

(1932) 04 CAL CK 0001
In the Calcutta High Court

Sri Sri Keshab Rai Jieu Thakur

APPELLANT

Vs

Raja Jyoti Prosad Singhadeo and Others

RESPONDENT

Date of Decision : 21-04-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4

Citation : 139 Ind. Cas. 123

Hon'ble Judges : Mitter, J; Bartley, J

Bench : Division Bench

Judgement

1. This is an appeal from an order of the District Judge of Bankura dated the 4th June, 1930, by which he dismissed the application of the appellant for substitution. This order of the 4th June is divisible into two parts, (1) by which the application for substitution was rejected and (2) by which the appeal before the District Judge was dismissed. It is to be noticed that the present appeal is directed only against that portion of the order which rejected the appellant's application for substitution as will appear from the memorandum of appeal at page 25 of the Paper Book.

2. A preliminary objection has been taken to the hearing of this appeal by the learned Advocate for the respondents. In order to consider the soundness or otherwise of this preliminary objection it is necessary to state a few facts. It appears that the suit was instituted by the deity Sri Sri Iswar Keshab Rai Jiu Thakur through the Mohunt and Shebait Sri Sri Raja Gopal Achariya Goswami for declaration of the title of the lakheraj debuttar property of the deity in the whole of Mousah Nabagram described in the Schedule to the plaint. That suit was instituted in the Court of the Subordinate Judge of Bankura and was dismissed. An appeal was preferred on behalf of the deity before the court of the District Judge of Bankura and it appears that during the pendency of the appeal the Mohunt Sri Sri Raja Gopal Achariya Goswami died on the 26th January, 1930. On the 4th March, 1930, the present appellant Jagarnath Achariya applied for substitution of his name in place of the Mohunt Sri Raja Gopal Achariya.

Objection to the petition for substitution was filed on behalf of Raja Jyoti Prosad Singh Deo on the 5th April, 1930. After certain adjournments the appellant examined one witness Surjya Narain Sircar for the purpose of establishing his right as next shebait of the deity in question and entitling to be substituted in place of the last shebait. On the same date it appears that a petition was put in on behalf of one Kamala Dabi objecting to the substitution of the appellant in place of the deceased Mohunt or Shebait and praying for her own substitution on the ground that she was the Paricharika. That petition was refused, because it was filed late. On the 4th June, 1930, the learned District Judge recorded an order in which he discussed the evidence of Surjya Narain and came to the conclusion that the appellant had failed to establish devolution of the shebaitship upon him and he rejected his application for substitution at the same time dismissing the appeal. It has already been stated that the present appeal is directed against the order refusing substitution. It is contended on behalf of the respondents that this order really was made under Order XXIV, Rule 5 of the Code of Civil Procedure, 1908. It is said that this is really a dispute as to who was the real representative of the deceased appellant. It is said that although the deity was really the appellant (as the deity was represented by the deceased shebait when the appeal was filed) Order XXII, Rule 2, 3, 4 and 5 applied to the present case. On the other hand, it has been contended on behalf of the appellant that the application for substitution as it was termed was really an application which was made under Order XXII, Rule 10 of the Civil Procedure Code. It is said that Rules 2, 3 and 4 relate to cases of devolution of interest on the death of a plaintiff or defendant when such plaintiff or defendant was suing or being sued respectively in his personal capacity. It is further contended by the appellant that these rules do not apply when a suit is brought by or against a person in his representative character and that the present suit was one of the latter description. In support of his contention reliance is placed on a decision of the Madras High Court in the case of Ratnam Pillai v. Annamalai Desikar 84 Ind. Cas. 200 : 19 L.W. 367 : 46 M.L.J. 341 : (1924) M.W.N. 361 : AIR 1921 Mad. 615 : 34 M.L.T. 31 reported in one of the unauthorised Reports 84 Ind. Cas 200. That decision was the decision of a single Judge Mr. Justice Waller who held that, in the circumstances like the present Order XXII, Rule 10, is the proper Order applicable. We are of opinion that this contention of the appellant is well founded and must prevail.

3. It is next said with regard to the preliminary objection by the respondents that even assuming that the matter came under Order XXII, Rule 10 as there has been no appeal from the decree dismissing the plaintiff's appeal, the decree of the lower Appellate Court dismissing the plaintiff's appeal against the order refusing substitution is incompetent and reliance has been placed in support of this contention on an unreported decision of this Court (B.B. Ghose and Panton, JJ.) in Appeal from Original Order No 297 of 1928 on the 1st February, 1929. It is argued for the respondents that when, as in the present case, a final decree has been made, there could be no appeal from the interlocutory order where there is

no appeal from the final decree as the interlocutory order has merged in the final decree and has got no separate existence. In answer to the contention, the respondents relied very strongly on a recent decision of the Full Bench of this Court in the case of Taleb Ali and Another Vs. Abdul Aziz and Others, . In that Full Bench case it was held that an appeal from a preliminary decree does not become incompetent by reason of there being no appeal from the final decree although the final decree had been made before the appeal was presented and the learned Advocate for the appellant argues on the principle of analogy that this decision should also apply to cases where there are no two decrees from which appeals are allowed by the court but where there are interlocutory orders made in the course of the suit from which an appeal is allowed under the provisions of Order XLIII of the Code. It is not necessary to express any final opinion on this question in the view which we take with regard to the merits of the case. The question is a somewhat debatable one and as it is not necessary, we refrain from expressing any final opinion on the question. Much can be said on either side of the question and in support of either view, We have accordingly heard the learned Advocate for the appellants on the merits of this appeal. The only evidence by which the appellant sought to establish his right to shebaitship is the evidence of his witness Surjya Narayan Sarkar which is to be found at page 20 of the paper book. This witness says that according to custom the elder brother becomes shebait. This he states in examination in-chief and when cross-examined he states that he has got papers to show that brother succeeded elder brother to Mohant-ship but he has not brought the same with him. He gives no instance of succession to his knowledge that a brother succeeded the elder brother before this. He states that there are papers in his sherista showing succession of Mohunts. Then again he says that there are no such papers and he has not seen any. In these circumstances the learned District Judge reached the conclusion that the onus of proving custom which was on the appellant has not been discharged. In order to establish custom several elements are necessary under the law and one of which is that it must be shown that custom existed from time immemorial or from time beyond living memory or at any rate there are so numerous instances of the existence of custom which would justify the court to conclude from the numerous instances from a long time past that the devolution was in the way alleged in the present case, namely, that an elder brother succeeded younger brother to the shebaitship. It has been decided with regard to the very instance of Mohuntshiv in a case before their Lordships of the Judicial Committee in the Privy Council that succession to shebaitship in the present case was not according to ordinary rules of inheritance under the Hindu Law but according to custom. Better evidence of proof of such custom should have been forthcoming. It is argued by the Advocate for the appellant that this was merely a summary proceeding and the appellant thought that the evidence of one witness which was unrebutted was sufficient to establish custom. That might have been so if the evidence was not of the description to which we have referred. Prima facie there ought to have been proof that all the elements necessary to establish custom exist in the present case. We are of opinion that

such evidence is lacking. It is said that in any event if the learned District Judge was not satisfied with the evidence of custom he ought to have given an opportunity to the appellant to adduce further evidence to establish custom. An examination, however, of the order sheet shows that the applicant had several opportunities from the 28th April, 1920, to produce such evidence but he did not avail himself of those opportunities. In these circumstances, we are of opinion that the appeal fails on the merits.

4. The result is that the appeal is dismissed with costs, hearing fee being assessed at 3 gold mohurs which is to be divided equally among the three sets of respondents who have appeared.