
(1955) 02 CAL CK 0010
In the Calcutta High Court
Case No : A.F.A.D. No. 216 of 1949

Sm. Sushama Roy

APPELLANT

Vs

Atul Krishna Roy and Another

RESPONDENT

Date of Decision : 22-02-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 1, 11

Citation : AIR 1955 Cal 624 : 59 CWN 779

Hon'ble Judges : Guha, J; Das Gupta, J

Bench : Division Bench

Advocate : Bhabanath Dutt, for the Appellant; Biswanath Naskar and S. Hazra, for the Respondent

Final Decision : Dismissed

Judgement

Das Gupta, J.—This appeal raises the difficult question whether in a case where the shebait of a deity have precluded themselves by their conduct from bringing a suit to protect the interests of the deity, a person interested in the proper sheba puja of the deity may institute a suit on behalf of the deity even though not appointed as next friend of the deity by the Court.

2. A private debottar was created by Bhaga-bati Dassi for the deity Sree Sree Iswar Jugal Kishore. Jiu by a deed of dedication. By the died the lady constituted herself the first shebait and provided that after her death Bejoy Lal Roy would be the shebait; and on Bejoy's death, his eldest son would be the shebait and in this way the eldest of each successive shebait would become shebait. After the death of Bejoy disputes arose between his sons, Atul Krishna and Monmatha, over the claim, to shebaiti and Monmatha instituted a suit against Atul Krishna claiming joint shebaitship with Amalya and for framing a scheme in accordance with the principles laid down in the case of -- AIR 1925 139 (Privy Council) by the Privy Council.

An order was passed for representation of the deity by a Pleader who was

appointed by the Court. It appears, however, that on 16-9-1942, the plaintiff Monmatha and the defendant Atul filed before the Court a petition of compromise and the Court passed an order in terms of the compromise in the following words;

"This suit coming on this day for final disposal before Mr. K. M. Islam. Sub-Judge, 3rd Court, Alipore, in the presence of Babu Hironmoya Mitra, pleader for the plaintiff and of Babu B. N. Bose, pleader for the defendant it is ordered and decreed that the suit be decreed finally in terms of petition. Petition of compromise do form part of the decree."

The deity did not join in the petition of compromise and there was no mention of it in the decree of the Court. The present suit was instituted by the deity through Sm. Susama Roy who, it may be mentioned, is wife of Monmatha and as such a member of the family interested in the sheba puja of the deity. The case in the plaint was that the scheme, as framed in the previous plaint WAS not binding on the deity, that it was against the terms of the "arpaunama" and against the interest of the deity and that a declaration should be made declaring the scheme, framed in the previous suit void. inoperative and not binding upon the plaintiff and that a new scheme should be framed for the sheba puja of the deity and management of the properties in terms of the deed of debottar.

3. The defence was that the suit, as framed, was not maintainable and further that the deity having been made a party to the previous suit the scheme, as framed therein, was binding on it under the principles of res judicata.

4. The trial Court held that the suit was not maintainable as framed and also that it was barred by res judicata, the scheme framed in the previous suit being binding on the deity. The learned Court below while holding that the suit was maintainable agreed with the trial Court that the suit was barred by res judicata and dismissed the appeal.

5. It is contended before us that the suit was not barred by the principles of res judicata as the deity, though a party to the proceedings was not a party to the compromise decree that was passed.

6. In my judgment, it cannot be held in the circumstances of the case that the decision in the previous suit operated as res judicata. It is not possible, in my judgment, to read the decree that was passed as a decree for or against the deity. So far as the deity was concerned as a party to the suit, the Court must be held to have passed no order at all. In my judgment, therefore, the Courts below are wrong in thinking that the decree passed as on compromise between Monmatha and Atul will operate as res judicata as against the deity represented by a person appointed by the Court, who was not a party to the compromise and who was not mentioned at all in the decree that was passed.

7. This brings us to the question whether the suit, as framed, is maintainable. It is well settled that when the shebait has by their conduct precluded themselves from bringing any suit to protect the interests of the deity, the deity

is not without remedy but can bring a suit through some other agency than the shebait. This right, it has to be remembered, is distinct from the rights of the members of a family who may be worshippers to bring a suit for the protection of their rights. It was pointed out by Mukherjea J. in his Tagore Law Lectures, 1936 (delivered in August, 1951) as follows:

".....where the deity wanted relief against the shebait himself, it cannot possibly be expected that the shebait would represent the deity in the suit. If the deity has any right of suit at all, it must be exercised through some other person as next friend" (p. 186).

If the Court appoints a person as next friend to represent the deity, there is no difficulty and the person so appointed can bring a suit on behalf of the deity. On the question whether without an order of appointment as next friend of a deity, a person can bring a suit on behalf of the deity, there has been judicial divergence. In the case of --"Administrator- Administrator-General of Bengal and Another Vs. Balkissen Misser and Others, (B) Page J. expressed the view that it is permissible to file a suit for possession in the name of the Idol where a shebait has not been appointed and that the Court will in such cases appoint some person to act as agent ad litem for the Idol.

As has been pointed out in later decisions of this Court, the expression "agent ad litem" is something unheard of and the learned Judge did not indicate under what provision of law such appointment could be made. In the case of -- Sharatchandra Shee Vs. Dwarkanath Shee and Others, (C) Lord-Williams J. held that in the case of a private religious trust, with regard to the mismanagement of which the members of the public cannot intervene and it cannot be expected that the shebait will bring a suit against himself, it is necessary and desirable that the Idol should file a suit by a disinterested next friend appointed by the Court. The learned Judge did not, however, go into the question whether a suit could be maintained by a person without an order of the Court but only said:

".....in the circumstances of the present case, I consider that it is necessary and desirable that the idol should appear in this suit by a disinterested next friend appointed by the Court....."

and appointed one of the parties Saratchandra Shee as the next friend. In the case of -- Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra and Others, Pal J. discussed the question thoroughly and expressed his view that no person other than the shebait can legally and effectively represent the deity unless he has been specially appointed by the Court. This was followed by Gentle J. in the case of -- Badu Mir and Another Vs. Emperor, .

Prior to this, however, in the case of -- Thakurani Sri Sri Annapurna Debi Vs. Sm. Shiva Sundari Dassi and Another, Sen J. had held that a suit in the name of a Hindu image by a person who was not a shebait and was not appointed by the Court as next friend but constituted herself next friend with- out such

appointment, was properly constituted and the fact that she was not specially appointed next friend by the Court did not render the suit bad, Referring to the view expressed by Pal J., in Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra and Others, Sen J. observed; .

"It must be said that if the view expressed in this passage is to be taken to be of general application, there can be no suit by a next friend unless such next friend is specially appointed by the Court. I am not, however, inclined to hold that the view expressed in this passage is of general application. The exact point which has now been raised was not a point for decision in that case. It is obvious that circumstances may well arise when it would be impossible to expect any of the shebaites to institute a suit; for instance, all the shebaites may be misappropriating debettar property and secularizing it, the Deity may be despoiled by all the shebaites acting in concert.

In such a case, it is not possible to expect of the shebaites to institute a suit to protect the pro- perty of the Deity. In those circumstances what is to happen? It seems to me that the only course open would be for some, person to come forward and institute a suit as the next friend of the Deity. The matter would first come up before the Court by a suit being instituted by a person claiming, to be next friend of the Deity. It would be permissible for the defendants thereafter to come up before the Court and contest the fitness of the next friend to act as such.

The Court would then investigate the matter and decide upon the suitability of the person instituting the suit to act as next friend but I do not see any ground for holding that the next friend must be appointed as such by the Court before he can institute a suit."

As already indicated, Gentle J. preferred the view taken by Pal J. in the case of Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra and Others, to the view expressed by Sen I. in Thakurani Sri Sri Annapurna Debi Vs. Sm. Shiva Sundari Dassi and Another, , Giving his reasons therefore, the learned Judge pointed out that whilst there were similarities in the status of a minor and of a Thakur, there was no justification for applying the provisions of Order 32, Civil P. C. which related solely to a minor to an entity who was not a minor unless, as in the case of a person of unsound man, there was- a provision for it to be done and further observed:

"There is, in my opinion, an additional reason against a person who is not a shebait and who is not appointed by the Court to do so, representing a thakur as next friend. I have previously printed out that, although a thakur can sue, the right of suit is vested in the shebait. No person, upon his own initiative, can exercise a right which is vested in another person.

In this respect the position of a thakur is different to that of a minor whose right

of suing is not vested in some other person. That being the position, a worshipper, or any other individuals cannot exercise the right of suit which is vested in the shebait and consequently a suit in the name of a thakur cannot be instituted by such person at his own will and pleasure. When a shebait fails or refuses to exercise his right of suit, then, in a proper case, the Court can appoint any person, interested or disinterested in the thakur or its property, to represent the thakur as next friend and to institute a suit in its name."

His Lordship held in the instant case before him that the suit was not properly instituted as there had been no appointment of the person claiming to represent the deity as next friend. In the case of -- Sri Sri Gopal Jew Vs. Baldeo Narain Singh and ors (G), Das, J. after an exhaustive review of the cases came to the conclusion that the provisions of Order 32, Civil P. C., should be applied to suits by a deity, and observed :

".....If Sub-rule 4(2) cannot, by reason of its position and explicit language be extended by analogy and applies to shebaits, then I am inclined to think that the appointment of a person other, than a shebait as next friend of a deity plaintiff by the Court is not a pre-requisite for the institution of a suit by such person in the name of the deity."

8. It is quite clear that if the provisions of Order 32, Civil P. C., are held to regulate suits brought by or against an Idol, no appointment is necessary before a suit could be filed by an Idol through a next friend. The question is whether when the provisions of Order 32, Civil P. C., do not apply in terms to a suit by a deity, it will be proper or right for the Court to apply such provisions to such suits. In deciding this question, the Court cannot but consider what procedure is likely to serve best the interests of the dcbattar administration. The very tact that the shebaits are not willing or able to come to Court to protect the deity's interests makes it necessary that the way of the deity should be made as easy as possible.

It must be remembered that a suit brought by a person on behalf of the deity will be the deity's suit, and an adverse decision will bind the deity for ever. So, it is necessary that a person, both competent and honest, should institute such suits. It will therefore be in the interests of the deity that when any person other than the she-baits wants to bring a suit in the name of the deity, he should first make an application to the Court and only if the Court, after, hearing him and the other interested persons, considers him fit and proper and appoints him to represent the deity, that he should be allowed to bring such a suit.

In proper cases, the Court will presumably issue notices on all interested persons, -- on members of the family interested in private debattar before deciding the fitness of a person to represent the deity. In the case of Sri Sri Gopal Jew Vs. Baldeo Narain Singh and ors (G), Das, J. observed:

.....I find it more logical and more convenient, for purposes of procedure, to extend the analogy of the minor to a Hindu deity than to invent a rule of

procedure which is ostensibly original and novel but it is in reality based on the analogy of the rules relating to a minor....."

After pointing out that the Court is not powerless to discourage or prevent intermeddling for it has power to remove a next friend or guardian ad litem if he does not do his duty properly and that if an adverse decree has been passed in such a suit due to the fraud and possibly also the gross negligence of the next friend or the guardian ad litem, the Court can rectify it in a subsequent suit, his Lordship concludes thus :

"...On a consideration of the general principles of law and procedure I have come to the conclusion that the rules of procedure relating to a minor should, for the purposes of procedure, be applied by analogy as far as possible to a Hindu deity."

With the respect that is due to so eminent Judge, as Das J., I must say that I cannot persuade my self that the Court will in the majority of cases be able to prevent intermeddling or that it will find it easy to rectify an adverse decree passed on account of the fraud or negligence of the next friend. The ways of litigation are long and tortuous and many an honest man dread to go inside the walls of the Court of law.

It has to be remembered that the question of the deity suing by a next friend arises only when the shebait is unwilling or unable to do his duty. There is always the risk of the defaulting shebait setting up one of his creatures to start a sham litigation in the name of the deity so that the adverse decree might bind the deity for ever.

Is it reasonable to expect that after the she-bait has failed in his duty and a suit brought by another person in the name of the deity has been unsuccessful, another person will ordinarily be found willing and able to start a fresh litigation to rectify the adverse decree? I do not think so. But even if some brave soul comes forward and undeterred by the ever-present clouds of adjournments, and the threat of high waves of costs launches his task on the sea of litigation, and safely reaches the harbour of success, such repeated tensions in the Court of law are bound to cause great loss to the debattar estate.

9. As against this, I can see no objection to the procedure favoured by Gentile, J. and Pal, J. that if anybody other than a shebait wishes to institute a suit on behalf of the deity, he should make an application to the Court and the suit will be maintainable only if the Court appoints him as the shebait of the deity. I have not overlooked Das, J.'s comment that an order of appointment of a next friend made by the Court on an ex parte application on a one-sided version set forth in a petition is not really effective in protecting the interest of the deity against an improper suit brought in its name.

But I do not see any reason why the appointment should be made "ex parte" or on a one-sided view. In a particular case the Court may make an ex parte order in order to prevent some imminent danger to the debattar estate but there is no

reason why ordinarily the Court should not, before making the order of appointment, consider the views of the interested parties.

In substance, the members of the family in the case of private debattar are the real beneficiaries and it is necessary and desirable that their views should be ascertained before any person other than the shebait is appointed to represent the deity. Even where an ex parte order has been made, it will be possible and proper to issue notices on all interested parties and to cancel the ex parte order in the interest of the deity.

10. On the whole I am of opinion that ordinarily the interests of the deity require that nobody other than a shebait be allowed to institute a suit in the name of the deity without a previous order of the Court appointing him to represent the deity.

11. As there was no order in the present case appointing Susama Roy to represent the deity, I hold that the suit was not maintainable. I therefore find that the suit has been rightly dismissed though on grounds different from those which found favour with the Court below.

The appeal is therefore dismissed with costs.

Guha, J.

12. I agree.