Sukumar Bose and ors. Vs. Abani Kumar Haldar and ors.

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Court : Kolkata

Decided On : May-27-1955

Reported in : AIR1956Cal308,60CWN778

Judge : Das Gupta and ;Guha, JJ.

Acts : Hindu Law; ;Code of Civil Procedure (CPC) , 1908; ;Constitution of India - Article 141

Appeal No. : A.F.A.D. No. 269 of 1950

Appellant : Sukumar Bose and ors.

Respondent : Abani Kumar Haldar and ors.

Advocate for Def. : Radhika Lal Tarafdar, Adv.

Advocate for Pet/Ap. : Jitendra Kumar Sen Gupta and ;Bijan Behari Das Gupta, Advs.

Disposition : Appeal dismissed

Judgement :

Das Gupta, J.

1. This appeal raises an important question of Hindu Law. In Konwur Doorganath Roy v. Ram Chunder Sen 4 Ind App 52 (PC) (A) their Lordships made an

observation in these words:

'Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction'.

2. The question has been raised in the present appeal whether this observation that 'in the case of a family idol, the consensus of the whole family might give the estate another direction', is binding authority for holding that an absolute debutter property of a family idol can be made secular by the members of the family agreeing to do so. The plaintiffs brought the present suit for declaration of their title & for delivery of possession of certain lands on the basis of a lease by the descendants of one Akshoy Kumar Haldar.

The defendants contend that this was absolute debutter property of the idol Abhoya Thakurani & so the descendants of Akshoy, who was one of the Shebaits, could not give any valid title to the plaintiffs by giving lease on the representation that the property was their own secular property. Another defence which was canvassed in the Courts below was that the transfer was invalid inasmuch as it offended against the terms of the document of family arrangement in regard to this property.

3. Both the Courts held that the property, though originally absolute debutter property of a private debutter of the family idol Abhoya Thakurani, was made secular by the consensus of the whole family. While the trial Court, held, however, that the restriction against transfer contained in the solenama was void, the learned Subordinate Judge held that this restriction was valid in law and as the transfer by Akshoy's heirs offended against this restriction, no title passed thereby. The learned Subordinate Judge who heard the appeal accordingly set aside the order of the learned Munsif, decreeing the suit, and dismissed the suit.

4. The main dispute between the parties before us is whether the property continued as the debuttar property of the idol Abhoya Thakurani or was secular property of the different, descendants of Gobardhan Holder, father of Akshoy Haldar at the date of the transfer. It appears that the absolute debutter character of

the property was declared by the Court in a suit brought by Akshoy in the year 1929. Shortly after this a partition suit was instituted by Akshoy Kumar Haldar against his co-sharers. That suit was decreed on compromise, in the terms of solenama, which is Ex. 1 in this case.

The very first term of the solenama provided that the property which had been made debutter by Gobardhan Haldar by his will would be partitioned as secular property. In para. 5 it was provided that certain niskar properties would remain charged on account of Deb Sheba and that the parties would not be entitled to sell, transfer, mortgage or lease any portion of this nisker property to anybody other than the parties.

The question is whether this conduct of the parties to the suit, Title Suit No. 73 of 1930, in declaring that the debuttar properties would be treated as secular and partitioned on that basis had the consequence of extinguishing the debutter character of the properties and making them secular. I have already set out the observation of the Privy Council on which this doctrine is based.

In 'Gobinda Kumar v. Debendra Kumar' 12 Cal WN 98(B), Rampini 'C. J. & Sharfuddin J. relied on this observation for holding that certain properties dedicated to a family idol had been converted into secular property by the consensus of the family. In 'Chandi Charan v. Dulal Paik' 1926 Cal. 1083 (AIR V13) (C), this Court, however, doubted the correctness of the preposition. Chatterjea J. observed:

'The proposition that in the case of a family idol, the consensus of the whole family might' give the estate another direction' cannot be said to be settled. It is based upon an observation to that effect in the case of 4 Ind App 52 (PC) (A). Butt their Lordships did not decide the question. There was in fact no question of consensus of the whole family in that case, for their Lordships observed in the next sentence; 'No question, however, of that kind arises in the present case'.

Page J. observed.

'... .it must not be taken that I should be prepared to hold that if all persons interested in the worship of a family deity are agreeable they can validly convert absolute debutter into secular property, or that such a doctrine can be sustained as being in accordance with Hindu Law. Although this is not the occasion to express a definite opinion upon this vexed and still unsettled question it appears to me, as at present advised and subject to any further argument that, hereafter may be presented when the question arises for determination, that this doctrine, which is based upon a mere obiter dictum of Sir Montague Smith in 'Konwur Doorganath Roy v. Ram Chunder Sen' (A), is incompatible with the spirit that moves a pious Hindu to set up a thakur for his family to worship from generation to generation and also with an absolute dedication of property to the deity'.

5. In 'Surendrakrishna Ray v. Ishwar Bhubaneswari' : AIR1933 Cal295 Rankin C. J. observed:

'I am not prepared to hold on the strength of the well-known passage in the case of 'Konwur Doorganath Roy v. Ram Chunder Sen' (A), that there is in Hindu law any warrant for the proposition that at any particular time by consent of all the parties then interested in the endowment, a dedication can be set aside. The passage, so much relied upon, does not appear to me to be intended as a considered opinion to that effect, & before importing any such doctrine into Hindu law there is much to be considered'.

6. In the present case, it has become necessary for us to consider whether the Courts below were right in holding on the authority of the doctrine embodied in Sir Montague Smith's observation that the members of a family by an agreement between themselves may make debutter property secular.

7. Dedication of property to an idol may take place at the time of installation of the idol or may precede it or may take place after the installation. If there is an absolute dedication, the property becomes the property of the idol and ceases to be the property of its former ownen. The doctrine that the consensus of a family can give another direction to the property, involves one or both of two propositions.

The first is that the members of the family may put an end to the existence of the idol and once the idol has ceased to exist, the property reverts to the donor who can then use it in any way he likes. It is impossible, however, to agree to the view that the members of the family may put an end to the installed idol. The particular image may be destroyed; but the deity, whose visible form the image is, continues for ever.

Quite apart from the view that deity represents the eternal Being the Parabrahma, we have to remember the Hindu belief that every God and Goddess of the Hindu pantheon is (immoral). The name idol, in whose favour the property is dedicated, can, therefore, never cease to exist. If the image is mutilated or defiled or destroyed or lost, a fresh image has to be installed and consecrated. As Mukherjea, J. in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Endowments states:

'The destruction of an image does not cause an extinction of the religious trust that is created in its favour. It is enough if an image is established substantially representing the old or is treated as such'.

8. It seems to me clear on these considerations that once an idol has been installed, member of a family cannot put an end to its existence.

9. The other proposition is that even though the idol continues to exist, it can be divested of its property of which it is the absolute owner by the members of the family for whom the idol was installed. The only reasoning on which this proposition can be supported is that if the members of the family for whose benefit the idol was installed do not desire any more that sheba of the idol should be carried on with the income of the property, they should be allowed to proceed as they like.

It is impossible, however, to find any legal basis for such a view. Owners of property in general can transfer it by gift or otherwise or may lose their title by adverse possession; but otherwise they continue to remain owners. There cannot be a different rule for a Hindu idol as an owner of property. It is difficult therefore to find any legal principle that will justify the view that members of a family

worshipping an idol can take away the property from the idol.

10. In considering how far the observation of Sir Montague Smith should be considered as settling the law on the subject, so far as the Courts in India are concerned, it is I think permissible to point out that while every observation of a superior Court is entitled to the highest respect from the inferior Court and that the Privy Council itself has laid down that its obiter dicta are binding, it is only dicta which purport to lay down some law, even though they may be obiter, which can be considered authority and that observations which the Privy Council may make not by way of stating the law should not be clothed with such authority.

11. It is proper in this connection to consider the later decisions of the Privy Council which have laid down that where interests of the idol require to be watched, the idol should be separately represented. In 'Pramatha Nath v. Pradyumna Kumar' , a quarrel arose as regards the right of one of the shebaits to remove the family idol to another place. Their Lordships observed:

'The true view of this is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the shebait, it be thought that a family idol should change its location the will of the idol itself, expressed through his guardian must be given effect to'.

12. In view of this, their Lordships held that it would be in the interest of all concerned that the idol should appear by a disinterested next friend appointed by the Court, and accordingly remitted the case to the High Court to be dealt with in accordance with their Lordships' observation.

In 'Kanhaya Lal v. Hamid Ali' , where the dispute was about a plot of land upon which the defendants had executed a thakurdwara the question arose as to the effect of the dedication of the land to the idol installed. Their Lordships held that it was not possible to deal with the appeal in the absence of the idol Sri Thakurji Maharaj or his representative and ordered, following the precedent in the case of 1925 PC 139 (AIR V12) (E), the case to be remitted to the Chief Court for directions as to a new trial with reference to the effect of the wakf with the

appropriate parties added.

13. The principle laid down in these cases that the deity's interest should be watched by appointment, wherever necessary, of a disinterested person as representative, assumes the greatest importance when members of a family proceed to take away from the family idol property of which it is absolute owner.

I cannot see how any disinterested representative of the idol could ordinarily agree to the deity's property being taken away without proper alternative arrangements being made for the deity's worship; but certainly before the property ofthe deity is taken away, the deity must be given a chance to express its will in the matter through a proper representative who obviously must be other than the persons who had agreed to divest the deity of its property.

14. I have, therefore, come to the conclusion that the principles of the necessity of protecting the deity's interest by some disinterested person as laid down by the Privy Council in and and followed in Indian Courts thereafter in numerous leases, cannot be disregarded when the question is of the members of the family divesting the deity of its property. In view of these later authorities, the observation in 4 Ind App 52 (PC) (A), cannot be taken any longer to be good law.

15. As I have already stated what happened in the present case was that shortly after the absolute right of the idol in certain properties was declared, parties who would become entitled to the properties if they had not been the deity's properties, agreed by solenama in a suit brought by one of them to treat the properties as secular.

The deity was no party to the compromise. The necessary conclusion on the 'authority of 'Pramatha Nath Mallick's case' (E), and other cases is that the solenama is not binding on the deity. It must, therefore, be held that there is no legal basis for the view that the properties which were declared by the Court to be absolute debutter of the deity Abhoya Thakkurani became secular,

16. While this is sufficient for the decision that the suit has been rightly dismissed by the learned Court of appeal below, I think it proper to point out that even if the

doctrine that members of a family by agreement between themselves can turn debutter property into secular property was correct, the necessary consensus has not been proved in the present case. No evidence was given to show that the persons who were parties to the solenama included all the members of the family.

On the contrary, it seems reasonable to think that it was only the members who were interested in the property who joined in the solenama. The Courts below appear to have overlooked the fact that there was no evidence to show that all the members of the family were parties to the solenama. This suit was, therefore, bound to fail even if the doctrine as embodied in Sir Montague Smith's observation was correct.

17. I would, therefore, dismiss this appeal with costs.

Guha, J.

18. I agree.