CALCUTTA HIGH COURT

Surendrakrishna Roy

Vs.

Shree Shree Ishwar Bhubaneshwari Thakurani

(Rankin, C.J.)

13.05.1932

JUDGMENT

Rankin, C.J.

1. We have before us three appeals Nos. 23, 24 and 25 of 1931, by different parties-defendant in a suit brought by a Hindu deity on 22nd January 1929, for the purpose of establishing title and obtaining possession of, (a) four properties alleged to have been dedicated to the deity on 5th May 1888, and (b) certain mofussil properties alleged to have been purchased on behalf of the plaintiff deity by a conveyance, dated 5th April 1896. The plaintiff's claim in respect of one of the four properties comprised in the deed of 1888, namely, the property known as 45, Elliot Road was withdrawn at the trial and need not further concern us. The learned Judge, by his decree, dated 19th December 1930, has declared that the plaintiff is absolutely entitled to the other properties comprised in these two deeds free from all encumbrances. He has directed such of the defendants, as have been found by him to be in possession, to deliver up possession to the plaintiff and has given other forms of relief to the plaintiff as against mortgagee-defendants not in possession, He has directed, as against Brajanath De, that an account of mesne profits be taken. The other reliefs need not be mentioned here.

2. In Appeal No. 23, the appellant is Brajanath De, who, with his brother Rakhalchandra De, was a grantor of the deed of 5th May 1888, by which he was declared to be a shebait of the plaintiff deity. In Appeal No. 24, the appellant is Satyacharan De, the younger son of Rakhal. Satya appears to have been born in February, 1899. He is the son of Rakhal, by his second wife, whose name is Sreemati Thakamani Dasee. Appeal No. 25 is brought by two sets of mortgagees, who may be called the Ray defendants and the Mandal defendants, and who claim under mortgages made in. 1922 and 1924, respectively, by Pulinbihari De, the elder son of Rakhal. Pulin's estate is before the Court, it is represented by Mohini and Jamini, but we have already pointed out that Mohini should sue as plaintiff on his own account as well as on behalf of the idol and this amendment has without objection been ordered by us. By the deed of 1888, the two brothers Rakhal and Braja dedicated to the idol properties, which now may be regarded as four: (i) 30, Beniapukur Road, (ii) 46, 47 and 48, Phulbagan Road, (iii) 45, Elliot Road and (iv) 4, Royd Street.

3. Of these properties, though all are in the environs of Calcutta, only 4, Royd Street, is within

the ordinary original civil jurisdiction of this Court. The deed provides that, out of the income to be produced from the properties, a sufficient sum is to be set aside for repairs; then that the sheba is to be performed in a manner therein set forth; that Government securities are to be purchased out of the surplus income left after meeting these expenses and that, when a sufficient sum has in this way been accumulated; the shebaits are to cause tenanted houses to be built on the dedicated land and that, out of the increased surplus, buildings are to be erected for the residence and habitation of the heirs of the grantors. The deed states that the value of the properties granted as debuttar is L 47,050.

4. In 1892, Rakhal and Braja entered into a document, which shows that, at that time, they had a business which had not been dedicated to the idol; and, in 1895, this document was cancelled by another, which shows that the brothers possessed properties at 34 and 35 Beniapukur Road, another property in Hooghly and a shop in Wellesley Street. On 5th April 1896, Rakhal and Braja, on the narrative that the purchase price of L 2,461-14-0 had been saved by the idol out of the debuttar property, executed a Bengali conveyance, selling their mofussil property, excluding their dwelling house, to the idol for this sum. Prima facie, in 1896, the brothers were still acting on the basis of the deed of 1888. Rakhal died in 1901. Braja is still alive and is a defendant in this suit. By his will, dated 29th July 1901, Rakhal appointed Pulin his executor, his younger son Satya to become executor when he attained majority. He directed Pulin not to sell anything till Satya came of age. He directed that his wife Thakamani is to be maintained out of my estate and will have a right to reside in my house.

5. The reference to the house is apparently a reference to 30, Beniapukur Road, which had all along been used in fact as the family dwelling house, consistently with the deed of 1888, but which was one of the dedicated properties. In December 1902, Rakhal's widow, Thakamani, as the mother and next friend of Satya, who at that time was about four years of age, brought a Suit No. 852 of 1902-on the original side of this High Court-to set aside the deeds of 1888 and 1896, on the allegation that the dedication to the idol was, on the part of Rakhal and Braja, a mere colourable device, never intended to be valid or operative but intended merely to be used as a shield against creditors of the grantors "should occasion arise in that behalf although no such occasion has arisen." The defendants to this suit were first of all Braja and Pulin. They were described in the cause title as alleged shebaits of the deities. The infant sons of Braja and Pulin were also impleaded as defendants. In this suit, Braja pleaded that Rakhal, his elder brother, had always represented to him that it had been the wish of their father that they should dedicate the properties and he denied that the dedication was a fraudulent device. Pulin, while making no admission as to the invalidity of the dedication, submitted to the Court that he had no objection to a partition being made of the property, if the Court thought it to be void or inoperative for any reason. The minor defendants pleaded that they had no knowledge of the matters and that they left their interests in the suit to the judgment, care and protection of the Court. Pulin, in 1903, had taken out probate of his father Rakhal's will and, in his affidavit of assets, had not set forth any of the dedicated properties. The hearing of the suit came on before Stephen, J., on 14th June 1904.

6. The learned Counsel for the plaintiff, in opening the case, asked, according to the minute, that the deed of endowment be declared null and void, but that if it were found to be partially operative, a scheme may be framed for the purpose of worship and the remainder "declared invalid. He objected to the legality of the provisions in the deed for the devolution of the office of shebait. While the plaintiff's counsel was still opening the case, the learned Counsel for Braja

said that he did not want to take a hostile attitude. He referred to the doctrine laid down in *Doorganath Boy v. Ram Chunder Sen*[1] and suggested that, as the idol was a family idol, by consent of all the parties, the dedication could be set aside. Pulin's counsel left the construction of the deed in the hands of the Court. Counsel for the infant-defendants suggested that there was a sufficient dedication to the idol. Pulin's counsel supported the suggestion, which had been made on behalf of Braja, that a private dedication could bo annulled by the consensus of the whole family. The hearing having been adjourned, the case was called on six days later, namely, on 20th June. Braja's counsel suggested that the debattar should be put an end to and that this would be to the benefit; of the infants. Counsel for the infant defendants suggested that a small portion should remain debuttar for carrying on the sheba, but this proposal received little support and was dropped. In the end, the Court made a consent decree in the nature of a preliminary decree for partition, directing the property to be divided into moieties, one to go to Braja and the other to belong to Pulin and Satya jointly, with liberty to Satya to claim a further partition to separate his one-fourth share from Pulin's. Braja was appointed receiver. The Court certified that this was for the benefit of the infant sons. The decree is expressed to be a decree by consent of the adult parties by their respective counsel. It set aside the deeds of 1888 and 1896 and directed them to be cancelled by the Registrar of this Court and a copy of the decree to be sent to the Registrar of Deeds and Assurances.

7. Under this decree, Braja collected rents from the tenanted property comprised in the endowment, giving receipts as receiver on behalf of himself, Pulin and Satya, on the footing that the shares of each were 8, 4 and 4-annas, respectively. Receipts dated 1311, 1312 and 1313 have been produced in evidence.

8. On 12th June 1906, a final decree for partition was made by Stephen, J. The parties had really come to terms as to the properties to be allotted to each and the decree allotted the properties to be in accordance with that agreement, gave judgment for L 5,000 owelty money in favor of Braja against Pulin and Satya, and directed the parties to execute the necessary conveyances. So far as Braja is concerned, there can be no doubt that he has at all times acted quite consistently under this decree. On 2nd September 1907, he sold 45, Elliot Road, which had been allotted to him to one K.K. Mitter. This property is now not in suit.

9. Satya, at the time of the decree (1906), was about eight years of age, and the properties which had been allotted jointly to Pulin and him were taken charge of by Pulin. Thakamani, Satya and Pulin went on living together at No. 30, Beniapukur Road, and it is clear, upon the evidence that Pulin collected rents of the properties allotted jointly to himself and his brother and as executor of Rakhal's will from other income-producing properties. Out of moneys coming into his hands from one source or the other, he paid the expenses of the joint family, i.e., he maintained Satya and his mother together with himself. Between 1906 and 1910,.No. 30, Beniapukur Road was on the Assessment Register in the name of Pulin for self and Satya; Nos. 47 and 48, Phulbagan Road appear to have been put into the name of Pulin Mohini, the eldest son of Pulin, who brings this suit on behalf of the idol, states that his father was dealing with these properties as his

[1](1876) 2 Cal 341

own secular properties (Q. 9) and that he has come to know that, after the decree for partition, the properties were divided (Q. 56). There seems indeed to be no reason to doubt that, as Mohini says, since the partition, the names were changed into the names of Braja, Pulin and Satya and that the rents have been collected and appropriated in accordance with the decree, Pulin and

Satya together possessing their shares of the dedicated properties for many years. The case, as made by the plaintiff, is that none of the properties claimed are in the possession of the deity.

10. When we come to the year 1917, we find that Satya is coming of age. In 1918, he gets a grant of probate to his father's will jointly with Pulin. It is evident that, at this time, he is not satisfied with merely living at No. 30, Beniapukac Road, and being maintained by Pulin; and, on 20th August 1918, he sued Pulin at Alipore for partition. In this plaint (para. 5), he treats the properties partitioned by the decree of 1902 as joint properties of Rakhal and Braja. He says that his father, Rakhal, had some self-acquired properties as well and that Pulin has been managing all these since his father's death. He says that, till the end of the Bengali year 1324 (i.e., April 1918), Pulin had paid to him and his mother only the costs of maintenance and had kept all the balance of income in his own hands. He charges Pulin with having appropriated to his own use assets of a money-lending business belonging to his father's estate. Ho makes other charges against Pulin, says that the whole of his father's estate has been administered and asks for partition and accounts. He includes among the immovable properties of his father, Nos. 34 and 35, Beniapukur Road, which had never been dedicated at all, as well as No. 30, Beniapukur Road, and Nos. 46, 47 and 48, Phulbagan Road, which had been dedicated. By his written statement in this suit, verified in December 1918. Pulin set up the deed of 1888 and claimed that the decree of 1906 was fraudulently obtained and that the properties had not lost their debuttar character. He alleged that, since the death of his father, he, Satya and Thakamani had lived together in the same mess and the rent of the ejmali tenanted houses and lands had been jointly realised and spent to meet the expenses of the ejmali family.

11. In this connexion, he makes allegations intended to parry the claim for accounts. A receiver was appointed in the suit and, on 16th June 1921, a preliminary decree for partition and accounts was made by the Subordinate Judge. From this decree, Pulin appealed to the High Court. He asked to be allowed to adduce in evidence a document which he said showed that the decree of 1904 was the result of a collusive arrangement between himself and his uncle Braja. The High Court, however on 30th March 1922, dismissed his appeal and refused to allow to go behind the consent decree of 5th June 1906, to which he was a party and, upon which he had for a long time acted. On 5th September 1922, Pulin executed a mortgage to the Ray defendants, in respect of which they are now impleaded. The mortgage was for L 28,000 and the mortgaged properties were Nos. 46 and 47, Phulbagan Road. He recited the deed of 1888 and the decrees of 1904 and 1906. On 12th March 1924, he granted a further mortgage for L 25,000 to the Mandal defendants, mortgaging No. 30, Beniapukur Road and Nos. 46, 47 and 48, Phulbagan Road, as also Nos. 34 and 35, Beniapukur Road to them, and reciting the Ray's mortgage.

12. In December 1924, Pulin died intestate, leaving his sons Mohini and Jamini as his heirs and, in 1926, the Ray mortgagees filed a mortgage suit at Alipore against his sons and the Mandal defendants as interested in the equity of redemption. In April 1927, Mohini filed a written statement, in which, among many other defences, he set up a claim that the mortgaged property is debuttar. As he did not appear at the hearing of the suit, a preliminary mortgage decree was made ex parte on 17th February 1928, followed by a final decree on 28th July of that year. Mohini, having failed in his application to set aside the ex parte decree, brought this suit on 22nd January 1929, on behalf of the deity. It is quite obvious that Mohini's father, Pulin, having lost everything and run through the whole of his property is the fact which accounts for his son's effort to set up the property as debuttar. The right of the idol however is a different thing from the

merits of Mohini.

13. Logically, issue 1 which claims attention is the contention on behalf of the mortgagee-defendants that the learned Judge had no jurisdiction to entertain this suit as against them, on the ground that no one of the properties mortgaged to them by Pulin is within the limits of the Ordinary Original Civil Jurisdiction of this Court. The only one of all the debuttar properties, which lies within that jurisdiction, is the property, No. 4, Royd Street, which on the partition of 1906, went to Braja. The Beniapukur Road and Phulbagan Road properties were outside that jurisdiction. The learned Judge has restrained the mortgagee-defendants from putting up their mortgaged properties to sale and has declared the title to be with the idol. The question of jurisdiction must be answered by reading Clause 12, Letters Patent of 1865. The suit, in my judgment, is a suit for land within the meaning of Clause 12, which says that this Court shall have jurisdiction to entertain a suit if the land is situated either wholly or, in case the leave of the Court shall have been first obtained, in part within the local limits of its Ordinary Original Jurisdiction. In the present case leave was granted under Clause 12. The contention of the mortgagee defendants is that C. 1, Rule 3, Civil Procedure Code proceeds on the assumption that the Court has jurisdiction and that the provisions of that order cannot be used to extend the jurisdiction given by the Letters Patent. They rely upon *Bengal and North Western Ry. Go. Ltd. v. Sadaram Bhairodan*[2], That was a case not of a suit for land, but one, where various causes of action having been brought against various defendants, it appeared that the whole of the cause of action against one defendant had arisen entirely outside the limits of the jurisdiction. In such a case, Clause 1, Rule 3 which merely has the effect of allowing parties or causes of action to be joined if the Court has jurisdiction to deal with them, was held to be an insufficient foundation upon which to introduce a cause of action which was not within Clause 12 at all.

14. It seems to me however that under Clause 12, the case of suits for land requires separate consideration. It contemplates a suit being brought for land and such land being situated partly within and partly without the jurisdiction. The cause of action does not matter in such a case, except in so far as it affects the property of the joinder of the claim to the different parcels of land in the same suit. Two different suits cannot certainly be rolled into one for the purpose of obtaining jurisdiction over land outside the limits. If however the claim to the different parcels of land is properly based upon a common title and the right to relief arises out of the same set of facts, I do not think it can be laid down that each defendant or set of defendants must be interested in some land within the jurisdiction. It is to be observed that the question whether, in any particular case, the jurisdiction is to be exercised is left to the discretion of the Court. In *Krishna Kishore De v. Amarnath Kshettry*[3] the mortgagee of certain land outside the local limits sub-mortgaged his interest, at the same time granting a mortgage over property within the

[2] AIR 1922 Ca 500: 70 Ind. Cas. 229

[3] AIR 1920 Cal 131

limits as security for the same debt. The sub-mortgagee-so to call him-brought a suit on the Original Side against the original mortgagor and the mortgagee. It was held that leave under Clause 12 had been improperly granted and that the decrees were without jurisdiction. It was held that the proper course would have been to bring a suit in the High Court to enforce the mortgage over the Calcutta property and to foreclose the sub-mortgagee's interest in the other mortgage, but that the mofussil properties could only have been sold in a suit brought in the mofussil Court. This decision proceeded partly upon considerations as to cause of action" and partly upon the view that the original mortgage contemplated a suit in the mofussil Court. Now, jurisdiction under Clause 12: of the Letters Patent cannot depend upon the question whether the

leave has been properly granted as a matter of discretion.

15. It must depend upon the question whether the suit is of the class described by the clause as the class with reference to which the discretion is given. Clause 12 must be applied, in my judgment, on the footing that the land which the plaintiff can properly claim in one suit is to be determined first of all by certain principles or rules of law. I do not think the test can be whether the plaintiff, in order to succeed as regards land within the limits, is obliged to join parties interested in other land; especially if this means whether he could have dispensed with their presence by framing his suit in some other way, and bringing a multiplicity of suits. If a suit is properly framed, so as to embrace land partly within and partly without the local limits, it is in all cases a question of the discretion of the Court and if the Court exercises its discretion in favour of entertaining the suit, the jurisdiction cannot be questioned. I see no other way to make Clause 12 work. It may or may not be hard upon a person who has taken a mortgage of land at Alipore that he should be impleaded in Calcutta. I think it would be harder still if important questions of title had to be litigated separately as between different parties, to the great increase of litigation and at the risk of partial and inconsistent decisions. The passage, which the learned Judge has quoted from the case of *Nundo Kumar Nasker v. Banomali Gay an*[4] affords some support to the construction which I have put upon Clause 12. The clause must, in any event be considered with reference to the particular case made by the plaint. Here the plaintiff's case was that Braja and Pulin jointly held the shebaiti, that the decrees of 1904 and 1906 were collusive and void otherwise. The idol, on that case, could not sensibly have sued Braja to recover the Royd Street property without bringing Pulin's representatives before the Court, and without so doing it would have asked in vain for any equitable relief against Braja such it claimed. Pulin's mortgagees have taken title, with their eyes open, under the decree of 1906, and if his estate must be implead they must be joined. It may here be noted that if the dedication of the mortgaged lands be held to be not an absolute debuttar but a charge for the worship of the idol extending over the mortgaged lands and the Royd Street property together with other lands, it would be necessary in a suit to declare and enforce the charge that all the lands affected should be dealt with in one and the same suit. The objection as to jurisdiction should, in my opinion, be dismissed.

16. The next issue for decision is whether the dedication of 1888 was valid and effective. This issue was formulated at the trial, but that it was not pressed is clear. The learned Judge says:

[4](1902) 29 Cal 871

> 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 1889.

17. In this Court, an Endeavour was however, made to raise the question. The mortgagee-defendants, by their written statement, pleaded that the deeds of 1888 and 1896 were never given effect to and were never meant to be operative, but were merely colorable and benami. On that issue, the burden of proof lies heavy upon them and the question is one of fact. It appears that the deposition of Thakamani Dasee had been taken on commission at great length at the instance of the mortgagees and Mr. A.K. Roy, who appeared for the mortgagees, in opening his case, said:

> Then there was some evidence taken on commission. Having regard to the view I am going to take of this case and the way I am going to put it before Your Lordship I don't think I shall have to refer very much to this evidence if at all. I may be wrong, but I am

> proposing to take a certain course which will not necessitate my reading this evidence before you, but as the evidence has been taken I don't know whether I shall be right in not reading it altogether. I simply tender it and leave it there. I will perhaps refer Your Lordship to passages in it that I may want. It is part of the record.

18. In fact, as we are informed, a passage from the deposition, bearing upon the question of the consensus of the whole family to abrogate the debuttar in 1904, was read to the learned Judge, but no part of this evidence was read to him, having any bearing upon the question whether the deeds were fraudulent or colorable. Thakamani Dasee is a witness, who, in 1902, alleged, on behalf of Satya, as we have seen, that the deed was a shield against possible creditors, though no occasion to use it bad arisen. That is a singularly feeble case and her evidence is small support for it. She is a biassed witness, a witness whom we have not seen and having made this case in the suit of 1902, she called no evidence whatever in support of it. If, moreover, this matter had been pressed before the learned Judge, it was a matter upon which the plaintiff would, in my opinion, have been entitled, if necessary, to give rebutting evidence. It is idle to ask us now to allow this question of fact to be agitated in the Court of the appeal. I have no doubt the main reason why this point was abandoned was that the evidence in support of it was thought to be hopelessly insufficient. Any question which can be raised on the face of the deed of 1888, however is in a different position. If it can be contended, as a matter of construction, that the document does not vest the properties in the idol, but merely charges them with a sufficient sum for the maintenance of the worship, this contention can be considered here. As I am not of opinion that this contention can be upheld as to all the properties, it will be convenient, for the present, to proceed on the hypothesis that the properties were absolutely dedicated and to examine this hypothesis later.

19. On this assumption, the next issue is whether or not it has been shown either that the debuttar character of the properties was validly terminated in 1904 or that the plaintiff deity is bound by the decrees made in the suit of 1902. It seems to me that it is one thing to bring a suit against a Hindu God for a declaration that the members of the family have terminated the endowment and, upon proper proof of this, to obtain a declaration to that effect, and another thing altogether to take a consent decree setting aside the deed of endowment in a suit constituted as the suit of 1902 was constituted. I am not prepared to hold on the strength of the well-known passage in the case of *Doorganath Boy v. Ram Chunder Sen*[5] 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 can be set aside. The passage, so much relied upon, does not appear to me to be intended as a considered opinion to that effect, and before importing any such doctrine into Hindu law there is much to be considered. I respectfully adopt what Chatterjea, J., said upon this subject in *Chandi Charan Das v. Dulal Chandra Paik*[6], and I would also here refer to the observations of Chakravarti; J., in *Sreepati Chatterjee v. Khudi Ram Banerjee*[7],

20. I am, moreover, not satisfied, upon the evidence of Thakamani, coupled with the fact that no female member of the family did bring a suit to challenge the decree of 1904, that the consent of the female members, of this family to put a complete end to this debuttar was, at any time, thought of or asked for or obtained. Pulin and Braja were described by the plaintiff as "alleged shebaits" in the cause title of the suit. Nothing in the way of proof of a proper legal termination of the debuttar was adduced before the Court and the Court came to no findings either of fact or

of law. It acted on the consent of the adult defendants and, as the determination of the debuttar was of advantage to the patrimonial interests of the minor defendants, the Court allowed them to consent to the decree. Such a consent decree has no greater operation and is subject to all the infirmities of a bargain made between the parties. In my judgment the question whether the debuttar character of the properties was validly terminated in 1904 mast be answered in the negative. Notwithstanding that the proceedings in the suit of 1902 were in no way fraudulent, the decrees of 1904 and 1906 are not binding upon the debuttar estate.

21. Proceeding still upon the assumption that the properties were absolute debuttar, the next question in my opinion is the question of limitation. Satya's father having died in 1901, when he was two years old, his mother in the following year repudiated, on his behalf the validity of the endowment. Under the decree of 1904, a moiety of the dedicated property was declared to belong jointly to Satya and Pulin. Satya though an infant of five or six years, was thereafter in possession according to his share. From 1906 the possession of Pulin was the possession of Satya and vice versa. Between 1904 and 1906 the properties were in possession of a receiver on behalf of Braja, Pulin and Satya according to their shares. In my judgment no question arises as to Satya being a shebait of the deity on the death of his father. A man is not born responsible as a shebait and does not become a shebait against his will: he had never accepted the office of shebait, nor acted as a bailiff, still less as a trustee of the deity. He may be treated as an outsider and, for all purposes a stranger. I am not prepared to hold with the learned Judge that because the moiety allotted to Pulin and Satya was not in 1906 divided between them by metes and bounds, Satya has not had adverse possession against the idol within the meaning of Article 144 of the schedule to Limitation Act. If Satya had not been in actual enjoyment of his share at all, still the possession of Pulin would have been the possession of Satya. But Satya was as much in possession as his brother and his possession according to his share is not tainted in any way by a fiduciary relationship subsisting between him and the idol. As the Limitation Act stood 12 years after 1904, Section 10 of the Act did not apply: see *Vidya Varuthi Thirtha v. Balusami Ayyar*[8]

[5](1876) 2 Cal 341
[6] AIR 1926 Cal 1083: (1927) ILR 54 Cal 30
[7] AIR 1925 Cal 442: AIR 1925 Cal 563
[8] AIR 1922 PC 123

22. The doctrine that an idol is a perpetual minor is, in my judgment an extravagant doctrine contrary to the decision of the Judicial Committee in such cases as *Damodar Das v. Lakhan Das*[9] It is open to shebaits or any person interested in an endowment to bring a suit to recover the idol's property for debuttar purposes. While strong facts may be necessary in order to establish adverse possession, in any case in which there is a reasonable possibility that the possession is being held under the idol's title, the facts of the present case are clear and plain; so far as any member of this family was concerned, the utmost publicity and the utmost solemnity attached to the change, by which Braja took the Elliot Road and Royd Street properties, and Rakhal's branch took the other properties. Had Rakhal's branch by the same decree taken a partition between themselves, the matter might have been slightly plainer, which was plain enough already. Satya was not acting fraudulently in collusion with Pulin. I attach no importance, either in fact or in law, to the circumstance that the possession enjoyed by Satya was enjoyed in the ordinary manner in which family property is enjoyed in Bengal by a member of a Hindu family. The learned Counsel for the plaintiff has complained of the paucity of evidence as to Satya's possession of the debuttar properties for the 12 years after 1904. This cannot be meant to apply to the property at 30, Beniapukur Road, but in any case it is entirely explained by the fact that the plaintiff, both by his case and by his evidence, admitted the possession of Pulin and his younger brother from the beginning.

23. It is not in the least necessary to inquire how much pocket-money Pulin allowed to Satya out of the estate or what was spent upon his maintenance while Rakhal's branch all lived together at 30, Beniapukur Road. Nor it is necessary to pursue any inquiry as to how much of the money spent on the ejmali establishment could have been derived from other properties left by Rakhal. I will consider in a moment whether Braja and Pulin, having accepted the office of shebait, can be heard to set up adverse' possession against the deity within the meaning of Article 144. Assuming that Pulin cannot, I hold that Satya can and that no fiduciary relationship of Pulin to the deity prevents Satya alleging as the fact was, that to the extent of his share he had adverse possession, We have seen that after Satya came of age in 1917 and quarrelled with Pulin, so far as to bring a suit against him for partition of his share, Pulin by his written statement, set up the debuttar character of the properties with which we are concerned. Save as a defence to his brother's claim, I am satisfied that Pulin, at no time made any pretence that the properties on which his branch of the family were living were debuttar. As an obstruction to Satya's right to partition, a contention of debuttar was thought to suit his interest. When he failed to prevent his brother from getting a decree, he mortgaged these very properties in 1922 and 1924 for large sums of money In my judgment', it is proved that, from 1904 and even from 1906, Satya had adverse possession of his share openly, continuously and completely. Assuming, therefore that all the properties in suit were absolutely dedicated, the suit as against Satya fails.

24. The mortgagees, if the property mortgaged to them was dedicated absolutely, cannot defeat this suit, by reason of the lapse of time, since the date of their mortgages of 1922 and 1924. On this point, their defense must be that their mortgagor's possession extinguished the title of the idol. They may say that Article 142 applies to the plaintiff's suit, but, if the suit as against them is treated as a suit for possession, the idol is in a
position to answer that twelve years before this suit, say 1916, it was in possession by its
[9](1910) 37 Cal 885
shebait Pulin. If, by that time, Pulin's wrongful dealings had not extinguished the idol's right, they amount to no more than a cloud upon its title. Both Braja and Pulin were shebaits who had accepted office; neither of them was a trustee in the sense that the debuttar property was vested in him. But they were managers or bailiffs for the idol as regards its properties. The office of shebait has other aspects, but that, as regards an idol's property, he stands in fiduciary relationship to the idol, is a proposition which cannot be questioned. Assuming that Section 10, Lim. Act, as it stood before 1929, did not apply to them, we have to consider whether, prior to that year, the idol had lost all right to recover the properties, with the result that Section 28 of the Act came into play and extinguished its title. Unless they can be hoard to allege and unless they can prove that their possession has been adverse to the idol within the meaning of Art. 144, their possession is the possession of the idol however flagrant be the breaches of fiduciary duty committed by them. Twelve years from 1904 is 1916; twelve years before this suit of January 1929 is January 1917. As the position has not altered, in the meantime let us look at 1917 and the reasoning will apply both to the shebaits and the mortgagees. If the idol had brought its suit in 1917 what, according to the substance and truth of the facts alleged in the present plaint and proved in the present case, would have been the nature of its claim ?

> The property is mine: it is in the hands of my bailiffs: they are dealing with it wrongfully: restrain their wrongful acts or direct them to hand it over to another agent on my behalf.

25. Such a claim is on the basis of the plaintiff's present possession by the hand of the defendants and, in my judgment, that is the real character of the claim as against Pulin's estate and Braja in the present suit. Verbal criticizm of para. 16 of the present plaint cannot alter the legal character of the case made, on the facts alleged by the plaint and established by the evidence. The real question therefore is whether the shebaits as against the idol could have said in 1917:

> The idol is not in possession by us because for twelve years we have claimed the properties for ourselves.

26. That is Article 144 or nothing. Before the judgment of the Judicial Committee in the case of *Vidya Varuthi Thirtha v. Balusami Ayyar*[10] it appears to have been generally assumed that Section 10, Lim. Act, would have rendered impossible such a contention on the part of a shebait. That decision, not less by its reasoning than by its authority, made it impossible to hold that a shebait is a person in whom the debuttar property is vested in trust for a specific purpose. The Limitation Act was, in consequence, amended by Act 1 of 1929, so as to bring shebaits within the section, but the case before us must be dealt with apart from this amendment. If a shebait can set up Art. 144 against the idol, no case could well be stronger, on the facts, than the present case, where the parties honestly thought themselves entitled to bring the endowment to an end and satisfied a Judge that they had done all that was necessary for that purpose. I am not prepared to hold, as a matter of construction of the Limitation Act, that an idol is a perpetual minor as was suggested in *Rama Reddy v. Rangadasan*[11], that a bailiff or manager is in the same position as a tenant mortgagee or pawnee who have a possession on their own account, or

[10] AIR 1922 PC 123

[11] AIR 1926 Mad 769: (1926) ILR 49 Mad 543 : (1926) 50 MLJ 589 : 1926-23-LW 657

that a bailiff, whose open claim to be in possession in his own rights is acquiesced in by his principal for twelve years, cannot come under Art. 144. But, in the present case, we have to see whether, the possession of two joint shebaits becomes adverse to the idol, when they openly claim to divide the property between them.

27. The fact of their possession is in accordance with the idol's title, and the question is, whether the change made by them, in the intention with which they hold, evidenced by an application of the rents and profits to their own purposes and other acts, extinguishes the idol's right. I am quite unable to hold that it does, because such a change of intention can only be brought home to the idol by means of the shebait's knowledge and the idol can only re-act to it by the shebaits. Adverse possession, in such circumstances, is a notion almost void of content. True, any heir or perhaps any descendant of the founder can bring a suit against the shebaits on the idol's behalf and, in the present case, it may be said that the acts of the shebaits must have been notorious in the family. But such persons have no legal duty to protect the endowment and, until the shebait is removed or controlled by the Court, he alone can act for the idol.

28. In *Seetaramaraju v. Subbaraju*[12] the question was discussed whether possession could be adverse against a lunatic and the opinion was expressed that, Tinder the Limitation Act, this would depend upon whether any fiduciary relation subsisted between the parties. I do not find it necessary to examine the particular provisions of the Act as to lunatics and minors, and I am not suggesting that there can be no adverse possession against an idol. It is sufficient to hold that there could be no adverse possession by the shebaits.

29. These findings dispose of the present case upon the assumption unchallenged in the trial Court that the true effect of the deed of 1888 was to grant the property absolutely to the Thakur so as to make it absolutely debuttar. This question of construction was not in the pleadings separated out from the question whether the deed could be shown by extrinsic evidence to represent no more than a colourable pretence of dedication not intended to be acted on. The written statement of Braja in para. 2, however submits that no valid dedication was effected by the said two documents nor was any charge created in favor of the idol or anybody else.

30. In para. 2 of Satya's written statement he denies that there was any dedication absolute or otherwise in favor of the said deity.

31. Issue 1 framed is:

> Was there a valid dedication effected by the instrument of 5th May 1888 and the deed of sale of 6th April 1896?

32. In this Court, the learned Counsel for the appellants raised the contention that the true effect of the deed of 1888 is to provide that, after the expense of religious worship and ceremony has been met, the surplus income is to be invested in tenanted houses for the production of still greater revenue and that the sole purpose mentioned as the ultimate destination of the fund is the building of a house or houses in which the settlors' descendants or some of them may reside and that, this not being a religious or charitable

[12] AIR 1922 Mad 12

purpose at all, the deed cannot be construed as an absolute dedication of the property. We have been referred to the cases of *Sonatum Bysank v. Juggutsundree Dossee*[13] *Ashutosh Dutt v. Doorga Churn Chatterjee*[14] and *Har Narayan v. Surja Kunwari*[15] as authorities for the proposition that, in view of the ultimate destination of the income, the passages in the deed, which describe the properties in the schedule as being properties granted to the auspicious lotus feet of the deity and which forbid the shebaits to sell or mortgage the properties or let them out at a permanently fixed rent, do not avail in law to carry the properties to the deity in absolute right.

33. The deed of 1888 opens by describing how Lalchand and Kalachand 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 Lalchand 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 debuttar 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 Braja had attained majority the two brothers had been carrying on the sheba, etc., as before. The deed then recites that Bakhal and Braja 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 debuttar. 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 Tehsildar 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 thakurbarhi 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.

34. 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 debuttar properties. So far therefore the deed contemplates that there shall be a surplus and that this surplus shall be invested so as to increase.

[13](1859) 8 MIA 66 [15] AIR 1921 PC 20

[14](1879) 5 Cal 438

35. In the next passage 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 buildings on the debuttar 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 these houses so far as practicable.

36. 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 debuttar is L 47,000. When we look at the schedule, items 2 and 3 are the Elliot Road and Royd Street properties, the former being over 4 bighas in area and the latter 5 kottas. The first item is the Entally land, having an area in excess of 6 bighas, within which the thakurbarhi stands on 14 kottas of land and the tenanted house on about 1 kotta of land, the remaining lands being let to temporary tenants, that is, being bustee property. This land is bounded on the north by Phulbagan Road and on the west by Beniapukur Road. By 1906, as we see from the final decree of that year, portions of this property had come to be known as 30, Beniapukur Road, and 46, 47 and 48, Phulbagan Road, which, as we have seen, went to Rakhal's branch, that is to Pulin and Satya, at the partition. The mortgage of the Rays covers 46 and 47, Phulbagan Road, and the mortgage of the Mandals covers, in addition, 30, Beniapukur Road, 48, Phulbagan Road, and 34 and 35, Beniapukur Road.

37. Now, on the construction of the deed of 1888, I cannot doubt that the thakurbarhi and the house built for residence of the shebaits on what is now 30, Beniapukur Road, are absolutely dedicated to the idol. And if the deed can in law be given that effect the same result would, prima

facie, follow as regards the rest of the lands mentioned in the schedule. Upon the authorities however I am of opinion that this effect cannot be given to the deed as regards the other properties. The directions as regards the income of the property are really four. The first is the provision for taxes and repairs; the second is the provision for worship and the feeding of Brahmins, etc., within which may be grouped the provision for the durwans, mali, pujari and tahsildar and the whole may be referred to generally as the provisions for the sheba; the third provision is a direction to accumulate and build tenanted houses. This is in the nature of an investment clause. The final provision is a provision for the erection of a house or houses for the convenience of residence and habitation of the heirs. This appears to me to be the ultimate destination of the next proceeds, subject to the expenses of the worship. I cannot regard the directions as to worship, the feeding of Brahmins, etc., as an expanding trust. With reference to the feeding of Brahmins and others, the direction is that this is to be "at an outlay of "reasonable expense," and earlier passages in the deed show that the intention was to continue the family ceremonies as they had been performed from the time of Lalchand and Kalachand. We are dealing with a family idol and there is no presumption that the settlors ever intended that the family ceremonies, as the income increased, should become more and more expensive. What was said by Lord Hobhouse in *Surendro Keshub Roy v. Doorgasoondery Dossee*[16] is applicable here:

[16](1891) 19 Cal 513

> There is no indication that the testator intended any extension of the worship of the family thakurs. He does not, as is sometime done, admit others to the benefit of the worship. He does not direct any additional ceremonies. He shows no intention save that which may be reasonably attributed to a devout Hindu gentleman, viz., to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the thakurs whom he venerates most. But the effect of that when the estate is large is to leave some beneficial interest undisposed of, and that interest must be subject to the legal incidents of property.

38. It is true that, in this case, the deed does not contain a schedule setting forth in detail the expenses to be incurred for the worship. It is also true that, if we confine ourselves to what can be collected from the deed itself, we know that the value of the properties is put down, doubtless for purposes of stamp, as L 47,000, which would include the value of the thakurbarhi and shebait's house But we know that the property was in Calcutta or in its immediate vicinity, that parts of it were bustee land and that, as a means of increasing the income, it was contemplated that the land should be built upon and houses let out at a rent. I think it is clear, according to the tenor of the deed, that the income was expected from the first to be more than sufficient for the worship, and that it was intended, as time went on that it would prove much more than sufficient. I think therefore that the observation of Lord Hobhouse is in point. The ultimate direction for the building of houses for the residence of the heirs is by no means on the same footing as a direction for the provision of a residence for the shebaits.

39. From the case of *Jadu Nath Singh v. Thakur Sita Ramji*[17] it is clear that a gift for the maintenance of a shebait or for the residence of a shebait would be a gift sub modo to the idol. In my judgment, this is not a gift sub modo to the idol. It is quite clear that a personal right may be given to members of the family to reside in the house provided for the thakur or provided for the

shebait: *Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen*[18] This provision is of a different character. It may be good or bad, but it is as much a gift for the benefit of some or all of the heirs as if the settlors had directed the ultimate balance to be distributed among them or invested for their benefit. We must apply the principles expressed in the judgment of Lord Shaw in the case of *Har Narayan v. Surja Kunwari*[19]

> The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favor 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 to the property, subject to a charge for the upkeep and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will.

40. It appears to me that the only construction which it is possible, in law, to put upon the deed of 1888, notwithstanding 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

[17] AIR 1917 PC 177
[18](1897) 25 Cal 112
[19] AIR 1921 PC 20

of the trust. It is, I think, otherwise with the thakurbarhi and the shebait's house on 30, Beniapukur Road. Since 1904, Satya, for reasons already given, acquired a one-half share in the thakurbarhi and shebait's house by adverse possession against the idol. It will not do to say that because the image has been located in the house, as an image may be located in the dwelling house of any Hindu, the idol has been in possession of this property. Neither Pulin's estate nor Pulin's mortgagees, however have any answer to this suit as regards the other half share. The property conveyed by the deed of 1896, is, I think, in the same position as the other properties under the deed of 1888. Apart from the plaintiff's claim to a half share of the thakurbarhi and the shebait's house at 30, Beniapukur Road, it seems to me that the idol is entitled to a declaration that the properties in suit are subject to a charge for the worship and ceremonies described in the deed of 1888. As I think it is only right to allow the question of the construction of the deed to be raised on this appeal, notwithstanding defective pleading by the defendants and the fact that they did not take their point before the learned Judge, I cannot refuse to the plaintiff relief in this suit in respect of the charge. I think therefore that the charge should be declared and that it should be referred to the Registrar, or such officer as he may appoint, to enquire what would be a sufficient annual sum to meet the expenses of the worship and ceremonies. I think it should also be referred to him to enquire whether since 12 years before this suit the worship of the idol and the ceremonies have in fact been duly and properly observed and provided for and, if not, to what extent the expenditure has been insufficient to answer the requirements of the deed. I do not propose, for the present to do anything further by way of enforcement of the charge, but there will be liberty to all parties to apply.

41. The result is that this appeal is allowed and the decree of the learned Judge must be set aside. In lieu thereof there will be a new decree to the following effect: (1) declaring that in the kurbarhi and shebait's house at 39, Beniapukur Road, the plaintiff is absolutely entitled to one-half share by virtue of the deed of 1888, the other half share belonging to Satya; (2) declaring that, in

respect of the other properties in the plaint in this suit mentioned, other than No. 45, Elliot Road, the plaintiff is entitled to a charge for the upkeep, worship and expenses of the idol and ceremonies connected therewith under the deed of 1888; (3) directing the enquiries hereinbefore mentioned. There must be an order for joint possession of the thakurbarhi and house to be delivered to the shebaits of the plaintiff idol in respect of its one-half share. The Mandal defendants should be restrained from entering upon or putting up to sale or otherwise dealing with the thakurbarhi and house. All the mortgagee defendants should be restrained from selling or otherwise dealing with any of the other properties mortgaged to them otherwise than subject to the charge in favour of the idol and after giving notice thereof. As to costs in the circumstances though Satya is hit by the declaration of charge, he appears to me to have had a good answer to the suit as framed and I think he should have his costs against Mohinimohon De personally and also against the idol's estate both at first instance and on this appeal. As regards the other defendants, I think the order for costs made by the learned Judge should stand against them and that there should be no costs of this appeal on either side.

Costello, J.

42. I have had the advantage of reading the judgment that has just been delivered by my Lord and I agree with him on all the points in the case.

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