
(1949) 03 OHC CK 0008
In the Orissa High Court
Case No : A.F.A.D. No. 94 of 1946

Balaram Rai and Others

APPELLANT

Vs

Mt. Ichha Patrani and Others

RESPONDENT

Date of Decision : 01-03-1949

Acts Referred:

Citation : AIR 1950 Ori 225

Hon'ble Judges : Ray, C.J;Panigrahi, J

Bench : Division Bench

Advocate : G.B. Mohanty and B.N. Das, for the Appellant; P.C. Chatterji and B. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

Panigrahi, J.—The plaintiffs, who have lost in both the Courts below, are the sons of one Fakir Charan Rai who held a revenue-free or muafi grant of the village of Nunia Jampalli in Bargarh Sub. Division of Sambalpur district. The defendants are purchasers of Fakir's interest at a court sale in execution of a money decree obtained against the plaintiffs' father.

2. The plaintiffs alleged that the village of Nunia Jampalli was granted by Haharaja Chhatar Sai to the family of one Lambodar Bai, an ancestor of the plaintiffs, on a permanent and hereditary tenure for doing pujaseba, in the temple of Sri Samaleawari at Sambalpur. It is alleged that the grant being one burdened with service and being a Denottar grant, is inalienable and that the court sale in execution of a decree obtained against the plaintiffs' father is void. The plaintiffs admit that the village was being enjoyed in three shares, i.e., an 8 annas share belonging to one Joydeb Bai, a 5 annag 4 pies share belonging to Fakir Bai, the father of the plaintiffs, and a 2 annas 8 pies share belonging to Iswar Bai. Iswar Bai died without leaving any male issue and his widow, Surjyo, used to get the services performed by Fakir and enjoy her share of the income of the village. Surjyo Bai died in the year 1934 or thereabouts and the plaintiffs claim that their father, Fakir, became entitled to the entire 8 annas share.

3. Defendants 1 to 4 are the daughters and daughters-in-law of Surjyo and allege that the grant of the village to the Bai family was an absolute personal grant capable of being partitioned and alienated and that, consequently, they succeeded to the interest of Surjyo under the Hindu law. They filed money Bait No 163 of 1937 against Fakir for arrears of rent collected by him and not handed over to them and obtained an ex parte decree. In execution of the decree 5 annas share out of the 5 annas 4 pies interest of Fakir was attached and sold in E. s. No. 846 of 1937. Defendants 1 to 4 purchased the property and took possession through Court on 23rd March 1938. These properties form schedule "Ka" attached to the plaint. The balance of 4 pies interest of Fakir Bai had previously been purchased by one Bushi Rai, who is now in possession of the same but whose purchase is not challenged in the present suit. Defendants 1 to 4 also filed Title Suit No. 110 of 1940 in the Court of the Munsif, Bargarh, for a declaration of their right to collect rent from the tenants in respect of the 7 annas-8 pies share which they had acquired by inheritance and court purchase and obtained an ex parte decree against Fakir. In execution of this decree for costs they attached some lands of the village. These lands form Schedule "Kha" of the plaint and are described as Bhogra lands. These were sold by auction in E. S. No. 158 of 1941 and defendant 5 purchased the same and has been in possession. In a separate statement, defendant 5 also averred that the suit village was alienable and that consequently he had acquired a valid title by reason of his court purchase.

4. The Courts below held that the members of the plaintiffs' family were undoubtedly the worshippers of goddess Samaleswari, but that it had not been proved that the grant of the suit village was necessarily connected with service in the temple. The learned Munsif says that "at the most this can be spoken of as a grant burdened with service" and that consequently the same is alienable. The learned Subordinate Judge observes that there was no evidence that the usufruct of the lands in village was ever used for the sevapuja of the deity and that as the name of the deity does not appear in any of the previous settlements the property must be held to be the personal property of the plaintiffs' ancestors.

5. Neither of the Courts below appears to have appreciated the real point at issue, and they both failed to properly construe the documents that had been exhibited in the case. It is, therefore, necessary that the evidence should be discussed in order to determine the nature of the grant and whether it is alienable or not.

6. It appears from Mr. Russell's Report that in 1862 an enquiry was made by Major Impy into the history and conditions of grant of all estates which had been granted, either revenue-free or on favourable terms by the previous Rulers. Paragraph 341 of his Report shows that all the temple grants or endowments which are in fact grants enjoyed by the priesthood were fully enquired into by Major Impy in 1863 who also prepared complete registers of all of them. Major Impy's successor was directed to verify the enquiries previously made and to

submit cases for fresh orders of Government. The Chief Commissioner accordingly re-opened the oases and sent them with his recommendations, under the rules laid down for the disposal of such cases in other districts, for sanction of Government. The terms under which the temple grants were released, free of all demand, were that "so long as the tenure under which the grants were originally made may be fulfilled." Government accordingly sanctioned all the proposals of the Chief Commissioner in September 1864. Mr. Bassell who was engaged in the settlement operations of Sambalpar district in 1872 again went through the terms of these grants and issued certificates or notices of release, under the seal and signature of the Settlement officer, as no Muafidar had up to that time been furnished with a Sannad or any other document showing on what terms and under what authority he held his grant.

7. Exhibit 7, dated 11th September 1673, is the true copy of the petition tiled by "Lambodar Rai, Pujhari Samaleswari" and EX. 8 is the order of the Settlement officer dated 18th December 1874. Exhibit 7 states that the petitioner had been performing the seba puja of Samaleawari and that, therefore, Maharaja Chhatar Sai had granted the village to Loohan Bai on condition that his descendants should be performing the seva puja of Samaleawari; that the documents of title had been burnt during the Raballion but that Lambodar Eai's family had been in enjoyment of the property for thirty to sixty years and that they had been performing the seva puja of Simlal for generations; and that Niranjan Rai and Kangal Bai were also equally entitled with Lambodar Rat. The order on this petition which is a part of Ex. 7 is that the Government had already ordered that the milksat rights be vested in Lambodar; that it be recorded in the Battlement and in the Proclamation to the people that he should be engaged in the puja-seva of Samtai always. The order recognising this grant is dated 14th September 1863 and reference is made to the Chief Commissioner's order no. 1/100 under Rule 10 dated 28th May 1863. The true copy of the robkari entry dated 14th September 1863 was granted by the Settlement officer, Mr. Buaaell, and is exhibited as Ex. 7.

8. Exhibit 8 is the true copy of a similar order dated 18th December 1874, of Mr. Russell during the Settlement operations. The document is entitled "Nishkara Vruthi" or revenue-free grant--mouza Nunia, Tahail Birgarh, District Sambalpur. It recites:

"This mouza had been granted by the previous Baja for the performance of puja-seva of Sri Samaleswari in Sambalpar town. The Chief Commissioner of C. P. had recommended to the Government of India, under Rule 10 of the revenue-free or Maufi Rules for confirming this grant as a, "permanent revenue-free mourasi" and to release the revenue from it. Secretary, Foreign Department, Government of India (Revenue) by his proceedings No. 28 (number torn) dated 30th September 1864 has approved. On enquiry it is found that Lambadar Bai is alive. Hence ordered that the present holder and his lawful heirs shall enjoy permanently and hereditarily and that it shall be resumed in default of heirs."

A portion of this document is torn and it is not possible to make out the rest of the order. But the Register of Muafi grants prepared under the authority of Government, which is marked Ex. 6 in the case, gives all the details of the origin, the nature and the conditions of the grant. Column 11 of the Register shows that the Tillage was being enjoyed revenue-free upto 1850 and that its origin was not known. Column 12 gives an extract of the entries of an earlier register prepared at the first Settlement of Sambalpur district in 1850 with the remarks of the investigating officer, The entry against column 12 is as follows:

"Anirudhha Rai, descendant of grantee. This is a grant alleged to have been granted by Chhatar Sai Maharaja on condition that the duties of the temple of Samalai are regularly performed. No authority is produced, but enjoyment proved back to grandfather's times 60 years ago. Recommended to be released so long as the terms of the original grant are fulfilled under Rule 6 and be held by the present holder and his lawful heirs during good behaviour, but reannuable on failure of legal heirs."

The order of Government is entered in Col. 13 of the Register as follows :

"Released in full hereditarily. Vide authority quoted in the case of para 31 of this Register."

The authority of Government is quoted in Ex. 5 which is a copy of the entry relating to the village of Para which was No. 31 in the old Muafi Register and No. 24 in the subsequent Register. Vide letter No. 288 dated 30th September 1864 from the Under Secretary to the Government of India, Foreign Department (Revenue) to the Chief Commissioner, Central Provinces--Copy forwarded by the Secretary to the Chief Commissioner to the Commissioner, Chhattisgarh Division under his order No. 4856, dated 18th October 1864 a copy of which was forwarded to the Deputy Commissioner, Sambalpur, by the Commissioner, Chhattisgarh Division, under his endorsement No. 3803 dated 22nd October 1864. These documents make it clear that the grant was made to an ancestor of the plaintiffs, who was a worship, per of the deity Samaleswari, and the grant was later confirmed by the British Government during the First Settlement of 1860, the condition of the grant being that "the duties of the temple of Samlai are regularly performed." Both the Courts below have unfortunately overlooked this entry and have fallen into the error of holding that the enjoyment of the village has nothing to do with the service in the temple. The fact, on the other hand, is that the village can be "held revenue free only so long as the duties in the temple of Samalai are regularly performed."

9. It cannot therefore be seriously disputed that the grant is one burdened with service and is a Dabottar grant. The fact that proprietary rights are vested on a grantee is not inconsistent with the charge of a trust in favour of a deity. The Government have reserved to themselves the right to resume if the performance of the service is refused or if the line of the grantee becomes extinct for want of heirs. That the grantee is to enjoy the village on condition of performing service

is itself an indication that the grant is inalienable and that the grantee is to enjoy it hereditarily does not detract from the character of the grant. Since the grant is made for the performance of seva-puja it is necessary that the property should remain in the hands of the grantee, and any alienation of his interests would be opposed to the terms of the grant besides being contrary to public policy. That other members of the family are entitled to share in the income and participate in the puja does not imply that the property as such can be partitioned. For convenience of enjoyment the members may agree to hold in definite shares and agree to perform the service by rotation. This is recognized by custom throughout the country and is consistent with the purpose for which the grant had been made. There is a unity of title in the family and any member of the family can claim right of worship and consequently the right of enjoyment as well; but this claim to enjoy in shares is confined among the members of the family inter se and cannot avail against the grantor or the Government who have the right of resumption. The Settlement of Officers have therefore recorded the names of the different co-share in the Muafi Register and these entries are consistent with the family being the owner of the village. That this is the view taken by the revenue authorities is also clear from Ex. 9, which is a copy of the order of the Deputy Commissioner in proceedings which were initiated for the resumption of the alienated share of 4 pies in case No. 1/6 of 1936 87. This presumably refers to the alienation made in favour of Rushi Eai. The order is dated 8th January 1937 and reads as follows :

"Vide printed note on the subject regarding Muafi grant for maintaining temple (C. P. Government). Fakir Rai has been rendering service well. So, no resumption proceedings can stand. Only warn him to redeem the mortgage as early as possible. No mutation shall be allowed in favour of the mortgages."

The name of the mortgagee is not given, but it is clear that the mortgagee was also an alienee of the 4 pies share which led to the initiation of resumption proceedings. Exhibit 9 thus makes it clear that Government did not recognise any alienation and therefore mutation was refused.

10. Exhibit 10 is the notice issued by the Deputy Commissioner, Sambalpur, to Fakir Oharan Rai, calling upon him to answer certain queries which are enumerated below ;

(i) How much land have you in your possession for doing seva-puja to Bamlai Devi after your mortgage of the Devottar Muafi lands ?

(ii) After the mortgage, who is rendering puja-seva?

(iii) Will you redeem the mortgage within 15 days ?

11. Exhibit 10-a is a similar notice showing that the 4 pies share in Nunia Jimpalli had been attached owing to its being alienated. The enquiry resulted in the order, exhibited as Ex. 9, refusing mutation and directing Fakir to redeem the mortgage as early as possible. As the service was being performed there was no occasion

for resumption in accordance with the terms of the grant.

12. Defendants have filed EXS. D and F which show that Malapatrani, and, after her death, defendants 1 to 4, have got their names mutated in the Proprietary Mutation Register under the orders of the Sub Divisional officer in the year 1938. In column 9 of the Register the entry under "Nature of Transfer" is "Civil Court decree " There was no enquiry as to whether the village could be transferred even by the decree of the civil Court, and therefore the order of the Sub-Divisional officer cannot justify an alienation of a tenure which is otherwise inalienable.

13. It was strenuously argued by Mr. Chatterji appearing for the respondents, viz, defendants 1 to 4, that the name of the deity or the purpose of the grant is not recorded in any of the Settlement registers prepared from time to time for the suit-village and he relied on EXS. G, H and I Exhibit G which is a copy of the Khewat prepared during Mr. Nethersoll's Settlement contains remark that

""this is a Muafi village and consequently there is no need to mention the names of the co-sharers."

Exhibit H is a copy of the Khewat prepared at the Settlement made by Mr. Bosaell and it gives the co-sharers' names and the revenue that had been remitted. Exhibit I is a copy of the Khewat prepared at the Settlement by Mr. Dewar and it carries out the previous entries and gives the names of the co-sharers. All these documents merely show that the village was being enjoyed by certain co-sharers in definite shares and that the public revenue was remitted. But it is clear that all these documents describe the grant as a "Muafi." The absence of the deity's name or of the purpose for which the grant had been made, can be no basis for an argument that the grant was a personal one. " There is nothing in these exhibits to show the nature of the grant.

14. Plaintiff 1 examined himself as P. W. 1 and deposed :

"We have three days in a month as our turn of worship. I go on these days to Sambalpur and help in cooking in Bhog. We all get the offerings to our house."

P. W. 1 is Ruahi Rai, the purchaser of the 4 pies interest. He is an agnate of the plaintiffs' family and is also one of the sevaks. He says :

"There can be no transfer except to my brother. Till we worship the deity we enjoy the village, and in default we will have no right over the lands. Every year an enquiry is made by the Tahsildar."

D. W. 1 also admits that

"Rushi and Fakir Rai are sebayats in the Samlai Temple in Sambalpur town. Their family members also worship They are enjoying the village and worshipping the deity since their forefather's time."

It is clear therefore that the terms of the grant are being observed to this day

and that the plaintiffs' family enjoys the village as a condition of rendering service to Samaleswari. Accordingly the plaintiffs' family cannot claim absolute proprietary rights and must hold the village in trust for the deity Samaleswari. The village is there, for a Devottar grant held by an Archaka for the service of the deity.

15. Thus the grant in this case was to the deity and not for the personal enjoyment of the grantee. This is evident also from the difference in language between the Brahmottar grant of village Para evidenced by EX. 5 and the grant of the suit-village of Nunia as evidenced by Ex. 6. The village Para was granted to a Brahmin

"at an eclipse of the-Sun for the maintenance of the Brahmin's family" and the grant was recommended for "release in perpetuity, under Rule 10, to be held rent-free by the Brahmin and his legitimate heirs during good behaviour."

The difference in the language employed in the case of the suit-village is significant. Column 12 of EX, 6 says that

"this is a grant alleged to have been granted by Ohhattar Sai Maharaja on condition that the duties of the temple of Samlai are regularly performed. Recommended to be released as long as the terms of the original grant are fulfilled, under Rule 6, and to be held by the present holder and his lawful heirs during good behaviour, but resumable on failure of legal heirs."

The right of resumption was expressly reserved in the case of this grant whereas the grant in the case of village Para was absolute without any right of resumption being retained by Government. Consequently, it would appear that the grant was to enure to the benefit of the "present holder as long as the terms of the original grant are fulfilled." Village Para was made revenue-free under Rule 10 while Rule 6 was made applicable to the suit village of Nunia Jampalli, It thus appears that while Para was a personal grant village Nunia was not. Had these two documents stood alone, they would have been sufficient to enable one to draw the inference that the grant of the village Nunia was made to the deity and not the ancestor of the plaintiffs. Exhibits 7 and 8 referred to above make it clear that Lambodar Rai claimed remission of public revenue as the Pujhari of the deity Samaleawari and expressly stated that the grant had been made for making offerings and doing seva puja to the goddess. The language employed in Ex. 8, does not warrant any inference that a personal grant was intended. It says that the Chief Commissioner had recommended that it be released, under Rule 10 of the Muafi Rules, as permanent, revenue free and hereditary. But Ex. 6 shows that the revenue was remitted under Rule 6 by the Government of India. There is nothing in these two documents to show that the grantee was to enjoy for his personal benefit hereditarily. The use of the words "present holder" seems to indicate that only a life estate was intended. In other words, every incumbent of the office of Sebayat was to hold the village for his life and the use of the words "'his legal heirs" indicate that a succession of life interests was intended.

16. On a proper construction of the documents, therefore, I hold that the grant of the village Nunia was made to the deity, for offerings to be made at the temple of Samaleswari. This is also borne out by the oral evidence of P. Ws. 1 and 2 who say that the village belongs to Samaleswari deity and the plaintiffs enjoy the village as sebayats. The goddess Samaleswari said to have been installed by Maharaja Chhatta Sai who, according to EX. 7, made the grant of the village, is enshrined in a temple and is held in great veneration by the people of the district. The deity is therefore a public deity and the temple in which it is enshrined in a public temple. It follows therefore that the grant for the service of the deity was intended to be a public religious grant for the benefit of the deity. In *Jagadindranath v. Rani Hemanta Kumari* 31 I. A. 203: 32 Cal. 129 P. O. Sir Arthur Wilson, delivering the judgment of the Board observed:

"The use of the term "sebayat" in the Settlement files of 1863 and 1877, and in the plaint in the suit, points rather to a dedication of the completest Character."

In *Abhiram Goswami v. Shyam Charan* 361. A. 148; 36 Cal. 1003 . a grant made to a Mahant for "beatowing blessings" on the donor was held to be Devottar. It was contended that there was no complete dedication to the service of any idol but that the gift was to the Mahant, personal and descendible to his heirs, in return for blessings bestowed on the donor and his family. Their Lordships referred to the evidence in the case which shows that the donee received the gift as a gift for the service of the particular idols, whose sebayat he was, and that the income of the mouza had ever since been entirely appropriated to their service. The Board observed that

"that was a fact which may well be taken into consideration to ascertain the Intention of the founder."

In the present case not only do the plaintiffs allege in the plaint and depose in their evidence that the produce of the village is used for offering bhog to the deity, but documentary evidence of unimpeachable authenticity also points in the same direction. I have, therefore, no doubt in my mind that the grant was made to the deity and that the dedication in favour of the deity was of the completest character. In *Ganesh Dharanidhar v. Keshao Rao* 15 Bom. 625 the Sannad recited that certain villages had been held as inam on account of worship, jubilees, etc., in honour of Shree (or the deity) and the inam was confirmed with the direction that it be continued to him, and his sons, and grandsons from generation to generation. It was held that the grant was primarily a grant to the religious foundation and not to the particular individuals for their own benefit. I am not unaware of the distinction existing between absolute dedications and dedications of a less complete character. The cases reported in *Ashutosh Dutt v. Durga Charan* 61. A. 182: 5 Cal. 438 P. C.) and in *Sonatun Bysack v. Jaggut Sundari* 8 M. I. A. 66: 1 Sar. 721 P. a.) are instances of less complete dedications in which, notwithstanding a religious dedication, property descends beneficially to heirs subject to trust or charge for the purpose of religion. In the case before us, on the other hand, the evidence does not allow any escape from the conclusion that

the dedication was to the deity and not to the ancestors of the plaintiffs" family.

17. That grants of this character are inalienable, as being opposed to public policy, can hardly be disputed, the principle being that the lands follow the office ex-necessitate. As was laid down in *Neti Anjaneyalu Vs. Sri Venugopal Rice Mill (Limited)*, . the sale of lands held on temple-service tenure is opposed to the nature of the interest affected and is consequently void. Their Lordships approved of the previous decision of that Court in *Pakiam Pillai v. Sitarama Vadyar* 14 M. L. J. 134: 27 Mad. 465 N which related to a spiritual office in a village. To the same effect are the oases reported in *Govinda Gounder v. Rama Ayyan* 25 I. o. 600: A. I. R. 1915 Mad. 235 (service inam for the performance of service in a temple); *Subbayya v. S. Ramayya* A. I. R. 1925 Mad. 1046: 91 I. C. 666 (for reciting hymns or Suddulu on the occasion of a festival of a village goddess). For other instances of service inams connected with a temple, reference may be made to *Archaka Sundara Raju Dikshatulu Vs. Archaka Seshadri Dikshatulu and Others*, ; *Velu Pillai and Others Vs. Secretary of State and Others*, ; *Meanakshisundaram Pillai v. Chokkxlingam* 15 M. L. J. 10 (fanning service), *Ramanathan Chettiyar v. Kalidas*, A. I. R. 1986 Mad. 559. 163 I. O. 724 (temple service); *Lakahmudu v. Ramudu* A. I.R. 1939 Mad. 867: I. L. R. (1940) Mad. 123 (case of Dasabandham inam or service of public utility). The same principle applies to other service tenures such as in *Madhava Rao v. Raghunath* to I. A. 255: A. I. R. 1923 P. O. 205 (Watandar) ; *Satya Naraian v. Satya Niranjana* 51 I. A. 37: A.I. R. 1924 P.C. 5 (Ghatwali); and *Venkata Jagannath v. Veerabhadrayya* 43 I. A. 244: A. I. R. 1922 P.C. 96 (Village Karnam office). Whether the grant is burdened with service or is grant of an office in lieu of wages, the principle underlying inalienability is equally applicable, and there is no difference between a private sale and an execution sale: See *Subbayya v. Mohammed Mustafa* A. I. R. 1923 P. C. 175. 46 Mad. 751

18. The Courts below have wholly misconceived the real point in controversy between the parties and, therefore, their judgment cannot be upheld. The plaintiffs shall have a decree declaring that the suit properties in schedules "ka" and "kha" are Devottar properties and not liable to be proceeded against in execution of decrees in Money suit) No. 1937 and in Title Suit No. 110 of 1940, and that the plaintiffs are entitled to recover these properties from defendants 1 to 5 who are in posssssion of the same. The plaintiffs shall also be entitled to the costs of this litigation throughout.

19. This appeal is accordingly allowed with costs.

Ray, C.J.

20. I agree.