Privy Council Appeal No. 10 *of* 1937
Allahabad Appeal No. 33 *of* 1934

Lachhmi Sewak Sahu - - - - - - - - - *Appellant*

v.

Ram Rup Sahu, deceased and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1943

Present at the Hearing:

LORD ATKIN
LORD PORTER
SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE RANKIN]

This appeal arises out of a partition suit brought on 3rd August, 1928, in the Court of the Subordinate Judge of Azamgarh by one Ram Rup son of Ram Narain a Hindu governed by the Mitakshara. Ram Rup the plaintiff died in 1936 and is now represented by his son and grandson. At the date of the suit his father and all his brothers were dead and he impleaded as defendants 1 to 6 the sons and widows of his brothers. The widow of one brother who had died in 1915 was not impleaded but need not be further mentioned. The first defendant is the son of his eldest brother Bhairon and is the appellant before the Board. The plaintiff averred that he and his nephews were members of a joint Hindu family of which Bhairon until his death in 1927, and thereafter the appellant, had been karta. He pleaded that on 4th August, 1927, the various members of the family had by a deed dated 4th August, 1927, agreed to come to a partition and nominated arbitrators for the purpose; and that these arbitrators had carried out this work in part though they had not effected any division of the houses, when on 23rd July, 1928, they withdrew from their task. The plaintiff joined as defendants certain persons who were alleged to be debtors to the joint family upon allegations which it is no longer necessary to consider. He also included a claim to be one of the managers of a private family idol—Sri Thakurji defendant 10—which was possessed of an 8 annas share in a village called Asni.

The present appellant resisted the suit saying that the family had not been joint since 1916, that the deed of 4th August, 1927, which recited that they were joint was fictitious, that the books of account and cash of the family were with the plaintiff, and that the plaintiff was not a " mutawalli " of the endowed property in Asni.

Both courts in India have disbelieved the appellant, have rejected his case and have found in favour of the plaintiff. They have held the deed of 4th August, 1927, to be genuine, that the family was at that date joint, that the arbitrators' partition so far as it went was fair and reasonable, and that the appellant is liable to render accounts. They have directed a partition of the houses into five shares—one going to Musamat Manaki, the sonless widow of the plaintiff's brother Bindeshri, as provided in the deed of 4th August, 1927.

Upon all these matters Mr. Parikh learned counsel for the appellant concedes that he cannot press this appeal and their Lordships are only concerned with them so far as to express their opinion that in view of the concurrent findings learned counsel has exercised his discretion very properly.

Upon one point however this appeal has been urged. It is not a point taken at any stage of the proceedings in either of the Indian Courts but, as it is a point of limitation, it is *prima facie* admissible even in a court of last resort. It has reference to the claim of the plaintiff to be a " mutawalli " of the property dedicated to Sri Thakurji, and it is founded upon the fact that in the revenue papers the property was recorded as belonging to Sri Thakurji " under the supervision of Bhairon." On this it is now contended that the plaintiff had been out of possession for a time sufficient to bar him from recovering in this suit of 1928 possession of his share in the office of mutawalli or of his share in the endowed property. On either of these views as to the nature of his claim he would be barred by twelve years adverse possession under article 124 or article 144 of the schedule to the Limitation Act, 1908 (*Gnanasambanda's* case (1899) L.R. 27 I.A. 69, 77).

This part of the plaintiff's claim was put forward in the plaint on the footing that the plaintiff was in possession to the extent of his right—that is, of a one-fifth share; and that he desired a declaration to that effect. The learned Subordinate Judge thought that the proper form of declaration was " that the plaintiff along with others is a mutawalli of Sri Thakurji." The High Court judgment states:

> " It is objected on behalf of defendant No. 1 that since the plaintiff is admittedly out of possession of this property he should have added a prayer in his plaint for consequential relief. It is a fact that the plaintiff is not in possession, but since this is a partition suit and all the parties are before the court, we are of opinion that under the provisions of O. 41 r. 33 C.P.C. this court can and should give to the plaintiff the supplementary relief of possession, this being the only method by which the partition can be given effect to in respect to the endowed property."

By their decree of 23rd August, 1934, they modified the trial Court's decree by a direction " that the plaintiff shall be given a decree for joint possession of the endowed property." No suggestion of any difficulty as to limitation appears from the High Court's judgment; the argument about " consequential relief " being an objection taken on the terms of section 42 of the Specific Relief Act to the grant of a mere declaration.

Neither by his petition of appeal nor by the case lodged on his behalf has the appellant suggested any difficulty on the score of limitation, but in argument his learned counsel drew the attention of the Board to the terms of the endowment. These are to be found in exhibit 3 a deed (waqfnama) dated 28th July, 1875, made by Ram Narain the plaintiff's father. By this deed he made a " waqf " of the 8 annas share of mauza Asni for meeting the necessary expenses of a " thakurdwara " situate in mauza Ghauspur which had been constructed by himself. The deed provided:

> " The profits of the endowed property shall after the payment of the Government revenue, be in the charge of me, the executant and my heirs generation after generation ".

On this provision learned counsel for the appellant very correctly points out that after the settlor's death his successors in the right of management would not take as members of a Mitakshara joint family but simply as his heirs might take his separate property as a matter of inheritance.

When full weight is given to this distinction it does not appear to their Lordships to make it possible on this appeal that they should come to a finding that the possession of the plaintiff's eldest brother Bhairon before 1927 had been adverse to the plaintiff. The case is really on the same footing as that common in Bengal of the sebaiti of the family idol descending by inheritance in like manner as secular property under the Dayabhaga. Under that law debutter property and secular property could hardly be treated differently: in the latter case it is clear that until something is done which amounts to an ouster of one of the heirs the possession of one

is considered to be the possession of all. That the representative of the eldest branch should in fact be allowed to see to the *debsheba* to collect the income and to defray the proper expenses is very far from being cogent proof of ouster. Let it be assumed however that there is some room for doubt as to the limits of the rule as to possession between co-owners. The question whether Bhairon's possession was adverse to the plaintiff is still a question of fact; and it would be manifestly unjust if it were held, in the absence of any issue, any cross-examination, any inquiry upon the point, and without giving the plaintiff an opportunity to meet the allegation, that the possession of Bhairon and of the appellant had been adverse to the plaintiff for twelve years. Their Lordships are not here concerned to forecast the result at which a proper inquiry would arrive, but there are important materials to be considered as tending to show that Bhairon's possession of the office of manager of this endowment was not adverse to the plaintiff. The mere facts that the idol was a private family idol, and that this Mitakshara family remained joint, as has now been held, till 1927, the year before suit, make it readily intelligible that the eldest brother who managed the family properties should manage the family idol's affairs. When to this it is added, as the appellant's own evidence would warrant, that Bhairon lived to be a very old man " engrossed always in his puja " the inference of adverse possession becomes still less plain. The High Court may well have been right in thinking that at the date of the suit or of the hearing the plaintiff was not in possession of any share in the office of manager: the plaint had stated that " the defendants 1 to 4 deny the plaintiff's rights as mutawalli." But there is nothing in this to suggest that they had denied it twelve years before and ever since, and their Lordships cannot now be asked to hold that the possession of the appellant's father was adverse to the plaintiff.

They will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of Ram Rup's legal representatives.

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In the Privy Council

LACHHMI SEWAK SAHU

v.

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DECEASED AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

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