

CALCUTTA HIGH COURT

Administrator-General of Bengal

Vs

Balkissen Misser

(Page ,J.)

12.05.1924

JUDGMENT

Page, J.

1. In this case the defendants, in my opinion, possess no merits, and deserve no sympathy. They possess no merits, because on the date when the suit was instituted none of them were clothed with a vestige of legal title to the premises in suit, which were originally known as 51-3, Cotton Street, afterwards as No. 55, Cotton Street, and now as No. 10, Hanumanji Lane, Calcutta. And they are entitled to no sympathy because, if they had not admitted at the hearing that on the date when these proceedings were commenced they possessed no title to the premises, and the circumstances Under which the property in the premises purported to have passed from the first and second defendants to one Ashutosh Pramanick, and subsequently to the fourth defendant, had been subjected to scrutiny in Court, I have more than a shrewd suspicion that it would have become apparent that the defendants at all material times wore fully aware that none of them possessed any title or interest whatever in these premises.

2. Moreover, it is clear that the Misser defendants were guilty of uttering deliberate falsehood (1) in asserting in a written statement filed in December 1911 in Suit No. 961 of 1911 that the said premises were not dedicated to the idol Sham Sunderjee; (2) in alleging in a plaint filed in (suit No. 1217 of 1911 in the same month, " that they were the owners and proprietors of the house and premises No. 10, Hanumanji Gully, in the town of Calcutta, which was a fourstoreyed building, and for upwards of a hundred years the plaintiffs and their predecessors in-title had been in possession of the said premises) in their own right;" and (3) in stating in an affidavit sworn on 20th October 1913 that The premises belonged to them absolutely and for ever, and that the said premises were not affected by or with any trust, public, religious or otherwise, of any sort or kind, and the said premises were their own absolute property.

3. Further, it is clear from a letter written by the solicitors to the fourth defendant on the 23rd January 1917, that the fourth defendant, who purchased the said premises at an auction sale directed by the Court in a mortgage suit filed by Pramanick against the Misser defendants, had been advised by counsel that the Misser defendants had no title to the premises, and yet, notwithstanding the advice given to him, that he was prepared to complete the purchase. It would be interesting to ascertain the circumstances under which Pramanick brought himself to accept

the mortgage. It may be that these matters will be further ventilated hereafter, if it is deemed advisable to take criminal proceedings in respect of these transactions.

4. Some time between 1842 and 1850 the premises in suit were acquired by the executors of one Asuram Burmon, a Hindu merchant of Burrabazar, Calcutta, and, pursuant to directions contained in his will, the premises were dedicated to the worship and service of Sham Sunderjee. By reason of the manner in which dedication was effected the property in the said premises passed in its entirety to, and, until this suit was instituted, remained vested in the God Sham Sunderjee.

5. In May 1917, the plaintiff, the Administrator-General of Bengal, as administrator de bonis non of the estate of Asuram Burmon, and the Official Assignee, as trustee of the funds appertaining to the said estate, were informed (as the fact was) that the Misser defendants in 1911 had succeeded in persuading the authorities to enter their names as the owners and occupiers of the premises in suit in the assessment book of the Records Department of the Corporation of Calcutta. It further transpired that in May 1912, the said defendants had mortgaged the premises to Pramanick for Rs. 8,000 that on the 27th June 1913, inasmuch as no part of the sum left had been repaid by the mortgagors as provided under the said mortgage deed, the mortgagee had filed a suit for sale of the said premises; that on the 22nd December 1914 a decree absolute for sale had been passed; and that the premises ultimately had been sold on the 18th November 1916 to the fourth defendant pursuant to the said decree for the sum of Rs. 25,200. The mortgage debt amounted to Rs. 9,903 2-4. On the 3rd April 1917 a sum of Rs. 5,000 was paid by the auction purchaser to the Misser defendants, and the residue of the purchase price was paid into Court. In these circumstances on the 3rd August 1917 the plaintiffs filed the present suit, inter alia, for a declaration that the premises in question formed part of the estate of Asuram Burmon and that the plaintiff, the Administrator-General was entitled as administrator de bonis non of Asuram Burmon's estate to possession thereof; that the indenture of mortgage of 14th May 1912 was void and inoperative; that the sale of the premises to Ashutosh Pramanick was invalid and inoperative, and that the fourth defendant under the auction sale acquired no right or interest therein. The plaintiffs also sought an order that the fourth defendant should be ordered to deliver up possession of the said premises to the Administrator-General, and asked for incidental relief.

6. Now although for some time prior to the date when the present suit was instituted, the Misser defendants, and since May 1917 the fourth defendant had been in actual possession of the said premises, I find that none of them had any title or interest therein, and that, at any rate up till the year 1911, when the Misser defendants procured the mutation of names in the Corporation assessment book such possession was not adverse to the right and title of the person in whom the legal title to the premises was vested, whether such person was the idol Sham Sunderjee, or the plaintiffs. Until 1911 the Misser defendants occupied the said premises as de facto not de jure shebait of the idol, and not otherwise. The fourth defendant admittedly was in possession of the premises on the date when these proceedings were commenced, and the plaintiffs are not entitled to succeed in this suit merely because they have satisfied that the defendants would not have been justified in retaining possession of the premises after the person legally entitled thereto had demanded delivery of possession. For in a suit framed as this suit is, in ejectment, the plaintiffs must rely upon the strength of their own title, and cannot succeed unless they prove that the legal title to the premises is vested in them, and that they have been in possession of the premises and have been ousted therefrom within 12 years before the present suit was filed.

7. I took time to consider what my judgment should be in this case because I was anxious fully to investigate the authorities material to the matters in controversy, and I am satisfied that at the date when the present proceedings were launched-I express no opinion as to what would be the result of any suit which might hereafter be instituted-no defence to a suit, aptly framed, to eject the defendants from possession of the said premises, would have been available or open to the defendants or any of them who might have been in possession, if instituted on behalf of the idol by a shebait or, as I apprehend, in the name of the idol itself (vide *Jodhi Rai v. Basdeo Prasad¹* *Pramada Nath Ray v. Poorna Chandra Ray²* *Maharaja Jagadindra Nath Roy v. Rani Hemanta Kumari Debt³* *Damodar Das v. Adhikari Lakhan Das⁴*. In *Jagadindra's case⁵* the Judicial Committee of the Privy Council expressed the opinion that, on the appointment of a shebait the right to sue for possession of the property with which the idol was endowed belonged to the shebait and not to the idol. Assuming religious dedication to have been of the strictest character it still remains that the possession and management of the dedicated property belonged to the shebait, and this carries with it the right to bring whatever suits are necessary for the protection of property. Every such right of suit is vested in the shebait, not in the idol.

8. (Per Sir Arthur Wilson, page 210). The law must now be taken to be that laid down in *Jagadindra's case* (1904) 32 Cal. 129, although I confess that I feel somewhat perplexed to find that the right to sue for possession is divorced from the proprietary right to the property which is vested in the idol. In such cases where adverse possession of the premises is proved, does time under the Statute of Limitation run only against the Shebait, or against the idol as well, notwithstanding that the right to sue for possession is vested solely in the Shebait?

9. I think, however, that *Jagadindra's case* (1904) 32 Cal. 129(Supra) must be read in the light of the later decision in *Damodar v. Lukhan⁶* where it was held that adverse possession affects the right and interest of the idol as well as the right and interest of the She-bait, and in my opinion where adverse possession is proved, time will also run against the idol even in circumstances such as those obtaining in the present case where no Shebait has been appointed. But it is not permissible in cases where a Shebait has not been appointed to file a suit for possession in the name of the idol.

10. I think that it is, although no doubt the Court will appoint some person to act as agent ad litem for the idol. It would, I imagine, sound a strange doctrine in the ears and the heart of a Hindu, that a public company which has neither mind nor morals, sense or sensibility, is a juristic entity deemed fit to promote or defend proceedings in its own name, while a god whose tabernacle the image is, although a juristic entity capable of being endowed with the title to property both moveable and immovable, is regarded in law as unfit to institute or defend suits in its own name.

11. In my opinion, the defendants would have been unable to resist a claim for possession if the present suit had been instituted in the name of the thakur. The same result would have followed if the suit had been brought by the Advocate-General, or by any one or more persons who were-or indeed might be- worshippers at the shrine of the god whose image was set up in the said premises, or by any other person interested in the maintenance of the religious observances to be carried on therein. Whether the plaintiffs or either of them, who represented the estate of Asuram Burmon, were under an obligation to repair the fabric of the temple, and to supply funds in aid of

the acts of worship to be performed and celebrated therein, were persons possessed of a sufficient interest to maintain the present suit, is a question which involves the consideration of an interesting problem, vide *Manohar Ganesh Tambekar v. Lakhmiram Govindaram*⁷, and Sections 5 and 14 of the Religious Endowment Act (XX of 1863).

12. But it is one upon which, in the circumstances of this case, I am relieved from embarking, because the plaintiffs have refrained from applying so to amend the claim as to entitle them to raise in these proceedings any of the issues which I have indicated above. No amendment to alter the frame of the suit or to raise a fresh issue or for any other purpose has been sought, and the plaintiffs have deliberately elected to stand or fall upon the result of this issue, viz., whether the legal title to the said premises was vested in them or in either of them on the date when the present suit was filed. The determination of this issue depends upon the terms and conditions of the founder's will in pursuance of which the premises were dedicated as a temple, and the image of Sham Sunderjee set up therein.

13. The material passages of Asuram Burmon's Will executed on the 9th February 1842 are as follows: I further will and direct that my said executors do lay out and expend out of my estate a sum of company's Rs. 5,000 in the erection and building of a temple in the City of Calcutta near the banks of the river Hoogly, and in placing an idol therein, such idol to be in the discretion of my executors. I further will and direct that my said executors do lay out and invest the sum of Company's Rs. 2,000 out of my estate in the purchase of a garden with a tank and fruit trees thereon in the name of Luchmeeputty Baboo, Juggul Doss Baboo, Poorsottom Doss Baboo and Hurry Deb Set, all of Burrabazar in Calcutta, merchants, or in the names of the survivor or survivors of them, and I hereby declare that the same or the survivor or survivors of them or other the trustee or trustees to be appointed as hereinafter mentioned, shall stand...find be possessed of and in the said garden and premises on trust, that they expend and lay out the rents, profits and produce thereof in the worship of the said last-mentioned idol, and in keeping the said last-mentioned temple in repair.

14. After appointing the above-mentioned persons executors and trustees of the will the testator proceeds: It shall be lawful to and for the surviving or continuing or other trustee or trustees of the said trust premises for the time being or in case there shall be no continuing trustee then for the retiring trustees or trustee of their or his own proper authority by any writing or writings under their, his or her hands and seals or hand and seal to nominate, substitute and appoint any other person or persons to be a trustee or trustees in the stead or place of him or them so dying or desiring to be discharged or refusing or declining to act or becoming incapable of acting as aforesaid.

15. After the death of Asuram Burmon, the executors, in pursuance of the directions in his will contained, purchased the premises in suit and erected therein an imago of Sham Sunderjee. In the will of Puraottam Das, who was the surviving executor and trustee under the will of Asuram Burmon, and which bore date the 21st March 1850, it was provided that- Whereas I am now sole surviving executor of the last will and testament of Asuram Burmon, and being desirous of providing for the proper administration of the same after my death, I am desirous of placing the said estate in the hands of the Administrator-General for the time being. I do therefore hereby nominate and appoint Maurice Fitzgerald Sands, Esquire, the Administrator- General for the time being, and his successors in the said office to be my executor, so far only, however, as to enable

him to represent and administer the estate of the said Asuram Burmon, not to be by general executor or to have the administration, of my own estate, and I do hereby in pursuance of the general directions contained in the said will appoint Gocul Babu of Burrabuzar to be manager of the Temple erected from the funds of the said estate and to receive and expend sums set aside and provided for the worship of Sham Sunderjee from and under the directions of the Administrator-General for the time being.

16. The testator then proceeded to give directions as to the sums which were to be expended annually in the service and worship of Sham Sunderjee.

17. It was contended by counsel on behalf of the fourth defendant that the appointment of the Administrator-General as executor and trustee to carry out the directions of the will of Asuram Burmon by Purushottam Das, not being under Purushottam's hand and seal, was inoperative as a valid appointment under the will. In my opinion, the appointment was a valid one, and I find that Lord Truro, Lord Chancellor, in *Innes v. Sayer*⁸ observed: That it ought to be considered as established by judicial decision that a power well exercised in all other respects will be deemed to be an effective execution of the power, although the form in which the power has been exercised has not conformed to the requisitions imposed by the instrument creating or giving the power.

18. On the 20th May 1850 the Administrator-General of Bengal was appointed administrator de bonis non, with the will and codicil annexed, of the unadministered goods and effects of the estate of Asuram Burmon, and on the 29th March 1906 the Administrator-General of Bengal assigned to the Official Trustee the funds of the estate of Asuram Burmon then in his hands. Now, according to the law as administered in British India property may be dedicated to religious purposes, e.g., to the worship or service of a god in such a manner that upon a dedication the proprietary title to such property passes in its own entirety and in perpetuity to the idol; and where there is dedication in this form the title to the property will vest in the idol without the necessity for the creation of a trust, or the intervention of a trustee, vide Manohur's case (1887) 12 Bom. 247. The dedication, however, may be in a form in which the property is vested in a trustee who, pursuant to the provisions of the trust, is under an obligation to administer the property wholly for religious purposes; or again, the property, may be transferred in beneficial ownership to secular persons subject to a charge thereon for religious purposes. Example of the various forms of endowment may be found in *Sonatum Bysack v. Sreemutty Juggutsoondree Dasi*⁹ Manohar's case (1887) 12 Bom. 247, Jagadindra Nath Roy's case (3), and *Jadu Nath Singh v. Sita Ramji* A.I.R. 1917 P.C. 177.

19. In my opinion, the intention of the founder, and the effect, of the provisions of his will, was that the premises in suit were to be dedicated in the strictest form, and upon acquisition of the same by his executors the proprietary right therein passed absolutely and for ever to the God Sham Sunderjee. Not only are the terms of the will in respect of this matter precise and clear, but it is to be observed that whereas the executors are directed to appeal the purchase of the garden and tank and promises in connection therewith in the name of the executors and trustees of the will, no such direction is made in respect of the acquisition of the premises dedicated to Sham Sunderjee. I have formed a clear opinion that neither at the date when the suit was filed, nor at any other time, was the property in the premises in suit vested in the plaintiffs or in either of them.

20. [After referring to the evidence on the point, His Lordship continued:]

21. I hold that, the plaintiffs have failed to make out that the premises in suit were vested in them or that they were in possession of the premises at any time. The plaintiffs, therefore, fail to make out their claim. The suit, in my opinion, is not maintainable, and must be dismissed.

22. So far as the costs are concerned, in my opinion, it was advisable, if not necessary, that the Administrator-General should have brought upon the record all the defendants, and in my opinion, although he has failed on a technical ground owing to the constitution of the suit, he, acting not unreasonably, was induced to launch these proceedings by reason of the unwarrantable conduct of the defendants in purporting to dispose of the premises in suit for which there was no justification whatever. There will be judgment for the defendants without costs. The costs of the Administrator-General will be defrayed out of the estate as between solicitor and client.

Cases Referred.

1(1911) 33 All. 735

2(1908) 35 Cal. 691

3(1904) 32 Cal. 129

4[1910] 37 Cal. 885

5(1904) 32 Cal. 129

6[1910] 37 Cal. 885

7(1887) 12 Bom. 247

8(1851) 3 Mar. & G. 606

9(1859) 8 M.I.A. 66