

Augustine and ors. Vs. Medlycott and ors.

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Court : Chennai

Decided On : Jan-19-1892

Reported in : (1892)ILR15Mad241

Judge : Parker and ;Subrahmania Ayyar, JJ.

Appellant : Augustine and ors.

Respondent : Medlycott and ors.

Judgement :

1. The first point taken before us is that the suit is not one within the scope of Section 539 of the Civil Procedure Code, and hence will not lie in the District Court. The District Judge held that, though the suit was not one for any of the five kinds of relief specially described in that section, the relief sought for came under the words 'such further or other relief as the nature of the case may require.'

2. It appears to us that the suit is not of the class contemplated in Section 539 at all. That section deals with suits brought by beneficiaries against trustees, or for any of the special purposes mentioned in Section 539; whereas this suit is brought by persons claiming to be the de jure, church-wardens entitled to possession of the building against their predecessors in office whose term has expired and who refused to surrender possession and have usurped possession of the church and become trespassers. Plaintiffs Nos. 1 and 2 on the one side and defendants Nos. 1 and 2 on the other are joined in the suit in order to obtain a declaration at the

same time as to the purposes of the trust, as to which the defendants, members of the congregation, are not in accord with the plaintiffs.

3. We are of opinion, therefore, that the suit should have been brought in the Subordinate Court; but we do not think it necessary on that ground to reverse the decree and return the plaint for presentation to the proper Court. The District Court had undoubtedly jurisdiction to try the suit, and we agree with the view taken by the High Courts of Allahabad and Calcutta as to the effect of Section 15 of the Civil Procedure Code—*Nidhi Lal v. Mazhar Husain* I.L.R. 7 All. 230 and *Matra Mondal v. Hari Mohun Mullick* I.L.R. 17 Cal. 155. In this case the suit has been fully tried on the merits by a Court which had jurisdiction to try it, and it would be manifestly unfair to direct an unnecessary retrial on account of an irregularity not affecting the merits.

4. The next point urged is that all the defendants' witnesses were not examined. We find that issues were settled on 30th July 1890, and the suit was then posted for final hearing on 14th October. On 7th October the defendants applied for summonses for 17 witnesses, many of whom were resident in the Cochin State. The trial began on 14th October and continued for several days, but not till 24th October did the defendants ask for an adjournment on the ground that all their witnesses were not present. It was not then stated that the summonses had not been issued, and there is nothing before us to show that they were not issued. The Judge rightly held that the defendants had been guilty of negligence and refused an adjournment. It is true that further time was asked for in September in order to obtain instructions and evidence from the Patriarch of Babylon, but this necessity (if real) does not excuse the defendants in neglecting to summon till too late witnesses who resided in their own immediate neighbourhood. Nor was the necessity for instructions from Babylon mentioned in the petition of 24th October.

5. Passing to the merits, it was next objected that the District Judge was not justified under Sections 57 and 87 of the Evidence Act in referring to the works spoken of in paragraphs 8 and 9 of his judgment. In this contention also we are unable to agree. Of these works, the first was published more than 200 years ante litem motam, the second in 1839, and the third, *India Orientalis Christiana*, was

published at Rome in 1794 and is of recognized historical authority. So far, therefore, as these books related to matters of public history, the Judge was justified in referring to them.

6. With reference to the general history of Christianity in Malabar we may also refer to Logan's Malabar Manual. Practically, however, there is no dispute as to the events which led to the Synod of Diamper in 1599, or to the fact that Archbishop Menezes in that year brought the Syrian churches in Malabar into subjugation to the Church of Rome. By decree VIII, session III of that synod the acknowledgment of the Patriarch of Babylon as supreme pastor was expressly forbidden under pain of excommunication. It is true no doubt as pointed out by the District Judge that after the synod several of the Syrian churches reverted to Nestorian doctrines and united themselves to what is known as the Jacobite church; but we may point out that the Jacobite Bishop sent out in 1653 (Mar Ignatius) was sent by the Patriarch of Antioch and not by the Patriarch of Babylon. It appears (Manual, p. 209) that the present community of Syrian Christians, not under allegiance to Rome, is at the present day under the Patriarch of Antioch, and we are not referred to any historical work which shows that there is any body of Christians now in Malabar rejecting allegiance to Rome which is under the jurisdiction of the Patriarch of Babylon. It is a significant fact that the defendants have never alleged that the Palayur church is under the Patriarch of Antioch, yet that prelate now represents those Nestorian doctrines which were held in Malabar anterior to the Synod of Diamper. It is remarkable that, while the defendants now claim that the trust should revert to the ancient faith, notwithstanding the lapse of time during which the authority of Rome has been impressed upon the trust, they do not claim to be subordinate to the only patriarch who now exercises spiritual jurisdiction in Malabar over congregations professing the Nestorian doctrine.

7. It was urged that the evidence to show that the Palayur church came under the jurisdiction of Rome at the Synod of Diamper was but meagre. The facts shown, if not many in number, are, however, significant, and there is absolutely no evidence on the other side to show that from 1599 to 1861 the Patriarch of Babylon exercised any jurisdiction over their church. In Hough's History of Christianity in India, Vol. II, page 314, published in 1839, reference is made to the arrival of two

Carmelite monks on the Malabar Coast in 1657 after the martyrdom of Bishop Attala and to the dissatisfaction of the Jesuits and Portuguese at their arrival. The narrative tells of their arrival at Palayur, one of the parishes in the diocese of Angamale (a Roman Bishopric), and that the cattanar (the rector of the place) concealed himself in order to avoid the unwelcome visitors. This certainly tends to show that at that time Palayur was under the jurisdiction of the Latin Bishops.

8. There can, we think, be no doubt that the Palayur church, entered in the list of Catholic churches at page 267 of *India Orientalis Christiana*, is the church now in dispute. Palayur is supposed to be one of the most ancient churches in Malabar, and it can hardly be supposed its name would be omitted in such a list. The mark affixed to the name shows that Palayur was one of the churches destroyed by fire by the army of Tippu Sultan.

9. It is scarcely possible that there can be stronger evidence as to what is really the faith and discipline of any church than the rituals in use in that church. Those in use at Palayur are the Syriac rituals prescribed for the use of the Malabar Romo-Syrian churches, and are printed at the Press of the Propaganda at Rome. Had the church not been Romo-Syrian, it is inconceivable such books would have been either supplied by the Propaganda or have been allowed to be used in the church by any of the metrans under a schismatic patriarch. It is not even suggested that from 1599 up to the present date any other ritual has been used. The oral evidence likewise points to the inference that up to the coming of Mar Thoma in 1861 the Palayur church was subject to the jurisdiction of the Roman Bishop of Virapoli.

10. It is admitted that Mar Thoma was sent by the Patriarch of Babylon in 1861, and that the Palayur church placed itself under him. Whether he came or professed to come with or without the sanction and authority of the Papal See there is no evidence to show; but his stay was short, and he left India in 1862. The defendants contend that after his departure the Palayur church remained under the authority of a metran appointed by the Patriarch of Babylon, while the plaintiffs assert that the church then submitted to the 'Gubernador' of Cranganore.

11. A large number of documents were put forward as showing that the Gobernador exercised jurisdiction over the Palayur church subsequent to 1861 and up to the coming of Bishop Melius in 1874. It is objected before us in appeal that these documents were not proved and that they were not produced at the right time. No such objections appear to have been taken in the Court below, and the Judge found that their genuineness was proved. A similar objection was taken in the Chittatur case and overruled--Bishop Melius v. The Vicar Apostolic of Malabar I.L.R. 2 Mad. 295 The documents unquestionably show that jurisdiction was exercised by the 'Gobernador.'

12. It may be noted as curious that the Palayur church did not on the departure of Mar Thoma again submit itself to the jurisdiction of the Bishop of Virapoli. In explanation, it is suggested that discipline was lax, and that so long as the churches did not place themselves under heretical bishops, the Roman authorities were not very particular which Latin Bishop was acknowledged. This explanation is by no means improbable. It was in 1861 that, in accordance with a concordat made between the Vatican and the King of Portugal, commissioners were sent out to define the jurisdiction of the Goanese prelates and the Vicars Apostolic under the control of the Propaganda. It was not, however, until 1887 that the whole of the Roman churches of the Syrian rite (Palayur included) were handed over to the Vicar Apostolic of Trichur by the Vicar-General of the Portuguese Mission at Crangahore (vide Exhibit T T A letter from the Vicar-General, Cranganore, to Bishop Medlycott, dated 24th January 1888).

13. It is then contended that, at any rate, since the arrival of the Bishop Melius in 1874 the Palayur church has ceased to acknowledge the jurisdiction of the Pope of Rome, and has returned to the Syro-Chaldean faith as it existed previous to 1599. Upon a careful examination of the evidence, we are not prepared to hold that Bishop Melius came to Malabar in the character of a bishop repudiating the supremacy of the See of Rome. The book marked C C C C Directorium spirituale a Reverendissimo Domino Elia Joanne Mello auctum, printed at the Propaganda in Rome in 1868 shows conclusively that in 1868 he was a Roman Catholic Bishop, and, as such, published a book which was printed at the Press of the Propaganda at Rome, of which the preface written by himself expressly asserted

the supremacy of the Pope and denounced the Nestorian heresy to which he is now alleged to be an adherent. The first defendant admits that this book is now used in the schools under him.

14. Bishop Mellus was no doubt sent to Malabar by the Patriarch of Babylon. Exhibit D D D D is a certified translation of the Syriac letter of the Patriarch introducing him to the church at Trichur. Nothing can be clearer from that letter than that the patriarch himself at that time acknowledged the jurisdiction of the Roman See. It is quite clear that the real object which the patriarch had at heart was that the Romo-Syrian churches of Malabar should be exempted from the jurisdiction of the Latin Bishops and placed under a bishop of the Syro-Chaldaic rite. For that object he had twice visited Rome, and it is quite clear from what he says that it was not the supremacy of the Pope, but the supervision of the Propaganda which the Romo-Syrian church so strongly objected to. It is apparent from the letter itself that his petition to the Pope was unsuccessful, for he goes on to say that in his capacity of Patriarch of Babylon (no mention is made of the Pope's approval) he sends Bishop Melius, though he anticipates he will meet with opposition from the Propaganda on his arrival in Malabar. Exhibit XVIII, which contains the introduction given by the Patriarch to Her Majesty's Consul-General at Bagdad, and is forwarded to the Bombay Government, contains the same complaint against the tyranny of the Roman Propaganda, against which the protection of Her Majesty's Government is requested.

15. There is considerable evidence that on first arrival in Malabar Bishop Melius professed to have come with the authority of the Pope. That authority was, however, soon questioned in a suit brought against him by the Vicar Apostolic of Malabar *Bishop Melius v. The Vicar Apostolic of Malabar*, I.L.R. 2 Mad. 295 in which the bull which he professed to hold from the Pope was denounced as a forgery. The evidence leaves no doubt that in course of time he was excommunicated by the Pope and was then recalled by the Patriarch of Babylon. Before leaving Malabar he appointed the first defendant as Chor Episcopa, but there is nothing to show that this appointment was ever approved by the patriarch, and the validity of any appointment under such circumstances may well be questioned. Exhibit XXIII is the pastoral letter addressed by Bishop Mellus to his

flock in 1882 on taking leave of them. It does not allude to the circumstances under which he was undoubtedly recalled, and contains no repudiation of the supremacy of the Pope, but contains an earnest appeal to remain faithful to the ancient Chaldean faith notwithstanding the interference of 'foreigners, '

16. The inference, therefore, to be drawn from this evidence is that the Palayur church in submitting originally to the authority of Bishop Melius never intended to repudiate the supremacy of the Roman See. Dr. Melius held himself out as long as he could as having come with the sanction of the Pope; when that illusion was dispelled, he set up the plea that the Patriarch of Babylon had the right to appoint him; but he was then recalled by the patriarch. On his departure the yogam and kaikars did no doubt submit themselves for a time to the authority of the first defendant, who now denies the supremacy of the Pope, though there is no evidence that he himself is an adherent to Nestorian doctrines.

17. That the vicar and the kaikars did again submit themselves to the Pope in 1886, and that Bishop Medlycott did visit and formally assume jurisdiction over the church there is no reason to doubt. But even had the first defendant held uninterrupted possession since 1882, that fact could make little difference. We have seen that from 1599 till 1882, with the doubtful interruption of one year (1861), the church had been held upon a trust for the worship of God according to the faith and discipline of the Church of Rome, and that being the case, the fact that the Palayur congregation prior to the Synod of Diamper in 1599 may have been Nestorian in doctrine is immaterial. The objects of the original trust, if different, have long since ceased to exist, and the profession for 290 years of the faith, doctrine and discipline of the Roman Catholic Church according to the Romo-Syrian ritual is amply sufficient to impress a trust of that character upon the funds and property of the Palayur church. We have no doubt that the decision of the Judge upon this main contention is right.

18. Objection was then taken that plaintiffs, Nos. 3 and 5 were not duly elected as kaikars. The point does not appear to have been strongly pressed in the lower Court, and we do not think there is sufficient reason to hold there was any technical informality in summoning the meeting. The plaintiffs, at all events,

represent that part of the yogam who are desirous of rescuing the property of the church from men who are seeking to divert the use of the trust to purposes alien to its proper object, and are on that ground entitled to succeed.

19. We can see no reasonable objection to the form of the decree. The language certainly would not preclude the See of Rome from transferring spiritual or ecclesiastical jurisdiction to any other Vicar Apostolic, and it is quite clear that those members of the yogam who repudiate the objects of the trust have for the time disqualified themselves from the exercise of the right to take part in its management.

20. The appeal must, therefore, be dismissed with costs.

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