

CALCUTTA HIGH COURT

Iswar Kalimata

Vs.

Manager Bijni Raj Court of Wards Estate in Assam

A.F.O.D. No. 69 of 1945

(R.C. Mitter and Roxburgh, JJ.)

22.12.1948

JUDGMENT

Roxburgh, JJ.

1. Three holdings Nos. 322, 322-B and 331 of sub-division 'M' of Division 6 of Dihi Panchanagram in mouza Kalighat had been let out in mokarari mourasi right to different persons Durga Mohan dass and others towards the end of the last century. The grantors were some of the she baits of the deity Sri Sri Kalimata of Kalighat, but the mokarari mourashi grants were made by them not in their character as she baits. In fact they made the grants on the assertion that the properties so granted were their personal Brah-mattar properties. Durga Mohan dass in course of time acquired by purchase the interest of some of the other mokarari mourashi tenants in those holdings and thus came to own a compact block of land - covering an area of 4 bighas 3 cottas and 8 chattaks and built his house. The premises were numbered by the Corporation of Calcutta as 146 and 147 Russa Road. After his death his three sons and his widow, who were his heirs, sold the said two premises on 20-2-1902 to Rani Abhoyeswari Debi, the then owner of the Bijni estate (Ex. W). The respondent before us Raja Bhairabendra Narayan Bhup, is the present owner of the Bijni Estate. Before 1903 a portion of the said premises was acquired by the Govt. under the Land Acquisition Act. In 1941 the remaining portion of No. 147 Russa Road which covered an area of 2 bighas 2 cottas and 9 chattaks odd was acquired by the Province of Bengal for the extension of the hospital, Chittaranjan Seva Saden. The declaration under Section 6, Land Acquisition Act, was made on 12-8-1940 and the Collector made his award on 4-2-1941 giving Rs. 1,07,107-4-0 for the land and Rs. 42,892-12-0 for the house, huts and trees. With the statutory compensation the total amount came to Rs. 1,72,500/-. This amount was apportioned between the respondent and the persons to whom he was paying the mokarari rent. Rs. 78-11-3 was paid to the said superior landlords and Rs. 1,07,107-4-0 was awarded to the respondent for his mokarari mourashi interest in the land. Nothing was awarded to the deity Sri Sri Kalimata. Harendra Nath Haldar, as next friend of the deity made a reference to the Special Land

Acquisition Judge, 24-Parganas under Section 18, Land Acquisition Act claiming for the deity the whole of the compensation awarded for the land. His case proceeded upon the ground that the acquired land was a part of an area of 595 bighas 9 cottas odd of revenue free land in mouza Kalighat which was the Debutter property of the Goddess. The learned Judge held that the claimant had failed to prove that the whole of the said area of revenue free land was the Debutter land of the deity, though a part thereof, the area covered by the compound of the temple at Kalighat may be so. He further observed that even if the property acquired was the Debutter property the claim of the deity had been extinguished by adverse possession in respect of the greater part of the acquired land. In deciding this point of law, he held that adverse possession would commence to run not from the date of the grants of the mokarari mourashi leases made by persons who were then some of the she baits of the deity, but from the death of the grantors. Proceeding upon this basis he held that the claim of the deity could not have been extinguished on the ground that her title had been extinguished by adverse possession in respect of the lands included in the mokarari mourashi leases Exs. X-4 and X-9. In support of this conclusion, he further held that the onus to prove adverse possession was on the respondent and that he failed to discharge that onus as he had failed to show that any part of the lands covered by these leases was not in the acquired area.

2. The deity preferred an appeal to this Court, but by an order made by a D. B. on 22-5-1944 in Civil Rule No. 144-F of that year, the appeal was limited to the area of 74 cottas covered by the leases Exs. X-4 and X-9. That order was accepted by the next friend of the deity and the memorandum of appeal was amended accordingly. Before us the claim was confined by the applt's Advocate to those plots only.

3. Before we go into questions of title and of adverse possession, we wish to deal with the point as to whether any part of the lands leased out by Ex. X-4 or Ex. X-9, is within the acquired area, though in the view we are taking on the question of limitation, that question is not of importance.

4. Holding No. 331 of sub-division M of Division 6 comprised an area of 3 bighas 14 cottas 13 chattaks of land. These leases, X-4 and X-9 are in respect of small but demarcated portions of land appertaining to the said holding No. 331. Exhibit X-4 was in respect of two plots of land with a total area of 4 cottas 6 ch. 6 gandas and 1 kara and Ex. X-9 was in respect of two plots also measuring 3 cottas 2 chattaks of land. Within the second plot was included the common passage over a piece of land in between 322-B and 322-C. The boundaries of holding 331 and 322-B and 322-C are shown by dotted lines in Map No. 3 (Ex. U), and that map shows that a portion of that common passage which is on 322-B has now been acquired. The southern portion of this holding (N. 331) covers the northernmost part of the acquired land.

5. The northern boundary of plot No. 1 of both Exs. X-4 and X-9 is Jitu Bewa's land, the northern and eastern boundaries of plot No. 2 of X-4 and X-9 are respectively Danes Darji's and Gobordhan Darji's land and western boundary is Kali Mohan Sarkar's land. Gobordhan Darji's

land was purchased by Chandi Charan Sen, and it is so stated in X-4. Kali Mohan Sarkar's land is holding No. 322-B. Kali Mohan Sarkar's land was purchased later on by Durga Mohan dass and made a part of premises No. 147 Russa Road. On 6-5-1897, Durga Mohan dass mortgaged properties No. 147 Russa Road to the Faridpore Loan Office Limited (Ex. CO. He described the boundaries of the mortgaged premises as follows :

"North - Land and tank belonging to the estate of Kali Mohan dass, and 'the land and tank' of Kamakshya Nath Majumdar 'purchased from Jitu Bewa and Danesh Darji.' South - Land and house of Kali Mohan Sarkar, East - Chandi Charan sen's house and his purchased land. West - Russa Road."

6. Chandi Charan sen's land and house therefore covered the whole of the eastern boundary of premises No. 147 Russa Road as it then was. Taken along with these facts Smart's plan Ex. A prepared between 1903-7 (Map. No. 1) shows the portions which had been acquired about that time. A comparison of map Nos. 1 and 3 taken along with the above facts would lead to the conclusion that the southern portion of the lands covered by plot No. 2 of Exs. X-4 and X-9 is within the area now acquired, for plot No. 2 of these exhibits went up to plot No. 322-B on the south.

7. We will now take up the question as to whether the deity had at the date of the acquisition, that is in 1940 a subsisting title to the lands of holding No. 331. That question resolves itself into two points, namely (1) whether that holding belonged to the deity at any time; (2) if so, has the deity lost the title by reason of adverse possession on the part of others. The first point has to be answered on reference to a few ancient documents which are of great importance. If documents established the property to be the debutter property of the deity the various acts of alienation by the she baits in the shape of permanent leases, etc., which are comparatively of recent times on the footing that the item in question and other items of property which stand on the same footing were their personal properties would not be of great importance, for they would be regarded as breaches of trust on their part. The temple of Sri Sri Kalimata is a very ancient one and of great sanctity. Its origin is lost in antiquity and its history travels to the domain of legend. The temple is on a 'Peethasthan.' The goddess is held in great veneration by Hindus throughout India and Kalighat is an important place for pilgrims from all parts of India. These facts are recited in authoritative books such as the Sabda Kalpadrum. Viswakosh and many other books which describe the place to be a public religious institution.

8. The first document of importance is the Taidad filed by the then she baits of Sri Sri Isswar Kalimata Guruprosad Haldar, Kunja Behary Haldar and others on the 15th Jaistha, 1204 B. S. (= 1797). That Taidad was filed in pursuance of the previous Regulation of XIX (19) of 1793. The certified copy of the Taidad was not filed before the learned Dist., J., as the Taidad could not be traced in the collectorate at the time.

9. A certified copy of that document was filed by the appellant with an application to receive it in evidence. That application also asks us to take into evidence two other documents which had been filed before the learned Dis., J., but were through inadvertence not marked as Exhibits, namely a certified copy of the written statement filed in Mutation Case No. 17 of 1882-1883 of the Court of the Deputy Collector of 24-Parganas and certified copy of a judgment passed on 26-6-1886 in title Suit No. 46 of 1884 of the first Court of the Subordinate Judge of Alipur. Although the respondent filed a counter affidavit in which he objected to the reception of the said documents in evidence, at the time of the hearing before us he through his Advocate waived the objections. We have accordingly received these documents in evidence and have marked them as Exhibits. With the consent of the parties we have also received in evidence the certified copy of the relevant entry in the Taidad Register which is also marked as Exhibit. There is no difference on any material point between the Taidad and the entry in the Taidad register and the number of the Taidad as given in the Register is what the Taidad itself bears. They refer to lands in mouza Kalighat in Pergana Khaspore. The portion where the area was written in the Taidad is torn. Other parts are also shown as torn. As the Taidad was entered in the Taidad Register much later the entry in the Register under the column headed area is shown as torn. The explanation seems to be that the original Taidad had been damaged in these parts where the entry was made in the Register. As the entries in the Taidad Register exactly tally with the Taidad it will be sufficient if we take into consideration the Taidad itself. The translation is not quite accurate and the mutilated portions in Cols. 4, 5 and 7 can be supplied by following the document in its original. The document is in Bengali language. We are setting forth the contents from the original, the words supplied by us being put within brackets.

TAIDAD No. 15379

1. Original Number.	2. present Number.	3. Class of baje lands.	4. Name of the grantor.	5. Name of the grantee	6. Name of the person in enjoyment.
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Not available filed on 15th Jaistha 1204 B. S.	No (torn) Debutter	From the Satya juga Sri Kali (mata) when the limb of Thakurani's She bait Issur Sati (fell) the who performed the village (Kali) a hat seva (puja) a most holy was named after Issue (and) truthful (Kali) mata Brahmin. His name we Thereafter a (Raja) of do not know. All along Kshatriya caste (made up to now seva (of the the grant). We do not deity) is being know his name. performed.	Guru Prosad Haldar, Kunja Behari Haldar and others she baits of Sree Sree Iswarti Kali Thakurani.
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On what basis the land is obtained.

By heredity from generation to generation by performing the seva of the said Thakurani the land (is obtained.) The other columns are as they are printed in the paper book. The several entries taken together mean that the lands in mouza Kalighat within Pargana Khospur had been granted in the past as 'debutter' of the goddess Sri Sri Kalimata Thakurani for the purpose of carrying on the seva puja of the deity by a Kshetreea king (name unknown) to the she bait of the deity, a most holy brahmin name unknown; that the persons filing the Taidad were also she baits of the deity and that they were in possession in the right of hereditary she bait. The document proves that in 1204 a claim was made by the she baits of the deity, Guruprosad Haldar, Kunja Behary Haldar and others that the property was the debutter of the deity and was all along being applied for the benefit of the deity. The property is described not as Brahmotter but debuttar. Having regard to the purpose of the Taidad the further assertion by them was that it was a very ancient revenue-free grant to the deity. The claim made was not a voluntary one but was made in pursuance of an obligation imposed with drastic consequences by the provision of Section 24 of Regulation XIX (19) of 1793. From one point of view, the Taidad is a claim asserted by the she baits of the deity and on behalf of the deity that the property in question was the deity's property held revenue free. Ordinarily a document by which assertion of title is made, though admissible in evidence, is of little evidentiary value and the Taidad like such documents would as against third parties have similar weight except what additional weight it may have due to its antiquity. In the case before us, however, the Taidad can be considered to be an admission by the parties who filed it that the property was not theirs but was the property of the deity. In this light, regarded as an admission, it has great evidentiary value as against these persons and their successors. The names of other she baits of the deity who joined Guruprosad Haldar and Kunja Behari Haldar do not appear in the Taidad and cannot be ascertained from the evidence on the record. They may have been all the remaining she baits or only some of them.

10. In 1859 Govt. started proceedings under Regulation II (2) of 1819 for assessing revenue on 595 bighas odd land of mouza Kalighat. The land proposed to be resumed was measured in 393 plots by a Deputy Collector Mr. Heysham in 1859. Those plots were given holding numbers under Division 6, sub-divisions E.P.M.P. and Q of Dihi Panchanagram, and he made a list of them indicating the persons who were then in possession. His list which is headed "List of Debutter lands in the possession of the Haldars of Kalighat" "is Ex. 12. Holding No. 331 of sub-division M of Division C is shown in that list to be in the possession of Fakir Haldar. Mr. Heysham was assessing revenue. The Collector Mr. Bright agreed with him (Ex. 9) and issued notices on the she baits of the deity in terms of Section 20 of Regulation II (2) of 1819. The persons whose names appear in the proceedings filed an appeal to the Revenue Commissioner, Mr. Lushington under Section 21 of the Regulation. That was the authority to receive appeals by virtue of a Regulation passed in 1828. They claimed the said area mentioned in Mr. Heysham's list to be the revenue free 'debutter' property of the deity and in support of their claim filed a certified copy of the said Taidad. They accordingly adopted against their personal interest the admissions contained in the Taidad that the properties were the debuttar properties of Kalimata.

The Revenue Commissioner by his Rubakari dated 31-5-1861 (Ex. 1) upheld their claim. He relied upon the Taidad and other documentary evidence and came to the conclusions that that area was revenue free. In support of his order he said that these lands had from a very long time been given away as debuttar' land and its income had been spent without Interruption for 'sheba' and 'puja', etc., and for religious and charitable purposes and it is well-known to one and all throughout India that Kalighat is the public Divine Peetasthan, one of the 51 places where the limbs of Sati fell." (Ex. 1). The Rubakari shows that the she baits who took part in those proceedings made unqualified admission that the whole of 595 bighas 9 cottas mentioned in Mr. Heysham's list was the absolute debuttar properties of the diety. Mr. Loushington's Rubakari supplies what is shown as torn in the Taidad under the heading "area". The figure must have been a large one approaching the figure of 595 bighas. Fakir Halidar got his name registered in respect of holding No. 331 an the jamabandi register that had been prepared by Heysham on the basis of Mr. Lushington's Robakari (Ex. 5a).

11. The grantors of the lease Ex. X-4, Rangalal Banerjee and his brother are the descendants in the daughter's line of Nabakumar Halidar. (See Harendra Haider's deposition) and became she baits by inheritance as Nabakumar had no male descendants. Ex. 2 (Part II pp. 187-189) the Pala Register of the Kalighat temple shows Nabafeumar Halidar to be a son of Guruprosad Halidar, the person who filed the Taidad wherein he made the admission that the lands were the debutter lands of Kalimata and the grantors of the lease (Ex. X-9) Sadhu and Sannysi the sons of Nirmal Halidar, are the grandsons of Shyarnacharan Halidar (Ex. 2 at pp. 187-189), whose name appears in Mr. Lushingtons Rubakari (Ex. 1). He adopted before Mr. Lushington the Taidad by joining the other she baits in filing it and made an unqualified admission that the lands under resumption were the deity's lands.

12. There are documents from 1842 onwards showing transfers by the Halidar of some items of property included in Heysham's list. But in our opinion those acts cannot outweigh the evidence which we have discussed which establish almost conclusively that the lands released from the resumption proceedings were the deity's absolute property. These transfers by the she baits can only be regarded as breaches of the trust on their part.

13. A question was raised before the learned Judge as to whether the reasons given in Mr. Lushington's Rubakari for releasing the lands from assessment are admissible in evidence. The learned Judge after noticing the case law on the subject summarised his conclusion at the bottom of p. 63 of his judgment. His conclusion on this point of law has not been challenged before us. We agree with him. As the point was not argued before, we do not wish to examine the authorities being on this point in detail. We may say that some of the cases cited by the respondent before the learned Dist., J., as for instance the case in 2 Hay 490 and '*Nimaye Churn v. Jogendro Nath*', are distinguishable and do not support the contention made in lower Court. We hold therefore that the lands acquired were the debutter properties of the goddess Sri Sri Kalimata of Kalighat. The next question is whether at the date of the acquisition the goddess had a subsisting title. That would depend upon the question as to whether her title had been extinguished by adverse possession before the acquisition proceedings had started. As Article

144, Limitation Act would apply the onus would be on the Respondent

14. The learned Judge held that possession would commence to be adverse from the death of the grantors who had granted the permanent leases and not from the date of the leases, or to be precise from the dates on which the lessees entered into possession. In that view he held that claim of the deity would not have been extinguished in respect of the lands covered by the leases Exs. X-4 and X-9 as the grantor of one is still alive and the grantors of the other had died within twelve years of the acquisition proceedings. We disagree with him and hold for the reasons hereafter appearing that possession became adverse on the facts of this case from the dates of those leases. As the said leases were granted in 1893 and 1898 respectively and lessee went into possession and was in possession at least from 1902 (see Ex. W) the title of the deity was extinguished long before the land acquisition proceedings had started and long before Article 134-B was put in the Limitation Act, for it was introduced into the Act by an amendment of the year 1929 (Act (1) of 1929). The decisions of the Judicial Committee on which reliance has been placed by the learned Advocate for the Respondent, '*Ram Charan v. Naurangi Lal*²', and '*Daivasikhamani v. Periyanna*³', on which the learned Judge had relied for his conclusion proceed upon the well established principle that "possession is not adverse if it can be referred to a lawful title." In the first mentioned case a Mohant of a muth 'qua mohant' had alienated muth properties. It was held that the transferee's possession did not become adverse from the date of the alienation but became adverse from the date of the death of the Mohant, who had made the alienation. The Judicial Committee held that :

¹21 WR 355

³63 IA 261

²60 IA 124

"A mohant had power (apart from any question of legal necessity) to create an interest in property appertaining to the muth which will continue during his own life or to put it perhaps more accurately which would continue during his tenure of office of mohant of the math with the result that adverse possession of the particular property will only commence when the mohant who disposed it ceases to be mohant by death or otherwise. In the case of '*Daivasikharmani*, 63 IA 281, the alienation was by the she bait of a temple 'qua she bait' of an item of debutter property. The person setting up the case of adverse possession contended that possession became adverse from the date of the alienation and not from the death, resignation or removal of the transferor she bait and sought to distinguish '*Ramcharan v. Naurangilal*'s case on the ground that that was a case of alienation of 'math' properties, the contention being that the position of a Mohant is different from that of a she bait, but the Judicial Committee of the Privy Council repelled that contention and held that there was no such distinction on the matter under consideration. At p. 275 of the report after reviewing the authorities Sir George Rankin observed :

"A complete alienation or an alienation by a permanent lease by a Mohant of the 'muth' properties or by a she bait of property belonging to a temple or to a family idol stand on the same footing. The alienation is good for the life time of the transferor."

15. These cases as we have already noticed were cases where the 'mohant' or 'she bait' had proceeded upon the footing that the property was muth' property or 'debutter' property as the case may be and purported to alienate it in his capacity as 'mohant' or 'she bait', but in reality had acted in excess of his powers which he had as manager of the endowment. In the case before us persons who happened to be she baits of the diety executed the leases not as she baits but in their personal capacity on an assertion that the properties were their personal properties. That in our opinion makes all the difference and the possession of the lessee became adverse to the diety from the date of the leases or to put it more accurately when the lessees obtained possession on the strength of the leases. The view we are taking is supported by the decision of a D. B. in the case of *'Hemanta Kumari v. Isswar Sridhar Jew'*⁴, where the distinction we are making was indicated (See observations at p. 632 of the report). The alienation by a person who happens to be the she bait of debutter property made by him in his personal capacity and on the footing that what he was alienating is his secular property would be a void and not voidable transaction 'vis a vis' the diety and the limitation under Article 144, Limitation Act, would run from the date of the alienation, or to be precise when the transferee took possession on the strength of the transfer.

16. The result is that this appeal is dismissed. As we have not agreed with the learned Judge on an important point in the case, namely whether the diety was the owner of the whole of the 595 bighas of land which was the subject of the resumption proceedings of 1859-1861; we direct the parties to bear their own costs in this appeal.

17. The cross-objection is not pressed and is dismissed without costs.

Appeal dismissed.

⁴50 CWN 629