

# MADHYA PRADESH HIGH COURT

Balram Chunnilal

Vs.

Durgalal Shivnarain

First Appeal No. 28 of 1962, Decided on 13-10-1966. from decree of 6th Addl. Dist.

J. Indore

(H.R. Krishnan and M.A. Razzaque, JJ.)

30.10.1966. 13.10.1966

## JUDGMENT

### **Krishnan, J.**

1. This is an appeal by the plaintiff suing on the authority the panchas of the Hariyana Gaud Brahmin community of Indore from the judgment of dismissal delivered by the Civil Judge in a suit for the removal of the defendant, a pujari or shebait, and the framing of scheme, filed with the sanction of the Advocate General under Section 92 C.P.C. The suit was also framed on the alternative - the necessity of which will presently appear - that in the event of the defendant being found to be not a trustee or shebait but just an appointed pujari-servant for his removal on account of improper conduct and the claiming of the temple as his own property. It was dismissed on different grounds, primarily on that the particulars of the foundation of the temple were not clearly ascertainable, and further the defendant's father and brother having openly claimed to be the full owners and not the pujaris as long ago as in 1933, they had prescribed title to themselves and accordingly the suit was barred.

(After stating facts and discussing evidence in paras 2 to 23 the Judgment proceeded)

2. Considering that the panchas had even at the time of the purchase in 1914 intended and expressly stated that the idol was to be installed there for worship by Hindus in general we can have no doubt that the property vested in the idol as soon as that plan was implemented. Cases are conceivable where the intending founders of a religious endowment having proclaimed their intention do nothing towards carrying it out; but

that is not the situation here. Not only had they proclaimed it; the deed mentions :-

"The house sold is bounded thus and I (vendor) am selling it to you for the purpose of your establishing a temple for Sri Sathyanarayan Bhagavan ....."

but also was the work immediately taken up, and very soon an idol was brought, consecrated and established and immediately a pujari was appointed and arrangements made for the worship of the deity. In addition it is unanimous evidence of everybody that has come as witness in this case that all Hindus were allowed to go and worship there without any discrimination, nor is there in the terms of Ex. P/1-A anything to indicate discrimination or exclusion of any section of the Hindu community.

2. These circumstances would be sufficient to show that the panchas had divested themselves in favor of the idol Satyanarayan Bhagwan. This is clear enough but a passage in the judgment of the Indore High Court in the 1927 litigation seems to suggest that they felt that there should be something like a registered deed to create a trust. This subject has been pronounced upon repeatedly by the Privy Council and the Supreme Court and we need quote only the decision of the latter in *Dasaratharami v. D. Subba Rao*,<sup>1</sup>

"Dedication to charity need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the private secular character of the property and its complete dedication to charity."

In the earlier Supreme Court decision in *Sree Iswar Shridhar Jew v. Mst. Sushila Bala Dasi*,<sup>2</sup> it was pointed out :-

"A dedication may be either absolute or partial. The property may be given out and out to the idol, or it may be subjected to a charge in favor of the idol."

In this case the entire course of events shows fully that the panchas having acquired the property and having made all the necessary changes and installation divested themselves in favor of the idol and arranged for the worship by the pujari of that time.

3. Whether or not the appointment of Shrinarayan made him the trustee or shebait or kept him in a status not higher than that of a servant can be answered having regard to the total effect of the wording of Ex. P/1-A.

"We the Brahman Sakal Panchas of the Hariyana Gauds have made the panchayati temple at the corner of Ditwariya near the peepal -a building in five chasmas. We have kept 'dharpayaya' Shrinarayanji and Bherulalji as the pujaris. Now you do the puja in the temple generation to generation (jaya-jamta). If you go against the mukhiya you will come to grief. Whatever income is derived from the Temple you collect and then do the repairs of the temple and if there is no income you come to the panchas and they will make appropriate arrangements. We of our own accord (raji se) ask you to do the puja from generation to generation. You should not create any trouble. If not, you will prove false to the Raja-Panchas."

4. This is signed by the panchas as well as by Shrinarayan. The panchas were putting the pujaris in charge but they were retaining control to be exercised if any occasion arose. The two elements which weigh this case in favor of the theory that the appointees were pujaris, that is, servants and not trustees are firstly, that there is a threat to visit the panchas' displeasure in case the pujaris misbehaved; the second element is that in case the income was insufficient for maintenance and repairs the panchas offered on being approached by the pujaris to provide the means for the same. Actually the panchas felt that there was no occasion for interference till 1925, nor was there any short fall in the offerings that obliged the pujaris to come to the panchas for their assistance. But the two conditions were there all the same to be invoked wherever necessary. Thus between the three panchas, the idol and the pujaris the position is that the idol is the owner by the dedication, the panchas are the trustees, and the pujaris are the servants of the trustees to do the worship in the prescribed manner.

5. As already noted we are prepared to consider the effect of the alternative that this instrument made Shrinarayan or Bherulal the hereditary shebait or trustees which for our purposes would make little difference. The very wide powers given to the pujaris might create that impression; but the two elements we have noticed above are crucial. On the former view, the permission of the Advocate General would be superfluity; on the latter view it would be necessary. But the mere fact that it has been obtained would

not lead to the failure of the suit because a superfluity can be ignored. In any case the plaintiffs themselves have framed the suit on both the alternatives.

6. While at this the parties have at some length referred to the decisions of the Supreme Court especially, *Deoki Nandan v. Murlidhar*,<sup>3</sup> which describes who is the real beneficiary of such religious endowments. A distinction is made there between the ideal beneficiary, that is the idol in which the property vests in accordance with the principles of the Hindu Law and the beneficiaries in practice that is, as the case may be, the general community of the worshippers - where the endowment is a public endowment or the section for whose benefit the endowment is created - where it is a private endowment :

"Under the Hindu Law, an idol is a juristic person capable of holding property and the properties endowed for the institution vest in it. But it does not follow from this that it is to be regarded as the beneficial owner of the endowment. It is only in an ideal sense that the idol is the owner of the endowed properties and it cannot have any beneficial interest in the endowment.....The true purpose of a gift of properties of the idol is not a gift of any benefit on God, but to acquire spiritual benefit by providing opportunities and facilities for those who desire to worship. The purpose of the endowment is the maintenance of that worship for the benefit of the worshippers." Thus while we have the ideal vestee namely, the deity of the temple we have also the beneficiaries in practice - the worshippers at the temple, in the instant case the Hindu community at large. But all this has no bearing upon the real controversy here, namely, whether the temple belongs to the pujaris as their private property, and whether when the panchas are seeking to remove the present pujari they are removing a trustee or a shebait in the manner provided in Section 92, or just seeking to get rid of a troublesome servant who has exceeded his mandate and is abusing his position as a servant. The sum total of the foregoing discussion is that the appointment of Shrinarayan as the hereditary pujari, is all things considered, the appointment of a servant to conduct the puja in the manner mentioned in the appointment order, and not the appointment of a trustee.

Question No. 5 :-

7. The defendant has urged that the status of his predecessors-in-interest was concluded as *res judicata* in the litigation in 1927; one fails to see how it helps him. In

the instant suit the plaintiffs have proceeded - a first alternative - on the assumption that the defendant is a shebait or trustee and taken steps under Section 92 C.P.C. At the same time they have taken the second alternative and asked for the removal of the servant who does not on notice remove himself. The position in the twenties was not much different. The plaintiffs of that time were uncertain as to the exact status of Shrinarayan and Bhairavanand - whether they were just servants or trustees. The High Court of Indore has pronounced twice on this subject and the relevant passages of both these judgments have already been set out. On the first occasion it was apropos of the question whether the permission of the Advocate General was really necessary. The Court held it was not because Shrinarayan and Bhairavanand were not trustees and were no better than pujaris. They had come to the conclusion according to the law in Indore at that time and whatever the reasonings that conclusion is *res judicata*. The defendant started by urging that it is *res judicata*; but argues that it is *res judicata* half-way, that is to say, it is *res judicata* in so far as the High Court held that no trust had been created, and not *res judicata* in so far as it held that Shrinarayan and Bhairavanand were no better than the servants of the panchas. This is certainly a strange application of the doctrine of *res judicata*. As already noted if we consider the first judgment to be only provisional, subject to the fuller investigation by the lower court, then it is not *res judicata*, either in regard to the first half of the finding or in regard to the second. But actually the High Court has pronounced on it a second time, which is of course final, in the judgment dated 23-3-1931 (Ex. D/24). Then again the decision is that the pujaris of that time were appointed servants; however, they were not liable to be removed because the Court found on facts that only a minority of the panchas were for removal while a majority were for maintaining them. In other words they were servants of the body of the panchas and were not removable because a sufficient proportion of the masters had not asked for it. Thus if we should find that the decision of the High court in these two judgments is *res judicata* the effect is that the predecessors were hereditary pujaris appointed by the panchas. This in fact is the finding already reached by us on an independent study of the evidence. Thus the argument that the decision in the 1927 suit is *res judicata* does not add any fresh strength to the plaintiff's case. It goes completely against the defendant's case that he is the owner of the temple. The effect would be just the same if we held that the property did not vest in the idol, but remained that of the panchas; the defendant would still be the servant in the temple owned by them as panchas of the Hariyana community, and not the shebait-trustee of the idol.

Question No. 6 :- Assertion of adverse title in 1933 :

8. There is no doubt that in 1933 apropos of the application for repairs the pujaris of that time, namely, Shrinarayan and Bherulal did assert before the authorities concerned defying the panchas that they were the full owners. Certainly they were wrong in asserting that the High Court had held to that effect; but wrong as it was, it was an assertion of adverse title for what it was worth. But in concluding from this that the suit was time barred, the lower Court has ignored the various principles, which will be set out presently, and has been fallacious in its logic. If independently of this that Court was going to hold as in a sense it had done, that even from the very beginning the title somehow vested in the pujaris, then there was no question at all of adverse possession; if, on the other hand, that Court was going to take the adverse assertion seriously, it has to go on the basis that these assertors of adverse title had no title beforehand.

If so, it was essential for the Court to find before setting out to investigate the nature and the duration of the adverse title whether they could be heard to make such a claim. If they could not be heard to do so, any amount of adverse assertion whether or not it might amount to a breach of trust would not lead to adverse possession - this aspect of the matter, to be considered both on the footing that they were servants and in the alternative they were trustees, has been ignored by the trial Court so that its finding in this regard turns out to be quite unacceptable.

Question No. 7 :- Adverse title asserted by servant.

9. Any one getting possession of property whether movable or immovable in a fiduciary capacity whether as a servant or trustee is estopped as long as he continues to be in possession in that capacity from asserting his own title, or which comes to the same thing questioning the title of the person from whom he got the possession. This is a basic principle of estoppel and is ultimately derived from the fundamental principle of justice that no law court should put a premium on dishonesty or breach of trust. Our own statute law on this subject is contained in Sections 115, 116 and 117 of the Evidence Act; for our present purposes we need refer only to the latter two Sections. Case law is ample and we shall while examining the problem with reference to trustees or shebaitis refer to some of the typical rulings; as the principles are applicable to every person in a fiduciary capacity they are applicable to servants also and need not be set out here separately. The list of different statutes that leads to estoppel, mentioned in these two sections is not exhaustive, and they are given more

or less illustratively; others, not expressly set out, but in a position analogous or similar are also estopped. For example, a servant (and an appointed pujari is one) and we have found the defendant to be so, - is given the properties of his employer only to enable him to discharge his duties in accordance with the terms and conditions of the employment. In a general sense it is also a trust though the word is used in a narrower sense for persons in whom the property may be deemed to vest for some limited purposes. When a servant occupies or comes into possession of immovable property belonging to his employer he is nothing more than a licensee; on the same principles when he handles the movable properties belonging to the employer he could be called either a licensee or a bailee. Very general as those two sections are, something like a general reference if made of these two classes;

"No person who came upon any immovable property by the license of the person to possession thereof shall be permitted to deny that such person had a good title to such possession at the time when such license was given." (S. 116).

Nor shall any bailee or licensee be permitted to deny that his bailor or licensor had at the time when the bailment or license commenced authority to make such bailment or grant such license." (S. 117).

10. In the instant case the pujaris Shrinarayan and Bherulal were put in charge of the temple in 1914 as servants appointed for the purpose of worship and of maintaining the temple; the appointors were the panchas who were competent to make arrangements for the worship of the deity Satyanarayan. Those two continued in possession and after their death the present defendant became the pujari in accordance with the conditions under which the original appointment itself had been made; unless he hands over the temple to the panchas and acquires the capacity of a third party - of somebody other than a servant he cannot be heard either to question the panchas' title or to set up his own. When his predecessors were doing something like this in 1933, they were certainly breaking the terms of their appointment and were committing a breach of trust, but they were not doing something that could be rated as an assertion of adverse title for the purposes of prescribing title in themselves. Two or three years after, the present defendant - son of Shrinarayan and brother of Bherulal - also became the pujari because the appointment itself was that they could do the service as hereditary pujaris. He had not made any adverse assertion in his time till 1949. Even if he had made it and even on the assumption that he is entitled to tag on the benefit of

the assertion by his predecessors he cannot be just heard to claim adverse possession.

Question No. 8 :

11. In this connection the appellant has urged that under Section 10 of the Limitation Act the defendant cannot plead limitation because the word "trustee" there is used in a wide sense so as to include the mutawalis or shebaitis or other persons in charge of a Hindu, Muslim or Buddhist religious or charitable endowments. The respondents have questioned this basing their argument on the legislative history of the section and the fact that the explanation introduced by the amendment of 1929 did not come into force in the Indore State area till after 1950 by which time of course the twelve years period had run if the adverse assertion in 1933 could be made and, if under the Indore Limitation Act the shebait or pujari could set up a case of adverse possession. We shall deal with this briefly because any answer we give to this question will have no practical consequence.

The incompetency of a trustee broadly so called to set up limitation really comes from two principles, actually the same basic doctrine taking two different forms, one of limitation properly so called and the other of estoppel. For limitation properly so called we make the assumption that a person asserting his title can be heard if it is allowable to him to do so; if he does it for the prescribed number of years which in a case like this is twelve years, the other party can no more oust him. Another form taken by this doctrine is estoppel. If a person cannot be heard to set up his own title then, however long he does set it up he can derive no benefit. If he is estopped in this sense he cannot also plead limitation. Now Section 10 which was originally enacted to cover the cases of express trusts as understood in the English Law, puts its emphasis on the first aspect of the principle, while the principle of estoppel of persons entering on or taking possession of property in a fiduciary capacity brings out the second aspect.

12. In view of the peculiar legislative history of the section both in the British Indian provinces and in the Indore State as it used to be, the plaintiffs cannot invoke Section 10 of the Limitation Act. Originally there was only a reference to "a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns not being assigns for valuable consideration." In *Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar*,<sup>4</sup> the central question was whether this phrase was wide enough to cover the case of a head of a Hindu math and it was held –

"It is to be remembered that a "trust" in the sense in which the expression is used in English Law is unknown in the Hindu system, pure and simple. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, the agent is only the manager and custodian of the idol or the institution. In no case is the property conveyed to or vested in him; nor is he a "trustee" in the English sense of the term although in view of the obligations and duties resting on him, is answerable as a trustee in the general sense for maladministration."

Accordingly, the section was amended in 1929 by the addition of the explanation which runs thus –

"For the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be a trustee thereof."

13. Courts have held that but for this amendment Section 10 in its original wording would not apply to this class of so-called trustees. Typical decision to this effect is *Mt. Allah Rakhi v. Shah Mohammed Abdur Rahim*,<sup>5</sup> This decision was given after the amendment of 1929; but the dispute itself arose before and the amendment not being retrospective it was held –

"Mutawalli or Sajjadanashin is merely a manager of the wakf property, the ownership of which vests in God Almighty. Mutawalli or Sajjadanashin is not a trustee as understood in the English system and under Section 10 as it stood before the amendment."

Applying this principle to Hindu religious endowments we need only note that the ownership of the property vests ideally speaking in the idol or the deity and in a practical sense in the Hindu community at large or the section, as the case may be, for whose worship the institution has been founded. This has been followed by the High Courts also, typical of which judgments is the one reported in *Silambani Chidambara Vinayar Devasthanam v. Chidambaram Chettiar*,<sup>6</sup>

"The property of a temple belongs to the idol and does not vest in the

Dharmakarta although he has a wide discretion in the spending of the funds of the institution. The Dharmakarta of a temple therefore is not a trustee of its properties and therefore Section 10 as it stood before the amendment of 1920 does not apply to him."

The assertion was no doubt made in 1933 but even on that date the Limitation Act in the Indore State was the Indore Limitation Act which followed the Indian Limitation Act, but did not have an amendment to Section 10 such as had been made in 1929. That amendment came into force in this area after 1950 along with a large body of laws that had been enacted originally for British India. But by the time this happened, the twelve years period after the assertion in 1933 was already complete. Thus one has to agree with the respondents that Section 10 of the Limitation Act as we now have it has no application to the instant case.

Question 9 :-

14. All the same, the non-applicability of Section 10 to the instant case does not in any manner help the defendant in resisting the suit on the ground of his having made an adverse assertion in 1933. This is because whether he was a servant or a trustee broadly so called he was estopped from setting up his own title and questioning the title of the panchas. The general aspect of this estoppel and its application to servants properly so called has already been considered. Even if we can call the defendant and his predecessors, shebaitis or trustees, still they are estopped. In fact this estoppel applies to everybody getting the property in a fiduciary capacity. Apart from Section 116 our Courts have repeatedly ruled that a person in such a capacity cannot be permitted to make any adverse assertion of title. The case law is ample and we need only cite a few typical decisions. For example, in *Abdul Rahim Khan v. Fakir Mohammad Shah*,<sup>7</sup> which was a case about a Muslim wakf it was held :

"Where a person is a mutawalli of a public charitable trust, all his acts which are claimed as acts showing adverse possession are referable to his lawful fiduciary position as mutawalli. Adverse possession in such circumstances, is a notion almost void of content. However flagrant the breaches of duty be on the part of the mutawalli he acts on behalf of the trust and has no right to claim adverse possession. Having entered into possession as trustee he is estopped from setting an adverse title until he obtains a proper discharge from the trust. The mere fact that a person is described in the record of rights as the

owner or describes himself as the "Mutawalli of a private mosque or imambada will not make that property his own if there is evidence on record to prove that the property was wakf. Nor will the mere fact that in certain applications the person uses expressions like "my mosque" or "my imambada" make the mosque his own when to his knowledge the property was held as wakf."

The same judgment sets out the earlier case law so that it is unnecessary for us to set them out over again.

15. In the Privy Council ruling reported in *Hafiz Mohammad Fateh Nasib v. Sir Swarup Chand Hukum Chand, a Firm*,<sup>8</sup> the same principle is reiterated :

"In law a title by adverse possession can be established against wakf property, but it is clear that a trustee for a charity entering into possession of property belonging to the charity cannot, whilst remaining a trustee, change the character of his possession and assert that he is in possession as a beneficial owner."

In two comparatively recent cases the Supreme Court has brought out this principle forcibly. In AIR 1954 Supreme Court 69 it was held –

"If a shebait by acting contrary to the terms of his appointment or in breach of his duty as such shebait could claim adverse possession of the dedicated property against the idol it would be putting a premium on dishonesty and breach of duty on his part and no property which is dedicated to an idol would ever be safe. The shebait for the time being is the only person competent to safeguard the interests of the idol, his possession of the dedicated property is the possession of the idol whose shebait he is, and no dealing of his with the property dedicated to the idol could afford the basis of a claim by him for adverse possession against the idol." Again in 1956 in which case they were dealing with the Mutawalli of a wakf the Supreme Court held (*Mohammad Shah v. Fasihuddin*,):<sup>9</sup>

"A stranger to the trust can encroach on the trust estate and will in course of time acquire a title by adverse possession. But Mutawalli cannot take up such a position. If the Mutawallis of a mosque choose to build on part of the mosque property in such a way as to integrate the whole into one unit then the Court is bound to regard this as an accretion to the estate of which they are trustees, and

they will be estopped from adopting any other attitude because no trustee can be allowed to set up a title adverse to the trust or be allowed to make a benefit out of the trust for his own personal ends."

The ruling is of interest in the instant case also because here too the defendant has stated that sometime in the forties he made additions to the temple building on special offerings by some Hindu Worshippers. Assuming it, this so-called addition by the erection of one room upstairs is an inseparable addition to the temple itself and cannot be treated as the separate property of the pujari, whether he was a servant or a trustee. As already noted, the case law cited under this heading would apply with equal force to a servant also, in fact, to any body who has entered on another's property in a fiduciary capacity.

16. The result of the whole discussion is that the plaintiffs are entitled to remove the defendant and his legal representatives who are in possession of the temple. The suit is accordingly allowed and decree is passed for the removal of the present pujaris, and it is further directed that the panchas as the trustees of Satyanarayan Bhagwan should with as short gap as possible appoint new pujaris for the conduct of the worship of the idol in the recognized manner and keep the institution open to all worshippers of the Hindu community. The defendants shall pay the plaintiffs costs of the litigation in both the Courts and pleaders fees in both the Courts.

Appeal allowed.

Cases Referred.

1. AIR 1957 SC 797
2. AIR 1954 SC 69
3. AIR 1957 SC 133
4. AIR 1922 PC 123
5. AIR 1934 PC 77
6. AIR 1943 Mad 691
7. AIR 1946 Nag 401
8. AIR 1948 PC 76
9. AIR 1956 SC 713