

(2010) 12 AHC CK 0190

Allahabad High Court

Case No: F.A.F.O. No. 3664 of 2010

Baikunt Lal Pandey and Others

APPELLANT

Vs

Rajendra Prasad Pandey and
Another

RESPONDENT

Date of Decision: Dec. 16, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 40 Rule 1, Order 40 Rule 3, 115
- Uttar Pradesh Government Servants (Conduct) Rules, 1956 - Rule 15

Citation: (2011) 1 ADJ 816 : (2011) 112 RD 154

Hon'ble Judges: Sanjay Misra, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Sanjay Misra, J.

This First Appeal From Order under Order XLIII, Rule 1(s) of the CPC arises out of the order dated 11.10.2010 (passed under Order XL, Rule 1 Code of Civil Procedure) and its consequential order dated 13.10.2010 passed by the Additional District Judge, Court No. 9, Mathura in Misc. Case No. 142 of 1990 whereby the Respondent No. 2, namely Mahesh Chandra Chaturvedi, has been appointed Receiver of the property that is subject-matter of compromise decree in Original Suit No. 94 of 1923.

2. Sri C.L. Pandey, learned Senior Counsel assisted by Sri Manoj Kumar, learned Counsel for the Appellants, Sri Raj Singh, learned Counsel for the Respondent No. 1 and Sri B.D. Mandhyan, learned Senior Counsel assisted by Sri Satish Mandhyan and Sri Gaurav Sharma, learned Counsels for the Respondent No. 2 have been heard at length. Counter affidavit and rejoinder affidavit has been exchanged between the Appellant and the Respondent No. 2. With the consent of all the Counsels this appeal is being decided finally at this stage itself.

3. A preliminary objection has been raised by Sri B.D. Mandhyan. He submits that by the impugned order an application for appointment of Receiver has been decided hence it would be a case decided and is revisable u/s 115 CPC therefore, this appeal is not maintainable.

4. Appointment of Receiver by the Court has been done under Order XL, Rule 1 Code of Civil Procedure. An appeal from such order is provided under Order XLIII, Rule 1(s) Code of Civil Procedure. The preliminary objection is therefore, misconceived.

5. A temple of Sri Dauji Maharaj is situate in Kasba Baldev, Pargana Mahavan, District Mathura. With the filing of Original Suit No. 94 of 1923 before the Sub-Judge, Mathura, District Agra a dispute was raised as to the right of management of the temple. A declaration and injunction of such right was claimed by the Plaintiffs. The suit was decreed in terms of a compromise on 15.10.1924. The compromise was entered in the decree. A translated copy of the compromise is available on record. It has been stated that one Babu Baldev Bihari Lal was appointed the first Receiver/Supervisor after the suit was filed in 1923. The compromise had provided the manner and method of appointment/selection of the person who was to be the Receiver. In Clause 4 of the compromise there were two eventualities contemplated and it was the Court that had to make the appointment/selection of a Receiver from time to time.

6. The exercise of this power by the Court under the impugned orders dated 11.10.2010 and 13.10.2010 is challenged herein. The Court has been appointing a Receiver from time to time for terms fixed by the Court ranging from one year to three years. The Appellant has filed copies of some orders passed by the Court in the past.

7. Sri C.L. Pandey, learned Counsel for the" Appellants has submitted that the Court has ignored as many as three applications filed by the Appellants in the proceedings on the issue of Selection of a person to be appointed as the Receiver. He has alleged that the Court below did not even take the applications on record nor considered them hence the impugned orders were passed in a hurry and in a predetermined manner. According to him Clause 4 of the compromise decree was the only source for appointment/selection of Receiver and the Court could not go beyond the stipulations contained therein. He states that under Clause 4 the trustees of the temple are required to select a suitable person and the Court has no other option but to appoint the person so selected by the trustees. He points out that it is only when the trustees fail to select a person then the Court can make appointment of a suitable person of its own choice. According to him the selection of a person by the trustees can be unanimous or even by majority. He refers to the orders passed by the Courts in the past (Annexure-11) where the majority opinion of the trustees was respected and such person was appointed as Receiver by the Court. Sri Pandey informs that there were fourteen trustees who were Pandas of the temple and in the suit of 1923 they were the Plaintiffs and the Defendants. Under the compromise

these trustees had the power for selection of a Receiver. The present Appellants are the descendants of the original trustees and their collective majority decision is binding on the Court which is in effect only executing the compromise decree. An executing Court cannot go behind the decree hence the Court's powers under Clause 4 of the decree are confined to the stipulations contained therein.

8. Sri Pandey argues that the twelve Appellants and the Respondent No. 1 namely Rajendra Prasad Pandey are the present trustees of the temple along with Ram Katore Pande who is the fourteenth trustee and is not a party to this appeal. On 5.10.2010 all the trustees met for selection of a person to be appointed Receiver because the term of the earlier Receiver (Respondent No. 2) had expired and the Court had issued notices to all the fourteen trustees to select a person who should be appointed as a Receiver of the temple. In the meeting it was unanimously decided that one of them namely Ram Katore Pande should be appointed as Receiver for a term of three years. To such affect all the thirteen trustees filed a joint application before the Court informing of their decision and for passing of necessary order to appoint Ram Katore Pande as Receiver of the temple. He refers to the individual affidavits filed by the trustees affirming the decision. Ram Katore Pande also gave his consent and agreed to work without any remuneration. Sri Pandey submits that subsequent to filing of the application and affidavits by the trustees one of them i.e: Rajendra Prasad Pandey (Respondent No. 1) filed another application and affidavit in the Court alleging that he did not agree to the appointment of Ram Katore Pande. According to him if one trustee had dissented even then a majority of the trustees in the ratio of 1:12 had selected Ram Katore Pande and the Court had no other option but to accept the majority decision. By not doing so and by ignoring the majority decision of the trustees the Court has acted beyond its powers for which the only source is Clause 4 of the compromise decree of 1924.

9. Sri B.D. Mandhyan has defended the impugned order and states that Clause 4 of the compromise decree provides for appointment/selection of a suitable person as Receiver of the temple by a unanimous decision of the trustees. The Respondent No. 2 was appointed by the Court and has worked for the past two years and has been found a suitable person to manage the affairs of the temple. There was no challenge to his appointment earlier. He states that for the current period there is no unanimity amongst the trustees and further that they have no locus to maintain this appeal since they are not the descendants of the original panda's. The Court has erroneously issued notices to them for selecting a person to be appointed Receiver. He further states that Ram Katore Pande is not eligible person since he is a Government employee working as a teacher in an educational institution run by the Basic Shiksha Parishad. His salary is paid out of the Government Exchequer therefore, he cannot be involved in the affairs of a private temple in the capacity of a Receiver.

10. Sri Raj Singh for the Respondent No. 1 adopts the submissions of Sri Mandhyan and raises the same objections. He further states that the Respondent No. 2 has not misappropriated or embezzled the temple funds and is a suitable person for appointment even if he is not the selected person by the trustees. According to him the Court is only bound by a unanimous decision of the trustees but if there is a dissent then the Court is not bound even by a majority decision although the Court may consider it. He informs that the Respondent No. 2 has worked as a District Government Counsel (Civil) in the Civil Court at Mathura and is an advocate by profession.

11. The issues that require consideration in this appeal appear to be mainly three. The first revolves around the interpretation of Clause 4 of the compromise decree and the power of the Court to appoint a Receiver. The Second is the eligibility of Ram Katore Pande to be appointed a Receiver although he has been selected by a majority and not a unanimous decision of the trustees. The third objection is based on allegations of misappropriation and embezzlement against the Respondent No. 2.

12. The issue raised by the Respondent No. 2 regarding the locus of the Appellants does not appear to have been raised before the Court below and even in this appeal the allegations are vague and unsupported by any valid reasons or evidence. Moreover the Respondent No. 2 has not filed any appeal against the impugned order.

13. Clause 4 of the Compromise Decree in Original Suit No. 94 of 1923 reads as under:-

14. It is a translation from the original which is transcribed in Urdu language.

15. This clause has received interpretation in the past whenever a dispute was raised on selection/appointment of a Receiver for this temple. From the various orders of the Court passed earlier and as filed along with this appeal it appears that at times the Court has accepted the majority decision of the trustees and at times it has not.

16. In 1954 the matter was considered by the High Court in First Appeal From Order No. 92 of 1954 connected with First Appeal From Order No. 100 of 1954 and it opined as quoted under in the order dated 15.4.1954:-

It appears that according to the terms the appointment is to be made in consultation with the persons who were parties to the suit or their representatives-in-interest. The terms provide that if there is no unanimity among the parties or if the parties do not give their opinion as to who should be appointed as a receiver then in that case the Court may appoint a receiver. The order of the learned Civil Judge dated 26th March, 1954 makes it apparent that he has not appointed the receiver in accordance with the terms of the decree. The learned Civil

Judge will now ask all the parties who are parties to the decree or their representatives-in-interest who have already been impleaded to nominate a receiver. If there is unanimity, the learned Civil Judge will appoint such person as a receiver and fix that person's remuneration. If there is no unanimity among all the persons concerned, then the learned Civil Judge will appoint a person of his own choice. In such a case, he may take the majority view into consideration, but he will not necessarily be bound by it. It will be open to the parties to unanimously nominate Sri Kanhaiya Lal, if they choose and it will also be open to the Court to consider his name for appointment as his own nominee, if he so desires, in case no name has been unanimously put forward.

17. There is nothing on record of this appeal for this Court to take any contrary view. Even when the Court has accepted a majority decision of the trustees it has always first considered the suitability and eligibility of the person so selected by the trustees. Clause 4 has itself provided that in case Babu Baldev Behari Lal is rendered ineligible on incompetent a new Receiver shall be selected/appointed. Therefore, the clause has to be read to mean that:-

1. If there is unanimity in the decision of the trustees then it should normally be accepted by the Court.
2. If there is no unanimity among the trustees then the majority view may be taken into consideration by the Court but it will not necessarily be bound by such majority view.
3. In either case the Court has to see the eligibility, suitability and competency of the person who has to be appointed as a Receiver.

18. In a unanimous decision of the trustees a person is selected. It is the Court that has the power to appoint. Under this power it has to ensure that a suitable, eligible and competent person is appointed as Receiver. In case a person who is not suitable not eligible or not competent the Court need not appoint him. When the first Receiver was appointed under the compromise decree it talked about a possibility of the person being rendered ineligible or incompetent. Therefore, the suitability, eligibility and competency of the person has to be borne in mind in all eventualities which is the reason that the parties gave the power to appoint a Receiver only to the Court and not to the trustees. Appointment by the Court of an unsuitable, ineligible or incompetent person selected by a unanimous decision of the trustees is not to be read into Clause 4 of the compromise decree. That is the spirit under the compromise and it has been the spirit and point of consideration made by the Court for the past nearly 87 years.

19. There is no reason for this Court to deviate from such interpretation and the spirit of the compromise decree has to be a relevant consideration and that cannot be held to be as going behind the decree.

20. Admittedly the trustees have not taken a unanimous decision at present. When the term of the Respondent No. 2 expired the Court issued notices to all the trustees. It called upon them to select a person to be appointed as Receiver of the temple. The notices are available on record. In response all the trustees made a joint application naming one of themselves i.e. Ram Katore Pande as the person. They also filed their separate affidavits in support. The Respondent No. 1 i.e. Rajendra Prasad Pandey then retracted from his stand taken in the joint application and his affidavit. He denied the affidavit. In his application and affidavit made subsequently he did not agree to the selection of Ram Katore Pande. At this stage the Court found that there was no unanimity amongst the trustees. It had before it a majority view in favour of Ram Katore Pande. By the impugned order it has not accepted the majority view.

21. A perusal of the impugned order indicates primarily two reasons for not accepting the majority view. It interpreted Clause 4 of the Compromise Decree and took aid of orders passed in the past. It found that its power gave it authority to either accept or disagree with the majority view. That Ram Katore Pande was a Government servant and permission from the Government had not been taken by him led the Court to conclude that he was not competent to be appointed as Receiver of this private temple. The absence of any personal details of Ram Katore Pande was also a reason for the Court to reject his selection.

22. It is not disputed that Ram Katore Pande is one of the fourteen trustees. He is also the brother of another trustee namely Ram Kumar Pandey. The record indicates that never in the recent past any trustee has ever been appointed or selected as a Receiver of the temple. The records show that non-trustees namely Babu Baldev Behari Lal, Chaube Bihari Lal Vakil, Ratan Lal Seth, Radha Charan Sharma, K.K. Arora and M.C. Chaturvedi have worked as Receiver since 1954 upto recently. Even Clause 4 of the Compromise Decree does not contemplate selection or appointment of a trustee as a Receiver. The trustees are only the selectors. Then whether Ram Katore Pande could be selected by the trustees to function as Receiver and continue as trustee is itself doubtful. At least the power of selection given to the trustees does not provide for selection/appointment of a trustee as a Receiver.

23. That Ram Katore Pande is a teacher in an educational institution run and managed by the Basic Shiksha Parishad is not denied. That he receives the salary as such teacher from the State Exchequer is admitted. He would therefore, be a Government servant within the definition given under the U.P. Government Servants Conduct Rules 1956. Rule 15 is quoted hereunder:-

15. Private trade or employment.--No Government servant shall, except with the previous sanction of the Government, engage directly or indirectly in any trade or business or undertake any employment:

Provided that a Government servant may, without such sanction, undertake honorary work of a social or charitable nature or occasional work of a social or charitable nature or occasional work of a literary, artistic or scientific character, subject to the condition that his official duties do not thereby suffer and that he informs his head of department, and, when he is himself the head of department, the Government, within one month of his undertaking such a work

24. The proviso permits a Government servant to undertake honorary work or occasional work of a social or charitable nature even without sanction provided the official duties do not suffer.

25. Although it is stated that Ram Ka-tore Pande has undertaken to work as Receiver without any remuneration but his duties as Receiver necessarily makes him involved in financial transactions in the management of the affairs of the temple. The duties of a Receiver have been enumerated under Order XL, Rule 3 Code of Civil Procedure. It is quoted hereunder:-

3. Duties.--Every receiver so appointed shall--

- (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property
- (b) submit his accounts at such periods and in such form as the Court directs
- (c) pay the amount due from him as the Court directs
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

26. The Receiver will have to involve in handling the properties of the temple, the offerings made in the temple, operation of Bank accounts, collection of rents and profits, expenses incurred in maintenance, payment of salary of employees, distribution of money collected as offerings and donations and submit accounts under his signature. He being a Government servant shall be involved in diverse financial transactions relating to the temple for which he can be made responsible in the event of loss or any financial irregularity alleged or investigated or proved.

27. From the above facts as are existing on record Ram Katore Pande cannot be held to be eligible and competent to be appointed as Receiver of this private temple for the reason of his himself being a trustee and a Government servant. The Courts have to be cautious when the intention of the parties reflects an attempt to be possessed of the suit property.

28. The responsibilities of a Receiver are as may be directed by the Court or as provided under Order XL, Code of Civil Procedure. There is no material on record to enable this Court or even the Court below to hold Ram Katore Pande to be a suitable person to be appointed as a Receiver of this temple.

29. The Respondent No. 2 i.e. Mahesh Chand Chaturvedi who is not a trustee has been appointed as Receiver by the impugned order although he was not selected by the trustees. Apart from Ram Katore Pande the trustees did not resolve on any other name. The Court found that some other persons including advocates had filed applications to be appointed Receiver of the temple. It found that the Respondent No. 2 has been working as Receiver of this temple for the past two years. The Court recorded its satisfaction with his working and found him a competent person. It found him a suitable person to discharge the functions of Receiver. He was a lawyer by profession and had in the past worked as District Government Counsel (Civil) in the Civil Court at Mathura hence he was eligible. Therefore, under the powers conferred on the Court by Clause 4 of the Compromise Decree it was not bound by the majority view of the trustees. The Court has considered the majority view of the trustees aired for Ram Katore Pande. No other person was selected or recommended by the trustees.

30. The Appellants have made vague allegations of misappropriation and embezzlement of temple funds against the Respondent No. 2 during his functioning as a Receiver in the past. Such allegations are neither specific nor any incident or particular transaction has been cited. These allegations cannot stand the test of scrutiny unless they are *prima facie* found established or proved. As they stand today these vague allegations are not sufficient to record a finding of misappropriation or embezzlement.

31. A submission was advanced that the Court has not taken into account certain applications made by the Appellants. It is also stated that such applications were not taken on record nor they were numbered to form part of the record. Ground number (c) of the memorandum of this appeal specifies the applications that are contained as Annexures 6, 9 and 10 of the affidavit.

32. Annexure-6 to the affidavit is an application dated 5.10.2010 made by the Appellants. This application contains a prayer for appointing Ram Katore Pande as Receiver of the temple. Clearly this application has been considered by the impugned order when it has given reasons not to appoint Ram Katore Pande. The ground number (c) and the submission based on it are thus misconceived.

33. Annexure-9 to the affidavit is an application dated 8.10.2010 made by the Appellants asking the Court not to appoint Mahesh Chandra Chaturvedi as Receiver of the temple. This prayer has been addressed by the Court in the impugned order when it was considering the suitability, eligibility and competency of Mahesh Chandra Chaturvedi. In the application and the affidavits accompanying it allegations of misappropriation and embezzlement have been made against the Respondent No. 2. As already recorded above they are vague allegations with no particulars. It appears that the Appellants want the Court to make a fishing inquiry on vague allegations. The Court cannot be made to create evidence against a party or in favour of a party. The onus is on the party making the allegations to at least be

specific or to *prima facie* establish the allegations. None of the allegations have been detailed nor specified hence the Appellants have not discharged their onus even for the purpose of making out a *prima facie* case of misappropriation and embezzlement.

34. Annexure-10 is an application dated 11.10.2010 made by some of the Appellants seeking adjournment of the case. It appears to have been made on the day the impugned order was passed by the Court. It was an attempt to get the case adjourned on the date fixed for orders. No benefit of such submission can be derived by the Appellants Whose objections and affidavits on the issue of appointment of Receiver were duly taken into consideration by the Court. That these applications were not numbered could be a ground to consider the submission which in effect attributes motive against the Court of being in a hurry to appoint the Respondent No. 2. No such motive of the Court below is reflected in its decision making process nor it is reflected from the reasons contained in the impugned orders.

35. For the aforesaid reasons, no illegality is found in the impugned orders. This appeal has no force. It is accordingly dismissed.

36. No order is passed as to costs.