
(1948) 08 CAL CK 0021
In the Calcutta High Court
Case No : A.F.O.D. No. 161 of 1943

Monmohan Haldar and others

APPELLANT

Vs

Dibbendu Prosad Roy Choudhury and others

RESPONDENT

Date of Decision : 06-08-1948

Acts Referred:

Citation : (1948) 08 CAL CK 0021

Judgement

K.C. Chunder, J.—This appeal is against a decree of the Subordinate Judge, First Court, 24-Parganas, dismissing a suit brought by the plaintiffs as worshippers of Badrikanath Shiva Thakur for a declaration that the lands of schedules Ka Kha of the plaint in that suit were the properties of the Harashiva Math and the deity and that the certificate sale for arrears of road cess in certificate case No. 612 of 1902-1903 did not affect the right, title and interest of the deity. At the appellate stage the facts are not very much in dispute. The religious foundation is a very old one and the properties mentioned in the schedules to the plaint were released by the Board of Revenue in favour of the deity as far back as 1827 and accepted as Niskar or revenue-free property.

2. Before the learned Subordinate Judge there was a contention that the religious foundation was a Mutt, the head of which was a Mohunt. This contention was given up before the learned Subordinate Judge and it was conceded that the property belonged to the idol and the head of the institution was the shebait thereof. Owing to historical reasons a clear distinction has come to exist regarding properties which belong to what is technically called a Mutt of which the head is the Mohunt who is the owner of the property. Very often there is an idol attached to the Mutt but it is more an adjunct to the Mutt for religious worship by disciples and the idol in such a case is not the owner of the Mutt property. In the other case the idol itself owns the property of the religious foundation and the shebait is the Manager of the property and represents the idol. As it is no longer disputed that the property in suit belonged to the idol, we need not discuss the question as to what the case would have been had it been the property of the Mohunt of a Mutt.

3. The properties mentioned in schedule Ka to the plaint comprise 14 bighas 3 cottahs and 1 chhataks of land with the temple and the buildings which used to be possessed in Khas; Schedule Kha comprises 506 bigbas 5 cottahs and 14 chhataks of land which are tenanted. The two together formed the Niskar Bahali lands No. 38B previously and now No. 38B/1, Alipore Collectorate. It appears that the shebait of the religious foundation had certain repairs done to the temple and was unable to pay for the same. In 1884 Money Suit No. 249 of 1884 was brought in the 3rd Munsif's Court at Diamond Harbour by one Kshetra Nath Nath or Jugi against the then shebait Sree Ram Giri for costs of repair of the temple. It appears that the decree was purchased in the name of one Nabin Chandra Chatterjee by Earn Krishna Banerjee, a Pleader of Alipore. The decree was executed in three Execution cases Nos. 161 of 1886, 391 of 1889 and 10 of 1891 and a total area of 77 bighas odd was sold in three Execution sales and purchased by the executing decree-holder. It appears that Bistu Giri had then become the shebait of the deity. He started a Miscellaneous case under S. 311, Civil P.C., for setting aside the last execution sale in which 24 bighas of land had been sold for Rs. 11. A compromise was effected between Bistu Giri and Ram Krishna Banerjee on 4th September 1897. Bistu Giri had granted an ejara lease of 509 bighas 14 cottahs and 6 chhataks of land to Narendra Nath Sardar from Pous 1295 to 1309 B.S. at an annual jama of Rs. 549. By the compromise it was agreed that Ram Krishna Banerjee would receive this rent for the balance of the period of the lease which was still to run for a few years and Ram Krishna Banerjee would pay Rs. 20 per month to Bistu Giri for carrying on the sheba of the deity. It was further agreed that in 1310 B.S. Bistu Giri would pay Rs. 200 to Ram Krishna Banerjee and then Ram Krishna Banerjee would re-convey the auction-purchased property of 77 bighas odd to Bistu Giri. It is now accepted that the payment by Bistu Giri was never made and the auction-purchased property i.e., 77 odd bighas of land were never re-conveyed. The title to the auction-purchased property remained with Ram Krishna Banerjee. As the interest of Ram Krishna Banerjee was also sold in the sale in execution of the Certificate for arrears of cess in certificate case No. 602 of 1902-03, it is now conceded that no claim can be made by the plaintiffs with regard to this 77 bighas odd of land to which the Thakur's title had been lost by the purchase of Ram Krishna. For the remaining lands it has been contended by Mr. Mitter on behalf of the appellants that the certificate sale did not pass any title to the property of the deity which still remained after the auction-purchase of Ram Krishna Banerjee in the Money Execution Case previously mentioned. His contention is that a shebait cannot divest himself of his shebaitship and make it over to another person, a proposition of law with which we agree. The sale in the Certificate case was of the whole revenue-free property with Ram Krishna Banerjee as proprietor for 77 odd bighas of land and for the rest Ram Krishna Banerjee was recorded as the Manager of the Shiv Thakur. The contention appears to be based on an entire misconception of what actually took place. It is, therefore, necessary for us to go into greater detail into the Certificate case itself.

4. It appears that on 2nd August 1901 Ram Krishna Banerjee filed a petition for mutation of his name in respect of this revenue-free property. It was registered as case No. 276 of 1901-02. His petition is Ext. R(6). In that petition he gave the nature of his interest as 77 bighas 11 cottahs and 5 chhataks by right of auction, purchase and the rest as joint proprietor in charge and he wanted his name to be recorded for his own share as owner and for the rest as joint proprietor in charge. In that case, Bistu Giri was examined by the Collector. In the enquiry under S. 52, Bengal Land Registration Act, his deposition is Ex. (9). Bistu Giri admitted therein:

The revenue-free property No. 38B is now in the possession of Babu Ram Krishna Bandopadhyaya. He has proprietary right in it to the extent of 4 as and is manager of the remaining 12 as. He is in possession from 1304 B.S., by virtue of a solenama which we filed in the Court of the 3rd Munsif of Diamond Harbour. I get Rs. 20 per month from Ram Krishna Babu for Deb Sheba. I have no claim to khas possession at present.

His evidence will show clearly that he had not transferred his shebaitship to Ram Krishna Banerjee; on the other hand, provision was made by him to carry on the Deb Sheba himself. It was as joint proprietor in charge and in possession of the property that Ram Krishna Banerjee was being recorded as Manager under the Bengal Land Registration Act. The Collector, therefore by his order dated 17th October 1903 directed

Register applicant's name in place of the former proprietor Badrikanath Thakur and Ram Krishna Banerjee for self and as Manager of the Thakur.

Under S. 42, Bengal Land Registration Act, a joint proprietor of an estate or revenue-free property assuming charge of the estate or property or of any interest therein on behalf of other proprietors can claim to be recorded for such other proprietors. Then provision is made for notice to other interested parties and then under S. 52, the Collector holds an enquiry. In the enquiry, the Collector will ascertain the truth of the alleged possession and if he is satisfied the Collector shall order the name of the applicant to be registered in the proper register as proprietor or manager of the said estate, or revenue-free property or interest therein. "Manager" has been defined in S. 3, cl. 6 of the Act thus:

Manager, means every person who is appointed by the Collector, the Court of Wards or by any Civil or Criminal Court to manage any estate or revenue-free property, or any part thereof, and every person who is in charge of an estate or revenue-free property, or any part thereof, on behalf of a minor, idiot or lunatic or on behalf of a religious or charitable foundation.

In 1906, the words "or as a trustee or executor" were added to the definition. The application, as we have stated, was previous to this amendment. So, Ram Krishna Banerjee in accordance with the definition in the Act as it then stood was recorded as proprietor for his own share and as he was found in the enquiry under S. 52 of the Act to be joint proprietor in charge of the remaining share of

the revenue-free property on behalf of the religious foundation, he was recorded as Manager for the share of the Thakur. He was, therefore, rightly recorded in the Collectorate D Register in place of the original proprietor of this part as Manager of the religious foundation, viz., the deity Shiv Thakur. This was not a transfer or alienation of the shebaitship by the Mohunt. It only meant that Ram Krishna became the sole representative before the Collector of the Thakur's share by virtue of the statute for the purposes of payment of the public dues etc. Under S. 68 of the Act, he became responsible for the payment of the public dues not only for his own share but also for the share of the Thakur as its sole representative in the Collector's register and when he failed to pay the road cess due from the entire revenue-free property, Certificate Case No. 612 of 1902/03 was started and when on 24th February 1903 a sale in execution of the certificate was held the right, title and interest in the entire revenue-free property passed to the purchasers. Ram Krishna Banerjee was the proprietor with respect to his own share and the properly recorded Manager and the sole representative liable to the Collector for payment of the road cess due with respect to the share of Shiv Thakur. The 16 as interest in the entire property was sold and purchased by Krishna Kalyani Dassi in the benami of her son, Jatindra Nath Mitter. It is not contested that Krishna Kalyani was given symbolical possession on 14th June 1903. Since then, purchaser and her successor-in-interest have never been altogether out of possession. On the 4th Aswin, 1311 B.S., that is in September 1904, Krishna Kalyani Dassi sold this revenue-free property to Baroda Prosad Ray Choudhuri for Rs. 6000. It appears that after 1809 B.S. when Narendra Nath Sardar's ejara previously spoken of had expired Bistu Giri had granted a fresh ejara for 12 years to him in continuation of his previous ejara and Bistu Giri had died on 4th March 1904. It appears that Baroda was actually in possession of a part of the property and he subsequently purchased the interest of Narendra Nath Sardar in the ejara in 1910.

5. It will appear from the Land Registration proceedings and the certificate proceedings and the sale held in execution of the certificate that the right, title and interest of Ram Krishna Banerjee as well as of Shiv Thakur had passed to the purchaser from whom Baroda had obtained his title. Therefore, in the present case as the successors in interest of the rightful owner the suit was rightly dismissed against Baroda Prosad Choudhury and his legal representatives. Question of adverse possession is not therefore very material.

6. As the learned Subordinate Judge has entered at length into the question of adverse possession, we think it necessary to deal as briefly as possible with the same. As far as the facts are concerned, it appears that after the purchase by Krishna Kalyani Dassi, Ram Krishna Banerjee had taken steps before the superior Revenue authorities to have the sale set aside. He had failed. He had then come to the civil Court, but it appears that subsequently he gave up the civil suit. In 1906 one Krishna Giri brought title Suit No. 50/60 of 1906 in the 3rd Court of the Subordinate Judge, 24 Parganas, claiming to be the Mohunt of the Shiv Thakur and claiming recovery of the property. It appears that the suit was decreed by

the Subordinate Judge and an appeal was filed against the decree and, in the appellate stage, Krishna Giri withdrew his suit with leave to bring a fresh suit. It further appears that in 1916, one Biswa Natah Giri filed title Suit No. 18 of 1916 in the 4th Court of the Subordinate Judge, 24 parganas, claiming to be the Mohunt of the Thakur and praying for recovery of possession of the property. The suit was dismissed by the Subordinate Judge and an appeal was filed but was withdrawn. It appears from the evidence discussed at length by the Subordinate Judge that Baroda Prosad Ray Choudhuri was undoubtedly in actual possession of the entire revenue free property since 1918. The learned Subordinate Judge has examined in detail three kinds of evidence adduced, namely, the evidence on plaintiffs' side, the documents, and the evidence on the defendants' side. The conclusion arrived at by the learned Subordinate Judge that Baroda was in continuous actual possession without interruption since 1918 has not been contested in this Court by Mr. Mitter and in our opinion the evidence is so overwhelmingly strong that it cannot be contested. The suit against him was filed on 6th February 1939, i.e. 21 years later.

7. Mr. Mitter contends that as Bistu Giri died on 4th March 1901 and as there was no shebait after him, there was no one who had the right to bring a suit and therefore limitation and adverse possession did not begin to run. He tried to support his contention by referring to the decision of the Judicial Committee in *Maharaja Jagadindra Nath Roy Bahadur v. Rani Hemanta Kumari Dasi*, reported in 31 I.A. 203 : (32 Cal. 129 P.C.) in which at p. 210 of the report, Sir Arthur Wilson said that "the right of suit is in the shebait and not in the idol". It must be noticed that before coming to this decision it had been found as a fact by the Judicial Committee that Jagadindra was the actual shebait. He was found to have been a minor and the decision proceeded upon the ground that he was the shebait and the right of suit was in the shebait and not in the idol and the shebait being a minor, he was entitled to the benefit of S. 7 (now S. 6) Limitation Act. Mr. Mitter has drawn our attention to two decisions of the Madras High Court, one reported in *Krishnama Chariar v. Chinmammal* 18 I.C. (369) at p. 872 : (24 M.L.J. 192) but it does not help us very much, as a perusal of the decision will show that it is dealing with a different state of things in Madras brought about by the Madras Religious Endowment Act. The other decision is in *Manikkam Pillai v. Thanikachalam Pillai*, 34 I.C. 945 : (A.I.R. 1917 Mad. 706) in which a Division Bench of the Madras High Court after referring to Jagadindra's case (31 I.A. 203 : 32 Cal. 129 P.C.), came to the conclusion that if there was no shebait to sue, no suit can be brought. The principle is well established that if there is really no one who can bring a suit, limitation does not begin to run. Jagadindra's case, (31 I.A. 203 : 32 Cal. 129 P.C.) on which Mr. Mitter relies and which without discussion seems to have been accepted in the Madras decision in *Manikkam Pillai v. Thanikachalam Pillai*, 34 I.C. 945 : (A.I.R. 1917 Mad. 706) has been examined many times in this Court. It is now clear from a series of decisions of this Court that where there is a shebait in existence, right of suit is in the shebait and no one else can bring a suit on behalf of the idol. The idol is a

juridical person and has the right to sue, but it is a person in an ideal sense, and the suit has to be brought through some representative. Where there is a proper representative, namely, the shebait, in existence, he is the only person competent to sue on behalf of the idol, unless, his interest is adverse to that of the idol, or because of quarrels and conflicts between the different shebait, or because the wishes of the deity with respect to a particular course of action have to be separately ascertained, some other person is to be appointed by the Court to represent the idol. Jagadindra's case: (31 I.A. 203 : 32 Cal. 129 P.C.) as we have pointed out proceeded upon the basis that there was a shebait in existence. In the present case there having been no shebait it was open to any person interested in the foundation to bring a suit as the next friend of the idol with the permission of the Court (Reference may be made to the decision reported in Administrator-General of Bengal and Another Vs. Balkissen Misser and Others, which appears to be the earliest case and Sri Sri Iswar Sridhar Jieu Thakur represented by his shebait Jyoti Prosad Bandopadhyaya Vs. Jahor Lal Mukhopadhyaya and Others, , from page 47 where all the other cases are collected, referred to and discussed). There is, therefore, no force in the contention urged by Mr. Mitter that limitation and adverse possession did not begin to run as there was no one who could sue. The idol was there. Limitation also runs against the idol. The idol has the right to sue and such a suit could be brought in the name of the idol by a next friend with the permission of the Court. The claim of the Thakur, therefore, to the property, had no title passed, would be long barred.

8. The learned Subordinate Judge had also dismissed the suit of the plaintiffs on the ground that S. 42, Specific Relief Act, would not apply as plaintiffs could ask for consequential relief. It is now clear that a suit can be brought by worshippers for a declaration of this nature. Reference may be made to Monindra Mohan Banerjee and Others Vs. Shamnagar Jute Factory Co. Ltd. and Another, . The learned Subordinate Judge was of the opinion that the plaintiffs should have asked for the appointment of a Mohunt and made a prayer for an order for restoration of the property to the Mohunt. He did not notice that such a prayer would be hit by S. 92, Civil P.C., and, therefore, in the present case no consequential relief could be prayed for. The learned Subordinate Judge was wrong in holding that the present suit could not be entertained under S. 42, Specific Relief Act. But as we have said, the defendants have acquired valid title from the purchaser at the certificate sale and any claim of the Thakur for recovery of possession is clearly barred, the learned Subordinate Judge was right in dismissing the suit of the plaintiff. The decree being right is confirmed and the appeal is dismissed with costs.

R.C. Mitter, J.

9. I agree.