

(1948) 04 CAL CK 0001

In the Calcutta High Court

Case No : Civil Revision Case No. 254 of 1948

Capt. G. Sarker and Another

APPELLANT

Vs

Nripendra Nath Dhar and Others

RESPONDENT

Date of Decision : 15-04-1948

Acts Referred:

Citation : (1948) 04 CAL CK 0001

Judgement

1. Six persons with the consent of the Collector of Hooghly instituted this suit being Trust Suit No. 7 of 1947 of the Court of the District Judge at Hooghly under sec. 92 of the Civil Procedure Code. It was subsequently transferred to Howrah and was numbered as Trust Suit No. 11 of 1947 of the Court of the District Judge at Howrah. It was filed against two persons Capt. G. Sarkar and his wife Mrs. Mary Alice Cunningham Sarkar. The subject-matter of the suit is a house situate in the town of Hooghly. The Plaintiffs case is that it belonged to one Miss Alice Raikes who died in 1929, after having executed a Will in the year 1927. By the, Will she appointed Defendants as executors but Defendant No. 1 Capt. G. Sarkar only took probate. The directions in the Will were that the executors were to pay maintenance to her adopted daughter Alice Hiranmay Raikes if the latter married with the consent and approval of the testatrix or the consent and approval of her executors or if she led a chaste life in the event of her choosing to remain unmarried ; that in the case of failure of the said disposition her properties would be appropriated and held in trust for the purpose and benefit of Hindu, Moslem and Christian Girls Schools and any other similar object The case of the Plaintiffs further is that Alice Hiranmay Raikes did not comply with the aforesaid conditions as laid down in the Will with the result that the house in question is now the subject-matter of a public trust and that Defendant No. 1 is the trustee. The prayers are for the removal of Defendant No. 1 from the trust, for the framing of a scheme and for accounts against Defendant No. 1. We have already stated that this suit was instituted with the consent of the Collector of Hooghly. That consent was endorsed by the Collector of Hooghly on the plaint in the following manner:-- Consent to the filing of this soft under sec. 92 of the CPC is given by

me in writing to the Plaintiffs by virtue of the powers conferred upon me by the provisions of sec. 96.

It is admitted before us,--and that position is also quite clear from the proceedings in the lower Court,--that the Local Government did not, previous to the said consent of the Collector of Hooghly, give sanction to the Collector to give consent to the Institutions of this particular suit. Under these circumstances, the Defendants raised a preliminary issue before the trial Court. They said that the suit was not maintainable inasmuch as the terms of sec. 93 of the CPC had not been complied with. Before the learned District Judge a general notification was produced by the Plaintiffs, namely, Notification No. 3592 L. R. dated the 15th of April, 1918, published in the Calcutta Gazette of 1918, Part I, page 650. The Notification runs thus:

In exercise of the powers conferred by sec. 93 of the Code of Civil Procedure, 1908 (Act V of 1908) the Governor in Council is pleased hereby to sanction the exercise of the powers conferred by secs. 91 and 92 of that Code upon the Advocate-General by all the Collectors and Deputy Commissioners in the Presidency Division (excluding the town of Calcutta), Burdwan Division and the District of Darjeeling within the limits of their respective districts.

2. The learned District Judge held that in view of this general notification the consent given by the Collector of Hooghly to the filing of this suit was good in law. It appears from the order of the learned District Judge that the case of Premnarain v. Ramcharan L. R. 59 I. A. 121 : S. C. 36 C. W. N. 257 (1931) was cited before him. The learned Judge made the following observations in relation to that case.

As pointed out by their Lordships of the Privy Council in the case of Premnarain v. Ramcharan. L. R. 59 I. A. 121 : S. C. 36 C. W. N. 257 (1931) there must be under sec. 93 of the Code, a previous sanction of the Local Government to the institution of every such suit whether brought by the Collector or by an officer appointed by the local Government to exercise the powers of the Advocate General or by two or more persons with consent in writing of such Collector or Officer.

3. Then he referred to the consent of the Collector as endorsed on the plaint. Thereafter he referred to the aforesaid notification and came to the conclusion that the Collector was competent to give consent to the filing of the suit in question. Against this order Defendants Nos. 1 and 2 moved this Court and obtained this Rule under sec. 115 of the Civil Procedure Code. We do not think that the learned District Judge was right in coming to the conclusion that sec. 93 had been complied with. That section runs as follows:--

The powers conferred by secs. 91 and 92 on the Advocate General may, outside the presidency towns be, with the previous sanction of the Local Government exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

4. The phrase "with the previous sanction of the Local Government" qualifies both the words "Collector" and "the Officer as may be appointed by the Local Government to exercise the powers of the Advocate-General." In Premnarain's case L. R. 59 I. A. 121: S. C. 36 C. W. N. 257 (1931) the Legal Remembrancer was the Officer who had been appointed by the Local Government under sec. 93 to exercise the powers of the Advocate General. With his sanction the suit was instituted by the persons who were interested in the trust. The Legal Remembrancer did not however, obtain the previous sanction of the Local Government to the filing of that particular suit. In these circumstances, the Defendants who were the Appellants before the Judicial Committee of the Privy Council raised the question as to whether the suit had been properly instituted. Mr. Raikes who appeared for the Defendants contended that under sec. 93 the Legal Remembrancer must have the previous sanction of the Local Government in such case before he sanctions the suit and that contention of Mr. Raikes was accepted by the Judicial Committee of the Privy Council. After distinguishing on the facts the earlier decision of that Board given in the case of Gulzar Lal v. The Collector of Etawah L. R. 58 I. A. 460 : S. C. 35 C. W. N. 699 (1931), Sir Lancelot Sanderson proceeded to observe as follows:--

It is clear, therefore, that the point which now arises was not decided in that case. There are however Passages in the judgment which (sic) the argument, of the learned Counsel for the Appellant-Defendant.

5. Lord Blanesburgh delivered the judgment of the Board and when dealing with the construction of sec. 93 of the Code he said as follows :--

The effect of that section as it seems to the Board is that no suit like the present, being, one outside the Presidency town, may be brought without the previous sanction of the Local Government, whether by the Collector or by any officer whom that Government may appoint for the purpose; so that the fact that the Legal Remembrancer is in the United Provinces invested as a rule with the duties elsewhere discharged by the Advocate-General in this behalf is no reason why for the purposes of a particular suit the Local Government may not appoint the Collector or any other officer to prosecute it. The fact that there must be a previous sanction by the Local Government to every suit makes it impossible that two suits by separate officials will ever be concurrently instituted. Accordingly no inconvenience results from this construction of the section.

Their Lordships agree with and adopt the construction upon sec. 93 in the abovementioned case. In their Lordships' opinion sec. 93 provides for two distinct matters, the appointment of an officer to exercise the powers, conferred by secs. 91 and 92 on the Advocate-General, and the previous sanction of the Local Government to the exercise of such power

6. Further on Sir Lancelot Sanderson made the following observation:--

It is clear however that having regard to the terms of sec. 93, the previous sanction of the Local Government is necessary, whether the suit is instituted by a

Collector or by an officer appointed by the Local Government, or whether the suit is instituted by two or more persons with the consent in writing of such Collector or officer.

For these reasons their Lordships are of opinion, that the point relied upon by the Appellant-Defendant is a good one and that, in as much as the previous sanction of the Local Government to the suit had not been obtained, the objection to the competence of the suit must be upheld.

7. In view of the decision given by the judicial Committee of the Privy Council in Premnarain's case L. R. 59 I. A. 121 : S. C. 36 C. W. N. 257 (1931) the position seems to us to be as follows: (1) Sec. 92 deals with the powers of the Advocate-General. He can himself institute a suit in respect of a trust created for purposes of a charitable and religious nature and ask for any one of the reliefs mentioned in sec. 92 and he can give sanction to two or more persons having an interest in the trust to institute a suit of that nature; (2) that outside the Presidency Towns the Collector can be authorised by the Local Government to exercise the powers--conferred upon the Advocate-General by sec. 92 of the Code but that the authority must be conferred by a previous sanction authorising the Collector to exercise those powers in respect of that particular suit when he himself chooses to file the suit; (3) that outside the Presidency Towns the Local Government may appoint any officer other than the Collector to exercise the powers of the Advocate-General, but in that case also a previous sanction to the exercise of those powers by him in respect of that particular suit must also be given by the Local Government where that officer chooses to file the suit himself, that is to say, in the case of an officer other than the Collector who chooses to file the suit two things are necessary, (1) an appointment and (2) previous sanction of the Local-Government entitling that officer to exercise the powers of the Advocate-General in that particular suit. (4) When the Collector or the officer appointed under sec. 93 as the case may be, does not choose to file the suit himself but gives his consent to the institution of a suit under sec. 92 to two or more persons interested in the trust, the Collector or the officer, so appointed, must obtain the previous sanction of the Local Government authorising him to give consent to the institution of that particular suit.

8. The construction put upon sec. 93 in Premnarain's case L. R. 59 I. A. 121 : S. C. 36 C. W. N. 257 (1931) is binding on us and that construction is, as we have already stated; that the Collector of a District can exercise the powers of an Advocate-General given under sec. 92 of the Code of Civil Procedure, but in order that the Collector may be competent to exercise those powers it is necessary that he should act with the previous sanction of the Local Government authorising him to exercise those powers in respect of that particular suit. Inasmuch as no such previous sanction of the Local Government was given to the Collector in the case before us, we hold that sec. 90 of the CPC has not been complied with and the contention of the Defendants Petitioners before us must be upheld. The result is that this Rule is made absolute and the suit is dismissed

on the ground we have stated above. Each party will bear their respective costs of the lower Court. The Opposite Parties must, however, pay to the Petitioners the costs of this Rule,--hearing-fee being assessed at two gold mohurs.