

(1993) 06 CAL CK 0010

In the Calcutta High Court

Case No : First Appeal Tender No. 3339 of 1991

Pratima Kundu

APPELLANT

Vs

Dibendu Kundu

RESPONDENT

Date of Decision : 25-06-1993

Acts Referred:

Succession Act, 1925 — Section 213

Citation : 97 CWN 1178 : (1993) 2 ILR (Cal) 141

Hon'ble Judges : N.K. Bhattacharyya, J;Mukul Gopal Mukherji, J

Bench : Division Bench

Advocate : R.K. Ghosal, for the Appellant;S.N. Sanyal, for Respondents Nos. 1, 2, 7 and 10 and Tapan Dutt, for the Respondent

Final Decision : Allowed

Judgement

Mukul Gopal Mukherji, J.—This appeal has been preferred by the Defendants Pratima Kundu and Sm. Kalpana Paul, widow and daughter respectively, of late Binjal Chandra Kundu, against the judgment and decree dated July 20, 1991, passed by the learned Judge, Tenth Bench, City Civil Court at Calcutta, in Title Suit No. 705 of 1975.

2. The suit was filed during the life time of Bimal Chandra Kundu by the Plaintiff deities represented by the Plaintiff Ashutosh Kundu since deceased, the predecessor-in-title of the Respondents Nos. 1 and 2, against Shyama-pada Kundu, the predecessor-in-interest of the Respondents Nos. 3 and 4 on the one hand and Bimal Chandra Kundu since deceased, the predecessor-in-title of the present Appellants. The case of the Plaintiffs, inter alia, is that Prova Moyee Dasi, wife of Biswanath Kundu, created a trust in which she appointed her two sons (i) Purna Chandra Kundu (being the father of Shyamapada and Bimal) and (ii) Bankubehari Kundu (being the father of Ashutosh Kundu), as executors and trustees for the maintenance of the debutar and for the performance of sheba-puja of the Plaintiffs Nos. 1 and 2 deities, name y 5/7 5// Jagadhatri Muta and iXarayan Jew who were installed at 20 Gulu Oslagar Lane. In that said Will

executed by Prova Moyee Kundu on May 10, 1929, she created a line of succession of the shebait and appointed the male heirs of herscif as a shebait excluding the female heirs. That will, however, was not probated at any point of lime, but some of the terms of the said Will were confirmed by act of parties in a suit being Suit No. 1695 of 1934 in -between Ashutosh Kundu and Susen Bala Dasi being the mother of Shyamapada and Bimal. An Arbitrator was appointed in that suit in the Original Side of this Hon"ble Court, and on the basis of the report of the Arbitrator, a decree was passed. It is the case of Plaintiff No. 3, Ashutosh Kundu, that he was deprived of performing the sheba-puja of the deities, but he carried on the sheba-puja of the deities till 1378/80 B.s. in every alternative year. Despite performance of the sheba-puja of the deities he did not receive anything from the income of the debuttar estate and he defrayed the expenditure from his own personal properties from 1353 B.s. to 1380 B.s. to the extent or Rs. 50,000 @ of Rs. 10 per day. He made prayer for the accounts of the estate and framing up a scheme for the performance of the sheba-puja of the deities.

3. The suit was contested by the Defendants Shyamapada Kundu and Bimal Chandra Kundu by filing a joint written statement wherein they denied all the material allegations of Ashutosh Kundu and contended inter alia that Ashutosh Kundu was mentally incapable for performing the sheba-puja of the deities and spent Rs. 25,000 on that account but also they had to give Rs. 25,000 for treatment of Ashutosh Kundu during that period of his insanity. They claimed to be reimbursed on that account and asserted a counter-claim to the effect in this context. According to these Defendants, the Plaintiff No. 3 performed the sheba-puja of the deities upto the year 1947 and thereafter he did not lake part in the sheba-puja of the deities owing to his insanity when he became incapable to dischanrge his duties.

4. During the pendency of the suit Ashutosh, Bimal and Shyamapada died and their heirs were brought on the record. The heir of Shyamapada adoplcd the written statement submitted by their father, but the heirs of Bimal, namely, his wife Pratima and his daughter Kalpana filed separate written statements denying all the material allegations of the Plaintiff No. 1 Ashutosh Kundu and, according to them, the Will executed by Prova Moyce Dasi not having been probated, it has no force in the eye of law. According to them, shebaili right being an immovable property, its devolution would follow natural law of inheritance. They contended further that they were performing the sheba-puja of the deities exclusively after the demise of Shyamapada and they should be treated as shebait just because Ashutosh lost_ his right to shebailship on account of his incapability due to insanity for more than 30 years.

5. The trial Court was of the view that since Susen Bala entered into a compromise in the dispute with Ashutosh Kundu in suit No. 1695 of 1934 in the Original Side of this Hon"ble Court and a decree was passed in that suit in which ultimately an Arbitrator was appointed wherein the Will, Ex. 1, was taken into consideration and the parties acted in terms of the Will, it did not lie in the

mouth of the present Defendants Appellants that the Will, Ex. 1, was not binding upon them since they were successors of Bimal Chandra Kundu who happened to be a son of Susen Bala. The trial Court was further of the view that even though the Will was not probated the fact could not be ignored that the parties acted under the terms of the Will. In Original Title Suit No. 1695 of 1934 preliminary decree was passed by the Original Side of this Hon"ble Court where a settlement was arrived at in between the parties and the properties of Prova Moyee Dasi were treated as absolute "slridhan" properties of the said Prova Moyee Dasi which she could bequeath by a Will executed by her and a scheme was arrived at in between the parties for the sheba-puja of the deities. Whereas it was laid down that sheba of the deities should be divided into palas of one year at a time between the two brothers according to the terms of the last Will and testament dated May 10, 1929, the first earlier pala being allotted to the branch of Purna Chandra Kundu commencing on and from Baisakh 1, 1342 B.s. corresponding to April 14, 1935. There Susen Bala, mother of Shyamapada and Bimal, took a written objection to the effect that Ashutosh was mentally incapacitated for performing the sheba-puja, but ultimately she withdrew her allegation against Ashutosh that he was a lunatic at any point of time. The trial Judge, accordingly, held that the Defendants Appellants could not contend that the Will of Prova Moyee Dasi was not operative. The trial Judge also found that the claim for accounts preferred by the deceased Plaintiff Ashutosh, not having any substance, he rejected the claim for accounts. As regards the counter-claim preferred by the Defendants Appellants the trial Judge also rejected the counter-claim since no corroboration worthy of reliance was found in support of the contention of the Defendants Appellants in this regard. The trial Judge, however, disbelieved the existence of different items of ornaments since the Plaintiff did not seek any relief regarding the ornaments in the original plaint and rejected the said claim altogether.

6. As regards the scheme for the sheba-puja of the two deities, namely, Sri Sri Jagadhatr Mata and Sri Sri Narayan Jew which are the two family deities of the parties, the trial Court was of the view that honour and respect to the pious wishes and the last desire of the testatrix Prova Moyee Dasi should be made. The direction as contained in the Will regarding different trustees working alternatively impressed the trial Court who, however, was of the view that since it was expressed in that Will that the heirs in the male line alone would be entitled to succeed, the female heirs should be excluded and in that view negated the claim of the Defendants Appellants and framed a scheme for sheba-puja of the two deities in the following manner:

(i) Dibendu Kundu, elder son of late Ashutosh Kundu

- 1st Year

(ii) Samir Kundu, elder son of Shyamapada Kundu

- 2nd Year

(iii) Subhendu Kundu, younger son of late Ashutosh Kundu

-- 3rd Year

(iv) Prabir Kundu, younger son of Shyamapada Kundu

- 4th Year

This turn or pala would commence from Baisak 1, 1399 B.S. and would continue hereafter. The trial Judge was further of the view that in terms of Will of Prova Moyee Dasi, Defendants Nos. 2(a) ad 2(b), i.e. the present Appellants, would not get any turn or pala for performing the sheba-puja of the deities since they were female heirs in the line of succession of the testatrix and when the nearest male heirs in the same line were living and capable of discharging their duties, they should be excluded.

7. The Appellants contended before us by filing the present appeal that even though some of the terms of the unprobated Will were incorporated in the compromise decree in the Original Side, suit as referred to hereinbefore, yet the Court could not proceed on the assumption that all the terms and conditions of the unprobated Will of Prova Moyee Dasi are to be given effect to.

8. Let us examine what was decided in the previous Suit No. 1695 of 1934 of the Ordinary Original Civil Jurisdiction of this Hon'ble Court between Ashutosh on the one hand and Sm. Susen Bala Dasi, the administratrix of the estate of Purna Chandra Kundu to which Sri Sri Jagadhatr Mata and Narayan Jew deities were impleaded. There was a compromise decree on July 10, 1935, and in the terms of settlement it was specifically incorporated that properties, namely, 6 Raja Brojendra Narayan Roy Street, Baranoshi Ghosh 2nd Lane, and 20 C Julu Oslagar Lane were declared as dedicated to the family deities to the Sri Sri Jagadhatr Mala and Narayan Jew founded and established by Prova Moyce Dasi-at 20 (julu Oslagar Lane as absolute dcbullar properties of the said deities under the last Will and Testament of the said Prova Moyce deceased dated May 10, 1929. Consequent upon the death of the said Prova Moyce Dasi the shcbaitsliip has devolved jointly upon the heirs of the said Puma Chandra Kundu and Banku Bchari Kundu respectively and the sheba of the said deities shall be divided into palas of one year at a time between the two branches according to the terms of the last Will and Testament dated May 10, 1929, the first yearly pa/a being allotted to the branch of Puma Chandra Kundu which shall be deemed to commence on and from Baisakh 1, 1343 B.s. corresponding to April 14, 1935. The d fondant Susen Bala Dasi withdrew all allegations in the srud suit against Ashutosh as a lunatic thus removing the alleged disqualification, if any, of Ashutosh. The matter having been referred to an arbitration and the Arbitrator having passed an award on August 25, 1937, there was a decree on the award on May 9, 1938. However, that compromise decree could not decide finally inter partes the binding character of the unprobated Will in full force as regards all its terms and conditions.

9. That apart the Appellants contended that on the death of Bimal Chandra Kundu the present Appellants became the heirs of the said Bimal Chandra Kundu under the Hindu Succession Act, and if Bimal Chandra Kundu could inherit his shebaiti rights, that should also devolve upon the present Appellants. It was further averred on behalf of the Appellants that the learned trial Judge failed to appreciate that there was already an interlocutory order on August 19, 1985, to the effect that Shyamapada and Bimal would continue to have turn or pala worship so as to make expenses out of the debuttar properties subject to the rights of the other shebaiti. That apart the Appellants, however, contended that when Pralima Kundu testified in the Court below about having made expenditure for ihc puja from her personal income, the Court below ought to have allowed her to produce her account books to substantiate her claim. It was further contended that in the compromise decree dated July 10, 1935, in Suit No. 1695 of 1934 in Clause S there was a provision made about devolution of shebaiti rights and division of pa la of shebaiti of the deities. Under Clause 7 of the said compromise decree properties at No. 6, Raja Brojcndra Narayan Roy Street, the properties at Baranoshi Ghosh 2nd Lane, and property at 20 Gulu Ostagar Lane were admitted as dedicated to the deities Sri Sri JagaUhatra Mala and Sri Sri Narayan Jew. Last but not least" the learned Advocate for the Appellants contended that the trial Court failed to appreciate that no title could pass in terms of the unprobated Will in view of the decision in the case of Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others, and Section 213 of the Indian Succession Act. We think that there is much force in this contention as advanced by the Appellants.

10. The Court below ought to have taken into consideration the fact that there was an admission on the part of the Plaintiffs that the present Appellants as heirs of Bimal Chandra Kundu were already performing the sheba-puja of the deities since the death of Bimal Chandra Kundu in 1984.

11. On behalf of the Respondents Nos. 1 and 2 it was contended that there was no objection on their part if the present Appellants be given a turn or pala in exercising their shebaiti rights for one year along with Samir Kundu and Prabir Kundu who may each have one year term, but then since Dibendu and Shuvendu who are the heirs of the other branch of Banku Behari and for the matter of that of Ashutosh (original Plaintiff No. 3) they should be given in parity a pala of one and half year each. The other set of Respondents Nos. 3 and 4 Samir and Prabir on the other hand contended that since it was the intention of the testator Sm. Pravamoyee Dasi that female heirs are to be excluded, it was in the fitness of the thing that the present Appellants should be excluded in the scheme as framed by the trial Court. In answer to the contention the learned Advocate for the other set of Respondents as also the Appellants cited before us the decision in AngurbalaMullick v. Dcbabralla Mullick AIR 1951 S.C. 292 " for thp proposition that there is nothing in any of the provisions of the Hindu Law which excludes the rights of the female heirs in succeeding to the shebaitship. Furthermore, in

Anath Bandhu De Vs. Krishna Lal Das and Others, it has been held by a Division Bench of our Court that prescribing a line of succession to the office of the shebait in tail male being opposed to Hindu Law would be void and even a compromise decree could not validate a line of succession which is otherwise void being opposed to Hindu Law.

12. Dr. Bijon Kumar Mukherjee in his famous book on the Hindu Law of Religious and Charitable Trusts has doubted relevance of all such decisions which did not recognise the claim of females to the succession of shebaitship and held that because of the subsequent development of law on the point it cannot be stated as a correct proposition of law that the ordinary rules of inheritance would not govern succession of shebaitship unless a usage to that effect to the contrary is proved to exist. In Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others, it was held that

whatever might be said about the office of a trustee, which carries no beneficial interest with it, shebaitship, as is now well-settled combines in it both the elements of office and property. As the shebaiti interest is heritable and follows the line of inheritance from the founder, obviously when the heir is a female, she must be deemed to have, what is known, a widow's estate in the shebaiti interest. In the first place, her rights of alienation are restricted and, in the second place, after her death the property goes not to her heirs but to the heirs of the last male owner. It is admitted that the second element is present in the case of succession to the rights of a female shebait. As regards the first, it is quite true that regarding the powers of alienation a female shebait is restricted in the same manner as the male shebait, but that is because there are certain limitations and restrictions attached to and inherent in the shebaiti right which exist irrespective of the fact whether the shebaitship vests in a male or a female heir.

Subject to various exceptions which were discussed by Dr. Bijon Kumar Mukherjee, which rather prove the rule, it was held that it is a well-settled doctrine that a woman is not disqualified by reason of her sex to succeed to the rights of shebait of an idol according to Hindu Law. When a woman succeeds as a shebait she takes like a Hindu female heir a limited interest in the shebaiti right in that sense that, after her death, the next male heir of the last shebait succeeds to the office, *Mt. Anuragi Kuer Vs. Parmanand Pathak and Another*, The right of a female heir to succeed to a religious office has since been considered by the Supreme Court in *Raj Kali Kuer Vs. Ram Rattan Pandey*, where it was held on a review of the authorities that the widow was entitled to succeed to the office of a pujari and share in the emoluments after getting the services performed by a deputy.

13. It would be pertinent in this context to point out that although shebaiti right is heritable like any other property, it lacks the other incident of proprietary right, namely, the character of being freely transferable by the person in whom it is vested. The reason is that the personal proprietary interest which the shebait has

got is ancillary to, and inseparable from, his duties as a ministrant of the deity, and a manager of its temporalities. As the personal interest cannot be detached from the duties of the transferor, which would not only be contrary to the express intentions of the founder, but would also contravene the very policy of law, a transfer of shebaitship or for the manager of that, of any religious office has nowhere been recognised by the jurists. A compromise which directs transfer of religious office is also unlawful and cannot be recorded.

14. As to the other question whether the rights and duties of the shebait are divisible when there were more shebails than one, we may only point out that this matter was also discussed by Dr. Bijon Kumar Mukherjee in his famous book on the Hindu Law of Religious and Charitable Trusts. The shebait like trustees must act jointly, and when there are more than one shebait, the office vests in them collectively, prima facie the office of a temple manager is neither alienable nor divisible, but customs have undoubtedly grown up in many places, which sanction such arrangements as can be had of such property by means of performance of the duties of the office and the enjoyment of emoluments by the different shebails in rotation. It must always be remembered that though some sort of division among the shebait inter se may be and are allowed on grounds of convenience, yet the shebait can only remain one body in the eye of law. The deity is represented by all of them acting together, and no one shebait can be said to represent the idol in part or to possess any interest in any fractional share of the idol's property.

15. It is now settled since the decision of the Judicial Committee in *Ramanathan v. Munigappa* (1910) L.R. 33 IndAp 139 " that when the management can, without detriment to the trust, be held by turns, it is open to the shebait to agree to do so in such order as they think proper. If in order to avoid confusion or any unseemly scramble, the parties interested arrange themselves for the due discharge of the functions belonging to the office in turn or in some other settled order of sequence, there is no breach of trust in such an arrangement nor any improper delegation of the duties of a shebait. The decision, however, differs as to how their functions are to be divided, and the question arises in such cases, whether any one or more of them can, in the absence of an agreement come to the Court and pray for a partition of the shebait right. Some of the old decisions of the Calcutta High Court support the proposition that in such circumstances the Court can pass a decree directing that the shebait right might be exercised in rotation by the different shebait.

16. Keeping in view the contentions of all the parties we modify the scheme as framed by the trial Court to the effect that the Appellants should be entitled to act as the managing shebait for the first one year from the date of the passing of the decree by this Court which will end on June 24, 1994, Dibendu Kutidu for the next one year from June 25, 1994, to June 24, 1995, to be followed by Samir Kundu for the following one year from June 25, 1995, to June 24, 1996, and Subhendu Kundu from June 25, 1996, to June 24, 1997, and Prabir Kundu from

June 25, 1997, to June 24, 1998, and it would again rotate for the term of one year each hereafter in the same order. We, further, declare that all the heirs and legal representatives of Ashutosh Kundu, Shyamapada Kundu and Bimal Chandra Kundu would be deemed to be the shebaites to the deities, but the managing trustees would be the aforesaid persons as delineated hereinbefore in the order as mentioned above. The managing trustees would be free to devise their own ways of management including collection of rents and payment of taxes and look on the upkeep of the debuttar properties. The appeal, accordingly, stands allowed. There will be no order as to costs. The rule is, accordingly, disposed of without any order as to costs.

17. Let a xerox copy of this judgment be given to learned Advocates for the parties on usual undertaking.

N. K. Bhattacharyya, J.: I agree.