

Shree Gollaleshwar Dev and Others

Vs

Gangawwa Kom Shantayya Math and Others

Civil Appeal No. 1195 of 1972

(A. P. Sen, D. P. Madon JJ)

15.10.1985

JUDGMENT

A. P. SEN, J. -

1. This appeal on certificate from the judgment and decree of the Karnataka High Court dated April 5, 1971 raises a question of general public importance. The question is whether two or more trustees of a registered public trust can, with the permission in writing of the Charity Commissioner as provided for in Section 51 of the Bombay Public Trusts Act, 1950, bring a suit for declaration that certain property belongs to the public trusts and for possession of the same from a person holding it adversely to the trust under section 50(ii) of the Bombay Public Trusts Act, 1950. That depends on whether the words "persons having interest in the trust" occurring in Section 2(10) and Section 50 of the Act do or do not include the trustees of a registered public trust. If they do not two or more trustees cannot file a suit as completed section 50(ii) of the Act. There had been divergence of opinion in the High Court as to the precise meaning of the words is "persons having interest in the trust" in the Section 2(10) and Section 50 of the Act and as conflicting views had been expressed by different Benches from time to time, the matter was referred to a full Bench. The correctness of the views taken by the Full Bench is in question in this appeal.

2. Put very briefly, the essential facts are these. Shree Gollaleshwar Dev is an ancient temple and is situate in village Golgeri in the district of Bijapur which formed part of the erstwhile state of Bombay prior to the reorganisation of the State. Consequent upon the enactment of the Bombay Public Trusts Act, 1950, the temple was registered as a public trust. The district of Bijapur became part of the new state of Karnataka on the appointed day i.e. November 1, 1956 under the states Reorganisation Act 1956. The Act has continued to remain in force in the areas which formed part of the erstwhile State of Bombay.

3. It had been customary for the trustees to permit persons rendering service to the temple to reside in the suit premises on leave and licence. The subject-matter in dispute consisting of arches alongside the eastern, northern and southern walls of the temples are meant for the use of devotees for their temporary rest and stay when they come to visit the temple. The main temple itself is situate in the middle surrounded by an open courtyard. The suit premises being within the four walls of the temple, they form part of the temple and are entered in the certificate of registration as belonging to the temple.

4. It appears that the plaintiff 2's uncle Mariyappa Lingappa permitted one Balalochanayya Hiremath to reside in a part of the suit premises as he happened to be a man of saintly pursuit and one without a family. Subsequently, Balalochanayya left the premises occupied by him. Thereafter,

plaintiff 2's father as the trustee employed two brothers, Rachayya and Gurunandayya to perform services for the temple and he assigned the suit premises to them for their residence with a view that they should be available to occupy the premises free so long as the trustees allowed them to remain in occupation and so long as they were retained in the service of the temple. They were to remain in occupation of the suit premises as licences of the trustee of the temple. Rachayya and Gurunandayya started asserting rights derogatory to the trust. Accordingly, plaintiff 2's father as the trustee filed Civil Suit 96 of 1935 in the court of the Joint Civil Judge Bijapur and the learned Civil Judge by his judgment dated August 8, 1936 decreed the plaintiffs claim. The dependents went up in appeal to the court to the District Judge in Regular Appeal 109 of 1936 but the appeal was dismissed on November 22, 1937. Thereafter, plaintiff 2's father terminated the services of Rachayya and Gurunandayya and called on them to vacate the suit premises which they did. After Rachayya and Gurunandayya were removed from service of the temple Shantayya brother Rachayya and Smt. Shankarawa, widow of Gurunandayya were taken in service of the temple and allowed to reside in the suit premises free of rent on condition that they were to occupy the said premises so long as their services to the temple were required. In 1957, Shantayya along with Smt. Shankarawa also started creating trouble and plaintiff 2's father, accordingly, terminated their services and asked them to vacate the suit premises. On their failure to do so, he brought two suits being Civil Suits 244 and 255 of 1957 in the name of idol Shree Gollaleshwar Dev as plaintiff 1 with himself being the trustee as plaintiff 2. The case of the plaintiff was that the defendants were in occupation of the said premises with leave and licence of the trustee of the temple and as they refused to deliver possession of the suit premises the suits had been instituted for a declaration that the property belongs to the temple and for possession thereof. The defendants contested the plaintiffs claim on various grounds. They pleaded inter alia that the temple had no right or title to the suit premises which belonged to them by virtue of the registered gift-deed dated February 19, 1917 executed by Mariyappa uncle of plaintiff 2 in favour of their predecessor-in-title Balalochanayya, that there was no consent in writing given by Charity Commissioner under section 51 and therefore the suits brought under section 50(ii) of the Act were not maintainable; and further that the Court of the suits. The learned Civil Judge following the decision of the Mysore High Court in Marikamba Temple and Hanumant Temple, Sirsi, by its Manager, S. S. Dhakappa v. Subraya Venkataramanappa Barkur (ILR 1958 Mys 736) upheld those contentions and dismissed the suit as not maintainable.

5. It was after this that the present suit was brought by the aforesaid plaintiffs in the court of the District Judge Bijapur as Civil Suit 2 of 1962 under Section 50(ii) of the Act for the aforesaid reliefs with the consent in writing of the Charity Commissioner granted under Section 51. As earlier the suit was instituted by appellant 2's father as plaintiff 2 in the name of idol Shree Gollaleshwar Dev as plaintiff 1. Plaintiff 2 was impleaded as the present trustee of the temple and plaintiff 3 as the grandson of Mariappa, the elder brother of plaintiff 2, as a beneficiary. Plaintiffs 2 and 3 joined the suit as "persons interested in the trust". The High Court in mean while had reversed the decision in Marikamba case (ILR 1958 Mys 736) in Ganapathi Ram Naik v. Kumta Shri Venkatraman Dev ((1964) 1 Mys LJ 172). The learned District Judge following the decision in Ganapathi Ram Naik Case ((1964) 1 Mys LJ 172) held that although a suit for recovery of property belonging to the idol could be brought either by the idol represented by the trustee or the manager such a suit is not contemplated by section 50(ii) of the Act and was therefore not maintainable. It was observed :

The words "persons having interest in the trust" in Section 50 denote a person whose interest is inferior to that of a trustee or manager and it is by reason of the existence of that inferior or smaller interest that section 50 of the Act like Section 92 of the Code of Civil Procedure 1908 authorises the institution of a suit and regulates it in the manner provided therein. But that section does not govern the institution of a suit

by a person possessing larger and higher interest which is not regulated by it.

The learned district Judge accordingly held that such a suit would be governed by the ordinary law and would not lie in the District Court but either in the Court of Civil Judge, Junior Division or the Court of the Civil Judge Senior Division according to the valuation of the subject-matter of the suit.

6. Aggrieved by the judgment of the District Judge the appellants preferred an appeal before the High Court. A Division Bench which heard the appeal felt that the decision in Ganapathi Ram Case ((1964) 1 Mys LJ 172) required reconsideration and framed two questions for the opinion of the Full Bench namely :

(1) Whether the expression "persons having interest in the trust" occurring in Section 2(10) and Section 50 of the Act includes trustees also.

(2) Whether two or more trustees of a public trust can file a suit for declaration that a property belongs to the public trust and for recovery of possession of the same from a person holding it adversely to the trust under Section 50(ii) of the Act.

7. The Full Bench upon the hypothesis that Section 50 of the Act is in pari materia with Section 92 of the Code expressed that the well-settled principles governing Section 92 of the code are equally applicable to Section 50 of the Act It accordingly held following the decision of Woodroffe, J. in Budree Das Mukim v. Chooni Lal Johurry (ILR (1906) 33 Cal 789, 807 : (1905-1906) 10 CWN 581) and various other decisions of different different High Court laying down the scope and effect of Section 92 of the Code and Dr. B. K. Mukherjea's Tagore Law Lectures on the Hindu Law of Religious and Charitable Trusts, 3rd Edn., p. 347 that the suit contemplated by section 50 of the Act was one of a representative character. The observation of Woodroffe, J. on the case of Budree Das Mukim v. Chooni Lal Johurry (ILR (1906) 33 Cal 789, 807 : (1905-1906) 10 CWN 581) which has become the locus classicus were to the effect :

The suit contemplated by the section is one of a representative character.

It is obvious that the Advocate-General Collector or other public officer can and do sue only as representing the public and if, instead of these public officer, two or more persons having an interest in the trust, sue with their consent, they so sue under a warrant to represent the public as the objects of the trusts : see Lakshmandas Raghunathdas v. Jugalkishore (ILR (1898) 22 Bom 216).

It follows from this that when a person or persons sue not to establish the general rights of the public, of which they are a member or members, but to remedy a particular infringement of their own individual rights, the suit is not within or need not be brought under the section.

8. It next relied upon the decision of this Court in Bishwanath v. Thakur Radhaballabhji ((1967) 2 SCR 618 : AIR 1967 SC 1044) laying down that a suit by an idol, as a juristic person against persons who interfered unlawfully with the property of the idol was a suit for enforcement of its private rights and was therefore not a suit to which Section 92 of the Code applied and thus such a suit was outside the purview of Section 92 of the Code and it was not a bar to its maintainability for the conclusion that a suit instituted by the idol represented by its trustees or by persons as qua trustees for recovery of trust property is a suit for enforcement of the private rights of the idol or the trustees.

9. The Full Bench approved of the view expressed by Somnath Iyer and Gopivallabha Iyengar, JJ. in *Ganapathi Ram Naik v. Kumta Shri Venkataraman Dev* (ILR 1963 Mys 1059) that a suit by a deity for possession being a suit for vindicating its own personal rights was not governed by Section 50 of the Act but disagreed with it on the construction placed by it upon the words "person having interest" in Section 2(10) and Section 50 of the Act. The Division Bench in *Ganapathi Ram* case (ILR 1963 Mys 1059) held that the expression "person having interest" denotes one whose interest inferior/to that of a trustee or a manager and it is by reason of existence of that inferior or smaller interest that section 50 of the Act like Section 92 of the Code, authorizes the institution of a suit and regulates it in the manner provided therein. It was of the view that Section 50 of the Act does not govern institution of a suit by a person possessing larger and a higher interest which is not regulated by it, and different from the view taken by Hegde, J. in *Shri Marikamba Temple v. Subraya Venkataramanappa* (ILR 1958 Mys 736) holding a suit by an idol represented by the trustee was governed by Section 50 of the Act. The Full Bench accordingly held that persons who institute suits in their capacity as trustees do so not in their representative capacity representing the interest of the public but in their own individual or personal capacity to vindicate their own rights or that of the idol. That is to say, merely because the trustees were persons having interest in the trust the provision of Section 50 (ii) of the Act would not be attracted to a suit of this kind. Upon this reasoning the Full Bench observed :

It is, therefore, clear that the expression "two or more persons having an interest in the trust" in Section 50 of the Act cannot include the trustees but persons other than the trustees who have an interest in the trust. The reason for holding that the expression "two or more persons having an interest in the trust" cannot be construed to include trustees, is not because the trustees are not persons interested in the trust but because of the character of the suit contemplated under Section 50 of the Act.

The remedy of the idol represented by its trustee or of the trustees to enforce their individual rights is not institute under Section 50, but to sue in the ordinary courts in the usual way as any other citizen, and for such a suit the trustees are not required to satisfy the conditions of Section 50 of the Act. A suit for recovery of trust property instituted by a trustee not because one for enforcement of the right of the public but being merely for enforcement of the private rights of the trust of trustees, does not, in our opinion, fall within the scope of section 50 of the Act.

Upon that view, the Full Bench answered the questions referred as follows :

- (1) The expression "persons having interest in the trust" occurring in section 2(10) and Section 50 of the Act does not include the trustees when they institute the suit in their capacity as trustees for vindicating their private rights.
- (2) Consequently, two or more trustees of a public trust cannot file a suit under Section 50(ii) of the Act for a declaration that the property belongs to the public trust and for possession of the same from a person holding it adversely to the trust.

In accordance with the opinion of the Full Bench the Division Bench dismissed the appeal filed by the appellants.

10. Before we advert to the argument based on Section 50 of the Act, it should be mentioned that it is undisputed that the temple of Shree Gollaleshwar Dev is a Public temple registered as a public trust under the provision of the Act. The Plaintiffs suing are first, the idol, second, a trustee, and

third, a member of the family creating the endowment i.e. a beneficiary. The question is whether the plaintiffs 2 and 3 are persons having an interest in the trust within the meaning of Section 2(10) which reads :

2(10) "Person having interest" includes -

(a) in the case of a temple, a person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in that habit of partaking in the distribution of gifts thereof :

(b) in the case of a math a disciple of the math or a person of the religious persuasion to which the math belongs :

(c) in the case of wakf, a person who is entitled to receive any pecuniary or other benefit from the wakf and includes a person who has a right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, maqbara or other religious institutions connected with the wakf or to participate in any religious or charitable institution under the wakf :

(d) in the case of a society registered under the Societies Registration Act, 1860, any member of such society; and

(e) in the case of any other public trust, any beneficiary.

11. The word 'trustee' as defined in section 2(18) reads :

2(18) 'trustee' means a person in whom either alone or in association with other persons the trust property is vested and includes a manager :

12. By the Bombay public Trusts (Amendment) Act, 1953, the word ' includes' was substituted for the word 'means'. The definition of the words "person having interest" in section 2(10) was made inclusive to set at rest all doubts and difficulties as to the meaning of these words, which were intended and meant to be used in a generic sense so as to include not only the trustees but also the beneficiaries and other persons interested in the trust. It would therefore appear that the definition of the expression "person having interest" in section 2(10) is wide enough to include to note merely the beneficiaries of the temple math wakf etc. but also the trustees. It must therefore follow that plaintiffs 2 and 3 who undoubtedly are members of the founder's family i.e. beneficiaries are entitled to attend at performance of worship or service in the temple and also entitled to partake in the distribution of offerings to the deity and thus answer the description "person having interest" as defined in section 2(10) of the Act.

13. Section 50 of the Act on the construction of which the appeal depends, insofar as material, provides as follows :

50. In any case -

#(i) * * *##

(ii) Where a declaration is necessary that a particular property is a property belonging to a public trust or where a direction is required to recover the possession of such

property or the proceeds thereof or for an account of such property or proceeds from any person including a person holding adversely to the public trust, or

(iii) where the direction of the court is deemed necessary for the administration of any public trust.

the Charity Commissioner or two or more persons having an interest in the trust and having obtained the consent in writing of the Charity Commissioner as provided in Section 51 may institute a suit whether contentious or not in the court within the local limits of whose jurisdiction the whole or part of the subject matter of the trust is state to obtain a decree for any of following reliefs :

(a) an order for the recovery of the possession of such property or proceeds thereof.

Sub-section (1) of Section 51 of the Act which also has a material bearing reads :

51(1) If the persons having an interest in any public trust intend to file a suit of the nature specified in section 50, they shall apply to the Charity Commissioner in writing for his consent. The Charity Commissioner, after hearing the parties and after making such inquiry as he thinks fit, may within a period of six months from the date on which the application is made, grant or refuse his consent to the institution of the such suit. The order the Charity Commissioner refusing his consent shall be in writing and shall state the reasons for the refusal.

Sob-section (1) of section 52 of the Act provides that notwithstanding anything contained in the Code of Civil Procedure, 1908, the provisions of Sections 92 and 93 of the Code shall not apply to the public trusts governed by the Act.

14. It is clear from these provisions that section 50 of the Act created an regulated a right to institute a suit by the Charity Commissioner or by two or more persons interested in the trust, in the form of supplementary statutory provisions without defeasance of the right of the manager or a trustee or a shebait of an idol to bring a suit in the name of idol to recover the property of the trust in the usual way. There is therefore no person why the two or more persons interested in the trust should be deprived of the right to bring a suit as contemplated by Section 50 (ii)(a) of the Act. Although sub-section (1) of Section 52 makes Sections 92 and 93 of the Code inapplicable public trust registered under the Act, it has made provision by Section 50 for institution of such suits by the Charity Commissioner or by the two or more persons interested in the trust and having obtained the consent in writing of the Charity commissioner under Section 51 of the Act.

15. We are unable to subscribe to the view expressed by the High Court. Although the Full Bench rightly adverted to sub-section (1) of Section 52 of the Act which excludes the applicability of Sections 92 and 93 of the Code to the public trusts governed by the Act, it was not right in its conclusion that a suit instituted by the idol, represented by two or more trustees, with the written consent of the Charity Commissioner as provided in Section 51 of the Act was not within the purview of Section 50(ii)(a) of the act and therefore could not be brought in the Court of the District Judge. Although section 50 of the Act is structured upon the pattern of Section 92 of the Code, the Full Bench failed to appropriate that there is no provision in Section 92 of the Code analogous to clause (ii) or relief (a) of Section 50 of the Act. It will be seen from Section 50 that the section authorizes the institution of a suit by the Charity Commissioner or two or more persons interested in the trust only in the District Court having jurisdiction to try it. The scope of Section 50 of the Act is

wider than that of Section 92 of the Code. It applies to a case so long as the relief claimed falls within the scope of section. One of the reliefs that can be claimed in a suit brought under Section 50 of the Act is that a covered by relief (a) set out in clause (ii) viz. for a declaration that a certain property belongs to a public trust and for possession thereof from a person holding it adversely to the trust viz. a suit brought by the Charity Commissioner or two or more persons interested in the trust with his consent in writing as provided in Section 51 of the Act.

16. The fallacy underlying in the reasoning of the Full Bench lies in the wrongful assumption that Section 50 of the act is in a pari materia with Section 92 of the Code. It is upon that erroneous hypothesis that it observes that the suit contemplated by Section 50 of the Act is one of a representative character. It overlooks the scope and effect of Section 50 of the Act which contemplates not only suits of a representative character but also suits by two or more trustees for preservation of the property of the trust. The reasoning of the Full Bench that if the suit is filed by the idol to enforce its private rights the provisions of Section 92 of the Code are not attracted and a fortiori the same principles equally govern suits under Section 50 of the Act, is not worthy of acceptance. The Full Bench was also wrong in relying upon the decision of this Court in Bishwanath case ((1967) 2 SCR 618 : AIR 1967 SC 1044) which turned on the construction of Section 92 of the Code. In that case it was held that the bar of section 92 did not apply to suit by an idol or by its trustees for a declaration that the suit property belonged to the trust and for possession of the same from persons holding the properties adversely to the trust inasmuch a suit is not a suit if the representative character institute in the interest of the public but is really a suit for the vindication of the individual or personal rights of the deity or the trustees. The decision in Bishwanath case ((1967) 2 SCR 618 : AIR 1967 SC 1044) is therefore clearly distinguishable and the principles laid down as to the applicability of Section 92 of the Code to such suits are not attracted.

17. There is no warrant for the restrictive construction placed by the Full Bench on the expression "person having interest" in a trust occurring in section 2(10) and Section 50 of the Act. The definition of the expression "person having interest" in Section 2(10) being an inclusive one there is no lawful jurisdiction to exclude the suit brought by two or more persons in the name of the idol, to recover possession of its property against a person holding it adversely to the trust from the purview of Section 50(ii) of the Act.

18. In the result the appeal succeeds and is allowed with costs. The judgment and decree of the High Court affirming those passed by the District Judge, Bijapur are set aside and the plaintiffs' suit for declaration of title and for possession of the suit property together with profits is decreed.

</html