APPELLATE CIVIL.

Before Mr. Justice Carr.

KHALIFA M. S. A. GANNY AND OTHERS
v.
MOHAMED EBRAHIM AND ANOTHER. *

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May 27.

Civil Procedure Code (Act V of 1908), s. 92—Suit for possession of trust property—Plaintiffs' claim as lawful trustees—Defendants validly removed from trusteeship—Consent of Government Advocate—Plaintiffs out of possession—Injunction against defendants—Prayer for possession, essential—Court-fee—Specific Relief Act (I of 1877), s. 42, proviso, s. 56 (1).

Where the plaintiffs claim that they are the lawfully appointed trustees of certain trust property and that the defendants have been removed from their trusteeship by competent authority and sue the defendants for possession of the trust property, the suit does not fall within s. 92 of the Civil Procedure Code and the consent of the Government Advocate is not necessary to institute it

Abdur Rahim v. *Mahomed Barkatali*, I.L.R. 55 Cal. 519 ; *Appana* v. *Narasinga*, I.L.R. 45 Mad. 113 ; *Budree Das* v. *Chooni Lal*, I.L.R. 33 Cal. 789 ; *Puttu Lal* v. *Daya Nand*, I.L.R. 44 All. 721 ; *Sir D. M. Petit* v. *Sir Jamsetji*, I.L.R. 33 Bom. 509—*referred to.*

But the plaintiffs, being out of possession, cannot merely ask for an injunction restraining the defendants from interfering with the exercise by the plaintiffs of their duties as trustees. Such a suit is barred by s. 56 (1) and by the proviso to s. 42 of the Specific Relief Act. They must pray for possession and value the suit accordingly.

Jahar Lal v. *Nanda Lal*, 18 C.W.N. 545 ; *Rathnasabapathi* v. *Ramasami*, I.L.R. 33 Mad. 452 ; *F. A. Shihan* v. *Abdul Alim*, I.L.R. 58 Cal. 474—*referred to.*

Kunj Bihari v. *Keshavlal*, I.L.R. 28 Bom. 567 ; *V. Ramados* v. *K. H. Rao*, I.L.R. 36 Mad. 364 ; *K. R. Swaminatha* v. *A. Ramier*, 80 I.C. 1053—*dissented from.*

Rafi for the appellants.

Hay for the respondents.

CARR, J.—On the 3rd July 1914, by the registered deed Exhibit 5, one Habib Abdoola Al-Attas, since deceased, created a Trust for religious and charitable purposes, appointed as Trustees the two present defendant-appellants and one other who

* Special Civil Second Appeal No. 40 of 1931 from the judgment of the District Court of Pegu in Civil Appeal No. 221 of 1930.

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has since died, and conveyed to them upon trust two buildings in Pegu Town, together with their sites. It was directed that certain prayers should be said and certain ceremonies performed in the first of the two buildings, which might also be used for residential purposes by the founder himself, certain other persons and the Trustees themselves. As to the second building it was directed that it should be let out on hire and that the rents should be devoted to the purposes of the Trust. The Trustees were to submit accounts annually to the Trustees of another Trust created by the founder at Mullickpore in Bengal. Power was given to the Trustees of this last-mentioned Trust, if they are of opinion that the affairs of the trust in question are not properly managed and the trusts not properly carried out, to remove the Trustees and to appoint others in their place.

Acting on this power the Trustees of the Mullickpore Trust on the 28th December 1928, gave notice to the defendants to deliver up their office as Trustees by the end of March 1929, and said that they would appoint new Trustees on and from the 1st April 1929 (Exhibit 3).

On the 6th July 1929, by the deed (Exhibit E) the Mullickpore Trustees appointed the present plaintiff-respondents as Trustees of the Pegu Trust, in the place of the defendants, and conveyed to the plaintiffs the properties of the Trust.

On the 2nd April 1930, the plaintiffs instituted the present suit, in which they pray for :—

(*a*) A declaration that they are the lawfully appointed Trustees of the Waqf.

(*b*) A direction that the defendants should be made to "restore" the office of Trustees to them.

(*c*) An injunction restraining the defendants from interfering with the exercise by plaintiffs of their duties as Trustees.

(*d*) Such further and other relief as the Court may think fit and proper.

The relief claimed was valued at Rs. 1,100.

In the written statement of the first defendant it was urged that since the value of the trust property was stated in the trust deed to be Rs. 7,000 the suit was undervalued and was also not within the jurisdiction of the Subdivisional Court, in which it was instituted. It appears that other contentions must have been raised orally for the following preliminary issues were framed :—

(1) Does section 92 of the Civil Procedure Code apply to the facts of the suit, and is the suit in its present form maintainable ?

(2) Is the suit properly valued ?

In an interlocutory order the Subdivisional Judge found in favour of the plaintiffs on both issues and the suit proceeded and the plaintiffs obtained a decree granting the reliefs claimed in clauses (*a*), (*b*) and (*c*) of their prayer.

The defendants appealed to the District Court and their appeal was allowed on the ground that the suit was within the purview of section 92 of the Code of Civil Procedure and was not maintainable without the sanction of the Government Advocate.

In the present appeal by the plaintiff-appellants the only contention is that the District Judge was wrong in holding that the suit was within the purview of the section 92, but the respondents support the judgment also on the ground that the prayer for an injunction is barred by section 56 of the Specific Relief Act, and further that since the plaintiffs are

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admittedly out of possession of the Trust property it was open to them to have prayed for possession and since they have not done so they cannot be granted a bare declaration under section 42 of the Specific Relief Act. These, therefore, are the questions now to be decided.

Before doing so, however, I think it desirable to clear the ground of some misconception. Arguments have been addressed to me on behalf of the appellants on the subject of the value of the Trust property. It has been claimed that since this property is dedicated to religious purposes it can have no market value, and also that if it have a market value, that value is in these days much less than it was at the time of execution of the trust deed (Exhibit 5). I do not think that these questions arise. The proper valuation of the suit must be arrived at on the reliefs claimed in the plaint itself. Those reliefs are a declaration, delivery of an office and an injunction. The only one of these that requires to be valued is the injunction and since it is open to a plaintiff to place his own valuation on an injunction that valuation cannot be questioned either in respect of the Court-fee payable or in regard to the jurisdiction of the Court. On the plaint the question of the value of the Trust property does not arise.

On the question whether this suit is within the purview of section 92 of the Code of Civil Procedure the first case cited is *Budree Das Mukim* v. *Chooni Lal Johurri* (1) in which Woodroffe, J., held that to come under the section a suit must be a representative one brought for the benefit of the public and to enforce a public right upon a cause of action alleging a breach of such trust or necessity for directions as to

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

its administration against a trustee and for the particular relief mentioned (in the section). Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section.

The next case is *Sir Dinsha Manekji Petit* v. *Sir Jamsetji Jijibhai* (1) and is to the same effect.

In *Subramania Pillai* v. *Krishnaswamy Somayajiar* (2) it was held that a suit by two trustees to declare that the appointment of a third trustee was invalid and for an injunction restraining him from interfering with the affairs of the trust falls under section 92.

In *Appama Poricha* v. *Narasinga Poricha* (3) a Full Bench of the Madras High Court held that a suit by a trustee against a co-trustee for accounts was not within the section. The view of Woodroffe, J., in *Budree Das's* case (4) was approved.

In *Puttu Lal* v. *Daya Nand* (5) it was held that the section does not apply to a suit between persons who individually claim a right to succeed to the office of trustee. Here again the view of Woodroffe, J., was accepted.

The District Judge in his judgment has referred to a remark in my own judgment in *P. C. Thevar* v. *V. Samban* (6) to the effect that section 92 (1) (*b*) seemed to cover any relief that could be asked in a suit relating to an alleged public trust. That remark was *obiter* and my attention has been called to *Abdur Rahim* v. *Mohamed Barkat Ali* (7) in which their Lordships of the Privy Council had a few weeks before my judgment was delivered, laid down that "further or other relief" in clause (*h*) must be

(1) (1908) I.L.R. 33 Bom. 509.
(2) (1919) I.L.R. 42 Mad. 668.
(3) (1921) I.L.R. 45 Mad. 113.
(4) (1906) I.L.R. 33 Cal. 789.
(5) (1922) I.L.R. 44 All. 721.
(6) (1928) I.L.R. 6 Ran. 188.
(7) (1927) I.L.R. 55 Cal. 519.

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taken to mean relief of the same nature as clauses (*a*) to (*g*). They did not accept the contention that all suits founded upon any breach of trust for public purposes of a religious or charitable nature were within section 92.

The weight of these authorities is very strongly in favour of the appellant's contention that this suit is not one which under section 92 requires the sanction of the Advocate-General. The only case against that proposition is *Subramania Pillai's* case. I think the law on this question must be held to be now well settled and that the view of Woodroffe, J., in *Budree Das's* case (1), has been generally approved. This consensus of authority ought to be followed, if only on the principle of *stare decisis*.

Apart from authority also I am of opinion that the suit does not fall within the section. It is not in fact based on an alleged breach of trust, though no doubt it ultimately arises out of one. The case of the plaintiff's is that the defendants have been removed from their trusteeship by competent authority which has appointed the plaintiffs themselves as trustee. They do not claim to remove or appoint any trustee ; their case is that they are in fact and in law trustees and are entitled to act as such. Nor do they ask that any property should be vested in them ; their claim is that the trust property was already vested in them. Although they do not actually ask for possession that is in reality what they are seeking (a matter which I shall shortly deal with), but that is not the same thing as seeking to have the property vested in them. Clauses (*e*) to (*g*) of section 92 (1) clearly have no bearing on this case, and under the Privy Council decision last cited above clause (*h*) cannot be held to cover any of the reliefs sought in this case.

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

I hold, therefore, that the decision of the District Court holding that the suit is not maintainable by reason of the provisions of section 92 of the Code of Civil Procedure was wrong.

The respondent's further objection that the prayer for an injunction is barred by section 56 (i) of the Specific Relief Act and that the suit for a bare declaration is barred by the proviso to section 42 of the same Act seems to me much more serious.

At the risk of some repetition I will set out the case for the plaintiffs as it appears to me. They claim to be the duly appointed trustees of the trust and therefore entitled to possession of the trust property and to its management; the defendants have possession of the property and are managing it, and the plaintiffs seek by this suit to enforce their rights.

Are they entitled to an injunction restraining the defendants from interfering with their management? In my view they are not. They are not in fact managing the trust and they cannot manage it until they obtain possession of the property which they have not at present got. They are therefore asking for an injunction to restrain something which at the present does not exist. The enforcement of their rights can only be obtained by obtaining possession of the property and the obvious way of doing that is to pray for possession in this suit. By doing so they would obtain fully efficacious relief and the case thus comes under section 56 (1) of the Specific Relief Act, which provides that an injunction may not be granted where an equally efficacious relief can be obtained by any other usual mode of proceeding.

This view was taken in *Kanakasabai* v. *Muttu* (1) though in that case it was *obiter*. The rule was

(1) (1890) I.L.R. 13 Mad. 445.

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enforced in *Chunilal* v. *Surat City Municipality* (1) but that was a case of a different class. In *Jahar Lal Banduri* v. *Nanda Lal Chaudhuri* (2) it was held that a plaintiff out of possession cannot sue for an injunction against an alleged trespasser. This seems to me a sufficiently obvious proposition and fully applicable to the present case. Perhaps more directly applicable than any of those decisions is *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3), which was a suit by a trustee for a declaration that his dismissal from trusteeship was invalid and for an injunction restraining his co-trustees from interfering with the exercise of his rights as trustee. He had been ousted from possession by his co-trustees. He had not prayed for possession and it was held that he ought to have done so and his suit was dismissed as barred under section 42. It was also held that being out of possession he could not ask for the injunction.

Against these authorities the appellant's learned advocate has referred me to a number of other cases. In *Kunj Bihari* v. *Keshavlal Hiralal* (4) a suit for certain declarations and injunctions had been dismissed under section 42 because possession had not been prayed for. It was held by the Bombay High Court that even if it was open to the plaintiff to pray for possession his prayer for injunctions was a sufficient prayer for consequential relief to satisfy the proviso to section 42. It was also held that that proviso did not in any event justify the dismissal of the suit, its terms being "Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so."

(1) (1903) I.L.R. 27 Bom. 403.
(2) (1913) 18 Cal. W.N. 545.
(3) (1910) I.L.R 33 Mad. 452.
(4) (1904) I.L.R. 28 Bom. 567.

This decision was expressly dissented from by the Madras High Court in *Rathnasabapathi's* case (1), with the arguments in which I agree. As regards the proposition that the proviso to section 42 does not justify the dismissal of a suit my view is that it does ; if a plaintiff sues for a relief which the Court cannot grant him obviously the suit is incompetent and must fail. The plaintiff might, of course, in appropriate circumstances be allowed to amend the plaint by adding a prayer for such relief as is open to him.

In *V. Ramados* v. *K. Hanumantha Rao* (2) it was held that—

"Where the lands of a temple were in the actual possession of tenants who were willing to pay rent to whomsoever was the trustee, a suit which merely prays for the recovery of the office of trustee and for an injunction against the defendants who were in possession of the office, which injunction was valued at a substantial figure, *viz.* Rs. 2,600, does not offend against the proviso to section 42 of the Specific Relief Act, as the plaintiff had asked for such possession as he could under the circumstances and as the possession of the tenants would not be adverse to the plaintiff after his recovery of office."

There is in my opinion much very unsound reasoning in this judgment. *Rathnasabapathi's* case (1) was distinguished on the ground that the injunction claimed in that case was valued at the nominal sum of Rs. 10. I am unable to see that the amount at which the injunction is valued makes any difference to the principle of the proviso. Again stress was laid on a statement in the plaint that the tenants would pay rent to whomsoever held the office, which statement had not been traversed, and it was said—

"If therefore plaintiff gets possession of the office, the tenants will pay rent to him and the plaintiff will obtain all the

(1) (1910) I.L.R. 33 Mad. 452. (2) (1911) I.L.R. 36 Mad. 364.

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possession to which he is entitled, *i.e.* the right to collect rent. Here again I am unable to see that the willingness of the tenants has anything to do with the matter. Even if they were unwilling they would be liable to pay the rent to the plaintiff if he got his decree. All this does not in any way affect the root facts that the plaintiff was out of possession, was able to pray for it and did not do so. The same argument might equally be applied to an entirely private suit, in which I have no doubt it would receive very short shrift."

In *Rugghan Prasad* v. *Dhanno* (1), it was held that it was competent to the legal representative of the founder of a trust to sue to declare that the right of appointment had devolved upon himself, and that neither section 92 of the Code of Civil Procedure nor section 42 of the Specific Relief Act was a bar to the suit. The judgment does not deal with the question whether the plaintiff was able to claim other relief and is therefore irrelevant.

The last case is *K. R. Swaminatha Iyer* v. *A. Ramier* (2) which is not reported in the authorised reports, but which I refer to because it avowedly furnished the model on which the present suit was framed. In that case it was held that—

> "Where the plaintiffs sued for a declaration that they were the trustees of a temple lawfully appointed—and for a direction that the defendants should be made to restore the office to them and for an injunction restraining them from interfering with the exercise of their duties as trustees; *Held*, that the suit as framed was properly maintainable without a prayer for possession of the trust properties and that the proviso to section 42 of the Specific Relief Act did not operate as a bar to the suit."

Here again, with all deference to the learned Judges concerned, I think there is much unsound reasoning. The learned officiating Chief Justice relied on the cases of *Kunj Bihari* (3) and *Ramados* (4), but the chief reason for his view seems to have been that it

(1) (1926) I.L.R. 49 All. 435.
(2) 80 I.C. 1053.
(3) (1904) I.L.R. 28 Bom. 567.
(4) (1911) I.L.R. 36 Mad. 364.

would be preposterous to require trustees to pay *ad valorem* Court-fees on a suit for possession of temple property. That seems to me a question for the Legislature, which could provide that in such suits fees should be calculated on some other basis, but has not done so. The law as it stands is that if they did sue for possession they would have to pay Court-fees on the same basis as any private person, and the consideration that it is unreasonable to require them to do this is irrelevant to the question whether they are bound to pray for possession or not. The other learned Judge criticised *Ramados's* case (1) in much the same way as I have done above, but finally followed it on the authority of *Kunj Bihari's case* (2) which in my view is equally unsound.

I am clearly of opinion that the plaintiffs, being out of possession, cannot be granted the injunction prayed for, and also that they were bound to add a prayer for possession of the trust properties, and that not having done so their suit is not maintainable and must fail.

It has been argued that the suit is one for an office. It seems to me to be essentially a suit for a declaration that the plaintiffs are in fact the holders of the office, and as such to come under section 42.

On the further question whether the plaintiffs should be allowed to amend their plaint by the addition of a prayer for possession I am of opinion that that course would not be justified. It would involve very large alterations in the pleadings and a valuation of the property, as a result of which it might well be found that the Subdivisional Court had no pecuniary jurisdiction, the effect of which would be that all its proceedings are void, which is the result of my present decision. It will be much more satis-

(1) I.L.R. 36 Mad. 364. (2) I.L.R. 28 Bom. 567.

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factory to leave the plaintiffs, if so advised, to file a fresh suit properly framed.

The appeal is dismissed with costs. I allow seven gold mohurs as advocate's fees.

NOTE.—A very recently reported case—*F. A. Shihan* v. *Abdul Alim Abed* (1)—has just come to my notice. The third paragraph of the head-note and the judgment at pages 499 *et seq.* seem to support the view I have taken.

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Before Mr. Justice Heald.

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May 28.

PALE ZABAING RURAL CO-OPERATIVE CREDIT SOCIETY

v.

MAUNG THU DAW AND ANOTHER.*

Rent paid by tenant before being due—Advance to landlord—Transfer of property by landlord—Plea of payment against purchaser—Transfer of Property Act (IV of 1882), s 50.

S. 50 of the Transfer of Property Act protects a tenant against having to pay his rent twice over, if paid in good faith, but if he has paid rent before it was due it is merely an advance to the landlord and is not a payment in fulfilment of an obligation to pay rent. A payment in advance cannot free the tenant from liability to pay rent to a purchaser who acquires the property from his landlord before the date on which the rent falls due.

Ram Lal v. *Marwari*, 3 Pat. L.T. 128 ; *Tilok Chand* v. *Beattie*, 29 C.W.N. 953—*referred to.*

Ba Han for the appellant.

Ba Maung for the respondents.

Applicant sued the respondents in the Township Court of Kawa as a Court of Small Causes for rent and for compensation for use and occupation of a house which he had purchased from the former owners on the 26th of April 1930. He claimed rent

(1) (1930) I.L.R. 58 Cal. 474.

* Civil Revision No. 463 from the judgment of the Township Court of Kawa in Civil Reg. No. 130 of 1930.