(1941) 09 PAT CK 0014

In the Patna High Court

Sadhu Charan Parija and Others APPELLANT

Vs

Krishnamani Dei and Others RESPONDENT

Date of Decision : 05-09-1941

Acts Referred:
Limitation Act, 1963 — Article 62, 5

Citation : AIR 1942 Patna 181

Hon'ble Judges : Meredith, J;Agarwala, J

Bench : Full Bench

Judgement

Meredith, J.—This second appeal is by defendants. There is also an application to be considered, by the son and heir of deceased respondent 20, for being substituted in his father''s place and added as a respondent.

2. In the plaint the plaintiff is described as Sri Gopinath Deb Thakur installed at Bhingarpur, through 23 named shebait marfatdars, and the suit was to recover a sum of Rs. 955-9-7 from the sons of a deceased karpardaz (agent) who is said to have retained that sum wrongfully out of moneys collected by him.

3. The suit was defended only on the ground of limitation, the defendants contending that limitation should run from the date of the receipt by their father of each item making up the sum claimed, and that Article 62, Limitation Act, was the article applicable. The Courts below have found, however, that in fact there was no liability on the part of the deceased karpardaz to pay over sums received to the estate directly on receipt. There was running account, and the arrangement was that he should retain sufficient funds in his hands out of the collection for cost of litigation on behalf of the plaintiff for whom he held a general power of attorney. In the statement of account given in the plaint, it appeared that whereas the karpardaz had taken advances amounting to only Rs. 1563-7-7, he had actually expended as cost of suits during the material period a sum of Rs. 3703-4-9. Hence the. j article of the Limitation Act applicable was either Article 89 or Article 120, and in either case the claim was not barred, the suit having been brought within three years of the date of the karpardaz''s death.

4. The decree of the trial Court was maintained by the Court of first appeal. In second appeal the peon who served the notice on the respondents reported that respondent 20'' (shebait marfatdar No. 20) was dead. Enquiry showed that he had actually died on 14th April 1935, and as the suit was decreed only on 28th August 1935, this was more than four months before the decree. Thereupon the defendants-appellants filed an application, claiming that the whole suit had abated, and the decree must be set aside as the suit was not properly constituted at the time of trial. As against this, the heir of the deceased shebait marfatdar has filed an application for substitution.

5. The question as to the effect of the death of one of the shebaits before the trial has been argued at great length. The contention on behalf of the appellants is that the shebaits form a corporate body, and can '' act only as a whole; everyone of them is a necessary party to the suit, if not as plaintiff, at least as defendant. In support of this contention a number of rulings have been cited, going back to the Privy Council case of Rajendranath Dutt v. Shaikh Mahomed Lal (''82) 8 Cal. 42. of the remaining rulings cited, it will suffice to notice Beahu Lal v. Oliullah (''85) 11 Cal. 338, where it was held that all the mutwallis of the endowment should be made parties to a suit for recovery of property; Kokilasari Dasi v. Mohunt Rudranand Goswami (''07) 5 C.L.J. 527, where it was held that where the administration of a trust is vested in several trustees, they all form, as it were, but one collective trustee and their interest and authority being equal and undivided they cannot; act separately, but all must join; Abdul Gofur Mandal v. Umakanta Pandit AIR 1915 Cal. 33, where it was held that joint shebaits are, in some respects, joint trustees; in order to succeed in the suit both shebaits should have joined as plaintiffs, or plaintiff should have made out a case that he was authorized by his co-shebait to maintain the suit on her behalf; Thina Shanmugha Mooppanar v. Mona Chuna AIR 1922 Mad. 317 , where it was held that if several persons have a joint right of action all must join in suing, if any will not come in as plaintiffs, they must be joined as defendants, and co-trustees form one collective trustees, and cannot act separately; AIR 1934 58 (Privy Council) where the Privy Council held that one of several co-shebaits cannot sue for his own share of rent. Lastly it is pointed out, on the authority of the Privy Council in Jagadindra Nath Roy v. Hemanta Kumari Debi (''05) 32 Cal. 129 that, however, the plaint may be worded, actually the right to sue for the protection of the dedicated property vests in the shebait, and not in the idol.

6. With regard to the application for substitution, it is pointed out that it is completely out of time, and no grounds at all have been put forward for the application of Section 5, Limitation Act. On the contrary, on any view of the law, a claim by the heir of the deceased shebait was barred by limitation on 26th August 1941, when the application was made. Indeed, in the death register, where the death was entered up on 15th April 1935 the general agent for the idol and the shebaits was shown as the informant.

7. It is quite obvious that the application for substitution cannot succeed. In

substance it is an application to add the applicant as plaintiff in the suit, and to include him among the decree-holders. That cannot be done out of time, after the suit has been decreed, and when any suit by him would be barred by limitation. Nor is there any question of abatement of the appeal as against the heir of the deceased respondent, since in fact the deceased respondent was not a party to the decree or to the appeal. The crucial question is, what is the effect of the death upon the suit; must it be held to have abated as a whole, or can the deity be regarded as having been substantially and sufficiently represented by the remaining twenty two shebaits? In my opinion, that can be done. It must be noted that this is not a case of a suit improperly constituted at its inception. At the time the plaint was filed all the shebaits were parties, and the suit was properly constituted. Had the deceased shebait never joined in the suit, then the rulings cited would be strictly applicable. But what we have to consider is not the effect of any improperly constituted suit, but the result of one of the plaintiffs dropping out in a properly constituted suit. The case is more closely analogous to one where after consultation amongst themselves it is arranged among the shebaits that some should act on behalf of all; for we know from the fact that the deceased shebait joined in the plaint he must have approved of the suit, and we know also from his son''s application to be joined as plaintiff that he also approves of the suit and would support the claim on behalf of the deity. Hence this is a case where the Court can be satisfied that all the shebaits are of the same mind. There are rulings in which it has been held that in such cases the interest of the deity can be held to have been sufficiently represented. For example, in Kunhan v. Moorthi, (''11) 34 Mad. 406 it was laid down that the rule that in the case of charitable trusts, the act of the majority will be binding on the minority only applies when such act is done after full opportunity given for mutual discussion. Where the act is done after mutual discussion, by all the members when the minority had an opportunity to record their dissent it will be the act of the whole body. Again, in Veliapalli Sekhara Menon v. Narayanan AIR 1930 Mad. 881, a case in several respects analogous to the present case, it was held that where during the pendency of an appeal in a suit for redemption by a trustee of a devaswom impleading the other trustees as well as the mortgagee as respondents, one of the trustees, who was a respondent, died and his legal representative the succeeding trustee in his place, was not brought on the record and judgment was passed in the appeal in favour of the devaswom, and a member of the mortgagee''s family, who was a respondent, applied to set aside the judgment as invalid, on the ground that the appeal had abated, the appeal had not abated and the devaswom was sufficiently represented in the appeal even after the death of the trustee, and the judgment was binding on both the parties. A distinction was drawn between a suit not properly constituted at its inception owing to the absence of some of the uralans and a case originally properly constituted where on the death of one of the trustees his successor had not been substituted in his place, and authorities were quoted for the proposition that in order that a decree may bind the devaswom it is not necessary to have all the trustees or uralans as parties, provided that the litigation was conducted bona fide in the interests of the devaswom by those uralans who were parties. The ratio decidendi in these cases seems to be that the deity can be held to be sustantially and sufficiently represented by the majority of the shebaits where there are materials to show that they are acting with the approval of all, bona fide, in the interests of the deity and there is no possibility of any conflict of decrees. That there is no possibility of any conflict appears clearly from Madhavan v. Keshavan 11 Mad. 191 where it was held that the decision in a suit by some of the shebaits will operate as res judicata should the remaining shebaits subsequently attempt a suit on behalf of the deity upon the same cause of action.

8. In my opinion, in the present case it can be held that the deity was sufficiently represented by the twenty two shebaits who were parties to the decree, and I would, therefore, hold that the suit did not abate.

9. With regard to the. merits, the contention is repeated that Article 62, Limitation Act, governs the case, but it is quite obvious that Article 62 has no application. The finding is that there was no liability on the part of the karpardaz to pay over the sums in question to the estate upon receipt. That being so, the date of receipt of the sums can in no circumstances operate as the starting point of limitation. The liability to pay the sum claimed first arose at the time of the karpardaz''s death. Whether the suit be against him or his sons, there is no question of limitation running before that date. On the view that limitation could run only from the date of death the suit was within time whatever article of the Limitation Act might be held applicable, whether 85, 89 or 120, since the suit was within three years of the karpardaz''s death.

10. The application for substitution must be rejected, but despite that it must be held that the decree is good, and the appeal fails. I would accordingly dismiss it with costs.

Agarwala, J.

I agree.

