

(1931) 11 BOM CK 0009
In the Bombay High Court

Prem Narain

APPELLANT

Vs

Ram Charan

RESPONDENT

Date of Decision : 30-11-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 93

Citation : (1932) 34 BOMLR 494

Hon'ble Judges : Thankerton, J;Salvesen, J;Lancelot Sanderson, J;George Lowndes, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Lancelot Sanderson, J.—This is an appeal, by special leave, by Prem Narain, a minor, through his mother, Musammat Chameli, against a decree of the High Court of Judicature at Allahabad, dated April 12, 1927, which varied a decree of the District Judge of Aligarh dated March 15, 1924, and decreed the major part of the plaintiffs' claim.

2. The suit was brought in pursuance of the provisions of Section 92 of the Code of Civil Procedure, by five persons, who were alleged to have an interest in certain property which was specified in the plaint, and which was stated to be endowed property and the subject-matter of a trust created for public purposes of a charitable or religious nature.

3. Prem Narain, the appellant, was the first of five defendants.

4. The reliefs asked for in the plaint were as follows : a declaration that the property was an endowed property; that the defendants should be dismissed from the managership and trusteeship thereof; that a scheme for the management of the property should be drawn up by the Court; and that an order for the rendering of accounts by the defendants should be made.

5. The learned District Judge, who tried the suit, dismissed it on the ground that there was no public trust.

6. The plaintiffs appealed to the High Court which allowed the appeal. The learned Judges held that the property, with the exception of a specified portion, was the subject of a public trust within the meaning of Section 92, and they made a decree that defendants Nos. 1, 3 and 4 should be removed from possession of such property. A direction was made that the case should be sent back to the District Judge for the framing of a scheme of management of the property.

7. The claim for accounts was disallowed. The appellant Prem Narain, was directed to pay the plaintiffs' costs in the appeal Court and in the lower Court.

8. From this decree the appellant, Prem Narain, has appealed.

9. The learned Counsel who appeared for the appellant, in the first instance relied upon the grounds, referred to in the first and second reasons of the appellant's case, which relate to the competence of the suit, and which are as follows :-

(1) Because the plaintiffs were not entitled to bring a suit u/s 92 of the Code of Civil Procedure.

(2) Because the previous sanction of the Local Government had not been obtained authorizing the Legal Remembrancer to exercise the powers of an Advocate-General in respect to this suit as provided by Section 93 of the Code of Civil Procedure.

10. This part of the case, therefore, was argued by learned Counsel on both Bides, since it was obvious that if the appellant were to succeed on the above-mentioned point, it would not be necessary to consider the other questions which arose in the appeal.

11. It may be stated at once that the above-mentioned point was not taken by the appellant-defendant until the presentation of his case in this appeal.

12. It is true that the appellant defendant had pleaded that the plaintiff had no right to maintain the suit u/s 92 of the CPC for certain reasons specified in the written statement.

13. But there is no doubt that, as already stated, the point on which reliance is now placed, was not taken in the written statement or in either of the Courts in India. It was alleged by the learned Counsel for the appellant-defendant that it was in consequence of the decision of this Eoard in Gulzari Lal Vs. Collector of Etah, that the appellant-defendant has raised the above-mentioned contention.

14. The matter is vital to the question whether the plaintiffs had the right to bring the suit, and therefore the Board must consider and decide the point, even though it was not raised in the Courts in India.

15. The facts which are relevant to this part of the appeal are as follows:

The property, which is the subject-matter of the suit, is situated in the district of

Etah, in the United Provinces, In these provinces there is no Advocate-General who could act u/s 92 of the Code of Civil Procedure. It appears, however, that on December 6, 1912, the Government of the United Provinces appointed the Legal Remembrancer to exercise the powers conferred on the Advocate-General by Sections 91 and 92 of the Code.

16. The appointment was in the following terms:-

No. 1622. VII/447.

In exercise of the powers conferred by Section 93 of the CPC 1908, and in supersession of Notification No. 1307-V. 11/25-21, VI, dated December 9, 1884, the Lieutenant Governor has been pleased to appoint the Legal Remembrancer to Government, United Provinces of Agra and Oudh, to exercise within the limits of the United Provinces of Agra and Oudh the powers conferred on the Advocate-General by Sections 91 and 82 of the Code of Civil Procedure.

By Order of the Hon^{ble} the Lieut-Govr. United Provinces,

S.P. O'DONNELL, Secretary to Government United Provinces.

December 6, 1912.

17. On February 2, 1923, the Legal Remembrancer, acting in pursuance of the above-mentioned order of the Government, granted sanction to the plaintiffs to institute the suit, in which this appeal arises.

18. The terms of the sanction are as follows:-

With reference to their application dated November 13, 1922, and acting under the powers conferred on the undersigned by Section 93, Code of Civil Procedure, and Government order No. 1622, VII-447, dated December 6, 1912, he accords sanction to the institution by them of a suit with respect to the alleged trust specified in the margin against such persons and for such relief as the nature of the case may require.

(Sd.) C.M. King, Legal Remembrancer, United Provinces.

19. Section 93 is as follows :-

The powers conferred by Sections 91 and 92 on the Advocate-General may, outside the Presidency towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

20. The argument of the learned Counsel for the appellant-defendant was to the effect that the above-mentioned sanction of the Legal Remembrancer was not sufficient by itself to comply with the provisions of Section 93 of the CPC : that the order of December 6, 1912, was no more than an appointment of the Legal Remembrancer to exercise the powers conferred upon the Advocate-General by Sections 91 and 92 of the Code, and that on the true construction of Section 93

the previous sanction of the Government was necessary in every suit before the Legal Remembrancer could exercise such powers : that no such sanction was obtained in this case, and, therefore, the suit was not maintainable by the plaintiffs. He relied upon the decision in the above-mentioned case of Gulzari Lal Vs. Collector of Etah,

21. The learned Counsel for the respondents contended that the previous sanction of the Government was not necessary in every suit, and that if it was, such sanction was sufficiently shown by the terms of the Government's order of December 6, 1912.

22. In their Lordships' opinion, the actual decision in Gulzari Lal v. Collector of Etah does not govern this appeal.

23. For, in the cited case, the suit was brought by the Collector, and there was express authority given by the Government of the United Provinces to the Collector of Etah to institute the suit u/s 92 of the Code.

24. This fact is not stated in the judgment in the cited case, although having regard to the terms of the judgment it was obviously assumed. Their Lordships have referred to the record in the cited case, and the fact was as already stated.

25. That part of the decision in the cited case, which dealt with the question relating to Section 93 of the Code, was to the effect that the fact that the Government had, by the order of December 6, 1912, appointed in general terms the Legal Remembrancer to exercise the powers conferred on the Advocate-General by Sections 92 and 93 of the Code, did not prevent the Government from giving an express sanction to the Collector to institute the suit in that case, that the Legal Remembrancer was not the only official who could maintain the suit, that the sanction, in fact, given to the Collector was a valid sanction, and that the suit was competent.

26. It is clear, therefore, that the point which now arises was not decided in that case. There are, however passages in the judgment which support the argument of the learned Counsel for the appellant-defendant.

27. Lord Blanesburgh delivered the judgment of the Board, and when dealing with the construction of Section 93 of the Code, he said as follows (p. 973) :-

The effect of that section as it seems to the Board is that no suit like the present, being one outside the Presidency towns, may be brought without the previous sanction of the Local Government, whether by the Collector or by any officer whom that Government may appoint for the purpose : so that the fact that the Legal Remembrancer is in the United Provinces invested as a rule with the duties elsewhere discharged by the Advocate General in this behalf is no reason why for the purposes of a particular suit Local Government may not appoint the Collector or any officer to prosecute it. The fact that there must be a previous sanction by the Local Government to every suit makes it impossible that two suits by separate officials will ever be concurrently instituted. Accordingly no

inconvenience results from this construction of the section.

28. Their Lordships agree with and adopt the construction put upon Section 93 in the above-mentioned case, In their Lordships' opinion Section 93 provides for two distinct matters, the appointment of an officer to exercise the powers conferred by Sections 91 and 92 on the Advocate-General, and the " previous sanction " of the Local Government to the exercise of such powers: in each case both the appointment and the previous sanction of the Local Government to the exercise of the powers are necessary before the provisions of Section 93 can be utilised. The Legislature, no doubt, considered that there were good reasons for imposing more stringent provisions when the powers conferred upon the Advocate General by Sections 91 and 92 of the Code were to be exercised outside the Presidency towns, not by an Advocate-General, but by a Collector or by some other officer to be appointed by the Local Government.

29. Section 92 provides for a suit being instituted by the Advocate-General or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General.

30. In the above-mentioned cited case the suit was instituted by the Collector with the sanction of the Local Government. In the present case the suit was instituted by the plaintiffs having an interest in the trust and having obtained the consent in writing of the Legal Remembrancer.

31. It is clear, however, that, having regard to the terms of Section 93, the previous sanction of the Local Government is necessary, whether the suit is instituted by a Collector or by an officer appointed by the Local Government, or whether the suit is instituted by two or more persons with the consent in writing of such Collector or officer.

32. For these reasons their Lordships are of opinion that the point relied upon by the appellant-defendant is a good one, and that, inasmuch as the previous sanction of the local Government to the suit had not been obtained, the objection to the competence of the suit must be upheld.

33. The result is that the appeal must be allowed on the above-mentioned grounds, and it is not necessary to consider the other reasons in the appellant's case which have not been argued.

34. The point on which the appeal has been decided could have been and ought to have been raised in the Courts in India, and the failure to raise it may have given rise to unnecessary proceedings and costs.

35. The proper order, therefore, in their Lordships' opinion, is that the appeal be allowed, that the decree of the High Court dated April 12, 1927, be set aside, and the decree of the District Judge dated March 15, 1924, be restored in so far as it dismissed the suit.

36. The direction of the District Judge as to costs must be set aside, and the

plaintiffs and the defendants must pay their own costs in both the Courts in India.

37. The plaintiffs must pay the appellant-defendant his costs of this appeal. Any costs which may have been paid in accordance with the orders of the Courts in India be returned.

38. For the above reasons, their Lordships have humbly advised His Majesty accordingly.