
(1938) 04 CAL CK 0001
In the Calcutta High Court

Jaharlal Mukherjee

APPELLANT

Vs

Jyoti Prosad Banerjee and Others

RESPONDENT

Date of Decision : 28-04-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 4, 151

Citation : AIR 1938 Cal 547

Hon'ble Judges : S.K. Ghose, J;Edgley, J

Bench : Full Bench

Judgement

S.K. Ghose, J.—This rule has arisen in the following circumstances: The opposite parties Nos. 2 and 3 as shebait of an idol Sri Sri Iswar Sridhar Jew brought Money Suit No. 31 of 1928 in the Third Court of the Subordinate Judge at Hooghly against the petitioner as defendant 1 and others. The suit was first dismissed by the Court below on 2nd July 1930, but on appeal it was remanded for re-hearing. Ultimately on 12th August 1935 on which date the suit was fixed for hearing, Babu Biman Chandra Chatterjee, a pleader for the plaintiffs, intimated to the Court that his clients had informed him through their agent that they would not proceed with the case. Thereupon, the Court dismissed the suit by recording the following order:

Babu B.C. Chatterjee, pleader, says that his clients' agent came to me (him) yesterday that he won't proceed with the case. The pleader for the plaintiffs has got no instructions. Defendants are absent. Their pleader not found though sent for. No steps taken by the decree-holder. It is now 2-5 P. M. Dismissed for default.

2. On 10th September 1935 the opposite party No. 1 claiming to be a shebait of the same idol Sri Sri Iswar Shridhar Jew made an application purporting to be under Order 9, Rule 4 and Section 151, Civil P.C. for restoring the suit. The petitioner opposed the application challenging the right of the opposite party No. 1 to maintain such an application. A title suit was pending between opposite party No. 1 on the one hand and opposite parties Nos. 2 and 3 on the other regarding the title to the shebaitship. By an order dated 21st December 1935 the

Court below stayed the hearing of the matter till the decision of the title suit. It appears that the suit was decided against the opposite party No. 1 but this decision was reversed on appeal and a second appeal has been preferred by opposite parties Nos. 2 and 3. The present petitioner prayed that the hearing of the application be stayed till the decision of the second appeal by this Court. The learned Subordinate Judge however by his order dated 29th January 1938 declined to stay the matter and held that the petitioner had no right to oppose the application under Order 9, Rule 4, Civil P.C. Then by an order dated 3rd February 1938 the Subordinate Judge allowed the application of the opposite party No. 1, set aside the order of dismissal dated 12th August 1935 and restored the suit with a direction that opposite party No. 1 would be joined as a co-plaintiff. Against that order this rule has been obtained. The first point taken is that the application for restoration is not maintainable because the order of the Subordinate Judge dated 12th August 1935 dismissing the suit was not one passed under Order 9, Civil P.C. It is suggested that the order was really passed under Order 23 as upon withdrawal by the plaintiff. In order to decide this question, one has only to look to the terms of the order dated 12th August 1935. It is no doubt correct that the plaintiff's pleader appeared before the Court and made a statement to the effect that his client's agent had informed him that he would not proceed with the case. But at the same time, the learned Subordinate Judge expressly recorded that the plaintiff's pleader had no instructions and no steps were taken by the plaintiff. At the same time, the defendants were absent. Consequently, the suit was dismissed for default. This was clearly an order passed under Order 9, Rule 3 and the petitioner himself took this view in his petition of objection filed in the lower Court in answer to the application for restoration. In this view, the application for restoration was clearly maintainable under Order 9, Rule 4, Civil P.C.

3. The next point taken is whether opposite party No. 1 has locus standi to file the application. It is not disputed that it is the plaintiff on the record and not some other person who can file such an application. The controversy centres round this position that, while the original plaint was filed by opposite parties Nos. 2 and 3 as shebait, an application for restoration under Rule 4 had been filed by opposite party No. 1 as shebait. It appears that at the time of filing the original plaint, opposite party No. 1 had no connexion with the sheba; his case is that he was subsequently appointed shebait and opposite parties Nos. 2 and 3 had ceased to perform the seva. Whether that is so or not, the question is whether the idol represented by opposite parties Nos. 2 and 3 can be taken to be the same juridical person as the same idol represented by opposite party No. 1. It seems to us that this question must be answered in the affirmative. No doubt the right of filing the suit is in the shebait and not in the idol: *Jagadindra Nath Roy v. Hemanta Kumari Devi* (1905) 32 Cal 129. This was held with reference to a question of limitation and it was pointed out that limitation is affected by the minority of the shebait. This is also explained in *Dasarathi Chatterjee v. Asist Mohan Ghose* AIR 1920 Cal 848. But the point that is relevant here is that the

shebait is only the representative of the idol just as a guardian is the representative of a minor. It has been held that the minor is the real plaintiff and not the guardian or next friend who may be changed: vide *Khodabux v. Budree Narain Singh* (1881) 7 Cal 137 and *Bhobotarini Debi v. Sreo Ram Paul* (1883) 9 Cal 629. This is borne out by Order 32. No doubt, there is a difference between a minor and an idol. But as I have said, the relevant point is that the shebait is only the representative of the idol. Our attention has been drawn to the cause title of the plaint which describes the plaintiff as Sri Sri Iswar Sridhar Jew Thakur represented by shebaits 1 and 2. Too much stress need not be laid on the literal meaning of the words, but it is clear that the real plaintiff must be held to be the idol and not the shebait who was suing in his name. That being so, the real plaintiff is not changed because a new shebait has come on the scene and his case is that the plaintiff idol did not appear on the date of hearing on account of the fraudulent conduct of the shebaits. In this view it must be held that the application for restoration under Order 9, Rule 4, Civil P.C. is maintainable by the opposite party No. 1.

4. The next point that has been argued is that in any event the opposite party No. 1 has no locus standi, because he is not really the shebait. For the other side, it is contended that whether opposite party No. 1 is a validly appointed shebait or not he is the de facto shebait and as such he is entitled to litigate in the name of the idol. Our attention has been drawn to the allegations of opposite party No. 1 in his application before the lower Court and also to the fact that in the written statement of the present petitioner it was stated that opposite party No. 1 has been appointed a shebait by Hari Mohan Banerjee, that he was performing the duties of the she-bait and that he was a necessary party to the suit. The learned advocate for the petitioner however contended that this was not an admission that opposite party No. 1 was the de facto shebait and as such entitled to litigate in the name of the idol. The controversy raises an intricate question of fact which was not gone into by the lower Court. We do not think it necessary to go into this question now in view of the circumstance that the question whether opposite party No. 1 is a shebait or not is awaiting decision in Second Appeal No. 231 of 1938 and we think it expedient in the interests of justice that the further progress of the suit be stayed pending the decision of the second appeal. If in the second appeal it is decided that opposite party No. 1 has the title to shebaitship, then the order of the lower Court dated 3rd February 1938 setting aside the order of dismissal and restoring the suit would be confirmed. If, on the other hand, it is decided in second appeal that opposite party No. 1 is not entitled to shebaitship, then the aforesaid order of the lower Court dated 3rd February 1938 will stand reversed. If in the second appeal, it is not decided that opposite party No. 1 is a de facto shebait, it would be open to the opposite parties to raise that question in the Court below. If there is no express decision arrived at in the second appeal, the parties will have liberty to apply to the lower Court. The result is that the progress of the suit will be stayed pending the decision of the aforesaid Second Appeal No. 231 of 1938. The rule is

disposed of in these terms. There will be no order as to costs in this rule.

Edgley, J.

5. I agree.