

(1916) 02 BOM CK 0009
In the Bombay High Court

Sayad Amin Saheb and Others

APPELLANT

Vs

Sheikh Masleudin and Others

RESPONDENT

Date of Decision : 28-02-1916

Acts Referred:

Bombay Court of Wards Act, 1905 — Section 31
Civil Procedure Code, 1908 (CPC) — Section 92

Citation : AIR 1916 Bom 150 : 37 Ind. Cas. 186

Hon'ble Judges : Basil Scott, C.J.;Heaton, J

Bench : Division Bench

Judgement

1. The plaintiffs, who are the present appellants, instituted a suit u/s 92 of the CPC for the administration and management of certain religious wakf property. The learned District Judge after an investigation found certain of the trustees liable for certain sums. The 4th trustee was found liable only in respect of certain costs, but he was not found to be a defaulting trustee. In providing for the appointment of new trustees, the learned District Judge has included the 4th defendant as one of the trustees. That is substantially the ground of the plaintiffs' appeal to this Court, but it does not appear to us that there is any such blame attaching to the 4th defendant upon the finding of the lower Court as should induce us to hold that he is not a fit and proper person to be a trustee under the new scheme. The appeal, therefore, must be dismissed.

2. That, however, is not the only question which we have to determine now, for it appears upon certain information brought to our notice by Mr. Mehta, who appears under instructions from the Talukdari Settlement Officer as the Court of Wards in charge of the superintendence of the property of the 1st defendant, that that defendant has now, and since 1909, been a Government ward under the Court of Wards and was so at the date of the institution of this suit on the 20th of December 1910, and although there was a full hearing of charges against the 1st defendant as a defaulting trustee in the Court of the District Judge, the Government Officer acting as the Court of Wards wishes to establish that by reason of defects in procedure provided by the Court of Wards Act (1 of 1905),

the whole proceedings so far as the 1st defendant is concerned are a nullity, including the decree for restoration of Rs. 6,000 found to be in his possession as a trustee liable to refund. The point has been brought to the notice of the Court in the form of cross-objections, as the Court of Wards was added as a party respondent by ex parte order. It has been contended on behalf of the appellants that the cross-objections are not properly stamped, We think that this contentious argument is well founded.

3. They must be stamped upon that footing as on an appeal relating to the sum of Rs. 6,000 decreed against the 1st defendant. We have no information as to the manner in which the 1st defendant became a Government ward under the Court of Wards Act; whether he is a person declared by the District Court after application and inquiry to be incapable of managing, or unfitted to manage, his own property on account of physical or mental defect or infirmity, or such habits as cause, or are likely to cause, injury to his property or to the well-being of inferior holders u/s 5 of the Act; or whether he is a landholder who has applied in writing to the Governor in Council, u/s 9 of the Act, to have the property placed under the superintendence of the Court of Wards. In the absence of any evidence of a declaration by the District Court u/s 5, it would probably be safe to assume that he has made the application u/s 9. The point, however, is not very material. The 1st defendant was sued with the other trustees of a Mahomedan religious institution, and has been found to have been in possession of the trust funds for a long series of years. Being found to be responsible for a sum of upwards of Rs. 6,000 which has come to his hands, a decree has been passed against him. That decree was passed in a suit u/s 92 of the CPC properly instituted in relation to a public charitable or religious trust.

4. It is argued, however, on behalf of the Court of Wards that the suit is, within the meaning of Section 31 of the Court of Wards Act, a suit "relating to the person or property of a Government ward," and, therefore, is one which cannot be brought in any Civil Court until the expiration of two months after the statutory notice in writing prescribed by the Section, which notice has not been given.

5. Now this suit as instituted is merely a suit relating to the property of a religious institution, and not to the property of the 1st defendant, and the argument of the Court of Wards could only be sustainable, if it is permissible to regard the possible consequences of a suit in deciding the nature of the suit. The consequence of any suit against any defendant may be that there will be a decree against him, if not for money, at all events for costs, and as a consequence of such a decree, an application may be made for the arrest of the defendant in execution, and, therefore, it may in that manner affect his person. Similarly an application may be made to satisfy the decretal costs by issuing execution against his property, and in that manner any decree may affect his property. But the words of the Section are not affecting the person or property of the Government ward," but "relating to the person or property." Those words

appear to us to bring within the scope of that Section a designedly limited class of suits. It would have been easier for the Legislature, if the contention of the Court of Wards was correct, to say "no suit shall be brought." That, however, is not the expression adopted. It must be not even any suit which may affect the person or property of the ward, but a suit relating to the person or property of the ward, and prima facie it must be a suit of which the nature is apparent as soon as the suit is framed, a suit to be judged by its intention and not by its possible consequences. It is easy to satisfy the words of the Section without holding that they embrace any suit of any kind whatever. A suit relating to the person of a Government ward might be a suit, such as is referred to in *Sharifa v. Mune Khan* 3 Bom. L.R. 167. for the custody of the person of the ward, or a suit relating to the marriage of the ward, or even a suit relating to the adoption of the ward. Similarly a suit relating to the property of the ward may reasonably be held to be a suit relating to property which is really the property of the ward, and not the property of some other institution.

6. Not only is this suit, however, a suit relating to the property of an institution in which the ward is concerned only as a trustee, but the decree itself when properly regarded is a decree for restoration of the property of that institution to the persons responsible for its management under the new scheme. The defaulting trustee is assumed to have the property which was placed in his charge still in his possession. It is on that footing that he is held liable for it. It is not, therefore, a decree directly affecting at all events the property of the ward. For these reasons we think that the suit is not bad on the ground that the statutory notice provided for by Section 31 has not been given.

7. Then it is argued that it is bad at all events u/s 32, which provides that subject to the second paragraph of Section 440 of the Civil Procedure Code, which is not material for this judgment, in every suit brought by or against a Government ward, the manager of the Government ward's property, or, where there is no manager, the Court of Wards having the superintendence of the Government ward's property shall be named as the next friend or guardian for the suit, as the case may be. But the Section does not say that if the Court of Wards is not named as guardian from the commencement of a suit, the suit is bad. If it is not in every case a fatal objection to a suit against a minor that a guardian has not been named as provided by Statute, then it is obvious that in certain circumstances the omission to name such a guardian during some part of the proceedings may be only a defect or irregularity in proceedings not affecting the merits of the case or the jurisdiction of the Court such as is contemplated by Section 152 of the Civil Procedure Code. In that case there would be no reason to reverse or substantially vary the decree or remand the case. In our judgment the omission in the present case in no way affects the merits of the case, and it is not suggested that the Court of Wards has any objection on the merits to the decree which has been passed. The conclusion that the omission, such as we have in this case, may be treated as a mere defect or irregularity in procedure is supported by a reference to the judgments in two cases mentioned in argument,

one *Rup Chand v. Dasodha* 30 A. 55 : 3 M.L.T. 58 : A.W.N. (1907) 280. and the other *Walian v. Banke Behari Pershad Singh* 30 I.A. 182 : 5 Bom. L.R. 822 : 7 C.W.N. 771 : 30 O. 1021 : 8 Sar. P.C.J. 512 a decision of the Privy Council. In both those cases the provisions of Section 443 of the CPC had not been complied with, as they should have been, but under the circumstances it was held that the non-compliance did not vitiate the proceedings. Every case, therefore, may be judged upon its own facts to see whether the omission has affected the merits or not. In the present case we think that the provisions of the Section will be sufficiently complied with for the purposes of justice if notice is given to the Court of Wards that it will be added to the record as guardian ad litem of the 1st defendant as from the date of this judgment, and the proceedings will be amended accordingly. Any further notices which have to be given will be given in the first instance to the Court of Wards as the guardian of the 1st defendant. We do not think that the plaintiffs should be punished in this case by an award against them of costs, and under the circumstances we will allow them their costs. Respondents Nos. 1 and 2 must pay their own costs, and respondent No. 1 must pay full Court-fee on the ground that he is seeking to set aside the decree for Rs. 6,000.