
(1954) 04 GAU CK 0007
In the Gauhati High Court
Case No : S.A.Nos. 41 and 54 of 1951

Jibon Chandra Sarma Doloi

APPELLANT

Vs

Naren Kalita

RESPONDENT

Date of Decision : 08-04-1954

Acts Referred:

Civil Procedure Code, 1908 — Section 100
Civil Procedure Code, 1908 (CPC) — Section 100
Limitation Act, 1908 — Article 134, 134, 144, 144
Specific Relief Act, 1877 — Section 42, 42

Citation : AIR 1955 Guw 23 : (1954) 6 ILR 242

Hon'ble Judges : Sarjoo Prosad, C.J. and H.Deka, J

Bench : Division Bench

Advocate : S.M.Lahiri, S.K.Ghose, S.C.Choudhary, D.N.Medhi, D.K.Sharma,
Advocates appearing for Parties

Judgement

Sabjoo Prosad C. J.

1. The plaintiff who has preferred these appeals is the Doloi of the Madhab Temple at Hajo in the District of Kamrup. He sued for a declaration that the sale of the lands described in the various schedules to the plaint was void, and for recovery of possession thereof.

(2) The plaintiff claimed that the Madhab Temple at Hajo is a very ancient and historic institution. The Assam Rajas granted lands to the Bardeuries (temple officials) in order that they might render service puja" and "sheba") to the deities installed in the temple. The lands in suit formed part of those grants and were thus endowed and burdened with service to the temple and the grantees were to enjoy the lands on condition of rendering service.

The plaintiff further claimed that the lands, were inalienable to strangers, but they could be transferred only to a Bardeuri of the temple. The grant of the suit lands was originally made to two persons Hem Kanta Sarma and Uma Kanta Sarma the Bardeuries, of the said temple, and the defendants to the suit

represent the heirs of the original grantees and the assignees from those heirs.

(3) The defendants pleaded that the grants in question were not burdened with service and that the lands were alienable without any restriction whatsoever. The transferees also claimed that they had purchased the lands bona fide for consideration and had no notice of any such burden or obligation subsisting on the lands. They also asserted that in any event, in respect of the lands in schedule "Kha" and "Ga", the plaintiff's suit was barred by limitation.

(4) The Court of first instance accepted the case of the plaintiff that the lands in suit were burdened with service and the alienations complained of were void. It also found that the purchasers had failed to make appropriate enquiries and, therefore, they could not be regarded as purchasers without notice of the nature of the tenures. The Court, however, found that the alienations in respect of the lands in schedules "Kha" and "Ga" being void "ab initio", the suit was barred under Art. 144, Limitation Act. It, therefore, decreed the suit in respect of the schedule "Ka" lands only and directed that the plaintiff would obtain delivery of possession of the lands in that schedule through the transferor defendants or their heirs, if the latter were willing to render service to the temple; otherwise the plaintiff would be entitled to get independent possession and the defendants would be deemed to have relinquished their interest in the lands.

There were appeals and crossappeals against the aforesaid decree by both parties. The lower appellate Court confirmed the decree of the trial Court in respect of schedule "Kha" and "Ga" lands, dismissing the plaintiff's claim. Regarding schedule "Ka" lands, the Court maintained the declaration in favour of the plaintiff that the sale of the lands was void "ab initio", but discharged the conditional decree for possession leaving it to the plaintiff to move the sovereign authority to sue for resumption of the tenure.

(5) "It would be well to recall at the outset certain facts which may now be taken to be well established and outside the pale of controversy: (1) that the Assam Rajas granted lands directly to the temple for the maintenance of the institution and its deities, and also granted lands individually to the Bardeuries; (2) that the lands in suit were not directly endowed to the temple but belonged to the latter category and were? granted to the Bardeuries themselves; (3) that the Bardeuries rendered service ("sheba" and "puja") to the temple deities; and (4) that the original grantees in the present case were Bardeuries.

The main controversy centres on the point whether the lands so granted to the Bardeuries, were burdened with service and inalienable as such, except to the limited extent indicated by the plaintiff, or, whether they were free from any such obligation and were given to the Bardeuries for their own maintenance and were, therefore, alienable, just as much as any other property in their hands. The other two questions which also arise for consideration are:

(1) whether the transferees were protected because of want of notice of any such obligation or burden subsisting on the tenures; and (2) whether the claim in

regard to the lands in two of the plaint schedules, that is, schedules "Kha" and "Ga", was barred by limitation, as held by the two Courts below. I propose to deal with these points in their order.

(6) On the question whether the grant of the lands was burdened with service, the decision of the two Courts below rests almost entirely upon oral testimony which consists of the evidence of some Dolois of other temples and some Bardeuries. The original grant or the copper inscription under which the grant is said to have been made, is not available, and there is no witness competent to say what the express terms of the grant were.

The trial Court realised that difficulty and, therefore, pointed out that as the point at issue involved the decision of a matter which went back to ancient times, the oral evidence offered by the plaintiff had to be viewed with great caution. The Court, however, proceeded to decide the matter on the assumption that because the Bardeuries rendered "puja" and "sheba" to the temple deities and the grant was for their maintenance, therefore the "logical inference must be that the enjoyment of the Bardeuri lands was contingent on the rendering of "puja" and "sheba".

This logical inference on the two factors stated by the learned Judge is not so irresistible; on the contrary the inference might well be that the grant was in recognition of services rendered by the Bardeuries and entirely for their benefit without imposing any burden of service.

The lower Appellate Court, in dealing with the point, seems to have acted on a similar assumption inasmuch as it observes that having regard to the circumstances as disclosed in the evidence, no other inference about the intention of the Assam Rajas making separate . grants to the Bardeuries could be made except to hold that

"the Rajas must have sought to make it doubly sure that besides any gift to the temple deity, its devotees, that is, those who would continue the worship of the deities without interruption, should also be given some lands on condition of their continuing the said service."

None of the two Courts has said that any of the witnesses of the plaintiff was competent to speak of the specific terms of the grant in the absence of the grant itself.

It is to be remembered that the onus to prove the nature of the tenures and their inalienable character, except to the limited extent stated by the plaintiff, was entirely upon the plaintiff; and the Court, therefore, had to see whether that burden had been satisfactorily discharged, specially when there was no grant produced in support of the plaintiff's claim and the oral evidence, more or less, was one of tradition only.

In the revenue records, as found by the two Courts below, the lands have been described as "Brahmottar" lands. The Courts below seem to suggest that the

word "Brahmottar" carried no special legal significance and the lower Appellate Court even suggested that the Lakheraj Commissioner used the term somewhat loosely as the grantees were almost in such case Brahmins. I am unable to find any adequate justification for this suggestion.

(7) The Introduction to the Assam Land and Revenue Regulation, 1886, shows that in 1831, shortly after the annexation of Assam by the British the Government of India ruled that

"all rights to hold lands free of assessment,, founded on grants made by any former Government, must be considered to have been cancelled by the British conquest. All claims, therefore, for restoration of such tenure could rest only on the indulgence of Government, without any right."

It appears that prior to the British conquest, the predecessors in interest of the present owners of *nisfkhiraj* estates held their lands revenue free and called themselves "*lakhirajdars*". They continued so to call themselves even after these lands were resumed and assessed at half rates. The first British Commissioner of Assam, Mr. Scott, disregarded all claims to hold land revenue free. When Captain (afterwards "General") Jenkins became the Commissioner, the "*lakhirajdars*" objected to pay any revenue on the ground that the imposition of revenue by Mr. Scott was temporary, with a promise to remit the same at a later stage. The question was referred to the Government of India who directed that there should be a full enquiry into all claims to rent free land on the part of *Rajas* or as "*debottar*" or "*dharmottar*" or on any other plea, throughout the Districts of Assam. One Captain Bogle was appointed Special Commissioner under Regulation III of 1818 to make this enquiry, subject to the control and orders of General Jenkins.

As a result of the enquiry, certain principles were laid down by Government, one of them being that pending the "*lakhiraj*" enquiry, Mr. Scott's rates were to be levied as before from all land claimed as "*lakhiraj*" (that is, "*debottar*", "*brahmottar*", "*dharmottar*", or on whatever plea") until brought under assessment at full rates, or until orders to the contrary were received from Government. The introduction further shows that General Jenkins did not treat all "*lakhiraj*" lands as on the same footing and liable to assessment. He drew a broad distinction between "*debottar*" lands, that is, lands appropriated to temples which were subdivided into "*bhogdhani*" and "*paikan*", and lands known as "*brahmottar*" and "*dharmottar*", that is, lands devoted to some religious purpose, not being temple lands. It is, of course, not clear on what grounds he made that classification, but the fact remains that he did so.

In all cases of "*debottar*" lands, he confirmed the grants revenue free, if he found them to have been bona fide and valid. But in the case of bona fide and valid "*brahmottar*" or "*dharmottar*" grants, he simply confirmed the grantee in possession, subject to the payment of the favourable rates fixed by Mr. Scott, until the investigation of the whole "*lakhiraj*" question had been completed and

reported on to the Government of India. This investigation, which extended over several years, was not completed until 1860, and no report was ever submitted to Government, with the result that "brahmottar" and "dharmottar" lands continued to be held at the rates fixed by Mr. Scott, or what is called "half rates" or "nisfkhiraj rates" up to the present day.

The right to continue to hold at those rates has also been recognised, and their estates were declared by the Government of India in 1879 to be heritable and transferable. It is thus clear that "brahmottar" and "dharmottar" lands were in due course clothed with these legal incidents, and in the Assam Land and Revenue Regulation, this class of tenureholders fell under the definition of "landholders", that is to say, they are on the same footing, as regards their status, as the decennial settlementholders at full rates, having a permanent, heritable and transferable interest in their lands, subject to the payment of landrevenue at half the revenue rates that may be assessed from time to time on "kliiraj" or fullrevenue paying lands, and also to the payment of legally assessed taxes and cesses. These legal attributes being there, as it appears from the Introduction to the Regulation, it is incorrect to say that the term "brahmottar" with respect to these lands was not used in a known legal significance by the Revenue Authorities. At any rate, it has to be assumed that these lands, when they were described as "brahmottar" in the revenue records, carried the legal incidents of being transferable and heritable.

These legal attributes of the tenancy are indeed not disputed by the plaintiff. But he seems to prescribe a limit to this right of transferability by stating that it was transferable amongst "Bardeuries" only, and could not be alienated in favour of any stranger; and in case of such a transfer being made, it was open to the plaintiff, as the Doloi of the temple, to resume the tenure. These special incidents, therefore, in derogation of the normal incidents of inheritance and transferability, had to be proved by the plaintiff, specially when in the Revenue records these tenures were repeatedly described as "Brahmottar".

The right of resumption had further to be proved as a special condition of the grant (see "Radha Gobinda v. Shyam Ray", AIR 1949 Cal 208 (A)). In this case, there was documentary evidence to show, as it appears from the judgments of the Courts below, that the "Bardeuri" lands were transferred to nonBardeuries. Some of these transfers were fairly ancient and, if accepted, would destroy the plaintiff's case. But the Courts below have rejected that evidence simply on the ground that the transfers did not prove any custom and that they were instances of misuse.

In my opinion, the Courts below appear to have lost sight of the legal position that it was not for the defendants to prove any custom of transfer in favour of nonBardeuries, but it was for the plaintiff to prove that there was no such right. These transfers, therefore, confirm the normal incidents of the tenancy that it was transferable and militate against the plea of custom or tradition set up by the plaintiff that these lands could not be transferred to strangers or

nonBardeuries.

In my opinion, this was a clear error of law which vitiated the finding of the Courts below on the point.

The position thus is that there is no inscription evidencing the grant, no witness capable of deposing to the actual terms of the grant, and no evidence to show that the right of resumption was a specific condition of the tenure even if it were held to be a service tenure; the incidents of transfer and hereditability were admitted, the former in a modified form, and there was evidence to prove that the lands were being alienated in favour of nonBardeuries. Thus, even on the materials discussed in the judgments of the two Courts below, it is obvious that the plaintiff had not been able to establish the special incidents of the tenures which he pleaded, and the decision of the Courts below on the point is vitiated by the errors which I have discussed above. The suit, therefore, could not succeed on this account alone.

(8) On the point of limitation, I agree with the decision given by Deka J. The transfer in the present case being on the footing that the lands belonged to the Bardeuries themselves, and were not endowed or trust property, the transfers were void "ab initio," even if the plaintiff's case be taken to be correct. Under these circumstances, Art. 144, Limitation Act, and not Art. 134, would apply. (See "Sm. Hemanta Kumari Bose v. Sree Sree Iswar Sridhar Jiu", AIR 1946 Cal 473 (B)). It is also not necessary that the defendants should prove when the plaintiff had knowledge of this transfer in order to make their possession adverse. In fact, the defendants' possession became adverse from the date of the transfer, and so long as their possession was overt, with no intent to conceal, the period of limitation started running from the date of the transfer under Art. 144, Limitation Act. The decision of the two Courts below on the point is, therefore, perfectly justified.

(9) Mr. Ghose contends that a declaration of the kind granted by the Courts below in regard to schedule "Ka" lands should not have been granted under S. 42, Specific Relief Act, and he has pressed his crossobjection on that ground. The declaration given by the Court is perfectly futile and the effect of it is, as pointed out by my learned brother, to keep the title to the property in vacuo. Such a futile declaration should not have been granted to the plaintiff.

In the view which I have taken of the case, it appears to me unnecessary to discuss whether the plaintiff had a right to sue for possession in the interest of the Idols of the temple on the ground that they were beneficiaries in respect of the grant made in favour of the "Bardeuries".

(10) I have already found that the plaintiff has failed to establish the special incidents which he attributed to the tenure of the defendants, namely, that the tenure was burdened with service, and that in case of alienation in favour of strangers, the plaintiff was entitled to resume the tenure, purporting to do so on behalf of the grantors who were then the sovereign authority.

(11) For the reasons stated above, I agree that these appeals should be dismissed and the crossobjection allowed with costs, as proposed.

DEKA J. :

(12) These are two appeals arising out of the same suit filed in the court of the Special Subordinate Judge, L. A. D. (Title Suit No. 37 of 1944) in consequence of two appeals being filed against the judgment and decree of the Subordinate Judge in the court of the District Judge by the plaintiff and the contesting defendants separately as none of the parties were satisfied with the decree. The learned Additional District Judge who heard the appeals delivered one judgment covering the two appeals but two decrees were prepared and hence these two appeals filed by the plaintiff and there is a crossappeal on behalf of the "contesting defendants, they being respondents Nos. 1 to 12.

(13) The plaintiff is the Daloi of the Madhab Temple at Hajo in the District of Kamrup and he brought this suit on behalf of the Madhab Temple for a declaration that the lands covered by the schedules "Ka", "Kha" and "Ga" attached to the plaint could not be alienated to the defendants Nos. 1, 2, 3 (the predecessors in interest of respondents 1 to 12) as the lands originally belonged to some of the Bardeuries of the Temple who held the land subject to rendering service in the shape of seva and puja to the temple deity and they could not alienate the same in favour of nonBardeuries or persons incapable of performing seva and puja to the temple, and the defendants 1, 2 and 3 belonged to this forbidden class.

The plaintiff accordingly prayed that the possession of the said lands be delivered to him on behalf of the temple after declaring the sale deeds in favour of the said defendants to be void and inoperative against the temple.

(14) The plaintiff's case was that he was the f "daloi" or manager of the Hajo Madhav Temple which is a very ancient institution in the Kamrup District. The Assam Rajas granted lands to the Bardeuries in order that they might render Pujah and sevas to the temple deities. The lands thus endowed were burdened with service to the temple.

The original Bordeuris were granted the lands for enjoyment on condition of rendering Pujahs and sevas to the deities in the temple. Ordinarily such lands are inalienable with the only exception that alienation, if any, could be amongst the Bordeuris only, inasmuch as nonBordeuris could not offer pujas and sevas to the temple. The suit land is alleged to be of such a character. Deceased Hemkanta and his sons defendants 4, 5, 6 and 7 were also Bordeuris and they owned Bordeuri lands burdened with temple service and without any right of alienation to nonBordeuris.

On 27139, deceased Hemkanta sold the suit land shown in the schedule "Ka" to the father of defendants Ka) to I(d) and defendants 2 and 3 who were nonBrahmins and nonBordeuris without any capacity to render pujah and sevas

to the temple.

(15) The suit land in schedule "Kha" to the plaint belonged to late Hemkanta and late Umakanta father of defendant No. 8 jointly and it belonged to the same class of land as in schedule "Ka". This land was also sold by them to the father of defendants I(a) to I(d) and the defendants 2 and 3 on 22224. Further the said Hemkanta and Urnakanta sold the land shown in schedule "Ga" to the plaint to the defendant No. 9 on 22124. This is also temple service land. Half of this land was sold by defendant No. 9 to defendant No. 10 on 17524.

Subsequently both defendants 9 and 10 sold the entire land in schedule "Ga" to the father of defendants 1 (a) to 1 (d) and defendants 2 and 3 on 13228 and 19428. All these sales are alleged to be sham and without consideration and the purchases are alleged to be with the knowledge of service tenure. These sales are challenged by the Doloipointiff and hence this suit. The father of defendants Ka) to Kd) died during the pendency of the suit and his heirs were substituted. Their defence is identical with that of defendants 2 and 3. Defendants 4 to 10 did not enter appearance.

(16) The case of the contesting defendants inter alia was that the original grant was never burdened with service, that the lands in suit were personal properties of the Bardeuris and they were alienable without any restriction, that the purchases were for value without any notice of any service tenure, that the claim in respect of lands described in schedule "Kha" and "Ga" was barred by limitation, that plaintiff was estopped from filing the suit and that he was not entitled to sue or succeed in his claim.

(17) The learned Subordinate Judge held that the lands were burdened with service to the temple and the original defendants 1, 2 and 3 being incapable of rendering such service, the alienation in their favour was inoperative, and accordingly, allowed the plaintiff's claim in respect of lands covered by schedule "Ka" and decreed the plaintiff's claim for recovery of possession with the condition that the defendants 4 to 7 who are the heirs of Hemakanta would have the option to enter the suit lands and continue in possession thereof on condition of offering sevas and pujas to the temple and that if the said defendants did not exercise this option, then the plaintiff would be entitled to recover khas possession of the suit lands. The learned Subordinate Judge dismissed the plaintiff's claim with respect to (Kha) and (Ga) schedule lands on the ground that the plaintiff's claim with respect to these lands was barred by limitation under Art. 144, Limitation Act.

(18) The learned Additional Judge on appeal affirmed the decree of the Subordinate Judge with respect to lands covered by schedule "Kha" and "Ga" and held that the plaintiff's suit was barred with respect to those lands and modified the decree with respect to schedule "Ka" lands and held that the plaintiff was not entitled to recover khas possession of the land on behalf of the temple nor the Bordeuris, though the declaration would be there that the

purchasers, that is defendants Nos. 1 and 2 and 3 or their heirs had acquired no right and title to the land (covered by schedule "Ka") on the basis of the purchase as the lands were inalienable, in favour of nonBordeuris, the land being covered by service tenure.

(19) Mr. Lahiri, AdvocateGeneral appearing on behalf of the appellant has urged two grounds, (1) that the suit was not barred by limitation with respect to lands covered by schedule "Kha" and "Ga" and (2) that the plaintiff had the right to resume the grant and enter into possession thereof on the basis of the finding that the land was covered by service tenure and the alienation in favour of the purchaser defendants was bad in law.

(20) Mr. Lahiri's contention was that Art. 134, Limitation Act applies to the facts of the case and not Art. 144 as held by the courts below. Article 134 relates to a suit for recovery of possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration and the limitation prescribed for such suits is twelve years from the date when the transfer becomes known to the plaintiff. Here it has never been the plaintiff's case that the vendors were trustees with respect to the land which they alienated and there was no question of any mortgage being created. Therefore, this Article cannot apply.

(21) His alternate argument is that even if Art. 144 applies, the starting point of limitation was not correctly appreciated. In support of his argument, he draws our attention to paragraph 6 of the plaint which runs as follows:

"The cause of action for the present suit has arisen with effect from 11439 (approximately) the date on which he came to know about the sale of the land described in schedule CKa") in respect of the copy of the sale deed and with effect from 29535 the date of receipt of the copy of the sale deed in respect of the land described in schedules ("Kha") and ("Ga") and from 91244 the date of receipt of the copy of the Jamabandi in respect to the land described in the schedule ("Ga") at village Dobok Maharia within the jurisdiction of this Court."

(22) Mr. Lahiri's contention is that the defendants cannot succeed unless they prove adverse possession for the statutory period and this adverse possession should be to the knowledge of the plaintiff. The plaintiff here did not know about the alienation since the services to the temple were continued by the vendor Bordeuris, and as such, he contends that the limitation should start only from the date of the plaintiff's knowledge as stated in the plaint.

In support of his contention, he relies on "Secy. of State v. Debendra Lal Khan", AIR 1934 PC 23 (C). The case of Debendra Lal Khan has been relied upon by the other party as well in support of their contention. This case evidently does not support Mr. Lahiri's contention. Though the counsel for the appellant before the Privy Council contended that adverse possession should be shown to have been created to the knowledge of the appellant (the Crown) their Lordships of the Judicial Committee rejected that contention and stated that there was no

authority for this requirement.

On the other hand, their Lordships held that it is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. The stand taken by the Crown in that case was identical with the stand taken by the appellant in this case and in our opinion, the Privy Council decision referred to above gives the correct ruling and the contention of the appellant that adverse possession should be to his knowledge cannot prevail.

(23) Another case cited by Mr. Lahiri is "Srischandra Nandy v. Baijnath Jugal Kishore", AIR 1935 PC 36 (D). In this case, also, the Privy Council adopted the same principle as in the earlier decision of the "Secy. of State v. Debendra Lal Khan (C)", but the facts therein were distinguished and in their Lordships' opinion, the defendants had failed to show in Maharaja Srischandra Nandy's case that the plaintiff's predecessors by exercising due vigilance, ought to have been aware of what was happening, apart from the question of whether the possession was adequate in continuity and extent.

In that case, there was removal of some coal, which could not be detected from outside by the predecessor in interest of the plaintiff. The facts in this case surely do not correspond to the facts of the present case as the possession of the defendants could not have escaped the vigilance of the plaintiff if he was particular about it. This case therefore does not help the plaintiff-appellant.

The same principle as in AIR 1934 PC 23 (C) has been followed in "Saroj Basini Debi v. Kumar Kamala Ranjan Roy", 45 Cal WN 126 (E).

The case reported in "Iswar Kalimata v. Manager, Bijni Raj, Court of Wards Estate in Assam", AIR 1952 Cal 387 (2): (P) has a close "affinity to the facts of this case. There it has been held that an alienation by a person who happens to be the shebait 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, and the limitation under Art. 144, Limitation Act would run from the alienation or to be precise, when the transferee takes possession on the strength of the transfer.

(24) The lower appellate court relied for its decision on the case reported in AIR 1946 Cal 473 (B). In "Aswakranta Temple v. Bapuram Koch", S. A. No. 27 of 1951 (Assam) (G) we have held a similar view. The decision had been followed in 1952 Cal 387 (2) (F) as well.

(25) To give effect to this contention on behalf of the appellants would mean that one could postpone his date of knowledge to any date he chose and keep the starting of limitation in abeyance to suit his convenience. In our opinion, the contention of the appellant that the point of limitation was wrongly decided cannot prevail, and the suit was rightly dismissed as barred by limitation with respect to "Kha" and "Ga" schedule lands.

(26) The other point for consideration is whether the plaintiff could resume the grant or get into possession thereof in case of violation of some of the conditions of settlements. It is not the plaintiff's case in the pleadings that he had any such right or that any such condition was attached to the original grant. Mr. Lahiri concedes that the right of resumption rests with the grantor and in this case, the grantor was the Assam Rajah, or at best the sovereign power which succeeded the Assam Rajah, provided it is held that they renewed or ratified the grants.

The plaintiff nowhere says that the right of the sovereign vests in him and though the learned Advocate General made a feeble attempt to show that the mantle of the "sevachalowa" (a Government official entrusted with the management of the temples services in the Kamakhya temple, in the days of the Ahom Kings) fell on the Daloi on the abolition of that office (vide pleadings in the Kamakhya case; "Baroda Kanta v. Bangshi Nath", AIR 1940 Cal 269 (H) he subsequently abandoned that position and argued that the deity was the beneficiary under the grant and could sue for enforcement of the conditions in its favour with respect to the grant.

In support of this contention, he relied on "Khwaja Muhammad Khan v. Hussaini Begum", 32 All 410 (PC) (I); "Dan Kuer v. Sarla Devi", AIR 1947 PC 8 (J) and "Khirode Behari v. Man Gobinda", AIR 1934 Cal 682 (K) and some other cases. All these cases show that in certain circumstances, a third party might sue for enforcement of the contract that enured to his benefit even though he was not a party thereto.

The case reported in 32 All 410 (PC) (I) relates to what is known as "Kharchipandan" agreed to be paid to a Muslim wife by her husband and the arrangement was entered into between the husband and the father of the Muslim lady. There what was held was that a serious injustice might be occasioned if the common English law doctrine were applied to agreements or arrangements entered into by parents or guardians of certain minor persons, as the conditions in India were different from those in England.

In AIR 1947 PC 8 (J) what was held was that where a contract is intended to secure a benefit to a third party as a beneficiary under a family arrangement, he may sue in his own right to enforce it. Therefore, where a partition of the joint family property between the male members of a joint Hindu family is made by arbitrators and a charge for maintenance of a female, member is created by the award over property allotted to certain male member, the female member though a stranger to the contract embodied in the award can sue on it and enforce the charge.

In AIR 1934 Cal 682 (K) the question for decision was whether the plaintiff can rely upon the contract which was made between two groups of defendants and get a decree for his rent against one set and what was held was that though ordinarily only a person who is a party to a contract can sue on it where a contract is made for the benefit of a third person, there may be an equity in the

third person to sue upon the contract.

(27) Assuming that this argument is correct, the only thing that the temple can ask for is the services of seva puja from the defendant Bordeuris and which according to the finding of the learned Additional Judge the Bordeuris are still continuing. Mr. Lahiri argues that in future an emergency might happen particularly when these defendants are dead or refuse to render service but that is no reason why the plaintiff should get declaration for certain rights which he has neither established nor pleaded.

Mr. Lahiri further argues that the service is a charge on the properties in the suit and the plaintiff wanted to enforce the same by "getting into possession, but unfortunately that is not his pleading and the nature of the suit cannot be allowed to be changed in the second appellate stage. In our opinion, the learned Additional Judge was abundantly right in holding that the plaintiff had no right of entry into the disputed lands.

(28) The learned Advocate for the contesting respondents contends that there was no basis for any decree against these defendants inasmuch as the plaintiff failed to prove that he had any right to sue or that the temple had any interest in the property at any stage. It is urged that the original endowment was in favour of the ancestors of the Bordeuri defendants, as the plaintiff himself admits and not in favour of the temple, the temple having its own endowment of a vast area, the original grant or copy thereof not having been produced to show that the land was held by the Bordeuris subject to service tenure, mere statement of some of the interested persons who had no knowledge of the original grant could not be accepted as evidence on the point.

Another contention was that there was no renewal of the grants by the British Government whereas they granted new settlements on the basis of possession by issuing periodic pattas and the Bordeuris had acquired heritable and transferable rights with respect to these lands and the defendants Nos. 1 to 3 being found to be bona fide purchasers for value of these lands which

were covered by the periodic pattas, they had no knowledge whatsoever as to whether there was any restriction on alienation of a limited character as now contended by plaintiff it being admitted by the plaintiff and his witnesses that for all other purposes the land was used as personal property of the Bordeuries as the Subordinate Judge himself found and the Additional Judge left that finding intact.

(29) Another point for consideration is that whether the decree in the present form as passed by Court of appeal below is competent. As the decree now stands, the purchaser defendants have acquired no title under the purchase, the Bardeuri defendants have no title thereto nor do they claim any and the plaintiff has proved no right or title to get into possession. The result is that the title in the property is kept in vacuo which is not a position tenable in law. In our opinion, the correct order would have been to dismiss the plaintiff's suit in toto

on the basis of the finding arrived at by the lower appellate Court.

Section 42, Specific Relief Act, provides that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled.....Here, the finding is that the Daloi or the temple has established no right to the property in suit and there was no question of any legal character or status. Therefore no relief could be given to the plaintiff in this suit and as such it ought to have been dismissed.

(30) The crossappeal on behalf of the contesting defendants should therefore succeed and the plaintiff's suit fails in its entirety. In this view, we need not go into other points raised by the contesting defendants.

(31) The result is that the appeals are dismissed with costs and the crossappeal allowed. There will be only one set of costs.

(32) This judgment to cover both the appeals.

Appeals dismissed.