

(1984) 06 GAU CK 0022
In the Gauhati High Court
Case No : Second Appeal No. 194 of 1977

Radha Govinda Jew Bigraha

APPELLANT

Vs

Kailash Dubey and Others

RESPONDENT

Date of Decision : 14-06-1984

Acts Referred:

Citation : (1987) 1 GLR 394

Hon'ble Judges : K.N.Saikia, J

Bench : Single Bench

Advocate : S.R.Bhattacharjee, C.R.Da, Advocates appearing for Parties

Judgement

1. This plaintiff's second appeal is from the judgment and decree of the District Judge, Cachar at Silchar in Title Appeal No. 23 of 1974 affirming the judgment and decree of the Assistant District Judge No. 1, Cachar at Silchar in Title Suit No. 35 of 1972.

2. The second appeal was admitted on the following substantial question of law, namely, whether both the courts below have misconstrued the debottarnama (Exht. I), which was the foundation of right claimed by the parties.

3. In Title Suit No. 35/1972, the plaintiffappellant claiming to have been appointed Shebait by the public prayed, inter alia, that he be declared shebait of the deity Sri Sri Radha Govinda Jew ; that the deity's possession in respect of the suit land be confirmed on declaration of plaintiff's right thereto; and that the deity be given possession thereof. The defendant resided the suit stating that the plaintiff was never appointed as shebait of the deity; and that the defendant has all along been the lawful shebait of the deity and managing its property and hence the suit be dismissed. On the pleadings five issues were settled; namely, whether the plaintiff had any cause of action; whether the suit was maintainable; whether the suit was barred by limitation; whether the plaintiff had any right, title and interest in the suit property; and to what relief, if any,, the plaintiff was entitled,

4. The learned Assistant District Judge decided issues No. 1, 2 and 3 in favour of the plaintiff, but issues No. 4 and 5 against him and dismissed the suit. The plaintiff's appeal therefrom was also dismissed by the District Judge holding that the parties submitted that the suit land belonged to the deity; that the dispute was only on the question of shebaitship of the deity; and that from the debottarnama (Ext. 1), the line of succession of shebait and the mutation in revenue records it was clear that the deity has been a private and not a public one and as such the public had no right to appoint the plaintiff as its shebait removing the defendant and the suit has rightly been dismissed. Hence this second appeal.

5. Mr. C. R. De the learned counsel for the plaintiffappellant submits, inter alia, that the debottarnama (Ext. 1) and the prevailing custom and practices of the deity reveal all the characteristics of a public deity and both the learned courts below, on a misconstruction of Extn. I, erred in holding it to be a private and not a public deity; and that as the Sewa Puja of the deity ceased to be performed and its properties fell into misuse in absence of a shebait, and the public appointed him as the shebait, and hence the suit ought to have been decreed. Counsel relies on AIR 1957 S.C. 133, AIR 1959 SC. 1002 and AIR 1953 S.C. 1638, and accepts the position that if the deity is held to be a private deity he would be out of court.

6. Mr. S. R. Bhattacharjee, the learned counsel for the defendantsrespondents, refutes submitting that from the debottarnama and the long line of successive shebait including the instant defendant there is no doubt that the deity is a private and not a public one and that the defendant is its present lawful shebait ; and that even assuming but not admitting that the deity is a public one the defendant having already been the shebait of the deity the public had no right to remove him and appoint the plaintiff as the shebait, and the plaintiff has no right to intermeddle with the affairs of the deity ; and that the learned courts below rightly dismissed the suit. Counsel further submits that the authorities relied on by Mr. De are distinguishable on facts.

7. The only questions required to be judicially determined in this appeal, therefore, are as to whether on proper construction of Ext. I the learned courts below erred on a substantial question of law in holding that the deity Sri Radha Govinda Jew is a private and not a public deity; and if the finding is erroneous, whether the concurrent finding is one of law or a mixed question of law and fact so as to be liable to interference in this appeal ?

8. The question whether the deity is a private or a public one would depend on various factors. Findings as to those factors are undoubtedly findings of fact but whether on the basis of those facts the deity as to be regarded as private or public would be a mixed question of law and facts, In Deokinandan v. Muralidhar, AIR 1957 SC 133 the question that arose for decision was whether the Thakurdwara of Sri Radha Krishna Ji at Bhadesia was a public endowment or a private one and their Lordships held that the question as to the scope of the

dedication was a mixed question of law and fact the decision of which must depend on the application of legal concepts. In *Lakshmidhar Misra vs. Ranga Lal*, AFR 1950 PC 56 the question was whether certain lands had been dedicated as cremation ground, it was observed by the Privy Council that it was "essentially a mixed question of law and fact and that while the findings of fact of the lower appellate court must be accepted as binding, its "actual conclusion that there has been a dedication or lost grant is more properly regarded as a proposition of law derived from those facts than as a finding of fact itself". Thus, where the controversy is only as to the scope of the dedication that would be a mixed question of law and fact, the decision of which must depend on the application of legal concepts of public and private endowment to the facts and an erroneous application of such legal concepts would be subject to second appeal. In the instant case, the giving of the property by the debottarnama (Ext. I) dated 13.6.27 in favour of the deity is an admitted fact. The appointment of Chandramani Das Baisnav as the first shebait by the donor has also been admitted. That after Chandramani Das Baisnav, Krishna Chandra Das Goalla acted as the shebait has not also been denied by the plaintiff. The dispute is as to the right of the public to appoint the plaintiff as the shebait on alleged misuse of the deity's property such appointment having affected the first defendant who claims to have been lawfully acting as shebait. The right of the public to appoint the plaintiff as shebait could be there only if the deity was a public and if it was a private deity. Whether it was a public or private deity could be decided on the basis of the facts. The concurrent findings on these facts would not be liable to be disturbed in this second appeal. But whether on the basis of the facts found the deity would be private or public would depend on the correct application of the accepted notions or concepts applicable to religious and charitable trusts under the Hindu Law and this would surely be a mixed question of law and fact subject to second appeal.

9. We now proceed to examine this question on the basis of the facts found. Ext. 1 is the debottarnama dated 13.6.27 creating the endowment of 131 B. 6 K. 3 Chataks of land in favour of Sri Radha Govinda Jew Bigrha by late Krishna Charan Das. The donor himself appointed Shri Chandramani Das Baisnav as the first shebait. But Exht. 1 did not lay down how subsequent shebaites would be appointed. The debottarnama is addressed to the shebait of Sri Sri Radha Govinda Jew Sri Chandramani Das Baisnav gifting the land measuring 131 B. 6 K. 3 Chataks for establishment of a temple and mandap of Sri Sri Radha Gobinda Jew on the land and to carry on the usual sewapuja services of the deity ; and in case he defaulted in performance of the usual services, or in case he left the place, or in case of his death, he who would be engaged in the performance of the services of the deity would continue to perform the services of shebait. Thus, from Exht. t it could not be ascertained as to who would be the beneficiaries of the services to the deity. As regards the shebaitship, Chandramanidas baisnav Being the first shebait in the eventualities mentioned in the debottarnama whoever would be engaged in; the sewa puja of the deity would be the shebait

and would perform those functions. The question, therefore, arises whether on the basis of Ext. 1 it would be permissible to hold the deity as a private one ? What other relevant facts have been found by the courts below ?

10. The trial court did not frame any issue on the question of public or private nature of the deity. It did not raise that question and dismissed the suit holding that the plaintiff failed to prove that he was shebait. The learned lower appellate court observed that the crucial point to be decided in the case was the character of the Bigraha itself and that in the plaint it was nowhere stated whether Bigraha was a public or a private one and that in course of evidence some attempt was made to characterise the Bigraha as a public one. After discussing the evidence the lower appellate court held that the Bigraha was never a public one and no public could be entitled to appoint a shebait as was alleged in the case. The question then arises, whether without there being an issue on the question of public or private nature of the deity, were there enough evidence before the court to decide the question ? What then are the criteria on which such a question could normally be decided ? In *Nobi Shiraz vs. The Province of Bengal*, ILR 1942 (I) Cal 211 it was observed that the essential distinction between a public and a private trust is, that in the former the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained, but in the latter the beneficial interest must be vested in an uncertain and fluctuating body of persons either the public at large or some considerable portion of it answering a particular description. The fact that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a section of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private trust. The question would have to be decided in terms of the document when it exists, if it is ambiguous or silent then from the evidence of the user and public repute etc. It was held by the Privy Council in *Bhagwan Din vs. Svarup*, 44 C.W.N. 294 that it is possible that a temple which was a private one at its inception might be so dealt with, that in course of years it might become a public temple. The essence of a public foundation consists in dedication to the public and whether there has been any dedication or not must be ascertained with reference to circumstances of each individual case. In *Bhagwan Din* (supra) the facts were that a person squatting on a plot of land, which did not belong to him, had set up a mud hut thereon with an idol in it and in 1781 a grant of the land was made to him personally and his heirs generation after generation and descent after descent. The temple had grown, but the family had always treated it as private property, without any interference by the public, dividing the various forms of profit, whether offerings or rents, letting out portions of lands in their own name, closing the temple to the public when necessary for family purpose and erecting samadhi on the land in honour of the dead. Having regard to these circumstances, particularly to the facts that the original grant was in favour of an individual, it was held by the Privy Council that no public trust could be inferred even though it was not disputed that no Hindu

worshipper was ever turned away or prevented from worshipping the deity or making votive offerings to the same; and further that the deity acquired considerable popularity in the Hindu locality. On the other hand, in *Pujari Lakshmiwa Gottndan vs. Subramania*, 29 CWN 112, the founder of the temple dreamed that he should instal at his house a Kalipatta an idol of the God Subramanya Swamy and that the God would come to his house and enable him to foretell events. He did instal that idol at his house and allowed Brahmins and other Hindus of various castes to worship the idol as if it was a public idol. He acted as the Pujari of the idol and received, as such, offerings made to the idol by worshippers and fees which he charged in respect of religious services. The number of worshippers increased and with the increased offerings and fees he purchased some jewels for the idol, shifted his family to another house which he built, extended the house in which the idol was and added to it covered rooms for the accommodation of the worshippers during the ceremonies of worship. He also built in the village a rest house for the use of worshippers of the idol. "With the income which he derived from offerings and fees, he efficiently maintained the temple as if it were a public temple and discharged all the expenses connected with the temple and the worship of the idol there. In these circumstances it was held by the Judicial Committee that no other inference was possible than that the founder dedicated the temple to the public.

11. It has been ruled in *Menakuru Dasaratharami Reddi vs. Cuddvkuru Subba Rao*, AIR 1957 S.C. 797 that a dedication to charity need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the private secular character of the property and its complete dedication to charity. On the other hand, there may be grants or gifts showing dedication of property to charity. Dedication of a property to religious or charitable purposes may be either complete or partial. It is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole. Similarly, in *State of Bihar vs. Sm. Charusila Dasi*, AIR 1959 S.C. 1002, it has been ruled that in order to determine the question whether an endowment is public or private, the cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshipers. Thus where in the trust deed the settlor had stated that she had installed the deity Iswar Srigopal in her house and she had been regularly worshipping the deity since such installation and if the trust had been created only for the purpose of

continuing such family worship, the conclusion would no doubt be that the endowment was wholly of a private character in which the public had no interest. But where the settlor went further and created a trust for the construction of two temples, in one of which was to be installed the deity Iswar Srigopal and in the other the marble image of her preceptor and also provided for the establishment of a charitable hospital and dispensary for the gratuitous medical, surgical and maternity advice and aid to the Hindu females; and the trustees consisted of five persons, three of whom are strangers to family, it was held that the Court must construe the deed of trust with reference to all its clauses and so construed, there was no doubt that the trusts imposed constituted a public endowment. In *Tilkayat Shri Govindlalji Maharaj vs. State of Rajasthan*, AIR 1963 S.C. 1638, it has been held that where evidence in regard to the foundation of a temple is not clearly available, the question whether a Hindu temple is public or private is determined by relying on certain other facts which are treated as relevant. Is the temple built in such an imposing manner that it may prima facie appear to be a public temple ? The appearance of the temple of course cannot be a decisive factor; at best it may be a relevant factor. Are the members of the public entitled to an entry in the temple ? Are they entitled to take part in offering service and taking Darshan in the temple ? Are the members of the public entitled to take part in the festivals and ceremonies arranged in the temple ? Are their offerings accepted as a matter of right ? The participation of the members of the public in the Darshan in the temple and in the daily acts of worship or in the celebrations of festival occasions may be a very important factor to consider in determining the character of the temple. So also in *Narayan Bhagwantrao Gosavi Balajiwale vs. Gopal Vinayak Gosavi* AIR 1960 S.C. 100, it has been held that the question of intention to dedicate the place for the use of the public or of the user by the public being as of right unnecessarily matter for inference from the nature of the institution and the nature of the user and the way the institution has been administered. Once a long course of user by public for the purpose of worship is established, and the fact of a separate endowment in trust for the deity is also proved, it is fair to infer that the institution must have been dedicated for user by the public (unless the contrary is established) particularly when character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples. When user by the public generally to the extent to which there is a worshipping public in the locality is established, it is not unreasonable to presume that the user by the public was as of right, unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that it can only be ascribed to the private character of the institution. Thus, in *Poohari Fakir Sadavarthy of Bondilipuram vs. Commissioner*, AIR 1963 S. C. 510, it was held that a religious institution will be a temple if two conditions are satisfied. One is that it is a place of public religious worship and the other is that it is dedicated to or is for the benefit of, or is used as of right by a particular community, or any section thereof, as a place of religious worship.

Where the original grants in favour of an institution are in the name of the head of the institution for the purpose of sadavarthy (feeding of the travellers and pilgrims) and for his own maintenance and prayer and though the head of the institution had built a temple for his private worship, there was no mention of it in various endowments for the period, which were for the head who ran the sadavarthy institution and were always in his name, and further, there was no evidence that the Hindu public went to the temple for worship as a matter of right. It was not a temple as defined in the Madras Hindu Religious Endowments Act. The above principles have been followed in a long line of decisions. In *Jadugopal vs. Pannalal*, AIR 1978 S. C. 1329, it was reiterated that the construction of the debuttar which went to the root of the matter, was a question of law and could be gone into in second appeal. In *Krishna Singh vs. Mathurct Ahir*, AIR 1980 S. C. 707, it has been enunciated that a math is an institutional sanctum presided over by a superior who combines in himself the dual office of being the religious or spiritual head of the particular cull or religious fraternity, and of the manager of the secular properties of the institution of the math. The property belonging to a math is in fact attached to the office of the mahant, and passed by inheritance to no one who does not fill the office. The law is well settled that succession to mahantship of a math or religious institution is regulated by custom or usage of the particular institution, except where a rule of succession is laid down by the founder himself who created the endowment. Even where the Mahant has the power to appoint his successor, it is the custom in the various Maths that such appointments should be confirmed or recognised by the members of the religious fraternity to which the deceased belonged. In *Radhakanta Deb vs. The Commissioner*, AIR 1981 S. C. 798, it has been ruled that there can be religious trust of a private character under the Hindu Law and it is not only permissible but also very common to have private endowments which though are meant for charitable purposes yet the dominant intention of the founder is to instal a family deity in the temple and worship the same in order to effectuate the spiritual benefit to the family of the founder and his descendants and to perpetuate the memory of the founder. In such cases, the property does not vest in God but in the beneficiaries who have installed the deity. In other words, the beneficiaries in a public trust are the general public or a section of the same and not a determinate body of individuals as a result of which the remedies for enforcement of charitable trust are somewhat different from those which can be availed of by the beneficiaries in a private trust. The members of the public may not be debarred from entering the temple and worshipping the deity but their entry into the temple is not as of right. This is one of the cardinal tests of a private endowment. The question as to whether the religious endowment is of a private nature or of a public nature has to be decided with reference to the facts proved in each case and it is difficult to lay down any test or tests which may be of universal application. Their Lordships, however indicated the following guidelines to determine whether an endowment is of a private or of public nature :

(1) Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right :

(2) The fact that the control and management vests either in a large body of persons or in the members of the public and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large ;

(3) Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of the maintenance of the temple belonging to the founder himself, this will be a conclusive proof to show that the endowment was of a private nature ;

(4) Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment."

12. Applying the above criteria to the facts of this case it is seen that the plaintiff did not at all mention whether the deity, Sri Sri Radha Govinda Jew, was a public deity or a private deity. From the debottarnama (Ext. 1) there is no indication as to who would be the beneficiaries. Also there is no indication about, the line of succession of the shebatt. The gift was to the Shebait Chandramani Das Baishnav. The defendants proved a long line of succession of shebait during a period from 13.6.27 upto date and his statement that he was still being serving as a shebait and managing its properties, has not been belied by evidence. There is evidence of the public having worshipped in the temple but there is no evidence of the public earlier exercising any right of appointing shebait which means that the long line of succession of shebait, as shown by the defendant, was accepted by the public. There is no evidence to show that the members of the public worshipped in the temple as a matter of right. There is no evidence to show that the public ever participated in or undertook the management of the temple or share its income. The revenue records indicate the mutation of the series of shebait. There is no evidence of the temple being such as it could not be a private temple but must be regarded as public one. On the basis of the above evidence on record it is not possible to hold that the deity was a public and not a private one. The plaintiff has failed to prove that the deity is a public one by adducing evidence to that effect. He never proved the deity to be a public one. It cannot, therefore, be held that the learned lower appellate court committed any error in holding that the deity is a private and not a public one.

13. In the result this second appeal is found to be without merit and it is dismissed. Under the peculiar facts and circumstances of the case there will be no order as to costs.