

Upendra Nath Chatterjee Vs. Nilmony Chatterjee

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Court : Kolkata

Decided On : Dec-19-1956

Reported in : AIR1957Cal342

Judge : R.P. Mookerjee and ;Sarkar, JJ.

Acts : Hindu Law; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 1, Rule 10

Appeal No. : A.F.O.D. No. 1 of 1954

Appellant : Upendra Nath Chatterjee

Respondent : Nilmony Chatterjee

Advocate for Def. : Charu Chandra Ganguli and ;Bijan Bihari Das Gupta, Advs.

Advocate for Pet/Ap. : Syamadas Bhattacharjyya, Sr. and ;Sunil Mookerjee, Advs.

Disposition : Appeal allowed

Judgement :

Sarkar, J.

1. One Adhar Nath Chatterjee of Howrah dedicated certain properties including the ancestral dwelling house to the family deity Sri Sri Iswar Gopal Jiu Thakur, established in the said house, by a deed of settlement dated 25-12-1922 and

appointed himself as the first sebait, his wife as the next sebait and, after her death, his two sons Upendra and Nilmony as joint sebait to the exclusion of the sons of a predeceased son. He died in 1923 and his wife died in 1925. The two sons thereafter succeeded as sebait, and after some time disputes and litigations commenced between them and Nilmony left the ancestral house in June 1939. On 20-9-1950 Nilmony instituted the suit out of which this appeal arises against his elder brother Upendra for the framing of a scheme for the proper performance of the seba and puja of the aforesaid deity and for the proper management of the properties dedicated to the deity, on the allegations that since he left the family dwelling house his brother had been carrying on the devaseba alone without asking for his co-operation and had been preventing him from participating therein and that in violation of the terms of the deed of settlement) he had been mismanaging and wasting the debutter properties and misappropriating the income thereof and had refused to render accounts. He accordingly asked for a decree for accounts also.

2. The defendant Upendra denied the plaintiff's allegations and charged him with neglect and abandonment of his duties as sebait after he had left the family dwelling house. He stated that he had performed the seba and puja of the deity with his own funds up to 1351 B. S., not having received any income from, the plaintiff who was in charge of the management of the estate and that since 1952 only he had taken over the charge of collection of the income and had been keeping proper accounts. He pleaded that the suit was not maintainable as framed, that he was not liable to render accounts and, on the other hand, was entitled to be reimbursed for the sums he had spent from his own funds for devaseba and that there was no reason or occasion for the framing of any scheme.

3. The learned Subordinate Judge who tried the suit held that the suit was maintainable as framed, being a suit instituted by a cosebait on behalf of the deity, and that the defendant was liable to render accounts and not entitled to be reimbursed for any expenses he might have incurred for the deity out of his own funds. He accordingly decreed the suit in a preliminary form calling upon the defendant to render accounts to a Commissioner to be appointed by the Court

from June 1939 upto the date of the decree. With regard to the prayer for the framing of a scheme he held that the Court was competent to frame a scheme and that it was essential that a scheme should be framed for the proper management of the endowment by overriding the directions of the founder of the endowment, if necessary. But he postponed the framing of the scheme pending the receipt of the report of the Commissioner whom he directed to ascertain the minimum amount necessary to be spent for the debaseba and to suggest a scheme in consultation with the parties.

4. The defendant has appealed and on his behalf Mr. Syamadas Bhattacharya has contended that the learned Subordinate Judge was wrong in his finding that the suit was maintainable as framed and that the defendant was liable to render accounts to the plaintiff. He also objected to the learned Judge's direction that a scheme should be framed by overriding the intention of the founder as expressed in the deed of settlement, though he did not challenge the power of the Court to frame a scheme in conformity with the object of the founder and the spirit of the deed of settlement.

5. As to maintainability the main objection is that the plaintiff instituted the suit in his personal capacity, and not in the capacity of a sebaite, and impleaded the defendant also in the same capacity. It is true that the plaintiff has not described himself or the defendant in the cause title of the plaint as the sebaite of the deity, but in the body of the plaint he has made it clear that both he and the defendant are cosebaits and in para 10 of the plaint he has averred that he is 'entitled as a sebaite of the deity Sri Sri Iswar Gopal Jin Thakur to have a scheme framed with the help of the Court for the welfare of the deity and for the satisfactory carrying out of the works of the deity and for the management of the debutter property.' He has also averred that as the defendant had alone received the income and usufruct of the entire debutter property wrongfully and illegally 'in His capacity as sebaite' and had misappropriated the same he was liable to render accounts of the income and expenditure of the debutter property. These averments make it clear that the plaintiff had not sued in the personal capacity or impleaded the defendant in that capacity,

6. In the case of -- 'Maharaja Jagadindra Nath Roy v. Rani Hemanta Kumari', 31 Ind App 203 (PC) (A), a suit had been instituted by the sebaite in his own name and without the description that 'he was the sebaite of the deity for recovery of possession of certain properties as belonging to the deity. It was held by the Judicial Committee that the suit was maintainable. It was laid down in this case that the right of suit in respect of the deity's property is in the sebaite who can sue in his own name and that the deity need not figure as a plaintiff in the suit, though the pleadings must show that the sebaite is suing as such.

7. In the case of 'Bimal Krishna v. Gunendra Krishna : AIR1937 Cal338', it was held by this Court that a suit for the framing of a scheme in respect of a private family debutter is entertainable by the Civil Court. It was pointed out in this case that the Judicial Committee directed the framing of a scheme in the case of a private debutter in the case of --'Framatha v. Pradyumna'. No doubt, the Judicial Committee held in the latter case that the deity was a necessary party to the suit and should be represented by a disinterested person to be appointed by the Court, but that was because the appellant claimed in that case the right to remove the deity from its location during the turn of his worship and hence it was considered necessary that the wishes of the deity regarding the change of location should be ascertained through a disinterested person. According to the decision in the case of : AIR1937 Cal338, a deity is not a necessary party to a suit for the framing of a scheme, unless of course its interests are likely to be affected by the scheme proposed, and direction was given in this case for joining the deity as a party through a proper and disinterested person at a later stage of the suit when the scheme would be finally approved of, if it should appear to the Court that such a step was necessary. In the case before us no scheme has yet been framed and, following the above decision with which we respectfully agree, we direct that the trial Court should, at the time of the framing of the scheme, add the deity as a party to the suit through a proper and disinterested person and ascertain the deity's wishes as regards the location and arrangements for the worship etc.

8. The next question is whether the plaintiff's prayer for accounts from the defendant is maintainable. It has been contended by Mr. Bhattacharya that the plaintiff being a cosebaite is not entitled to ask for accounts from the other sebaite.

But the plaintiff has asked for accounts on the footing that the defendant was the managing sebaite and that, after he had removed from the ancestral residence in 1939, the defendant had been alone functioning as the sebaite and receiving the income of the debutter properties and it is also alleged that the defendant had been misapplying and misappropriating the same and causing loss to the deity. If these allegations are true, then the defendant would be liable to account for his management. Dr. B.K. Mukherjea has observed in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust (p. 312): 'As recipient of the income of the debutter property or the offerings that are made to the deity, the sebaite is responsible for the due application of the deity's income and is bound to render accounts of his management. He is bound to keep regular accounts of his management'. The deed of settlement in this case provides that the income of the debutter properties should be wholly appropriated to the purposes of the debutter and that the sebaite will only get the prasada or food offered to the deity and will not be entitled to get any share of the income. The deed directs the sebaite to meet the expenses of the daily and periodical seba of the deity and of the festivals etc., from the income of the debutter property as far as possible without exceeding it and to utilise the surplus, if any, in making repairs of the thakurbati and acquiring new properties in the name of the deity. It is also directed that the sebaite should keep proper account of the income and the expenditure, though 'he will not be liable to render accounts to any one'. A sebaite who has received the income of the debutter properties and misappropriated or misapplied the same without spending it for the purposes of the deity and has not kept proper account of the income and the expenditure cannot, however, take advantage of the last clause and refuse to render accounts when so required by the other sebaits or persons interested in the endowment. It is well settled that if a sebaite is negligent or is the guilty party against whom the deity needs relief, it is open to a worshipper or any person interested in the endowment to bring a suit for the protection of the endowment. (Vide Dr. B.K. Mukherjea's Tagore Law Lectures p. 265). So under such circumstances there can be no objection to a cosebaite bringing a suit for the rendition of accounts against the managing sebaite.

9. It has not, however, been proved in the present case that the defendant was the managing sebaite or that he misappropriated and misapplied the income of the

debutter property. The learned Subordinate Judge who has held the defendant liable to account has arrived at findings which are hardly consistent with one another. He has held that the various allegations regarding misconduct and misappropriation against the defendant are of a minor character and that many of them have not been proved. As regards misappropriation of selami said to have been received by the defendant from the tenants to whom leases were given of debutter property he found that only one instance was alleged but not proved. As regards misappropriation of rents he found that there was no evidence. One of the allegations was that the defendant had been creating documents with an eye to ultimate conversion of the debutter properties. As to this the learned Judge found that there was no evidence. He considered the allegations regarding appropriation of fruits, trees and fish to be very minor matters and certainly a seba cannot be called to account for such minor things. The defendant has allowed his son to set up a workshop in the old garage attached to the ancestral homestead, but that can hardly be called conversion of the debutter property and the defendant's case is that rent is being paid therefor. We are not called upon to, and do not, decide the rights, if any, of the defendant's son. That question is left open. So it is clear that none of the allegations of misappropriation or misapplication of the income of the debutter properties has been substantiated.

10. The learned Judge has further found that the defendant has been keeping accounts since 1346 B. S., i. e., since the plaintiff's departure from the ancestral house, and the said accounts have been filed in Court. For some years the accounts show only expenditure on account of the seba and puja of the deity and the defendant's case is that upto 1351 B. S., the collections were in charge of the plaintiff and that he did not receive or make any collection himself. The accounts make it clear, as the learned Judge has found, that the expenditure for the seba and puja of the deity have really been in excess of the annual income and so there cannot be any reason to suspect that the defendant has misappropriated or misapplied any part of the income. The learned Judge was also convinced that the defendant had been performing the debaseba properly and that the accounts of the expenses therefor were not inflated.

11. In spite of all these findings, however, the learned Judge has held the defendant liable to account. The reason for this appears to be that he considered the defendant to be the managing sebaite and was of the opinion that on account of his mismanagement and neglect a considerable sum due from the tenants of the debutter properties as arrears of rents had become time barred and that loss had thereby been caused to the deity. But both these conclusions of the learned Judge seem to be wrong. He relied upon two documents, viz., Exs. 3 and 3a, in support of his finding that a considerable amount due as rent was not realised from the tenants, but the entries in these papers have not been proved and the only evidence given on the point is that they had been obtained by the plaintiff from one Sambhu Roy who was the officer in charge of collection of rents from the debutter estate. Sambhu was not examined and no evidence was offered as to how these papers were prepared by him or whether there was any basis for them. These papers should not, therefore, have been relied upon by the learned Judge.

12. The admitted case of both parties is that there was a manager in charge of the joint estates including the debutter estate when the plaintiff left the ancestral house in 1939 and that the said manager who was a lawyer was in service till March 1943 when he resigned. (Vide Ex. 14). The learned Judge also found that this manager Atul Majumdar was managing the debutter properties on behalf of both the sebaits up to 1943. In spite of this finding, however, he held that after 1939, i.e., after the departure of the plaintiff from the ancestral house, the defendant became the managing sebaite and that since admittedly he did not make any collections up to 1351 B. S., he had failed in his duty and was liable to account for the collections he had neglected to make and to reimburse the debutter estate for any loss caused to it by his mismanagement. The defendant only took over charge of the seba and puja of the deity after the plaintiff had left the house and ceased to do his part of it, but the debutter estate continued to be managed by the joint manager and there was no change in the matter of collections of rent after the plaintiff's departure. There is nothing to show that the defendant assumed the function of the managing sebaite, so far as the management of the debutter properties is concerned, after 1939. The plaintiff admitted that Atul Majumdar was the general manager till 1943 and that he had no grievance against the manager and did not ask for accounts from him when he left. If no collections were made

from the debutter estate during the incumbency of the general manager up to 1943, he should have been made responsible therefor, but the plaintiff, curiously enough, made no grievance against him but let him go without asking for accounts. It is in evidence that the plaintiff had asked for accounts from the officer in charge of collections from the debutter estate, viz., Sambhu Roy, and in a letter dated 9-11-1945 written to him by Becharam Banerjee on behalf of the plaintiff (Ex. 8a) ' there is a distinct charge made against him that he was misappropriating one-half share of the collections made from the Sibpur mahal of the debutter estate and that he had neglected to render accounts in spite of repeated demands. The plaintiff did not, however, pursue the matter against Sambhu and, on the other hand, after the institution of the present suit in 1950, his pleader wrote a letter to Sambhu on 12-3-1951 in a mild form asking him not to pay anything out of the collections to the defendant without a joint receipt from the plaintiff and the defendant and requesting him to send a list of tenants with arrears of rents due from them. (Ex. 4). There is no allegation that the defendant ever prevented the general manager or Sambhu from making collections in the debutter mahal or otherwise interfered with their work. If anybody was liable for allowing rents to fall in arrears it was Sambhu, but the plaintiff did not proceed against him even after charging him with misappropriation of the collections but, instead, chose to proceed against the defendant.

13. An allegation has been made that the plaintiff had had no access to the documents and collection papers relating to the debutter properties since he left the ancestral residence, but it appears from the correspondence with the manager Atul Gobinda Majumdar which has been produced that the documents and papers were in the latter's custody, so long as he was there. In the letter, Ex. B, dated 21-8-1939 the plaintiff directed the manager to remove the documents from the almirah to his personal care under his roof. From the letters exchanged between the lawyers of the plaintiff and the defendant in 1945 It appears that the defendant charged the plaintiff with having withheld the documents and papers relating to the debutter property (vide Ex. 13. (b)), while the plaintiff charged the defendant with having mismanaged the debutter properties as the karta of the family, in a letter dated 25-7-1945 (Ex. 13d) the defendant's lawyer gave notice to the plaintiff's lawyer that since the plaintiff had not cared to co-operate with the defendant in the

management of the debutter estate the latter would be compelled to take up the management in the interest of the deity. The plaintiff's lawyer thereupon insisted that the plaintiff's sanction should be obtained in every matter of detail regarding such management. The plaintiff insisted upon such consultation or sanction in the matter of every detail while he chose to stay away from the ancestral house -- sometime in Calcutta and latterly at Deoghar -- and obviously such a condition could not be complied with. So the defendant had to take up the work of management in 1352 B. S., in the interest of the debutter and he has been keeping full accounts all through which have been produced in Court, as already stated.

14. In these circumstances we are not able to agree with the finding of the learned Subordinate Judge that the defendant was the managing sebaite or that he was responsible for any mismanagement of, or loss to, the debutter estate or for misappropriation of the income of the estate for which the plaintiff can hold him liable to account. The plaintiff is equally responsible for any loss caused to the estate by the officers in charge of collections and it is against the said officers that the plaintiff should have proceeded. The defendant did not commence collections until 1352 B. S., as would appear from the accounts, and the learned Judge has found that the accounts have been properly kept and have not been inflated. We hold therefore that the defendant is not liable to render any accounts. The defendant's Claim for reimbursement for the expenses incurred during 1346-1351 B. S., for the seba and puja of the deity does not arise in view of this finding and, apart from that, the defendant cannot claim any reimbursement because he, as a cosebaite, was equally responsible for the seba and puja of the deity and for the collection of the income of the estate through the manager or the collecting officers during this period. It has not been proved that the plaintiff prevented him from making such collection in any way. The two sebaits being equally responsible for the proper management of the debutter properties, they cannot hold each other liable.

15. So far as the framing of a scheme for the management of the debutter is concerned we agree with the finding of the learned Subordinate Judge that it is necessary to frame a scheme in the circumstances of this case, as the two sebaits

cannot pull on together and one sebaity has left the ancestral house. That house is part of the debutter and there is a provision in the deed of settlement that whoever will be the sebaity of the debutter property at any particular time will reside with his dependants in the house. A question was raised that the plaintiff having left the house had ceased to be a sebaity and could not, therefore, sue for the framing of a scheme. But the effect of the above provision in the deed of settlement is not that the sebaity who will not reside in the ancestral house will be incapable of acting as sebaity and will lose his right to act as such. As we read the provision, it is only an enabling provision entitling the sebaity to reside in the house in which the deity has been installed and it is also a provision intended for the convenience of the sebaity. If the intention of the settlor had been that a sebaity who will refuse to live in the house will lose his right to act as sebaity, it would have been clearly stated in the deed. The plaintiff's allegation is that it was the defendant who by his machinations and conduct made his stay in the house impossible, and he even went so far as to say that if he had not left the house, either of them would have been led to commit murder. There is no evidence in support of these wild allegations excepting that there were occasional quarrels and exchange of angry words between the brothers and the letters written by the plaintiff show that he is a man of easily excitable nature and is nursing grievances against his brother for various reasons. There have been many litigations between the brothers regarding other properties and joint businesses and these have naturally exacerbated the none too happy relations between them. It is not, however, necessary for us to evaluate the quantum of responsibility as between the two brothers leading to one of them leaving the house.

16. Reference has been made to the case of --'Bhuban Mohan v. Narendra : AIR1932 Cal27 , in which it was held that a sebaity being a mere manager of the endowment ceases to be a sebaity when he ceases to manage the debutter property and carry on the worship of the deity. It has been observed by Dr. Mukherjea in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust) that this proposition has been too broadly stated and that the fact that a sebaity does not perform his duties properly may be a ground for removing him from his office but, by itself, would not be sufficient to terminate his office, except that it may be treated as evidence of relinquishment. In the above case the

facts found were that out of four sebaitis one sebait had sold her interest as sebait to another person and another had removed to her paternal house after selling away all her husband's properties and even Ms house in the village in which the deity was located. In the case before us the plaintiff never ceased to interest himself in the management of the debutter properties. When he removed from the house the properties were being managed by a joint manager on behalf of both the sebaitis and collections were being made in the names of both. As the letters show, he was giving directions from time to time to the manager. There is no question of relinquishment of his right as sebait in this case and the mere fact that he is not living in the house and taking part in the seba and puja will not disentitle him to sue for the framing of a scheme for the better management of the endowment.

17. Finally objection has been taken to an observation of the learned Subordinate Judge that the scheme may provide for the division of the worship of the deity into pales, because that is prohibited by the deed of settlement. The settler directed that the sebaitis would not be competent to alienate the properties in any manner or partition them & that they should not remove the deity from the house except when going on pilgrimage or divide the seba of the deity into pales. The learned Subordinate Judge has observed that in framing a scheme, the Court has jurisdiction to override the wishes of the founder, if it finds that in the interest of the endowment itself such wishes cannot be followed. He has not, however, given any direction on the point but has mentioned the division into palas as one of the alternative arrangements among others, namely, division of functions between the sebaitis, appointment of a paid manager or constitution of a committee of management, that may be provided in the scheme. He has invited suggestions from the parties on these points and also directed the commissioner who will take accounts to make suggestions. Since we have held that the defendant is not liable to render accounts no commissioner to take accounts will be appointed and so the Court will have to settle a scheme in consultation with parties'.

18. The question whether in framing a scheme regarding a private endowment the Court can divide the functions and duties of the sebaitis against the wishes of the founder is not free from difficulty and no direct authority on the point has been

cited before us. In the case of : AIR1937 Cal338 , already cited, the deed of settlement provided for Joint sebais and joint management of the debutter properties and in construing the deed it was observed that 'for purposes of convenience there may be something like the division of the turn of worship', but no direction was given to that effect, as it was not necessary to express any opinion at that stage. This observation was, therefore, in the nature of an obiter and it does not appear from the report that the division into palas or turns of worship had been forbidden by the founders of the endowment. It is true that though the law requires that the sebais as trustees should act jointly, some sort of division among the sebais inter se may be sanctioned by custom or allowed on grounds of convenience, but where such division is expressly forbidden by the founder and the sebais themselves cannot agree to any kind of division, we do not think that it is open to the Court to impose such division on grounds of convenience by way of framing a scheme. The following observations of Dr. B.K. Mukherjea who delivered the judgment in the case of : AIR1937 Cal338 , in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust (at p. 242) may be referred to in this connection:

'It is now settled by the decision of the Judicial Committee in -- 'Rarnanathan v. Murugappa', 33 Ind App 139 (PC) (E), that when the management can without detriment to the trust be held by turns, it is open to the sebais to agree to do so in such order as they think proper. If in order to avoid confusion or any unseemly scramble, the parties interested arrange themselves for the discharge of the functions belonging to the office in turn or in some other settled order of sequence, there is no breach of trust in such an arrangement, nor any improper delegation of the duties of a trustee. The position, however, seems different if the sebais themselves cannot agree as to how their functions are to be divided and the question arises in such cases whether any or more of them can, in the absence of an agreement, come to the Court and pray for a partition of the sebaiti right.'

19. Certain old decisions of this Court were then quoted in one of which -- 'Mittakanth v. Neerunjan', 22 Suth WR 437 (P), the right of one of several joint owners of property to claim a partition was held applicable to sebais also and it was further held that in order to entitle the plaintiff to a division of the right of

worship, it was not necessary that there should be an agreement between the parties for such division. But in this case also it does not appear from the report whether such division was allowed against the wishes of the founder. The Allahabad High Court held in the case of -- Raman Lalji v. Gopal Lalji', ILR 19 All 428 (G), that where the trustees have no pecuniary interest in the subject matter of the trust, none of them can approach the Court and ask for a mere partition of their duties. In the case before us the sebaitis have no pecuniary interest in the endowment, according to the directions of the founder, except the right of residence in the house and participation in the prasada or food offering. Partition of the endowed properties is also forbidden by the founder. In our opinion, if a sebait has no right to get a partition of the endowed property or of the office, the Court cannot by way of framing a scheme direct such partition or division against the express wishes of the founder. We direct accordingly that in framing the scheme the trial Court should not divide the right of worship or management among the sebaitis, unless they can agree thereto, and that the scheme should be framed without overriding any of the wishes of the founder as expressed in the deed of settlement.

20. The result is that this appeal is allowed and the decree passed directing the defendant to render accounts for the period mentioned in the decree or any period is set aside. The suit is remanded for the framing of a scheme in the light of the directions given above. Each party will bear his own costs in this appeal.

Mookerjee, J.

21. I agree.

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