

THE PARENS PATRIAE ROLE OF THE COURTS IN THE MATTER OF PUBLIC TRUSTS UNDER §92 OF THE CIVIL PROCEDURE CODE: EXPECTATIONS, CONTRIBUTIONS, AND LIMITATIONS

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The discourse on public trusts in India has been ridden with contradictions. In the absence of any specific laws governing them, trusts, and more importantly, trustees, are more often than not faced with conundrums to which the law may not always have solutions. In this paper, I examine this jurisprudence on the subject of public trusts, and delve into why the Judiciary ought to assume the duties of parens patriae in protecting the rights of a trust. As these rights are not compartmentalised as black or white, it becomes all the more vital for strengthening the role of the Judiciary in this regard.

I. INTRODUCTION

Public trusts – either religious or charitable, are vital communitarian instruments for the provision of public facilities, social services, and various cultural activities. They assist in vindicating human rights and implementing a robust social inclusion policy. However, trusts are vulnerable to various conundrums which *inter alia* include the abuse of funds and property, mismanagement, fraud, negligence, indifference, and internal disagreements between the trustees. Thus, it becomes the responsibility of the legal system to maintain the sanctity of trusts in order to meet the expectations of the donors as well as the public.

In the absence of any comprehensive law on the subject of public trusts in India, §92 of the Civil Procedure Code, 1908 (‘CPC’), has attained great significance. As the current trend depicts, the decisions of civil courts are shaped by dimensions of protection, which includes their regulation and facilitation.¹ Thus, courts have adopted the role of *parens patriae* for the public

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¹ *Parens patriae* in Latin means “parent of the nation.” In law, it refers to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian, or informal caretaker, and to act as the parent of any child or individual who is in need of protection; in English law, the Crown as *parens patriae* is the constitutional protector of all property subject to charitable trusts, such trusts essentially matters of public concern *Attorney General v.*

trusts. In this paper, I critically examine §92 of the CPC, detailing its expectations, contributions and limitations, and argue that the section allows the Judiciary to assume the duties of *parens patriae*. In the Part II of the paper, I present the rationale behind the functioning of trusts, from a moral and philosophical stand point. In the next part of the paper, I consider the historical development of the principle of *parens patriae*, within the Indian legislative framework. Next, I scrutinise the legal provision of §92, enumerating its various requirements and implications. Finally, I suggest alternatives, and urge for the expansion of the provision, in order to ensure that the Judiciary perform its inherent protectionist role.

II. THE RATIONALE BEHIND PUBLIC TRUSTS

The organisation and management of public trusts is a unique phenomenon. It involves the dedication of property or income for a public cause, divesting that property right, reposing confidence in trustees, and finally, assisting beneficiaries from the public.² It rests on the basis of the joint operation of common law and equity.³ The expectations of the donors and beneficiaries, as well as the socio-cultural role of these trusts motivate their smooth functioning. Their operation is based on the trustworthiness between trustees, beneficiaries and donors. ‘Trust’, after all, entails a willingness to submit to the risks of failure while expecting such failures to be avoided or remedied, and this is ensured only by virtue of a safeguard mechanism.⁴

A. CONCEPTUALISATION OF TRUST

Piotr Sztompka considers that trustfulness has a psychological propensity, and historically accumulated collective experiences of a given society further give rise to trustful acts.⁵ Close-knit communities evince what Emile Durkheim calls ‘moral density’ of intimate bonds, and strengthen trustworthiness.⁶ It can also be said that social capital erodes in the absence of trust.⁷

Brown, (1818) 1 Swans 265 : 36 ER 384, approved in Mahant Moti Das v. S.P. Sahi, AIR 1959 SC 942 at 956, ¶6; see also B. K. MUKHERJEA, THE HINDU LAW OF RELIGIOUS AND CHARITABLE TRUSTS 404 (5th ed., 2003).

² The term trust is defined under §3 of the Indian Trusts Act, 1882 as an obligation annexed to the ownership of property, and arising out of confidence reposed in and accepted by the owner, or declared and accepted for the benefit of another, or of another and the owner. Although the Indian Trust Act is not applicable to public trusts, the notion is relevant in understanding the nature of public trust.

³ MAUDSLEY & BURN, TRUSTS AND TRUSTEES 6 (7th ed., 2008).

⁴ BARTE NOOTEBOOM, TRUST: FORMS, FOUNDATIONS, FUNCTIONS, FAILURES AND FIGURES 45 (2002) (“Trust is a simplifying strategy that enables individuals to adapt to complex social environment, and thereby benefit from increased opportunities”); TIMOTHY C. EARLE & GEORGE T. CVETKOVICH, SOCIAL TRUST: TOWARDS A COSMOPOLITAN SOCIETY 35 (1995).

⁵ *Id.*, 70.

⁶ EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY (1893).

⁷ PIOTR SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY 105 (1999).

Rooted in reputation, a system of trust requires permanent confirmation by the society in obligating trustees to behave impeccably for social benefit.⁸ Its fruitful exercise requires the presence and application of positive spirit, reasonable behaviour, and proper conditions on part of the performer.⁹

According to Barte Nooteboom, trust stems from two sources. The *first* is by divine sanction. This can entail legal authority or patriarchal decision, or, organisational compulsion or material advantage. The *second*, flowing from altruistic considerations, entails ethics, social morality, values of proper conduct, a sense of duty, empathy, and bonds of friendship or kinship.¹⁰ Psychological, social, cultural and economic factors work beneath these levers – both egoistic and altruistic – to influence human behaviour.¹¹ These facts accumulating within organisations entrusted with specific responsibilities influence their reliability. Therefore, the performance of the people involved in the organisation is determined by, and in turn determines the degree of trust.¹² Thus, the ability of, and the commitment displayed by a public trust in fulfilling the expectations of the public, in turn fosters respect for it and its purpose.

B. TRUST-BASED MANAGEMENT

A commitment to public interest, reciprocal behaviour of the community, short and long term plans, and the arrangements and strength to fulfil commitments go a long way in ensuring the robust functioning of public trusts.¹³ Public trusts for charity and religion have clear social roles and cultural dimensions.¹⁴ Moreover, the quasi-sacred character of these obligations creates psychological inhibitions for potential violators.¹⁵ The involvement of the community in the functioning and use of the public trust make it a uniquely placed social institution.

Hence, a cluster of supportive endowments by likeminded members of the public further a trust's activities. The trust's expenses are borne

⁸ *Id.*, 77.

⁹ Kenneth Newton, *Trust, Social Capital, Civil Society, and Democracy*, 22 (2) INT. POLIT. SCI. REV. 203 (2001).

¹⁰ NOOTEBOOM, *supra* note 4, 64 (“We can trust an organisation to behave responsibly, regarding its stakeholders and environment. Of course, an organisation itself has no intention, but it has interests and can try to regulate the intention of its workers to serve those interests. The perceived interests of organisations are in turn the result of perceptions and communication of the people in the organisation. One’s trust in an individual may be based on one’s organisation one belongs to. Trust in an organisation can be based on trust in the people in it... Particularly important for the perceptions that underlie the trust in an organisation are the public conduct of the firm’s leadership and the roles that connect the firm with customers or outside partners”).

¹¹ See GEORGE CASPAR HOMANS, *SOCIAL BEHAVIOUR: ITS ELEMENTARY FORMS* 404 (1961).

¹² NOOTEBOOM, *supra* note 4, 75.

¹³ *Id.*, 28.

¹⁴ SZTOMPKA, *supra* note 7, 24.

¹⁵ *Id.*, 5.

by the public through a continuous use of its facilities, thus making it a viable enterprise. In pursuance, individual donations are the most popular means of raising funds. These donations are made by devotees who are also the beneficiaries of the trust, and this further strengthens the trust's financial standing. The sense of respect for public trusts arising out of religious beliefs or moral realisation infuses a sense of enthusiasm and fair management in its operation. Hence, the informal organisational character of public trust is imperative in the dynamics of its functioning. This feature supports, and is supported by, a culture of trust.

C. JUDICIAL SAFEGUARDS OF TRUSTWORTHINESS

A mechanism for accountability of the trust certainly enhances its credibility.¹⁶ With regard to accountability, mere precursory arrangements made in order to dedicate property are inadequate to mitigate the risks and uncertainties involved in the functioning of a trust.¹⁷ To effectively minimise such risks, a system of specific and overarching judicial safeguards is required. In moulding judicial remedies, three considerations must be kept in mind. *First*, there must be an allowance made for representative suits. *Second*, the law must protect against the abuse of the judicial process which might otherwise subject trusts to unnecessary, wasteful, and vexatious litigation. *Third*, there must be scope for judicial deliberation in order to provide appropriate remedy amidst the various available measures.

Such a system essentially bestows upon the Judiciary a secondary role as *parens patriae*. The primary role of the Judiciary is to effectively resolve disputes.¹⁸ However, when a party is in a vulnerable position due to its minority or lack of competence, the Judiciary must adopt the proactive role of a guardian in the interest of justice. This role is usually performed by the State itself. The legal position is that the State, as *parens patriae* is the constitutional protector of all property subject to charitable trusts, as such trusts are essentially a matter of public concern.¹⁹ The Supreme Court in *Aruna Ramachandra Shanbaug v. Union of India*, observed that the State is the most competent to assume the role of a parent if a citizen is in need of protection.²⁰ However, the Court also

¹⁶ SZTOMPKA, *supra* note 7, 87.

¹⁷ C.A. Rajkumar S. Adukia, *Handbook on Laws Governing Formation and Administration of Charitable Organisations in India*, 94, available at http://www.caaa.in/Image/hb-charitable_org.pdf (Last visited on September 25, 2015).

¹⁸ See J. FM Johnson Jr., *The Role of the Judiciary with Respect to the Other Branches of Government*, 2 GA. L. REV. 455 (1977).

¹⁹ Attorney General v. Brown, (1818) 1 Swans 265 at 392 : 36 ER 384 approvingly cited in Mahant Moti Das v. S.P. Sahi, AIR 1959 SC 942 at 956, ¶6.

²⁰ Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454 : AIR 2011 SC 1290 at 1333; Heller v. Doe, 125 L Ed 2d 257 : 509 US 312 (1993) (Mr. Justice Kennedy speaking for the U.S. Supreme Court observed : "the State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable to care for themselves").

noted that in certain situations, courts may also assume such a role.²¹ Such a responsibility on part of the Judiciary forms the philosophical underpinning of §92 of the CPC.

In the context of public trusts, whether the trust has been created on a religious basis or not, courts have employed the doctrine of *parens patriae* to safeguard the interests of beneficiaries. In *Bishwanath v. Radha Ballabhji*,²² the Supreme Court offered a pragmatic solution to the issue of abuse of religious trusts. In this case, the Court noted that an idol is placed in a similar position as that of a minor, incapable of representing itself. Thus, any person interested in its worship may be issued the *ad hoc* power to protect its interests.²³ This analogy may be extended to all forms of public trusts, and is not restricted to religious purposes. All trusts suffer from a similar defencelessness and face common troubles.²⁴ This includes the scattered nature of their beneficiaries, the vast base of devotees, the unpredictability of the worshipping community and the absence of an organised will for legal representation. Further, the Judiciary can ensure that the beneficiary's expectations are met, without it being an obstacle to the sanctity of worship and social service.²⁵

III. THE EVOLUTION OF THE LAW ON TRUSTS

Ancient Indian law has not extensively elaborated on the concept of trust. In what has in fact been discussed, the King was bequeathed power to reduce even a *sanyasin* or sage to serfdom if he was guilty of incontinence. *Narada* contemplated the extrapolation of this jurisdiction to religious bodies and institutions as well.²⁶ *Mitakshara* law refers to practices authorising the King to enforce customs relating to management of temples. As envisaged in the *Sukraniti*, the King had a primary duty to protect endowments.²⁷

²¹ Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454 : AIR 2011 SC 1290 at 1333 (In the case, it was observed, "In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as *parens patriae*, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight").

²² Bishwanath v. Radha Ballabhji, AIR 1967 SC 1044.

²³ *Id.*, at 1047, emphasis added (It is the responsibility of the Shebait to promote the will of the idol by appropriate interpretation of the pious founder's wish while law takes into account the interests of the worshippers and the social interest in carrying out the purpose of the dedication. When Shebait acts contrary to these interests, this shall be cured through interference of disinterested party); See Pramatha Nath Mullick v. Pradyumna Kumar Mullick, (1924-25) 52 IA 245; see also PW DUFF, THE PERSONALITY OF AN IDOL 43, 44 (1927).

²⁴ See Sampradaan Indian Centre for Philanthropy, *A Review of Charities Administration in India*, 2004 available at http://planningcommission.nic.in/reports/sereport/ser/stdy_cai.pdf (Last visited on September 25, 2015).

²⁵ See J. DUNCAN M DERRETT, RELIGION, LAW AND THE STATE IN INDIA 483-4 (1999) (for a discussion about central importance of fulfilment of expectations in religious endowments).

²⁶ Narada Chapter IV, §8.

²⁷ KRISHNA LAL, THE SUKRANITI 9 (2005).

The common law approach allowed the Crown to regulate charitable trusts and endowments, and provided remedies against breach of trust.²⁸ The British Government continued this regulatory regime in India. It exercised the power of superintendence over religious institutions of both the Hindus and Muslims. While doing so, it preserved their structure and managed their affairs through trustees.²⁹ Pagoda funds were often used for construction of bridges or the arrangement of security finances.³⁰

Under the Madras Regulation of 1817 ('the Regulation'), the Board of Revenue ('the Board') assumed the responsibility of ensuring that all charitable and religious endowments were used according to the real intent and will of the donor.³¹ The power of general superintendence over all endowments was vested with the Board as well.³² On the basis of reports submitted by local agencies supervising the endowments, the offices of trustees, managers and superintendents were to be decided by the Board through nominations. §15 of the Regulation, for example, specifically provided for the use of land and other endowments exclusively for fulfilling the intent of the donor, and not for the benefit of Government. The Bengal Regulation of 1810 and the Bombay Regulation of 1827 also had similar provisions. These laws worked to the advantage of indigenous institutions, due to the pressure exerted by Christian missionaries in India and England.³³

Subsequently, the Government repealed these regulations and enacted the Religious Endowment Act, 1863 ('the Act'). The Act continued to vest the power of appointment with the Board, on the basis of elections from respective communities.³⁴ These trustees performed their functions in accordance with the general wishes of those who were interested in the maintenance of the institutions.³⁵ The property continued to vest with the idol or the institution, and not with the trustees or managers.³⁶ Judicial remedy was therefore limited to instances of breach of trust alone, whereas other forms of abuse were not remediable under the law.

²⁸ See JEAN WARBURTON, *TUDOR ON CHARITIES* 412 (2003): "Visitation is a form of supervision over the internal domestic affairs of an institution...it is a practical and expeditious means of resolving disputes."

²⁹ *Muttu Ramalinga Setupati v. Perianayagum Pillai*, (1873-74) 1 IA 209 at 233 (The Privy Council and High Courts recognised king's power to interfere for prevention of mismanagement, fraud and waste in dealing with religious endowment).

³⁰ *Ramiengar v. Gnanasambanda*, (1867) 5 Mad HCR 53 at 57; *see also* MUKHERJEA, *supra* note 1, 408.

³¹ The Madras Regulation, 1817, §4, §7, §8.

³² The Madras Regulation, 1817, §2.

³³ DONALD EUGENE SMITH, *INDIA AS A SECULAR STATE* 244-5 (1963); *see also* WILLIAM CAMPBELL, *BRITISH IN INDIA IN ITS RELATION TO THE DECLINE OF HINDUISM AND THE PROGRESS OF CHRISTIANITY* (1839).

³⁴ The Religious Endowment Act, 1863 §8.

³⁵ The Religious Endowment Act, 1863 §8, §9.

³⁶ *See Sankaranarayanan Iyer v. Sri Poovananathaswami Temple*, (1949) 2 MLJ 171.

The Civil Procedure Code of 1877 recognised the civil court's power to provide remedies relating to public charitable trusts.³⁷ Under §539 of the Civil Procedure Code 1882, this power was extended to grant remedy against public trusts which had either charitable or religious purposes. The remedies were however, confined to removal of the manager and did not include appointment of a new trustee or a settlement of any sort. These defects were rectified in §92 of the Civil Procedure Code 1908 ('the CPC'), and §539 was interpreted as a permissive provision. Further, it was given a cumulative, not restrictive effect.³⁸ The insertion of §92(2) alters this position by confining itself to specific remedies and forms. The importance of §92 is that it provides a forum for filing a representative suit against public religious and charitable trusts. It also enables the courts to decide effectively and finally what is in the best interest of the public.³⁹

IV. ANALYSIS OF §92

§92 of the CPC provides various methods to remedy the malfunctioning of public trusts. It grants civil courts the original jurisdiction to entertain representative suits filed by the Advocate General or two or more persons interested in the trust.⁴⁰ The Court is given wide powers, to the extent of altering the original purpose of the trusts in certain circumstances.⁴¹ This provision

³⁷ *Lutifunnissa v. Nazirun*, ILR 11 Cal 33; *Thanga v. Arumuga*, ILR 5 Mad 383 (The remedy was not available against religious trusts. This defect was cured in the Code of 1882).

³⁸ *Budree Das v. Chooni Lal*, ILR 33 Cal 789.

³⁹ MUKHERJEA, *supra* note 1, 420.

⁴⁰ The Code of Civil Procedure, §92(1),

(In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the Court may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree-

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
 - c [(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;]
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust.
- (f) authorising the whole or any part of the trust property to be let, sold mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require).

⁴¹ The Code of Civil Procedure, §92 (3) (The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and

is an alternative to that provided under the Religious Endowment Act, 1863 or other corresponding laws.⁴² A suit under §92 of the CPC is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character.⁴³ State amendments may qualify the application of §92.⁴⁴ The four individual criteria required to invoke §92 are discussed in detail below, in order to juxtapose the provision with the principle of *parens patriae*.

A. EXISTENCE OF A PUBLIC TRUST

Judicial creativity has greatly moulded various approaches relating to the identification of an entity as a public trust. A plaintiff claiming under §92 must prove that the body is indeed a public trust, as the very existence of a trust is the first threshold of requirement for the application of this section. A suit for mere declaration that a particular public trust exists does not come

allow the property or income of such trust or any portion thereof to be applied cy pres in one or more of the following circumstances, namely:-

- (a) where the original purposes of the trust, in whole or in part,-
 - (i) have been, as far as may be, fulfilled; or
 - (ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or
- (b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or
- (c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or
- (d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or
- (e) where the original purposes, in whole or in part, have, since they were laid down,-
 - (i) been adequately provided for by other means, or
 - (ii) ceased, as being useless or harmful to the community, or
 - (iii) ceased to be, in law, charitable, or
 - (iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust).

⁴² The Code of Civil Procedure, 1908, §92(2).

⁴³ *Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhai Narsibhai*, AIR 1952 SC 143.

⁴⁴ *See* The Madras Hindu Religious And Charitable Endowments Act, 1951, §5 (§92 and §93 ceased to apply to Madras Religious Trusts and Endowments, with effect from 01/01/1960); *A.V.G.P. Chettiar & Sons v. T. Palanisamy Gounder*, (2002) 5 SCC 337 : AIR 2002 SC 2171; *see* Andhra Pradesh Charitable and Hindu Religious and Endowments Act 1966, §110(c) (Said sections cease to apply to Charitable Institutions and Hindu Religious Institutions and Endowments in Andhra Pradesh with effect from 28/1/1967); *see also* A.P. Act 20 of 1979, §48(e) (w.e.f. May 18, 1979) & A.P. Act 30 of 1987, §156 (w.e.f. May 28, 1987); *see* U.P. Muslim Wakfs Act, 1960, §64 & U.P. Gaz., Ext. (September 3, 1960) (For institution of suits for relief under §92 without obtaining prior consent by the Wakf Board in U.P.); *See* Bombay Act 29 of 1950, §52 (§92 does not apply to public trusts in Maharashtra and Gujarat); *see* Rajasthan Act 42 of 1959, §44 (w.e.f. August 1, 1962) (§92 ceases to apply to public trusts in Rajasthan).

under the purview of §92.⁴⁵ However, courts can entertain the examination of such an issue, in a larger context.⁴⁶

For example, in spite of an absence of specific conveyance of property, *Mohunts*, *Shebait*s or *Mutawallis*, were held to be trustees for the purpose of the administration of the trust alone and not in a strict legal sense.⁴⁷ Vast administrative powers do not exclude a person from the being considered a trustee.⁴⁸ Further, the fact that it was created by a minority community does not deny the body the status of a trust.⁴⁹

In Hindu law, the very concept of trust is shaped in a unique and flexible fashion in the context of an idol for whose purpose property is dedicated.⁵⁰ An idol is deemed to be the owner of property only in an ideal or figurative sense, but not a beneficial owner like the general public.⁵¹ Hence, the question arises time and again as to who the trustee actually is. This mixed question of law and fact has been tackled by the Indian Judiciary on multiple occasions.⁵² In *Bhupati Nath Smrititirtha v. Ram Lal Maitra*,⁵³ after considering *Shastrik* texts, the Court noted that a gift to an idol was not subject to the rules applicable to the transfer of property to a ‘sentient being’.⁵⁴ Rather, it was held that the dedication of property to an idol consisted of an abandonment of the property by the owner, in order for it to be appropriated for public use. It was observed in this case that dedication of property to a deity may be a reflection of piety.⁵⁵

Extending this rationale, the Court has also held that in spite of the idol not having a physical existence, a gift for the purpose of its worship

⁴⁵ *Alimiya Mahmadiya v. Sayed Mohamed Baquir Eledroos*, AIR 1968 Guj 257.

⁴⁶ *Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhair Narsibhai*, AIR 1952 SC 143; *Chiranjit Lal v. LIC*, AIR 1959 Bom 396.

⁴⁷ *Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar*, (1920-21) 48 IA 302; *Ram Parkash Das v. Anand Das*, (1915-16) 43 IA 73.

⁴⁸ *Basudeo Roy v. Jugalkishwar Das*, AIR 1918 PC 37.

⁴⁹ *T. Varghese George v. Kora K. George*, (2012) 1 SCC 369 : AIR 2012 SC 144.

⁵⁰ *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, AIR 1925 P.C. 139.

⁵¹ *Deoki Nandan v. Murlidhar*, AIR 1957 SC 133 (According to Medhathithi, “Property of the Gods, Devaswam, means whatever is abandoned for Gods for purposes of sacrifice and the like, because ownership in the primary sense, as showing the relationship between the owner and the properly owned, is impossible of application to Gods. For the Gods do not make use of the property according to their desire nor are they seen to act for protecting the same” Manu, Chap. XI., Verse 26).

⁵² *Lakshmidhar Misra v. Rangalal*, AIR 1950 P.C. 56.

⁵³ *Bhupati Nath Smrititirtha v. Ram Lal Maitra*, ILR (1910) 37 Cal 128.

⁵⁴ *Yogendra Nath Naskar v. CIT*, (1969) 1 SCC 555 : AIR 1969 SC 1089 (According to Sabara Swamy, “That (God’s village or land) is property which can be said to belong to a person, which he can make use of as he desires. God however does not make use of the village or lands, according to its desires. Therefore nobody makes a gift (to Gods). Whatever, property is abandoned for Gods, brings prosperity to those who serve Gods.” Purva Mimamsa, Adhyaya 9, Pada 1).

⁵⁵ ILR (1910) 37 Cal 128, 138, ¶6, 13; *see also Bhupati Nath Smrititirtha v. Ram Lal Maitra*, ILR (1910) 37 Cal 128 (Sir Asutosh Mookerjee at p. 155).

is valid.⁵⁶ This approach deviated from the traditional application of English law, which denied rights to the donees in cases of non-idolatry worship. This was amongst the first instances, where the court adopted a parental role, in order to protect the interest of public trusts. Along similar lines, in *Board of Commissioners v. Veeraraghavacharlu*,⁵⁷ it was stated that the purpose of a gift to a temple was for the benefit for its devotees and not for the deity itself. Thus, it was unequivocally established that a temple and its endowments fall under the category of a public trust.

In order to distinguish public trusts from private trusts, the Judiciary evolved the ‘multiple factor test’ which looked at communitarian participation, social benefit and public funding instead of merely relying on original purpose.⁵⁸ In doing so, it expanded the application of the principle of *parens patriae*. This was a clear deviation from the rigid distinction between private and public trust in English law,⁵⁹ as Indian law allotted a public character to even private charitable trusts which involved some component of communitarian participation.⁶⁰ For instance, in *Lakshmina Goundan v. Subramania Ayyar*,⁶¹ a man installed an idol in his home based on a divine premonition. He allowed all Hindus entry to worship and make offerings. The donations acquired were spent for purchase of jewels for idol and the construction of a separate residential house and a guest house. The original house was converted into a temple. The Court held that the temple had been dedicated to the public and was subject to the laws of a trust.⁶²

However, in *Bhagwan Din v. Gir Har Saroop*,⁶³ the Court adopted a contrasting approach. In this case, a man built a mud hut on a land he was squatting on. He installed an idol in the hut. Subsequently, the land was granted to him. Worshippers came to see the idol, and as a result of immense community participation, it received considerable donations. The family treated these contributions as family property, used them for the erection of a *Samadhi* for exclusive family rituals, and divided the profits amongst the members. The Court noted that as the land was granted to an individual and in light of his family’s exclusive approach to its use, the trust was private rather than public. This decision appears to be based on narrow reasoning as it failed to consider the factors of public participation and origin of the temple property by virtue of a grant from a public body.

⁵⁶ *Id.*, ¶56.

⁵⁷ *Board of Commissioners v. Veeraraghavacharlu*, AIR 1937 Mad 750.

⁵⁸ *Ram Saroop Dasji v. S.P. Sahi*, AIR 1959 SC 951; *Bala Shankar Maha Shanker Bhattjee v. Charity Commr.*, 1995 Supp (1) SCC 485; AIR 1995 SC 167.

⁵⁹ MUKHERJEA, *supra* note 1, 87, 57; WARBURTON, *supra* note 28, 7.

⁶⁰ *Lakshmina Goundan v. Subramania Ayyar*, AIR 1924 PC 44; *Sri C.S. Ambigai Temple v. Commr., HR & CE*, (2001) 3 MLJ 269.

⁶¹ *Lakshmina Goundan v. Subramania Ayyar*, AIR 1924 PC 44.

⁶² *Id.*

⁶³ *Bhagwan Din v. Gir Har Saroop*, AIR 1940 PC 7.

Fortunately, the Judiciary revived the multiple factor test in subsequent cases. Various High Courts have held that a temple initiated as private temple may in the course of time become a public temple due to right of access, participation by the public, and contribution of the public for the extension of the facilities of the temple.⁶⁴ In the landmark case of *Deoki Nandan v. Murlidhar*,⁶⁵ the Supreme Court concretised the use of the multiple-factor test to identify a public trust. The Court observed,

“When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshipers, and that the purpose of the endowment is the maintenance of that worship for the benefit of the worshipers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers.”

In *T. Varghese George v. Kora K. George*, the Court demonstrated the use of the multiple factors test with respect to secular charities as well.⁶⁶ The Court looked into the original trust deed which contemplated accepting donations in any manner from any person or institution for carrying out the purpose of the Trust. No benefit whatsoever was to be retained by any member of the founding family. Accordingly, it was held to be a public trust, and its abuse was remediated.

Moreover, for the operation of §92, the trust may also be a constructive public trust. This ‘constructive trust’ arises not out of the acts of the parties but also by virtue of the operation of law.⁶⁷ A *trustee de son tort* also falls under the purview of constructive trustee. Where the defendants have without doubt been looking after the suit properties in one capacity or another

⁶⁴ Mahadeva v. Commr. for the Board of Hindu Religious Endowments, ILR 1956 Mad 624; Sarat Chandra v. Rabindra Nath, AIR 1957 Cal 11; Bala Krishna Kar v. Ganesh Prasad Bhagat, ILR 1952 Cut 81, 99.

⁶⁵ AIR 1957 SC 133.

⁶⁶ T. Varghese George v. Kora K. George, (2012) 1 SCC 369 : AIR 2012 SC 144.

⁶⁷ Budree Das v. Chooni Lal, ILR 33 Cal 789 at 806.

and have been enjoying the usufruct thereof, they are *trustees de son tort*.⁶⁸ They are not deemed to be trespassers by the mere fact that they put forward their own title to the properties.⁶⁹ This brings even those bodies which are by technical definition are not trusts, under the purview of §92. Thus, the Judiciary has expanded the scope of the remedies available under the section.

In instances where the character of the trust is ambiguous, i.e., both public and private in nature; the courts adopted a policy of bifurcation.⁷⁰ The Supreme Court distinguished between individual transfers and identified the body as a public trust only to the extent to which it was ‘used for public purpose’. However, the Court subsequently shifted its view to the position that a trust would fall within the purview of §92 if it was “substantially” catered to a public purpose.⁷¹

A limitation of §92 is that it cannot be applied to registered societies even if they perform functions of a charitable nature. The rationale is that registered societies are not formal trusts. The Kerala High Court’s decision in *Abhaya v. Raheem* demonstrated this position.⁷² In this case, a registered society ‘Abhaya’ was constituted with the objective of serving the mentally disabled. Initially, the District Court held that the organisation possessed the characteristics of a trust. However, the High Court noted that as the organisation was governed by a Memorandum of Understanding, it did not function in the manner of a trust.⁷³ The Court distinguished the case from an earlier one where the local community had contributed towards creation of ‘trust fund’ for building a school, and subsequently formed a registered society.⁷⁴ The Court noted that the intention to create a trust existed in the latter but was absent in the former. Finally, the Court noted that remedy may be sort under the analogous §25 of the Societies Registration Act, 1860 (‘SRA’).

Such a distinction proves problematic in a number of ways. *First*, the dimension of constructive public trust was not considered even after acknowledging that the society had an obligation to use public money for the purposes stated in the Memorandum of Association, which had a clear charitable purpose. *Second*, the social obligation of the organisation and the expectations of good governance of mental health institutions made it imperative that interpretation of procedural law was in line with the substantive rights of the public. Thus, from a human rights point of view, a liberal approach would have been more appropriate. *Third*, the Court’s finding of similarity between §25 of the

⁶⁸ Syed Mohammad Salie Labbai v. Mohd. Hanifa, (1976) 4 SCC 780 : AIR 1976 SC 1569.

⁶⁹ *Id.*

⁷⁰ Vaidyanatha Ayyar v. K. Swaminatha Ayyar, AIR 1924 PC 221.

⁷¹ Sugra Bibi v. Haji Kummu Mia, AIR 1969 SC 884, 887; Sarat K. Mitra v. Hem Ch. Dey, AIR 1960 Cal 558.

⁷² Abhaya v. Raheem, AIR 2005 Ker 233.

⁷³ *Id.*

⁷⁴ Kesava Panicker v. Damodara Panicker, AIR 1976 Ker 86.

SRA and §92 of CPC was glaringly flawed. The former has far fewer remedies than the latter. Further, its availability is subject to more rigorous conditions such as, the petition ought to be supported by 10 per cent of members of the society. Finally, §92 is a special remedy and its scope must be expanded, however the Court in its approach has restricted its application rather than broadening it.

B. OCCURRENCE OF BREACH OF PUBLIC TRUST

The judicial approach to handling instances of breach of trust has been to confine the application of procedural law to the spirit of the substantive law.⁷⁵ This ensures that the special remedy available does not interfere unnecessarily with the autonomy of the trust. In *Paramatmanand v. Ramji Tripathi*, the Supreme Court declined to grant remedy to the *Mahanth*, as a breach of trust had not occurred.⁷⁶ Relief was available under §92(1)(e) and (f).⁷⁷ However, the Court observed that relief could be sought under §92 only if it was proven that a breach of trust had occurred. The Court pointed out the essential objective of promoting public interest through representative suits under §92, and found no such element in the instant case. An instance of such a breach is occasioned in cases where the trustee misappropriated the funds for the trust for their personal use, it is a clear breach of trust.⁷⁸

The Judiciary's response to the abuse of public trusts has been inadequate due to its restrictive rendering of the notion of breach of trust. The Court in *Harendra Nath Bhattacharya v. Kaliram Das*,⁷⁹ held that a breach of trust cannot arise from a mere temporary denial of access to premises of the trust. However, I argue that the breach of trust must be understood in a wider sense, so as to include the unjustified denial of any form of service contemplated under the trust. Hence, the standard of intention required under §92 cannot be analogous to criminal breach of trust. It must necessarily have a lower threshold of proof.

⁷⁵ Saiyad Mohammad Bakar El-Edroos v. Abdulhabib Hasan Arab, (1998) 4 SCC 343 : AIR 1998 SC 1624 (another ground for invoking §92 is breach of the court directions or scheme for administration of the public trust. Significant juridical developments have not taken place on this matter. As viewed by Woodroffe, J. in *Budree Das v. Chooni Lal* ILR 33 Cal 789, the directions are for carrying out of the trust).

⁷⁶ *Paramatmanand Saraswati v. Ramji Tripathi*, (1974) 2 SCC 695 : AIR 1974 SC 2141.

⁷⁷ The Code of Civil Procedure, 1908, §92(1) (e) ("declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust"); The Code of Civil Procedure, 1908, §92(1) (f) ("authorising the whole or any part of the trust property to be let, sold mortgaged or exchanged").

⁷⁸ *Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhair Narsibhai*, AIR 1952 SC 143; *Duttgir Mahant v. Rishi Ram*, AIR 1993 P&H 231.

⁷⁹ *Harendra Nath Bhattacharya v. Kaliram Das*, (1972) 1 SCC 115 : AIR 1972 SC 246; *see also* *Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhair Narsibhai*, AIR 1952 SC 143 (for the proposition that unless a remedy specifically named under §92 is not invoked, the petition will fail).

In the same breath, courts have refused to invoke §92 in cases where plaintiffs have pleaded for the ejection of a trespasser from trust property.⁸⁰ In many cases, this can be related to or caused by a breach of trust. Trespassers often enter the premises due to collusion or negligence of the trustees. In such cases, providing a remedy under §92 becomes essential to prevent both unlawful trespass and internal discrepancies. Another problem is that no heed is paid to the fact that effective remedies are available for the avoidance or eviction of unlawful occupiers, under the law of *waqf*.⁸¹ Further, yet another instance of judicial apathy is depicted in cases concerning the validity of the appointments of trustees.⁸² At such a juncture, it is imperative that the Judiciary reevaluate its responsibility under §92, which enshrines the spirit of *parens patriae*.

Treating the standard for breach of trust as equivalent to that of criminal breach of trust is itself problematic. This understanding restricts the application §92 solely to embezzlement and misuse of property. Such an approach is not suitable to a procedural remedial provision intended to promote substantial rights of the community. Failure to fulfil the legitimate expectations of the beneficiaries by not performing or obstructing the performance of functions of a public trust must also be considered as a breach of trust. Accordingly, I advocate a liberal approach to interpreting §92, keeping in mind the Judiciary's role as of *parens patriae*.

C. RELIEFS UNDER §92

The range of remedies available under §92 is quite wide. The Judiciary has, by and large, strengthened their efficacy by keeping in mind the welfare of the trust.⁸³ The courts have exercised restraint and condoned petty negligent acts or minor inaccuracies in keeping accounts.⁸⁴ At the same time, they have also been firm and removed trustees in cases involving gross abuse of position, fraud or misappropriation.⁸⁵ In some cases involving the appointment of new trustees, the courts have kept in mind, the wishes of the founder, socio-historic importance of the institution, previous association of

⁸⁰ *Abdur Rahim v. Syed Abu Mahomed Barkat Ali Shah*, (1927-28) 55 IA 96; *Collector v. Bal Chanchal Bai*, ILR 35 Bom 470; *Anjaneya Sastri v. Kothandapani Chettiar*, AIR 1936 Mad 449; *Venkatanarasimha v. Subba Rao*, ILR 46 Mad 300.

⁸¹ *See* The Bombay Public Trust Act, 1950, §50; The Waqf Act, 1995 & The Waqf (Amendment) Act, 2013.

⁸² *Sundaralingam v. Nagalingam*, AIR 1958 Mad 307; *Nilkanth v. Ramakrishna*, ILR 46 Bom 101; *Subramania Pillai v. Krishnaswami*, ILR 42 Mad 668.

⁸³ *Joygunnessa v. Majilullah*, AIR 1924 Cal 1024 (as per Aushutosh Mukherjee, J.).

⁸⁴ *Balmakund v. Nanak Chand*, AIR 1929 All 433.

⁸⁵ *Srinivasa v. Evalappa*, ILR 45 Mad 565; *Joygunnessa v. Majilullah*, AIR 1924 Cal 1024; *Chintaman v. Dhondo*, ILR 15 Bom 612.

the person or family with the institution, competence and prior antecedents.⁸⁶ For the formulation of schemes under §92, the Judiciary has insisted on respect for the institutional trust, avoidance of interference with the spiritual, ceremonial or ethical code, protection of the trust property and interests of the body of worshippers.⁸⁷ It has also provided leeway for the future accommodation of changes by providing scope for variation of schemes.⁸⁸

The provisions of §92, essentially address various defects in the functioning of public trusts. However, the list of reliefs enumerated in §92 is not exhaustive. The section contains a 'residuary powers' clause, vesting in civil courts the power to grant any relief as may be required in a particular case. In *Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhai Narsibhai*,⁸⁹ the Supreme Court observed that it cannot declare that suit properties belong to the trust, because such a relief has not been envisioned under §92. Although this observation is not meant to marginalise the residuary power of the court under this section, it has had unintended consequences. This is seen in practice, where the pigeonholing of remedies into specific heads has caused rigidity, and excluded the courts' competence to deal with various problems.⁹⁰

In addition to the issue of interpretational rigidity, is the use of the rule of *ejusdem generis* to determine the ambit of the residuary clause. In *Abdur Rahim v. Syed Abu Mahomed Barkat Ali Shah*,⁹¹ the Court interpreted the residuary clause as only providing reliefs which are of the same nature as the preceding clauses. It held that any contrary interpretation would reduce the substantive rights of public trusts.⁹² The Calcutta High Court took this reasoning further when it held that general words following a category of specific words shall have a meaning limited by reference to the specific words.⁹³ However, the principle of *ejusdem generis* is applicable only where all the specific categories belong to the same genus, of which they are different species. The various individual clauses of §92 pertain to different issues, such as the transfer of property, accounting, etc., and there is no common genus amidst these clauses. Hence, the application of this rule of interpretation is misplaced. Consequently, innovation in the application of remedies is denied, often unjustifiably.⁹⁴

⁸⁶ Mohd. Ismail Arif v. Ahmed Moolla Dawood, (1915-16) 43 IA 127; Bapugouda v. Vinayak, AIR 1941 Bom 317.

⁸⁷ Sripathi Prasadji v. Barot Laxmidas, (1928-29) 33 CWN 352 (PC); Annaji v. Narayan, ILR 21 Bom 556; Sriji Nyayatiirtha v. Sreemant Dandy Swami Jagannath Ashram, AIR 1941 Cal 618.

⁸⁸ Prayaga Doss v. Tirumala, (1906-07) 34 IA 78; Chandraprasad v. Jinabharathi, ILR 55 Bom 414.

⁸⁹ Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhai Narsibhai, AIR 1952 SC 143.

⁹⁰ See e.g., Harendra Nath Bhattacharya v. Kaliram Das, (1972) 1 SCC 115 : AIR 1972 SC 246.

⁹¹ Abdur Rahim v. Syed Abu Mahomed Barkat Ali Shah, (1927-28) 55 IA 96.

⁹² *Id.*

⁹³ Nabi Shirazi v. Province of Bengal, ILR (1942) 1 Cal 211.

⁹⁴ For instance, using this approach, §92 becomes unproductive in dealing with trespassers or situations of negligent conduct.

D. REPRESENTATIVE SUIT ON BEHALF OF THE PUBLIC

A suit under §92 can be filed by two or more persons interested in the good governance of the public trust, on behalf of the community. The consent of either the Advocate General or the permission of the presiding court is required bring a case under the section. The first method of invoking §92 jurisdiction, is through the written consent of the Advocate General of the State ('AG'). This power is purely administrative and not quasi-judicial in nature.⁹⁵ The AG's consent however does not concretise the litigation and new plaintiffs may be included.⁹⁶ Defendants can be added as well, as long as the nature of the suit remains the same.⁹⁷ This route impedes the judicial process and causes delay as a result of which some genuine grievances are not remedied.

To circumvent this drawback, the Allahabad High Court introduced a plausible solution.⁹⁸ In a case wherein the management of an educational trust attempted to bar admissions and sell the land used by the trust, concerned alumni filed a suit under §92 in the District Court, and were successful.⁹⁹ On appeal, the trust challenged the lower court's decision on the ground that the respondents had not procured the AG's consent. The Court while noting that the consent of the AG was a mandatory provision, ordered for the trust to produce an undertaking that it would not sell the properties under its name and that it will improve the quality of its operation.

The Judiciary's innovative approach ensured that the public's interests were protected. In exercise of its role as *parens patriae*, the Court supported the substantive rights of the beneficiaries by virtue of a procedural refinement. In 1976, the Parliament dispensed with the mandatory requirement of the AG's consent.¹⁰⁰ This amendment strengthened the mechanism under §92 and made it self-contained. The conferment of jurisdiction under this section no longer depends on the value of the subject matter of the suit, but rather on the effect the suit may have on the public.¹⁰¹

As a representative suit, the litigation under §92 is aimed at the protection of public interest, and not mere private vindication. Thus, a suit initiated by individual members of the community, not to establish the general

⁹⁵ Nanhoobeg v. Gulam Hussain, ILR 1950 Nag 50.

⁹⁶ Ponniatha v. Moothedath, ILR 40 Mad 110.

⁹⁷ Kidar Nath Datt v. Kishan Das Bairagi, AIR 1957 Punj 106; Sundaralingam v. Nagalingam, AIR 1958 Mad 307.

⁹⁸ Lucknow Diocessan Trust Assn. v. Sachindranand Bakshi, AIR 1990 All 202.

⁹⁹ The case was instituted in 1968.

¹⁰⁰ The Code of Civil Procedure (Amendment) Act, 1976 (Prior to legislative change made by the Code of Civil Procedure (Amendment) Act, 104 of 1976 the expression used was "consent in writing of the Advocate-General". This expression has been substituted by the words "leave of the Court").

¹⁰¹ Sri Jeyaram Educational Trust v. A.G. Syed Mohideen, (2010) 2 SCC 513 : AIR 2010 SC 671.

rights of the public, but to remedy a particular infringement of their own individual right, is not within the purview of §92.¹⁰² For instance, the Madras High Court disallowed a co-trustee's suit for rendition of accounts under §92 as it was a claim arising from his personal interest.¹⁰³ However, the courts have subsequently been more liberal, basing their decision to maintain or dismiss the case on the remedy claimed rather than the capacity under which the plaint was brought.¹⁰⁴ For example, a suit instituted by the concerned community in the name of the idol for misappropriation of funds was held to be admissible.¹⁰⁵

In light of the amendment of §92 in 1976,¹⁰⁶ the Supreme Court in *Vidyodaya Trust v. Mohan Prasad R.* granted prior leave to concerned individuals in order to file a case under the section.¹⁰⁷ The Court observed that frequent legal battles could prove financially detrimental to a public trust. Ergo, respectable and honest members of society might be dissuaded from becoming trustees. To avoid such a problem, courts now first approve the filing of the plaint before deciding the case on its merits.¹⁰⁸ As a secondary precaution, defendants are also given an opportunity to be heard before such leave is granted.¹⁰⁹ The Supreme Court in *R.M. Narayana Chettiar v. N. Lakshmanan Chettiar* observed that the defendants could always point out that the allegations made in the plaint were frivolous or that its purpose was to harass the trust.¹¹⁰ However, the desirability of a plaint is not a factor to be taken into consideration as it could cause unnecessary delay and considerable loss to the trust.¹¹¹

Remedies under §92 are available even when administrative remedies like supervision or inquiry by the *Muzrai* officer are available, provided that the operation of §92 is not restrained under that law. In *Sudhir G. Angur v. M. Sanjeev*, the Supreme Court found that for certain serious allegations such as forgery, fraud or diversion of trust property, a summary inquiry by an administrative officer would be inadequate, and a remedy under §92 was appropriate.¹¹²

¹⁰² Budree Das v. Chooni Lal, ILR 33 Cal 789, 807.

¹⁰³ Appanna v. Narasinga, ILR 45 Mad 113; Sri Vedagiri Lakshmi Narasimha Swami Temple v. Induru Pattabhirami Reddi, AIR 1967 SC 781 (per Subba Rao, J).

¹⁰⁴ “§92 of the Code of Civil Procedure does not impose a general embargo on filing of a suit in a civil court, but only directs that suits of the nature mentioned in sub-s. (1) thereof shall not be instituted in a civil court except in conformity with the provisions of the said sub-§. If a suit does not fall within the ambit of §92 (1) of the Code of Civil Procedure, it is not hit also by sub-s. (2) thereof.”

¹⁰⁵ Janaki Bai v. Tiruchitrumbala, ILR 58 Mad 988.

¹⁰⁶ *Id.*

¹⁰⁷ The Code of Civil Procedure (Amendment) Act, 1976 (Prior to legislative change made by the Code of Civil Procedure (Amendment) Act, 104 of 1976 the expression used was “consent in writing of the Advocate-General”. This expression has been substituted by the words “leave of the Court”).

¹⁰⁸ *Vidyodaya Trust v. Mohan Prasad R.*, (2008) 4 SCC 115 : AIR 2008 SC 1633.

¹⁰⁹ *Id.*

¹¹⁰ *R.M. Narayana Chettiar v. N. Lakshmanan Chettiar*, (1991) 1 SCC 48.

¹¹¹ *Id.*

¹¹² *Sudhir G. Angur v. M. Sanjeev*, (2006) 1 SCC 141 : AIR 2006 SC 351.

Representative suits are socially beneficial as they bring together people who have common concerns. A suit under §92 is one of special nature, for the protection of public rights in trusts and charities.¹¹³ Such a suit is primarily on the behalf of the entire body of people who are interested in the trust. However, it is to be noted that the jurisdiction of civil courts under §92, is often at conflict with various state endowment legislations. These remedial statutes are specific in nature and hence exclude the application of the general provisions under §92.¹¹⁴ Thus, §92 jurisdiction is largely limited to cases involving enforcement of schemes laid down under it¹¹⁵ or when the exclusion clause itself is overridden by another enactment of the State.¹¹⁶

E. CY-PRES DOCTRINE AND THE JUDICIAL APPROACH

The application of the doctrine of *cy-pres* to the law of trusts involves the extrapolation of the original purpose of a trust in order to save it from becoming functionally moribund.¹¹⁷ The parameters for judicial exercise in this regard have been laid down in §92(3).¹¹⁸ According to the Supreme Court, the *cy-pres* doctrine can be applied where it is impossible or impractical to carry out a trust's original purpose.¹¹⁹ In such a situation, the Court may slightly modify the purpose the trust so as to allow it to function properly, focusing on an intent closely resembling the original purpose.¹²⁰

A famous instance of the application of this doctrine was in *Jackson v. Phillips*.¹²¹ An exposition into this case will give one a clear understanding of the applicability of the doctrine in the case of public trusts. The issue was with regard to a charitable trust which had been created for the purpose of abolishing slavery in America. Subsequently, slavery was made illegal by the Thirteenth Amendment. The question was, "should the trust be dissolved in light of the fact that the objective it sought to fulfil is no longer in existence?" The Court opined that the trust should be used *cy-pres*, in order to fulfil the

¹¹³ R. Venugopala Naidu v. Venkatarayulu Naidu Charities, 1989 Supp (2) SCC 356 : AIR 1990 SC 444.

¹¹⁴ The Bombay Public Trust Act, 1950, §5; The Tamil Nadu Hindu Religious and Charitable Endowment Act, 1959, §108.

¹¹⁵ Minoor Rustomji Shroff v. Charity Commr., (2005) 2 Mah LJ 1135.

¹¹⁶ See A.V.G.P. Chettiar & Sons v. T. Palanisamy Gounder, (2002) 5 SCC 337 : AIR 2002 SC 2171.

¹¹⁷ HALSBURY'S LAWS OF ENGLAND: CHARITIES, Vol. 5.2 (4th ed., 2001) (Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode *cy pres* that is as near as possible to the mode specified by the donor).

¹¹⁸ See Sankaranarayanan Iyer v. Sri Poovananathaswami Temple, (1949) 2 MLJ 171.

¹¹⁹ N.S. Rajabathar Mudaliar v. M.S. Vadivelu Mudaliar, (1970) 1 SCC 12 : AIR 1970 SC 1839, 1841.

¹²⁰ See MUKHERJEA, *supra* note 1, 457.

¹²¹ Jackson v. Phillips, (1867) 96 Mass (14 Allen) 539, 556.

intention of its contributors. It should continue to work to “promote the education, support and interests of the freedmen, lately slaves, in those states in which slavery had been so abolished”.¹²²

As public trusts have an immense social purpose, it would prove counterproductive to disband or dissolve a trust when its original purpose is extinguished. Charitable or public spirited work can never be limited in a strict sense. Public trusts as opposed to private ones have the additional role of inspiring and motivating the members of a society. Thus, scholars have recognised this important social contribution and hence continue to advocate the expansion and application of the *cy-pres* doctrine in spite of the fact that modern day science and technology may render public trusts largely redundant.¹²³

V. SUGGESTED ALTERNATIVE

In search of a better alternative to the rather weak §92 of the CPC, I argue that judicial intervention and remedy under §50 of the Bombay Public Trusts Act, 1950 (‘BPTA’) provides a stronger means of control over trustees. While this resembles §92 of CPC to some extent, it goes far ahead of it,¹²⁴ and is a better substitute. Grievances addressed in §92 include only ‘alleged breach of trust’ or ‘where direction of the Court is deemed necessary’. Moreover, in the context of §92, the Judiciary has abstained from expanding its jurisdiction through liberal interpretation. Hence, against a trespasser or adverse possessor, §92 does not provide remedy as such deviations do not come within its purview. Even with regard to negligence, misconduct and misapplication of fund by the trustee, §92 is inadequate. Similarly, unlike the BPTA, declaration or injunction in favour of or against a public trust, trustees or beneficiaries is not claimable under §92 of the CPC. Moreover, the range of remedies available

¹²² *Id.*

¹²³ See Alex M. Johnson Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353 (1999); James Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule against Perpetuities and Trusts for Accumulation*, 21 N.Y.U. L. Q. REV. 384 (1946); C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407 (1978-1979); Roger G. Sisson, *Relaxing the Dead Hand’s Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 (3) VIRGINIA LR 635-654 (1988).

¹²⁴ The circumstances under which §50 can be invoked are:-

- (i) where it is alleged that there is a breach of public trust, negligence, misapplication or misconduct on the part of a trustee or trustees;
- (ii) where a direction or decree is required to recover the possession of or to follow a property belonging to or alleged to be belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from a trustee, ex-trustee, alliance, trespasser or any adverse possessor but not a tenant or licensee;
- (iii) when the direction of the court is deemed necessary for the administration of any public trust or;
- (iv) for any declaration or injunction in favour of or against a public trust or trustee/s or beneficiary.

through suits under §50 of the BPTA is comprehensive.¹²⁵ These remedies can be invoked only after necessary inquiry or by a specified number of persons having an interest in the suit.¹²⁶ This filtering process prevents vexatious and unnecessary litigation. Hence, such a mechanism can prove to be a far superior alternative to §92.

VI. CONCLUSION

Public trusts immensely contribute to the socio-cultural heritage of the nation. Trusts are uniquely placed as their efficiency depends on a relationship of trust between the trustees and the beneficiaries. This in turn, makes them more vulnerable to an abuse of trust. Thus, safeguarding trusts through an effective legal remedial system is crucial. Morally and philosophically, societal expectations motivate the legitimate and competent operation of the trusts. The representative suit model under §92 of the CPC allows the Judiciary to adopt the role of *parens patriae* and protect the community's interests as manifested in the trust.

The Judiciary has shaped §92 jurisprudence largely towards the path of public good, welfare and human rights. This is evident in the evolution and application of the multiple social factors test in identifying the public character of the trusts. Courts have held that the public nature of a body is sufficient to label it a trust, in spite of the absence of specific objects such as idols. Courts have also attempted to protect trusts from harassment or vexatious litigation.

However, certain self-imposed fetters have prevented the Judiciary from effectively guarding the interests of the public. By narrowly applying the concept of 'constructive trust', courts have inadvertently excluded various socially purposeful organisations such as registered societies from the purview of §92. This restrictive interpretation of 'breach of trust' has led to the failure on part of the Judiciary in protecting the substantive rights of trustees as laid down in the section. Further, the misplaced application of the *ejusdem generis* to the remedies under §92 has caused damage to the remedial competence of the provision. In order to strengthen §92, these fetters must be undone. More importantly, the scope of remediable clauses under the section must be widened, by perhaps emulating the framework of the Bombay Public Trusts Act.

¹²⁵ Recovery of possession; removal and appointment of trustee or manager; vesting of property in trustees; direction for accounts; direction for reimbursement of loss; quantification of allocation of property for various objects of trust; direction about cy-pres use; direction for alienation of property; settlement of schemes; amalgamation of trusts with framing of common schemes winding up of any trust; handing over of any trust to trustees of another trust; and deregistering of the trust exonerating trustees from technical breach order varying; altering or amending any trust instrument; declaring or denying any right in favour of or against any trust; granting of any other relief as the nature of the case may require in the circumstances of the case and in the interests of the trust are the remedies available under §50.

¹²⁶ See Bombay Public Trusts Act, 1950, §50.