
(1954) 04 OHC CK 0007
In the Orissa High Court
Case No : Second Appeal No. 174 of 1948

Sm. Mahani Dasi and Others	Vs	APPELLANT
Pareshnath Thakur and Others		RESPONDENT

Date of Decision : 22-04-1954

Acts Referred:

Evidence Act, 1872 — Section 60

Citation : AIR 1954 Ori 198 : (1954) 20 CLT 545

Hon'ble Judges : Panigrahi, C.J.;Narasimham, J

Bench : Division Bench

Advocate : L.K. Das Gupta, for the Appellant; L. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

Panigrahi, C.J.—This second appeal by the plaintiffs is directed against the judgment of the District Judge, Cuttack, affirming a decision of the Second Munsif. Cuttack, in a suit filed under Order 21, Rule 63, Civil P. C. The plaintiffs' case was that plaintiff No. 1 Mahani Dasi and Chandamani Dasi, mother of plaintiffs Nos. 2 to 4, obtained on 6-7-1932, a transfer of a mortgage deed executed by one Kapur Chand (deceased husband of defendant No. 2) and his brother Kanhailal (defendant No. 3) in favour of one Hanuman Bux and Ratiram on 14-4-1927, for the sum of Rs. 3800/-. The plaintiffs filed Mortgage Suit No. 17 of 1934, in the Court of the Subordinate Judge, Cuttack, against defendants 2 and 3 and obtained a mortgage decree, in execution of which the mortgaged properties were put to sale and purchased by the plaintiffs.

During the pendency of the mortgage suit, the plaintiffs had the two plots, now in dispute, namely C. S. plots 140 and 216, attached before judgment on 23-9-1934. Thereafter, the plaintiffs obtained a personal decree against the judgments debtors, as the amount realized by the sale of the mortgaged properties was insufficient to satisfy the mortgage-debt. In execution of this personal decree, the suit properties were brought to sale in Execution Case No. 258 of 1941. The first defendant, who is an idol going by the name of Pareshnath

Thakur represented by defendants I-(a) to I-(f), filed a claim petition under Order 21, Rule 58, Civil P. C., claiming the disputed properties on the strength of a trust deed, Ext. P dated 15-12-1926, executed by (1) defendant No. 3, (2) Kapur Chand, the deceased husband of defendant No. 2, and (3) Kunja Behari Lal (defendant No. 1-(f)) who is one of the three alleged trustees of the above-named deity. This claim having been upheld the plaintiffs filed the suit, out of which the present second appeal arises, for a declaration that the suit properties belong to the Judgment-debtors and as such are liable to be put to sale in execution of the decree obtained by the plaintiffs.

The contesting defendants are the idol and its trustees. The substantial contention put forward on behalf of the defendants is that defendant No. 1 is a deity dedicated to the Jain community of Cuttack town and that it was installed on C. S. plot No. 216 which formed part of the residential house of the late Iswarlal. Iswarlal died in the year 1923, and his three sons -- Kapur Chand (husband of defendant No. 2), Kanhailal (defendant No. 3) and Kunja Behari Lal (defendant No. 1-(f)) executed Ext. P, dated 15-12-1926, conveying the suit properties in favour of the three trustees named in the trust deed. Of the three trustees, Chandulal was appointed President, Kapur Chand (one of the executants) was appointed the Secretary, and Jagulal (D, W. 2) was appointed the Treasurer. The defendants averred that these properties had been dedicated to the deity long prior to the execution of the trust deed, and that both before and after the execution of the trust deed they have been in the possession of defendant No. 1. It is accordingly contended that the judgment-debtors have no subsisting interest in the properties covered by Ext. P and as such they are not liable to attachment and sale by the plaintiffs-decree-holders.

2. The principal issue on which the decision of this case turns, is issue No. 3 which is as follows:

"Are the properties in suit Devottar properties of the deity (defendant No. 1), or the properties of the husband of defendant No. 2 and of defendants 3 and 4?"

A mass of irrelevant evidence was adduced on both sides, bearing on the existence and identity of the idol, namely defendant No. 1. The plaintiffs' case was that the Jain community owned a Temple in Choudhuri Bazar of Cuttack town in which a deity (bearing the same name as the suit deity) is installed, and that no deity bearing the name of the first defendant ever existed in the house on C. S. plot No. 216. The plaintiffs also led evidence to show that the family of the executants of the trust deed (Ext. F) was heavily involved in debts, and that the deed was executed with a view to keep the properties away from the reach of the creditors. The defendants, on the other hand, attempted to establish that Iswarlal, the father of the executants was a rich man owning "vast properties" and that the deity had been installed by his father Hiralal and had been dedicated to the Jain community of the town.

It was further sought to be proved by them that the properties conveyed under

Ext. P valued at Rs. 5,000/- and consisting of buildings and about 8 acres of land, had been donated to the deity by religious-minded members of the Jain community at different times and that the family of the executants had no interest therein at any time. Both the Courts have concurrently found that the deity defendant No. 1 has been in existence at least since 1914. They have held that after having found that the disputed properties were Devottar in character it is unnecessary, for the purpose of deciding the suit, to record a finding whether the deity was a public or private one. The Courts have also found that the disputed properties belong to the Deity. In arriving at this finding, they have relied upon the recitals in Ext. F and on the oral evidence of D. W. 3. On these findings the plaintiffs' suit was directed to be dismissed.

3. In second appeal, the substantial point urged before us is whether the evidence, both oral and documentary, would warrant an inference that the properties had, in fact been dedicated to the deity. As stated already, both the Courts below have based their findings on the recitals in the trust deed and on the oral evidence of D. W. 3. It should be made clear at the outset that no endowment is created if the deed is not meant to be acted upon and the founder had other or ulterior motives such as tying up of property in the family and keeping it out of the reach of creditors. The mere fact that an idol is proved to have been established does not, by itself, create an endowment of properties in favour of the idol. An idol may be installed and worshipped without any property being dedicated to it. An idol, like any living person, may be rich or poor. If property is dedicated a religious trust is created and the property vests absolutely in the idol though the management may be left in the hands of the trustees; but the title to the property itself is in the idol and not in the shebayat.

It is equally well-established that the absence of a document creating a trust does not necessarily imply the absence of an endowment, though the absence of a formal deed throws a heavy onus on the party who sets up dedication, to prove that the property has been inalienably conferred upon the idol. Judged by these principles Ext. P, the deed of trust by itself creates no endowment; and it is necessary for the defendants to show by evidence "aliunde" that there had been an existing endowment in favour of this particular idol to which the description "Devottar" can be applied. The Courts below have rested their decision by merely relying on a recital in the deed to the effect that certain properties belong to the deity. But this, by itself, is not sufficient to prove that there had, in fact, been a dedication. To prove this fact it must further be established that the executants had intended to divest themselves of their ownership" in the properties dedicated. The test of a bona fide or nominal endowment is "How did the founder treat the property, or how have the descendants treated it? Has the income of the endowed lands been continuously applied to the object of dedication?" The Courts have not tried the bona fide character or the nature of the endowment with reference to the use of the proceeds, either from before or after the execution of the deed of trust, exclusively for the purpose of the deity, and have confined their decision to an inference drawn from the recitals in the deed itself.

4. There are innumerable decisions where it has been held that no formal act of dedication is necessary either by way of a deed or performance of ceremonies. Performance of ceremonies; is only relevant to show the intention of the grantor, and a dedication must be held to be complete if there is an unequivocal manifestation of the intention to create a trust. The absence of religious ceremonies may constitute an item of evidence in helping the Court to arrive at a proper decision, but mere performance of ceremonies is no conclusive test.

5. Applying the above principles to the facts of this case, we find that no evidence has been given with regard to the formal dedication of the properties to the deity except what is recited in Ext. P. This recital is insufficient to support a finding that there had been a real dedication of these properties. It is clear from the evidence that two of the trustees appointed under the deed as President and Treasurer are brothers, while the third who was appointed Secretary is himself an executant of the deed. The deed recites that the deity had been in existence from a "very long time" and that different donors had made gifts to the deity at different times. But no details are available as to when and by whom these gifts were made.

On the other hand, there is a clear admission in the deed itself that all these properties stood recorded in the name of Iswarlal, the father of the executants, and that their names had also been recorded in the Revenue accounts as owners of these properties after the death of Iswarlal. There is, again, another recital that the Puja or worship of the deity was being conducted by members of the defendants' family. Above all, there is a further significant recital which appears to have escaped the notice of both the Courts below, and that is that

"the trustees can dispose of the properties if ever they think it necessary, and may also appoint a pujari for conducting the daily worship of the deity".

In my opinion, this statement indicates that the executants could, if necessity arose, deal with the property through the trustees who were so appointed only nominally -- one of them being Kapur Chand and the other two being relations.

If the properties had been intended to be really Devottar, such a recital would be out of place in the deed.

6. The other item of evidence relied on by the Courts below is that of D. W. 3, a Pleader of Cuttack, who attested the trust deed and effected a partition among the brothers. His evidence is to the effect that the properties included in the trust deed were all Devottar properties of the Thakur. In cross-examination, however, he admitted that he did not know how the properties stood recorded in the revenue papers, nor could he remember any details of the papers relating to the endowment. To quote one sentence from his evidence:

"Except the building in which the Thakur is installed I do not remember the particulars of the other properties covered by Ext. P."

This evidence throws no light on the point at Issue as to whether there had been

a dedication of the properties in favour of the deity. Undoubtedly, the testimony of this witness is entitled to great respect and the Courts below have accepted it as reliable. But unfortunately they have failed to find whether his evidence by itself is of material help at all in ascertaining the fact in issue. The witness had no personal knowledge, either of the details of the properties or of their having been dedicated. The only fact which can be said to have been proved from his evidence is the existence of the deity in the house of Iswarlal; and this, to a certain extent, may serve to dispel the suggestion made on behalf of the plaintiffs that the deed was executed in order to keep the properties out of the reach of creditors.

But as I have stated above this is not the only criterion in determining the issue. The motive may be anything; the intention of the executants may have been to tie up the properties in the family, or there may be some other ulterior motive. It is unnecessary, for the purpose of deciding the case, to come to a finding on this point. We are here concerned with the determination of the sole question as to whether there has, in fact, been a dedication in favour of the deity. No witness has been called to prove the gift of any single item of the properties in suit. Even the evidence relating to the installation of the idol is extremely obscure. In addition to the insufficiency of proof, there is so much obscurity in the evidence that it is impossible to say when exactly the deity came into existence and whether any dedication of property was made for its worship or service.

There is no evidence of the appropriation of the rents and profits of the properties up to the year 1938, and even the accounts, which are alleged to have been maintained, have not been produced. No pujari had been appointed till the year 1935. There are no accounts to show that the rents were separately collected and applied for the worship of the deity. It is possible that the rents may have gone into the general body of the accounts relating to the estate of this family, and such evidence as has been given in this case can only be characterised as "extremely vague" and "extremely loose" as was done by the Privy Council in -- "Durga Nath v. Rama Chander Sen", 4 Ind App 52 (PC) (A) on facts similar to the present.

7. On the other hand, the other facts and circumstances of the case raise a strong presumption that there had, in fact, been no such endowment. The conduct of the family in its relation to the deity and its properties would be a strong indicator as to how the properties were being used. It is said that the trustees never took any steps to have the properties mutated in the name of the idol till 1940. It is admitted that no accounts had been kept till Dhaneshwar took up the management in 1935, and no accounts of expenses have been actually produced in the suit. The attachment before judgment was made on the 23-9-1934, but no claim was put forward by the trustees till 1942. The shop-house which is one of the suit items has all along been in the possession of either D. W. 2 or his son-in-law, and no account relating to realization of rent has been produced.

D. W. 1, Kunja Behari Lal, one of the executants of the deed of trust admitted that some of his belongings were still to be found in one of the rooms forming a part of the Temple and he made the frank admission that he "could not give any reason why the Thakur's name was not recorded from 1926 to 1940." He said that one Maniklal gifted some properties by means of a formal deed, but no explanation was given as to why that deed was not produced. Indeed, there is no mention of any such gift-deed in Ext. F. D. W. 1 also admitted that the other two trustees, namely Chandulal and Jagulal, were his relations, and that he was living in the house of Chandulal without paying any rent. He lost all his properties in 1932 and his brother's properties were sold at the instance of the creditors in 1935. Even their residential house was sold away to satisfy a decree debt. The only inference possible from these facts is that so long as the brothers had other properties to satisfy the creditors they did not bother about the suit properties. It was only after all their properties had been sold away that they turned their attention to create evidence in favour of the deity in respect of the suit properties.

8. There are also other circumstances which lend support to the fictitious character of the alleged deed of trust, Ext. F. It appears from Ext. 8 that one Pramode Kishore" Das obtained a decree against the defendants for Rs. 8550/- on a registered mortgage bond dated 14th February, 1919. If Iswarlal had been such a rich man as he is claimed to be, it is difficult to explain why he was forced to mortgage his properties and raise a loan which remained undischarged even after his death. Ext. 11 series show that the brothers Kapur Chand and Kanhailal borrowed Rs. 1000/- on 7-7-1925 under a registered bond; Rs. 150/- on 17-9-1926 on a handnote; Rs. 300/- on a handnote dated 14-9-1926; Rs. 115/- by a handnote dated 25-10-1926; and Rs. 200/- by a, handnote dated 4-12-1926.

It would thus appear that by 15-12-1926, the date of Ext. F, the executants were in straitened circumstances, and had to resort to borrowing side of the defendants to show what their assets were. All that the evidence discloses is a vague and loose general statement that Iswarlal was in an "affluent condition" and that he had left "vast properties". This is no more than opinion evidence and has little evidentiary value. It is not safe for the Court to speculate as to whether there was any necessity for the family to execute a formal deed of trust if really the properties had already belonged to the deity. As was pointed out by the Privy Council in -- AIR 1941 16 (Privy Council) , the evidence of the witnesses examined for the defendants stands on no higher footing than mere hearsay evidence, and it is not open to any Judge to exercise a dispensing power and to admit evidence not admissible by the statute, because to him it appears that the irregular evidence would throw light upon the issue.

The evidence here is of such doubtful value that on the whole it is more likely to disguise truth than discover it. If the trial court had excluded such evidence it would not have been led away from ascertaining the truth. Even if the evidence

were to be accepted at its face value at best it proves only the existence of an idol and its worship being carried on by the family members of Iswarlal, but nothing more than that. Having regard to the admission that there was no separate passage or entrance leading to the temple and that the only passage runs through the dwelling house of Iswarlal, I am inclined to think that the deity was being worshipped by the members of Iswarlal's family and its puja was conducted from the income of their own properties. The evidence is consistent with there having been no dedication of properties, exclusively in favour of the idol at all. Indeed, the absence of accounts showing how the properties were being managed prior to the year 1926 would raise a reasonable presumption that there had, in fact, been no dedication of any property in favour of the deity.

In similar circumstances Banerji J. held in --"Ramachandra Mukerjee v. Ranjit Singh", 27 Cal 242 (C), that "the mode of dealing with the property by the donor and his successors" is an important factor in determining whether the endowment is fictitious, or real. The same proposition has been put in more lucid language by Das J., in -- Thakur Parmod Banabihari Vs. C.G. Atkins and Others, , when his Lordship observed:

"The property has always stood recorded in the name of the estate in the Land Registration Department, and the mode of dealing with the properties by the parties interested in the endowment shows conclusively that they regarded the properties as belonging to the estate."

To support the defendants' case that the properties in suit formed the subject of a valid public endowment it must be established that an absolute grant was, in the first place, made with the intention that the properties should be applied for the service of the idol, and that the properties have since been so applied, & that the members of the family of the settlor have not treated the property as one the profits of which were mainly intended to be applied for their benefit; see --"Madhab Chandra v. Sarat Kumari Debi", 15 C.W. N. 126 (E). See also -- Sri Sri Gopal Jew Thakur through Narendra Nath Mondal Vs. Radha Binode Mondal and Others, .

The lower appellate court appears to have made light of the fact that the name of the deity was not mutated in the Khasmahal office for a long time as, in its opinion, the right of the deity was complete when the endowment was created. But it has again & again been laid down that if the dedication is alleged to be oral & is not followed by mutation of names and no accounts are produced to show how the rents and profits and the income of the dedicated property were used, the inference would be that there was no complete divestment of ownership, see -- Harihar Prasad and Another Vs. Siri Gurugranthaheb under The Management of Mahabir Prasad, .

9. My conclusions therefore are: that till sometime after the attachment before judgment was effected in September, 1934 there can be said to be no evidence of any dedication or appropriation of the income of the dedicated property for the

service of the deity (defendant No. 1); that the trust deed, Ext. P does not, by itself, create any title in the deity and that accordingly the recitals in the deed are not sufficient to prove the alleged dedication; that the non-production of the accounts, which are alleged to have been kept, is a strong factor going against the case set up by the defendants : that there is a singular lack of documentary evidence to show that the defendants ever divested themselves of their interest in the property and the oral evidence relied on by the Courts below is of such vague and loose character that it is unsafe to act upon it. I would, therefore, hold that defendant No. 1 has failed to prove his title and that the plaintiffs are entitled to have the suit properties sold with a view to satisfy the decree obtained by them against the judgment-debtors.

10. In the result, the appeal succeeds, the judgment and decree of the lower appellate court are set aside and the plaintiffs shall be granted a decree as prayed for in the plaint with costs throughout.

Narasimham, J.

11. I agree.