

(1954) 05 CAL CK 0025
In the Calcutta High Court
Case No : A.F.O.D. No. 41 of 1951

Satyananda Brahmachari and Others

APPELLANT

Vs

Phani Lal Mookerjee and Others

RESPONDENT

Date of Decision : 12-05-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 91, 92, 93

Citation : AIR 1955 Cal 155 : 58 CWN 861

Hon'ble Judges : Renupada Mukherjee, J; R.P. Mookerjee, J

Bench : Division Bench

Advocate : Nalini Ranjan Bhattacharjya, for the Appellant; S.M. Bose, Advocate-General, Subodh Chandra Basak and Payodhi Nath Roy Choudhury, (for Nos. 1 to 5, 8 and 10 to 13) and Samarendra Krishna Dev, (for Nos. 7 and 9), for the Respondent

Final Decision : Dismissed

Judgement

K.P. Mookerjee, J.—The only question raised in this appeal is whether the plaintiffs had obtained the consent required under Sections 92 and 93, Civil P. C., for filing the present suit. The learned District Judge has held against the plaintiffs. Hence this appeal to this Court.

2. The three plaintiffs claimed to be persons interested in the sheba puja of the famous deity Sri Sri Kalimata of Kalighat.

3. It is alleged that this temple along with other associate ones are part of a public endowment. They are riot being properly managed. Certain definite allegations are also made about mismanagement and misappropriation.

4. In the body of the plaint it is averred that this suit is brought under the provisions of Section 92 read with Section 93, Civil P. C., and that the written consent of the Collector, 24-Parganas as required therein had been obtained. On the original plaint the Collector, 24-Parganas made the following endorsement:

"Under Government Order No. 5977-J, dated 11-11-1949, I hereby give consent

in writing to the institution of this suit u/s 92, Civil P. C., by the applicants (1) Sreemat Swami Satyananda Brahmachari (2) Ganapati Sarkar and (3) Parimal Chandra Sen against Phanilal Mukherjee and other shebait and paladars of the deity Sri Sri Iswari Kalimata Thakurani of Kalighat in the District of 24-Parganas for relief as sought for in the present suit.

S.N. Maitra, Collector, 24-Parganas 24-11-1949."

The defendants were originally 13 in number who were described as members of the Executive Committee of the Shebait Sabha constituted by some of the influential shebait and paladars who were made parties for themselves and for the benefit of all shebait and paladars in general under the provisions of Order 1, Rule 8, Civil P. C. Various reliefs were claimed including preparation of inventory of the properties of the deity the shebait to be directed to render accounts, for removing such persons as are found to have defaulted in the work of the sheba puja, committed any breach of trust or are found unfit and to settle a Scheme for the proper management and control of the debuttar properties. It is not necessary for our present purpose to refer in detail either to the allegations as made in the plaint or to the various objections raised in the written statement.

5. Of the many issues one was--

"Is the suit maintainable and is it filed in compliance with the terms of Section 93, Civil P. C.? Have the plaintiffs properly complied with the terms of Sections 92 and 93 of the Code in instituting the present suit?"

As this issue concerned the maintainability of the suit it was taken up for hearing as a preliminary issue with the consent of the parties.

6. It appears from the records that the connected papers relating to the alleged approval u/s 93, Civil P. C., were called for from the office of the Collector of the District as also from the office of the Secretary to the Government of West Bengal, Judicial Department. Only such of the papers as were considered relevant by the parties were marked as exhibits and the rest were returned to the respective offices. It will have to be considered later on whether all the relevant papers have been brought into the record. As stated already the learned District Judge found this issue against the plaintiffs and dismissed the suit on this preliminary issue.

7. When there are allegations of breach of any express or constructive trust created for public purposes and for certain other reasons Section 92, Civil P. C., provides that

"The Advocate General, or two or more persons having an interest in the Trust and having obtained the consent of the Advocate General, may institute a suit"

to obtain a decree for any one or more of the reliefs referred to in that section.

8. Sub-section (2) of Section 92 of the Code bars the institution of a suit except

in conformity with the provisions contained in Sub-section (1) of that section referred to above, unless such a suit is specially allowed under the Religious Endowments Act, 1863, or in any corresponding law in force in a Part B State.

9. It is clear from the provisions contained in Sub-section (1) of Section 92 of the Code that if the Advocate General himself files a suit he can do it immediately for any one or more of the reliefs contained in Sub-section (1) if that be in respect of a public trust.

10. Two or more persons interested in the said trust may be permitted to maintain a suit only after having obtained the consent in writing of the Advocate General.

11. u/s 93 of the Code the powers conferred u/s 92 on the Advocate General "may, outside the Presidency town, be with the previous consent of the State Government exercised also by the Collector or by such officer as the State Government may appoint in this behalf."

12. The expression "the previous consent of the State Government" appearing in Section 93 of the Code has been interpreted by the Judicial Committee in -- AIR 1932 51 (Privy Council) that the local Government must have given its previous sanction to "each" particular suit. Such previous sanction in each particular case was considered to be vital to the right of the plaintiffs to sue and even when such objection had not been raised in the Courts in India the attention of the Board being drawn to that defect at the final stage such objection was allowed. (See also -- AIR 1931 121 (Privy Council) .

13. The effect of these decisions was considered in -- AIR 1948 357 (Nagpur) and it was observed that a general sanction was not enough and the previous sanction of the Government must be obtained in each case. A sanction of this type has to be strictly proved because in the absence of a proper sanction the suit is without jurisdiction. It is not open in such a case to raise the presumption u/s 114, Evidence Act, that all due formalities of law must have been complied with.

14. The strictness with which these provisions have been interpreted will appear from -- "Somchand Bhikhabhai v. Chhaganlal Khupchand", 35 Bom 243 that after the Government approval had been obtained the consent was actually endorsed by the Assistant Collector who on the particular day the certificate was given was attending to the duties of the Collector who was too ill to attend office on that day was not considered to be a permission by the Collector. The reason was that the officer signing, though working for the Collector, had not been formally appointed as such though he might be discharging the functions of the Collector under the provisions of Section 11, Land Revenue Code, Bombay Act of 1879.

15. Reference may also be made to the recent decision of this Court -- Capt. G. Sarker and Another Vs. Nripendra Nath Dhar and Others . In that case the

consent of the Collector of Hooghly was endorsed on the plaint in the following manner:

"Consent to the filing of this suit u/s 92, Civil P. C., is given by me in writing to the plaintiff by virtue of the powers conferred upon me by the provisions of Section 93."

16. It transpired in that case that the local Government had not, previous to the consent recorded by the Collector of Hoohgly, given consent to the institution of that particular suit. A general Notification was produced by the plaintiffs, namely, Notification No. 3592 L.R. dated 15-4-1918, published in the Calcutta Gazette of 1918 at p. 650 of Part I. This notification will have to be referred to subsequently as in course of the correspondence in the suit how before us reference was made by the Judicial Secretary to this particular notification. The Division Court of this Court held that in view of the clear decision in AIR 1932 51 (Privy Council) such a general notification could not be deemed to have satisfied the conditions imposed by Section 93, Civil P. C. The requirements of that section not having been complied with the suit was dismissed.

17. On behalf of the defendants respondents it was contended before us that in the present case also the Government did not purport to have authorised the Collector to give his consent to this particular case but simply referred the Collector to the self-same general notification dated 15-4-1918 which was produced in the earlier case reported in Capt. G. Sarker and Another Vs. Nripendra Nath Dhar and Others (E). The present suit therefore was not maintainable.

18. On the other hand the contention of the plaintiff appellants is that in the letter issued by the Judicial Secretary to the Government of West Bengal it was clearly stated that there was no objection to the Collector consenting to the filing of a plaint u/s 92, Civil P. C.

19. It will, therefore, be necessary to refer to the correspondence between the Collector and the Judicial Secretary to the Government of West Bengal for finding out whether the Government had specifically authorised the Collector of 24-Parganas in this particular case as required u/s 93 of the Code.

20. It appears from the papers produced in this case that there had been a previous suit in respect of this endowment which ultimately came up on appeal to this Court in F. A. 36 of 1940. No copies of either the pleadings or of the judgments of the trial Court or of this Court in this the earlier suit have been produced in this case. Reference however is made in paragraph 14 of the plaint to this litigation and an extract from the concluding portion of the High Court Judgment is quoted.

21. It is the admitted case of both the parties that the High Court had then held that the endowment was a public one and the properties described in Schedule D of that plaint (particulars of which are not available to us) were the properties of

the deity. The other reliefs claimed in that suit, which had not been instituted in terms of Section 92 read with Section 93, Civil P. C., could not be considered in that suit. The concluding observation quoted in the plaint and accepted by the parties before us as being a correct quotation runs as follows:

"In conclusion we may say that the affairs of the temple, though somewhat improved after the formation of the Shebait Sabha are still in a deplorable state and it is highly desirable that either all the shebaites should agree and frame a proper scheme for management in the interest of the deity or if that is not possible a scheme should be put through in a properly framed suit u/s 92, Civil P. C. The importance from the public point of view seems to us to be of great urgency."

22. The plaintiffs alleged in the plaint that no scheme as suggested by this Court in the above judgment had been framed nor was it possible on the part of all the shebaites to agree and frame such a scheme nor such a scheme, if at all framed, be binding upon the deity or the public. The judgment in the other suit was delivered on 22-12-1948.

23. On 4-7-1949 the advocate for the widow of one Harendra Lal Halder who was stated to have been the original plaintiff, responsible for the filing of the earlier suit, moved the Advocate General of Bengal to immediately file a suit u/s 92, Civil P. C., or having a scheme framed and for recovery of debuttar properties which had been illegally transferred or misappropriated.

24. On this letter the then Advocate General of West Bengal made an endorsement on 11-7-1949 forwarding the same to the Collector, 24-Parganas for consideration.

25. From Ex. 1 a letter addressed by the Collector 24-Parganas to the Commissioner of the Presidency Division on 30-8-1949 it appears that a memorandum dated 1-8-1949 had been received by the former from the Commissioner, Presidency Division. It has not been brought to our notice as to what that memorandum contained. It however appears from the body of the plaint filed in the present case that the draft plaint had been, made ready by 2-8-1949 as appears from the verification clause at the end of the plaint. This was presumably placed before the Collector, 24-Parganas and was considered by the latter along with the opinion of the Government Pleader.

26. On 30-8-1949 the Collector, 24-Parganas forwarded the copy of the draft plaint along with a copy of the opinion obtained from the Government Pleader as also a copy of Government letter dated 6-6-1935 and with his own observations. He stated that in view of the previous litigation and, the opinion expressed by the High Court in F. A. 36 of 1942 it was unnecessary to hold independent enquiries afresh. He accordingly recommended-- "that necessary sanction for the institution of the suit may be accorded by Government."

27. It is quite clear from the concluding paragraph of this letter addressed by the

Collector (Ex. 1) that he had asked for the sanction of the Government to the institution of this particular suit of which, the draft plaint was sent with, his letter.

28. The letter addressed by the Collector to the Commissioner, Presidency Division was ultimately replied by the Judicial Secretary to the Government of West Bengal. It is on the interpretation of this letter that the parties have agreed to differ. It is, therefore, essential that the letter should be quoted in its entirety.

"Government of West Bengal Judicial Department. From

Sree S.K. Sen, I.C.S.,? Secretary to the Government of West Bengal

To

The Collector, 24-Parganas No. 5977-J, dated Calcutta, the 11th November 1949

Subject: Kalighat Debuttar Property.

Sir,

I am directed to refer to your memorandum No. C.700-5-49, dated the August, 1949 to the address of the Commissioner, Presidency Division and to say that in Notification No. 3592 L.R., dated 15-4-1918 (copy enclosed for ready reference) all the Collectors and Deputy Commissioners in the Presidency Division (excluding the town of Calcutta) have been authorised to exercise the powers of the Advocate General to give consent in writing to institution of suits under Sections 91 and 92, Civil P. C., by two or more persons having interest in a trust. There is therefore, no objection to such consent being given in respect of the above trust property. It is, however, not intended that that such a suit should be instituted by yourself or through another Government servant.

Yours faithfully, S.K. Sen Secretary to the Government of West Bengal."
"(Annexure).

Notification No. 3592 L.R. dated 15-4-1918 (published in "Calcutta Gazette" of 1918, Pt. I (p.) 650)

In exercise of the powers conferred by Section 93, Civil P. C., 1908 (Act 5 of 1908) the Governor in Council is pleased hereby to sanction the exercise of the powers conferred by Sections 91 and 92 of that Code upon the Advocate-General by all the Collectors and Deputy Commissioners, in Presidency Division (excluding the town of Calcutta), Burdwan Division and the District of Darjeeling within the limits of their respective districts."

29. On behalf of the defendants stress is laid on the fact that the letter opens with a reference to the general Notification dated 15-4-1918 of which a copy was enclosed with the letter. It may be noted that this is the same notification to which reference had been made in 52 CWN 831 (E). According to the Secretary to the Government of West Bengal that notification authorised the Collector to exercise the power u/s 92, Civil P. C. The Secretary accordingly stated that

"There is, "therefore", no objection to such consent being given in respect of the above trust property."

30. It is contended that this is no specific sanction to the filing of the particular suit but the Government simply draws the attention of the Collector to the notification of 1918 which, had already authorised him to exercise the powers, of the Advocate General u/s 92 of the Code and no objection can "therefore" be raised by the Government to consent being given by the Collector. It is not that the Government officers applied their mind to the facts of this particular case, as to whether the plaint as drafted could be filed and the Collector authorised to give his consent to the "filing of that plaint". It is urged that that the Government had not applied its mind to the facts arising in that particular case was also clear from the last sentence in the letter issued by the Secretary to the Government of West Bengal.

31. If the Collector is being empowered to give his consent on the basis of the draft plaint it could be only consenting to a suit to be filed by the three particular plaintiffs as in the draft plaint. There was no suggestion and there was no occasion even for supposing that the Collector himself was thinking of instituting the suit himself or of permitting the institution of the suit through another Government servant.

32. It is apparent that the Government had overlooked the effect of the decision by the Judicial Committee in AIR 1932 51 (Privy Council) and the very clear observation of this Court in Capt. G. Sarker and Another Vs. Nripendra Nath Dhar and Others made only a few months before.

33. Whether this was an intentional one or by oversight the fact remains as it is clear on the letter written by the Judicial Secretary (Ex. A) that the Government was not authorising the Collector in this particular case permitting the latter to give his consent to the "filing of the suit by the three plaintiffs".

34. The endorsement, therefore, by the Collector on the face of the plaint is of no consequence as it must be held that he had not been authorised by the Government to give his consent to the filing of this particular plaint but Government had simply reminded the Collector of the general notification of 1918.

35. We must therefore hold that on the face of Ex. A the Collector had not been authorised in this particular case to give his consent to the filing of this suit.

36. Our attention has been drawn to the fact that immediately after the filing of the plaint in the present suit another plaint had been filed by some of the other shebais of the deity purporting to be u/s 92, Civil P. C., after getting the consent of the Advocate General of West Bengal (Suit No. 85 of 1949 Administration). Copies of the pleadings of the other suit have not been made available in the present suit but it was conceded by both the parties that the scope of this latter suit is a limited one as it purports to place before the Court a scheme prepared

with the help of some of the legal advisers of the Shebait and the Advocate General but does not contain any one of the various other reliefs relating to misappropriation, mal-administration or the other allegations made against the shebait in general or against some amongst them.

37. At one stage of the argument it had been suggested on behalf of the appellant that if reference were made to the steps taken by the Government after the receipt of the Collector's letter dated 30-8-1949 forwarding the draft plaint with the recommendation that the filing of the suit be approved it might be made clear as to whether Government had actually approved of the filing of the present plaint or not. It was contended that for finding out the actual fact the file in the office of the Secretary Government of West Bengal may be called for again. We do not think that we can allow additional evidence to be led at this stage as on a plain reading of the letter Ex. A there is no lacuna.

Further the records from the office of the Collector 24-Parganas and from the office of the Secretary, Judicial Department of the Government of West Bengal had been brought before the learned District Judge in the trial Court. We must proceed on the basis that all such items as were considered relevant for the decision of this preliminary issue had been brought into the record of the present case by the parties and as there is no definite suggestion that there are any relevant materials in the file of the Government of West Bengal no such roving enquiry can be allowed at this late stage. Although the circumstances are rather unfortunate the very strict provisions of the Code leave no option and we must hold that the suit has properly been dismissed by the trial Court. This appeal is accordingly dismissed.

38. In the circumstances of the present case, however, as it is no fault of the plaintiffs for which the suit has to be dismissed, it is only proper that the parties will bear their respective costs in both the Courts.

39. Let a copy of this judgment be sent to the Legal Remembrancer for communication, to the authorities concerned.

Renupada Mukherjee, J.

40. I agree.