
(1957) 09 AHC CK 0045
In the Allahabad High Court
Case No : Special Appeal No. 20 of 1947

Sankatha Pandey

APPELLANT

Vs

Brij Mohan Pandey

RESPONDENT

Date of Decision : 16-09-1957

Acts Referred:

Specific Relief Act, 1877 — Section 42

Citation : AIR 1958 All 371 : (1957) 27 AWR 748

Hon'ble Judges : O.H. Mootham, C.J.;Raghubar Dayal, J;A.P. Srivastava, J

Bench : Full Bench

Advocate : A. Sanyal, for the Appellant; Satish Chandra, for the Respondent

Final Decision : Allowed

Judgement

Raghubar Dayal, J.—This is a special appeal against the order of a learned Single Judge dismissing a second appeal.

2. The facts leading to this appeal are as follows. Dalthamnmn Pandey and Dalganjan. Pandey were brothers. Dalganjan Pandey died in 1898. leaving his widow Srimati Uttama and his daughter Srimati Gaura. Dalthamman pandey died in 1935. On 11-2-1931 he dedicated certain properties of his to some deities. He executed a will on 23-7-1921 and another will on 2-11-1923.

By his first will he appointed Srimati Uttama, Srimati Gaura and Srimati Gaura's father-in-law Sital Pandey as his executors. By his second will he - appointed Srimati Uttama, Srimati Gaura and Jagmohan Pandey, one of the three sons then alive of Sital Pandey, as his executors. Both Sital Pandey and Jagmohan, Pandey died within the lifetime of Dalthamman Pandey, the former dying in 1934 and the latter in 1924.

3. It was provided in the first will of 1921 that after the death of Srimati Uttama and Srimati Gaura, the heirs and representatives of Sital Pandey, executor No. 3, would as shebait be worshipping executors and would look after the management of the dedicated properties according to conditions laid down in the

will.

In the later will of 1923 it was provided that after the death of Srimati Uttama and Srimati Gaura the third executor, i. e. Jagmohan Pandey, would remain in possession and occupation of the property in respect of which the will had been made "generation after generation."

4. Srimati Uttama and Srimati Gaura, who outlive Dalthamman Pandey, executed a surrender deed in favour of Sankatha Pandey in 1938. Srimati Uttama died in 1939 and Srimati Gaura died in 1940. In view of this admittedly invalid surrender deed, Sankatha Pande got in possession of the entire endowed property,

5. Brij Mohan Pandey instituted the suit giving rise to this appeal in 1941. He alleged in paragraph 1 of the plaint that Dalthamman Pandey, who exclusively owned the properties mentioned in schedules A and B, dedicated the said properties to various deities by means of a will registered on 23-7-1921. This paragraph was admitted subject to pleas in the written statement by Sankatha Pandey.

The additional pleas, however, did not say anything to challenge the correctness of the allegation with respect to the subject-matter of the dedicated properties. We can, therefore, proceed on the assumption that all the properties in suit are endowed properties.

6. It was further alleged in the plaint that on the basis of the deed of relinquishment executed by Srimati Uttama and Srimati Gaura the defendant claimed to be the sole shebait and denied the right of co-shebaitship of the plaintiff. In paragraph 7 of the plaint the plaintiff alleged that he had requested the defendant to join him (the plaintiff) also along with him in the office of shebaitship to manage the Immovable endowed property jointly with him and to place the moveable endowed property in the custody and supervision of the plaintiff also so that the endowed property be managed jointly with mutual consultation, but the defendant had refused to do so.

7. The plaintiff, inter alia, prayed for the following reliefs:

(a) A decree may be passed in favour of the plaintiff and it may be declared that he as a co-shebait with the defendant has a right to exercise all the powers relating to the office of shebaitship like the defendant. A declaratory court-fee of Rs. 15 was paid in respect of this relief. For the purpose of jurisdiction, this relief was valued at Rs. 100/-.

(b) By means of a decree, a perpetual injunction may be issued directing the defendant to join the plaintiff as a co-shebait along with him in the use and management and possession and occupation of the endowed property specified below, mentioned in schedules A and B of this plaint, like himself, that he may be perpetually restrained from doing wrongful interference. The relief was valued at Rs. 2353/5/4. A court-fee of Rs. 15/- was paid on one-tenth of this amount.

8. It may be mentioned that originally the plaintiff had prayed for the recovery of possession over the properties in dispute. He, however, amended the plaint when he was asked to pay a court-fee on the relief for possession and confined his claim to a declaration and an injunction only.

9. The trial Court decreed the suit for a declaration that as a co-shebait the plaintiff had a right to enjoy all the rights of a shebait along with the defendant and to do all acts incidental to the office of shebaitship and for an injunction restraining the defendant from interfering with the plaintiff's right to hold the office of shebaitship as a co-shebait and to manage the property detailed in schedules A and B. This decree was confirmed both by the first appellate Court and by the learned Single Judge against whose decree the present appeal is preferred.

10. The first contention for the appellant is that the suit as framed is bad in view of the proviso to Section 42, Specific Relief Act, as the plaintiff did not claim the relief of possession or joint possession against the defendant who was admittedly in possession as a shebait of the dedicated property. We are of opinion that this contention has no force.

The various deities are in possession of the endowed property. The shebait only manages it and exercises control over it on behalf of the deities. The reliefs claimed contained everything which the plaintiff really wanted, viz., a declaration of his rights as a co-shebait and being allowed to act as a joint shebait. It was not, therefore, necessary to ask for any further relief for joint possession even if it was possible to grant it.

The cases of *Md. Jafar Husain Khan v. Md. Taqi Khan*, AIR 1933 Oudh 517 (A); and AIR 1947 17 (Oudh) , support this view. They were cases in which a suit by the plaintiff for a declaration that he was the mutawalli of the waqf property was held to be not bad on account of his not suing for possession when the fact of the property being waqf property was not being challenged. The observations in the case of *Sheo Prasad Sahu Vs. Ram Chandar Prasad* , do not really go against the view expressed in the aforesaid Oudh cases.

11. In the Allahabad case *Sheo Prasad (C)*, the plaintiff instituted a suit for a declaration that one Ram Chandar Prasad had no right as a trustee or manager either separately or jointly with the plaintiff or, in the alternative, for such other relief as the facts of the case would justify. The defendant contended that the plaintiff himself was not a trustee or manager of the trust property in suit.

The Court found that Ram Chandar Prasad, the defendant, was a duly appointed co-trustee and that Sheo Prasad was also a trustee. In view of the alternative prayer in the plaint, the Court expressed an intention to declare that they should grant a declaration that the plaintiff Sheo Prasad and the defendant Ram Chandar Prasad were jointly entitled to act as trustees of the trust.

It was then contended for the defendant that the suit should be dismissed

because the declaration which the plaintiff sought was in a negative instead of a positive form, that is, that the plaintiff instead of asking for a declaration that he was the sole trustee of the trust asked for a declaration that the defendant was not a trustee either jointly with him or separately. In this connection, their Lordships observed at page 365:

"It seems to us that this objection is not one of substance but as we are granting a positive declaration that the parties are joint trustees, the question does not arise.

Another argument was that the plaintiff could not be granted a mere declaration that he was the sole trustee because he had not applied for the consequential relief of possession or an injunction. That might possibly have been a good objection if there had been any question of granting the plaintiff his first relief but as we are granting a declaration that the parties are jointly entitled to be trustees, the objection has no force. In the circumstances that we have now found to exist there would be no need for a decree for possession or for an injunction." The learned Judges did not lay down that a suit for a mere declaration that the plaintiff was the sole trustee would have been bad in law in view of the omission of the plaintiff in not suing for the consequential relief of possession or an injunction. In fact, it may be implied in the last portion of the observations that when the plaintiff and the defendant were to be declared joint trustees there was no need for a decree of possession or for an injunction.

In the present case, the declaration the plaintiff sought is to the effect that he and the defendant were joint mutawallig of the endowed property and therefore, in view of the above-mentioned observations, there was no need for a decree for possession or even for an injunction.

12. The cases relied on for the appellant are distinguishable. They are Rathnasabapathi Filial v. Ramaswami Aiyar ILR Mad 452 (D) and Kandaswami Thambiran Vs. Vagheesam Pillai, wrongfully styling himself as Ponnambala Desikar, . In the former case a trustee who had been definitely removed by the other trustees sued for a declaration and an injunction restraining the co-trustees from interfering with his exercising of his rights.

The fact that the trustee had been removed and the fact that no injunction was sought against the co-trustees to join him as a co-trustee in the management of the trust property distinguished this case from the present one. In the latter case of 1941, the plaintiff sued for a declaration of his title as a mahant and for an injunction restraining the rival from interfering with his rights. It was not a case for joint possession. Therefore, no injunction could have been claimed against the rival mahant to join the plaintiff in the management of that math property.

13. The case of Kunj Behari v. Keshavlal Hira Lal ILR 28 Bom 567 (P), supports our view. There the plaintiff alleged that he had been installed on the gaddi of God Shri Nar Narayan and nobody but himself had any right to the same and stated that the defendants relying on certain will were attempting to place some

other person on the gaddi. He sued for a declaration that the will set up by the defendants was not executed by the late Acharya and that if it was so executed it was not binding; a declaration that the right to become Acharya was his, and he was the owner of the gaddi; an injunction restraining the defendants from obstructing the plaintiff and from placing any other person on the gaddi. Their Lordships observed at page 571:

"The suit, therefore, in the plaintiff's view is not one for the possession of the land, but to determine who is to occupy the gaddi and thus as gadinashin to become the human agent of the deity.

If that be so, then an injunction restraining all interference with the occupancy by the plaintiff of the gadi secures in the most complete manner to him the rights he claims. We do not say that the plaintiff might not in terms have asked for possession of the office he says is his; we will assume he could, but how would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up?" In the present case, as indicated earlier, the injunction prayed for against the defendant would secure to the plaintiff in the most complete manner the rights he claims.

14. This case was followed in *Ali Shah v. Pateh Mohammad*, AIR 1935 Lah 657 (G). A similar view was taken in *Kisanlal v. Narayan-das* ILR 1946 Nag 578 : AIR 1946 Nag 251 (H).

15. The next and the more important question is whether Brij Mohan Pandey has any right as a joint shebait.

16. Dalthamman Pandey appointed certain executors under his will of 1921 and appointed them shebaites of the various deities after his death. He appointed different shebaites under the will of 1923, though two of the three she-baites under each will were common, namely Sri-mati Uttama and. Srimati Gaura. It is contended for the respondent that Dalthamman Pandey had no right to alter the line of shebaites by the second will. Of course it is urged on behalf of the appellant that Dalthamman Pandey could change the arrangement for shebaitship.

We are inclined to agree with the contention for the appellant. Dalthamman Pandey was the founder of the deities and the endowment. The office of shebait vested in him and his heirs unless he had disposed of it otherwise. He could alter the line of succession provided by the deed of endowment if he had reserved such a right to himself. If he had not reserved such a right to himself he was not entitled to alter the line of succession once laid down by him. This has been held in *Gouri Kumari Dasi Vs. Srimati Ranimoyi Dasi and Others*, and also in *Bindraban Vs. Sri Godamji Maharani Birajman Mandir Sri Rangji Maharaj* .

The line of succession of shebaitship was not laid down by Dalthamman Pandey in any deed by which the endowment was created. In fact, at the time of endowment on 11-2-1921 he executed no document and therefore laid down no line of succession. He laid down the line of succession to the office of shebait for

the first time in his will of 1921. A will can be revoked by the executant at any time.

It should be therefore implied that when a person who has founded the worship of an idol lays down the line of succession in a will he reserves to himself the right to revoke that line of succession by another will. If he does not intend to do so, he is not expected to lay down the line of succession in a will. In that case he would execute a separate document laying down the various conditions appertaining to that endowment and the office of shebait.

17. It follows, therefore, that the line of shebaitship after the death of Dalthamman Pandey in 1935 was to be governed by the terms of the will of 1923. This will provided, as already mentioned, that after the death of the ladies, Srimati Uttama and Srimati Gaura, the third executor Jagmohan Pandey would remain in possession and occupation of the property in respect of which the will had been made generation after generation.

Jagmohan Pandey did die in the lifetime of Dalthamman Pandey, but the right to the executorship and the office of shebait vested in those who would answer the expression "generation after generation". The vernacular expression corresponding to the translated expression "generation after generation" is "Naslan bad naslan taut-nun baad butnun". in Ahmad Azin v. Sari Jan AIR 1926 Oudh 561 (L), this vernacular expression has been interpreted to mean, "heritable and heritable only by the lineal male descendants".

The expression "naslan bad naslan" was held to mean "heritable and alienable estate" in Raj Bajrang Bahadur Singh Vs. Thakurain Bakhtraj Kuer, , Their Lordships of the Judicial Committee observed in the case of Saadat Kamel Kanum v. Attorney-General for Palestine, 1939 AC 508 (N), at P- 523:

"Aziz J., and the Supreme Court appear to have considered that the example makes a special rule applicable where the limitation is qualified by the condition "from generation to generation". This phrase appears in authoritative works on Mahomedan law in its Arabic form (butnun baad butnun) as having the intention and effect of preventing nearer and more remote descendants from being treated alike.

The following passage from the Fatawai Alamgiri, vol. ii., p. 474, explains it: "And if he should say "upon my child, and child of my child, and child of the child of my child," mentioning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor; while one remains the waqf is to them, and the lowest among them: the nearer and more remote being alike unless the appropriator say in making the waqf, "the nearest is nearer" or say, "on my child, then after them on the child of my child", or say, "generation after generation" (butnun baad butnun), when a beginning must be made with them with whom the appropriator has begun." This supports the view expressed in the case of AIR 1926 Oudh 561 (L).

18. According to the will of 1923, the she baitship devolved after the two women Uttama and Gaura Jagmohan Pandey having died before, on Jagmohan Pandey's generation after generation, that is, on his male lineal descendants. No such male lineal descendant was left by Jagmohan Pandey. The office of shebait therefore does not vest, according to the directions of Dalthamman Pandey, in either of the two parties before us, namely Sankatha Pandey, the defendant-appellant, and Brij Mohan Pandey, the plaintiff-respondent. The result is that Brij Mohan Pandey falls to establish his alleged right to the office of shebaitship and that his suit should fail.

19. If it be held that the generation after generation of Jagmohan Pandey had no vested right in the office of shebaitship, the office of shebaitship would after the death of Srimati Uttama and Srimati Gaura revert to the heirs of the founder Dalthamman Pandey. The parties are not the heirs of Dalthamman Pandey. In this view also the plaintiff has no right to the shebaitship or joint shebaitship of the deities.

20. In case it be held that Dalthamman Pandey could not lay down a second line of Shebaitship by the will of 1923 and that the office of shebaitship would be governed by the terms of the first will of 1921, the plaintiff would have a right if the heirs of Sital Pandey had a vested interest under the will of 1921. In view of our opinion that Dalthamman Pandey could execute a second will, this alternative consideration does not help the plaintiff-respondent in the present appeal.

21. We therefore allow the appeal, set aside the decree of the trial Court confirmed by the learned Single Judge and dismiss the plaintiff's suit with costs throughout.