

APPELLATE CIVIL.

Before *Mullick and Ross, J.J.*

SYED DILJAN ALI

v.

BIBI AKHTARI BEGUM.*

1925.

April, 16,
17, 21.

Mutwalli, removal of, suit for—Religious Endowments Act, 1863 (Act XX of 1863), section 14—Declaration that the mutwalli has been rightly dismissed, suit for, whether cognizable by a Civil Court—Code of Civil Procedure, 1908 (Act V of 1908), sections 9 and 92.

A suit for a declaration that a *mutwalli* was liable to dismissal and that he has been rightly dismissed by the plaintiff is not a suit of a civil nature and is not cognizable by any Civil Court under section 9 of the Code of Civil Procedure, 1908.

Where, however, the plaintiff brought a suit against the *mutwalli* alleging that, under the power reserved to the founder or his heirs by the *wakfnamah*, he had dismissed the defendant from the post of *mutwalli* on the ground of "misappropriation, slackness and negligence", and prayed for a declaration (i) that the plaintiff being the heir of the donor was entitled to dismiss the defendant on the ground of "misappropriation, slackness and negligence", (ii) that the defendant had committed acts of misappropriation and was liable to dismissal, and (iii) that the defendant had been dismissed from the post of *mutwalli*;

held, that, on a proper construction of the plaint, the suit being in essence for the removal of the trustee and for the administration of the trust, section 14 of the Religious Endowments Act, 1863, and section 92 of the Code of Civil Procedure, 1908, were applicable.

The Religious Endowments Act, 1863, which repealed Regulation XIX of 1810, was intended to have the same scope as that Regulation and while some parts of it provide for endowments over which the Local Government was exercising control at the time of the repeal of the Regulation, section 14

* Appeal from Original Order no. 107 of 1924, from an order of M. Wali Muhammad, Subordinate Judge of Bhagalpur, dated the 24th March, 1924.

1925.

SYED
DILJAN ALI
v.
BIBI
AKHTARI
BEGUM.

was intended to have a wider scope and to apply to endowments coming into existence after that date.

Dhurrum Singh v. Kissen Singh (1), *Fakuruddin Sahib v. Acken Sahib* (2), *Sheoratan Kunwari v. Ram Pargash* (3) and *Sivava v. Rami Reddi* (4), followed.

The jurisdiction of the Court in suits relating to the management of trust property is controlled by the Religious Endowments Act, 1863, and section 92 of the Code of Civil Procedure.

A suit for the removal of the trustee by the donor or his heirs cannot, therefore, be instituted except under the special jurisdiction conferred by the Religious Endowments Act, 1863, or section 92, Civil Procedure Code.

Budree Das Mukim v. Chooni Lal Jehurry (5), not followed.

Venku Chettiar v. Dorasami Chettiar (6), distinguished.

Clause (ii) of section 92, Civil Procedure Code, makes it clear that the section is mandatory and the reliefs specified in the section can only be enforced by resort to the procedure prescribed by that section.

Appeal by the plaintiff.

The Subordinate Judge of Bhagalpur having on the 24th March, 1924, returned the plaintiff's plaint, dated the 30th April, 1923, for presentation to the proper Court, this appeal was preferred by the plaintiff under rule 1, clause (a), of Order XLIII of the Civil Procedure Code. The litigation arose out of a *wakfnamah* executed by Mir Imam Bux in the year 1874 who dedicated certain immoveable property for the maintenance of a certain *masjid* and *khankah* at Bhagalpur and appointed the plaintiff's father Syed Mehdi Hussain to be the *mutwalli* thereof. The plaintiff's case was that Mehdi Hussain was succeeded as *mutwalli* by his widow Bibi Umda Begum who, upon her death, left only one daughter Bibi Muham-madi Begum who was of unsound mind. The

(1) (1881) I. L. R. 7 Cal. 767.

(2) (1878-81) I. L. R. 2 Mad. 197.

(3) (1896) I. L. R. 18 All. 227.

(4) (1899) I. L. R. 22 Mad. 228.

(5) (1906) I. L. R. 33 Cal. 789.

(6) (1921) 62 Ind. Cas. 761.

defendant was one of the surviving daughters of Muhammadi Begum and upon her mother's death she took possession of the trust properties on the allegation that she was entitled to succeed thereto as *mutwalli*. The plaintiff, however, denied her claim alleging that he was entitled to be the *mutwalli* as the heir of Mir Imam Bux upon the failure of the line of Syed Mehdi Hussain, and on the 13th March, 1914, he instituted a suit in the Court of the Subordinate Judge of Bhagalpur for a declaration of his title to the *mutwalliship* and for recovery of possession. The suit was dismissed in the trial Court but was decreed in the High Court on the 5th March, 1919. The defendant Bibi Akhtari Begum thereupon appealed to the Privy Council who, on the 30th December, 1922, set aside the judgment of the High Court and restored that of the Subordinate Judge. Thereupon application having been made on the 20th April, 1923, to execute the decree of the Privy Council, the plaintiff filed on the 30th April, 1923, the plaint out of which this appeal arose. In this plaint he alleged that under the powers reserved to the founder or his heirs by the *wakfnamah* he, on the 28th February, 1923, had dismissed the defendant from the post of *mutwalli* on the ground of "misappropriation, slackness and negligence," and he prayed for the following reliefs:—

(a) That the Court may be pleased to decide that the plaintiff being the heir of the donor is entitled to dismiss the defendant from the post of *mutwalli* on the ground of his "misappropriation, slackness and negligence" (*kheanat, susti, gaslat*), under the terms of the deed of endowment aforesaid.

(b) That the Court may be pleased to decide that the defendant has committed acts mentioned in paragraphs 23 to 32 of this plaint and was and is liable to dismissal from the post of *mutwalli* under the terms of the deed of endowment aforesaid.

(c) That on adjudication of above matters the Court may be pleased to decree in favour of the plaintiff declaring that the defendant has been dismissed from the post of *mutwalli* of the mosque and *khankah* situated at Takiya Shah Mohammad Saidque Jafri and of endowed properties appertaining thereto.

An application was made after the institution of the suit for an interlocutory order for an injunction:

1925.

SYED
DILJAN ALI
v.
BIBI
AKHTARI
BEGUM.

1925.

SYED
DILJAN ALI
v.
BIRI
AKHTARI
BEGUM.

to restrain the execution of the Privy Council decree, or in the alternative for the appointment of a receiver. Both prayers were rejected and possession was duly delivered.

Thereafter objection having been taken to the maintainability of the suit, the Subordinate Judge, on the 24th March, 1924, held that he had no jurisdiction to entertain the plaint on the ground that it was in effect an application for the removal of a *mutwalli* for misfeasance or breach of trust or neglect of duty and that by reason of section 14 of the Religious Endowments Act (Act XX of 1863) the proper Court for presentation was the principal civil court of the district.

Muhammad Hasan Jan, for the appellant: The present case does not come under Act XX of 1863 which applies only to endowments which came into existence before the passing of the Act; further, the Act has no application to an endowment which had not come under the control of the Board of Revenue. The Act applies only to those endowments which were in existence at the time of Regulation XIX of 1810. The whole object of the Act was to divest the Government of the task of supervision already undertaken; hence, where there is no question of any such divesting, the Act does not apply. Section 539, Civil Procedure Code, 1882, was enacted specially for cases not covered by section 14 of Act XX of 1863, because it was thought that the Act would be applicable only to trusts existing prior to that date.

[MULLICK, J.—By Regulation XIX of 1810 the Government had powers to control all endowments; therefore Act XX of 1863 would be applicable to all endowments irrespective of the date when they first came into existence.]

I submit not. Act XX applies only to those trusts of which the Government had taken or could have taken charge under Regulation XIX of 1810, and it cannot be said that in 1810 the Government

could take charge of an endowment which had no existence at that time. The observations in *Sheoratan Kunwari v. Ram Purgash*⁽¹⁾, *Sivappa v. Rami Reddi*⁽²⁾ and *Dhurrum Singh v. Kissen Singh*⁽³⁾ are *obiter dicta* and in none of those cases was the endowment in question subsequent to Act XX of 1863. In the second place, the reliefs sought in the present suit are not covered by those specified in section 92, Civil Procedure Code, or section 14, Act XX of 1863. The Statute does not affect my right to sue simply because it can be inferred that in effect the relief sought will be one of those specified in section 92, Civil Procedure Code, or section 14, Act XX of 1863. Even assuming that both these enactments are applicable to the present case they cannot take away rights which exist in a personal capacity independently of the Statute. I rely on *Budree Das Mukim v. Chooni Lal Jehurry* ⁽⁴⁾ and *Mahomed Athar v. Ramjan Khan* ⁽⁵⁾.

1925.

SYED
DILJAN ALI
v.
BIBI
AKHTARI
BEGUM.

[MULLICK, J.—The question whether or not you possess a right independently of the Act is immaterial because under the present Code if your prayer is for the removal of a *mutwalli* you have to bring the suit under section 92, Civil Procedure Code, or section 14 of Act XX of 1863.]

It depends upon the construction of the plaint whether or no it can be said that the relief sought is one of those specified in the sections. Moreover, section 92, Civil Procedure Code, contemplates a suit of a representative character, whereas in the present case I am asserting an individual right derived from the trust deed.

[MULLICK, J.—But the moment you come forward with a prayer to dismiss the *mutwalli*, even by virtue of a right conferred on you by the trust deed, you have to proceed under section 92, Civil Procedure Code.]

(1) (1896) I. L. R. 18 All. 227. (3) (1881) I. L. R. 7 Cal. 767.

(2) (1899) I. L. R. 22 Mad. 223. (4) (1906) I. L. R. 33 Cal. 789.

(5) (1907) I. L. R. 34 Cal. 587.

1925.

SYED
DILJAN ALI
v.
BIBI
AKHTARI
BEGUM.

I submit not. The section applies only to a case where the suit is brought by two or more individuals as representing the public.

Sultan Ahmed (with him *S. M. Naim, Khurshed Hasnain, Nirode Chandra Ray* and *Syed Ali Khan*), for the respondent: If this is not a case falling either under section 92, Code of Civil Procedure, or section 14 of Act XX of 1863, it is not cognizable by any civil court at all. It is now settled by authorities that Act XX of 1863 is applicable to all endowments which came into existence either before or after 1863. [See *Sivappa v. Rami Reddi* (1), *Sheoratan Kunwari v. Ram Pargash* (2) and *Dhurrum Singh v. Kissen Singh* (3).] *Mahomed Athar v. Ramjan Khan* (4), relied on by the appellant is directly against him.

The relief sought in this case is in effect a relief covered by section 92, Civil Procedure Code. The moment you urge the dismissal of a *mutwalli* you have to come to Court and seek its intervention which can only be had under section 92, Civil Procedure Code, or section 14 of Act XX. *Budree Das Mukim v. Chooni Lal Jehurry* (5) was decided under the old Act and is no more the law. Under the present Code every suit of a nature contemplated by section 92 has to be brought in accordance with the procedure laid down therein. Secondly, the present suit is not one of a civil nature. A belief for a declaration that a certain person has been rightly dismissed does not come within the cognizance of a civil court. There have been cases which have held that a suit for a declaration that the plaintiff is entitled to a dignity attached to an office is barred by section 9 of the Code of Civil Procedure. In the present case there is no contest to an office.

[MULLICK, J.—Section 42, Specific Relief Act, seems to be a bar to the present suit as it is framed.]

(1) (1899) I. L. R. 22 Mad. 228. (3) (1881) I. L. R. 7 Cal. 757.

(2) (1896) I. L. R. 18 All. 227. (4) (1907) I. L. R. 34 Cal. 537.

(5) (1906) I. L. R. 33 Cal. 789.

Yes. Moreover the founder or his heirs have no right to dismiss a *mutwalli* who has been validly appointed.

1925.

SYED
DILJAN ALI
v.
BIKI
AKHTARI
BEGUM.

Muhammad Hasan Jan, in reply: In *Budree Das Mukim v. Chooni Lal Jehurry*⁽¹⁾, Woodroffe, J., observed that the donor or his heir has authority to appoint or dismiss old trustees

A suit contemplated by section 92 must be a suit of a representative character. In the present case the right to hold office is contested. In substance the relief is that the respondent was a trustee but now she is not entitled to the office of *mutwalli*. The relief, therefore, is clearly within the purview of section 9, Civil Procedure Code. The principle enunciated in *Venku Chettiar v. Dorasami Chettiar*⁽²⁾ is applicable to the present case. Besides, the Court might at the trial decide on the maintainability of the suit with reference to section 9, Civil Procedure Code, or section 42, Specific Relief Act, but these sections cannot be a bar to the jurisdiction of the court admitting a plaint.

S. A. K.

MULLICK, J. (after stating the facts set out above, proceeded as follows): On behalf of the appellant it is contended that his suit is neither under section 14 of the Religious Endowments Act nor under section 92 of the Civil Procedure Code but one for the enforcement of a civil right cognizable by a civil court under the general law as declared by section 9 of the Civil Procedure Code.

21st April
1925.

The first question therefore is, what is the meaning of the plaint and the reliefs claimed therein. As it stands the plaint does not expressly ask for any relief of a civil nature or for the adjudication of any contest as to a right of property or an office. It is not understood why any court should decide whether the plaintiff is entitled to dismiss the defendant or

(1) (1906) I. L. R. 33 Cal. 789, (2) (1921) 62 Ind. Cas. 761.

1925.
 SYED
 DILJAN ALI
 v.
 BIBI
 AKHTARI
 BEGUM.
 MULLICK, J.

declare that the defendant was and is liable to dismissal from the post of the *mutwalli* or that she has in fact been dismissed. If the *wakfnamah* creates a right in the plaintiff to dismiss the defendant the plaintiff is at liberty to exercise that right without the intervention of the court and there is no reason why the court should be asked to declare that he has in fact exercised that right. If the defendant accepts the dismissal, there is nothing further to be done. If she does not, then it is open to the plaintiff to ask for the administration of the trust and for her removal and the suit would then be one cognizable under section 9 of the Civil Procedure Code by the Civil Court.

The declarations asked for by the plaintiff cannot even be construed as coming within the purview of section 42 of the Specific Relief Act. If the plaintiff had desired a declaration as to some legal character, which had been denied, and if consequential relief had not been possible, the Subordinate Judge would have had jurisdiction to take cognizance; but here there is no such case.

The fact is that in essence the plaint is one for the removal of the trustee and for the administration of the trust. When he asks the court to declare that the defendant has been duly dismissed he means either that the court is required to remove her in the event of refusal to vacate or otherwise arrange for the administration of the trust. It is inconceivable that a person of the plaintiff's experience in litigation would have filed a plaint which does not ask for any relief of a civil nature, and in my opinion, the Subordinate Judge was right in holding that the object of the suit being to protect the endowment against misfeasance, breach of trust or neglect of duty, section 14 of the Religious Endowments Act is applicable.

But it is said that this section cannot apply because the Act has no application to trusts established after 1863. It is said that the authorities, which hold that section 14 of the Act is general and

that it applies to endowments created both before and after 1863, were *obiter dicta*, but it is clear that this contention cannot be accepted. [See *Dhurrum Singh v. Kissen Singh* (1), *Fakuruddin Sahib v. Acken Sahib*(2), *Sheoratan Kunwari v. Ram Pargash*(3) and *Sivavva v. Rami Reddi* (4).] By Regulation 19 of 1810 all public endowments in this province were declared to be under the control and superintendence of the Board of Revenue which was entitled to take charge of their properties and to administer the same, although it sometimes did not do so. In respect of some of the endowments the Local Government had the power to nominate or confirm the manager or Superintendent. In others the Local Government did not appoint but had powers of supervision. Act XX of 1863 made rules for the management of both these classes. Regulation 19 if not repealed would have been applicable to endowments created after 1863 also and it is reasonable to suppose therefore that Act XX of 1863 which repealed it was intended to have the same scope and that while some parts of it provided for endowments over which the Local Government were then exercising control, section 14 was intended to have wider scope and to apply to endowments coming into existence in the future.

It is to be noticed that the reliefs granted under section 14 of Act XX of 1863 are slightly different from those accorded under section 92 of the Civil Procedure Code. The power of appointing a new trustee and of making a scheme for the administration of the property is restricted to section 92 only and in the present case if the object of the plaintiff is to provide for the administration of the estate after the removal of the defendant, section 92 would appear to be the proper machinery for securing it. The respondent therefore contends that the plaintiff should first obtain the sanction of the Advocate General and join some other person with him as plaintiff as required by the

1925.

SYED
DILJAN ALI
v.
BIBI
AKHTARI
BEGUM.

MULLICK, J.

(1) (1878) I. L. R. 7 Cal. 767.

(3) (1896) I. L. R. 18 All. 227.

(2) (1878-81) I. L. R. 2 Mad. 197

(4) (1899) I. L. R. 22 Mad. 223.

1925.

SYED
DILJAN ALI
v.
BIBI
AKHTARI
BEGUM.

MULLICK, J.

provisions of section 92. I agree that this would have been the proper course, but if the plaintiff chooses to adopt the procedure of section 14 of Act XX of 1863 rather than section 92 of the Civil Procedure Code, the risk is his and the Court cannot make any objection. The Subordinate Judge appears to have thought that as the plaintiff was suing alone and had not obtained the sanction of the Advocate General or other officer empowered to give sanction under section 92, Civil Procedure Code, it was his intention to cast the suit as one under section 14. Probably the learned Judge was right but even if he had held the suit to be one under section 92, then also would he have been compelled to return the plaint.

But the appellant's reply is that he has a right to sue independently of the Religious Endowments Act and section 92 of the Civil Procedure Code. He contends that so far as Act XX is concerned it is cumulative and not restrictive and that so far as section 92 of the Civil Procedure Code is concerned it deals only with suits brought in a representative capacity, and that it does not affect a suit to enforce a right conferred by the deed of endowment itself. He relies upon cases decided previously to 1908 and in particular upon *Budree Das Mukim v. Chooni Lal Jehurry* (1) in which it has been held that the founder of an endowment or his heirs have the right to sue the trustees for due performance of the trust and to remove them and to appoint new trustees without invoking the aid of section 92. These cases, however, are no longer law and the second clause of section 92 makes it clear that the section is mandatory and the reliefs specified in the section can only be enforced now by resort to the procedure of the section. Neither the founder nor his heirs is now entitled to sue for the removal of the trustee and the appointment of a new trustee if he alleges a breach of trust or requires directions for the administration of it. The jurisdiction of the High Court over suits relating to the management of trust

(1) (1906) I. L. R. 33 Cal. 789,

property has been derived from the Supreme Court and was in the first instance independent of the Civil Procedure Code. As for the mofussil courts, their jurisdiction appears to have been based upon justice, equity and good conscience. But that jurisdiction in respect of both sets of tribunals is now affirmed and controlled by Act XX of 1863 and section 92 of the Civil Procedure Code. The fact is that the trustee, though by a legal fiction, is vested with the legal ownership of the property and the legislature will not allow the Civil Court to divest him unless and until certain preliminaries have been strictly observed. In one sense a suit for the removal of a trustee may not strictly speaking be a suit of a civil nature, and perhaps for that reason the legislature has removed all doubts by enacting the statutes above referred to and has declared that no such suit can now be instituted except under the special jurisdiction conferred thereby.

It is contended that *Venku Chettiar v. Dorasami Chettiar*⁽¹⁾ is authority to the contrary. But that case was one between an admitted trustee and one who was not a trustee for the recovery of trust property and submission of accounts. Such a suit would obviously be cognizable by the ordinary Civil Court without any preliminary formalities. So would a suit for the establishment of the right to act as *mutwalli*. But it is otherwise where the appointment of a trustee has been recognized and it is sought to remove him for a breach of trust. But, says the appellant, "I may not wish to sue for breach of trust and I may have the right to dismiss the *mutwalli* for mere misconduct not amounting to a breach of trust. Why may I not enforce my right to remove him." The answer is that we are not concerned now to discuss hypothetical cases and whether in certain events a declaratory suit will lie. What we have to decide here is whether the plaint as it stands is one which can be entertained by the Subordinate Judge. I have no doubt that the

1925.

SYED
DIJAN ALI
v.
BIBI
AKHTAR
BEGUM.

MULLICK, J.

(1) (1921) 62 Ind. Cas. 761.

1925. answer is in the negative. The Subordinate Judge has held the plaint to be an application within the purview of section 14 of Act XX of 1863. It is for consideration whether, if and when the application has been admitted, the principal civil court will be able to give the relief which the plaintiff seeks. If the court is not competent to appoint or cause to be appointed a new trustee, he will probably not remove the defendant and will probably direct the appellant to sue under section 92 of the Civil Procedure Code. Therefore it is for consideration whether the plaintiff will be better advised to adopt the procedure under section 92, Code of Civil Procedure, instead of that under section 14 of Act XX of 1863. However, it is not for us to advise the plaintiff as to how he should proceed. All that we can do is to affirm the Subordinate Judge's order and to dismiss the appeal with costs.

Ross, J.—I agree.

Appeal dismissed.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Dawson Miller, C.J. and Jwalu Prasad, J.

1925. INCOME-TAX COMMISSIONER, BIHAR AND ORISSA

v.

SHIVA PRASAD SINGH.*

April, 24,
27.

Income-tax Act, 1922 (Act XI of 1922), section 12—Income derived from royalties of collieries—whether deduction allowed on account of cesses paid under Jharia Water-supply Act, 1914 (Bihar and Orissa Act V of 1914), section 45, and Bihar and Orissa Mining Settlement Act, 1920 (Bihar and Orissa Act IV of 1920), section 23.

Cesses paid under the Jharia Water-supply Act of 1914 and the Mining Settlement Act of 1920 cannot be deducted, under the Income-tax Act, 1922, section 12, for the purpose of arriving at the taxable income under the head of royalties.

* Miscellaneous Judicial Case no. 136 of 1924.