ORIGINAL CIVIL.

Before Mr. Justice Pugh.

In re HALIMA KHATUN.*

1910

June 1.

Mahomedan Law—Wakf property, sanction to sell—Jurisdiction—Practice—Trustees Act (XXVII of 1866) s. 3—Trustees' and Mortgagees' Powers Act (XXVIII of 1866) s. 45—"Cases to which English law is applicable."

On an application made by the *mutwallis* to a *wakf*, for sanction to sell *wakf* property :—

Held, that there being no statute authorising such an application, such sanction could only be obtained by means of a suit.

In the matter of Woozatunnessa Bibee (1) not followed.

Although a Judge of the High Court exercises the functions of a *kazi* when administering Mahomedan law, the procedure to be adopted is to be regulated by the Code of Civil Procedure, and the Rules and Orders of the High Court.

Shama Churn Roy v. *Abdul Kaheer* (2) and *Nemai Chand Addya* v. *Golam Hossein* (3) referred to.

Such an application does not come within the purview of Acts XXVII and XXVIII of 1866 : these Acts govern only such trusts as are in the form of an English trust and are constituted by persons of purely English domicile, or persons governed by the Indian Succession Act.

In re Kahandas Narrandas (4) and *In re Nilmoney Dey Sarkar* (5) not followed.

APPLICATION.

This was an application by *mutwallis* for the sanction of the Court to sell certain premises which were the subject of a *wakf*.

On the 26th February 1905, one Halima Khatun, a Mahomedan lady governed by the Hanafi school, executed a *wakf-namah*, whereby she dedicated, *inter alia*, the premises No. 31, Park Street in Calcutta, to the purposes of the *wakf* and appointed her sons the *mutwallis*. At the time of this application, the premises consisted of a little over six cottahs of tenanted land yielding a monthly income of Rs. 19, and were

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(1) (1908) I. L. R. 36 Calc. 21.
(2) (1898) 3 C. W. N. 158.
(3) (1909) I. L. R. 37 Calc. 179, 187.
(4) (1881) I. L. R. 5 Bom. 154.
(5) (1904) I. L. R. 32 Calc. 143.

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valued at Rs. 8,020. The *mutwallis* received an offer, for the sale of the land, of over Rs. 12,400 which they were desirous of accepting, with the intention of investing the proceeds more productively in the purchase of Government securities or of certain other premises in Calcutta.

There was, however, no power of sale or exchange reserved in the *wakfnamah*, and the *mutwallis* consequently, with the consent of Halima Khatun, petitioned the Court for sanction to sell the premises. It was submitted in the petition that the High Court exercised the jurisdiction formerly exercised by the Mahomedan *kazis*, and had the power to grant the sanction.

A question was raised by the Court as to whether the proper procedure had been adopted by applying for sanction on a petition instituted "in the matter of a *wakf*, etc.," instead of by a suit properly framed.

Mr. C. E. Bagram, for the petitioners. The question is purely one of procedure, as to whether the *mutwallis* should have instituted a suit instead of applying on this petition. It has been established, since the judgment of West J. in *In re Kahandas Narrandas* (1), that the procedure is by way of a petition. This authority has been followed: *In re Nilmoney Dey Sarkar* (2), *In the matter of Woozatunnessa Bibee* (3).

[PUGH J. The decision in *In re Kahandas Narrandas* (1) was under the Indian Trustees Act: the *dictum* there was *obiter*, inasmuch as the application was refused. Moreover, it has not been followed in this Court. Woodroffe J. in *In the matter of Woozatunnessa Bibee* (3) expressly refused to make the order prayed for under Acts XXVII and XXVIII of 1866, and relied on *Shama Churn Roy* v. *Abdul Kabeer* (4), where, however, a suit had been instituted. *In re Nilmoney Dey Sarkar* (2) has been dissented from on several occasions.]

It is submitted this application can be made under section 43 of the Trustees' and Mortgagees' Powers Act.

(1) (1881) I. L. R. 5 Bom. 154.
(2) (1904) I. L. R. 32 Calc. 143.
(3) (1908) I. L. R. 36 Calc. 21.
(4) (1898) 3 C. W. N. 158.

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[PUGH J. That Act has no application to a Mahomedan *wakf*: see section 45.]

Section 45 of this Act is similar to section 3 of the Indian Trustees Act; and the latter Act has been taken to apply to Hindu trusts: *In re Kahandas Narrandas* (1). It is submitted that English law is to some extent applicable to Hindu and Mahomedan trusts. The principles of English Courts of Equity were made applicable to Hindu and Mahomedan trusts by the Act establishing the Supreme Court: and this was confirmed by 24 and 25 Vic. C. 104, sections 9 and 10, and the Charter of 1865, section 19.

PUGH J. This is an application in the matter of a *wakf* executed by Halima Khatun to obtain the sanction of the Court to the sale of a small piece of land in Park Street to Mr. Galstaun at what appears to be a very satisfactory price. On the merits of the application I should have no difficulty, but it is unnecessary for me to express an opinion thereon, because I have come to the conclusion that the matter is not properly before me.

The point involved is really one of procedure, though it involves a question of the jurisdiction of the Court also—the question being whether an order, such as is prayed for, can be made upon a petition intituled *In the matter of a Trust* and without a suit.

There have been conflicting decisions as to the power of the Court to accede to the prayer of a petition such as this, but I am also called upon to refer to a similar, but rather different, question, because the argument in favor of the jurisdiction has been mainly based on a discussion of an earlier question which arose with regard to the orders made, or to be made, under the Trustees Act, and the Trustees' and Mortgagees' Powers Act (Acts XXVII and XXVIII of 1866). The question under those Acts arose in this way. The first of these Acts, by section 3, expressly provides that the Act is only to relate to cases to which English Law is applicable. Act XXVIII in its preamble

(1) (1881) I. L. R. 5 Bom. 154.

states that the Act relates to cases to which English Law is applicable, and section 45 expressly confines the operation of the Act to cases to which English Law is applicable.

In the result, therefore, both Acts only apply to a particular class of cases. What the class of cases was to which the Trustees Act applied was considered in the Bombay High Court by West J. in *In re Kahandas Narrandas* (1); his decision with regard to this matter is to be found on page 170 and the following pages. The application was made to him on petition under the Trustees Act (Act XXVII of 1866), and it was in substance an application to remove a trustee. West J. refused the application on the ground that no case to supersede the trustee had arisen, but he held that the application was properly made to him by petition under that Act, and though the trust with which he was dealing was undoubtedly a Hindu trust, he held that the application was one to which English law applied and was therefore authorized by the Act. He seems to have considered that it was open to the Court, on such an application being made with regard to a Hindu endowment, to consider in each case whether a particular relief sought was the subject of Hindu law or of English law, and he appears to have considered that the matter of appointing trustees was one to which English law was applicable. He says, on page 173, that "English law is applicable in all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not consistently, with the Statutes and the Charter, be employed to subvert the native substantive laws, but they afforded a means of continually ameliorating them;" and he appears to consider that the condition precedent to the applicability of the Act was fulfilled if the application was to be dealt with under some rule introduced as an improvement into the Hindu law from the English law of Trusts. I only observe that if the test, whether such an application is to be made by petition under the Act, be the precise form of relief sought, an undesirable vagueness in practice would be introduced.

(1) (1881) I. L. R. 5 Bom. 154.

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I need not discuss this case in detail, because the finding is in fact an *obiter dictum*, for no case was made on the merits; and, further, the Judges sitting in this Court have consistently refused to follow it except in two instances: *In the matter of Nilmoney Dey Sarkar* (1) and an unreported decision mentioned in the report of that case. Those cases have not been followed, and the former practice has been re-established. With these exceptions, in this Court it has always been held, both before and after these cases, that the Bombay decision was not good law. The cases to which English law applies have always been considered to be cases of trusts in the form of an English trust, and constituted by persons to whom English law or ordinary local law, which is based on English law as distinct from Hindu and Mahomedan law, applies; *i.e.*, persons governed by the Indian Succession Act as well as persons of purely English domicile. If it were necessary to support the established view of this Court, it might be pointed out that it is settled law that in the case of Hindu endowment for the benefit of the family idol the family can, if they choose, by a general agreement and *consensus* of all members, abolish the idol and resume the property, and I wholly fail to see how English law can apply to such a trust even though, while it exists, some of the obligations arising out of such a trust would be enforced in accordance with principles of English law.

It is not very apparent, however, how any argument in support of the present application can be deduced from this doctrine, even if it applied: for, *ex hypothesi*, the foundation of the jurisdiction is statutory, and the whole discussion turns on whether or not the Act by which such an application is authorised applies.

To come to the exact question before me: an application was made to Woodroffe J. in *In the matter of Woozatunnessa Bibee* (2) by petition under these two Acts for sanction by the Court to the granting of a lease of certain premises the subject of a *wakf* by the *mutwalli*. Woodroffe J. declined to make an order under these two Acts in accordance with the established

(1) (1904) I. L. R. 32 Calc. 143. (2) (1908) I. L. R. 36 Calc. 21.

practice of this Court, but he made an order as *kazi* under the Mahomedan law on the authority of the case of *Shama Churn Roy* v. *Abdul Kabeer* (1). I should have considered that judgment binding on me, but for the fact that I was informed by counsel that Fletcher J. on a subsequent similar application declined to make an order. I have ascertained that this is so, and that he refused the application on the ground that there being no statutory authority authorising such an application to be made to the Court on petition, it could only be done by means of a suit. It, therefore, becomes necessary for me to consider and express my opinion as to which of these decisions I ought to follow. It is purely a matter of procedure, because there is no question that a Judge of this Court does exercise the functions of a *kazi* in such matters. That is clearly laid down in the case of *Nimai Chand Addya* v. *Golam Hossein* (2). It has been argued that, inasmuch as Mahomedan law relating to endowments has been preserved by virtue of 21 George III, Chapter 70, sections 17 to 19, and inasmuch as the *kazi* was able to make these orders, this Court, administering justice in place of a *kazi*, should make such orders when applied for. The difficulty I have in assenting to this argument is that, although provision is made for the application of Mahomedan law in certain matters, there is no provision by which Mahomedan procedure is introduced into this Court. There is, therefore, no basis for following the procedure under which justice was administered by the *kazi*. The procedure of this Court is regulated by its own Orders and Rules and the Code of Civil Procedure, and even, when administering Mahomedan law, this Court does not vary its practice with regard to Mahomedan cases. If it were to do so, many curious positions might arise. For example: if two Mahomedans were litigants, and one called a number of English and Hindu witnesses while the other relied on his own testimony, it would apparently be obligatory to apply the rule of Mahomedan law, that if a devout Mahomedan has sworn to a certain fact upon the *Koran*, his evidence must be accepted in preference to that of any

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infidel. I need not say that that rule of Mahomedan law does not apply to this Court. I agree with the view taken by Fletcher J. that the Court cannot deal with this matter unless it is brought before it by means of a suit, there being no statute authorising the matter to be brought in any other way. Whether facilities for such applications in both Mahomedan and Hindu cases should be given will no doubt be considered if, and when, new rules are made by this Court under the powers given by the Civil Procedure Code to introduce procedure by way of originating summons. It has been argued that the old Supreme Court was made, by section 18 of the Charter of 14 George III, 1774, a Court of Equity and was directed to administer justice in a manner as nearly as might be the same as the High Court of Chancery, and that this Equity Jurisdiction of the Supreme Court was preserved by the subsequent Letters Patent of 1862, section 18, and 1865, section 19, and consequently such an application could be made in this way. I assert to the first part of this argument, but I do not think that it assists Mr. Bagram, for in the old Equity Courts every proceeding was initiated by a bill which was equivalent to a suit. It was necessary to have a bill for purposes of discovery and also for the purpose of reviving a suit which had abated by death of a party. I think any argument deduced from the procedure of the Court of Chancery would tend to destroy, rather than support, the contention that I have any jurisdiction to deal with this matter without a suit being filed. I regret to have to come to this conclusion, because I think that the jurisdiction to make such orders, if it existed, would be a beneficial jurisdiction and would save expense. I am, however, quite clear that it is not beneficial to make such orders unless the jurisdiction to do so is clearly established. In this city, orders of the Court are accepted and acted on by conveyancers practically without question. No one investigates the jurisdiction of the Court to make orders as practitioners under a more exact system in England would do. It would be most regrettable if, after the Court had made such an order and a mortgagee or purchaser had dealt with property on the faith

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of such an order, the validity of the order was questioned in a suit, and the Court was compelled to hold that the original order was made without jurisdiction and was therefore invalid. Though I have been much pressed to make this order, and the intending purchaser is said to be willing to act upon such an order if made, I think it is really to his interest that no order should be made which might be contested or questioned afterwards, and that he should be protected by an order properly made in a suit. If a suit is filed, it will be necessary to consider the question raised by Mookerjee J., but not decided, in *Nemai Chand Addya* v. *Golam Hossein* (1), as to whether the *kazi* could and the Court can authorize a sale of *wakf* property. I should wish to hear the question argued before expressing an opinion about it, but I may say that at present I do not associate myself with Mookerjee J.'s doubt on the subject, and speaking off-hand, I imagine that so many such orders have been obtained in suits on the Original Side of this Court that the power to make a decree granting sanction is not open to question by one Judge on the Original Side. There will be no order on this application for the reasons already given.

Attorney for the petitioners: *K. L. Burral.*

J. C.

(1) (1909) I. L. R. 37 Calc. 179, 187.