

being so erected would create a nuisance, or to lead to the inference that the Legislature supposed that they could not be erected without creating a nuisance, from which it might be concluded that the Legislature intended they should be made regardless of other persons' rights. The absence of these indications in the Act under which the power is exercised is relied on by Lord Selbourne and Lord Blackburn in the case above referred to as distinguishing it from *The Directors, &c., of the Hammersmith and City Railway Company v. G. H. Brand* (1). As the Municipality had, therefore, in our opinion on the proper construction of the Act, Bombay Act VI of 1873, no authority to order the defendants to erect a privy regardless of the plaintiff's rights, they cannot plead that they acted under their orders. We must, therefore, reverse the decree and direct an injunction to issue, directing the defendants to remove the privy within three months from the date hereof. Plaintiff to have his costs throughout.

*Decree reversed.*

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*Before Mr. Justice Scott.*

IN RE LAKSHMIBAI, WIDOW AND ADMINISTRATRIX OF VINAYAKRAV  
JAGANNATH SHANKARSHET, DECEASED (*Petitioner*).

[23rd April, 1888.]

*Trustees' and Mortgagees' Powers Act XXVIII of 1866, s. 43, powers of Court under.*

J.S., a Hindu, died in 1865 possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879 the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of J.S., still unadministered. As administratrix she continued to apply the income of the said land as directed in the will. She now filed the present petition alleging that the said income, which amounted to about Rs. 900 *per annum*, was [639] insufficient to keep up the said charity. She stated that a sum of Rs. 12,600 was urgently required for certain purposes connected with the said charity, and that she had agreed, in September 1887, with one Ruttonji Bhikaji that he should advance the said sum to her, to be expended as aforesaid, and that she should grant to him a lease of the said land for 99 years, with a proviso for renewal, at a rent of Rs. 350 *per mensem*. In October, 1887, however, her adopted son served her with a notice to desist from granting the said lease. She, therefore, presented this petition to the Court under s. 43 of the Trustees' and Mortgagees' Powers Act XXVIII of 1866, praying (a) that she might be advised whether she had power to grant the said proposed lease; (b) that the said lease might be sanctioned or directed by the Court; and (c) that the Court might give such opinion, advice or direction in the premises as the Court might think fit.

*Held*, that, under the section, the Court had no power to sanction the proposed lease, or to advise as to whether the petitioner had power to grant it. The Court will not, under this section, advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings, &c.

*Held*, also, that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money

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by way of charge for the purposes of necessary repairs and maintenance; but with regard to the details of amount, or as to the work to be done, the Court refused to give any opinion.

THIS was a petition to the High Court, under s. 43 (1) of the Trustees' and Mortgagees' Powers Act XXVIII of 1866, for the [640] opinion, advice, and direction of the said Court under the circumstances set forth in the petition, which was as follows:—

"1. Jagannath Shankarshet, late of Bombay, Hindu inhabitant, died on or about the 31st July, 1865, possessed of considerable property, both moveable and immoveable, and leaving unrevoked his last will bearing date the 1st July, 1864.

"2. The said Jagannath Shankarshet left him surviving his only son Vinayakrav Jagannath Shankarshet, since deceased, and no other male issue.

"3. Amongst the properties of which the said Jagannath Shankarshet died possessed was a temple at Girgaum and a piece of garden ground opposite the same which the said Jagannath Shankarshet had purchased in his lifetime. The particular description of the said garden ground is contained in the draft lease hereinafter mentioned. It is called Angir Baugh, and hereinafter referred to as the said charitable land.

"4. With reference to the said charitable land, the said Jagannath Shankarshet by his said will directed as follows:—

"I further will and direct that my executors shall receive and apply the income and produce of the garden ground opposite my father's said temple at Girgaum between the cross road near Grant Road and the garden wall of the late Ramlal Thakursidas which I purchased and brought into cultivation, for the purpose of defraying the expenses of keeping up the daily *puja*, the wages of Brahmins, the dinner called *naivad*, the ceremony called *amushthan* in the month of *Shravan*, and of the annual fair of the said temple and all the expenses of repairs and maintenance and all other incidental expenses attending or required by the said temple at Girgaum and the *dharmshalas* adjoining and appurtenant thereto.

"5. The said Vinayakrav Jagannath Shankarshet, the executor appointed by the said will, during his lifetime managed the said charitable land and applied the rents and profits thereof as directed by the said testator in his said will. The said Vinayakrav Jagannath Shankarshet died intestate on or about the 5th of October, 1873, leaving him surviving your petitioner his widow Lakshmbai and his son Bhavanishankar *alias*

(1) Act XXVIII of 1866, s. 43.—"Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice or direction of such Judge on any question respecting the management or administration of the trust-property or the assets of any testator or intestate.

"Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient.

"The trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject-matter of the said application:

"Provided nevertheless that this Act shall not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made."

Balla Saheb. A posthumous son Ravji was subsequently born to the said Vinayakrav Jagannath Shankarshet and your petitioner.

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"6. On the 21st September, 1874, letters of administration to the estate of the said Vinayakrav Jagannath Shankarshet were granted by this Honourable Court to your petitioner for the use and benefit of the said Bhavanishankar *alias* Balla Saheb and Ravji Vinayakrav and until one of them should attain full age. The said Ravji Vinayakrav died on or about the 1st of November, 1874, while still an infant, and the said Bhavanishankar *alias* Balla Saheb Vinayakrav also while still an infant died on or about the 28th of February, 1877, leaving his mother your petitioner as his heir and next of kin him surviving.

"7. On the 21st April, 1879, your petitioner was appointed by this Honourable Court administratrix, with the will of the said Jagannath Shankarshet annexed, of [641] all and singular the goods and chattels, credits and effects of the said Jagannath Shankarshet left unadministered by the said Vinayakrav Jagannath Shankarshet.

"8. Your petitioner since the death of her said husband and sons respectively has been, as administratrix as aforesaid, managing the said charitable land and applying the rents and profits thereof as directed by the said will. The land has been let for cultivation, and for the last seven years along with certain other land appurtenant to the bungalow opposite to it has produced a gross rental of Rs. 1,300 *per annum* and a net income of Rs. 900 *per annum* or thereabouts attributable to the said charitable land.

"9. The said income is insufficient for the proper keeping up of the said charity and of the buildings appurtenant thereto, and in connection with the said charity a sum of Rs. 12,600 is urgently required to be expended in the following manner:—

"(1) In re-building a *dharmshala* for *sadhus* near the Bhavanishankar's temple on the site of the old *dharmshala* which stood there, but owing to want of proper repairs was recently pulled down by the orders of the Municipality. In the absence of a proper and habitable *dharmshala* the *sadhus* and pilgrims who sojourn and resort to the said *dharmshala* are exposed to the inclemency of the weather.

"(2) In repairing and altering the big building attached to the said temple of Bhavanishankar.

"(3) It is also desirable to erect a '*nobut khana*', (a building used for the purpose of beating a native drum), over the main gate of the said Bhavanishankar's temple.

"(4) The tank, which is in the compound of the said Bhavanishankar's temple, is out of repair and requires repairs and cleaning.

"(5) The petitioner has incurred certain expenses in connection with the last year's annual fair of the said Bhavanishankar's temple which still remains unpaid.

"(6) The gate and compound of the said temple of Bhavanishankar requires repairs and improvement, and *pujaris* or worshippers of the said temple are in need of separate quarters.

"(7) Accordingly, your petitioner proposes to disburse the said sum of Rs. 12,600 in the following manner." (The petition then set forth in detail various repairs, &c., contemplated by the petitioner, requiring Rs. 12,600.)

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"10. In order to increase the income accruing from the said charitable land, your petitioner in or about the month of September, 1887, entered into an agreement with one Ruttonji Bhikaji Karanjavala to let the said charitable land to him on lease for ninety-nine years, with a proviso for a renewal of the said lease for a further period of sixty years or less if so desired by the said intended lessee, at a rental of Rs. 350 *per mensem*. Your petitioner was on the 25th of October, 1887, served with a notice from the solicitor of Ravji Vinayakrav Jagannath, your petitioner's adopted son, as hereinafter stated, requiring your petitioner to desist [642] from granting the said lease. Before receiving the notice, your petitioner had entered into the said agreement. The alleged offer of Rs. 5,000 *per annum* for the said land your petitioner does not believe could have been or was *bona fide* made, if in fact it was made. A draft lease to carry out the said agreement has been prepared, but has not as yet been executed.

"11. Before entering into the aforesaid agreement your petitioner had received several offers from various brokers for a lease of the said land, but all such offers were at a lower rental than that offered by the said Ruttonji Bhikaji Karanjavala. The most favourable offer your petitioner obtained was from Mr. Nusservanji Manockji Petit, which was Rs. 300 *per mensem* for the land, including the part reserved for shops or booths during the annual fair. The brokerage upon the transaction, if carried out, would have been Rs. 1,400. The negotiations fell through, principally on account of the brokerage demanded being so large.

"12. Your petitioner believes that the terms of the said proposed lease are very favourable, and as high as a *bona fide* lessee of the premises would be prepared to offer.

"13. In order to effect the purposes set forth in the ninth paragraph hereof, your petitioner has arranged with the said Ruttonji Bhikaji Karanjavala that he shall pay the said sum of Rs. 12,600 in advance, as provided in the said proposed lease. The said purposes are necessary and proper purposes, and ought at once to be carried out in the interest of the said charity.

"14. The said Ravji Vinayakrav was adopted by your petitioner on or about the 18th of April, 1878, upon certain terms, which provided for your petitioner continuing the manager and owner of the estate of her sons and husband during her lifetime as though she had not adopted a son.

"15. After the said Ravji Vinayakrav came of age and in the year 1886 certain disputes and quarrels arose between the said Ravji Vinayakrav and your petitioner: a suit was on or about the 22nd of September, 1886, filed by him against your petitioner, being suit No. 405 of 1886, in this Honourable Court. On the 3rd May a decree was passed in the said suit, whereby, amongst other things, Mr. Charles Agnew Turner was appointed receiver to take charge of and manage the estate of Jagannath Shankarshet and Vinayakrav Jagannath Shankarshet, save and except the temple of Shri Bhavanishankar and the *dharmshala* appurtenant thereto and the vacant land situate opposite the said temple of Girgaum and specifically devised of the will of the said Jagannath Shankarshet for the purpose of defraying the expenses of the said temple and the said *dharmshala* and for the other purposes therein mentioned. The said vacant land referred to in the said decree is the charitable land hereinbefore referred to.

" Your petitioner prays :—

" (a) That she may be advised by this Honourable Court whether she has the power to grant the said proposed lease to the said Ruttonji Bhikaji Karanjavala.

" (b) That her granting the said proposed lease may be sanctioned or directed by this Honourable Court.

" [643] (c) That this Honourable Court may give such opinion, advice or direction in the premises as to this Honourable Court may seem fit."

*Farran*, for the petitioner.—There are three questions arising on this petition, viz., (1) is the petitioner *de jure* and *de facto* a trustee of the charity land? (2) Is there any provision in Jagannath Shankarshet's will to prevent the trustee from granting a lease of the land left in charity? (3) Does the law permit such a lease to be given? He referred to *Tudor on Charitable Trusts*, pp. 204, 307; *Lewin on Trusts* (8th ed.), p. 546; *The Attorney-General v. Foord* (1); Act XXVIII of 1866, s. 43. He also cited *The Attorney-General v. The South Sea Company* (2); *Maniklal Atmaram v. Manchershahi Dinsha Coachman* (3).

*Inverarity*, for the proposed lessee.—The only question is whether the lease would be profitable or not—*Attorney-General v. Hungerford* (4). There is no doubt as to the abstract power to alienate apart from special statutory or other limitation—*The Attorney-General v. Pilgrim* (5).

*Lang*, for Ravji Vinayakrav Shankarshet, the adopted son of the petitioner.—The Court has no power to sanction the lease. The Act gives no power, nor can the Court decide upon the rights of parties—*Re Lorenze's Settlement* (6); *In re Samuel Marie Brereton* (7); *Re Barrington's Settlement* (8). This lease contains no provision as to buildings being given up at the expiry of the lease—*Davidson's Conveyancing*, Vol. V, p. 1; *The Attorney-General v. Foord* (1). There is no condition as to repair, &c.

*Latham* (Advocate-General), for the charity.—It was never intended that on a petition of this kind the Court should decide nice questions of law or construction—*Lewin on Trusts*, Ch. 23, s. 2; *Morgan's Chancery Acts and Orders*, p. 103; *Re Mockett's Will* (9); *Lewin on Trusts*, p. 618. There ought to be a friendly suit for the purpose of deciding the question raised—*Tudor on Charities*, 323—425.

### JUDGMENT.

[644] SCOTT, J.—This is a matter arising in chambers under s. 43 of Act XXVIII of 1866. I am asked on the petition of Lakshmbai, widow of the late Vinayakrav Jagannath Shankarshet, for my opinion, advice or direction on certain questions of management or administration of trust property of which she is trustee. Under that section a trustee may apply, without instituting a suit, to any Judge of the High Court for his opinion, advice or direction, and by acting on such opinion the trustee is deemed to have properly discharged his duty. Obviously the Court under such circumstances must act with caution, and only advise in matters when the rights of the parties *inter se* are not in dispute either in

(1) 6 Beav. 288.

(4) 2 Cl. & F. 357.

(7) 7 B. 381.

(2) 4 Beav. 453.

(5) 12 Beav. 57.

(8) 1 J. & H. 142.

(3) 1 B. 269 (285).

(6) 1 Dr. & Sm. 401.

(9) John 628.

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law or in fact. The section is substantially the same as s. 30 of Lord St. Leonard's Act (22 & 23 Vic., c. 35). The decisions under that section show clearly under what circumstances and within what limits the Court will give its advice, and they are collected in Seton on Decrees, Vol. I, p. 492.

The questions on which the Court has advised trustees have related strictly to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings. But disputed points of law or fact have never been included. The Court will not, for instance, construe an instrument or make any order affecting the rights of parties—*Re Lorenz's Settlement* (1) and *Re Evans* (2). Nor can affidavits be used (Lewin on Trusts, 618). The Court must advise on the facts stated in the petition alone—*Re Muggeridge's Trusts* (3). Vice-Chancellor Sir W. Page Wood in *Re Barrington's Settlement* (4) declined to give an express opinion on the details of a scheme to raise money for repairs and permanent improvements, and his language might be adopted *ipsissimis verbis* in this present matter. "This is not a case," he said "in which I can properly give an opinion, but I have no objection to express my view as to the principle involved. My reason for not giving an express opinion is, that the case goes into details, with which the Court cannot effectually deal, without having a superintending [645] power and being informed by affidavits; and the Court has no means of exercising any controlling power over the subject-matter." As regards the section in the Indian Act, there is an express decision—*In re Samuel Marie Brereton* (5)—where the learned Judge follows the English decisions, and says: "It is no part of the duty of a Judge, under s. 43 of the Trustees' and Mortgagees' Act, to give any opinion on a point on the decision of which may depend questions of right or title." The limits, therefore, within which I must confine myself have been clearly laid down both at home and in Bombay.

Now in this matter I am asked to advise the trustee—(a) whether she has the power to grant the proposed lease to the said Ruttonji Bhikaji Karanjavala; (b) whether the Court will sanction or direct the said lease; and there is a further prayer (c) that the Court will advise in the premises as may seem fit. Now reading the section under which I am asked to act by the light of the above decisions, I must reply to these questions as follows:—(a) So far as this question involves a decision on the construction of the will to the effect that Lakshmibai is the trustee of the property, I cannot answer it. But her management seems to have been settled by the decision in the case of *Ravji Vnayakrav v. Lakshmibai* (6). She is *de facto* trustee, and my answer is based on the assumption that she is also trustee *de jure*. Replying on that basis, I do not think I can say that she has power to grant this particular lease to Ruttonji Bhikaji, because it would be a decision on a question of detail and of fact without sufficient grounds for me to go upon. But I am of opinion, as a matter of general principle, that the trustee of this charitable property could make a lease—a building lease—of the land devoted to the maintenance of the trust. The property hitherto has only been used for agricultural purposes, the return has been small, and the temple and its adjuncts have been in consequence insufficiently maintained. A sufficient income for the trust

(1) 1 Dr. & Sm. 401.  
(4) 1 J. & H. 143.

(2) 30 Beav. 232.  
(5) 7 B. 381 (384).

(3) John 625.  
(6) 11 B. 381.

would be probably obtained if the land were let for building purposes. Such portion of it as is required for the annual fair, which is one of the objects of the trust, should be reserved. The lease should be for the [646] usual period of ninety-nine years, and should contain the usual covenants to build, repair, &c.; due provision should be made for the surrender or removal of the building at the close of the period on such terms as are customary in Bombay. The rental should be such as would make the arrangement beneficial to the trust, considering the market value of the land. I am of opinion that a lease fulfilling these conditions would be within the powers of the trustee.

As regards the money which is required to meet the expense of repairs and maintenance, it will evidently have to be raised in some way as a charge, either temporary or permanent, on the trust property. I am of opinion that such a charge, limited to the purposes of necessary repairs and maintenance of all the objects of the trust, would not be beyond the intention of the testator. But I cannot discuss any details as to amount or particular work to be done, as under this section of the Act I have no controlling power. I consequently think the sanction of the Court should be obtained to any charge.

As regards question (b), I have already stated that I cannot advise as to the particular lease, and I have no power under the section to sanction it. Question (c) I have answered already.

As regards costs, I think the petitioner and the Advocate-General are entitled to their costs out of the fund, to be taxed as between attorney and client. As regards Mr. Lang's client, he appeared on notice, and he is entitled to his cost of appearance in chambers, but exclusive of his affidavits, which ought not to have been filed. I think Mr. Inverarity's client, who appeared without notice, and at his own risk, had no *locus standi* in such an application as the present one. He must pay his own costs. I certify for counsel.

Attorneys for petitioner: Messrs. *Craigie, Lynch and Owen.*

Attorneys for other parties: Messrs. *Crawford and Buckland*; Messrs. *Ardksir, Hormasji and Dinshaw*; and Messrs. *Little, Smith, Frere and Nicholson.*

12 B. 647.

[647] ORIGINAL CIVIL.

*Before Mr. Justice Scott.*

THE IMPERIAL FLOUR MILLS COMPANY, LIMITED (*Plaintiffs*) v.  
W. T. LAMB (*Defendant*).<sup>\*</sup> [1st and 2nd May, 1888.]

*Company—Indian Companies Act VI of 1882, s. 45—Member—Signing unregistered copy of memorandum of association—Agreement to become a member—Proposal—Acceptance—Repudiation before registration of company.*

On the 13th April, 1886, Lamb signed a printed copy of the proposed memorandum of association of a projected company for ten shares which on the 3rd August was registered as a Imperial Flour Mills Company. On that day, *viz.*, the 3rd August, 1886, Lamb received a notice from the secretary of the company, informing him that the company had been duly registered, and requesting him to pay

<sup>\*</sup> Small Cause Court Suit No. 511 4890 of 1888.