Before Mr. Justice Banerjee and Mr. Justice Rampini.

*1897 *January* 26.

SAJEDUR RAJA CHOWDHURI (ONE OF THE DEFENDANTS) *v.* GOUI MOHUN DAS BAISHNAV AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code (Act XIV of 1882), section 539—Suit to remove a trustee and to recover possession of trust property in the hands of a third party—Right of suit—Limitation Act (XV of 1877), Sch. II, Art. 134—Statute 52 Geo. III, Cap. 101—Civil Procedure Code Amendment Act (VII of 1888)—Act XX of 1863, section 14—Duty of Collector in sanctioning suit—Irregularity not affecting merits of suit—Civil Procedure Code, section 578.

A suit for the dismissal of a trustee and for the recovery of trust property from the hands of a third party to whom the same has been improperly alienated is within the scope of section 539 of the Civil Procedure Code.

Subbayya v. *Krishna* (1) followed.

Lakshmandas Parashram v. *Ganpatrav Krishna* (2) distinguished.

Article 134 of the second schedule of the Indian Limitation Act (XV of 1877) applies to such a suit.

The difference between the provisions of section 539 of the Civil Procedure Code and those of 52 George III, cap. 101 (Romilly's Act) pointed out.

Persons having a right to worship in a temple are within the scope of section 539. Under that section, as originally enacted, the words were "having a direct interest in the trust," and the word "direct" has been taken out by Act VII of 1888. The inference is that the Legislature intended to allow persons having the same sort of interest that is sufficient under section 14 of Act XX of 1863 to maintain a suit under section 539.

The Collector in giving his consent to the institution of a suit under section 539 has to exercise his judgment in the matter, and see not only whether the persons suing are persons having 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 *primâ facie* grounds for thinking that there has been a breach of trust. But where the form of the permission showed that he had omitted to exercise his judgment in the matter of the interest of the plaintiffs in the trust such omission was held to be a mere irregularity, and within the scope of section 578 of the Civil Procedure Code.

THE plaintiffs brought a suit under section 539 of the Civil

* Appeal from Original Decree No. 165 of 1895 against the decree of R. H. Greaves, Esq., District Judge of Sylhet, dated the 29th of December 1894.

(1) I. L. R., 14 Mad., 186. (2) I. L. R., 8 Bom., 365.

1897

SAJEDUR RAJA CHOWDHURI v. GOUR MOHUN DAS BAISHNAV.

Procedure Code against defendant No. 1, the *mohunt* of the *akra* of the idol Sri Sri Narsingh, and against defendant No. 2, to whom defendant No. 1 had alienated certain immoveable properties of the idol, on the allegation that the *akra* was a public place of worship for Hindus in general. The plaint alleged that plaintiff No. 1 had for some time been discharging the duties of the *mohunt* of that *akra*, and that plaintiff No. 2 was the *pujari* of the idol; that the properties described in the schedules to the plaint constituted the *debutter* property of the idol; that of these certain portions had been wrongfully alienated by defendant No. 1 in favour of defendant No. 2; and that defendant No. 1 had by various acts committed by him in breach of trust, disqualified himself for holding the office of *mohunt*. The plaintiffs prayed that the properties in dispute might be declared to be the *debutter* property of the idol; that the alienations in favour of defendant No. 2 might be declared to be inoperative as against the rights of the idol; that defendant No. 1 might be removed from the office of *mohunt*; that some competent person might be appointed *mohunt* in his place; and that the properties in dispute might be taken from the possession of the defendants and be delivered to the custody of the person who might be appointed. Defendant No. 2 in his written statement alleged, *inter alia*, that the suit was not maintainable under section 539 of of the Code of Civil Procedure, and that the properties in dispute did not belong to the idol. Defendant No. 1 did not appear. At the hearing a further objection was taken that the suit was barred by limitation.

The plaintiffs obtained a decree in the Court below, and defendant No. 2 brought this appeal on the grounds, *inter alia*, *firstly*, that section 539 of the Code did not apply to the facts of this case; *secondly*, that the consent of the Collector given in this case was not such as that section required; *thirdly*, that the plaintiffs had no such interest in the trust within the meaning of section 539 as would authorize them to maintain a suit under that section; and, *fourthly*, that the suit was barred by limitation.

Dr. *Rash Behari Ghose*, Babu *Tara Kishore Chowdhry*, and Babu *Mohini Mohun Chuckerbutty*, for the appellant.

Babu *Lal Mohun Das*, and Babu *Prosano Gopal Roy*, for the respondents.

1897

SAJEDUR RAJA CHOWDHURI v. GOUR MOHUN DAS BAISHNAV.

Dr. *Rash Behari Ghose.*—The suit purports to be brought under section 539 of the Civil Procedure Code for the removal of the trustee and for a decree for possession against defendant No. 2, who is a third party. Such a suit is not contemplated by the section which only authorizes suits to obtain certain specified reliefs—See *Rangasami Naickan* v. *Varadappa Naickan* (1). In his judgment in that case Collins, C. J., says: "It appears to me that section 539 of the Civil Procedure Code was drafted on the lines of 52 George III cap. 101, commonly called Romilly's Act, and the draftsman must have been well aware that it had been held that the Act did not apply when the question arose as to whether a trustee should be adversely dismissed for misconduct, Is it probable, therefore, that if the Legislature intended the section to apply to a case where the removal of a trustee was in question that specific relief would not have been mentioned? The section enumerates the specific reliefs that are given, and the first is appointment of new trustees under the trust. We are however asked to add words to the section, and to say that the Legislature intended to give the power to remove adversely a trustee although the Legislature refrained from saying so. The words 'granting such further or other relief as the nature of the case may require' cannot under the recognized rules of construction be said to give the Court the power to remove a trustee." See also the judgment of Ayyar, J., in *Subbayya* v. *Krishna* (2). In *Mohiuddin* v. *Sayiduddin* (3) it was decided that section 539 applied both to contentious and non-contentious cases. "A jurisdiction to remove trustees has always been exercised by the Mofussil Courts. The remedy is not wanting altogether; but except in this section of the Code there is no provision of law empowering any public official to take action"—*per* Shephard, J., in *Rangasami Naickan* v. *Varadappa Naickan* (1). See also *Sheoratan Kunwari* v. *Ram Pargash* (4) and *Lakshmandas Parashram* v. *Ganpatrav Krishna* (5). The cases upon Romilly's Act are collected in "Lewin on Trusts, 9th Ed. 1061, 1062. Although the Act authorises any two or more persons to present the petition, the words must be understood

(1) I. L. R., 17 Mad. 462. (2) I. L. R., 14 Mad., 186 (188).
(3) I. L. R., 20 Calc., 810. (4) I. L. R., 18 All., 227.
(5) I. L. R., 8 Bom., 365.

to mean any persons having an interest: and the Court is bound to see, not only that the petitioners are possessed of a clear interest, but that they prove themselves to be possessed of the interest they allege in their petition. The words 'an interest' in section 539 were substituted for the words 'a direct interest' by Act VII of 1888, section 44; but the cases show the two expressions to be the same. I submit also that the sanction given was no sanction, and refer to *Ex parte Skinner* (1). In that case Lord Eldon says: "The intention of the Legislature in framing the Act (Romilly's) was to guard charitable trusts against abuse, and for that purpose to prevent such 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." As to limitation, article 120 of Schedule II of the Limitation Act applies. Mitra on Limitation, 3rd Ed., pp. 765—767. The plaintiffs had no such interest as to authorise them to bring a suit under section 539. See *Jan Ali* v. *Ram Nath Mundul* (2).

Babu *Tara Kishore Chowdhry* on the same side.

Babu *Lal Mohun Das* for the respondents.—It has been held both in Calcutta and Bombay that section 539 applies to suits for the removal of trustees and also to suits brought against third parties. The clauses of that section are not exhaustive, and the words "appointing new trustees" includes removing *old* trustees. It has been held by the Madras High Court that a suit will lie for the removal of a trustee. *Subbaya* v. *Krishna* (3). That decision was followed in *Tricumdass Muljí* v. *Khimji Vullabhdass* (4). The cases of *Lutifunnissa* v. *Nasirun Bibi* (5), *Dhurrum Singh* v. *Kissen Singh* (6), *Sajedur Raja* v. *Baidya*

(1) 2 Mer., 456.
(2) I. L. R., 8 Calc., 32.
(3) I. L. R., 14 Mad., 186.
(4) I. L. R., 16 Bom., 627.
(5) I. L. R., 11 Calc., 33.
(6) I. L. R., 7 Calc., 767.

1897

SAJEDUR RAJA CHOWDHURI v. GOUR MOHUN DAS BAISHNAV.

Nath Deb (1), *Raghubar Dial* v. *Kesho Ramanuj Das* (2), *Chukkun Lal Roy* v. *Lolit Mohun Roy* (3), *Kalishunkur Doss* v. *Gopal Chunder Dutt* (4), *Commissioners of Sewers of the City of London* v. *Gellatly* (5) were also referred to.

Babu *Tara Kishore Chowdhry* in reply.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) after setting out the facts continued as follows :—

Upon the first point, the contention on behalf of the appellant is two-fold, *viz.*, that section 539 does not contemplate a suit for the removal of any trustee ; nor does it contemplate a suit against a third party, the object of the section according to the appellant being only to authorize suits for obtaining certain reliefs specified in it when such suits are not brought adversely to the trustees for the time being ; and it is urged that the section is drawn upon the lines on which the English Statute known as Sir Samuel Romilly's Act, 52 George III, cap. 101, is drawn. In support of this argument the decision of a Full Bench of the Madras Court in the case of *Rangasami Naickan* v. *Varadappa Naickan* (6), and the cases of *Sheoratan Kunwari* v. *Ram Pargash* (7) and *Lakshmandas Parashram* v. *Ganpatrav Krishna* (8) are relied upon.

On the other hand it is argued on behalf of the respondents that section 539 is very different in its terms and in its scope from Sir Samuel Romilly's Act ; and that both in this Court and in the Bombay High Court it has been held that it applies to suits brought for the removal of trustees, and also to suits brought against third parties in whose hands trust property may have passed under improper alienations by the trustee ; and in support of this argument, the cases of *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (9), *Mohiuddin* v. *Sayiduddin* (10), *Lutifunnissa Bibi* v. *Nazirun Bibi* (11) and *Sajedur Raja* v. *Baidya Nath Deb* (1) are cited.

(1) I. L. R., 20 Calc., 397.
(2) I. L. R., 11 All., 18.
(3) I. L. R., 20 Calc., 905.
(4) I. L. R., 6 Calc., 49.
(5) L. R., 3 Ch. D., 610.
(6) I. L. R., 17 Mad., 462.
(7) I. L. R., 18 All., 227.
(8) I. L. R., 8 Bom., 365.
(9) I. L. R., 15 Bom., 612.
(10) I. L. R., 20 Calc., 810.
(11) I. L. R., 11 Calc., 33.

1897

SAJEDUR RAJA CHOWDHURI v. GOUR MOHUN DAS BAISHNAV.

Upon the question whether section 539 should have the limited scope contended for by the learned Vakils for the appellant, or whether it should have the wider scope that the other side contends for, the arguments on both sides have been fully set out in the judgment of Mr. Justice Shephard in *Rangasami Naickan* v. *Varadappa Naickan* (1) and also in the judgments of Mr. Justice Muttusami Ayyar and Mr. Justice Weir in *Subbayya* v. *Krishna* (2). We do not think it necessary to notice in detail all these arguments. It will be enough to say that though section 539 does not expressly specify the dismissal of a trustee, or the taking possession of trust property from the hands of any third party, amongst the reliefs that are specifically mentioned, still, having regard to the fact that the cases to which the section is made applicable are cases of alleged breach of trust, that amongst the reliefs expressly mentioned are included the appointment of new trustees under the trust and the vesting of any property in the trustees under the trust, and that these specified reliefs are followed by the general clause, "such further or other relief as the nature of the case may require," we think the terms of the section include a case like the present. For the case being one of alleged breach of trust, and the section expressly authorizing the appointment of new trustees, there can be no good reason for limiting the expression, "appointment of new trustees" to cases of appointment of new trustees in addition to old trustees, to the exclusion of cases in which the appointment is in supersession of them. Moreover, where, as in this case, the alleged breach of trust consists mainly in improper alienations of the trust property by the trustee, the vesting of any property in the trustees to be newly appointed, coupled with "such further or other relief as the nature of the case may require," may well include the taking possession of the trust property from the hands of a third party, to whom the same may be shown to have been improperly alienated.

We are therefore of opinion that looking to the terms of the section, there is no good reason for thinking that it should be limited in its scope in the manner contended for on behalf of the appellant.

(1) I. L. R., 17 Mad., 482. (2) I. L. R., 14 Mad., 186.

1897

SAJEDUR RAJA CHOWDHURI v. GOUR MOHUN DAS BAISHNAV.

But then it is further urged that if we look to the source from which this provision of the law (section 539) is derived, we shall find that there is a reason why its scope should be limited in the manner contended for. It is said that this section is taken from the English Statute known as Sir Samuel Romilly's Act. Now, although there may be some similarity between the provisions of section 539 of the Code and those of Romilly's Act, a comparison of the two enactments will show that they differ in many material respects.

In the first place, whereas the procedure in Romilly's Act is expressly stated to be summary, the proceedings being initiated by a petition, the procedure under section 539 is the ordinary procedure applicable to suits, the proceedings being initiated by a plaint.

In the second place, while Romilly's Act contains no qualification as to who the persons are that are authorized to file the petition therein contemplated, section 539 expressly enacts that the persons who are authorized to institute a suit under it are persons who have an interest in the trust. It is said that this, if not taken from the Act, is taken from decisions upon Romilly's Act. That is true. The decision from which this qualification, that the persons authorized to sue must have an interest in the trust, is taken, is that in the case of the *Corporation of Ludlow* v. *Greenhouse* (1); but though this one qualification is taken from that decision, other qualifications such as those—that the enactment is not to apply to cases which are brought adversely to the trustees, and that it is not to apply where any stranger is interested, which are laid down in that very case—have not been expressly incorporated in the section. And what is the inference to be drawn from this? To our minds the inference is clear that these restrictions were not intended to be imposed upon the scope and operation of the section. And the reason for this appears to be clear. Romilly's Act was held to be inapplicable to cases brought adversely against trustees, and to cases in which third parties were interested, because as we gather from the case of the *Corporation of Ludlow* v. *Greenhouse* (1) the procedure prescribed by that Act,

(1) 1 Bligh N. S. 17 (66) '93).

viz, that by petition, was considered inapplicable to cases of those descriptions.

Nor can we accept as correct the argument that section 539 created a new and special jurisdiction.

The real object of the special provisions of section 539 seems to us to be clear. Persons interested in any trust were, if they could all join, always competent to maintain a suit against any trustee for his removal for breach of trust; but where the joining of all of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate General or of the Collector of the District; and 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.

It is argued that if a suit under this section is allowed to be brought against a defaulting trustee and a third party, the suit may be open to the objection of misjoinder. Where a suit under section 539 is open to that objection, the objection will no doubt have effect given to it; but it does not follow that a suit against a trustee guilty of breach of trust and a third party who has purchased any trust property from him can, in no case, be brought under the section, even though the objection as to misjoinder does not apply. In the present case we are of opinion that no objection on the ground of misjoinder can apply, the suit so far as any such objection is concerned being properly framed within the meaning of section 28 of the Code.

Then as to the cases cited, with all respect for the learned Judges who decided the case of *Rangasami Naicken* v. *Varadappa Naicken* (1), we must say that the reasons given in the judgments of Mr. Justice Weir and Mr. Justice Best in *Subbayya* v. *Krishna* (2) commend themselves for our acceptance, and we follow the view taken by them with reference to the meaning and construction of

(1) I. L. R., 17 Mad., 462. (2) I. L. R., 14 Mad., 186.

1897

SAJEDUR RAJA CHOWDHURI v. GOUR MOHUN DAS BAISHNAV.

section 539. The case of *Sheoratan Kunwari* v. *Ram Pargash* (1) does not call for any detailed examination, as the reasons for the decision that section 539 of the Code was inapplicable to it are not set out in the judgment very explicitly. And as for the case of *Lakshmandas Parashram* v. *Ganpatrav Krishna* (2) that case is quite distinguishable from the present, as the object of the plaintiff in that case, to use the words of the learned Chief Justice, was "merely to recover the trust property from outsiders" whereas in the present case the suit is brought against a trustee who is guilty of breach of trust, and a third party is added as a defendant, because part of the trust property has passed into his hands by improper alienation from the trustee. On the other hand, the view we take is supported by the decision of the Bombay High Court in *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (3), and of this Court in *Mohiuddin* v. *Sayiduddin* (4), in which it was held that a suit for the dismissal of a trustee comes within the scope of section 539, and also by the *dicta* of the learned Judges of this Court in *Latifunnissa Bibi* v. *Nazirun Bibi* (5), and in *Sajedur Raja* v. *Baidyanath Deb* (6), which are to the effect, that a suit brought against a trustee and a person claiming under an alienation from him comes within the scope of section 539. We may add that the case of *Sajedur Raja* v. *Baidyanath Deb* (6) is of special importance, as that was a case against the present defendants with reference to this very endowment on account of the same breach of trust that is alleged in this case, the only difference between the two cases being that the plaintiffs there were different from those who have instituted this suit; and in that case the present appellant successfully contended that the suit which was for the dismissal of the trustee, and for vesting in new trustees the trust property, part of which had passed to him, was one which came within the scope of section 539.

For all these reasons we are of opinion that the first contention of the appellant must fail.

Then as to the second, it was argued upon the authority of the case of *Jan Ali* v. *Ram Nath Mundul* (7) that persons in the posi-

(1) I. L. R., 18 All., 227.
(2) I. L. R., 8 Bom., 365.
(3) I. L. R., 15 Bom., 612.
(4) I. L. R., 20 Calc., 816.
(5) I. L. R., 11 Calc., 33.
(6) I. L. R., 20 Calc., 397.
(7) I. L. R., 8 Calc., 32.

tion of the plaintiffs in this case who were only entitled to worship in a public temple, are not persons having an "interest" within the meaning of section 539, so as to be authorized to maintain a suit under that section.

It was further argued that a comparison of section 539 of the Code with sections 14 and 15 of Act XX of 1863 would go to show that the interest required in the first mentioned provision of law must be different from a mere right to worship.

Now, it should be borne in mind that under section 539 as originally enacted, the words were "having a direct interest in the trust," and the word "direct" has been taken out by Act VII of 1888. The inference, therefore, is that the Legislature intended to allow persons having the same sort of interest that is sufficient under section 14 of Act XX of 1863 to maintain a suit under section 539 ; and this change in the law is, in our opinion, sufficient to distinguish the present case from that of *Jan Ali* v. *Ram Nath Mundul* (1) which was decided before section 539 had been amended by the omission of the word "direct."

On the other hand, we may refer to the case of *Monohar Ganesh Tambekar* v. *Lakhmiram Govindram* (2) to show that persons having a right to worship in a temple are within the scope of section 539. We may add that the two plaintiffs in the present case have a somewhat larger interest than that of mere worshippers, plaintiff No. 1 alleging that he has for some time been performing some of the duties of the *mohunt*, and plaintiff No. 2, that he has been performing the *poojah* in the temple. These allegations have been supported by some evidence which is not contradicted.

In support of the third contention, that the consent of the Collector is not such as section 539 contemplates, our attention has been drawn to the terms of the permission, Exhibit 7, p. 47 of the Paper Book. This is what the Deputy Commissioner, who is also the Collector, says : "Assuming that petitioners are persons interested I accord my consent to the institution by them of a suit for the purpose of obtaining the relief directed in the petition."

(1) I. L. R., 8 Calc., 32. (2) I. L. R., 12 Bom., 247.

1897

SAJEDUR RAJA CHOWDHURI v. GOUR MOHUN DAS BAISHNAV.

No doubt the language of this permission is in one respect not such as it ought to be. When the law directs that the consent of the Collector should be obtained as a necessary preliminary to the maintaining of a suit under section 539, the Collector is required to exercise his judgment in the matter before giving his consent. This view is borne out by the observations of Lord Eldon in *Ex parte Skinner* (1). But though the consent of the Collector is thus defective in language in this one respect, we do not think that the defect is fatal to the case. 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 *primâ facie* grounds for thinking that there has been a breach of trust; and, as was pointed out in the course of the argument, there is nothing to show that the Collector has not exercised his judgment as to the last two points. It is only in regard to one matter, namely, that relating to the interest of the petitioners in the trust that the language of the permission may be taken to indicate that the Collector did not exercise his judgment. Though that is so, we think it is after all an irregularity in an order which the law requires should form a necessary preliminary to the institution of a suit, and such an irregularity in our opinion comes within the scope of section 578 which protects judgments and decrees from interference in appeal on mere technical grounds.

The next point for consideration is whether the suit is barred by limitation. As against defendant No. 1, no question of limitation can arise, the suit coming within the scope of section 10 of the Limitation Act; and as against defendant No 2, the provision of the Limitation Act applicable is, we think, article 134 of the second schedule. It was urged for the appellant that that article does not apply to this suit, as it is not a suit for possession; that the article applicable is 120; and that as the suit has been brought more than six years after the date of the latest of the alienations in favour of defendant No. 2, it is barred notwithstanding that it is brought within twelve years from the date of the earliest alienation.

(1) 2 Mer., 453.

1897

SAJEDUR RAJA CHOWDHURI v. GOUR MOHUN DAS BAISHNAV.

Article 120 can apply only if article 134 is not applicable to the case. The question, therefore, is whether the suit can be treated as one for possession within the meaning of article 134. That article provides for suits to recover possession of immoveable property conveyed or bequeathed in trust or mortgage and afterwards purchased from the trustee or mortgagee for a valuable consideration. The limitation is twelve years, and it runs from the date of the purchase.

The fifth prayer in the plaint is, "that the property may be taken from the possession of the defendants and delivered to the possession and custody of the person who may be appointed *mohunt* and trustee for the management of the idol's properties;" and section 539, as we have already observed, does contemplate a suit of this nature as coming within its scope.

That being so, we do not think that it would be any undue straining of language to say that a suit for such a purpose is a suit to recover possession of property which had been bequeathed in trust and afterwards purchased from the trustee. Article 134 therefore applies to this suit, and it is not barred by limitation.

The grounds urged before us therefore all fail and the appeal must be dismissed with costs.

Appeal dismissed.

F. K. D.

CRIMINAL REFERENCE.

Before Mr. Justice Rampini and Mr. Justice Stevens.

QUEEN-EMPRESS *v.* KAYEMULLAH MANDAL AND OTHERS. *

1897 *April* 6.

Magistrate, Jurisdiction of—Power of Commitment to Sessions Judge—Code of Criminal Procedure (Act X of 1882), sections 28, 207, 245, 254—Penal Code (Act XLV of 1860), section 147—Circular order No. 9 of 6th September 1869—Rioting.

The commitment of a case under section 147 of the Penal Code to the Court of Session by a Deputy Magistrate is not necessarily illegal.

Although the case is shown to be triable only by a Magistrate under the second schedule of the Criminal Procedure Code, there is nothing in section 254 of the Criminal Procedure Code which prevents a Magistrate commit-

* Criminal Reference No. 55 of 1897, made by A. Ahmad, Esq., Sessions Judge of Rungpur, dated the 23rd of March 1897.