Ram Rattan (Dead) by L. Rs.

Vs

Bajrang Lal and Others

Civil Appeal No. 1244(N) of 1973

(CJI Y. V. Chandrachud, D. A. Desai, R. S. Pathak JJ)

05.05.1978

JUDGMENT

DESAI, J. -

1. The unsuccessful plaintiff, appellant in this appeal by special leave, who died pending the appeal, seeks a declaration that he is entitled to a right of worship by turn (called Osra) for 10 days in a circuit of 18 months in the temple of Kalyanji Maharaj at village Diggi, Distt. Tonk, Rajasthan, under the will Ext. I, dated September 22, 1961 executed by deceased Mst. Acharaj, wife of Onkar. The suit was resisted by four amongst five defendants, the 5th defendant having not put in an appearance. Various contentions were raised but the only one surviving for present consideration is whether document Ext. I purporting to be a will of deceased Mst. Acharaj is a will or a gift, and if the latter, whether it is admissible in evidence on the ground that it was not duly stamped and registered as required by law ?

2. When the plaintiff referred to the disputed document in his evidence and proceeded to prove the same, an objection was raised on behalf of the defendants that the document was inadmissible in evidence as being not duly stamped and for want of registration. The trial Court did not decide the objection when raised but made a note : "Objected. Allowed subject to objection", and proceeded to make the document as Ext. I. When at stage of arguments, the defendants contended that the document Ext. I. is inadmissible in evidence, the learned trial Judge rejected the contention taking recourse to Section 36 of the Stamp Act. On the question of registration it was held that the document is not compulsorily registrable insofar as the subject-matter of the suit is concerned, viz., turn of worship which in the opinion of the learned trial Judge was movable property. On appeal by the defendants the judgment of the trial Judge was reversed, inter alia, holding that the document Ext. I was a gift and as it involved gift of immovable property, the document was inadmissible in evidence both on the ground that it is not duly stamped and for want of registration. The plaintiff's second appeal to the High Court did not meet with success.

3. The only question canvassed before this Court is that even if upon its true construction the document Ext. I purports to be a gift of turn of worship as a Shebait-cum-Pujari in a Hindu temple, does it purport to transfer an interest in immovable property, and therefore, the document is compulsorily registrable ? On the question whether the document was duly stamped it was said with some justification that it was not open to the court to exclude the document from being read in evidence on the ground that it was not duly stamped because in any event under Section 33 of the Stamp Act it is obligatory upon the court to impound the document and recover duty and penalty as provided in proviso (a) to Section 35.

4. Mst. Acharaj, wife of Onkar had inherited the right to worship by turn for 10 days in a circuit of 18 months in Kalyanji Maharaj Temple. It is common ground that she was entitled during her turn to officiate as Pujari and receive all the offerings made to the deity. During the period of her turn she would be holding the office of a shebait. She purported to transfer this office with its ancillary rights to plaintiff Ram Rattan under the deed Ext. I purporting to be a will. Upon its true construction it has been held to be a deed gift and that finding was not controverted, not was it possible to controvert it, in view of the recital in the deed that : "now Ram Rattan will acquire legal rights and possession of my entire property from the date the will is written, the details of the property are in Schedule 'A' and after him, his legal heirs will acquire these rights". It appears crystal clear that the document purports to pass the title to the property thereby conveyed in presenti and in the face of this recital it could never be said that the document Ext. I purports to be a will.

5. If by document Ext. I the donor conveyed property by gift to donee and the property included the right to worship by turn in a temple, is it transfer of immoveable property which could only be done by a registered instrument which must be duly stamped according to the provisions of the relevant Stamp Act.

6. When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned trial Judge to apply his mind to the objection raised and to decide the objection in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial Court admits a document in evidence, Section 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The court, and of necessity it would be trial Court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting Section 36 (see Javer Chand v. Pukhraj Surana) (AIR 1961 SC 1655). The endorsement made by the learned trial Judge that "Objected, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation Section 36 would not be attracted.

7. Mr. Desai then contended that where an instrument not duly stamped or insufficiently stamped in tentered in evidence, the court has to impound it as obligated by Section 33 and then proceed as required by Section 35, viz., to recover the deficit stamp duty along with penalty. Undoubtedly, if a person having by law authority to receive evidence and the Civil Court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor penalty till today. Therefore, stricto sensu the instrument is not admissible in evidence. Mr. Desai, however, wanted us to refer the instrument to the authority

competent to adjudicate the requisite stamp duty payable on the instrument and then recover the duty and penalty which the party who tendered the instrument in evidence is in any event bound to pay and, therefore, on this account it was said that the document should not be excluded from evidence. The duty and the penalty has to be paid when the document is tendered in evidence and an objection is raised. The difficulty in this case arises from the fact that the learned trial Judge declined to decide the objection on merits and then sought refuge under Section 36. The plaintiff was, therefore, unable to pay the deficit duty and penalty which when paid subject to all just exceptions, the document has to be admitted in evidence. In this background while holding that the document Ext. I would be inadmissible in evidence as it is not duly stamped, we would not decline to take it into consideration because the trial Court is bound to impound the document and deal with it according to law.

8. Serious controversy centered, however, round the question whether right to worship by turn is immovable property gift of which can only be made by registered instrument. Hindu law recognises gift of property to an idol. In respect of possession and management of the property which belongs to the Devasthanam or temple the responsibility would be in the manager who is described by Hindu law as Shebait. The devolution of the office of Shebait depends on the terms of the deed or will by which it is created and in the absence of a provision to the contrary, the settlor himself becomes a Shebait and the office devolves according to line of inheritence from the founder and passes to his heirs. This led to an arrangement amongst various equally entitled to inherit the office for the due execution of the functions belonging to the office, discharging duty in turn. This turn of worship is styled as 'Pala' in West Bengal and 'Osra' in Rajasthan. Shebaiti being held to be property, in Angurbala Mullick v. Debabrata Mullick (1951 SCR 1125), this Court recognised the right of the family to succeed to the religious office of Shebaitship. This hereditary office of Shebait it traceable to old Hindu texts and is a recognised concept of traditional Hindu law. It appears to be heretable and partible in the strict sense that it is enjoyed by heirs of equal degree by turn and transferable by gift subject to the limitation that it may not pass to a Non-Hindu. On principles of morality and propriety sale of the office of Shebait is not favoured.

9. The position of Shebait is not merely that of a Pujari. He is a human ministrant of the deity. By virtue of the office a Shebait is an administrator of the property attached to the temple of which he is Shebait. Both the elements of office and property, of duties and personal interest are blended together in the conception of Shebaitship and neither can be detached from the other (vide Commissioner of Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (1954 SCR 1005)).

10. The question then is whether the hereditary office of Shebait is immovable property. Much before the enactment of the Transfer of Property Act a question arose in the context of the Limitation Act then in force whether a suit for a share in the worship and the emolument incidental to the same would be a suit for recovery of immovable property or an interest in immovable property. In Krishnabhat bia Hiragange v. Kanabhat bia Mahalbhat etc (6 Bom HCR 137). After referring to various texts of Hindu law and the commentaries of English commentators thereon, a Division Bench of the Bombay High Court held as under :

> Although, therefore, the office of a priest in a temple, when it is not annexed to the ownership of any land, or held by virtue of such ownership, may not, in the ordinary sense of the term, be immovable property, but is an incorporeal hereditament of a personal nature, yet being by the custom of Hindus classed with immovable property, and so regarded in their law .....

11. The privileges and precedence attached to a hereditary office were termed in Hindu law as Nibandha, and the text of Yajnavalkya treated Nibandha, loosely translated as corody, as immovable property. Soon thereafter the question again arose in Balvantray alias Tatiaji Banaji v. Purshotam Sidheshvar, (9 Bom HCR 99) in view of a conflict in decision between Krishnabhat (supra) and Baiji Manor v. Dassi Kallianrai Hukmatrai, (6 Bom HCR 56) the matter was referred to a Full Bench of 5 Judges. The question arose in the context of the Limitation Act in a suit to recover fees payable to the incumbent of a hereditary office, viz., that of a village Joshi (astrologer). The contention was that such a hereditary office of a village Joshi is immovable property. After exhaustively referring to the texts of Yajnavalkya and the commentaries thereon, Westropp, C.J., observed that the word 'corody' is not a happy translation of term Nibandha. It was held that Hindu law has always treated hereditary office as immovable property. These two decisions were affirmed by the Judicial Committee of the Privy Council in Maharana Fattehsangji Jaswantsangji v. Dassi Kallianraiji Hakoomutraiji. (1 IA 34) The principle that emerges from these decisions is that when the question concerns the rights of Hindus it must be taken to include whatever the Hindu law classes as immovable although not so in ordinary acceptation of the word and to the application of this rule within the appropriate limits the Judicial Committee sees no objection. In Raghoo Pandey v. Kesav Parey, (ILR 10 Cal 73) the Calcutta High Court held that the right to officiate as a priest at funeral ceremonies of Hindus is in the nature of immovable property. A Full Bench of the Calcutta High Court in Manohar Mukherjee v. Bhupendra Nath Mukherjee, (AIR 1932 Cal 791) held that the office of shebait is hereditary and is regarded in Hindu law as immovable property. This Court took note of these decisions with approval in Angurbala Mullick's case (supra).

12. Mr. Desai urged that there is a distinct line of authorities which indicate that a Pala or turn of worship is movable property. In Mulla's Transfer of Property Act, 5th Edition, p.17, the auther has observed that a pala or turn of worship is movable property. In Eshan Chander Roy v. Manmohini Dassi, (ILR 4 Cal 683) it was said that it was not possible to come to the conclusion that the right to worship an idol is in the nature of an interest in immovable property. It is a bare statement with no reference to texts of Hindu law or commentaries thereon. In Jharula Das v. Jalandhar Thakur, (ILR 39 Cal 887) it was held that the office of Shebait is hereditary and that the suit which was brought after a period of 12 years was barred by limitation. This decision does not specify the nature of property termed as turn of worship in Hindu law. The Patna High Court in Jagdeo Singh v. Ram Saran Pande, (AIR 1927 Pat 7) has in terms held that a turn of worship is not an interest in immovable property and, therefore, a sale thereof does not require registration. The decision purports to follow the ratio in Eshan Chunder Roy's case (supra), which gives no reasons for the decision and also Jharula Das's case (supra), where this question appears not to have been in terms raised.

13. The definition of immovable property in Section 3 of the Transfer of Property Act is couched in negative form in that it does not include standing timber, growing crops, or grass. The statute avoids positively defining what is immovable property but merely excludes certain types of property from being treated as immovable property. Section 2(6) of the Registration Act defines immovable property to include lands, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass. Section 2(26) of the General Clauses Act defines immovable property to include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. It may be mentioned that the definition of immovable property in Registration Act lends assurance to treating Shebait's, hereditary office as immovable property because the definition includes hereditary allowances. Office of Shebait is hereditary unless provision to the contrary is made in the

deed creating the endowment. In the conception of Shebait both the elements of office and property, duties and personal interest are mixed up and blended together and one of the elements cannot be detached from the other. Old texts, one of the principal sources of Hindu law and the commentaries thereon, and over a century the courts with very few exceptions have recognised hereditary office of Shebait as immovable property, and it has all along been treated as immovable property almost uniformly. While examining the nature and character of an office as envisaged by Hindu law it would be correct to accept and designate it in the same manner as has been done by the Hindu law text writers and accepted by courts over a long period. It is, therefore, safe to conclude that the hereditary office of Shebait which would be enjoyed by the person by turn would be immovable property. The gift of such immovable property must of course by registered instrument. Exhibit I being not registered, the High Court was justified in excluding it from evidence. On this conclusion the plaintiff's suit has been rightly dismissed.

14. This appeal accordingly fails and it dismissed with costs.

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