
(1925) 12 MAD CK 0027
In the Madras High Court

Abdul Hakim Baig and Others

APPELLANT

Vs

Mahomed Burrammudin and Others

RESPONDENT

Date of Decision : 11-12-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : AIR 1926 Mad 559 : (1926) ILR (Mad) 580 : 95 Ind. Cas. 720

Hon'ble Judges : Wallace, J;Devadoss, J

Bench : Full Bench

Judgement

Devadoss, J.—A scheme suit was framed for a mosque at Bezwada in O.S. No. 113 of 1913. Five worshippers at the mosque applied to the "Subordinate Court at Bezwada to have the scheme amended. The Subordinate Judge, after taking evidence, has amended the scheme to a considerable extent. This appeal is by the members of the panchayat who were appointed to hold office for life. The question raised in the appeal is whether the following clause in the scheme is ultra vires or intra vires.

The provisions of this scheme may be altered or modified as if it were in execution of the decree in this suit on the application of not less than three worshippers resident in Bezwada to the Sub-Court exercising original jurisdiction over the town of Bezwada or in the absence of such Court, the District Court of Kistna.

2. The contention of Mr. Ramadoss for the appellant is that this provision is ultra vires. Before considering the question whether such a clause is ultra vires or not, we have to see what the clause means. Under the clause an application can be made as if in execution of the decree. It has been held by the Privy Council in AIR 1925 155 (Privy Council) that an order on an application of this kind is not an order on an execution application." In that case, under the decrees "the District Court was empowered to frame rules for the working of a scheme. Certain Rule 3 were framed and an appeal was preferred to the High Court against the order of the District Judge. The Privy Council held that no appeal lay

against the order of the District Judge. In *Ranganath Thathachariyar v. Krishnaswamy Thathachariar* AIR 1924 Mad. 369, it was held that no appeal lay against the order of appointment of a trustee by the Subordinate Judge in exercise of the power given to him under the scheme. In that case some worshippers interested in the temple presented a petition to the Sub-Court for directions to fill up a vacancy caused by the resignation of a trustee. The Subordinate Judge directed the Board of Supervision to fill up the vacancy. The trustee who is said to have resigned appealed to the High Court. The High Court held that though the order of the Subordinate Judge was a judicial one, it was not passed in execution and therefore no appeal lay. The application of the respondents cannot be considered to be an application in execution. Parties cannot give power to a Court to treat the matter in a particular way. This contention necessarily involves an objection to the maintainability of this appeal. The order passed by the lower Court not being one in execution no appeal lies. It cannot be treated as a decree within the meaning of Section 47. Though in many cases appeals were allowed yet, after the ruling of the Privy Council in AIR 1925 155 (Privy Council) Courts are incompetent to entertain appeals against orders passed by Subordinate Courts with regard to the alteration of a scheme once settled by the Court. I, therefore, treat this as a revision petition as I consider that the lower Court acted without jurisdiction in altering the scheme.

3. The contention of the respondent is that a scheme once framed is always liable to alteration and that the Courts in India have the same power as the Courts of Chancery in England and that Courts can always alter schemes for proper reasons. That the Court has power to alter a scheme cannot be denied. Any schemes framed for the management of a public, charitable, or religious institution or trust can always be altered for proper grounds. The question is whether it should be done as provided by Section 92, or by an application to the Court which framed the scheme. In several schemes provision is made for alteration by an application to the Court by the parties or by persons interested in their working. In the well-known *Tirupathi* case such a provision was made in the scheme : vide *Prayag Doss Ji Vara v. Trimai Sreerangacharlu Varu* [1907] 30 Mad. 138. The question is whether such a provision gives the Court jurisdiction to alter the scheme on an application made to it. When a scheme is settled the suit comes to an end. To say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending. It cannot be said that the suit is pending for all time from the mere fact that the scheme framed contains a provision that an application can be made for altering the scheme. Section 92 of the CPC requires the sanction of the Advocate-General or the Collector of the District to enable persons to bring a suit for obtaining directions of the Court for the administration of a trust or for settling a scheme. If it is held that by virtue of a clause in a scheme providing for its alteration on application, the Court can alter the scheme, the provisions of Section 92 would be practically abrogated. When Section 92, Civil P.C. directs that for the settlement of a scheme and for other reliefs the sanction of the Advocate-General should be

obtained, it would be ultra vires of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme. Before a scheme is actually put in working order, it is open to the parties to the suit in which the scheme is framed to apply to have the scheme modified. But where a scheme has to be modified after the suit comes to an end, though the Court has power to alter the scheme it could do so only after the formalities required by law are complied with. The analogy of the English practice cannot be relied upon in support of the contention that such provision is intra vires. In England the Attorney-General or the Relators can apply for the framing of a scheme and for its modification. The Court of Chancery is in London and the Attorney-General is practically, if not actually, in charge of the conduct of the proceedings. But in this Presidency, where there are so many District Courts and Subordinate Courts entitled to act u/s 92 it is impossible for the Advocate-General to have control over persons who obtain permission from him to file suits u/s 92. In practice the persons who obtain permission act independently of the Advocate-General and he very seldom interferes in the conduct of the suit. When Courts find some difficulty or when they think that the help of the Advocate-General should be obtained they no doubt call upon the Advocate-General to help them. But in the absence of such request from the Court the Advocate-General, does not trouble himself about the conduct of a suit u/s 92. That being so the analogy of the English practice cannot be held to apply to the practice obtaining here. Where a clause in the scheme is opposed to, or contravenes, a specific provision of law, it cannot be said that that clause is intra vires from the mere fact that the Court gives sanction for its inclusion in the scheme. In *Narayanamurthi v. Achayya Sastrulu* AIR 1925 Mad. 411, *Spencer Offg. C.J.*, and *Srinivasa Iyengar, J.*, were of opinion that such a clause was ultra vires having regard to the express provisions of Section 92, Civil P.C. In two cases to which I was a party C.M.A. Nos. 45 of 1923 and 20 of 1925, it was held that such a wide clause as the one in this case was ultra vires of the Court. *Spencer and Madhavan Nair, JJ.*, held the same view in C.M.A. No. 70 of 1925 and in C.R.P. No. 452 of 1924, the learned Chief Justice was of the same opinion. In C.S. No. 430 of 1895, *Bakewell, J.*, held that any relief which was covered by Section 92 should not be dealt with by the Court on an application in the suit in which the scheme was framed.

4. The argument of Mr. Varadachari for the respondent is that such a clause is intra vires; for in order to effect proper working of the scheme, or owing to the changed conditions, the scheme can be modified and for doing so an application can be made in the suit itself, whatever may be the distance of time from the actual framing of the scheme to the date on which the application is made ; and he relies upon *Sadupadhya Omoshanand v. Ravaneswar Prasad Singh* [1918] 43 I.C. 772; *Govindasami Naidu v. Uchippa Goundan* AIR 1922 Mad. 413 and *Muhamad Waheb Hussain v. Abbas Hussain* AIR 1923 Pat. 420. In *Govindasami Naidu v. Uchippa Goundan* [1900] 24 Bom. 45, *Krishnan, J.*, doubted the competency of an application to alter a scheme, though *Spencer, J.*, was of a

different opinion. In *Sadupadhya Omoshanand v. Ravaneswar Prasad Singh* [1918] 43 I.C. 772, reference was made to *Damodarbat v. Bogilal Karsondas* [1900] 24 Bom. 45. These cases do not really touch the question. If a clause provides for the removal of a trustee on an application, that clause is invalid, for it goes right across the provisions of Section 92. In order to remove a trustee a suit has to be filed with the sanction of the Advocate General. Obtaining the sanction of the Advocate-General is not merely a matter of form. The Advocate-General, as a responsible officer, is bound to see whether the applicant has made out a proper case and to satisfy himself that the grounds are not frivolous before he grants sanction. To apply for the removal of a trustee, without obtaining the sanction of the Advocate-General, because there is a provision in the scheme for such removal, is not merely overlooking the provisions of Section 92 but it is setting at naught the distinct provisions of law intended to prevent frivolous applications to Court and consequent waste of time. The case in *Bamadoss v. Hanumanta Rao* [1913] 36 Mad. 364, does not help the respondent.

5. The contention for the respondent is that a suit u/s 92 must be considered to be a suit on behalf of all the worshippers and, therefore, it is not only the parties to the suit but any one interested in the institution that can apply for the alteration of the scheme. As I have already observed the Court's power to alter a scheme at any time for proper grounds is not denied by the appellant. But in order to give jurisdiction to the Court the proper procedure for the purpose should be adopted with the necessary preliminaries, and a scheme cannot be altered by a mere application to the Court simply by reason of the existence of a clause in the scheme to that effect. Even if such a provision is valid, the proper course would be to apply to the Advocate-General for permission to obtain a specific relief and if the Advocate-General gives permission an application may be made. But without it an application cannot be made by anyone at his will and pleasure to alter a scheme. I am prepared to hold that such a general provision in a schema that anyone interested in the institution can apply for the removal of a trustee, or for any such relief is *ultra vires*. But in this case it is unnecessary to go that length as the provision here is that the application should be made as if it were in execution of the decree in the suit. There is no decree to be executed and, therefore, no application could be made as if it were in execution of the decree.

6. There is another clause which is clearly invalid and that is,

The Court may act on the application of not less than three worshippers resident in Bezwada in the matter of its disciplinary jurisdiction over the trustee and the panchayatdars.

7. Such a clause makes the Court practically the superintendent of the religious institution. The Courts in India are not empowered to interfere in matters religious, but they can only act in civil matters. To empower the Court to exercise disciplinary jurisdiction over the trustee and panchayatdars of a religious institution is practically investing the Court with power of management of the

institution. Such a provision cannot empower the Court to interfere in matters of internal arrangement, and parties cannot invest the Court with jurisdiction which it does not possess, for under the Civil P.C. it is only suits of civil nature that can be entertained. A clause of this kind if held valid, would empower the Court to interfere in matters purely religious. For example, suppose the trustee of a temple introduces some new ritual or changes the ritual. Can the Court hold an enquiry whether the ritual is approved by the Shastras and whether it should be introduced in the temple or not? Surely the Court is incompetent to go into such matters and parties cannot invest the Court with jurisdiction which it is incompetent to exercise. As I hold that the clause in para. 9 of the scheme is ultra vires, the order of the lower Court altering the scheme was made without jurisdiction. In this view it is unnecessary to go into the merits of the case.

8. In the result the order of the lower Court is set aside and the appeal is allowed with costs. Both parties will have the costs out of the Trust estate.

9. Memo of objections is dismissed.

Wallace, J.

10. This appeal raises questions of great importance for religious trusts and a satisfactory answer is by no means easy. In O.S. No. 113 of 1913 on the file of the Subordinate, Judge, Bezwada, the final decree settled a scheme in respect of a Jumma Masjid in Bezwada. In that scheme a committee of one trustee and five panchayatdars was appointed for life. The scheme contains a clause that the trustee or member of the panchayat shall be liable for removal or suspension by the Court for proved misconduct or neglect of duty and that the Court may act in such matters on the application of not less than three worshippers resident in Bezwada. Under this clause five worshippers presented an application asking for the removal of the present committee and for certain, modifications of the scheme. The lower Court heard the application and modified the scheme providing inter alia that the panchayat should be appointed for five years only instead of for life, and directing, further that as five years had already elapsed since the present panchayat took charge, they must vacate their office.

11. This was accordingly done and a fresh committee has been appointed under rules framed by the lower Court. Against their removal in this fashion the five panchayatdars have appealed.

12. Their contention is twofold: first that, the clause in the original scheme permitting, if it does permit, such radical alterations in the scheme was ultra vires of the Court which drew it up ; and second, even if the clause is intra vires the present circumstances do not call for such measures. The other parties to the appeal raises a preliminary objection that no appeal lies. As to that if the lower Court's proceedings are wholly ultra vires I would, if necessary, allow the appeal to be converted into a civil revision petition and decide the case on the question of jurisdiction. The discussion as to the maintainability of the appeal may be dealt with incidentally in considering the wider question which has been opened

up in this ease, namely, whether, where a scheme was sanctioned for the administration of a trust, Courts are at liberty on a mere application to grant relief of the nature which, Section 92 of the CPC says, shall be obtained by a suit.

13. Where a scheme does not purport to confer on the Court power to remove a trustee or to grant any of the other reliefs of the kind set out in Section 92 the answer is easy. The Court has no authority to grant such a relief on an application; the only method by which they can be obtained is by way of a suit u/s 92. But where a scheme purports to confer on the Court power to grant such reliefs, the question is whether such authority in the scheme is not beyond the jurisdiction of any Court to grant because in effect it abrogates Section 92 of the Code of Civil Procedure.

14. The principle underlying Section 92, I take it, is that no trustee shall be removed or new trustees appointed or any other reliefs of the nature specified therein granted except by way of a suit filed under the sanction of the Advocate-General, so that trustees may be afforded some protection against frivolous and vexatious attempts to remove them. I do not think the Legislature intended this principle to be any the less applicable when a scheme for the administration of a public trust has once been framed, or intended to countenance any procedure by which once a scheme has been framed, Section 92 will no longer have any application to the trust and that in future if a scheme has been framed the interesting game of attacking, harassing and removing trustees may go on merely on an application under the scheme without any guarantee, such as the necessity of obtaining the sanction of the Advocate-General affords, that the proceedings are either in the interests of the public or in the interests of the institution. I am of opinion that Section 92 was intended to be enforced whenever any of the reliefs mentioned in it are asked for whether or no a scheme has already been framed under it. When therefore, for example, a scheme has been already settled, and it is sought to be altered so that a trustee may be removed and a new trustee appointed, that cannot be done by an application under the scheme even if the scheme purports to allow it to be so done. It can only be done by a suit after obtaining the sanction of the Advocate-General. The true test as to the legal propriety of a clause in a scheme is whether the relief granted by that clause is such relief that if it was being sought before the scheme was sanctioned, it would have to be sought by a suit u/s 92. If it was, it cannot be granted by any sort of application under the scheme notwithstanding that the scheme itself purports to provide such a means of obtaining that relief.

15. Any other conclusion would lead to fantastic results. If it be held, for example, that under such a clause as that which exists in the scheme under consideration the life membership of a trustee may be reduced to five years, there is nothing to prevent the Court extending the five years period again to a life-period, or reducing the number of trustees or in effect altering the original scheme out of all recognition, while at the same time it removes the wholesome

check to frivolous and vexatious applications which Section 92 imposes and which is no less necessary after the scheme is framed than before it is framed.

16. It is argued and I appreciate the force of the contention, that this conclusion will compel worshippers to bring suits even for the most petty alterations in the original scheme, but that will only be so for such alterations as are within the mischief of Section 92. If the relief is such as does not really alter the lines of the original scheme so as to make it to all intents and purposes a new scheme, or does not otherwise run counter to Section 92, then Section 92 is no Bar. But even so I would suggest that in future schemes such alterations should only be made after obtaining the sanction of the Advocate-General, Alterations which go to the root of the scheme, particularly alterations which limit or affect any right conferred on individuals by the original scheme, are on a wholly different footing and cannot be introduced under guise of petty modifications of the scheme.

17. The present case affords an illustration of both forms of reliefs. The alteration of term of membership from life to five years, whereby, under the guise of modification of the scheme, five members appointed for life are removed, is obviously a radical alteration of the original scheme. Such a proposal is really a new scheme and therefore within the mischief of Section 92. The other alteration, namely, directing, publication of annual balance sheets is a matter of purely administrative detail which the trustees are perfectly competent to carry out without reference to the Court.

18. The view which I have put forward above is, I think, the view to which this High Court has been gradually moving. In *Prayag Doss Ji Vara Ma ant v. Tirumala Srirangacharlavaru* [1906] 28 Mad. 319 u/s 539 of the old CPC this Court held that power should be reserved in a trust scheme for an application to the Court by persons interested for directions, which might be enforced by way of execution. On appeal from this decision the Privy Council, in *Prayag Doss Ji Varu v. Tirumala Srirangacharlavaru* [1907] 30 Mad. 138 modified the scheme, and inter alia provided for liberty for persons interested to apply to the District Court with reference to the carrying out of the scheme and the High Court for modification of the scheme. The legal propriety of these directions was not raised before the Board. This scheme coming back to the District Court for framing rules, and rules having been framed, the High Court held in *Prayag Doss Ji Varu v. Tirumala Srirangacharlavaru* [1909] 31 Mad. 406 that the District Court acted, when it framed these rules, by way of execution of the decree and that an appeal lay from such directions to the High Court. This was in 1908. In *Ramdoss v. Hanumantha Rao* [1913] 36 Mad. 364 which is also a case u/s 589 of the old Code, it was held by a Bench in 1911 that a scheme framed u/s 539 can be altered by the Court, and that the section confers the same powers that the Court in England possesses, and the previous cases cited above were relied upon. In *Govinda-sami Naidu v. Uchippa Goundan* AIR 1922 Mad. 413, Spencer, J., on the authority of 24 Bom. 45 was inclined to hold that modifications of an original scheme should be moved before the Court by way of an application by

persons interested and not by a suit. But the same learned Judge in *Narayanamurti v. Achayya Sastrulu* AIR 1925 Mad. 411 in 1924 objected to a clause in a scheme permitting general liberty to apply for modifications, being of opinion that such liberty in respect of matters relating to the reliefs mentioned in Section 92 is ultra vires. The same view has been taken by another Bench to which one of us was a party in C.M.A. 45 of 1923. The learned Judges there relied on the Privy Council case in AIR 1925 155 (Privy Council) , which certainly is not reconcilable with 31 Mad. 406, and pointed out that if this view is not taken it would practically throw on the Court the burden of administering such trusts up and down the whole country, whenever a scheme has been framed. I am in full agreement with this view.

19. The difficulty of holding any other view is enhanced when I consider what remedy a trustee removed under such a removal clause in such a scheme has. If he had been removed by a suit u/s 92 he has the right of appeal, but if he is removed under a clause in the scheme it is very doubtful if he has any right of appeal, even though the scheme confers it. From the decision of the Privy Council, in AIR 1925 155 (Privy Council) it would appear that alterations in a scheme are not matters in execution as if made u/s 47 of the Civil Procedure Code, which would permit of an appeal. The Patna High Court seems to view such a provision for alterations as an amendment of the decree: see *Muhammad Wehab v. Abbas Hussain* AIR 1923 Pat 420 where they remark.

It is to prevent a multiplicity of suits that the Courts in administration actions reserve a liberty to the parties to apply from time to time and so often as may be necessary.

20. But if that view is adopted an appeal would lie as if from a decree, and there are difficulties in the way of that view. It implies that a suit is, in a sense, never finished, and that the sanction of the Advocate-General given at the commencement of the suit continues ad infinitum and may be used to cover all sorts of motions and prayers never contemplated by the parties when they filed their suit, and never contemplated by the Advocate-General when he gave his sanction, and may in fact be reliefs which, if they had been mooted at the time when the suit was first presented, might have been refused altogether.

21. It has been held lately in several cases by this Court that no appeal will lie against any action taken by the Court under a sanctioned scheme. In C.M.A. 70 of 1925, reported in *Sivan Pillai and Another Vs. T.S. Venkateswara Ayyar* , *Spencer and Madhavan Nair*, JJ., held that 31 Mad. 406 is no longer good law in view of the Privy Council decision in *Sevak Jeranch od Bhogilal's case* AIR 1924 Mad. 369. The cases reported in *Lokasikamani Mudaliar v. Thiagaraja Chettiar* [1917] 5 L.W. 596 and *Ranganatha v. Krishnasami* AIR 1924 Mad. 339, were also relied on in C.M.A. 45 of 1923. *Devadoss and Waller*, JJ., held also that no appeal lies. If the lower Court acts outside the scheme or acts under a clause in the scheme which is itself ultra vires of the Court which framed the scheme, then the Court acts without jurisdiction and its order may be set aside by a civil revision

petition : see C.M.A. 45 of 1923 to which one of us was a party.

22. I think that the view laid down by the Privy Council in the AIR 1925 155 (Privy Council) is that orders in such matters are orders passed neither in execution nor in a pending suit, but under a jurisdiction conferred by the scheme itself, which will give the Court jurisdiction in a matter which the scheme permits, provided it is otherwise not ultra vires because in conflict with some other jurisdiction conferred by statute or rule having the force of law. If therefore a clause permitting the Court to remove a trustee is intra vires, the trustee removed under it has no remedy by way of appeal such as he would have had if he had been removed by a suit u/s 92. To my mind this is another indication that any clause which conflicts with Section 92, Civil P.C., is ultra vires.

23. I must hold, therefore, that no appeal lies, but that if the alteration in the scheme is ultra vires or had been obtained by a method, e.g., by way of execution, which is not legal, it is necessary to treat this appeal as a civil revision petition and cancel the order of the lower Court.

24. It is clear from what I have already said that I regard Clauses 8 and 9 of the present scheme as ultra vires if and in so far as the Court has utilized them to grant reliefs of the nature provided for in Section 92 of the Civil Procedure Code, and Clause 9 also further because modifications of the scheme are not matters in execution. The modification by the lower Court which changes the period of membership of a panchayat from life to five years, thus ipso facto putting an end to the membership of Respondents 2 to 6, is a form of relief which the worshippers could obtain only by way of a suit u/s 92 and is therefore ultra vires; the other alteration is one for the trustees themselves under the scheme.

25. I therefore agree that the alterations must be and are hereby cancelled.

26. Costs of both parties in this appeal will come out of the trust estate.