 19th May 1890 made their award. On the first issue they found that the endowment was not made for the benefit of the public; but they found that Jitram Misser, the ancestor of the defendants, had obtained the property and the idol from Monsharam, who had obtained the property as a gift from Raghunath Singh Deb Bahadur, in order that out of its income the sheba of the idol might be conducted and the donee maintained. On the second issue they held that Jitram Misser got the property (which they held was the debottar property of the idol) together with the idol as a gift from Monsharam; and on the third issue they came to the conclusion that the defendants had neglected to carry on the sheba of the idol properly. They further in their award laid down certain definite rules according to which the sheba ought to be conducted, and they proposed that the temple should be repaired within six months; and added that, if the defendants failed to act according to the rules or neglected to repair the temple within the prescribed time, any member of the family would be competent to sue for the appointment of a manager in place of the shebaits.

1891

PROTAP CHANDRA MISSER v. BROJONATH MISSER.

That award was filed on the 19th May 1890, and notice was given to the parties. The plaintiffs thereupon filed objections to the award on the 30th May, which, however, they withdrew on the 31st July 1890.

On the 5th June 1890 the defendants also filed objections to the award to the effect that, as the arbitrators had held the endowment was not a public one, they had no power to frame the rules and give the directions they had. The Court, however, held that these objections were barred by limitation under Art. 158 of Schedule II of the Limitation Act of 1877.

The case then came on for hearing on the 31st July 1890 for the trial of the fourth issue before Babu Brojendro Coomar Seal, the then District Judge, who upon that portion of the case delivered the following judgment:—

"Now according to the finding of the arbitrators the property is debottar; that being so, on the authority of *Fakurudin Sahib* v. *Ackeni Sahib* (1) the suit at the instance of any member of the Misser family must lie, and the plaintiffs are two members of the Misser family. The Madras High Court observed: 'We can find nothing to control the generality of the terms of section 14 which empower any person interested in any mosque, temple or religious endowment or in the performance of the trusts relating thereto to sue the trustee, manager or superintendent or the members of a committee appointed under the Act for misfeasance, and also empower the Court to order the removal of a trustee, etc. The plaintiffs as resident Muhammadans, apart from any pecuniary interest they may have in the income of the institution, are in our judgment sufficiently interested therein to entitle them to maintain suits if the institution be a religious establishment.'

"Thus there is no doubt that the plaintiffs had the right to sue.

"Now the suit was a suit for the removal of the present shebaits, and the arbitrators propose that if the defendants neglect to act according to the rules for the sheba of the idol proposed by them, and do not get the temple repaired within six months, any member of the Misser family would be competent to sue for their removal and for the appointment of a manager. Acting under the provisions

(1) I. L. R., 2 Mad., 197.

1891

PROTAP CHANDRA MISSER v. BROJONATH MISSER.

of section 518 of the Civil Procedure Code, I might amend the award and pass a decree to the effect that if within six months the defendants did not repair the temple or neglect to carry on the sheba according to the rules laid down by the arbitrators, they would be liable to be removed in execution of the decree in this case. The arbitrators have taken rather a lenient view of the conduct of the defendants. Perhaps they thought that though the defendants have been found to be neglectful, if their attention is properly drawn to the matter they would like to do their duty properly, and so the arbitrators are for giving them another trial before recommending their removal. The plaintiffs are satisfied with such recommendation, and to have the shebaits removed in execution of this decree on the terms of the award would give rise to several complicated questions which it is better should be decided in a regular suit. I therefore accept the award as it is, and make a declaratory decree declaring the rights of the parties in the same way as they have been declared by the arbitrators, and leaving it open to the members of the Misser family, including the plaintiffs, to sue for the appointment of a manager in substitution of the defendants should they fail to act in the way the arbitrators wish them to act. I make no order for costs."

Against the decree drawn up on that judgment the defendant No. 2 appealed.

Dr. *Rash Behary Ghose*, Babu *Biprodas Mukerjee*, Babu *Jasada Nandan Pramanick*, and Babu *Nalini Ranjan Chatterjee* for the appellant.

Dr. *Troilokya Nath Mitter* and Babu *Digambur Chatterjee* for the respondents.

Dr. *Rash Behary Ghose*.—The principal question in the case is whether Act XX of 1863 applies at all. If this suit could not be brought within the purview of the Act, the reference to the arbitrators falls to the ground and the suit must fail. The arbitrators have found that the endowment is not a public but a private one. The course of the decisions in this Court is in my favour—*Delrus Banoo Begum* v. *Kazee Abdur Ruhman* (1); and their Lordships of the Privy Council, though not expressly

(1) 23 W. R., 453.

deciding that point, seem to be of the same opinion—*Ashgar Ali* v. *Delroos Banoo Begum* (1).

Section 14 of Act XX of 1863 appears on the face of it to be rather general, but it must be read in connection with the rest of the Act. The title of the Act shows that it was enacted for the purpose of enabling the Government to divest itself of the management of religious endowments; the Act must therefore mean to provide only for those endowments of which charge had been taken under the previous law, viz., Regulation XIX of 1810 [see *Punch Courie Mull* v. *Chunnoo Lall* (2), *Kalee Churn Giri* v. *Golabi* (3), *Dhurrum Singh* v. *Kissen Singh* (4), *Jan Ali* v. *Ram Nath Mundul* (5)]. The case of *Fakurudin Sahib* v. *Ackeni Sahib* (6) is clearly distinguishable. I therefore submit that the Act has no application to this case, and that consequently the compulsory reference to arbitration in spite of our objection, and the decree made on the footing of the award, are illegal and void, and the suit should be dismissed.

Further, the decree of the lower Court is clearly wrong and is not within the power of the Court to pass, having regard to the provisions of section 14 of the Act. A declaratory decree could not be passed (see section 21 of the Specific Relief Act).

On the question of limitation held by the lower Court to apply to our objection to the award, see *Muhammad Abid* v. *Muhammad Asghar* (7).

Dr. *Trailokya Nath Mitter* (for the respondents).—In order fully to understand the scope of Act XX of 1863 it is necessary to look at the earlier Regulation in place of which it was passed. The preamble to Regulation XIX of 1810 shows that the object of the legislature was to ensure the proper administration of all rents and produce of all lands granted for the support of Hindu temples, etc. Section 2 of the Regulation vests the general superintendence of all such lands in the Board of Revenue and Board of Commissioners, and no restriction is made in respect of such lands only as shall be actually taken possession

(1) I. L. R., 3 Calc., 324 (330).
(2) 2 C. L. R., 121.
(3) 2 C. L. R., 128.
(4) I. L. R., 7 Calc., 767.
(5) I. L. R., 8 Calc., 32.
(6) I. L. R., 2 Mad., 197.
(7) I. L. R., 8 All., 64.

1891

PROTAP CHANDRA MISSER v. BROJONATH MISSER.

of by the Board. If therefore Act XX of 1863 applies to endowments to which that Regulation applied, it must be held to apply to the present case, as there is admittedly a Hindu temple and an endowment of lands for its support. Section 3 of the Act shows that this is the correct view of the law, the words there used being "is vested in or may be exercised by;" so that if this endowment was capable of being actually taken charge of by the authorities, the Act applies to it, and as there is nothing to show that it was not so capable, the Act must be held to apply. Moreover, the provisions of the Act are not so limited as has been contended. A contrary view has been held by this Court in *Dhurrum Singh* v. *Kissen Singh* (1).

The case of *Punch Cowrie Mull* v. *Chunnoo Lall* (2) is in my favour. Their Lordships say at page 127—"Although the language of section 14 . . . . . is general in its terms, yet we do not consider that the legislature had in its contemplation to interfere with the procedure of the Supreme Court," etc. If the Court had been of opinion then that the Act only applies to an endowment actually taken in hand by the Board of Revenue, it would have expressly said so, as that would at once have disposed of the case, the Board of Revenue never having had actual jurisdiction in respect of endowments in the presidency towns. *Kalee Churn Giri* v. *Golabi* (3) merely follows that decision, and is distinguishable from this case; and the remarks of the Judicial Committee in *Ashgar Ali* v. *Delroos Banoo Begum* (4) relied on by the other side are mere *obiter dicta*. *Delrus Banoo Begum* v. *Kazee Abdur Ruhman* (5) is distinguishable; the deed of endowment was there set aside, and it was therefore unnecessary for the decision of that case to go into this question at all. In *Jan Ali* v. *Ram Nath Mundul* (6), the lands subject to the endowment had never been taken charge of by the revenue authorities, and yet the provisions of the Act were held to apply. *Fakurudin Sahib* v. *Ackeni Sahib* (7) also supports this view.

(1) I. L. R., 7 Calc., 767 (770).
(2) 2 C. L. R., 121.
(3) 2 C. L. R., 128.
(4) I. L. R., 3 Calc., 324.
(5) 23 W. R., 463.
(6) I. L. R., 8 Calc., 32.
(7) I. L. R., 2 Mad., 197.

Whatever may be the correct view of the law on that point, the appellants are precluded from succeeding in this appeal, as they allowed the order under section 18 to become final by not appealing against it. Under the Civil Courts Act of 1876, an appeal lay to the High Court where an appeal was allowed by law. The present Civil Courts Act, XII of 1887, has introduced a distinct change, and an appeal now lies to the High Court against all orders of a District Judge unless barred by any law for the time being in force. The order under section 18 of Act XX of 1863 has therefore become final, and the appellants cannot now be heard to say that it was an incorrect order.

Dr. *Rash Behary Ghose* (in reply).—The order under section 18 was not appealable [see *Venkateswara, In re* (1) and *Kazem Ali* v. *Azim Ali Khan* (2)]. The Civil Courts Act only defines the venue of an appeal when an appeal lies. As the arbitrators have held that the endowment is not a public one, and the respondents withdrew their objections to the award, the suit ought to be dismissed.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows :—

This appeal arises out of a suit brought under section 14 of Act XX of 1863 for the removal of the present shebaits of a certain religious endowment.

The plaintiffs allege in their plaint that the idol Raghunath Jeo had certain debottar property endowed for its worship and for the feeding of guests; that the present shebaits had no exclusive right of their own in the said property; that all Hindus had a common right of worshipping the idol; that the present shebaits had been mismanaging the debottar property and misappropriating its profits; that the plaintiffs as persons interested in the worship, having obtained the permission of the District Judge under section 18 of Act XX of 1863, were entitled to maintain this suit; and that they brought this suit for the purpose of having the present shebaits removed from office.

The defendant No. 2, who is the appellant before us, amongst other objections not necessary now to consider, urged that the

(1) I. L. R., 10 Mad., 98. (2) I. L. R., 18 Calc., 382.

1891

PROTAP CHANDRA MISSER v. BROJONATH MISSER.

endowment was not a public one, and that Act XX of 1863 was in consequence not applicable to the present suit.

The Court below thought that the Act was applicable to the case, and it referred the case to arbitration under section 16 of the Act, though the defendant No. 2 was unwilling to refer the matter to arbitration. The arbitrators, to whom the case was referred, made an award, and the Court below made a decree in modification of the award to the effect that it be declared that the idol Raghunath Jeo is the ancestral idol of both parties, and that the defendants be directed to perform the worship in a certain way, not necessary to specify here, and that they do repair the temple as necessary within six months; and that if the parties do not act as directed, then any member of the Misser family shall be able to take steps for the due performance of the said acts, that is to say, any member of the Paricharak Misser family shall be able to bring a suit for the appointment of a manager.

The defendant No. 2 has appealed against that decree; and it is contended on his behalf that the decree is bad, *first*, because, upon the fact found in the case and embodied in the decree that the idol is the ancestral idol of both parties, Act XX of 1863 was not applicable to the case, and the compulsory reference to arbitration and the decree made on the footing of the arbitration award are altogether illegal and void; and *secondly*, because the decree that has been made in the case is one that is not authorized by the terms of section 14 of Act XX of 1863.

We think that both these contentions are valid. Act XX of 1863, as appears from the preamble to the Act and sections 1 to 12, applies only to endowments to which Regulation XIX of 1810 was applicable; and that Regulation, as appears from section 16, had application only to endowments for public purposes. This is the view that was taken of the scope of the Act in the case of *Debrus Banoo Begum* v. *Kazee Abdur Ruhman* (1). That case went up on appeal to the Privy Council, and though in consequence of the decision arrived at upon another question raised in the case the Judicial Committee did not think it necessary to decide the present question, yet their Lordships say "that they see no reason for disagreeing with that part of the judgment" of this Court

(1) 23 W. R., 453.

which dealt with the question now before us. We think therefore that this case is an authority binding upon us, and we accordingly follow it—*Asgar Ali* v. *Delroos Banoo Beyum* (1).

Several other cases, both in this Court and in the other High Courts, have been discussed in the course of the argument; but we do not think it necessary to refer to them in detail, as some of them are not quite in point, and there is no decision of this Court which takes the contrary view; and though there is one Madras case—*Fakruddin Sahib* v. *Ackeni Sahib* (2)—which favours the respondents' contention that section 14 of Act XX of 1863 is general in its application, a different view is taken of the scope of the Act in a later case, *Sathappayyar* v. *Periasami* (3), which is in favour of the restricted construction put upon the Act by this Court in the case to which reference has already been made.

It was contended by the learned vakil for the respondents that whatever may be the true view of the scope of the Act, the defendant, appellant, is precluded from raising the present contention by reason of his having omitted to appeal against the order of the Judge under section 18 of the Act, which was made in his presence.

We do not think there is anything in this contention. That order was not appealable under Act XX of 1863, and there is nothing in the Code of Civil Procedure which would allow an appeal from such an order, it not being a decree in any sense. In support of the argument that an appeal lies against such an order, reference was made to section 20 of the Civil Courts Act, XII of 1887, which says:—"Save as otherwise provided by any enactment for the time being in force, an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court." It was argued that the language of this section compared with the language of the corresponding provision of the former Act, VI of 1876, goes to show that whereas by the former provision of the law an appeal lay to the High Court where such an appeal was allowed, the intention of the present law is to allow an appeal to the High Court, except where such an appeal is taken away. We

(1) I. L. R., 3 Calc., 324 (330). (2) I. L. R., 2 Mad., 197.
(3) I. L. R., 14 Mad., 1.

1891

PROTAP CHANDRA MISSER v. BROJONATH MISSER.

do not think that this is the correct interpretation of the law. Section 20 of the Civil Courts Act is intended only to define the Court to which an appeal lies from a decree or order of a District Judge, but it is not intended to define the right of appeal or the class of decrees or orders from which appeals shall lie. In support of our view that no appeal lies from an order under section 18 of Act XX of 1863, we may refer to the case of *Kazem Ali* v. *Asim Ali Khan* (1), and also to a Full Bench decision of the Madras High Court, *Venkateswara, In re* (2).

In our opinion, therefore, Act XX of 1863 was not applicable to this case upon the findings arrived at by the Court below, and the proceedings had in this case are therefore contrary to law and void.

We are further of opinion that the decree made in this case is not one that comes within the scope of section 14 of Act XX of 1863.

We accordingly set aside the decree made by the Court below, and dismiss the suit with costs of both Courts.

Appeal allowed and suit dismissed.

H. T. H.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

1891
Dec. 11.

TIKUM SINGH AND OTHERS (DEFENDANTS NOS. 1 TO 3) *v.* SHEO RAM SINGH (PLAINTIFF) AND SHEO PERSHAD BHAGUT (DEFENDANT NO. 4).*

Attachment of property deposited in, or in the custody of, a Court—Priority—Title to property in custody of a Court—Code of Civil Procedure—Act XIV of 1882, *ss.* 272 *and* 278—283—*Suit to set aside order under proviso to s.* 272, *Code of Civil Procedure.*

A suit will lie to set aside an order such as is contemplated by the proviso to section 272 of the Code of Civil Procedure, that is, an order determining any question of title or priority as between the decree-holder and any other person in respect of money in deposit in a Court of Justice.

* Appeal from Appellate Decree No. 1771 of 1890 against the decree of Babu Jadu Nath Das, Subordinate Judge of Patna, dated the 13th of August 1890, reversing the decree of Babu Purna Chunder Banerjee, Munsif of Patna, dated the 19th of September 1889.

(1) I. L. R., 18 Calc., 382. (2) I. L. R., 10 Mad., 98.