
(1954) 11 OHC CK 0013

Orissa High Court

Case No: S.A. No. 631 of 1950

Indramani Padhi and
Others

APPELLANT

Vs

Keluni Dibya

RESPONDENT

Date of Decision: Nov. 30, 1954

Citation: (1955) 21 CLT 111

Hon'ble Judges: Rao, J

Bench: Single Bench

Advocate: G.C. Das, for the Appellant; H. Mohapatra, for the Respondent

Final Decision: Dismissed

Judgement

Rao, J.

The Defendants are the Appellants in this Second Appeal. The Plaintiff filed the suit for a declaration of her 8 annas shebaiti right and for confirmation of possession over the disputed property and for a permanent injunction restraining the Defendants from disturbing her possession.

2. The Plaintiff's case is that one Panchu Padhi, grand-father of the Plaintiff and his two brothers Madan and Nisakar were shebaiti of Sri Janakeswar Mahadeb that Nisakar died without male issue before the Provincial Settlement leaving behind him survivors Panchu and Madan who performed the seba-puja of the deity and possessed the debottar properties in equal shares. That after Panchu's death his shebaiti right devolved on the Plaintiff's father Neta Padhi and after him it devolved upon her mother Kanchan who performed the seba-puja of the deity and possessed the disputed property till her death that after her death about 15 or 16 years back the Plaintiff is performing the seba-puja and is in possession of the disputed property that the Defendants threatened to dispossess her from the disputed property on 21-11-47 and hence she filed the suit.

3. The contention of the Defendants is that the Plaintiff has no locus standi to bring the suit in as much as she being a member of a different gotra, is incompetent to be shebait

of the deity and that the Plaintiff's claim is barred by limitation.

4. The learned Munsif dismissed the Plaintiff's suit holding that she has no locus standi to bring it and also held that the suit is barred by limitation. In appeal, the learned Subordinate Judge held that the Plaintiff is entitled to bring the suit and that it is not barred by time.

5. The learned Counsel for the Appellants contends that the learned Subordinate Judge erred in coming to the conclusion that the Plaintiff has locus standi to file the suit and that the suit is not barred by time. He also contends that Nisakar had two daughters by the time of his death and the properties did not pass to them and were taken by his other two brothers Panchu and Madan and this supports the finding of the learned Munsif that females who are married into a different gotra are not entitled to succeed. He further contends in the first place that under the general law the females are not entitled to succeed and that after the death of Kanchan the properties should revert back to the male reversioners, and secondly she is not entitled to succeed according to custom.

6. In support of his contention that after the death of Kanchan the properties should revert to the male reversioner he relies upon a Sentence in the Hindu Law of Religious and Charitable Trust by Mr. B.K. Mukherjea now a Judge of the Supreme Court at page 220, "When a woman succeeds as shebait she takes like a Hindu female heir a limited interest in the shebaiti right in the sense that after her death, the next male heir of the last shebait succeeds to the office". But the immediately preceding sentence is as follows, "Subject to these exceptions which rather prove the rule, we may take it to be a settled doctrine that a woman is not disqualified by reason of her sex to succeed to the rights of shebait of an idol according to Hindu Law", and the entire discussion by the learned author on the subject commencing from page 217 clearly shows that in the absence of a custom or family usage, succession to shebaiti right is governed under the general Hindu Law. At page 217 the learned author says, "As succession to shebaitship is governed by the ordinary Law of inheritance, it scarcely admits of any doubt that a woman can succeed to shebaitship." After discussing certain cases of the Judicial Committee of the Privy Council, the learned Author observes at page 218, "Having regard to the subsequent development of law on the point it could not be stated as a broad proposition of law that the ordinary rules of inheritance would not govern succession to shebaitship unless a usage to that effect is proved to exist. The true view is that the ordinary rules would apply unless a usage to the contrary is established." In view of these statements by the learned Author, I cannot agree with the contention of the learned Counsel that because Kanchan had a limited right as a Hindu widow, the male heirs of the last shebait succeeded to the office. In my opinion, the words "male heir" are used at page 220 in the concluding clause of the sentence of that paragraph by accidental slip, as the case on which that sentence was based was a case where the next claimant was a male. The Plaintiff being her daughter is the next heir.

7. The learned Counsel also relied upon a decision in the case of Sri Sankareswar Mahadev v. Bhagabati Dibya 14 C.L.T. 47 which it was held that "in a suit where the Plaintiff sties for the exercise of the right of shebaitship to a temple, it is for him to establish his competency to the office", and urges that the Plaintiff should be non-suited as she failed to prove her competency. It was also held in that "if it is established that the services be performed by the Plaintiff, then in such a case to allow the Plaintiff's claim, would defeat the purpose for which the worship was established and hence the suit is not maintainable". The case was decided on the authority of two decisions of the Judicial Committee in the cases of Gossamme Sree Greedharreejee v. Rumanlollijee Gossamme 16 I.A. 137 and Mohan Lalji v. Gobardhan Lalji Maharaj ILR All. 283. In the first case the decision was based upon the intention of the founder and it was observed,

According to Hindu law, when the worship of a thakoor has been founded the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution.

The second case was decided on the facts peculiar to that case. The Plaintiffs in that case were daughter"s sons by one of the shebaits. They claimed that as they were the heirs by ordinary rule of inheritance under the Hindu law and that there was no custom to the contrary, they must be held entitled to succeed. Their Lordships observed,

This rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. This qualification is in fact covered by the words used by Lord Hobhouse.

and their Lordships went on to say, "Starting from this point the first question to determine is whether the Plaintiffs suing for the joint exercise of the right of shebaitship to the temple in suit, have established their competency for the office" and then their Lordships dealt with the evidence and came to the finding that as Bhats, the Plaintiffs were not competent to perform the services attached to the office. Their Lordship further observed,

But to allow the Plaintiffs" claim to an admittedly Ballav temple, where the rites are performed according to Ballav ritual, which it is clearly established, they cannot perform, would, in their Lordships "judgment, defeat the purpose for which the worship was established.

Thus it can be clearly seen that in the above case the general law of inheritance was not followed as the daughter"s sons on account of belonging to a different religious persuasion were not competent to perform the worship. So, on the authority of this decision, I am inclined to hold that general law of inheritance applies to succession to the shebaiti right unless there is any fundamental incompetency to carryon the worship. The decision in 14 CLT 47 was actually sed upon the very document on which the endowment

was based. Construing that document, their Lordships of the Patna High Court came to the conclusion on the authority of the two decisions of the Judicial Committee noted above that the services in that particular case cannot be preformed by anybody other than a member of the Kar family. In the present case there is 10 document by the-founder regulating the succession and it is not also the case of the Defendants that the Plaintiff belongs to a different religious persuasion and as such is incompetent to perform the services. The expression "competency to worship" used in 14 CLT 47 is thus to be construed as having reference to actual incompetency according to the directions of the founder or according to the religious us persuasion of the person claiming the right. In the present case the Plaintiff is the daughter of the last male-holder and is entitled to succeed under Hindu Law. She is not disqualified to perform the shebaiti duties on account of any directions of the founder or on account of her belonging to a different religious persuasion. She has the competency to perform the services. Further it has been held by the Judicial Committee in the case of Radha Mohan v. Jadoomani 21 I.W.R. 369 that females can get the services of deity performed by others. So I hold that the Plaintiff has the requisite competency and she cannot be excluded under the general Hindu law by a male reversioner and is entitled to succeed to the shebaiti right. In my opinion, therefore, the contention of the learned Counsel on this point cannot be accepted.

8. The learned Counsel for the Appellants then contends that the learned Subordinate Judge ought not to have rejected his contention on the ground that he has not pleaded any custom specifically in the written statement. The learned Counsel took me into the entire written statement filed by them and contended that inasmuch as the daughters of Nisakar did not claim any right to the property after the death of their father and as after the death of Kanchan's husband, it is alleged that the Defendants were in possession of the properties and carrying on the seba-puja, there is sufficient material in the written statement alleging a custom. He therefore contends that this custom of exclusion of the daughters who are married into a different gotra is proved and is alleged in the written statement and therefore the Plaintiff should be non-suited as this custom must be preferred to the general right of inheritance. It is settled law that a custom should be specifically pleaded in the written statement and proved to be continuous and of long duration. A single instance cannot, in my view, amount to a custom.

9. In the case of Protap Chandra Deo v. Jagadish Chandra Deo 54 I.A. 289 it has been observed that a custom if it is to be accepted must be clearly pleaded and proved and that a single instance is not sufficient.

10. In the case of AIR 1943 111 (Privy Council) it has been held that, The burden lies upon one who sets up a custom in derogation of the ordinary rights of another as the owner of immovable property to give clear and positive proof of the user relied upon to substantiate the custom.

In the present case there is not only the absence of a specific and definite assertion of custom as observed by the learned Subordinate Judge) but no evidence was also given

in proof of the existence of such a custom. As the custom) as alleged by the Defendants) is in derogation of the ordinary right of the Plaintiff, it must be definitely asserted and proved. In my opinion) therefore, the Defendants cannot rely upon the plea of custom which is advanced by them.

11. Lastly, the learned Counsel contended that the suit is barred by time, inasmuch as the Defendants were -in possession of the properties for over the statutory period openly and in their own right. It has been found by the learned subordinate Judge that the Defendants" possession was only a permissive possession. But the evidence in the case is that there was some relinquishment by Kanchan and that the Defendants consequently were in possession since then in their own right. The rent receipts and the mutation register clearly show that the name of Kanchan was not mutated. But, in my view, the facts) and circumstances of this case are such that Kanchan being a female, the Defendants might have been in management of the properties and consequently got their names mutated. The mutation of the names of the Defendants cannot be taken to be a possession hostile to Kanchan or the Plaintiff. Further it should be remembered that according to the law applicable to the case, Kanchan and the Plaintiff stand in the position of co-sharers. In such a case it is heavily incumbent on the part of the Defendants to prove by clear evidence that Kanchan or the Plaintiff was ousted from exercise of their rights to the property. There is evidence on the side of the Plaintiff that Kanchan was getting the services performed through other Brahmins competent to perform the worship and that the Plaintiff has returned from her father"s house and is getting the worship performed.

12. In this view of the case and for the reasons stated above, I am of opinion that the judgment of the learned Subordinate Judge is correct and that the Plaintiff is entitled to succeed. The appeal, therefore, fails and is dismissed with costs and the Plaintiff"s suit is decreed with costs throughout.