
(1969) 09 MAD CK 0048
In the Madras High Court

A. Subramanyam and Others APPELLANT
Vs
B. Yegnanarayaniah and Another RESPONDENT

Date of Decision : 04-09-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : (1970) 83 LW 607 : (1971) 1 MLJ 46

Hon'ble Judges : K.S. Palaniswamy, J;K.S. Palaniswami, J

Bench : Division Bench

Judgement

K.S. Palaniswamy, J.—Issue No. 1 framed in this suit has been heard as preliminary issue and it thus reads:

Is the suit not maintainable for want of sanction u/s 92 of the Code of Civil Procedure.

2. The relevant facts are these. One Vavilla Venkateswara Sastrulu was possessed of extensive properties both at Madras and at Nellore in Andhra Pradesh. He was also conducting a printing and publishing concern known as "Vavilla Ramaswamy Sastrulu and Sons", reputed for the publication in classical, religions, devotional and literary works in Sanskrit, Telugu, Tamil, Hindi, etc. He died intestate and issueless on 9th April, 1956 leaving his widow, Vavilla Subbamma, who became entitled to all the properties of her husband with absolute powers under the provisions of the Hindu Succession Act, 1956. With a view to cater to the spiritual beatitude of her husband and for the perpetuation of the trust carried on by her husband, Vavilla Subbamma executed a deed of trust on 30th June 1956. Under the trust deed she constituted herself as the sole trustee for her lifetime with the assistance of such adviser or advisers as she may choose at her discretion. She also reserved to herself the power and right to nominate her successors as trustees in office either by deed or will to administer the trust in accordance with the provisions of the trust deed. The trust deed further provided that in case the founder failed to nominate her successors, the management shall vest in a Board of three trustees. Provision was also made as

regards the persons from whom the choice of trustees should be made. Duties of the trustees were also laid down in detail. What trusts should be performed were also indicated. Paragraph 19 of the trust deed, which is important, runs thus:

The trustee shall cause the accounts of the Trust to be duly audited annually by the 31st of March by a duly qualified auditor or auditors. As soon as the auditor furnishes his certificates and report, the trustees shall make due provision from and out of the nett profits for the following:

- (a) 5 per cent for the parishad referred to in Clause 14 supra;
- (b) 5 per cent for the distribution of tuition fee, etc., for the poor students; vide Clause 15 supra;
- (c) 10 per cent fund for the Hall.
- (d) 5 per cent for the Library.
- (e) 15 per cent for reserve--vide Clause 20 infra;
- if) 5 Per cent for sinking fund--Clause 21 infra.

3. The next important provision is contained in paragraph 23, which runs thus;

23. The trustees shall make sufficient provisions from the net profits to discharge the debts and pay the estate duty referred to in Schedule "B" hereunder. The surplus in regard to the balance of the net profits shall be divided into nine equal shares. Of the said 9 shares two shares shall be taken by Vavilla Subbamma, the sole trustee; and out of the remaining 7 shares (1) K. Viswanathan, (2) Srimathi K. Gnanambal (wife of K. Ramanathan), (3) A. Subramanyam, (4) A. Kanakavalli Amma, (5) G. Vedagirirama Sastry, (6) G. Sitharama Sastry, and (7) K. Chandramouleswara Sastry shall each be paid a share for the period of their lives. The share of each after his or her lifetime other than the shares of the sole trustee shall revert to the trust. The trustee, however, shall have the full liberty and right to make a disposition in respect of her shares by an appropriate document in her lifetime. If, however, she fails to do so, her share also shall revert to the trust.

4. The two plaintiffs and defendants 2 to 5 are among the beneficiaries mentioned above. The other beneficiary was one Chandramouleswara Sastri, who appears to have been the manager of the publication concern, is no more. The plaintiffs and defendants 2 to 5 are the relations of the founder, Vavilla Subbamma. After the constitution of the trust, the founder managed the trust as its sole trustee till her death on 12th September, 1958. On 10th September, 1958, she executed a will appointing the first defendant, son-in-law of her sister, as the sole trustee to come into office after her lifetime. This she did by virtue of the express powers reserved in the trust deed. The first defendant assumed management of the trust on the death of the founder on 12th September, 1958. On 3rd July, 1961, the plaintiffs applied to the Advocate-General, Madras u/s 92 of the Code of Civil Procedure, praying for his sanction to institute a suit against

the first defendant enclosing a copy of the plaint proposed to be filed. The six defendants, who are parties in this case, were ranked as defendants in that plaint. The plaintiffs alleged against the first defendant various acts of malfeasance, misfeasance, non-feasance, breaches of trust, misappropriation of trust monies and failure to pay them their share in the income derived from the trust properties. Among several pleas, the first defendant contended that the trust was a private trust and that, therefore, the application for sanction u/s 92 of the CPC was incompetent. In the course of the hearing before him, the Advocate-General directed the first defendant to deposit a sum of Rs. 10,000 towards the public items of the trust and wanted the first defendant to take out an originating summons before this Court seeking directions with regard to the items dealing with public trust. Accordingly, the first defendant filed C.S. No. 77 of 1961 (O.S.) in the nature of originating summons with regard to the items (a) to (d) of paragraph 19 of the trust deed already adverted to. This matter came up before Kailasam, J. who held that all those items related to public trust and directed the first defendant to deposit a sum of Rs. 37,500 into Court which the first defendant accordingly did.

Thereupon, the Advocate-General passed the following order on 1st November, 1961:

In view of C.S. No. 77 of 1961 (O.S.) having been filed, consent to file the intended suit in sanction Application No. 4 of 1961 is refused.

2. As regards private rights they are of course free to take proceedings.

5. The plaintiff instituted this suit on 12th February, 1962, making the same, allegations against the first defendant as regards acts of misfeasance, malfeasance, non-feasance, breach of trust, misappropriation of trust monies, etc. praying for the following, among other reliefs:

(1) that the first defendant may be removed from the trusteeship and of the management of the trust properties;

(2) that the first defendant may be directed to render a true and proper account of his management and interference with the trust estate from 12th September, 1958 until his removal and to pay to the trust estate such sum as may be found due on such account taking;

(3) that a Board of three trustees may be constituted as per the provisions contained in the trust deed dated 30th June, 1956, or a Board of such other number of trustees may be constituted in such manner as to this Honourable Court may seem fit and proper for the due administration and management of the trust;

(4) that a proper scheme for the due administration and management of the suit trust and its properties may be framed by this Honourable Court.

6. Among the several defences raised by the first defendant, one is with regard

to the maintainability of the suit, and it is whether the suit is not maintainable or barred without the sanction of the Advocate-General u/s 92 of the Code of Civil Procedure. When this matter came up for hearing before Ramamurti, J., it was contended on behalf of the plaintiffs that they were seeking relief in the suit not with regard to the public trust, but only to enforce their rights under the private trust created in the same document and that, if necessary, the plaintiffs were prepared to file an application for amendment of the plaint with a view to clarify the position. The learned Judge recorded by an order dated 27th January, 1966, that in view of what was stated before him it was not necessary that an application for amendment should be filed and that it was sufficient to record that the plaintiffs were not seeking any relief with regard to the public trust created in the trust deed. The learned Judge also observed that it was still open to the defendant to raise any objection if they were so advised as to whether the suit was maintainable in the present form after the clarification, referred to above. The matter again came up before the same learned Judge for a consideration of the question of the maintainability of the suit. After hearing the arguments, the learned Judge orally indicated his view that the suit did not require the sanction of the Advocate-General and was hence maintainable. Without recording his reasons for that conclusion on that question he directed the appointment of a Commissioner for recording evidence on the allegations already made in the plaint against the first defendant. Against this order of appointment of Commissioner, the first defendant preferred an appeal in O.S.A. No. 44 of 1966. Anantanarayanan, C.J. delivering the judgment on behalf of the Bench, indicated what should be done by the Commissioner and what the parties should do with regard to the matter referred to him. He gave opportunity to the parties to apply to the trial Court for further directions in that regard, at the same time observing that if oral evidence was given on a crucial matter in determining the issues, it would be clearly desirable that the said evidence was adduced before the trial Judge himself and not before the Commissioner. The Bench disposed of the appeal with those observations which were considered to be in the nature of clarification. As regards the view expressed by Ramamurti, J., on the question of maintainability of the suit u/s 92 of the Code of Civil Procedure, the Bench observed that they were not concerned with that matter at that stage, that if the learned Judge stated his reasons for his views the parties aggrieved would have a right of appeal and other remedies at law and that, therefore, in view of the position obtaining at that stage there was no need for the Bench to go into the question. After the disposal of the above original side appeal, the matter was not proceeded with further. It is represented on behalf of both sides that the Commissioner has not done any work. Inasmuch as the matter as to the maintainability of the suit has not been disposed of by a judgment rendered in accordance with law, the learned Counsel for the first defendant wanted me to hear this as a preliminary issue and give a judgment. His submission was that if his contention were to prevail then it would be unnecessary for the parties to waste time and energy, on the question of the several charges levelled by the plaintiffs in their plaint. It is in those

circumstances that this issue has been taken up as a preliminary issue.

7. Section 92 of the Code of Civil Procedure, reads thus:

92. (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree-

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (or by any corresponding law in force in a part B State) no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

8. This is a re-enactment of Section 539 of the Code of 1882, with certain modifications. Before that section could be invoked, three conditions should be satisfied. In the first place, there must be a trust created for a public purpose of a charitable or religious nature. Secondly, the allegation as to the breach of such trust must be deemed to be necessary for the administration of such trust. Thirdly, the relief claimed in the suit must be one or the other of the reliefs mentioned in Clauses (a) to (A) of Sub-section (1) of the said section. The scope of this section arose for consideration in a number of decisions, and it is unnecessary to refer to the several decisions on this point except those that have a bearing on the nature of the trust that arises for consideration in this suit. It is the common case of both parties that the trust created by Vavilla Subbamma is a composite trust consisting partly of public trust and partly of private trust. The applicability of Section 92 to a suit by one trustee against another trustee arose for consideration in Appanna Poricha v. Narasinga Poricha (1922) 41 M.L.J. 608 :

ILR 45 Mad. 113 The Full Bench held that such a suit, even if relates to a public charitable or religious trust, would not fall within the scope of Section 92 of the CPC and may be brought without the sanction of the Advocate-General. The question arose before a Bench consisting of Leach, C.J., and Varadachariar, J., in Shanmugham Chetti v. Govinda Chetty ILR (1938) Mad. 39, whether the aforesaid Full Bench decision can be taken as having laid down good law in view of the subsequent decision of Judicial Committee in Abdur Rahim v. Mahomed Barkat Ali L.R. 55 IndAp 96 : 54 M.L.J. 609 : ILR 55 Cal. 519 . The Bench held that the view of the Full Bench was not in any way affected by the decision of the Judicial Committee. Another Full Bench decision in Janaki Bai v. Thiruchitrambala Vinayakar ILR(1935) Mad. 988 : 69 M.L.J. 291, also came up for consideration before the Bench. Varadachariar, J., in his separate judgment commented upon the observation of Cornish, J., namely, "whether the suit falls within Section 92 depends not upon the character in which the plaintiff sues but upon the nature of the relief sought," and observed that the said position was not correct. This matter again came up for consideration before another Full Bench in The Tirumalai Tirupati Devasthanams Committee Vs. Udiavar Krishnayya Shanbhaga and Others, , in which one of the learned Judges was Leach, C.J. himself. The opinion of the Full Bench was given by that learned Chief Justice. He approved the observations of Varadachariar, J., above referred to, and held that in deciding whether the suit falls within the scope of Section 92, the Court must go beyond the reliefs sought and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought.

9. If the matter relates to private trust, the question arises whether even such a suit would require the sanction of the Advocate-General u/s 92 in which the reliefs similiar to those indicated in Section 92 are asked for. When a person interested in private trust alleges mismanagement or acts of breach of trust, it is a civil right and u/s 9 of the Code of Civil Procedure, such a person is entitled to seek redress in Court for the purpose of remedying the mischief. In a long catena of cases it has been held that in the case of a private trust, Courts have jurisdiction to interfere for the purpose of seeing that no breach of trust is committed and that a scheme could be framed even in the matter of private trust and the trustee for the time being can be removed and a new trustee can be appointed further provision (can be made) for devolution of the trusteeship and other matters connected with the trust, vide M.G. Narayanaswami Naidu and Another Vs. M. Balasundaram Naidu and Others, KT. N. RM. Thenappa Chettiar and Others Vs. N.S. KR. Karuppan Chettiar and Others, . Such suits do not fall within the scope of Section 92, Civil Procedure Code.

10. The decision in Shabbir Hussain v. Ashiq Hussain AIR 1929 Oudh. 225, to which Mr. Alladi Subramaniam, appearing for the plaintiffs relied, has no relevancy to this case, as that related to matters arising under the Charitable and Religious Trusts Act, 1920 and Mussalman Wakf Act, 1923. In Mt. Shah Jahan Begum and Others Vs. Ibn Ali and Others, , on which reliance was placed on behalf of the plaintiffs, the trust was a composite trust, as in the instant case.

After meeting certain charities, a sum of Rs. 10, a month was directed to be paid to the plaintiffs in that suit who was the then Pesh namaz of a mosque. The said plaintiff and another person instituted a suit u/s 92 impleading the persons who were then muttawallis and prayed for their removal from the position of muttawallis and for rendition of accounts. The reliefs were based on the allegation that the trust was mismanaged and the income was applied in a manner which was not in accordance with the terms of the wakfnama. The trial Court found that those allegations were untrue, that the accounts had been properly and carefully kept and that the income had all been spent in proper purposes. In that view, the suit was dismissed. In the appeal, a single Judge of the Allahabad High Court agreed with those findings except on one point. He examined the trust deed and came to the conclusion that the salary ought to have been paid to the plaintiff and in that view, he set aside the decree of the trial Court and remanded the suit for decision with a direction that an enquiry should be made into the amount of the income every year so that it might be ascertained exactly how much should have been paid in each year to the plaintiff. This matter was taken on appeal. The Bench differing from the decision of the single Judge, held:

The learned single Judge of this Court was concerned with the private disputes between Ibn Ali (plaintiff) as one of the beneficiaries, and the trust through its mutawalli. We do not think that the dispute was one which properly arose in a suit u/s 92. The interests of the public were not in any way affected by that dispute and there was no allegation that the public had suffered in any way on account of the non-payment of the full allowance to Ibn Ali if he was entitled to an allowance of more than Rs. 10, a month. On findings there was no cause of action for a suit u/s 92, Civil Procedure Code.

11. In the above view, the Bench restored the decision of the trial Court. That case also does not help the plaintiffs.

12. In *Thangachi Nachial v. Malumair* (1957) 1 M.L.J. 300, on which reliance was placed on behalf of the plaintiffs, one of the issues framed in the trial Court was whether the suit was barred u/s 92 of the Code of Civil Procedure. In that case, the plaintiff was a beneficiary interested in a trust and also, as an heir, entitled to be appointed as a trustee under the terms of the trust deed in certain circumstances. He instituted a suit for recovery of possession of the trust properties and for other reliefs. The trust in that case was created for the purpose of meeting the expenses of a Mouluth to be performed in the month of Rabiul-avul when 40 marakals of rice should be cooked and distributed to relatives, friends and the poor and another Mouluth to be performed in the Mohurrarn month of each year in the Husainia Moulatkhana belonging to the settlor when 25 marakals of rice had to be cooked and distributed to poor muslims. The trust deed provided for the distribution of the three-fourths of net income from the lands. It also provided that one-fourth of the income was to be distributed among the founder's santhathi, male and female. The trial Court

found that the suit was not barred u/s 92. But in appeal, this point was not taken up and a decision in the appeal was invited only on the question (1) whether the plaintiff was entitled to maintain the suit, (2) whether the revenue sale which the defendants set up had been properly held and could be set aside and (3) whether the suit was barred by limitation. Inasmuch as there is no adjudication on the question of the maintainability of the suit u/s 92 of the Code of Civil Procedure, that decision is of no use in deciding this case.

13. In *Aboo v. Aboo* AIR 1939 Rangg. 254, cited on behalf of the plaintiffs, a lady settled her properties upon a trustee with a direction that the income from the said property should be utilised towards certain trusts. The benefactions consisted of a primary trust for the benefit of the poor members of the settlor's, her father's and grandfather's family, and subject thereto a secondary trust for the benefit of wider class of poor people of certain community and other objects was created and that was unquestionably for charitable and religious purposes. The secondary public trust was, however, to take effect only in the event of there being no primary objects or those objects not exhausting the whole of the income. Certain persons who called themselves relatives of the founder of the trust and calling themselves as the beneficiaries, brought a suit against the trustee alleging breach of trust on his part and for his removal and for appointment of a new trustee. The breaches complained of were all breaches affecting the income of the property as opposed to capital. In these circumstances, it was held that the trust, of which the breach was alleged, was not a trust for public purposes of a charitable or religious nature and that the case did not fall u/s 92 of the Code of Civil Procedure. On facts it would be seen that what was sought to be litigated upon was only in respect of the private nature of the trust.

14. In *Bashikar v. Srinivasa Thathachariar* (1922) ILR Mad. 113 : 41 M.L.J. 608 , the principle laid down is that a suit filed by an individual worshipper against the trustee complaining of infringement of his right of worship is not one falling within the scope of Section 92 even though for the purpose of giving relief to the plaintiffs the Court may have to issue a mandatory injunction or give a direction to the trustee. In *H. Syed Abbas Saheb and Others Vs. I. Syed Amir Hamiza Saheb and Others*, , on which reliance was next placed on behalf of the plaintiffs, the suit was by a trustee, and following the Full Bench decision in *Appanna Poricha v. Narasinga Poricha* 41 M.L.J. 608 : ILR(1922) Mad. 113 , it was held that the suit was not barred u/s 92 of the Code of Civil Procedure.

15. In *H. Syed Abbas Saheb and Others Vs. I. Syed Amir Hamiza Saheb and Others*, , the trust deed which was a composite one provided for the purpose of certain charitable trusts and for paying over the surplus to the descendants of the founder of the trust. The suit was laid for an account from the trustee only as regards the surplus. The question arose whether the suit against the trustee for rendition of such accounts attracted the applicability of Section 92. In holding that Section 92 was not attracted, the learned Judge Govindarajachari, J.,

observed:

The argument regarding the bar u/s 92, Civil Procedure Code, can be shortly dealt with. The account that is asked for does not relate to the charities which were directed by the settlor. The plaintiffs are seeking to enforce their private right in the surplus which remains after the charitable purposes are met. No account is asked for in respect of those purposes. The bar u/s 92 does not therefore arise.

16. To find out whether or not the suit falls within the scope of Section 92, we must primarily concern ourselves with the examination of the allegations made in the plaint. What may be stated in the written statement is irrelevant vide *Abdul Razack Sahib and Others Vs. A. Abdul Hamid Said and Others*, . In that view, that the first defendant has stated in paragraph 4 of the written statement about the scope of this suit, namely, that the plaintiffs have restricted their claims to private trust (on which allegation the plaintiff's Counsel placed considerable reliance in support of his argument that Section 92, Civil Procedure Code, is not attracted) is not relevant. That allegation is also inconsistent with the allegations in that paragraph in which the first defendant has stated that the plaintiffs are attempting to frame a scheme for the entire trust inclusive of public trust. In the instant case, the plaint runs to several long paragraphs. Paragraph 3 sets out the relationship of the plaintiffs with Vavilla Venkateswara Sastrulu and his wife, Vavilla Subbamma. Paragraphs 4 and 5 refer to the death of Vavilla Venkateswara Sastrulu and the properties possessed by him. Paragraph 5 sets out the circumstances under which the trust deed came to be executed. Paragraphs 6 to 9 set out the terms of the trust in elaborate details both as regards the public trust and private trust. In paragraphs 10 and 11 reference is made to the execution of the will by Vavilla Subbamma. Allegations are also made against the first defendant to the effect that he brought about the will for his own ends by exercising influence over Subbamma. Paragraphs 12 to 37 set out the several charges of malfeasance, misfeasance, falsification of accounts, breach of trust, misappropriation of trust money etc. In all these paragraphs the trust as a whole is referred to. It is alleged in unambiguous terms that all the breaches attributed to the first defendant was in respect of the institution as a whole. Emphasis is laid on the failure of the first defendant to perform the charities of public nature. Emphasis is also laid on the alleged failure of the first defendant to cause the publication of classical works in several languages already referred to, which is an integral part of the public trust. Paragraph 37, which is important, reads thus:

37. The plaintiffs submit that the first defendant has been guilty of gross laches and negligence in the management and administration of the trust estate. He has also committed several acts of breaches of trust and misappropriation of moneys and funds belonging to the trust estate which have already been set out above. The plaintiffs therefore submit that the first defendant has been guilty of acts of misfeasance, non-feasance in the matter of the administration of the trust and its

properties and business. He is liable to render a true and faithful account of his management of the trust estate from 12th September, 1958, when he assumed charge as trustee upto date and to pay such sum as may be due upon such account taking to the trust estate.

17. Paragraph 38 again refers to the will of Vavilla Subbamma, and an attack is made against the first defendant as being responsible for the execution of the will for his own ulterior purposes. According to the plaintiffs the provisions in the will are contrary to the scheme and intendment of the trust deed and as such the will is void. In paragraph 39 reference is made to the terms of the trust deed providing for the constitution of a Board of Trustees to be appointed for the management of the trust, and proceeds to state as follows:

The plaintiffs therefore submit that the provision in the said will of Vavilla Subbamma purporting to appoint the first defendant as sole trustee of the trust with power to appoint a sole trustee in his place is void, inoperative and invalid in law. The plaintiffs therefore state that the first defendant has no right to manage the suit trust as sole trustee. The plaintiffs submit that in the circumstances it is absolutely necessary in the interests of the suit trust and also in the interests of all the beneficiaries that the said trust be managed by a Board of three trustees as originally provided in the deed of trust and that appropriate directions in that behalf for the constitution of a Board of three trustees may be made by this Honourable Court.

18. In paragraph 40 reference is made to the importance of the publications, and it is stated that the institution had attained an all India public status and was serving the cause of Hindu religion and Sanskrit, Telugu and Tamil literature. It is also alleged that it is necessary that the trust is managed and administered by a Board of at least three trustees. This is what the plaintiffs have further alleged:

The plaintiffs, therefore, submit that it is absolutely necessary in the interests of the institution and of all the beneficiaries that a proper scheme for the proper and efficient management of the suit trust may be framed by this Honourable Court so that the lapses, abuses and breaches of trust referred to above may be avoided at least in future.

19. Paragraph 42 sets out the interest of the plaintiffs in the trust. Paragraph 43 sets out the interest of the defendants 2 to 5, who are the co-beneficiaries along with the plaintiffs. In paragraph 44, it is alleged that the first defendant had not complied with the request of the plaintiffs for payment of their shares, but had paid only a sum of Rs. 1,500 to the first plaintiff and that the first defendant was liable to pay the plaintiffs their shares of the income from the properties from 1956 up to the date of account taking. Paragraph 45 sets out the cause of action. It runs thus:

The cause of action for the suit arose at Madras on 30th June, 1956, when late Vavilla Subbamma constituted the trust under a registered trust deed of the same date, on 10th September, 1958, when she is said to have executed a will

containing a provision for appointment of the sole trustee after the lifetime on 12th September, 1958, when she died and the first defendant assumed charge of the sole trusteeship and subsequently when the first defendant has been guilty of various acts of malfeasance, misfeasance and non-feasance, breaches of trust and misappropriation of trust moneys and when the first defendant failed to pay to the plaintiffs their shares in the income derived from the trust properties.

20. In paragraph 46, the details of the valuation of the suit for the purpose of jurisdiction are given. It is said that as the suit is for the framing of a scheme for the management of the "suit trust and for the appointment of a proper trustee", a Court-fee of Rs. 300 is paid u/s 50 of the Madras Court-fees Act. Details are also given as regards the Court-fee payable on the relief of account taking. I have already referred to the reliefs prayed for in the suit contained in Clauses (1) to (4) of paragraph 47.

21. Reference has already been made to the fact that when the plaintiffs sought the leave of the Advocate-General u/s 92, they enclosed a copy of the plaint proposed to be filed. A perusal of that plaint in juxtaposition with the plaint in the instant case would show that the present plaint is almost a copy of that plaint excepting for some omissions and additions here and there. The cause of action alleged in the proposed plaint is verbatim the same as that set out in the present plaint. In that plaint, the plaintiffs prayed for a declaration that the first defendant was not a duly constituted trustee. No doubt relief is not included in the present plaint. But makes no difference. The reliefs regarding the removal of the first defendant from trusteeship, directing the first defendant to render an account in respect of the trust estate, constitution of a Board of trustees for the management of the trust, and framing a scheme for the administration and management of the trust are all common. In the proposed plaint the plaintiffs had asked for a direction to the first defendant to distribute to them the amount payable under the terms of the trust deed out of the income of the trust properties. That is undoubtedly a matter relating to the private trust. But significantly and also curiously that relief is omitted in the present plaint.

22. On a consideration of the plaint allegations, as they stand, the question arises whether the plaintiffs want the Court to give them reliefs only as regards that part of the trust which relates to the distribution of 55 percent, of the net income of the trust estate. What is constituted under the trust deed is a composite trust. The public trust and the private trust are inter-connected. This is not a suit simpliciter seeking relief in respect of the amount payable to the plaintiffs out of the net income. This cannot, therefore be treated on a par with *H. Syed Abbas Saheb and Others Vs. I. Syed Amir Hamiza Saheb and Others*, , already adverted to, in which the plaintiffs made it clear that the claim was restricted only to the reliefs in respect of the private trust without making any allegations as regards the public trust. In this case, the plaintiffs want the first defendant to be removed from trusteeship and management of the trust properties. They want the first defendant to render an account of his

management of the trust estate and to pay over to the trust estate whatever sum that may be found due. They want a Board of three trustees to be constituted for the due administration and management of the trust. They also want a proper scheme for the due administration and management of the trust and its properties. Thus on a plain reading of the reliefs, the inescapable inference is that the suit is for the purpose of administering the entire trust and for other reliefs connected with the entire trust. When I pointed out this position, Mr. Alladi Subramaniam, appearing for the plaintiffs, submitted that what the plaintiffs want is only relief as their share in the 55 per cent, of the income and that, therefore, wherever the expressions "trust estate", "Board of Trustees", "Management", etc., occur, such expressions should be understood as relating only to the private trust and that if such a construction of the plaint is adopted, Section 92 of the Code of Civil Procedure, would not be attracted. This argument, which is not doubt ingenious and looks apparently plausible, cannot be accepted. The question is, do the plaint allegations require any such clarification? The further question is, even if such a clarification is warranted and permitted, what would be the result? The words used in the plaint admit of no doubt or ambiguity about the import and object of the suit. The fact that at one or two places the plaintiffs have made reference to the liability of the first defendant to pay them their share out of the net income after meeting the public charges does not and cannot take away the effect of the several reliefs which are based upon the elaborate allegations made in the plaint upon which those reliefs are founded. All the allegations necessary to cover the whole of the trust, both private trust part and public trust part, are elaborately set out. In the scheme of things, as contemplated in the trust deed, the first defendant cannot be allowed to function as a trustee of the public trust alone after he is removed from trusteeship as regards the private trust. Likewise, a scheme cannot be framed as regards the private trust leaving out the public trust, and equally a Board of Trustees cannot be constituted only for the purpose of the private trust leaving the first defendant to function as the trustee of the public trust. Evidently, the framers of the plaint were aware of this position, and that is the reason why all the allegations necessary to cover both the trusts have been made and comprehensive reliefs have been prayed for. The object underlying the suit is the preservation and advancement of the trust as a whole and its proper and efficient administration. If, in achieving those objects, the plaintiffs, incidentally stand to gain individually and personally, the suit is nonetheless a suit falling squarely within the ambit of Section 92 of the Code of Civil Procedure, and it is not open to the plaintiffs to say that reliefs could be given to them only so far as their personal right was concerned. No doubt, a plaintiff cannot be compelled to ask for reliefs which he does not want. But if the relief which he wants is so inextricably and intimately connected with a matter, which cannot be agitated except in conformity with certain provision of law, he cannot evade such a provision but should necessarily conform to that provision even to vindicate his personal right. Section 92 of the CPC is wide in its terms. But it has been held to be inapplicable even to a case of public trust in certain circumstances if the relief asked for is intended only to

vindicate or protect the personal right. But to say that the section is inapplicable even to a case in which the clear and avowed object is the proper management of the public trust, even though incidentally private right might also be attracted, would amount to setting at naught the mandatory provisions contained in Section 92. What plaintiffs want in this case is exactly the same which cannot be countenanced.

23. In *Sundara Ayyar and Others Vs. Morari Varada Ayyar and Others*, , the plaintiffs purported to claim relief by way of vindication of an individual right in a trust and asked for a decree appointing trustees from the family members and for framing of a scheme for the purpose of the charities. The lower appellate Court dismissed the suit as it did not comply with Section 92, Civil Procedure Code. In considering the correctness of this view, the learned Judge Varadachariar, J., observed at page 856:

Assuming for the present that Section 92 has no application to suits whose object is the assertion or vindication of personal or individual rights of persons claiming to be trustees, the mere fact that the plaintiffs may in a sense be trustees will not necessarily preclude the application of Section 92, if the reliefs in the suit relate not to the vindication of their personal rights but to the advancement of the interests of the institution itself by securing more efficient management. It must be remembered that the language of Sub-section (2) of Section 92 is very wide and it is only by an attempt to reconcile Section 92 and the corresponding Section 539 with the pre-existing law relating to private rights that has sometimes been held that a suit though relating to a public trust will not fall within Section 92 if it merely relates to the vindication of private rights. It will be an unwarranted extension of this exception to hold that a suit whose avowed object is the furtherance of the interests of the institution itself, by the framing of a proper scheme amongst the alleged trustees who are not able to agree among themselves upon proper management, will also not fall u/s 92.

24. I am in respectful agreement with the above view. A party cannot be allowed to evade a provision of law by litigating a matter which could be properly litigated only by complying with Section 92, Civil Procedure Code, by asking for relief as if it falls outside the purview of that section. Mr. Alladi Subramaniam, appearing for the plaintiffs, cited *Kisan v. Shree Marote Sansthan Mohori* ILR (1947) Nag. 819, in support of his argument that a plaintiff is entitled to ask for a particular relief independently of Section 92 if he can seek it and if, in so doing, the matter falls u/s 92, still he could litigate. No doubt there is an observation at page 824 running thus:

If a plaintiff is entitled to a particular relief independently of Section 92 he can seek it outside that section and in doing so, he can litigate matters which would also arise in a suit u/s 92.

25. But the same learned Judge has also observed thus:

I do not agree that a plaintiff can evade the provisions of Section 92 by asking

for relief which are not covered by Section 92 and then evade these provisions by litigating a matter which is foreign to the relief sought and which would be covered by Section 92, had the suit been framed otherwise.

26. This observation is more apposite to the facts of this case, for as already pointed out, what the plaintiff now want to establish (according to the so-called clarification) is a relief falling outside Section 92, but they want to litigate matters which are directly covered by that Section 92.

27. The next question is, can the plaintiffs be permitted to say that they want reliefs only in respect of the private trust and that whatever allegations are there in the plaint relating to the public trust they may be ignored. I do not think that this is a clarification, as the plaintiff's counsel would like to put it. To repeat what I have already observed, the plaint allegations are unambiguous and clear and they require no clarification whatsoever. If the plaintiffs say that they do not want any relief in respect of the public trust, but want relief only in respect of the private trust, this is nothing but an abandonment of the reliefs as regards public trust. They cannot be permitted to adopt this device of abandonment with a view to escape the bar imposed u/s 92. The bar imposed by Sub-section (2) of that section is that no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such trust referred to therein except in conformity with the provisions of that sub-section. What is barred is the institution of the suit and not mere maintainability. What the Court should see is the plaint as presented at the time of the institution and also should see what the prayers were in the plaint on the date of the institution. Any amendment or abandonment which may be made at a later stage would be wholly irrelevant in considering the question whether the suit was properly instituted or not. The same view was taken by a Bench of the Bombay High Court in *Narsidas Jekisondas Vs. Ravishankar Prabhashankar*, , Backwell, J., has observed:

In my opinion the use of the word "instituted" makes it incumbent upon the Court to see what were the prayers in the plaint at the date the suit was instituted in order to satisfy itself whether Section 92(2) has been complied with and for this purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit.

28. One of the reliefs prayed for by the plaintiffs in this suit is a direction to the first defendant to render accounts. Though there is no specific prayer in the plaint that after such rendition of accounts the first defendant may be directed to pay to the plaintiffs whatever amount is due to them in terms of the trust deed, we may concede, for the sake of argument, that such a relief is impliedly asked for. Even then, the suit would be one in which such a relief relating to the private trust is mixed up with other reliefs which relate to the public trust. Where a suit comprises of such reliefs, even then the provisions of Section 92 would be attracted. The applicability of Section 92 to a case in which reliefs relating to private trust and also reliefs relating to public trust are asked arose for consideration before a Bench of the Bombay High Court in *Ranchhoddas Kalidas*

and Others Vs. Goswami Shree Mahalaxmi Vahuji and Others, , Gajendragadgar, J., as he then was, observed at page 157:

There can be no doubt that in substance this is a suit for possession of the trust properties and the claim for possession is made against the alienees. Such a suit is obviously outside the purview of Section 92. However, Mr. Purushothamam is right when he contends, that the bar created by Section 92 would apply to a suit if some of the reliefs claimed in the suit attract the provisions of Section 92 even though the other reliefs claimed in the suit may be wholly outside Section 92.

29. Mr. Alladi Subramaniam, counsel for the plaintiffs, drew my attention to the following passage in the Hindu Law of Religious and Charitable Trust by Mukherjee, Chief Justice of India, who delivered the Tagore Law Lectures in 1951, at page 404:

To determine, therefore, whether a case comes within the purview of Section 92 or not it is necessary to see precisely what allegations are made in the plaint. If what is complained of relates entirely to the private part of the trust and has nothing to do with the portion which concerns the public, Section 92 would obviously have no application. On the other hand, if the grievance of the plaintiff is that the public trust has not been properly carried out or there is misfeasance or neglect of duty in respect of the same, the suit would, have to be framed in conformity with the provision of Section 92 of the Civil Procedure Code. In a case decided by the Judicial Commissioners of Sind a portion of a property was allotted for the benefit of the poor members of the Kachi Lahano community and the rest was instituted in respect of the property without taking the sanction of the Advocate-General. It was held that the suit would fail for non-compliance with the provisions of Section 92 of the Civil Procedure Code, even though the property allotted to charity constituted a small portion of the trust property in respect of which the suit was instituted. The correctness of the decision is open to doubt, though it may perhaps be justified on the ground that the suit as it was framed was of a comprehensive character and the reliefs claimed related both to public as well as to private trust and were not divisible. If it is possible to separate the two parts of the trusts, the proper procedure should be to confine the suit u/s 92 to the public trust alone.

30. The above passage, far from supporting the contention of the plaintiffs, supports the case of the first defendant. As already pointed out, this suit is so framed as to include reliefs relating to public as well as private trust and the reliefs are not divisible. The bar u/s 92(2) cannot, therefore, be escaped.

31. Lastly it was contended on behalf of the plaintiffs that the first defendant was barred from raising the plea of bar u/s 92 after having contended before the Advocate-General that the trust was a private trust. No doubt, in his counter-statement filed before the Advocate-General, the first defendant took up the position that the trust was a private trust. He evidently put forward that contention as the trust was partly private and partly public. But he did not persist

in that plea. In obedience to the direction of the Advocate-General, he took out an originating summons with regard to the first four items of the trust enumerated in Clause 19 of the trust deed, already referred to. In taking out that summons he submitted that the first two items alone related to public trust and that the other two related to private trust. The contention as regards the private nature of those two items was not accepted and this Court held that all the four items constituted public trust. Mr. Chalapathi Rao, appearing for the first defendant, submitted that the first defendant contended that the trust was "a private trust before the Advocate-General under an erroneous view of the law and that any statement made by him under that erroneous impression cannot bind him and that notwithstanding that admission, he was entitled to put forward, what, according to him, is the correct position. In support of his contention he referred to *Mangru Rai v. Shivanand Lal* AIR All. 575, in which the principle laid down is that an erroneous admission does not bind the person making such admission. On behalf of the plaintiffs reliance was placed upon the *Controller of Insurance v. Vanguard Insurance Co.* (1966) 1 Comp. L.J. 85 : (1966) 1 M.L.J. 196, in support of the argument that a party should not be allowed to both approbate and reprobate a transaction. In that case, the question was whether a particular proceeding was entertain-able by a Court at Ambala or by a Court at Madras. One of the parties took up the position that the Court at Madras alone was having competent jurisdiction. As a result of this position, the Court at Ambala dismissed the proceeding pending before it. The question was sought to be re-opened by the same party in appeal as to whether the Court at Madras had jurisdiction. In negating this contention, the appellate Court held that the party could not both approbate and reprobate and cannot be heard to contend to one Court that the other Court alone had jurisdiction and to contend precisely to the opposite effect in the other Court. In my view, this decision is not applicable to the instant case. It is not as though the Advocate-General declined to accord sanction u/s 92 on the ground that the trust was a private trust. He declined to accord sanction in view of the originating summons instituted by the first defendant. How far the institution of that proceeding gave adequate relief to the plaintiffs so as to deny then the sanction is not a matter with which I am concerned. As pointed out by the Supreme Court in *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, , the maxim that a person cannot approbate and reprobate had its origin in the doctrine of election and was confined to the reliefs arising out of one and the same transaction and that where there was no question of election, the maxim has no application. If the first defendant had succeeded in his contention before the Advocate-General that the trust is a private trust and that consequently no sanction could be given u/s 92 of the Code of Civil Procedure, then the position would undoubtedly be different, and he would not be entitled to make up the opposite position now in this proceeding and say that the suit is barred for want of sanction u/s 92. But that is not the position here. Therefore, there is no basis for the argument that the first defendant should not be allowed to approbate and reprobate.

32. To sum up, reading the plaint as it stands, I am of the view that only one inference is possible and that is, this is a suit falling squarely u/s 92 of the Code of Civil Procedure. The plaintiffs assert that they have vital interest not merely in the portion of the income divisible among the beneficiaries but in the trust property as a whole. They seek to represent all those interested in the trust, namely, the public, with special emphasis on their personal interest as well. The purpose of the suit is the preservation of the trust as a whole and for making provisions for its efficient administration. The main reliefs prayed for fall under Clauses (a), (d), (b) and (g) of Sub-section (i) of Section 92 of the Code of Civil Procedure. The suit instituted without the sanction of the Advocate-General as required under Sub-section (2) of that section is, therefore, liable to be, and is accordingly, dismissed. In the circumstances of the case, the parties will bear their own costs.