
(1931) 08 BOM CK 0005
In the Bombay High Court
Case No : First Appeal No. 518 of 1928

Gafuralli Sayad Anwar

APPELLANT

Vs

Mohiddin Shamsuddin

RESPONDENT

Date of Decision : 14-08-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 92

Citation : AIR 1932 Bom 65 : (1931) 33 BOMLR 1575

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

Bench : Division Bench

Judgement

Patkar, J.—This was a suit brought by the plaintiffs praying for a declaration that they and other Mahomedans of other Mohollas at Chopda have a right along with the defendants and other residents of their Moholla, i.e., Darga Moholla, to look after the Darga of Hazrat Mustafa Saheb in the city of Chopda, to manage the property and income of that Darga and to keep accounts, to assemble Urus and to perform all other functions, and that a permanent injunction be issued to the defendants that they for themselves and on behalf of other Mahomedans of Darga Moholla should cause no obstruction.

2. The point as to whether the suit is barred u/s 92 of the CPC was not taken by the defendants in their written statement and no issue was raised on the point. The learned Subordinate Judge examined the witnesses on behalf of both the parties and instead of recording findings on the material issues Nos. 3, 4, and 5 dismissed the suit on the ground that the plaintiffs do not represent all the Mahomedans of Chopda, and that the permission ought not to have been given under Order I, Rule 8, of the Civil Procedure Code, and further came to the conclusion that the suit fell within the ambit of Section 92 of the CPC and therefore ought to have been brought with the sanction of the Advocate General in the District Court and not in the First Class Subordinate Judge's Court. The first question, therefore, arising in the case is whether the suit falls within Section 92 of the Civil Procedure Code.

3. Two essential conditions are necessary in order that the suit should fall u/s 92 of the Civil Procedure Code?either, there must be an alleged breach of an express or constructive trust created for public purposes of a charitable or religious nature, or the direction of the Court is deemed necessary for the administration of the trust. In the event of any of these eventualities, if the suit asks for a decree claiming any of the reliefs mentioned in Section 92, clauses (a) to (h), then the suit shall be instituted in respect of any such trust in conformity with the provisions of Section 92. Reading the plaint we fail to find any allegation of a breach of an express or constructive trust created for public purposes of a charitable or religious nature.

4. Assuming that the endowment in the present case is an express or constructive trust created for public purposes of a charitable or religious nature, there is no allegation in the plaint of an alleged breach of such trust. It is doubtful whether the injunction asked for amounts to a direction for the administration of such trust in view of the decision of this Court in Nilkanth Devrao v. Ramkrishna Vithal ILR (1921) Bom. 101 23 Bom. L.R. 876 Assuming that the injunction sought for by the plaintiffs amounts to a direction of the Court for the administration of the trust, there is no relief asked for which would fall within Clauses (a) to (g). What is prayed for by the plaintiff's is a declaration of their right of joint management of the mosque together with the defendants and the residents of their Moholla. The declaration is sought for by the plaintiffs to enforce their individual rights and the rights of the Mahomedans of all the Mohollas in the town, not to the exclusion of the defendants, but in conjunction with the defendants and other Mahomedans of their Moholla. We do not think that the relief that is asked for comes within Clause (h) "granting such further or other relief as the nature of the case may require", for, according to the decision of the Privy Council in Abdur Rahim v. Mohamed Barkat Ali ILR (1927) Cal. 519 30 Bom L.R. 774 "any further or other relief" must be read ejusdem generis with Clauses (a) to (g) of Section 92. We think, therefore, that the reliefs claimed in the plaint as drafted do not fall within Section 92 of the Civil Procedure Code. Indeed it has been contended on behalf of the respondents that the mosque does not represent a constructive trust created for public purposes of a charitable or religious nature, and the point based on Section 92 of the CPC was not taken by the respondents in the lower Court, but the learned Judge after taking the evidence in the case suo motu raised that point, and dismissed the plaintiffs' suit without recording the findings on the essential questions arising in the case. We think, therefore, that the suit does not fall u/s 92 of the Civil Procedure Code.

5. The other ground taken by the learned Judge in the judgment for dismissing the suit, viz., that the plaintiffs do not represent the Mahomedans of the town, and therefore leave ought not to have been granted under Order I, Rule 8, is, in our opinion, not tenable.

6. On November 18, 1926, the learned Subordinate Judge granted the permission under Order I, Rule 8. It appears from Exhibits 22 to 32 that fifty two

persons made applications that the defendants had the exclusive right of managing the mosque and the Darga in question. But, even assuming that fifty-two persons were in favour of the defendants' management and were against the joint management of the plaintiffs and the defendants, it is conceded that other Mahomedans residing in all the Mohollas of the towns exceed largely in numbers the dissentients, who made the applications, Exhibits 22 to 32. The reasoning, therefore, of the case in *Harkisandas Shivilal v, Chhaganlal Narsidas* ILR (1915) Bom. 158 18 Bom. L.R. 1 does not apply to the facts of the present case. The predecessor of the learned Subordinate Judge having given permission to the plaintiffs to sue under Order I, Rule 8, he could not review the order in the final judgment. The proper procedure for him would have been to allow any of the persons who made applications, Exhibits 22 to 32, to be brought on the record as parties under clause (2) of Rule 8 of Order I. It is not permissible for the learned Judge to dismiss the suit under Order I, Rule 8, simply on the ground that some persons objected to the plaintiffs carrying on the suit.

7. We think, therefore, that the reasons given by the learned Subordinate Judge for dismissing the suit are not sound. We must, therefore, reverse the decree of the lower Court and remand the case to the lower Court for finding on issues Nos. 3, 4 and 5. If the learned Judge comes to the conclusion on the evidence that plaintiffs and the Mohamedans of the Mohollas of the town are not entitled to joint management with the defendants, it would be open to him to dismiss the plaintiffs' suit on the merits, but we think it was erroneous on the part of the learned Judge to dismiss the suit on the ground that the plaintiffs did not represent the Mahomedans under Order I, Rule 8, or that the suit fell within the ambit of Section 92 of the Civil Procedure Code. Costs of this appeal will be costs in the suit.

Tyabji, J.

8. I agree. The learned Subordinate Judge has dismissed the suit of the plaintiffs on two preliminary issues.

9. Before I deal with either of the contentions, I must, with all deference to the learned Judge, record my strong protest at the manner in which he has dealt with these questions. Both questions had reference to the rights of the parties arising under provisions of the Civil Procedure Code: Order I, Rule 8; and Section 92. The learned Subordinate Judge has not dealt with the provisions of the Civil Procedure Code, or paid any attention to its words, but has considered a great number of decided cases, and allowed himself to be bewildered by them. As it is, after reading the whole of the judgment, we are left in the dark as to what he exactly intended to decide, as to which of the numerous clauses of Section 92 he considers to affect the case, and how he applies the provisions of Order I, Rule 8.

10. The case before us is one of the numerous cases in which, where, Huhammadan trusts and charities are concerned, the plaint is drafted without a due regard to the law. I have had no (sic) difficulty in understanding what the

contentions of the parties are, and what they desire. But after having heard counsel, I have come to the conclusion that the plaintiffs pray in effect for a declaration, determining the method in which the property, the subject-matter of the suit, must be managed, and its trusts administered. This was expressed in the following inartificial language:?

It be decided that plaintiffs themselves and Muhommedans of other Mohollas at Chopda have a right along with defendants and other residents of their Moholla, to look after the Darga of Hazrat Mustafa Saheb in the city of Chopda, to manage the property and income of that Darga and to keep accounts etc, to assemble Urus etc, (and) to perform all other (similar) functions, (and) that permanent injunction be issued to the defendants that they (either) for themselves or on behalf of other Muhammadans of Darga Moholla should cause no obstruction.

11. The learned Subordinate Judge has held that, this being the nature of the suit, it is for some reason obnoxious to Section 92 of the Civil Procedure Code. He does not mention?as I have already said?the particular provision or clause of Section 92, that is, in his opinion, obnoxious to the suit.

12. Section 92 of the CPC starts with three data: first, there must be an express or constructive trust, created for public purposes, of a charitable or a religious nature, secondly, in the case of such a trust, there must either (a) be an alleged breach of such a trust, or (b) the direction of the Court is deemed necessary for the administration of any such trust, and thirdly, the relief sought in the suit is one of the reliefs mentioned under Clauses (a) to (h) of Section 92 (1).

13. When all these three conditions are satisfied, then it is provided that the suit, whether contentious or not, can only be instituted in conformity with Sub-section (1) of Section 92, viz., that 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, shall institute the suit, and that the suit shall be instituted in the principal civil Court of original jurisdiction, or in any other Court empowered in that behalf by the Local Government, within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situated.

14. The proper course, therefore, for considering the question whether a suit is bad for contravening Section 92 is to turn to each of the three considerations that I have mentioned above, and, if the suit satisfies them all, to inquire whether the suit is instituted in conformity with Section 92 (1): viz., (a) by the Advocate General or persons authorized by him, and (b) in a Court that has jurisdiction to try it.

15. When this course is followed, it becomes obvious that the present suit is not obnoxious to Section 92. Assuming that the first and second conditions, above mentioned, are satisfied, still there is no prayer on behalf of the plaintiffs that a new trustee should be appointed, under Clause (b), which is the only clause alleged before us to be applicable to the present case. A faint effort was made to bring Clause (h) into operation against the suit: but the Privy Council decision in

Abdur Bahim v, Mahomed Barkat Ali ILR (1927) Cal, 519 30 Bom. L.R. 774 that the clause must be taken to mean relief of the same nature as those mentioned in Clauses (a) to (g), made the attempt futile.

16. Therefore, the learned Judge's decision on this point is erroneous.

17. Coming to the learned Judge's decision under Order I, Rule 8, the object of that rule is to provide facilities where numerous persons have the same interest in a suit. The rule provides a method by which such numerous persons can be before the Court, as if they were plaintiffs or defendants, without the necessity of making every one of them a party. The scheme of the rule is that in such a case one or more persons may be given leave to sue or to defend the suit on behalf of all persons interested. Leave may be given to one, or, if necessary, to several representative persons. The leave may be sought on behalf either of the plaintiffs or the defendants. When the leave is applied for, the Court may, of course, take steps to verify the allegations of the applicant or applicants. If the number of those who apply to the Court on the ground that they have the same interest is "numerous," (that is the word of the rule) the Court has jurisdiction to make the order. If an application is made on behalf of persons, as to whose willingness to be represented by the applicant or applicants, the Court desires to have some evidence, there is no difficulty in this being insisted upon. As a further safeguard, it is provided that notice in the manner laid down in the rule shall be given to all such persons, as are alleged to have the same interest in the suit. Finally, under Sub-section (2), if these other persons are not satisfied by the plaintiff representing them, they may apply to be made parties.

18. This being an enabling rule, for the purpose of making it practicable to bring to trial, a suit in which numerous persons would otherwise have to be made parties, whose number might make the trial embarrassing, I am at a loss to understand what the learned Judge can mean when he says:?

I hold that plaintiffs have no right to sue in the representative capacity, and that the suit is bad under Order I, Rule 8, of the Civil Procedure Code.

19. Order I, Rule 8, does not make any suit bad or good. It only provides for a case where a number of persons are interested in a suit. A means is devised by which such a suit may be placed before the Court with greater facility.

20. In the present case, the plaintiffs, on behalf of themselves and a number of other persons who have the same interest as himself, came before the Court and obtained the leave of the Court, and after the evidence on the merits of the suit has been adduced, the learned Subordinate Judge does not deal with the case on the merits, but holds that the plaintiffs have no right to sue. Had the leave been wrongly granted, how would the merits of the suit be affected? Supposing it turns out that instead of there being numerous persons having the same interest in the suit, there is only one, how does that make the suit bad? If that one person is entitled to some relief he will get it, if not, the suit will be dismissed: but the decision will be on the merits. It seems to me that the learned Judge has

entirely misunderstood the scope of Order I, Rule 8, and if he had attended to the rule, instead of decisions on other points, he would have saved himself from falling into such an error.

21. I agree with the order proposed by my learned brother.