
(1923) 12 MAD CK 0004
In the Madras High Court

Peria Nattamai Malkajigunda and Others, Thippa Ramaswami Chettiar and Others APPELLANT

Vs

Peria Nattamai Malkaji Gumda, Thippa Ramaswami Chettiar and Others RESPONDENT

Date of Decision : 14-12-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : 78 Ind. Cas. 950

Hon'ble Judges : Venkatasubba Rao, J;Phillips, J

Bench : Division Bench

Judgement

Phillips, J.—The plaintiffs bring this suit u/s 92 of the Code of Civil Procedure against Seven defendants and pray for the removal of the

defendants from management, for the appointment of new trustees, for an account from the defendants and for the settlement of a scheme. In

the plaint it is stated that defendants Nos. 6 and 7 are the "present trustees" of the plaint temple and defendants Nos. 1 to 5 are the Nattamaikars

who are entrusted with collecting money due to the temple; and, although defendants Nos. 1 to 5 are not specifically described in the plaint as

trustees, it is clear from the language of the plaint that the allegation is that they have been in management of the trust and should be removed on

account of their misappropriation of the temple funds.

2. When the case came on for trial, the plaintiffs and defendants Nos. 6 and 7 agreed upon a schedule which was approved of by the Court, but

defendants Nos. 1 to 5 were ex parte at this hearing. A preliminary decree was, therefore, drawn up settling the scheme and ordering a

Commissioner to examine the accounts in order to find out which of the

defendants were liable to make good monies to the temple. In accordance with this decree, the Commissioner proceeded to examine the accounts and to take evidence and, as a result of his enquiry, he sent in a report to which objections were taken by -the defendants. After hearing these objections, the learned Subordinate Judge has found that deefendants Nos. 6 and 7 have to make good a sum of Rs. 338; that the 1st defendant has to account for Rs. 2,774-8-2, and that the 7th defendant is also liable for another sum of Rs. 60.

3. Defendants Nos. 1 to 5 appeal against the preliminary decree in Appeal No 85 of 1921 and the 1st defendant alone appeals against the final

decree in Appeal No. 118 of 1922. The first objeotion that is taken in appeal is, that this suit, u/s 92 Civil Procedure Code, will not lie against the

defendants Nos. 1 to 5 as they are not trustees but mere alienees of the trust property. It has been held that no relief can be granted against

"alienees of trust property in a suit u/s 92, vide Kasturi Venkataramana Aiyangar v. Kasturi Ranga Aiyengar 38 Ind.Cas. 73 : 40 M. 212 : 31

M.L.J. 777 : 20 M.L.T. 490 : 5 L.W. 625; (1917) M.W.N. 400, Asam Raghavalu Shetty v. Pellati Sitamma 25 Ind. Cas. 794 : 27 M.L.J. 266 :

16 M.L.T. 178; (1914) M.W.N. 692 and Rangayya Naidu v. Chinnasamy Iyer 28 Ind. Cas. 898 : 28 M.L.J. 326 : 17 M.L.T. 191 and if the 1st

defendant, to whose case the argument is almost entirely addressed is a, mere alienee, it is clear that no relief can be granted against him in this suit.

It is, however, contended for the plaintiffs that the 1st defendant is not a mere alienee but a trustee de son tort and it is well settled that a suit u/s 92

will lie against such a person, for he is in effect a trustee de facto, though not de jure. I may refer to Jugalkishore v. Lakshmandas 23 B. 659 : 1

Bom. L.R. 118 : 12 Ind. Dec. 448, Budree Das Mukin v. Chooni Lal Johurry 83 C. 789 : 10 C.W.N. 581, Ram Bilas v. Nitya Nand 69 Ind.

Cas. 990 : 44 A. 652 : 21 A.L.J.105; A.I.R (1922) (A.) 542 and Siddan Lal v. Gauri Shankar 40 Ind. Cas. 165.

4. It is argued that the Subordinate Judge, when directing an account to be taken, did not find that the 1st defendant was a tustee de son tort and

that apparently is correct, for no finding is recorded and admittedly no evidence on the point was taken; but the Commissioner was ordered to

enquire as to which defendant was liable and although the Subordinate Judge

seems to have taken it for granted that the 1st defendant would be liable, he did not definitely consider the point, probably because, defendants Nos. 1 to 5, being ex parte, the question was not argued before him.

When evidence was taken by the Commissioner, two witnesses were examined on behalf of defendants Nos. 6 and 7 who were not at all cross-examined, and their evidence shows clearly that the 1st defendant was actually collecting money for the temple and was, in effect, managing all the affairs of the temple. There is no counter-evidence and, consequently, I think we must accept the statements of these witnesses and find that the 1st defendant was a trust de son tort.

5. A request is made that the case should be sent down for further enquiry; but, inasmuch as defendants Nos. 1 to 5 have been grossly negligent in conducting their defence, I do not think it is right that they should be given any further opportunity of prolonging this litigation on the chance that they may be able to establish their innocence. The lower Court has, in effect, found that the 1st defendant as a trustee is liable to refund large sums of money and, on the evidence before the Commissioner, this finding is obviously correct.

6. It is alleged that the plaintiffs and defendants Nos. 6 and 7 have colluded together in order to defraud the 1st defendant. No doubt, they did come to an agreement in the case and it is the witnesses examined on behalf of defendants Nos. 6 and 7 who prove the management by the 1st defendant and his receipt of the temple funds. It is possible that, in the absence of defendants Nos. 1 to 5, the plaintiffs and defendants Nos. 6 and 7 have made up their differences and have joined in imputing liability to the first defendant; but in the proceedings before the Commissioner the 1st defendant had ample opportunity to put forward his own case and not only was he ex parte when the preliminary decree was passed but he declined to adduce any evidence before the Commissioner and did not even cross-examine the witnesses that were examined. There is, therefore, no ground for delaying the proceedings by allowing any further enquiry to be held.

7. It is then urged that the Commissioner's account is altogether wrong and does not represent the true state of affairs. A similar objection was taken before the Subordinate Judge but, as he points out, the objections taken

were hazy and the 1st defendant made silly allegations against the Commissioner. The 6th and 7th defendants raised objections which were in part allowed and now the 1st defendant again raises his objections which I think may well be described again as hazy. No real attempt has been made to show in what respect the accounts are wrong. Certain portions of the account have been placed before us, but from the data afforded by these papers it is impossible to say that the Commissioner is wrong. It is not suggested that he has deliberately misstated the accounts, and his account was accepted by the lower Court. I see no grounds now for holding that the Commissioner's report is not strictly accurate. In this view, the 1st defendant's appeal would have to be dismissed

8. The only point remaining for consideration is, whether defendants Nos. 6 and 7 should not be made jointly liable with the 1st defendant. This

plea was not specifically taken in the memorandum of appeal by 1st defendant and it would perhaps be hard on defendants Nos. 6 and 7 to make

them liable without giving them an opportunity of putting forward an answer. It is clear from the Commissioner's report that it was the 1st

defendant alone who actually received the money which has been misappropriated and, therefore, he has rightly been made liable and his liability is

certainly the preliminary liability. Nevertheless, defendants Nos. 6 and 7 are trustees and as such responsible for the proper administration of the

trust property and are no doubt secondarily liable. I would, therefore, modify the decree by declaring that the 1st defendant is liable for the amount

specified therein and that, failing recovery from him defendants Nos. 6 and 7 will have to make good the deficiency.

9. No objections are taken in appeal to the scheme that has been framed and, consequently, subject to the above modification, both these appeals

must be dismissed with costs of plaintiffs.

10. As regards the memorandum of objections, I am not prepared to interfere with the lower Court's discretion and, therefore, dismiss it.

Venkatasubba Rao, J.

11. It is conceded that the decree against the 1st defendant could be justified only on the footing that he was a trustee de son tort. The allegations

in this respect in the plaint, such as they are, have been denied not only in the written statement of defendants Nos. 1 and 2 but also by the 6th and

7th defendants. Even should issue 9 ""Whether defendants Nos. 1 to 5 are necessary parties to the suit"" be deemed to cover this question, there has been no trial of that issue and no finding has been recorded. The truth is, that in the lower Court the case was not looked at from this point of view at all and the Commissioner was directed to take an account on the assumption that a suit under section 92 would lie against strangers. It was not within his province to adjudicate upon the liability of the 1st defendant a question that should have been tried by the Court before the Commissioner was appointed. Even when evidence was adduced before the Commissioner, it was directed to prove not that the 1st defendant was liable but to prove the measure of his liability and this circumstance is amply borne out by the fact that witnesses were examined only by defendants Nos. 6 and 7 who had previously denied that the 1st defendant was a trustee. My inclination is, therefore, to direct further inquiry, but as my learned brother takes a different view and as the nonchalant manner in which the 1st defendant conducted his case before the lower Court makes me very sceptical as to his ultimate success, whereas a further enquiry will certainly entail more expense, I do not desire to dissent from my learned brother's conclusion and I, therefore, agree in the order proposed by him.