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GANGA DIN v. DHURANDHAR SINGH.

The following opinions were delivered by the Full Bench :—

STUART, C. J.—In the order of reference in this case it is stated that the Full Bench reference in *Badri Nath* v. *Parbat* (1) and *Gopal Pandey* v. *Parsotam Das* (1) did not cover the point raised in the case then referred. I suggested at the hearing that the reasoning used by our answers in those cases appeared to me equally to apply to the present reference, the only difference being that in the former the transfer was a simple mortgage, whereas in the present case it is a mortgage for a term of years, or, in other words, a usufructuary mortgage for such a period. In fact, in my remarks proposing the reference in *Badri Nath* v. *Parbat* (1) I said : "It was admitted at the hearing before Brodhurst, J., and myself that a usufructuary mortgage by an occupancy-tenant to a stranger mortgagee was as a transfer bad under s. 9 of the Rent Act." That is exactly the state of things expressed in the referring order now before us, and my answer is that a mortgage of a cultivatory holding by an occupancy-tenant is within the prohibition of the Rent Acts of 1873 and 1881.

STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—We are of opinion that a mortgage with possession by an occupancy-tenant of his cultivatory holding is a transfer within the prohibition of s. 9 of the Rent Act, 1881.

APPELLATE CIVIL.

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March 27.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

ZAFARYAB ALI AND OTHERS (PLAINTIFFS) *v.* BAKHTAWAR SINGH (DEFENDANT).*

"Wakf" property—Suit relating to public charity—Civil Procedure Code, s. 539—*Religious endowment—"Religious institution"—Act VI of* 1871 *(Bengal Civil Courts Act), s.* 24—*Muhammadan Law.*

Certain Muhammadans sued to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejectment of the purchaser.

* Second Appeal No. 914 of 1882, from a decree of H. G. Keene, Esq., Judge of Saharanpur, dated the 16th May, 1882, reversing a decree of Maulvi Muhammad Said Khan, Munsif of Muzaffarnagar, dated the 17th March, 1882.

(1) I. L. R., 5 All., 121.

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Held that the plaintiffs, as Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment, could maintain the suit, and s. 539 of the Civil Procedure Code had no application to the case, the endowment being a religious institution, within the meaning of s. 24 of Act VI of 1871 and therefore governed by Muhammadan Law.

THE plaintiffs, Muhammadans, sued for possession of a "*takia*," known by the name of Najuf Ali Shah, "by cancellation of an hypothecation thereof, dated the 28th May, 1877, and of a decree dated the 18th May, 1880, as well as of a judicial sale dated the 30th May, 1881; by the demolition of two walls; and by the ejectment of the defendants." They alleged in their plaint that the property in suit was "*wakf*" or a charitable endowment, including a mosque (*imambara*), and a grave-yard, in which there were many tombs; that the wood of the trees standing on the property was always used to roof the charitable buildings; that there was a house on the property for the residence of the custodian; that defendant 1, the manager of the property, and the ancestors of defendants 2, 3, and 4 hypothecated the premises to defendant 5, who, having obtained a decree enforcing the hypothecation, caused the property to be brought to sale, and it was purchased by him and defendants 6 and 7; that defendant 5, having obtained possession of the property, erected two walls on the land, thereby interfering with the purposes for which the property was originally intended; and that the plaintiffs became aware of all these proceedings on the 24th January, 1882, and in consequence brought the present suit. The defendants set up as a defence to the suit that the plaintiffs were not competent to sue. The Court of first instance held that the plaintiffs were competent to sue, observing as follows:—"It is a rule of daily practice that every aggrieved party is entitled to get his grievance remedied. On the same principle a certain set of the interested Muhammadans in this case have come forward to bring this suit against the defendants to get their complaint redressed by the Courts of Justice. The Muhammadan Law sanctions the course of action by the plaintiffs in this case. Every Muhammadan, according to the tenets of his religion, is entitled to get public charitable property protected from the hands of strangers." On the same point the lower appellate Court held that the plaintiff had no right to sue, observing as follows:—"Referring to a recent

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and closely analogous case decided by the Presidency Court in August last—*Jan Ali* v. *Ram Nath Mundul* (1)—I am of opinion that the plaintiffs have no right to bring the present suit, which is to have the property declared *wakf* and made over to them as such. They do not, however, pretend to be the trustees, or to have any special interest in the alleged endowment, nor do they bring forward any deed creating it. I do not think that this brings the suit under Act XX of 1863, for they do not really mean to sue the manager for misfeasance, although they have included him in the prayer to set aside his conveyance. But even if it did, the suit is out of rule, as there was no application made to this Court or to any other for permission to sue. If it be alleged that there has been a breach of trust regarding a charitable endowment, then the leave of the Collector ought to have been obtained under s. 539, which has not been done. The plaintiffs, moreover, have not made any assertion in any part of their plaint as to any special right of suit as to their being persons attending or having a right to attend the alleged mosque, but simply state their ground of action to have arisen when they heard of the alienation to the defendants. Were this suit brought by the latter, the Courts could deal with it, but a question (such as lies at the root here) of whether a place was one of public worship, &c., would be more appropriately settled by the Municipal Commissioners of the town, as it certainly would be more legal to adopt such a course. For this reason I dismiss the suit."

In second appeal the plaintiffs contended (i) that being members of the Muhammadan community, they were legally competent to maintain the suit; (ii) that they were not bound to observe the preliminary procedure enjoined by s. 539 of the Civil Procedure Code, that section having no bearing on the suit; and (iii) that the lower appellate Court had misapprehended the scope of the suit, which did not seek any of the remedies provided for by that section.

Mr. *Amiruddin* and Shaikh *Maula Bukhsh*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent (defendant 5).

(1) I. L. R., 8 Calc., 32.

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The Court (STUART, C. J., and BRODHURST, J.) delivered the following judgment :—

STUART, C. J.—The preliminary pleas raised in this case must be allowed, and it will go back for trial on the merits. The plaintiffs, as Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment, can clearly maintain the present suit, and s. 539 of the Procedure Code has no application to such a case, the endowment in question being, in our opinion, a religious institution within the meaning of s. 24 of Act VI of 1871, and therefore governed by Muhammadan Law. We therefore remand the case under s. 562 of the Code of Procedure for trial on the merits.

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April 1.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

KALIAN DAS (DEFENDANT) *v.* GANGA SAHAI AND OTHERS (PLAINTIFFS).*

Suit for dissolution of partnership—Jurisdiction—Arbitration—Finality of decree in accordance with award—Civil Procedure Code, s. 215, *Chapter XXXVII—Act IX of* 1872 (*Contract Act*), *s.* 265.

A suit for dissolution of a partnership, taking the accounts of the firm, and declaration of the plaintiff's right to a certain share in the debts due to the firm, was, with reference to the value of the subject-matter of the suit, instituted in the Court of a Munsif. The matters in difference in the suit were eventually referred to arbitration under Chapter XXXVII of the Code of Civil Procedure, and an award was made declaring the plaintiff entitled to recover a certain sum from the defendant. Judgment and a decree were given in accordance with the award. *Held* that, the award notwithstanding, the question whether the suit was cognziable in the Munsif's Court was entertainable. *Bhagirath* v. *Ram Ghulam* (1) referred to.

Held also that the suit was not an application of the nature mentioned in s. 265 of the Contract Act, 1872, but a suit of the nature mentioned in s. 215 of the Civil Procedure Code, and was therefore not cognizable in the District Court, but in the Court of the Munsif. *Prosad Doss Mullick* v. *Russick Lall Mullick* (2) and *Ram Chunder Shaha* v. *Manick Chunder Banikya* (3) dissented from.

THE facts of this case are fully set out in the judgment of the High Court. The main question raised by the appeal was whether regard being had to s. 265 of the Contract Act, 1872, a suit for

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*Second Appeal No. 1188 of 1882, from a decree of E. Rose, Esq., Judge of Meerut, dated the 26th August, 1882, reversing a decree of Babu Brij Pal Das, Munsif of Ghaziabad, dated the 20th March, 1882.

(1) I. L. R., 4 All., 283. (2) I. L. R., 7 Calc., 157.
(3) I. L. R., 7 Calc., 428.