Rai Sundari Dasya Vs Benode Behari Saha and Others

Court: Calcutta High Court

Date of Decision: Jan. 31, 1935

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 115

Citation: 163 Ind. Cas. 595

Hon'ble Judges: Patterson, J; D.N. Mitter, J

Bench: Division Bench

Judgement

D.N. Mitter, J.
This is an appeal from a decision of the Subordinate Judge of Rangpur, daled February 23, 1930, by which he decreed a

suit brought by the plaintiffs (now respondents) in which J hey ask for a declaration of their rights as joint shebaits of two family idols Sri Sri

Rajrajeswar and Sri Sri Radha Krishna as also for recovery of joint possession along with the defendant now appellant. The relationship of the

parties to the suit is shown in a family pedigree which is found at page 46 of the 1st part of the paper book and which is reproduced below.

SITARAM SAHA, deceased.

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Anandiram Saha Gopnath Saha Kenaram Saha

deceased deceased deceased

| |

Ramkrishna Saha |

deceased |

| |

Padmolochan deceased |

| |

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| |

Raisundari Dasya _____

(defendant) | |

| Jagannath Saha deceased Kali Charan Saha

| deceased,

Purna Chandra Saha |

Dead |

| |

Wife Saroda Sundra Sundari|_____

Dasya, Dead. |

| _____

| | | | |

| Jiban Krishan Bhuban Mohen Krishna Harish

| Saha Dead Saha Dead Chandra Chandra

Sudhir Kumar Saha Saha Saha

(alleged to be adopted by | | deceased deceased

Haridhan Bhabani |

Saroda Sundari) Saha Dead. Chandra |

Saha Wife Sidhes

plaintiff wari Dasya

No. 3. P.W. No. 4.

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| | |

Benode Behari Banku Behari Pulin Behari

Saha plaintiff Saha plaintiff Saha

No. 1. No. 2. defendant.

2. It appears from the said pedigree that one Sitaram Saha was the ancestor of the parties to the present litigation, that is, the present plaintiffs. The

appellant Srimati Rai Sundari Dassi is the widow of one Padmolochan, who is one of the descendants of Sitaram Saha. The plaintiffs Nos. 1, 2, 3

and 4 are descendants from a branch of Jagannath Saha, one of the descendants of Sitaram Saha. It appears that Purna Chandra Saha, one of the

descendants of the said Sitaram Saha died in 1899. He left a will by which he directed that his widow Srimati Sarada Sundari Dasya should remain

in possession of the properties for her lifetime. There are certain provisions with regard to the maintenance of the mother and the grandmother. His

widow Sarada Sundari Dasya was given authority to adopt a son, and it was provided that if she died without making any adoption, all the

properties would be devoted for the debseba of the idols Sri Sri Iswar Rajrajeswar and Sri Sri Iswar Radha Krishna, if there was any surplus after

meeting the revenue charges, and if there was a further surplus, the money should be devoted for the purpose of certain charitable institutions and a

hospital. This lady Srimati Sarada Sundari Dasya died on November 23, 1921, and after her death one of the respondents before us, Benode

Behari Saha, took possession of (he properties both movable and immovable left by Sarada Sundari Dasya alleging that Sarada Sundari Dasya

had adopted his son Sudhir Kumar Saha according to the authority given in the will of Purna Chandra Saha. On this the present appellant Srimati

Rai Sundari Dassi who is the mother of Purna Chandra Saha made an application under Act XIX of 1841 on which the District Judge passed an

order maintaining her possession as shebaiti of the two idols Sri Sri Rajraieswar and Sri Sri Radha Krishna. There was an application for revision

of the said order by Benode Behari Saha before this Court. The application which was purported to be made u/s 115 of the Code was ultimately

dismissed, a Rule having been issued which was discharged. The order of the High Court is dated January 29, 1926. In that order the High Court

did not express any opinion on the question whether Benode Behari Saha would be entitled to the possession of the properties and the shebaitship

of the idols,, or did not determine the rights of the parties under the will of Purna Chandra Saha. Having been defeated in the High Court the

present suit was instituted by Benoda Behari Saha and his brother Banka Behari Saha, one Bhabani Chandra Saha and Sidheswari Das, whose

positions are shown in the geneological table as plaintiffs Nos. 3 and 4, respectively. In the plaint they make the following statement in Paragraph 4

to which it is necessary to refer in particular.

That on Agrahyan 6, 1331, corresponding to November 21, 1921, the late Sarada Sundari Dasya adopted plaintiff No. l''s son Sriman Sudhir

Kumar Saha as the son in adoption of her husband under the power given in the said will; and Sarada Sundari Dassya, deceased, died on

Agrahyan carresponding to November 23, 1921. In Paragraph 9 of the plaint it is stated ""that in law plaintiffs are at present the shebaits of the

aforesaid three idols by right of inheritence; and until and unless the summery order of August 26, 1925, of the Court of the District Judge of

Rangpur is set aside by a competent Court upon declaration of the adoption of Sriman Sudhir Kumar Saha, the defendant Rai Sundari Dasya is a

joint shebait of the aforesaid three idols with the plaintiffs, as a shebait, in fact, of the branch of Purna Chandra Saha....

3. The cause of action is staled to have arisen from the date of the summary order of August 26, 1925, and subsequently from the time when the

shebaitship of the plaintiffs was denied. It is stated in Paragraph 10 of the plaint that the defendant denied the plaintiffs right of joint, shebaitship of

the said three idols and also in acounter affidavit sworn in the High Court in connection with the application for revision against the order under Act

XIX of 1841. Upon this they asked for several declarations which are mentioned in the prayers at pages 41 and 45 in the 1st part of the paper

book. The substantial declaration asked for is that the plaintiffs are joint shebaits of the three idols Sri Sri Iswar Rajrajeswar and Sri Sri Iswur

Radha Krishna. Although there has been no prayer for recovery of possession the plaintiffs have paid ad valorem court-fees, treating the suit as

one for recovery of joint possession, with the defendant. The Subordinate Judge granted a decree with regard to the properties mentioned in

schedules ka and kha and dismissed plaintiffs suit with reference to the properties mentioned in schedule ga. The ordering part of the Subordinate

Judge"s judgment is in this form:

That the suit be decreed and the plaintiff"s right as joint shebaits of the idols and their right to joint possession of the disputed lands except those in

schedule ga be declared as. stated in the plaint. That a suitable person be nominated by both the parties to represent the idols, and in the presence

of the contending parties, and the idols so represented, a scheme be framed for the due performance of the sheba of the idols and the special

ceremonial worships according to the directions of the will of Purna Chandra Saha. The costs of the parties will be ultimately borne by the debuttar

estate after the scheme is prepared and approved by the Court. If the parties cannot agree about a person to represent the idols, the Court will

appoint one to do the same. The suit so far as it relates to schedule go, properties be dismissed and the other prayers in the plaint be also

disallowed.

4. It is against this decree that the present appeal has been brought by the defendant and two contentions substantially have been put forward

before us by Dr. N.C. Gupta, who appears for the appellant. It is sated in the first place, that plaintiffs should be non-suited on their own

statements made in Paragraph 4 of the plaint to the effect that the plaintiff No. 1"s son Sudhir Kumar Saha has been taken in adoption by Sarada

Sundari Dasya under the power given to her by her husband Purna Chandra Saha under the will, and as the properties, which form the subject-

matter of the suit, cannot be regarded as debuttar properties, if there has been a valid adoption by Sarada Sundari Dasya, the plaintiffs'' claim must

fail on their own allegation in the plaint. This question turns on the construction of the will of Puma Chandra Saha a certified copy of which has

been marked a as Rs. 2 and is to be found at page 38 of the 2nd part of the paper book. The question of any dedication to, or trust in favour of

the idols depends on the event o of there being no adoption by Sarada Sundari Dasya. At page 39, the material provisions of the will run as

follows:

If my wile Srimati Sarada Sundari Dasya dies without taking any son in adoption, then on t her death all the properties belonging to my estate shall

become the properties for the sheba of the idols Sri Sri Iswar Rajrajeswar and Sri Sri Radha Krishna; and from the surplus amount of profits that

shall remain after defraying the Sadar Revenue of those properties and the collection charges the sheba of the aforesaid idols and the daily and

periodical rites prevalent from before the atithi sheba (feeding of guests) will be performed; and if there be any surplus amount after that then an

English School and a charitable dispensary will be established in my own village, and the costs thereof will be defrayed from the estate.

5. Having regard to the provisions in the will it is absolutely clear, and it is not disputed so far as the construction of the will is concerned, that in the

event of there being a validly adopted son of Purna Chandra Saha by Sarada Sundari Dasya under the authority given in this will, no question of

treating Purna Chandra Saha''s properties as debuttar properties can possibly arise. This is the case which is made out in the plaint; it is not merely

made out in the plaint but it is adhered to in the evidence of Benode Behari Saha, one of the plaintiffs who has taken an active part in the litigation,

as given in Court. At page 86 of the 1st part of the paper book Benode Behari Saha says this:

After the decision of the case in the District Judge''s Court my wife was guardian of Sudhir. I gave up the guardianship of Sudhir as it came to be

against my interest as joint shebait. I set up Sudhir as an adopted son in the Act XIX case as he was actually adopted. If Sudhir is validly adopted

son, the disputed properties are his. The District Judge has found him not to be validly adopted son, so I claimed as shebait. In my estimation

Sudhir is a valid Dattak.

6. So the case which he makes in the plaint is persisted in his evidence and in the face of all that has been stated in his evidence, it would be difficult

to hold that the plaintiffs are entitled to maintain this suit. The Subordinate Judge has entirely missed the effort (effect?) of this allegation made in the

plaint. He says this:

He contended that the plaintiffs alleged the adoption of Sudhir Kumar as a fact and therefore is attitude must be deemed hostile to the idol

themselves. As regards this branch of the arguments, I wish to observe that Benode Behari does not claim any relief on his statements in the Plaint.

He simply mentions it as a fact and were to consider whether this should form his disqualification for getting any relief. Parties often make

statements of fact on verification in the headings but the Courts have always to decide which of these statements are true and statements if one of

the contending parties must be held to be false.

7. This statement of the Subordinate Judge is contrary to the rules which are followed in granting reliefs to parties on the pleadings. It is elementary

that parties can succeed only on the case which they have made out in the pleadings. Having regard to the statement in the plaint which it not

abandoned, or which is not withdrawn and which is persisted in throughout the course of the trial, we are of opinion that on this ground alone the

plaintiffs" suit should fail and should have been dismissed.

8. But as the question as to the right construction of the will in regard to the succession of the shebaitship of the two idols has been debated before

us at considerable length, and as learned Advocate for the respondent has asked that it is expected by the parties that a decision should be given,

we proceed to determine the same. In considering, however, this question of construction, we will have to bear in mind the very important

circumstance which is practically admitted that the worship of the two idols Sri Sri Rajrajeswar and Sri Sri Radha Krishna was founded by the

ancestor of the plaintiffs sometime prior to the year 1846, and that by an ekrarnama of December 23, 1846 Ex. N page 1 of the paper book and a

counter part of the ekrarnama Ex.12 which was executed by Biswesswari Dassi and another in favour of Konoram Das Saha, whose names

appear in the genealogical table at page 46 of the paper book, certain parties were charged with the worship of the idols. The arrangement was

that the two parties referring to the two branches through whom the plaintiffs and the defendants respectively claim shall get their shares in

proportion of 10 annas and 6 annas. And there was this further provision:

You and we shall get according to our respective shares the surplus amount of profits whatever there will remain after paying oft according to our

respective shares the revenue of the Mehals due from the Punyaha of the year 1254 B.S. and defraying the expenses of the established Sri Sri

Iswar Debalaya and the annual worship of Gods and for the guests, etc., which have been carried on all along. We and you shall pay without any

objection the expenses of the debshebas and religious ceremonies, etc.

9. The result was that specific portions of the properties belonging to the two branches respectively of Sitaram Saha''s family were charged for the

purpose of the worship of the two idols.

10. In the evidence which has been given in this case on both sides, it is stated that certain palas or turns of worship were established shortly after

the execution of the ekrarnama, and that Purna Chandra Saha''s ancestor agreed to worship the idols during 19 days of the month while his co-

sharers agreed to worship them during 11 days. The founders of the idols were some remote ancestors of Purna Chandra Saha and his co-sharers

whose names do not appear in the record. It is really common ground between the parties that there has been this division of the right of

shebaitship which has continued from after the year 1816, and this matter will have to be kept in view in considering the will of Purna Chandra

Saha, shortly before his death.

11. It is argued for the appellant that by the will in the event of there being no adoption by Saroda Sundari Dasya, a trust was created for the

worship of the two idols after meeting the expenses of the daily and periodical rites which have been prevalent and the atithi sheba (feeding of

guests) and also the establishment of an English School and a charitable dispensary. And it is said that in these circumstances, after the death of

Sarada Sundari Dasya her legal heir, that is her mother, the present appellant, would be the rightful person to have charge of the properties to

which the trust attached. Then followed the provision that if there was no adoption of Sudhir all the properties or at least a good portion of them

would be the properties of the idols. In fact the appellant contends that this could only refer to the sheba, in the manner as it was being carried on

since the year 1816. On the other hand, the respondents contend that there was no limitation in the will and that that there was an absolute

dedication of Puma''s properties to the two idols, and that the said provision was to come into effect after Puma''s death.

12. We have carefully examined the provisions of the will, we have looked into the original Bengali certified copy, and we are of opinion that the

contentions of the appellant that the trust was created for the purpose of meeting the expenses of the debsheba, as it was being carried on during

Purna''s, lifetime ever since the year 1816 is the right one and by the will of the testator, he intended that the money should be devoted for carrying

on his turn of worship. It would be difficult to accept the contention of the respondents as that would mean that you would have to disregard the

state of things which was in existence at the time when the testator made the will. You have also to disregard what is said in the previous passages

in the will describing what the sheba consisted of Having regard to the fact that there has been a partition of the right of worship for more than 70

or 80 years, it is difficult to imagine that the testator would be making provision for the sheba, of the idols as was being carried on by the other

branch of the family, namely, for 11 days. In order to consider the provisions of the will, regard must be had to the entire will, to the setting of the

expressions indifferent parts of the will. It is difficult to, read the word debsheba in the subsequent passage in the will where there is reference to

the property being gifted for the debsheba of the idols, without reference to the principal mode of sheba as indicated in lines 8 to 10 of the said

will. If this view is adopted, namely, that there has been a partition of the right to worship and a division of such a right as contemplated by the

Hindu Law, then the succession to the shebaitship, assuming that there has been a dedication in favour of the idols for the purpose of the She has,

must follow the line of succession of Purna"s heirs, and it is conceded that the next heir of Purna is the mother, the present appellant. The right to

worship by turns is established by the authorities and reference may be made in this connection to the recent decision of their Lordships of the

Judicial Committee in the case of AIR 1925 176 (Privy Council) , the question was raised whether the right of worship of the idol can be made the

subject of partition. Their Lordships after quoting certain authorities of this Court came to the conclusion that such a right exists.

13. Having regard to the state established by the facts which, are almost admitted, it is difficult to say that there has been no division or partition in

this case. In this view of the case the plaintiff also has got no case. There is also considerable force in the contention raised on behalf of the

appellant that reading the terms of the will it seems clear that there was a sort of trust in favour of the idols and for other charitable purposes. If that

view is accepted, the plaintiff also has got no case. There can be no doubt that if there is no provision in a document creating the endowment as to

the succession of the shebaitship, the shebaitship follows the line of the heirs of the founder. This position is well established in view of the decision

of their Lordships of the Privy Council in the case of Gossomee Sree Greedhareejee v. Ramanlalljee Gossami 16 I.A. 137 : 17 C. 3 : 5 Sar. 350 :

13 Ind. Jur. 211(P.C.), It is also stated that the same rule of devolution applies where there is an accretion to debuttar properties either by other

members of the family or by a stranger. That, in my opinion, is not an absolute rule. It is to be considered with reference to the facts of each case

and here, having regard to the circumstances that there has been a division of the turn of worship, it would be just that the shebaitship should follow

the line of the heirs of the person who made the subsequent dedication. In this ground also we are of opinion that the plaintiffs" case should fail.

14. The question as to whether Sudhir Kumar Saha was validly adopted or not is a matter which cannot be decided in the absence of Sudhir. We

also think that the suit is bad for defect of parties. It also seems to us that the idols are a necessary party or at least a proper party to the suit and

these questions which have now been raised cannot be rightly agitated in the absence of the idols.

15. Apart from this question of defect of parties we rest our decision first on the statement made in Paragraph 4 of the plaint as also on our

decision as to the true construction of the will.

16. The result is that the plaintiffs" suit must fail and is dismissed with costs both here and in the Court below. We assess the hearing fee at 20 gold

mohurs.

17. The cross-appeal which is not pressed is dismissed.

Patterson, J.

18. I agree.