CALCUTTA HIGH COURT

Bimal Krishna Ghose

Vs

Shebaits of Sree Sree Iswar Radha

(B.K. Mukherjea ,J.)

11.01.1937

JUDGMENT

B.K. Mukherjea, J.

1. These two appeals are by different parties against the decision in the same suit which was commenced by the plaintiff for settling a scheme in relation to a private debutter. The facts which are material for our present purpose may be briefly stated as follows; Three brothers, namely, Nabin Krishna, Raj Krishna and Gopi Krishna installed two deities to wit Radhaballav Jew and Radha Rani Jew in a Thakurbati which they erected close to their residential house. There was an Ekrarnama executed by and between the brothers on 15th April 1852 which recited inter alia that the brothers had contributed a sum of Rupees 1,500 each and certain ornaments and utensils for the Seva of the idols and that with this money certain immovable properties would be purchased, the income of which would be sufficient to meet the expenses of worship. So long as such property was not purchased, the Seva would be carried on with the interest of this money and in case it was found insufficient, the brothers would supplement the income from their own private funds. Under this Ekrarnama, the three brothers were made joint Shebaits with rights of survivorship amongst them and after the death of the last survivor the Shebaiti right, would devolve per stirpes upon the heirs of the three founders. It may be mentioned here that there were two other brothers and all the five had effected a partition amongst them sometime in the year 1846, and since then each one of the brothers had separate funds of his own. The plaintiff in the suit is one Ganendra Krishna Ghose who is a great-grand-son of Nabin Krishna and what he alleges in substance is that after the death of the original Shebaits, there was an arrangement come to by the heirs according to which a sum of Rs. 821 was to be spent yearly for the Pujah and ceremonies of the deities. Apurba Krishna, a son of Nabin Krishna became the managing Shebait with the consent of all the co-sharers and after him Bata Krishna, another son of Nabin became the manager. This Bata Krishna, is alleged to have wasted and misappropriated a good amount of debutter money in collusion with one Namik Chandra, a Gomasta of the debutter estate. He died in 1910 and since then a quarrel is going on amongst the Shebaits regarding the mode of management and performance of the Seva of the idols. Hence the plaintiff brought this suit for having a proper scheme settled by the Court as to how the debutter property should be managed and the Seva performed. Originally, there were six defendants who are all the descendants of three sons of Nabin, namely, Siva Krishna, Pran Krishna and Bata Krishna. Later on, the heirs of Gosain Das, another son of Nabin, and the descendants of Raj Krishna and Gopi

Krishna were added as parties defendants and some of them subsequently got themselves transferred to the category of plaintiffs and figure as added plaintiffs in the suit. Defendants 1 to 5 are in reality the contesting defendants and they raised certain points some of which have come up for decision in this appeal. The other defendants practically supported the plaintiffs in their written statements.

2. Defendants 1 to 5 contended inter alia that the debutter being a private debutter, no scheme could be settled by the civil Court and the deity would be a necessary party to such a proceeding. It was further alleged that with regard to properties 1, 2 and 3 of the debutter estate the management should be confined to Nabin's branch alone according to the provision of the Ekrarnama inasmuch as they were subsequent gifts made by Nabin out of his own self, acquisition. Among Nabin's descendants, it is said, that the heirs of Gosain Das and Radhanath, two of the five sons of Nabin should be excluded and amongst the heirs of the other three sons, again defendants 1 to 5 want to exclude the plaintiff and defendant 6 all of whom according to them had forfeited their Shebaiti right by reason of their conduct. The trial Court overruled all these contentions and passed a preliminary decree in favour of the plaintiffs. It was ordered that a scheme should be framed for the better management of the debutter estate and Seva of the idols and all the Shebaits on record were invited to submit a scheme for approval of the Court. Defendants 1 to 5 preferred an appeal against this decision to the lower appellate Court which modified the trial Court's decree to some extent. The contention of defendants 1 to 5 was so far allowed that with regard to properties Nos. 2 and 3 the management was left exclusively to the plaintiff and defendants 1 to 6; in other words, it was held to be confined to Nabin's descendants' excluding the heirs of Gossain Das and Radhanath. Against this decree, two second appeals have been taken to this Court, being Second Appeals Nos. 1730 of 1935 and 125 of 1936. Appeal No. 1730/35 is by defendants 1 to 5. Some of the other defendants who sided with the plaintiff are the appellants in Appeal No. 125 of 1936.

3. Mr. C.C. Biswas who appears in Second Appeal No. 1730/35 pressed three points for our consideration. He has put forward the two preliminary points raised in the Court below, namely, that a suit for a scheme in respect of a private debutter was not entertainable by a civil Court, and that in any event, no relief could be given unless the deities were made parties to the suit. In the third place, he has argued that the direction given by the Court of appeal below as regards properties Nos. 2 and 3 that they should remain in exclusive management of plaintiffs and defendants 1 to 6 should have been extended to property No. 1 as well inasmuch as the said property was also Nabin's self-acquisition and the finding to the contrary, which was arrived at by the Court of appeal below, was vitiated by an error of law. Mr. Gupta who has appeared in support of the other appeal has contested all these three points and has pressed one point in support of his appeal, namely, that the Ekrarnama does not support the conclusion of the lower appellate Court that the properties subsequently dedicated by one particular Shebait should remain under the exclusive control and management of his branch. Mr. Abinash Chandra Ghose who appears for the original plaintiff who was made a respondent in both these appeals has supported Mr. Gupta in his contention. It is better that we should take these points in their proper order. We will first of all deal with the two preliminary points raised by Mr. Biswas, and then take up the point raised by Mr. Gupta in support of his appeal and consider along with that the third point raised by Mr. Biswas as indicated above.

4. On the first point Mr. Biswas argues that as the debutter is a private one, Section 92, Civil P. C, obviously has no application. The Shebaits of a private religious endowment according to him

can have an adjudication of their rights if there is a dispute regarding the same and it is possible also to have a declaration of their rights on construction of an Arpannama or any other document. The Court, however, cannot frame any scheme as it can do in the case of a public trust. Reliance has been placed for this view upon the observation of Lord Buckmaster in *Gopal Lal v. Purna Chandra*[1]. The relevant passage which is at p. 107, runs as follows: Their Lordships see no reason to doubt that the Court executing the duty of appointing trustees would pay due regard to the claims of that branch of the family with whom the worship was established and by whom the services performed. But they regard the gift as in effect a private trust to which the provisions of Section 539, Civil P.C., 1882, would not apply, and consequently the establishment of a scheme for its administration, as provided by the decree of the High Court, is inappropriate.

5. This observation is entitled to the highest respect and it is necessary, therefore, to look into the facts of the case closely to find out what their Lordships actually meant. It is clear from the facts set out in that judgment that in this case there was no gift of the idols but the property was given to one Udoy who was made a trustee in the legal sense of the word and upon whom were cast certain duties both religious and secular in their nature. He was to perform the worship of a certain idol with the income of a particular property and the remainder of the income was given to three people whose names were given in the will. In a case like this, where a private trust was created not of a purely religious character and the ownership of the property was vested in the trustee in the legal sense of the word, the Court could not possibly frame a scheme for the administration of the trust estate. In a religious endowment, however, where the deity who is a perpetual infant is the legal owner of the property and the Shebaits occupy the position of managers or guardians, the position is different. In *Manohar Mookerjee v. Peary Mohan Mookerjee*[2], it was held by Asutosh Mookerjee, J. sitting with Panton, J. that: In respect of a Debutter in this country, the founder or his heirs may invoke the assistance of a judicial tribunal for the proper administration thereof on the allegation that the trusts are not properly performed.

6. Mookerjee, J. invoked the analogy of the rule of English law according to which in case of a charitable corporation where the founder was a private person he and his heirs became visitors in law and in case such heirs were extinct or were incompetent the visitatorial powers devolved on the crown. It is true that in England such trusts are regarded as matters of public concern and the Attorney-General who represents the Crown takes proceedings on his behalf for protection of these charities: vide Att.*Gen. v. James Brown*[3] In India, the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the Shebaits who represent the deity are entitled to seek the assistance of the Court in case of mismanagement or maladministration of the deity's estate and to have a proper scheme for management framed which would end the disputes amongst the guardians and prevent the debutter estate from being wasted or ruined. This principle was reiterated in Rabindra Nath v. Chandi Charan . The Privy Council itself directed the framing of a scheme, in case of a private debutter in Pramatha Nath v. Pradhyumna Kumar Mullick and the case was remanded to the trial Court expressly for that purpose. The same directions were given by this Court in the case in Prasad Das Pal v. Jagannath Pal which was also a case of private debutter and we are unable to uphold the extreme contention raised by Mr. Biswas that a civil Court is incompetent to entertain a suit the object of which is to have a scheme established for the administration of a private debutter.

7. Mr. Biswas's second argument which he put forward in the alternative is that even if such a suit was cognizable by a Court of law, the deity is a necessary party to such a proceeding and it

should be represented by a disinterested person as was done in Pramatha Nath v. Pradhyumna Kumar Mullick referred to above. It is perfectly true that in a matter in which the deity is vitally interested the deity should be made a party and if the Shebaits have got any interest adverse to that of the deity, it is necessary that the idol should be represented by a perfectly disinterested person as was indicated by their Lordships of the Judicial Committee in the case mentioned above. Necessity, however, has got to be judged on the facts of each particular case and the controversies to which it gives rise. In Pramatha Nath v. Pradhyumna Kumar Mullick , the appellant claimed the right to remove the idol during his term of worship and their Lordships held the will of the idol as regards location must be respected and the suit was remitted in order that the idol might appear by a disinterested person to be appointed by the Court. In Kanhaya Lal v. Hamid Ali there was a suit for possession of a property upon which a Thakurdalan was raised by the defendants and an idol called Sri Thakurji Maharaj was installed. The Privy Council held that they could not deal with the appeal in the absence of the idol whose interest arose under the Wakf and the case was sent back in order that the question might be decided in the presence of appropriate parties. In the present case it is admitted that none else except the parties to the suit are interested in the deity and it is not suggested that the deity's interest would in any way be affected by adjustment of the rights of management among the Shebaits inter se. Up to now, the preliminary decree had dealt only with one substantial question, namely as to whether upon the construction of the Ekrarnama, properties added to the debutter by a particular Shebait should remain under the exclusive management and control of his branch only. For this purpose, the presence of the deity is not necessary. The facts are somewhat similar to those in Upendra Nath v. Baikunatha Nath , where it was held by the learned Judges that the deity was not a necessary party to such a suit. At any further stage of the proceedings where the scheme would have to be finally approved of by the Court it might feel the necessity of having the deity before it. In such circumstances it would be open to the trial Court to direct that the deity should appear by a proper and disinterested person. We do not see, however, that up to this time any necessity for this has arisen. It will be relevant to point out that the plea of non-joinder of the deity as a party was not taken in the written statement and there was no such issue expressly framed upon it. We overrule therefore this second contention of Mr. Biswas.

8. The third point raised by Mr. Biswas should be considered along with the question raised by Mr. Gupta in support of his appeal. The lower appellate Court has held that according to the Ekrarnama, in case of a dedication of any property by any of the Shebaits, the management is to be confined entirely to his descendants. We will have to see whether this decision is correct and this conclusion can be arrived at upon a proper construction of the Ekrarnama. The Ekrarnama, as we have indicated above, recites first of all the dedication of certain ornaments and utensils and a sum of Rs. 4,500 by the three brothers in equal shares. It is stated next that with this money landed properties would be purchased with the income of which the expenses of the seva and worship of the deities might be defrayed; and so long as the landed properties were not purchased, the interest in this money should be utilised for seva and worship and when that fell insufficient, the deficiency could be made up by the shebaits themselves in proportion to their resources. Then comes the passage which literally translated would stand as follows: Whoever amongst us will purchase suitable lands with the money already given or in excess of it for carrying on the seva, with the income or profits of that thing his share of the seva should be carried on.

9. After that the Ekrarnama provides that the three brothers would remain shebaits with rights of

survivorship and after the death of the last survivor, the shebaiti would devolve on the heirs of all the three brothers who should step into the shoes of the respective ancestors and exercise the powers of a malik and mukhtar in the matter of exercising control and carrying on the worship of the deities. There is one other passage which has to be mentioned and which says that in case a surplus is left after meeting the expenses of the seva, that will be kept as a deposit in the khata of Iswar Jiu and with the consent of all co-sharers it would be spent for repairs of the temple or for the decoration or ornaments of the deities, etc. The document read as a whole does not, in our opinion, support the conclusion which is arrived at by the lower appellate Court. The word 'Ansha' cannot suggest a division of the shebaiti right as found by the lower appellate Court. The deed expressly contemplates that the three brothers would remain joint Shebaits during their lives with rights of survivorship among them.

10. We are unable to say that the document contemplates any division of the shebaiti, even after the death of the last surviving brother. All that is contemplated is that the shebaiti right should after the death of the last Shebait, vest in the heirs of all the co-sharers whose shares or interests in the right would be the same as in other properties of their ancestor and they will get it per stirpes and not per capita. If there is any doubt on this point, it is removed by the last clause mentioned above which definitely indicates that the property or the fund of the deities is an integral thing with regard to which no separation on the basis of gifts made by individual Shebaits is recognized and whatever is to be done is to be done with the concurrence of all the co-sharers. Of course, for purposes of convenience, there may be something like the division of the turn of worship, but with regard to that it is not necessary to express any opinion at the present stage. It is enough for our purposes that the ekrarnama does not justify the decision of the lower appellate Court that any property given by a particular shebait should remain for ever under the exclusive control and management of his heirs. In the above view of the case, it is not necessary for us to go into the other questions raised by Mr. Biswas as to whether property No. 1 was Nabin's self-acquisition or not. Even if it was and was dedicated by Nabin to the deities it would be a debutter property to all intents and purposes and all the shebaits would have a right of control and management of the same. The result therefore is that Second Appeal No. 1730 of 1935 is dismissed and Second Appeal No. 125 of 1936 is allowed in part. The decree of the lower appellate Court is set aside and that of the trial Court restored. The appellants in Appeal No. 125 of 1936 will be entitled to their costs against defendants 1 to 5 respondents.

11. We make no order as to costs in Appeal No. 1730 of 1935.

M.C. Ghose, J.

12. I agree.

Cases Referred.

1AIR 1922 P C 253
2AIR 1920 Cal 210
3(1816) 1 Swans 265 at p. 291