RAM RATTAN (DEAD) BY LEGAL REPRESENTATIVES

v.

BAJRANG LAL & ORS.

May 5, 1978

[Y. V. CHANDRACHUD, C.J., D. A. DESAI AND R. S. PATHAK, JJ.]

Duty of Court to consider preliminary objection as to admissibility of a document in evidence—Explained.

Stamp Act, Sections 33, 35, 36—*Scope of.*

Hereditary office of Shebait enjoyed by a person, whether movable or immovable property—Whether the deed of gift of such a right requires registration.—The office being immovable property in the instant case, the gift deed is inadmissible in evidence for want of registration.

The plaintiff-appellant, who died pending the appeal sought a declaration that he was entitled to a right of worship by turn (called Osra) for 10 days in a circuit of 18 months in the temple of Kalyanji Maharaj at village Diggi District. Tonk, Rajasthan under the Will Ext. dated 22 September, 1961 executed by deceased Mst. Acharaj, wife of Onkar. The Trial Court did not try the preliminary objection, when it was raised at the time of the trial; but made a note : "Objected. Allowed subject to objection". The Court rejected it at the time of arguments taking recourse to Section 36 of the Stamp Act. On the question of registration it held that as the "turn of worship was a movable property", if did not require compulsory registration and decreed the suit. In appeal the first Appellate Court reversed the Judgment, *inter alia*, holding that the document Ext. I was a gift and as it involved gift of immovable property the document was inadmissible in evidence both on the ground that it is not duly stamped and for want of registration. The Plaintiff's second appeal before the High Court failed.

Dismissing the appeal by special leave, the Court

HELD : 1. When a document is tendered in evidence by the plaintiff while in witness box and the defendant raises an objection that the document is inadmissible in evidence as it was not duly stamped and for want of Registration, it is obligatory upon the Trial Judge to apply his mind to the objection raised and to decide the objection according to law. Tendency sometimes is to postpone the decison to avoid interruption in the process of recording evidence and, therefore, a very convenient device is restored to, of marking the document in evidence 'subject to objection.' This, however, would not mean that the objection that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would non-the-less be obligatory upon the Court to decide the objection. If after applying its mind to the rival contentions the trial court admits a document in evidence, s. 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The Court, and of necessity it would be trial court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, as to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting s. 36. [966 C-G]

A In the instant case, the endorsement made by the learned trial judge that "objected, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation s. 36 would not be attracted. [966 G-H]

Javar Chand v. *Pukhraj Surana;* A.I.R. 1961 S.C. 1655.

B 2. Undoubtedly, if a person having by law authority to receive evidence and the civil court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor the penalty till today. Therefore, *stricto sensu* the instrument is not admissible in evidence. [967 A-B]

C 3. The hereditary office of Shebait which would be enjoyed by the person by turn would be immovable property. The gift of such immovable property must, of course, be by registered instrument. Exhibit I being not registered the High Court was justified in excluding it from evidence. The definition of immovable property in S. 2(6) of the Registration Act lends assurance to treating Shehait's hereditary office as immovable property because the definition includes hereditary allowances. Office of Shebait is hereditary unless provision to the contrary is made in the deed creating the endowment. In the conception of Shebait both the elements of office and property duties and D personal interest are mixed up and blended together and one of the elements cannot be detached from the other. Old texts, one of the principal sources of Hindu law and the commentaries thereon, and over a century the courts with very few exceptions have recognised hereditary office of Shebait as immovable property, and it has all along been treated as immovable property almost uniformly. [970 A-C]

Angurbala Mullick v. *Debabrata Mullick,* [1951] SCR 1125 and *Commissioner of Hindu Religious Endowments Madras* v. *Sri Lakshmindra Thirtha* E *Swamiar of Sri Shirur Mutt,* [1954] S.C.R. 1005; foilowed.

Krishnabhat Bin Hiragange v. *Kanbhat Bin Mahalbhat* 6 Bombay High Court Reports 137, *Balvantrey alias Tatiaji Banaji* v. *Purshotam Sidheshwar and Anr.,* 9 Bombay High Court Reports 99, *Raiji Manor* v. *Desai Kallianrai Hukmatrai,* 6 Bombay High Court Reports 56 *Maharana Fattehsangji Jaswantsangji* v. *Desai Kallianraiji Hekoomutraiji,* 1 I.A. 34, *Raghoo Pandey & Anr.* v. *Kassy Parey and Ors.* I.L.R. 10 Cal. 73, *Manohar Mukherjee* v. *Bhunendra* F *Nath Mukherjee and Ors.,* A.I.R. 1932 Cal. 791; approved.

Eshan Chander Roy & Ors. v. *Manmohini Dassi,* I.L.R. 4 Cal. 693, *Jharulu Das* v. *Jalandhar Thakur,* I.L.R. 39 Cal. 887, *Jagden Singh* v. *Ram Saran Pande and Ors.* A.I.R. 1927 Patna 7; explained.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1244 of 1973.

G Appeal by Special Leave from the Judgment and Order/Decree dated the 14th August, 1972 of the Rajasthan High Court in S.B. Civil Second Appeal No. 520 of 1968.

V. S. Desai, Sharad Manohar, S. S. Khanduja and *R. K. Shukla* for the Appellant.

H *Badri Das Sharma* for Respondents Nos. 1, 3 and 4.

M. B. L. Bhargava, S. N. Bhargava and *Sobhagmal Jain* for Respondent No. 2.

The Judgment of the Court was delivered by A

DESAI, J.—The unsuccessful plaintiff, appellant in this appeal by special leave, who died pending the appeal, seeks a declaration that he is entitled to a right of worship by turn (called Osra) for 10 days in a circuit of 18 months in the temple of Kalyanji Maharaj at Village Diggi, Distt. Tonk, Rajasthan, under the will Ext. I dated 22nd September 1961 executed by deceased Mst. Acharaj, wife of Onkar. The B suit was resisted by four amongst five defendants, the 5th defendant having not put in an appearance. Various contentions were raised but the only one surviving for present consideration is whether document Exht. I purporting to be a will of deceased Mst. Acharaj is a will or a gift, and if the latter, whether it is admissible in evidence on the ground that it was not duly stamped and registered as required by law ? C

When the plaintiff referred to the disputed document in his evidence and proceeded to prove the same, an objection was raised on behalf of the defendents that the document was inadmissible in evidence as being not duly stamped and for want of registration. The trial court did not decide the objection when raised but made a note : "Objected. Allowed subject to objection", and proceeded to mark the document D as Exhibit. I. When at the stage of arguments, the defendants contended that the document Ext. I is inadmissible in evidence, the learned trial judge rejected the contention taking recourse to section 36 of the Stamp Act. On the question of registration it was held that the document is not compulsorily registrable insofar as the subject-matter of the suit is concerned, viz., turn of worship which in the E opinion of the learned trial judge movable property. On appeal by the defendants the judgment of the trial judge was reversed, *inter alia,* holding that the document Exht. I was a gift and as it involved gift of immovable property, the document was inadmissible in evidence both on the ground that it is not duly stamped and for want of registration. The plaintiff's second appeal to the High Court did not meet with success. F

The only question canvassed before this Court is that even if upon its true construction the document Ext. I purports to be a gift of turn of worship as a Shebait-cum-Pujari in a Hindu temple, does it purport to transfer an interest in immovable property, and, therefore, the document is compulsorily registrable ? On the question whether the document was duly stamped it was said with some justification that it G was not open to the Court to exclude the document from being read in evidence on the ground that it was not duly stamped because in any event under s. 33 of the Stamp Act it is obligatory upon the court to impound the document and recover duty and penalty as provided in proviso (a) to s. 35.

Mst. Acharaj, wife of Onkar had inherited the right to worship by turn for 10 days in a circuit of 18 months in Kalyanji Maharaj Temple. H It is common ground that she was entitled during her turn to officiate as Pujari and received all the offering made to the deity. During the

A period of her turn she would be holding the office of a Shebait. She purported to transfer this office with its ancillary rights to plaintiff Ram Rattan under the deed Exhibit I purporting to be a will. Upon its true construction it has been held to be a deed of gift and that finding was not controverted, nor was it possible to controvert it, in view of the recital in the deed that: "now Ram Rattan will acquire legal rights and possession of my entire property from the date the B will is written the details of the property are in Schedule 'A' and after him, his legal heirs will acquire those rights" It appears crystal clear that the document purports to pass the title to the property thereby conveyed *in presenti* and in the face of this recital it could never be said that the document Ext. I purports to be a Will.

If by document Ext. I the donor conveyed property by gift to donee C and the property included the right to worship by turn in a temple, is it transfer of immovable property which could only be done by a registered instrument which must be duly stamped according to the provisions of the relevant Stamp Act?

When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped D and for want of registration, it was obligatory upon the learned trial judge to apply his mind to the objection raised and decide the objection in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however, would not E mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial court admits a document in evidence, s. 36 of the Stamp Act would come into play and such admission cannot be called in question F at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The Court, and of necessity it would be trial Court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the Court applying G its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting s. 36 (see *Javar Chand* v. *Pukhraj Surana*).(1) The endorsement made by the learned trial judge that "objected, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation s. 36 would not be attracted.

H Mr. Desai then contended that where an instrument not duly stamped or insufficiently stamped is tendered in evidence, the Court has to

(1) AIR 1961 S.C. 1665.

impound it as obligated by s. 33 and then proceed as required by s. 35, viz., to recover the deficit stamp duty along with penalty. Undoubtedly, if a person having by law authority to receive evidence and the civil court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor penalty till today. Therefore, *stricto sensu* the instrument is not admissible in evidence. Mr. Desai, however, wanted us to refer the instrument to the authority competent to adjudicate the requisite stamp duty payable on the instrument and then recover the duty and penalty which the party who tenders the instrument in evidence is in any event bound to pay and, therefore, on this account it was said that the document should not be excluded from evidence. The duty and the penalty has to be paid when the document is tendered in evidence and an objection is raised. The difficulty in this case arises from the fact that the learned trial judge declined to decide the objection on merits and then sought refuge under s. 36. The plaintiff was, therefore, unable to pay the deficit duty and penalty which when paid subject to all just exceptions, the document has to be admitted in evidence. In this background while holding that the document Ext. I would be inadmissible in evidence as it is not duly stamped, we would not decline to take it into consideration because the trial Court is bound to impound the document and deal with it according to law.

Serious controversy centered, however, round the question whether right to worship by turn is immovable property gift of which can only be made by registered instrument. Hindu law recognises gift of property to an idol. In respect of possession and management of the property which belongs to the Devasthanam or temple the responsibility would be in the manager who is described by Hindu law as Shebait. The devolution of the office of Shebait depends on the terms of the deed or will by which it is created and in the absence of a provision to the contrary, the settlor himself becomes a Shebait and the office devolves according to line of inheritence from the founder and passes to his heirs. This led to an arrangement amongst various heirs equally entitled to inherit the office for the due execution of the functions belonging to the office, discharging duty in turn. This turn of worship is styled as 'Pala' in West Bengal and 'Osra' in Rajasthan. Shebaiti being held to be property, in *Angurbala Mulick* v. *Debabrata Mullick*,(1) this Court recognised the right of a family to succeed to the religious office of Shebaitship. This hereditary office of Shebait is traceable to old Hindu texts and is a recognised concept of traditional Hindu law. It appears to be heritable and partible in the strick sense that it is enjoyed by heirs of equal degree by turn and transferable by gift subject to the limitation that it may not pass to a non-Hindu. On principles of morality and propriety sale of the office of Shebait is not favoured.

1) [1951] SCR 1125.

A The position of Shebait is not merely that of a Pujari. He is a human ministrant of the deity. By virtue of the office a Shebait is an administrator of the property attached to the temple of which he is Shebait. Both the elements of office and property, of duties and personal interest are blended together in the conception of Shebaitship and neither can be detached from the other (*vide Commissioner of Hindu Religions Endorsements, Madras* v. *Sri Lakshmindra Thirtha* B *Swamiar of Sri Shirur Mutt*).(1)

The question then is whether the hereditary office of Shebait is immovable property. Much before the enactment of the Transfer of Property Act a question arose in the context of the Limitation Act then in force whether a suit for a share in the worship and the emoluments incidental to the same would be suit for recovery of immovable C property or an interest in immovable property. In *Krishnabhat bin Hiragange* v. *Konabhat bin Mahalbhat et al,*(2) after referring to various texts of Hindu law and the commentaries of English commentators thereon, a Division Bench of the Bombay High Court held as under :

> D "Although, therefore the office of a priest in a temple, when it is not annexed to the ownership of any land, or held by virtue of such ownership, may not, in the ordinary sense of the term, be immovable property, but is an incorporeal hereditament of a personal nature, yet being by the custom of Hindus classed with immovable property, and so regarded in their law....."

E The privileges and precedence attached to a hereditary office were termed in Hindu law as *Nibandha* and the text of Yajnavalkay treated *Nibandha,* loosely translated as corody, as immovable property. Soon thereafter the question again arose in *Balyantray alias Tatiaji Bapaji* v. *Purshotam Sidheshvar and another*(3), where, in view of a conflict in decision between *Krishnabhat* (supra) and *Baiji Manor* v. *Desai Kallianrai Hukmatrai*(4), the matter was referred to a Full F Bench of 5 Judges. The question arose in the context of the Limitation Act in a suit to recover fees payable to the incumbent of a hereditary office, viz., that of a village Joshi (astrologer). The contention was that such a hereditary office of village Joshi is immovable property. After exhaustively referring to the texts of Yajnavalkay and the commentaries thereon, Westropp, C.J. observed that the word 'corody' is not a happy translation of term *Nibandha.* It was held G that Hindu law has always treated hereditary office as immovable property. These two decisions were affirmed by the Judcial Committee of the Privy Council in *Maharana Fattehsangji Jaswantsangji* v. *Desai Kallianraiji Hekoomutraiji*(5). The principle that emerges

(1) [1954] SCR 1005.
(2) 6 Bombay High Court Reports 137.
H (3) 9 Bombay High Court Reports 89.
(4) 6 Bombay High Court Reports 55.
(5) 1 I.A. 34.

from these decisions is that when the question concerns the rights of Hindus it must be taken to include whatever the Hindu law classes as immovable although not so in ordinary acceptation of the word and to the application of this rule within the appropriate limits the Judicial Committee sees no objection. In *Raghav Pandey & Anr.* v. *Kasav Parey & Ors.*(1), the Calcutta High Court held that the right to officiate as a priest at funeral ceremonies of Hindus is in the nature of immovable property. A Full Bench of the Calcutta High Court in *Manohar Mukherjee* v. *Bhupendra Nath Mukherjee & Others*(2), held that the office of Shebait is hereditary and is regarded in Hindu Law as immovable property. This Court took note of these decisions with approval in *Angurbala Mullick's* case (supra).

Mr. Desai urged that there is a distinct line of authorities which indicate that a *Pala* or turn of worship is movable property. In Mulla's Transfer of Property Act, 5th Edition, p. 17, the author has observed that a *pala* or turn of worship is movable property. In *Eshan Chandra Roy & Ors.* v. *Monobini Desai*(3) it was said that it was not possible to come to the conclusion that the right to worship an idol is in the nature of an interest in immovable property. It is a bare statement with no reference to texts of Hindu law or commentaries thereon. In *Jharula Das* v. *Jalandhar Thakur*(4), it was held that the office of Shebait is hereditary and that the suit which was brought after a period of 12 years was barred by limitation. This decision does not specify the nature of property termed as turn of worship in Hindu law. The Patna High Court in *Jagdeo* v. *Ram Saran Pande & Ors.*(5), has in terms held that a turn of worship is not interest in immovable property and, therefore, a sale thereof does not require registration. The decision purports to follow the ratio in *Eshan Chander Roy's* case (supra) which gives no reasons for the decision and also *Jharula Das's* case (supra) where this question appears not to have been in terms raised.

The definition of immovable property in s. 3 of the Transfer of Property Act is couched in negative form in that it does not include standing timber, growing crops, or grass. The statute avoids positively defining what is immovable property but merely excludes certain types of property from being treated as immovable property. Section 2(6) of the Registration Act defines immovable property to include lands, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass. Section 2(26) of the General Clauses Act defines immovable property to include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.

(1) ILR 10 Cal. 73.
(2) AIR 1932 Cal. 791.
(3) ILR 4 Cal. 683.
(4) ILR 39 Cal. 887.
(5) AIR 1927 Patna 7.

A It may be mentioned that the definition of immovable property in Registration Act lends assurance to treating Shebait's hereditary office as immovable property because the definition includes hereditary allowaces. Office of Shebait is hereditary unless provision to the countrary is made in the deed creating the endowment. In the conception of Shebait both the elements of office and property, duties and personal interest are mixed up and blended together and B one of the elements cannot be detached from the other. Old texts, one of the principal sources of Hindu law and the commentaries thereon, and over a century the Courts with very few exceptions have recognised hereditary office of Shebait as immovable property, and it has all along been treated as immovable property almost uniformly. While examining the nature and character of an office as envisaged by Hindu law it would be correct to accept and designate it in C the same manner as has been done by the Hindu law text writers and accepted by courts over a long period. It is, therefore, safe to conclude that the hereditary office of Shebait which would be enjoyed by the person by turn would be immovable property. The gift of such immovable property must of course be by registered instrument. Exhibit I being not registered, the High Court was justified in excluding it from evidence. On this conclusion the plaintiff's suit has been D rightly dismissed.

This appeal accordingly fails and is dismissed with costs.

S.R. *Appeal dismissed.*