

## APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice Krishnan.*

1925,  
February 26.

ARUMUGA THAMBIRAN AND OTHERS, (PLAINTIFFS),  
APPELLANTS,

v.

NAMASIVAYA PANDARA SANNADHI AND OTHERS (LEGAL  
REPRESENTATIVE OF 2ND DEFENDANT AND OTHER  
DEFENDANTS), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), sec. 92—Suit for removal of defendant from office of Pandara Sannadhi and for a scheme—Allegations in the plaint as to misconduct of, and breaches of trust by, defendant—Death of defendant before trial of suit—No allegations of any separate ground for a scheme—Suit for scheme, whether abates on death of the defendant.*

In a suit instituted under section 92, Civil Procedure Code, for the removal of the defendant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the Mutt, the defendant sought to be removed died pending the suit. It appeared that the main allegations in the plaint related to breaches of trust by the deceased defendant and no separate allegations had been made in the plaint in support of the prayer for a scheme. The succeeding Pandara Sannadhi, who was brought on record as legal representative of the defendant, contended that the suit had abated. *Held*, that the suit regarding the scheme did not abate on the death of the defendant but that the cause of action for a scheme survived and the suit could be prosecuted.

*Raja Anand Rao v. Ramdas Daduram*, (1921) I.L.R. 48 Calc., 493 (P.C.). *Sivagnana Desika Gnanasambhanda Pandara-sannadhi v. Advocate-General of Madras*, (1915) 28 M.L.J., 174, followed.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakōnam in Original Suit No. 71 of 1918.

The material facts appear from the judgment.

\* Appeal Suit No. 43 of 1921.

*S. Srinivasa Ayyangar* for appellants.

*T. Rangachariar* for respondents.

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### JUDGMENT.

The plaintiffs in this case have brought their suit under section 92 of the Code of Civil Procedure for the removal of the defendant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the Mutt. The Advocate-General has also joined the suit as a supplemental plaintiff. After the institution of the suit and before it was tried, the defendant died, and the Subordinate Judge has held that owing to the defendant's death the suit has abated and cannot be revived, on the ground that it is a personal action against the defendant and that the second relief in the suit, namely, that of the framing of the scheme, is an ancillary relief dependent on the removal of the defendant from his office of trustee. Against this decision the plaintiffs have appealed; and it is contended in the appeal that as two reliefs are claimed, namely the removal of the defendant and the framing of the scheme which are distinct and separate reliefs, the suit may well be prosecuted with reference to the second relief, namely, the framing of the scheme. It is pointed out that, in a very similar case, it was held by the Privy Council that the cause of action did survive—*Raja Anand Rao v. Ramdas Daduram*(1). Apart from this authority we have also a case in this Court, *Sivagnana Desika Guanasambhanda Pandarasannadhi v. Advocate-General of Madras*(2), in which the same conclusion was arrived at. Although the plaint is mainly taken up with allegations of misconduct on the part of the respondent and the prayer for the scheme is only mentioned at the end of

(1) (1921) I.L.R., 48 Calc., 493 (P.C.).

(2) (1915) 28 M.L.J., 174.

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the plaint, without giving any special reasons why the scheme is necessary, yet, when we come to read section 92 of the Code of Civil Procedure, it is quite clear that in order to provide a cause of action for a scheme suit there must be an allegation of a breach of trust, or it must "otherwise" be necessary to obtain directions of the Court. In order, therefore, to justify this suit for a scheme it is necessary for the plaintiffs to allege a breach of trust and it is very difficult to see how this second relief can be deemed to be ancillary to the removal of the defendant. It is absurd to suppose that the plaintiffs and the Advocate-General have merely brought this suit to satisfy a vindictive spite against the defendant and that that is their sole cause of action and, consequently, that the rest of the suit must fail as the defendant can no longer be held responsible. The two reliefs are distinct; the second relief is to a certain extent dependent on the first, because it is necessary to allege a breach of trust in order to constitute the necessary cause of action.

Mr. Rangachariar for the respondent has not referred us to any authority against those cited above; and we are satisfied that the cause of action does survive against the representative of the deceased defendant for the purpose of framing a scheme. We may also observe that, in addition to the prayer for the scheme generally, there is a prayer for directions as to the utilization of the surplus funds of the institution, which are alleged to be very large indeed.

A further objection is taken for the respondents that this question is *res judicata* in that it has already been decided by a bench of this Court which disposed of an application for the appointment of a receiver in this suit. No doubt that bench in its judgment says :

“The plaint before us deals only with the misconduct of the deceased Pandara Sannadhi and does not refer to the absence of any means of preventing it,”

and again

“in paragraph 21, where the necessity for a scheme is suggested, it is referred to only in connexion with the removal of the then incumbent, not as independently justifiable on its merits.”

It is contended that this judgment has decided the present appeal. This appeal was not before that bench, nor do we think that it purported to decide it. Mr. Rangachariar relies on three decisions of the Privy Council reported in *Ram Kirpal Shukul v. Mussumat Rup Kuari* (1), *Hook v. Administrator-General of Bengal* (2) and *Sir Rameshwar Singh v. Hitendra Singh* (3). In these cases the principle was laid down that section 11 of the Code of Civil Procedure is not exhaustive on the question of *res judicata*; but all these cases can be distinguished from the present one in that the prior decision which was relied upon as binding on the parties in subsequent proceedings between them was with reference to a question which directly arose and had to be decided in the prior proceedings, being directly in issue. In the present case, however, there was no necessity to decide this appeal in an application for the appointment of a receiver; and although the bench expressed an opinion as to the meaning of the plaint in this suit as a reason for refusing to appoint a receiver, it can certainly not amount to *res judicata* in the sense applied by the Privy Council in the above cases. For this proposition we need only refer to *Massam v. Thorley's Cattle Food Company* (4). Apart from this we are not at all clear that that bench of this Court did really decide the point, for they merely said:—

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(1) (1883) 11 I.A., 37.

(2) (1921) I.L.R., 48 Calc., 499 (P.C.).

(3) (1924) 47 M.L.J., 286 (P.C.).

(4) (1880) 14 Ch. D., 748.

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“It is not clear that the respondents’ claim to a scheme, the only relief for which they can now ask, can be supported separately on the allegations they have made.”

That merely amounts to saying that they have not definitely proved in these interlocutory proceedings the question which has now been argued before us. In any case it does not amount to *res judicata*. With all respect for the opinion expressed in that judgment, we have now come to a contrary conclusion.

A further suggestion is made that this suit may be affected by the recently passed Religious Endowments Act; but there is nothing in that Act which gives retrospective effect in respect of proceedings already instituted, and therefore this objection also must fail.

This appeal therefore is allowed with costs and the suit will be remanded to the lower Court for disposal according to law. Court-fee on appeal memorandum will be refunded.

Appeal No. 44 of 1921 is not pressed and is dismissed with costs of the 20th respondent.

These appeals having been set down to be spoken to this day, the Court delivered the following

#### JUDGMENT.

Appellants 3 and 4 are allowed to withdraw and the judgment in Appeal Nos. 43 and 44 of 1921 will stand as regards appellants 1, 2 and 5.

K.R.