Privy Council Appeal No. 13 *of* 1939
Bengal Appeal No. 1 *of* 1938

Maharaja Sris Chandra Nandy and another - - *Appellants*

v.

Rakhalananda Thakur (deceased) 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 11TH NOVEMBER, 1940

Present at the Hearing:
LORD ATKIN.
LORD THANKERTON.
SIR GEORGE RANKIN

[*Delivered by* LORD ATKIN.]

This is an appeal from the High Court of Judicature at Fort William in Bengal who affirmed a decree of the Additional District Judge 24 Parganas in favour of the plaintiffs the present respondents. The plaintiffs are a distinguished family of Brahmin priests, Thakurs of Shrikhanda: and their claim is for a declaration that they are entitled to a charge on the Kasimbazar Raj Estate represented by the defendants for an annual britti of 4,000 rupees payable by half-yearly instalments and for a money decree for arrears amounting to Rs.13,260. The defences to the suit are in substance that the plaintiffs never had a legal right to the britti, and that in any event it was not charged upon the estate. These issues were raised in the proceedings and have been decided in favour of the plaintiffs in both courts. The history of the claim begins with the founder of the Raj fortunes one Krishna Kanta Nandy. He appears to have been a Hindu of comparatively humble origin who by his abilities attracted the attention of Warren Hastings, became his Diwan, and died in the year 1778 proprietor of large possessions in about twelve different districts and in Calcutta. After his death his son Loknath appears to have been given the title of Maharajah of Kasimbazar by Warren Hastings, and the property to which he and his descendants have succeeded is known as the Kasimbazar Raj Estate. The case of the plaintiffs is that Krishna Kanta Nandy established two deities Radhagovinda and Lakshminarayan at Shrikhanda the plaintiffs' home and granted the plaintiffs a britti of Rs.4,000 for the worship of the two deities: and at the same time

charged his Raj estate with the payment of the britti. The plaintiffs and their successors it is said became the gurus of Krishna Kanta Nandy and his family and its successors: they have conducted the worship and service of the deities ever since.

The learned Assistant District Judge found that the plaintiffs had established the whole of their case. A permanent grant of britti was made by Krishna Kanta Nandy who had established at the home of the plaintiffs the two deities and provided the britti for securing their service and worship. To secure the permanent payment he had charged it upon the estate. The learned High Court Judges were not able to find that Krishna Kanta Nandy had established the deities, but they concurred in the finding that he had made a permanent grant, and had charged it upon the Kasimbazar estate.

Their Lordships are of opinion that no evidence was given sufficient to support these findings. As they will point out later both Courts erred in admitting as valid evidence of tradition given by and on behalf of the plaintiffs: and when the admissible evidence is considered there is none to justify the finding of a permanent grant or of a charge. The evidence establishes the following facts: that from the time of Krishna Kanta Nandy the sum of Rs. 4,000 has been paid annually to the plaintiffs and their successors as britti: that they have continuously conducted the worship and service of the two deities: and that until about the year 1897 such worship was conducted on behalf of the holder of the Raj and that the plaintiffs were the gurus of his family. The succession of the Raj family is relevant. Krishna died in 1778 and was succeeded by his son Loknath who first received the title of Maharajah. There is nothing to indicate that this is an impartible estate. Indeed what little evidence there is on the point indicates the contrary, but in fact there only appears to have been one person at a time entitled in the line of descent. Loknath was succeeded by Harinath who died in 1832, who was succeeded in turn by his son Krishnanath, who died in 1844 without issue. His widow Rani Swarnamayi succeeded to the estate and possessed it for over 50 years until her death in 1897. On her death the estate reverted to Krishnanath's mother Rani Hari Sundari. She, who must have been a very old lady at the time, in the same year transferred her interest to the next successor Manindra Chandra Nandy the son of her daughter Gobinda. The estate thus passed out of the direct male succession. Manindra had for his gurus another family the Thakurs of Jogeswardi, and had family deities other than Radhagovinda and Lakshminarayan. In 1923 Manindra Chandra Nandy executed a trust deed in favour of the firm of Ogilvy Gillanders & Co. and certain named trustees with the object that the firm should raise a loan for the Maharajah of £675,000 and pay off certain scheduled incumbrances and unsecured liabilities. The bulk of the Raj estate was assigned to the trustees by way of mortgage

or trust to keep down the necessary charges, and create certain reserve funds including a sum of three lacs which the Maharajah estimated would be sufficient for his personal household expenses. The Maharajah covenanted *inter alia* that the property was free from all incumbrances other than those mentioned in the 4th schedule to the deed which did not include the charge now alleged to exist. In February 1929 on the application of the Maharajah Manindra the estate was taken under the management of the Court of Wards by whom it is now managed subject to the provisions of the deed of trust of 1923. In 1929 the Maharajah Manindra died and was succeeded by the present Maharajah Sris Chandra Nandy. On April 10, 1929 the plaintiffs presented a petition to the General Manager of the Kasimbazar Raj Ward's Estate alleging that they had been receiving for generations from the estate an annual annuity allowance of Rs. 4,000, that they had been spending the said allowance as well as their own income towards the worship of several deities and other acts of piety: and asking for the payment of one year's arrears. It may be noticed that in this letter there is no suggestion of the establishment by Krishna Kanta Nandy of the two specified deities, or of a permanent grant by him, or of the creation of any charge. This request was refused by the Manager of the Court of Wards and on June 28, 1929, the Maharajah Manindra wrote to him having been told by the plaintiffs of the refusal.

Kasimbazar Rajbari,
The 28th June, 1929.

My dear Mr. Burrows,

I have read your letter No. 575ES/16-108 dated the 4th May, 1929 (a copy of which was forwarded to me) as also another letter No. 1565ES dated the 15th June, 1929 (shown to me) sent in reply to the letters of Srijut Rakhalananda Thakur of Shrikhanda.

The annual Britti payable to our spiritual guides, the Thakurs of Shrikhanda amounting to Rs. 4,000 (Four thousand) has been paid by the Raj family of Kasimbazar from generation to generation, and I have been paying it all along during my management.

During Mr. Lyall's administration as he did not like to meddle with Religious and Spiritual matters, he left the matter with me of course leaving sufficient fund in my hands.

It is not of the nature of personal charity but has always been regarded as a charge upon the Estate. I have nothing to say regarding your decision. You may hold it or alter it if there be good reason for doing so, but this Britti in my opinion, is legally enforceable against the Kasimbazar Raj Estate.

In this connection I would like to refer you to my letter No. 1/XII-4/3-G dated the 19th April, 1929 in which I mentioned the recurring permanent grants which in addition to other commitments I am bound to make *viz.* 1. To spiritual guides of Shrikhanda and Jageswardihi, 2. Debkarjya and Debsheba &c. and to my letter to the Secretary Board of Revenue dated the 2nd February, 1929 with statements therewith attached, a careful perusal of which will clearly convince you that the above demand is a charge really upon Kasimbazar Raj Estate and incidentally upon me as proprietor of the Estate and not in my personal capacity.

The following is an extract of the relevant portion of my letter to Mr. Fawcus, Secretary Board of Revenue dated the 2nd February, 1929 for your easy reference.

" I should like to state however in this connection that whereas I have these additional sources of income which are not covered by the Trust Deed I have at the same time additional demands on me for Debkarjya, Brittis to spiritual guides and Brahmin Pundits and the maintenance of educational institutions which have been recognised by the family from generations past."

I shall be glad if you will consider all the facts relating to this matter and recommend to the Court for acceptance of the charge of paying Rs. 4,000 annually to the Thakurs of Shrikhanda which is in reality a charge on the Kasimbazar Raj Estate.

Yours sincerely,
Manindra Chandra Nandy.

L. B. Burrows, Esqr., B. A.,
Manager, Kasimbazar Raj Wards' Estate,
2/1, Russell Street,
Calcutta.

So far from regarding this letter as proof of a legal charge their Lordships are of opinion that it tends to negative such a claim. The Maharajah is obviously seeking to limit his personal liabilities: and is treating the continual payment of this britti as an instance of the " additional demands on me for debkarjya and britti for spiritual guides and Brahmin Pundits and the maintenance of educational institutions which have been recognised by the family from generations past." It seems obvious that the continuous recognition is to him another way of saying it has always been regarded as a charge upon the estate. It would not be suggested that the other " additional demands " in which this claim is included involved legal charges upon the property. It seems obvious the letter of the Maharajah, written in the circumstances set out in the letter, could not possibly outweigh the express covenant in the deed of 1923 that there were no incumbrances other than those scheduled.

In the result, therefore, there is no evidence at all of the establishment of the deities by Krishna, of any permanent grant by him of the britti, or of the creation of any charge upon any property. It is very significant that though the plaintiffs appear to have very complete records of their transactions from early times no document is produced making or evidencing the grant or charge: and this alone is sufficient to cast doubt upon the claim. Moreover while it would not be unusual to assign particular lands as the source from which britti was to be paid and in this sense create a charge it would seem to their Lordships very improbable that a vast estate should be charged as a whole with the payment of Rs. 4,000 a year. Their Lordships are not prepared to say that a valid charge could not be created upon what could be defined to be the whole of a man's property at the date of the charge. In the present case it should be noticed that not only is the charge claimed and decreed a charge upon the estate as it at present exists; but it has been decreed without any condition that the families of the grantor or the plaintiffs should continue to exist, or that the plaintiffs should continue to perform the service and worship, sheva and puja, of the two named deities. This defect in the decree was admitted by counsel for the respondents who submitted an amended form of decree

which would remedy the mistake. But for present purposes the point is the difficulty the plaintiffs are in in establishing any grant or charge with any sufficient certainty. Naturally if the continuous payments could not be explained without asserting some legal origin which would create the rights claimed, any court would feel inclined to presume the necessary legal origin. But in the present case there are no facts which require a presumption of any lost grant either for the permanent gift of the britti or still less for it being constituted a charge. It appears to their Lordships the natural inference from the known facts that the original founder of the estate granted the britti in his lifetime: and that his successors from pious motives continued the grant to the plaintiffs' successors who continued to be the family spiritual guides, and served and worshipped the family gods. Without assuming any legal obligation it would in the circumstances have been strange if the britti had not been continued. The learned trial Judge working backwards, as it would seem from the fact that the payment was continued for several generations, has imputed to the founder the intention that it should continue for all those generations: and has so drawn the inference that he did in fact grant a permanent britti; and took steps to secure its permanence by creating a charge, the uncertainty of the terms of which their Lordships have already discussed. The trial Judge it is true found that Krishna Kanta Nandy established the deities. The High Court have found that it would not be safe on the evidence to hold that the plaintiffs had established the case that the two deities were so established. Nevertheless they go on to say that they cannot express the definite opinion that the trial Judge was not right in his inference that the deities were so established. This conclusion appears to involve some confusion of thought. If it was not safe from the evidence for the Appellate Court to draw a particular inference it was not safe for the trial Judge to draw the inference. Not safe, must mean that there is not evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases the appellate tribunal may select the inference they choose: but they can have no equal choice between an inference that is safe, and one that is unsafe.

But the conclusions of the two Indian Courts are not based solely on the evidence of which the substance has been stated above and which their Lordships have held to be insufficient. Both Courts relied on the evidence of some of the plaintiffs' witnesses speaking of a tradition in their family that Krishna Kanta Nandy had established the two deities, had granted the britti in perpetuity and had made it a charge upon the estate. Obviously this is hearsay evidence, and it is equally clear that it is not one of the claims of hearsay evidence admissible under the provisions of sect. 32[illegible] of the Indian Evidence Act. The members of the High Court recognised this but they made a statement as to the law of evidence which their Lordships feel bound to

state is entirely erroneous. They say, " It is to be noticed " in this connection that sect. 2(1) of the Indian Evidence " Act repeals the whole of the English common law on " evidence so far as it was in force in British India before " the passing of the Indian Evidence Act, and that provision " of the law in effect prohibits the employment of any kind " of evidence not specifically authorised by the Act itself." This is of course correct. But they continue, " It must be " recognised however, that the principle of exclusion adopted " by the Indian Evidence Act should not be applied so as " to exclude matters which may be essential for the ascer- " tainment of truth." It seems to their Lordships essential in the interests of the administration of justice in India that this mode of regarding the law of evidence should emphatically be stated to be unsound. What matters should be given in evidence as essential for the ascertainment of truth it is the purpose of the law of evidence whether at common law or by statute to define. Once a statute is passed which purports to contain the whole law it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. It is therefore discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule. There is therefore no such principle as is suggested in the passage now under discussion. At the same time their Lordships wish to make it clear that apart from any rule of law the evidence in question so far from leading to the ascertainment of truth in fact for the reasons already given leads away from it. It is not remarkable that the learned Judges who gave leave to appeal in this case did not conceal some uncertainty as to the correctness of this part of the judgment. Their Lordships do not think it necessary to discuss at any length inferences drawn by both Courts from the absence of evidence by the defendants of the contents of their own books. They do not think that in the circumstances the comments are well founded. In the result therefore their Lordships are of opinion that this suit fails, and that the appeal should be allowed and the suit dismissed. Their Lordships will humbly advise His Majesty accordingly. They notice however that the late Maharajah Manindra clearly regarded the payment of the britti as being a personal obligation of his, and it would seem to follow in their opinion that the Court of Wards would be justified in making payment of the arrears up to the time of his death to the plaintiffs. This is not however a matter for decree in this suit. The respondents must pay the costs in the Indian Courts and of this appeal.

(27364) Wt. 8017—49 180 11/40 P. St. G. 338

In the Privy Council

MAHARAJA SRIS CHANDRA NANDY
AND ANOTHER

v.

RAKHALANANDA THAKUR (DECEASED)
AND OTHERS

DELIVERED BY LORD ATKIN

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