
(1941) 08 AHC CK 0001
In the Allahabad High Court

Mahant Som Giri	Vs	APPELLANT
Mahant Ram Ratan Giri and Others		RESPONDENT

Date of Decision : 26-08-1941

Acts Referred:

Citation : AIR 1941 All 387 : (1941) 11 AWR 283

Hon'ble Judges : Iqbal Ahmad, C.J

Bench : Division Bench

Judgement

Iqbal Ahmad, C.J.—The decision of this appeal depends on the answer to the question whether, in the events that have happened, Som Giri plaintiff, appellant was entitled to maintain the suit giving rise to the present appeal for recovery of the amount due on the basis of the mortgage deed in suit. The Court below answered this question in the negative and dismissed the suit. The mortgage deed in suit is dated 1st December 1932, and is for a sum of Rs. 10,300. It was executed in favour of one Mahant Swami Krishnanand Giri by the defendants, who are members of a joint Hindu family. The Court below held that due execution of the deed in suit by the defendants and the passing of consideration was proved. It also held that the deed was executed in lieu of an antecedent debt, and, as such, the family property of the defendants was liable for the debt due on the basis of the deed. No exception has been taken in the present appeal to these findings of the Court below.

2. The suit was originally filed by Swami Shib Dayal Giri, but on an application dated 26th May 1936, being filed by Sorn Giri his name was substituted as a plaintiff in place of Shib Dayal Giri. The application is printed at p. 11 and the order of the Court is printed at p. 13 of the record. The defendants contested the suit inter alia on the ground that Som Giri had no right to maintain the suit and, as stated before, this contention of the defendants found favour with the Court below. The relevant facts relating to this plea of the defendants which are no longer in controversy are as follows : One Swami Shankaranand Giri founded a "math" known as Gaddi Shankar Ashram at Bhimgodda. On 7th January 1919,

the de-fendants executed a simple mortgage deed for a sum of Rs. 12,000 in favour of Shankaranand. Thereafter Shankaranand on 13th March 1924 executed a will which is printed at p. 67 of the record. The decision of the question set out at the inception of this judgment depends on the interpretation of the terms of that will. It was provided by the will that Shankaranand will, in his lifetime, be the absolute owner of all the properties devised by the will and that, after his death, his disciple Pranwanand Giri shall, in every way, be the owner in possession of the entire moveable and immovable property and cash given below in my possession at present or which I might acquire in future.

3. Pranwanand Giri and his successors were enjoined not to transfer the immovable properties at any time. Pranwanand Giri was a minor on the date of the execution of the will and it was provided by para. 4 of the will that

if after my death Pranwanand Giri...has not attained majority, Swami Shib Dayal Giri Sarwanand.... Mahadewanand and Bhagwatanand...shall look after the management of the bequeathed property as trustees and as guardians of the minor aforesaid.

6. The will contained a direction for the establishment of a "sannyasi pathshala" (school) and the trustees were enjoined to make arrangements for the residence and mess of sannyasi students and bramhcharis

and to meet the expenses of the same from the income of "the bequeathed property aforesaid." By the will "the trustees aforesaid" were given the power to look after the management "of the bequeathed property in every way" in the event of any disciple, grand-disciple.etc, of Pranwanand Giri being a minor. Further, in the event of Pranwanand Giri dying without leaving any disciple the trustees aforesaid were given the power to appoint any learned sannyasi and gaddi-nashin in place of Pranwanand Giri. Paragraphs 8 and 11 of the will have a direct bearing on the decision of the question mentioned above and those paragraphs run as follows:

8. If one or two of the trustees aforesaid die, the remaining trustees shall have power to co-opt their disciples as trustees in their places. If the disciples of the deceased trustees are not found to be fit, the remaining trustees aforesaid shall have power to co-opt one or two learned "sannyasi mahatmas" out of Dashnam Sikhs according to needs.

11. My disciple or grand-disciple, etc, shall not generation after generation have power to marry or use any intoxicant, etc., or to turn immoral. If they act to the contrary (aur hoi gair chalchalan chale) the trustees aforesaid shall have power to remove them from the "gaddi" and to appoint some other learned "sannyasi" as "gaddinashin" on the bequeathed "gaddi." The trustees aforesaid shall act as guides and advisers to him also and he shall also be bound by all the terms of this will. After my death my disciple Pranwanand Giri and the trustees aforesaid shall be liable for and entitled to recover any outstandings.

7. The detail of the bequeathed property was given at the foot of the will. Shankaranand died on 15th May 1925. Out of the four trustees originally appointed Bhagwatanand was removed by Shankaranand himself in his lifetime and Shankaranand did not appoint any trustee in his place. Out of the remaining three trustees Sarwanand died shortly after the death of Shankaranand, and Mahadewanand resigned. Of the four trustees originally appointed Shib Dayal Giri was the only trustee left and it is not denied that he entered on the execution of the duties entrusted to him by the will. He acted as the guardian of Pranwanand, looked after the school that was founded in pursuance of the directions contained in the will and, it is a matter of admission that, sadhus, sannyasis and bramcharis were fed and clothed at the cost of the institution. In short, Shib Dayal was the sole virtual trustee during the minority of Pranwanand. Pranwanand attained majority in the year 1930, and then on 16th October 1930, Shib Dayal got the mortgage deed of 7th January 1919, referred to above, renewed by the defendants in favour of Pranwanand Giri. Pranwanand Giri died on 10th March 1932, without leaving any disciple and then Bhish Dayal brought one Krishnanand Giri from Kishikesh and duly installed him on the "gaddi." That Krishnanand was a duly appointed mahant of the "gaddi" is not disputed. On 1st December 1932 the mortgage deed in suit was executed by the defendants in favour of Krishnanand and is printed at p. 75 of the record. This mortgage was in renewal of the mortgage deed dated 16th October 1930, referred to above. It was recited in the deed that:

Pranwanand Giri Ji, the principal creditor under the bond aforesaid, is dead. Mahant Swami Krishnanand Giri Ji, disciple of Swami Shankaranand Giri Ji, "gaddinashin" of Shankar Ashram Bhim Godda, Hardwar, his representative in possession is alive, and is entitled to recover the amount.... Accordingly we requested Mahant Swami Krishnanand Giri Ji aforesaid that in place of the previous bond he should obtain a possessory mortgage deed from us at a lower rate with respect to the property specified as given below out of the hypothecated property....

8. The mortgage was for a sum of Rs. 10,300 and was a mortgage with possession. Krishnanand, the mortgagee, was, however, given the right to recover the mortgage debt whenever he might choose, and similarly the mortgagors had the option to pay the mortgage debt whenever they liked to redeem the mortgage. In the event of the disturbance of or interference with the possession of the mortgagee the mortgagee was given the right to recover the principal with interest by means of a suit for sale. A few months after the execution of the mortgage deed in suit, viz., in April 1933, Krishnanand left the ashram and the "gaddi" and went away on pilgrimage without making any provision for the management of the ashram and the properties appertaining thereto. He even did not disclose his whereabouts. After the departure of Krishnanand one Baldeo Prasad took the properties mortgaged under the deed in suit on lease from Shib Dayal Giri who was described in the deed of lease as "the manager in possession and trustee of the Shankar Ashram.

9. It appears that before Krishnanand had gone on pilgrimage, certain suits for recovery of debts had been filed on behalf of Krishnanand, and the plaintiffs of those suits were signed by Bodhamal, the general attorney of Krishnanand. The defendants of those suits pleaded that Krishnanand was dead when the suits were filed and accordingly the suits were not maintainable. The Court concerned then ordered that Krishnanand be produced in Court. Time was taken repeatedly and vigorous search of Krishnanand was made. Krishnanand was, however, not forthcoming. Then Shib Dayal, by a deed dated 2nd July 1934, (p. 85 of the record) removed Krishnanand from his office. The circumstances that led to the removal of Krishnanand were recited in the deed as also the circumstances that had prevented Shib Dayal from co-opting other trustees with him, and it was provided that Shib Dayal had "taken the management of the property and business" in his own hands. The very next day after the execution of this deed, viz., on 3rd July 1934, Shib Dayal applied for substitution of his name in place of Krishnanand as plaintiff in the various suits. The applications were under Order 22, Rule 10, Civil P.C. and were allowed by the Court with the result that Shib Dayal was substituted as plaintiff in the suits in place of Krishnanand. The defendant of one of the suits, however, filed a first appeal from order in this Court against the order of the trial Court substituting Shib Dayal as plaintiff in place of Krishnanand. During the pendency of the above appeal the suit giving rise to the present appeal was filed in the Court below by Shib Dayal for recovery of the amount due on the basis of the mortgage deed in suit. The appeal from order was allowed by this Court on 22nd April 1936. This Court held that even if it be assumed that Shib Dayal

has a right to appoint a "mahant" of this alleged "math" and that he has further the power to remove, the question still remains that till a new appointment of a "mahant" is made after the removal of Krishnanand Giri, it cannot be said that there was any devolution of interest and the "mahantship" is in these circumstances in suspense. Learned Counsel for the respondent, however, contended that it was open to the applicant to appoint himself a "mahant" and in that case there would have been a devolution of interest. That may be so. All that we need say at this stage is that the applicant has not appointed himself as a "mahant," and, therefore it is not open to him to say that he could be substituted in place of the "mahant" alleged to have been removed from his office.

10. In pursuance of the observations of this Court just quoted Shib Dayal appointed and installed Som Giri as the mahant of the "gaddi" in question on 18th May 1936, and then the application for substitution of the name of Som Giri in place of Shib Dayal as plaintiff in the suit giving rise to the present appeal was, as stated in an earlier portion of this judgment, filed in the Court below on 26th May 1936, and Som Giri's name was substituted as plaintiff and Shib Dayal's name was struck off. It may here be stated that after his departure in April 1933 Krishnanand once appeared on the scene for a short period, and in one of the suits referred to above filed an affidavit on 22nd January 1935, stating

that:

It is not known when I may go where. It is necessary that the name of the Swami Ji aforesaid (Shib Dayal) should be substituted and should continue as the plaintiff.

11. This fact however has no bearing on the decision of the appeal before us. The Court below dismissed the suit giving rise to the present appeal on three grounds. Firstly, it held that the mortgage in suit does not appertain to the trust but was the personal property of Pranwanand, and, as such, no mahant or trustee has the right to recover the amount due. Secondly, it held that Shib Dayal alone was not competent to remove Krishnanand and appoint Som Giri as a mahant. Lastly, it held that, even if Shib Dayal alone had the right to remove Krishnanand, the conditions precedent to the exercise of the power of removal as set out in para. 11 of the will did not exist, and, as such, Krishnanand could not be removed. In our judgment the decision of the Court below is erroneous and this appeal must prevail.

12. It is manifest from the will that Shankaranand had devised all his properties, moveable and immovable, and the income accruing from the same was charged with the expenses of the trust. That this is so will appear from paras. 5 and 6 of the will which provided that the expenses incurred in the board and lodging of the students and in paying the salaries of teachers and employees of the "pathshala" will be met from the income of "the bequeathed property." The mortgage dated 7th January 1919 was not exempted from the operation of the will. The debt due on the basis of that mortgage was payable to Shankaranand and the trustees were directed by para. 11 of the will to recover the "outstandings." It therefore follows that the debt due on the basis of the mortgage deed of 1919 was bequeathed and was attached to the "gaddi." The mortgage of 1919 as already stated, was renewed in favour of Pranwanand in 1930 and the latter mortgage deed was in its turn renewed by the mortgage deed in suit. In the mortgage deed in suit Krishnanand Giri, the mortgagee, was described as "gaddinashin" of Shankar Ashram and as representative of Shankaranand Giri. This shows that the defendants, the mortgagors, themselves admitted that all the three mortgages appertained to and were the properties of the "math." We therefore find it impossible to agree with the finding of the Court below that Pranwanand was the absolute owner of the mortgage bond of 1919 and that that bond was his personal property.

13. The question, however, remains whether Som Giri was a validly appointed mahant, and, as such, was entitled to maintain the suit. It was argued on behalf of the defendants that in accordance with the terms of the will Shib Dayal alone was not competent to remove or to appoint a mahant. It was contended that in accordance with the directions contained in the will it was obligatory on the surviving trustees to appoint new trustees in place of the original trustees, and reliance was placed on para. 8 of the will in support of this contention. It was urged that the trustees had the right to act jointly or not at all, and, as such,

Shib Dayal alone could not remove or appoint a mahant. We are unable to agree with this contention.

14. Paragraph 8 of the will is directory and not mandatory. It no doubt empowered the surviving trustees to co-opt other trustees with them, but the will is conspicuous by the absence of any obligatory or mandatory provision regarding the minimum power of trustees required to represent the trust. The will no doubt, as pointed out by the Court below, refers to the trustees "in the plural," but there is no express provision against one trustee acting in the interests of the trust and for the preservation of the trust property. There is nothing in the will to indicate that the authority of a surviving trustee to act was to remain suspended till new trustees in place of old ones were appointed. In short, there is no provision in the will supporting the contention of the defendants that the "math" could not be represented unless the power given by para. 8 of co-opting new trustees was exercised. We therefore consider that Shib Dayal had the right to remove or to appoint a mahant provided the conditions laid down by the will were fulfilled. The view that we take is in consonance with the view taken in *Kesho v. Shri Laxminarayan Sansthan* ("26) 13 AIR 1926 Nag. 86. It was held in that case that a surviving trustee can continue the trust in the absence of any term in the instrument of trust itself indicating an intention to show that the conjoint act of the whole body of trustees was necessary for the validity of all or any of the proceedings under the trust. To the same affect is the decision in *Warburton v. Sandys* 60 E.R. 499. It was pointed out in that case that the testator does not say that if the surviving trustees do not exercise the power of appointing a new trustee, they shall not exercise any of the powers given by the will; but what he says is of an affirmative nature.

15. The view that we take is also in consonance with the principles underlying Sections 44 and 76, Trusts Act. The Act no doubt does riot apply to public or private religious charitable endowments, but nevertheless the principles underlying the sections just mentioned serve as useful guide. Those sections run as follows:

44. When an authority to deal with the trust property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

76. On the death or discharge of one of the several no-trustees, the trust survives and the trust property passes to the others, unless the instrument of trust expressly declares otherwise.

16. We therefore hold that Shib Dayal was competent to act alone. Before leaving this part of the case we may point out that the evidence shows that Shib Dayal was on the best of terms with Shankaranand, and all along acted in the interests of the trust according to the best of his lights. Shib Dayal figured as a

witness in the case and he deposed that

the income of the trust is very little and there being a lot of disputes concerning it, no one came or comes forward to be appointed its "mahant".

17. We believe this statement of Shib Dayal and attribute his failure to co-opt other trustees to the fact that no suitable man was willing to undertake the duties of a trustee rather than, as suggested by the Court below, to a desire on his part to play the roll of a dictator. There was no emolument attached to the office of a trustee and it is therefore not surprising that persons willing to act as trustees were not forthcoming. It is pertinent to note in connexion with this part of the case that Krishnanand was appointed mahant solely by Shib Dayal and nobody ever disputed the validity of his appointment. Indeed, in the present litigation, the defendants themselves maintained all through that Krishnanand was validly appointed mahant and, as such, Som Giri was not entitled to maintain the suit. The conclusion is therefore irresistible that Shib Dayal was alone competent to remove or to appoint a mahant.

18. The matter may be looked at in another way. By the will certain powers were given to the trustees and the powers were attached or annexed to the trust. It is well settled that there is a distinction between a bare power and power attached or annexed to a trust or office. In the former case the power can be exercised by the donees of the power conjointly or not at all, whereas in the latter case the power can be exercised by the survivor. The law is that if the power is given to two persons by name the power can be exercised by the two conjointly. But if the power is given to two persons not by name but as office-holders, the power can be exercised even by the survivor of the two. In cases where power is given to two persons by name coupled with the description of their office, then in order to decide whether the power can be exercised by the survivor, the Court has to gather the intention from the terms of the deed whether the power was given to them as *persona designata* or as holders of the office and the rule set forth above has then to be applied : vide *Chhotey Lal Vs. Sri Thakur Gopalji and Others*, . In the will under consideration, four persons were no doubt named as trustees but the power was given to them not as *persona designata* but as holders of the office of trustees. The survivor of those trustees could therefore exercise those powers.

19. The question that remains for consideration is whether Shib Dayal in removing Krishnanand and in appointing Som Giri as mahant acted within the scope of the authority given to him by the will. It is not suggested that Shib Dayal was actuated by any ulterior motive in removing Krishnanand and in installing Som Giri as mahant. There is no suggestion of any animosity between Shib Dayal and Krishnanand. On the other hand we know that Krishnanand owed his mahantship to Shib Dayal, and apparently Shib Dayal had no reason to remove Krishnanand unless he was forced by circumstances to do so. Krishnanand disappeared without making suitable arrangements for the management and preservation of the trust property. The suit giving rise to the

present appeal was instituted so far back as on 1st May 1935. The whereabouts of Krishnanand are even unknown at present and he has taken no interest whatsoever in the suit. Indeed he has taken no interest whatsoever in the affairs of the "math" during all these years and has to all intents and purposes abdicated the "gaddi." Shib Dayal as the sole surviving trustee instituted the suit in his own name. This, as observed by the Court below, he did in the interest of the trust. During the pendency of the suit, the first appeal from order referred to above was decided by this Court, and then Shib Dayal was faced with an awkward situation. He found that as a result of that decision he had no right to maintain the suit. The only alternative that was left to him was to act in accordance with the pronouncement of this Court and he acted in conformity with that pronouncement. He removed Krishnanand from the mahantship and appointed Som Giri as mahant and then applied for the substitution of the name of Som Giri as plaintiff.

20. It is therefore manifest that the appointment of Som Giri as mahant was bona fide. But it is argued by the defendants that the removal of Krishnanand and the appointment of Som Giri offended against the provisions of para. 11 of the will Shib Dayal deposed that he had heard from certain mahants that Krishnanand had taken to drink and was keeping a woman with him. This part of the evidence of Shib Dayal was hearsay and was rightly discarded by the Court below. But the exercise of the power for the removal of the mahant for the time being given by para. 11 was not conditional only on the mahant using any intoxicant or becoming immoral. That paragraph contained words of very wide import. It gave power to the trustees to remove a mahant if he was guilty of some improper conduct (it may be noted here that the English rendering of para. 11 at p. 68 of the paper-book is not quite accurate). It cannot be doubted that the conduct of Krishnanand in leaving the "math" and in absenting himself for a long period without making provision for the management of the trust properties was improper and Shib Dayal was therefore in our opinion well within his rights in removing Krishnanand and appointing Som Giri as a mahant. We have therefore no hesitation in holding that Som Giri was validly appointed and had the right to maintain the suit.

21. Before concluding this judgment, we may observe that Som Giri has been the de facto mahant from the year 1936 and Krishnanand has never upto this date appeared on the scene and claimed to replace Som Giri. [There is no suggestion that the decretal amount if realised by Som Giri will be lost (to the trust. Indeed the suit is in the interest of the trust. Som Giri was therefore entitled to bring the suit : vide AIR 1935 44 (Privy Council) . For the reasons given above, we allow this appeal, set aside the decree of the Court below and decree the plaintiff's suit with costs here and below. The office will draw up a decree under Order 34, Rule 4, Civil P.C.