
(1931) 11 BOM CK 0006

In the Bombay High Court

Case No : Cross Second Appeal No's. 959 and 960 of 1928

Maruti Ramrao Chandavarkar

APPELLANT

Vs

Mallapur Shri Gopal Krishna

RESPONDENT

Date of Decision : 17-11-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Registration Act, 1908 — Section 49

Citation : AIR 1932 Bom 305 : (1932) 34 BOMLR 415

Hon'ble Judges : Nanavati, J; Baker, J

Bench : Division Bench

Judgement

Baker, J.—These two appeals are cross-appeals arising out of the judgment and decree of the District Judge of Kanara in Appeal No. 19 of 1927 from the decree in Suit No. 488 of 1924 of the Subordinate Judge's Court at Kumta. The arguments in these appeals have occupied a considerable time, but the main points are comparatively restricted. The facts are that the suit was brought in the name of the idol of Shri Gopalkrishna Dev of Mallapur by its vahivatdar Shesbgiri against the defendants, who are members of the same family to which the plaintiff before his adoption originally belonged, and the suit prayed for two reliefs. The plaintiff alleged that certain property, which is described in Schedule A of the plaint, situated at Konali in taluka Kumta and consisting of a considerable number of survey numbers, was purchased by the defendants' predecessor Annappa for the God, and that its produce was to be devoted to the upkeep of the idol and its service. As regards the property mentioned in schedule B, which consists of one or two survey numbers, that property was burdened with a charge of three khandis of rice for the performance of certain ceremonies of the idol. The defendants denied that the purchase of the lands in schedule A by Annappa was for the benefit of the idol, although they appear to have admitted in the first part of their written statement that certain payments were made out of the produce of these lands to the idol, but as a matter of grace and not as a matter of right. With regard to the property mentioned in schedule B, it

has been admitted in the written statement that originally that property was burdened with the payment of three khandis of rice annually for the purposes of the ceremony mentioned in the plaint, but that a great many years ago that custom was discontinued when the family bought certain lands at Kekkar and Haldipur for the God, and therefore no liability attached to the property in schedule B. They further contested the right of the plaintiff (by which I mean the human plaintiff) to sue. They also said that the property was not liable to pay anything to the idol, there being no dedication, and that the claim was barred by limitation.

2. The first Court, the Subordinate Judge of Kumta, held that the plaintiff had the right to sue, the property in schedule A belonged to the plaintiff, the suit was in time, and the plaintiff was entitled to the declaration sought (as regards property B), and that he was entitled to possession of property A, not in his own capacity but as representing the idol. He, therefore, passed a decree in the plaintiff's favour together with mesne profits and costs.

3. On appeal by the defendants to the District Court, the District Judge confirmed the decree as regards property A, which was the decree as to possession with mesne profits, but he set aside the decree as regards the property mentioned in schedule B, holding that it was not proved that this property was burdened with the charge of an annual payment of three khandis of rice to the idol, Both parties have appealed, the main appeal being by the defendants, Second Appeal No. 959 of 1928, and the other appeal by the plaintiff is Second Appeal No. 960 of 1928.

4. Both appeals can be disposed of in one judgment. Various questions of law and mixed law and fact arise in this appeal, which, as I have said, has been argued in great detail, and four principal questions will arise for decision. The first is as to the right of the plaintiff to sue. The second is as to whether the property A was bought for the benefit of the idol. The third is whether the suit is in time, and the fourth is to what relief is the plaintiff entitled as regards the property mentioned in schedule A, and the remaining point which arises in the other appeal is whether the property mentioned in schedule B is burdened with a charge for the payment of three khandis of rice to the idol.

5. So far as regards the first point a good many rulings have been quoted, and the matter has been argued very elaborately, but before we proceed to consider these rulings, it will be just as well to have a clear statement as to what the facts are, because in my opinion a good many of the rulings which have been quoted will not apply to the facts of this case. Now the case is that this land mentioned in" schedule A of the plaint was purchased by Annappa, who is the predecessor-in-title of the present defendants for the idol, It is admitted that the land does not stand in the name of the idol, nor is there any sale-deed in its name, nor is there any deed of gift to the idol or any document which may prove dedication. But the case put forward by the plaintiff is that this land is the property of the idol, and the defendants, who are the descendants of Annappa, deny that the purchase was on behalf of the idol, and say that the land belongs to their family.

Now clearly the idol must be represented, as has been frequently laid down, by some sentient being to conduct a case on its behalf. This is not a case in which there is a dispute between two persons claiming to be entitled to manage the affairs of the idol, but, so far as the defendants are concerned, we have a total denial of any rights of the idol over this particular property. Defendants, as the pedigree which has been put in will show, are the descendants of Annappa, who may be regarded as the original founder. He is the natural father of defendant No. 4, who was adopted by Eamchandra the brother of Annappa. Annappa is further the grandfather of defendant No. 1, and the great-grandfather of defendants Nos. 2 and 8, and although the learned Counsel for the appellant has denied that the family is joint, it is in evidence that there was a partition between them in 1917-1918, which is the cause of the present suit, because the property, which is alleged to belong to the idol, was attempted to be divided at that partition. Up to 1917-1918, therefore, they formed a joint family. The defendants are the direct descendants of Annappa. On these facts it will be apparent that cases which lay down such propositions as this, that on there being a failure of shebait, or there being no arrangement for the appointment of shebait, the management of the trust reverts to the heirs of the original founder (that was the case in *Kashinath v. Gangubai* (1928) 31 Bom. L.R. 349) can have no application to the present case, where the existence of the trust is denied. If we were to apply such principles to the present case, then the defendants, who themselves deny the trust, could not be appointed managers of the trust, and the result would be that the property of the trust would be gone without hope of recovery. The position of the plaintiff, as is admitted by the defendants, is this, that he has taken an interest in the affairs of the temple, and that he has raised a subscription for the purpose of its repair, towards which the defendants contributed. In a case where the very existence of the property of the idol is disputed, where the persons in possession of the property who are the direct descendants and heirs of the person who originally purchased the property deny the rights of the religious institution with regard to this property, it is obvious that somebody must be appointed or allowed to represent the interest of the idol as against the interest of those persons who are in possession of the property, as they allege, adversely to the idol, and it would not be in consonance with ordinary notions of justice or equity that a person who comes forward not in his own behalf but on behalf of the religious or charitable foundation should be non-suited on the ground that he had no power or no legal position to represent the idol. It would be a master of regret if the cases laid down any proposition of that character, but I do not think they do. The learned Counsel for the appellant has referred to a number of cases beginning with *Kashinath v. Gangubai*, which is a decision of my own confirmed on appeal in *Kashinath Mahadev Mahajan Vs. Gangubai Keshav Nagarkar*. As I have already said, that case has no application to the facts before us. What happened in that case was, while the existence of the trust was admitted, the trust property was in possession of strangers, and the heir of the founder of the trust, a woman, sued to recover the property on behalf of the trust. The next case quoted is 8 CWN 809 (Privy Council) which lays

down that although an idol may be regarded as a juridical person capable as such of holding property, especially where the dedication is of the completest character, yet the possession and management of the dedicated property with the right to sue in respect of it are vested in the shebait, The point in that case was that the plaintiff, who was the shebait, had brought a suit in ejectment, and limitation was pleaded, and the question was whether the person entitled to bring the suit was the idol itself or the shebait, In the present case there is admittedly no shebait. There is no scheme of management, and the property has at different times been managed by various members of the defendants' family. The defendants in their written statement have clearly disclaimed the right to be vahivatdars of this particular idol. The question will arise, therefore, when there is no shebait or vahivatdar of the idol, what is to happen ? The next case quoted by the learned Counsel for the appellant is *Ananda Chandra Chuckerbutty v. Braja Lal Singh* ILR (1922) Cal. 292 This case lays down a number of propositions, but the only proposition for which it is quoted is that when the worship of an idol has been founded, the shebaitship is vested in the founder and his heirs, unless he has disposed of it otherwise, or there has been some usage or course of dealing which points to a different mode of devolution. This case will not apply to the facts of the present case, in my opinion, because here we have an express disclaimer by the defendants, who are the heirs of the original founder, of any trusteeship or shebaitship of this institution, and we have come back to the point where we were before, namely, that there is no shebait, and there is no arrangement or custom by which a shebait is to be appointed, and, as I have already said, it is perfectly impossible in this case to take the view that the trusteeship should revert to the heirs of the original founder, who are the defendants in this case and who are setting up a title adverse to the idol. These cases in which the existence of the trust property is admitted do not help us in dealing with a case like the present, where the existence of the trust property is denied by the heirs of the original founder. The learned advocate for the respondent has relied on *Shea Ramji v. Sri Ridhnath Mahadeoji* ILR (1923) All. 319 which follows *Jodhi Bai v. Basdeo Prasad* ILR (1911) All. 735 *Administrator General of Bengal v. Balkissen Misser* ILR (1924) Cal. 953 *Thackersey Dewraj v. Hurbhum Nursey* ILR (1883) Bom. 432 followed in *Shankarlal v. Dakor Temple Committee* (1925) 28 Bom. L.R. 309 and (1928) ILR 55 519 (Privy Council) In *Sheo Ramji v. Ridhnath Mahadeoji*, where the original mahant being dead, and his chela and successor a minor, one of the supervisors of the endowment appointed one V as manager of the property on behalf of the minor mahant, and V in that capacity filed a suit in the name of the idol for the recovery of a portion of the endowed property which had been wrongfully sold by a relative of the last mahant-it was held that V was a competent person to file such a suit in the name of the idol to which the property claimed belonged in law, and he had no personal interest in the property and no interest adverse to the minor. Reference was made to the case of *Jodhi Mai v. Basdeo Prasad*, in which it was held that inasmuch as an idol is a juristic person capable of holding property, a suit respecting property in which an idol is interested is properly brought or defended

in the name of the idol, although necessarily the proceedings in the suit must be carried on by some person who represents the idol, usually the manager of the temple in which the idol is installed. It was held that the manager of the idol is not personally interested in the suit, and can sue on behalf of the idol. That does not, strictly speaking, touch the point before us now. In *Administrator General of Bengal v. Balkissen Misser* it was held that it is permissible to file a suit for possession in the name of the idol where a shebait has not been appointed, and the Court will appoint some person to act as agent ad item for the idol. In *Thackersey Dewraj v. Hurbhum Nursey* it was held that worshippers or devotees of an idol are entitled to bring a suit complaining of a breach of trust with reference to the funds or property belonging to the idol or appendant to its temple, The present suit is not a suit u/s 92 of the Civil Procedure Code. *Abdur Rahim v. Mahomed Barkat Ali* is a suit u/s 92. I do not find anything in any of these cases which would prevent the present suit being maintained by the present plaintiff acting on behalf of the idol as a person interested in the management of the property of the idol, In addition to this, the plaintiff applied by Exhibit 43 that a notice should be published in the newspaper to ascertain if any devotees wanted to be added as a party. His application was granted, and a notice was actually issued, although at the time of the suit nobody else appeared. That order would appear to have been made under Order I, Rule 8. I have already pointed out that to hold that the plaintiff was not entitled to sue would be practically to refuse any opportunity of allowing the question of the right of the idol to this particular property to be decided in a Court of law, inasmuch as the defendants, who are the heirs of the original founder or the original grantor, now deny the right of the idol to this property. In these circumstances, I do not see any reason to differ from the view which has been taken by both the Courts below as to the plaintiff's right to sue.

6. The next question is one which at first sight might seem to be one of fact as to whether there was as a matter of fact a dedication or a gift by the original purchaser Annappa to the idol. As regards this it has been contended by the learned Counsel for the appellant that in order to constitute a dedication certain ceremonies must be performed, which have not been performed in the present case. He refers to Mayne's Hindu Law, Section 378, p, 525, Sections 437 and 438, also to *Ram Dhan v. Prayag Narain* ILR (1921) All. 503 where it was held that the mere execution of a deed of endowment is not sufficient under the Hindu law to create a valid endowment, but to complete the gift there must be a transfer of the apparent evidences of ownership from the donor to the donee. It is contended that not only there is no document, but that the land stands in the name of various members of the defendants' family and admittedly the profits of this land have not been entered in the account books of the temple. He refers also to (1876) L.R. 4 I.A. 52 (Privy Council) which, however, is a case which proceeded on the interpretation of certain deeds of transfer, and to *Gangi Reddi Vs. Tammi Reddi*, That, however, does not support the appellant. That lays down that a dedication of a portion of the family property for the purpose of a religious

charity may be validly made without any instrument in writing, even if it be an appropriation of some landed property, and the karta's act would be valid if assented to in any way, however informally, by the other family members. But that case refers to property which was already in the possession of the family, and was then dedicated, whereas in the present case we have property which was brought by Annappa, whether out of his own funds or family funds does not seem clear, for the benefit of this idol. Now it is settled law that no writing is necessary to create an endowment except when it is created by a will; no trust is required, even in the case of a dedication to an idol, which cannot itself physically hold lands; it is not necessary though it is usual to vest the lands in trustees; nor is it necessary that there should be any express words of gift to the idol. That has been laid down in Venkatanarasimha Rao v. Subba Rao ILR (1922) Mad. 300; see also Manohar Ganesh Tambekar v. Lakhmiram Govindram I.L.R. (1887) Bom. 247 It is necessary for the validity of a deed of endowment, that the executant should divest himself of the property. Whether he has done so or not is to be determined by subsequent acts and conduct. In the present case we have no question of a deed of endowment; the property was purchased for the first time by Annappa, but we have on record the clearest possible admissions both by Ramchandra and Mangesh, Ramchandra being the brother of the original acquirer Annappa and uncle of Mangeeh. Those are Exhibits 37 and 38. Those admissions are referred to at p, 11 of the Subordinate Judge's judgment. Exhibit 31 is a judgment in a suit between Mangesh and certain debtors in which Mangesh contended that the property now in suit belonged to the God. The purpose for which this judgment was put in is only to show the pleadings, the original pleadings not being available at this distance of time, the suit being of 1884. The two admissions referred to by the learned Subordinate Judge are in criminal cases, I need not repeat them. Then there is Exhibit 62, which is a copy of a partition list in which this property A is not mentioned. All these documents are referred to in para. 4 of the lower appellate Court's judgment. With regard to objections for lack of registration, the objection is to receiving unregistered documents as evidence of any transaction affecting the property in question, but they are not excluded for collateral purposes such as showing that they contain or do not contain items of family property, or signatures of certain persons, and I do not think that this evidence can be held to be inadmissible. The Privy Council in Varada Pillai v. Jeevarathnammal (1919) 22 Bom. L.R. 444 allowed a petition reciting a gift and praying that the villages, subject of the gift, be transferred to the donee's name, though inadmissible to prove title, to be referred to to prove the character of the donee's possession. It might be argued that the finding of the lower appellate Court on the question of whether as a matter of fact the property mentioned in schedule A was purchased by Annappa for the idol is a question of fact, but in view of the documents on which it is based we have allowed this question to be argued as if it were a question of law. But on the evidence as it stands (it has been detailed by both the Courts below), and in particular on the admissions of Mangesh and Ramchandra, there can be no doubt with regard to property A that the purchase by Annappa was for the idol, and

that the land is the property of the idol. This being so, the next question is whether there is anything which would prevent the present plaintiff from recovering possession of the property on behalf of the idol, the defendants having denied the title of the idol, Now the defendants were in possession from the beginning on behalf of the idol, the land standing in their names, they were trustees of the idol, and there is nothing to show that they asserted any adverse possession until the partition of 1917-1918, which was only six years before the suit brought in 1924. Nor has the question of adverse possession been argued at any great length in this Court, or apparently in the Courts below, and I have no doubt that the finding of the lower Courts that there is no adverse possession is correct. -

7. Lastly, inasmuch as the idol is the owner of the property mentioned in schedule A, it being purchased for its benefit, the persona who are in possession of the property having denied the title of the idol to this property, are in the position of trespassers, and are liable to be evicted and possession handed over to the idol, acting of course through its representative. I have already pointed out that somebody must represent the idol, and that in the circumstances of the present case the plaintiff, who it appears was acting with the consent of other devotees of the idol (although their power of attorney was not put in till after the suit, it is on the record of the suit as Exhibit 63), is a proper person to represent the idol, and therefore he is entitled to possession of the property mentioned in schedule A. Time disposes of the defendants' appeal No. 959 of 1928.

8. As regards the plaintiff's appeal, No. 960, it relates to property B, which according to the appellant it burdened with a charge of three khandis of rice payable to the idol for certain Jayanti ceremonies. In the written statement at p. 25, para, 10, defendant No. 1 says as follows:-

I admit that there was an arrangement of giving three khandis of rice out of the property in schedule B for providing the expenses of santappan for two days during the celebration of Krishna-Jayanti as mentioned in the plaint But in accordance with the arrangement made by our ancestors by providing for these expenses the income of our property at Kekkar and Haldipur villages, the provision for these expenses have been continued by our family alone with the income of that property.

This is, therefore, an admission that this property was burdened with the liability to provide three khandis of rice annually for certain ceremonies, but on the purchase of certain lands at Kekkar and Haldipur for the idol this liability was discontinued. Clearly on these pleadings the burden of proof of the discontinuance was on the defendants, and the issue should have been, whether the defendants have proved that from the date of the purchase of the property at Kekkar and Haldipur the liability of the lands in schedule B to the payment of three khandis of rice has ceased to exist ? The learned Subordinate Judge, however, threw the burden of proof on the plaintiff" by the form of issue No. 5 (a), but in disposing of the issue he pointed out that there was no evidence on

either side except the statements of the parties, and Exhibit 62 which was passed in 1892, and refers to the three khaudis of rice, although it is subsequent to the purchase of the Kekkar and Haldipur property, and so he held the charge was proved. On appeal, this finding was upset by the learned District Judge on the ground that there was no admission and that the issue was not framed as if there were any admission. The learned District Judge was in error, in my opinion, in finding that there was no admission. There is an admission and the burden of proof should have been thrown on the defendants. As regards Exhibit 62, although it could not be used for the purpose of enforcing such a charge, it may be used, under the ruling I have already referred to, *Varada Pillai v. Jeevarathnammal*, for a collateral purpose, namely, to show the reference to the charge at a subsequent date. Apart from this, Section 49 of the Indian Registration Act will not apply to a case where there has been an admission in the pleadings, as laid down in *Burjorji Cursetji Panthaki v. Muncherji Kuverji* ILR (1880) Bom. 143 I am, therefore, of opinion that the existence of this charge having been admitted, and its discontinuance not proved, it must be held to exist, and that the finding of the first Court on this point should be restored and that of the lower appellate Court set aside. The result is that the decree of the first Court is restored, and the decree of the lower appellate Court varied in this respect.

9. Second Appeal No. 959 of 1928 is dismissed with costs, and Second Appeal No. 960 of 1928 will be allowed, also with costs throughout.

Nanavati, J.

10. I entirely agree. I might add a few words as to the question whether the human plaintiff is entitled to represent the idol in the present suit, As found by both Courts, he has proved that he was a de facto vahivatdar of the affairs of this idol. He collected certain sums of money, and had the temple repaired. He seems to have been a pensioner free to devote his time to work of public utility of this sort, and none of the other members of the Ubhayakar family, who are the devotees of this temple, have ever objected to his activities. Not only that but he has also filed a document signed by a large number of members of this family agreeing to his bringing the suit, and although a public notice was issued asking any one else interested in the affairs of this temple to appear, no one asked to be joined as plaintiff or objected to the present plaintiff continuing the suit. The cases referred to by my learned brother in *Administrator General of Bengal v. Baljissen Misser* ILR (1924) Cal. 953 and *Thackersey Dewraj v. Hurbhum Nurrsay* ILR (1883) Bom. 432 show that the Courts would allow any proper person to bring a suit on behalf of an idol when the property belonging to the idol is being interfered with by trespassers or being misappropriated. In the present case everything goes to show that the present human plaintiff who calls himself the vahivatdar is a proper person to bring the suit, and there is no reason why he should not be allowed to maintain the suit in order to preserve the property of the idol. The cases in which the status of being vahivatdar or manager or trustee

is disputed between the parties to the suit will obviously have no application to the present suit, in which the human plaintiff is the only person who claims to act on behalf of the idol, and no one else has challenged that position.