

(1982) 03 CAL CK 0037
In the Calcutta High Court

Bibhuti Bhusan Roy

APPELLANT

Vs

Sm. Saralabala Hazra and Others

RESPONDENT

Date of Decision : 22-03-1982

Acts Referred:

Specific Relief Act, 1963 — Section 34, 42

Citation : 86 CWN 735

Hon'ble Judges : B. N. Maitra, J

Bench : Single Bench

Advocate : B. K. Panda, M. K. Roy, for the Appellant; Panchanan Pal, B. Bhattacharjee, for the Respondent

Final Decision : Allowed

Judgement

B. N. Maitra, J.—The plaintiff has alleged that one Nahesh Chandra Roy installed the family deity, Sri Iswar Laxmi Mata Thakurani. The entire property described in the Schedule A to the plaint was dedicated by him to the deity by the registered Arpannama executed on 10th November, 1884. Kedar and Kshirode are sons of his first wife. He appointed them shebaites and stated that they would have four annas share each. He appointed his youngest brother's son Surendra Shebati and stated that the latter had four annas share. His further assertion was that his second wife, Amritamoyee, would have the remaining four annas share. Further provisions is that her share would be inherited by her son, should there be any. In 1898 he died leaving Kedar, Kshirode and also three sons by second wife, viz., Prafulla, Amulya and Bharat. Proforma defendants nos.5 and 6 are Bharat's sons and proforma defendants nos.2 to 4 are Amulya's sons. In 1918 Kshirode died leaving three sons, Chandra Bhusan, Bibhuti Bhusan (plaintiff) and Satya Bhusan (Proforma defendant no.10). The latter died on 21st November, 1956, without leaving any male child. At that time only his widow Adhibasini and five daughters, Sarala, Santi, Sudharani, Bularani and Renubala were alive. Proforma defendants nos.7 to 9 are Prafulla's sons. Then on the 3rd May, 1969, Adhibasini died leaving Sarala, Santilata, Sudharani and Bula and three sons of

her predeceased daughter, Renubala. Regarding Chandra Bhusan the present dispute has cropped up. The terms of the Arpannama are that no "Douhitra" and a member of separate Gotra would become shebait. The plaintiff has stated that he and the proforma defendant no.10 jointly have one-third share in the property. With a view to depriving their interest, Adhibasini along with her daughters Santilata, Sudha and Bula fraudulently executed a Deed of Settlement dated 29th January, 1969, in favour of Saralabala (defendant no.1). On the strength of that collusive and invalid document, the defendant no.1 has been trying to disturb their possession in the property. The suit is for a declaration that the Deed of Settlement in favour Saralabala is void and for a further declaration that the plaintiff and the proforma defendant no. 10 jointly have one-third share in the properties and for an injunction to restrain the defendant no.1 from interfering with their possession and seba puja of the deity.

2. The defendant no. 1 has filed a written statement denying the plaintiff's allegations. Her defence is that the alleged Arpannama of Mahesh Roy was never acted upon. He treated the suit property as his secular one. At any rate there was a partial dedication and it was not an absolute debuttar. She has been enjoying the usufructs of the property to the extent held by her father Chandra Bhusan in her own right as an heir and also by dint of the deed of settlement given by the other heirs. The suit is not maintainable and plaintiff and the alleged co-sharers are not in possession.

3.The learned Munsif stated that the alleged Arpannama (Ext.1/a) contained provisions repugnant to Hindu Law. There was only a partial dedication and there was no absolute debuttar. The females could not be excluded from the line of shebait. Hence the suit was decreed.

4. The defendant no.1 preferred an appeal. The appellate court agreed with the learned Munsif and found that by the Deed of Arpannama, Ext. 1/a, there was only a partial debuttar. By that document Mahesh did not create any estate unknown to Hindu Law. But the restriction regarding Gotra was not valid. The defendant no.1 acquired an interest in the property by inheritance as well as by the deed of settlement executed in her favour. Since the Arpannama in question was merely charged with Deb Seba, one-ninth share of Chandra Bhusan devolved on his heirs. Accordingly the plaintiff or proforma defendant no.10 could not claim that share. He held the plaintiff was not in actual possession. The latter did not pray for recovery of khas possession. In view of provisions of S .34 of the Specific Relief Act, the suit was not maintainable. The appeal was allowed and the suit dismissed. Hence this appeal by the plaintiff.

5. It has been contended on behalf of the appellant that the construction of the Deed of Dedication (Ext. 1/a) of 1884 shows that it is invalid in law, because at that time no female could become a shebait and touch the idol. Since the deed was executed about a century ago, when the position of the Hindu Law was otherwise, the learned Munsif has passed a correct order by stating that the Deed of Dedication executed by Mahesh Roy was not valid because he created an

estate which is unknown to Hindu law. There was an absolute dedication in favour of the deity. This suit is maintainable in law because the learned Munsif has stated that the question of maintainability was not pressed before him.

6. The learned Advocate appearing on behalf of the Respondent has supported the decision of the appellate court. He has stated that the plaintiff has only 1/9th share in the property.

7. The first question is, whether the point of maintainability can be pressed though that point was abandoned before the learned Munsif. On this, the decision of Lord Sumner in the case of 22 CWN 866 (Privy Council) at pages 870-871 may be referred to. It has been stated that where a point was not pressed, in the absence of evidence to show that the judgment was erroneous on the point, the appellant must accept that position in the appellate court. Now, the clear statement in the defence is that the plaintiff is out of possession. Accordingly, the plaintiff is enjoined to ask for recovery of possession within the meaning of the proviso to S. 34 of the Specific Relief Act. This was stated in the Bench case of Kumud Ranjan Banerjee Vs. Manabendra Banerjee, and also by Subba Rao, J, in the case of Mst. Rukhmabai Vs. Lala Laxminarayan and Others, at page 285. It has been stated that the well-settled rule practice is not to dismiss the suit automatically when it is within the mischief of the proviso to S. 42 of the Specific Relief Act, but to allow the plaintiff to make necessary amendment of the plaint, S. 42 of the Specific Relief Act have been engrafted in S. 34 of the new Act. Hence the point advanced on behalf of the appellant on this is devoid of substance.

8. Then about the construction of the disputed Arpannama, (Ext 1/a) The learned Advocate appearing on behalf of the Respondent says that this is a finding of fact and is thus binding in the High Court in second appeal. This is not so because the question of construction of document is a question of law. Hence this question can be agitated in this Court. That deed of dedication, Ext. 1(a), shows that the shebait would perform their work and also enjoy the usufructs of the property. By that deed, the property was merely charged with the seva puja of the deity.

9. Then about the question whether by the disputed document, Ext.1 an absolute debutter or partial debutter was created. In the case reported in 41 CWN 968 PC & AIR 1954 SC, it has been stated that the question whether an absolute or partial debutter has been created, has to be determined with reference to the intention of the settler. The decision of the Judicial Committee in the case of Maharaja Jagadindra v. Rani Hemanta Kumari in LR 31 IA 203 at pages 209-210 shows that where by a grant a mere charge is created, the dedication is qualified. The property descends and is alienable and partible but subject always to the trust or charge in the idol's favour. This has also been stated by Dr. Bijan Kumar Mukherjee in his well-known book on Hindu Law of Religious and Charitable Trust, 4th Edition, at page 175.

10. It will appear from pages 220 and 221 of Dr. Mukherjee's book that a female

can be a shebait. That view was taken a century ago. In the case reported in Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others, it has been stated that the powers of male and female are the same as regard alternation of the trust property and trusteeship carries with elements of property and office, The observations made in the case in Angurbala Mullick Vs. Debabrata Mullick, were followed. It will appear from the case of Raj Kali Kuer Vs. Ram Rattan Pandey, that the right of female heir to succeed to religious office is maintainable in law and she can perform her duty through a deputy. Hence the submission made on behalf of the appellant, that a female could not be a shebait of the deity in 1884, cannot be accepted. Of course, the restriction contained in that deed about Gotra are of no importance. So it is held that no absolute debutter was created by that deed, that only a partial debutter was created thereby and it is a valid document.

11. It has been stated that the plaintiff has 1/9th share in the property. Admittedly he is not in possession of the disputed property, as held by the final court of fact. But in view of the aforesaid Supreme Court decision in the case of Rukma v. Lakshmi Narayan (supra) an opportunity should have been given to the plaintiff to amend the plaint and the suit should not have been dismissed straightway. Hence the matter will be remitted to the trial court to give an opportunity to the plaintiff to amend the plaint, if he desires to do so. If he makes such prayer, than a chance will be given to the defendant to file a written statement. Then further evidence will be taken and the suit will be decided according to law.

12. The learned Munsif made a mistake in declaring the alleged title of proforma defendant no.10. He did not pay any court fees and make any prayer. Hence in the plaintiff's suit, his alleged title cannot be declared.

13. The appeal is allowed. The judgment and decree appealed against are set aside. The matter is now remitted to the trial court for a decision in the light of the observations made above.

There will be no order as to costs.

Preparation of formal decree in this appeal is dispensed with.