

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Croom.

MAHAMAD HAJI ZAKERIA, APPELLANT, v. AHMADBHAI
HABIBBHAI, OPPONENT.*

1900,
November 22.

*Practice—Procedure—Reference to High Court—Civil Procedure Code
(Act XIV of 1882), secs. 539, 617, 647.*

M, claiming to be a trustee or manager of a mosque, applied to the District Judge for permission to grant a lease of lands belonging to the mosque. In response to a proclamation issued, A, the opponent, appeared before the District Judge claiming to be the owner of the village in which the lands were situate and contended that the lands did not belong to the mosque and that the applicant was not the manager. The District Judge felt a doubt as to whether he had jurisdiction to entertain the application unless a suit was properly framed and filed under section 539 of the Civil Procedure Code (Act XIV of 1882), and referred the point to the High Court under section 617 of the Code.

The High Court refused to answer the reference, being of opinion that no reference under section 617 could be made on such an application. Sections 617 and 647 of the Civil Procedure Code apply when doubts arise in the proceeding of a suit or appeal or execution or other proceeding. Section 617 was not intended to provide for suppositious cases which do not naturally arise in a proper proceeding before the Court.

REFERENCE by R. S. Tipnis, District Judge of Thána, under section 617, read with section 647 of the Civil Procedure Code (Act XIV of 1882).

The reference was made in the following terms:—

One Mahamad Haji Zakeria made an application to the District Court at Thána for permission to lease in perpetuity certain land alleged to have been granted to, and set apart for the purposes of, a masjid by his ancestors. It is alleged by the applicant that the land at present yields less than Rs. 10 per annum, but there are offers of an annual rent of Rs. 240 if it is granted in permanent lease. He further alleges that according to Mahomedan law sanction of the Kazi or, in his absence, the Court is necessary to validate a permanent lease of masjid property.

My predecessor, Mr. M. B. Tyabji, registered this application, and, in pursuance of his order passed on 9th December 1899, a proclamation was issued and published by beat of drum in the village in which the land is situate, calling upon any one interested in the mosque to file objections to the proposed lease, and

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announcements to the same effect were published in the local paper and in another newspaper of Bombay.

One Ahmadbhai Habibbhai, by his attorney, Hari Krishna, filed objections, alleging that he is the owner of Málád, wherein the land in question is situate and that this land is not shown in village papers as pertaining to the mosque; that the applicant has no right to grant it in lease, and that any such proposed lease may injure the interests of the masjid.

The applicant filed two affidavits to prove that the proposed permanent lease would be beneficial to the masjid.

When this case came before me for disposal, I felt doubts as to the jurisdiction of the District Court to entertain an application of this nature. Mr. Joglekar for the applicant argued the case before me and desired me to refer the matter to their Lordships if I had any doubts as to this Court's jurisdiction.

I suppose, for the sake of argument, that this land in question is wakf property set apart for the purposes of a mosque, and that the applicant is the legal or *de facto* manager of it. I further assume for a moment that it is competent to a manager like the applicant to grant a lease of such cultivable land for building purposes for the benefit of the mosque, and that for a lease of a longer term than three years, advantage to the mosque should be proved and the sanction of the Kazi should be obtained (The Law relating to Gifts, Trusts, &c., among the Mahomedans by Mr. Syed Ameer Ali, page 270).

For Málád there is no Kazi appointed by Government. It has been argued that the function of the Kazi in this respect ought to be exercised by the District Court. I think that the District Court, as representing the Crown's judicial authority, is competent to grant sanction in such cases, but I doubt very much if the sanction may be sought for in this summary manner by an application.

Section 539 of the Civil Procedure Code provides, *inter alia*, that whenever the direction of the Court is deemed necessary for the administration of any trust created for public religious purposes (the present wakf property comes under that denomination), a suit may be filed in the District Court by certain persons specified in that section to obtain a decree for (amongst other reliefs) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged. It is this procedure which the applicant should adopt.

It has been argued that there is practically no opposition of this kind and therefore there can be no defendants in the suit: but a friendly suit in which some of the interested persons appearing as defendants is often resorted to. In the present case, however, Ahmadbhai is sure to be a defendant, for he has objected to this petition.

I have ventured to make this reference as my predecessor took cognizance of the case, and there is no appeal against any order that I may pass in regard to want of jurisdiction; and, lastly, I have some reasonable doubts on this point.

The point I refer for their Lordships' opinion is whether the District Court has jurisdiction to entertain an application of this nature without a suit properly framed and filed under section 539 of Civil Procedure Code.

Chintaman A. Rele (amicus curiæ) for the applicant.

Ganpatrav S. Mulgaumkar (amicus curiæ) for the opponent.

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RANADE, J. :—In this case the reference is made by the District Judge under section 617 of the Civil Procedure Code in the matter of an application made by a certain person who claims to be a trustee or manager of a mosque, and has sought the permission of the District Judge to grant certain lands described as belonging to the mosque on a long lease. The application was made to the District Judge, because the applicant was advised that, in the absence of a Kazi, the District Judge was the proper party to give the sanction.

In response to a proclamation issued, an opponent appeared before the District Judge, and claiming to be owner of the village, contended that the land did not belong to the mosque, and that the applicant was not manager. The District Judge made this reference, because he felt a doubt as to whether section 539 of the Civil Procedure Code did not lay down the proper procedure to follow.

We do not think that a reference under section 617 or 647 can be made merely on an application of this sort made to the District Judge who took no further action in the matter. Sections 617 and 647 apply when doubts arise in the hearing of a suit or appeal or execution or other proceeding. The District Judge assumes that the applicant is Mutwalli or trustee, and that the land is wakf property—both which positions are directly contested by the opponent. Section 617 was not intended to provide for suppositious cases which do not actually arise in a proper proceeding before the Court. Section 539, clause (d), provides for cases where trustees seek directions in the matter of the management of a trust, but until in a properly instituted proceeding between applicant and opponent the case comes up regularly before the Court, we do not think we are called upon to deal with such a reference under section 617. It was admitted that there has been no precedent of any such application as that made to the District Judge in this case. For these reasons we return the reference unanswered.

Order accordingly.