

*Privy Council Appeal No. 121 of 1929.*

K. B. Mian Karim Bakhsh, since deceased (now represented by  
Haji Allah Bakhsh and another), and others - - - *Appellants*

v.

Dargah Pir Rattan Nath and others - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, NORTH-WEST  
FRONTIER PROVINCE.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 11TH JUNE, 1931.

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*Present at the Hearing :*

LORD RUSSELL OF KILLOWEN.

SIR GEORGE LOWNDES.

SIR DINSHAH MULLA.

[*Delivered by* SIR DINSHAH MULLA.]

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The property in dispute is a *serai* situated outside the Katcheri Gate of the Peshawar City, which, with some lands and buildings adjoining it, belonged jointly as to one moiety to Sadhu Ram and his sons, who were members of a joint Hindu family, and as to the other to Lachmi, widow of Mul Chand. In the Jamabandi for the year 1895-96 these properties were entered in the names of Sadhu Ram and Lachmi as owners.

On January 24th, 1900, Sadhu Ram executed a mortgage with possession of his interest in the *serai* and a house in favour of the first appellant and two others to secure payment of Rs. 7,500 advanced to him by the mortgagees.

Shortly afterwards Sadhu Ram contracted to sell his interest in the *serai* and the lands and buildings to Pir Moti Nath. The contract was not carried out and a suit was brought by Pir Moti Nath against Sadhu Ram, Rs. 1,292.3.0 being claimed as damages. The suit was compromised through the intervention of a *jirgah*, the final arrangement being that Sadhu Ram should make a gift

of the *serai* and the lands and buildings to a Dargah, known as Dargah Pir Rattan Nath, and that the Dargah should compensate Pir Moti Nath by a payment of Rs. 1,200, and contribute Rs. 5,000 towards payment of the mortgage debt.

In accordance with the compromise Sadhu Ram executed a deed of gift on August 27th, 1904, in favour of the Dargah. The deed was duly registered. In 1909 the Dargah applied for mutation as purchaser of the *serai*, and there is a note in the Jamabandi for the year 1909-10 that the property was sold to the Dargah and that a revenue mutation had been entered up.

On June 21st, 1911, Sadhu Ram purported to sell the equity of redemption in the *serai* and the house to the mortgagees for Rs. 9,484.5.3.

This sale was impeached by the sons of Sadhu Ram while the latter was still alive, with the result that the mortgagees reconveyed the house to the sons and the sons executed a release on March 24th, 1912, of their interest in the *serai* in favour of the mortgagees.

Subsequently, on a partition amongst the mortgagees and the heirs of such of them as were dead, the *serai* came to the share of some of them, who sold it to the fourth appellant in 1924.

On January 13th, 1925, the Dargah instituted the present suit in the Court of the District Judge of Peshawar for redemption of the mortgage against the first and fourth appellants and the legal representatives of the deceased mortgagees. The widow and sons of Sadhu Ram, who was then dead, were subsequently impleaded as defendants. The plaint alleged that the Dargah had paid Rs. 1,200 to Pir Moti Nath, that the transfer of the *serai* by Sadhu Ram to the Dargah, though in form a gift, was in reality a sale, and that the subsequent sale by Sadhu Ram to the mortgagees was a nullity, as Sadhu Ram had then no interest in the property. The plaintiffs offered to pay the full amount of the mortgage debt, though their liability under the agreement referred to above was limited to Rs. 5,000.

The defendants denied payment of the Rs. 1,200 by the Dargah to Pir Moti Nath. They contended that the *serai*, being joint family property, the gift of it by Sadhu Ram to the Dargah was void, and that the plaintiffs were precluded by their conduct from disputing the validity of the 1911 sale.

The District Judge found that the transfer of the *serai* by Sadhu Ram to the Dargah was for the discharge of an antecedent debt and was therefore valid, but he dismissed the suit on the ground that Sadhu Ram's name continued to appear in the revenue records as part owner, and that the mortgagees were entitled to the property under Section 41 of the Transfer of Property Act, as *bona fide* purchasers for value from Sadhu Ram, who the judge held was ostensible owner of the property with the consent of the Dargah within the meaning of that section.

Against this decree the Dargah preferred an appeal to the Judicial Commissioner, North-West Frontier Province. He found

that the Rs. 1,200 was paid in fact, and he agreed with the District Judge in holding that the transfer to the Dargah was for the discharge of an antecedent debt, but disagreed with his conclusion that the mortgagees were *bona fide* purchasers of the property without notice. He pointed out that the Transfer of Property Act was not in force in that Province, and that the principle of the section in question could have no application, as the mortgagees would, if they had taken search of the revenue records, have found the note referred to above in the Jamabandi for the year 1909-10. He accordingly passed a preliminary decree, dated August 18th, 1928, in favour of the Dargah for redemption on payment by the Dargah into Court of Rs. 14,723 within six months from the date of the decree.

Against this decree the defendants, other than the widow and sons of Sadhu Ram, have appealed to His Majesty in Council. It has been urged on behalf of the appellants that there is no satisfactory evidence of the payment of Rs. 1,200, that the transfer by Sadhu Ram to the Dargah was not for the payment of an antecedent debt, and that the Dargah was estopped from disputing the validity of the sale by Sadhu Ram to the mortgagees.

As regards the payment of Rs. 1,200, two witnesses, Visakhi Singhi and Lala Ram Nath, were examined on behalf of the Dargah, and they both deposed to the payment. The District Judge, though he has not recorded any express finding as to the payment, does not discredit them in any way, and the Judicial Commissioner accepts their evidence. Their Lordships see no reason to differ from his conclusion.

On the question whether the transfer of the *serai* by Sadhu Ram to the Dargah was for payment of an antecedent debt, there are concurrent findings of facts of both Courts in India which their Lordships accept.

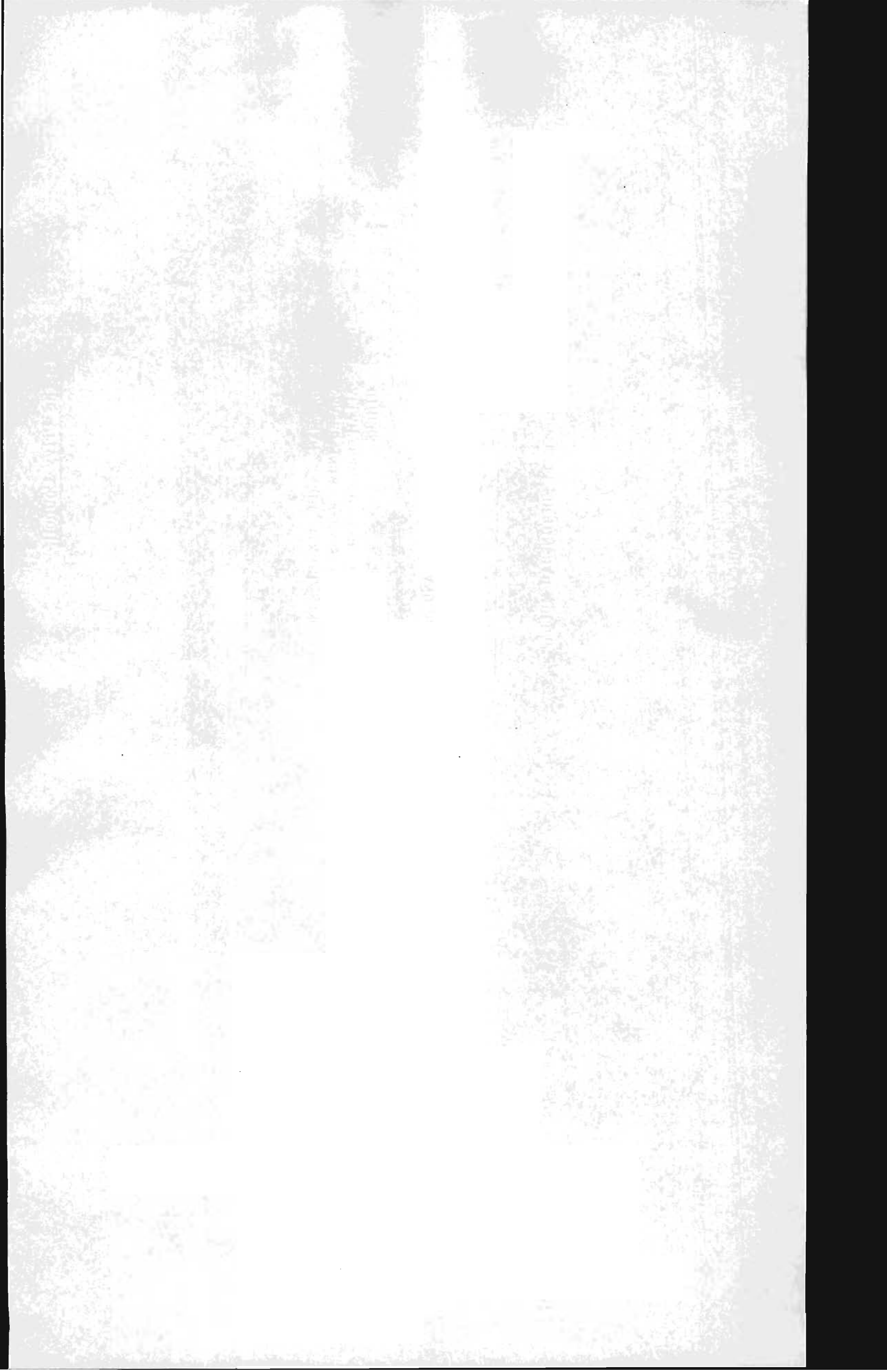
At the hearing of the appeal a point was raised on behalf of the appellants that the religious obligation of a Hindu son to pay his father's debts is confined to debt in the sense of an ascertained sum of money, and that it does not extend to a liability for unliquidated damages for breach of contract. Starting with this proposition, counsel for the appellants contended that the ascertainment of the amount of damages to be paid by Sadhu Ram to Pir Moti Nath and the transfer of the *serai* by Sadhu Ram to the Dargah formed parts of one and the same transaction, and that the condition laid down by this Board in *Brij Narain v. Mangla Prasad* (1924), L.R. 51 I.A. 129, at p. 139, that the debt must be independent and not part of the transaction impeached was not satisfied.

This point was not taken in either of the Courts below, nor was it a ground of appeal before their Lordships. Had the question been raised before the trial Court, the respondents would have had an opportunity to show that the amount of

damages was ascertained before the transfer of the property was agreed to, and that the debt was truly independent of the transfer. Under these circumstances their Lordships think that the point, whatever its value might be as a legal proposition, is not open to the appellants.

As to the point of estoppel raised for the appellants, their Lordships think that there is no substance in it. It is not suggested that the mortgagees took search of the revenue records, and it is idle to suggest that they were misled.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.



In the Privy Council.

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K. B. MIAN KARIM BAKHSH, SINCE DE-  
CEASED (NOW REPRESENTED BY HAJI  
ALLAH BAKHSH AND ANOTHER), AND  
OTHERS

v.

DARQAH PIR RATTAN NATH AND OTHERS.

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DELIVERED BY SIR DINSHAH MULLA.

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