
(1915) 04 BOM CK 0002
In the Bombay High Court
Case No : First Appeal No. 206 of 1913

Suleman Haji Usman

APPELLANT

Vs

Shaikh Ismail Shaikh Oosman

RESPONDENT

Date of Decision : 14-04-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 157, 92, 93

Citation : AIR 1915 Bom 88 : (1915) 17 BOMLR 625 : 30 Ind. Cas. 17

Hon'ble Judges : Batchelor, J; Basil Scott, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Basil Scott, C.J.—This was a suit brought in the name of the two plaintiffs, Suleman Haji Usman and Jusub Jan Mahomadi purporting to be disciples of a certain Pir for relief regarding an alleged Darga of the Pir Saheb said to be in the possession of the defendants, for a declaration that the Darga was the owner of all the moveable and Immovable property in the possession of the defendants; that the defendants were unfit to act as trustees; for a perpetual injunction against the defendants; and that the plaintiffs or other persons might be appointed trustees in their place, and put in possession of the property.

2. Under the authority of a Government Resolution, the Collector of Thana was invested with the powers of the Advocate-General u/s 539 of the CPC of 1882, and by virtue of Section 157 of the CPC of 1908, the powers conferred operate under the present Code in respect of Sections 91 and 92. We are here concerned with Section 92. Sub-section (2) of that section provides that " save as provided by the Religious Endowments Act of 1863, no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section." This being a suit in respect of such a trust claiming reliefs specified in Sub-section (1) it can only be supported if brought in conformity with the provisions of Section 92. It is sought to show that these provisions have been complied with

by a communication from the Collector in reply to a petition addressed to him by the 1st plaintiff alone. That petition states that "the petitioner as a member of the Mahomedan community, and especially a disciple of His Holiness Pir Mowlanasaheb wants to file a civil suit against the said heirs according to the Civil Procedure Code, Sections 92 and 93. Your Honour's consent is necessary for the institution of the suit. The suit is to be filed in the name of the petitioner and another member of the Mahomedan community and disciple of the Pir Saheb, Jusub Jan Mahomed." The Collector's reply is as follows:- "The Collector doubts whether Section 92 of the CPC applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in Section 92 which the Court may deem fit to grant."

3. In some High Courts it was considered, until the year 1908, that the provisions of Section 539 were permissive and not imperative, but that has never been the view of this High Court, and the Legislature by the enactment of Sub-section (2) of Section 92 has made it clear that Section 92 must be regarded as imperative.

4. The Collector u/s 93 stands in the position with regard to his Collectorate of the Advocate-General in the Presidency town, and the suit which requires his consent is a suit which he, if he thought fit, would be competent to file in his own name as a public Officer, whose duty it is to protect public charities as the representative of the Crown in that capacity, and he has no right to consent to the institution of a suit by two persons claiming to have an interest in the trust, unless it is such a suit as he would consider himself to be justified in filing at the relation of such two persons in his own name. The duties of the Collector have been described by the Calcutta High Court in *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* ILR (1897) ILR 24 Cal. 418. It is there stated that-

The Collector is required to exercise his judgment in the matter before giving his consent [t] the institution of a suit.] This view is borne out by the observations of Lord Eldon in *Ex parte Skinner* (1817) 2 Mer. 458,....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 prima facie grounds for thinking that there has been a breach of trust.

5. The observations of Lord Eldon in *Ex parte Skinner* (1817) 2 Mer. 458, were as follows:-

It appears to me that such a petition as the present, supposing it to be properly within the scope of the Act of Parliament, can derive no sanction from the signature of the Solicitor-General, he being competent to act as, and in the place of, the Attorney-General, only when there is no such officer as an Attorney-General. The intention of the Legislature in framing the Act, was to guard

charitable trusts from 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.

6. We may point out with reference to the powers of the Advocate-General which are vested in the Collector that it is an invariable practice in this Presidency for the Advocate-General, where he does not file the suit himself, to endorse his consent upon the plaint. If the Collector had followed this practice he would perhaps have more clearly realised his responsibilities in the matter. The plaint is, to a certain extent, his plaint as it is launched under his sanction. It should only be such a plaint as he would feel justified in filing himself.

7. In the present case we agree with the learned District Judge that the Collector has not acted in the manner provided by the section. He has not indicated on the proceedings that the suit is filed with his consent, and in that respect has not followed the practice of the officer whose powers he is to discharge. But more important than that he has not even come to a conclusion that the suit is one which ought to be filed.

8. He doubts whether Section 92 of the CPC applies to this case, but if the Court holds that it does, the Collector "hereby declares his consent to the filing of the suit to obtain any of the reliefs specified in Section 92 which the Court may deem fit to grant;" that is to say, instead of consenting to the institution of a suit for certain definite reliefs, of which he approves, he leaves it to the Court to decide whether such a suit ought to be filed or not. We are of opinion that he has not discharged the powers conferred upon him as intended by the Legislature, and we, therefore, hold that the suit has not been filed in conformity with the provisions of Section 92, and that the learned District Judge was right in dismissing it on that ground.

9. We are not, however, satisfied that the Judge was justified in awarding two sets of costs to the defendants who had one and the same defence, and his award of costs has not been seriously defended by the learned counsel who appears for the respondents. We affirm the decree and dismiss the appeal with costs. There must be only one set of costs against the plaintiffs throughout.