Privy Council Appeal No. 109 *of* 1931.
Bengal Appeal No. 7 *of* 1929.

Monohar Mukerji - - - - - - - - - - *Appellant*

v.

Kumar Bhupendra Nath Mukerji and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER, 1935.

Present at the Hearing:

LORD THANKERTON.
LORD ALNESS.
SIR JOHN WALLIS.

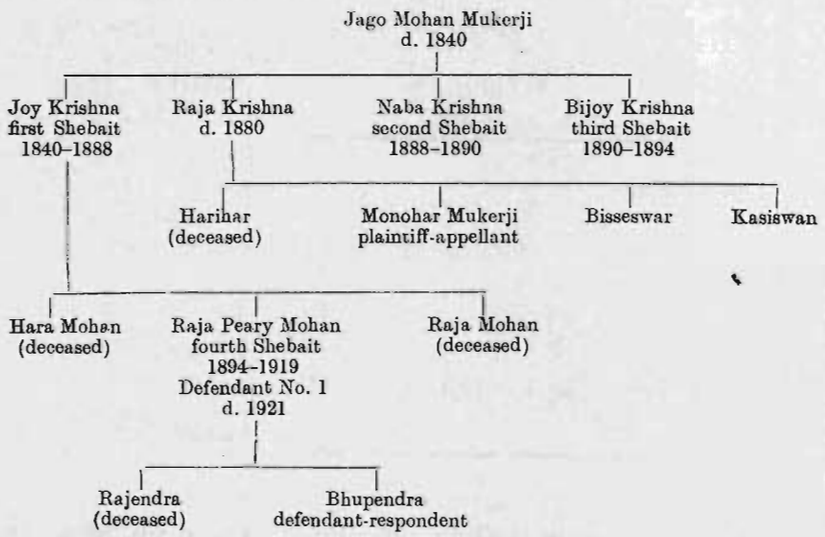
[*Delivered by* LORD THANKERTON.]

This is an appeal from the judgment and decree of the High Court of Judicature at Fort William in Bengal dated the 26th April, 1928, which set aside a decree of the Subordinate Judge of the Second Court at Hooghly, made in title suit No. 13 of 1913 on the 3rd April, 1928, and remanded the case to be dealt with in accordance with the directions contained in the judgment.

The suit was instituted in 1913 by the present appellant, seeking to obtain the removal of Raja Peary Mohan Mukerji, the original defendant No. 1, from the office of shebait to the debattar estate founded by the will of the Raja's grandfather, Jaga Mohan Mukerji, and to set aside the purchase of lot Bahirgora, part of the debattar estate, by the Raja in January, 1913. After protracted litigation, it was finally decided by this Board on the 19th April, 1921, in affirming the judgment of the High Court, that the Raja should be removed from his office and that the sale should be set aside, and the Raja was held entitled to repayment of the purchase moneys, subject to the direction that " an account should be directed showing what, if anything, is due from the first appellant to the estate, and such money should be deducted from the purchase-moneys in Court to be paid out and the first appellant to have a charge on the estate for that sum."

The case having been remanded to the Second Subordinate Judge, Hooghly, to take the account, he made an order on the 5th September, 1921, under which he appointed commissioners to take the accounts and gave directions, which will be more easily understood if certain facts are first stated.

Under the will of Jago Mohan Mukerji, dated the 11th September, 1840, which created the debattar estate, it was provided that the office of shebait should be held by his four sons in succession, and after them by their respective sons, sons' sons and so on in succession. The following pedigree will show the holders of the office, and the relationship of the principal parties :—



On the death of Naba Krishna in 1890, the Raja challenged the validity of the debattar and the right of Bijoy Krishna to the office of shebait, and the latter brought a suit in 1892 against the Raja to establish his rights, in which he succeeded in the first Court. While an appeal by the Raja was pending, Bijoy died, and thereafter the Raja withdrew his challenge of the debattar, and took the office of shebait. It has been found that the Raja was in possession of certain parts of the debattar estate during a period dating back to the death of his father, Joy Krishna, in 1888, and the accounting period accordingly commences in that year. On the removal of the Raja from office by the High Court, a receiver was appointed on the 14th November, 1919, and the receiver has been in possession since that date.

Reverting to the Subordinate Judge's order of the 5th September, 1921, he directed that the Raja should render accounts for three periods, viz. :—

1. From the 19th July, 1888, when Naba Krishna became shebait on the death of the Raja's father, Joy Krishna, to the 11th September, 1890, when Naba Krishna died.

2. From the 11th September, 1890, when Bijoy Krishna became shebait, to the 29th January, 1894, when Bijoy Krishna died.

3. From the 29th January, 1894, when the Raja became shebait, until the receiver took possession under the order of the High Court.

The learned Judge further directed that :—

"In taking the accounts the commissioners will enquire if any loss has been occasioned to the debattar estate by the defendant Raja during this period by his wilful neglect or misconduct, that amount will be added to his liability."

On an appeal by the present respondent No. 1, as representative of the Raja, who had died meanwhile, the High Court, on the 9th May, 1923, varied the order of the Subordinate Judge in certain respects, the variation material to the present questions being as follows :—

"It is ordered that the direction in the order of the lower Court for an account on the footing of wilful default be and the same is hereby expunged and in lieu thereof it is hereby ordered that a common account be taken as explained in the judgment of this Court in this appeal pronounced, a copy whereof is hereto annexed, liberty being reserved to the plaintiff or other party interested in the taking of the accounts to apply when the accounts have been lodged for a direction that the commissioner should take accounts on the footing of wilful default either in respect of any particular matter or generally."

The commissioners thereafter proceed with the accounting, the Raja's accounts being produced by respondent No. 1 under their order of the 8th August, 1923. Eventually, in order to dispose more rapidly of the matter, the Subordinate Judge took proceedings into his own hands in February, 1926, and obtained a report from the commissioners. On the 30th September, 1926, after a full debate before him, the Subordinate Judge issued a judgment and remitted certain points to the commissioners; after receiving their report, the Subordinate Judge on the 3rd April, 1928, made a final decree, under which he found respondent No. 1, as representing the Raja's estate, liable for Rs.1,40,619-7-1½. This was arrived at by deduction of Rs.86,830, the balance of the purchase moneys of lot Bahirgora repayable to the Raja, from Rs.2,27,449-7-1½, the total balance found due by the Raja to the estate on the accounting.

The present respondent No. 1 appealed to the High Court, *inter alia*, on the two grounds which are in issue in the present appeal, viz. (*a*) that the Subordinate Judge had not taken the account on the receipts side on the footing of common account, as directed by the High Court, but on the footing of wilful default, though no application had been made for such a direction, and (*b*) that the learned Judge had erred in refusing to allow the whole amount claimed in respect of expenses of Durga puja. On the 26th April, 1928, the High Court allowed the appeal on both these grounds and sent the case back for the account to be taken on the footing of common account; they declined to allow the present appellant any further liberty to apply for the account to be taken on the footing of wilful default. Hence the present appeal.

The question as to the footing on which the Subordinate Judge had taken the account relates only to the receipts side of the account, and arises out of the manner in which he dealt with the accounts rendered on behalf of the Raja. These accounts were rendered by the end of September, 1923, and the commissioners were proceeding with the hearing of evidence to vouch the items in the accounts, which was proving a lengthy process, when an admission is recorded in the commissioners' order sheet, under date the 13th August, 1924, viz., "To-day at the instance of the defendant's pleader, plaintiff's pleader Babu Mahendra Nath Mukerji admits that the entries both on the credit and debit sides in all the khata books filed by the defendant are correctly entered as they are and that he does not challenge the genuineness of these entries but the plaintiff's pleader challenges the legality or otherwise of those entries." The commissioners proceeded to mark the entries as exhibits for the defendant. In January, 1926, the defendant petitioned for leave to lead oral evidence, and the plaintiff objected, and on the 9th January, 1926, the commissioners referred this matter to the Court. On the 11th January, 1926, the plaintiff filed a petition stating objections to the receipts side of the defendant's accounts, and a second petition of objections to the disbursements side. The matter was dealt with by the Subordinate Judge on the 1st February, 1926, as follows :—

> "The commissioners should submit their report as early as possible, basing the account on actual receipts and actual expenditures. They should not take any oral evidence now. After the report and the account are submitted, any interested party can apply to show that any entry was made by mistake, or he can apply to show that any amount was not realised in breach of the trust or spent in breach of the trust. The Court will pass necessary orders then."

The commissioners submitted their report and no application such as is referred to in the order was made, and the learned Judge, after a lengthy debate before him, disposed of the whole matter by the judgment and decree already referred to. No oral evidence was adduced before him nor was any application made by either party for that purpose.

Confining attention to the receipts side of the accounts, the Subordinate Judge, in his judgment, refers fully to the directions as to the footing on which the account was to be taken, which were given by the High Court to his predecessor in office, and states :—

> "As to the method of account, it was held that a common account will be rendered in the first instance on the basis of actual receipts. It was however expressly directed that the plaintiff might, in the course of the accounting, apply for directions to take accounts on the footing of wilful default either in respect of any particular matter or generally."

In fact, no such application had been made. It is not possible to treat the petition of objections as such an application; it was not made to the Court, but to the commissioners, and its terms are directed to challenging the Raja's

accounts, on the ground that the annual collection of the debattar estate is of a stated amount, and that the Raja has failed to account for the whole of the collection. As already stated, the plaintiff did not attempt to lead evidence to prove actual receipt of any part of the alleged deficiencies, and the only evidence of actual receipts before the learned Judge was contained in the items in the Raja's accounts as to which the plaintiff had made the admission above referred to.

Their Lordships desire to record at this stage that Mr. De Gruyther, on behalf of the respondents, stated that they did not challenge the findings of the Subordinate Judge as to the accounts for the first and second periods of accounting, their challenge as to the learned Judge's treatment of the receipts side being confined to the third period, viz., from 29th January, 1894, to the 14th November, 1919 (17th Magh 1301 to 29th Kartik 1326). It is further to be noted that only paragraphs 1 and 10 of the petition of objections to the receipts side of the accounts relate to this period. Paragraph 1 states that the annual collection of the debattar estate is not less than Rs.23,000, and paragraph 10 refers to the incompleteness of the khata filed for the year 1303 (1896).

In his judgment the Subordinate Judge, in reference to the judgment of the High Court of the 9th May, 1923, correctly states,

> "As to the method of account, it was held that a common account will be rendered in the first instance on the basis of actual receipts. It was however expressly directed that the plaintiff might, in the course of the accounting, apply for directions to take accounts on the footing of wilful default either in respect of any particular matter or generally."

The learned Judge, after deploring the absence of direct evidence to show what the annual gross income of the immovable properties would be, finds that Rs.22,000 was the gross annual income for each year, and then turns to consideration of the Raja's accounts. Then follows the passage on which the present question arises, viz. :—

> "It is clear that the account as rendered by the Raja is clearly not accurate. No explanation whatsoever has been given as to why the realisations in any one year did not amount to the full annual rent of Rs.22,000. There was realisation of rent by suit as the commissioners' report shows that Rs.13,000 were spent in rent-suits during this period and Rs.8,000 was spent in other litigations. No objection was raised by the plaintiff to any of these items. It is argued that as the account is being taken on the footing of actual receipts and not on the footing of wilful default, so the Court has not to look to anything beyond actual realisations. This, however, is not really the case. It is true no doubt that the High Court ordered that the direction for an account on the footing of wilful default, as directed in the judgment of Babu Lal Behari Chatterji, should be expunged and a common account should be taken. But at the same time liberty was reserved to the plaintiff to apply, when accounts were lodged, for a direction that account on the footing of wilful default be taken so far as any item was concerned.

> The first item of objection on the head of receipts preferred by the plaintiff shows that the gross annual collection could not be less than Rs.23,000, and there was a specific objection that all the books of account for 1303 were not filed and so the gross collection made by the Raja for 1303 B.S. could not at all be known. There is no evidence adduced by the defendant to show why the entire account books for 1303 could not be filed and why the collection did not amount to the actual rent roll in any single year. In fact, as I have already discussed, there was no attempt by defendant to help the Court by showing what the rent roll was, and the sum of Rs.22,000 was taken by me to be the gross realisation for the years 1301 to 1326 B.S. after considering all the evidence and circumstances of the case. The gross receipts from the debattar estate must therefore be held to be Rs.22,000 each year on the basis of wilful default by the shebait who has given no explanation at all why the rent was not realised in any year to the full extent."

In a subsequent passage, in which he finds that the Raja had appropriated personally the interest on Rs.11,500 of Government securities, the learned Judge characterises it as " one of the instances of wilful default." This at least satisfies their Lordships that the learned Judge did not appreciate the meaning of wilful default, as the term is clearly misapplied to a misappropriation of monies already collected.

The question, accordingly, is whether the learned Judge, in his use of the term " wilful default " or in substance in the passage quoted above, has gone beyond the proper limits of common account, or has merely misapplied the term " wilful default." Now it is to be observed that, if it was a question of surcharging, the burden of proof would be on the party seeking to surcharge, and the plaintiff does not appear to have attempted to discharge that burden. Secondly, the learned Judge's language clearly postulates wilful default as the reason for departure from the basis of actual receipts, and he places the burden on the defendant. Thirdly, his ultimate finding ignored the actual receipts altogether, and found the Raja liable to account for Rs.19,800 per annum for the years 1301 to 1326, after deduction of the cost of collection from the Rs.22,000 per annum.

It is enough to say that their Lordships are unable to find that the learned Judge has excluded the element of wilful default, and that they therefore hold the accounting must be reconsidered as regards the receipts side for this third period on the basis of actual receipts. On this basis it is open to the appellant to seek to surcharge the Raja in respect of specific instances in which the Raja is alleged to have received sums on behalf of the estate and to have failed to credit them in the accounts. But it will be for the appellant to satisfy the Court that the Raja ought to be surcharged.

Their Lordships agree with the High Court that no further liberty should be given to the appellant to apply for a direction for an account on the footing of wilful default.

Their Lordships desire to observe that it would have been better practice for the High Court to express their directions specifically in the decree, rather than to insert a general reference to their judgment in the decree.

There remains the question of the Durga puja expenses. The Raja's accounts show an expenditure of over Rs.77,500 during the years 1301 to 1326, and a similar admission as to the fact of expenditure was made, as in the case of receipts. The Subordinate Judge only allowed this item to the extent of Rs.50,000, being at the rate of Rs.2,000 per annum, on the ground that the Raja was performing the ceremonies not only in his capacity as shebait, but also in his personal capacity, the apportionment being based on consideration of the scale of expenditure of previous shebaits and that of the Raja himself before he held the office.

It was the duty of the Raja, as shebait, to perform the Durga puja, and no limit on the expenditure was prescribed by the will which constituted the debattar; he was therefore entitled to incur these expenses on behalf of the debattar estate, and their Lordships are unable to accept as legitimate the Subordinate Judge's disintegration of the Raja's personality in the performance of the Durga puja, and they are of opinion that this expenditure was rightly allowed in full by the High Court.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed, and that the decree of the High Court of the 26th April, 1928, should be affirmed subject to the variation that the case should be sent back to the Subordinate Judge, Second Court at Chinsurah, Zillah Hooghly, with the direction that the account should be taken again as regards the receipts during the third period from the year 1301 to the year 1326, the account to be taken on the footing of common account, without any liberty to the appellant to apply for a direction that the account should be taken on the footing of wilful default, and that the actual expenditure on Durga puja as shown in the Raja's accounts should be allowed, the accounts otherwise to stand as already settled by the Subordinate Judge. The first respondent will have his costs in this appeal, including those of the application to this Board by the first respondent lodged on the 14th June, 1933, seeking dismissal of this appeal for non-prosecution, but the appellant is to be entitled to re-imbursement out of the debottar estate in respect of the said costs which he will have to pay the first respondent and also in respect of his own costs of this appeal.

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In the Privy Council.

MONOHAR MUKERJI

v.

KUMAR BHUPENDRA NATH MUKERJI AND OTHERS

DELIVERED BY LORD THANKERTON.

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