

1904
DEC. 14.

ORIGINAL
CIVIL.

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[273] ORIGINAL CIVIL.

Before Mr. Justice Bodilly.

MANIJAN BIBEE v. KHADEM HOSSEIN.*

[14th December, 1904.]

Right of suit—Mutwalis, rights of—Wakf property, claim to—Suits relating to public rights—Civil Procedure Code (Act XIV of 1882), s. 539.

A suit between two private parties claiming certain rights as *mutwalis* over wakf property is not of such a public nature as to come within the purview of s. 539 of the Civil Procedure Code, which contemplates that there must be some dispute in existence between the parties of such a public nature, that the intervention of the Advocate-General is necessary to decide if and by whom a suit should be brought to establish a public right.

Sajedur Raja Chowdhuri v. Gour Mohun Das Basshnav (1) referred to.

[Fol. 33 Cal. 789=10 C. W. N. 581.]

THIS was a suit brought by one Manijan Bibee asking for an order that it might be declared that she, the plaintiff, was entitled to possession of a certain mosque, and that the defendants, Khadem Hossein and Imdad Hossein, be ordered to deliver up possession of the property to the plaintiff; and, further, for an account to be taken under the direction of the Court.

The facts shortly were as follows :—One Helen Daye, a Mahomedan of the Sunni sect, during her lifetime possessed a certain piece of land, now No. 375, Upper Circular Road in Calcutta, and she erected a small mosque on the land. On the 3rd September 1850, she appointed her husband, Jhungoo Mollah, mutwali of the mosque and the land appertaining to it. Jhungoo Mollah took possession of the wakf property as mutwali, and thereafter, on the 3rd September 1853, appointed his son-in-law, one Haro Khan, mutwali in his place. Haro Khan finding the mosque in a dilapidated condition, pulled it down and reconstructed a new and enlarged one at his own expense. Haro [274] Khan subsequently died in the year 1865, leaving him surviving his widow, Kolan Bibee, two sons Ramjan Khan and Manwar Khan, and a daughter Manijan Bibee. Kolan Bibee, his widow, succeeded to the mutwaliship of the said wakf property until her death, which took place in the year 1870. Upon Kolan Bibee's death her two sons, Ramjan Khan and Manwar Khan, succeeded to the mutwaliship of the wakf property, and they without the consent of the plaintiff, Manijan Bibee, conveyed the wakf property on the 25th April 1876 to one Tasadduck Hossein for Rs. 1,750. Thereupon, Manijan Bibee on coming to know of this conveyance came and took possession of the wakf property; but it was subsequently agreed between Manijan and Tasadduck Hossein that the latter should reconvey the wakf property to Manijan after twenty years, and he executed a document, on the 8th May 1876, to that effect and delivered it over to the plaintiff, Manijan Bibee. This document was subsequently lost by a heavy flood which occurred in the year 1881, whereupon Tasadduck executed another document on the 5th June 1882.

On the 7th November, 1885, Tasadduck died leaving him surviving a widow, Saboo Bibee; three sons, *viz.*, Abdul Hossein, Khadem Hossein and Imdad Hossein; and three daughters, *viz.*, Fooda Bibee, Hooda Bibee

* Original Civil Suit No. 697 of 1901.

(1) (1897) I. L. R. 24 Cal. 418, 425.

(since deceased) and Manijan Bibee ; and left a will dated the 20th December 1883. In 1895 Abul Hossein died leaving him surviving two widows and a daughter, whereupon his brothers, the defendants Khadem Hossein and Imdad Hossein took possession of the mosque.

Ramjan Khan and Manwar Khan, the brothers of the plaintiff, died in the year 1899.

The 20 years mentioned in the document of 1876, subsequently ratified by the document of 1882, expired on the 7th May 1896, and the plaintiff, Manijan Bibee, became entitled to possession of the wakf property. She then called upon the defendants to give up possession of the mosque but they refused, thereupon the plaintiff instituted this suit.

At the hearing of the suit a preliminary objection was raised by the defendants, *viz.*, that this suit could not be maintained inasmuch as leave had not been granted under the provisions of s. 539 of the Civil Procedure Code, which provides that the [275] consent of the Advocate-General in writing is necessary for the institution of a suit brought by a person having an interest in a trust created for religious or charitable purposes.

Mr. B. C. Mitter (Mr. A. N. Chowdhuri and Mr. P. N. Sen with him), for the plaintiff. Section 539 of the Civil Procedure Code has no application to a suit against strangers ; it can only apply when the relief is sought against a trustee. My case is that the defendant is a stranger and has nothing to do with the trust property : *Lakshmandas Parashram v. Ganpatrav Krishna* (1), *Miya Vali Ulla v. Sayad Bava Santi Miya* (2), and *Kazi Hussain v. Sagun Balkrishna* (3). If the basis of my action was a breach of trust, then s. 539 of the Code would apply ; but here that is not so : *Vishwanath Gobind Deshmone v. Ramshat* (4), and *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (5).

Mr. N. Chatterjee (Mr. J. C. Gupta with him), for the defendants (*contra*). From the plaint it is clear that the plaintiff wishes the Court to hold that we have been guilty of malversation. The Bombay cases cited by other side show that the trustees sued for the possession of the property, whereas in the present suit the plaintiff asks for a declaration that she is the mutwali, and therefore this suit comes under the second portion of s. 539 of the Civil Procedure Code : *Neti Rama Jogiah v. Venkatacharulu* (6). Upon the authority of *Jan Ali v. Ram Nath Mundal* (7), when there is an endowment made on behalf of the public community, any one claiming the property to be wakf property must obtain the consent of the Advocate-General in writing before instituting a suit under s. 539 of the Code. It is admitted that this is a public trust ; that being so, this suit must come under that section of the Civil Procedure Code.

BODILLY, J. This case must proceed in spite of the preliminary objection. I do not, however, think that the point is entirely [276] free from the doubt, but I must follow, in my opinion, the principle laid down by a large number of cases in the Bombay and the Allahabad Courts which have been cited to me and which deal with this section. The section is worded, as I said during the argument, in a very obscure manner but it means, in my opinion, that there must be some dispute in existence of such a public nature that the intervention of the Advocate-General is

(1) (1884) I. L. R. 8 Bom. 365.
 (2) (1896) I. L. R. 22 Bom. 496.
 (3) (1899) I. L. R. 24 Bom. 179.
 (4) (1890) I. L. R. 15 Bom. 148.

(5) (1897) I. L. R. 24 Cal. 418.
 (6) (1902) I. L. R. 26 Mad. 450.
 (7) (1881) I. L. R. 8 Cal. 32.

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necessary to decide, if and by whom a suit should be brought to establish public rights.

In this regard, I follow the words of Mr. Justice Banerjee in *Sajedur Raja Chowdhuri v. Gour Mohun Das* (1), which are as follow: "This condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust. Where this condition is fulfilled, and the risk of harassing suits being brought against trustees is thus guarded against, there is no reason why suits brought under the section should be restricted in any other way.

This dispute is merely one between two entirely private parties each claiming to exercise rights as *mutwalis* over *wakf* property and it is not a dispute of such a public nature as to bring it in my opinion within section 539 of the Civil Procedure Code, making it necessary that the sanction of the Advocate-General should be obtained. For these reasons I decide that the preliminary objection fails.

Attorney for the Plaintiff: *J. N. Chatterjee.*

Attorney for the Defendant: *S. C. Mitter.*

32 C. 277 (=9 C. W. N. 217.)

[277] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Sale and Mr. Justice Harrington.

CORPORATION OF CALCUTTA *v.* SHYAMA CHARAN PAL.*

[16th December, 1904.]

Limitation—"Accrual of the right to sue"—*Calcutta Municipal Act (Bengal Act III of 1899) s. 634—Rate-payers, interests of.*

As a plaintiff is debarred by cl. (1) of s. 634 of the Calcutta Municipal Act (Bengal Act III of 1899) from commencing a suit until the expiration of one month after delivery of notice, the expression "accrual of the right to sue" in cl. (2) must apply to the date when the month's notice expired from which date he has three months within which to commence his action.

The words "accrual of the right to sue" in s. 634 of the Act do not mean accrual of the cause of action.

APPEAL by the defendants, the Corporation of Calcutta, from a judgment of STEPHEN, J.

On the 19th of January 1893, one Ramanund Pal purchased the plot of land No. 172, Harrison Road, for Rs. 21,000 and conveyed the same to the plaintiffs. On the 17th of June, 1895, sanction was given by the defendant Corporation for a building to be erected on the land according to the plan then provided by the plaintiffs in the ordinary course. No building operations took place within a year from that date, and a re-sanction was granted on the 2nd of June, 1897. Some work was done within 12 months of the re-sanction and then the work was stopped for some time and begun again in March, 1901.

On some date prior to the 2nd of November, 1901, the defendant

* Appeal from Original Civil, No. 33 of 1904, in suit No. 722 of 1902.

(1) (1897) I. L. R. 24 Cal. 418, 425.