**PRIVY COUNCIL**

Lal Chand Marwari

Vs.

Mahant Ramrup Gir

P.C.A No. 34 of 1924
(Lords Phillimore Blanesburgh and Sir John Edge JJ.)

05.12.1925

**JUDGMENT**

**LORD BLANESBURGH J.**

1. These are consolidated appeals by the defendants in four out of eight suits instituted by one Ramrup Gir in the Court of the First Sub-Judge at Muzafferpur on the 30th November, 1916. The suits were brought on the allegation that the plaintiff, as the then Mahant of an asthal or math at Paprikhan Karan, was entitled to recover from the defendants different properties, endowments of the math, then in their possession. These properties had, it was alleged, been alienated without warrant by Bhawan Gir, deceased, the immediate predecessor as mahant of the plaintiff. The suits, as they progressed, were amended by the joinder, as co-plaintiffs, of three persons to whom, in consideration of their supplying funds for the conduct of the litigation, Ramrup Gir had agreed to transfer, when recovered certain portions of the properties in question. As so amended, they were heard at length by the learned Subordinate Judge, and, on appeal, by the High Court at Patna, where many issues were raised and strenuously contested. of these, one only remains for determination by their Lordships, namely, the issue of limitation. The learned Trial Judge held that the suits were barred by statute. The High Court, on appeal, held that they were not, and made decrees for possession of the proper ties with mesne profits. It is against these decrees and on the ground that the suits should have been dismissed as being out of time, that the present appeals have been brought and argued.

2. The math in question has a considerable history. It is a math of the Sanyasis who are celibate and have renounced the world. The properties in suit had been amongst its endowed properties for a period of nearly 150 years. They stood in the name of the

mahant for the time being, but he had no right to alienate them otherwise than for necessity. The income from them at one time, at all events, amounted to Rs. 4,000 a year, appropriated not to a single deity, but for Puja of Siuji, the principal deity, for the Pujas of the other established deities of the math and in the entertainment of mendicants and ascetics. These matters, all in dispute in the Courts below, were not again raised in contest before the Board, and may now be taken to be accepted.

3. In the year 1880 or shortly afterwards, Bhawan Gir became mahant of this asthal or math. He had, as his elder Chela, the plaintiff Ramrup Gir, and, as his younger Chela, one Harihar Gir, Bhawan Gir was drunken, immoral and dissolute, and, as might be expected of such a person, profligate and extravagant. Portions of the endowed properties he mortgaged without justification, by way of security for loans made to himself. Other portions equally without justification, he purported to sell outright. The proceeds in every case were, it can hardly be doubted, spent mainly, if not entirely, upon himself. The properties mortgaged have since been sold under decrees made in suits brought to enforce the securities. and so it has come about that those properties now in dispute have all of them been in the exclusive possession of the defendants or their predecessors in title, as for absolute interests, for periods exceeding on the 30th November, 1916, in every instance a term of 26 years of continuous duration.

4. By 1888, Bhawan Gir had denuded him self and the math of all its endowed properties. In March, 1892, he made the asthal over to the plaintiff, and, as the plaintiff recites in a deed of sale of the 15th June, 1917, left the place for good. and he has never returned. He went on pilgrimage and Harihar Gir went with him. Some weeks later, Harihar Gir came back alone and reported to the plain tiff that Bhawan Gir had died in his arms at Hardwar on the 27th April, 1892.

5. The plaintiff accepted that statement. It was, of course, then greatly to his interest to do so. He had become mahant if it were true. It is, however, contrary to his interest now to accept it. Indeed, if the fact be as stated, it is fatal to his present claims. Yet in his evidence in these suits - to his credit be it said he has again declared his belief that Harihar Gir's statement as to Bhawan Gir's death at Hardwar in April, 1892 is in accordance with fact. and his actions since the date of Harihar Gir's return, if they be honest, have been consistent, and consistent only with a constant belief that Bhawan Gir was dead. Almost at once he performed his Bhandara and Shadh, and he was himself instituted as mahant of the math and got Chudder and Pagree and was installed in the Gadi. Three years later, that is to say on the 16th April, 1895, with money found by others on terms analogous to those on which the funds for the present

litigation have been obtained, he instituted a series of suits against the present defendants or their then predecessors in title to recover the proper ties on the allegation that he had on the death of Bhawan Gir succeeded thereto as mahant. In those suits the plaintiff gave evidence to the effect just stated, Harihar Gir too was called as a witness, and he directly deposed to Bhawan Gir's death in his presence on the date already given. His statements at that date were of course highly interested. Moreover, it was essential to the plaintiff's case then that they should be true. The learned Trial Judge, how ever, disbelieved them, accepting as preferable, and perhaps as true, a body of evidence adduced by the then defendants - suspicious only because of its volume and circumstance that Bhawan Gir was alive after April, 1892 : that indeed he had been seen alive in 1895 after action brought. For the reason therefore that the plaintiff had failed to establish the fact essential to the validity of his claim, namely, that Bhawan Gir was dead when the suits were instituted, the Trial Judge, by decrees dated the 27th January, 1896, dismissed them all with costs. The plain tiff appealed to the High Court, but the learned Judges of that Court, finding themselves unable on the materials before them to review the Trial Judge's finding on this issue of fact, by orders dated the 30th November, 1897, dismissed the appeals. and so that litigation ended. Attention must be given to this last date. It will be found that the plaintiff sets great store by it in these proceedings.

6. The plaintiff in 1905 again performed the Bhandara of Bhawan Gir and was again installed in the Gadi, although in his own view, as he stated in evidence in these suits, that ceremony was neither essential to his institution nor redundant in its repetition. On the 30th November, 1916, he instituted the present litigation. The date is significant. Required by Order VII, Rule 1 (e) of the First Schedule to the Code to set forth in his plaint the facts constituting his cause of action, and when it arose, the plaintiff in each of the plaints alleges that the Judges of the High Court in the earlier proceedings had, on the 30th November, 1897, accepted the then defendant's statement that the plaintiff's Guru, Mahant Bhawan Gir, was then alive : that no particulars regarding him had been known for seven years from the date of that judgment, and that it was necessary for the plaintiff to accept the 30th November, 1904, as the date of death of his Guru, when the cause of action accrued to him. His suits were in time - such is the impli cation of the allegation, and such is his way of establishing it - in that they were commenced within twelve years to a day from the 30th November, 1904.

7. This view is undoubtedly mistaken. It would be fatal to the plaintiff if it were not.

For his case on his chosen foundation fails upon the facts. It is not correct to say that the High Court in the earlier litigation found that Bhawan Gir was alive on the 30th November, 1897. What that Court did find, affirming the Subordinate Judge, was that be had not been proved to be dead on the 16th April, 1895. The la test date at which anyone deposed to his being alive was a later date in the same year. and there is no evidence, either in that litigation - if it may be regarded - or in this, that he has ever since been heard of. So far indeed as the present suits are concerned, the only testimony adduced, apart from that of Harihar Gir, is that he has been neither seen nor heard of since he left the math in March, 1892. Putting the case therefore at its highest for the plaintiff - that is excluding altogether from consideration both Harihar Gir's direct evidence of death and the plaintiff's belief in its truth - the position is that Bhawan Gir has not been seen or heard of since the year 1895. If so, on the principle set up by the plain tiff, he must be presumed to be dead by the end of 1902. Accordingly these suits commenced only in 1916 are clearly statute barred as against the defendants.

8. But the law really is that on the facts now assumed there is no presumption as to Bhawan Gir being dead either in 1902 or 1904. There is only one presumption, and that is that when these suits were in stituted in 1916 Bhawan Gir was no lon ger alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof. and their Lord ships would here observe that it strikes them as not a little remarkable that the theory on this point, on which the plaintiff's pleader hazards his whole case, is still so widely held, although it has so often been shown to be mistaken. The learned Judges of the High Court have in these suits pointed out the plaintiff's error. Yet, in another part of their judgment, if their Lordships are not mistaken, they have themselves unconsciously fallen into it. They have made a decree in the plaintiff's favour because they had, as they thought, no reliable evidence as to the date of Bhawan Gir's death, and because in their judgment it was for the defendants to prove that date if they relied on it. Yet at the same time they have acceded to the plain tiff's claim for mesne profits which, at all events as claimed, are those profits accruing three years prior to the institution of the suits. This imports that Bhawan Gir was dead at that date. But if he was, then the same evidence showed that he had died many years before. The evidence, indeed, if regarded at all, required the Court not to allow mesne profits but to dismiss the suits altogether.

9. Now upon this question there is, their Lordships are satisfied, no difference bet ween the law of India as declared in the Evidence Act and the Law of England *[Rango*

*Balaji v. Mudiyeppa* and searching for an explanation of this very persistent heresy their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from In re Phene's Trusts, L. R. 5 Ch. 139 : 30 L. J. Ch. 316 : 18 W. R. 303 : 22 L. T. 111 run as follows :-

> " If a person has not been heard of for seven years, there is a presumption of law that he is dead : but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

10. Following these words, it is constantly assumed - not perhaps unnaturally - that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one of not less than seven years."

11. To resume, however. It is manifest that the attempt made by the plaintiff in his plaint to comply with Order VII, r. 1, (e) and set forth the date when his cause of action arose has failed him on the facts. The result is to disclose, so far as he is concerned, a very serious position. It is made plain by the plaint that as against him the defendants had, at the institution of the suits, been by themselves and their predecessors in adverse possession of the properties in question for more than 12 years - in point of fact since 1895 at least when the earlier litigation against them was commenced by the plaintiff, and which is the last year in which anyone proposes that Bhawan Gir was seen alive. The plaint itself accordingly discloses a state of things to which section 144 of the Limitation Act is applicable. In such circumstances, it may well be that it is the obligation of the plaintiff by the law of India, as it is by the law of England, to satisfy the Court that his action is not barred by lapse of time. See as to India, *Raja Sahib Perlad, Sein v. Maha rajah Rajender Kishore Singh Mahomed Ibrahim v. Morrison (1880) 5 Cal. 36*; as to England :- " There is no doubt," said the Court of Queen's Bench in *Doc v. Nepean 5 B. and Ad. 94* "that the lessor of the plaintiff must recover by the strength of his own title and, in order " to do so, must prove that he had a right to enter on the lands sought to be recovered within twenty

years before ejection brought."

12. To all of which may be added the comment by Lord Justice Giffard on *Doc v. Nepean*, that the onus of proving death of any person at any particular period must rest with the person to whose title that fact is essential. *In re Phene's Trusts at pp. 151-2*.

13. On this footing therefore the plaintiff here would fail in the absence of evidence of the death of Bhawan Gir within twelve years before the institution of the suits.

14. But it is unnecessary in the state of the evidence in this case to proceed upon any such strict view of the plaintiff's position. He has himself, and in these suits, supplied affirmative evidence which their Lordships cannot disregard, Harihar Gir was called as a witness on his behalf. In his evidence in chief he solemnly deposed that Bhawan Gir died in his presence at Hardwar in April, 1892. In cross-examination he added that he himself performed his funeral ceremonies, and that if anybody said that he did not die in April, 1892, it would be false. and by way of confirmation the plaintiff stated in his evidence, as their Lordships have already observed, that he himself believed that Harihar Gir was telling the truth in this matter, while, as has also been shown, his own actions and claims ever since have alone been consistent with that belief.

15. To their Lordships it seems impossible that such evidence adduced by the plaintiff himself, fatal as it is to his case, can be ignored. They are not blind to the difficulty. They do not forget the wealth of circumstantial evidence to the effect that Bhawan Gir was alive as late as 1895, adduced by the defendants or their predecessors in title in the earlier litigation, and then accepted and acted upon by the Trial Judge to the plaintiff's undoing. They do not forget that at that time such evidence was vital to the defence, nor do they fail to note the absence now of any counterpart to it when the lapse of time has made it, to the highest interest of the defendants, to accept the plaintiff's story that Bhawan Gir has been dead all these years. Their Lordships bear all this in mind, and see no occasion to commend these highly sophisticated tactics of the defendants. But they find it impossible to ignore the consistent attitude of the plaintiff, supported now by uncontradicted direct evidence of death and a wealth of concurring testimony to the effect that since Bhawan Gir abandoned the math in 1892 with Harihar Gir he has not been seen or heard of. If these suits were being brought against defendants, neither parties nor privies to the earlier litigation, there could, in their Lordships' view, have been no question that the evidence now adduced on behalf of the plaintiff would have been completely destructive of his case. Is the position of the defendants so compromised by their attitude in the earlier litigation, that they are

in effect estopped from deriving benefit from the plaintiff's evidence of death even if it now by reason of the lapse of time has gained so greatly in force ? It is of course hard upon the plaintiff that evidence rejected in 1895, when it would have helped him, should now be accepted when it hurts him. On the other hand, it must be remembered that the complete disappearance, down to the present time, of Bhawan Gir and the now disinterested character of the evidence adds, to the plaintiff's story of his death, a strength from external circumstances altogether lacking in 1895. Moreover, to ignore the evidence altogether would be to fly in the face of the statute.

16. The difficulty of the plaintiff's present position in this matter was not, it would seem, at all appreciated in the Courts below. Das J., in the High Court, for instance, proceeded upon the footing that his evidence on this point was adduced only in the earlier proceedings, and the learned Judge disposed of the point :-

> " It is quite true that it was the plaintiff's case in the suit which he instituted in 1895 that Bha wan Gir died on the 15th Baisak, 1299, but that case was not accepted by the Courts."

17. That is all. To the evidence in the present suit the learned Judge makes no allusion. It is that evidence which their Lordships find themselves unable to ignore. The plaintiff must, as it seems to them, take the consequences of solemn testimony given by himself and adduced on his behalf.

18. This disposes of the case, and it is unnecessary for their Lordships to deal with the important and difficult question whether here the statute did not commence to run in favour of the defendants from the dates of the wrongful alienations of the properties or at all events from the date of his final abandonment of his office by Bhawan Gir and not only from his death. Whether, in other words, the case is governed by the decisions of which *Damodar Das v. Lakhan Das*, may be taken as the leading autho rity : or by the line of authority of which *Vidya Varuthi Thirtha v. Balusami Ayyar AIR 1922 PC 123*, may be taken as typical. Their Lordships, while not pronouncing upon it, have given very careful consideration to this interesting and difficult question. Upon it they say no more than this, that they must not be taken to accept the view with reference to it propounded by the High Court. So far as they are concerned, the question remains entirely open to be deter mined when it arises.

19. For the reasons above given, however, they are of opinion that the decree of the High Court should be recalled and that of the Trial Judge restored, and they will humbly advise His Majesty accordingly. The respondents must pay to the appellants

their costs before the Board and in the High Court.

Cases Referred.

(1899) 23 Bom. 296.]

(1867-69) 12 M. I. A. 342 : 12 W. R. 6 : 2 B. L. R. 111 : 2 Suther 225 : 2 Sar. 439 (P. C.) ;

(1910) 37 Cal. 885 : 37 I. A. 147 : 14 C. W. N. 889 : 12 C. L. J. 110 : 1910 M. W. N. 303 : 7 A, L. J. 791 : 8 M. L. T. 145 : 20 M. L. J. 624 : 12 Bom. L. R. 632 (P. C.)