

M.K. Rapai and ors. Vs. John and ors.

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Overruled by : [M.K. Rappai and Ors. Vs. John and Ors.](#)

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Court : Kerala

Decided On : May-18-1964

Reported in : AIR1965Ker203

Judge : T.K. Joseph and; T.C. Raghavan, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 - Order 6, Rule 7;
[Contract Act, 1872](#) - Sections 2; [Trusts Act, 1882](#) - Sections 6

Appeal No. : A.S. No. 591 of 1963 and C.M.P. No. 488 of 1964

Appellant : M.K. Rapai and ors.

Respondent : John and ors.

Advocate for Pet/Ap. : Panampilly Govinda Menon,; P.K. Krishnankutty Menon,;
P.

Disposition : Appeal partly allowed

Judgement :

Raghavan, J.

1. The appeal arises out of a suit claiming some reliefs regarding a trust, defendants 3 to 8 being the appellants and the two plaintiff's being the contesting respondents. The 1st plaintiff is a major and the 2nd plaintiff a minor represented

by his father as next friend. The matter comes up before this Court for the second time.

2. A Christian named Kochu Vareed settled considerable properties in trust under the deed of trust, Ex. P. 1, in December 1955. He executed the supplementary deed of trust, Ex. D 2, in October 1956. Two of the trustees under Ex. P. 1 were the fathers of the two plaintiffs respectively. The father of the 1st plaintiff resigned his trusteeship on 27th May 1957 and the father of the 2nd plaintiff also resigned on 12th March, 1960. The suit was instituted in 1981 containing as many as eleven prayers, of which the last three were reliefs pending suit and regarding costs. We are not concerned with those three. Prayer (h) was abandoned by the plaintiffs and we are not concerned with that either. The other seven prayers may be extracted ; and they are :

'(a) that defendants 4 to 9 be declared trespassers on the trust;

(b) that all the acts and proceedings of defendants 1 to 9, done since the resignation of T. V, John and V. L. Lazar, in respect of the administration of the trust, be declared invalid, and void ;

(c) that a full inquiry into their administration and accounts caused to be duly rendered;

(d) that all properties and funds used, misused, disbursed, wasted or appropriated by them on any account be recovered with interest for the trust, from the wrongdoers and from all those who benefited by their acts or held such properties or funds;

(e) that plaintiffs be appointed to their rightful place as trustees and the second plaintiff, being a minor now, be permitted to exercise his rights and safeguard his interest until he attains majority, through his 'Next Friend', namely, his father;

(f) that defendants' 10 and 11 be declared to be, and to have always since the constitution of the trust been, lawful trustees thereof entitled to share in its administration; and

(g) that defendants 4 to 9 be permanently restrained from interfering in any manner with the trust and its lawful trustees.'

The trial Court framed the following two issues :

'(1) Whether the suit is maintainable due to want of compliance with Section 92 of the Code of Civil Procedure; and

(2) Whether this Court has jurisdiction to try this suit being a suit relating to trust.' These issues were tried as preliminary issues; and the trial Court held that Section 92(1) of the Code was a bar; and therefore dismissed the suit.'

3. The plaintiffs took the matter in appeal before this Court and a Division Bench heard the appeal.

The learned Judges set four tests to find out whether the suit was hit by Section 92(1) of the Code. The tests were that

'(1) there must exist a trust for public purpose of a charitable or religious nature;

(2) the plaintiff must allege that there is a breach of such trust or that the direction of the Court is necessary for the administration of the trust;

(3) the reliefs claimed must include one or more of the reliefs specified in the section; and

(4) the suit must be a representative suit brought on behalf of the interested public, in other words, brought to vindicate public rights and not the personal rights of individuals.'

Our learned brothers applied the aforesaid tests to the several prayers in the plaint extracted hereinbefore and held that the first three tests or conditions were satisfied regarding all the prayers; but the fourth condition was satisfied only regarding prayers other than prayer (e). In their opinion the suit was not a representative one in so far as prayer (e) was concerned; and that prayer was only personal in character to the plaintiffs and the relief was in no way shared by the general public, the beneficiaries of the trust. In this view the learned Judges

allowed the appeal in part and set aside the dismissal of the suit 'in so far, and only in so far as, it related to prayer (e)' and remanded 'the suit to the Court below for trial in respect of the claim in that prayer'. They also indicated clearly that the lower Court would try the suit as if prayer (e) were the only relief sought in the suit.

4. The lower Court thereafter framed the following four additional issues :

'(3) Are plaintiffs entitled to be appointed trustees ?

(4) Can the next friend of 2nd plaintiff exercise such right ?

(5) is the claim of the plaintiffs barred by limitation and waiver or laches and

(6) Regarding costs and reliefs.'

The lower Court held on issue 5 that the claim was not barred by limitation, waiver or laches; and that finding is not questioned before us in appeal. On issue 3 the lower Court held in favour of the plaintiffs and on issue 4 it entered a negative finding. Ultimately, the lower Court ruled that 'plaintiffs 1 and 2 are declared appointed as two of the trustees of the Thattil Kochu Vareed. Educational and Charitable Trust, but the 2nd plaintiff will have right to exercise rights as trustees only after he attains majority'.

5. in the appeal defendants 3 to 8 dispute the correctness of the decision on issue 3 and in the memorandum of cross-objections the 2nd plaintiff questions the correctness of the decision on issue 4. In the C. M. P. the appellants seek leave to advance arguments on a question of law, which is not specifically raised in the memorandum of appeal, namely, that the plaintiffs, not being parties to the trust deed,, cannot claim and enforce rights based upon that document. We allow this.

6. The contentions raised by Mr. Panampilli Govinda Menon on behalf of the appellants are (1) that the trial Court has not in fact appointed the plaintiffs trustees and therefore the declaration that they are appointed trustees is wrong; (2) that under the law and under the terms of the deed of trust, the power of appointment is with the trustees 'and unless they appoint the plaintiffs trustees, the latter do not get any right; (3) that the right of the plaintiffs can arise only on the

death of their fathers, the predecessor trustees, and not on their resignation; (4) that the plaintiffs, being strangers to the trust deed, cannot file a suit to enforce any rights under the deed; (5) that the 2nd plaintiff, who is a minor, is unfit to be appointed trustee; and (6) that both the plaintiffs are not fit and proper persons to be appointed trustees. In the memorandum of cross-objections Mr. Manuel T. Pafkeday contends that the lower Court has erred in not allowing the 2nd plaintiff to exercise his powers as trustee through his next friend and in deferring such exercise of powers until he attains majority.

7. Though the appeal has been argued at some length, we are of opinion that the questions for adjudication fall within narrow confines as a consequence of the decision of this Court in the earlier appeal. The earlier decision has concluded between the parties the following questions: (1) that the character of defendants 4 to 9 as trustees cannot be questioned and the plaintiffs cannot contend that the said defendants are trespassers or usurpers; (2) that their appointment as trustees cannot even be obliquely questioned; and (3) that the plaintiffs cannot question the finding that they are mere claimants for appointment as trustees and not trustees holding office. For instance, paragraph 9 of the earlier judgment of this Court says :

'That these defendants are in actual possession of the office and are functioning as trustees is conceded by the plaintiff, and if it is to be declared that they are trespassers on the office and if they are to be prevented from discharging the functions thereof, that would be nothing more or less than their removal. It is well settled that Section 92(1)(a) applies to the removal of a de facto trustee as of a de jure trustee and the wording of prayers (a) and (g), as if these prayers were for a declaration and injunction and not, as they in fact are, for a removal, seems to us only a transparent attempt to keep out of the section. But this cannot be achieved by a mere change in the wording when the meaning remains the same.'

Again in paragraph 15 appears :

'So far as prayer (c) is concerned, what the plaintiffs seek is their appointment to their rightful place as trustees.'

and in paragraph 16 :

'Admittedly, the plaintiffs are not holding and have never held that office, and what they seek is not a declaration that they are trustees, but an appointment to their rightful place as trustees.'

These observations are binding on the parties, since the parties have not appealed against the earlier decision; and they cannot go behind that decision.

8. Bearing this in mind we shall now consider the several contentions raised in the appeal and in the memorandum of cross-objections. Mr. Govinda Menon points out under his first ground of attack that the lower Court has not appointed the plaintiffs trustees, nor has anybody appointed them. Consequently, the counsel contends, the conclusion of the lower Court that the plaintiffs 'are declared appointed as two of the trustees' is incorrect. Mr. Paikeday replies that the plaintiffs are hereditary trustees and nobody need appoint them trustees. According to him, the plaintiffs have to be, automatically as it were, trustees on the resignation of their respective fathers, the predecessor trustees. This argument of Mr. Paikeday is not warranted by the averments in the plaint; for instance, paragraph 12 states that the plaintiff's have right to be appointed trustees on the resignation of their fathers. Prayer (e) is also to the same effect, that the plaintiffs be appointed to their rightful place as trustees, The earlier appeal also proceeded on that basis. Similarly, additional issue 3 framed after remand is also to the same effect.

Therefore, the contention that the plaintiffs are hereditary trustees, and as such, they have already become trustees on the resignation of their fathers cannot be accepted. Even though the office of trustee may be hereditary under Clause 5 (3) of Ex. P. 1, which will be considered in more detail hereafter, until the plaintiffs are appointed trustees as contemplated by Clause 6, which will again be considered in detail hereafter, they will not be trustees. The scheme of the said provisions appears to be that the office of trustee is held by reason of appointment and not simply because of a hereditary right to it. In this connection it will be instructive to refer to *Ramappa v. Sangappa*, AIR 1958 S C 937, which has again been followed in the recent decision in *Guru Gobinda Basu v. Sankari Prasad Ghosal*, AIR 1964

S C 254. If the lower court has not appointed the plaintiffs trustees, the declaration that they are appointed trustees is wrong. If, on the other hand, the lower court by its declaration means that it has appointed the plaintiffs trustees, then the question arises whether the court in the present suit could have so appointed them. This question we propose to consider at a later stage. For the present we only observe that if the lower court has not appointed the plaintiffs trustees, the conclusion of the lower court that the plaintiffs are declared appointed as trustees is wrong.

9. The second ground of attack on behalf of the appellants is that under the trust deed and also under the law the power of appointment of trustees is vested in the other trustees; and until such appointment is made, the plaintiffs do not get any right as trustees. The relevant provisions are found in Clauses 6 and 11 of Ex. P-I. Clause 6 provides that in the case of the occurrence of vacancy of a trustee by reason of death or resignation or for any other cause, the remaining trustees shall appoint a new trustee. The clause provides further that if, however, the remaining trustees refuse or fail to co-opt within six months to fill the vacancies, application may be made to the District Court of Trichur for nomination of the trustee or trustees after the said period of six months. Clause 11 recites that the properties of the trust shall vest in the trustees for the time being in office and on death, resignation or removal of any trustee or trustees, they shall continue to vest in the surviving or remaining trustees; and on the appointment of any new trustee or trustees the said properties shall vest in him or them also along with the other trustees.

What these provisions show is that on the death or resignation of any of the trustees the successor has to be appointed by the remaining trustees; and if they fail to do that within six months, the claimant to trusteeship, even if he claims it as a hereditary right, has to apply to the District Court of Tricnur for getting him nominated as trustee. The trustee has to be appointed; and the appointment must, in the first instance, be by the remaining trustees, and on their failure, by the court. Until a person is appointed trustee, the trust properties vest in the other trustees already in office; and only on his appointment as trustees will the properties vest in him as well. As observed by the Supreme Court in Hamappa's case, AIR 1958 S C 937, he becomes a trustee only by reason of the appointment, either by the

remaining trustees or by the court, and not simply because of a hereditary right to the trusteeship.

10. in this connection the appellants' counsel seeks to make a distinction between the successor to P. P. Joseph, one of the trustees, and the successors like the plaintiff's to the other trustees on the basis of Clause (5) (3) of the trust deed, which reads :

'P.P.Joseph and after him his second son, namely P. J. Sunny, shall be one of the trustees; T, V. John, T. D. Verghese, P. P. Antony, T. J. George, V. L. Lazar and M, K. Rappai and after them their eldestsons and thereafter the eldest male among the descendants in the male line of descent of all the above trustees shall have a right to be one of the trustees.'

The learned counsel argues that on.the wording 'P. P. Joseph and after him his second son, namely P. J Sunny, shall be one of the trustees', P. J. Sunny shall be a trustee after his father; whereas, in the case of successors like the plaintiffs of the other trustees, the successors shall have only 'a right to be one of the trustees.'

We do not think that this distinction is of much consequence. If we scrutinise Sub-clause (3) more closely, what emerges is this : P. P, Joseph 'shall be one of the trustees'; and after him his second son, P. J. Sunny, 'shall be one of the trustees'. T. V. John, T. D. Verghese, etc, 'shall have a right to be one of the trustees'; and after them their eldest sons and thereafter the eldest male among the descendants in the male line of descent of all the above trustees 'shall have a right to be one of the trustees'. T. V. John, T. D. Varghese, etc., the original trustees, are made trustees by Ex. P-I, and they are not merelyfiven a right to be one of the trustees, as P. P. Joseph imself is made one of the trustees. It will be a little puerile and hypertechnical to say that P. P. Joseph is a trustee, but T. V. Joseph, T. D. Varghese, etc., have only a right to be trustees; and this will be the result if this contention is accepted. Therefore, the slight difference in wording 'regarding P. P. Joseph and his successor and the other trustees and their successors is not of any consequence. All the original trustees are appointed under Ex. P. 1; and their successors have a hereditary right to be trustees subject to their appointment

under Clause 6 of the trust deed.

11. The third contention of Mr. Govinda Menon is that the right of the plaintiffs can arise only on the death of their fathers, the predecessor trustees, and not on their resignation. He argues that the word used in the document is 'after,' which, according to him, means- 'on the death of.' We do not think this contention has much force, because clause 6 already referred to makes it abundantly clear that the claim for appointment arises equally On resignation or on vacating office for any other cause as on death. Clause 6 also provides that a trustee after acceptance of office may resign at pleasure without assigning any reason. Therefore, we have no hesitation in rejecting this contention.

12. it is then argued by the learned counsel of the appellants that the plaintiffs being strangers to the trust deed, cannot claim or enforce any right under the trust deed, because there is no privity of contract. We do not think that this contention is quite happy. If the document creating the trust is treated as a contract simpliciter, detached of the public trust attached to it, the argument may have some force. But in this case, the settlor has created a public trust and transferred properties in the name of trustees to be held and utilised for certain charitable purposes. He has also set lines of succession for the trusteeship and has further indicated the remedy if a person having a right to be a trustee is not appointed trustee by the other trustees. In such a case, a person coming within such a line and having a right to be appointed trustee can seek the relief to get himself appointed. Therefore, we reject this contention as well of Mr. Govinda Menon.

13. The next two grounds of attack are that the 2nd plaintiff being a minor should not have been appointed trustee; and that both the plaintiffs are not in fact fit and proper persons to be appointed trustees. The learned counsel of the plaintiff-respondents brings to our notice some decisions to the effect that hereditary trusteeship is property and even a minor can get himself appointed trustee and function through his next friend. Two of the decisions are Meenakshi Achi v. Somasundaram Piliai, AIR 1921 Mad 388 and Monohar Mukerjee v. Bhupendra Nath; AIR 1932 Cal 791. But the appellants' counsel contends that this proposition applies only to trusts under the Hindu law and not to a trust like the present one

created by a Christian. He points out that both the above mentioned decisions relate to Hindu trusts and he further refers to the decision in *Janki Raman Pd. Mishra v. Koshalyanandan Pd. Mishra*, AIR 1961 Pat 293 and also to a passage at page 184 of ,B. K. Mukherjea's *Tagore Law Lectures on the Hindu Law of Religious and Charitable Trusts*, 2nd Edn., to the effect that shebaitship is property in Hindu Law. In the view we are taking, we do not think it is necessary to decide this question in the present case. We are again of opinion that the question whether the plaintiffs are fit and proper persons to be appointed trustees also does not arise for consideration in this case..

14. On the memorandum of cross-objections also we do not express any opinion on the question whether the 2nd plaintiff can act as a trustee through his next friend. That question can arise only when the 2nd plaintiff seeks to get himself appointed trustee under the provisions of the trust deed.

15. Before we conclude we would advert to one or two other arguments advanced by Mr. Paikeday. He contends that this suit is not one for removal of trustees and for appointment of new trustees. According to him, this is a suit, at the most, for declaring or establishing the right of the plaintiffs; and is merely a contest between the plaintiffs on the one side and the defendants on the other, both in their individual capacities, and not in any representative capacity. He also contends that a trustee de son tort need not be removed from office. In support of this he draws our attention to decisions like *Ayatannessa Bibi v. K. Khalifa*, ILR 41 Cal 749: (AIR 1914 Cal 356) and *Sundaralingam Chettiar v. S. Nagalingam Chettiar*, AIR 1958 Mad 307. But, we are afraid we cannot countenance this contention, because this matter was specifically considered by this Court on the earlier occasion and that decision, right or wrong, binds the parties.

16. Mr. Paikeday then argues that Ex. D-2 cannot be looked into, because clause 12 of Ex. P. 1 specifically recites that the trust shall be irrevocable. According to him, the provision in Ex. D-2 fixing the maximum number of trustees at twelve and the other provisions are in reality in revocation of the provisions of Ex. P. 1, in support of this contention he cites *Puttu Lal v. Daya Nand*, AIR 1922 All 499 and *Nallasivan Pillai v. Ganapathi Mudaliar*, AIR 1940 Mad 633. We do not propose to

pronounce any opinion on the authority, validity or binding nature of Ex. D2 in this litigation, because, according to us, the matter will have to be considered at the time when the plaintiffs seek to get themselves appointed trustees.

17. it is also pointed out that the court may have no option but to appoint the plaintiffs, if they are hereditary trustees and they have a right to be appointed to the office--vide *Kalandar Batcha Saib v. Jailani Saib*, AIR 1930 Mad 554. But, that again can arise only when the question of appointment of trustees arises for consideration in a properly framed suit and not in this litigation.

18. There is yet another hurdle for the plaintiffs in this case. They cannot be appointed trustees without removing some of the trustees already in office. If it is accepted that the new trustees were appointed under Ex. D2 and the places of V. L. Lazar and T. V. John, the fathers of the plaintiffs, were not filled up and are still vacant, there may be some force in the contention that in the present litigation no removal of any trustee already functioning is either prayed for or need be made. But the plaintiffs dispute the validity of Ex. D2; for instance, they say in paragraphs 8 and 9 of their replication that the supplementary deed is nothing more than 'just waste of paper' and that they repudiate the same. In the previous judgment of this Court it was definitely found that defendants 4 to 9 were functioning as trustees and without removing some of them the plaintiffs could not be appointed trustees. Thus, even if the plaintiffs in their individual capacity can claim to be appointed trustees in this suit, which we very much doubt in view of clause of Sub-section (1) of Section 92 of the Code of Civil Procedure, that cannot be effected without removing two other trustees already in office; and such removal can be made only in a suit under Section 92 of the Code. In this view also the plaintiffs cannot get themselves appointed trustees in this suit.

19. in the result, we allow the appeal in part and alter the declaration granted by the lower Court to one to the effect that the plaintiff's are next in the line of succession to V. L. Lazar and T. V. John respectively and that they are entitled to claim appointment as trustees. But' such appointment can be made only in a properly framed suit under Section 92 of the Code of Civil Procedure. The memorandum of cross-objections is dismissed; but we make it clear that the

plaintiffs are free to raise the same question again if and when they bring the suit. In the circumstances, we direct both parties to bear their respective costs in the appeal as well as in the memorandum of cross-objections.

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