PRIVY COUNCIL.

P. C.* 1927

March 25.

RADHA BINODE MANDAL

v.

GOPAL JIU THAKUR AND OTHERS.

(AND CONNECTED APPEAL).

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Res Judicata—Religious endowment—Issue whether property debottar—Suit by family idols—Earlier suit by shebaits for scheme—Code of Civil Procedure (Act V of 1908), s. 11.

A suit between members of a Hindu family, the plaint describing both plaintiffs and defendants as shebaits of a family idol, and praying for a scheme for the management of property stated to be debottar and the performance of the worship, cannot be regarded as a suit in which the idol is plaintiff. Consequently, a finding therein that the property was not proved to be debottar raises no *res judicata* in a later suit in which the plaintiffs are the same and another family idol, represented by a shebait (one of the defendants in the earlier suit), and the prayer is for a declaration that the properties were owned by the idols as debottar property.

Decree of the High Court affirmed on a different ground.

Consolidated Appeal (No. 78 of 1925) from two decrees of the High Court (March 3, 1924) reversing two decrees of the Subordinate Judge of 24-Parganas.

The first of the two suits (No. 155 of 1919) giving rise to the consolidated appeal was brought by the abovenamed respondents, two family idols represented by a shebait, against the appellant and other members of the family for a declaration that certain

Present: LORD ATKINSON, LORD CARSON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

property was owned by the idols as debottar. The second suit (No. 214 of 1919) was brought by the above-named appellant, first defendant in the first suit, against the other members of the family, for a declaration that the property was ancestral property in which he had a two annas share, and for partition.

The appellant by his written statement in the first suit pleaded that having regard to the decision of a previous suit, No. 206 of 1915, it was *res judicata* that the properties were not debottar. That suit was one between members of the family, the plaint describing the plaintiffs and defendants as shebaits of one of the idols and praying for a scheme of management. The defendants included the appellant and the shebait who represented the idols in suit No. 155 of 1919.

The facts appear fully from the judgment of the Judicial Committee.

In suit No. 155 of 1919 the Subordinate Judge found on the evidence that the property had not been dedicated to the idols; he was of opinion also that that was *res judicata* under the decision in the suit of 1915. Accordingly he dismissed suit No. 155 of 1919 and made a decree for partition in suit No. 214 of 1919 which was tried later. Appeals in both suits were heard by the High Court together and were allowed.

The learned Judges (Chatterjea and Cuming JJ) while rejecting a contention that suit No. 206 of 1915 could not be regarded as brought by the idol, held that the decision then arrived at did not operate as *res judicata* in the present suit; they so held mainly on the grounds that the Court had held that the earlier suit was not maintainable as framed, and that the decision as to the character of the property was merely incidental and not necessary to the decree. The

1927

RADHA BINODE MANDAL v. GOPAL JIU THAKUR.

learned Judges found on the evidence that the property had been dedicated to the idols.

March 7th, 8th, 10th and 11th. De Gruyther, K. C., and *Kenworthy Brown*, for the appellant. That the property was not debottar was *res judicata* under the decision in suit No. 206 of 1915. The question whether the property was debottar was directly and substantially in issue in that suit: it is not material that the suit was also held not to be maintainable: *Peary Mohan Mukherjee* v. *Ambica Charan Bandopadya* (1) followed in *Rambehari Sarkar* v. *Surendra Nath Ghose* (2). So far as *Shib Charan Lal* v. *Raghu Nath* (3) held otherwise, it was wrongly decided. If either issue in the suit of 1915 was incidental, it was the other issue. The Court intended to decide the issue as to whether the property was debottar and the issue is *res judicata*: *Chaudhry Risal Singh* v. *Balwant Singh* (4). Even if the question was not *res judicata* in the present suit under the Code of Civil Procedure, 1908, s. 11, it was so under the general law of *res judicata* which is also applicable: *Krishna Behari* v. *Brojeswari Chowdranee* (5), *Hook* v *Administrator-General* (6), *Rama Chandra Rao* v. *Rama Chandra Rao* (7). The suit of 1915 was in substance one on behalf of the idol, as was held by the High Court; it was not a suit in relation to the personal rights of the shebaits: *Babijirao* v. *Laxmandas* (8). On the evidence it was not established that the property was debottar.

(1) (1897) I. L. R. 24 Calc. 900.
(2) (1914) 19 C. L. J. 34.
(3) (1895) I. L. R. 17 All. 174.
(4) (1918) I. L. R. 40 All. 593, 603; L. R. 45 I. A. 168, 177.
(5) (1875) L. R. 2 I. A. 283, 285.
(6) (1921) I. L. R. 48 Calc. 499; L. R. 48 I. A., 187.
(7) (1922) I. L. R. 45 Mad. 320; L. R. 49 I. A. 129.
(8) (1903) I. L. R. 28 Bom. 216, 223.

Sir George Lowndes, K. C., and *Dube*, for the respondents. The decision in suit No. 206 of 1915 raised no *res judicata* in suit No. 155 of 1919. Only one idol was concerned in the former suit; the latter suit is brought by two idols; the idols are distinct, one representing Krishna and the other Shiva. Apart from that, the plaintiffs are different in the two suits. The earlier suit was not by the idol, but was simply for administration of the property, and to settle differences between the shebaits as to management. In the present suit the idols sue on their own behalf to establish their right to the property. They were entitled so to sue: *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (1). Further, the suit of 1915 having been dismissed as not maintainable, the other finding was not necessary and raised no *res judicata*: *Shib Charan Lal* v. *Raghu Nath* (2).

De Gruyther, K. C., replied.

The judgment of their Lordships was delivered by

March 25.

SIR LANCELOT SANDERSON. These are consolidated appeals against two decrees of a Division Bench of the High Court of Judicature at Fort William in Bengal, dated the 3rd March 1924.

The first decree reversed a decree, dated the 9th May 1921, of a learned Subordinate Judge of Alipore, and the second varied a decree of another learned Subordinate Judge of that Court, dated the 20th September 1921.

The decree of the 9th May 1921 was made in suit No. 155 of 1919, and the decree of the 26th September 1921 was made in suit No. 214 of 1919.

(1) (1925) I. L. R. 52 Calc. 809, 815; L. R. 52 I. A. 245, 250.

(2) (1895) I. L. R. 17 All. 174.

1927

RADHA BINODE MANDAL v. GOPAL JIU THAKUR.

The appellant to His Majesty in Council in both appeals is Radha Binode Mandal.

The suit 155 of 1919 was instituted on the 26th July 1919. by the plaintiffs (1) Sri Sri God Gopal Jiu Thakur and (2) Sri Sri God Shambhu Nath Shib Thakur—represented by the Shebait Narendra Nath Mandal. Radha Binode Mandal is the first defendant and there are 19 other defendants.

The shebait plaintiff. Narendra Nath Mandal and the defendants are all members of the Mandal family of Bawali.

The plaint alleges that the properties described in the schedule attached to the plaint are owned and possessed by the plaintiff Thakurs, and that the property numbered 1 is the residential house of the plaintiff Thakurs, where the plaintiff Thakurs have resided with other Thakurs connected with them and where the sheba and worship have been performed. The relief claimed in the suit is for a declaration that the properties in suit are owned and possessed by the plaintiff Thakurs as debottar properties.

At the trial Radha Binode Mandal was the only contesting defendant, and his case was, first, that the suit was barred by reason of *res judicata*, and second, that there was no valid dedication of the properties in suit to the idols and that the properties were not debottar.

The learned Subordinate Judge, who tried the suit, decided both these questions in favour of the defendant Radha Binode Mandal and dismissed the suit with costs.

The plaintiffs appealed to the High Court, and the Division Bench of the High Court, consisting of Chatterjea and Cuming JJ., held that the suit was not

barred by reason of *res judicata*, and that the properties mentioned in the schedule to the plaint, except items 14 and 15, were debottar properties.

The suit 214 of 1919 was instituted on the 17th September 1919. The plaintiff is Radha Binode Mandal and the defendants are the other members of the family.

The plaint alleges that the 28 plots of property, described in the schedule to the plaint in that suit, are ancestral joint properties of the plaintiff and the defendants, and that the plaintiff and the defendants are in joint possession thereof.

The plaintiff claims a declaration that he has a two-annas share in the properties mentioned in the schedule, and he asks for a preliminary decree for partition of the properties.

This suit was contested. The learned trial Judge held as follows:—"The evidence shows that the disputed properties were the debottar properties, but, subsequently, in suit 206 of 1915 it was decided that the properties were not debottar."

He therefore decided in favour of the plaintiff and made a preliminary decree for partition, and directed a Commissioner to be appointed to effect a partition of the disputed properties.

Certain of the defendants in that suit, including Narendra Nath Mandal, appealed to the High Court, one of the grounds of appeal being that the learned Subordinate Judge should have held that the disputed properties were debottar.

The appeal was heard by the same learned Judges in the High Court, and they stated that in the other appeal they had held that all the properties mentioned in the schedule to the plaint in the suit 214 of 1919, except properties numbered in that schedule 22 and 27, were debottar properties.

1927

RADHA BINODE MANDAL v. GOPAL JIU THAKUR.

They therefore varied the decree of the learned Subordinate Judge and directed that the plaintiff's suit in respect of items other than Nos. 22 and 27 should be dismissed, and they further ordered that the case should be sent back to the lower Court in order that partition might be effected of items Nos. 22 and 27, in accordance with the directions contained in their judgment.

Radha Binode Mandal has appealed, as already stated, against the two abovementioned decrees of the High Court.

The arguments which were presented to their Lordships related mainly to the suit No. 155 of 1919, which was brought by the two abovementioned gods, through the shebait, Narendra Nath Mandal, against Radha Binode Mandal and others.

It was contended, on behalf of the appellant in the first place, that the question whether there had been a valid dedication of the properties in suit, and whether they were debottar properties, was *res judicata* and reliance was placed upon section 11 of the Civil Procedure Code of 1908.

The material facts which it is necessary to state for the consideration of this argument are as follows :—

In 1914 a suit, No. 212 of 1914, was instituted by Gopal Lal Mandal, Ram Lal Mandal, and six others, against other members of the family, and it was prayed that it might be declared that the properties mentioned in the schedule were debottar properties of Sri Sri Iswar Gopal Jiu Thakur established by the late Peary Lal and Moni Mohan Mandal. The suit was valued at Rs. 1,87,052. This suit was withdrawn on the 5th August 1915, with liberty to bring a fresh suit.

On the 24th September 1915, another suit (No. 206 of 1915) was instituted by Gopal Lal Mandal and Ram

Lal Mandal. In the plaint the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's "Shebaits."

Gopal Lal and Ram Lal Mandal are defendants 2 and 3 in the present suit (No. 155 of 1919). The defendants in the 1915 suit, nineteen in number, were the other members of the Mandal family, and they included Narendra Nath Mandal and Radha Binode Mandal. The defendants also were described as "Sri Sri Iswar Gopal Jiu Thakur's Shebaits."

The first prayer in the plaint was as follows:—

"That all the properties, being debottar properties of Sri Sri Iswar "Gopal Jiu Thakur established by the said Peary Lal Mandal and Moni "Mohan Mandal, a scheme may be framed for the preservation, manage- "ment and improvement of the said properties, and for the efficient "performance of the daily and periodical shebas of Sri Sri Iswar Gopal "Jiu Thakur and the festivals, etc."

There was a further prayer that a manager or trustee should be appointed.

The plaint contained allegations that the defendant No. 10, *viz.*, Radha Binode Mandal and certain other defendants, had been putting obstacles in the way of the collection of rents and of the management of the properties, and that on account of difference of opinion among the shebaits it had become very difficult to manage the debottar estate properly, to collect rents and to perform the deb-sheba, etc., in a proper way.

Radha Binode Mandal (defendant No. 10 in the 1915 suit) denied that the properties were debottar.

Among other issues the following issues were stated in the Court of the learned Subordinate Judge who tried the suit:—

"(3) Is the suit maintainable in its present form?

"(5) Are the properties described in the schedule of the plaint "debottar properties? Was there any valid arpannama or dedication of "the same to the Thakur Sri Sri Gopal Jiu?"

1927

RADHA BINODE MANDAL v. GOPAL JIU THAKUR.

On the third issue, the learned Subordinate Judge held that the frame of the suit was defective. He was of opinion that the plaintiffs should have directly prayed for a declaration that the properties of the plaint were dedicated debottar properties.

He pointed out that in the previous suit (*viz.*, the 1914 suit) such a prayer was made; that the Court called for *ad valorem* Court fees on the value of the properties; that the plaintiffs in that suit were unwilling to pay such fees, and that the suit was withdrawn. He came to the conclusion that the 1915 suit had been framed in a slightly different form in respect of practically the same relief, and with a view to avoid the payment of a large amount of Court fees. He therefore held that the suit was not maintainable as framed.

Although the learned Judge had come to the abovementioned conclusion, that the suit as framed was not maintainable, he proceeded to consider the fifth issue, and in respect thereof he held that the plaintiffs had failed to prove that the properties were debottar. This decision was on the 31st July 1916.

There was an appeal by the plaintiffs to the learned District Judge, who held that the plaintiffs had not succeeded in establishing an absolute endowment, and he agreed with the learned Subordinate Judge that the suit was not maintainable in its present form. He said:—

"The character of the property was a direct issue in the case and the "plaintiffs should not have attempted to obtain a decision on this direct "issue by bringing a suit in such a form as to avoid the payment of a "larger amount in Court fees."

The appeal accordingly was dismissed with costs. This was on the 19th July 1917.

As already stated, the suit now under consideration, No. 155 of 1919, was instituted on the 26th July 1919.

The seventh issue at the trial of that suit was. "Is the "suit barred by the principles of *res judicata?*"

The learned Subordinate Judge held that the judgment in the suit, No. 206 of 1915, operated as *res judicata.*

The Division Bench of the High Court came to the conclusion that the decision in the 1915 suit did not operate as *res judicata*, and the learned Judges stated several reasons for the conclusion at which they arrived.

The abovementioned reasons were fully debated and considered during the arguments, but their Lordships do not think it necessary to refer to them in detail because, in their Lordships' opinion, this part of the case should be disposed of on one consideration which goes to the root of the matter.

The plaintiffs in the suit which is now under consideration, *viz.*, No. 155 of 1919, are the two gods Gopal Jiu Thakur and Shambhu Nath Shib Thakur, suing by the Shebait Narendra Nath Mandal.

In their Lordships' opinion, these two gods were not parties to the 1915 suit.

It is true that in the 1915 suit the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's Shebaits," and it was argued that the 1915 suit must therefore be regarded as having been brought on behalf of the deity "Gopal Jiu."

Their Lordships, however, are not prepared to accept that argument.

It is to be noted that not only were the plaintiffs described as the shebaits of the god, but the defendants also were described in the same way. Therefore, if the god Gopal Jiu were to be regarded as a plaintiff, he must also be regarded as a defendant, which would be a *reductio ad absurdum.*

1927

RADHA BINODE MANDAL v. GOPAL JIU THAKUR.

For the consideration of this point, however, it is necessary to examine not only the heading of the plaint but also the allegations therein.

In their Lordships' opinion the allegations in the plaint show that the 1915 suit was based upon the assumption that the properties were debottar properties, and that the suit was brought for the purpose of having a scheme framed by the Court for the preservation and management of the properties and for the performance of the daily and periodical shebas.

The suit, it was alleged, had become necessary by reason of the disputes as to the management of the properties between the plaintiffs and some of the defendants, all of whom were alleged to be shebaits of the god and it was apparently not thought necessary to make the two gods, the plaintiffs in the present suit, parties to the 1915 suit.

In their Lordships' opinion the description of the plaintiffs and the defendants in the 1915 suit as shebaits of the Thakur, and the nature of the suit, as disclosed by the allegations in the plaint, are not sufficient to constitute the 1915 suit a suit by or on behalf of the gods, who are the plaintiffs in the present suit, *viz.*, No. 155 of 1919.

The result, therefore, in their Lordships' opinion, is that the suit of 1915 was not between the same parties as the parties in the suit now before the Board; the case, therefore, does not fall within Section 11 of the Code of Civil Procedure, 1908, or within the statement of the general law made in *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1).

For the abovementioned reason, their Lordships are of opinion that the conclusion, at which the learned Judges of the High Court arrived on the issue of *res judicata*, was correct.

(1) (1875) L. R. 2 I. A. 283.

They desire to guard themselves by saying that they must not be taken as adopting the grounds upon which the decision of the High Court was based. They express no opinion on any ground other than that which has been hereinbefore dealt with.

Secondly, it was argued on behalf of the appellant that the decision of the learned Judges of the High Court as to the character of the properties in suit was wrong.

Their Lordships had the advantage of a very careful and elaborate examination of the documents and evidence presented to them by the learned counsel who appeared on behalf of the appellants.

They have the further advantage of a judgment of the High Court, which is conspicuous for the care with which it was obviously prepared. All the material points, which were urged by the learned counsel for the appellant, were referred to and considered by the learned Judges of the High Court, and no fault could be found with the accurate statement of the facts—an evidence in relation to such matters

In their Lordships' opinion, there is only one question on this part of the case, *viz.*, whether the learned Judges were justified in drawing the inference from the evidence, to which they referred, that the properties described in the schedule, with the exception of two items, were debottar properties.

Their Lordships, having come to a clear conclusion during the course of the argument, did not think it necessary to call upon the learned counsel for the respondents for an answer on this part of the case.

In their Lordships' opinion, there was ample evidence in the case to justify the inference which the learned Judges drew as to the character of the properties.

1927

RADHA BINODE MANDAL v. GOPAL JIU THAKUR.

Their Lordships, therefore, are of opinion that the appeal of Radha Binode Mandal against the decree of the High Court in the suit No. 155 of 1919 fails. It follows as a necessary consequence of the findings of the High Court being upheld, that the appeal of Radha Binode Mandal against the decree of the High Court in suit No. 214 of 1919 also must fail.

Their Lordships, therefore, are of opinion that both the appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for Respondents: *Watkins & Hunter.*

A. M. T.

CIVIL RULE.

Before Panton and Mitter JJ.

1927

March 28.

DHARANI MOHAN RAY

v.

KSHITIPATI RAY*

Arrest of Judgment-debtor—Release of judgment-debtor after arrest on furnishing security—"Other sufficient cause" in O. XXI, r. 40, C. P. C., what it means—Sufficiency of security—Civil Procedure Code (Act V of 1908), s. 55 and O. XXI., r. 40(3).

The Court must be satisfied, on *proper* materials being placed before it that a judgment-debtor is unable from poverty or "other sufficient "cause" to pay the amount of the decree, before he can release him on his furnishing security or commit him to jail, under Order XXI., rule 40 of the Code of Civil Procedure. Such security must be substantial.

The provisions of s. 55 of the Code of Civil Procedure are mandatory.

*Civil Rule No. 330 of 1927, against the order of A. C. Banerjee, Subordinate Judge of Hooghly, dated March 7, 1927.