

(1928) 10 BOM CK 0013

Bombay High Court

Case No: Appeal form Order No. 46 of 1927

Madhavrao Anandrao Raste

APPELLANT

Vs

Shri Omkareshvar Ghat

RESPONDENT

Date of Decision: Oct. 30, 1928

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 92

Citation: (1929) 31 BOMLR 192

Hon'ble Judges: Patkar, J; Murphy, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Patkar, J.

This is a suit brought by the Shree Omkareshvar Ghat of Kondopant Nana Gadgil, through its Vahivatdars, the plaintiffs, against the defendant, Sardar Madhavrao Anandrao Raste, for an account for the years 1880 to 1923 in respect of the amount due for 2/16th share payable to the plaintiff-institution by the defendant and for the determination of the balance due from the defendant after deducting the amounts of village expenses, and for the recovery of the balance due from the defendant.

2. The principal contention on behalf of the defendant in the written statement was that the suit was bad for want of a certificate u/s 92 of the Civil Procedure Code.

3. The learned Subordinate Judge held that the suit was barred by Section 92, and Order I, Rule 8, of the Civil Procedure Code, and dismissed the plaintiff's suit. On appeal, the learned Assistant Judge reversed the decree of the lower Court and remanded the suit for decision on the merits, holding that the suit was not barred u/s 92 and Order I, Rule 8, of the Civil Procedure Code.

4. The defendant, in this case, is described as a trustee in the plaint. The ancestor of the defendant granted a Dharadatta Agrahar Inam in the year 1803 to several

institutions, viz., the Shr. Mahalaxmi of the Pastes, the seven Ghats of Was and to seventeen specified Brahmin families. The plaintiff-institution is one of the seven Ghats, The defendant's ancestor may be considered to have constituted himself and his family as trustee of the fund liable to pay to the several institutions. The learned Assistant Judge is of opinion that the present suit is brought by the plaintiff-institution through its Vahivatdara for recovery of the arrears from a person who is the holder of the fund charged with the liability to pay for expenses of the festivals of the plaintiff-institution.

5. The question, therefore, in this appeal, is whether Section 92 of the CPC bars the present suit for want of a certificate from the Collector, and whether the Subordinate Judge had jurisdiction to decide the suit as it was not a principal civil Court of original jurisdiction.

6. The scope of Section 92 has been discussed in a recent decision of the Privy Council in *Abdur Rahiin v. Abu Mahomed* (1927) 30 Bom. L.R. 774 p.c. where it was held that, under the CPC of 1877, as well as the Code of 1882, the question had arisen whether Section 589 was mandatory and, therefore, all suits claiming any relief mentioned in Section 539 should be brought as required by that section or whether the remedy provided by Section 539 corresponding to Section 92 of the present Code was in addition to any other remedy that existed under the law for the redress of any wrongful action in connection with a public trust of a charitable or religious nature. The view of the Bombay High Court, that the suit which prayed for any of the reliefs mentioned in Section 92 could only be instituted in accordance with the provisions of that section, was accepted by the Privy Council in the case of *Abdur Rahim v. Abu Mahomed*. The question, therefore, in this case, is whether the present suit falls within the ambit of Section 92 of the Civil Procedure Code. It has been argued on behalf of the appellant that the suit falls within the provisions of Section 92. Two conditions are necessary for the application of Section 92, first, there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, and, secondly, the direction of the Court is deemed necessary for the administration of such trust. It is urged on behalf of the appellant that there is an allegation in the plaint of a breach of an express trust created for public purposes of a charitable or religious nature, and reliance is placed on paragraphs 4 and 7 of the counter written statement of the plaintiff. It is urged on behalf of the respondent that the statements in paragraphs 4 and 7 in the counter written statement were made in answer to the contention of the defendant in the written statement that he was not a trustee and was not liable to pay anything to the plaintiff institution. It is further urged on behalf of the respondent that in the original plaint there is no express allegation of a breach of trust on the part of defendant. In paragraph 4, it is said :◆

Some amount is being received from the defendant from year to year for the Shrikrishnotsava of the plaintiff's Madhnli Allioha Ghat (of Kondopant Nana). But it

is not known whether the same is given in the proportion of the income received or in the proportion of the right.

7. And it is further stated in the same paragraph:◆

So the whole matter should be made clear.

It is suggested on behalf of the appellant that these statements amount to an allegation of a breach of an express trust created for a public purpose. We do not agree with the contention on behalf of the appellant that there is an alleged breach of any express or constructive trust created for public purposes in the plaint, and though such an allegation may by twisting of language be spelt out of the statements in the counter written statement, we think that for the purpose of Section 92 there must be a clear allegation of a breach of an express or constructive trust created for public purposes. It does not appear from the plaint that any direction of the Court is invoked for the administration of any such trust. In the present case there are two trusts, a trust which is to be performed by the defendant in respect of the fund of which the members of the defendant's family have constituted themselves trustees, and a second trust in respect of the plaintiff-institution for the purpose of the several festivals which are to be performed during the year. As soon as the amount payable by the defendant's family is made over to the plaintiff-institution the plaintiffs are interested in the administration of the trust relating to the plaintiff-institution, and the defendant fairly is not interested in the administration of that trust. In the plaint no direction is invoked in regard to the administration of the trust relating to the fund in the possession of the defendant's family; nor is there any direction invoked in regard to the administration of the trust relating to the plaintiff-institution. The suit is a simple suit of the plaintiff-institution through its managers to recover the amount payable by the defendant. In my opinion there being no express allegation of a breach of a constructive trust for public purposes and there being no prayer for direction to the Court for the administration of such trust, Section 92 of the CPC does not apply to the present suit. What we have to see is the nature of the suit, not in its form but in its substance. Though an account is asked for and that relief may fall u/s 92(d), the present suit is really a suit brought by the plaintiff-institution to recover the amount due to the plaintiff-institution by the defendant's family, who have constituted themselves trustees of the fund liable to pay certain portion of that fund to the plaintiff for the observance of the several festivals in which the plaintiff-institution is interested.

8. On behalf of the appellant a reference is made to the case of [Narayan Bhikaji Khanolkar Vs. Vasudeo Vinayak Prabhu](#), . In that case the difficulty of deciding whether a particular case falls within the scope of Section 92 was recognised. The facts of that case are quite different from the facts of the present case. There the defendants-trustees were in the actual management of the temple in respect of which the suit was brought and there was a prayer for a direction as to what should

be done with the trust funds. The suit there was against the trustees of the temple in respect of which the suit was brought and there was a specific relief asking for a direction as to what should be done with the trust funds. In that case there was really a dispute between the parties as to who were or should be the trustees of a public trust. In the present case as soon as the amount was paid by the defendant's family they had no further interest in the administration of the fund so far as the plaintiff-institution was concerned.

9. In the case of *Jugalkwhore v. Lakshmandas* I.L.R (1899) Bom. 659: 1 Bom L.R. 118, referred to on behalf of the appellant, it was held that the defendant, though he was not appointed as a trustee, had made himself a constructive trustee, by purporting to manage it as temple property and was liable as such to the beneficiaries, That was a suit brought on behalf of a Hindu temple by the Fujari and five other worship, pars of the idol alleging a breach of a constructive trust and praying for the removal of the defendant from the management and for settlement of a scheme under the directions of the Court for the future management of the charity.

10. In *Nilkanth Devrao v. Ramhrishna Vithal* I.L.R (1921) Bom. 101: Bom. L.R. 876. it was held that Order 92 applied only when two conditions were satisfied, first, either there must be an alleged breach of an express or constructive trust created for a public purpose of a charitable or religious nature, and, secondly, a direction of the Court must be deemed necessary for the administration of any such trust. It was further held that unless the suit fell within the scope of Section 92 of the Civil Procedure Code, 1908, the mere fact that it resembles in certain respects a suit which may properly be brought u/s 92 can afford no good ground for holding that Article 92 could apply. In that case the suit was brought by the hereditary Muktesars (trustees) of a temple for a declaration that defendants Nos. 1 to 4 were not properly appointed trustees of the temple, and for an injunction restraining them from interfering with the plaintiffs in the management of the affairs of the temple, and it was held that the suit was outside the scope of that section as the plaintiffs were not suing on account of any breach of trust as contemplated by it, nor were they applying for any direction of the Court for the administration of the trust.

11. The case of *Appanna Porioha v. Narasinga Porieha* I.L.R (1921) Mad. 113 which refers to a suit brought by one of the trustees against a co-trustee for accounts, does not directly apply to the facts of the present case where the defendants are not the trustees of the plaintiff-institution, but trustees of a different fund liable to pay a portion of the fund to the plaintiff-institution.

12. The case of *Nellaiyappa Pillai v. Thangama Nachiyar* I.L.R (1897) Mad. 406 resembles the present case in its essential features. In that case the trustees of a temple sued to recover from the representatives of the trustees of a fund constituted for special purposes in connection with the tempels worship a sum of money misappropriated by him and to obtain the appointment in his place of himself or some other fit person, it was held that the suit was maintainable without

the sanction of the Advocate General or the Collector u/s 539 of the Civil Procedure Code. In the present case, however, there is no prayer for removal of the defendant from his position of a trustee of the fund in his charge. We think, therefore, the view of the lower appellate Court is correct that the suit is not barred by Section 92 of the Civil Procedure Code.

13. Another point which was not taken in the lower Court is urged on behalf of the appellant, viz., that the present suit brought by the institution described as Shri Omkareshvar Ghat was not maintainable. On the other hand, it has been argued on behalf of the respondent that it is a religious institution and that the present suit is not brought on behalf of the public, but to enforce the individual right of the plaintiff-institution entitled to receive a portion of the income from the defendant. A temple is attached to each of the several Ghats. We agree with the contention of the respondent that the suit is maintainable by the present plaintiff-institution, the Shree Omkareshvar Ghat, a religious institution. The property can be said to belong to the plaintiff-institution in an ideal sense like other religious institutions and temples. The plaintiff-institution like a Math or an idol is a juristic person capable of holding property and acquiring and vindicating legal rights though of necessity it can only act in relation to those rights through the medium of some human agency. See *Jodhi Rai v. Basdeo Prasad* I.L.R (1911) All 735. and *Babajirao v. Laxmandas* I.L.R (1903) Bom. 223, :5 Bom. L.R. 932. The plaintiff-institution can, therefore, bring a suit through its Vahivatdars, the Panchas. The suit, therefore, brought by the present plaintiff is not a suit brought on behalf of the public for vindication of the rights of the general public as contemplated by Section 92, but was a suit by the plaintiff-institution to enforce the right to recover the amount due to the institution from the defendant. We think that the view of the lower Court is correct and, therefore, dismiss the appeal with costs.

Murphy, J.

14. The facts have already been fully set out in my learned brother Patkar's judgment, and I need not recapitulate them. The simple question before us is whether the plaintiff's suit is within one of the classes covered by Article 92 of the Civil Procedure Code, and is consequently barred by the formalities required by that section not having been complied with, or is not covered by the section. I think that it is not a suit of the nature contemplated in Section 92. It was actually brought by certain persons, who described themselves as the "Panchas" of a charity known as "Shree Omkareshvar Ghat," against the representative of the Raste family whose ancestor was the donor of an allowance of Rs. 100 to this "Ghat", apparently for the purposes of the annual "Utsava" and in support of its attached Brahmins. In fact, it is a claim by the Brahmins for what they believe to be a larger sum, which has become available owing to an increase in the village revenue, out of which the allowance is to be paid. The class of cases included in Section 92 has been very clearly defined in two cases on which I rely. The first of these is *Nillcanth Devrao v. Ramkrishna Vithal*

I.L.R (1921) Bom. 101. 23 Bom. L.R. 876. where the principle has been laid down that to be covered by the Section 92 there must either be an allegation in the plaint of a breach of trust, or a prayer for direction on some point in connection with its management. Although it has been urged before us that an allegation of breach of trust has been made in this case, it certainly has not been made in clear terms, though it may possibly and with difficulty be spelled out from the plaintiff's counter written statement.

15. The second case I rely on is Appanna Porioha v. Narasinga Poricha I.L.R (1921) Mad 113. Kumaraswami Sastri J. has at p. 127 of the same volume clearly defined the general classes of cases to which Section 92 was intended to apply. In his opinion the object was that it should govern suits by the public, or by the Advocate General, for the vindication of the rights of the public in charitable trusts, and the relief asked for should be all or any of the reliefs specified in Clauses (a) to (h) of Sub-section (1). It appears to me that, looking at the section in the light of and with the aid of the opinions to be found in these rulings, it is not possible to say that the present suit, as framed, comes within any of the classes to which the section was intended to apply, I agree, therefore, that the learned Assistant Judge's judgment is correct, that his order of remand is proper, and that the appeal should be dismissed with costs.