# Shivaji Mahraj And Ors. vs Lala Barati Lal And Ors. on 13 October, 1955

## Equivalent citations: AIR1956ALL207, AIR 1956 ALLAHABAD 207

JUDGMENT

V.D. Bhargava, J.

1. This is an appeal on behalf of the plaintiffs who had brought a suit for proprietary possession of the land (for clarity, which was marked in the Commissioner's map), by demolition of certain constructions made thereon, on the allegations that that plot of land belonged to Shivaji and the defendants have wrongfully encroached upon that land and had made constructions in December 1945.

2. The plaintiffs in the suit were Shivaji through Babu Ram, acting as next friend of plaintiff 1, claiming to be its Pujari and there were 9 other Hindus who had claimed to file the Suit in representative capacity and had taken permission of the Court under Order 1, Rule 8, Civil P. C. The existence of a temple of Shivaji in Gurahi Bazar, Mohalla Saadatganj, cannot be denied. It has been there for a very long time.

On behalf of the plaintiffs it was alleged that it was a public temple and it stood on plot No. 1944 which number includes the land in dispute also. This land was dedicated to plff. 1, Shivaji from time immemorial and the dedication was sought to be proved by long user and it was said that plaintiff 1 had derived title on account of this dedication by long user. Plaintiffs also claimed damages in the sum of Rs. 320/- in respect of a wall and two trees that stood on that plot and said to have been destroyed by the defendants.

3. Defendant 1 carries an extensive business in vicinity of the temple and the other defendants are his relations. They denied the title of the plaintiffs either by virtue of Khasra or by dedication. They claimed the proprietorship of the land In themselves and they alleged that the Shivala had been built by their ancestors and they had been supervising and maintaining the service of Shivaji. They admitted the existence of the wall and the trees but they denied that the plaintiffs were entitled to any damages.

The defendants also pleaded that the plaintiffs had no right to bring the suit and the plaintiffs were also not in possession of the property in dispute within 12 years and, therefore, the suit was barred by limitation. The trial Court decreed the plaintiffs' suit on the findings that the plaintiff was entitled to sue through Babu Ram, who was a worshipper, and that the suit was within 12 years and the suit was not barred by time and that the plaintiff's right to this plot of land had been established.

4. Defendants filed an appeal and the lower appellate Court has dismissed the suit. The lower appellate Court has given the findings that though the plaintiff had established his title by virtue of the lettar of the Financial Commissioner but he has failed to establish his possession within. 12 years and he has recorded a finding that plaintiff 1 was not entitled to maintain the suit through Bibu Ram, who was held by the lower appellate Court to be only a worshipper and was not a Pujari.

5. Aggrieved by that decision the plaintiffs have come up in appeal to this Court and learned counsel for the appellants has urged two points in appeal. The first point urged by him was that the finding of the lower appellate Court about the possession of the plaintiffs, is vitiated, because the lower appellate Court has not considered the evidence of defence at all and has not come to the conclusion that the defendants were in possession.

The plot of land over which possession was claimed being an open land, in case, the Court does not record a finding of the defendants' possession it should have been deemed to have been in possession of the plaintiffs, whose title was established and was admitted by the lower appellate Court. The second point urged by the learned counsel for the appellants was that the lower appellate Court had erred in law in holding that an idol cannot sue through a worshipper.

6. While replying to the arguments of the learned counsel for the appellants, counsel for the respondents has also challenged the finding regarding the title in favour of plaintiff 1.

7. In support of the contention that the finding about the possession was vitiated, learned counsel for the appellants had taken me through the judgment of the learned Munsif on that issue. The learned Munsif had, in fact, believed the evidence of the plaintiffs & disbelieved the evidence of the defendants and, therefore, he had come to a finding that the plaintiffs had been in possession over this plot of land as there were tin shed, cistern, and well which had been used by plaintiff 1 or his worshippers.

The lower appellate Court has not believed that evidence. In particular, it appears that it might have been influenced by the fact that the witnesses of the plaintiff were not consistent. Plaintiff's witness P. W. 2, Dr. Laxmi Sahai, in his evidence, has stated that there was a tin shed towards the West of the Shivaji. He has deposed that there was no wall intervening between the Shivala and this plot of land. As regards the well he had stated that the well stood on the Municipal land and belonged to .Municipal Board. Later on he tried to improve upon his statement by saying that It belonged to Shivaji and it was repaired by the Municipal Board.

P. W. 3 Babu Ram, who claimed to be the Pujari of the Shivala, admitted the existence of the wall between the two places which was denied by Dr. Laxmi Sahai. He claimed possession over this plot, of land by the performance of music and Katha on this land and fee said that it was performed till Sawan last. He had not deposed anything about the cistern or the tin shed.

P. W. 4 Masani had stated that there was a cistern on the western side and also a tin shed which was supported by pillars. He, again, said that there was no wall intervening between this plot of land and the Shivala. All the open space, according to him, was paved with bricks. The last witness on this

point was Raj Narain P. W. 5, He had deposed about the cistern being on the western side. According to him there was no wall towards the western side of the Shivala running North and South.

8. Both the Courts have come to the finding that the wall between the two places was an old one. The trial Court came to the conclusion that certain portions of it appear to be new but most of the wall was found by both the Courts as being old and if the witnesses have denied the very existence of the old wall and they have been disbelieved by the lower appellate Court, it cannot be said that the Court has committed any error. The plot of land was not of such a nature over which possession could not be exercised.

If the story of the plaintiff is correct that it formed part of the Shivala then it must have been used by the plaintiff and his worshippers and for that, better evidence could have been given. The nature of the plot of land was not as would be called an open Uftada land lying, over which possession could not be exercised. The case of the plaintiff was definitely that there were constructions. There was well and cistern over it and, therefore, the presumption which arises in the case of an, open land being in possession of its true owner will not be available to the plaintiff.

The lower appellate Court has disbelieved the evidence of the plaintiff and has thus come to a finding that the plaintiff failed to establish his possession. It was not necessary for the lower appellate' Court to consider the defendants' evidence because if the plaintiff had failed to prove his possession within the statutory period, he will be out of Court. I feel myself to be bound by the finding of fact. recorded by the appellate Court regarding the possession of the plaintiff.

9. As regards the second question whether the plaintiff was entitled to bring a suit through a worshipper, it was contended, that since in this case, there is no Shebait, a worshipper could bring a suit. Idol has been held to be a Juristic person and if it is so, it was contended, he must have a right to bring a suit and if there is no Shebait, his right must be protected by any Hindu worshipper to see that its property is not taken away by outsiders.

10. When the suit was brought Babu Ram claimed to be the Fujari and had claimed a special right apart from Being a worshipper. He had actually claimed himself to be a de facto manager but that issue has been decided against Babu Ram. The finding of the lower appellate Court is that he was not a Pujari and that finding of fact is binding upon me, and that the question that has to be seen is whether a mere worshipper has a right to bring a suit for possession on behalf of the idol.

The present suit appears to be a curious joinder of the plaintiffs. If the suit was to be for possession on behalf of the idol how could other Hindu worshippers join in that suit? A decree for possession and for damages could not possibly have been given in favour of plaintiffs 2 to 8. They could have brought a suit for the reliefs that could be granted under Section 92, Civil P. C.

11. Learned counsel for the appellants has relied on the cases of, -- 'Doongarsee Syamji v. Tirbhuwan Das', AIR 1947 All 375 (A); --'Kishan Bhagwan v. Shree - Maroti Saunsthan, Mahori', AIR 1947 Nag 233 (B); -- 'Gurpad Haldar v. Manmohan Mukherjee', AIR 1936 Cal 215 (C) and -- 'Sheo Ramji v.

Ridhnath Mahadeoji, AIR 1023 All 160 (D).

12. 'Dongarsee Syatoji v. Tirbhuwan Das (A)', was a case of a private idol in which case Section 92, C. P. C. would not apply and there would be different considerations. That case had held as under:

> "A deity cannot be treated as a minor to make Order 32, C. P. C. applicable so as to enable any disinterested third party to bring a suit as next friend of the deity."

It was further held:

> "No doubt, ordinarily, it is the Shebait or de jure or de facto Manager who has the right to sue for protection of the idol's property. But it cannot be said that the idol has no right of suit. Where the person in charge of the idol and its property acts adversely to the interests of the idol, a disinterested third party though not belonging to the founder's family can sue as next friend of the deity but such a suit must be in the Interest of the idol and for vindication of its rights, and not for getting hold of its property".

13. Reliance was placed by the learned counsel for the appellants on this passage. In that case, as it related to a private idol, it was further observed as under:

> "In a proper case where all parties Interested in a deity or its management or worship are impleaded and the deity Itself is represented by a disinterested third party, the Court may prepare a scheme which may be binding against third persons not so interested; for example, if in the case of a private deity all persons interested therein are parties' to the suit, a scheme may be prepared by the Court, and a trustee or manager appointed under the scheme can claim rent from tenants or eject a trespasser or file suits in his own name as Shebait and the Courts will not allow the defendant to raise the question of the propriety of his appointment. Even a de facto shebait or de facto mutwalli can bring such suits".

It thus appears that even in that case the learned Judges in fact, accepted that before a person can bring a suit he may in that very suit be appointed a Shebait and that then the suit can proceed. But this would hardly be possible in a case of public trust.

In a private trust only limited number of people will be interested but in a public trust innumerable persons will be interested and there may be hundreds of worshippers of an idol and if all of them would be given a right to bring a suit for possession or one suit may be filed by one worshipper and the second suit by another, it would not be conducive to the interest of the idol itself.

It is, therefore, necessary in the case of a public trust that the suit should be brought by either a Shebait or a de facto or de jure manager. Suits, which are filed for declaration or for preparation of scheme, contemplated under Section 92, stand on a different footing, and there even a worshipper with the permission of Advocate-General can file the suits.

14. The case of 'Kishan Bhagwan v. Shree Maroti Saunsthan, Mahorl (B)', to a certain extent appears to be similar to the one filed in the present case and it was argued on behalf of the appellants that just as in the Nagpur case a third person was allowed, to sue on behalf of the idol, in this case also the plaintiff should be permitted to continue the suit. It was held in that case as under:

> "Ordinarily, an idol must be represented by its duly appointed manager or shebait. No other person has a right to sue on its behalf. A third person can however sue only if he shows that he has a personal interest in the idol, as for example, that he is a worshipper or a donor of the property in question or a settlor of the trust which embraces the subject-matter of the suit and that the shebait or manager who would ordinarily represent the idol has an adverse interest."

Great reliance was placed by the learned counsel for the appellants on this passage. In this case also there were three plaintiffs. The first was the idol, and the other two were worshippers who had been permitted to sue on behalf of the whole body of the worshippers under Order 1, Rule 8. The learned Judge was of opinion that this joinder was misconceived. In that case the only relief sought was of possession. Throughout the plaint there was no allegation that the worshippers had any title in the property or that they were in any way entitled to the possession. Under these circumstances his Lordship held "As I have already explained, a worshipper is entitled to act as the deity's manager or next friend for the purposes of the suit in same way as the next friend of an infant but that does not give him a right to become a plaintiff".

In that case there was a Wahiwatdar or manager of that deity. He was made defendant 1. The deity or the two persons who had sued on its behalf did not seek to remove the manager & it was held that unless & until he was removed he was the person entitled to hold possession of the property on behalf of the deity. Therefore, what the learned Judge, in that case did, was that he allowed the plaintiff to sue for possession with this direction that the possession of the property shall be placed in the hand of defendant 1 for and on behalf of the plaintiffs. It was observed:

> "I fully agree that in the ordinary way a plaintiff cannot be compelled to seek a relief which he does not want, but equally, in the ordinary way outsiders cannot oust the wahiwat-dar of an idol and sue on behalf of the idol".

15. In these circumstances it was held that "It was the duty of the Court to impose restrictions and limitations where that was necessary.... It is essential, as was pointed out in --'Nagorao Shamji v. Gulab Rao Ramji', 1941 Nag LJ 587 (E) that trust properties are not permitted to fall into the wrong hands, and as the plaintiffs steadily refuse to ask for the removal of the wahiwatdar, or to have a proper scheme prepared, I must insist that the property be placed in the possession of the person who is legally entitled to hold it on behalf of the deity until he is displaced by law. It would, in my opinion, be most undesirable to have a number of different persons holding different parcels of an idol's property on behalf of the idol".

16. It was only after these modifications that the plaintiff was entitled to sue. This authority makes it clear that the possession of the property of an idol cannot vest in anybody else except a duly

appointed shebait or de facto or de jure manager.

17. The case in AIR 1936 Cal 215 (C), was not a case filed by a worshipper. It was a suit filed by the sons of shebait and it was held that the sons had no locus standi to file the suit. It was observed therein that it was possible for a de facto shebait or even a stranger, to bring a suit to recover possession of the idol's property and on the basis of this observation it was urged that the worshipper should be entitled to maintain the suit.

With respect, I regard that observation as an obiter as it was not necessary for the purposes of that case to decide whether stranger could bring a suit to recover possession of the idol's property or not.

18. The case in AIR 1923 All 160 (D) was also a case of a different nature. In that case the original Mahant had died and the chela, who was the successor, was a minor. Therefore, during the minority of the Mahant the supervisors of the endowment appointed a person as a manager of the property on behalf of the minor Mahant, and he had brought the suit.

Their Lordships held that he was a, competent person to file such a suit in the name of the idol, to which the property claimed belonged in law. He was really in that case a next friend of the minor Mahant who could not by virtue of his minority act as Mahant or shebait of the idol. That decision, in my opinion, does not help the appellants.

19. On behalf of the respondents reliance was placed on the case of -- 'Kunj Behari v. Shyam Chand Jiu', AIR 1938 Pat 394 (F). It was laid down in that case as follows:

> "In the case of a public endowment suits to recover a part of the trust property which had been alienated by the shebait or lost in consequence of his action can be recovered only in a suit instituted by a shebait.
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> The only remedy which the members of the public have, where the property has been alienated by a person who is a shebait for the time being, is to secure the removal of a shebait by proceedings under Section 92, Civil P. C., and then to secure the appointment of another shebait who would then have authority to represent the idol in a suit to recover the idol's properties".

This Patna case relied on the case of --'Kalimata Debi v. Nagendra Nath', AIR 1927 Cal 244 (G), where it was laid down that:

> "The proper person to institute a suit in respect of the property belonging to an idol 'is the Shebait and nobody else'. In the absence of refusal by the Shebait to institute such a suit neither a worshipper nor the idol is competent to sue".

20. The learned counsel for the respondents also relied on the case of -- 'Jagtanand Bram-chari v. Barhmdeo', AIR 1940 All 68 (H); where a Bench of this Court held that "No doubt any one who is a worshipper at a temple or of an image, if he obtains permission under Section 92, Civil P. O., can

bring a suit for the declaratory reliefs allowed by that section, but where the suit is not a suit under Section 92, Civil P. C., but a suit for possession of property, alleged to have been illegally transferred by previous persons who were in legal possession of that property, the plaintiff would have to show some right or title to claim possession. The mere worship of the image does not constitute a math nor does it give the plaintiff any right to bring a suit for possession of Zamindari property".

21. The plaintiff as a member of public or a worshipper can certainly be entitled to bring suits for declaration, but, in my opinion, he cannot be entitled to sue for possession. In these circumstances, I hold that the view taken by the lower appellate Court was correct, that the plaintiff was not entitled to maintain the suit.

22-23. The correctness of the finding about the title was challenged by the respondents on the ground that the finding was based upon the Financial Commissioner's letter and entry in the Khasra Abadi of the 1st Settlement, but on a perusal of the Khasra Abadi, it was urged, it appears that they do not confer that right on the idol. It was conceded by the respondents that in Oudh, Khasra Abadi is a document of title, and if the entry therein amounts to confer a title on anybody, in the absence of any other proof, will be deemed to have conferred the title validly.

In the document Ex. 2, Khasra Abadi, the first column is 'number of Ahata' and therein it is shown '1944'. Second column shows 'Nam Qita' which in the language of their Lordships of the Privy Council meant 'Description of the plot -- 'Ballabhdas v. Nur Mohammad', AIR 1936 PC 83 (I). The third column is 'name of Kucha or Gali' and the fourth column is 'Number of house'. Columns 5, 6, and 7 come under one heading, 'Name of owner according to possession', and these three sub-headings are 'Government', 'Nazool' and 'others'. Then the eighth column is 'name of occupier or tenant'.

24. As against '1944', the plot under dis pute, in column No. 2 i.e., 'the description of the property', is entered "Shivala". Columns 5, 6, 7 and 8 are all blank. On this state of entries learned counsel for the respondents urged that it cannot be said that idol Shivaji had been given the proprietary right and the entry of Shivala in column No. 2 does not show the pro prietorship but it shows the nature of the pro perty and, therefore, finding arrived at, by, the lower appellate Court on the basis of this Khasra is vitiated.

In the case of other plots, in column No. 2, it was entered as 'Uftada' or 'Abadi' and it appears that in any case name of the owner was not given. It was urged on behalf of the appellants 'that since Shivala, would be deemed to be public property, and as there was no shebait existing on this endowment, the mere entry of Shivala should be deemed to vest the right of proprietorship in the idol. Reliance was placed for this on AIR 1936 PC 83 (I), where in column No. 2 a plot of land was entered as 'graveyard' and therefore, it was held to be a public graveyard and a decree on the basis of that entry was given in favour of the Muslim community.

That was a case in which the nature of the plot was in dispute and, therefore, the description of the plot was enough to clothe that plot of land, as a graveyard. Besides, in that case as against the graveyatd the name of Kalekhan was also entered as being the owner and it was held that he was

really the Mutwalli at that time and, therefore, the property was declared to be a graveyard.

25. It is not necessary for me, in this case, to arrive at a definite finding about the title because as I have already held that the plaintiff is not entitled to maintain the suit and also the plaintiff having not been proved to have been in possession during, the last 12 years, the suit as barred by time and consequently the suit will be dismissed. Therefore, on the question of title I do not propose to express any opinion. In the circumstances, of the case I dismiss the appeal with costs.

26 Learned counsel has prayed for leave for special appeal. I grant the said leave.