

Surendra Nath Sarkar and Others - - - - - *Appellants*

v.

Sree Sree Iswar Lakshmi Durga and Others - - - *Respondents*

FROM

**THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 6TH DECEMBER 1949**

Present at the Hearing:

LORD SIMONDS

LORD RADCLIFFE

SIR LIONEL LEACH

[*Delivered by* LORD RADCLIFFE]

This is an appeal from a decree of the High Court at Calcutta dated 19th March, 1941. The respondents are not represented on the appeal. The High Court decree, which was given on second appeal, had reversed a decree of the additional District Judge at Alipore dated 31st August, 1936, dismissing an appeal by the present respondents from an original decree of the Subordinate Judge at Alipore dated 22nd August, 1935. In the result the original decree was set aside and an order passed by the High Court which was substantially different in effect.

The dispute with which the suit was concerned related to certain debutter properties consisting of two neighbouring plots of land in Rakhal Ghose Lane in the City of Calcutta. That they were in fact debutter was not disputed. The dedication was made in 1883 when one Hara Chandra Kundu executed an arpannama or deed of gift devoting these plots of land to the service of the deities who are the respondents to this appeal. At the time of dedication there were a building and two temples on one of the plots. The deed also made provisions for the Shebaitship. Hara Chandra himself was to be Shebait during his life time: after his death his two wives Kailasmoni and Durgamoni and the survivor of them: after the death of the survivor his adopted son Sibdas.

Kailasmoni survived Hara Chandra, Durgamoni and Sibdas and on her death in 1910 the Shebaitship devolved upon the heirs of Hara Chandra, four grandsons of an uncle of his. There seems to be no doubt that after her death these, the rightful Shebait, failed to obtain either possession or receipt of the rents of the debutter properties which had come into their hands. Nor did they perform the duties of Shebait. They were too poor to take the necessary steps to assert their position or their rights.

It was this state of affairs that led to the granting of several leases in favour of the appellants, the validity of which was challenged in the Courts below. This challenge was the principal ground upon which leave to appeal to their Lordships' Board was granted by the High Court at Calcutta. Since the appellants' counsel, however, on the opening of this appeal, intimated that they did not wish to submit any argument to the effect that the leases were valid, it is unnecessary to refer to them in any detail. But, as a result, the appeal actually conducted before their Lordships was confined to matters of comparative detail which by themselves would hardly have warranted a grant of leave to appeal.

There were four leases in all. They were granted separately during the years 1919 to 1921 by one or more of the rightful Shebait or their legal representatives. One lease purported to be a grant of the whole of the debutter property on the basis that the lessor was the sole Shebait: the other leases purported to be a grant of the lessors' respective interests in the various properties. Their common feature was that a Selami of varying amount was accepted by the lessor and a rent taken. The lessees were one or more of the appellants or a nominee of theirs. A quotation from the High Court's judgment describing the first lease granted will suffice to show the general nature and effect of these leases: "the document recited that . . . it was necessary to grant the lease inasmuch as there was no money with which he could carry on litigation . . . or conduct the worship of the idols. The rent received was Rs. 50 a month and a sum of Rs. 1,000 was taken as Selami, it being stated in the deed that this money was taken for repairs of the temple. The lessees were not to pay any rent till they got possession of the properties and after the properties were recovered, the rents were to be appropriated by the lessees towards the costs of litigation incurred by them, less what was necessary to pay the Government revenue and the expenses of the daily Sheba of the idols. If the entire costs of litigation were not satisfied within the period of 10 years, the lessor undertook to grant a fresh lease on the expiry of the term at the same rental and without a fresh selami."

By December, 1927, effective proceedings had been taken to recover possession of the debutter properties from the previous occupiers. A Court decree was obtained in favour of the appellants as lessees and their lessors. The appellants later acquired by purchase at an execution sale whatever interest their lessors might have in the debutter properties. By 1928 the appellants were in possession and there seems to be no doubt that in reliance on their title they incurred expenses in connection with the sheba of the deities and the repair of the temple.

Then came the present suit. It was instituted in December, 1930, by the respondent deities and its purpose was to recover possession of the debutter properties on the ground that the four leases which have been mentioned above were void as against the interest of the deities. In view of the criticisms which have been submitted by the appellants as to certain details of the High Court decree against which they appeal it is necessary to make some reference to the course of the suit.

Before the trial Court the respondents succeeded in part. Of the four impugned leases the first had by then expired and the fourth was held to be altogether void: so was every lease in so far as it purported to effect a demise of the idols and the temples themselves: but the learned Munsiff who tried the case held that the second and third leases were binding on the deities to the extent of the 12 annas share to which the lessors who were party to them were entitled. In the result his decree took this form. Shailendra Nath Kundu was declared to be the Shebait of the deities and those of the lessors, members of the Kundu family, who were still living were removed from office. Shailendra, as Shebait, was given Khas possession of the "temples and their appurtenances mentioned in Schedule 'Ka' of the plaint including the idols and their ornaments, utensils and other movables lying within the temples in respect of 16 annas share and of any other properties in respect of 4 annas share." On

the other hand he was declared to be entitled to nothing but the receipt of rents from the appellants in respect of the remaining 12 annas share of the other properties mentioned in Schedule Ka.

The present respondents appealed to the District Judge on the ground that the second and third leases ought also to be declared void. This appeal failed and the decree of the trial Court remained unaltered.

A second appeal was then taken to the High Court in its civil appellate jurisdiction. There the respondents succeeded in upsetting these two remaining leases, the learned judges who heard the appeal deciding that, no one Shebait being capable of owning a defined share in the debutter property, the leases in question were a nullity passing no interest in the property and could not be read together with the other leases as if there had been one joint demise of the whole property. Holding the leases to be void the Court then proceeded to consider upon what terms the respondents should be allowed to recover possession. The general principle upon which they acted was that, as the appellants had admittedly spent large sums of money on the litigation against the wrongful occupiers, without which there would have been no recovery at all, and had spent money for repairs of the temple and for carrying on the temple ceremonies, the respondents should not recover the properties without compensating the appellants "for all the expenses which they have legitimately incurred."

The appellants have raised before their Lordships objections on three points to the decree of the High Court which was made in pursuance of this judgment.

Firstly, they demur to that part of the decree that declares that the appellants are held liable for all municipal taxes and government revenues payable in respect of the debutter properties up to the date of the decree and that the amount of any such taxes and revenues in arrear at that date is to be debited against them. There is a difficulty in reconciling the direction that arrears of such taxes and revenues as at the date of the decree are to be debited against the appellants with the general scheme on which the decree proceeds or with the declaration that has preceded it that the respondents are only to get possession on the terms that they reimburse to the appellants the "entire amount of expenses, including all costs of the items referred to in the judgment of this Court of this day's date in this appeal which may be found to have been incurred by the appellants in the interests of the idols from 13th September, 1919, to this date." It seems clear from the judgment referred to that one of the items for which the appellants were to be reimbursed was the "Government revenues and municipal taxes and other charges paid by the" appellants "for preservation of the property during the entire period from 13th September, 1919, up to this date." The position then is this. If the appellants had in fact paid all such taxes without leaving any arrears up to the date of the decree, they would get the whole of their expenditure back. If, on the other hand, there were some arrears and they paid them subsequently (since under the decree they are to remain liable for arrears even after going out of possession) they would have no right to reimbursement for that amount, since it will be "debited" against them. Whatever the word "debited" may be intended to convey (and the word is sometimes used in an ambiguous sense) it must preclude any idea of reimbursement.

Their Lordships have not been able to satisfy themselves that this particular provision is effective to carry out the general scheme of equitable compensation that the learned judges clearly intended to make provision for. It may be that the apparent inconsistency could be removed by some further clarification in the wording of the decree; it may be that there has actually been a slip in the insertion of this phrase. But the provision is itself one part of a detailed scheme which the High Court, in its discretion, worked out as the fair terms upon which immediate possession should be granted. And there has been no opportunity of hearing what the respondents have to say. It seems to their Lordships that

the more satisfactory course would be to remit the matter of the decree to the High Court at Calcutta desiring that Court to make such alterations therein as may appear to be necessary in the light of these observations on this point rather than that they should undertake themselves to reframe this part of the decree so as to bring it into conformity with the general principle of compensation enunciated in the High Court judgment.

Two other points of criticism were made by the appellants. They are small points which would not normally have come before their Lordships for consideration. Each of them appears to justify some alteration of detail in the decree appealed from. Their Lordships would have been prepared to make the necessary adjustment, but since the decree is to go back to the High Court in any event for reconsideration on the first point their Lordships will merely record their views and leave it to the High Court to make the alterations.

In the first case the appellants draw attention to the fact that the decree remits the suit to the trial Court for taking accounts and for ascertainment of the amount due by the respondents to the appellants "in the manner and on the basis indicated in the judgment of this Court of this day's date." Now the enquiry so directed is at large. One of the important items which would be the subject of such an enquiry is the amount expended by the appellants on the repair of the temples. The appellants point out that this matter has already been gone into in the course of the suit. The judgment of the Subordinate Judge dated 22nd August, 1935, gives consideration to the question of repairs, and he speaks of "numerous independent and respectable witnesses" having been before him. He also speaks of the repairs having been done in 1929 through a contractor who had been called before him on behalf of the appellants and puts the cost of the repairs at about Rs.6,000. The High Court in their judgment seem to have been under some misapprehension as to this, for they say, on the subject of expenses, that the evidence on the point was not examined at the trial and no finding was arrived at. It was the absence of such findings that compelled them to send the case back for enquiry. Had they had brought to their attention what the trial Judge had said on this point of expenditure on repairs, it seems certain that they would have inserted some direction to the Court that was to conduct the enquiry, so as to avoid the waste of time and money involved in taking this part of the evidence over again. Indeed at this distance of time it may be impossible to tender the evidence at all. In the circumstances, it seems to their Lordships that the right course would be to preface the order for accounts and enquiry contained in the decree with some direction to the effect that the Judge is to proceed on the basis that the appellants expended about Rs.6,000 on proper repairs of the temples during the relevant period.

The last point is a very small one. It relates to the declaration that the respondents are entitled to recover Khas possession of "the temples and their appurtenances together with the idols and moveables mentioned in the Schedule Ka of the plaint at once." The right to immediate possession of this part of the debutter property had been conceded by the trial Judge and the judgment of the High Court expresses no more than agreement with his view on this aspect of the case. There is however a slight verbal difference between his decree and theirs. In his it is declared that Shailendra is to get Khas possession of the temples and their appurtenances mentioned in Schedule Ka "including the idols and their ornaments, utensils and other moveables lying within the temples." It is possible that there is some significance in the addition of the words "lying within the temples," if they are intended to amount to a qualification, for the learned trial Judge had said in his judgment "regarding the moveables mentioned in Schedule Kha, existence of some of them has been denied by the defendants. There is no evidence to show that any ornament, utensil or any other moveable of the idols has been removed or misappropriated by the defendants. The plaintiffs will get possession of such moveables as may be found within the temples." The High Court

order, probably by inadvertence, omits the words of description or qualification "lying within the temples." In view of what is said by the trial Judge it seems to their Lordships that it would be more satisfactory that the order for possession in respect of this part of the property should not base itself on the Schedule attached to the respondents' plaint without some such limiting description as is introduced by the order of the trial Court.

Their Lordships will humbly advise His Majesty that the decree of the High Court dated 19th March, 1941, should be set aside and the case remitted to the High Court of Western Bengal for such amended decree to be made as shall appear necessary in the light of the observations contained in this judgment. Having regard to the fact that the appellants did not seek to argue before the Board the principal ground upon which leave to appeal to the Board was granted in India their Lordships think that the right course is to make no order as to the costs of this appeal.

In the Privy Council

SURENDRA NATH SARKAR AND OTHERS

v.

SREE SREE ISWAR LAKSHMI DURGA AND
OTHERS

[DELIVERED BY LORD RADCLIFFE]

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