Privy Council Appeal No. 79 of 1937

Oudh Appeals No. 1 and 2 of 1935

Babu Bhagwan Din and others - - - - *Appellants*

v.

Gir Har Saroop and others - - - - *Respondents*

Same - - - - - - - *Appellants*

v.

Kundan Gir and others - - - - - *Respondents*

Consolidated Appeals

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1939

Present at the Hearing:

LORD MACMILLAN.
SIR GEORGE RANKIN.
MR. M. R. JAYAKAR.

[*Delivered by* SIR GEORGE RANKIN.]

On 14th April, 1930, the first two appellants (uncle and nephew) filed before the District Judge at Lucknow an application under section 3 of the Charitable and Religious Trusts Act (XIV of 1920) for an order directing accounts to be furnished in respect of a certain temple in Lucknow together with land and houses adjacent thereto and occupied therewith. The principal deity is Bhaironji and from this idol the temple takes its name but there are other idols also in different parts of the temple compound, which is now of an area variously stated as about four *bighas* or 16 *biswas*. The respondents to the application were five in number, three men and two women: with certain other members of their family they are now respondents before the Board in this consolidated appeal. They claim to be direct descendants of one Daryao Gir to whom a grant was made in 1781 of the land now in question by the then reigning Nawab of Oudh. It has been found and it does not appear to be in doubt that the members of this family are *grihastha fakirs* being at once *goshains* and householders. The family comes from the Bijnore district " on the Dhampur side " and is a joint Hindu family of the usual type. At the time of the application to the District Judge members of the family had been continuously in occupation and control of the temple and a number of *samadhs* or tombs had been set up containing the

ashes of *goshains* who had belonged to the family. No interference with the management of the temple or the conduct of its worship whether on behalf of the public or otherwise had at any time taken place. It was not alleged in the application that the family had been guilty of any neglect or mismanagement and the contrary has now been held by the Courts in India. The District Judge gave to the five respondents before him an option to bring a suit for a declaration that the property was not subject to a trust for a public purpose of a charitable or religious nature but they did not take this course. Accordingly he threw upon them the burden of disproving this allegation and after hearing nine witnesses for the applicants and two of the respondent *goshains,* and after considering certain documents, he held that there was a strong *prima facie* case that the temple formed the subject of a public trust and that the *goshains* had failed to establish the opposite. He therefore directed the *goshains* before him to furnish particulars of the extent of the property, the nature of the buildings and the income for the past year (1st October, 1930). This order was not complied with, and on the 16th September, 1931, the first two appellants brought in the Court of the Subordinate Judge, Mohanlalganj, suit No. 108/7 of 1931 against the same five members of the respondents' family. The suit was framed under section 92, C.P.C.: relying upon the failure to furnish particulars as ordered by the District Judge, the plaint asked for removal of the defendants, the appointment of new trustees and the framing of a scheme for the management of the temple. Before judgment had been given in this suit, another suit—No. 8/130 of 1931—was on 23rd December, 1931, brought in the same Court by 14 plaintiffs, claiming that they and four of the persons impleaded as defendants were members of the joint Hindu family to whom the temple belonged. This meant that 13 persons who had not been made parties to the proceedings before the District Judge were now putting their rights in suit as descendants of Daryao Gir and his co-parceners. The contesting defendants to this suit included the first two appellants—that is the uncle and nephew who had initiated the proceedings before the District Judge. Judgment in the former of these suits (No. 108/7) was given on 22nd February, 1932, by the learned Subordinate Judge at Mohanlalganj. He held that the five *goshains,* defendants before him, had not proved that 13 other members of their family were interested and he left this to be determined in the other suit. He considered that the order of the District Judge concluded the question whether the temple was or was not the subject of a public religious trust and he decreed the suit, removing the five defendants, appointing new trustees and approving a scheme. About a year later (28th February, 1933) judgment in suit No. 8/130 of 1931 was delivered by another Subordinate Judge (at Malihabad) holding that the temple property was the private and personal property of the 18 persons (14 plaintiffs and four defendants) of the respondents' family on behalf of whom it had been claimed. Both of these decisions

were taken on appeal to the Chief Court at Lucknow and on 23rd October, 1934, Nanuvutty and Zia-ul-Hasan JJ. delivered one judgment covering the two appeals. They held that the temple property was not impressed with a public trust but was private property belonging to the joint family of the *goshains*. Hence the two appeals, which are now before the Board as a consolidated appeal.

The first question is whether the order of the District Judge made under the Charitable and Religious Trusts Act, 1920, precludes the respondents from disputing that the temple is the subject of a public religious trust. That order was made in the presence of five members only of the family and it is not shown that the other members are bound by it according to any principle of representation. Hence it is difficult to see how these other members can be prevented from claiming the property as belonging to their joint family. The Chief Court have refused for other reasons also to regard the District Judge's order as conclusive. In this they have followed the decisions of a Bench of the Lahore High Court in *Prem Nath* v. *Har Ram,* A.I.R. 1934, Lahore 771, and a single Judge of the Bombay High Court in *Haidarali* v. *Gulammohiuddin,* (1934) I.L.R. 58 Bombay 623, and have agreed with the view of Niamutulla J. in *Mahadeo Bharthi* v. *Mahadeo Rai,* (1929) I.L.R. 51 All. 805, in preference to the opinion of Mukerji J. in the case last mentioned. Their Lordships agree with the Chief Court. They hold that the decision of the District Judge under the Act of 1920—a decision from which by section 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit; that it has not been made final by any provision in the Act; and that the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. The existence of a public trust is the foundation of the proceedings authorised by section 3 of the Act: *prima facie* while the District Judge may have to come to a decision upon this point in order to satisfy himself on the question of his own jurisdiction, he cannot by an erroneous decision thereon give himself jurisdiction. To produce this result there must be some provision in the Act which requires a contrary construction. No matter how long or how peaceably an individual may have been in possession and enjoyment of property it is always possible for persons claiming to be acting for the public to lay claim to the property as having been impressed with a trust of a charitable or religious nature. It is readily intelligible that the District Judge should be required to stay proceedings under the Act in any case in which the person against whom they have been taken is willing to bring a suit. But it would be both drastic and anomalous to provide that a person in possession, if not willing to bring a suit to establish his own title affirmatively, must be content to abide without right of appeal by the decision of the District Judge in a proceeding of this character. The terms of section 6 of the Act are intended, in their Lordships' view, to define the consequences

of such an order as was made in this case by the District Judge on 1st October, 1930, but the words "if a trustee without reasonable excuse fails to comply" cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under section 92 of the Code.

Upon the merits, it is desirable to consider first the documents. The main document of title has already been mentioned. It is exhibit No. 4 dated 2nd April, 1781, whereby the Nawab of Oudh granted the property now in question to the respondents' ancestor, Daryao Gir. The grant runs as follows:—

> "The present and future state officials of Haveli Lucknow, suburbs and the province of Akhtarnagar Oudh, should know that five *pucca* bighas waste land, free from Government revenue, *mal* and *sewai*. in the immediate vicinity of village Nawagaon, included in the said Haveli whereon lies the house of Bhairon, has been granted along with the said house, in the name of Daryao Gir Goshain the Mahant, free of all dues and shall not be shown in the record; that the said land shall, generation after generation and descent after descent, be left in the possession and enjoyment of the said person and his heirs and they (officials) should not interfere and meddle with the same for any reason so that the said person having remained in possession of the said land and constructed a house, etc., should with contentment and devotion remain engaged in praying for His Highness."

This grant was construed by a Court of the Nawab in 1843 when members of the respondents' family took proceedings to eject certain *dhobis* (washermen) who had been allowed to set up and live in a thatched hut in the courtyard of the temple. It was held to be a grant of five bighas of the waste land to Daryao Gir, ancester of the "*fakirs*", to be held generation after generation as a *muafi* (revenue free grant) and that the "*fakirs*" had been long in possession. There is also the *Khasra* compiled after 1857 at the time of the first Settlement of the city of Lucknow soon after the annexation of Oudh by the British. This shows the plot as "mud house of Bhaironji" and under the heading "name of owner by virtue of possession" are inserted "Kesri Gir and Jawahir Gir and Kalyan Gir disciples of Daryao Gir". These are the main documents in the case but there are in addition a number of "sarkhats", or leases of shop rooms on the outskirts of the temple property. These are expressed to be granted by individual members of the respondents' family: as the Trial Judge (in suit No. 8/130) has pointed out, the lessors were representative of each of the three branches of the family. The Chief Court noticed that there is no lease in the name of the idol as distinct from the names of individual *goshains*. In these leases the *goshains* are sometimes referred to as "owners" of the shop or *kothri*: in one at least, as owners of the "*asthan Sri Bhaironji*".

It will be convenient to indicate the main features of the evidence before attempting to draw any inferences from the documents. The appellants rely strongly on the fact that for many years Hindu members of the public have resorted

to the temple for worship and *darshan* without let or hindrance. About 46 years before the trial, a *mela* or fair had been started by some musicians and dancers and had become an annual function towards which public subscriptions were collected. There was some evidence that part of these monies had been spent upon whitewashing and repairing the temple but the Chief Court does not consider this to be established; though it is certain that the temple and its *goshains* profited from the increased resort to the temple during the *mela*.

The appellants maintain that upon a review of the history of the temple they have established that it was held out to the public as a public temple and that the Courts in India should have applied to it the reasoning of the Board in the Madras case of *Pujari Lakshmana Goundan* v. *Subramania Ayyar*, (1923) 29 Cal. Weekly Notes 112. The facts which have been held by the Courts below to tell in favour of the respondents are that there had been no previous interference with the temple on behalf of the public; that the *goshains* took the offerings for themselves; that they divided them according to their shares as members of different branches of the family; that they spent money on repairs; that they gave leases in their individual names and not in the name of the idol; that they closed the temple when they had occasion to go to their native village for family ceremonies, e.g., marriages; and that tombs to certain members of the family were put up though they could not claim to be famous saints.

Their Lordships agree with the Chief Court in holding that the grant of 1781 is not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. The grant is to Daryao Gir and his heirs in perpetuity. Had it been intended as an endowment for an idol it would have been very differently expressed: the reference to the grantee's heirs, and the Arabic terminology "*naslan ba'da naslin wa batnan ba'da batnin*" (descendant after descendant and generation after generation) are not reconcileable with the view that the grantor was in effect making a wakf for a Hindu religious purpose, even if it be assumed that this is not otherwise an untenable hypothesis. While it is true that the origin of the idol is not completely traced—the respondents' allegation that it was founded or set up by Kishore Gir, father of the grantee, not being established by evidence—the grant of 1781 discloses the existence of a fakir with an idol in a mud hut squatting upon waste land which did not belong to him and which was given to him for the first time by the grant. It would, in their Lordships' opinion, be an error in method if the subsequent history of the little temple was not looked at in the light of this grant. While it is certainly possible that in the course of years the temple should have been so dealt with as to become dedicated for the benefit of the Hindu public as a public temple, such a dedication requires to be proved. Their Lordships consider that in suit No. 8/130,

the Courts in India have followed a proper method and arrived at a correct conclusion upon the point. The decision of 1843 shows the position to have then been as in 1781 and the *khasra* at the time of the Settlement of Lucknow shows no variation—there is still a mud hut with an idol in it and the "owners" are members of the respondents' family, though described as "disciples of Daryao Gir". The general effect of the evidence is that the family have treated the temple as family property, dividing the various forms of profit whether offerings or rents, closing it so as to exclude the public from worship when marriage or other ceremonies required the attendance of the members of the family at its original home, and erecting *samadhs* to the honour of its dead. In these circumstances it is not enough, in their Lordships' opinion, to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual *mela*. Worshippers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol: they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case as the present; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity. Thus in *Mundancheri Koman v. Achuthan Nair,* (1934) 61 I.A. 405, the Board expressed itself as being slow to act on the mere fact of the public having been freely admitted to a temple. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right. Their Lordships do not consider that the case before them is in general outline the same as the case of the Madras temple, *Pujari Lakshmana Goundan* v. *Subramania Ayyar* (*supra*), in which it was held that the founder who had enlarged the house in which the idol had been installed by him, constructed circular roads for processions, built a rest house in the village for worshippers, and so forth, had held out and represented to the Hindu public that it was a public temple. The Chief Court have, in the opinion of the Board, correctly estimated the particular facts of the case before them and have rightly negatived the contentions that the temple is a public temple and that the property in suit is impressed with a trust of a public religious character.

Their Lordships will humbly advise His Majesty that this consolidated appeal should be dismissed. The appellants must pay the respondents' costs.

(19248—3A) Wt. 8075—41 190 10/39 P. St. G. 338

In the Privy Council

BABU BHAGWAN DIN AND OTHERS

v.

GIR HAR SAROOP AND OTHERS

SAME

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KUNDAN GIR AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

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