APPELLATE CIVIL.

1915.

April 14.

Before Sir Basil Scott, Kt., Chief Justice. and Mr. Justice Batchelor.

SULEMAN HAJI USMAN AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SHAIKH ISMAIL SHAIKH OOSMAN SHANDOLE AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 92—Suit regarding public charitable property—Consent by Collector—Conditional consent.

A suit was brought in the name of two plaintiffs for the removal of trustees, for a declaration that the property in the hands of the trustees belonged to the Darga of Pir Saheb and to recover possession of the property. Before the institution of the suit one of the plaintiffs applied to the Collector of the District for permission to file the suit under section 92 of the Civil Procedure Code of 1908. The Collector replied as follows :—" The Collector doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in section 92 which the Court may deem fit to grant. " The trying Court was of opinion that the above certificate was defective in form and therefore dismissed the suit. The plaintiffs having appealed :—

Held, dismissing the appeal, that the Collector had not acted in the manner provided by section 92 of the Civil Procedure Code of 1908. He had not indicated on the proceedings that the suit was filed with his consent and that he had not even come to a conclusion that the suit was one which should have been filed.

The Collector acting under section 93 of the Civil Procedure Code had no right to consent to the institution of a suit by two persons claiming to have an interest in the trust unless it was such a suit as he would consider himself to be justified in filing at the relation of such two persons in his own name.

The provisions of section 92 of the Civil Procedure Code must be regarded as imperative.

FIRST appeal from the decision of J. D. Dikshit, District Judge of Thana, in Original Suit No. 10 of 1912.

Suit for a declaration and injunction.

Two plaintiffs Suleman Haji Usman and Jusub Jan

* First Appeal No. 206 of 1913.

Mahomad purporting to be disciples of Pir Maulana Mahomad Sultansaheb Sufinacas Bandi sued for a declaration that all the property moveable and immoveable, received during the life-time of Pir Saheb and afterwards as dedicated to the Darga and now in possession of the defendants, belonged to the Darga and the defendants should be ordered to render an account; that the defendants are unfit to act as trustees; that a perpetual injunction be granted restraining the defendants from receiving the Galla or other moveable property and looking after the management of the immoveable property and staying at the Darga; that the plaintiffs or other persons might be appointed trustees in their place and put in possession of the property; that the plaintiffs have brought this suit after obtaining the consent of the Collector of Thana under section 92 of the Civil Procedure Code.

The defendants denied that the property in suit belonged to any charitable trust. They managed it as their private family property and the plaintiffs had no right to bring a suit in respect of it.

The District Judge on a preliminary issue: "Is the certificate obtained by the plaintiffs defective in form, and if so, what is the consequence?" found that the consent given in the present case by the Collector was no consent at all as required by section 92 of the Civil Procedure Code and dismissed the suit. His reasons were as follows:—

"In issuing the certificate the Collector says 'the Collector doubts whether section 2, Civil Procedure Code, applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in section 92 which the Court may deem fit to grant.' Such a certificate in my opinion is *ultra vires*. If the view of the Collector is correct, then no certificate from him at all would be necessary. It is he who is first to determine whether the particular institution is a public religious trust, whether the applicants are the persons interested and whether

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any breach of the trust has been committed. If he does not satisfy himself on any of these points and wants the Court to determine them, and in the event of the Court finding on these questions in a manner which would justify his issuing the certificate, and gives his consent conditionally on the findings of the Court, the result would be that there is no certificate as required by law before the institution of the suit; for if the Court finds on merits against the relator's application, then the consent is withdrawn or the right construction of a certificate like the present would be to say that the Collector had not from the beginning given any certificate. It would be open for him to argue that 'I had not given a certificate in the particular case, because I said I would give my consent if the Court holds the allegations of the applicants proved.' The consent of the Collector is to precede the institution of the suit and is not to depend upon the findings of the Court after the institution. If there is no consent before institution the Court cannot proceed with the suit and until it proceeds with the suit and finds on the merits it is not in a position to say whether there will be the consent of the Collector or not. If the Court does not proceed as it should not, it will be never known if the Collector has given the consent. I am of opinion that the consent given in the present case is no consent at all as required by section 92, Civil Procedure Code, even to the one plaintiff and the suit must be dismissed."

Bahadurji with *Pandya and Co.* for the appellants:—We submit that the certificate was quite legal. It expressly authorised "the filing of a suit to claim any of the reliefs" and as the original application was made with the intention to ask permission to file a suit in the name of applicant himself and the second plaintiff, the certificate should be deemed to authorise both the plaintiffs to file the suit. The very fact that the Collector entertained doubt as to whether section 92 of the Civil Procedure Code would apply to the case shows that he did apply his mind to the matter. The conditional form does not impair the validity of the certificate. It was in the power of the Collector to grant the certificate or to withhold it and he has chosen to grant it. What he meant was that he granted the certificate so far as he himself was concerned, but the Court may or may not grant any reliefs.

I. K. Yadnik for appellant No. 1.

H. C. Coyaji with *S. M. Kaikini* (for *S. S. Patkar*) for respondents Nos. 1 and 2:—We contend that the certificate was bad in law as it did not fulfil the requirements of sections 92 and 93. Sub-section 2 of section 92 shows that section 92 is imperative. According to that the Collector is required to apply his mind to all the points mentioned, namely, whether there is a religious or charitable trust, whether the applicants are interested in it, whether there has been any breach of such a trust, whether the reliefs asked for are proper. See *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*[1]; *Ex parte Skinner*[2]. Here the application was made by the first plaintiff only and the Collector's letter was also addressed to him only. The words of the Collector's reply show that he had not definitely applied his mind to all the points. Further no reliefs are mentioned in the original application and the Collector's words authorise the first plaintiff to ask for "such reliefs as the Court may deem fit to grant" while he ought to specify the reliefs.

Bahadurji in reply.

SCOTT, C. J.:—This was a suit brought in the name of the two plaintiffs, Suleman Haji Usman and Jusub Jan Mahomad, purporting to be disciples of a certain Pir for relief regarding an alleged Darga of the Pir Saheb said to be in the possession of the defendants; for a declaration that the Darga was the owner of all the moveable and immoveable property in the possession of the defendants; that the defendants were unfit to act as trustees; for a perpetual injunction against the defendants; and that the plaintiffs or other persons might be appointed trustees in their place, and put in possession of the property.

Under the authority of a Government Resolution, the Collector of Thana was invested with the powers of

(1) (1897) 24 Cal. 418 at p. 428. (2) (1817) 2 Mer. 453 at p. 456.

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the Advocate-General under section 539 of the Code of Civil Procedure of 1882, and by virtue of section 157 of the Code of Civil Procedure of 1908, the powers conferred operate under the present Code in respect of sections 91 and 92. We are here concerned with section 92. Sub-section (2) of that section provides that "save as provided by the Religious Endowments Act of 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section." This being a suit in respect of such a trust claiming reliefs specified in sub-section (1) it can only be supported if brought in conformity with the provisions of section 92. It is sought to show that these provisions have been complied with by a communication from the Collector in reply to a petition addressed to him by the 1st plaintiff alone. That petition states that "the petitioner as a member of the Mahomedan community, and especially a disciple of His Holiness Pir Mowlanasaheb wants to file a civil suit against the said heirs according to the Civil Procedure Code, sections 92 and 93. Your Honour's consent is necessary for the institution of the suit. The suit is to be filed in the name of the petitioner and another member of the Mahomedan community and disciple of the Pir Saheb, Jusab Jan Mahomed." The Collector's reply is as follows :—"The Collector doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in section 92 which the Court may deem fit to grant."

In some High Courts it was considered, until the year 1908, that the provisions of section 539 were permissive and not imperative, but that has never been

the view of this High Court, and the Legislature by the enactment of sub-section (2) of section 92 has made it clear that section 92 must be regarded as imperative.

The Collector under section 93 stands in the position with regard to his Collectorate of the Advocate-General in the Presidency town, and the suit which requires his consent is a suit which he, if he thought fit, would be competent to file in his own name as a public Officer, whose duty it is to protect public charities as the representative of the Crown in that capacity, and he has no right to consent to the institution of a suit by two persons claiming to have an interest in the trust, unless it is such a suit as he would consider himself to be justified in filing at the relation of such two persons in his own name. The duties of the Collector have been described by the Calcutta High Court in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*[1]. It is there stated that—

"The Collector is required to exercise his judgment in the matter before giving his consent [to the institution of a suit]. This view is borne out by the observations of Lord Eldon in *Ex parte Skinner*[2]....The Collector in giving his consent has to exercise his judgment in the matter, and see, not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the kind contemplated by the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust."

The observations of Lord Eldon in *Ex parte Skinner*[2] were as follows:—

"It appears to me that such a petition as the present, supposing it to be properly within the scope of the Act of Parliament, can derive no sanction from the signature of the Solicitor-General, he being competent to act as, and in the place of, the Attorney-General, only when there is no such officer as an Attorney-General. The intention of the legislature in framing the Act, was to guard charitable trusts from abuse, and, for that purpose, to prevent such

(1) (1897) 24 Cal. 418 at p. 428. (2) (1817) 2 Mer. 453 at p. 456.

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proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the Legislature provided for the signature of the Attorney-General, or, in case of there being no Attorney, of the Solicitor-General; and I desire to have it understood, that no petition under the Act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information."

We may point out with reference to the powers of the Advocate-General which are vested in the Collector that it is an invariable practice in this Presidency for the Advocate-General, where he does not file the suit himself, to endorse his consent upon the plaint. If the Collector had followed this practice he would perhaps have more clearly realised his responsibilities in the matter. The plaint is, to a certain extent, his plaint as it is launched under his sanction. It should only be such a plaint as he would feel justified in filing himself.

In the present case we agree with the learned District Judge that the Collector has not acted in the manner provided by the section. He has not indicated on the proceedings that the suit is filed with his consent, and in that respect has not followed the practice of the officer whose powers he is to discharge. But more important than that he has not even come to a conclusion that the suit is one which ought to be filed.

He doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector "hereby declares his consent to the filing of the suit to obtain any of the reliefs specified in section 92 which the Court may deem fit to grant;" that is to say, instead of consenting to the institution of a suit for certain definite reliefs, of which he approves, he leaves it to the Court to decide whether such a suit ought to be filed or not. We are of opinion

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that he has not discharged the powers conferred upon him as intended by the Legislature, and we, therefore, hold that the suit has not been filed in conformity with the provisions of section 92, and that the learned District Judge was right in dismissing it on that ground.

We are not, however, satisfied that the Judge was justified in awarding two sets of costs to the defendants who had one and the same defence, and his award of costs has not been seriously defended by the learned counsel who appears for the respondents. We affirm the decree and dismiss the appeal with costs. There must be only one set of costs against the plaintiffs throughout.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

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June 21.

RAMACHANDRA VENKAJI NAIK (ORIGINAL DEFENDANT 7, APPELLANT, *v.* KALLO DEVJI DESHPANDE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1 TO 6 AND 8 TO 11) RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 13—Mortgage by Vatandar—Suit for account and redemption—Adverse possession by mortgagee—Hereditary Offices Act (Bom. Act III of 1874), section 5—Mesne profits from the date of suit.

One Madhavrao, grandfather of the plaintiff, by a deed dated the 15th July 1867 mortgaged with possession certain Vatan Inam lands to Babaji Anant, an ancestor of the defendants. Madhavrao died, 1873, and in 1909 plaintiff sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendants contended that by reason of the provisions of section 5 of the Vatan Act, the mortgage became void on the death of

* Second Appeal No. 167 of 1914.