Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Raja Peary Mohan Mukerji v. *Narendra Nath Mukerji and others, from the High Court of Judicature at Fort William in Bengal; delivered the* 16*th December*, 1909.

Present at the Hearing:

LORD MACNAGHTEN.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal from a Decree of the High Court of Calcutta affirming a Decree of the Subordinate Judge of Hooghly.

In the Court of first instance the present Respondents were Plaintiffs. The suit was brought by them as executors of Bijoy Krishna Mukerji, who was Shebait of a debottar estate for nearly four years, to recover Rs. 77,964.9.6 alleged to be due to him in that capacity, either from the estate or from the principal Defendant, the present Appellant, personally.

The history of the litigation is shortly as follows:—

Jaga Mohan Mukerji, who died in 1840, by will dedicated certain properties to the sheba, or worship, of two Thakurs, or idols, the annual celebration of Durgapuja and other pious acts,

[61] P.C.J. 175.—L. & M.—125—25/11/09. Wt. 98.

and provided for the order of succession to the office of Shebait among his own descendants.

The first Shebait was the Appellant's father. He was succeeded by his step-brother, who died in September, 1890. On his death the succession opened to Bijoy Krishna Mukerji.

Bijoy's succession was opposed by the present Appellant, who threw every possible difficulty in the way of his obtaining possession of the estate and collecting the rents.

Finally Bijoy brought a suit, No. 40 of 1892, in the Court of the Subordinate Judge of Hooghly, to establish his title to the office of Shebait under the testator's will.

On the 29th of January, 1894, the Court decided in Bijoy's favour. Bijoy died on the day on which the Decree was made. By his will he appointed the present Respondents his executors, and on the 2nd of March, 1894, they obtained probate.

On the 25th of January, 1897, the Respondents brought the present suit against the Appellant, who had been appointed receiver of the debottar estate, both in his capacity of receiver and in his personal capacity. All the surviving descendants of the original testator were made Defendants. The Respondents as Plaintiffs alleged that, owing to the interference of the Appellant and his persistent opposition, Bijoy was not able to recover more than Rs. 4,607 odd during his incumbency, while he was compelled to spend Rs. 71,572 odd out of his private funds in protecting the debottar estate and performing his obligations as Shebait, and that after Bijoy's death they had to pay a further sum on account of the debts of the estate. In the result they claimed the sum of Rs. 77,964.9.6 from the estate, or in the alternative from the Appellant personally.

The Appellant defended the suit, alleging, among other things, that the claim was barred by limitation, and that neither he nor the estate was under any liability to Bijoy's executors.

On the 17th of February, 1899, the Subordinate Judge made a Decree determining that the claim was not barred by limitation. He held that the Appellant was liable personally so far as he had realised moneys belonging to the estate, and that, as regards the rest of the claim, the debottar estate was liable for such costs and losses as on enquiry by a commission should be found to be reasonable. The Appellant appealed to the High Court. On the 28th of November, 1900, the High Court held that the claim against the Appellant personally could not be maintained. As regards the rest of the claim the learned Judges were of opinion that it was not barred. But, although every possible claimant to the office of Shebait was a party to the suit, they thought that the debottar estate was not properly represented, and they remanded the suit in order that the prayer of the plaint might be amended, so as to raise directly the question as to the right to the office of Shebait, and the representation of the estate.

On remand, the Subordinate Judge came to the conclusion that the Appellant must be considered to be the Shebait and, as such, the proper person to represent the estate. He directed that two Commissioners should be nominated to enquire into and report upon the expenditure in question with liberty to state their own opinion in regard to the liability of the Appellant as Shebait.

On the 16th of March, 1903, the Commissioners so appointed submitted their report. After a detailed examination of the several matters referred to them, they stated that, in their

opinion, the sum of Rs. 49,139 odd was due to the Plaintiffs. Both parties filed objections. On the 30th of June, 1903, the Subordinate Judge delivered his final judgment to the effect that the amount found due by the Commissioners should be reduced to Rs. 45,960.11.10. He held that that sum was recoverable from the debottar estate, then in the hands of the Appellant as Shebait.

Both parties again appealed. On the 24th of February, 1905, the High Court affirmed the Decree of the Subordinate Judge and dismissed both the appeal and the cross-appeal with costs.

From that order the Appellant has appealed to His Majesty in Council.

On the hearing before this Board the learned Counsel for the Appellant raised two points. They contended (1) that the suit was barred by limitation and (2) that the estate of Bijoy was not entitled to be reimbursed out of the debottar estate expenditure incurred by Bijoy as Shebait in excess of his actual receipts from the property.

As regards the first question their Lordships are of opinion that the appropriate period of limitation is the period of six years from the date of Bijoy's death, and that the suit therefore was instituted in time, inasmuch as the amendment directed by the High Court did not alter the character of the suit and no new Defendant was brought on the record. The object of the amendment was to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered Shebait.

As regards the question of reimbursement, it is quite clear, and indeed it was hardly disputed, that Bijoy's estate was entitled to be reimbursed all sums properly expended by him in the

preservation of the trust estate, as for instance all moneys paid in respect of Government revenue and the like. It is equally clear that Bijoy's estate is entitled to be reimbursed all moneys properly expended by him in defending his position as Shebait, which was challenged unsuccessfully by the Appellant. If any authority is wanted for this proposition it will be found in *Walters* v. *Woodbridge*, L.R. 7, C.D. 504. As regards the other items of expenditure, their Lordships are of opinion that Bijoy's estate is entitled to be reimbursed all moneys properly expended in performing the obligations imposed upon him by the original testator's will. The right of indemnity as has often been said is incident to the position of a trustee. The liability in respect of that indemnity is the first charge on the trust estate. The only question is, was Bijoy, as trustee, justified in incurring the expenditure for which his executors now claim reimbursement? It was contended by the learned Counsel for the Appellant that Bijoy was not justified in spending, as Shebait, more than he actually received, and that he ought to have managed the trust so economically, that at his death, whenever it might happen, there should be no outstanding claim against the trust estate. This objection is somewhat ungracious, if not absurd. There is no foundation for it in the will. The average income of the trust estate on which Bijoy might fairly have calculated was Rs. 10,000 a year. During the whole period of his incumbency he received less than Rs. 5,000. The diminution of income was due entirely to the Appellant's wrongful acts. It was not unreasonable to expect that, on the cessation of those acts or on the interposition of the Court which Bijoy invoked, the income would be sufficient to defray the expenditure incurred in the meantime in

maintaining the religious observances prescribed by the founder of the trust.

Their Lordships see no reason to differ from the High Court. They will therefore humbly advise His Majesty that the Appeal should be dismissed.

The Appellant will pay the costs of the Appeal.

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