(1965) 08 OHC CK 0010

In the Orissa High Court

Case No : Supreme Court Appeal No. 70 of 1964

Nanda Kishore Panigrahi and Others — APPELLANT

Vs

Commissioner for Hindu Religious Endowments — RESPONDENT

Date of Decision : 14-08-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 45 Rule 5, 109, 110
Constitution of India, 1950 — Article 133(1)
Orissa Hindu Religious Endowments Act, 1939 — Section 64(3)

Citation : AIR 1966 Ori 89

Hon'ble Judges : Khaleel Ahmad, C.J;R.K. Das, J

Bench : Division Bench

Advocate : B. Mohapatra and R.K. Mohapatra, for the Appellant; S. Mohanty, for the Respondent

Judgement

Ahmad, C.J.—The Plaintiff-petitioners having lost their suit in this Court by a judgment of reversal in First Appeal No. 38 of 1962, have now filed this application for leave to appeal to the Supreme Court, substantially under Sub-clause (a) of Clause (1) of Article 133 of the Constitution of India, read with Sections 109 and 110 of the Civil Procedure Code.

2. Along with their application the petitioners have also filed a petition under Order 45, Rule 5, Civil Procedure Code, with a prayer that a reference be made to the Court of the first instance, that is the Subordinate Judge, Cuttack for determination of the value of the suit properties both in the Court of first instance and the Court of appeal.

3. The petitioners are admittedly the present marfatdars of the Debottar Estate and the temple whereto the litigation in this case relates. There are now, in all, about 15 acres of agricultural lands endowed to the Deity installed in the temple, namely, Shri Kunja Behari Deb. The main question in controversy between the contesting parties is whether the temple and the Debottar Estate are a private institution or a public endowment as contemplated by the Orissa Hindu Religious

Endowments Act 1939 (Orissa Act IV of 1939) hereinafter called the Act. The claim of the petitioners who constitute an undivided Mitakshara joint Hindu Family with plaintiff No. 1 as the Karta is that the Deity is their family deity and the endowment is a private endowment and they are as such not attracted by the mischief of the Act. The Endowments Commissioner however, by his order dated 7th August 1952 passed u/s 64 (1) of the Act declared the institution as to be an "Excepted Temple" within the meaning of the Act. In other words, he held that the deity is a public deity and the endowment is a public endowment. Thereupon the petitioners instituted title suit No. 60 of 1962 giving rise to the aforesaid first appeal No. 39 of 1962 u/s 64 (3) of the Act for setting aside the decision of the Endowments Commissioner, and for a declaration that the Debotiar Estate is a private or family endowment and the temple is a private temple. The persons impleaded thereto as party defendants were the Endowments Commissioner and some others. At the trial, on contest by the Endowments Commissioner, the suit was decreed on the 31st of March 1962. In appeal the judgment of the trial court, as already stated, has been reversed by this Court in First Appeal No. 38 of 1962. This appellate judgment being a judgment of reversal the petitioners are as of right entitled to get a certificate for leave to appeal, under Sub-clause (a) of Clause (1) of Article 133 of the Constitution-vide AIR 1941 Pat 269 (SB)--if the necessary requisites as to valuation as provided therein are found satisfied. Therefore, the only question that arises here for consideration is whether the requisites of Article 133(1) of the Constitution as to valuation are complied with in the present case.

4. Under law the court-fee payable for a suit u/s 64 (2) of the Act is a fixed court-fee of Rs. 22 and it was this court-fee which was in the present case affixed on the plaint. Necessarily therefore, the valuation that was stated in the plaint was not for the purpose of court-fee, but was only for the purpose of jurisdiction. This, as stated in the plaint, was Rs. 5,100 which as now claimed in the present petition, was fixed on the basis of the original price of the aforesaid 15 acres of land. In appeal also the valuation given by the contesting defendant, namely, the Endowment Commissioner, was the same. The value as stated in the plaint, is admittedly much below the mark as required under Article 133 of the Constitution. Therefore, the application for leave to appeal either under Clause (a) or Clause (b) of Article 133(1) should have been, in the ordinary course summarily dismissed. However, in the application for leave to appeal it has been stated that though in the plaint a low valuation was stated, but it is still open to the petitioners to satisfy the Court that the real value of the subject-matter of dispute in the court of the first instance and also in appeal was in fact not less than Rs. 20,000 or that a claim or question respecting property of the like amount was involved in the judgment proposed to be appealed from; or, in other words that the necessary requirements of Article 133 of the Constitution as to valuation are here complied with. Further, by way of explanation as to why a low valuation was stated in the plaint, it is in the petition claimed that-

"Low value for the purposes of jurisdiction was mentioned in view of the price given in the earlier documents of 1930, 1934, and 1942, and as no ad valorem court-fee was paid and the suit was filed before the Subordinate Judge who had unlimited jurisdiction, no attention was paid at the time of filing of the suit to the exact value of the suit properties."

Accordingly a prayer has been made therein for a fresh determination of the value of the suit property in the court of the first instance and the court of appeal, as required under the aforesaid sub-clauses of Article 133(1) of the Constitution.

5. Thereunder, however, it seems the leave to appeal was intended to be sought mainly under Sub-clause (a) of Clause (1) of Article 133. But at the time of argument a case under Sub-clause (b) was also attempted to be made out.

6. No doubt under the CPC as it stood before the Constitution came in force, there was the view taken by some courts in India that paragraph (ii) of Section 110 of the Code was dependent on paragraph (1) and, therefore, there could be no appeal as of right in any case, unless the amount or value of the subject-matter of the suit in the court of the first instance also was not less than the amount specified--see Champamani Bibi and Another Vs. Mohammad Yunus and Others, . But under Article 133 of the Constitution there is no scope for any such construction. Therein the two Sub-clauses (a) and (b) are wholly independent and therefore, each of them stands on its own terms. See Lalmina Singh Vs. Kumar Kamal Singh, . It follows therefore, that under Article 133(1)(b) the value of the subject-matter of dispute in the court of first instance is immaterial. See Subha Rao v. Chelamayya AIR 1952 Mad 771 (FB). In that view of the matter, therefore, it is always open to a petitioner for leave to appeal to press his case either under Sub-clause (a) or Sub-clause (b) or alternatively under both. As such, in principle there is no difficulty in considering the case both under Sub-clause (a) and Sub-clause (b) as now prayed for. It will be convenient, however, if we take up the contention of these two sub-clauses separately. So I first take up Sub-clause (a).

7. Now in that connection two of the basic principles that underlie Article 133(1)(a) have to be restated at the outset. The first is that, the right of appeal to the Supreme Court under Article 133(1) of the Constitution being a constitutional right, cannot be abridged or abrogated by any ordinary legislation nor, can it be circumscribed or whittled down by any consideration extraneous not to be found therein--for example on the ground of mistake or omission unless, that mistake or omission, as a result of some event happening in the meantime, has, by reason of other evidence or procedure, ripened into a legal plea open to be raised by the adversary. It is for this reason, therefore, that in a case

(i) where there has been a judicial determination of the correctness of the valuation given in the plaint so as to attract the principle of res judicala (vide Kuppanna Gounder v. Peruma Gounder AIR 1961 Mad 511 (FB) and Parikhit Das v. Madhab Jena 29 CLT 28); or

(ii) where the petitioner has already obtain ed an advantage of lower forum whether in the matter of institution of suit or of an appeal on the basis of lower valuation and is thereby hit by the principle of approbation and reprobation he cannot be permitted to turn round and raise the valuation for the purpose of bringing the case within the specified amount required for appeal to the Supreme Court (see Krishto Indro Saha v. Huromonee Dasee 1 IA 84 (PC)). But they obviously constitute exceptions to the general rule. Therefore, in a case where these exceptions do not arise for consideration the general rule shall have its unrestricted application. As such a mere misstatement as to valuation either in the plaint or in the memorandum of appeal can not and should not operate as a bar to the consideration of any application made for re- determination of the value of the subject-matter as contemplated under Article 133(1) of the Constitution. Secondly, it has also to be remembered that what is meant by the "value of the subject-matter" as contemplated under Article 133(1) of the Constitution is the real or market value and not any value which may have been stated in the plaint for the requirements of the Court-fees Act or Suits Valuation Act. Each case therefore, has to be judged on its own facts so as to find out whether the value of the subject-matter as given in the plaint is the real or market value or is based on considerations quite independent of and without regard to, the real or market value. If, on investigation, it is found that the value of the subject-matter as given in the plaint is the real or market value as contemplated in law, the matter ends there and no further enquiry is called for. But in case it is found that the value or subject-matter as given in the plaint is not the real or market value an investigation has to be made for the determination of the real market value of the subject-matter, both in the court of first instance as also in the court of appeal--as contemplated by Sub-clause (a) of the Article 133(1),--unless the case is one which is covered by any of the two exceptions mentioned above: vide Zaraton Nessa v. Faizur Rahaman AIR 1955 gau 126, AIR 1961 Mad 511 (FB);Radhikanath v. Midnapore Zamindary Co. Ltd Radhika Nath Biswas Vs. Midnapore Zemindari Co. Ltd., .

8. In the present case however, it is not disputed that none of these exceptions arises for consideration. At no point of time the valuation as given here in the plaint was judicially determined to be correct so as to attract the rule of res judicata, nor there is any material on record to suggest that as a result of the low valuation put in the plaint the plaintiffs in the present case have in any way so far obtained any advantage in the course of this litigation. The suit giving rise to the present application was admittedly filed in the Court of the Subordinate Judge. The revised valuation of the subject-matter, therefore, as now proposed, would not have in any way, adversely affected the trial of the suit in that Court.

9. In that view of the matter all that needs consideration here is as to what was the real or market value of the subject-matter of the dispute in the court of the first instance and thereafter, in the court of appeal, as provided in Sub-clause (a) of Article 133(1); or in other words, whether the value as stated in the plaint for the purpose of jurisdiction was the real or market value of the subject-matter as

provided thereunder.

10. This takes us to the question as to what is the subject-matter of dispute in the present case. In determining the question we have to remember that the main point of controversy in the present case as already stated, is whether the temple and its debot-tar estate constitute a private or public trust. A public trust is one which is for the benefit of the general public or of a section thereof which consists of an uncertain and indeterminate body of persons. In other words the essence of a public foundation consists in dedication to the public. In a private trust the beneficiaries are individuals or a defined body of persons such as members of the family or the disciples of the particular religious preceptor and the like--vide Deoki Nandan Vs. Murlidhar, and Ram Saroop Dasji Vs. S.P. Sahi, Special Officer-in-charge of The Hindu Religious Trusts and Others, --and that is provided for the material or spiritual benefit of those individuals, families or the like. Therefore, what is substantially the subject-matter of the dispute in the present case is whether the beneficiaries under the endowment in dispute are the members of the testator''s family alone or the Hindu Public at large.

11. Finally therefore what has to be determined for the purpose of valuation under Sub-clause (a) of Clause (1) of Article 133 is the real or market value of the beneficiary interest which the plaintiffs claim to have in the Debottar property and the temple. In law it is well established that "the value of the action must mean the value to the plaintiff" vide Bibi Phul Kumari v. Ghanashyam Misra 17 MLJ 618.

12. Now, here what the plaintiffs have done in determining the real or market value of their beneficiary interest in the Debottar estate is that they have equated it with the real or market value of the Debottar property itself. But, in doing that, I think apart from the question of their right, they are factually also not far from the real state of affairs, nor can they be said to have in doing it, adopted a basis which is either fantastic or unreal. In the ideal sense no doubt the deity is the owner of the Debottar property but in the actual working of the trust in the case of a family trust, it is the family which is substantially possessed of most of the benefits thereunder; so much so that in Konwar Doorga Nath v. Ram Chander Sen 4 IA 52 (PC) their Lordships of the Judicial Committee observed that in the case of a family idol the consensus of the whole family might give the Debottar estate a secular turn. Therefore, according to the plaintiffs it is the value of the Debottar estate that will give the measure of detriment they would be put to in case the trust is held to be a public trust. In other words for the family the value of their beneficiary interest in the debottar estate is practically the same as the value of the property given in trust. Looked at, therefore, from this point of view, what has to be determined in this case for the purpose of valuation under Sub-clause (a) of Article 133(1) is the real or market value of the Debottar property. It appears however, that in assessing the real or market value of the Debottar property the plaintiffs in their plaint adopted the market value which the property had when it was originally purchased as is

stated in paragraph 3 of the petition which has been filed under Rule 5 of Order 45 Civil Procedure Code. That statement is in these terms :

"A low valuation for the purpose of jurisdiction was mentioned in view of the price given in the earlier documents of 1930, 1934 and 1948 ".

And this averment made by the plaintiff has not been challenged before us by the contesting defendant. Therefore, it logically follows from it that though, for the purpose of jurisdiction the value of the debottar property was made the basis for determining the value of the subject-matter in dispute but that value was assessed in reference to the time when that property was purchased in the years 1930, 1934 and 1948 and not in reference to the price that it had on the date when the suit was instituted and much less on the date when the judgment proposed to be appealed from was delivered. But in law, in order to comply with the requirement of Sub-clause (a) the market or real value of the subject-matter in dispute has to be determined, in reference to the date when the suit was instituted, vide AIR 1931 125 (Privy Council); AIR 1930 44 (Privy Council); East Indian Railway Company Vs. Badri Narain and Others, and thereafter in reference to the date when the judgment proposed to be appealed from was delivered (vide Gooroopersad Khoond v. Jaggut Chunder 8 Moo Ind App 166 (PC) and Moti Chand v. Ganga Pershad Singh ILR 24 All 174 (PC).

13. Mr. Mohanty however, on behalf of the defendant-opposite party has contended that in a case where the subject-matter in dispute is incapable of valuation Sub-clause (a) of Article 133(1) of the Constitution does not apply and therefore, in a case as the one here, whether the subject-matter in dispute is said to be the beneficiary interest in the debottar property the petitioners are not entitled to get any leave to appeal under that sub-clause: as according to the learned counsel such beneficiary interest is incapable of any valuation. In support of this contention reliance has been placed by the learned counsel on a Bench decision of this Court in Lucky Bidi Co. Vs. Secretary of state of Orissa (in charge of Commercial Taxes), . In our opinion the facts of that case are clearly distinguishable. Therein the prayer for leave to appeal was pressed under Sub-clause (b) of Article 133(1) and it was to counteract that point that the aforesaid observation was made there. That case, therefore, can have no bearing on the facts of the present case. Further, it has to be noted that in the present case it is not the pure and simple office of trusteeship, which is in dispute, but it is the beneficiary interest of the family which the plaintiffs claim to have in the debottar estate that has to be decided. The mere office of trusteeship may be incapable of valuation. It is however, not so in the case of the latter. Therefore, the submission made by Mr. Mohanty has to be rejected.

14. Finally therefore, the case is referred to the court of the first instance for determination of the value of the debottar property : firstly on the date when the suit was instituted (i.e., 18th November 1952) and then on the date when the judgment proposed to be appealed from was delivered (i.e., 27th July 1964). But substantially I think it is the value on the date of institution of the suit which is

more important for in order to determine the other value the court may take judicial notice of the fact that in the meantime the prices of lands have very much gone high. It is however, for the Court of the first instance to decide as to how he will proceed in the matter.

15. Next I take up the submission made on behalf of the petitioners to the effect that it is a case which is in any event attracted by Sub-clause (b) of Article 133(1) of the Constitution. In my opinion, in view of what I have already held above the consideration of this aspect of the case is now purely academic. Secondly, on merits also I think this part of the submission made on behalf of the petitioners has no substance. Recently, the Supreme Court in the unreported case of Chittarmal v. Sah Pannalal Chandulal in Petn. for Spl. Leave to Appeal No. 890 of 1964, dated 14th January 1965 (since reported in Chhitarmal Vs. Shah Pannalal Chandulal, has clearly laid down that :

"The variation in the language used in Clauses (a) and (b) of Article 133 pointedly highlights the conditions which attract the application of the two clauses. Under Clause (a) what is decisive is the amount or value of the subject-matter in the court of the first instance and ''still in dispute'' in appeal to the Supreme Court; under Clause (b) it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from. The expression ''property'' is not defined in the Code but having regard to the use of the expression ''amount'' it would apparently include money. But the property respecting which the claim or question arises, must be property in addition to or other than the subject-matter of the dispute. If, in a proposed appeal, there is no claim or question raised respecting property other than the subject-matter, Clause (a) will apply ; if there is involved in the appeal a claim or question respecting property of an amount or value not less than Rs. 20,000 in addition to or other than the subject-matter of dispute, Clause (b) will apply."

In the present case, as already discussed above the subject-matter in dispute is only the beneficiary interest of the petitioners in the debottar estate and there is no claim made respecting any property other than that subject-matter. In fact it is the admitted case of both parties that the property constituting the debottar estate has a trust impressed upon it. As such there is no dispute in regard to that property, though it is different matter that for determining the value of the beneficiary interest of the family in that debottar property, its market value has been taken into consideration. Therefore, the prayer made for leave to appeal under Clause (b) of Article 133(1) is in view of this conclusive authority rejected; and as that by itself is sufficient to dispose of the matter the other cases cited by the parties on this point like those in: Vysyaraju Kasiviswanadham Raju and Others Vs. Provas Chandra Poddar, : Smt. Rajah Kishore Devigaru Vs. Bhaskara Gouta Chorani and Others, ;Maghji Lakhmashi and Bros v. Furniture Workshop 1954 AC 80 ; Ram Lakshman Singh Vs. Girindra Mohan Hazra, ; Central Talkies and Another Vs. Lala Dwarka Prasad, ; Chunilal Jamnadas Vs. Mulchand Harjivandas, ; Maneklal Mansukhbhai Vs. Hormusji Jamshedji, ; Rukmani Bai Vs.

Joshi Ram Kishan Joshi Bhawani Shanker, ; Haramani Devi and Others Vs. Balaram Panda and Others, : Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, ; and Sati Bala Dasi Vs. Chota Nagpur Banking Association Ltd. and Another, need not be, I think, discussed here now.

16. In the result, therefore, the application made under Order 45, Rule 5 CPC for determination of the value of the suit property as required under Sub-clause (a) of Article 133(1) of the Constitution of India, is allowed, and the case is sent back to the Court of first instance, i.e., the Subordinate Judge. Cuttack for that purpose. The learned Subordinate Judge after completing the enquiry about the value of the suit property, as directed above, shall submit his report to this Court within a period of three months from to-day.

On receipt of the report the case shall be listed for final orders in the application for leave to appeal. The question of costs will abide the result of the main application.

Das, J.

17. I agree.

