Phulchand Lakhmichand Jain and Another Vs Hukumchand Gulabchand Jain and Another

Court: Bombay High Court

Date of Decision: Sept. 15, 1959

Acts Referred: Trusts Act, 1882 â€" Section 1, 23

Citation: AIR 1960 Bom 438 : (1960) 62 BOMLR 308

Hon'ble Judges: Patel, J; Mudholkar, J

Bench: Division Bench

Advocate: C.S. Trivedi, for the Appellant; G.N. Vaidya and M.M. Bhatt and M.A. Rane, Asst. govt. Pleader, for the Respondent

Judgement

Patel, J.

(1) This appeal arises out of a final decree made by the learned District Judge of West Khandesh at Dhulia in a suit instituted for accounts of a

temple known as "Shri Chandraprabhu Khandelwal Jain Temple" at Dhulia.

(2) The plaintiffs alleged that the temple was a public trust; that all the members of the Khandelwal Jain Community were interested in the trust; that

it was a temple of the Community and that the devotees offer their oblations to the temple on various occasions in their families; that certain

festivals were held in the temple; that the father of the defendant No. 1 was a leading member in the community and for more than 40 years he was

looking after the temple. After the death of Gulabchand Hiralal, hi son, the defendant No. 1, started managing the property,- the death of his father

was somwwhere in 1949. It was further alleged that Gulabchand Hiralal contended that the temple was his familyproperty and that the members of

the public had nthing to do with the temple. Because of this contention of his a suit was instituted being suit No. 51 of 1937 against Gulabchand

Hiralal. It, however, appears that sanction was not obtained from the Collector u/s 92 of the CPC and the suit came to be dismissed. Thereafter a

Miscellaneous aplication was ade by the present plaintiffs and four other members of the Community for registration of the Trust under the

provisions of the Bombay Act No. XXV of 1935 - being Misc. Application No. 110 of 1949, u/s 6 of the Act. During the pendency of that

application the father of the defendant No. 1 died. It was held threin that the temple was public trust and that its income exceeded Rs. 1,000/- and

therefore, it was ordered to be registered. The defendant No. 1 was ordered to furnish several particulars required by the Act. It appears that the

defendant No. 1 tailed to furnish those particulars. after the Bombay Public Trut Act, 1950 (Act No. XXIX of 1950) came into force the plaintiffs

approached the Assistant Charity Commissioner for the registration of the Trust and also sought permission of the Charity Commissioner for

instituting a suit for accounts and for removal of the defendant No. 1 from the managership of the trust.

(3) The defendant No. 1 challenged the case of the plaintiff with regard to the statements of the properties of the temple. He further stated that

since 31st October 1951 he had kept separateaccount-books for the temple and that the same were audited from time to time. He then said that

moveables including the case could be ascertained from the entries in the account-books. He contended that proper accounts were maintined by

his father and himself in regard to the income and expenses of the temple. He also contended that the accounts were inspected by the plaintiffs and

that he was bound to give particulars about the incorrectness of the accounts or the imporpriety of the management of the temple. He also

challenged the relief sought for removal of himself as the trustee. He tried to explain the contention of his views and he wanted that the temple or its

property should not change hands in regard to the management ad in that sense he set up his exclusive right to the same consistently with the

position of the trustee thereof. He coaimed to be permitted to contimue in the management of the trust. The suit was instituted on the 17th of

February 1954 and on the 3rd of November 1954 a decree was made by the learned District Judge appointing a Commissioner to ascertain the

price of the furniture, books and silver posts belonging to the temple and also to find out the cash balance due to the temple till that day on taking

accounts of the incoe and expenditure of the temple. He also gave some specific directions with regard to some persons who were to be on the

managing committee along with the defendant No. 1. He also directed the plaintiffs and the defendants to submit a draft or drafts of the proposed

scheme for the mangement of the temple within 15 days from that date.

(4) The Commissioner thereafter made a report which is Ex. 54, wherein he valued the property of the temple. In that report he found a sum of Rs.

21, 971-15-6 as the amount of banalce in the account of the temple up to the date of the suit.Both the plaintiffs as well as the defendant No. 1,

challenged the report of the commissioner before the Court, as a result of which the Court did not accept the said report but gave further directions

and asked him to hear the objections of the plaintiffs and the defendant and thereafter settle the accounts between the parties. He then made a

fresh report at Ex. 74, finding a total sum of Rs. 10,088-10-3 for principal and Rs. 16853-6-0 for interest as being due to the temple from the

defendant No. 1 up to the date of the suit. The plaintiffs admitted the report but the defendant No. 1 contended that under the rule of Damdupat

interest exceeding the amount of the principal cannot be allowed. The learned Judge was of the view that the rule of Dam-Dupat applied to the

case and he, therefore, made a ecree in favour of the temple for Rs. 20,177-4-6. It also appears that an agreed draft scheme prepared by the

parties was filed. Accordingly the Court framed the scheme for the management of the temple and also passed a decree for Rs. 20,177-4-6

against the defendant No. 1 in favour of the management of the temple and by its order it continued the defendant No. 1 as one of the trustees. The

plaintiffs have come to this Court in appeal against this judgment and the defendant No. 1 has filed cross-objections to the decree.

(5) It was the contention of the plaintiffs that defendants father and after him the defendants used the funds of the temple in their business and that

they were therefore liable to account on that footing. The parties had filed Khulasas before the Commissioner and in their khulasa the plaintiffs

made a specific allegation that the amount was being used by the defendants and his father in business. In this statement of the plaintiffs they were

supported by the deposition of the father o the defendants in regular Suit No. 377 of 1931 which has been produced at Ex. 24. He there stated

that he had with him money belonging to the temple and he was paying compund interest for the same at 8 annas per cent. This deposition was

given in the year 1931. It appears that in a proceeding commenced against him in the year 1944 being miscellaneous application No. 110 of 1949

u/s 6 of the Bombay Public Trusts Registration Act 1935, he again gave evidence before the Court. Therein he admitted that he had stated n the

earlier suit that he had moneys belonging to the temple with him and he was paying 8 annas interest. No explanation has been offered with regard

to the earlier statement in this deposition. The defendant has nowhere denied the fact of the moneys of the temple being used for the purpose of his

business. Before the Commissioner the plaintiffs had made applications as also in Court prayng that the defendant should be called upon to

produce his book of account of the relevant years. The only books that were produced before the Commissioner were Khatavahis and in spite of

repeated demands for Nakal books not one was produced by the defendant. Even the khatavahis that were produced were khatvahis for the year

1984 and upwards. It was admitted even by the defendant at Ex. 56 that balances were drawn in the khata of the temple only up to the year 1987

but thereafter from Samvat Year 1988 to 1995 balances were not drawn at all. It appears that in some of the khatavahis there have been

corrections. The leared Judge has opined in his order below Ex. 54 in the course of the proceedings, that in some years interest has been credited

to the Khata of the temple from the year 1984 to 1988. Against each of these entries referenc of the akkal Vahis is given. Those Nakkal Vahis

were not produced. In order that one should not be able to compare the corresponding entries in the interest account of the defendants, some

entries in the interest account have been changed. The learned Judge was of the view, and we think very rightly, that there ere changes and

interpolations in the interest khata of the ledgers of some of these years. We have seen two of the Khata books which have been produced in the

case and it does appearthat there is nothing to show that the amount belonging to the temple was in any manner kept separate and distinct from the

other amounts belonging to the defendants. The facts connected with the se of moneys of the temple were within the knowledge of defendant No.

1 and could have been very well explained by defendant No. 1 by proper references to his books of account. But no attempt has been made to do

so. The defendant has said that his Nakkal books are not available as they are lost. It must be remembered that on his own admission the

defendant and his father before him, were carrying on this business, and that it is about 100 years old. It is unthinkable that any business man, who

has got an old and established business, would at any time destroy any of his ccount books and if we reject his explanation that the books are lost

then we would be entitled to infer that if these books were produced they couldnot have supported the case of the defendant. Under these

circumstances, it would not be an unreasonable inference to draw that the amounts belonging to the temple were being utilised by defendant No. 1

and before him by his father in their business.

(6) After establishing this position it is argued by the learned Advocate for the appellants that the accounts are not taken on a correct footing. He

says that defendant No. I should have been charged compund interest while taking accounts during the relevant period. Mr. Vaidya the learned

counsel for the respondents argues on the other hand that tht could not be done and that even the trial Court''s decree decreeing him to pay interest

was incorrect. Before this contention can be disposed of, we have to consider the position of the defendant vis-a-vis the temple and its properties.

It is admitted that defendant I and his father were managers of this temple. But the respondents'' counsel relies on the case of Vidya Varutji Thirtha

v. Baluswami Ayyar, 48 Ind App 302 : AIR 1922 PC 123, and argues that the defendants cannot be regarded as a trustee. The judicial

Committee says:-

It is also to be remembered that a ""trust"" in the sense in which the expression is used in English Law, is unknown in the Hindu system, pure and

simple..... In no case was the property conveyed to or vested in him, nor is he a ""trustee"" in the English sense of the term, although in vie of the

bligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration"".

These observatios were in relation to the head of a Matt who has got far larger rights of management and administration and most often has far

higher personal beneficial interests in the properties then in the case of a mere manager of a temple. (See Srinivasa Chariar v. Evalappa Mudaliar

reported in 49 ind App 237 : AIR 1922 PC 325 . With regard to the manager of a temple, Lord Mcnaghten says in Ramanathan Chetti v.

Murugappa Chetti 33 Ind App 139:

The manager of the temple is by virtue of his office the administrator of the property attached to it. As regards the property, the manager is in the

position of a trustee.

If his position is analogous to that of a trustee ""In view of the obligations and duties resting on him he is answerable as a trustee in the general sense

for mal-administration."" 48 I. A 302 : AIR 1922 PC 126 . He must therefore be deemed to be in the position of a trustee vis-a-vis the temple.

(7) The question then is as to whether or not the defendant and the estate of his father is liable for interest whether compund or simple. In support

of his argument that his client is not liable to pay interest, Mr. Vaidya relies on the case of AIR 1938 67 (Privy Council) and on the case of Seth

Thawardas Pherumal Vs. The Union of India (UOI), . Now in the earlier of the cases cited it is said ""interest for the period prior to the date of the

suit may be awarded if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of

law, or under the provisions of any substantive law entitling the plaintiff to recover interest, as for instance, u/s 80 of the Negotiable Instruments

Act, 1881, when the Court may award interest at the rate of 6 per cent per annum, when no rate of interest is specified in the primissory note or

bill of exchange."" and the judgment of the Supreme Court in the case of Seth Thawardas Pherumal Vs. The Union of India (UOI), has also

followed this principle. The Privy Council then referred in that case to the Interest Act XXXII of 1839. Under the Act interest could be allowed by

the Court if the amount claimed kis a sum certain payable at a certain time by virtue ofa written instrument or from th date of demand in any other

case. The proviso provided however that it should be payable in all cases in which it was then payable by law and the Privy Council said ""This

proviso applies o cases in which the Court of Equity exercises jurisdiction to allow interest."" That particular aspect of the matter was not before the

Supreme Court and it did not touch the question. Same view is expressed by the Privy Council in the case of Radhoba Baloba v. Aburao

Bhagwantrao 56 Ind App 316 : AIR 1929 PC 231. That this could be done is illustrated by the case in Hamira Bibi v. Zubaida Bibi 43 Ind App

294 : AIR 1916 PC 46 and Ahmed Musaji v. Hashim Ebrahim, ILR 42 Cal. 914 : AIR 1915 PC 116 where interest was allowed on equitable

ground. In the case of Maine and New Brunswick Electrical Power Co. Ltd.v. Alice M. Hart AIR 1929 PC 185 where the question of

construction of the New Brunswick Judicature Act Section 24(1) which was in terms similar to the Interest Act was considered where interest was

granted by the lower Courts, and the Privy Council negatived the right to interest under the terms of the first part of the section and then observed

It remains to consider wether any rule of equity entitles the plaintiff to interest,"" and after examining the case they held that the plaintiff was not

entitled to interest on equitable grounds.

(8) The question that must therefore be considered is whether or not the plaintffs can claim interest on equitable grounds. a breach of trust in itself

is merely a violation of an equitable obligation; the remedy for it, thereore, lies in equity only and must be sought in a court of equitable jurisdiction:

See Halsbury''s Laws of England (2nd Edn.) Vol. 33 p. 305, para 532 and the Court of Equity allows interest against trustees on the following

principles:

1, Where he can be proved to have received interest;

2. Where the cour is entitled to decide that he ought to have received interest;

3. Where in brech of his duty he:

(I) retains trust money in hi own hands univested or

(ii) mixes it with his own money or property or

(iii) employs it in trade or speculation, or

(iv) applies it in an unauthorised manner, or

(v) pays it to the wrong person or

(iv) fails to produce or account for it when lawfully demanded by the cestui que trust or ordered by the Court.

Compond interest is charged where he employs it in trade or speculation for his own benefit. Hals. Laws of England Vl. 33 p. para (See also

Lewin on rust 15th Edition page 246).

(9) To the same effect are the provisions of theIndian Trust Act. Section 23 of the Indian Trust Act makes provision for he liability of a trustee for

breach of trust. The second part of it says ""a trustee committing a breach of trust is not liable to pay interest except in the following cases:

(a) where he has actuall recived interest.

(b) where breach consists in unreasonable delay in paying trust money to the beneficiary.

(c) where the trustee ought to have received interest, but has not done so.

(d) Where he may have fairly presumed to have received interest.

He is liable under case (a) to account for the interest actually received and in cases (b), (c) and (d) to account for simple interest at the rate of 6%

per annum unless the Court otherwise irects.

(e) where the breach consists in failure to invest trust money and to accumulate interest or dividends thereon, he is liable to account for compund

interest (with half-yearly rests) at the same rate;

(f) where the breach consists in the employment of trust property or the proceeds thereof in trade or business, he is liable to account, at the option

of the beneficiary either for compund nterest (with half-yearly rests) at the same rate, or for net profits made by such employment"".

It is true that by section 1 the provisions of the Indian Trusts Act are not made applicable to public trusts. Even so, the provisions of the Trusts Act

are founded on general principles, and Rules of English Law. In matters which are not provided for, the Courts in India apply the principles and

Rulesof English Law. on the subject unless they are inconsistent with the Rules and practice of this Court. (See In Re: Sabnis, Goregaonkar and

Senjit and Shivramdas and Others, , Rambabu v. Committee of Rameshwar Bom LR 667 and Nathiri Menon v. Gopalan Nair 39 Mad 597 : AIR

1916 Mad 92 . The principles above stated therefore apply to the present case. Since we are of the view that the defendant No. 1 and his father

have used the fund of the temple in their business or have so mixed it up with their. own funds that it is impossible to say that they have not so used

it, we hold that he is aliable to be charged compound interest with yearly rests and no rational reason is suggested for not awarding te same.

(10) The question then is whether the rule of Dam dupat should apply inthis case. Mr. Vaidya says that the liability of a trustee is a simple

contractual debt and therefore the rule applies. The first question that must therefore be considered is that of the nature of the liability of a trustee or

manager.

(11) At page 745 in lewin on Trust, Fifteenth Edition is the following passage: ""the claim of the cestui que trust is in genral a simple contract

debt.....it was recoverable, not from the real, but only from the personal estate."" In Halsbury''s Laws of England, Halsbury''s Vol. 33 (Trust

and Trustees) Part IV Section 1, sub-section 2, Article 532 the statemet is,

A breach of trust is in equity, regarded as giving rise to a simple contract debt, unless the trustee has covenanted under his seal that he will

perform the trust in which case his breach of trust being also a breach of covenant, gives rise to a specialty debt.

In the first mentioned book no authorities are cited, but in the latter several cases have been referred to. They are Cox v. Bateman (1715) 2 Ves.

Sen. 19; Venon v. Vawdry (1740) 2 Atk. 119; Adey v. Arnold, (1852) 2 De G.M. 432; Brereton v. Hutchinson (1854) 3 Ir. Ch. 361 and

Brittlebank v. Goddwin (1868), 5 Eq . 545. In (1715) 2 V Sen 19 the Vice-Chancellor said:

He could not follow the moeny and charge his real estate therewith.....It was a breach of Trust and must be a charge on his personal estate; but

he would help it as far as he could; and therefore it any specialt creditors exhaust th personal estate, let simple contract creditors stand in their

place, to have satisfaction out of the real estate.

In (1740) 2 Atk 119 it was said:

a breach of trust is considered but as a smple contract debt, and can only fall upon the personal etate of a trustee. and the particular circumstances

of a case ought not to var the rule"".

In (1852) 2 De G. M. 432 it was said:

This Court will enforce a trust, but only qua trust, and only so far as to make it fall within the rule which constitutes the claim under3 it a simple

contract debt.

None of these cases goes to the length of saying that the debt is an outcome of contractual relationship. In (1854) 3 Ir Ch 361, following the earlier

case of Dunne v. Doran (1844) 13 I E R. 545, it was held:

It is a breanch of the doctrine that, unless in cases of trust created by specialty, the liability of a deceased trustee who has committed a breach of

trust ranks against hs assets butas a demand by simple contract; and the case of (1844) 13 I ER 545 decided that, as such, it is subject to the rules

on which a Court of equity acts in analogy to the Statute of Limitations, and is barred by the laps of six years from the death of the trustee"".

The English Court however in (1868) 5 Eq. 545 dissenting from these two cases (1844) 13 Ir. Dq R. 545 or (1854) 3 Ir. Ch. 361 refused to

apply the statute of Limitation. Even in the case of (1854) 3 Ir. Ch. 361 the Master of the Rolls who first tried the case dissented from the earlier

statement on the ground that ""the debt in his opinion was a debitum ex delicto and was not founded on a lending or contract, althouh it would rank

in the administration of assets a simple contract debt"" (See 2 Ir. Ch R 648. Sharp v. Jackson (1899) A.C. 419 was a case of construction of

section 48 of the Bankrupcy Act and an argument was made that a transfer by a trustee who had committed breach of trust of some of his propety

to make good the loss would not amount to a fraudulent preference as the relationshipof dbotor and creditor did not exist. The House however

held it not to be fraudulent preference on a different ground, but Lord Halsbury dealt with this argumnt also and said :

It has been suggested that there was a proposition which could be maintained, as to which I confess I entertain grave doubts whether any decisin

goes to that extent, namely, that the relation between a cestui que trust and a trustee who has misappropriated the trust fund is not that of debtor

and creditor. That it may be something more than that is true, but that it is that of debtor and creditor I can entertainno doubt. As that question has

been mooted and brought before your Lordships'' House as one question for decision here, I certainly have no hesitation in saying that in my

opinion nosuch proposition can properly be maintained, and that although there are other and peculiar elements in the relation between a cestul que

trust and a trustee, undoubtedly the relation of debtor and creditor can and does exist"".

The other members however did not decide this point. On the other hand there are decisions to the contrary also. In Ex parte Tayor: In re

Goldsmid (1886) 18 QB 295 Lindley LJ said in reference to the same section:

A cestuie que trust is not a creditor of his trustee. nor is a trustee a creditor of his co-trustee. In neither case do parties stand in the relation of

debtor and creditor"".

The dictum of Lord Halsbury in (1899) AC 419 has not gone unquestioned. (See In re, Lake; Exparte Dyer (1901) 1 KB 710. None of these

cases therefore hold that the relationship is contractual. More often than not a trustee exists in spite of the will of the beneficiary. Even if a trustee

be regarded a debtor in the larger sense the debt would be ex delicto and not one founded on lending or contracvt.

(12) If this is so, then the next question to be considered is whether the rule of Dam Dupat applies. In the case of Hariram Serowagee v. madan

Gopal 31 Bom LR 710 : AIR 1929 C 77 the Privy Council says :

The peculiar Hindu rule of ""damdupat"" as to interest, is applicable to matters of contract."" That was a case of liability of an executrix and the

contention that the Rule did not apply was repelled not because the Rule applied to such a case, but because of the conduct of the plaintiff on the

ground that he could not approbate and reprobate. In Dhondu Jagannath v. Narayan Ramchandra 1 Bom HCR 47 the head note is:

By Hindu Law the amount receverable at any one time for interest or arrears of interest on money lent cannot exceed the principal"".

Reference to Manusmriti, - Yajnavalkya Smriti as also Mitaksshara would suggest that the rule is meant to apply to debts arising out of loans and

not any other contract. It is however not necessary for us to decide whether the rule applies only to debts arising from loans or to debts arising out

of ther contracts also. Since in the present case the liability is not founded on either, we think the rule has no application and the Court below was

in error in applying it.

(13) The learned counsel has argued that the accounts are not properly taken. It appears the Commsissioner calculated simple interest at 6% as

directed by the Court below. We think that accounts should have been made up on the footing of 6 p. c. compound interest with yearly rests and

in that view that accounts taken by the Commissioner would not be correct. A complaint is also made that defendant No. 1 had produced a sum of

Rs. 7,000/- in 1953 before the meeting of the Community and that amount was not taken into account for the purpose of computation of interest

on funds in possession of the defendant and his father before the date of production. There is justification for this complaint. The account furnished

by the Commissioner does not show that this amount was considered for the calculation of interest at any time. the defendant''s case that it was

found in a safe in a bag with a label attached to it, is impossible of acceptance. When his father died o 1949 or 1950 being a man of business he

must have examined all the safes in business he must have examined all the safes in the house and it is impossible to accept his explanation that it

was found lying in the safe and for three years and more he had not seen it. The Court ought to have calculated interest on this amount whice taking

accounts if liable.

(14) Under these circumtsances, we think that in the interest of justice it is necessary that the matter should be sent back for a fresh determination

of the amount due to the temple.

(15) No contention has been made with regard to the rest of the decree. We understand that the defendant No. 1 has now resigned from the

managing committee. and, therefore, no further question as to his right to continue to manage the trust remains to be considered. We set aside the

decree in so far as it determines the amount due to the temple and confirm the rest of the decree. The matter is referred to he triawl Court for

reassessment of the amount due to the temple having due regard to the observations made by us in our judgment.

(16) In view of the fact tha we are remitting the case to the trial Court we direct that so far as the order for costs made by the learned Trial Judge

is concerned it will be confirmed but so far as the costs of this court are concerned the respondent will bear his own costs. The costs of the

appellants and the Charity Commissioner will come out of the estate.

(17) Cross-obections are dismissed with costs. The costs of cross-objections will be credited to the trust for the purpose of the appeal.

(18) Case remanded.