(1943) 04 PAT CK 0003

Patna High Court

Case No: None

Mahant Banabehari Puri		APPELLANT
	Vs	
Naga Ananda Puri and Another		RESPONDENT

Date of Decision: April 21, 1943

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11, 92

Citation: AIR 1944 Patna 115

Judgement

1. This appeal and the civil revision arise out of a suit which was instituted by the respondents under the provisions of Section 92, Civil P.C. for a declaration that the defendant, who is the appellant before us, should be removed from the trusteeship of a public endowment known as Lakshmibhadra Math situated in the town of Puri, for appointing some competent persons as trustees so that the endowed properties may vest in them, and for settling a scheme for the due administration of the trust. After the written statement was filed the issues, which were agreed to, were framed at page 21, the important issues being whether the defendant-committed any breach of trust, malfeasance, misfeasance, misappropriation or illegal alienation of the math properties as alleged, whether the defendant was incompetent to manage the affairs of the math and should be removed from the mahantship, and whether settlement of a scheme by the Court was necessary for the administration of the math. But at page 8 the issues are stated as follows: (1) Restriction of the defendants'' power of alienation of math properties, (2) Allotments for feeding guests, (3) Arrangement for necessary repairs. It is not understood how the important issues as to whether the defendant had committed any breach of trust, etc., and whether owing to his incompetency to manage the affairs of the math he should be removed from the mahantship were omitted when the issues were signed by the learned District Judge on 18th November 1938. On the other hand, the order of 18th November 1938, says that draft issues filed are accepted. The draft issues, which we have reproduced already from page 21, show that they were draft issues by

consent and were signed by the pleaders of both sides.

2. On 13th February 1939, an application was put in by both the parties in which they prayed that the case be referred to arbitration to decide the dispute by settling a scheme for smooth and better management of the math by the defendant. That application is to be found at page 22 and contains names of the arbitrators as Rai Bahadur Lokenath Misra, Advocate, Puri, and Babu Harihar Das, Advocate, Puri. The former gentleman was appearing for the plaintiff in the case and Babu Harihar Das is married to the first cousin of Rai Bahadur Lokenath Misra. Upon receiving this petition, the Court ordered that the application is allowed and the order of reference should be issued at once and that the award should be submitted positively by 14th February 1939. It will be noticed that the Court did not make any provision for a difference of opinion between the arbitrators such as he was required to do by para. 4 of Schedule 2, Civil P.C. But this was a more irregularity and as the arbitrators agreed in the award the question is not material for further consideration. On 14th February 1939, the arbitrators filed an award which is at page 23.

3. In that they decided that the mahant shall not transfer or encumber the math properties without previously obtaining the sanction of the committee consisting of Rai Bahadur Lokenath Misra, Babu Chandrasekhar Misra and Babu Harihar Das, Advocate, after looking into the accounts of the math and that Rs. 400 will be set apart every year for the repairs of the math building. Then provision is made for feeding each guest without fixing the number and in particular that plaintiff 1 will remain in charge of the feeding of the guests and will get its. 15 per mensem as his maintenance and also will get two free meals every day. The defendant immediately filed an objection to the award in which he very strongly objected to the appointment of the committee and its personnel, in particular of Babu Chandrasekhar Misra. He also asserted that Rai Bahadur Lokenath Misra is an enemy of the defendant and bears ill-will towards him. It was also objected that the award was imperfect as it did not settle a scheme for the administration of the math nor did it indicate how the existing debts are to be discharged and that it was vague in so far as it did not fix the number of guests who are to be fed daily. Objection is also taken to the fixing of maintenance for plaintiff 1 who it was asserted, was a leper and should not have been left in charge of feeding the guests.

4. The objections to the award came up for hearing before the learned Judge before whom it was also objected that the award was bad as matter of law because it appears to have been objected before the learned District Judge at the time of hearing that the suit u/s 92, Civil P.C. could not be disposed of as a result of a compromise arrived at between the parties even though there was reference through the intervention of the Court. The learned District Judge overruled the objection and held that he saw no reason why the scheme which was prepared by the arbitrators should e be rejected by him as he thought that the scheme should be accepted on the ground of public policy. He then proceeded to consider the other objections and overruled them against the defendant and came to the conclusion that the award could not be set aside and ordered that a decree might be

passed in terms of the award.

5. Against this decision dated 28th July 1939, an appeal has been preferred to this Court. A civil revision has also been filed in case it is held that no appeal lies.

6. A number of authorities have been drawn to our attention in which contradictory views are taken as to whether a suit u/s 92, Civil P.C. can be referred to arbitration. Distinction is drawn in several cases that an award on a private arbitration with the intervention of the Court settling a dispute with regard to a public institution cannot be filed in Court so as to found a decree thereon.

7. In Abdur Rahim v. Mahomed Barkat Ali AIR 1928 P.C. 16. Lord Sinha, who delivered the judgment of their Lordships, had to consider whether a compromise decree passed in a suit instituted under the provisions of Section 92, Civil P.C. with the sanction of the Advocate-General can be treated as res judicata so as to bar a subsequent suit by other plaintiffs u/s 92, Civil P.C. His Lordship observed at p. 106 that it is extremely doubtful whether such a decree could be held to be res judicata as against any persons other than those who consented to that decree and then made the following observations:

The case Jenkins v. Robertson (1867) 1 H.L. Sc. 117 was based on Scottish law and as explained in In re Soth American and Mexican Co. (1895) 1 Ch. 37 appears to lay down broadly that persons instituting a suit on behalf of the public have no right to bind the public by a compromise decree, though a decree passed against them on contest would bind the public. It is not necessary for the purpose of this case to decide whether the law in India u/s 11, Civil P.C. is the same as so explained. Their Lordships ft consider that, in so far as the nature of the suit was changed by the amendments mentioned, namely by adding strangers to the trust as defendants and by prayers for relief not covered by Section 92, the suit ceased to be one of a representative character and the decree based on the compromise such as it was, namely by six only out of the seven plaintiffs in the suit, however binding as against the consenting parties, cannot bind the rest of the public. Section 11, Expln. 6 has no application to such a case.

8. This was an appeal from the decision of the Calcutta High Court reported as Syed Abu Mahomed Barakat Ali and Others Vs. Abdur Rahim and Others, on which reliance was placed by the learned Advocate for the respondent before us. So far as the question which is before us is concerned, the learned Judges held that there was no want of jurisdiction of the Judge to entertain a suit or to order an amendment as prayed or to direct a decree to be made on compromise of the suit and then observed that the cases in Gyananda Asram v. Kristo Chandra Mudherji 8 C.W.N. 404 and Abdul Karim Abu Ahmad Khan v. Abdus Sobhan Choudhury AIR 1915 Cal. 193 merely show that in a suit brought u/s 92, Civil P.C. when a petition of compromise is filed, it is open to the Judge to say that the compromise is not lawful and he could then refuse to paas an order on the basis of the compromise, bat it is another thing to say that a Judge has no jurisdiction to pass a decree on the basis of compromise in a suit brought u/s 92, Civil P.C. and that

Order 23, Civil P.C. dealing with adjustment of suits makes no such distinction. The authority of this case is weakened by the fact that their Lordships of the Judicial Committee did not approve of some propositions of law laid down in this case with regard to the addition of strangers.

9. The case in Abdul Karim Abu Ahmad Khan v. Abdus Sobhan Choudhury AIR 1915 Cal. 193 appears to be somewhat similar to the facts of the case before us. In that case n, suit was instituted u/s 92, Civil P.C. on the allegation that the defendant has misappropriated certain properties dedicated for up-keep of the mosques and prayed inter alia that the defendant should be removed from mutwalliship and a new mutwalli appointed and a scheme for the proper discharge of the trust framed. The parties then entered into a compromise whereby the plaintiffs agreed to withdraw from the suit in consideration of certain advantages to be received by them, but the Court refused to record the compromise. It was held by the learned Judges that if the endowment was a public endowment the suit cannot be compromised by a petition because there is no reason whatever why the worship, pers of the mosque, if it be a public mosque, and those who are interested in its management should be prejudiced, as undoubtedly they would be prejudiced by the stifling of this suit. They then referred to the terms of Order 23, Rule 3, Civil P.C. that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement, the Court shall order the agreement to be recorded and pass a decree e and observed that.

the question whether this is or is not a lawful agreement depends on the further question whether this is or is not a public endowment, and so long as it remains subject to controversy whether this is a> public endowment or not it cannot be said to be proved to the satisfaction of the Court, that the suit has been adjusted by a lawful agreement.

10. In the present case it appears to have been agreed between the parties that this was a public endowment and, therefore, it was to the interest of the public to have it determined whether the defendant was guilty of having committed a breach of trust, malfeasance, misfeasance and misappropriation as was the subject of issue 2 and, therefore, whether he was at all competent to manage the affairs of the math as he was further, alleged to have committed illegal alienations and so should be removed from the mahantship. That question has never been decided by the arbitrators and the learned District Judge appears to have completely overlooked that important question. The agreement arrived at as a result of the award between the parties was to avoid any enquiry into this important matter by giving the plaintiff Rs. 15, a month. The interest of the institution has been wholly ignored and neglected by the "parties, by the arbitrators and by the Court.

11. In our opinion the proper course which should have been adopted by the learned Judge was that he should have first decided issues 2, 3 and 4. If it had been decided that the defendant was not guilty of breach of trust as alleged, the suit should have been dismissed, but if on the other hand it had been decided that the defendant was guilty,

then the learned Judge might have, with the agreement of the parties, taken the help of arbitrators to settle a scheme and to appoint another trustee or a committee of trustees. If the scheme for the management of the trust property thus pro-posed there was sound and trustworthy, the learned Judge could have accepted it and disposed of that part of the suit under Order 23, Rule 3, Civil P.C. It would have been open to him to take further evidence to decide the nature of the objection which was raised to the personnel of the committee and then he should have framed a scheme as provided by Section 92, Sub-clause (f) and (g), Civil P.C. or he could have appointed a new trustee by removing the defendant and vesting the property in a trustee or a committee of trustees as provided by Sub-clause (a), (b) and (c). He could have also given some other directions as the nature of the case required. For these reasons we would set aside the decision of a the learned District Judge and remand the suit for re-hearing and disposal in accordance with law.

12. With regard to the objection that no appeal lies to this Court the matter is easy of decision. The Court is bound to apply the provisions of Order 23, Rule 3, as was held Abdul Karim Abu Ahmad Khan v. Abdus Sobhan Choudhury AIR 1915 Cal. 193. referred to above, and the mere obtaining of an award in a case where Section 92 applies will not take away the jurisdiction of the Court to decide whether the award was lawful or not within the meaning of Order 23, Rule 3. An appeal lies from an order recording or refusing to record a compromise or agreement I under Order 43, Rule 1(m), Civil P.C. If, on the other hand, it is assumed that no appeal lies we have ample jurisdiction in the exercise of our powers of revision to set aside the order because we are satisfied that the interests of this public institution have not at all been considered by the learned District Judge. He has not given any finding that defendant 1 is or is not fit to continue as a trustee. Indeed he could not give any such finding because that portion of the dispute between the parties was carefully removed from an investigation by him.

13. In this view it is unnecessary to consider the various objections which have been raised to the personnel of the committee. But we wish to observe that it is desirable that Rai Bahadur Lokenath Misra and his relations should not serve on this committee when the defendant was so seriously objecting to the presence of Rai Bahadur Lokenath Misra. He was appearing for the plaintiff and there has been some litigation between him and defendant 1. How can the defendant have any confidence in him? The defendant has also a very serious objection to the inclusion of Babu Chandrasekhar Misra on the committee. The result is that the appeal is allowed, the order of the learned District Judge dated 28th July 1939, is set aside and the suit is remanded for re-hearing and disposal in accordance with law.

14. In the circumstances each party will bear his own costs of this litigation both in this Court and in the Court below. It is desirable that the suit which was instituted in 1938 should now be taken up with the utmost speed by the learned District Judge and disposed of in accordance with law.

15. It is unnecessary to pass any order in Civil Revision No. 118 of 1939 in view of the observations made above.