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**(1911) 07 BOM CK 0007**  
**In the Bombay High Court**  
**Case No : Second Appeal No. 131 of 1910**

Ghelabhai Gavrishankar

APPELLANT

Vs

Uderam Ichharam

RESPONDENT

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**Date of Decision :** 18-07-1911

**Acts Referred:**

**Citation :** (1911) 13 BOMLR 989 : 12 Ind. Cas. 577

**Hon'ble Judges :** N.G. Chandavarkar, J;Hayward, J

**Bench :** Division Bench

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## Judgement

N.G. Chandavarkar, Kt., J.—The dispute in this case relates to a house, which originally formed part of the property belonging to one Ambaram Bhikariram. He by his will made in the year 1849 bequeathed the property to his wife for life, and, on her death, to Bai Ganga, his widowed daughter-in-law, also for life; and he further directed that on their death his four executors, named in the will, should make shivarpana of the property, that is to say, they should make a public religious trust of it by devoting it to the worship of the Hindu deity, Shiva. On his death, his widow took under the will. On her death, his daughter-in-law succeeded to the estate and she sold the house now in dispute. The present respondents claim to be in possession in virtue of that sale.

2. The executors, charged with the duty of making a public trust of the property, predeceased the daughter-in-law. She herself died in the year 1898. The trustees, named by the testator for the purpose of making and completing the trust at the point of time fixed by him, having died, and the object of the trust, as named by him, being specific and definite, the case falls within the rule of law, laid down by Lord Eldon in the leading case of *Moggridge v. Thackwell* (1803) 7 Ves. Jr. 36, that "where the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust." See also *In re Pyne: Lilley v. Attorney General* [1903] CH, 83. It is for such cases that the Indian Legislature provided a remedy by means of Section 539 of the old CPC (Act XIV of 1882), reproduced, with some alteration, in the new Code, (Act

V of 1908), as Section 92.

3. In the present case, the suit was brought by the appellant in the Court of the Second Class Subordinate Judge at Surat independently of Section 539 of the old Code, which was then in force. In his plaint he sought to eject the respondents as trespassers and prayed for possession of the property, for the appointment of a trustee by the Court, for the settlement of a scheme for the administration of the trust, and for such other relief as the Court might think fit to grant. All the relief's claimed, except the prayer for possession, fell within the purview of Section 539, and to that extent the suit was outside the jurisdiction of the Subordinate Judge's Court, having regard to the law that the provisions of the section are mandatory, not enabling or permissive: *Tricumdass Mulji v. Khimji Vullabhdass* ILR (1892) 16 Bom. 626.

4. But it is contended for the appellant that, so far as it was a suit to eject a trespasser from property, which is the subject of a public religious trust, Section 539 did not apply, and that the suit rightly lay in the Subordinate Judge's Court, as held in *Lakshmandas Parashram v. Ganpatrav Krishna* ILR (1884) 8 Bom. 365; *Vishvanath Govind Deshmane v. Rambhat* ILR (1890) 15 Bom. 148; *Kazi Hassan v. Sagun Balkrishna* ILR (1899) 24 Bom. 170; and *Ravichand Bhaichand v. Samal Shivram* (1880) P.J. 273.

5. This contention is sound and the present action must be treated as one in ejectment. So regarded, it requires that the appellant must make out his title to eject. The title claimed by him is that of trustee or manager arising in virtue of his right as the heir of Ambaram. There can be no doubt that Ambaram himself could have, if alive, ejected the trespasser and taken steps to complete the trust. "The duties and obligations of the deceased are attached by the law to his representatives and to those who actually take his property" : (West and Buhler, 3rd Edition, page 215). Ambaram having named certain persons to carry out the trust pointed out by him, and those persons having all died before the period for the creation and completion of the trust, in the absence of any provision made by the testator to meet such a contingency, the right to do that which those persons would have done devolved, according to Hindu law, on the heir of the testator. He takes either their place or his : (1889) L.R. 16 I.A. 137 (Privy Council) . As observed by this Court in *Ravichand Bhaichand v. Samal Shivram* (1886) P.J.278, "in the absence of any provision made for the management by the founder or proof of a long established custom with regard to it, the descendants of the founder are entitled to exercise it."

6. Whatever might be the case as to property which, having been completely devoted by its owner to a public charitable or religious trust, has passed out of his hands and from his ownership and, therefore, is in no sense under his control or the control of his family and heirs on his death, we have here property of a different character. It is not the case here that the owner died after having made a complete trust of it. He merely directed that it should be endowed for a certain purpose at a certain time by certain persons after his death. Until the arrival of

the time and complete dedication of it in the manner and for the object pointed out by the testator, the property must be regarded, in the eye of law, as part of his estate but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time; and he who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanction of the Court, if necessary. But before he can do that, he must first secure the property from the wrongdoer into whose possession it has passed.

7. To hold otherwise would be contrary to the principles of Hindu Law and to encourage the mis-use of trust property.

8. Yajnyavalkya says: "Whatever is promised to be given shall be given ; where it has been given, it shall not be resumed." Vijnaneshwara in the Mitakshara explains this smriti or text as follows:--

Whatever is promised (as a gift) to any person for a religious purpose should be given to that person (by the promisor); otherwise the latter shall lapse from religion." (The Mitakshara: Moghe's Edition, 3rd, page 225). So Katyayana as cited in the Mayukha: "If a gift be promised by a person whether in health or in sickness, for a religious purpose, and he die without making it, his son should be compelled to make it, of this there is no doubt." (Mandlik's Hindu Law, page 124).

9. The word "son" is here merely illustrative and stands for any one who inherits or takes the promisor's property. These are monitory, not mandatory texts; but the principle underlying them is that, where a Hindu, who has directed a trust of his property for a religious purpose, dies before giving effect to it, the Hindu Law authorises his heir to take steps for carrying out his directions, after recovering the property from a trespasser.

10. So far the appellant's title is clear. It remains to consider whether the question of that title is *res judicata* in consequence of the result against him of this suit, No. 360 of 1900, brought against the respondents. That was a suit in which he claimed possession of all the properties of Ambaram, including the house now in dispute, as his reversionary heir. It was held that he was entitled to all of them except the house. As to it, the Court decided that, as it had been made the subject of a gift to the Hindu deity, Shiva, it was endowed property, to which the plaintiff had no right as heir and owner. It is true that in both the litigations the appellant claimed as heir. But, as pointed out by the learned Subordinate Judge who tried the present suit, the appellant asks for relief now as trustee with reference to property which is impressed with a trust. As soon as Bai Ganga died, the house became in the eye of law subject to a trust; and Ambaram's heir became entitled to recover it, not as heir, but in a different capacity, i. e., as trustee or manager, for the purpose of giving effect to the trust. The trusteeship, no doubt, arose out of the heir ship; but all the same the two capacities or titles are distinct and gave rise to two separate causes of action.

11. One way of testing it is this. Suppose the trustees named by the testator had survived Bai Ganga. It is undeniable that they could have claimed possession of the house as against a trespasser for the purpose of carrying out the object of the trust pointed out by the testator. At the same time the reversionary heir of Ambaram could have in that event maintained a suit on his own account for the rest of Ambaram's property, to which he had become entitled, either by right of succession under the Hindu Law or under the will. If the two rights were in inception distinct, they cannot be said to have coalesced and become one cause of action merely because one and the same person happens to be the heir and to take the place of the trustees. It is a matter of mere accident, not of substance or essence, that the trusteeship arises from the heir ship.

12. For these reasons, the decree of the District Court must be reversed, and, as the pleaders on either side agree that there is no further question on the merits to be determined, the appeal is allowed. The Court doth declare that the property in dispute is a public religious trust under the will of Ambaram Bhikariram and must be dedicated to the worship of Shiva and that the plaintiff is entitled to recover possession for the purpose of carrying out the said trust according to the directions in the said will. The Court awards possession accordingly. The plaintiff should give an undertaking to the Court of the Subordinate Judge at Surat that within three months from the date of recovery of possession he will take the proper, legal and necessary steps for the purpose of completing the trust and securing its administration. Costs throughout on the respondent.