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Present: Pereira J. and De Sampayo A.J.

RUSTOMJEE *et al.* *v.* KHAN *et al.*

79—D. C. Colombo, 595.

Ordinance No. 7 of 1871—Does it apply to public trusts?—Civil Procedure Code, s. 639—Does it supersede the Ordinance (No. 7 of 1871)?—Non-Christian may swear.

Semble, per PEREIRA J.—Ordinance No. 7 of 1871 applied not only to private but to public trusts as well. In any case section 639 of the Civil Procedure Code was not intended to supersede the Ordinance so far as public charitable trusts were concerned.

Under the Oaths Ordinance, 1895, it is open to a non-Christian who believed in God to swear rather than affirm.

THE facts are set out in the judgment of the Acting District Judge (T. F. Garvin, Esq.):—

This is a proceeding under the provisions of Ordinance No. 7 of 1871 for the appointment of fresh trustees to have control over the Parsee burial ground in place of the first respondent, P. D. Khan; the petitioners, J. Rustomjee and J. K. Hormusjee, further pray that they be appointed trustees.

Under deed 1,179 dated April 10, 1847, Byramjee Suparjee and Cowrasjee Eduljee acquired the premises involved in this case in trust for the members of the Parsee community upon the trust and for the purposes to be determined by the committee of superintendence.

Upon the death of Suparjee, and at the request of Cowrasjee Eduljee, who desired to relinquish his trust, it was resolved at a meeting of the Parsee community that Coverjee Byramjee Guzder, Nowrajie Pallonjie Kapadia, and Pestinjee Dinshaw Khan, the first respondent, should be trustees in his place.

In accordance with this resolution Cowrasjee Eduljee, by deed 5,333 dated November 26, 1885, transferred the premises to the three persons above named subject to similar trusts.

Coverjee Byramjee Guzder and Nowrajie Pallonjie Kapadia are now dead, and the sole trustee is P. D. Khan, the first respondent.

The grounds upon which the intervention of this Court is sought are—

(*a*) That the first respondent tendered his resignation, which was accepted by the Parsee community; that at two meetings held thereafter the first and second petitioners were elected as trustees, and that the first respondent refused to transfer the trust property to them.

(*b*) That the first respondent has failed to render an account of his trusteeship, has expended trust moneys without the authority of the committee of superintendence or of the Parsee community, and has failed to attend to and preserve the burial ground at Kotahena, and has otherwise failed and neglected to perform his duties as trustee.

(c) That the first respondent is advanced in years, has left the Colony, and is now residing at Bombay.

Mr. Jayawardene, on behalf of the respondent, took the preliminary objection that those allegations do not bring the application within the contemplation of section 4 of Ordinance No. 7 of 1871, and that the petitioners are accordingly not entitled to the relief claimed.

Section 4 of Ordinance No. 7 of 1871 sets out the cases in which the intervention of this Court may be sought, and unless the petition can be brought within one or other of the four sub-sections to that section it must fail.

The petitioners contend that their petition falls within sub-sections (1), (2), and (3) of section 4.

It is contended for the respondents that sub-section (1) does not apply, because the trust deed does contain adequate provision for the appointment of a new trustee. This contention is based upon the fact that the habendum clause of deed 5,333 runs as follows:—"To have and to hold unto the said P. D. Khan, C. B. Guzder, and P. Kapadia and the survivor or survivors of them and his heirs, executors, administrators, and assigns."

P. D. Khan being the surviving trustee, it is argued, is entitled to appoint trustees in his place.

It is quite clear that this deed does not in express terms give the trustees, or any of them a power to appoint trustees in their place. The Court is invited to infer such a power from the fact that the word "assigns" appears in the habendum clause.

There is ample authority in English law for the proposition that the mere existence of the word "assigns," as in this case, does not give a trustee a right to relieve himself from the burden of the trust by assignment *inter vivos*. The case of *Titley v. Wolstenholme* [1] is in point. The clause relied on in this case is exactly similar in language. Even assuming that P. D. Khan had the right to assign by devise or bequest to take effect after his death, he clearly has no authority to make an assignment *inter vivos*.

P. D. Khan having, as alleged, resigned his trust and left the Island, there is no adequate provision in the deed for the appointment of new trustees. I am therefore of opinion that section 4 (1) applies to the facts of this case.

Moreover, it seems to me quite clear that the allegations in the petition if true, bring the case well within the provisions of section 4 (3). In paragraph 6 of the petition it is stated that the first respondent, who is the sole surviving trustee, "is now advanced in years, and has left the Colony, and is residing in Bombay, and has become incapable of acting as such trustee." This allegation brings the petition well within the case "where the remaining trustee or trustees may be resident out of the Colony"—section 4 (3).

In view of the conclusions at which I have arrived, it is unnecessary to consider whether the allegations in the petition touching misconduct amount to misconduct within the meaning of section 4 (2).

I have still to consider the general objection to the procedure adopted in this case, on the ground that being a public charitable trust the

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only remedy open to the petitioner is a proceeding under the provisions of section, of the Civil Procedure Code. The Parsee community, numerically speaking, is quite an insignificant portion of the general community. The object of the trust is to provide a burial ground for their use, but there is nothing in the deed which creates an unqualified right in each member of the Parsee community to burial in those grounds. The trusts and uses are to be determined and regulated by the committee of management. I am unable to say that such a trust is a public charitable trust within the contemplation of section of the Code.

I accordingly answer issue No. 1 in the affirmative, and direct that the case be set down to be mentioned on June 22 next for the purpose of fixing a date for the trial of the remaining issues.

Elliott and *A. St. V. Jayewardene*, for the first respondent, appellant.

Bawa, K. C., for the petitioners, respondents.

Cur. adv. vult.

September 8, 1914. PEREIRA J.—

The petition presented to the District Court by the first and second respondents to this appeal does not mention the provision of the law under which it was presented, but presumably it was a petition under section 4 of Ordinance No. 7 of 1871 for the nomination of a trustee to have control of the trust property described in the petition.

At the very outset of the argument in appeal it was contended that the trust referred to was a trust created for a public charitable purpose, and that the only action that it was open to the petitioners to take was action under section 639 of the Civil Procedure Code, one of the reasons urged being that Ordinance No. 7 of 1871 applied to private and not to public trusts. As at present advised, I am not prepared to give the Ordinance such a limited operation. No reason for doing so appears in the Ordinance itself. It was also argued that, in any case, so far as regards a public charitable trust, section 639 of the Code must be deemed to have superseded the Ordinance. I am not inclined to think so. The scope of the Ordinance is no more than merely to appoint a trustee, leaving him to assert his rights as such in competent courts of justice, and the necessity for proceeding under the Ordinance arises in the event, *inter alia* of the death of a trustee, or his incapability to act, or his having left the Island, or of his being desirous of being relieved from the trust, whereas the proceeding under section 639 of the Civil Procedure Code is a regular action, in which execution might issue, and it is necessitated by a breach of the trust or the direction of the Court being required for the administration of the trust, and it has no concern with the eventualities mentioned above. In view of the order on this appeal, however, I shall not give a final decision on

those questions, but leave them open for further consideration if necessary.

The procedure adopted by the parties on the petitioner's application was summary procedure under chapter XXIV. of the Code. That, I think, was in order by reason of the provisions of section 380.

On the petition filed the District Judge made an interlocutory order in terms of sub-section (*b*) of section 377 of the Civil Procedure Code. The respondent filed two affidavits in terms of section 384. One of these affidavits the District Judge rejected, because the deponent, a Parsee gentleman, and presumably a Zoroastrian, preferred to swear instead of affirming. Whatever other reasons there may be for rejecting this affidavit, the reason given by the District Judge appears to me to be untenable. He says: "The word 'sworn' would seem only to be appropriate to the case of an oath by a Christian." I do not agree with him here. While the old Ordinance, No. 3 of 1842, made it compulsory on witnesses who were non-Christians to make affirmations, the new Ordinance (the Oaths Ordinance, 1895) made it optional with them to do so. The primary provision of the new Ordinance is that all witnesses shall make oaths. It then enacts that a witness who, being a non-Christian, is a Buddhist, Hindu, or Muhammadan, or of some other religion according to which oaths are not of binding force, "may," instead of making an oath, make an affirmation. To swear is no more than to assert, calling God to witness, or invoking His help to the deponent in the matter in connection with which the oath is taken, and it is open to any person, be he Hindu, Muhammadan or Zoroastrian, who believes in God to claim to be sworn (rather than to affirm) in such form and with such formalities as may be approved by the Court. I need say no more on the District Judge's order on the affidavit, because he eventually framed issues, and from that fact it may be presumed that he thought that the respondent had placed sufficient material before him to justify the framing of issues. The first issue framed was: "Does this application come within the provisions of section 4 of Ordinance No. 7 of 1871?" This issue appears to me to be somewhat out of order, because the issues to be framed under section 386 are issues of fact, and this issue is more an issue of law than of fact. However, this issue was agreed to by all the parties, and the District Judge has noted that he decides the issue on the footing that the averments in the petition and affidavits of the petitioner are true. He has answered the issue in the affirmative, and the petitioners have appealed from his order, for fear, it is said, that unless they did so they might be held to be concluded by the decision on the questions as to the truth of the averments in the petition and affidavits of the petitioners. This is an erroneous notion altogether. In my opinion the appeal is premature, and although the inclination of my mind is

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in favour of the order made by the District Judge. I think it would be best not to give effect to that inclination, but let the whole case be gone into before the points now raised are considered and finally decided.

I would dismiss the appeal with costs, and remit the case for a final decison after adjudication on all the issues framed.

DE SAMPAYO A.J.—I agree.

Appeal dismissed.