

(1922) 08 CAL CK 0001
In the Calcutta High Court

Monmohon Ghose and Others

APPELLANT

Vs

Siddeswar Dubay and Others

RESPONDENT

Date of Decision : 21-08-1922

Acts Referred:

Citation : 76 Ind. Cas. 213

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

Bench : Division Bench

Judgement

John Woodroffe, J.—The question in this appeal is whether there was an absolute or imperfect debutter that is a mere charge, and in the former case whether the property, the subject-matter of the debutter, was converted by the consent of the whole family into secular property. On reading the myama patra which has been placed before us I have no doubt whatever in holding that the Munsif was right and that an absolute debutter was intended to be created by that document. The provision as to the disposal of any surplus, namely, "if there be any surplus in the profits after performance of the sheba in the prescribed way then other property will be acquired for the "Iswar Jiw" as also the dissociation which was markedly made by the deed of this and secular properties strongly support the view which the Munsif has taken. In passing to the question to which I shall later refer as to whether or not there was a dedication to any particular debata it is important to remember in this connection the provision as regards the surplus, namely, that other property which will be acquired by the surplus must be acquired for Iswar Jiw. It is to be observed that the defendant, who now denies the debutter character of this property, took a lease of this property as debutter property.

2. A point has been made that there has been no particular dedication to any particular debata. It appears to me however, that the dedication was to Sri Sri Iswar Krishna Chandra Jiw in whose favour some of the properties were acquired and in whose name the surplus was to be invested, though the income was to be spent for the performance also of the sheba of other debatas I hold therefore

that there was an absolute debutter in favour of the deity named.

3. The next question is whether the consensus of the family can give a different direction to the property. Speaking for myself, I think there are good grounds for the criticisms of Babu Golap Chandra Sarkar in his Hindu Law, page 492, in this matter. However this be, the Privy Council appears to have held (although it has been submitted to us that the remark was obiter) that in the case of what it calls a private or family trust the property may be converted into secular property by consent of the whole family. The Subordinate Judge appears to have held that this had happened in the present case. At least the language of some portion of his judgment leads me to suppose so. But the findings of fact do not support sufficiently the conclusions at which he arrived upon a wrong assumption of law. We must distinguish in the first place in this connection such consent given by all parties interested and acts which may amount to nothing more than a breach of trust. According to the Subordinate Judge the parties some times treated the property as debutter and some times as an individual property. This does not show such consent of the whole family; on the contrary, it shows, so far as it goes, that there was no such consent. For if Here was a consent to treat the property as secular from about the year 1880 as alleged why was the property treated as debutter subsequent to that date. That fact may show (at least, it is so contended) that there was no consent to treat the property as secular but an actual treatment of it as such amounting to a breach of trust. "Although," the Subordinate Judge says, "the properties were described as niskar debutter properties, the so-called she/baits dealt with many of these as then own personal properties and have thereby given them different turn." This, however, is not sound law. It is not the sheba its only, who by their dealing give the property a different turn. It is the members of the family interested, who by their consent (according to the decision of the Privy Council) may convert the debutter property into secular property. Moreover, the finding is not that all the properties but that many of the properties were so dealt with. The only persons who can convert the property, are the members of the whole family, male and female, interested in the worship of which the shebaits are merely managers. It is not, as the learned Subordinate Judge has held, dealings of the property which change the original character of the property but it is the consent of the family, although dealings subsequent to such consent may, under circumstances, be evidence of consent. Whether there is anything to show such consent in the present case is another matter.

4. We have been asked to remand the case if we are against the respondent on this point. But there is no necessity in the present case to do so because the learned Judge has come to a finding of fact in the appeal that the properties were sometimes dealt with as debutter and sometimes as secular. But if that be so, then there could not be on his finding of fact such consent as could convert the nature of the property.

5. The judgment and decree of the Subordinate Judge are, therefore, reversed

and that of the Munsif restored, the appellant being entitled to his costs of this Court and in the lower Appellate Court.

6. The appellant will be entitled to add to his own costs the cost which he paid to the Deputy Registrar and will recover both costs from the estate of the deceased Siddeswar Dubey in the hand of his heirs the minor respondents.

7. Before signing our judgment, a point was raised as regards the period for which mesne profits should be allowed. It is argued before us that the lease was a good lease so long as the lessor was alive and that assuming that, as our judgment says, it is invalid, it is only so invalid beyond that period. It is then contended that the mesne profits should not run as provided in the judgment of the Munsif which we restored but from February 1920, the date of the lessor's death. This ground appears to me to be untenable because It raises a question which was not put forth in the pleadings or in the issues or in the lower Courts or in the argument before us, indeed the pleadings go on the basis that the plaintiff is entitled to immediate possession. Therefore, our judgment stands and the decree of the Munsif is restored.

Suhrawardy, J.

8. I agree.