

(1918) 04 CAL CK 0031
In the Calcutta High Court

Mohendra Nath Bagchi and Others

APPELLANT

Vs

Gour Chandra Ghosh and Others

RESPONDENT

Date of Decision : 18-04-1918

Acts Referred:

Citation : 46 Ind. Cas. 867

Hon'ble Judges : Smither, J; John Woodroffe, J

Bench : Division Bench

Judgement

John Woodroffe, J.—The present suit is brought by two persons in their capacity as executors of the Will of one Sidheswar Goswami, who by his Will created a Debutter in favour of his deity Sri Sri Gour Gopal and appointed his four disciples as Shebait. They are Gopeswar Das Goswami, Gobinda Das Brojobashi, Hariswar Das Goswami, and Kristeswar Das Goswami. The last two persons appear to have taken no part in the matter of this Debutter, and they do not appear to have been heard of as stated in paragraph No. 2 of the plaint and as alleged before us. The Will, after appointing these four persons as Shebait, provided that if Gopeswar Das was unable or unwilling to carry on the Sheba, then Sri Jogneswar Goasain would act as Shebait in his place; and it is stated that this man Jogneswar has not been found also. Nothing, however, turns upon the facts that are stated here in the view that I take of this case. The other two, Gopeswar Das and Gobinda Das, by deeds of transfer made over their Shebaitship to the 1st and 2nd defendants. It is stated, though this is disputed, that the fourth defendant took a document from his transferee, the defendant No. 1, under which the former was to act as Shebait during his life. One of the original Shebait is thus in office, and the other original Shebait, Gopeswar Das, is said to be engaged in the Shebaiti work. The plaint alleges that the transfers of the Shebaiti right were unauthorized as a matter of law. It also alleges that the Sheba was not properly carried on by the defendants. It asks that possession of the Dabutter property may be made over to the executors, that the transferees defendants Nos. 1 and 2 may be evicted and that the deeds may be declared null and void and that defendant No. 3 may be declared incompetent as Shebait. No

special mention is made in the prayer of the plaint as regards defendant No. 4. At the trial the plaintiffs said that they did not require any adjudication on the charges of misconduct and said that they would rest their case on the question whether the transfers of the Shebaitship were authorised or not. The testator died in 1898. In 1899, there was a compromise in a suit brought by Gopeswar Das Goswami against the executor and executrix. That suit was compromised upon the terms that Gopeswar Das Goswami and Gobinda Das Brojobashi should be Shebait and should be able to appoint succeeding Shebait of their respective Shebaiti right by means of a Will or by any other document to whomsoever they pleased. A question has arisen as to the accuracy of the translation of the 7th clause in the petition of compromise.

2. It has been suggested on behalf of the respondents that this clause confers upon the Shebait the right only to appoint their successors upon their death.

3. By the appellants, it is contended that there is no such limitation and we have, therefore, had that clause translated by a translator of this Court who says that it was as follows:

The two aforesaid Shebait shall be competent to appoint succeeding Shebait in respect of their respective shares of Shebaitship by a Will or any other deed, and to make over his (their) Shebait share to whomsoever they like.

4. Therefore, the contention of the learned Counsel for the respondents on this point fails. It may be observed, that the compromise took place so far back as fourteen years before suit. On the 5th January 1909, that is four years before suit a deed of transfer of the Shebaitship was made to defendant No. 2, and on the 16th March 1911 a similar deed was made in favour of defendant No. 1. The deeds were substantially in the same terms, and they recited that of the four Shebait mentioned in the Will, two, Hariswar Das Goswami and Kriteswar Das Goswami, could not be found and that Gopeswar Das Goswami and Gobinda Das Brojobashi had been carrying on the Sheba possessing the Debutter property. Then it states that the income of the Debutter properties is such that the Shebait could not manage the duties of the Debsheba out of the same, nor had they any other means whereby the Debsheba could be managed; and that, therefore, it was the desire of the executant of the deed executed in favour of one Protap Chandra Goswami to place the charge of Debsheba in the hands of some great man. The charge of Debsheba was placed in the hands of the donee who was a Goswami--a descendant of Srimut Nityananda. I should mention here that the testator was a Vaishnab. The document then proceeded to vest in the donee the right to the Shebaitship. The present suit was instituted in 1913, as I have said, four years after the execution of one of these deeds and 14 years after the compromise.

5. Now, it is to be observed in the first place that the plaint does not challenge the validity of the compromise. On the contrary it says that the Shebaiti right could not be sold or transferred according to the terms of the Will and the

rafanama, thus assuming, so far as it goes, the validity of the compromise.

6. Here, however, another case is made before us by the learned Counsel for the respondents, to the effect that the compromise was an improper document and that the executors had improperly--perhaps it may be said fraudulently--entered into an arrangement by which, in order to escape from the liability to render an account, they had consented that the transferors, the Shebait, should do something which the Will did not allow; and on this ground he contended that the compromise could not stand.

7. We must, however, deal with the case as it is made in the plaint, though I proceed to deal with the question whether or not this compromise does, as the appellants contend, form a bar to the plaintiffs' suit. It is said that even if it be held that the compromise was not an improper transaction in the sense stated, it is not a bar because it is suggested that it deals only with the question of the succession to the properties after the death of the then existing Shebait, and reliance is placed upon the summary of the claim which precedes the petition of compromise, which is to the following effect: "who shall carry on the Debsheba and manage the Debutter properties and also of the rules by which the management will be governed and for a declaration of the manners and conditions to which the aforesaid duties be subject after the death of the Shebait and advisory executors." This, it is argued, shows that the executors could not have agreed to a compromise giving a right to deal with the Shebait before death. The answer, however, to this is that this sets out the nature of the claim which was made, and the petition of compromise following shows what was in fact agreed to, and as I have said, on a proper translation of Clause 7, the Shebait had the power to appoint Shebait in succession to them even before their death. By the terms of that compromise Gopeswar Das Goswami and Gobind Das Brojobashi were to carry on the Sheba as Shebait. And in paragraph 15 it is stated that "the two Shebait will be bound to carry on their respective duties of Sheba according to the terms of the Will". The Will provided that the executors were to be the advisors of the Shebait who were to do everything according to their advice, and, it was, by this compromise, determined that the rights and duties of the executors in this respect should be confined to the two clauses which are set out in paragraphs Nos. 5 and 11 of the petition of compromise. The 7th paragraph provided for succession to the Shebaitship which the Will had omitted to do.

8. Now, if as would appear from these deeds of transfer, these Shebait were short of funds for carrying on the Sheba, and if, as appears to be the case, the Sheba was by this transfer placed in the hands of persons who were in a position to carry on the Sheba, it is clear that the transfers were transfers for the benefit of the idol, the beneficiary. Even if these recitals were not established by evidence; it is thereby shown that the transfers are unnecessary and ipso facto void.

9. It is also clear, I think, that the transfers were made to properly qualified

persons. It is not contended here that there was a right of transfer to anybody. There is no evidence of any impropriety on the part of the persons to whom the transfer was made nor of the transferors, for, as I have said, though some charges were made, no evidence was given in support of them. Under the circumstances, it does not appear to me that there was anything illegal in the compromise, and that the existence of that compromise is a bar to the successful institution of the present suit. I may also point out here that the law of limitation also appears to be against the plaintiffs, because the compromise was effected 14 years before the suit, and unless that compromise can be shown to be null and void, which, I agree with the Subordinate Judge, has not been done, it would be necessary for the plaintiffs, before they can get the reliefs claimed in this suit, that they should set aside that compromise under the provisions of Article 95 of the Limitation Act--more than three years" time has already elapsed--because the impropriety which is now alleged was impropriety by and known to the plaintiffs themselves.

10. Farther, there appears to be another bar by limitation as regards the 2nd defendant under the provisions of Article 91 of the Limitation Act, as the suit was brought more than three years after the date of the deed. It is not, however, necessary to rest my judgment entirely upon this ground of limitation, as, apart from that, for the reasons I have stated, I hold that the compromise is a bar to the suit. Further, the plaintiffs, it is contended, do not establish their right to sue at all for the reliefs which they claim.

11. It appears from the Will that the Debutter which is mentioned in it must have been created before the date of the Will, for the preamble to the Will says that the deity had been established, and paragraph 4 says that the testator had been carrying on the Sheba and Puja during his lifetime. There is, however, a provision in the Will that if any property were subsequently acquired after the date of the Will, that also would be treated as Debutter of the deity. We must take it that the plaintiffs were executor and executrix of the Will, as in a previous case in this Court it has been so decided; but these executor and executrix were entitled only to possession of the properties belonging to the testator and the property which had been made Debutter at the time of the Will was no longer that; and further, even if the executor and executrix were at any time vested with the Debutter property (without holding that that was a fact), such possession was made over by them to the Shebaites and on such making over the executor and executrix became functus officio, except as regards the property, if any, which might have been acquired after the date of the Will. It does not appear that there was any such. This document appears to be rather a nomination of Shebaites than a testamentary disposition; having regard, however, to the fact that it contained a provision that the subsequently acquired property should also be made Debutter, it was doubtless treated as a testament of which executors were appointed by the High Court in the previous proceedings.

12. The learned Counsel for the respondents, to get out of this difficulty, submits

that the Will either appointed both the executors and Shebaites, in effect, trustees of the dedicated properties with different functions, namely, the so called Shebaites were to carry on the worship and the executors were to do the secular business of the trust, or it was contended that the legal title was in the executors alone who were the trustees proper and that the Shebaites were appointed merely to carry on the Puja and the Sheba under the advice and directions of the executors. In this way it is contended that there was a title in the executors to maintain the suit, and that, in fact, the executors had had such title from the date of the death of the testator until the institution of the suit. I think, however, this construction of the Will does not hold good. In the 14th paragraph of the Will which appointed the executors, it is said that "these four persons are appointed advising executors of the Shebaites. Everything will be done with their advice". It is said everything would be done. But by whom? As this is followed by the words "with their advice", this must, in my opinion, refer to the Shebaites who were to do everything under this Will with the advice of the executors. This is what we might expect seeing that ordinarily the trusteeship is, in such matters, vested in the Shebaites of the idol. As I have said, this question of the right of interference by the executors, subsequently arose in the suit which was compromised and was there limited to the clauses mentioned in paragraphs Nos. 5 and 11 of that compromise. In my opinion, therefore, it has not been shown that the plaintiffs had title to maintain the suit for the reliefs claimed.

13. The suit, therefore, fails on both the grounds and the appeal is decreed with costs and the suit dismissed with costs. The appellants are entitled to their costs in the lower Appellate Court. Defendant No. 2 will be entitled to get from the plaintiffs the whole of the costs which he has incurred in this appeal and to those costs he will be solely entitled. As regards the hearing fee, the plaintiffs will pay the hearing fee to the appellants who will divide the same between them.

Smither, J.

14. I agree that this suit should, be dismissed with costs. At the time when the document which is spoken of as a Will, and, which is in some respects a Will, was executed, the particular properties now in suit, were already Debutter. That document, in so far as it gives directions regarding those properties, does not take effect as a Will; and though the plaintiffs may have some rights under that document in respect of those properties, they did not get those rights in their capacity as executor and executrix to the Will, in which capacity they bring this suit.