ORISSA HIGH COURT

Artatran Alekhagadi Brahma

Vs

Sudersan Mohapatra

Second Appeal No. 203 of 1948

(Narasimham and Mohapatra, JJ.)

29.07.1953

JUDGMENT

Mohapatra, J.

1. This is a plaintiff's Second Appeal against the judgment and decree dated 4-3-48, of Sri B.K. Patra, Subordinate Judge of Puri in Title Appeal No. 10/47. Admittedly the deity (plaintiff 1) Artatran Alekhagadi Eramha is the owner of the property in dispute. Plaintiffs 2 to 19 are the villagers of the village in which the deity is situate. The suit is for a declaration that the sale deed dated 4-1-44, executed by defendant 3 in favor of defendants 1 and 2 is invalid as not being for justifying necessity of the deity. The plaintiffs have prayed for confirmation of plaintiff's possession in respect of the property in suit. The plaintiffs allege that the deity is a public one and that the villagers had founded the deity and are marfatdars. For performing Sebapuja of the deity they have brought defendant 3 from mouza Benupada. According to the plaintiffs, therefore, it is the villagers who are the marfatdars of the deity and defendant 3 is merely in the position of a servant. The present suit was brought on behalf of all the villagers represented by plaintiffs 2 to 19 under the provisions of Order 1, Rule 8, Civil Procedure Code , and the permission of the Court under the said rule was also obtained.

2. The defense plea was that it was defendant 3 who founded the deity and he is the marfatdar; plaintiffs 2 to 19 have no right to represent the deity and the suit must fall as being not maintainable and the transaction dated 4-1-44 is for justifying necessity of the deity.

3. The case had a chequered career and it will not be out of place to give a short history of the case. The learned Munsif who first tried the case held the deity to be a public one and that there was no legal necessity for executing the transaction in favor of defendants 1 and 2. The learned Munsif decreed the suit even though he did not come to a definite finding as to whether defendant 3 or the villagers were the marfatdars. His judgment was based on the position that plaintiffs 2 to 19, even though they are mere worshippers, can maintain the suit as defendant 3, by his own conduct, made himself unfit to bring the present suit.
In appeal, it was found that it was only a marfatdar who could maintain a suit of this nature to set aside an alienation; the villagers cannot effectively represent the deity and as such, the suit is to

fail if plaintiffs 2 to 19 are not marfatdars. In this view, therefore, he remanded the entire case for disposal in accordance with law and directed the Munsif to come to a clear finding as to whether plaintiffs 2 to 19 are the marfatdars of the deity. The learned Munsif, after remand, found that the villagers are the marfatdars and even went on to find as a position of law that any worshipper, interested in an endowment, is entitled to maintain a suit of this nature. The learned lower appellate Court in his judgment, which is under appeal before us, has found as a matter of fact that it is defendant 3 who is the marfatdar and plaintiffs 2 to 19 are not. On the position of law on a review of many cases he has come to the decision that the marfatdar alone can maintain the suit and, as such, he has dismissed the plaintiff's suit.

4. It is to be mentioned here that the two findings remain unchallenged and final, that the deity is a public deity and that the transaction was for no legal necessity. Mr. B.N. Das, appearing on behalf of the plaintiffs-appellants, has taken up two points : (i) that the learned lower appellate Court has gone wrong in coming to the finding that defendant 3 alone is the marfatdar; and (ii) that even the villagers as worshippers of the deity have got the right to represent the deity as defendant 3 has by his own conduct disqualified himself to bring the suit. The first point seems to be a question of fact which is concluded by the finding of the lower appellate Court. In the Current Settlement record of rights in respect of the properties standing in the name of the deity, defendant 3 has been recorded as the marfatdar. Defendant 3 is also recorded as the marfatdar of the deity in the Revisional Settlement Khatian. These two records of rights raise a strong presumption that defendant 3 is the mariatdar. The lower appellate Court was also impressed with the position that the Kabalas in respect of the lands purchased by the deity stand in the name of defendant 3 as marfatdar. This directly militates against the theory set up by the plaintiffs that defendant 3 was merely a servant. Mr. Das very strongly relies upon the position that the Bijesthali (Seat) of the deity stands recorded in the name of the deity through the villagers as marfatdars in the Current Settlement. In the Revisions Settlement Bijesthali is recorded in the name of Gangadhar Mohapatra, the Zamindar of the village. The learned lower appellate Court has considered this aspect of the case and has come to a definite finding that

> "In these circumstances the explanation offered by defendant 3 regarding the circumstances under which the Bijesthali of the deity was not recorded in his name either in the R.S. or C.S. Khatian appears to me to be satisfactory".

In the face of these findings, therefore, the first point taken up by Mr. Das fails.

5. But the second point seems to have considerable force and requires closer scrutiny. I will first of all refer to a decision of their Lordships of the Privy Council reported in - *Jagadindra Nath v. Rani Hemanta Kumara Debi*[1]*',* There the sebait, being a minor at the time when the cause of action for the suit arose, brought the suit within 3 years after his attaining majority and wanted to rely upon the provisions of Section 7, Limitation Act; the defense plea taken in the case was that the idol being the plaintiff, the suit was barred by limitation and the minority of the sebait was immaterial.
Their Lordships made a very categorical observation which is as follows :

> "But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belong to the

> sebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property.
> 'Every such right of suit is vested in the sebait, not in the idol." '

In this view of the matter, their Lordships allowed the plaintiff protection under Section 7 of the said Act as the sebait was a minor when the cause of action arose. This observation is a strong support for the contention that it is the marfatdar and marfatdar alone in whom the right to sue vests who can bring a suit on behalf of the deity; and, any other person, however interested he may be in the endowment, is not entitled to represent the deity in a suit.

6. A similar case came up before Chutney, J. in - '*Kalimantan Debi v. Agenda Nath*[2]*',* where a suit was instituted by Sri Kalimantan Debi, the public deity, by her next friend, Srimati Basant Kumari Debi, one of the worshippers of the said deity, for declaration that the deed of alienation executed by the marfatdar is not binding on idol. His Lordship relied on the observation made by their Lordships of the Privy Council to come to the conclusion that it was the sebait alone and no one else who could institute a suit on behalf of the deity. He, however, made some observations to the effect that :

> "Had the position been that Nagendra in his capacity of shebait had definitely declined to institute the suit, it might perhaps have been Basant as the next friend of the idol to have taken his place, but in the absence of any such refusal in seems to me that neither Basanta nor the idol are competent."

It is clear from the above observation of Chotzner, J. that he entertained doubt about the position when the real shebait would refuse to institute a suit.

7. But a very categorical and emphatical pronouncement has been made by Agarwala, J. in - '*Kunj Behari v. Shyam Chand*[3]*'* The reasons given by his Lordship in support of his decision seem to carry much force. This was a case of public endowment in a suit for recovery of a part of the trust property which had been alienated by the sebait. The suit was instituted not by sebait Radhagovinda but by one Jyoti Lal Goawami describing himself as the future-sebait and the son of Radhagobinda. Sebait Radhagobinda was made a party as defendant 4. His Lordship observed that in the case of religious endowment it was the sebait alone representing the deity who could bring a suit for recovery of the part of the trust property from the hands of a stranger-alienee from the sebait. The only remedy of the public is to bring a suit under Section 92, Civil Procedure Code , for the removal of the trustee who effected the alienation.
His Lordship distinguished the case of - '*Girish Chandra v. Upendra Nath*[4]*',* wherein it was held that the worshippers or the other members of the public who are interested in the endowment could maintain such a suit on the ground that the case was in respect of a private endowment. Mr. Das, appearing on behalf of the appellants, has drawn our attention to a Division Bench case of the Patna High court reported in -'*Radha Krishnaji v. Rameshwar*[5]*',* He argues that this Division Bench case, to which Agarwala, J. was also a party, was not placed before his Lordship while deciding the case reported in - 'AIR 1938 Patna 394. In the Division Bench case, the endowment was a private one and the person who brought the suit on behalf of the idol was the de facto manager of the public endowment though he was not appointed manager in accordance with the

terms of the endowment. Their Lordships decided that in such a case the de facto manager was competent to bring a suit against a lessee on the ground that the lease was illegal. In that case, their Lordships went further to make an observation relying upon the decision reported in - *'Abdur Rahim v. Mahomed Barkat Ali'*[6], that in the case of public and charitable endowment any person who was interested in the trust was entitled to maintain a suit for a declaration that alienations made by the trustee are not binding on the trust. With great respect, we would observe that the case before their Lordships of the Privy Council was entirely of a different nature and the quotation of the above observation of their Lordships was not fitting in with the case before their Lordships in the Division Bench case. The Privy Council case was not whether any other member of the public or worshippers could effectively represent the deity, or in a suit to set aside alienation by marfatdar the deity could be represented only by a marfatdar. In that case 5 members of the Mohammedan public prayed for recovery of the waki property from the alienees on the ground that the alienation was illegal. The defence contention that such a suit was barred under the provisions of Section 92, Civil Procedure Code was negatived and the suit was held maintainable. The case reported in '31 Ind App 203 (PC) (A)' was not placed before their Lordships for the obvious reason that the suit was not by any deity. In our view, the case reported in - 'AIR 1934 Patna 584' does not give us any assistance for the decision of the present case on account of two reasons (1) that the case before them was a private endowment and (2) that the suit was brought by the de facto manager on behalf of the deity. Exactly the same view was taken by a Division Bench of the Calcutta High Court in the case reported in - 'AIR 1931 Calcutta 776. There their Lordships observed that a person interested in a private trust as a member of the family for whose spiritual benefit the worship of the idol was established and who had further the prospect of holding the office of sebait could maintain a suit challenging the alienations of debettar property by a sebait. Their Lordships also referred to the decision reported in - 'AIR 1928 PC 16'. We would distinguish that case also on the same ground that it was in respect of a private endowment and the suit was brought by the members of the family for whose spiritual benefit the worship of the idol was established and further that they were also in the line of succession of the office of the sebait. To our mind, as it appears, in cases of this nature a distinction has got to be made between the public endowment and the private endowment. The private endowments are established primarily, if not solely, for the spiritual benefit and worship of the members of the family who are deeply interested in the deity. In such a case the worshippers are quite limited in number. And furthermore in the case
of private endowments the remedy provided under Section 92, Civil Procedure Code , or as a matter of that, under Section 54 of the Orissa Hindu Religious Endowments Act, for the removal of the trustees on account of maladministration of the Endowment properties, is not available. But in the case of a public endowment, the persons interested in the worship are usually too numerous. To allow such a right to any member of the public interested in the endowment to bring a 'suit on behalf of the deity' as representing the deity and thereby making the deity bound by such action will be, in our opinion, too dangerous. Moreover, another specific remedy is open to the members of the public interested in the institution to bring a suit under the provisions of Section 92, Civil Procedure Code for the removal of the trustee and appointment of a new trustee who can effectively bring a suit on behalf of the deity and bind the deity by the result of such a suit.

8. We would, in this connexion, refer to another decision of the Calcutta High Court reported in - *'Tarit Bhusan v. Sridhar Salagram*[7]*',* arising out of a case in respect of private endowment wherein the same question also cropped up for decision, that is, whether the deity can be

represented by the sebait alone or any other member of the public. This was a case brought by the deity represented by the sebait wherein the defence taken was that the suit was barred under the provisions of Order 9, Rule 9, Civil Procedure Code , on account of the reason that there was a previous suit on the same cause of action brought by the deity represented by any other member of the family interested in the endowment which was dismissed for default. Pal, J. in an elaborate judgment after review of decisions on the subject, enunciated the principle that ordinarily a sebait alone could represent the deity; but if the sebait persistently refuses to bring a suit to set aside an alienation or that by his own conduct he had made himself unfit for bringing such a suit any other person interested in the deity can bring such suit only by appointment of Court on the analogy of the provisions of next friend under Order 32, Civil Procedure Code In that case, there being no such appointment by Court, the plea under Order 9, Rule 9 was negatived on the ground that the previous suit will not bind the deity. Nasim Ali, J. who was also a member of the Bench, in a separate judgment, did not go so far as to observe that any other member of the family could represent the deity by appointment of Court, but he negatived the plea in defence under Order 9, Rule 9, on the ground that in the previous suit the deity was not represented. The view of Pal, J. was, however, confirmed in a subsequent decision of the Calcutta High Court reported in - *'Manamohan Haldar v. Dibendu Prosad[8]',* wherein their Lordships have laid down the principle that :

> "Where there is a shebait in existence, right of suit is in the shebait and no one else can bring a suit on behalf of the idol. The idol is a juridical person and has the right to sue, but it is a person in an ideal sense, and the suit has to be brought through some representative.

Where there is a proper representative, namely, the shebait, in existence, he is the only person competent to sue on behalf of the idol, unless his interest is adverse to that of the idol, or because of quarrels and conflicts between the different shebaits, or

because the wishes of the deity with respect to a particular course of action have to be separately ascertained, some other person is to be appointed by the Court to represent the idol. Where there is no shebait, it is open to any person interested in the religious foundation to bring a suit as the next friend of the idol with the permission of the Court."

This again was a case of private endowment.

9. On a review of the above decisions and for the reasons given above in our view, in the case of a public endowment, it is the sebait alone who can represent the deity to bring such a suit for recovery of possession of the properties improperly alienated by a sebait, and other members of the public have got the remedy under the provisions of Section 92, Civil Procedure Code or under Section 54, Orissa Hindu Religious Endowments Act for removal of the trustee guilty of mal-administration and for the appointment of a new trustee who alone can represent the deity; and in the case of a private endowment, we would, with great respect, accept the view expressed in the decision quoted above of - 'AIR 1949 Calcutta 199'. In this view of the matter, therefore we find that plaintiffs 2 to 19 are not entitled to represent the deity (plaintiff 1) in the present suit as they are not marfatdars of the public endowment. But this does not dispose of the case.

10. We are further to examine whether plaintiffs 2 to 19 have any other independent rights as

worshippers, apart from representing the deity, to bring such a suit in their own name and on their own behalf for challenging the illegal alienation by the sebait.
In this connexion, we will quote a passage from the judgment of Pal, J. in the case reported in - 'AIR 1942 Calcutta 99 which has dearly brought a distinction between the nature of those two classes of suits :

> "In my judgment there is a very substantial distinction between a suit by certain interested persons as such in their own name, and, at least in form, on their own behalf, and a suit by a person in the name of the idol and as its next friend. In the former case the consequences of the suit will be binding only on the persons suing or on the persons whom they represented in form (Order 1 Rule 8, Civil Procedure Code). In the latter case the idol itself will be affected as a juristic person and it is therefore a question brought with grave consequences demanding serious consideration as to who should be allowed to represent the idol in such a suit."

There is thus a clear distinction that in one set of case where the worshippers come in the capacity of merely as worshippers and not representing the deity, the decision will not be binding on the deity, but in another case where the deity is properly represented through sebait the decision is binding against the deity.

11. Let us examine the decisions on the point as to any other worshipper to bring a suit challenging such an alienation. We will first of all refer to a decision of the Full Bench of the Madras High Court reported in - '*Venkata Ramana Ayyangar v.*

Kasturiranga[9]*,* wherein two of the worshippers of the public temple purporting to sue on behalf of themselves and others under Order 1 Rule 8, Civil Procedure Code instituted a suit for declaring invalidity as against the temple of a perpetual lease granted by the committee to the archakas. The nature of the case seems to be exactly similar as in the present. Their Lordships held that such a suit was maintainable. Indeed, the only plea taken against the maintainability of the suit was that the suit was barred under the provisions of Section 92, Civil Procedure Code. The suit was brought not on behalf of the deity but by the worshippers in their capacity as well. Manifestly, therefore, no such plea of representation of the deity could be raised. The only plea of bar under Section 92, Civil Procedure Code , having been negatived it was decided that the worshippers had the right to bring suit challenging the right of alienation in respect of the public endowment. But we will with great respect, quote some observations made by Seshagiri Ayyar, J. in his referring judgment appearing at page 117 of the report :

> "The provisions which bear on the questions are : (a) Order 1 Rule 8, Civil Procedure Code (b) Section 92 of the same Code, and (c) Sections 14 and 13, of Act 20 of 1863. In my opinion, these provisions are mutually exclusive. An individual may have a right of suit irrespective of any of these provisions, when his civil right in relation to a trust is interfered with.

If a man is denied access to a temple or mosque for purposes of worship, he can resort to a Court to establish his right. If the property of the institution is wasted or alienated, prima facie the

collective body of worshippers can sue on behalf of the trust'. Order 1, Rule 8 is designed to consolidate this right of action and to confer the position of 'dominus litis' on a few who obtain the sanction of the Court to represent others equally interested." The observation made by a very eminent Judge of India is entitled to great weight. This decision has been uniformly followed in the Madras High Court in cases of this nature where some of the worshippers having obtained an order under Order 1 Rule 8 are allowed to maintain a suit for declaration, of the invalidity of the improper alienation of public debuttar property. A similar case came up before Patanjali Shastri, J. (as he then was) in - '*Subramania Ayyar v. Maya Kone*'[10], Patanjali Shastri, J. (as he then was) the eminent Judge, relying upon the aforesaid decision observed :

> "A suit by certain persons on behalf of all the villagers for a declaration that the suit property belongs to the temple in that village that certain alienations thereof by the pujaries are void and not binding on the institution is maintainable apart from the provisions of Section 92."

In agreement to the views expressed by their Lordships of the Madras High Court in the aforesaid cases, we find that the present suit brought by plaintiffs 2 to 19 in their capacity as belonging to the same village and as worshippers of the deity for declaring the alienation to be null and void is maintainable. This view of ours gains' much support by reference to the Privy Council decision reported in - 'AIR 1928 PC 16', referred to above. As we have already observed, 5 members of the Mohammedan
public were allowed to maintain a suit challenging the alienation made by the
Mutwalli of wakf property. Indeed the only plea taken before their Lordships was a
plea of bar under Section 92, Civil Procedure Code , but nevertheless no other plea of maintainability of the suit on the ground that the worshippers have no 'locus standi' to maintain such a suit was taken and we may safely take it as it was accepted by the counsel appearing for the parties and by their Lordships of the Privy Council that such a plea could not be entertained.

12. In conclusion, therefore, we find that the suit by plaintiffs 2 to 19 in representing all the villagers under Order 1 Rule 8 in their capacity as worshippers of the public deity Sri Artatran Alekhagadi Bramha to set aside the alienation made by the marfatdar (defendant 3) on 4-1-44 in favor of defendants 1 and 2 is maintainable As we have already mentioned that the finding that the transaction is not supported by justifying legal necessity of the deity remained unchallenged and final, the sale deed dated 4-1-44 executed by defendant 3 in favor of defendants 1 and 2 is therefore declared as invalid and not binding on the deity.

13. But as to the form of the decree on our finding that defendant 3 is the marfatdar and plaintiffs 2 to 19 are only worshippers of the deity, plaintiffs 2 to 19 are not entitled to possession of the property in dispute; defendant 3 is entitled to possession of the property on behalf of the deity, Vide - *'Subramania Aiyar v. Nagarathna Naicker*[11]', If defendant 3 is not in possession of the disputed property he will be entitled to recover possession by virtue of this decree if the possession be with defendants 1 and 2 or plaintiffs 2 to 19, defendant 3 on recovery of possession will possess the property on behalf of the deity and for the benefit of the deity merely as a marfatdar.

14. The appeal is, therefore, allowed and the judgment and decree of the lower appellate Court

are set aside. Plaintiffs 2 to 19 will be entitled to costs throughout as against defendants 1 and 2.

Narasimham, J

15. I agree.

Appeal allowed.

Cases Referred.

[1]31 Ind App 203 (PC) (A)
[2] AIR 1927 Cal 244
[3] AIR 1938 Pat 394
[4] AIR 1931 Cal 776
[5] AIR 1934 Pat 584
[6] AIR 1928 PC 16
[7] AIR 1942 Cal 99
[8] AIR 1949 Cal199
[9] AIR 1917 Mad 112
[10] AIR 1940 Mad 81
[11]20 Mad LJ 151 (K)