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prisoner before it for disposing of the appeal. But it cannot be said that a convicted person presenting his appeal under s. 420 from jail has a right to be heard in person. The Court if it thinks proper can decline to hear him. It may be noted that an argument drawn *ab inconvenienti* has been regarded as forcible in law. In such matters, where convicts from jail frequently apply for permission to be heard in person, the Courts have to allow their decision to be determined generally by considerations of inconvenience and public expense. The case is, however, different when notice is given to the appellant under s. 422, Criminal Procedure Code. (See *Emperor* v. *Lal Bahadur*.[1]) In the present case the accused's presence is not necessary. I therefore agree with the order proposed by my Lord the Chief Justice.

Appeal dismissed.

J. G. R.

[1] (1927) 50 All. 543, F. B.

APPELLATE CIVIL.

Before Mr. Justice Divatia and Mr. Justice Sen.

1937 *September 16*

NAGAPPA ALIAS RAMAYA BAB BALGI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* SANTAPPA PANDURANG PAI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2 AND 4), RESPONDENTS.*

Religious Endowments Act (XX of 1863), s. 14—Breach of trust—Suit against trespasser—Suit not maintainable—Construction.

Section 14 of the Religious Endowments Act, 1863, contemplates that in a suit under the section the Court has not to pass any order against a person who is alleged to have intruded into management without authority, but that the only question to be considered is whether a person in whom property has been vested should be removed for misfeasance or malfeasance.

In a suit in which the plaintiffs asked for a declaration that one of the defendants, viz., defendant No. 4, had no right to manage the property of the suit temple, for

* Cross Appeals Nos. 24 and 25 of 1932.

the removal of defendants Nos. 1 to 4 from the management thereof, and for other reliefs, defendant No. 4 contended that that the suit as against him was not maintainable, it being a suit against a trespasser and not against a person entitled to manage the property of the temple :—

Held, that the suit was not maintainable as against defendant No. 4 under s. 14 of the Religious Endowments Act, 1863.

Sabapathi v. *Subraya and Ramanadha*[1] and *Sivayya* v. *Rami Reddi*,[2] relied on;

Muhammad Siraj-Ul-Haq v. *Imam-Ud-Din*,[3] distinguished;

Nur Hussain Shah v. *Mt. Hussain Bibi*,[4] referred to.

FIRST APPEALS from the decision of D. S. Oka, Acting District Judge, Karwar, in Civil Suit No. 2 of 1928.

Suit for declaration and removal of defendants from management of temple property.

At Kumta, there is a temple known as Shri Vyankatraman. Plaintiffs alleged that defendants Nos. 1 to 3 were *muktesars* of the temple, that although they were appointed by the Temple Committee, they did not do their work properly and that they had unauthorisedly allowed defendant No. 4, defendant No. 1's natural brother, to interfere with its management. It was further alleged that the temple had vast funds, that defendant No. 4 had set up a hereditary right to its management through the sufferance of defendants Nos. 1 and 2, that the trustees were guilty of malfeasance, misfeasance and neglect of duty and that they having committed a breach of trust, were liable to be removed.

The plaintiffs, therefore, brought the suit for the following reliefs, viz. : (1) for a declaration that defendant No. 4 had no hereditary right of management, (2) for removal of defendants Nos. 1 to 4 from the management of the suit temple, (3) for damages for malfeasance, misfeasance, neglect of duty and breach of trust, (4) for delivery of the temple property to the possession of the persons who might

(1) (1878) 2 Mad. 58.
(2) (1899) 22 Mad. 223.
(3) (1896) 19 All. 104.
(4) [1926] A. I. R. Lah. 16.

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be appointed trustees of the temple, and for costs of suit.

Defendant No. 1, by his written statement, admitted that he was appointed *muktesar* by the Temple Committee, that his only duty was to bring cash allowance from the Treasury, and to hand it over to defendant No. 4, that defendant No. 4 managed the affairs of the temple, that there was no act of malfeasance, misfeasance and that defendant No. 4 was in management in his own right according to long established practice.

Defendant No. 4, while admitting that he was managing the temple, contended, *inter alia*, that the suit could not lie as againts him under s. 14 of the Religious Endowments Act. His other contentions were similar to those of defendant No. 1.

The learned trial Judge framed several issues of which issue No. 3 was, "Is the suit against defendant No. 4 maintainable under the Religious Endowments Act?" He answered that issue in the affirmative, observing as follows:—

"It is not shown how the temple is not subject to the control of the Temple Committee. No doubt there are the two documents, exhibits 26 and 27, which show that in the years 1839 and 1849, gifts were obtained for the temple by tens of the caste. Still that does not prove that the temple did not come under the control of the said Committee. Exhibit 319 is a notice to Pandurang as *maktesar* by members of the same family as members of the Temple Committee to show accounts. It is of the year 1888. The accounts, it seems, were shown then. That shows that the control of the Temple Committee was recognized. Besides I do not understand why *maktesars* should be appointed by the Temple Committee if the business of these *maktesars* is to bring the cash allowance which is about Rs. 12 or so and give it to the so-called manager especially when the property of the temple is said to be nearly a lac of rupees. The very fact therefore that so many as three *maktesars* are appointed by the Temple Committee leads to the inference that the Temple Committee has control over the said temple. Hence my finding on issue No. 5 in the negative. Then as to the point raised in issue No. 3, I think it is answered in the ruling in *Mahamad Shiraj Hulhuq* v. *Imamuddin*, I.L.R. 19 All. page 104. In that case it was argued that section 14 of the Religious Endowments Act applied only to lawfully appointed trustees. Still it was held that it applied to persons professing to be trustees also. I have found above that defendant No. 4 has no hereditary right. Even if he had such a right, he would have become subject

to the jurisdiction of this Court as is laid down in the case of *Mahamad Atha* v. *Ramjan*, I.L.R. 34 Cal. page 587. The suit therefore is maintainable against defendant No. 4. Hence my finding in the affirmative on issue No. 3."

The trial Court eventually made a decree, declaring that defendant No. 4 had no hereditary right to take part in the management of the suit temple and ordered the removal of defendant No. 4, directing him to give the temple property into the possession of the Temple Committee and defendants Nos. 1 and 2. The rest of the plaintiffs' claim was rejected.

Plaintiffs and defendant No. 4 filed separate appeals.

FIRST APPEAL NO. 24 OF 1932.

R. A. Jahagirdar, for the appellants.

D. R. Manerikar, for respondents Nos. 1 and 3.

V. G. Wagle, for respondent No. 3.

FIRST APPEAL NO. 25 OF 1932.

H. C. Coyajee, with *D. R. Manerikar* and *V. G. Wagle*, for the appellant.

R. A. Jahagirdar, for respondent No. 1.

DIVATIA J. These two appeals have been preferred against a decree passed by the acting District Judge at Karwar in a suit by the plaintiffs for a declaration that defendant No. 4 had no right to manage the property of the suit temple, which is known as the Shri Vyankatraman temple at Kumta, in his hereditary right, secondly, for the removal of defendants Nos. 1 to 4 from the management of the suit temple, for an order on the defendants to produce the accounts of the moveable property, cash ornaments, etc., for damages from the defendants for their acts of misfeasance and malfeasance, and lastly for an order directing the defendants to hand over the possession of the suit properties to the trustees who may hereafter be appointed for the temple.

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Appeal No. 24 has been preferred by the plaintiffs while Appeal No. 25 has been preferred by defendant No. 4. The final order of the lower Court was partly against the plaintiffs and partly against defendant No. 4. It was against defendant No. 4 inasmuch as it was declared that he had no hereditary right to take part in the management of the suit temple and that therefore he should be removed from the management and that he should hand over possession of the property to the Temple Committee and defendants Nos. 1 and 2. As against the other defendants the plaintiffs' suit was dismissed and they did not succeed in their prayer for the defendants' removal and for accounts.

The plaintiffs' allegations in the plaint were shortly these: that defendants Nos. 1 to 3 were appointed *muktesars* by the Temple Committee which had been appointed under the Religious Endowments Act (XX of 1863); that defendant No. 4 was the undivided brother of defendant No. 1 and he was practically in the exclusive management of this temple; that the *muktesars* did not exercise any power of management but they allowed the management to remain with defendant No. 4 who set up a false hereditary right to the management of this temple and its properties; that therefore, inasmuch as the first three defendants were responsible for the proper management of the properties, they ought not to have allowed defendant No. 4 to wrongfully manage the properties of the suit temple and on that ground they should be removed from their management; that defendant No. 4 had no hereditary right of management in the temple and that he should therefore be removed from management. On these pleadings the plaintiffs asked for the removal of the defendants and for consequential reliefs of accounts, damages, possession, etc.

The suit was defended mainly by defendant No. 4. Written statements were filed by defendants Nos. 1 and 4. Defendant No. 1 asserted in his statement that although

it was true that the first three defendants had been appointed as managers by the Temple Committee, there was a separate manager to manage the affairs of the temple, and the long established practice of the temple was that the latter was to manage the temple as per the wishes and directions of the devotees and they had no active hand in the management. He further stated that the temple belonged to certain Gowd Saraswat families of Kumta which originally numbered fifty-eight and their descendants only, who were called the Tens or the panchas of the community, were the persons who were interested in the temple, and it was with their advice that defendant No. 4, who was the president of the Tens, was managing the temple affairs, and there was no mismanagement to their knowledge, and that it was not proved that they had left the management in the hands of defendant No. 4 but the latter was in management in his own right according to the long established practice of the temple.

Defendant No. 4 in his written statement contended, first, that the suit was not maintainable as against him inasmuch as it was alleged by the plaintiffs that he was only a trespasser and not a person who was entitled to manage the property of the temple, and such a suit against a person who is alleged to be a trespasser was not maintainable under s. 14 of the Religious Endowments Act. He admitted that he was in the management of the temple, but he asserted that the temple was founded by certain persons of the Gowd Saraswat community at Kumta, that the practice was that it was to be managed by the Tens or the panchas of Kumta of which he was the chairman, that the usage of the temple both before as well as after the Religious Endowments Act and for the past one hundred years or more was that the manager of defendant No. 4's family was to be the manager of this temple not by appointment but by way of a hereditary right, that the usage also was that the Tens of the community were to meet in the temple and discuss all

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matters and decide as to the mode and amount of contributions to be levied from the members of the community and also as to the mode in which the investment should be made of the cash balances, etc., and that the management of the properties of the deity or contributions and fines from the community was to be carried on by means of resolutions passed by the panchas. He admitted that the first three defendants were the trustees appointed by the Temple Committee but he contended that they had no hand in the actual management of the temple except receiving the cash allowance from Government and paying it over to the manager of the temple. He further asserted that there had been no acts of mismanagement by the defendants as alleged by the plaintiffs in their plaint, and he, therefore, contended that the suit as against him should be dismissed.

On these pleadings the learned Judge framed several issues. The legal issues were as to whether the suit against defendant No. 4 was maintainable under the Religious Endowments Act, and secondly, whether defendant No. 4 had proved that the temple was not subject to the jurisdiction of the Temple Committee and that therefore the suit under the Religious Endowments Act was not maintainable at all. The learned Judge found on the first issue that the suit against defendant No. 4 was maintainable, and on the second issue he found that it was not proved that the temple was not subject to the jurisdiction of the Temple Committee. With regard to the issues on the merits the learned Judge found that it had been proved by the plaintiffs that defendants Nos. 1 to 3 had unauthorizedly allowed defendant No. 4 to interfere with the management, but it cannot be said that it was improperly done. He further found that defendant No. 4 had not proved that he was the hereditary manager of the suit temple, but the plaintiffs had not succeeded in proving that the various items, alleged by them, of mismanagement or misappropriation by the defendants had been proved. In view of these findings the learned

Judge passed the final order which I have referred to above.

Now, in the plaintiffs' appeal, their grievance is that the lower Court was wrong in not holding that defendants Nos. 1 to 3 had unauthorizedly as well as improperly allowed defendant No. 4 to interfere in the management and that the lower Court ought to have held that the items of misapplication or mismanagement of funds, alleged by them, ought to have been held as proved, and that therefore defendants Nos. 1 to 3 should be removed from the managership. Defendant No. 4's case in his appeal is that the suit is not maintainable against him at all, and that in any case, although he may not be a hereditary manager of this temple, he is entitled to manage this temple in virtue of the long established custom by which a member of defendant No. 4's family, who generally is the president of the Tens, is in management of this temple as well.

I will deal with the appeal of defendant No. 4 first. His main contention is that the suit is not maintainable as against him under s. 14 of the Religious Endowments Act which says that "any person or persons interested in any . . . temple . . . or in the performance of the worship or of the service thereof, or the trusts relating thereto, may . . . sue before the civil Court the trustee, manager or superintendent of such . . . temple . . . or the member of any committee appointed under this Act, for any misfeasance, breach of trust or neglect of duty, committed by such trustee, manager, superintendent or member of such committee, in respect of the trusts vested in, or confided to them respectively." Reliance is placed upon the words "trusts vested in, or confided to them respectively," and it is urged that according to the plaintiffs' own allegations in the plaint no property was either vested in defendant No. 4 or confided to him, and the plaintiffs' allegation was that he was a trespasser or intruder into the management of this temple without any right and without

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having been appointed as manager of this temple, and it is on these grounds that a declaration has been prayed as against him by the plaintiffs. Under the section the suit can lie only against those persons in whom the property has been vested or confided. In other words, the suit could be filed against the members of the Temple Committee or against the trustees or managers who are appointed by the members of the Temple Committee to manage the temple, and defendant No. 4, according to the plaintiffs, does not come under any of these categories, and therefore, no suit could be filed against him under s. 14. For this contention the learned advocate for defendant No. 4 has relied on the case of *Sabapathi* v. *Subraya and Ramanadha*,[1] which has been subsequently approved in the case of *Sivayya* v. *Rami Reddi*.[2] We think this contention has force inasmuch as the wording of the section is quite clear and the remedy which is given under the section and which is a sort of a summary remedy under the Act is to be obtained only against those persons in whom the properties of the institution have been duly vested for the purpose of management. In other words, the section contemplates that in a suit under this section the Court has not to pass any order against a person who is alleged to have intruded into management without authority, but that the only question to be considered is whether a person in whom property has been vested should be removed for misfeasance or malfeasance. Now, it may be that in a suit where the plaintiff alleges that a certain person is a trustee in whom property has vested and the defendant denies that position, the point may arise whether the defendant was a trustee in whom the property had been vested, and for that purpose the Court may go into the question whether he is a trustee. But that is not the position here. The plaintiffs' own case is that defendant No. 4 is not a person in whom the property or management has been vested. So according to the

[1] (1878) 2 Mad. 58.

[2] (1899) 22 Mad. 223.

plaintiffs' own allegation, defendant No. 4 does not come under this section. It is true that defendant No. 4 has set up a hereditary right of management of this temple, and by virtue of the long established custom he says that the right of management is his. But that does not bring him within the wording of this section. The section contemplates only those persons in whom property has been vested or to whom certain funds are confided. Whatever may be the practice according to the defendants, it is not the plaintiffs' case that defendant No. 4 had any right whatever either by direct appointment or by long established practice. That being so, the present suit against him under s. 14 could not be maintained.

It is contended on behalf of the plaintiffs that the suit is so maintainable against defendant No. 4 and reliance is placed on their behalf on the ruling in the case of *Muhammad Siraj-Ul-Haq* v. *Imam-Ud-Din*,[1] and also on the ruling in *Nur Hussain Shah* v. *Mt. Hussain Bibi*.[2] With regard to the Allahabad ruling, it has been rightly distinguished in a Madras case, viz. *Venkatappayya* v. *Venkatapathi*,[3] inasmuch as the defendant in the Allahabad case had been treated as a trustee and not merely as an agent. No doubt, there are some observations in the case in *Muhammad Siraj-Ul-Haq's* case[1] which the plaintiffs might invoke in their favour. But if the learned Judges thought that the plaintiffs could file a suit under s. 14 against a person whom they alleged to be a trespasser or intruder in the right of management, with great respect to them, I think that is not so, and the view taken by the Madras High Court in *Sabapathi* v. *Subraya and Ramanadha*[4] is correct and in consonance with the wording of the section. In the Lahore case which has been relied upon, the contention was that the defendant trustee's father was a trespasser and that the defendant also should be regarded as a trespasser. It was held that that

[1] (1896) 19 All. 104.
[2] [1926] A. I. R. Lah. 16.
[3] (1899) 9 Mad. L. J. 105.
[4] (1878) 2 Mad. 58.

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question was irrelevant and that defendant must be taken to be a validly appointed trustee as the section contemplated that the person in whom the trust vests was a validly appointed trustee. This case instead of supporting the plaintiffs' contention is really against it. The plaintiffs' case in the plaint is that defendant No. 4 was a trespasser and could not be regarded as a person in whom the property would vest.

The result, therefore, is that the present suit is not maintainable as against defendant No. 4, and it should have been dismissed as against him. There is no question, therefore, with regard to the prayer about his removal from management.

[The rest of the judgment is not material to this report. It wound up thus.]

The result would be that the plaintiffs are not entitled to the relief which they seek with regard to the removal of defendants Nos. 1 to 3 from their office as managers, and that the suit against them should be dismissed.

It is not without some regret that we cannot do anything more in this suit because we think that in view of the factions which prevail in this community, the affairs of the temple would not be set in order unless there is a regular scheme for its management which scheme could not unfortunately be framed in this suit under s. 14. If the plaintiffs had filed a suit under s. 92 of the Civil Procedure Code, a scheme could have been framed in consonance with the ancient practice of this temple. But as it is, we cannot do anything by way of framing a scheme except saying that in our opinion the evidence in this case establishes the long established practice of management of this temple affairs by the Tens along with the *muktesars* of the temple. The best course, therefore, would be for the persons interested in the welfare of this temple to file a suit under s. 92 for directions of the Court with regard to the management of

the temple and the framing of a scheme. In the meanwhile, we think that the affairs of this temple, at least its pecuniary affairs, should be sufficiently safeguarded. Unfortunately, the members of the Temple Committee have not been made parties to the suit, and we cannot therefore pass any order as against them in this suit. At the same time, under s. 13 of the Act the Temple Committee has got certain powers over the *muktesars* appointed by them with regard to the annual production of the accounts of this temple. The member of the Committee, who has been examined, has stated that no accounts have been submitted and asked for after 1888 till 1927 when the accounts were refused to be shown by the *muktesars*. It is stated that at that time it was told that the matter was under litigation. Now, however, that this litigation has ended, the Temple Committee should exercise its right of asking the *muktesars* appointed by it to submit the annual accounts to them as provided under the law. Even though the management is done by the community, we believe, the Temple Committee can scrutinize the accounts as *muktesars* have been appointed by it.

As we cannot pass any decretal order against the members of the Temple Committee in this suit, we direct that a copy of our judgment should be sent to the District Magistrate with a request that he or whoever is the proper authority should see that the Temple Committee henceforth exercises its powers over the *muktesars* under the law. We hope that this step would be sufficient to protect to a certain extent the interests of the temple and that in future good sense might prevail among the members of the community so that a scheme might be settled under which the interests of the temple may be safeguarded and the rights of the community may also be respected.

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As the result of our findings First Appeal No. 25 of 1932 will be allowed with costs throughout in favour of defendant No. 4. First Appeal No. 24 of 1932 is dismissed with costs. As there has been no appeal against the order of costs on behalf of defendants Nos. 1 and 2, the order passed by the lower Court will stand.

SEN J. I agree.

Decree varied.

Y. V. D.

APPELLATE CIVIL.

SPECIAL BENCH.

Before Sir John Beaumont, Chief Justice, Mr. Justice Blackwell and Mr. Justice Rangnekar.

1937 October 15

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND AND BALUCHISTAN, REFEROR *v.* THE MAZAGAON DOCK, LIMITED, BOMBAY, ASSESSEES.*

Indian Income-tax Act (XI of 1922), ss. 10 (2) (vi), 2 (2), 26 (2)—Partnership firm converted into a limited company—Company taking over business on a reduced value of buildings, machinery and plant—Company making return of income earned by firm in previous year—Allowance for depreciation—Whether depreciation can be allowed on the original cost to the firm "Assessee"—Interpretation.

A partnership firm known as the Mazagaon Dock carried on business in Bombay as shipbuilders and repairers. The partnership was converted into a limited company and the assessee company, the Mazagaon Dock, Ltd., took over and acquired the business of the firm on April 1, 1935. The buildings, machinery and plant were revalued and purchased by the company at a price which was less than the original price paid by the firm. The assessee company made a return of their income for the year ending March 31, 1935, based on the profit and loss account for that year of the vendor firm, after making an allowance for the depreciation of the buildings, machinery and plant on the original cost paid by the firm, under s. 10 (2) (*vi*) of the Income-tax Act, 1922. The company was assessed under s. 26 (*2*) of the Act by the Income-tax Officer, who was of opinion that the depreciation should be calculated on the reduced cost paid by the assessee company. On a reference to the High Court,

* Civil Reference No. 10 of 1937.