

(1960) 11 OHC CK 0017
In the Orissa High Court
Case No : First Appeal No. 12 of 1957

Somanath Dani and Others	Vs	APPELLANT
Shri Gopal Jew Mohaparvu and Another		RESPONDENT

Date of Decision : 15-11-1960

Acts Referred:

Citation : AIR 1961 Ori 105

Hon'ble Judges : S.P. Mohapatra, J;J.K. Misra, J

Bench : Division Bench

Advocate : U.C. Misra, for the Appellant; A.B. Roy, for the Respondent

Final Decision : Allowed

Judgement

Mohapatra, J.—This is a First appeal against the judgment and decree dated 5-11-1956, of Sri S. K. Mitra, Subordinate Judge of Sambalpur, arising out of a suit for foreclosure on the basis of a mortgage transaction dated 1-3-37 for a principal amount of Rs. 3500/-. The suit has been filed for Rs. 7000/- by the plaintiff Gopal Jew Mohaparvu, represented through Raghunath Pujhari, the Manager of the deity. Defendants 1 and 2 and the deceased father of defendant No. 1 are the executants of the mortgage deed. Defendants 3 to 6 are the sons of defendant No. 2. Defendant No. 7 is a purchaser of a portion of the mortgaged property. It may be noted that in the mortgage deed, the mortgagee was named as Gopal Jew Mohaparvu through the then manager, Nilamani Das. The plaintiff's suit is on the basis that the mortgage transaction is for the legal necessity of joint family consisting of defendants 1 to 6, and as such binding on the defendants.

The main defence is that the present so-called next friend Raghunath Pujhari cannot represent the plaintiff and the suit in that view of the matter is not maintainable. Further defence was that the deity is only a benamidar, while in fact the money was advanced by the Maharaja of Sonapur. Several issues were raised; but the two important issues which are necessary for quotation are issues

Nos. 1 and 3. --Issue No. 1-- "Can the present next friend represent the plaintiff?" and the issue No. 3--"Is the suit maintainable?"

The other issues indeed were not seriously pressed. The trial Court gave its decree in favour of the plaintiff finding that the defendants are estopped, from challenging the present manager Raghunath Pujhari to represent the deity, inasmuch as the mortgage transaction itself was executed by defendants 1 and 2 with their father in favour of the deity who was represented by the then manager, Nilamani Das. Whether a manager can properly represent the deity to bind the deity by a decree eventually passed in a suit was not decided.

2. Mr. U. C. Misra, appearing on behalf of the defendants-appellants takes up the point that the suit must fail as the deity has not been properly represented. The admitted position is that the Maharaja of Sonapur is the sebaite (de jure) of the plaintiff deity. In the plaint it was asserted in paragraph 9 that the manager Raghunath Pujhari is the duly and authoritatively constituted manager of the plaintiff deity, and as such he is competent to represent the deity.

In the written statement filed by defendant No. 1 it was alleged, "The present so-called next friend cannot represent the plaintiff and the suit in that view of the matter is not maintainable". In the two other written statements -- one filed by defendants 2 to 6 and the other by defendant No. 7 -- it was categorically stated that Raghunath Pujhari is not the manager as alleged and he cannot represent the deity.

The evidence as to whether Raghunath Pujhari is the properly constituted manager of the deity appears to be very meagre. The evidence on the plaintiffs side is practically confined to the statement of Raghunath Pujhari (P. W. 2) and the evidence on the defence side is that of defendant No. 1 who is also D. W. 2. Raghunath Pujhari admits that he had been appointed manager by the Maharaja of Sonapur in the year 1953, and he gets a sum of Rs. 50/- as pay for acting as such from the present Maharaja of Sonapur whose ancestors had founded or established the deity and installed the same in the temple.

He also admits that the Maharaja of Sonapur can dismiss him or remove him from the managership of the deity, as the Maharaja is the appointing authority. The position remains as admitted that it is the Maharaja of Sonapur who is the sebaite and de jure manager of the deity. Raghunath Pujhari P. W. 2 also admits that there are rules in the temple of the plaintiff deity which enjoins the duties of different persons who work for the deity; but there are no rules defining the duties of the manager of the plaintiff deity. In this state of evidence, we are of the view that the deity in the present suit is not properly represented and the decree which has eventually been passed in such a suit brought by the deity not having been properly represented, cannot be legally binding against the deity.

3. We would avail of this opportunity to clarify the position of law as to how in suits of this nature a deity can be said to be properly represented. Ever since the decision of their Lordships of the Privy Council in *Jagadindra Nath Rai v.*

Hemanta Kumari Devi ILR Cal 129 the position was recognised that right to property vests in the deity; but as the deity is a spiritual juristic person, right to sue is vested in the sebaite and not in the deity.

The position has been clarified by a number of decisions, and the proposition to a great extent is widened in order to meet the contingencies arising out of all situations where the de jure sebaite had disqualified himself to bring a suit of this nature by his own conduct, or where a person who asserts to represent the deity has not been able to fully establish his absolute right to be the de jure trustee or manager.

It will be needless in this appeal to refer to and trace out the history of the decisions. But we think it sufficient to refer to a Bench decision of this Court reported in *Artatran v. Sudersan*, ILR 1953 Cut 578 : (AIR 1954 Orissa 11), where after review of quite a number of decisions the position was fully explained and clarified. The leading judgment was delivered by Mohapatra J. to which Narasimham, J. (as he then was) agreed.

It was laid down that in the case of a public endowment, it is the sebaite alone who can represent the deity to bring a suit for recovery of possession of the properties improperly alienated by a sebaite, and other members of the public have got the remedy under the provisions of statutes for removal of the trustee who is guilty of maladministration and for the appointment of a new trustee who alone can represent the deity.

In the case of a private endowment, where there is a shebaite in existence, he is the only person competent to sue on behalf of the idol unless his interest is adverse to that of the idol, or because of quarrels and conflicts between the different shebaits, or on account of several circumstances, the de jure shebaite has disqualified himself to bring a suit, some other person is to be appointed by the Court to represent the idol.

Where there is no sebaite, it is open to any person interested in the religious foundation to bring a suit as the next friend of the idol with the permission of the Court. That was a case of a public endowment and the villagers on the basis of their right to worship the deity had brought the suit for setting aside the alienation by the then marfatdar. The marfatdar was made a party.

It was however decreed in the form that the alienation was set aside, the properties were to be recovered from the alienees and possession was to be obtained by the deity through the marfatdar and not by the villagers. After this decision, there has been a subsequent decision of the Calcutta High Court reported in *Sushama Roy Vs. Atul Krishna Roy and Another*, which was in respect of a private institution, and they reiterated the same view.

In the Cuttack case, as we have mentioned, the de jure marfatdar was made a party in order to clarify the position a little more, that where in the circumstances the de jure manager has disqualified himself to bring a suit, the

persons interested in the deity should obtain the permission of the court to prosecute the suit establishing their competency and the peculiar circumstances existing. But in such a suit the de jure manager should be made a party, so that the decree passed would be binding not only against the deity, but against the de jure manager, and should be a valid and forceful decree binding against all parties concerned. This will obviate all future difficulties.

4. But Mr. Roy appearing on behalf of the respondent has strongly argued on the points that the present suit is maintainable, as it has been held that a de facto manager of the deity is always competent to represent the deity. The question how far the de facto manager of the deity is competent to represent the deity was not before the other Bench who decided the case reported in ILR 1953 Cut 578 : (AIR 1954 Orissa 11). So it will be necessary to discuss some decisions to find out the position of law arising as to this aspect. We may refer to the decision of their Lordships of the Privy Council in *Ram Charan v. Naurangi Lal*, AIR 1933 PC 75.

There Mahant Rampat Das died in or about July 1913. On his death one Sant Das took possession of the Math claiming to be Mahant, but on 20-2-1916 by a registered deed he surrendered all his rights to the plaintiff, who was and is the Mahant of the Math at Ramdin Baga. The plaintiff claimed that Rampat Das had died without leaving behind any disciple, and that in those circumstances, he, as Mahant of the Ramdin Baga Muth, was entitled to take possession of the Math at Paliganj which was subordinate to the said Math, and all properties appertaining to it. Their Lordships observed :

"Their Lordships, however, are not now concerned with any question of title because both the courts below have found that the plaintiff is the person in actual possession of the Paliganj mutt and as such entitled to maintain a suit to recover property not for his own benefit but for the benefit of the Mutt".

The proposition laid down in this case appears to us to be a bald proposition widely stated which has been clarified subsequently fixing the limits as to under what circumstances a de facto manager can represent the deity in bringing a suit. But nevertheless the position is clear even from this decision of the year 1933 that the de jure trustee was not in existence at the time of bringing the suit and that the plaintiff appears to have been in exclusive possession of the math properties. The matter is further clarified by reference to a decision of the same Board in AIR 1935 44 (Privy Council) . Their Lordships observed :

"There can be little doubt that Karia (the plaintiff) who asserts to represent the deity has been managing the affairs of the institution since 1904, and has since the death of Rajbans (the previous trustee) been treated as its Mahant by all the persons interested therein. The property entered in the revenue records in the name of Rajbans was, on his death, mutated to Kark, and it is not suggested that there is any person who disputes his title to the office of the mahant. In these circumstances their Lordships agree with the High Court that Karia was entitled

to recover for the benefit of the math the property which belonged to the math and is now wrongly held by the appellants".

These observations will, to a great extent, clarify that where there is no de jure mahant or trustee or manager, and the de facto manager has been recognised as the real trustee by all persons concerned and has been recognised as such in public records, even then in the interests of the institution such a person should be entitled to prosecute the suit on behalf of the institution. In our view, the limits have been fully defined and the position has been clarified, as to what exactly is the meaning of a de facto manager who will be entitled to represent the deity and to make the decree binding against the institution.

In the Full Bench decision of the Madras High Court in *Shankaranarayanan v. Shri Poovananathaswami Temple Koilpatti* AIR 1949 Mad 721, the leading judgment was of Chief Justice Rajamannar who observed that a de facto trustee, that is, a person other than a manager or the head of the charitable religious temple, trust or endowment, even though he has not been able to establish his absolute title to the office, can maintain a suit on behalf of the deity to recover properties belonging to the idol of the institution on behalf of the idol or institution, provided such a person is able to prove that he is in exclusive possession of the office of manager or head of the institution.

The matter has been more fully explained in the judgment of Viswanath Sastri J. while in a very learned judgment fully discussing the import of terms of a de facto trustee and a trustee de son tort, he defines the limitations of the de facto manager who can represent the deity of an institution. The observation is to the effect that in recognising the right of de facto trustee to sue for recovery of possession of trust property, courts must be astute to safeguard the interests of the institution, for it is only in such interest that the right of a suit is at all conceded to him.

The de facto trustee can act only in the absence of the de jure trustee and in the interests of the trust, and cannot keep the lawful trustee or manager out of possession. The expression "de facto trustee" cannot include persons who purport to act as trustees in fraud of the rights of the existing lawful trustee. The manifest position therefore is that in order that the de facto manager can maintain a suit of this nature, it is essential to prove that the de jure trustee or manager is not in existence at all; and further that the de facto manager is in exclusive possession and exercising fullest control over the right of management of the properties belonging to the institution without any let or hindrance from any quarters whatsoever.

He has been practically for all purposes recognised as a real person in charge of the office. Such a person, even though he is not able to establish fully the absolute right, that is an ultimate right to the office, will be entitled to prosecute the suit on behalf of the institution. From this standard therefore the present suit, in our opinion, can never be said to have been a regularly instituted suit

where : the deity was properly represented. Here the admitted position is that the Maharaja of Sonapur is the de jure sebaite of the deity.

Raghunath Pujhari on his own admission is only a paid servant of the institution appointed by the Maharaja and is liable to be dismissed at any time. There is no other evidence indicating what exactly are the functions of the so-called manager appointed by the Maharaja. The evidence absolutely is wanting as to the point that Raghunath Pujhari was in exclusive possession and exercised fullest control over the institution.

It may be noted further that just prior to the hearing of this appeal, a petition has been filed by the plaintiff-respondent that the said Raghunath Pujhari has retired and a new manager has been appointed in his place. The new manager Durga Prasad also filed a petition to be impleaded as a party which has been allowed. Before closing the appeal, we may note just another feature that the mortgage bond was executed in favour of the deity represented by the then manager Nilamani.

But the evidence is to the effect that Nilamani paid the money under the mortgage transaction to the executants as directed by the Maharaja of Sonapur in a letter, and that at the time of execution of the transaction the Maharaja was not present. In our view this does not prove the plaintiff's case in the least, far less can it make out any case of estoppel as against the present appellants to take up the plea that the suit must be thrown off as the deity has not been properly represented.

The only question in the present suit is whether the decree passed in the present suit can bind the deity who had not been effectively represented in conducting the suit. If the suit is not properly represented, the deity can safely take up the position of ignoring the result of the suit if it was a case of dismissal and would certainly be competent to bring a properly constituted suit through the de jure manager if the cause of action was alive and within time. Under the above circumstances, therefore, the appeal is allowed, the judgment and decree passed by the learned trial Court are set aside and the suit is dismissed. But as the suit is being dismissed since the deity is not properly represented, it is just fair and equitable to pass order that parties are to bear their own costs throughout.

Misra, J.

5. I agree.