

Radhamohan Dev and anr. Vs. Nabakishore Naik and ors.

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Court : Orissa

Decided On : May-18-1979

Reported in : AIR1979Ori181; 48(1979)CLT178

Judge : B.K. Ray and ;J.K. Mohanty, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 92; Hindu Law

Appeal No. : First Appeal No. 12 of 1970

Appellant : Radhamohan Dev and anr.

Respondent : Nabakishore Naik and ors.

Advocate for Def. : R.N. Sinha, ;S.N. Sinha and ;P.K. Routray, Advs.

Advocate for Pet/Ap. : B.K. Pal, ;B. Pal and ;A. Mohanty, Advs.

Judgement :

J.K. Mohanty, J.

1. Plaintiffs, whose suit has been decreed in part by the Subordinate Judge, Puri in O. S. No. 4/61 of 1969/66 (I), have preferred this appeal against that part of the decree which has gone against them.

2. Plaintiff No. 2 Parbati Dei claiming herself as a marfatdar of the family deity Sri Radhamohan Dev (Plaintiff No. 1) filed the suit for giving her 4 annas share in the

sebayati right of plaintiff No. 1; for partition of the sebayati interest of herself and of defendants Nos. 1 to 6 or, in the alternative, for joint possession of all the deity's properties described in Schedules 'A' and 'B' of the plaint; for framing of a scheme for the proper management of the affairs of plaintiff No. 1 by allowing each of the sebayats to have his term in proportion to his right over the endowed properties; for setting aside the alienations of the devottar properties effected by defendants Nos. 2 and 3 in favour of defendants Nos. 7 ' to 9 which are described in schedule 'C' of the plaint; for recovery of possession of the properties described in Schedule 'C' of the plaint; for a direction to defendant No. 3 to furnish accounts of the deity's properties from the date of his management i.e. 30-8-63 till the date of filing of the suit; for awarding costs of the suit; and for an injunction against defendant No. 3 not to alienate any of the deity's properties.

3. The case as disclosed from the plaint is as follows: Plaintiff No. 1 is the family deity of plaintiff No. 2 and defendants Nos. 1 to 6. Plaintiff No. 2 is the daughter of late Bharat Naik, who was one of the founders of the deity. Bharat Naik's son is Nabakishore (defendant No. 1). Bharat Naik's brother was Babajee. Babajee's two sons are Biswanath (defendant No. 3) and Kasinath (defendant No. 2) and two daughters are Nilamani (defendant No. 5) and Ujyolmani (defendant No. 6). Defendant No. 4 Radhamani is the widow of Babajee. Bharat and Babajee continued to live jointly after the death of their father Brundaban Naik. They by their industry and perseverance acquired huge landed properties which were their secular properties. As they were men of religious temperament, they installed plaintiff No. 1 as the family deity and purchased large extent of immovable properties in the name of plaintiff No. 1. They also acquired huge moveable properties for the use of the deity and dedicated both moveable and immovable properties to plaintiff No. 1 which are fully described in Schedules 'A' and 'B' of the plaint and Schedule 'A' properties stood recorded in the revenue papers and municipal records in the name of plaintiff No. 1. After the death of Bharat Naik in 1960, defendant No. 1 and Babajee and his sons, effected partition of their secular properties by a deed dated 30-8-63. But at the time of partition, plaintiff No, 2 was not given any share nor she was consulted. On her demand for a share, defendant No. 1 agreed and executed a deed of partition in her favour on 28-3-66. Hence she (plaintiff No. 2) got her due share from the family properties which were

secular in character. Bharat and Babaji, who were the founders of plaintiff No. 1, continued to exercise the right of sebayats of the deity till their death. During the lifetime of Bharat and Babaji, as they became old and unable to manage the affairs of the deity and the endowed properties, they on 26-12-57/16-1-58 executed a registered deed (Ext. 1) in favour of defendants 1 and 3 for the management of the endowed properties and the affairs of the deity. The said document was only a power of attorney and by that the founders did not cease to have any interest as sebayats over the deity's affairs. As both the founders continued to be the sebayats of the deity till their death, the plaintiff No. 2 is entitled to succeed to the sebayati right of her father and as such she had 4 annas interest in the sebayati right of the family deity. After the death of Bharat, on 30-8-1963 Babajee and defendants 1 and 2 executed another registered deed styled as 'Seba Samarpana Patra' (Ext. 4) in favour of defendant No. 3. It is mentioned in the said deed that the three executants had no time to look after the management of the endowment and as such they transferred their sebayati rights in favour of defendant No. 3, who was considered to have more time to look after the seba puja of the deity. Though styled as 'Seba Samarpana Patra'. The document was only a power of attorney and as the plaintiff No. 2 is not a party to the deed, her sebayati interest is not affected by the execution of such a deed by other defendants. The deity has vast landed properties to the extent of 73 acres which are fully described in Schedule 'A' of the plaintiff. The income of the landed properties was quite sufficient for the maintenance of the deity's affairs and since the installation, the deity was never in want, rather there was surplus from the income of the properties. Defendant No. 3 after taking over management is not incurring the prescribed expenditure for the daily and periodical Nities of the deity, but he is spending the income of deity for his own personal purposes and is asserting his personal right over the deity's properties. Defendant No. 3 and his brother defendant No. 2 have alienated the properties of the deity in favour of defendant Nos. 7 and 9 which are fully described in Schedule 'C' of the plaint. As the properties are devottar properties and as the deity has no want, the said alienations are invalid and are to be set aside. As the defendant No. 3 is mismanaging the affairs of the deity, and he is out to sell the other properties of the deity, the plaintiff No. 2 was obliged to file the suit for the aforesaid reliefs.

4. Only defendant No. 3 contested the suit and the other defendants remained ex parte. Defendant No. 3 in his written statement stated as follows: Admittedly Bharat and Babajee were the founders of the family deity and they built the temple to consecrate plaintiff No. 1 and settle the properties with the deity. Both the founders executed a registered deed (Ext. 1) whereunder defendants 1 and 3 became the sole trustees of the deity and the entire management of the deity's affairs. So defendant Nos. 1 and 3 in their turn were also authorised to nominate their successors and as such the founders had no powers in them and they could not have any residuary control, right, title or interest in respect of such marfatdari right of plaintiff No. 1. It is on account of this Bharat, the father of plaintiff No. 2 had absolutely no interest over the sebayati right of plaintiff No. 1 and the plaintiff No. 2 has no interest in the affairs of plaintiff No. 1 and hence the suit as laid is not maintainable. It is alleged that the plaintiff No. 2 appears to have been set up by some interested persons to lay a false claim to the properties. Defendants 1 and 3 were appointed as the trustees by the trust deed dated 26-12-1957 and they took over management of the deity's affairs. Defendant No. 1, one of the trustees, has transferred all his interest in favour of defendant No. 3 by another Seba Samarpan Patra on 30-8-1963 (Ext. 4) to which the other members of the family, namely, the father of defendant No. 3 and his brothers and the mother of defendant No. 1, gave their consent. Hence after 30-8-1963 defendant No. 3 is the sole trustee of the endowed properties and none else has any interest therein. Defendant No. 3 has denied all the plaint allegations regarding mismanagement etc. and asserted that the seba puja and the Nities are being performed as usual and he is not liable to render accounts to plaintiff No. 2 as she has no interest in the endowment. Defendant No. 3 specifically pleaded that the properties described in Schedule 'C' have been alienated in the best interest of the deity' and that cannot be set aside. As plaintiff No. 2 has no interest in the deity and its affairs, her suit on false averments should be dismissed with costs.

5. Learned trial court's findings are as follows:--

(1) That the dedication made in favour of the deity by the founders is absolute and the properties are absolute devottar properties.

(2) That the plaintiff No. 2 has no right, title or interest over the deity's sebayati right as her father alienated the same under Ext. 1.

(3) That the plaintiff No. 2 being a female member of the founders' family, she has an interest in the worship and maintenance of the deity and she has a right to challenge the alienations of the deity's properties and to that extent the plaintiff's suit is maintainable.

(4) That the defendants 1 and 3 are the real sebayats, but the claim of defendant No. 3 to be the sole trustee is left open to be decided in a properly constituted suit.

(5) That the alienation by defendant No. 3 under the sale deed Ext. 2/b in favour of defendant No. 7 and the alienations by defendant No. 2 under Ext. 2 in favour of defendant No. 9 and under Ext. 2/e in favour of defendant No. 8 out of the properties of the deity mentioned in Schedule 'C' of the plaint were invalid and are to be set aside and the deity is to recover possession of the properties by ejecting the alienees; and

(6) That the evidence of mismanagement by defendant No. 3 is very vague and it cannot be said that the allegation of mismanagement is established and, therefore, the question of framing the scheme does not arise.

On the above findings the trial court decreed the plaintiff's suit in part and held:--

'The plaintiff's prayer for a declaration that the transfers effected by the defendants Nos. 2 and 3 in favour of defendants Nos. 7 to 9 as fully described in Schedule 'C' is not binding on the deity i. e. plaintiff No. 1, is hereby allowed and the deity to recover the properties by ejecting the purchasers therefrom. The plaintiff's prayer for declaration of her Sebayati right to the extent of 4 ans., and for framing of a scheme is hereby disallowed.'

6. The appellants have filed this appeal against the decision of the Subordinate Judge rejecting the plaintiff No. 2's claim for declaration of her sebayati right to the extent of four annas of the suit endowment and refusing the prayer to frame a scheme for the proper management of the affairs of plaintiff No. 1, as would appear from the appeal memo.

7. During argument Mr. Pal, learned counsel for the appellants, confined his argument mainly to the question that the allegation of mismanagement has been proved by overwhelming evidence and a case has been made out for framing a scheme for the proper management of the affairs of plaintiff No. 1 and the learned court has illegally rejected the claim of the plaintiffs.

Mr. Sinha, learned counsel for the respondent No. 3 (defendant No. 3 in the court below), on the other hand, contended that plaintiff No. 2 has no locus standi to file the suit on behalf of plaintiff No. 1 as she has no interest in the deity or in its affairs and as such the lower court has rightly rejected the claim of plaintiff No. 2 for a declaration that she has interest to the extent of 4 annas share in the sebayati right and the plaintiffs having failed to prove mismanagement, the question of framing a scheme does not arise and moreover this being a private endowment, the court has no jurisdiction to frame a scheme, as prayed for.

8. Mr. Pal in order to substantiate his case of mismanagement contends, firstly, that the learned court has held that the alienation made by defendant No. 3 under Ext. 2/b is not for necessity of the deity and has set aside the alienation of the properties conveyed under Ext. 2/b as not binding on the deity. Similarly the learned court has also held that the properties alienated under Exts. 2 and 2/b by defendant No. 2 were devottar properties and the alienations were not made for the necessity of the deity and has set aside the same and allowed the deity to recover the properties by ejecting the purchasers therefrom. To add to this, defendant No. 3 in his written statement in paragraph 15 has asserted that the alienations of Schedule 'C' properties are valid and are in the interest of the deity and in any event plaintiff No. 2 is not entitled to question the same. Thus defendant No. 3 not only asserted that the alienations made by him are valid, but also has claimed that the alienations made by defendant No. 2, who is a stranger are also valid. On the above grounds alone, the lower court should have held that the properties of the deity have been mismanaged and are not safe in the hands of defendant No. 3 and should have directed framing of a scheme. Secondly, that defendant No. 3, who was examined as D. W. 7, in cross-examination has stated:--

'It is not a fact that the deity is family deity.'

Thirdly, that defendant No. 3 after taking over management is not performing daily seba puja and Nities regularly and also is not performing the periodical festival Nities in the manner as it was being performed, and is spending the income from the properties of the deity for his own personal purposes. In support of this contention, Mr. Pal referred to the evidence of P. W. 12, who has stated:--'The usual nities and the festivals of the deity are not being done.' Plaintiff No. 2, who was examined as P. W. 10 has stated:--

'The defendant No. 3 after taking up management has stopped all the. festive occasions. He has stopped the Arua bhog by one time. There were temple servants and they have been disbanded.

XX XX XX XX Now a days Niti is being performed in the morning and the evening Niti has been discontinued.' D. W. 2, the defendants' own witness has supported the above statements of P. Ws. 10 and 12 and has stated:--

'Now a days the seba puja is not being done in the manner in which manner it was being performed during the lifetime of Bharat Mahajan.' Fourthly, that though defendant No. 3 was called upon by the plaintiffs to produce the accounts of the deity's income and expenditure, he did not produce the same and gave a false explanation that those were with his lawyer and this fact he admits that he has not informed either to the plaintiff or to the court.

In reply, Mr. Sinha submitted that the property alienated under Ext. 2/b is the only instance of transfer. The property, which was a small house and was yielding no profit, was sold to meet the expenses of repairing the temple and for acquiring a land adjacent to the Thakur's garden, and the alienation was for necessity. This will be evident from the evidence of defendant No. 3 (D. W. 7) and from Ext. 2/b. This belated explanation given by defendant No. 3 in his defence was not in the pleadings and appears to be an afterthought and cannot be accepted. Mr. Sinha then submitted that the Nities are being performed regularly and the evidence of the witnesses should not be believed and further defendant No. 3 has not denied that plaintiff No. 1 is not the family deity.

Considering the aforesaid argument of the parties and the evidence on record, we have no doubt in our mind that the seba puja and the festivals of the deity are not being performed in the manner in which they were being done and the allegation of mismanagement has been fully established.

8A. Mr. Sinha further submitted that this being a private devottar Section 92, Civil Procedure Code does not apply to this case and the civil court has no jurisdiction to frame a scheme for the management of the same.

In reply, Mr. Pal referred to Hindu Law of Religious and Charitable Trusts, Third Edition, by Hon'ble Mr. Justice B. K. Mukherjea, page 387 wherein it has been observed:--

'The question whether a suit for framing of a scheme in a family debuttar is at all entertainable by a civil court was elaborately discussed by a Division Bench of the Calcutta High Court in the case of Bimal Krishna v. Iswar Radha ((1937) 41 Cal WN 728) and it was held that a scheme for administration of a private debutter could be framed by a civil court.' In the same page it has been further observed:--

'If a shebait has improperly alienated a trust property, a suit can be brought, by any person interested, for a declaration that such alienation is not binding on the deity.' At page 389 it has also been observed:--

'It has now been decided in a number of authorities that in the case of private charities and religious trusts, the members of the family have the right to move the court for redress, and that it is open to the court in those proceedings to frame a scheme for their administration.' In a decision reported in AIR 1968 SC 915 at p. 918 (Thenappa Chettiar v. Karuppan Chettiar) the Supreme Court has observed:--

'We proceed to consider the next question arising in the appeal, viz., whether the plaintiffs are entitled to ask for the settlement of a scheme even on the assumption that they were not co-founders of the trust. The parties in the case have proceeded on the footing that the trust is a private trust, but the authorities establish that even in the case of a private trust a suit can be filed for the removal of the trustee or for settlement of a scheme for the purpose of effectively carrying

out the objects of the trust. If there is a breach of trust or mismanagement on the part of the trustee, a suit can be brought in a civil court by any person interested for the removal of the trustee and for the proper administration of the endowment. -- (See, for example, *Pramatha Nath Mullick's case*, 52 Ind App 245 : (AIR 1925 PC 139) and *Mahonar Mookerjee v. Peary Mohan*, 24 Cal WN 478: (AIR 1920 Cal 210). There are also authorities to the effect that Civil Court may frame a scheme in the case of a private endowment at the instance of the parties interested. The question has been discussed by the Calcutta High Court in *Bimal Krishna's case*, 41 Cal WN 728: (AIR 1937 Cal 338) and it was held in that case that a scheme for the administration of a private endowment can be framed by a Civil Court, Mookerjee, J. observed in that case that in India the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the shebait who represent the deity are entitled to seek the assistance of the Court in case of mis-management, fraud or maladministration on the part of the shebait and to have a proper scheme for management framed for the administration of the private trust. In *Pramatha Nath Mullick's case*, 52 Ind App 245: (AIR 1925 PC 139) to which we have already made reference, the Judicial Committee itself directed the framing of a scheme in the case of a private endowment and the case was expressly remanded to the trial court for that purpose. In the present case the appellants being contributors to the trust are interested in the proper administration of the trust and in our opinion, they have a sufficient right to bring a suit in a Civil Court in case there is mismanagement or breach of trust on the part of the managing trustee and for framing of a scheme.' In the decision reported in AIR 1925 PC 139 : 52 Ind App 245 (*Pramatha Nath Mullick v. Pradyumna Kumar Mullick*) to which reference has been made by the Supreme Court in the case reported in AIR 1968 SC 915 (*supra*) it has been held:--

'that the will of the idol as to its location must be respected, and that accordingly the suit should be remitted in order that the idol might appear by a disinterested next friend to be appointed by the Court; that the female members of the family, having the right to participate in the worship, should be joined; and that a scheme for regulating the worship should be framed.' In view of the above discussion, we are of the view that a scheme can be framed even in the case of a private devottar. Mr. Pal next contended that the founders Bharat and Babajee did not

appoint defendants 1 and 3 as Sebayats at the time of dedication. Ext. 1 in which defendants 1 and 3 were appointed as sebayats was executed much after in the year 1957 i.e. on 26-12-1957. So it should be deemed that plaintiff No. 2's father continued as a sebayat till his death. This contention of Mr. Pal is unfounded and cannot be accepted in view of the settled principle of law as has been observed in Mukherjee's Hindu Law of Religious and Charitable Trusts, Third Edition, at page 154 which is quoted below:-- 'When a man founds a deity, then if he does not appoint a Shebait he himself becomes responsible for the services of the deity. This responsibility is often maintained by a Hindu either by the personal performance of religious duties, or in the case of Sudras by the employment of a Brahmin priest. Even if no Shebait is appointed at the time of dedication, the founder may exercise this power any time before his death and failing him the power can be exercised by his successors as well.'

9. The learned lower court has held that the suit is maintainable by plaintiff No. 2 as she is a person interested for the deity. In clause 15 of Ext. 1 it has been mentioned that if any of the parties to the deed or their heirs due to any unforeseen circumstances becomes poor and unable to maintain himself, he will have a right to take the Prasad from out of the offerings of the deity every day. So it cannot be disputed that plaintiff No. 2 is a person interested for the proper administration of the endowment.

10. In view of the aforesaid findings it has been clearly established that the plaintiff No. 2 is entitled to seek the assistance of the court due to the mismanagement and maladministration on the part of the Sebait and to have a proper scheme for management framed for the administration of the affairs of plaintiff No. 1 and its endowment. The appeal is, therefore, allowed to the extent that the defendant No. 3 is removed from the Sebaitship and that a proper scheme for the management of plaintiff No. 1 and its endowment be framed by the Subordinate Judge in consultation with plaintiff No. 2 and defendants Nos. 1 to 6.

11. In the circumstances, there will be no order for costs.

B.K. Ray, J.

I agree.

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