

Subbayya and anr. Vs. Krishna

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Court : Chennai

Decided On : Nov-07-1890

Reported in : (1891)ILR14Mad186

Judge : Muttusami Ayyar, ;Best ;and Weir, JJ.

Appellant : Subbayya and anr.

Respondent : Krishna

Judgement :

Muttusami Ayyar, J.

1. The appellants are parties interested in the due administration of an endowed public charity in Tanjore, and the respondent is its present trustee by right of inheritance. The former charged the latter with negligence and misconduct and instituted this suit in the District Court of Tanjore to remove him from the office of trustee and to have another appointed in his place. The Judge held that he had no jurisdiction to entertain the suit under Section 539 of the Code of Civil Procedure, and, relying on the decision in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157), dismissed the claim with costs.

2. The contention in appeal is that the Judge has jurisdiction, and if he has no jurisdiction, he ought to have returned the plaint to be presented to a Court of competent jurisdiction. It is urged that since *Narasimha v. Ayyan* I.L.R. 12 Mad.

157), was decided, Section 539 has been amended, and that, as pointed out in *Chimpa v. Pattabhirama* (Appeal No. 199 of 1887 not reported), the procedure under Sir Samuel Romilly's Act (52 Geo. III, Cap. 101) was by petition and summary order, whereas a regular suit is prescribed by Section 539 of the Code of Civil Procedure.

3. The decision in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157), rests on two grounds, viz., that the plaintiff in that case had no direct interest in the trust, and that it was not clear that a suit to remove a trustee hostilely could be brought under Section 539. As Act VII of 1888 amended that section by substituting the words 'two or more persons having an interest in the trust' for the words 'two or more persons having a direct interest in the trust,' the question in this appeal is whether a suit to remove a hereditary trustee for misconduct will lie under Section 539, though the trustee denies the misconduct imputed to him and is willing to act as trustee. It is not denied that under Sir Samuel Romilly's Act a trustee could not be removed hostilely, but our attention is drawn to the Trustee Act, 13 and 14 Vic, Cap. 60, Section 50. Even under this Statute, the Courts refused to remove a trustee by an order and otherwise than by a suit--(see the cases cited in *Lewin on Trusts*, 8th edition, p. 1028). A reference, therefore, to the English Statutes does not carry the case further than that Section 539 is taken from them, but that a suit has to be instituted under it whilst the procedure prescribed by the former was summary. The decision in *Chimpa v. Pattabhirama* (Appeal No. 199 of 1887 not reported) simply pointed out this distinction, and the question has, herefore, to be determined with reference to the language of Section 539 and the construction suggested by it. It is to be observed that the dismissal or removal of a trustee is not specified among the descriptions of relief to be awarded under Section 539, and the proviso for such further relief as the nature of the case may require presupposes, as explained in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157) some matter incidental to the relief expressly authorized to be granted. This appears to warrant the construction placed upon it that it was intended not to include cases in which a hereditary trustee has to be hostilely removed, but to limit it to the classes of cases dealt with by orders under the English Statutes. The decision of the Judge is right. As regards, however, the contention that the plaint ought to have been returned for want of jurisdiction, I think it is well founded, as no other

question has been decided in this case.

4. I would, therefore, modify the decree by ordering the plaint to be returned and confirm it in other respects.

Best, J.

5. The District Judge has dismissed the suit on the ground that the plaintiffs are not entitled to sue under Section 539 of the Code of Civil Procedure, quoting, as his authority, the decision of this Court in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157).

6. The suit was held in that case to be non-maintainable, because 'the plaintiffs had not a direct interest in the trust within the terms of Section 539 of the Civil Procedure Code.' That section has, however, been amended by Act VII of 1888 (Section 14) by removal of the word 'direct,' and the section, as it now stands, is applicable to suits in which persons have 'an interest in the trust.'

7. The question remains whether Section 539 is applicable to a suit to remove a trustee. This is not one of the reliefs specifically mentioned in the section, but the last clause of the section provides for the 'granting of such further or other relief as the nature of the case may require.' In the case above referred to, the opinion is expressed that such 'grounds of relief would be some matter consequent on the relief which the section enables to be granted.' The section says 'further or other relief,' and if a new trustee can be appointed under the section in place of an existing trustee, the removal of the latter would be a 'further or other relief required by the nature of the case.' This is, I imagine, the reason why the removal of a trustee is not specifically mentioned in Section 539.

8. It does not seem to me that the decisions under Sir Samuel Romilly's Act can be of use in deciding the question.

9. As pointed out by the learned Judges who decided *Narasimha v. Ayyan* I.L.R. 12 Mad. 157) its object was to 'enable trusts of certain classes to be carried out by summary procedure and not by suit;' whereas Section 539 of the Code of Civil Procedure contemplates a suit, not merely a petition. Such being the case, I do not

see why the construction of the section should be limited so as to exclude cases in which there is 'hostility.' The opening words of Section 539 - 'in case of any alleged breach of any express or constructive trust'--seem to imply the existence of a trustee who is alleged to have been guilty of such breach; and the power subsequently given by the same section to appoint new trustees must imply, I think, also power in the Court to remove the old trustees (or trustee), if such removal is found to be necessary and justifiable as a result of the suit.

10. I would, therefore, set aside the Lower Court's decree and remand the suit for replacement on the file and disposal according to law, and direct that the costs hitherto incurred be costs in the suit to be provided for in the decree to be passed by the District Judge.

11. In consequence of the difference of opinion between their Lordships the appeal was referred to Mr. Justice Weir under the provisions of Section 575 of the Civil Procedure Code on the 11th October 1890.

12. When the appeal came on for hearing before Mr Justice Weir on 23rd October 1890, Pattabhirama Ayyar for the appellant took the objection that it was not competent to Mr. Justice Weir to hear the appeal alone and sitting apart from the two Judges who originally heard the appeal, and relied upon the Full Bench decision of the Allahabad High Court in Rohilkhand Kumaon Bank (Limited) v. Row I.L.R. 6 All. 468.

13. Rama Row for respondent supported the contention that the appeal should be heard by the three Judges.

Weir, J.

14. Appeal Suit No. 70 of 1889 was referred by the Chief Justice to me by order dated 11th October 1890.

15. On this case being called on, objection is taken by the Pleaders of both parties that it is not competent to a single Judge sitting by himself and apart from the Judges who have first heard the appeal to hear an appeal referred under Section

575, Civil Procedure Code. The language of Section 575, Civil Procedure Code, itself and the construction put upon that section by a Full Bench of the Allahabad High Court in Rohilkhand Kumaon Bank, Limited v. Row I.L.R. 6 All. 468) are relied on in support of this argument.

16. The language of the section does not appear to me to imply that the appeal must necessarily be heard again at the reference by the two Judges who first heard it and differed; but there is authority in support of the opposite view, and as the Pleaders of both parties concur in supporting the objection, it would be inadvisable on my part to press them to proceed with their argument.

17. The question raised is one of great importance and the narrow construction placed on the scope of Civil Procedure Code, Section 539, by the decision in Narasimha v. Ayyan I.L.R. 12 Mad. 157) is likely, it is said, to affect prejudicially numerous endowments in the mofussil.

18. On this ground the Pleaders suggest that the case is one which it may be desirable to refer to a Full Bench. The great importance of the question involved, I think, justifies the suggestion. On the other hand, it may be considered that there is no such conflict of opinion as renders a reference to a Full Bench necessary. Excepting in the instance of Mr. Justice Best's opinion now recorded there has been no dissent from the view stated in Narasimha v. Ayyan I.L.R. 12 Mad. 157. I myself followed the latter decision in a suit tried on the Original Side in September last--Krishnasami v. Balakrishna Civil Suit No. 167 of 188 not reported, but as a single Judge I of course considered myself bound by the reported decision of a Bench of two Judges. The question was also, I see, raised in an appeal before the Chief Justice and Parker, J., in Chimpa v. Pattabhirama Appeal No. 199 of 1887 not reported but was not gone into as the objection had not been stated in the grounds of appeal. With these remarks I refer the objection for the orders of the Chief Justice.

19. [The appeal came on again for hearing before Muttusami Ayyar, Best and Weir, JJ., on 27th October 1890.

20. Pattabhirama Ayyar for Appellants.

21. The District Judge erred in holding that the decision in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 is authority for the contention that the suit for removal of a trustee does not lie under Section 539 of the Civil Procedure Code. The only point decided in it was that the plaintiffs had not a direct interest within the terms of Section 539, and the Legislature has now substituted the words 'having an interest' for the words 'having a direct interest.' See Section 44 of Act VII of 1888. The other point as to the removal of a trustee was no doubt considered, but there is no opinion expressed about it. It is not even an obiter dictum; it is only a *quoere*. Besides, the observations of the learned Judges are not strictly accurate. The provisions of Romilly's Act were confused with those of another Act, the Trustee Act 13 and 14 Vic, Cap. 60. The appointment of new trustees is referred to only in Section 32 of the latter Act.

22. This question as to the removal of trustees was also considered in *Chimpa v. Pattabhirama* Appeal No. 199 of 1887 not reported, which was heard before the Chief Justice and Mr. Justice Parker, and although it was unnecessary to decide the point, their Lordships pointed out that the procedure described by Romilly's Act was by petition, whereas a suit was permitted to be brought under Section 539. There is also a decision by Weir, J., in *Krishnasami v. Balahrishna* Civil Suit No. 167 of 1889 not reported, but his Lordship there considered himself bound as a single Judge by the decision in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157. Then as to the construction of Section 539, it is true that it contains no special clause as to the removal of a trustee, but the removal of a trustee is only auxiliary to the real relief, i.e., the proper administration of the trust. See Story's Equity Jurisprudence, Sections 1287 to 1289 and case of *Letterstedt v. Broers* L.R. 9 App. Clause 371. The fact that the removal of the trustee is only an auxiliary relief accounts for its not being specially mentioned in Section 539. The power to appoint new trustees under Clause (a) must be held to include the power to remove, if necessary, the old trustee, who has committed a breach of trust. Even apart from Clause (a) the Court has power to grant such further or other relief as the nature of the case may require, and in certain instances of breach of trust, the nature of the case may require the removal of the trustee. See also illustration (e) to Section 60 of the Indian Trusts Act.

23. The argument advanced on the other side would have weight if the section could be considered as contemplating only a summary proceeding and not a regular suit. But the section is the sole section in Chapter XL of the Code, the heading of which is 'suits relating to public charities.' The side note to the section refers to suits. The section clearly refers to suits and to decrees passed on such suits. The distinction between petitions and suits and between orders and decrees is well recognised by the Legislature. See the Minors Act and the Succession Certificate Act. Similarly the distinction is recognised in the Trusts Act, see Sections 34 and 74.

24. Section 539 was, for the first time, enacted in Act X of 1877. Then it was modified by Act XII of 1879, Act XIV of 1882, and Act VII of 1888, and the changes that have been from time to time introduced have extended the scope and usefulness of the section and show that the section ought to be liberally construed.

25. In Romilly's Act 52, Geo. III, cap. 101, the procedure was summary not by suit, but by petition. The leading case upon the construction of this Act is *Corporation of Ludlow v. Greenhouse* 1 Bligh. N.S., p. 17--(see especially pages 49, 52, 66, 81 and 88 of the report); see also *re Phillipott's Charity* 8 Simon, 381, (especially page 389 of the report) and *re West Retford Church Lands* 10 Simon 101, (especially page 111 of the report) and in *re Hall's Charity* 14 Beav. 115, and the footnote in which all the cases are summarised. The Indian Legislature knowing the difficulties which arose in working Romilly's Act have carefully avoided them in framing Section 539, and the procedure under the Trustee Act of 1850 13 and 14 Vic, Cap. 60), is also of a summary character, see Sections 40--43, Section 32 of the Trustee Act of 1850 was considered in *re Blanchard* 3 De G. F. & J. 131. See also *re Hodson's Settlement* (9 Hare 118), (especially page 121 of the report) and *re Hadley* 5 De G. & Sm., 67), (especially page 70 of the report).

26. The language of Section 539 is thus materially different from the language used in Romilly's Act and in the Trustee Act of 1850, though the Legislature has, in framing the section, kept certain provisions of the two enactments in view.

27. The construction of Section 539, contended for by the other side, will cause considerable difficulty. If the District Court is not competent to remove a trustee

under Section 539, the suit to remove a trustee will have to be instituted elsewhere, and after the trustee is removed, a suit to appoint a new trustee will have to be instituted in the District Court - vide Clause (a) of Section 539. In this connection the provisions of Section 43 of the Code have also to be kept in view. If a suit is brought in the Munsif's Court to remove a trustee, the District Court in appeal will have power to pass such decree as it thinks fit; but, according to the construction contended for on the other side, it will have no power to entertain the suit if it is instituted in the first instance in the District Court itself.

28. Rama Rau for Respondent.

29. The removal of a trustee is not specially mentioned in Section 539. The words at the ending of the section 'further or other relief' ought not to be construed widely. The section finds its place in Chapter XL, which is one of the four chapters in Part V of the Civil Procedure Code treating of special proceedings. Though the special proceedings are termed suits, and the decisions arrived at in them are called decrees, yet the Legislature did not contemplate such a lengthy and exhaustive enquiry as takes place in an ordinary contentious proceeding. Section 539 contemplates only a summary proceeding, and that is the reason why the removal of a trustee hostilely is not mentioned. To remove the trustee hostilely a regular suit must be instituted.

30. The power to entertain suits to remove trustees always existed in the Civil Courts in the mofussil - see Ponnambala Mudaliyar v. Varaguna Rama Pandia Chinnatambiar 7 M.H.C.R. 117. Section 539 is enacted to confer an additional remedy to suitors in cases falling within its scope. See also the observations of Whitely Stokes in page 429 of Volume II of the Anglo-Indian Codes. Under Section 14 of Act XX of 1863 the District Court has power to remove trustees, and the omission of the relief in Section 539 is significant.

31. Pattabhirama Ayyar in reply.

32. If the object of the Legislature in enacting Section 539 was to provide for the granting of comparatively easy and unimportant reliefs, why should the section require, as an essential preliminary, the institution of the suit by at least two

persons interested in the trust and the sanction of the Advocate-General to the institution of the suit--see *Panchcowrie Mull v. Chumroolall* I.L.R. 3 Clause 563. It is true that removal of a trustee is mentioned in Section 14 of Act XX of 1863, but if it is held that the District Court has no power to remove a trustee under Section 539, this anomaly will result that the District Court has jurisdiction to remove trustees of religious endowments, but not of charitable endowments.

Muttusami Ayyar, J.

33. This was a suit relating to a public charity called Vastad Chavadi near Tanjore. The appellants, alleging that the hereditary trustee for the time being was bound to manage the charity subject to their control, charged the respondent with breach of trust and misappropriation of trust property and prayed for his removal from the management of the trust and the appointment of other proper trustee or trustees, and for such further or other reliefs as the nature of the case might require. The respondent denied the charge and insisted on his right to continue in management of the charity. The suit was brought in the District Court of Tanjore under Section 539; but the Judge, relying on the decision of this Court in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 held that he had no jurisdiction to entertain the suit under that section. Hence this appeal.

34. The appeal was first heard by Mr. Justice Best and myself. I considered that the construction of Section 539 suggested in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 was correct, but my learned colleague held that the District Court had jurisdiction. The appeal was, therefore, referred to a third Judge Mr. Justice Weir, and argued again before him and ourselves. The point for determination is whether a suit can be maintained under Section 539 to dismiss a trustee for misconduct hostilely, that is to say, when he denies the misconduct imputed to him and claims to continue in the office.

35. *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 was heard by Mr. Justice kernan and Mr. Justice wilkinson, and the learned Judges rested their decision therein on two grounds. The first was that the plaintiffs there had not a direct interest in the trust within the terms of Section 539 as it then stood. As a second reason they

observed as follows:

Section 539, in most parts of it, follows the provisions of Romilly's Act which enabled trusts of certain classes to be carried out by summary procedure and not by suit; among the objects of the Act, one was to appoint a new trustee, and it was held under the Act that a trustee could not be removed hostilely. No doubt Section 539 provides that a suit may be brought to appoint the trustee and for other purposes, and it contains a proviso that further relief may be given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief which the section enables to be granted.

36. Except *Narasimha v. Ayyan* I.L.R. 12 Mad. 157, we are referred to no other decision in which the question was considered and determined. Nor was its determination necessary even in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157, inasmuch as the absence of a direct interest in the trust was of itself sufficient for the disposal of that case. In this sense the opinion expressed in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 is only an obiter dictum, although it was followed by the District Judge in this case and also in another case heard on the original side by a single Judge. I must add that there are also several cases in which the question was not raised, and which were decided on the assumption that the District Court had jurisdiction. There was, indeed, an attempt made to raise the question for determination in *Chimpa v. Pattabhirama* Appeal No. 199 of 1887 not reported before another Divisional Bench, but the learned Judges who heard that case observed that the proceeding prescribed by Romilly's Act was by petition, whereas, a suit was permitted to be brought by Section 539, and with that observation they declined to consider the question for the reason that it was not one of the grounds of appeal. In this state of authority, I think that the question is *res integra*, and, as the District Judge relied in support of his judgment on the dictum in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157, it becomes necessary to decide whether we should adopt or overrule it.

37. This case has been argued twice, and, on this occasion, with considerable learning and ability by the pleaders on both sides. After carefully reconsidering the question, I do not see my way to alter the opinion which I expressed at the former

hearing.

38. Among the reliefs specified in Section 539, the removal of the existing trustee for misconduct and the relief which may be granted against him on such removal are not mentioned. The omission appears to me to be intentional when regard is had to the language of Section 14 of Act XX of 1863 and to the fact that it is the relief usually asked in an ordinary suit. If it was intended that whatever relief a Court of Equity might grant upon information might be granted under Section 539, there was no necessity for specifying only some reliefs or for any specification at all. According to the recognized rules of construction, the general words at the end of the section, viz., 'granting such further or other relief as the nature of the case may require' must be taken, as observed in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 to refer to what precedes them and to some matter consequent on the relief which the section authorizes to be granted. Again, the Civil Courts in the Mofussil were at liberty to entertain suits for removing a trustee from the management of charitable trusts on the ground of malversation from before the date of Regulation VII of 1817 as pointed out by this Court in *Ponnambala Mudaliyar v. Varaguna Bama Pandia Chinnatambiar* 7 M.H.C.R. 117. Thus, as Courts of Equity, they always exercised jurisdiction in an ordinary suit to remove old trustees for misconduct and appoint new ones in cases requiring such a remedy on the principle mentioned in *Letterstedt v. Broers* L.R. 9 App. Ca. 371. As regards such suit, no limitation is prescribed in Part I of the Civil Procedure Code as in Part V, Section 539, either to the effect that two or more persons ought to be plaintiffs, or that the sanction of the Advocate General is necessary. It is not clear then why the pre-existing remedy by an ordinary suit is restricted by Section 539 if it includes the hostile removal of existing trustees. Again, District Munsifs and Subordinate Judges have always had jurisdiction to entertain such suits. Why is their jurisdiction taken away when the same relief is claimed under Section 539, and why is a concurrent jurisdiction given to the High Court so as to authorize the institution of a suit before that tribunal for the dismissal of the trustee of a petty village temple in remote parts of the Presidency? Moreover, Section 539 is inserted in the Civil Procedure Code, Part V, among what is designated, in contradistinction to ordinary suits, 'Special Proceedings' and as one of the four kinds of special proceedings. Its position in the Code and its designation as a

special proceeding appear to me to be significant when I consider the nature of the special proceedings which are grouped together in Part V. The first special proceeding is a reference to arbitration, chapter XXXVII, and its special character consists in excluding lengthy investigation by the Court of intricate questions of fact raised in a contentious suit and in adopting the award of arbitrators subject to certain conditions as the judgment of the Court. The second is the special proceeding on agreement of parties, and its special character lies also in excluding such protracted investigation as to facts as is often necessary in an ordinary suit and accepting the statements contained in the agreement as facts which the parties concerned are not at liberty to deny (see Section 530). It must be noted here that for purposes of future litigation, the proceeding is regarded as a suit and the decree passed on the award or the agreement is declared to have the same force as a decree passed in an ordinary suit. The third special proceeding is what is called the summary procedure on Negotiable Instruments.

39. Here, again, the special character consists in avoiding an intricate investigation of disputed facts indispensable in an ordinary suit by declaring it incumbent on the defendant to obtain special leave to appear and defend and empowering the Court to grant such leave subject to certain conditions. It will be observed that this proceeding is termed a summary suit, and yet the decree which the plaintiff obtains when leave to defend is refused has the force of a decree in a regular suit unless it is set aside in the mode prescribed by Section 534, chapter XXXIX. It is also to be observed that the exercise of the power to refuse leave, which, if abused, would amount to a denial of justice, is constituted by Section 538 into a case of special jurisdiction vesting in the particular Courts mentioned therein, and in such other Court having ordinary Civil Jurisdiction as the Local Government may specially select.

40. What then is the peculiar characteristic of the so-called Special Proceedings in general? Why are they still termed suits, and why are decisions arrived at in such proceedings termed decrees though in some cases the procedure is expressly stated by the Legislature to be summary

41. As already explained, the special character consists in avoiding the protracted investigation necessary in a contentious ordinary suit either by authorizing a reference to arbitration or insisting on an agreement or constituting a special leave to defend a condition subject to which the defendant is to be permitted to defend, and making the power of granting or withholding of such leave, a matter of special jurisdiction to be exercised by particular Courts. The result is that in the cases to which they apply the decision is final as in an ordinary suit with this difference that a lengthy and expensive inquiry inevitable in contentious proceedings, and the delay consequent on the institution of an appeal and of a second appeal are avoided. This appears to me to be the scheme of the Code so far as it relates to Special Proceedings.

42. The insertion of Section 539 among such proceedings and as of the fourth kind indicates a unity of design in regard to them all and the avoidance of a protracted inquiry consequent on an ordinary hostile suit as their common special feature.

43. Reading the section, as I think we ought to do, with reference to the nature of the special proceedings which precede it, the omission to include the removal of the existing trustee hostilely and the relief to be had against him on such removal among the reliefs specified in that section, appears to me to be significant as well as intentional, and neither the designating of the special proceeding as a suit, nor of the decision therein as a decree seems to make a difference or to imply plenary jurisdiction.

44. This view, I think, receives further confirmation when the law regarding public charities as administered in India prior to 1877 is considered together with the modification made by the introduction of Section 539 into Act X of 1877. That the removal of a trustee from the management of charitable trusts on the ground of malversation was a remedy always available in the Mofussil Courts as Courts of Equity is clear, as already observed, from the decision in *Ponnambala Mudaliyar v. Varaguna Rama Pandia Chinnatambiar* 7 M.H.C.R. 117. But I am aware of no case nor was any cited at the hearing in which the equitable doctrine of cy-pres was applied in relation to public charities in the Mofussil and a scheme framed on such application. There was also a doubt as to what ought to be done with the

accumulations called the pagoda surplus funds and similar accumulations from charitable funds. That branch of equitable jurisdiction was, however, exercised in the Presidency towns, by the late Supreme Courts under the charter and as a notable instance, the establishment of the Patchayappa's High School at Madras on a firm basis is the outcome of the scheme framed in 1845 under the direction of the late Supreme Courts based on the cy-pres principle. When the High Courts in the Presidency towns displaced the late Supreme Courts, the former inherited this branch of equitable jurisdiction from the latter. I may here refer to the Mayor of Lyons v. Advocate-General of Bengal I.L.R. 1 Clause 303) and to Longbottom v. Sattoor 1 M.H.C.R. 429 as instances in which the High Courts of Calcutta and Madras exercised such equitable jurisdiction on petition. The non-existence in the Provinces of this special equitable jurisdiction in regard to public charities presumed from its non-exercise by the Provincial Courts or from the doubt felt regarding it, is the defect in the prior law which Section 539 was probably framed to remedy. I may here allude to the remarks of Mr. Whitley Stokes in his edition of the Anglo Indian Codes, Vol. II, p. 431:- 'The Supreme Courts in the Presidency Towns' says, the learned editor, 'had an equitable jurisdiction over charities. This jurisdiction the present High Courts inherited, but the Provincial Courts had no such jurisdiction.' Hence it is that the section gives this special jurisdiction to the High Court which it always possessed concurrently with the District Court and limits it to the District Courts in the Provinces. Hence it is that it does not prohibit private suits for dismissal of trustees for misconduct without the consent of the Advocate-General because such suits were ordinarily entertained by the Provincial Courts and not touched by the creation of a special jurisdiction as to certain other reliefs or classes of trusts regarding which they exercised no jurisdiction. As it was an additional branch of equitable jurisdiction that the section conferred, it was safeguarded by requiring that two or more beneficiaries should join in the suit and by prescribing as a condition precedent the consent of the Advocate-General in the Presidency town and that of the Collector or other officer outside the Presidency town. As a reason for limiting the jurisdiction in the Provinces to the District Courts, I may say that this special equity was administered in the Presidency towns by Her Majesty's Judges and in England by the Lord Chancellor or by the Master of the Rolls. I may also refer to the cases already mentioned as

instances of the exercise of this branch of equitable jurisdiction by the High Courts at Calcutta and Madras, and state that a reference to them would show that very difficult questions regarding construction of wills and regarding the nature of the cy-pres doctrine, and the extent of its application in particular cases might arise as between rival charities on the one hand and as between them and the residuary legatee on the other. I may here add that the practice of leaving a vacancy in the office of trustee open for years was a defect common in this country, as well in the management of public as of temple charities, and the section was framed also to provide an effective remedy in this respect, as was done by Act XX of 1863, Section 5, in regard to Hindu temples.

45. Furthermore, the source from which a selection was made of the reliefs to be granted in the exercise of this branch of equitable jurisdiction corroborates the view expressed as to the probable intention of the Legislature.

46. Romilly's Act 52 Geo. III., Cap. 101, declared that 'in every case of a breach of any trust created for charitable purposes or whenever the direction or order of a Court of Equity is deemed necessary for the administration of any trust for charitable purposes, it should be lawful for any two or more persons to present a petition to the Lord Chancellor, Master of the Rolls or the Court of Exchequer praying for such relief as the nature of the case might require.' It was held with reference to these general words as to the nature of the relief that the Court might settle or alter a scheme of the charities or appoint new trustees or apportion the charities among the districts where parishes have been divided or direct a sale of the charity property in a proper case, and, in short, exercise as between the trustees and the beneficiaries a discretion in putting in operation the power conferred by the Act with benefit to the charity. It was also held that when the question to be discussed was whether a trustee ought to be adversely dismissed for malversation as he might be upon information, the Act did not apply. (See Lewin on Trusts, 8th edition, pp. 928, 929, and the cases therein cited.) When the Act was put into operation, two important defects were often pointed out by the eminent Judges who worked it. One of them was the difficulty felt in putting a construction upon the Act by reason of the vague language used in describing the relief to be granted and the other was the prescribed procedure by petition which

only tended to pave the way for fresh litigation, whilst the statute was avowedly framed to ensure speedy and cheap justice to beneficiaries of public charities.

47. Now compare and contrast Section 539 with the English Statute. The cases premised are the same with this difference, viz., that constructive trusts are included in Section 539, whilst they were held not to be included in the English Statute. Two or more persons having an interest are required by Section 539 to institute the suit as was the case under Romilly's Act with the difference that the words 'having an interest' are taken not from the Act itself, but from a case decided under it, the Corporation of Ludlow v. Green home decided in 1827 1 Bligh N.S. 91. The sanction of the Advocate General or other officer is prescribed by analogy to the provision in Romilly's Act that every petition presented under it must be allowed by Her Majesty's Attorney or Solicitor-General. The theory, as stated by the Lord Chancellor, is this. The Sovereign as *parens patriae* interferes through his representative to protect his subjects who have an interest in the trust, and who from their situation cannot themselves interfere in cases of public charities and sanctions the institution of proceedings by such beneficiaries.

48. Passing on to the reliefs, the English Act directed such relief as the nature of the case might require; and the interpretation placed on those words In re Manchester New College 16 Beav. 610 decided in 1853 was that the Court had a discretion to put the powers conferred by the Act into motion with benefit to the charity as between the trustees and the beneficiaries, and that decided cases cut down the Act to questions arising between them and precluded interference where third parties were concerned. The plan adopted by the Indian Legislature consisted first in omitting the removal of a trustee adversely on the ground of malversation as a relief available under Section 539. The English Statute did not authorize it, because the procedure was by petition and summary, and because a lengthy inquiry in a hostile suit was incompatible with such procedure and Section 539 was not intended to include it, because such inquiry would impede the course of speedy justice which the section was framed to secure. The next step consisted in adopting with a slight addition or modification the reliefs granted under Romilly's Act in specific cases, such as, re The Royston Free Grammar School 2 Beav. 228 decided in 1839 (settling a scheme), Bignold v. Springfield 7 Clark & F. 71 decided

in 1837 (appointing a new trustee) and *re West Ham Charities* 2 De G. & Sm. 218 decided in 1848 declaring the mode in which the charity is to be apportioned, and placing the general words at the end so as to render them only auxiliary to what precedes them, and thereby adopt the result of cases decided under the English Statute in lieu of the description of relief contained in the statute itself. I do not see how the general words at the end of Section 539 'further or other relief,' are, even when considered without reference to the rules of construction, wider than the discretion which the Court had under Romilly's Act to put the powers created by the Act into motion with benefit to the charity between the trustee and beneficiaries. Almost all the reliefs are taken either from Romilly's Act, 52 Geo. III., Cap. 101 or from the cases decided under it in which it was held a trustee could not be removed hostilely. The Trustee Act of 1850 13 and 14 Vic, Cap. 60 formulated, inter alia, into rules of law the principles of several classes of cases decided under Romilly's Act. Hence Clause (a), it may also be said, was taken from Section 32 of the Trustee Act of 1850, Clause (b) was borrowed from Section 34, Clause (c) was taken from *re Hall's Charity* 14 Beav. 115 and the general words from Romilly's Act. The specification of particular reliefs in Section 539 is substantially a mere classification of the reliefs granted under Romilly's Act and the posting of the general words at the end of the section was designed to subordinate their effect to the ordinary rule of construction and thereby to avoid the difficulty in the construction pointed out by the Lord Chancellor in *re Manchester New College* 16 Beav. 610. The conclusion I come to is that no suit to remove a trustee for misconduct hostilely lies or was intended to lie under Section 539 and that while it creates a special and new jurisdiction in respect of the relief mentioned therein, it leaves unimpaired or unlimited in any way in the interest of the charities the ordinary equitable jurisdiction exercised in an ordinary suit for the purpose of removing a trustee for misconduct and obtaining such relief against him as is consequent on such removal. The jurisdiction created by Romilly's Act was called in England when it came into operation the 'new jurisdiction' by reason of the several reliefs expeditiously granted under it, but the mischief of it was that the procedure being by petition, further litigation was not avoided. The Indian Legislature so framed Section 539 as to retain the benefit and to eliminate the mischief by excluding from its operation ordinary suits for the hostile removal of

trustees as under the English Statute and by substituting for the procedure by petition procedure by a special suit and thereby giving finality to the decision.

49. I now proceed to consider the objections urged by the learned pleader for the appellants in support of this appeal. The first objection is that under Romilly's Act the proceedings commenced with a petition, whereas, Section 539 permits a suit though it is called a special proceeding. The remarks already made in regard to special proceedings mentioned in part V and their common special character and as to how they differ from ordinary suits contain a sufficient answer to this objection. It may well be that what was a proceeding by petition was altered into a proceeding by a special suit to obviate the mischief felt in England in working Romilly's Act. The jurisdiction may still be new as under the English Act, because it introduced new reliefs for the benefit of public charities which were not granted before in the mofussil.

50. It is next urged that the jurisdiction conferred by Romilly's Act and the Statute of 1850 was exercised in a summary way by Courts which had plenary jurisdiction upon information and that the jurisdiction conferred by Section 539 ought to be taken to be plenary, because a suit (corresponding to information) was thereby permitted. The answer is that Section 539 was framed to give the District Courts a special branch of equitable jurisdiction which it was considered they never exercised before. The state of things in England when Romilly's Act was passed and in the provinces when this branch of jurisdiction was created was not similar; hence a distinction is made by the Indian Legislature between an ordinary suit and special proceedings by investing the latter with a special character limiting their scope. I am, therefore, unable to attach weight to this objection either.

51. It is next argued that the removal of a trustee hostilely is not specified in Section 539, because it is in itself no positive benefit but only a step towards claiming the other relief specified in that Section. It must be observed that when Section 539 was framed, the Legislature must have been aware that the dismissal of a trustee for misconduct and the appointment of another in his place was a remedy usually claimed in an ordinary suit and that they would have mentioned it if they had intended to make the jurisdiction plenary as was done in Act XX of 1863.

The learned Pleader for the appellants overlooks the fact that as consequent upon such dismissal, a positive benefit on which he lays so much stress may also be claimed such as damages or the transfer of some specific property in the trustee's possession on the ground that it was acquired from misuse 'of the funds of the charity. See also Section 14 of Act XX of 1863.

52. Another objection urged is that the words premised by Section 539, 'in case of any alleged breach of trust' and 'appointing new trustees under the trust' imply when considered as cause and effect a power to dismiss a trustee hostilely. There may, however, be cases in which there may be a breach of trust and the beneficiary may not deem it necessary to ask for the removal of the trustee. The Judicial Committee also say in *Letterstedt v. Broers L.R.*, 9 App. 371, after pointing out that it is the duty of Courts of Equity to see that the trusts are properly executed, that 'this duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases.'

53. Another objection is that the three expressions (1) 'in case of an alleged breach of trust express or constructive,' (2) 'appointing new trustees under the trust,' and (3) 'such further or other relief as the nature of the case may require' imply and include the hostile removal of the existing trustee for misconduct.

54. As regards the last expression, the general effect claimed for it cannot be recognized under the rules of construction, the words 'further besides other relief' being only explanatory and as such referable to some relief consequent on or incidental to the relief specified and the words under the English Statute were much wider as shown already when read in the light of cases decided under it.

55. As regards the words 'in the case of any alleged breach of trust,' they do not necessarily imply a jurisdiction to remove a trustee hostilely. Unless there is a breach of trust in some form, there would be no occasion for the beneficiaries to interfere with the existing management nor to ask for directions. It is hardly necessary for me to add that when the breach of trust is only constructive or venial, or when the beneficiaries ask only for a direction to prevent its recurrence, an ignominious dismissal of the existing trustee would be undesirable in the

interests of the charity itself; while such dismissal can always be secured when the breach of trust is corrupt or fraudulent by an ordinary suit, without retarding by a protracted investigation the exercise of a special jurisdiction beneficial to the charity. The words are also to be found in the English Statute which did not permit a trustee to be removed in a hostile proceeding except upon information.

56. Another objection is that all public charitable institutions are under the superintendence of the Crown as *parens patriae*, and it is reasonable to hold that the section which recognizes the right of the Crown does not exclude suits for dismissal of the existing trustee for mismanagement. It must be remembered here that so far as the Crown's right to interfere is concerned, Regulation VII of 1817 recognized it and enabled it to interfere even without the necessity of instituting a suit. So far as private individuals are concerned, there was always a right of suit in respect of the dismissal of a trustee for misconduct. Section 539 was not needed unless it was the intention, which it has been held that it was not, to restrict this right. That it does not, is clear from the fact that substantially the same language was used in the English Statutes which did not include the hostile removal of a trustee.

57. In this connection, our attention is drawn to the Indian Trusts Act, Act II of 1882, Section 73, where a procedure by petition is prescribed, as it is said, by analogy to the English Statute along with a right of suit. Section 1 declares the Act inapplicable to public charities, and, as regards these, the beneficiaries may be many, whilst in private suits they are few. May not the answer be this? The special proceeding when limited in the sense indicated' already combines in it, with regard to certain classes of reliefs, the speedy justice which a procedure by petition is likely to ensure and the finality of decision, the absence of which led to the observation of Lord Redesdale that 'the farthest way about was often the nearest way home.' It will be noted here that Section 539 applies also to the High Court, where the prior procedure, it must have been known to the Legislature, was by petition.

58. In conclusion, I am unable to accede to the contention for the appellants, because I have to introduce in Section 539, first, words which I do not find there,

and, secondly, to add to the reliefs specified, a relief not specified in it, viz., such relief as may be had consequent on the dismissal of a trustee, thirdly, to give to the general words at the end of the Section 'further or other relief,' a wider meaning than is warranted by the rules of construction, and, fourthly, to ignore the presumable unity of design common to Chapter XL and Chapters XXXVII to XXXIX and the distinction contemplated between ordinary suits and special proceedings. I have further to let in two anomalies, viz., to suppose that the pre-existing jurisdiction by an ordinary suit for removing a corrupt trustee which is unrestricted by Chapter I is restricted by Chapter XL, and that a concurrent jurisdiction is given to the High Court and District Courts as regards such removal when there was no apparent necessity for it.

59. I have again to vary the result of grammatical interpretation, not to remove an apparent error or incongruity, not to execute the declared intention of the Legislature, but to introduce a theory of consolidation which does not fit into the frame of the Section.

60. On the other hand, the contention for the respondent steers clear of these difficulties and suggests a simple solution as the one adopted by the Legislature, viz., adopt the principle of Romilly's Act as regards the reliefs granted under it, change the procedure by petition into a procedure by a special proceeding or suit in contradistinction to an ordinary suit for removing a trustee for misconduct and such relief as is consequent on it, and leave the latter which the Privy Council characterized in *Letterstedt v. Broers* L.R. 9 App. Ca. 371 as the exercise of a very delicate jurisdiction as unfettered as before, or as if Section 539 were not introduced into the Code of Civil Procedure, and thus secure to the public charities the benefit of prompt and speedy justice done under Romilly's Act, and, at the same time, avoid the difficulty and mischief felt during its practical operation by substituting a special suit for petition and by a special classification of the reliefs or particular trusts falling under the Section.

61. For these reasons I do not see my way to hold that the opinion expressed in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 is not sound in law though it is only an obiter dictum.

Best, J.

62. The arguments of the Vakils on either side, at the further hearing of this appeal, have been sufficiently stated in the judgment of my learned colleague weir, J., and, as the conclusions of my learned colleague on the points at issue are in accordance with my opinion already expressed in the case, I do not think it necessary to say much more than that the result of the further hearing has been to confirm me in the opinion already expressed.

63. Section 539 of the Code of Civil Procedure is taken not from Bomilly's Act, as appears to have been supposed by the learned Judges who took part in the case of *Narasimha v. Ayyan* I.L.R. 12 Mad. 157, but from the English Trustee Act of 1850; but the Legislature in wording Section 539 has taken care to remove all words which might have supported the contention that the procedure under the Section should be summary, being by petition and order thereon as in the English Acts, and has expressly provided that, it shall be by suit which is to result in a decree. Such being the case, there is no reason for holding that only non-contentious cases can be disposed of under Section 539.

64. As to the non-mention in the section of the removal of trustees as one of the remedies that can be given thereunder--as has been contended on behalf of the appellant, where the removal of a trustee is merely auxiliary to the appointment of another in his place, the mere fact of such auxiliary relief not being mentioned in the section is no reason for holding that it is beyond the Court's jurisdiction.

65. The ordinary Courts of this country administer equity as well as law, and there is no doubt that Courts of Equity can remove old trustees and appoint new ones in cases requiring such a remedy. See *Story's Equity Jurisprudence*, 1287, also 1289 where it is said that 'in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust.' Such being the case, when, in a suit brought before a District Court under Section 539 of the Code of Civil Procedure, such Court has power to appoint a new trustee, it must also be held to have power to remove, if necessary, the old trustee whose misconduct justifies the suit and consequent decree for the appointment of a new trustee.

66. It is contended on behalf of the respondent that Courts other than District Courts possessed prior to 1877, when Section 539 was first introduced into the Code of Civil Procedure, jurisdiction to entertain suits for removal of trustees, and that the result of holding that such suits can be brought under Section 539 in the District Court would be to abrogate that jurisdiction. The answer to this seems to be that Section 539 relates only to suits being brought by a few of the public interested in an endowment, and is an exception to the rule that all persons interested in a suit should join in bringing it, or that, when one or a few only sue on behalf of many, sanction should be obtained and notice issued under Section 30 of the Code of Civil Procedure--the cost of issuing these notices being often very heavy and therefore likely to deter persons from coming forward as public benefactors. In order, however, that the procedure intended for the public benefit should not be available to any ill-disposed person wishing to harm a trustee, the section requires the previous sanction to such suit of the Advocate-General or other officer appointed by Government to give such sanction. When all parties interested join in suing, or sanction is obtained under Section 30, the jurisdiction of the ordinary Courts as to suits for the removal of trustees still exists, I imagine. It is only in suits brought by a few of the persons interested with the sanction required by Section 539 that the District Court has exclusive jurisdiction--just as in similar suits under Act XX of 1863--and when a suit is brought under Section 539 with the necessary sanction the mere fact of a trustee having to be removed as an auxiliary relief is not sufficient to oust the jurisdiction of the District Court.

67. I would therefore set aside the decree of the lower Court and remand the case for disposal as previously suggested by me.

Weir, J.

68. This is an appeal from the decree of the District Court of Tanjore dismissing a suit brought under the provisions of Section 539 of the Civil Procedure Code for the removal of a trustee of a charitable endowment and for certain other reliefs.

69. The plaint set out that the endowment was granted to an ancestor of the plaintiffs and of the defendant by a former Maharajah of Tanjore for the charitable

purpose of maintaining a permanent water-shed on the road to Rameswaram, &c.; that the charity was conducted by the original grantee, and afterwards by the father of plaintiff No. 2 and of the defendant; that the management of the charity, subject to the control of the other members of the family passed to the defendant, and that the latter had for the last 17 years neglected to maintain the charity, and had misappropriated the incomes to his own use, and had failed to keep and submit accounts. The plaint also set out that the sanction of the Collector had been obtained for the institution of the suit under Section 539, Civil Procedure Code, and prayed for a decree removing the defendant from the management of the trust, appointing other proper trustees and granting such further or other relief as the nature of the case might require.

70. The defendant tiled a written statement resisting the suit on various grounds which need not here be adverted to; but it may be noted that he took no objection that the suit to remove him from the trusteeship would not lie under Section 539, Civil Procedure Code. The District Judge, however, framed an issue as to whether the plaintiffs were entitled to sue under Section 539 of the Code of Civil Procedure, and being of opinion that the judgment of the High Court in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 was authority for the proposition that a suit will not lie under Section 539, Civil Procedure Code, for the removal of a trustee, he dismissed the suit on that ground. Against this decision the plaintiffs appealed, and the appeal came on for hearing before a Bench consisting of Mr. Justice muttusami ayyar and Mr Justice best, and the learned Judges having differed in opinion as to the construction to be put on Section 539 of the Code of Civil Procedure, the case has been referred to a third Judge, as provided in Civil Procedure Code, Section 575, and has been very fully and ably argued before a special Bench, including the learned Judges who first heard it.

71. On behalf of the appellant it was urged in the preliminary portion of the argument that the District Judge was in error in holding that the decision in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 is authority for the proposition that a suit for the removal of a trustee will not lie under Section 539.

72. The decision in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 proceeded, it was pointed out distinctly, on the ground that 'the plaintiffs had not a direct interest in the trust within the terms of Section 539 of the Civil Procedure Code, and the suit was not therefore maintainable.' The Court, however, went on to remark as follows:-'Again we think it is not at all clear that a suit to remove a trustee can be maintained under Section 539 of the Civil Procedure Code. It has been pointed out by Mr. Pattabhirama Ayyar that Section 539, in most parts of it, follows the provisions of Romilly's Act which enabled trusts of certain classes to be carried out by summary procedure and not by suit. Amongst the objects of that Act one was to appoint a new trustee and it was held that, under the Act, a trustee could not be removed hostilely. No doubt Section 539 provides that a suit may be brought to appoint the trustee and for other purposes and it contains a proviso that further relief may be given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief which the section enables to be granted '

73. These observations, although no doubt entitled to great weight, are not, it must be admitted, necessary to the decision which proceeded, as has been seen, on the special ground already stated that the plaintiffs in the suit had not such a direct interest in the trust as is required by Section 539 of the Code.

74. The argument of the learned Pleader for the appellants that the decision in *Narasimha v. Ayyan* I.L.R. Mad. 157 is not a binding authority to the extent supposed by the District Judge may then be conceded. Nevertheless, as already stated, the observations of the learned Judges, who were parties to that decision, are entitled to great weight, and the doubts suggested by them having been adopted by the District Judge as the ground of the decision now under appeal, the whole question has now to be considered and determined on the materials available for decision.

75. The next argument advanced on behalf of the appellant was that there was some apparent inaccuracy in the argument, as reported, of the learned Judges in the passage cited, the provisions of Romilly's Act having been confounded with those of another and distinct Act, viz., the Trustee Act 13 and 14 Vic, Cap. 60, and

the power conferred in Section 32 of the latter Act in regard to the appointment of trustees having been assumed to be exercisable under the former Act. The last-mentioned Statute in Section 32 provides that 'whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or trustees either in substitution for or in addition to any existing trustee or trustees.' Although it has been held that the Court has power under Romilly's Act in certain circumstances to appoint new trustees see *Bignold v. Springfield*, 7 Clark & Fin. 71, it was with reference to this provision in the Trustee Act and not with reference to any provision in Romilly's Act that it was held, by the Court of Chancery in England that that Court had not jurisdiction under the 32nd Section to remove hostilely a trustee who was desirous of continuing in the trust. (In the matter of *Hodson's Settlement*, 9 Hare, 118). This decision was followed in the later case of *The matter of Richard Blanchard*, 3 De G. F. & J. 131, and in other cases cited in *Lewin on Trusts*, page 1028.

76. In this connection it was also pointed out by the learned Pleader for the appellants that of the reliefs specified in Section 539 of the Code of Civil Procedure, those set out in clauses (a) and (b) were apparently founded upon Sections 32 and 34 of the Trustee Act, 1850 13 and 14 Vict., Cap. 60; that set out in Clause (c) was a relief which it was held could be granted under Romilly's Act in *re Hall's Charity* 14 Beav. 115 while the reliefs set out in clauses (d) and (e) of the Section were equitable reliefs which, provided the cases were simple cases, could also, for the most part, be granted under Romilly's Act, [see *Lewin on Trusts*, 8th edition, p. 929, also cases summarized in *re Hall's Charity* 14 Beav. 115].

77. It appears to follow from the above that the decision in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 in so far as it is founded--if it is founded on the view that a trustee could not be removed hostilely under Romilly's Act is not sound.

78. No doubt he could not be removed hostilely as has been seen under Section 32 of the Trustee Act, and it may be--especially as it is now stated that both the enactments were referred to at the argument--that the learned Judges, although

they do not expressly refer to the Trustee Act, had that enactment in mind.

79. The similarity already noticed between the provisions of Sections 32 and 34 of the Trustee Act and the provisions of clauses (a) and (b) of Section 539 may be thought to some extent to favor the conclusion that the relief given in the Code is subject to the same restrictions as that given in the English Statute.

80. The determination of this question will, however, depend on wider considerations than the mere similarity of the provisions.

81. These considerations will be dealt with hereafter, It may, however, here be pointed out that, while Section 32 of the Trustee Act speaks of appointing new trustees in substitution for, or in addition to any existing trustee or trustees, the Civil Procedure Code in Clause (a.) speaks merely of appointing new trustees under the trust. The difference of language can scarcely have been unintentional.

82. Before leaving this portion of the case it may also be as well to notice that the procedure under the Trustee Act was a summary procedure. The procedure is prescribed in Sections 40 to 43. Under Section 40 of the Act the party might apply by petition for an order of the Court of Chancery, and might give evidence by affidavit, and the matter was to be disposed of by an order of the Court Section 43 of the Act. In this respect also, as will be seen hereafter, the language of Section 539 of the Civil Procedure Code is materially different from that of the Trustee Act.

83. Proceeding now to Romilly's Act, 52 Geo. III., Cap. 101, its provisions, so far as they are material, are as follows:

84. 'Whereas it is expedient to provide a more summary remedy in cases of breaches of trusts created for charitable purposes, as well as for the just and upright administration of the same. Be it therefore enacted in every case of a breach of any trust or supposed breach of any trust created for charitable purposes or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal or Master

of the Rolls for the time being, or to the Court of Exchequer stating such complaint and praying such relief as the nature of the case may require, and it shall be lawful for the Lord Chancellor, Lord Keeper and Commissioners for the custody of the Great Seal and for the Master of the Rolls and the Court of Exchequer, and they are hereby required to hear such petition in a summary way and upon affidavits or such other evidence as shall be produced upon such hearing to determine the same and to make such order therein and with respect to the costs of such applications as to him or them shall seem just; and such order shall be final and conclusive unless the party or parties who shall think himself or themselves aggrieved thereby shall, within two years from the time when such order shall have been passed and entered by the proper officer, have preferred an appeal from such decision to the House of Lords, to whom it is hereby enacted and declared that an appeal shall lie from such order.'

85. The material portions are that in every case of a breach of any trust or supposed breach of trust created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, any two or more persons may present a petition to the Court of Chancery or to the Court of Exchequer stating such complaint and praying such relief as the nature of the case may require and the Court shall make such order thereon as shall seem just.

86. Prior to this enactment the only mode of proceeding in such breaches of trust had been by information of the Attorney-General and the new procedure was welcomed as giving a more speedy and less costly remedy--(see Lewin on Trusts, Chapter XXX, Section IV, and Story's Equity Jurisprudence, Chapter XXXII). In its practical operation, however, the Act is said to have disappointed the expectations that were entertained of it, and the construction put upon the Act confined to comparatively narrow limits, the reliefs which could be granted under it--[see Lewin on Trusts, Chapter XXX, Section IV, clause 4, and the observations of Lord Redesdale on the Corporation of Ludlow v. Greenhouse 1 B N. S. 49] The decisions on the point are summarized in a note, which will be found in re Hall's Charity 14 Beav. 121. It is unnecessary to go through the decisions there cited, but speaking generally although the Court exercised wide powers under the Act in the

absence of adverse claims, or where third persons were not interested, the Act was held to be confined in its operation to simple cases of abuse of a clear trust and it was also held not to apply to cases of constructive trusts.

87. It has been argued on behalf of the appellants that the Indian Legislature, when framing Section 539 of the Code of Civil Procedure, had the advantage of the experience derived from the practical operation of Romilly's Act, and was therefore careful to frame this newly introduced provision of the Code in such a way as to avoid the difficulties which had arisen on a construction of the English Statute. This argument is one which from the nature of the case cannot well be supported otherwise than on the inferences derivable from certain considerations which will now be discussed, and the first of these matters for consideration is the language and the apparent scope, as defined by that language, of the provisions of the section under consideration.

88. Romilly's Act, as has been seen, was intended to provide a more summary remedy than that hitherto existing. The procedure was to be by petition which was to pray for such relief as the nature of the case might require, and the Court was to make such order thereon as should seem just.

89. Two or more persons were empowered under the Act to put the Court in motion and the Act applied in every case of a breach of any trust or supposed breach of trust created for charitable purposes, or whenever the direction or order of a Court of Equity should be deemed necessary for the administration of any trust for charitable purposes. Comparing the language of Section 539 of our Indian Code, the provisions of Romilly's Act last cited would appear at first sight to be very closely reproduced in the opening lines of Section 539, viz., 'In case of any alleged breach of any express or constructive trusts created for public, charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust.' Even, however, in these lines, there are these material differences, that the provision in the Indian Code applies to constructive trusts while Romilly's Act was held not to apply to them in *ex parte Brown* (Cooper, 295), and the words the 'direction of the Court' are substituted in the Civil Procedure Code for the words 'the direction or order of the Court' in the

English Act. It is unnecessary for our present purpose to notice that the provision in the Code applies also to trusts for religious purposes.

90. Proceeding next to the reliefs which can be given under the two enactments, we find that while the Court under Romilly's Act was to make such order as shall seem just on the prayer for relief as the nature of the case might require, under the Code of Civil Procedure, the Court is empowered, besides the specific reliefs already noticed, to grant such further or other relief as the nature of the case may require.

91. These specific reliefs include, as has been seen in clauses (a) and (b), reliefs which were specifically provided for subsequently to Romilly's Act by a different enactment (the Trustee Act) and other reliefs, as to some of which it is, at least, doubtful whether they could be given under Romilly's Act.

92. The language of the Section in regard to relief especially in the words 'such further or other relief as the nature of the case may require' appears to me wider than the language of Romilly's Act, and in respect of relief the Section in its entirety appears to me to travel beyond the limits laid down by the express terms of the English Statute, as well as by the construction put upon the terms of that Statute by the English Courts.

93. Lastly, as to procedure, the procedure throughout under Romilly's Act is clearly expressed to be a summary procedure, and one of the points most debated at the argument in this case has been whether the procedure, under Section 539 of the Indian Code, is to be held to be a summary procedure or in the nature of a summary procedure.

94. In favour of the view that the procedure is not of a summary character, there is, it is argued in the first place, the heading of Chapter XL itself 'of suits relating to public charities,' and there is the provision in the Section itself that the parties may institute a suit to obtain a decree. Under Romilly's Act and under the Trustees' Act, the adjudication which the parties were entitled to obtain was to be an order and without in any way relying on the clear distinction by definition in our Indian Code between 'decree' and 'order,' it seems reasonable to infer from the use of the

terms 'petition' and 'order' in the English Statute that the adjudication under the English Statute was one of a less formal and more summary character than that contemplated under the Indian Code.

95. The distinction between summary procedure resulting in a determination by order is one which is well known to the Indian Courts (see, for example, the Minors Act and the Succession Certificate Act), and the Legislature would not have used in Section 539, Civil Procedure Code, the words 'suit' and 'decree,' it may fairly be contended, if they had intended to introduce merely a, summary procedure.

96. This view is strengthened by a reference to the Indian Trusts Act - Act II of 1882, which Act is declared in Section I not to apply to public or private religious or charitable endowments. This Act in Section 72 and in Section 74 (in the latter section following the English Statute) provides a summary procedure by petition and 'without instituting a suit' for the reliefs therein specified, that contemplated in Section 74 being the appointment of new trustees. This Act, viz., Act II of 1882, was passed in 1882 at a time when Section 539 of the Civil Procedure Code was amended and made applicable to religious endowments, and the preservation by express terms of a summary procedure under the Indian Trusts Act, when contrasted with the provisions in Section 539 of the Civil Procedure Code, that the procedure shall be by suit is, it may be said, peculiarly significant.

97. On the other hand, it is argued for the respondent, that the peculiar position of chapter XL in the scheme of the Civil Procedure Code under Part V, Special Proceedings, and following immediately on the chapters relating to 'Reference to arbitration,' 'Proceedings on agreement of parties,' and 'Summary Procedure on Negotiable Instruments,' warrants the view that suits other than suits of the character of regular suits were contemplated in Section 539 of the Code of Civil Procedure.

98. An observation of Mr. Whitley Stokes, the learned Editor of the Anglo-Indian Codes, and an undoubted authority, vol. II of the Anglo-Indian Codes, page 429, is cited in support of this view.

99. In this connection, it may, perhaps, be observed that chapter XL of the Code would appear to have been interpolated, if it may be so said, into the Civil Procedure Code of 1877, at the last moment. The provision does not appear in the latest edition of the Bill sent to this Court under date 16th October 1876, and the Act received the sanction of the Governor-General on the 31st March 1877. In the Bill of 10th October 1876, chapter XXXIX, was as now 'On summary procedure on Negotiable Instruments,' while chapter XL related to 'Appeals from Original Decrees.'

100. I am not, however, able to see that the position of chapter XL in the Code of Civil Procedure, or the other argument cited affords any valid ground, in the face of the express language of the section and in view of the strong contrast between that language and the language of the English Statutes, for the opinion that the procedure under Section 539 of the Civil Procedure Code is intended to be of a summary character.

101. Moreover, if regard be had to the importance of the subject-matter of the suit, there is no reason why the suit should be of a summary character. On the contrary, there are very strong reasons why it should not be such.

102. It appears to me, therefore, that Section 539, Civil Procedure Code, differs materially both as respects the nature of the relief that can be granted and the procedure which has to be followed from the English Statutes on which the Court proceeded in arriving at the decision in *Narasimha v. Ayyan* I.L.R. 12 Mad. 157 and that those Statutes and the construction put upon them can, therefore, be no safe guide in determining the construction of the provision in Section 539 of our Indian Civil Procedure Code. I arrive at this opinion on a construction of the section itself and an examination of the English Statutes.

103. Having arrived at this conclusion for the reasons stated, it may now more appropriately than could hitherto have been done be pointed out that the inconvenience, which must manifestly arise from the construction that the reliefs contemplated in Section 539 do not extend to the removal of a trustee, would be very great. If the view that a trustee cannot be removed under the section is correct, it would appear to result that, while a suit for the appointment of new

trustees can be instituted only in the District Court, and after obtaining the required sanction, a suit for the removal of a trustee, which must in most cases be a necessary preliminary, will ordinarily have to be instituted elsewhere.

104. Under the rules relating to the valuation of suits and jurisdiction, the latter suit would generally be instituted in a District Munsif's Court, and Anr. suit arising out of the same cause of action would have to be brought in the District Court. Assuming the cause of action in both suits to be the same--an assumption which in the conditions stated may not unreasonably be made--the splitting of the suits would be opposed to the provisions of Section 43 of the Code of Civil Procedure. It may also, I think, fairly be conceded, as was maintained at the argument, that the object of the section would be in great part defeated if the Court had not power in a suit framed under the section to remove a defaulting trustee. The object of the section is to take cognizance of breaches of trust of the special class stated and to give direction for the administration of the trust in furtherance of the object of the trust. How, it may be asked, is the object to be effected if the hands of the Court are tied in regard to the removal of the trustee? The new trustees to be appointed under the section are not, as is the case in regard to the trustees under Section 32 of the English Trustee Act, expressed to be appointed in substitution for, or in addition to, the existing trustees. The power is apparently unrestricted and the basis of the suit being an alleged breach of trust, the Court is presumably not to act unless the alleged breach of trust is ascertained after trial to be well founded. As it is not every breach of trust which of necessity renders it obligatory to remove a trustee, the Section may, it seems to me, not unreasonably, be read as if it contained the words 'in case of a trustee being found to have committed a breach of trust which renders his removal necessary, the Court may appoint new trustees.'

105. If the Court cannot, on such a result being arrived at, remove the defaulting trustee, the power to appoint a new trustee seems uncalled for and the remedy futile and illusory.

106. The words of the section relating to relief, viz., 'such further or other relief as the nature of the case may require,' are, certainly in my opinion, wide enough to render such a futile result a far from necessary construction, The omission,

however, from the section of any words directly importing a power to remove a trustee has been much pressed on the side of the respondent, and an inference against the existence of a power to remove a trustee has been said to be derivable from Section 14 of Act XX of 1863, in which power is expressly given to Courts to remove a trustee of a mosque or temple. For the reasons already stated, however, I am of opinion that the omission of any express provision conferring a power to remove has not the significance sought to be given to it.

107. In connection with this portion of the case, the argument has also extended to a brief examination of the state of the law on the subject of the removal of trustees of such charitable or religious institutions as are described in Section 539 anterior to the enactment of that section, it having at one portion of the argument been asserted that no suit for the removal of a trustee presumably lay before Section 539 found a place in the Civil Procedure Code.

108. The provision now enacted as Section 539, Code of Civil Procedure, made its appearance for the first time, as already noticed in the Civil Procedure Code, Act X of 1877. It found no place in the first Civil Procedure Code, Act VIII of 1859.

109. Apart from authority on the subject, there can however be no question that a suit would, at any period of our administration, have lain for the removal of a trustee on the ground of his having committed a breach of trust. That the supreme Court possessed the jurisdiction scarcely requires to be stated. The Courts administering justice outside the Presidency town also clearly possessed it. From their first establishment these Courts were vested with an equitable jurisdiction (vide Regulation II of 1802, Section 17), and the power to remove defaulting trustees is a power which the Courts of Equity in England have indisputably exercised in a long series of cases (vide Story's Equity, Sections 1287, 1288, 1289 and the cases there cited). There is, however, express authority on the subject in our own High Court Reports, viz., in *Ponnambala Mudaliyar v. Varaguna Rama Pandia Chinnatambiar* 7 M.H.C.R. 117 In that case, a District Judge had dismissed a suit for the removal of a trustee of certain charitable trust who was charged with malversation, on the ground that in his opinion Regulation VII of 1817 required that application should first be made in such cases to the Board of

Revenue. The High Court observed that the decision of the District Judge was wrong:

110. 'The Courts had unquestionably jurisdiction in such cases prior to the enactment of Regulation VII of 1817, and there is nothing in the Regulation to deprive the Courts of their jurisdiction, while it gives the Board of Revenue the power and imposes upon it the duty of interfering whenever it appears necessary to do so for the protection of charitable endowments. The Regulation is clearly intended to be supplementary of existing remedies. This was held by the late Sudr Court in the decision in *Kassylvassy Kristna Putter v. Vangala Shangaranat Josser* (Sudder Decisions of 1858, p. 39) which was followed in *Narasimha Charry v. Tundree Comara Tata Charry* Sudder Decisions of 1858, p. 141.'

111. Besides the case cited, there appear to be no other reported decisions on the matter. The power of supervision conferred by the Regulation and exercised by the Board of Revenue may not unreasonably, perhaps, be taken to account for the apparent paucity of suits relating to such trusts. The case of the Attorney-General v. Brodie 4 M.I.A. 190, was also referred to, but it merely decides that the then Supreme Court of Madras had an equitable jurisdiction similar to and corresponding with the equitable jurisdiction exercised by the Court of Chancery in England over charities.

112. The power then to remove a trustee for breach of his trust undoubtedly existed prior to the enactment of Section 539 in the Code of 1877.

113. What then, it may be asked, was the intention of the Legislature according to reasonable presumption in enacting the provision which first appeared in the Code as Section 539 of Act X of 1877.

114. On behalf of the respondent it has been urged that it was the intention of the Legislature to confer a special privilege by enabling two or more persons to sue in the case supposed for certain specified reliefs only, but in the case of the relief being for the removal of the trustee, to leave the persons having the same interest to their ordinary remedy by suit after obtaining, if necessary, the permission of the Court as provided in Section 30 of the Code for one or more to sue on behalf of all,

and it was also argued that the section was confined to non-contentious cases.

115. In India non-contentious suits of this class are, it may be remarked, as far as my experience enables me to speak, comparatively few, whatever may be the case in England.

116. In my opinion, this argument does not give a reasonable view of the intention of the Legislature. The object aimed at was, it appears to me, to consolidate and embody in one definite provision the procedure to be followed in British India in suits relating to public, charitable and religious endowments other than the limited classes of such endowments which fall to be dealt with under Act XX of 1863. It cannot reasonably be contended that the intention of the Legislature was to take away any existing remedies, but if such was not their intention, and if the intention was not to embody the law of procedure in one single provision, then we are landed on the anomalies and difficulties already noticed of the party moving the Courts having to split up his suit and seek for one relief in respect of the dismissal of a trustee in a Court subordinate to the District Court and for the other specified reliefs in the District Court itself.

117. Such a state of affairs could not, I think, it may reasonably be concluded, have been the intention of the Legislature.

118. For the reasons stated, therefore, I arrive at the conclusion that the opinion expressed in the case of *Narasimna v. Ayyan* I.L.R. 12 Mad. 157 that Section 539 of the Code of Civil Procedure is subject to the restriction imposed by the construction placed by the English Courts on Romilly's Act and on the Trustee Act, 1850, is not well founded, and that, although the power to remove a trustee is not in express terms given by Section 539 of the Code of Civil Procedure, it is a power which, from the nature of the case, may reasonably be held to have been given under the wide words 'such further or other relief as the nature of the case may require.'

119. For the reasons stated, I would allow the appeal, and reversing the decree of the District Judge, I would remand the suit for trial on the merits. The costs of this appeal, and in the lower Court, will abide and follow the result of the re-trial.

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