

**(1936) 03 BOM CK 0020**  
**In the Bombay High Court**  
**Case No : First Appeal No. 110 of 1930**

Annappa Ramchandra Pai

APPELLANT

Vs

Krishna Narayan Prasad

RESPONDENT

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**Date of Decision :** 18-03-1936

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 92  
Limitation Act, 1908 — Section 10

**Citation :** AIR 1936 Bom 412 : (1936) 38 BOMLR 808 : 165 Ind. Cas. 1001

**Hon'ble Judges :** Tyabji, J;Broomfield, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## Judgement

Broomfield, J.—In the suit from which these appeals arise the plaintiffs are the managers of a temple called Shri Mahableshwar of Gokarn. Defendants Nos. 1 to 5 are members of a committee called the Kumta Dharma-dav Committee and as such they hold and manage a fund called " Dharma-dav Fund ", which is collected for the benefit of a number of religious and charitable institutions in the neighbourhood of Kumta. Part of this fund has been set apart for the benefit of the Shri Mahableshwar temple and some land has been purchased out of this part of the fund. The plaintiffs brought the suit alleging that the defendants are the trustees of the fund, and that they have been guilty of a breach of trust. The reliefs prayed for are possession of the land purchased out of the fund and recovery of the rest of the amount due to the temple after taking accounts of the fund from the beginning.

2. The trial Court has made a preliminary decree awarding the plaintiffs possession of the land with mesne profits and also directing the taking of accounts of the fund in the hands of the defendants. A Commissioner was appointed to take accounts, and, after he had reported, a final decree was passed awarding the plaintiffs a sum of Rs. 2,759-12-0.

3. Appeal No. 110 is from the final decree and appeal No. 112 from the original

decree.

4. It is necessary to refer briefly to the history of the fund in question. It appears that some time before 1874 the merchants of Kumta started a fund for the benefit of certain charitable and religious institutions by setting aside four annas out of the price of every khandi of goods sold by upcountry people in Kumta. The Gokarn temple was one of the institutions to be benefited, and one-quarter anna, that is one-sixteenth of the fund, was allotted to it. In 1874 there was a meeting of the merchants at which a resolution (exhibit 45) was passed. Some alterations were made in the constitution of the fund and special directions were given in the case of some of the institutions. What was decided in the case of the plaintiff temple was this. The money collected for it was to be paid to one Venkat Subba Bhagvat who was a nominee of the merchants. He was incidentally the grandfather of the present defendant No. 3. He was to credit the money to the account of the temple and he was to utilize it for the service of the temple according to the opinion of certain other persons named in the resolution.

5. Then in 1896 another resolution (exhibit 46) was passed. By this time the fund was in the hands of one Jayaram Piraji. The amount he held to the credit of the Gokarn temple was then Rs. 1,292. The directions given in respect of the monies in his hands were as follows :

The money should be applied for purposes of hundis, discount, etc., and lending at interest, and thus the amount should be increased. It is to be decided later on in what way these amounts and the amounts that may be recovered in future should be expended.

6. Then in 1905 a third resolution (exhibit 47) was passed. In this a history of the management of the fund is given. It is stated that there had been certain mismanagement before the appointment of Jayaram Piraji and accordingly the duty of making recoveries had been handed over to him. But he having left the city had handed over the money together with his accounts to one Dayal Shet who, it is stated, was not willing to continue the management. It was resolved accordingly that a committee of five persons should be appointed, who should take charge of the money left by Dayal Shet, collect the outstandings due from the merchants and make proper arrangements for increasing the fund. One of the members of this committee was Ramchandra father of defendant No. 2. One was defendant No. 1 himself. Another was the father of defendant No. 3, and the others appear to have been relations of defendants Nos. 4 and 5.

7. As far as the evidence in this case goes, there has been no meeting of the general body of merchants in connection with this fund since that day and no further resolutions have been placed on record.

8. It is conceded that a trust has been constituted in favour of the temple. The principal defence in the lower Court and the argument on which the appeals have, been mainly supported is that the plaintiffs' remedy for breach of the trust, if any, is against the general body of merchants of Kumta who created the

fund and are the trustees thereof and not against the defendants who are merely agents of the trustees, i.e., custodians of the fund with duties and powers of investing and lending it but not of applying it for the purposes of the trust. It is contended that the defendants are responsible not to the plaintiffs but only to their principals, i.e., to the general body of the merchants.

9. It is, I think, perfectly clear on the one hand that if the fund has been handed over to the defendants in order that they should pay it to the temple or utilize it for the temple, it must be held to have vested in them as trustees for that purpose and the plaintiffs would be entitled to call them to account. On that footing the case would be precisely on all fours with the one in *Abdul Baqi v. Sundararamayya* ILR (1934) Mad. 777. On the other hand if the defendants are merely agents of the trustees and the fund is not vested in that, the *cestuis que* trust have no remedy against them; they would in that case be accountable to their principals only: *Lewin on Trusts*, 13th Edn., pp. 203 and 470.

10. Some support is afforded to the argument of the learned counsel for the appellants by the language used in the resolutions of 1896 and 1905 to which I have referred. It is arguable, I think, that the committee appointed in 1905 was only a managing committee with power to invest but not to dispose of the fund. But that was a long time ago, and in view of what has happened since, I think it would be impossible to hold that the present committee have no power of disposal. As I have mentioned, one of the defendants is a member of the original committee. The evidence does not show how the others were appointed. There is no reason to suppose, however, that they are not duly appointed to represent the merchants of Kumta in connection with the fund. All the members are themselves merchants of Kumta and it appears that the fund is now held by them as representing the general body with power to dispose of it and not merely as custodians.

11. In March 1914 the father of defendant No. 3 borrowed a sum of Rs. 3,500 from the committee on the security of his land. He executed a mortgage in favour of Ramchandra, father of defendant No. 2, as representing the committee. At the same time he sold his Mulgeni rights in the land in suit to the father of defendant No. 2. The price Rs. 2,800 was not paid as he had in his possession money belonging to the fund to that amount. In April, 1923, defendant No. 3 sold the land, which he had mortgaged, to the plaintiffs subject to the mortgage which the plaintiffs undertook to pay off. The land which has been sold to Ramchandra is entered in the Record of Rights in his name. No doubt he is described as a member of the Dharmadav Committee, but there is nothing about this transaction or indeed about any other dealings of the committee with the fund to suggest that they were merely acting as agents of the general body of merchants. In fact the general body has apparently ceased to function for the last thirty years. The defendants' conduct throughout is hardly consistent with the view that they were merely agents without power of disposal of the fund.

12. But in addition to this, the case set up in the written statement is not really

consistent with the case set up in the arguments. The defendants deny in paragraph 4 of the written statement that they are trustees of the whole at the Dharmadav Fund. They say that the Kumta merchants have appointed independent or separate vahiwatdars to deal with different portions of the Fund and they say that they carry on the management and superintendence of the portion of the fund set apart for the plaintiff temple.

13. In paragraph 8 it is stated-

A committee has been appointed to make recoveries in respect of some portion of the fund and to dispose of the same and now we defendants Nos. 1 to 5 are carrying on the management as members of such a managing committee.

14. Further in paragraph 9 it is stated-

In the arrangement made for this by persons who give money to this charity all power to recover that amount and to make expenses for the rendering of service etc., that may be thought proper, on behalf of Kumta City, in the temple in suit has been given to the said managing committee. Defendants Nos. 1 to 5 who form the committee have full power to dispose of that amount accordingly. But the power of dealing with it does not belong to the plaintiffs.

15. Reading the written statement as a whole, it seems to me perfectly clear that what the defendants intended to assert was that the plaintiffs as managers of the temple had no right of control over the fund, but not that the defendants had no such power. The contention that the defendants' committee has no power to apply the fund to the uses of the temple or to dispose of it without the orders of the general body of merchants is not really to be found in the written statement at all. Nor does it derive much support from the statements made by defendant No. 2 when he was examined as a witness. He says-

The owners of this money are the Kumta merchant public represented by us. It is our right to determine in what way and for what purposes this money should be utilised. We have to consult the Kumta merchants for that. The Temple Committee have no right in that connection....

It is my opinion that the merchants of Kumta have the absolute right of disposal over the fund through us. We have not consulted the merchants in this respect....

The suit land was purchased with the funds intended for the plaintiff temple out of the said fund. The fund intended for the plaintiff temple is to be used for the purposes of the plaintiff temple, but for what purposes it should be utilized is yet to be settled. We have not thought over the matter yet.... We members of the committee have not consulted the Kumta merchants as to what should be done with the money.

Thus the defendant does no doubt say that the general body of merchants has the right to prescribe the manner in which the fund is to be used for the benefit of the temple. He makes it quite clear, however, that the general body is to act

through the committee, and his case is really the same as the case made in the written statement, viz., that the plaintiffs have no control over the fund and not that the defendants have not.

16. Under these circumstances it seems to me that the learned trial Judge has rightly found that the defendants are trustees of the fund. That being so, the plaintiffs are clearly entitled to the trust property in their hands. No cause whatever has been shown against handing it over to them. It may well be that the defendants' committee have the right, after consulting the general body of merchants, if necessary, to prescribe the manner in which the property and the money are to be utilized for the benefit of the temple. There never was anything to prevent the defendants from laying down any conditions they thought necessary. There is no reason to suppose that the plaintiffs would not be willing to abide by any such reasonable directions. But the defendants were obviously not justified in refusing to hand over the property, and as they did refuse to do so, the plaintiffs as beneficiaries undoubtedly had a cause of action against them.

17. A point of limitation has been argued, but on this view of the position of the defendants as trustees no question of limitation could arise, as Section 10 of the Indian Limitation Act would cover the case.

18. On the merits, therefore, the plaintiffs would be entitled to succeed and the appeal would fail. Unfortunately however there is a serious preliminary difficulty arising u/s 92 of the Civil Procedure Code. This is a case of an alleged breach of a trust created for public purposes of a religious nature and one of the reliefs prayed for in the suit, namely, the taking of accounts, is a relief of the kind specified in Section 92. Sub-section (2) of the section provides that save as provided by the Religious Endowments Act, 1863, (which does not affect the present case), no suit claiming any of the reliefs specified in Sub-section (I) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. The institution of this suit, therefore, required the previous sanction of the Collector u/s 93 and that sanction has not been obtained. This point was not taken in the trial Court. It was not even mentioned in the memorandum of appeal. But, as it appears on the face of the record that there has been a breach of a statutory requirement, we felt that we could not refuse to allow the point to be taken and argued.

19. Mr. Murdeshwar who appears for the respondents has frankly conceded that in view of the authorities, *Janaki Dai v. Thiruchitrambala Vinayakar* ILR (1935) 58 Mad. 988 and *Narayan Bhikaji Khanolkar Vs. Vasudeo Vinayak Prabhu*, the objection is valid, that is to say, it is a suit covered by Section 92, in its present form, and it has not been instituted in accordance with that section. The learned advocate sought to get out of the difficulty by suggesting that the plaint might be allowed to be amended by abandoning the claim for taking accounts. If there had been no prayer for this relief, he says, there would have been no objection on account of Section 92 and the plaintiffs would have been able to obtain practically the same relief as they have been awarded. At any rate they could

have recovered the land and such monies as are in the hands of the defendants to the credit of the fund. But there are obvious difficulties in the way of this proposal. Having regard to the frame, of the plaint the prayer for an account could not be regarded as mere surplusage. Moreover, a Commissioner was appointed to take accounts and accounts have actually been taken. Then again what Sub-section (2) of Section 92 says is that no suit shall be instituted claiming any of the reliefs specified in the first part of the section. In my view that must mean that the question whether Section 92 has to be applied must depend upon the prayers in the plaint at the date when the suit was instituted, and the provisions of the section cannot be evaded by an amendment of the plaint at a later date. There is authority for that view in Narsidas Jekisondas Vs. Ravishankar Prabhashankar, , see especially the judgment of Mr. Justice Blackwell at p. 1446.

20. As far as I can see, there is no means of getting over the difficulty created by Section 92 and the appellants therefore must succeed, in spite of the fact that the objection was taken at a very late stage. The result is unfortunate. On the merits of the dispute we are by no means satisfied with the attitude taken up by the defendants. The plaintiffs are undoubtedly entitled to the fund and the property purchased out of it subject to any conditions as to the use of it which might be reasonably imposed. The defendants ought to have seen the reasonableness of the plaintiffs' claim, and if any further authority from the general body of merchants is required, they should have taken steps to obtain it. They must be held responsible, or at any rate very largely responsible, for this litigation which should not have been necessary at all.

21. For these reasons, I think, we must allow the appeals, set aside the decrees of the lower Court and dismiss the suit. We direct, however, that the parties will pay their own costs throughout.

22. Cross-objections also dismissed.

Tyabji, J.

23. I agree with the orders proposed. The ultimate difficulty in the way of the decrees appealed against being confirmed is Section 92 of the Civil Procedure Code, Mr. Murdeshwar admitted that Section 92 was fatal to the suit as framed; but suggested that the difficulty might be got over by an amendment of the plaint, and applied for permission to amend : so that the prayer for accounts (which brings the case u/s 92) may be struck off. When, however the plaint is examined, this course appears wholly impracticable. The very basis of the plaint is an account of the sums collected in respect of the fund in question. It is only after an account is taken, that it is possible to deal with the prayer that the defendants be ordered to hand the fund over to the plaintiffs. The accounts are necessary to determine how much is claimed. Unless an account is taken, the basis of the decree that the plaintiffs seek cannot be determined. The plaintiffs cannot say what sums represent the funds or give any other particulars of them.

It is true that a claim is made with respect to certain properties mentioned in the plaint. But these properties are stated to represent a part of the sum to which the plaintiffs can lay claim only on the basis of the account. Referring to the plaint, the origin and basis of the claim is stated in paragraph 2. Shortly it is "that the people of Kumta determined to recover fixed amounts as Dharmadav and the practice of making recoveries has continued accordingly for a long period." Paragraph 3 refers to the amount being credited and accounts thereof being maintained and defendants Nos. 1 to 5 being appointed trustees for the purpose of keeping these accounts. Out of the accumulation of the fund so collected, of which no other particulars are given in the plaint, certain properties are stated in paragraph 5 to be purchased. " Therefore the cause of action "-so paragraph 7 runs-" for this suit brought for the purpose of obtaining possession of the lands in suit and for obtaining the amount of the said charity fund and the amount of the income of the lands in suit payable after getting the same ascertained by making an account from the beginning, arose from August 11, 1928." The prayers are, first, that the contentions of defendants Nos. 1 to 5 may be set aside and thereafter possession of the said lands awarded to the plaintiffs; secondly, that true accounts from the beginning of the said charity should be ordered and the amount found payable under account in respect of the fund and the amount that may be found payable under the account after taking the account in respect of the income up to this day, of the lands in suit from defendants Nos. 1 to 5, may be awarded. In my opinion, therefore, if the plaint were amended by striking off the prayers for the account, nothing would be left after making the consequential amendments.

24. For this reason in spite of the grounds which appear from my learned brother's judgment inclining us to assist the plaintiffs in obtaining the relief that they claim, the application for amendment of the plaint cannot be allowed.

25. In connection with the application for amendment of the plaint two decisions were cited. In (1928) ILR 55 519 (Privy Council) the question was whether a point was *res judicata*-whether the compromise decree in a previous suit precluded the later suit. That question depended upon whether the compromise decree in the previous suit was a decree in a representative suit, (i.e., whether the previous suit was a suit u/s 92) and was binding upon that section of the public which was represented by the plaintiff in that suit, and therefore (by virtue of explanation 6 of Section 11 of the Code) binding upon the plaintiffs in the later suit. The previous suit had been instituted under the provisions of Section 92 with the sanction of the Advocate General "and therefore became a representative suit". But subsequently new defendants and new prayers had been added by amendment of the plaint, and Lord Sinha in delivering the judgment of the Privy Council said (p. 106) :-

Their Lordships consider that, in so far as the nature of the suit was changed by the amendments mentioned, namely, by adding strangers to the trust as defendants and by prayers for relief not covered by Section 92, the suit ceased

to be one of a representative character and the decree based on the compromise such as it was, namely, by six only out of the seven plaintiffs in the suit, however binding as against the consenting parties, cannot bind the rest of the public. Sect. 11, explanation 6, has no application to such a case.

The decision therefore was (1) that a decree in a suit originally brought u/s 92 could not be considered as a decree in such a suit, in so far as the nature of the suit had been changed prior to the decree being obtained; and (2) that the nature of the suit had been changed in so far that by amendments of the plaint, strangers had been added as defendants and prayers introduced for relief not covered by Section 92.

26. It was argued before us that the nature of the suit might similarly be changed by amendments so as to take away from the suit that which offends Section 92 : so that a suit which as originally instituted is obnoxious to Section 92 might, by amendments in the plaint, be altered and might be rendered not obnoxious to Section 92. It was argued, on the other hand, that such an amendment could not be allowed in view of the decision in *Narsidas Jekisondas Vs. Ravishankar Prabhashankar*, . In my opinion, this decision does not refer to the question we have to consider. In the case cited, Mr. Justice Mirza in the Court of first instance had answered the first issue to the effect that the suit as framed was maintainable, that the reliefs were not those referred to in Section 92, and that therefore it was not necessary to comply with the provisions of that section. But the Court of Appeal held the suit to be for reliefs specified in Section 92 and therefore that compliance with that section was necessary. Thereafter in the Court of Appeal it was relied upon (in answer to the objection of failure to comply with Section 92,) that at a late stage of the hearing before Mr. Justice Mirza two of the prayers had been abandoned on behalf of the plaintiffs. The argument in the Court of Appeal was that the two prayers that had been so abandoned were the only prayers for reliefs mentioned in Section 92, and that therefore after those prayers had been abandoned the suit must be treated as not falling under the terms of Section 92 (2) but that after the abandonment of these prayers the suit must be held to be maintainable just as if the plaint had not contained the prayers that had been abandoned. This argument was rejected. Blackwell J. emphasized that Section 92 precludes the institution of a suit claiming the specified relief. The terms of Section 92 are not that (unless the suit is in conformity with the provisions of Section 92, Sub-section (2)) none of the reliefs specified in Sub-section (1) of Section 92 shall be granted in a suit instituted in respect of any such trust as is mentioned in Section 92. The argument that was rejected required the sub-section to be read as if it can "where a suit is instituted in respect of any such trust except in conformity with Sub-section (I) to Section 92, no reliefs specified in Sub-section (2) shall be granted ". That is not how Section 92 is worded. The decision does not go beyond that. It does not deal with the question which is before us-the question that arises when an application is made that the plaint should be allowed to be amended in a particular manner. The reasons for the application to be allowed to amend may be that the suit as

instituted is found to be obnoxious to Section 92; and it may be part of the argument in the application that if the plaint is amended, it may be considered for the purpose of Section 92 as if it had been filed in the amended form. That question was not considered and was not before the Court in *Narsidas v. Ravishankar*. The application for permission to amend in the present plaint cannot in this case be allowed, the reason shortly being that the whole suit would fall to the ground if the amendments were allowed. That of course is not the only reason why an application to amend the plaint may be refused. The Court considers, amongst other matters, the stage at which the application is made, the nature of the suit, the effect that would result from the amendment and the terms on which the amendment might or might not be permitted. If there had been no such initial difficulty in permitting an amendment as I have found in this case, it might have been necessary to consider whether the decision of the Privy Council helps the argument, addressed to us in favour of amendment, viz., that since the Privy Council held that the nature of the suit before them had been changed so that the suit did not to the extent of the amendment remain a representative suit, so also the present suit would after the amendments be considered no more to remain a suit claiming the specified reliefs, but would be turned into a suit which need not have been instituted in conformity with Section 92 : that, if by amendment the suit may lose its efficacy as a suit u/s 92, then by amendment it may lose the necessity for conforming with Section 92. I am only stating the argument, not expressing any opinion on it. The initial difficulty in the way of the amendment makes it unnecessary to consider this argument. The decision relied upon, viz. *Narsidas v. Ravishankar*, was not dealing with any application for amendment.

27. I agree with the orders proposed by my learned brother.