

(1915) 03 CAL CK 0057
In the Calcutta High Court

Kumar Rameshwar Malia and Others

APPELLANT

Vs

Sri Sri Jiu Thakur, by his Shebait, Mahant Sri Sri Ram
Chandra Acharjya Goswami and Others

RESPONDENT

Date of Decision : 18-03-1915

Acts Referred:

Limitation Act, 1908 — Section 30

Citation : 29 Ind. Cas. 337

Hon'ble Judges : Teunon, J; Fletcher, J

Bench : Division Bench

Judgement

Fletcher, J.—This is an appeal by the defendants Nos. 9 and 13 against the judgment of the learned Subordinate Judge of Bankura dated the 21st September 1911.

2. The suit was brought by the plaintiff, an idol, through his shebait to recover possession of the properties mentioned in the plaint, on the ground that they formed part of the debuttar estate of the idol and that a putni settlement, dated the 29th of Baisakh 1261, granted by a former shebait in favour of the predecessors of the defendants Nos. 1 to 13 was invalid.

3. On the present appeal it was not argued by the appellants that the idol had no interest in the properties in suit. Having regard to the evidence which has been considered at great length by the learned Subordinate Judge, it is clear that the endowment is an ancient one. It was, however, argued before us, though somewhat faintly, that the properties were the private property of the shebait, subject nevertheless to a charge for the maintenance of the worship of the idol. On the evidence before us I think we can come to only one conclusion, namely, that there was an absolute dedication of the properties in favour of the idol.

4. The next question is, whether the present suit is barred by limitation.

5. The grant of a permanent lease without legal necessity was in excess of the powers of the shebait who granted the lease. The shebait who granted the lease

died in the year 1859. Next came an infant who held the office until the year 1863. His adoptive mother then held the office for a few months and was succeeded by the father of the present shebait. The present shebait's father died on the 28th of July 1893 and since that date the present shebait has held the office. The rent has been duly paid.

6. Now the question as to whether a suit of the present nature is barred after 12 years from the date of the permanent lease under Article 134 of Schedule II of the Limitation Act (XV of 1877), has been considered in two judgments of the Privy Council in the cases of *Abhiram Goswami v. Shyama Charan Nandi* 4 Ind. Cas. 449 : 36 C. 1003 : 10 C.L.J. 284 (P. c.) : 6 A.L.J. 857 : 11 Bom. L.R. 1234 : 39 M L.J. 530 : 14 C.W.N. 1 : 36 I.A. 148 and *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* 10 Ind. Cas. 683 : 38 C. 526 : 9 M.L.T. 448 (P.C.) : 15 C.W. N 417 : 8 A.L.J. 528 : 13 Bom. L.R. 421 : 14 C.L.J. 238 : (1911) 2 M.W.N. 28 : 21 M.L.J. 1145. The facts in those two cases cannot be distinguished from the facts in the present case. The view that the Privy Council took with regard to Article 134 of the Schedule II to the Act of 1877 was that the Article only applied to the purchase of an absolute interest and not to the grant of a permanent lease. This view of the law was expressed in the case of *Abhiram Goswami v. Shyama Charan Nandi* 4 Ind. Cas. 449 : 36 C. 1003 : 10 C.L.J. 284 (P. c.) : 6 A.L.J. 857 : 11 Bom. L.R. 1234 : 39 M L.J. 530 : 14 C.W.N. 1 : 36 I.A. 148. It is, however, to be noticed that the judgment in the case of *Ishwar Shyam Chander v. Ram Kanai Ghose* 10 Ind. Cas. 683 : 38 C. 526 : 9 M.L.T. 448 (P.C.) : 15 C.W. N 417 : 8 A.L.J. 528: 13 Bom. L.R. 421 : 14 C.L.J. 238 : (1911) 2 M.W.N. 28 : 21 M.L.J. 1145 was delivered by their Lordships after an application for a review of judgment See *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* 14 C.W.N. cexliv. And in delivering their judgment their Lordships made the following remarks: "The only question remaining depends on the law of limitation. On this point attention has been called to the case of *Abhiram Goswami v. Shyama Charan Nandi* 4 Ind. Cas. 449 : 36 C. 1003 : 10 C.L.J. 284 ; 6 A.L.J. 857 : 11 Bom. L.R. 1234 : 39 M L.J. 530 : 14 C.W.N. 1 : 36 I.A. 148 decided by this Board in July 1909. It is impossible to distinguish that case from the present. Whatever might have been the inclination of their opinion if the matter had been *res Integra* it seems to their Lordships that they would not be justified in reviewing on an *ex parte* application the considered judgment of the Hoard delivered after full argument. They will, therefore, simply follow the decision in *Abhiram Goswami v. Shyama Charan Nandi* 4 Ind. Cas. 449 : 36 C. 1003 : 10 C.L.J. 284 (P. c.); 6 A.L.J. 857 : 11 Bom. L.R. 1234 : 39 M L.J. 530 : 14 C.W.N. 1 : 36 I.A. 148. They do so with the less hesitation because the language of the Article under discussion in that case and in this has been altered by subsequent legislation.

7. Another authority was also relied upon in the course of the argument. That authority was the decision by the Privy Council in the case of *Damodar Das v. Trilochan Das* 7 Ind. Cas. 240. 37 C. 885 : 14 C.W.N. 889 (P.C.) : 7 A.L.J. 791 : 12 Bom. L.R. 632 : 12 C.L.J. 110 : 8 M.L.T. 145 : 20 M.L.J. 624 : (1910) M.W.N. 303 : 37 I.A. 147. That decision did not, however, turn on Article 134 of the

Schedule to the Act of 1877. There was nothing in that case to show that the property was vested in the chela as trustee for the idol. Their Lordships found agreeing with this Court that the property belonged to the idol and that the possession of the junior chela had become adverse to the idol.

8. So far as the evidence goes in this case, it appears that the property was vested in the shebait in trust for the idol. The original grant is not forthcoming but subsequent documents appear to have recognised it. The question of limitation must, therefore, be considered with reference to Article 134 of Schedule I of the Limitation Act (IX of 1908). The wording of that Article is as follows: "To recover possession of Immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration." It will be noticed that the Article in the present Act has been substantially altered from the Article as it appeared in the Act of 1877. Presumably the word "transferred" was deliberately inserted in place of the word "purchased," in view of the decisions on the meaning of the word "purchased" in Article 134, Schedule II, of the Act of 1877.

9. The learned Subordinate Judge has found that the grant of a permanent lease was a "transfer". In that view I agree. He has, however, come to the conclusion that it was not a transfer for valuable consideration. In the opinion of: the learned Judge a transfer for valuable consideration in a case such as the present could only take place when a fine or premium was paid for the grant of lease. The learned Judge, also found that there was no proof that the premium was paid for the grant of the putni in the present case. It may, however, be doubted whether evidence of the actual payment of the premium could, at this time, be produced. But whether that be so or not, I think that a grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration. As was remarked by the Exchequer Chamber in the case of *Currie v. Misa* (1875) 10 Ex. cas. 153 : 1 App. Cas. 554 "a valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other.

10. In my opinion the grant of the permanent lease in the present case was a transfer for valuable consideration and the present suit is barred under Article 134 of the Schedule I to the Act of 1908, unless the plaintiff can bring his case under s 30 of the Act.

11. The learned Vakil for the respondent in the present appeal, however, based his main argument on this branch of the case not on the ground stated in the judgment of the learned Subordinate Judge, but on Section 30 of the Limitation Act, 1908. But that section does not, in my opinion, apply. Section 30 only applies when there is a period of limitation "prescribed" both by the Act of 1877 and the Act of 1908. The decisions of the Privy Council show that no period of limitation was "prescribed" for a suit of the present nature under the Act of 1877.

12. The present suit is, I think, barred by limitation.

13. Another point that raises a difficulty in the way of the respondent is the usufructuary mortgage in favour of the Raja of Pachete. The respondent on the 8th of August 1909 granted to the Raja a usufructuary mortgage of (amongst other properties) the property in suit for a term that had not expired at the institution of the present suit. Whether that mortgage was binding on the idol we do not know, the Raja not being a party to this suit. The mortgage is, however, expressed to be made for legal necessity and is treated by the learned Judge in his judgment as being a valid transaction. On the 9th of September 1909 notice to quit was served on the defendants. But on the 15th of November 1910, that is after the institution of the present suit, the Raja received and granted a receipt for rent part of which accrued due after the institution of the suit. In the absence of the Raja we cannot determine whether the mortgage to the Raja was a valid transaction, but assuming, as the learned Judge did, that the mortgage was valid, then it was not open to the shebait to determine without the Raja's consent the lease to the defendants, the benefit of which had been expressly assigned by the shebait to the Raja in the usufructuary mortgage to him. Moreover, the receipt of rent by the Raja, after the institution of the suit, would seem to show that at the date of the receipt the Raja considered the lease as in existence. Further, under the terms of the decree the defendants are liable to pay mesne profits as from the date of the expiry of the notice to quit, although they have paid rent to the Raja to a date subsequent to the institution of the present suit under an assignment of the rents to the Raja under the terms of a document executed by the shebait, which the learned Judge treats as a valid transaction in his judgment. Clearly the Raja ought to have been a party to the present suit and if his usufructuary mortgage is a valid one, then the defendants have paid rent to him to a date subsequent to the suit and are not liable to ejection.

14. I think we ought to reverse the decision of the learned Judge in the Court below and allow the present appeal. The plaintiff-respondent must pay to the appellants their costs both in this Court and the Court below.

15. The defendants Nos. 14 and 15, who are co-appellants with the defendants Nos. 9 and 13 in this appeal, have, it is represented, settled their disputes with the plaintiff. Their appeal is, therefore, allowed to be withdrawn.

Teunon, J.

16. I agree.