
AIR 1960 Bom 438 : (1960) 62 BOMLR 308

Bombay High Court

Case No: Appeal No. 600 of 1955

Phulchand
Lakhmichand Jain and
Another

APPELLANT

Vs

Hukumchand
Gulabchand Jain and
Another

RESPONDENT

Date of Decision: Sept. 15, 1959

Acts Referred:

- Trusts Act, 1882 - 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 Chandrabrabhu 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

family property and that the members of the public had nothing 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 application was made 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 therein 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 failed to furnish those particulars. After the Bombay Public Trust 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 separate account-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 maintained 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 impropriety 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 and in that sense he set up his exclusive right to the same consistently with the position of the trustee thereof. He claimed to be permitted to continue 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 pots belonging to the temple and also to find out the cash balance due to the temple till that day on taking accounts of the income 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 management 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 balance 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 decree 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 of 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 compound 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 in 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 praying 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 learned 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 reference 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 appear that 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 compound 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 promissory 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 was a sum certain payable at a certain time by virtue of a written instrument or from the 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 to 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 whether 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 plaintiffs can claim interest on equitable grounds. a breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, 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 court is entitled to decide that he ought to have received interest;
3. Where in breach of his duty he:

(i) retains trust money in his own hands uninvested 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

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

Compound interest is charged where he employs it in trade or speculation for his own benefit. Hals. Laws of England VI. 33 p. para (See also Lewin on Trust 15th Edition page 246).

(9) To the same effect are the provisions of the Indian Trust Act. Section 23 of the Indian Trust Act makes provision for the 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 actually received 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 directs.

(e) where the breach consists in failure to invest trust money and to accumulate interest or dividends thereon, he is liable to account for compound 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 compound interest (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 Rules of 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 liable to be charged compound interest with yearly rests and no rational reason is suggested for not awarding the same.

(10) The question then is whether the rule of Dam dupat should apply in this 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 general 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 statement 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 money 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 if any specialty creditors exhaust the 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 simple contract debt, and can only fall upon the personal estate of a trustee. and the particular circumstances of a case ought not to vary 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 under 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 branch 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 his assets but as 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 lapse 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, although it would rank in the administration of assets as 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 Bankruptcy Act and an argument was made that a transfer by a trustee who had committed breach of trust of some of his property to make good the loss would not amount to a fraudulent preference as the relationship of debtor 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 argument 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 decision 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 entertain no 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 no such proposition can properly be maintained, and that although there are other and peculiar elements in the relation between a cestui 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 Taylor: In re Goldsmid* (1886) 18 QB 295

Lindley LJ said in reference to the same section:

"A cestui 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; Ex parte 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 contract.

(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 receivable 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 their 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 Commissioner 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 in 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 while taking accounts if liable.

(14) Under these circumstances, 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 the trial 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 that 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-objections are dismissed with costs. The costs of cross-objections will be credited to the trust for the purpose of the appeal.

(18) Case remanded.