Privy Council Appeal No. 87 of 1939

Lala Hem Chand – – – – – – – – *Appellant*

v.

Lala Pearey Lal and others – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JUNE, 1942

Present at the Hearing:

LORD THANKERTON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a decree of the High Court of Judicature at Lahore dated the 27th of January, 1938, which reversed a decree of the Court of the Subordinate Judge of Delhi dated the 30th of November, 1936, in favour of the defendant—the appellant before the Board.

The appeal arises out of a suit instituted by the plaintiffs, on behalf of the members of the brotherhood of the Digamber Jains, for recovery of possession from the defendant of a house described as " Jain Dharmasala," situate at Khatra Mashru in ward 4 of the town of Delhi, and entered as No. 48 in the municipal registers.

The question for decision in this appeal is whether the plaintiffs have established their title to, and right to recover possession of, the suit propert, from the defendant.

The parties to the suit are Jains, and are governed by the Mitakshara Law. In the plaint, it was alleged that the house in dispute was purchased by one Lala Janaki Das, presumably with his own funds, that he " converted it " into a Dharmasala, that it was used as such and managed by him during his lifetime, that after his death in 1909 it remained under the management of his son, Ramchand, the third plaintiff, till it was handed over to the Jain Orphanage Society of Delhi, that the defendant got possession of it from him in January, 1931, for temporary use during the occasion of the marriage of his daughter, and that he refused to vacate when he was asked to return it. The defendant traversed the allegations of the plaint, repudiated the dedication of the property as " Dharmasala," and pleaded as material facts that the house was owned and possessed " by him." He also questioned the right of the plaintiffs to maintain the suit.

In the course of evidence, the following facts were elicited: one, Sri Ram, " by occupation a pleader, resident of Delhi," executed a will on the 23rd March, 1892. After appointing two executors, Lala Janaki Das (mentioned in the plaint) and Munshi Ramji Das, and setting out the

details of his movable and immovable properties, valued at Rs.40,400, the testator expressed in para. 1 of the will his intention of creating a trust for charity in respect of Rs.11,500 out of his properties as follows:—

1. " Out of the aforesaid property of the value of Rs.40,400, property " worth Rs.11,500 . . . viz., one house situate in Khatramashru and " valued at Rs.6,500 . . . and Rs.5,000 . . . in cash be given away in " charity. That is, the money be given away in charity account and the " house under reference be made wakf. I myself will manage the wakf " house in my lifetime, and after my death managers shall be appointed " and instructions shall be laid down for their guidance."

In paras. ii and iii of the will the testator made provisions in favour of his wife, Mst. Durgi Devi, and Mst. Bhugli, widow of his deceased son.

In para. iv, after giving a legacy to a cousin of his, he left the residue for charity in the following terms:—

" As regards the remaining property of the value of about Rs.12,000 " (twelve thousand), I make the following will:—

" The property which is left unbequeathed at the time of my death " be included in the charity account."

It may be mentioned that the testator did not carry out his intention of creating a charitable trust. About a week before his death, by a codicil dated the 30th April, 1892, he amended the disposition for charity of the residue made in para. iv of the will as follows:—

" . . . I now . . . amend the said wording of Para. No. iv of the " will . . . and make the following will about the use of the unbequeathed " sum of about Rs.12,000:—

" The said amount of money . . . .

" To be deposited in the charity account, on account of the Land situate " at Pahar Gang. . . . Rs.7,000 (Rupees 7,000)."

He applied the balance of the residue to legacies to certain specified persons and for the construction of an inner hall in a named temple in the name of his deceased son.

On the 7th of May, 1892, the testator died leaving surviving him his widow Musammat Durgi, and Musammat Bhugli, the widow of his pre-deceased son Peari Lal, who died on the 21st February, 1892. On the 19th November the executor Lala Janaki Das obtained probate of the wills.

In 1894, while Musammat Durgi, the widow of Sri Ram, was still living, Musammat Bhugli, the widow of Peari Lal, adopted Hemchand, the defendant, who was then said to be seven or eight years old. The factum of adoption was at first disputed by the respondents, but it is admitted before the Board. Its validity however, has been questioned throughout.

On the 3rd April, 1907, Janaki Das purchased from one Badri Das, the house in suit. The sale deed states that " . . . the vendee has pur- " chased the property with the money left by Babu Sri Ram Vakil " deceased for purposes of building a Dharmasala. . . ." It is common ground that the property was purchased by Lala Janaki Das out of the estate left by Babu Sri Ram. The defendant was present when the document was registered. After purchase, the house was completely renovated in 1908. The defendant stated that " he looked to the building of the " house." It bears on one of its walls the inscription " Dharmasala " Babu Sri Ram Vakil, Jaini 1909 " written in Urdu and Hindi. This was known to the defendant. Lala Janaki Das died in 1909.

It will be observed that important facts forming the basis of the case as presented to the lower Courts for decision, viz., that Lala Janaki Das purchased the suit property from the funds of the estate of Babu Sri Ram of which he was an executor under his will, that the defendant claimed that he was adopted by the widow of Peari Lal—a claim disputed by the plaintiffs but important to the defendant, as he based his title to the

property on it—were disclosed with connected facts only in the course of evidence, and had not been mentioned in the pleadings by either party; nor had any issues been raised regarding them. Their Lordships desire to observe that, though the case has been decided on all the points which arose on the evidence led by the parties, the procedure adopted by the trial Court of allowing the parties to adduce evidence on points not raised in the pleadings or issues was irregular and should not have been allowed without amending the pleadings and raising the necessary issues.

The plaintiffs contended that the suit property was dedicated as a " Dharmasala " by Janaki Das, that the title to it belonged to the Digambar Jain Brotherhood, that the defendant's adoption by Musammat Bhugli at the time when the property vested in Musammat Durgi was invalid, that he came into possession as the house was lent to him in 1931 for temporary use on the occasion of his daughter's marriage, and that he was thus liable to ejectment. They also urged that Lala Hemchand (i.e., the defendant), having himself accepted and joined in the trust and allowed construction of the house in dispute out of the sale proceeds of the property at Paharganj, is estopped from denying its validity.

On behalf of the defendant, it was contended that the provisions of the will relating to the creation of the charity are vague, and therefore inoperative in law, that the money should be treated as undisposed of and held by the trustee on behalf of the author of the trust or his legal representatives, that as the will was void with regard to the gift to charity, the user of the property in dispute as a " Dharmasala " was immaterial, that his adoption was valid under the Hindu Law, and that he is therefore entitled to the property as Babu Ram's legal heir. It was also contended that the defendant was all along in possession of the property and that he was not estopped from contesting the present suit.

The Subordinate Judge accepted the contentions of the defendant, and dismissed the plaintiffs' suit, holding that the defendant is in " possession " and cannot be ousted by any person not holding a superior title. He held further that the house in question was used for public and charitable purposes from 1909 to 1931, and that the defendant was not estopped from contesting the validity of the trust.

On appeal by the plaintiffs, the learned Judges of the High Court held that the adoption of the defendant was invalid under Hindu Law, inasmuch as the adoptive mother, Musammat Bhugli, could not by her adoption divest Musammat Durgi of the estate that she held, and that the defendant's claim cannot be maintained for the reasons, that he was present when the property was purchased with the avowed object of building a Dharmasala, that it was with his knowledge and consent that the building was consecrated as a Dharmasala, and that during the course of more than twenty years he never asserted his title to it. They also came to the conclusion that it was for the first time in 1931 that the defendant obtained possession of the property, with the permission of the then manager. In the result, the decision of the Subordinate Judge was set aside and the plaintiffs' suit was decreed.

The law is well settled that in an action for ejectment the plaintiff can recover only by the strength of his own title, and not by the weakness of that of the defendant. Mr. Parikh, appearing for the respondents, admitted at the outset that the provision of the will relating to charity is vague, and is therefore inoperative to create a charitable trust; but he did not admit that the result of the failure of the trust is, as was held by the Subordinate Judge, that the executor must be considered as holding the undisposed of residue as trustee for the benefit of the author of the trust or his legal representative, his position being, that the resulting trust which arises when the trust fails or is void on account of vagueness or uncertainty is a trust against the deed and the property if retained by the executor is *prima facie* held by the executor *adversely* to the heir-at-law; and if, as in the present case, he dedicates the property to charity, the trust so created, after the expiry of 12 years' adverse possession would acquire a statutory title to it.

The law is well established that where a trustee has been in possession for upwards of 12 years, of property under a trust which is void under the law, an action against him by the rightful owner would be barred by limitation under the statute, the reason being that the possession of the trustee is as much adverse to the true owner as that of any trespasser. Section 10 of the Indian Limitation Act (Act No. IX of 1908) says, " . . . no suit against a person in whom property has become vested in " trust for any specific purpose or against his legal representatives or " assigns (not being assigns for valuable consideration) for the purpose of " following in his or their hands such property or the proceeds thereof " or for an account of such property or proceeds shall be barred by any " length of time." If this section could successfully be invoked in favour of the appellant, then the respondents would be precluded from relying on the plea of adverse possession in their favour; but Mr. Rewcastle has frankly conceded, and in their Lordships' opinion rightly, that the appellant cannot claim the benefit of this section, as it would be impossible to hold that the property in respect of which the direction in the will is void has become " vested in trust for a specific purpose " within its meaning. Since the provision in the will creating the charitable trust is invalid, and section 10 of the Limitation Act is inapplicable to the case, it follows that the property is held by the executor adversely to the true owner; and if he so holds it for the statutory period, he would acquire a good title to it.

The learned counsel for the appellant then contended that in this case the executor has shown by his conduct that he did not hold the property for himself, that he held it in no other capacity than purely as executor under the will, that his son after his death continued to act in the same manner, and that, in any event, it has not been shown that the property was dedicated as " Dharmasala," and that Lala Janaki Das and Ramchand have been in adverse possession of it for upwards of 12 years. Neither branch of his argument can be accepted. In support of the first part, reliance was placed on the facts that it was with the proceeds of the sale of the property allotted in the will to charity and other funds of the estate that the property in dispute was bought by Lala Janaki Das, and that the house tax receipts issued by the municipality show that they were issued in favour of the testator Sri Ram, deceased. But this is no proof that the executor was not holding adversely to the heir.

Adverse possession having begun in the manner indicated above, the next question is whether it has been proved that the property was dedicated and that it was held in adverse possession by Lala Janaki Das and Ramchand for the statutory period. It may be mentioned, as argument referred to it, that the absence of a deed in this case creating the trust cannot invalidate the endowment, for " no writing is necessary to create " an endowment except where the endowment is created by will, in which " case the will must be in writing and attested by at least two witnesses " if the case is governed by the Indian Succession Act, s. 57." (See " Principles of Hindu Law," by Mulla, 9th Edition, Section 407.) As stated already, the Subordinate Judge has found specifically " that there is " sufficient material on the record to show that the house in question has " been used for public and charitable purposes from 1909-1931." Both Courts have found that the property was dedicated as " Dharmasala." There is ample evidence to show that it was treated as dedicated property and used as such for charitable and religious purposes till the year 1931, when the defendant came into possession. The evidence shows further, that the defendant was aware that the property was purchased with the money allotted by Babu Sri Ram for charitable purposes, that he was present when the sale was registered, that he supervised the construction of the building, and that to his knowledge the building bore the inscription " Dharmasala Babu Ram." The inference from the evidence as a whole is irresistible that it was with his knowledge and implied consent that the building was consecrated as a Dharmasala and used as such for charitable and religious purposes, and that Lala Janaki Das, and after him Ram-

chand, was in possession of the property till 1931. As forcibly pointed out by the High Court in considering the merits of the case, " During the " course of more than twenty years that this building remained in the " charge of Janaki Das, and on his death in that of his son, Ramchand, " the defendant had never once claimed the property as his own or objected " to its being treated as dedicated property." This Board held in *Gunga Gobindas Mundal* v. *The Collector of the Twenty Four Pergunnahs* (1866-7) 11 M.I.A. p. 345, at p. 361, that if the owner whose property is encroached upon suffers his right to be barred by the law of limitation " the practical effect is the extinction of his title in favour of the " party in possession." Section 28 of the Limitation Act says " At the determination of the period hereby limited to any person " for instituting a suit for possession of any property his right to " such property shall be extinguished." Lala Janaki Das and Ramchand having held the property adversely for upwards of twelve years on behalf of the charity for which it was dedicated, it follows that the title to it, acquired by prescription, has become vested in the charity and that of the defendant, if he had any, has become extinguished by operation of section 28 of the Limitation Act. Their Lordships have no doubt that the Subordinate Judge would also have come to the conclusion that the title of the defendant has become barred by limitation, had he not been of the view that Lala Janaki Das retained possession of the suit property as trustee for the benefit of the author of the trust and his legal representatives, and that presumably section 10 of the Limitation Act would apply to the case, though he does not specifically refer to the section. For the above reasons, their Lordships hold that the plaintiffs have established their title to the suit property by adverse possession for upwards of twelve years before the defendant obtained possession of it; and since the suit was brought in January, 1933, within so short a time as two years of dispossession, the plaintiffs are entitled to recover it from the defendant, whose title to hold it if he had any has become extinct by limitation, in whichever manner he may have obtained possession, permissively or by trespass.

In the above view, the validity of the defendant's adoption by Musammat Bhugli, the widow of Peari Lal, decided in his favour by the Subordinate Judge and against him by the High Court, does not arise for decision by the Board.

Their Lordships will therefore humbly advise His Majesty to dismiss this appeal with costs.

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In the Privy Council

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