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In the Bombay High Court

Case No : Appeal No. 34 of 1929 and Suit No. 1611 of 1927

Narsidas Jekisondas — APPELLANT

Vs

Ravishankar Prabhashankar — RESPONDENT

Date of Decision : 22-08-1930

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 92
Evidence Act, 1872 — Section 65(a), 66(2)

Citation : (1930) 32 BOMLR 1435

Hon'ble Judges : J.W.F. Beaumont, C.J;Blackwell, J

Bench : Division Bench

Judgement

J.W.F. Beaumont, C.J.—A preliminary question arises in this case as to whether the document, Exhibit A, is admissible in evidence. Exhibit A is a certified copy of a document which is in the possession of the Collector of Bombay. The document of which Exhibit A is a copy is a copy conveyance, dated August 6, 1838, of a property which now belongs to defendant No. 1, There is no question that the certified copy is a correct copy. The question is whether the document, of which it is a copy, namely, the copy in the possession of the Collector, is properly admissible in evidence of the original document.

2. Under Regulation 9 of 1827 it is provided in the second clause of Section 5 that

A separate book to be called ''the Book of .Entries '' shall be kept for each of the two registers, in the form contained in appendix C.

3. That is a form of register for registering the particulars of the document relating to Immovable property, and various particulars have to be entered in that. Then the 4th clause of Section 5 provides that-

The deeds and -writings presented for registry, shall be copied at full length into the proper register, in the order in which they stand in the Books of Entries, and the copies shall be carefully compared with the original, and be attested by the signature of the Superintendent ". Then Clause 7 provides that:-

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The original deed, or other writing, after being registered, shall be returned to the owner, or the person who presented it, who shall sign a receipt for it, on the margin of the entry, in the Book of Entries.

Under that provision, the Collector had a duty, when this document was presented to him, to make a full and accurate copy of it in his book, and the Collector''s book which is produced is, therefore, I think, good secondary evidence of the original document, provided secondary evidence could be admitted at all.

4. Under the Indian Evidence Act, Section 65, it is provided that secondary evidence may be given of the existence, condition or contents of a document in the following cases:-

(a) when the original is shown or appears to be in the possession or power--of the person against whom the document is sought to be proved,...

5. Then by Section 66, leaving out immaterial parts, it is provided that-

the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is proscribed by law ; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

So that to bring the ease within Section 65 (a), notice to produce must be given u/s 66. Then there are other sub-clauses of a 65, particularly (c), which provides''-

when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

For the purposes of that sub-section, notice to produce is not necessary.

6. Now, the document in question in this case, that is to say, the original document of August 6,1838, is a document of title relating to defendant No. 1''s property, and prima facie it would be in the possession of the defendant, or would have been at some time in his possession and would be included in his affidavit of documents. He made an affidavit of documents disclosing title deeds going back to 1859. But he did not disclose this document. He was given, on February 28, 1929, a notice to produce the title deeds relating to the Immovable property, they being described, including those prior to the year 1859. It may be doubted if that notice brings the case within Section 65 (a), but it seems to me that by giving that notice the plaintiffs had done really all that they could do, in order to bring the case within Section 65 (c). They had given a notice to the person in whose possession or power prima facie these title deeds would be to produce them, and that person had not produced them. I don''t know what else the plaintiffs could have done to entitle them to give secondary evidence, and

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that being so, I think that we must presume that the original had been lost or destroyed, or at any rate that the plaintiffs have not been able to produce it for some reason not arising from their own fault. I agree, therefore, with the learned Judge that Exhibit A is admissible in evidence.

Blackwell, J.

7. I agree. Mr. Coltman has contended that the notice to produce is not a good notice, in so far as it is a notice to produce some document which is not referred to in the other party''s affidavit of documents as being in his possession or power as was the case with Exhibit A. In my opinion, this contention of Mr. Coltman is right so far as regards Section 65 (a) of the Indian Evidence Act. That refers to cases where the original document is shown or appears to be in the possession or power of the person legally bound to produce it. In so far as the notice to produce was a notice to produce a document which the other party had sworn not to be in his possession or power, I do not think it can be relied upon as justifying the giving of secondary evidence under the first part of Section 65.

8. Another question, however, arises as regards Section 65 (c), and also as regards Section 66 (2) to the proviso, which says that-

such notice shall not be required in order to render secondary evidence admissible in any of the following oases [namely],

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it.

9. Now, there had been a controversy raised in the course of these proceedings as to whether or riot, the particular title deed, of which Exhibit A is a copy, was or was not in the possession or power of defendant No. 1. It appears from Exhibit No. 1, which is a passage in paragraph 3 of plaintiffs'' affidavit dated August 29,1927, that the plaintiffs had there alleged that defendant No. 1 had deliberately suppressed the title deeds relating to his property prior to 1868. It is quite true that there had been no application for a further and better affidavit of documents, but in the notice to produce, clear intimation had been conveyed to defendant No. 1 that he was required to produce the title deeds of a date earlier than those which he had admitted to be in his possession or power in his affidavit of documents. Although that notice to produce, in my opinion, cannot be relied upon as a notice to produce the title deed of which Exhibit A is a copy so as to bring into operations, 65 (a), I think that it is of material importance for the purpose of considering whether secondary evidence may not be admissible u/s 35 (c) coupled with proviso (2) to Section 66 Both from Exhibit No. 1 and the document purporting to be a notice to produce the title deed in question, it seems to me clear that defendant No. 1 must have known that he was required by the plaintiffs to produce this document. He did not produce it. The plaintiffs would have no means whatever of ascertaining in whose custody or control this document was, if it was not in the possession or power of defendant No. 1. In these circumstances, I think the reasonable presumption is that the document

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had been either destroyed or lost. Quite apart from that, it seems to me that the steps taken by the plaintiffs in intimating to defendant No. 1 that they required him to produce the document show that they were not able to produce it themselves, and the fact that the plaintiffs could not, in my opinion, possibly know in whose custody the document was if it was not in the custody of defendant No. 1 warrants the inference that their inability to produce it was not occasioned by any default or neglect of their own. In my opinion, they have taken such steps as they could, namely, by calling upon the opposite party in whose custody it would naturally be, to produce it. The original not having been produced, I think that secondary evidence of its contents is admissible having regard to sub-paragraph (2) of the proviso to Section 66 and to Section 65 (c) of the Indian Evidence Act.

10. The appeal was then heard on the merits, and the following jundgments were delivered.

J.W.F. Beaumont, C.J.

11. This is an appeal from the decision of Mr. Justice Mirza. The first issue is whether the suit as framed is maintainable, and the second issue is whether the temple in suit has been dedicated in trust for public purposes of a religious nature, as alleged in para. 2 of the plaint. Those two issues the learned Judge answered in the affirmative. The first issue, as to whether the suit, as framed, is maintainable, was argued as a preliminary point, but we decided, whatever might be our view about that, to hear the appeal out, so that if this case was taken to the Privy Council, the Board would be seized of the whole matter and would be able to dispose of the whole matter and not merely of the preliminary point. But I will deal first with this preliminary point.

12. That question depends upon whether this case falls within Section 92 of the Civil Procedure Code, the provisions of which have admittedly not been complied with. Section 92 provides that in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, 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, may institute a suit asking for certain specific relief which is stated in eight sub-heads. So that, in order to bring that section into operation, you must have, first of all, a suit alleging a breach of some express or constructive trust created for public purposes of a charitable or religious nature, or you must deem the direction of the Court necessary for the administration of any such trust. If either of those conditions is fulfilled, and you file a suit asking for any of the specific relief mentioned in the sub-heads, then your case falls within Sub-section (1) of Section 92, and Sub-section 2 provides:-

Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such

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trust as is therein referred to except in conformity with the provisions of that sub-section.

So that, once you get a suit within Sub-section (1), it must be instituted as provided in that sub-section ; otherwise, it does not lie.

13. Now, in construing Section 92 there are some authorities which assist. It has been held by the Privy Council in Abdur Rahim v. Abu Mahomed (1927) 30 Bom. L.R. 774., first of all, that the general words in sub-head (h) of Sub-section (1) "granting such further or other relief as the nature of the case may require," must be construed ejusdem generis to the other sub-heads, and that the words do not cover any further or other relief which might naturally be required in a case of the class specified in the body of Section 92. It has also been held that Section 92 does not apply to the case of actions or suits relating to charities which are brought against third persons, i.e., to the case of a trustee for a charity bringing a suit to recover property belonging to the charity. But if the relief is claimed against persons who are constructive trustees, who have intermeddled with the charitable property and made themselves trustees, then the action is within the section. Authority for that is to be found in Narayan Bhikaji Khanolkar Vs. Vasudeo Vinayak Prabhu, , It has, I think, also been held in the case to which I have referred, Abdur Rahim v. Abu Mahomed (1927) 30 Bom. L.R. 774., that if. any of the relief claimed in the suit falls within any of the sub-heads of Section 92 (1), then the suit is within the section. Their Lordships stated at the bottom of page 781:-

The conclusion is that, inasmuch as the suit out of which this appeal arises did not claim any such relief as is specified in Sub-section (1) of Section 92, that section was no bar to -the maintainability of the suit without the sanction of the Advocate General and in the Court of the Subordinate Judge.

I think it follows from that passage and the earlier part of their Lordships'' judgment that the view of their Lordships was, that if any part of the relief claimed fell within the sub-heads in Sub-section (1), then the suit would not lie.

14. Now, bearing those principles in mind, one has to look at the plaint in this case.

15. Para. 1 states :-

The plaintiffs are the pujaris of a temple of Shri Muhadeo situate &c., &c.

16. Para. 2 states:-

The said temple has been dedicated to trust for public purposes of a religious nature from time immemorial and was in the possession, management and control of the plaintiff''s and their ancestors as pujaris for a number of years.

So far, I think, the suit is not within Section 92.

17. Then, para 4 states:-

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About eight years ago the 1st defendant wanted to erect a shop at the entrance of the said temple. The plaintiffs objected to the construction of the said shop. Ultimately at the intervention of mutual friends it was agreed that the 1st defendant should build the said shop but should hold the income and profits thereof for the use and benefit of the said temple and that the public should be allowed to go to the temple through the entrance of defendant No. 1''s said building.

So that there is an allegation there that defendant No. 1 was to hold the rents and profits for the benefit of the temple.

18. Then, para. 9-which is the next material one-states:-

The plaintiffs say that for some time the 1st defendant has also boon recovering the rents arid profits of the said shop without using them for the temple and is also collecting the offerings.

19. Now it is not alleged that there are any trustees of this temple, and if that allegation in para. 9 is proved, it means that defendant No. 1 has received the rents and profits of the shop and the offerings as a constructive trustee for the temple. And, when you come to the relief prayed for, prayer (y) asks :-

That the 1st defendant may be ordered to render a true and complete account of the income and, offerings of the said temple and the rents and profits of the said shop.

It seems to me therefore, that this is a claim alleging breach of a constructive trust for religious purposes and asking for accounts, and that it, falls directly within Sub-section (1) of Section 92. In my opinion, therefore, the learned Judge should have answered issue No. 1 by declaring that the action does not lie, and, if that view is right, the appeal succeeds. But, as I have said, we thought it right to hear the appeal on the merits and I will, therefore, shortly express the opinion I have formed upon the second issue as to whether this temple has, in fact, been dedicated to the public, or is merely a private temple.

20. Now, of the witnesses called in support of the plaintiffs'' case, the plaintiffs themselves proved very unsatisfactory, so unsatisfactory that their counsel abandoned them, and he does not rely on their evidence at all. He relies on the other evidence which he has called and on the evidence called by the defendants.

21. The plaintiffs, in the first instance, relied on a conveyance made in August 1888, of which a certified copy was produced and we have held that the certified copy is admissible in evidence. AH that that evidence comes to is this, that there is a conveyance of property, which now belongs to the defendants, and which does except a room in which, it is stated that there is an image of Shree Mahadev. I think the only relevance of it is that it shows that this room with the idol in it existed in 1838, though it is to be noticed that the apartment is referred to as a room, and not as a temple. I do not myself think that very great weight is to be attached to that document [After referring to the facts on which the

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plaintiffs relied his Lordship proceeded :]

22. Now, that being the state of the evidence, one has to look and see, on the whole, whether the plaintiffs have established their case that this is a public temple. The conclusion I have come to is that they have established their case. For that conclusion the three things I rely on most are the uninterrupted user by the public of this temple for a very large number of years, the fact that the pujaris employed in the temple were not paid by the defendants, and the fact of the rebuilding.

23. On the whole, it seems to me that the balance of the evidence is in favour of the plaintiffs and that the evidence is strong enough to establish dedication. So that if I had agreed with the learned Judge upon the first issue, I should have agreed with him also upon the second. But, on the view J take on the first issue, the appeal must be allowed with costs.

Blackwell, J.

24. In my opinion, the learned Judge was right in the conclusion at which he arrived that there had been a dedication to the public and that this was a public temple. There is no direct evidence of dedication, but, in my view, the circumstances in this case to be gathered from the evidence are such that a presumption of dedication to the public arisen. There are several authorities which lay down that long user by the public is one of the elements to be considered in determining whether such a presumption arises, as for instance, Chiniaman Balaja Dav v. Dhondo Ganesh Dev ILR (1888) 15 Bom. 612; Jugalkishore v. Lakshmandas ILR (1899) 23 Bom. 659 and Ananda, Chandra Chuckerbuty v. Bray a Lal Singh ILR (1922) Cal. 292, where some of the tests enumerated for considering the question whether there should be a presumption of dedication are user by the public, worship by the public, and offerings by the public.

25. In the present case, the user by the public for a long period, without objection, testified to by several of the plaintiffs'' witnesses, and admitted by defendants'' witnesses, Gotubhai Haridas and Ghaturbhuj Bhowanidas, both before the reconstruction of the building by Jekisondas and after, the fact that Jekisondas brought his own family Gods and placed them, not in the room in which this idol of Shri Mahadev was, but in a different room, the presence of the Nohatkhana for a long period, first at the main entrance, and then in a loft, with Jekisondas'' permission, when he opened the passage which gave access to the temple on reconstructing the building, the making of gifts of the deity by the public and the contribution by the public to repairs, the fact that the pujaris received no payment from the defendant or his predecessors, and that no account of the offerings was asked for by them, all seem to me against the view that this temple was a '' private temple, and to lead strongly to the conclusion that there had been a dedication of this temple to the public.

26. No attempt has been made to prove the case made in para. 2 of the written

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statement, that persons other than the members of the family of the defendants who wished to worship this idol in the said temple had been allowed to do so with the leave and license of the defendant and his predecessors. No evidence whatever of any leave and license was given in this case either by defendant No. 1 himself or by any of the other witnesses. On the contrary there is a large body of evidence that the public were allowed for a long period of time to go to this temple and worship there without objection.

27. As regards the notice board, "No admission without permission" the evidence is that that was put up at the time of the plague. It is at the entrance to the whole of the premises, and not near the entrance to the temple, and there is no evidence that the consent of the owner of the premises was ever insisted upon for the public to worship in this temple. The fact that this notice board was put up at that time and in that position does not, in my opinion, justify the inference that the person putting it up regarded the temple in suit as his private temple.

28. The fact that Jekisondas did repairs is relied upon as evidence establishing control by him over the temple, from which an inference of private ownership is sought to be drawn. In my opinion, the evidence as to repairs done by Jekisondas does not warrant his inference. There were no separate accounts kept with regard to any repairs to this temple, and the evidence as to repairs seems to me to indicate that the repairs done by Jekisondas were done as part of repairs to the building as a whole. On the other hand, there is the evidence of one witness that he, as a member of the public, contributed to repairs to the temple.

29. Then the fact that Jekisondas paid for the gas and electric light in this temple is also relied upon as evidence of ownership of the temple as a private temple. I do not think that that conclusion by any means necessarily follows from such payment. From the evidence it appears that Jekisondas was a devout Hindu. As such, like any other devout Hindu, he would have a right to worship at a public temple and might make contributions towards the upkeep and repairs of this temple. In my opinion the true conclusion from the evidence as a whole is that Jekisondas always regarded this temple as a public temple, and that any contributions made by him towards its upkeep were made by him as a member of the public.

30. In my opinion, on the evidence taken as a whole, the plaintiffs have succeeded in establishing that there was at some time unknown a dedication of this temple to the public.

31. I turn now to deal with the question whether this suit was maintainable, in view of the fact that the consent of the Advocate General had not been obtained as provided by Section 92 of the Civil Procedure Code. In my opinion the learned Judge was wrong in holding that the suit was maintainable.

32. The learned Chief Justice has referred to the relevant portions of the plaint and I need not refer to them again in detail. It seems to me that paragraphs 4

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and 9 amount to an allegation that defendant No.] constituted himself trustee of the income and profits of the shop and a further allegation that he had not duly accounted for them to the temple. In my opinion that amounts to an allegation in the plaint of a breach of a trust created for public purposes of a charitable or religious nature. In my opinion also having regard to other allegations in this plaint the direction of the Court was deemed by the plaintiffs necessary for the administration of the trust, which they set up. In paragraph 1 they assert that they are the pujaris of the temple and in paragraph 2 that the temple has been dedicated to trust for public purposes. Then, having been ousted by the present defendant, they allege in paragraph 10 that in the month of Sara van various pujas of the deity Shri Mahadeo have to be celebrated, and they submit that it is just and convenient that the plaintiffs should be appointed receivers to carry out the said pujas during the said month of Shravan. In paragraph (c) of the prayers they claim a declaration that the plaintiffs as the hereditary pujaris are entitled to the management, possession and control of the said temple and in paragraph (h) they ask that they may be appointed receivers. In my opinion, therefore, not only is a breach of trust alleged, but the directions of the Court, in connection with the administration of the alleged trust, are asked for. Then there is in the plaint a prayer, viz. (g):-

That the first defendant may be ordered to render a true and complete account of the income and offerings of the said temple and the rents and profits of the said shop.

That comes directly within Sub-section (1) (d) of Section 92 of the Civil Procedure Code.

33. In the Privy Council decision, which the Chief Justice has referred to, namely, Abdur Rahim v. Abu Mahomed (1927) 30 Bom. L.R. 774., their Lordships at page 781 say :-

Great divergence of opinion had arisen in India in this connection, not merely as between the different High Courts, but between different Benches of the same Court, The resulting uncertainty could only be removed by legislative enactment, and Sub-section (2) of Section 92 was enacted to put an end to this difference of opinion. It accepted and enacted the view which had been taken by the Bombay High Court, as opposed to the view taken by the other High Courts generally, viz., that a suit which prayed for any of the reliefs mentioned in Section 9$ could only be instituted in accordance with the provisions of that section.

In my opinion, therefore, the fact that the plaintiffs in prayer (g) included a claim which fell within Section 92 (1) (d) rendered it imperative upon them to obtain the sanction of the Advocate General. This they had not done.

34. It was contended by Mr. Desai for the plaintiffs that as the plaintiff''s had abandoned prayers (b) and (g] of the plaint at a late stage of the hearing of the suit there was then no claim which fell within the various sub-headings (a) to (h) to Section 92 (1), that sanction was not required for the maintenance of the suit

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with prayer (g) abandoned, that the suit upon this footing was really a suit against a trespasser, and as such could continue, although the leave of the Advocate General had not been obtained for its institution. Having regard to the fact that the words in Section 92 (2) are that '' no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section,'' I am unable to agree with Mr. Desai''s argument. In my opinion the use of the word '' instituted'' makes it incumbent upon the Court to see what were the prayers in the plaint at the date the suit was instituted in order to satisfy itself whether Section 92 (2) has been complied with, and for this purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit.

35. Accordingly, I agree with the Chief Justice that the appeal should be allowed inasmuch as this suit was not, in my opinion, maintainable without the leave of the Advocate General

36. Per Curiam, Appeal allowed and the action dismissed with costs here and the Court below. By consent receiver discharged without passing any accounts. Cross-objections dismissed with costs.

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