1937

GWALA PRASAD KHANNA v. MATHURA PRASAD

given security of some items of property to the decree-holder, the decree-holder should first proceed against those properties and can claim to recover the decretal amount against the person and other properties only after exhausting the properties given as security. We see no force in this argument also. No doubt properties were mentioned in the compromise as having been given as security for the recovery of the decretal amount but the compromise clearly shows that there was a personal covenant on the part of the judgment-debtor to pay the amount.

Thomas and Ziaul Hasan, JJ.

The result, therefore, is that the appeal is decreed with costs and the order of the lower appellate court is set aside. The order of the trial Court is restored.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

1937
April, 8

CHANDRIKA BAKHSH SINGH AND OTHERS (DEFENDANTS-APPELLANTS) *v.* BHOLA SINGH AND OTHERS PLAINTIFFS, AND OTHERS, DEFENDANTS (RESPONDENTS)*

Hindu Law—Endowment—Religious endowment—Shebaitship, *devolution of*—Shebaitship *not being disposed of by founder, vests in his heirs—Limitation Act* (*IX of* 1908), *Articles* 124 *and* 120—*Hereditary office, meaning of—Suit for recovery of possession of office of* shebaitship, *limitation applicable to—Trustee* de son tort—*Limitation Act* (*IX of* 1908), *section* 10, *applicability of, to trustee* de son tort.

According to Hindu Law, when the worship of a *Thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or that there has been some usage, course of dealing, or circumstances to show a different mode of devolution. Where, therefore, no right is conferred on a person under a will or a *tamliknama* except that of a bare trustee and there is no provision about the appointment of subsequent trustees and no disposition is made in respect of the *shebaitship* after

*First Civil Appeal No. 50 of 1935, against the decree of Pandit Pradyumna Krishna Kaul, Civil Judge of Sitapur, dated the 30th of March, 1935.

the death of the trustee the general rule of Hindu Law governs the case. *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* (1), relied on.

Where there is no suggestion that the appointment of a *shebait* is to be made by nomination, the right of *shebaitship* vests in the heirs of the founder and after the death of the person appointed by will, it must be regarded as a hereditary office. A suit for possession of such an office is governed by the 12 years rule laid down in Article 124 of the first schedule of the Indian Limitation Act.

Section 10 of the Limitation Act applies to express trustees and their representatives and not to a trustee *de son tort*. *Bihari Lal* v. *Shiva Narain* (2), followed. *Dhanpal Singh Khettry v. Mohesh Nath Tewari* (3), dissented from. *Paramanand Das Goswami* v. *Radha Krishna Das* (4), referred to.

Messrs. *M. Wasim, S C. Das* and *Badri Prasad Gupta*, for the appellants.

Messrs. *Hyder Husain, H. H. Zaidi* and *T. N. Harkauli*, for the respondents.

SRIVASTAVA, C. J. and SMITH, J.:—This is a first appeal against a decree dated the 30th of March, 1935, of the learned Civil Judge of Sitapur. The facts of the case are that one Moti Singh owned zamindari shares in several villages, including village Bhoela Kalan. On the 21st of October, 1872, he made a will in favour of his wife, Muna Kuar. The latter on the 1st of September, 1886, executed a *"tamliknama"* (exhibit 4) in respect of a 9 annas share in mauza Bhoela Kalan. Under this deed she created an endowment, and made her cousin, Parwan Singh, the manager for administration of the trust. Parwan Singh was directed to build a *thakurdwara*, and instal therein an idol of *Sri Thakurji*. In pursuance of these directions Parwan Singh constructed a *thakurdwara* and had the idol duly installed therein. There was a litigation in the life-time of Parwan Singh, as a result of which Parwan Singh lost a one anna share, in which Muna Kuar, who died in 1891, was held to possess only a life interest. There-

(1) (1889) L.R., 16 I.A., 137. (2) (1925) I.L.R., 47 All., 17.
(3) (1920) 24 C.W.N., 752. (4) (1926) 97 I.C., 437.

1937

CHANDRIKA BAKHSH SINGH v. BHOLA SINGH

Srivastava, C.J. and Smith, J.

after Parwan Singh remained in possession of the remaining 8 annas share as manager of the trust on behalf of *Sri Thakurji*. Parwan Singh died on the 28th of February, 1923, and after his death mutation was effected in respect of the aforesaid 8 annas share in the name of *Sri Thakurji*. The revenue court further ordered that pending the legal appointment of a sarbarahkar three persons Bajrang Singh, Jang Singh and Jwala Singh would be responsible for the land revenue. The present suit was instituted on the 2nd of January, 1935, for possession of the 8 annas zamindari share in village Bhoela Kalan jointly by two sets of plaintiffs, namely, plaintiffs 1 to 3, who are the sons and heirs of Parwan Singh, and plaintiffs 4 to 8, who jointly with defendants 7 to 13 are the heirs of Musammat Muna Kuar. Defendants 1 and 2 are the sons, and defendant 3 is the grandson of the aforesaid Bajrang Singh, who had died before the suit. Jang Singh had also died before the institution of the suit. He had two sons, Jwala Singh and Shankar Singh. Jwala Singh is defendant No. 4, and Shankar Singh also being dead his widow, Musammat Ram Kuar, is defendant No. 5. The idol of *Sri Thakurji* was impleaded as defendant 6.

The case of the plaintiffs 1 to 3 was that under the deed of trust dated the 1st of September, 1886, Parwan Singh was the absolute owner of the property in suit subject to a charge to maintain the *thakurdwara*, or at any rate was entitled to the surplus after defraying the expenses of the *thakurdwara*. They also claimed the right to administer the trust as successors of Parwan Singh. It was pleaded in the alternative that if the sons of Parwan Singh had no right to the property or to administer the trust, then the right to administer the trust vested on Parwan Singh's death in plaintiffs 4 to 8 and defendants 7 to 13, as the heirs of Muna Kuar. The plaintiffs therefore prayed for a decree for possession of the property, and mesne profits, in favour of

either plaintiffs 1 to 3 or plaintiffs 4 to 8 jointly with defendants 7 to 13.

The suit was resisted on various grounds which would appear from the issues framed in the case, which were as follows:

(1) Was Parwan Singh owner of the property in suit under exhibit 1?

(2) If Parwan Singh was not the owner and the deed exhibit 1 created a trust, who were the heirs of Muna Kuar at the time of the death of Parwan Singh?

(3) Had Parwan Singh the power to nominate trustees who were to act after him; and did he appoint plaintiffs 1 to 3 as such trustees?

(4) Is the claim within time?

(5) Are the plaintiffs entitled to maintain this suit without the appointment of a sarbarahkar?

(6) Whether if in certain contingencies the court decided to appoint a sarbarahkar it should not appoint one of the plaintiffs or defendants 7 to 13 to the office because—

(*a*) of the strained relations between them and Muna Kuar,

(*b*) of their being possessed of no property of their own and

(*c*) of their having claimed the trust property in their own right?

(7) Are defendants 1—5 the persons entitled to succeed to the sarbarahkarship of the trust property for the reasons detailed in paragraph 24 of the defendants written statement?

(8) Is the suit bad as all the heirs of Muna Kuar have not been made party to it?

(9) Is the suit bad for multifariousness?

(10) Is the trust created by exhibit 1 a public trust? If so, its effect?

(11) Are plaintiffs entitled to claim mesne profits? If so, for what period?

1937

CHANDRIKA BAKHSH SINGH v. BHOLA SINGH

Srivastava, C.J. and Smith, J.

(12) To what relief are the plaintiffs entitled?

The learned Civil Judge decided the first issue in the negative. On the second issue he found that Tulshi Singh, Ganga Singh and Harakh Singh, who were represented by plaintiffs 4 to 8 and defendants 7 to 13, were the heirs of Muna Kuar at the time of the death of Parwan Singh. His finding on issue 3 was that Parwan Singh had no power to nominate his successor though as a matter of fact he did nominate plaintiff no. 1 as his successor. He answered issues 4 and 5 in the affirmative. He did not record any definite finding on issue no. 6. With reference to it he simply remarked that it was not necessary to appoint any sarbarahkar or *shebait* in the present case. Issue 7 was not pressed. His findings on issues 8 and 9 were in the negative. His finding on issue 10 was that although the endowment founded by Muna Kuar was one for the benefit of the public, yet section 92 of the Code of Civil Procedure had no application to the case. On issue No. 11 he found that the plaintiffs were entitled to mesne profits only for three years preceding the suit. As a result of the above findings he passed a decree for possession of the property in suit in favour of plaintiffs 4 to 8 and defendants 7 to 13 jointly. They were also given a decree for mesne profits for three years, but the amount was left for determination in the execution department.

The plaintiffs 1 to 3 have submitted to the decree of the lower court, and have not appealed against it. The present appeal has been filed only by defendants 1 to 6, and plaintiffs 4 to 8 and defendants 7 to 13 have been impleaded as respondents.

In *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* (1) it was held by their Lordships of the Judicial Committee that according to Hindu Law, when the worship of a *Thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or that

(1) (1889) L.R., 16 I.A., 137.

there has been some usage, course of dealing, or circumstances to show a different mode of devolution. The learned counsel for the appellants does not question the correctness of the law as enunciated above, nor does he rely on any usage, course of dealing, or circumstances to show a different mode of devolution. He has, however, contended that in the present case it should be held that Muna Kuar had disposed of the right of *shebaitship* either in favour of Sheo Din Singh, one of the predecessors of defendants 1 to 5, or in the alternative in favour of Parwan Singh. In support of the first branch of this argument reliance has been placed on exhibit D-1, the will dated the 9th of June, 1890, which was executed by Muna Kuar in favour of Sheo Din Singh. It may be noted that this plea formed the subject-matter of issue No. 7, which was not pressed in the lower court at the time of arguments. It must also fail on its merits. We have carefully examined the will exhibit D-1. All that it says is that Musammat Muna Kuar and her husband had not been on good terms with Tulshi Singh, and therefore she gave preference to Sheo Din Singh, and bequeathed her 9 annas' share in all the property of which she was in possession, as well as the remaining 7 annas share in which she possessed a reversionary interest, in favour of Sheo Din Singh, subject to provisions in favour of one Mahipal Singh. She also made mention of the deed of trust which had been executed by her, and stated that Parwan Singh would remain in possession of the property assigned thereunder without any interference. It does not contain a single word as regards succession to the right of *shebaitship* after the death of Parwan Singh. It is impossible to interpret this document as disposing of the right of *shebaitship* in favour of Sheo Din Singh, or as depriving Tulshi Singh of that right. Reliance was placed on the "*tamliknama*" (exhibit 4) in support of the second branch of the argument. We have no hesitation in agreeing with the lower court that the deed does not confer any right on Parwan Singh except

1937

CHANDRIKA BAKHSH SINGH v. BHOLA SINGH

Srivastava, C.J. and Smith, J.

that of a bare trustee. He has been vested with all the powers of management, but there is no provision in it about the appointment of any subsequent trustee. We are therefore clearly of opinion that the case is governed by the general rule laid down in *Gosamee Sree Greedhareejee* v. *Rumanlolljee Gossamee* (1). The appellants having absolutely failed to show that Muna Kuar had made any disposition in respect of the vesting of the *shebaitship* after the death of Parwan Singh, the lower court was right in holding that it must be deemed to have vested in the heirs of Muna Kuar, namely, the respondents to the appeal

Next it was argued that the suit was barred by limitation. It is admitted that if the suit is governed by the 12 years' rule of limitation laid down in Article 124 or Article 144 of the Limitation Act, it is within time, but it is contended that neither of these Articles is applicable to the case, and that the suit should therefore be governed by the residuary Article 120. The suit purports to be merely a suit for recovery of possession. As such, it would be *ex facie* governed by Article 133 of the Limitation Act; but assuming that in substance it is to be regarded as a suit for possession of the office of *shebaitship*, we are inclined to agree with the lower court that it must be regarded as a suit for possession of a hereditary office, and as such governed by the 12 years' rule laid down in Article 124 of the first schedule of the Indian Limitation Act. It appears to be that the words "hereditary office" have been used in this Article in contra-distinction to cases where the office is to be filled in by nomination. There is no suggestion that the appointment of a *shebait* in this case was to be made by nomination. The right of *shebaitship* therefore, in the words of their Lordships in *Gossamee Sree Greedhareejee* v. *Rumanlolljee Gossamee* (1) quoted above, vested in the heirs of the founder. In this sense, therefore, after the death of Parwan Singh, it must be regarded as a hereditary office.

(1) (1889) L.R., 16 I.A., 137.

We are supported in this view by the decision of a Bench of the Calcutta High Court in *Jagannath Prasad Gupta* v. *Runjit Singh* (1). The following observations made in that case may be usefully quoted:

> "The second ground of appeal, namely, that the suit, so far as the plaintiff seeks to oust the defendant from the office of *shebait* and to recover possession of the endowed properties, should have been held as barred under Article 120 of Schedule II of the Limitation Act, is based upon the case of *Jagannath Dass* v. *Bir Bhadra Das*—(1892) I. L. R., 19 Cal., 776. But that case is quite distinguishable from the present. What was held there was that a suit to oust a *shebait* from his office which is not hereditary, and the appointment to which is made by nomination, is governed by the six years' rule of limitation under Article 120. In the present case the late *shebait* Rani Ananda Moye, not having appointed her successor as provided in the will of the founder, Rani Annapurna (Exhibit B), and there being no other provisions for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder (see *Jai Bansi Kunwar* v. *Chattardhari Singh*—(1870) 5 B.L.R.,. 181; 13 W. R., 396; *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee*—(1889) L. R., 16 I.A., 137; I.L.R., 17 Cal., 3, and the office of *shebait* henceforth must be hereditary in the founder's family. The limitation applicable to a suit for posession of such an office is twelve years under Article 124, and not six years under Article 120, and the suit being brought within twelve years from the date when the defendant took up the management of the endowed properties, is well within time."

Mr. Wasim on behalf of the appellants relied on the decision of the Madras High Court in *Sri Mahant Paramanand Das Goswami* v. *Radha Krishna Das* (2) in support of his contention that the suit was governed by Article 120. This case is quite distinguishable inasmuch as the right to the office of the head of a Mutt was claimed in that case by nomination, and could not therefore be treated as hereditary. We are accordingly of opinion that the lower court is right in holding that

(1) (1898) I.L.R., 25 Cal., 354. (2) (1926) 97 I.C., 437.

1937

CHANDRIKA BAKHSH SINGH v. BHOLA SINGH

Srivastava, C.J. and Smith, J.

the present suit is governed by the 12 years' rule of limitation.

This disposes of all the grounds urged on behalf of the appellants. The plaintiffs-respondents have also filed a cross-objection on the question of mesne profits. Their contention is that they should be allowed mesne profits for the entire period since the death of Parwan Singh, and not merely for the three years preceding the suit. The contention is based on section 10 of the Indian Limitation Act. It is argued that the position of the defendants 1 to 5 and of their predecessors, Bajrang Singh and Jang Singh, was that of trustees *de son tort*, and that section 10 of the Limitation Act therefore applies to the case. That their possession was that of trustees *de son tort* might be conceded, but we feel very doubtful about the application of section 10 to the case of such trustees. The section deals with suits "against a person in whom property has become *vested in trust for any specific* purpose or against his legal representatives or assigns." The words just quoted clearly show that it is intended to apply to express trustees and their representatives, which a trustee *de son tort* is not. The contention is no doubt supported by the decision of the Calcutta High Court in *Dhanpat Singh Khettry* v. *Mohesh Nath Tewari* (1), in which the opinion was expressed that a trustee *de son tort* stands in the same position as an express trustee, but no reasons were given in support of the opinion. A contrary opinion was expressed by MUKERJI, J. in *Bihari Lal* v. *Shiva Narain* (2), who dissented from the view taken in the Calcutta case. We are inclined to agree with the opinion of Justice MUKERJI. The plaintiffs-respondents are not, therefor, entitled to mesne profits for more than three years.

The result therefore is that the appeal as well as the cross-objections must fail, and we dismiss them both with costs.

Appeal dismissed.

(1) (1920) 24 C.W.N., 752.

(2) (1925) I.L.R., 47 All., 17(22).