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BAI JAMNABAI *In re.*

false statement had been made to the Court regarding the necessity of some means being taken for the protection of the minor's property.

In my opinion, therefore, there is no ground whatever for setting aside or modifying my order of the 19th of November, and this summons must, therefore, be discharged with costs.

Attorneys for the petitioner: Messrs. *Maneklal & Co.*

Attorneys for Goverdhandas: Messrs. *Bhaishankar, Kanga* and *Girdharlal.*

Summons discharged.

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

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July 18.

GHELABHAI GAVRISHANKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* UDERAM ICHARAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 539—Trust for public religious purpose—Dedication of property as Shivarpana—Ejectment of trespassers from the trust property—Court—Jurisdiction—Trust created by will—Trust coming into being at a future date—Duty of heirs to carry out the trust—Hindu law—Will.

A suit to eject a trespasser from property, which is the subject of a public religious trust, does not fall within the purview of section 539 of the Civil Procedure Code of 1882.

Lakshmandas Parashram v. *Ganpatrav Krishna*(1); *Vishvanath Govind Deshmane* v. *Rambhat*(2); *Kazi Hassan* v. *Sagun Balkrishna*(3); *Ravichand* v. *Samal*(4), followed.

Where the trustees named by the testator for the purpose of making and completing the trust at the point of time fixed by him are dead, and the object of the trust as named by him is specific and definite, the Court will take the administration of the trust.

Moggridge v. *Thackwell*(5); and *In re Pyne. Lilley* v. *Attorney-General*(6), followed.

* Second Appeal No. 181 of 1910.

(1) (1884) 8 Bom. 365.
(2) (1890) 15 Bom. 143.
(3) (1899) 24 Bom. 170.
(4) (1886) P. J. 273.
(5) (1803) 7 Ves. Jun. 36.
(6) [1903] 1 Ch. 83.

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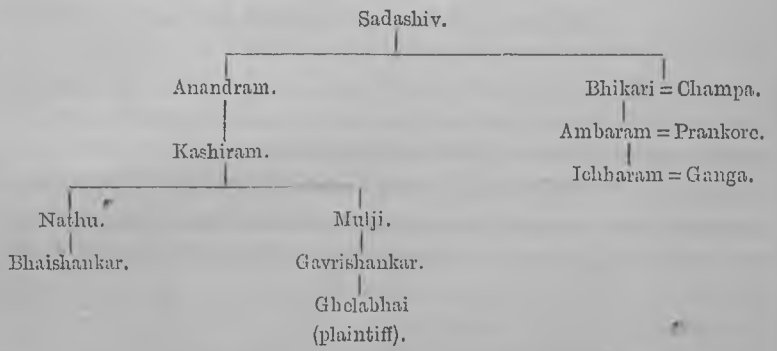
Where a Hindu who has directed a trust of his property for a religious purpose dies before giving effect to it, the Hindu law authorises his heir to take steps for carrying out his directions after recovering the property from a trespasser.

Where the testator merely directs that his property should be endowed for a certain purpose at a certain time by certain persons after his death, then, until the arrival of the time and the complete dedication of it in the manner and for the object pointed out by the testator, the property must be regarded, in the eye of law, as part of his estate, but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time. He who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanction of the Court, if necessary. Before he can do that, he must first secure the property from the wrong-doer into whose possession it has passed.

SECOND appeal from the decision of G. D. Madgaonkar District Judge of Surat, reversing the decree passed by N. R. Majmundar, Joint Subordinate Judge at Surat.

Suit to recover possession of property.

Ghelabhai (the plaintiff) sued to recover possession of property, which belonged to one Ambaram, who was related to him as shown in the following genealogical tree :—



Ambaram made his will on the 18th March 1849, whereby he directed that the whole of the property left by him should, on his death, be taken by his wife Bai Prankore; that on her death, Bai Ganga (the widow of a pre-deceased son of Ambaram) should take the property; and that on Bai Ganga's death, the property should be given in *shivarpana* (*i. e.*, dedication to the God Shiva) by the four executors who were named.

Both Champa and Prankore died shortly after Ambaram's death. Ganga lived up to the 15th July 1898. Before that date, the four executors named in Ambaram's will also died.

In 1857, Ganga mortgaged Ambaram's house to meet the expenses of pilgrimage to Benares. This mortgage was redeemed from the sale-proceeds of the house in 1863. The sale was made to Ichharam (husband of Ganga's sister Tapi) the father of defendant No. 1 and grandfather of defendants Nos. 2 and 3, and one Dalpat.

In 1898, the plaintiff filed an application for a certificate of heirship to Ambaram's estate. This application was granted: but the house was excluded from the certificate on the ground that it had been dedicated to the God Shiva.

In 1899, the plaintiff brought a suit against Tapi and Ichharam, to recover possession of Ambaram's property inclusive of the house in dispute. It was held that the gift to Shiva was probably void, but that the mortgage and sale of the house by Ganga was binding on the plaintiff.

In 1907, the plaintiff filed the present suit, claiming, *inter alia*, the following reliefs: (1) That the defendants who were trespassers should be ordered to deliver up possession of the house to the plaintiff and that necessary directions should be given and a scheme framed for carrying out the provision regarding the *shivarpana;* (2) that in case the Court deemed it undesirable to give sole possession to the plaintiff, other gentlemen might be appointed as joint trustees for carrying out of the *shivarpana;* (3) that in the event of the Court considering it inadvisable to give sole or joint possession to the plaintiff other gentlemen might be appointed to carry out the trust; and (4) that the house in dispute might be ordered to be sold and the proceeds ordered to be applied towards the purposes of the *shivarpana.*

The Subordinate Judge held that he had jurisdiction to try the suit as it did not fall within the purview of section 539 of the Civil Procedure Code of 1882; that the plaintiff was entitled to maintain the suit; that the plaintiff was not estopped from trying to enforce the gift to Shiva on the ground that in the previous litigation he had contended that the gift was unlawful and void; and that the house should be given into possession of the plaintiff for the purposes of being appropriated as *shivarpana.*

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On appeal, the District Judge held that the Subordinate Judge had no jurisdiction to entertain the suit as it fell under section 539. He, therefore, dismissed the suit.

The plaintiff appealed to the High Court.

L. A. Shah for the appellant :—The suit does not fall within the purview of section 539 of the Civil Procedure Code (Act XIV of 1882), its object being to recover the trust property from outsiders: *Lakshmandas Parashram* v. *Ganpatrav Krishna*[1]. Here the property is to be assigned to a religious purpose, but before it can be so assigned, the trustees died and a third party set up a claim against the trust. The plaintiff can therefore proceed independently of section 539. See *Kazi Hassan* v. *Sagun Balkrishna*[2]; *Muhammad Abdullah Khan* v. *Kallu*[3]; *Jamal-uddin* v. *Mujtaba Husain*[4]; *Srinivasa Ayyangar* v. *Srinivasa Swami*[5]; *Ghazaffar Husain Khan* v. *Yawar Husain*[6].

Modi, with *N. K. Mehta*, for the respondents :—The suit falls within section 539. Its provisions are mandatory. See *Tricumdass Mulji* v. *Khimji Vullabhdass*[7]; *Nanpura Parsi Panchayat Case*[8]; *Manji Karimbhai* v. *Hoorbai*[9]; *Neti Rama* v. *Venkatacharulu*[10]. The cases relied on by the other side were cases in which the relief prayed for was declaration that the property was a trust property. The case of *Lakshmandas Parashram* v. *Ganpatrav Krishna*[1] was a suit to have the sale of the trust property set aside, which admittedly did not fall under section 539.

CHANDAVARKAR, J. :—The dispute in this case relates to a house, which originally formed part of the property belonging to one Ambaram Bhikariram. He by his will made in the year 1849 bequeathed the property to his wife for life, and, on her

(1) (1884) 8 Bom. 365.
(2) (1899) 24 Bom. 170.
(3) (1899) 21 All. 187.
(4) (1903) 25 All. 631.
(5) (1892) 16 Mad. 31.
(6) (1905) 28 All. 112.
(7) (1892) 16 Bom. 626.
(8) F. A. No. 111 of 1907 (Unreported).
(9) (1910) 35 Bom. 342.
(10) (1902) 26 Mad. 450.

death, to Bai Ganga, his widowed daughter-in-law, also for life; and he further directed that on their death his four executors, named in the will, should make *shivarpana* of the property, that is to say, that they should make a public religious trust of it by devoting it to the worship of the Hindu deity Shiva. On his death, his widow took under the will. On her death, his daughter-in-law succeeded to the estate and she sold the house now in dispute. The present respondents claim to be in possession in virtue of that sale.

The executors, charged with the duty of making a public trust of the property, predeceased the daughter-in-law. She herself died in the year 1898. The trustees, named by the testator for the purpose of making and completing the trust at the point of time fixed by him, having died, and the object of the trust, as named by him, being specific and definite, the case falls within the rule of law, laid down by Lord Eldon in the leading case of *Moggridge* v. *Thackwell*[1], that "where the execution is to be by a trustee, with general or some objects pointed out, there the Court will take the administration of the trust." See also *In re Pyne. Lilley* v. *Attorney-General*[2]. It is for such cases that the Indian Legislature provided a remedy by means of section 539 of the old Code of Civil Procedure (Act XIV of 1882), reproduced, with some alteration, in the new Code, (Act V of 1908), as section 92.

In the present case, the suit was brought by the appellant in the Court of the Second Class Subordinate Judge at Surat independently of section 539 of the old Code, which was then in force. In his plaint he sought to eject the respondents as trespassers and prayed for possession of the property, for the appointment of a trustee by the Court, for the settlement of a scheme for the administration of the trust, and for such other relief as the Court might think fit to grant. All the reliefs claimed, except the prayer for possession, fell within the purview of section 539, and to that extent the suit was outside the jurisdiction of the Subordinate Judge's Court, having regard to the law that the provisions of the section are mandatory, not

(1) (1803) 7 Ves. Jun. 36. (2) [1903] 1 Ch. 83.

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enabling or permissive: *Tricumdass Mulji* v. *Khimji Vullabh-dass*[1].

But it is contended for the appellant that, so far as it was a suit to eject a trespasser from property, which is the subject of a public religious trust, section 539 did not apply, and that the suit rightly lay in the Subordinate Judge's Court, as held in *Lakshmandas Parashram* v. *Ganpatrav Krishna*[2]; *Vishvanath Govind Deshmane* v. *Rambhat*[3]; *Kazi Hassan* v. *Sagun Balkrishna*[4]; and *Ravichand Bhaichand* v. *Samal Shivram*[5].

This contention is sound and the present action must be treated as one in ejectment. So regarded, it requires that the appellant must make out his title to eject. The title claimed by him is that of trustee or manager arising in virtue of his right as the heir of Ambaram. There can be no doubt that Ambaram himself could have, if alive, ejected the trespasser and taken steps to complete the trust. "The duties and obligations of the deceased are attached by the law to his representatives and to those who actually take his property" (West and Buhler, 3rd Edition, p. 215). Ambaram having named certain persons to carry out the trust pointed out by him, and those persons having all died before the period for the creation and completion of the trust, in the absence of any provision made by the testator to meet such a contingency, the right to do that which those persons would have done devolved, according to Hindu law, on the heir of the testator. He takes either their place or his: *Gossamee Sree Greedharreejee* v. *Bumanlolljee Jossamee*[6]. As observed by this Court in *Ravichand Bhaichand* v. *Samal Shivram*[5], "in the absence of any provision made for the management by the founder or proof of a long established custom with regard to it, the descendants of the founder are entitled to exercise it."

Whatever might be the case as to property which, having been completely devoted by its owner to a public charitable or

(1) (1892) 16 Bom. 626.
(2) (1884) 8 Bom. 365.
(3) (1890) 15 Bom. 146.
(4) (1899) 24 Bom. 170.
(5) (1886) P. J. p. 273.
(6) (1889) L. R. 16 I. A. 137.

religious trust, has passed out of his hands and from his ownership and, therefore, is in no sense under his control or the control of his family and heirs on his death, we have here property of a different character. It is not the case here that the owner died after having made a complete trust of it. He merely directed that it should be endowed for a certain purpose at a certain time by certain persons after his death. Until the arrival of the time and complete dedication of it in the manner and for the object pointed out by the testator, the property must be regarded, in the eye of law, as part of his estate, but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time; and he who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanction of the Court, if necessary. But before he can do that, he must first secure the property from the wrong-doer into whose possession it has passed.

To hold otherwise would be contrary to the principles of Hindu law and to encourage the misuse of trust property.

Yajnyavalkya says: "Whatever is promised to be given shall be given; where it has been given, it shall not be resumed." Vijnaneshwara in the *Mitakshara* explains this *Smriti* or text as follows:

"Whatever is promised (as a gift) to any person for a religious purpose should be given to that person (by the promisor); otherwise the latter shall lapse from religion." (The Mitakshara; Moghe's Edition, 3rd, page 225.) So Katyayana as cited in the Mayukha: "If a gift be promised by a person, whether in health or in sickness, for a religious purpose, and he die without making it, his son should be compelled to make it; of this there is no doubt" (Mandlik's Hindu Law, p. 124).

The word "son" is here merely illustrative and stands for anyone who inherits or takes the promisor's property. These are monitory, not mandatory texts; but the principle underlying them is that, where a Hindu, who has directed a trust of his property for a religious purpose, dies before giving effect to

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it, the Hindu Law authorises his heir to take steps for carrying out his directions, after recovering the property from a trespasser.

So far the appellant's title is clear. It remains to consider whether the question of that title is *res judicata* in consequence of the result against him of his suit, No. 360 of 1900, brought against the respondents. That was a suit in which he claimed possession of all the properties of Ambaram, including the house now in dispute, as his reversionary heir. It was held that he was entitled to all of them except the house. As to it, the Court decided that, as it had been made the subject of a gift to the Hindu deity Shiva, it was endowed property, to which the plaintiff had no right as heir and owner. It is true that in both the litigations the appellant claimed as heir. But, as pointed out by the learned Subordinate Judge who tried the present suit, the appellant asks for relief now as trustee with reference to property which is impressed with a trust. As soon as Bai Ganga died, the house became in the eye of law subject to a trust; and Ambaram's heir became entitled to recover it, not as heir, but in a different capacity, *i. e.*, as trustee or manager, for the purpose of giving effect to the trust. The trusteeship, no doubt, arose out of the heirship; but all the same the two capacities or titles are distinct and gave rise to two separate causes of action.

One way of testing it is this. Suppose the trustees named by the testator had survived Bai Ganga. It is undeniable that they could have claimed possession of the house as against a trespasser for the purpose of carrying out the object of the trust pointed out by the testator. At the same time the reversionary heir of Ambaram could have in that event maintained a suit on his own account for the rest of Ambaram's property, to which he had become entitled, either by right of succession under the Hindu Law or under the will. If the two rights were in inception distinct, they cannot be said to have coalesced and become one cause of action merely because one and the same person happens to be the heir and to take the place of the trustees. It is a matter of mere accident, not

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of substance or essence, that the trusteeship arises from the heirship.

For these reasons, the decree of the District Court must be reversed, and, as the pleaders on either side agree that there is no further question on the merits to be determined, the appeal is allowed. The Court doth declare that the property in dispute is a public religious trust under the will of Ambaram Bhikariram and must be dedicated to the worship of Shiva and that the plaintiff is entitled to recover possession for the purpose of carrying out the said trust according to the directions in the said will. The Court awards possession accordingly. The plaintiff should give an undertaking to the Court of the Subordinate Judge at Surat that within three months from the date of recovery of possession he will take the proper, legal and necessary steps for the purpose of completing the trust and securing its administration. Costs throughout on the respondent.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Rao.

1911.
July 20.

TRIMBAK BHIKAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHANKAR SHAMRAV *alias* MAHADEO BALVANT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), section 19—Registered deed of gift—Right of revocation not reserved by the donor—Title of the donee—Challenge by a third party having no title.

Though it might be open to a donor, within the time allowed by the law of Limitation, to attack his gift under a registered deed, which reserved no right of revocation, on the grounds mentioned in section 19 of the Contract Act (IX of 1872), still so long as the registered deed stands, the title of the donee under it cannot be challenged by a third party who has no title.

SECOND appeal against the decision of H. S. Phadnis, District Judge of Khandesh, confirming the decree of V. R. Kulkarni, Subordinate Judge of Yaval.

* Second Appeal No. 15 of 1910.