CALCUTTA HIGH COURT

Sri Mahadeo Jew

Vs.

Balkrishna Vyas

O.O.C.J. No. 4003 of 1950

(P.B. Mukharji, J.)

04.09.1951

JUDGMENT

P.B. Mukharji, J.

1. This is a suit for setting aside a consent decree in Suit No. 4136 of 1948, for a declaration that the second plaintiff Ratan Bala was and is still a trustee of the estate of Ranubala dassi, and if necessary for a decree for administration of the trust estate and for a scheme. The plaintiffs are the Deity Sri Sri Mahadev Jew and Ratan Bala dassi. Originally there were three defendants, defendant 1 was Dr. Benode Bahari Sen who was appointed the Managing Trustee under the said consent decree but who has since retired during the pendency of this suit. After the necessary amendment there are now two defendants, the first one being Bal Krishna Vyas and defendant 2 is Pran Ballav Saha. The amendment, was made under order of Court dated 15-3-1951.

2. The facts of the case are briefly these. One Ranubala dassi a woman of the town died on 22-6-1946 after leaving a Will of the same date in which she appointed the two present defendants as trustees of the trust created by the said Will. Probate was granted of the Will on 15-8-1946 to both these defendants. On 21-12-1948 the defendant Vyas instituted a suit being. Suit No. 4156 of 1948 against defendant 2 Pran Ballav Saha alleging maladministration and misappropriation of the trust estate. The suit came up for hearing on 13-7-1949 before my learned brother S.R. Das Gupta, J., and the matter was ultimately settled on certain terms of settlement and a consent decree was made on or about 7-9-1949. That consent decree is now challenged before me in this suit.

3. On behalf of the defendants the following Issues were raised and they were accepted on behalf of the plaintiffs. The Issues are :

> (1) Is the consent decree dated 7-9-1949 invalid on the ground of non-representation of the Deity? (2) Is the consent decree invalid on the ground that it is at variance with the terms of the Will? (3) Is the consent decree invalid on the ground that there was no free and voluntary consent by Ratan Bala? (4) To what scheme of administration, if any, are

the plaintiffs entitled?

The third Issue is the only issue of fact and the 1st and second Issues are Issues of law. The parties have naturally therefore led evidence on this Issue 3 of fact as to whether there was free and voluntary consent by the plaintiff Ratan Bala to the consent decree which is impeached before me. I, therefore propose to take up this third Issue first as it is a question of fact.

4-10. Issue No. 8. - [His Lordship discussed the evidence and held as follows] :- On this evidence I am unable to hold that the consent decree of 7-9-1949 is invalid on the ground that there was no free and voluntary consent by Ratan Bala. I am of the opinion and I hold that Ratan Bala did give her free and voluntary consent to such terms of settlement.

11. Issue No. 1 :- These terms of settlement and the consent decree are said to be invalid on the ground of non-representation of the deity plaintiff Sri Sri Mahadev Jew. The consideration of this Issue involves an examination and analysis of the terms of settlement and of the provisions of the Will of Renubala. In Suit No. 4156 of 1945 the plaintiff deity was not a party and it is therefore said that the terms of settlement and the consent decree made therein are not binding on the plaintiff deity.

12. By Clause 6 of the Will of Renubala it is provided as follows :

> "That I have consecrated a deity known as Mahadev Jew at premises No. 3, Gouri Shankar Lane, Calcutta. I direct that the trustees herein mentioned shall carry on the sheva of the said deity and may spend a sum not exceeding Rs. 60 per month for the sheva of the said deity out of the income of the said premises No. 3, Gouri Shankar Lane which is charged for the said purpose."

13. The Will thereafter proceeds in Clause 8 to appoint Bal Krishna Vyas, Pran Ballav Saha and Ratanbala dassi as trustees.

14. Now by the terms of settlement and the consent decree Ratanbala gave up her trusteeship (Clause 5). A third trustee was appointed by the Court who under the terms of settlement is said to be the Managing Trustee (Cl.). This third trustee was Dr. Benode Behari Sen who was one of the defendants in this suit originally but who has since retired from the office of the trusteeship. Thereafter the terms of settlement goes on to provide in Clause 8 that Ratan Bala will continue to carry on the Sheva under the Will of Renu Bala dassi deceased.

15. It will therefore be apparent now on a comparison between the provision of the Will and the terms of settlement and the consent decree that while the sheva of the plaintiff deity Mahadeb Jew was directed to be carried on by the trustees mentioned under the Will, the terms of settlement provide that such sheva will be carried on by only one person Ratanbala who again lost her character as a trustee of the Will by relinquishment under the consent decree. The question therefore is can the provision regarding the sheva and the terms of settlement bind the plaintiff deity who was not a party to those terms of settlement. It certainly concerns the interest of the deity in the sense that it is the sheva of the deity for which provision has been made. It appears to me that the deity has a right to be heard on this question of sheva which directly affects it, if such provision is going to be changed as has been done by the terms of settlement and the consent decree. The plaintiff deity has a right under the Will of Renubala and in so far as

the terms of settlement and consent decree alter the character of that right then it can only be done in my judgment after giving the deity an opportunity to be heard on the point.

16. The Judicial Committee of the Privy Council in *Pramatha Nath v. Pradyumna Kumar*[1], is an authority for the proposition that the idol cannot be regarded as a mere chattel and that the will of the idol as to its location must be respected. As the idol in that case was not represented by a disinterested next friend the suit was remanded by the Judicial Committee for such representation of the deity in order to find out the will of the deity. It is quite true that no question of location arises here. But that to my mind is immaterial. The question is in this case whether the provision that the idol as a beneficiary under Clause 6 of the Will of Renubala directing the sheba to be performed by the trustees mentioned in the will can be altered in any manner without the deity being a party in the suit and without the deity being given any opportunity to be heard on the question of sheva. If the location of the deity is a matter in which the idol's Will has to be found out by a proper representation of the idol it is in my opinion all the more necessary in the case of the sheva of the deity. I consider sheva to be a far more important concern than the location of the idol in which the idol should have a voice.

17. In suit No. 4256 of 1948 the deity was not a party. It was a suit between the two executors under the Will each making allegation against the other. In such a suit where the executor trustees have fallen out neither of them in my view was competent to represent the deity. The ordinary rule of law where there are more than one shebait or trustee of the deity is that all of them must join to represent the deity. Undoubtedly there are exceptions to the rule. But suit No. 4256 of 1948 did not come under any such exceptions. Besides it should be remembered that the scope of the suit No. 4256 of 1948 was extended by addition of Renubala as a party and if alteration was to be made in the sheva of the deity which differed from the provisions made in the Will it was in ordinary fairness that the deity should also have been joined as a party with a view to find out what the deity has to say on the question of scheme that was formulated in the terms of settlement specially in so far as it affected the sheva of the deity. The view that I take does not conflict with the view taken in *Tarit Bhusan v. Sri Iswar Sridhar Salagram Sila Thakur*[2],

18. Mr. I.P. Mukherjee learned counsel for defendant Vyas has argued that the deity's interests have not suffered and that in fact there is no evidence that the deity's interest is not looked after. In support of that argument he has referred me to the evidence of the priest Jhanendra Nath Chakravarti given in this case where he says that the sheva of the deity is being carried on and a sum of Rs. 60 mentioned in the Will is being spent. I do not consider that such argument meets the essential point in this case. The essential point is not whether in fact the deity's interest has up till now been affected in the matter of the sheva in the sense that no proper sheva is performed. In my opinion the essential point is that the legal right, whatever may be the present fact, of the plaintiff deity as embodied in clause 6 of the Will has been altered by the terms of settlement and the consent decree without giving an opportunity to the deity to be heard on the point. That goes in my view against all principles of natural justice and the well known principle audi alteram partem.

[1]52 Ind App 245 (PC)
[2] ILR (1941) 2 Cal 477

19. A Hindu deity like the present plaintiff deity is a juristic person and has the right to sue or be sued and has the right to be heard on a matter concerning the deity.

20. It has also been contended on behalf of the defendant Vyas that the present case is not a case of absolute Debuttar but is the case where the sum of Rs. 60 per month for the sheva of the plaintiff deity out of the income of premises No. 3, Gouri Sankar Lane, Calcutta, is charged on the said premises. These considerations whether the property is absolute Debuttar or partial Debuttar or is merely a Trust for the deity are in my opinion irrelevant for the purpose of this Issue.What is important is the fact that under clause 6 of the Will of Renubala dassi the plaintiff deity is a beneficiary and it contains a clear direction upon the trustees mentioned in the Will that they shall carry on the sheva of the said Deity and may spend a sum not exceeding Rs. 60 per month for the sheva of the said deity out of the income of the said premises which is charged for such purpose. That makes the deity in my opinion a sufficiently interested party. Indeed the Judicial Committee in *Pramatha Nath v. Pradyumna Kumar*[3], also observed that the female members of the family in that case who were only entitled to participate in the worship although excluded from the managership of the idols were also necessary parties to the suit by reason of the fact that they were entitled to worship and as such the Privy Council directed such female members also to be joined as parties.

21. For these reasons I am of the opinion that the terms of settlement are not binding on the plaintiff deity specially the provisions relating to the deity's sheva and particularly Clause 8 of such terms of settlement. I therefore hold that the consent decree embodying the terms of settlement and dated 7th September 1949 is invalid on the ground of the non-representation of the deity in so far as it affects the plaintiff deity.

22. Issue No. 2 : In this issue the question is raised that the consent decree is invalid on the ground that it is at variance with the terms of the Will.

23. Here again a comparison and contrast are essential between the terms of settlement and the Will in order to appreciate and determine this Issue.

24. By Clause 1 of the Will defendant Bal Krishna Vyas and Pran Ballav Saha were appointed executors of the Will. The Will then proceeds to grant Panamoyee dassi and Ratan Bala dassi the right to reside in some room or rooms at 3, Gouri Sankar Lane, Calcutta, and to be maintained out of the income of such premises during the terms of their natural lives provided that if any of them chooses to reside elsewhere then each of them will be entitled to have a sum of Rs. 50 for their respective residence and maintenance during their natural lives. The next grant in the Will is for spending a sum of exceeding Rs. 50 for giving alms to the poor out of the income of the said premises. Thereafter the Will proceeds to direct the executors to spend a sum of Rs. 3,000 for funeral expenses and Adya Sradh and for offering Pinda at Gaya for the testatrix. The next direction is upon the executors to pay out of the estate expenses for the medical treatment for Pannamoyee dassi and also to spend a sum upto Rs. 2000 for her funeral expenses, Adya Sradh and Pinda. Then the Will makes a provision for the deity in Clause 6 which I have already noted above. Thereafter the Will proceeds to provide that after meeting all debts and expenses of the estate the estate will be held in trust first for

[3]52 Ind App 245 (PC)

payment of the outgoing of the estate and for expenses for repairs thereof and secondly the rest of income to be spent for treating sick persons with free medical advice and giving them free medicine and diet and for such purpose the trustees may employ medical practitioner,

compounder and servants and for setting apart a room or rooms in any of the properties for attending patients, storing medicine and dispensing the same. Lastly the Will appoints defendants Bal Krishna Vyas and Pran Ballav Saha and plaintiff Ratan Bala dassi as trustees. Except Ratan Bala each of the said trustees is given the power to nominate a trustee in his place and such appointee may appoint or nominate trustee in his place. The Will also provides that if any of such trustees dies or retires without appointing or nominating a trustee the other remaining trustee shall be entitled to appoint a new trustee in the place of the deceased or retiring trustee. The will gives power to any of the trustees to retire. Each of the trustees then are given a sum of Rs. 15 per month by way of remuneration out of the trust estate so long as he or she will act as such. That in brief is a summary survey of the provisions in the Will.

25. Now by the terms of settlement and the consent decree Ratan Bala dassi gave up her trusteeship under Clause 5 thereof. Defendants Pran Ballav Saha and Bal Krishna Vyas were appointed trustees but a third trustee was to be appointed by the Court who was to be a Doctor and the Managing Trustee. It is further provided by these terms of settlement (Clause 1) that defendant Bal Krishna Vyas and Pran Ballav Saha are to act according to the direction of the Managing Trustee.

26. The argument on behalf of the plaintiffs is that the whole basis of the scheme of the Will was supplanted and replaced by the terms of settlement in so far as a Managing Trustee was introduced and the other two trustees were required to act according to the directions of the Managing Trustee.

27. Mr. I.P. Mookherjee contended that these facts do not affect the rights in any way of any of the beneficiaries. Now that contention however is not correct. It certainly affects as I have already indicated the rights of the sheva of the plaintiff deity under Clause 6 of the Will when compared with Clause 8 of the terms of settlement. I may also point out that plaintiff Ratan Bala on relinquishing her right lost the sum of Rs. 15 per month which she otherwise would have got if she acted as a trustee under Clause 8 of the Will. On that ground alone if plaintiff Ratan Bala had been an illiterate and Pardanashin lady and on the records which do not show that this particular deprivation of Rs. 15 per month was clearly explained to her, the terms of settlement could have been impeached. But of course that question does not arise here any further not only because Ratan Bala gave her free and voluntary consent but also because I cannot hold on the facts that Ratan Bala is a Pardanashin lady and because I feel that she had competent legal advice at all stages.

28. But the more serious question here is whether the two trustees namely defendants Vyas and Saha can under law agree to act according to the directions of another trustee who is described as the Managing Trustee under Clause 1 of the terms of settlement. No trustee can delegate his powers and duties to another trustee. An agreement to do so will be illegal and void To require therefore as required by Clause 1 of the terms of settlement that two trustees shall act according to the directions of the Managing Trustee is to say that the other two trustees will he merely agents of the Managing Trustee to carry out the orders and directions of the Managing Trustee. That in my judgment violates the fundamental principles of the Law of Trustees. A trustee cannot by agreement or otherwise surrender his own conscience and agree to act according to dictates of any other trustee or any other person. If he does so he will not be discharging his duties as a trustee.

29. Section 47, Indian Trustees Act lays down that a trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger unless the instrument of trust so provides or the delegation is in the regular course of business or delegation is necessary or the beneficiary being competent to contract consents to delegation. Now here the will which is the instrument of trust does not permit such delegation nor can it be said to be in the regular course of business. Nothing is also shown that such delegation is necessary. Necessity of delegation cannot be presumed except on certain facts which must appear on the record. The usual case where delegation is necessary is where the trustee is a foreign trustee or remains abroad, or some such similar circumstances. So far as beneficiary is concerned, Ratan Bala has consented but the plaintiff deity has not consented to any such delegation. Besides I am told that Pannamoyee dassi who is another beneficiary is dead and her heirs will be entitled to enforce such benefits as are enforceable under Clause 5 of the terms of the Will namely offering of 'Pinda.' The present case, therefore, does not in my view come within any of the exceptions noted in Section 47, Indian Trusts Act.

30. Section 48, Trusts Act is in my view still more explicit on the point. That section lays down that when there are more trustees than one all must join in the execution of the trust except where the instrument of trust otherwise provides. The instrument of trust in this case is the Will and the Testatrix trusted all the trustees mentioned therein. It is, therefore, the duty of every one of them to exercise and give the benefit of their individual judgment and discretion in respect of all matters concerning the trust. The terms of settlement cannot be regarded as the instrument of trust in this case. These terms of settlement provide that the Managing Trustee must be the supreme trustee and the other two trustees are to act according to his directions. Now this certainly is at variance with the basic scheme of the Will which is the instrument of Trust and which contemplates all the trustees acting together jointly. In any event the terms of settlement cannot be binding on the plaintiff deity because such deity was not a party to these terms of settlement and the will of the deity might as well be that it will not permit the Managing Trustee to override the other two trustees.

31. I, therefore, hold that clause 1 of these Terms of Settlement to be illegal and that even if such delegation as is contemplated in Clause 1 of the terms of settlement was held to be valid as between the consenting parties namely defendants Vyas and Saha and plaintiff Ratan Bala that cannot be validly binding on the plaintiff deity.

32. It is unnecessary for me to refer to the numerous case-law on the subject of co-trustees and delegation and will content myself by referring to one authoritative and succinct pronouncement on the subject. The learned Editor of Lewin on Trusts 14th Edition at p. 196 observes :

> "In the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees they all form as it were but one collective trustee and, therefore, must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees as the acting trustee but the Court knows no such distinction; all who accept the office are in the eyes of the law acting trustees."

33. On this Issue therefore I hold that the consent decree is invalid on the ground that it is at

variance with the terms of the Will in so far as the plaintiff deity does not get the benefit of the individual judgment and discretion of the three trustees mentioned in the Will in respect of the sheva of the deity and is placed at the mercy of whoever happens to be the Managing Trustee the other two trustees merely acting at the dictates of such Managing Trustee.

34. As the clauses in the terms of settlement are to be read as a whole are not separable and as I consider that Clauses 1 and 8 of the Terms to be basic clauses, it is not possible to set aside only these two clauses but the Terms of Settlement must in my view be set aside as a whole. Not to do so, but only to partially set them aside will be to spell out a new agreement which is not the agreement of parties.

35. Issue No. 4 :- A preliminary objection on this issue has been raised by Mr. Mookherjee and he has argued that no scheme can be framed by this Court in respect of a private Debuttar or rather quasi Debuttar such as the present one. For this purpose reliance has been placed on the authority of *Gopal Lal v. Purna Chandra*[4], Lord Buckmaster delivering judgment in that case observes at p. 107 :

> "Their Lordships see no reason to doubt that the Court executing the duty of appointing trustees would pay due regard to the claim 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 provisions of Section 539, Civil Procedure Code, 1882 did not apply and consequently the establishment for scheme of its administration as provided by the decree of the High Court is not appropriate."

This Privy Council case has no application to this suit. Their Lordships of the Judicial Committee in that case were concerned with the old Section 539, Civil Procedure Code , whose present counterpart is Section 92, Civil Procedure Code. This provision however relates to public charities. In fact it refers to express or constructive trust created for public purposes of a charitable or religious nature. I am not concerned here with public charities or trusts for public purposes of a charitable or religious nature. The suit before me is not a suit under Section 92, Civil Procedure Code, at all. This is a suit for administration of trust, for a scheme and other reliefs. That decision of the Privy Council is in my judgment no authority for the proposition that this Court in a suit for administration cannot frame a scheme in respect of a private trust. This contention of Mr. Mookherjee cannot be sustained and in my judgment is unsound. In that very decision of *Pramatha Nath v. Pradyumna Kumar*[5], to which reference has already been made, their Lordships of the Judicial Committee of the Privy Council directed at p. 261 :

> "A scheme should be framed for the regulation of the worship of the idols."

There also was a case of private trust.

[4]49 Ind App 100 (PC)

[5]52 Ind App 245

36. I therefore hold that it is permissible for this Court in a suit for administration of the trust relating to a private trust to frame a scheme for the proper management of the trust. To deny such power to the Court will be to hold that a trust will be allowed to fail because of a proper scheme for administering and upholding it. That is a proposition to which I am unable to assent. I am also of the opinion that a suit for a scheme and administration of a private trust is a justiciable claim

within the meaning of Section 9, Civil Procedure Code, and therefore the Court has all the relevant and necessary powers to determine a scheme for the proper administration and due management of the trust.

37. As has been already seen from an examination of the different provisions in the Will the objects mentioned therein have really four main divisions. The first division that I find is in respect of the management of the properties comprised in the estate of Renubala dassi. The second division is with regard to the payments of annuities and/or legacies under Clauses 2, 4 and 5 of the Will. The third division is with regard to the distribution of alms to the poor and treatment of sick persons with free medical advice. The fourth division is with regard to the sheva of the plaintiff deity Mahadeb Jew. It is therefore desirable in my view to frame the following scheme keeping these main objects of the Testatrix in view. To my mind the following scheme is appropriate in the context :

38. [After laying down the scheme the judgment proceeds thus :] The scheme that I have laid down above follows the broad outlines of the Will of Renubala dassi and in my view no scheme should be made which infringes or supplants the trusts and directions very clearly laid down in the Will of Renubala dassi. The scheme therefore follows such trusts and directions.

39. For reasons stated above I set aside the consent decree embodying the terms of settlement dated 7-9-1949 and direct in this judgment that a decree be made embodying the above scheme.

40. I have maintained the original trustees appointed by the Will of Renubala dassi. There were vague allegations on evidence but they in my judgment are not such on which it can be found that any particular trustee is guilty of maladministration and breach of trust. It is also noteworthy that in the original terms of settlement such allegations were withdrawn. Having held that as between defendant Vyas and Pran Ballav Saha and plaintiff Ratan Bala dassi there was free and voluntary consent, the withdrawal of such allegations must go to show that these allegations were in any event not substantial.

41. The costs including reserved costs of the respective parties appearing in this suit and all costs thrown away in the other suit No. 4156 of 1948 will come out of the estate but having regard to value of the estate I do not certify it for two counsel.

42. I would only wish to add the great assistance that I received from all counsel appearing and the very reasonable attitude they took throughout the proceedings with a view to minimize the costs and they all ultimately expressed their anxiety to have a scheme for composing litigation and this Court would expect that the original trustees under the Will in having this opportunity to serve the estate will not abuse such opportunity.

Order accordingly.