Privy Council Appeal No. 13 *of* 1935

Sri Sri Iswari Bhubaneshwari Thakurani - - - *Appellant*

v.

Brojo Nath Dey 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 8TH APRIL, 1937.

Present at the Hearing :

LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
SIR JOHN WALLIS

[*Delivered by* LORD MACMILLAN.]

On 5th May, 1888, Rakhal Chandra Dey, since deceased, and his brother Brojo Nath Dey, the first respondent, executed a deed of dedication of certain properties in the environs of Calcutta in favour of a female domestic Hindu deity, who, by her shebait Mohini Dey is the present appellant. On 5th April, 1896, the same two brothers as individuals by deed of sale sold and conveyed to themselves as shebaits of the deity certain land in the district of Hooghly. The main question in the appeal relates to the efficacy of the deed of dedication of 1888.

Before proceeding to deal with this question it is desirable to narrate certain events which intervened between the granting of the deed in 1888 and the raising of the present action. Rakhal Chandra Dey, one of the granters of the deed, died in 1901 leaving two sons, Pulin and his half-brother Satya, the latter then an infant. In 1904, in a suit brought by Satya, by his mother as his next friend, against his uncle Brojo Nath Dey and others, a consent order was pronounced setting aside the deed of dedication of 1888 and the deed of sale of 1896, ordering the properties therein comprised to be divided into two equal shares and finding Pulin and Satya jointly entitled to one moiety and Brojo Nath Dey entitled to the other moiety, with liberty to Pulin and Satya to apply for partition of their moiety between them. The final decree for partition between Pulin and Satya on the one hand and Brojo Nath Dey on the other hand was pronounced in 1906. The idol was not a party to the suit. It was submitted by eminent counsel who appeared in the case that inasmuch as the idol

was a private one the dedication could competently be set aside by consent of all the members of the family. Authority was cited for this view and it was apparently accepted by the Court as being then good law.

In 1917 Satya came of age and in the following year he brought a suit for partition as between himself and Pulin. In this suit Pulin, notwithstanding that he had been a party to the consent order of 1904, maintained that the properties were still debutter and subject to the dedication to the idol. A preliminary decree for partition was pronounced in this suit but no final decree has yet been passed. Pulin next in 1922 mortgaged his half share in certain of the properties for Rs.28,000 to persons of the name of Roy and in 1924 he executed a further mortgage for Rs.25,000 in favour of some other persons named Mondal. In that year Pulin died leaving two sons Mohini and Jamini. Subsequently in 1928, in execution of a money decree which had been obtained against Pulin in 1919, his share of the properties was sold subject to the mortgages in favour of the Roys and the Mondals and was purchased by one Ganapati Chatterji.

The mortgagees having instituted suits for the realisation of their securities, the appellant Mohini, Pulin's son, claiming to be the shebait of the idol, retorted by raising the present action in the name of the idol claiming that the idol was entitled to all the properties comprised in the deed of dedication of 1888 and the deed of sale of 1896. The defendants to the suit include Brojo Nath Dey, Satya and the mortgagees under the mortgages granted by Pulin. Buckland J., before whom the case came in the first instance, found in favour of the plaintiff, now the appellant, granting a declaration of her title to the properties in suit, a decree for quiet possession and consequential injunctions. This judgment was reversed on appeal and in lieu thereof the Appeal Court (Rankin C.J. and Costello J.) held that the plaintiff was entitled absolutely to only one equal half share in the Thakurbari and shebait's house at 30, Beniapukur Road, Calcutta, that Satya had acquired by limitation a title to the other half of these subjects and that as regards the other properties in suit (other than the property at 45, Elliot Road, the claim to which was given up) the plaintiff was entitled to a charge thereon " for her upkeep, worship, expenses and ceremonies in connection therewith.". Various consequential directions followed including a reference to the Registrar to inquire and report as to what would be a sufficient sum to meet the annual expenses of the upkeep and worship of the plaintiff idol and of the ceremonies in connection therewith as provided in the deed of 1888.

The learned Chief Justice in his judgment deals with the effect of the consent order of 1904 and states that he is not prepared to hold on the strength of a well-known passage in the judgment of this Board in *Konwur Doorganath Roy* v. *Ram Chunder Sen,* (1876), 4 I.A. 52 at p. 58, that there is in Hindu law any warrant for the proposition that at any particular time by consent of all the parties then interested

in the endowment a dedication in favour of a private idol may be set aside and he finds in addition in the present case special reasons why the consent decree of 1904 should not be held to have validly terminated the debutter character of the properties. Their Lordships are not called upon to consider this question for none of the respondents at their Lordships' bar maintained that the consent order precluded the present appellant from raising the issue of the continued validity of the endowment and their Lordships, therefore, say nothing upon the subject. They take note of the matter only as one episode in the somewhat chequered legal history of the endowment.

The two grounds on which the judgment of the Appeal Court was challenged before their Lordships related to the interpretation placed upon the deed of dedication by the Appeal Court and to the plea of limitation upheld in favour of Satya.

As to the first of these matters the learned Judge of first instance states that " it has not been argued that there was no valid dedication or that the idol was not effectively endowed with the properties in suit by the deed of 1888.". In the Appeal Court, however, the defendants were allowed to raise the question of the construction of the deed of dedication. It is fully dealt with in the judgment of the learned Chief Justice and must now in turn be considered by their Lordships.

The material provisions of the dedication deed are conveniently summarised by the learned Chief Justice in the following passage from his judgment:

> " The Deed of 1888 opens by describing how Lalchand and Kalachand [the uncle and father of the granters Rakhal and Brojo] established the deity in their life time, how they prospered, how they bought land on Royd Street and in Entally, how ' with the income of all the said lands and with the money earned by them ' they used to cause daily and special shebas to be performed, Brahmins and poor persons to be fed and festivals to be observed. It then recites that Lal Chand died, that Kalachand purchased land on Elliot Road, that he continued the Sheba and festivals as before, that he intended to build a house on the land in Entally for the location of the Thakuranis and for the residence of the Shebaits and to make the house and the lands specified in the schedule Debutter, but that he died before carrying out his intention; that after his death Rakhal ' with the income of all the said lands ' caused the Sheba to be performed and people to be fed as before; that when Brojo had attained majority, the two brothers had been carrying on the Sheba, etc., as before. The Deed then recites that Rakhal and Brojo had built a house for the location of the Thakurs and the residence of the Shebaits on the Entally land; and states that for the continuance in perpetuity of the Shebas and the feeding of Brahmins, etc., in perpetuity they grant the properties in the schedule to the auspicious lotus feet of the Thakuranis as Debutter. They make provision for the Shebaiti right to go to their male heirs by primogeniture; they provide that the Shebaits should keep accounts and that other heirs shall be competent to inspect the accounts. There is a provision for the removal from office of a Shebait acting improperly ,and a provision to exclude females from the Shebaiti. There is a provision in certain circumstances for Shebaits to be appointed by Deed. It is provided that the Shebaits

> are to employ two Durwans and a Mali and other servants for the purposes of the Sheba and a Tahsildar for keeping accounts, collecting rents, etc., as well as a Pujari to perform the worship. Then come the passages upon which the present question must turn. Out of the income is first of all to be reserved sufficient money for taxes and repairs to the Thakur Bari and the existing house at Entally; then out of the said income the Shebaits are to cause the daily and other worship to be performed and ' at an outlay of reasonable expense' shall entertain Brahmins, feed the poor. The Deed proceeds ' The Shebaits shall purchase Government securities, that is Company's papers, with the surplus annually left after meeting the prescribed expenses '. It provides that when a large amount of money gradually accumulates in this manner, they shall cause tenanted houses to be built on the lands specified in the schedule and take measures for improvement and increase of the income of the Debutter properties. So far, therefore, the Deed contemplates that there shall be a surplus and that this surplus shall be invested so as to increase.
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> " In the next page in the Deed the Shebaits are given a right to reside in the house in which the deities are located and as far as practicable, other heirs may reside in the house. Then comes the only clause which operates to give an ultimate destination to the accumulating funds: The Shebaits are directed ' to build with the said money additional masonry building, house, etc., on the Debutter lands and give them for the convenience of residence and habitation of our heirs. If in the course of time the number of heirs becomes large, the nearer heirs shall reside in this house as far as practicable.'. The remaining passages in the Deed are important in so far as they disclose that the tenants on the scheduled lands are mere tenants at will, which means that so far as occupied, the property was Bustee property. It states that the value of the properties granted as Debutter is Rs.47,000."

In the "schedule of properties" annexed to the deed the first item is the land in Entally of over six bighas in extent, on which the Thakurbari stands, occupying 14 cottahs and the tenanted house occupying about one cottah; the remainder of the Entally land is let to temporary tenants or in other words is Bustee property. The two other properties described in the schedule are the Elliot Road property and the Royd Street property, the former over four bighas in area and the latter over five cottahs.

The effect of a valid deed of dedication is to place the property comprised in the endowment *extra commercium* and beyond the reach of creditors.. The dedication is not invalidated by reason of the fact that members of the settlor's family are nominated as shebaits and given reasonable remuneration out of the endowment and also rights of residence in the dedicated property. In view of the privileges attached to dedicated property it has not infrequently happened, as the Law Reports show, that simulate dedications have been made and a close scrutiny of any challenged deed of dedication is necessary in order to ascertain whether there has been a genuine divestiture by the settlor in favour of the idol. The dedication, moreover, may be either absolute or partial. The property may be given out and out to the idol or it may be subjected to a charge in favour of the idol. " The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or

specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will" (*Pande Har Narayan* v. *Surja Kunwari,* (1921), 48 I.A. 143 at pp. 145-6). It is also of importance to consider the extent of the property alleged to be dedicated in relation to the expense to be incurred and the ceremonies to be observed in the worship of the idol. The purposes of the dedication may be directed to expand as the income increases, or the purposes may be prescribed in limiting terms so that if the income increases beyond what is required for the fulfilment of these purposes it may not be protected by the dedication.

Their Lordships have read the deed of dedication with these considerations in mind and they have been much assisted by the careful analysis to which its provisions have been subjected by the learned Chief Justice. They have no difficulty in agreeing with his conclusion that the deed effectively dedicated to the service of the idol the Thakurbari, or building in which the idol is located, at 30, Beniapukur Road on the Entally land and also the shebait's house there, subject only to the question, to be dealt with later, of Satya's claim under the Limitation Act.

But different considerations apply with regard to the remaining properties comprised in the deed of dedication and deed of sale. In the first place throughout the deed of dedication the observances prescribed are repeatedly referred to as those originally in use to be performed and their Lordships agree with the learned Chief Justice that on a fair reading of the deed as a whole it was not intended that the ceremonies and expenditure should increase indefinitely with the growing income yielded by the properties. (See *Surendrakeshav Roy* v. *Doorgasundari Dassee,* (1892), 19 I.A. 108 at pp. 127-28.) From the nature and situation of the properties and the directions given for their development it must have been clearly contemplated that the income derived from them would be a growing one and must exceed the expenditure required for the prescribed ceremonies and charities. It is significant that in 1922 and 1924 Pulin was able to raise on mortgage Rs.53.000 on the security of parts only of the properties. In these circumstances the directions as to the disposal of the surplus income become of much importance. Now the clause dealing with the ultimate surplus directs that it shall be applied in the building of additional premises " for the convenience of residence and habitation of our heirs ". This destination, it will be observed, is not in favour of the shebaits, but is really in substance a gift in favour of the settlors' heirs generally.

For the reasons thus summarised their Lordships find themselves in agreement with the conclusion which the learned Chief Justice reaches " that the only construction which it is possible in law to put upon the deed of 1888, not-

withstanding the language of certain passages therein, is that there is a charge for the upkeep, worship and expenses of the idol, and that the idol cannot claim to have an absolute interest in any portion of the property which is governed by the provision that tenanted houses should be built on the land for the increase of the income of the trust. It is, I think, otherwise with the Thakurbari and the shebait's house on 30, Beniapukur Road.". The property conveyed by the deed of sale of 1896 cannot be differentiated in any material respect and must go with the property comprised in the deed of dedication (apart from the Thakurbari and shebait's house).

It only remains to consider whether the High Court rightly decided that Satya had acquired by limitation a title to one-half of the Thakurbari and shebait's house. Pleas of limitation were advanced in the Courts below also on behalf of the respondent Brojo Nath and the mortgagees deriving right through Pulin, but these were repelled, the Chief Justice holding that the office of shebaits held by Brojo and Pulin disabled them from possessing adversely to the idol. As this decision was not made the subject of appeal, their Lordships are absolved from the necessity of discussing the topic.

Satya, however, was in a different position from his half-brother and his uncle. As the learned Chief Justice points out, Satya was never a shebait of the idol and therefore never was under any fiduciary disability in the matter of possessing adversely to the idol. When he was three years old, his father being dead, his mother repudiated the deed of dedication and by the consent decree of 1904 one-half of the property alleged to have been dedicated was declared to belong jointly to Pulin and Satya. From 1904 onwards for at least 12 years Satya openly and without any fraudulent collusion enjoyed continuous possession of his share of the Thakurbari and shebait's house on the basis that the consent order of 1904 was effective and that the property was not subject to dedication. It is so found by the learned Chief Justice in the Court below both on evidence and on admission and their Lordships accept the finding. True, the possession of Satya for the 12 years from 1904 was jointly with Pulin, but Satya was not affected by any fiduciary disability attaching to Pulin and there was nothing to prevent his possession of his half being adverse to the appellant idol. Their Lordships accordingly see no reason to disturb the finding of the High Court in favour of Satya.

The result is that their Lordships will humbly advise His Majesty that the appeal be dismissed and the decree of the High Court dated 13th May, 1932, and filed 3rd September, 1932, be affirmed. The appellant must pay to the respondent Satya Charan Dey his costs in the appeal and to the other respondents one set of costs among them.

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