(1929) 31 BOMLR 349 : 117 Ind. Cas. 523

Bombay High Court

Case No: Second Appeal No. 17 of 1927

Kashinath Mahadev Mahajan		APPELLANT
	Vs	
Gangubai Keshav Nagarkar		RESPONDENT

Date of Decision: Dec. 5, 1928

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 92

Citation: (1929) 31 BOMLR 349 : 117 Ind. Cas. 523

Hon'ble Judges: Baker, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Baker, J.
[His Lordship, after setting out the facts, continued :] Now so far as concerns the allegation that defendant No. 1 was appointed

a trustee by the last surviving trustee Vinayak previous to his death, that is a finding of fact, and the point has not been raised by the learned

pleader for the appellant nor indeed could it be raised in the face of the finding on it based on evidence. The position, therefore, in this case is this:

There is no living trustee who can administer the property in respect of which the trust was created by the will of Radhabai. The plaintiff is the heir

of the founder of the trust, It has been argued by the learned Counsel for the appellants that nobody can be appointed a trustee whose interests are

adverse to those of the trust, and that the conduct of the plaintiff, as disclosed by the previous litigations in which she has denied the execution of

the will by her mother Radhabai and the validity of the will, is such that she cannot be appointed a trustee, nor under Hindu law can she succeed to

the trust property. The law, however, which has been dealt with by the learned Assistant Judge, is quite clear on the point. In the case of a trust the

heirs of the founder or his legal representatives have a right to be appointed trustees, and where, as in the present case, no trustees are in existence,

(nor indeed does the will of Radhabai which has been translated by the lower appellate Court give the trustees the power of appointing

successors), it is obvious that somebody must be in existence to administer the property, and represent the trust, and under the authorities the

plaintiff is the only person who can do so. In this connection I may refer to Gossami Sri Gridhariji v. Romanlalji Gossami (1889) ILR 17 Cal. 3

p.c. where it is laid down that according to Hindu law, when the worship of a Thakur has been founded the office of a shebait is held to be vested

in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course

of dealing, or circumstance, showing a different mode of devolution. To the same effect is Jagadindra Nath Roy v. Hemanta Kumari Debi

I.L.R(1904) .Cal 129. where there was no reliable evidence as to the foundation of a religious endowment, or as to its terms or conditions, and it

was held that the legal inference was that title to the property or to its management and control followed the line of inheritance from the founder.

The latest case on the point is the one on which the learned Judge of the lower appellate Court has relied, namely, Anand Chandra Chuckerbutty

v. Braja Lal Singh ILR (1922) Cal. 292 where it was laid down that where a shebait appointed by the founder fails to nominate a successor in

accordance with the conditions or usage of the endowment, the office reverts to the founder and his representatives even though the endowment

has assumed a public character. And the same principle will apply to a case where no provision has been made by the founder, as in this case, for

the appointment of fresh trustees after the death of those originally appointed.

2. It Was next contended that the present suit will not lie, and that the proper course was to bring a suit with the permission of the Collector u/s 92

of the Code of Civil Procedure. Section 92 refers to breaches of any express or constructive trust or suits where the direction of the Court is

deemed necessary for the administration of any such trust, and the reliefs which are set out in that section are not the prime reliefs which the plaintiff

is seeking in the present suit. The present suit is one brought by the plaintiff in her private capacity to recover possession of the property from the

persons who, she alleges, are trespassers. Section 92 refers to a suit by some members of the public, of whom there must not be less than two, in

order to remove trustees, appoint trustees, have accounts and inquiries taken and getting a scheme settled or generally arranging for the

management of the trust. There are a very large number of rulings on this point as to what suits will fall u/s 92, and what will not. The learned

pleader for the respondent has relied on Muhammad Abdul Majid Khan v. Ahmad Said Khan I.L.R.(1913) All, 459 ; Ayatunnessa Bibi v. Kulfu

Khalifa I.L.R.(1914) Cal. 749; Appanna Porioha v. Narasinga Poricha ILR (1921) Mad, 113; Miya Vali Ulla v. Sayed Bava Santi Miya

I.L.R(1898) . 22 Bom. 496; Navroji Manekji Wadia v. Bastur Kharshedji Mancherji I.L.R.(1903) 28 Bom. 20; and Nilkanth Devrao Nadkarny

Vs. Ramakrishna Vithal Bhat, . There are many other cases, and the general principle laid down by these cases is that a distinction is drawn

between a suit brought by a person in his private capacity and as a member of the public. In order to make the point clear, however, it may be as

well to refer very briefly to the cases in order to show what cases have been held not to lie within the four corners of Article 92. In Muhammad

Abdul Majid Khan v. Ahmad Said Khana (1913) 1. L.R. All, 459 a suit by a plaintiff alleging that he was the rightful mutawalli of a waqf and that

the defendant had taken wrongful possession of the property was held not to lie within the purview of Section 92 of the Code of Civil Procedure.

Similarly, in Ayatwnnessa Bibi v. Kulfu Khalifa ILR (1914) Cal. 749 it was held that a suit for the removal of a trespasser in possession of trust

property is not a suit of the kind contemplated by Section 92 of the Code of Civil Procedure, and, therefore, for the institution of such a suit no

consent of the Advocate General is necessary. In Appanna Poricha v. Narasinga Poricha I.L.R.(1921) Mad. 113 it was held that a suit by a

trustee of a charitable or religious trust against a co-trustee for accounts does not fall within Section 92 of the Code of Civil Procedure, and may

be brought without the sanction of the Advocate General. In Miya Vali Vila v. Sayed Bava Santi Miya I.L.R(1896) . 22 Bom. 498 the suit was by

a plaintiff who claimed to be a co-trustee of certain dargas and entitled to a share in the management and in the profits thereof. It was held that it

did not fall within the purview of Section 589(that is, the present Section 92) of the Code of Civil Procedure. I may also refer to Nilkanth Devrao

Nadkarny Vs. Ramakrishna Vithal Bhat, , which is a late case, where it was held that a suit for a declaration that defendants were not properly

appointed trustees of a temple, and for an injunction appropriate to that declaration, did not fall within the purview of Section 92 of the Civil

Procedure Code. I think this is sufficient authority on the point. The learned Counsel for appellant has referred to one case of this Court in Narayan

Bhikaji Khanolkar Vs. Vasudeo Vinayak Prabhu, , where Section 92 was held to apply, and also to Salcharam v. Ganu (1920) 23 Bom. L.R.

125. In Sakharam v. Ganu, it was held that a suit by a hereditary pujari of a temple to recover his share in the offerings to the deity falls within the

purview of Section 92, but in that case a scheme had been framed, and a dispute had arisen which invited the direotiou of the Court to the

administration of the trust property and therefore the section was held to apply. In Narayan v. Vasudeo (1924) 25 Bom. L.R. 950 the suit was

held to fall within the scope of Section 92 of the CPC since the prayers in the plaint showed that accounts of the trust property were to be taken,

inquiries made and directions given. This does not at all apply to the facts of the present case, where the plaintiff merely seeks to recover

possession of the property from persons whom she alleges to be trespassers. I am, therefore, of opinion that the lower appellate Court was correct

in rinding that the present suit was maintainable, and in view of the finding that the plaintiff, as the heir of the founder of the trust, is entitled to the

trusteeship and possession of the property in the absence of any trustees, the finding of the lower appellate Court is correct, and must be upheld.

3. The learned pleader for the respondent has put in cross objections, but as a matter of fact he has only supported the decree on some of the

grounds decided against him. He does not want any alteration in the decree. He has objected to the finding of the lower appellate Court that the

award decree passed between the trustees and the present plaintiff in 1904 was void as being passed without jurisdiction. The reasons are given

on the last page of the judgment. As the appeal will have to be dismissed on the other points which have already been decided against the

appellants, this point is not of great importance. The learned District Judge found the only objection to the award was that the arbitrator had no

right to appoint the successor trustee after the death of the executors when the trust was admittedly of a public character. The fraud which was

argued had not been distinctly pleaded in the lower Court, and on that point the learned Assistant Judge has rightly found that the award is not void

on account of any fraud. As a matter of fact any appointment made by the award of the plaintiff as a trustee after the death of the surviving trustees

would be without authority as the arbitrators had no power to appoint her. On the other hand by operation of law, as has actually happened in this

case, on their deaths she would become a trustee -under the principles which have been already referred to. It is argued that the [earned Assistant

Judge was wrong in holding that an award filed without the intervention of the Court cannot be split, and must be filed as a whole, and reference is

made to the cases in Buta v. Municipal Committee of Lahore I.L.R.(1902) Cal. 854 and Amir Begam v. Budruddin Husain I.L.R.(1914) All. 336.

The learned pleader for the appellants has endeavoured to distinguish the first of these cases as not falling under paragraph 20 of Schedule II of the

Civil Procedure Code, but the case of Amir Begam v. Badruddin Husain is under that paragraph, and that no such distinction as he seeks to argue

exists is shown by the notes at p. 1104 of Mulla''s Code of Civil Procedure, 8th Edition, where it is pointed out that paragraph 21 refers to

paragraph 14 of the Second Schedule, where she principle of separation is recognised. However, as I have already said, this point is of

comparatively small importance in view of the finding on the other parts of the case. The only comment I have to make on the decree of the lower

Court is that it is not very happily worded. It states that the plaintiff must make a declaration that she has no right over the trust property, namely,

the house in Shukrawar Peth, and that she thereby makes it over to the trust. But as she herself is at present the only trustee, there is nobody to

whom she can make it over, and it would have been better perhaps to have stated in the decree of the lower Court that the plaintiff'' should state

that this house in Shukrawar Peth is the property of the trust and that she holds it only as a trustee. However, I do not think it is necessary to

amend the decree by inserting these words, which is merely a question of phraseology.

4. The result is that the decree of the lower appellate Court will be confirmed, and the appeal dismissed with costs.