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on the assumption that the shares of the minor sons of Ganga Prasad in the property sought to be attached are liable, unless the said sons can prove that the debt in respect of which the simple money decree was passed was one tainted with immorality. The decree-holder should get his costs of this appeal.

WALSH, J. :—I agree. In my opinion it is too late to contend that the joint family estate cannot be sold to satisfy a personal decree against the father of a joint family; except in the one case of the sons being able to show that the debt was tainted with immorality. This appears to me to be established by a long line of decisions by the Privy Council, namely :—

Musammât Nanomi Babuasin v. Modun Mohun (1); *Bhagbut Pershad v. Musammât Girja Koer* (2); *Meenakshi Naidu v. Immudi Kanak Ramaya Kounden* (3); *Rai Babu Mahabir Pershad v. Rai Markunda Nath Sahai* (4), reviewed and explained by a Full Bench in *Karan Singh v. Bhup Singh* (5) and finally by the Lord Chancellor, Lord BUCKMASTER, in *Sripat Singh Dugar v. Prodyot Kumar Tagore* (6). The opinion of their Lordships in *Sahu Ram Chandra* (7) relates to a case in which an alienation by mortgage was sought to be enforced and all other possible remedies of the mortgagee had been extinguished. I agree with the view which seems already to have been expressed in India that it could hardly have been intended by what was said in the opinion of their Lordships in that case to reverse everything that had been said before.

Appeal allowed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

RAM BILAS AND OTHERS (DEFENDANTS) v. NITYA NAND AND OTHERS (PLAINTIFFS)*

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April, 27.

Civil Procedure Code (1908), section 92—Suit relating to a trust created for a public purpose of a charitable or religious nature—Suit against a trustee de son tort :

Held that a suit of the nature mentioned in section 92 of the Code of Civil Procedure, 1908, will lie against a person who, without title, chooses to take upon himself the character of a trustee, or, in other words, a trustee de son tort. *Budree Das Mukim v. Chooni Lal Johurry* (8) referred to.

* First Appeal No. 78 of 1920, from a decree of L. Johnston, District Judge of Pilibhit, dated the 14th of February, 1920.

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| (1) (1885) L. R., 13 I. A., 1. | (2) (1888) L. R., 15 I. A., 90. |
| (3) (1888) L. R., 16 I. A., 1. | (4) (1889) L. R., 17 I. A., 11. |
| (5) (1904) I. L. R., 27 All., 16. | (6) (1916) I. L. R., 44 Calc., 524. |
| (7) (1917) I. L. R., 39 All., 437. | (8) (1906) I. L. R., 33 Calc., 780. |

THE facts of this case are fully set forth in the judgment of the Court.

Babu *Sital Prasad Ghosh*, for the appellants.

Mr. *J. M. Banerji*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ. :—This appeal arises out of a suit brought in the court of the District Judge of Pilibhit, by three plaintiffs, Nitya Nand, Lal Bahadur and Tika Ram.

The suit purported to be a suit under section 92 of the Code of Civil Procedure, *i.e.*, a suit relating to a trust created for a public purpose of a charitable or religious nature.

There were six defendants to the suit, the principal of whom were Ram Bilas, defendant No. 1, Bankey Behari Lal, defendant No. 2, and Bhagwan Das, defendant No. 6. Defendants Nos. 3, 4 and 5 were really *pro forma* defendants.

The parties all belong to the same family and the allegations in the plaint were to the following effect. It was stated that about 16 years before the institution of the suit one Nath Mal, who was the paternal uncle of the plaintiffs, had constructed a Thakurdwara at a village called Belsanda and had installed an idol therein.

It was next alleged that under a deed of waqf executed in August, 1865 the plaintiffs' father and his cousin Tula Ram had dedicated the entire 20 biswa share of mauza Badhepura Marauri for the support of the temple. It was further alleged that a trustee had been appointed under this deed, that the trust had been acted upon, and that the person who had been originally appointed trustee had died some seven years before the present suit was brought. It was then said that after the death of the original *pujari* his place was filled by another person and that thereafter the first defendant, namely Ram Bilas, who was a son of Tula Ram, one of the creators of the trust, had taken possession of the property and had posed as a trustee. The material allegation on this latter part of the case is to be found in paragraph 5 of the plaint.

It was stated that after the death of Tula Ram the name of Ram Bilas, defendant No. 1, was wrongly recorded in the revenue papers against the endowed property; in other words it was alleged that whereas the property belonged to the idol, Ram Bilas had got his name recorded in the papers as if he was the proprietor. A further allegation in the same paragraph of the plaint is that Ram Bilas was appointed

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lambardar and by his own improper action had held himself out as trustee of the endowed property.

In the 8th paragraph of the plaint it was stated that Ram Bilas as lambardar was misappropriating the income of the entire trust property and was not devoting that income to the uses declared by the trust.

Paragraph 14 sets out the reliefs claimed by the plaintiffs and the first relief claimed was that the first defendant, Ram Bilas, might be removed from the trust. The second relief claimed was that other trustees might be appointed to manage the trust property. The other reliefs need not be mentioned at this stage.

In his written statement Ram Bilas denied that he was trustee of the property in suit. In paragraph 9 of his written statement he raised the plea that the suit was not maintainable under section 92 of the Code of Civil Procedure because he (Ram Bilas) was in proprietary possession of the ten biswa share and was not a trustee but a zamindar and a lambardar. He claimed that the plaintiffs had no right to bring a suit for the purpose of having him removed from his office of lambardar and he disclaimed any liability to render any account in respect of the collections of the property in question.

It is plain, therefore, that on these pleadings an issue arose as to whether the suit was maintainable under section 92 of the Code of Civil Procedure and accordingly issue No. 2 was directed to the trial of that question. The only finding at which the learned District Judge has arrived is as follows :

He says—

" Coming to the second issue I find that the trust was a valid one and is enforceable in law. Ram Bilas is the lambardar. There is no proof that he was appointed *mutawalli*, but it is immaterial if he was."

We do not agree with this dictum of the learned District Judge : on the contrary, for the purpose of deciding the second issue in the case it was a matter of supreme importance whether Ram Bilas, defendant No. 1, was or was not a trustee of the property in question. There seems to be no doubt whatever that Ram Bilas had not been regularly appointed as a *mutawalli* of the property in dispute. The allegation which the plaintiffs made against Ram Bilas was

that he had entered into possession of this property and held himself out to be the trustee. On the other hand, Ram Bilas denied altogether that he was in any way acting as a trustee or had in any way assumed the responsibility of a trustee. It was, therefore, a matter to be decided upon the evidence produced before the lower court whether the allegation contained in paragraph 5 of the plaint was made out, namely, that Ram Bilas after entering on the property had held himself out and acted as a trustee. If he had done so then undoubtedly a suit under section 92 of the Code of Civil Procedure was competent, for it has been held and the matter is settled by authority that a suit brought against a trustee *de son tort* can lie under section 92 (I. L. R., 33 Cal. p. 789 at pp. 805 and 806). In other words, such a suit will lie against a person who without title chooses to take upon himself the character of a trustee.

The learned District Judge has not referred to any evidence on this point, and in the view of the law which he took, it was hardly necessary for him to do so. He states that it is quite immaterial whether Ram Bilas was a *mutawalli* or not.

The learned counsel for the respondents has referred to some evidence on this point. He calls attention to the deposition of Nitya Nand, one of the plaintiffs in the case, which is printed at p. 1 of the respondents' book.

In this statement we cannot find anything done or said by Nitya Nand for the purpose of showing that the first defendant Ram Bilas had taken upon himself the duties of a *mutawalli*.

He mentions indeed something said or done by Bhagwan Das, defendant No. 6. That, however, is quite a different matter, and a reference to the plaint shows that no relief was being sought against Bhagwan Das. What the plaintiffs were asking for was the removal of Ram Bilas, defendant No. 1, from the possession of the trust property.

Another piece of evidence to which we will refer is printed at p. 8 of the respondents' book. It seems that some inquiry was held by the Collector of Pilibhit in the year 1910 with regard to the administration of this trust property, and there is upon the record a statement made by Bhagwan Das in which he admits that some of the profits of this village had

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accumulated. Bhagwan Das undertook through the Collector to have the temple property repaired out of these accumulations.

Whatever may be the effect of anything done or said by Bhagwan Das, it seems to us perfectly clear that neither the statement made by Nitya Nand in court nor the admission made by Bhagwan Das before the Collector in 1910 can possibly be treated as evidence for the purpose of showing that Ram Bilas, the first defendant in the case, is a trustee *de son tort*.

As the question relating to the maintainability of this suit is a vital question in the case, we are of opinion that the hearing of the appeal ought not to proceed until the learned Judge has come to a proper finding which would enable us to dispose of that matter.

We observe that the fourth issue in the case was whether section 92 of the Code of Civil Procedure applied to the case. In his judgment the learned Judge states that when the case came up for hearing he deleted this issue. Why he did so is not apparent, for on the pleadings it was one of the most important issues in the case.

The learned Judge will now have to decide the question whether or not Ram Bilas, defendant No. 1, is a trustee *de son tort* of the property in dispute. That will be the first issue before him, and after deciding that issue he will proceed to give a definite finding on the fourth issue which he deleted from the record, namely, whether section 92 of the Code of Civil Procedure applies to the case.

It is probable that the action of the learned Judge in deleting this issue has misled the parties and prevented the production of evidence which would otherwise have been produced. We, therefore, deem it right to allow both sides to call such evidence as they can before the learned District Judge so as to enable him to decide the two issues upon which we call for findings. The findings of the learned District Judge will be submitted within two months from the date of the receipt of this Court's order and the usual period of ten days will be allowed for objections to the findings when they are received in this Court.

Issues remitted.