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March 29

AHMED ADAM SAIT & OTHERS

v.

INAYATHULLAH MEKHRI AND OTHERS

(P. B. GAJENDRAGADKAR, K. N. WANCHOO, and K. C. DAS GUPTA JJ.)

Public Religious Trust—Scheme—Suit to set aside scheme—Beneficiaries, not a particular sect of Muslim Community—Plea of res judicata—Character and nature of representative suit—Circumstances under which a scheme can be set aside—Code of Civil Procedure, 1908, (Act V of 1908), ss. 11 Exp. VI, 92, Or. 1. rr. 6, *8.*

The respondents filed a suit under s. 92 of the Code of Civil Procedure, 1908 claiming to represent the Sunni Muslims population of Bangalore and praying that a scheme should be settled for the proper administration of the Jumma Masjid, Bangalore.

The plot on which the Masjid was built was purchased about a century ago by a large number of Muslims consisting of several groups from all walks of life. The mosque was constructed from the funds given as gifts by a large number of Muslims. A grant of land made to the mosque shows that the mosque and its properties were intended for the benefit of the Muslim Community as a whole. For about 60 years the mosque and its properties were under the management of non-Cutchi Memons and prior to this the management was not exclusively in the hands of Cutchi Memons but predominently in the hands of Dekkhani Muslims of the locality. In subsequent years on some occasions the management was predominently in the hands of the Cutchi Muslims but the Dekkhani Muslims in Bangalore numbered about 30,000 and the Cutchi Muslims never exceeded 300.

Prior to the present suit a suit under s. 92 was filed in 1924 and a scheme was settled and Trustees were appointed and they had been in management ever since. In the said proceedings, the plaintifffs, both in the application made to the Collector for sanction under s. 92 Code of Civil Procedure and in the plaint, specifically averred that the Masjid in question was an institution belonging to the Cutchi Memon Community

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and they purported to represent the interests of that Community and no other. There were some defendants in the suit who were non Cutchi Muslims but they were sued as trespassers and their only interest in defending the suit was to support their individual rights.

In the suit out of which the present appeal has arisen the respondents claimed that the Masjid with its adjuncts belonged to the whole Muslim Community of Bangalore and not exclusively to the Cutchi Muslims. It was further claimed that the scheme framed under the earlier suit was the result of collusion and that the said decree did not bind the non-Cutchi Memons and that the present trustees were guilty of mismanangement and breach of trust. The appellants contended that the Cutchi Memons were the exclusive beneficiaries and that the suit was barred by *res judicata* and denied the allegations of collusion, breach of trust and mismanagement.

The trial court rejected the contentions of the respondents and upholding the plea of *res judicata* raised by the appellants dismissed the suit. Thereupon the respondents appealed to the High Court and the High Court while rejecting the pleas of collusion and breach of trust differed from the trial court on the question of *res judicata*. It found that the Mosque and its adjuncts belonged to the whole of the Muslim community and not exclusively to the Cutchi Memons. Therefore the High Court while agreeing with the trial court that a scheme should not be lightly disturbed found that a case had been made out for framing a new scheme and remanded the case to the trial court. The present appeal is by way of special leave.

The first point raised in the appeal was that the suit was barred by *res judicata* on the ground that a suit under s.92 Code of Civil Procedure was a representative suit and the present respondents would be bound by it whether they were parties to it or not since they were interested in the Trust. It was further contended that since both the courts below had rejected the plea of mismanagement and breach of trust and since the High Court had found that the present trustees were managing the trust reasonably and in a responsible manner this Court should not lightly disturb the said findings.

Held that the mosque and its adjuncts came into being and continued to be an institution belonging to the Sunni Muslim Community of Bangalore and it cannot be held that its management was exclusively in the hands of Cutchi Memons at any time before 1924.

Reading ss. 11, 92 Exp. VI, O. 1 rr. 6 and 8 of the Code of Civil Procedure it is clear that in determining the question about the effect of a decree passed in a representative suit, it is essential to inquire which interests were represented by the plaintiffs or the defendants. If the decree was passed in a suit under s. 92 it will become necessary to examine the plaint in order to decide in what character the plaintiffs had sued and what interests they had claimed.

The basis of the principle that a decree under s. 92 suit binds all persons interested in the trust, is that the interests of all persons interested in the trust are represented in the suit as required by Exp. VI to s. 11 and if that basis is absent the decree cannot create a bar of *res judicata* against persons claiming an interest not represented in the earlier suit.

The plaint in the earlier suit as well as the application to the Collector for sanction proceeded on a clear and unambiguous basis that the mosque belonged to the Cutchi Memons and the suit was instituted on their behalf by persons who claimed to be interested in the mosque as Cutchi Memons. Once it is found as it has been found in the present case, that this basis of the claim made in the plaint was not well founded and that the mosque belonged to all Sunni Muslims of Bangalore it would be difficult to accept that the suit can be regarded as a representative suit so far as the interests of the Muslim Community other than the Cutchi Memons residing in Bangalore are concerned.

Raja Anandrao v. *Shamrao*, [1961] 3 S.C.R. 930, *Ramados* v. *Hanumantha Rao*, (1911) I. L. R. 36 Mad., 364 and *Khaja Hassanulla Khan* v. *Royal Mosque Trust Board*, I. L. R. (1948) Mad. 257, distinguished.

There can be no doubt that if a scheme is framed in a suit brought under s. 92 it should not be changed unless there are strong and substantial reasons to do so. It must be clearly shown not only that the scheme does not operate beneficially but that it can by alteration be made to do so consistently with the object of the foundation.

Attorney General v. *Bishop of Worcestor* (1851) 68 L. R. 530 and *Attorney General* v. *Stewart* (1872) L. R. 14 Eq. 17.

The impugned scheme in the present suit proceeded on the erroneous assumption that the Mosque belonged to Cutchi Memons and that the said community alone was entitled to its exclusive administration. This assumption has clearly introduced certain infirmities in the scheme. The scheme must

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be revised on the true basis that the Mosque does not belong exclusively to the Cutchi Memons, but belongs to all the Sunni Musalmans of Bangalore.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 308 of 1961.

Appeal by special leave from the judgment and decree dated November 3, 1958 of the Mysore High Court in Regular Appeal No. 120 of 1950-51.

M. C. Setalvad, M. L. Venkatanarasimhaiah, S. N. Andley, Rameshwar Nath and *P. L. Vohra,* for the appellants.

A. V. Viswanatha Sastri, M. S. K. Sastri and *M. S. Narasimhan,* for respondent No. 1.

1963. March 29. The Judgment of the Court was delivered by

Gajendragadkar J.

GAJENDRAGADKAR J.—This appeal by special leave arises out of a suit instituted by the respondents in the Court of the District Judge, Bangalore under section 92 of the Code of Civil Procedure (O.S. No 2 of 1947). The respondents claimed to represent the Sunni Muslim population of the Civil and Military Station at Bangalore, and as such they prayed in their plaint that a scheme should be settled for the proper administration of the Jumma Masjid which is situated on Old Poor House Road, C & M Station, Bangalore. Their case was that the Masjid in question along with its adjuncts such as Idgah, Makkhan, Madrassa, Kutubkhana and Musafarkhana as well as large movable and immovable properties, constitutes a Trust created for public purposes of a religious nature coupled with charity, and that the Dakkhani Muslims as well as the Cutchi Memons residing in Bangalore are the beneficiaries of the Trust and have an abiding interest in its proper management, control and direction.

It appears that a similar suit had been filed in 1924 (O.S.No.32 of 1924) in the same Court and in that suit a scheme had been framed in 1927. Pursuant to the said scheme, Trustees were appointed and they have been in management of the Trust properties since then. The respondents alleged that in the said suit, it was represented that the Masjid belonged mainly to the Cutchi Memons of Bangalore and that the Cutchi Memons were entitled exclusively to its management. It is on this basis that the said suit was prosecuted by consent and a scheme was drawn up by the court after considering different schemes put before it by the respective parties. To that suit seven defendants were impleaded; defendants 2 and 7 claimed the right of management of the Trust under wills executed by the deceased Mutawalli Abdul Gaffar. Defendant No.2 was then a minor and his mother was impleaded as defendant No.1 both in her own right and as guardian of defendant No.2. Defendants 3 to 6 were the Executors under the will of Abdul Gaffar on which defendant No.2 relied. All those defendants were non-Cutchi Memons and the appellants who had filed the suit were Cutchi Memons. While the said suit was pending, six persons who were Cutchi Memons applied to be joined as defendants to the suit. Their case appears to have been that no scheme need be framed. Their application was rejected by the District Judge, but on revision before the Court of Resident in Mysore, the District Judge's order was set aside and they were ordered to be impleaded. That is how ultimately, 13 defendants were joined to the said suit.

While the administration of the Trust and the management of its affairs and properties were thus entrusted to the Board of Trustees appointed under the scheme, and the same was being continued after the scheme decree was passed, an application was made by the present respondents on January 22, 1945 under O.1 r.10 and sections 141 and

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151 of the Code in which they prayed that they may be joined as parties to the proceedings under the scheme and that the Trustees should be ordered to convene a fresh meeting of the general body of worshippers of the Masjid and prepare a list containing their names and submit the same to the Court irrespective of whether they happen to belong to the Cutchi Memon Jamayet or the Dakkhani Muslim Community of Bangalore. Their contention was that a meeting which had been held in pursuance of the order on C. M. P. No. 242 of 1944 was invalid, null and void, and so they wanted to be joined to the proceedings; they desired that a fresh meeting should be called for the purpose of preparing a list of worshippers as prescribed by the scheme. In support of this application, an elaborate affidavit was filed in which they set out their grievance that the management of the Trust which had been left exclusively in the hands of Cutchi Memons was inconsistent with the scheme and on the merits, unjustified and unfair.

This application was rejected by the learned District Judge on July 20, 1945. The learned Judge, while rejecting the application, observed that there was some force in the contention of the petitioners that the suit in which the scheme was framed, was not fully representative and that there were some "commissions in the proceedings" taken under the decree which may tend to show that the management of the Trust was not to be exclusively by the members of the Cutchi Memon Community. In fact, he noticed that the suit had been filed in very peculiar circumstances without impleading the members of the Dakkhani Muslim Comminity. He however held that after the framing of the scheme, the management had, in fact, been entrusted solely to the Cutchi Memon Community and that it would be inappropriate to make any change in the pattern of management in

the proceedings initiated by the application; that can be done, he thought, in a regular suit. It is this order that has led to the present suit by the respondents.

In the present suit, the respondents joined the five appellants and others as defendants and claimed reliefs against them. Their case was that the scheme decree which was passed in the earlier suit was the result of collusion and that the said decree did not bind the non-Cutchi Memons who were the beneficiaries of the Trust. According to them, though the Cutchi Memons were entitled to claim the benefiit of the Trust, the predominant interest in the Trust was of the Dakkhani Muslims who had built the Mosque and contributed substantially to its financial progress and prosperity. They further pleaded that the five appellants who were in charge of the administration of the Trust were guilty of breach of trust. According to them, even the scheme which was framed in the earlier suit did not confer a monopoly of management on the Cutchi Memons as appears to have been assumed in making the appointment of Trustees ever since the said decree was passed, and it was urged that if on a correct interpretation, the scheme did confer such a monopoly, it should be held to be bad in law. It is on these allegations that the respondents wanted the Court to settle a scheme taking into account all the worshippers of the Masjid both Dakkhani Muslims and Cutchi Memons, and recognising the right of the Dakkhani Muslims also to manage the Trust and its affairs. As a consequential relief, the respondents claimed that the appellants be removed from their position as Trustees and that a Committee of Trust appointed under the old scheme should be dissolved and new Trustees should be appointed in its place. That, in short, is the nature of the claim made by the respondents in their present suit.

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The appellants disputed the respondents' claim on several grounds. It was urged by them that the Cutchi Memons were entitled to the exclusive management of the Masjid and its affairs; it was pleaded that the present claim was barred by *res judicata* and that the respondents had not any interest in the Trust and as such, had no *locus standi* to file the present suit under section 92 of the Code. The allegation of collusion made by the respondents in regard to the earlier suit was traversed and it was contended that if any relief was intended to be asked in respect of the modification of the said scheme, the proper remedy was an application under clause 25 of the scheme itself and not the present suit. The charge that the appellants had committed a breach of trust was seriously disputed and emphasis was laid on the fact that even if a case for change in the scheme was made out that case should not be accepted unless there are over-riding considerations to do so.

On these pleadings, the learned District Judge framed appropriate issues. He held that the respondents had not shown that they had sufficient interest to bring the suit under s. 92 of the Code. He also found that their plea that the decree in the earlier suit had been obtained by collusion had not been established, nor had they succeeded in showing that the Trustees under the said scheme had committed a breach of trust. In regard to the contention of *res judicata* raised by the appellants, he held that the decree passed in the earlier suit was a bar to the maintainability of the present suit, and he expressed the opinion that the reliefs claimed by the respondents by their present action could have been claimed by them by an application under clause 25 of the scheme. Then the learned Judge considered the question as to whether the scheme should be modified and he took the view that in such matters, it was necessary to exercise utmost caution before disturbing a settled scheme. Since no satisfactory reason had

been shown by the respondents in support of their case that the scheme should be changed, the trial Judge rejected their claim and dismissed the suit.

The respondents challenged this decree by preferring an appeal in the High Court of Mysore. The High Court agreed with the trial Court in rejecting the respondent's case that the decree in the earlier suit had been obtained by collusion and that the Trustees appointed under the said scheme had committed breach of trust. It, however, differed from the trial Court on the question of *res judicata*. It took the view that the plea of *res judicata* could not be sustained and so, it came to the conclusion that the present suit under s. 92 was competent. The High Court agreed with the trial Court that in law, a scheme once settled should not be lightly disturbed or modified, but in its opinion, a case had been made out for framing a new scheme, beause it was satisfied that the Mosque in question really belonged to the whole of the Sunni Muslim Community of C & M Station, Bangalore, and the basis of the earlier suit that the Cutchi Memons were entitled to the exclusive management of the said Mosque, its properties and its administration was not well-founded. On these findings, the High Court set aside the decree passed by the trial Court and remanded the case to the said Court to take further proceedings in the light of the appellate judgment for the purpose of framing a new scheme. It is against this order that the appellants have come to this Court by special leave.

Before dealing with the merits of the contention which have been urged before us by Mr. Setalvad on behalf of the appellants, it is necessary to set out briefly the history of the Mosque with which we are concerned, and the background of the incidents which have led to the institution of the present suit. The finding recorded by the High Court in regard to the history of the Mosque, its origin and further

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development, and the part played by the Dakkhani Muslim Community in both the matters, has not been disputed before us, and so, we must proceed to deal with the appeal on the basis that the said finding truly and correctly represents the facts proved in this case. It is in the light of the said finding, therefore, that we propose to set out the history of the institution and the background of the dispute.

It is not disputed that the Mosque came into existence as a relatively small structure more than 100 years ago and that it was rebuilt in its present form some time about 1885. The oral evidence led by the parties in support of their respective contentions is as often happens, not very satisfactory, and so, the High Court dealt with this part of the case on documentary evidence. The respondents have produced numerous documents to prove their case that in the original building of the Mosque, in its reconstruction in 1885 and in its progress from year to year, the Dakkhani Muslims have played a dominant part, though it is conceded by them that later on the Cutchi Memons were also actively associated with the affairs of the Mosque and have made contributions to its prosperity and progress. The earliest document on the record (Ext. K) which is a sale-dead executed on January 4, 1823 shows that the generality of the people wished to construct a Masjid, and so, the open plot covered by the sale-deed was purchased. The purchasers were a large number of Muslims consisting of several groups described as traders, bakers, sweetmeat makers, copper-smiths, rope-makers, mutton butchers, beef butchers, gardeners and other Muslims. That shows the very broad basis of the cross-section of the Muslim community which joined in purchasing the open polt on which the mosque was built. Then followed a gift deed executed on November 1, 1923 (Ext. 'L') which was a voluntary undertaking given by a large number of Musalmans to coutribute funds in the

construction of the Mosque. A grant of land made on October 4, 1830 (Ext. YYYY) clearly brings out that the Mosque and its appurtenances were intended for the benefit of the whole Muslim Community represented by the local Kazi. In about 1850, Abdul Khuddus appeared on the scene and it is common ground between the parties that he was actively associated with the institution for about half a century. He appears to have been a very influential person in the locality and helped to popularise the institution and acquired considerable properties for it; thereby, he rendered the mosque useful to the community in various directions. Abdul Khuddus was in management of the Mosque till 1905 when he died. He was followed by his son Abdul Gaffar who died in 1922. It appears that Abdul Gaffar left behind him two wills under which two different claims for the Mutavalliship of the Mosque were made. About this time, the eariler suit of 1924 was instituted. It is thus not disputed that for nearly 60 years and more, Abdul Khuddus and his son who were non-Cutchi Memons were in management of the Mosque and as we have already noticed, prior to 1850 when Abdul Khuddus came on the scene, the management does not appear to have been in the hands of the Cutchi Memons exclusively, but it was predominantly in the hands of the Dakkhani Muslims of the locality.

On June, 29, 1880, a Power of Attorney was executed by the Jamayat in favour of Abdul Khuddus in order to enable him to enter into transactions on behalf of the Mosque. Of the ten presons who executed the Power of Attorney, three were Cutchi Memons and the rest Dakkhani Muslims. This document shows that Cutchi Memons had by then associated themselves with the administration of the affairs of the Mosque and formed part of the Jamayat which owed allegiance to the Mosque but amongst the Trustees who executed the Power of

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Attorney in favour of Abdul Khuddus, the proportion was 3 : 7.

On December 29, 1892, a sale deed was executed by one Thulsibayama (Ext. HHHH) conveying her house property in favour of Abdul Khuddus. Abdul Khuddus was described as the Head Trustee of the Jumma Masjid. The other Trustees mentioned in the document who numbered 13, represented the Dakkhani Muslims and the Cutchi Memons in the proportion of 7:6. It is true that on some occasions, the Headmen appeared to have been predominantly Cutchi Memons; for instance, the document pertaining to the transfer of Fazel Mahomed Asham Sait's right to Jumma Masjid (Ext. UUU) was executed in favour of six Headmen all of whom appear to be Cutchi Memons; but as the High Court has observed, this can have no special significance since in this document, Abdul Khuddus himself is not mentioned and that may show that the Headmen did not include the main person who was looking after the Masjid. However, one fact is significant that the Dakkhani Muslims numbered about 30,000 and the Cutchi Memons never exceeded 300 and this fact has to be borne in mind in dealing with the question of the administration of the properties belonging to Jumma Masjid, and, so it would be clear that though the Cutchi Memons were associated with the administration of the Trust, they were not at all in its exclusive management. Before his death Abdul Khuddus had executed a Power of Attorney in favour of his son Abdul Gaffar on June 14, 1905, and as we have already seen, Abdul Gaffar stepped into the management. Thus, the documentary evidence which the High Court has accepted supports its finding that the Mosque came into being and continued to be an institution belonging to the whole Sunni Muslim Community of Bangalore and that it could not be held that its management was exclusively in the hands of Cutchi Memons at any

time before 1924. Having regard to the very prominent and Powerful part played by Abdul Khuddus in the development of the Mosque and its properties, it is not surprising that the Mosque came to be known as "Khuddus Saheb's Mosque." This description of the Mosque is found in a document executed on June 7, 1884 (Ext. RRRRRR-1). Subsequently, when the Cutchi Memons filed a suit in 1924, they alleged that the Mosque was known as the Sait's Mosque, but that is undoubtedly a later development.

It may be conceded that the several Jamayats of Muslims residing in Bangalore in different localities have their separate mosques, and as often happens, the Muslim residents of a particular locality generally offer prayers in the mosque situated in the locality and in that sense, owned by the Jamayat of the said locality. The position of the Jumma Masjid with which we are concerned, however, appears to be that of a central Mosque to which allegiance is owed by all the Sunni Muslims of Bangalore. In fact, evidence adduced in this case clearly shows that the Cutchi Memons constituting a Jamayat by themselves have a mosque of their own in Fraser town. This fact was admitted, though with reluctance and then too not clearly, by Haji Saleh Mohamed Sait whom the appellants examined on their behalf. It also appears from the evidence of the said witness that the bulk of Nikahs in the Jumma Masjid (Ext.Y-6) consists of those Muslims other than Cutchi Memons and that rather shows that amongst the usual worshippers at the Jumma Masjid the non-Cutchi Memons occupied an important place. It is in the light of these facts that the controversy between the parties in the present litigation has to be judged.

It appears that about 1920, when the non-co-operation movement was in full force, there was a

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sharp division in the Cutchi Memon Community as well as the Dakkhani Muslims at Bangalore. The majority of the community sympathised with the non-co-operation movement and applauded those who took part in it, whereas the minority led by Haji Sir Ismail Sait disapproved of the movement and publicly denounced it. That led to the usual development of excommunication of the minority, and so, Haji Sir Ismail Sait filed a suit No. 6/1921 to vindicate his right of access to the Mosque for performing religious ceremonies and claimed an injunction against the managers of the Mosque restraining them from interfering with the exercise of his right in that behalf. During the pendency of the suit, however, Abdul Gaffar died on January 9, 1922. That tended to accentuate the division in the Community and it was this sharp division in the Community which was further complicated by the rival claims made by two different persons who had set up two different wills of Abdul Gaffar that led to Suit No. 32/1924 being filed. In that suit, it was claimed that the Mosque was primarily developed by the Cutchi Memons and that the Cutchi Memons were entitled to the exclusive management of the affairs of the Mosque. The defendants who had been impleaded to that suit first appeared to resist the claim. We have already seen who these defendants were. They were interested in supporting their individual rights in respect of the management of the Mosque and it appears that they reached an amicable settlement with the plaintiffs and ultimately submitted to a preliminary decree directing that the scheme be framed. Those defendants who were non-Cutchi Memons did not represent the non-Cutchi Memon Community as such and were interested only in their personal rights based upon the wills executed by Abdul Gaffar. After the parties agreed that the scheme should be drawn up, the District Judge directed them to file their respective schemes. The Court then examined the said schemes and finally

framed its own scheme. Thereafter, Trustees have been appointed under the Scheme from time to time and the administration of the Trust and the management of its properties has remained in the hands of Trustees who have always been Cutchi Memons. That, in short, is the history of the commencement and the development of the Mosque and of the facts leading to the present dispute.

The first point which has been pressed before us by Mr. Setalvad is that the present suit is barred by reason of the fact that in the earlier suit instituted under s. 92 of the Code a scheme had already been framed by a court of competent jurisdiction and the decree by which the said scheme was ordered to be drawn binds all parties interested in the Trust. A suit under s. 92, it is urged, is a representative suit, and so, whether or not the present respondents actually appeared in that suit, they would be bound by the decree which had framed a scheme for the proper administration of the Trust. In support of this argument, reliance is placed on the decision of this Court in *Raja Anandrao* v. *Shamrao* (1), where it is observed that though the Pujaris were not parties to the suit under s. 92, the decision in that suit binds the pujaris as worshippers so far as the administration of the temple is concerned, because a suit under s. 92 is a representative suit and binds not only the parties thereto, but all those who are interested in the Trust. Mr. Setalvad has also relied on the two decisions of the Madras High Court, (1) in *Ramados* v. *Hanumantha Rao* (2), and (2) in *Khaja Hassanullah Khan* v. *Royal Mosque Trust Board* (3). The effect of those two decisions is that a decree passed in a suit filed under s. 92 framing a scheme is binding on all and it prevents every person whether a party to the suit or not from asserting in a subsequent suit rights which conflict with or attack the scheme.

In assessing the validity of this arguement, it is necessary to consider the basis of the decisions that

(1) [1961] 3 S.C.R. 930, 940. (2) (1911) I.L.R. 36 Mad. 364.
(3) I.L.R. (1948) Mad. 257.

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a decree passed in a suit under s. 92 binds all parties. The basis of this view is that a suit under s. 92 is a representative suit and is brought with the necessary sanction required by it on behalf of all the beneficiaries interested in the Trust. The said section authorises two or more persons having an interest in the Trust to file a suit for claiming one or more of the reliefs specified in clauses (a) to (h) of sub-section (1) after consent in writing there prescribed has been obtained. Thus, when a suit is brought under s. 92, it is brought by two or more persons interested in the Trust who have taken upon themselves the responsibility of representing all the beneficiaries of the Trust. In such a suit, though all the beneficiaries may not be expressly impleaded, the action is instituted on their behalf and relief is claimed in a representative character. This position immediately attracts the provisions of explanation VI to s. 11 of the Code. Explanation VI provides that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. It is clear that s. 11 read with its explanation VI leads to the result that a decree passed in a suit instituted by persons to which explanation VI applies will bar further claims by persons interested in the same right in respect of which the prior suit had been instituted. Explanation VI thus illustrates one aspect of constructive *res judicata*. Where a representative suit is brought under s. 92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by *res judicata* from reagitating the matters directly and substantially in issue in the said earlier suit.

A similar result follows if a suit is either brought or defended under O. I, r. 8. In that case,

persons either suing or defending an action are doing so in a representative character, and so, the decree passed in such a suit binds all those whose interests were represented either by the plaintiffs or by the defendants. Thus, it is clear that in determining the question about the effect of a decree passed in a representative suit, it is essential to enquire which interests were represented by the plaintiffs or the defendants. If the decree was passed in a suit under s. 92, it will become necessary to examine the plaint in order to decide in what character the plaintiffs had sued and what interests they had claimed. If a suit is brought under O. 1 r. 8, the same process will have to be adopted and if a suit is defended under O. I r. 8, the plea taken by the defendants will have to be examined with a view to decide which interests the defendants purported to defend in common with others. The decision of this question would be material in determining the correctness of the argument urged by Mr. Setalvad before us.

Let us, therefore, examine the plaint filed in the earlier suit of 1924. Before filing the said suit, an application had been made to obtain sanction of the Collector as required by s. 92. In that application, the petitioners had specifically averred that the Masjid in question was an ancient and important institution belonging to the Cutchi Memon Community and there were properties attached to it worth over a lac of rupees : the net income from them being about Rs. 2,400/- per annum. On this basis, the petitioners claimed that they were interested in the Trust and wanted a scheme to be framed. It would thus be clear that the application for sanction proceeded on the narrow and specific ground that the Mosque belonged to the Cutchi Memon Community and the interest which the petitioners purported to represent was the interest of the Cutchi Memon Community and no other.

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After permission was obtained from the Collector, the suit was filed. In the plaint, the same position was adopted. It was averred that the Mosque had been mainly founded by the Cutchi Memon Mohammadens residing at Bangalore and it was alleged that the Mohmmaden communities other than the Cutchi Memon had established other independent mosques for their use and benefit and for the last over a century, the Cutchi Memons had been maintaining and managing the said Mosque. The plaint further claimed that the plaintiffs as members of the Cutchi Memon Community were interested in the proper management of the suit Mosque and that as Mohammadens and members of the said Community they had the right to perform therein their daily and usual prayers as well as funeral and other special prayers. Consistently with this attitude, the plaint in its prayer clause claimed, *inter alia*, that a scheme should be framed safeguarding the rights and privileges of the Cutchi Memon Community. It is thus clear that the plaint, like the application for the sanction of the Collector, proceeded on a clear and unambiguous basis that the Mosque belonged to the Cutchi Memon Community and the suit was instituted only on behalf of the Cutchi Memon Community by persons who claimed to be interested in the Mosque as Cutchi Memons. There is, therefore, no doubt that the plaintiffs in the said suit did not claim and in fact, did not represent the interests of any community other than the Cutchi Memon Community. Once it is found as it has been in the present case, that this basis of the claim made in the plaint was not well-founded and that the Mosque belongs to all the Sunni Mohmmadens of Bangalore, it would be difficult to accept the argument that the suit instituted on the narrow basis to which we have just referred can be regarded as a representative suit so far as the interest of Muslim Communities other than the Cutchi Memon Community residing in Bangalore are concerned. These

who filed the said suit expressly pleaded that no other community was concerned or interested in the said Trust and, therefore, it would be idle for them now to contend that they purported to represent the interests of the other communities.

It is true that defendants 1 to 7 who had been impleaded in that suit were non-Cutchi Memons, but as we have already observed, these defendants were sued as trespassers and their only interest in defending the suit was to support their individual right to manage the property. The written statements filed by them leave no doubt at all that they did not purport to represent non-Cutchi Memons residing in Bangalore. Their pleas centered round the rights which they claimed under the wills of Abdul Gaffar. Similarly, the written statements filed by defendants 8 to 13 in that suit cannot be pressed into service for supporting the argument that non-Cutchi Memons' interests were represented. These defendants were Cutchi Memons and. in substance, they agreed with the plaintiffs in that suit that the Mosque belonged to Cutchi Memons alone. No doubt, they made some other pleas disputing some of the allegations made in the plaints, but those pleas have no relevance on the point with which we are concerned. It is thus clear that the allegations made in the plaint, as well as the averments made by the respective defendents in their written statements do not justify the contention that the earlier suit was either filed by persons who could claim to represent non-Cutchi Memons, or was defended by persons who could make a similar claim. If that be so, the very basis on which the binding character of a decree passed in a suit under s. 92 of the Code rests disappears; we have already seen that the basis of the principle that a decree under s. 92 suit binds all persons interested in the trust, is that the interests of all persons interested in the Trust are represented in the suit as required by

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explanation VI to s. 11; and if that basis is absent, the decree cannot create a bar of *res judicata* against persons claiming interest not represented in the earlier suit.

In the case of *Raja Anandrao* (1), this Court has no doubt observed that a decree passed in a representative suit under s. 92 binds not only the parties thereto, but all those who are interested in the Trust, and Mr. Setalvad has naturally relied upon this observation in support of his plea of *res judicata*: but it would be unreasonable to treat the said observation as laying down a broad and unqualified proposition like the one which Mr. Setalvad had submitted before us. The context in which the observation has been made must be borne in mind and that context clearly shows that the earlier suit had been filed in respect of a Hindu Temple and it was plain from the recitals in the plaint filed in that suit that the plaintiffs who had brought the said suit represented the interests of all worshippers and devotees of the said temple, including the worshippers who had brought the subsequent suit. In other words, in accepting the plea that the subsequent suit brought by the worshippers was barred by *res judicata*, this Court affirmed the finding that the interests of the said worshippers had been represented in the earlier suit, and so, it made no difference to the binding character of the decree passed in that suit that the said worshippers personally did not appear in the earlier litigation. This decision, therefore, proceeds on the basis that the party who was held precluded from filing a subsequent suit was constructively represented in the earlier litigation and the provisions of explanation VI to s. 11 therefore, applied. It is thus clear that the observations made in *Raja Anandrao's case* (1) do not support Mr. Setalvad's contention in the present appeal.

(1) [1961] 3 S. C. R 930, 940.

That takes us to the next question as to whether it would be appropriate to change the scheme in the present litigation even though the present suit may not be technically barred by *res judicata*. Mr. Setalvad contends that it is a well-recognised principle of law that a scheme in regard to a public trust once framed should not be altered light-heartedly unless there are substantial reasons to do so and he has strenuously relied on the finding of the High Court that the Trustees appointed under the scheme ever since it was framed have, on the whole, managed the trust properties and its affairs in a reasonable and responsible manner and that the allegations of breach of trust which had been made against them in the present suit have been held not to be proved by both the courts below. There can be no doubt that if a scheme is framed in a suit brought under s. 92, it should not be changed unless there are strong and substantial reasons to do so. This position is well established and cannot and has not been disputed before us. As observed by Halsbury, when a scheme has been settled by the Charity Commissioners, the Court will not interfere with it unless the Commissioners have acted *ultra vires*, or the scheme contains something wrong in principle or in law, or by reason of changed circumstances, the continuance of the charity under the constitution established by the scheme has become impracticable. This principle was laid down as early as 1851 in the case of the *Attorney-General* v. *The Bishop of Worcester* (1), where it was held that schemes which have been settled under the directions of the Court are not to be disturbed upon merely speculative view or in matters of discretion or regulation upon which Judges or Attorneys-General may differ in opinion, or except upon substantial grounds and clear evidence, not only that the scheme does not operate beneficially, but that it can by alteration be made to do so consistently with the object of the

(1) [1851] 68 E. R. 530.

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foundation. The same principle was reiterated in 1872 in the case of *Attorney-General* v. *Stewart* (1).

There are, however, two considerations which must be borne in mind in dealing with Mr. Setalvad's argument on this point. It is not disputed that even after a scheme is framed in a suit properly instituted under s. 92, if supervening considerations justify its alteration or modification, the bar of *res judicata* cannot then be pleaded against such alteration or modification. Besides, in the present case, it has now been discovered that the scheme framed in 1927 proceeded on the erroneous assumption that the Mosque belonged to the Cutchi Memon Community and that the said community alone was entitled to its exclusive administration. It may be that the parties who conceded in that suit that the said assumption was right did not collude, but, nevertheless, the said assumption has clearly introduced a serious infirmity in the scheme. Speaking numerically, the interests of the non-Cutchi Memons who numbered about 30,000 were ignored and attention was paid exclusively to the interests of Cutchi Memons who never numbered more than 300. Once it is found that the Mosque is a Central Mosque and the Dakkhani Muslims residing in Bangalore were responsible for the constructions of the Mosque and were vitally interested in offering worship in the Mosque and in taking part in the administration of the Mosque, its affairs and properties, it would be difficult to resist the respondents' case that the scheme framed in 1927 must be revised bearing in mind the interests of all those who are interested in the Mosque. Therefore, we are satisfied that the High Court was right in coming to the conclusion that the scheme must be revised on the true basis that the Mosque does not belong exclusively to the Cutchi Memons, but belongs to all the Sunni Musalmans of Bangalore.

(1) (1872) L. R. 14 Eq. Cases 17.

The next question which we have to consider is whether it is necessary that the order of remand passed by the High Court should be confirmed and the District Judge directed to frame a new scheme in the light of our decision. We are inclined to take the view that it is not necessary to frame an entirely new scheme in the circumstances of this case. We have already referred to the fact that the High Court was satisfied that the scheme has worked, on the whole satisfactorily. We have examined the 25 clauses of the scheme and have heard the learned counsel for both the parties in regard to the modification's which these clauses may need and we are satisfied that if suitable changes are made in clauses (iv), (v), (xxiv) and (xxv), that would meet the requirements of justice and fair administration of the Mosque, its affairs and its properties. Broadly stated, the scheme framed in 1927 provided for the appointment of a Committee of five Trustees who were to hold office for seven years commencing from the date on which the scheme came into force. Clause (iv) then made a provision for the appointment of fresh Trustees at the completion of the seven years' period prescribed by cl. (i). This clause reads thus:—

> "Six months before the completion of the seven years mentioned above, the committee of trustees shall prepare a list of male adult worshippers, and submit the same to the Court within a month thereafter; and the Court shall as soon as convenient nominate from among the worshippers a committee consisting of 15 worshippers. Each member of the committee of worshippers shall hold office for ten years from the date of his appointment; and any vacancy arising among them for any of the reasons specified in clause 3 supra shall be filled up by the Court. And this committee shall elect from among their number 5 (five) persons to

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perform the duties of trustees after the expiry of seven years aforesaid."

Clause (v) which is also relevant re ds thus:

> "The trustees so elected shall hold office for a term of five years and whenever any vacancy arises among the elected trustees by reason of death or resignation or if any member shall be absent from the Bangalore C & M Station for a continuous period of six months, or be an undischarged insolvant or be convicted of any criminal offence involving moral turpitude or refuses or in the opinion of the Court becomes unfit or incapable of acting as trustee or ceases to be a member of the committee of worshippers the same shall be filled up by the committee of worshippers, from amongst themselves the person so appointed to hold office for the remaining period of five years. The procedure described in clause (4) shall be adopted for electing trustees for each successive period of five years."

It is obvious that clause (iv) has worked itself out; but it provides for the basic structure for the appointment of Trustees, and we are inclined to think that that basic structure must now be alterad in view of the fact that the number of worshippers is very much larger than was then assumed. 'Worshippers' in the context, would mean not Musalmans who are entitled to offer worship, because that view would take in Musalmans not only from Bangalore but from all over the country. The 'worshippers', in the context, should include persons who usually worship in the said Mosque. In our opinion, it is not necessary to make any list of male adult worshippers as provided by cl. (iv), nor should a Committee of worshippers be appointed as contemplated by it. We think, it is desirable that the appointment of

five trustees from time to time should be made by the District Judge from amongst the worshippers of the Mosque, the class of worshippers being determined in the sense which we have just clarified. It appears that after the scheme came into force, trustees were appointed, when necessary, by a kind of election. We have no doubt that this course should be avoided. We would, therefore, insert in place of cls. (iv) and (v), cl. (iv) in these words :

> "The district judge of Bangalore should nominate five persons from amongst male adult worshippers of the mosque as trustees to look after the mosque, its affairs and its administration. The trustees so nominated shall hold office for a term of five years and whenever any vacancy occurs among them either by reason of death, or resignation, or otherwise, the District Judge shall fill that vacancy by nominating another Trustee in that behalf. The remaining trustees will continue to function till the vacancy is filled."

The result would be that cl. (iv) & (v) as they stand would be removed and cl. (iv) as we have formulated will take their place, and the remaining clauses will be renumbered accordingly.

Clause (xxiv) which gives the right to demand copies of the rules and of translations thereof in Urdu language only to the members of the cutchi Memon Community will now be available to all the Sunni Musalmans residing in Bangalore. Thorefore, the modification in the clause would be that in place of the words "any member of the Cutchi Memon Community" shall be substituted the words "any Sunni Musalman of Bangalore".

Clause (xxv) which enables the Trustees to apply for advice or direction to the District Court as

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occasion may arise, should be so amended as to enable the Trustees or any person interested in the Trust to apply for modification of the scheme. Clause (xxv) so amended would read thus:—

> "The Trustees may apply for advice or direction, and the Trustees or any person interested in the Trust may apply for modification of the scheme to the District Court of the C & M Station, Bangalore, as occasion may arise."

By modifying the clause in this way, we wish to make it clear that if in future an occasion arises for changing or altering the terms of the scheme, it should not be necessary to file a separate suit.

Before we part with this appeal, there is one point to which we may incidentally refer. During the course of the hearing of this appeal, an argument was urged before us by both the parties as to the true denotation of the word "worshippers" used in cl. (iv). Mr. Setalvad contended that in the context of the pleadings filed by the parties in that suit and in the light of cl. (xxiv), it was clear that the word "worshippers" must mean only worshippers from the Cutchi Memon Community. If that argument is upheld, it would emphatically bring out the fact that in the suit, the only interest that was represented was that of the Cutchi Memons and that would clearly help to negative the plea of *res judicata*. On the other hand, if the word "worshippers" received a larger denotation, it may show that the scheme binds all the worshippers interested in the Trust, but it would immediately raise the question of clarification of the scheme because in the administration of the scheme, the word "worshippers" has consistently received the narrow interpretation, and the Trustees as well as the committee of worshippers has always been constituted out of members of the Cutchi Memon Community and no others, so that on this

alternative basis, the plea of *res judicata* may be upheld; but an occasion will clearly arise for either clarifying the scheme or redically changing it so as to make the other worshippers eligible for appointment as Trustees.

In the result, we reject all the contentions raised by the appellents and confirm the findings recorded by the High Court in favour of the respondents. We are, however, not inclined to affirm the order of remand passed by the High Court, because we have held that the scheme framed in 1927 should be left as it is with the modifications which we have indicated in our judgment. Therefore, the order of remand passed by the High Court is reversed and the respondents' claim for a modified scheme allowed. The appeal is dismissed with the above modifications. The appellants will pay the costs of the contesting respondents throughout.

MADAMANCHI RAMAPPA & ANR.

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March 29

(P. B. GAJENDRAGADKAR, K. N. WANCHOO and K. C. DAS GUPTA JJ.)

Civil Procedure—Concurrent findings of fact—Powers of second appellate court—Insufficiency of evidence, if a ground for interference—Equity, if must yield to express provisions of law—Single Judge's decision—Grant of Special Leave—Constitution of India (1950), Art, 133 (3)—Code of Civil Procedure, 1908 (Act V of 1908), s. 100.

The appellants' father bought 35 years before the date of the suit 40 acres of land from one Krishnappa out of his land measuring 166 acres. After the purchase the appellants'