APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice H. G. Smith

1932
October, 13

PREMO, MUSAMMAT (DEFENDANT-APPELLANT) *v.* SHEO NATH, PANDIT, AND OTHERS, PLAINTIFFS AND OTHERS (DEFENDANTS-RESPONDENTS)*

Civil Procedure Code (Act V of 1908), sections 92 and 93—Public Suits Validation Act (XI of 1932)—Hindu law—Endowments—Public and Private temple, distinction between—Testator building a temple removed from his residential house—Bequeathing property for exclusive use of the temple—Public in general having free access for worship—Temple, if a public or private one—Sanction under section 92, Civil Procedure Code, if to be in any particular form—Sanction of Local Government under section 93, Civil Procedure Code, necessity of—Plaintiff, when can be regarded to have an 'interest in the trust' under section 92, Civil Procedure Code—Samadhi, *significance of—Trustees, who may be appointed—Daughter of founder of trust, denying existence of a public trust and claiming adverse possession and responsible for the mismanagement, if to be appointed a trustee.*

One of the avowed objects of the Public Suits Validation Act (XI of 1932) is to validate suits pending at the time of its enactment which would otherwise be invalid by reason of the previous sanction of the Local Government in respect thereof not having been obtained as required by section 93 of the Code of Civil Procedure. Section 93 refers to previous sanction and in suits to which Public Suits Validation Act applies it is not necessary for a plaintiff to obtain any sanction of the Local Government during the pendency of the suit. *Prem Narain* v. *Ram Charan* (1), referred to.

Section 92 does not require that details as regards the names of the proposed defendants and the reliefs should be stated in the order granting the sanction and therefore a sanction granted by a letter by the Legal Remembrancer on a printed form usually employed for the purpose which did not specify the persons against whom the suit was to be instituted or the reliefs which were to be asked for in the suit cannot be said to be defective.

* First Civil Appeal No. 36 of 1931, against the decree of L. S. White, District Judge of Lucknow, dated the 11th of August, 1930.

(1) (1931) 9 O. W. N., 53.

Where it has been found that the plaintiffs were in the habit of going to the *thakurdwara* in question to worship and that they were men of the same caste as the founder of the trust, and that one of the plaintiffs had built a shrine within the precincts of the temple in suit, they had sufficient interest in the trust within the meaning of section 92 of the Code of Civil Procedure to entitle them to institute a suit for proper management of the temple.

The determination of the question whether a temple is public or private is generally not free from difficulty. It is not possible to lay down any hard and fast rule, or any conclusive tests for the purpose. There is no peculiarity in the architecture of the building or in the ritual of the worship, and there are no other insignia to distinguish a public from a private temple. The main characteristic of a public temple is that it is intended for the use of the public at large, or at any rate an indeterminate, though restricted class of the Hindu community generally. On the other hand, private temples are intended for the worship of the family or other god by members of the family of the donor exclusively. A private temple is like a private chapel in England in which the public have no interest. Though the public can be allowed access even to a private temple in such a way as to exclude any idea of its being a public institution, such access is only by sufferance. But in the case of a public temple the public is entitled to the privilege of worship therein as a matter of right. The question therefore is generally one of inference to be drawn from the circumstances of each case.

Where the will of the founder of a temple shows that he had built the temple in dispute in another mohalla removed from the precincts of the residential house and that the building had been constructed especially as a temple and the provisions of the will also show that he had made a complete dedication of a portion of the property in favour of the temple and *shivala* which property was described as the property of Thakurji and its income was to be spent by the trustees for th expenses of the temple and for charitable purposes and it is further found on evidence that the public in general had free access to the temple for purposes of worship and the visitors to the temple also made offerings there in kind and money, the cumulative effect of all these circumstances is to show unmistakably that the temple was not intended for the exclusive use of the members of the founder's family, but was

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dedicated for the use of the public and has all along been used as such. *Permeshri Das* v. *Girdhari Lal* (1), *Hari Kishen* v. *Raghubar Dayal* (2), *Pecsapati Sitaramanuja Charri* v. *Kanduri Vallamma* (3), *Ram Das* v. *Musammat Basanti* (4), *Madhub Chandra Bera* v. *Srimati Rani Sarat Kumari Debi* (5), *Bhekdhari Singh* v. *Sri Ramchanderji* (6), *Siri Thakur Parmod Banabihari* v. *C. G. Atkins* (7), and *Sri Thakurji* v. *Sukhdeo Singh* (8), referred to.

Amongst Hindus *Samadhis* are usually built in memory of religious persons who are held in veneration by the public. The construction of such a tomb in the compound of a temple is a fact which is more in favour of the temple being public than its being a private one. At any rate the existence of the tomb within the temple affords no argument in support of its being private.

Where the daughter of the founder of the trust denied the existence of any public trust and claimed title by adverse possession to part of the trust property and besides that she was mainly responsible for the mismanagement of the trust so that if she was appointed a trustee it would introduce a discordant element in the Board and would only lead to friction in the management of the trust *held*, that she was rightly excluded from the Board of Trustees.

Mr. *B. K. Dhaon*, for the appellant.

Messrs. *D. K. Seth* and *Suraj Sahai*, for the respondents.

SRIVASTAVA and SMITH, JJ. :—This is an appeal by Musammat Premo, defendant No. 2, against the decision, dated the 11th of August, 1930, of the learned District Judge of Lucknow, removing her from trusteeship. It arises out of a suit brought by the three plaintiffs under section 92 of the Code of Civil Procedure in respect of a *thakurdwara* and *shivala* near the temple of Kalkaji in Chowk, Lucknow.

The plaintiffs' case was that Lala Lakhumal, a Khattri by caste, constructed the temple and *shivala* in dispute, consecrated it and created a trust for its upkeep

(1) (1915) 2 O. L. J., 259.
(2) (1926) 3 O. W. N., 645.
(3) (1915) M. W. N., 842.
(4) (1922) 20 A. L. J., 789.
(5) (1910) 15 C. W. N., 126.
(6) (1930) I. L. R., 10 Pat., 388.
(7) (1919) 4 P. L. J., 533.
(8) (1920) I. L. R., 42 All., 395.

and for other charitable purposes. The terms and conditions of this trust are to be found in his will, exhibit 3, dated the 22nd of September, 1891. It appears that Musammat Shamo Bibi, the widow of Lala Lakhumal, continued in sole management of the Trust, and that the other trustees appointed by Lala Lakhumal took little interest in the management. All the trustees appointed by Lala Lakhumal, except herself and one other, being dead, Musammat Shamo Bibi executed a will, dated the 9th of May, 1908, whereby she appointed seven trustees, including the one survivor of the trustees appointed by her husband, for the management of the temple and the trust connected with it. Two of these trustees were her own daughters, Musammat Rup Dei and Musammat Premo. Shamo Bibi died in 1917. It was alleged by the plaintiffs that on account of dissensions and quarrels between the two daughters the other trustees were unable to carry out their responsibility, and that the affairs of the trust were considerably mismanaged, with the result that the temple had fallen into disrepair and the necessary religious services were not properly performed. The plaintiffs therefore applied to the Legal Remembrancer and having obtained the requisite permission from him, filed the present suit against the surviving trustees praying for their removal from the office of trusteeship, for appointment of new trustees in their place, and for the settling of a scheme for the proper management of the trust properties.

Musammat Rup Dei did not contest the claim except as regards the prayer for her own removal from trusteeship. She threw the whole responsibility for the mismanagement on Musammat Premo, defendant No. 2, and stated that she herself was anxious that the management be put on a sound basis and a scheme be settled. The suit was resisted only by Musammat Premo. The main plea raised by her in defence was

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that the temple in question was the private temple of her father, and that the suit under section 92 of the Code of Civil Procedure was, therefore, not maintainable. In the course of oral pleadings Musammat Premo also pleaded that she had been in adverse possession for more than twelve years of the house entered at No. 11 of list B of the plaint.

The learned District Judge found that the trust was a public one, that the house in question was part of the trust property, and that the defendant-appellant had failed to establish her adverse possession. In the result he passed a decree as stated above. He was also of opinion that Musammat Rup Dei was not seriously to blame for the mismanagement, and has therefore included her as a member of the board of trustees appointed by him.

The first contention urged on behalf of the appellant is that the provisions of section 93 of the Code of Civil Procedure have not been complied with, and that the suit is for this reason incompetent. This contention is based on the decision of their Lordships of the Judicial Committee in *Prem Narain* v. *Ram Charan* (1). In this case it was held by their Lordships that 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 utilized. The argument was that although the suit was instituted with the consent of the Legal Remembrancer, yet it was not maintainable as no previous sanction of the Local Government had been obtained. The provisions of the Public Suits Validation Act (XI of 1932) afford a sufficient answer to this

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contention. One of the avowed objects of this Act is to validate suits pending at the time of its enactment which would otherwise be invalid by reason of the previous sanction of the Local Government in respect thereof not having been obtained as required by section 93 of the Code of Civil Procedure. The view which had prevailed in this country before the decision of their Lordships of the Judicial Committee in *Prem Narain* v. *Ram Charan* (1) was that the previous sanction of the Local Government under section 93 of the Code of Civil Procedure was not necessary in each particular suit. The result of this decision was to make a large number of pending suits in which such previous sanction had not been obtained liable to dismissal through no fault of the plaintiffs. The Legislature therefore intervened to remove this hardship. It has been argued that even though the effect of Act XI of 1932 is to save such suits from dismissal, yet it does not dispense with the necessity of sanction by the Local Government. The argument cannot bear examination. Section 93 refers to previous sanction. In the case of pending suits instituted without such permission, compliance with this condition is impossible. If the Legislature intended that in such suits to which the Act applied the plaintiff should be required to apply to the Local Government for sanction during the pendency of the suit, they would, it may reasonably be held, have said so. In the absence of any such provision, we are of opinion that the defect of want of previous sanction by the Local Government in this particular case is cured by the provisions of the Public Suits Validation Act (XI of 1932), and it was not necessary for the plaintiffs to obtain any sanction of the Local Government during the pendency of the suit.

Another branch of the argument is that the sanction given by the Legal Remembrancer is defective, inasmuch as it does not specify the persons against whom the suit has to be instituted, or the reliefs which are to be

(1) (1931) 9 O. W. N., 53.

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asked for in that suit. This contention also seems to us to be without substance. Exhibit 2 is the copy of the letter of the Legal Remembrancer containing the sanction granted by him to the plaintiffs for the institution of the suit. This letter is on the printed form usually employed for the grant of such sanctions. Section 92 does not require that details as regards the names of the proposed defendants and the reliefs should be stated in the order granting the sanction. We are therefore of opinion that the order, exhibit 2, sufficiently satisfies the requirements of the law.

Next it was contended that the plaintiffs have not shown that they have "an interest in the trust" within the meaning of these words as used in section 92 of the Code of Civil Procedure so as to entitle them to maintain the suit. No such plea was raised in the lower court. Sheo Nath, plaintiff, as P. W. 1 stated that he and the other plaintiffs are in the habit of going to the *thakurdwara* in the evening to worship the idol. It is not denied that plaintiffs Nos. 2 and 3 are men of the same caste as Lala Lakhumal, the founder of the trust. It is also in evidence that Ram Narain, plaintiff No. 3, has built a shrine of Bhaironji within the precincts of the temple in suit.

On the facts stated above we are satisfied that the plaintiffs have sufficient interest in the trust to entitle them to institute the suit.

Then there is the question whether this is a trust created for public purposes of a charitable or religious nature as contemplated by section 92 of the Code of Civil Procedure. That there is a trust of a religious nature has not been disputed and can admit of no doubt. The only question is whether it is public or private. The determination of the question whether a temple like the one in dispute is public or private is generally not free from difficulty. It is not possible to lay down any hard and fast rule, or any conclusive tests for the purpose.

There is no peculiarity in the architecture of the building or in the ritual of the worship, and there are no other insignia to distinguish a public from a private temple. The main characteristic of a public temple is that it is intended for the use of the public at large, or at any rate an indeterminate, though restricted class of the Hindu community generally. On the other hand, private temples are intended for the worship of the family or other god by members of the family of the donor exclusively. A private temple is like a private chapel in England in which the public have no interest. Though the public can be allowed access even to a private temple in such a way as to exclude any idea of its being a public institution, such access is only by sufferance. But in the case of a public temple the public is entitled to the privilege of worship therein as a matter of right. The question therefore is generally one of inference to be drawn from the circumstances of each case.

The will of Lakhumal, exhibit 3, shows that his residential house was in mohalla Khirki Tepurchand, and that he had built the temple in dispute in another mohalla removed from the precincts of the residential house. The translation of item No. 2 of the properties of the testator which relates to the temple as contained in the printed record is not correct. The wording in the original will, correctly rendered, is as follows:

> "(2) Temple building (*makan*) Sri Thakurji and *shivala*, situate near the temple of Kalkaji, with the shop."

This description seems to indicate clearly that the building had been constructed especially as a temple. The terms of paragraphs 1 and 2 of this will also point to the same conclusion. The provisions of the will also show that whereas the testator had bequeathed part of his property to his relations and dependents, he had made a complete dedication of a portion of the property in favour of the temple and *shivala*. This property is described

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as the property of Thakurji, and its income was to be spent by the trustees for the expenses of the temple and for charitable purposes. Exhibit 1, the will executed by Musammat Shamo Bibi, also shows that her residential house was quite separate from the temple.

Srivastava and Smith, JJ.

The learned counsel for the parties have read to us *in extenso* the oral evidence of the witnesses examined in the case. We have no hesitation in agreeing with the learned District Judge that the evidence of the witnesses examined by the plaintiffs and by Musammat Rup Dei, defendant No. 1, who made common cause with the plaintiffs, is decidedly superior in quality as compared with the evidence of the witnesses examined by the defendant-appellant. It is proved from this evidence that the temple contains the idols of Gauri Shankar, Radha Krishna, Mahadeoji, Hanumanji and Bhaironji. The public in general have free access to the temple for purposes of worship. The visitors to the temple also make offerings there in kind and money. The plaintiff Ram Narain, who is an outsider to the family, built a shrine within the precincts of the temple some time ago for the idol of Bhaironji, which had been in the temple for a long time. P. W. 8 Shiam Sunda', who is an old man of seventy-four years, has also deposed to having witnessed the installation ceremony, in which there was also a procession, which is usual on such occasions. Taking all these circumstances into consideration, we think their cumulative effect is to show unmistakably that the temple was not intended for the exclusive use of the members of Lakhumal's family, but was dedicated for the use of the public and has all along been used as such.

The learned counsel for the appellant laid stress on the fact that on one occasion the reciting of hymns (*bhajans*), which used to be done in the temple, was stopped. The evidence of P. W. 4, Sheo Nath, shows that he used to go to the temple for singing hymns, which attracted a number of people who went to listen to them. He says

that some time ago there was a quarrel amongst the persons who used to sing *bhajans*, and they divided themselves into two parties. Musammat Premo sided with one party, while Musammat Rup Dei sided with the other. Since this quarrel, Sheo Nath, who belonged to Musammat Premo's party, began to hold *bhajans* in his house, while the others continued to do so at the *thakurdwara*. The statement of Musammat Rup Dei, D. W. 1, is also to the same effect. Thus we are of opinion that this incident of the quarrel amongst the persons who used to sing hymns cannot justify the argument that they were forbidden to sing hymns, and cannot be regarded as any evidence of the public not having an unrestricted right of worship in the temple. It was also contended that the evidence shows that the doors of the temple used to be closed during the night, and for two hours about midday, under the orders of Rup Dei. We are satisfied that this was not done by Rup Dei in the exercise of any right to deny the public free access to the temple, but only in order to safeguard the contents of the *thakurdwara*. The fact of the public having free access to the temple is also admitted by one of the appellant's own witnesses, Parbhu Dayal, D. W. 6, who stated that every one had liberty to come to the temple at the time of *arti* and receive *prasad*.

An argument in favour of the temple being public was also based on the existence of a *samadhi* within the temple compound. The evidence shows that when Nathji, a brother of Lakhumal, died, his dead body was cremated and the ashes and bones were deposited in a *samadhi* (tomb) constructed in the compound of the temple. Amongst Hindus such *samadhis* are usually built in memory of religious persons who are held in veneration by the public. The construction of such a tomb in the temple compound seems to us to be a fact which is more in favour of the temple being public than its being a private one. At any rate, we are not prepared

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to hold that the existence of the tomb within the temple affords any argument in support of its being private.

It was also argued on behalf of the plaintiffs-respondents that the idol in the temple being fixed and immovable (*achal*), the temple must be held to be a public one. No text or authority has been cited in support of this proposition. In the absence of any authority, we are not prepared to say that the fact of the idol being fixed (*achal*) necessarily proves that the temple is public.

Srivastava and Smith, JJ.

Next it remains for us to discuss some of the cases, relevant to the question under consideration, cited in the course of arguments.

In *Parmeshri Das* v. *Girdhari Lal* (1) a Bench of the late Court of the Judicial Commissioner of Oudh held that a *thakurdwara* which had been formally consecrated for the worship of the idol installed there, which had been open since then for public worship, where a *pujari* had been employed for carrying on worship and making offerings of "*bhog*" or food in accordance with usage, and which bore a stone inscription at its door describing it as a temple, was a public temple intended for public worship. It may be remarked that it is the common case of both parties before us that a *pujari* used to be employed in the temple in dispute for carrying on the worship and making offerings of *bhog* to the idol.

In *Hari Kishen* v. *Raghubar Dayal* (2) one of the learned Judges of this Court held that where a temple is used for worship by the public at large without any hindrance or obstruction either on the part of the person who had built the temple or of his descendants, the existence of certain constructions for the purpose of providing some place for the *pujari* to live in and allowing accommodation to the pilgrims and worshippers resorting to the said temple, does not in any way indicate that the temple is anything else but a public institution.

(1) (1915) 2 O. L. J., 259. (2) (1926) 3 O. W. N., 645.

From a public user the fact of a public dedication can always be inferred.

In *Peesapati Sitaramanuja Charri* v. *Kanduri Vallamma* (1) it was held that in southern India it was unusual for a person to construct a temple for private worship outside his dwelling house. We think that it is equally unusual in this part of the country also.

In *Ram Das* v. *Musammat Basanti* (2) a Bench of the Allahabad High Court remarked that a useful test for a Judge to apply to see whether the evidence satisfies the conditions of a private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalized by proceedings for trespass.

The learned counsel for the appellant also cited *Madhub Chandra Bera* v. *Srimati Rani Sarat Kumari Debi* (3), *Bhekdhari Singh* v. *Sri Ramchanderji* (4), *Siri Thakur Parmod Banabihari* v. *C. G. Atkins* (5), and *Sri Thakurji* v. *Sukhdeo Singh* (6), but the question dealt with in these cases was whether there was a real and valid endowment or whether it was merely illusory. No such question arises in the present case because the validity of the endowment is not questioned.

The *indicia* of a public temple as laid down in the cases discussed above, if applied to the facts established by the evidence in this case, support the conclusion reached by us about the temple in dispute being a public one. We must therefore uphold the finding of the learned District Judge on this point.

Lastly it was contended on behalf of the appellant that she, being a daughter of the founder of the trust, should be given a place on the board of trustees appointed by the lower court. The pleadings of the case show that the appellant denied the existence of any public trust. She also claimed title by adverse possession

(1) (1915) M. W. N., 842.
(2) (1922) 20 A. L. J., 789.
(3) (1910) 15 C. W. N., 126.
(4) (1930) I. L. R., 10 Pat., 388.
(5) (1919) 4 P. L. J., 533.
(6) (1920) I. L. R., 42 All., 395.

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to part of the trust property. Besides, she was mainly responsible for the mismanagement of the trust which necessitated the present suit. In view of all these circumstances we feel that if we appoint her as a trustee it would introduce a discordant element in the board and would only lead to friction in the management of the trust. We think therefore that the learned District Judge has exercised a wise discretion in excluding her from the board of trustees.

Srivastava and Smith, JJ.

The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice H. G. Smith

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SHYAM LAL AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* MUNNE AND OTHERS (DEFENDANTS-RESPONDENTS)*

Easements Act (V of 1882), section 60—Work of a permanent character, meaning of—Residential house having a tiled roof, if a work of a permanent character—Licence, if can be revoked by payment of compensation.

Held, that the expression "a work of a permanent character" as used in section 60 clause (*b*) of the Easements Act is intended to denote some work which is not merely of a temporary nature. A residential house constructed by the licensees in which they have been residing for a long number of years, must be held to be a work of a permanent character, in spite of its having a tiled roof which would presumably require to be renewed from time to time. *Nasir-ul-zaman Khan* v. *Azim Ullah* (1), relied on.

Held further, that section 60 of the Indian Easements Act contains a definite statutory provision that a licence cannot be revoked when the licensee acting upon the licence has executed a work of a permanent character and incurred expenses

* Second Civil Appeal No. 337 of 1931, against the decree of Dr. Chaudhri Abdul Azim Siddiqi, Additional Subordinate Judge of Lucknow, dated the 30th of September, 1931, reversing the decree of M. Munir Uddin Ahmad Kirmani, Munsif, Lucknow District, dated the 31st of March, 1931.

(1) (1906) I. L. R., 28 All., 741.