

(1890) 01 MAD CK 0001**Madras High Court****Case No:** None

Subbayya Jetty and Subba Jetty

APPELLANT

Vs

Thamothara Kristna Jetty

RESPONDENT

Date of Decision: Jan. 7, 1890**Citation:** (1896) 6 MLJ 101**Hon'ble Judges:** Muttusami Aiyar, J; Muthuswami Aiyar, J; Best, J**Bench:** Full Bench**Judgement**

Muttusami Aiyar, J.

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 [96] another appointed in his place. The Judge held that he had no

jurisdiction to entertain the suit u/s 539 of the Code of Civil Procedure, and relying on the decision in Narasimha v. Aiyar Ghatty ILR (1388) M.

157 dismissed the $5\frac{1}{2}$ 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 the case of Narasimha v. Ayyan Ghatty ILR (1388) M. 157 was decided, section 539 has

been amended, and that, as pointed out in R.A. 199 of 1887,2 the procedure under Sir Samuel Romilly's Act, 52 Geo. III, Ch. 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. Aiyar* ILR (1388) M. 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 u/s 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 u/s 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 Eomilly's Act a trustee could not be removed

hostilely, but our attention is drawn to the Trustees Extension Act Section 50, 13 and 14, Viet, Ch. 60. Even under this statute, Section 34, "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, page 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 E.A. 199 of 1887, simply pointed out this

distinction and the question has, therefore, 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 u/s 539 and the proviso

[97] for "" such further relief as the nature of the case may require"" presupposes, as explained in XII Madras Series, 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.

5. The appeal has substantially failed and the appellants will pay the respondent's costs.

Best, J.

5. The District Judge has dismissed the suit on the ground that the plaintiffs are not entitled to sue u/s 539 of the Code of Civil Procedure, quoting

as his authority the decision of this Court in *Narasimha v. Aiyar* ILR (1388) M. 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 I) by the removal of the word "" direct

and the section, as it now stands, is applicable to suits in which persons have "" an interest in the trusts

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 trustee1 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. As pointed out by the learned

Judges who decided Appeal Suit No. 160 of 1887 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 CPC 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 for trustee), if such removal is found to be necessary and justifiable as a result of the suit.

9. 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.