

(1937) 07 CAL CK 0004
In the Calcutta High Court

Sm. Panna Sundari Deby and Others

APPELLANT

Vs

Benares Bank Ltd. and Others

RESPONDENT

Date of Decision : 26-07-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1938 Cal 81

Hon'ble Judges : R.C. Mitter, J; M.C. Ghose, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—These three appeals arise out of three suits for declaration that a house at Dharmatolla Lane in Bally on an area of about 6 bighas and a garden in the same locality on an area of about 17 bighas are the debutter properties of the idols Sree Sree Gopal Jra Thakur and others and are not liable to be attached and sold in execution of money decree obtained by the principal defendants against one Rajendra Nath Sanyal. The idols have brought the suits represented by their alleged shebait, Panna Sundari Debi, who is no other person than the wife of the said Rajendra Sanyal. The suits have been instituted as the executing Courts have rejected the claims of the idols preferred by Panna Sundari to the properties in suit. A short genealogical table is necessary for following the events which have a material bearing on the controversies between the parties:

DEB NATH SANYAL = KANAK MONI (died 26th May 1837) | (died 3rd January 1866)

_____ | | | | Srinath = Muktokeshi Janaki Sita Nath Dina Nath
Jadu (died 30th Janu- (died 16th Septem- (Predeceased = Brojo (died 1839)
(died 2nd ary 1892) ber 1877) Deb Nath) Kumari September 1875 = Nitya Kali
| | Gobinda (died 1849) | Uday (said to be adopted Adopted in 1877 by Brojo
Kumari) Rajendra (died 2nd April 1895) = Panna Sundari.

2. Deb Nath was a very wealthy man of Kulgachi in the District of Burdwan. His wife Kanak Moni was the only daughter of a very rich man, Rash Behary Brojo-bashi. Deb Nath was the executor of the estate of Rash Behary and Kanak Moni

was,, the surviving executrix to her husband's estate after Sita Nath's death. The surviving sons of Deb Nath were the beneficiaries under his will. In 1845 litigations among the members of the family began. Sita Nath left a will by which he appointed Jadhu his executor. His widow Braja Kumari disputed the will. At Sita Nath's death Brojo Kumari was with child. A posthumous son was born, named Gobinda Nath. In 1845 Brojo Kumari brought a suit valued at 13 lacs odd on behalf of her son Gobinda Nath against Jadu by which she claimed possession of the properties left by Sita Nath (Suit No. 26 of 1845). During the pendency of the suit Gobinda Nath died and Brojo Kumari purported to adopt a person, Uday (whose name is very important in the appeals before us) under an alleged verbal authority from her husband. In 1847, Jadu on his own behalf and as executor to the estate of Sita Nath, brought a suit against Kanak Moni in which he claimed 11 lacs odd on the ground that the said money which belonged to Deb Nath had been taken by Kanak Moni, his father's executrix (Suit No. 47 of 1847). The family had their ancestral residence at Kulgachi.

3. On 20th June 1846 Kanak Moni purchased for Rs. 1,400 a piece of bastu with pucca buildings, garden and tank at Bally from Ram Prosad Kongar [Ex, 7 (a).II. I]. The area is stated to be about 4 bighas in the conveyance. She began to reside there. From its description, I have no doubt that this dwelling house was her stridban and is the house mentioned in item 2 of the plaint, although its present measurement is stated to be about 6 bighas odd. In the said house, she established two deities Sree Sree Gopal and Sree Radha Gobinda Jius. The exact time when she consecrated the deities cannot be ascertained, but it was certainly before the year 1852; while the appeals against the decrees passed in Suit No. 26 of 1845 and No. 47 of 1847 were pending in the Suddar Dewany Adalat (Appeals Nos. 110 and 111 of 1852), the parties thereto composed their differences and filed petitions of compromise on the basis of which the said suits were disposed of. Brojo Kumari admitted her husband's will to be genuine and also admitted that the adoption of Uday was invalid, she having in fact no verbal authority to adopt from her husband. Jadu made over 6 annas share of the properties described in the compromise petitions to Brojo Kumari as being her husband's properties and Brojo Kumari absolved Jadu from her claim for mesne profits. She was to take also six annas share of the debts due from debtors amounting to Rs. 1,93,000 odd and bear six annas share of the liability of a loan of Rs 1,13,000 odd due to Protap Singh Dugar and others. The claim for money against Kanak Moni was given up by Jadu, he admitting all moneys which came to her hands as executrix had been spent by her for the benefit of the estate. Kanak Moni gave up all claims to "move-able, immovable or to any other properties left by her husband" (II.25-1, 44-47) (the translation in the paper-book is inaccurate, the words "left by my husband" should be after the words "or to any other properties"). These petitions of compromise were filed on 24th June 1852.

4. On the same day Kanak Moni executed the first deed of endowment in favour of the idols she had already established [Ex. 1 (a).II.7]. In the deed, which was

executed with the consent of Jadu and Brojo Kumari, it is recited that a sum of Rs. 52,480 which belonged to her was in deposit with Babu Prosonno Kumar Tagore carrying an interest of 5 per cent. per annum. Out of this, she made a gift of Rs. 50,000 to the deities. The debtsheva was to be carried on with the interest of the said sum or from the income of properties which may be acquired by employing the said sum or any portion thereof. The deed contemplated the investment of the said sum on mortgages or purchases of immovable properties. She was to be the first shebait. She reserved the right of making rules for the devolution of the office of shebaitship and if she died without making such rules, her heirs were to be the succeeding shebait. On 25th June 1852 (next day) the sum of Rs. 50,000 was lent out to Jadu and Brojo Kumari on mortgage of their zamindaries, etc. The mortgagors having failed to repay, she (Kanak Moni) instituted a suit to enforce the mortgage in the Supreme Court at Calcutta, recovered a decree and in execution purchased the mortgage properties on various dates between February 1854 and October 1856. On 20th July 1859 she executed and registered another deed of endowment (Ex. 1.II.38). By this deed, she formally transferred to the idols established by her as also the idols of her father, her dwelling house at Bally and the properties she had purchased at the aforesaid mortgage sales and a considerable amount of ornaments and moveable properties. She appointed Uday to be the shebait after her, and gave the latter the power to nominate his successor, The deed according to its purport creates an absolute debutter. This deed is the foundation of the claim of the plaintiff deities in the suits before us. The principal defendants challenged this deed as a paper transaction and never meant to be acted upon, and the debutter according to them was illusory. The Subordinate Judge has accepted the defendants contention and the first point for us to see if the finding of the Subordinate Judge on this point is correct. The Subordinate Judge has also found that if this deed represented a genuine transaction, only 4 bighas out of 6 bighas on which the house stands was included in it and the garden (property No. 1 of the plaint) and the rest of plot 2 of the plaint (the house) are not covered by it. From the description of the pro-parties dedicated by this deed (Ex. I), I have come to the conclusion that the whole of property No. 2 of the plaint (house) is dealt with by it, but there is nothing in the deed by which it can be said with any amount of certainty that the garden (property No. I) was also dedicated.

5. On the evidence on the record, I cannot however hold that the debutter made by Ex. 1 was illusory. Kanak Moni had established the deities and in 1852 had executed a formal deed by which she made permanent provision for the worship of the deities. She had established the idols in the house. By Ex. 1 which was executed seven years later, she expressly made the said house the property of the idols. In this document she recites that she had been carrying on the worship in accordance with the provisions of her deed of endowment of 1852. I do not see why these recitals in an ancient document should, in the absence of any evidence to the contrary, be brushed aside. Kanak Moni was a pious Hindu widow of a Brahmin family of affluent means. She was the daughter of a pious man, a

Brojobashi. She had removed from Kul-gachi to Bally, a place on the banks of the holy river Bhagirathi (River Hooghly). She had no debts and no motive to create a fictitious debutter. More than six substantial temples were built in the said house (the reasonable inference is that she built them) and the idols were located there. In these circumstances, in the absence of any evidence to the contrary, the onus being on the defendants, I cannot but hold that the debutter created by Ex. 1 was a genuine debutter and that on the principles formulated in *Har Narayan v. Sarja Kunwari* AIR 1921 PC 20 it was an absolute one, the money allowance reserved for the personal benefit of Brojo Kumari who was not the shebait being very small and comparatively an insignificant amount. The fact that she made Uday the shebait and excluded her heirs from the office was not unnatural. Her eldest son was a lunatic and without issue and her relations with her son Jadu were not happy. No doubt in 1852 her differences with him were composed but only for a short time, for in 1854 she had to sue Jadu to recover the dues on the mortgage. On these facts I hold that the house at Bally which is item 2 of property in suit was the absolute property of the deities.

6. Two further questions arise, namely : (1) whether the title of the idols have been extinguished by adverse possession; and (2) whether the properties were by acts of the members of the family converted into secular property. On the view I am taking on the first of the aforesaid questions, the second question does not arise my view being that long before 1894 the title of the idols to the house had been extinguished by adverse possession. The facts bearing upon the question of adverse possession can be summarized as follows: Kanak Moni died on 3rd January 1865. On her death, Uday became shebait according to the tenor of the deed of endowment Ex, 1, but he was not allowed by the descendants of Kanak Moni to exercise any acts of possession over the debutter properties or to perform the sheba of the idols. He was excluded from the debutter properties and from his office. He lived up to the year 1895. Shortly after the death of Kanak Moni, Muktokeshi made an application to the District Judge of Burdwan under Act 35 of 1858 for adjudging her husband Sreenath a lunatic. The inquisition was held and the properties of Sreenath were made over by the learned District Judge to the Collector of Dinajpur as representing the Court of Wards. This was apparently u/s 11 of the said Act. The properties so made over included the house in suit. The Collector took possession in August 1873 and remained in possession till 1st February 1898 (Ex. L-II .279). There is no evidence that Jadu who died in 1876 or anybody else assumed the functions of shebait of the endowment created by Kanak Moni after Kanak Moni's death or were in possession of the properties dedicated by her in acknowledgment of the idol's title. Three witnesses have been examined by the plaintiff. All the three persons say that the idol's pujas were performed by the descendants of Kanak Moni. That is usual in a Hindu household, for no Hindu would neglect the actual puja, i.e. neglect to offer bhog and flowers to deities located in the house where he is residing. The pujas would be offered whether the idols have property or not. The offering of puja would not necessarily lead to the inference that it was

done in acknowledgment of the idol's title to endowed properties. Of these witnesses, Probodh Chandra Mukherjee who was only 63 years old in 1933 said Jadu acted as shebait. He was only about five years old when Jadu died and is therefore not competent to speak on the subject.

7. Shortly after possession was taken by the Collector of everything as the property of the lunatic Sreenath, Muktokeshi dedicated her personal property at Dianhat to the idols [Ex. 1 (b)-II.49]. She was to be the first shebait under her deed and then Nitya Kali, who was given the power to appoint her successor. If the incomes of the properties dedicated by Kanak Moni were being applied for debsheba or the said properties dedicated by her, treated still as debutter, one would have expected a reference in the recital of Muktokeshi's deed to the deed of the endowment of Kanak Moni and a possible explanation why the additional endowment was being made by her. The possibility is that Muktokeshi endowed her properties because at that time there was no visible fund from which the worship of the idols could be permanently maintained. The fact of the Collector having taken possession may by itself be an equivocal fact, but the said fact when taken with Muktokeshi's deed and the whole course of conduct of the members of the family at different periods of time, coupled with the fact that Uday was excluded and never preferred his claim as shebait, lead to the conclusion that the properties dedicated by Kanak Moni were kept in possession of her defendants on the assertion that they were their personal properties and not the properties of the deities.

8. Sreenath died on 30th January 1892, his wife, Muktokeshi having predeceased him by many years. On his death three applications were made in the Original Side of this Court by three persons, for letters of administration to his estate. One such application was made by Rajendra, another by Uday and the third by Ishan who was the nephew of Deb Nath. These applications were disposed of by compromise dated 6th September 1894 (Ex. O-II-54) as a result of which Rajendra got eight annas share and the house and garden in suit, Uday five annas share and Ishan three annas share. The compromise petition was also signed by Nitya Kali. Rajendra made an application on 17th April 1896 to the Board of Revenue for release of this share allotted to him by the compromise Ex. 0 from the management of the Collector including the house and garden now in suit. In 1900 he mortgaged them along with other properties to Raja Janaki Nath Roy as his personal property and thereafter mortgaged them several times. When the respondents to these appeals attached them, he filed objections u/s 47 of the Code and took all possible and impossible objections but never; breathed that they were the idols' properties. He ultimately agreed to pay the Benares Bank their dues in instalments: and when all resources had failed him, he turned a pious man and declared what he had all along treated as his personal property to be debutter and under the convenient plea of old age with the imagined inability to discharge the duties of a shebait, which he never had discharged at anytime, appointed his wife Panna Sundari to be shebait under his mother's long neglected deed [Ex. 2 (a) dated 1st May 1931. II-209], My findings on these

facts are: (i) the shebait, Uday, was excluded from the worship and the properties under a claim that the properties were secular properties which had descended from Kanak Moni to her natural heirs. The period of exclusion was from 1865, at least from 1873, to 1895 when Uday died; (ii) that Rajendra never acted as shebait, i.e. never placed himself in a fiduciary relation with the idols at any time from 1898 when he got possession of the house and garden in suit till these suits and that the recitals made by him in Ex. 2 (a), the deed by which he appointed his wife shebait, which state that he had been in possession as shebait and discharged the duties of a shebait, are false recitals; (iii) that the idols were located and are located in the house in suit and pujas offered to them, but that is not in acknowledgment of their title to the house in suit.

9. On these findings the question of adverse possession can be decided in one way only, that is against the idols. An idol acts through its shebait, prosecutes and defends suits through its shebait. Its shebait is its protector and defender of its rights. An exclusion of the shebait accordingly from the endowed properties can have the effect of excluding the idol from it. I do not say that that must necessarily be the effect. An exclusion of a she bait from worship and the endowed properties may have only the effect of excluding him from his office. The effect of time following the exclusion of the shebait from the endowed properties may have the effect of extinguishing the idols' right to the property or may have an adverse effect upon his right to the office only. This would depend upon intention with which the acts of dispossession are done. In all cases of adverse possession, the extent of the interest acquired by adverse possession depends upon the assertion of intention expressed or necessarily implied of the wrongdoer when dispossessing and keeping out of possession the rightful owner. When therefore a shebait is turned out and kept out of the endowed properties by a person who has no title on the assertion that the property is his and not of the idols, the adverse possession is against the idol also and if its duration is sufficiently long, the idol loses the right to the property. The physical presence of the idol on the property or the fact that pujas were performed by the wrongdoer are not material. This I take to be the decision both of this Court and the Judicial Committee in *Surendra Krishna Roy v. Ishwari Bhubaneshwari* AIR 1933 Cal 295 affirmed sub nomine AIR 1937 185 (Privy Council) . This I take to be the principle also underlying *Damodar Das v. Lakhan Das* (1910) 37 I A 147. Where a mohant or shebait sells the endowed properties to a stranger who is to hold it as his personal property, the possession of the purchaser becomes adverse to the idol from the date of his purchase and possession, if the sale is void. This is on the principle that the shebait or mohant is kept out of possession by the purchaser on an assertion that the property is his and not of the idol. When the sale or transfer is by the mohant of some item of the endowed property or the whole of it in excess of his powers and the suit for possession is by the succeeding shebait, the possession of the purchaser becomes adverse to the idol from the date the succession opens on the ground that the sale or transfer is not absolutely void and as the purchaser has the right to remain in possession as

long as his transferor is alive and is the mohant or shebait and his possession is referable to a lawful title, his vendor or transferor having no right to challenge his transfer and recover possession. This I think is the principle deducible from the oases in AIR 1933 75 (Privy Council) and AIR 1935 44 (Privy Council) where their Lordships of the Judicial Committee explained and distinguished the oases in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (1900) 27 I A 69 and *Damodar Das v. Lakhan Das* (1910) 37 I A 147 on the ground that the alienations in these cases being of the Mohanti and the endowed properties were absolutely void. In view of the decisions of the Judicial Committee in AIR 1933 75 (Privy Council) and AIR 1935 44 (Privy Council) , it may be a question as to whether the actual decision in *Badri Narayan Singh v. Kailash Gir* AIR 1926 Pat 239 on the basis of which the decision in *Parkas Das v. Janki Ballabha Saran* AIR 1926 Oudh 444 mainly proceeded, was a correct one. I hold accordingly that the title of the idols has been extinguished by adverse possession on the part of the natural heirs of Kanak Moni before the year 1894, the exclusion of Uday being the exclusion of the idols from the properties in suit.

10. I also hold that the possession of Rajendra was also adverse to the idols. Uday having died without appointing any shebait in his place, Rajendra being the sole surviving heir of Kanak Moni at Uday's death would have no doubt succeeded to the shebaiti and would have had a legal title to hold and possess the idols' proper-ties, e. g. the house in suit, assuming that the idols had a subsisting title to the same at Uday's death. But Rajendra never accepted the office. From before Uday's death he asserted his personal right to the same and got them in his personal right by Ex. O. After Uday's death he did not at any time act as shebait and continued to exercise acts of possession and ownership in his character as full owner. The mere fact that in law he would become the idol's shebait on Uday's death would not in my view prevent him from prescribing against the idols. No fiduciary relation with the idol existed between him and the idols; ha never accepted the office of shebaitship. The view I am taking is supported by the decision in *Ganga Prosad Chowdhury Vs. Kuladananda Roy and Others*, where Makham who had been expressly named a shebait in the debutter deed was allowed to prescribe against the idol on the ground that he never accepted. the office. It is also supported by the observations of Rankin C. J. in *Surendrakrishna Roy Vs. Shree Shree Ishwar Bhuvaneshwari Thakurani*, . It is only the acceptance of the office of shebait by a person who has a legal title to it that prevents him from prescribing against the idol on the principle that he then becomes in law the protector of the idol's interest and its natural defender against all attacks there-on by strangers and so cannot be heard to say that he preferred his personal interest over his duty. The possession of Rajendra "was of a sufficient length of time and it alone in my judgment has the effect of extinguishing the title of the idols. I accordingly hold that the suits have been rightly dismissed. In the view I have taken on the question of adverse possession, it is not necessary to decide whether the compromise of the year 1894 (Ex. O) made the properties in suit secular. However, I am of opinion that it

did not for the following reasons:

(i) The question whether the debutter properties can be converted to secular properties was never before the mind of the parties then. For such conversion, the act must be a conscious one, i.e. expressly intended to have that effect. In 1894 the parties had in view only the question of adjusting their claims to Sreenath's properties and divided them in certain shares on the footing that all the items were the personal properties of Sreenath. (ii) All the members of the family were not parties to Ex. O. Panna Sundari and Rajendra's son Jitendra, who was born then, did not join. (iii) For the reasons given by Bankin C.J. in Surendrakrishna Roy Vs. Shree Shree Ishwar Bhuvaneshwari Thakurani, and in oases on the point noticed there, I am of opinion that the theory of conversion of debutter properties to secular properties by consensus of the family members has no warrant in Hindu law and is against Hindu conceptions. Appropriations of idol's properties or what has been given to religious uses and purposes are condemned in unequivocal terms by Hindu sages. Some of the texts are quoted in Bhupati Nath v. Ram Lal (1910) 37 Cal 128 Manu's sloka (11, 26) being one of the most emphatic ones. It runs thus:

The wicked man who misappropriates God property and Brahman property lives in the next world by the leavings of vultures.

11. On the view I have taken on the question of adverse possession, I agree with the decrees made by the learned Subordinate Judge and would dismiss the appeals. Appeal No. 74 of 1934 is dismissed with costs to the creditor defendant, and Appeals Nos. 75 and 76 are dismissed but without costs.

M.C. Ghose, J.

12. I am of the same opinion. The main question is whether the two deeds made by lady Kanak Moni were real deeds of dedication or were merely nominal deeds. In my opinion there would be no doubt that at the moment of the execution of the deeds the lady intended them to be real. It is to be noted that on 24th June 1852, when she made the first deed of dedication, she had on that very day in a compromise with her son Jadunath agreed to give up all her claims to her husband's property moveable or immovable or any other sort; so that this Rs. 50,000 which she dedicated on that day to the idols was the only property left to her out of her husband's estate. She safeguarded it by making the dedication to the idols she had established. Later, this money was taken in loan by her son Jadunath and her widowed daughter, in law Brojo Kumari, but they did not pay back the money and she was forced to bring a suit and realize the same by sale of their properties. This must have caused the revulsion of feelings towards her son Jadunath and her widowed daughter-in-law. In my opinion, that was one of the motives which led to the deed of dedication in 1859 whereby she not only dedicated all her properties to the idols but she appointed her grand-son Uday to be a shebait after her and gave him the power to appoint a shebait after him and directed that if among his own sons and grandsons he found one virtuous and

well-behaved, then he would appoint that person to be the shebait. She further went to the extent of saying that it would not be competent to any heir of herself to prefer any claim to the properties. However strong her power of division might be, the deed was certainly partly actuated by her repulsion of feelings towards her son Jadunath and her widowed daughter-in-law Brojo Kumari. It is probable however as time, the great healing-agent, passed, she gradually came to return to a feeling of more normal affection towards her son Jadunath and probably on that account she before her death in 1865 took no step to have Uday succeed her as she-bait. It does not appear that the properties were registered and mutated as the properties of the idols and it does not appear that Uday after her death made any claim for the office of shebait. Indeed, when the natural heirs of Kanak Moni had taken possession of the property and when, on the petition of the wife of the lunatic son was made the District Judge took the property and made it over to the Court of Wards. Uday applied to the Court of Wards for an allowance on the ground that he was the adopted grandson of the lady Kanak Moni and not on the ground that he as shebait was entitled to the whole of the property on behalf of the idols. That petition was rejected on the ground that the adoption of Uday had not been established to be valid. It is clear therefore that from the death of Kanak Moni the property was taken over by her natural heirs as secular property adversely to the idols. The mere fact that the idols continued to be worshipped does not prove the intention. In a pious family, pious persona, specially pious ladies, continue to worship the family idols even if there be no property wherein the worship is to be done. In such a case the worshippers themselves pay the cost of the worship. It is worthy of note that when in 1877 Muktokeshi, the wife of the lunatic son, dedicated her only little property to the idols, she made no mention of any previous dedication of property by Kanak Moni to the idols. When after the death of the lunatic the persons who claimed to be the only heirs of Kanak Moni applied to the High Court for letters of administration, there was no allegation by anyone that it was the idol's property. They openly claimed the property as secular property and by compromise they divided the property among themselves as secular property. Rajendra who was an adopted son of Jadunath got 8 annas share of the property and he proceeded from the time of taking possession to squander it right and left. The first mortgage he made of the property was in 1900. He made subsequent mortgages and in 1917 Raja Janaki Nath Ray, the mortgagee, had a sum of over Rs. 2,00,000 due on his mortgage and Rajendra was forced to sell away nearly all his property to pay up the mortgage. Apparently, the two plots of land now in suit and another plot were the only property left after the clearance of that mortgage. But still his debts went on.

13. The three present suits arose out of claims by three decree-holders who had obtained decrees : (1) over Rs. 22,000, (2) over Rs. 53,000 and (3) over Rs. 11,000, in all over Rs. 86,000. When the Benares Bank, the defendants in the first case, applied for execution and attached the two plots now in suit and certain other lands, Rajendra made a compromise with them whereby one small

plot of 1 bigha 8 cottas odd, which he had gifted to his son in 1926, was released by the decree-holders and Rajendra promised to pay the decretal sum by instalments. He did not take up the position that the lands in suit were the property of the idols. Afterwards, as he did not pay up the decree, the decree-holders proceeded to take execution. Rajendra made an objection to the execution and took various grounds but not the ground that the property belonged to the idols. His objection was made on 18th November 1930. Thereafter, on 1st May 1931, he made a transfer of the office of shebait to his wife, the plaintiff. Apparently, he was conscious that his objection to the execution would fail and actually it was dismissed shortly afterwards in July 1931. In this position there can be no doubt that Rajendra all his life treated the property as secular property. Indeed he has wasted away nearly the whole of the property and now, when the ancestral residence was also to be lost, he thought the only way to save it would be to go back and assert the claim of the family idols and transfer the office to his wife.

14. The whole claim is a pretence on the part of Rajendra. He having treated the property all his life as a secular property, it is not open to him through his wife to claim it now on behalf of the idols. The idols were dispossessed in 1865 on the death of the lady Kanak Moni. Since then they were worshipped as family idols, but no one asserted or allowed any claim to any property on behalf of the idols. I agree that the appeals must be dismissed. First Appeal No. 74 of 1934 is dismissed with costs, and First Appeals Nos. 75 and 76 are dismissed without costs.