

(1925) 04 AHC CK 0024

Allahabad High Court

Case No: None

(Acharya Guru Mahant) Ramrup
Goshain and Others

APPELLANT

Vs

Mahant Ramdhari Bhagat and
Others

RESPONDENT

Date of Decision: April 20, 1925

Hon'ble Judges: Sulaiman, J; Boys, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Sulaiman, J.

This is a plaintiffs' appeal arising out of a suit which was brought professedly u/s 92 of the CPC after the plaintiffs had obtained sanction of the Legal Remembrancer. The plaintiffs alleged that they had an interest in the properties in dispute which were dedicated properties, that the deceased trustee as well as the present trustee had committed various breaches of trust and that the present trustee was liable to be removed. They impleaded a number of other defendants alleged to be transferees of the trust-property. There were six reliefs claimed in the plaint : (a) a declaration that the properties in dispute were waqf properties; (b) that the present trustee defendant No. 1 be removed and in his place a new trustee be appointed; (c) that the properties of Schedules 1 and 2 be vested in the new trustee; (d) that the transfers be declared to be null and void and the newly appointed mahanth may be put in possession of the said properties; (e) a scheme be prepared for the upkeep of the math and its properties; and (f) any other relief that may be fit and proper.

2. The learned District Judge came to the conclusion that the suit, so far as it was one for recovery of possession against the defendants second party, was not properly brought u/s 92 of the Code of Civil Procedure. He was of opinion that the proper form in which to institute a suit to recover possession was the Court of the Subordinate Judge, being the Court of the lowest grade having jurisdiction to try

such suits. He accordingly thought that it would avoid a multiplicity of litigation in having the matter fought out in two Courts, and he, therefore, thought fit to order that the plaint be returned for presentation to the Court of the Subordinate Judge. It is against this order that the present appeal has been filed.

3. It cannot be disputed for a moment that the order of the learned District Judge cannot be upheld in its entirety. Some of the reliefs claimed in the suit were reliefs which expressly and clearly came u/s 92 of the CPC and therefore under Sub-clause (2) of that section were excluded from any regular suit brought not in conformity with the provisions of that section. If the suit were filed in the Court of the Subordinate Judge that officer would have no jurisdiction to order the removal of the present trustee nor would have any power to appoint a new trustee. He may also find it difficult to grant many of the other reliefs claimed in the suit.

4. It is obvious, therefore, that even if the learned Judge was right in holding that no relief for recovery of possession could be granted in a suit u/s 92 he was not justified in returning the plaint altogether. He might have called upon the plaintiffs to amend the plaint by striking off the relief which he considered could not be properly granted in the suit or he might have waited till he came to pronounce his judgment and might have dismissed the claim with regard to that particular relief. I, however, agree with the learned Judge that in a suit u/s 92 a decree for actual possession against transferees from the trustee cannot be properly passed and so the last portion of relief (d) cannot be granted. It may be that the language of Sub-clause (h) of the section is very wide, but it must be understood that the words "granting such further or other relief as the nature of the case may require" refer to reliefs ejusdem generis and not to every possible relief which a Civil Court may grant.

5. In a case of this Court, *Ghazaffar Hussain Khan v. Yawar Husain* (1905) 28 All. 112 a Bench came to the conclusion that there was no objection to impleading transferees of the trust property in a suit u/s 539 of the old Code corresponding to Section 92 of the present Code, or to declaring in that suit the property in dispute was trust property. Stanley, C.J., however, did not express any definite opinion as to whether a Court could direct the trustee to be put in possession of the properties in the hands of the trespassers. Burkitt, J., was clearly of opinion that such a relief could not be granted in a suit of that nature. He was of opinion that if the transferees surrendered possession of the property on demand by the new trustee, well and good; but if they refused, then the trustee could not recover possession otherwise than in execution of a decree for recovery of possession passed in a suit instituted by him before a Court competent to hear such suits. His opinion clearly was that no decree for actual possession could be granted by the District Judge u/s 539 of the old Code, but that armed with a declaration the trustee would be entitled to dispossess the trespasser in a subsequent regular suit. This opinion has found favour with other High Courts also. In *Budh Singh v. Niradbaran Roy* (1905) 2 C.L.J.

431 the case in Sajdur Raja Ghowdhury v. Gour Mohan Das Baishnav (1887) 24 Cal. 418 was dissented from. The Bombay High Court has expressly held so in the case of the Collector of Poona v. Bai Ghanchal Bai (1911) 35 Bom. 470. The Madras High Court has inclined the same way vide [Assam Raghavalu Chetty and Another Vs. Pellati Sitamma and Others.](#)

6. The learned Advocate for the appellants has not been able to lay before us any case other than that in Sajeir Raja Choudhury v. Gour Mohan Das Baishnav (1887) 24 Cal. 418 where a decree for actual possession against trespassers who are transferees from the trustee has been passed in a suit brought u/s 539 of the old Code or Section 92 of the new Code. The reason for not granting such a decree is that the wording of Sub-clause (h) cannot be taken in its most general sense. It must be read with the preceding sub-clauses and the relief granted under it must be of a similar character. A relief for actual dispossession of trespassers is wholly outside the scope of Section 92.

7. But I have already said that this defect did not entitle the learned Judge to throw out the whole plaint and return it for presentation to another Court. No other matter has been considered or decided by the Judge nor has he yet considered the question as to whether a previous decision between the present trustee and some of the transferees operates as res judicata. I would, therefore, allow the appeal and remand the case.

Boys, J.

8. The circumstances in which this appeal comes before us have already-been fully set out by my learned brother. The question for decision is whether the learned District Judge was right in returning the plaint or whether he could and should have tried the right of the plaintiffs to some or all of the reliefs claimed by them and, if so, which. There is no need to deal specifically with the relief (a) asking for a declaration that the properties specified be declared to be waqf properties. This relief is clearly within Section 92 of the CPC - see Ghazaffar Husan Khan v. Yawar Husain (1905) 28 All. 112. Similarly the reliefs (b), (c) and (e) for the removal of a Mahanth, the appointment of a new Mahanth, the vesting of the properties in the new Mahanth and the preparation of a scheme are declaredly within Section 92 of the Civil Procedure Code. Belief (d) really contains two reliefs : (a) that the transfers complained of be declared null and void and of no effect; and (b) a prayer for recovery of possession by delivery to the new trustee.

9. At the hearing a question was raised in connection with this issue as to whether the third party transferees could be impleaded in a suit u/s 92, Civil Procedure Code. It has been held that they can be so impleaded - see Sajedur Raja Chowdhury v. Gour Mohun Das Baishnav (1887) 24 Cal. 418 and Ghazaffar Husain Khan v. Yawar Husain (1905) 28 All. 112 - and I agree. It is clearly necessary for the purposes of an enquiry into the propriety of transfers by the trustee that the Court should have

before it the transferees themselves.

10. To consider then the first portion of the relief (d) which prays for a declaration that the alienations made by the trustee, whose removal is prayed for in relief (b) may be declared void. As the removal of trustee is to be based on breach of trust clearly the acts of the trustee must be examined and if those acts prove to be the breaches of the trustee's duty, clearly the Court must say so and this is equivalent to declaring the acts to be invalid and the alienations to be void see also *Ghazaffar Husain Khan v. Yawar Husain* (1905) 28 All. 112.

11. Before passing to consider the second portion of the relief (d) asking for delivery of possession to the new trustee, it may be noted that the plaint alleges certain acts of the predecessor of the existing trustee to have been breaches of trust. Such acts cannot in themselves be regarded as breaches of trust by the present trustee—compare *Budree Das Mukim v. Chooni Lal Johurry* (1906) 33 Cal. 789 but if the present trustee could have taken steps to save the property from the consequences of the breach of trust committed by his predecessor, his neglect to do so might in given circumstances constitute a breach of trust¹ by him himself and naturally this would be still more so, if he continued to reap personally the benefit of his predecessor's breach of trust and the allegations should be enquired into.

12. I will now consider the prayer in the second portion of relief (d) asking as against the third party transferees for delivery of possession to the new trustee. It might seem at first sight that if, as already held, the alienations can, in a suit u/s 92 be declared void, because it is a natural corollary, that a decree for recovery of possession should follow, but the two reliefs are not on the same footing. A declaration as to the legality of the alienation is within Section 92 because it is a necessary foundation for the finding that there has been a breach of trust and that declaration involves and is equivalent to a declaration that the alienation is void and such latter declaration is, therefore, within Section 92. But the recovery of possession by the new trustee is not necessary to complete the finding that there has been a breach of trust nor is it necessary for the purpose of any direction as to how the trust is to be administered.

13. The only cases directly apposite are *Sajedur Raja Choudhury v. Gour Mohun Das Baishnav* (1887) 24 Cal. 418 and *Ghazaffar Husain Khan v. Yawar Husain* (1905) 28 All. 112. In *Sajedur Raja Chowdhury v. Gour Mohun Das Baishnav* (1887) 24 Cal. 418 Banerji and Rampini, JJ. held at page 429 in a suit u/s 539 (corresponding generally to the present Section 92) that there can be a decree for the return of the property by the transferees. In *Ghazaffar Husain Khan v. Yawar Husain* (1905) 28 All. 112 the decree appealed against, was not a decree for delivery of possession, but only directed the trustee "to bring into his possession" the property improperly alienated (page 116). Both Stanley, C.J., and Burkitt, J. held that this latter direction was a valid direction. The question whether there could be a decree for actual delivery of possession, therefore, did not actually arise, and any dicta in regard to the

possibility of such a decree were, therefore, obiter. Both Judges, however, discussed the question. Burkitt, J., held (1) that a decree that the new trustee should "bring into his possession" the property improperly alienated was within the power of a District Judge in a suit u/s 539 (now Section 92), but it did not amount to a decree "for recovery of possession" and could not be executed as such; that if the transferees surrendered possession, well and good; but that, if they refused to surrender, the new trustee must bring a separate suit in the competent civil Court and get a decree for recovery : (2) that a District Judge could not in a suit u/s 539 (now Section 92) pass a decree for recovery of possession against third party transferees : unless, of course, a suit to obtain such a decree had been instituted in the ordinary competent Civil Court and he had called it up for trial before himself; in which case it would not of course be a suit u/s 539 at all. He did not refer to *Sajedur Raja Chowdhury v. Gour Mohun Das Baishnav* (1887) 24 Cal. 418 in which Banerji and Rampini, JJ. held that such a decree for recovery of possession against the transferees was within Section 539, but the case had been quoted in argument. Stanley, C.J., held that it was clear that the Court may in a suit u/s 539 direct a trustee who is being removed to make over the trust property, to the new trustee. As to whether it could direct a transferee of property held to have been improperly alienated to make over the property to the new trustee, he said that he would have had difficulty in following Burkitt, J. in the difficulties which the latter found in the way of accepting *Sajedur Raja Chowdhury v. Gour Mohun Das Baishnav* (1887) 24 Cal. 418; but he did not consider it necessary to decide the point.

14. These two cases are, so far as appears to me, the only cases which appear to be directly apposite to the one before us. We have therefore a decision of two Judges of the Calcutta High Court that such a decree is within Section 539 (now Section 92) the obiter dictum of one Judge Burkitt, J. of a Bench of this High Court that such a decree is not within Section 92 and the obiter dictum of the other Judge, Stanley, C.J. of the Bench that if he had to decide the point he could not accept the arguments which had influenced his brother Judge. The question arises directly in the present case before us. Section 92 by its terms applies only where there has been an alleged breach of trust or where a direction of the Court is necessary for the administration of the trust, and if either of those conditions is satisfied, and, in addition, the proper consent has been obtained to the institution of the suit, the section then proceeds to declare (a) to (h) what decree may be passed.

15. The object of the section has been declared to be vide - *Sajedur Raja Chowdhury v. Gour Mohun Das Baishnav* (3) - and this interpretation has not, so far as I am aware, ever been qualified or challenged, "to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust." This object is in no way furthered by holding that in a suit by a person interested for the removal of a trustee and the appointment of a new trustee, a relief may be added against a third party transferee that he be ordered to deliver up possession.

16. Again, a consideration of the matters set out in Clauses (a) to (h) in Section 92 strongly suggests that those clauses are only concerned with either (1) the direct consequences of the breach of trust which is one of the alternative conditions precedent to the applicability of Section 92, e.g., Clauses (a), (b), (c) and (d) or (2) directions for the administration of the trust which is the other of the alternative conditions precedent to the applicability of Section 92, e.g., Clauses (c) and (g).

17. To neither of these purposes is a decree for recovery from a third party of property improperly alienated, in any real sense akin. A decree for delivery of possession by the trustee who has been removed to the new trustee may be held to be within Section 92 as being a necessary consequence of his removal for breach of trust but that is not the case before us and is on quite a different footing from the case of the third party transferee.

18. It is urged that Clause (h) is wide enough to include a decree against a third party transferee for delivery of possession. It is admitted, and it has been more than once pointed out - vide *Jamalluddin v. Mujtaba Hussain* (1903) 25 All. 631; *Ghazaffar Husain Khan v. Yawar Husain* (1905) 28 All. 112 *Budree Das Mukim v. Chooni Lal Johurry* (1906) 33 Cal. 789 that to Clause (h) must be applied the ordinary test generally applicable to such clauses, that it can only be applied to matters ejusdem generis with the preceding matters, but, admitting this, it is further urged that a decree for recovery of possession is ejusdem generis with the power given by Clause (c) to vest any property in a trustee. That clause is clearly only intended to cover such cases as where a new trustee is appointed.

19. There is nothing else in Clauses (a) to (g) which can remotely suggest that the relief which we are considering can be included in Clause (h).

20. The passing of a decree for possession is properly the duty of the ordinary Court possessing jurisdiction in the particular case. The jurisdiction given by Section 92 to the principal Civil Court of original jurisdiction is a special jurisdiction given for a particular purpose and where the purpose of the section would not be furthered by the inclusion of the relief in the section, it would require strong grounds to justify holding that the relief is within the section. Such grounds do not appear. I concur, therefore, in the order proposed by my learned brother.

21. We accordingly allow this appeal and, setting aside the order of the learned District Judge, remand the case to his Court in order that it may be restored on its pending file and disposed of according to law. The costs in the Court below and in this Court will abide the event. The costs in this Court will include fees.