(1940) 12 BOM CK 0007

Bombay High Court

Case No: None

Maharani Hemanta Kumari Debi	APPELLANT
Vs	
Gauri Sankar Tewari	RESPONDENT

Date of Decision: Dec. 4, 1940

Citation: (1941) 43 BOMLR 777

Hon'ble Judges: Thankerton, J; George Rankin, J; Atkin, J

Bench: Full Bench

Final Decision: Allowed

Judgement

George Rankin, J.

The sanctity which Hindu thought and feeling attribute to the Ganges and the special veneration which its stream commands at it flows past the holy city of Benares (Kashi) are manifested by the temples and bathing ghats upon the banks. The efficacy of its waters to wash away every form of sin and pollution is widely accepted doctrine among the orthodox and brings the Hindu pilgrim in large numbers seeking to acquire religious merit and advantage. According to evidence given in the present case "Mankarnika, Dasaswamedh, Panch Ganga, Assi and Barna are the panch tirthas, of Kashi: one who comes to Kashi on pilgrimage has to visit all these five places." In this appeal their Lordships are concerned with a bathing ghat which is known as the Prayag or Puthiya ghat and which is covered by the name Dasaswamedh--the name of a mohalla, of the city.

2. The suit was brought on February 15, 1929, in the Court of the Additional Subordinate Judge of Benares, The plaintiff was Maharani Hemanta Kumari Debi, widow of the last male owner of the Puthiya Raj estate. She claimed to be owner of the ghat. She will be referred to as "the plaintiff" notwithstanding that pending this appeal she has by relinquishnent accelerated the interest of her husband''s reversioners who have been joined with her as appellants to His Majesty in Council. She impleaded six sets of defendants, fourteen persons in all, alleging that they belonged to a class of Brahmins known as ghatias and that they, and their

predecessors, had been allowed by the owners of the ghat to sit on different portions of it in order to gain a livelihood by receiving alms and gifts from pilgrim bathers. She complained that the defendants were abusing the permission granted to them, by altering the condition of the steps, putting down platforms of earth and wood, erecting canopies, and blocking up the free space to the detriment of the utility, cleanliness and beauty of the ghat. She alleged that the defendants were mere squatters; that she had been willing to allow them to continue to sit on the ghat if they would execute written agreements for the proper conduct of the ghat; but that they had failed or refused so to do. She asked for relief in different forms--a declaration that she was the owner of the ghat and that the defendants had no right to sit on any portion of it; an order of ejectment of the defendants; an order for removal of the various obstructions put up by the defendants; and an injunction restraining the defendants "from using any portion of the said Prayag ghat as ghatias in any season of the year and from sitting and squatting over the same for the purposes of collecting dan dakshina from the bathers."

3. A number of written statements were filed. The defendants numbered 2, 8 and 11 pleaded that they were mere servants of other defendants. The main defence as pleaded on behalf of the rest denied the plaintiff''s proprietary right and set up that the ghatias were a community whose business and duty it was to assist bathers; that a ghat necessarily involved a right on the part of some members of this community to occupy portions of it by the use of seats or platforms of the kind known as chaukis or takhts; that this right was a form of property heritable and transferable by the Hindu law; that the defendants and their ancestors had been in occupation of definite sites on the ghat for hundreds of years; and that they had been guilty of no impropriety. They maintained that a right to occupy sites-on the ghat by laying out chaukis and takhts had become vested in them by lost grant, prescription or custom.

4. The learned trial Judge heard more than twenty witnesses and by his judgment (June 25, 1930) came to the conclusion that the plaintiff''s ownership of the ghat was proved and that she had a right to sue as owner notwithstanding that the ghat was dedicated to the use of the public for purposes of bathing. He found that the ghatias do not belong to any particular class or community but are called ghatias because they sit on the ghats. He thought that there was nothing in any Shastra to show that their presence at the ghat is indispensable for the performance of religious ceremonies or that a bath in the Ganges would not yield any spiritual benefit unless accompanied by gifts to them. He found that in the case of plaintiff''s ghat and neighbouring ghats the ghatias had sat by leave and licence of the owners. He negatived the existence of any customary right in the defendants and found that at no time had any grant of any interest in the ghat been made to them. He further held that they could have no claim by prescription to an exclusive right to occupy any specific portion of a bathing ghat dedicated to the use of the public. In the result he found for the plaintiff, but, following a practice which is not to be commended,

he contented himself with ordering "that the plaintiff''s suit as prayed be decreed" without formally stating the terms of the various orders, declarations and injunctions which he was granting, save by this reference to prayers in the plaint which might well have been improved by revision. An appeal to the High Court was taken by a number of the defendants.

5. On March 27, 1935, it came before a division bench, who, in referring it to a full bench, recorded an order mentioning that before them it was not in dispute that the plaintiff was owner of the ghat or that: the defendants or their predecessors had sat on different portions of the ghat for generations; also that the defendants did not claim any right by virtue of adverse possession but that they did claim a right of property in the ghat in respect of their long use of it for the purpose of assisting the bathers. A single judg ment was given by the full bench (Sulaiman C.J., Bajpai and Ganga Nath JJ.) on January 3, 1936. The learned Judges maintained the decree of the trial Judge in so far as it directed removal of railings, planks, canopies and other articles of obstruction but discharged the trial Judge''s order of ejectment and the injunction granted by him to restrain the defendants from using the ghat as ghatias or sitting or squatting over the same. They discharged also the declaration made by the trial Judge that the plaintiff was owner of the ghat. The plaintiff upon this appeal complains of these variations and asks that the decree of the trial Judge be restored.

6. In the view of the learned Judges of the full bench the right claimed by the defendants may be divided into two parts: (1) a right to exclusive possession over specific plots of land and to place platforms and canopies over them; (2) the right to minister to the needs of the bathing public and to receive alms and gifts for their services. As regards the first, the full bench found some difficulty in appreciating the nature of the right claimed, but they found that ghatias as members of a class have no customary right and that the individual defendants could have no right by custom to exclusive possession of any parts of the ghat. The claim to such a right by prescription or lost grant was also held to be bad. The full bench considered it to be proved that the takhts and canopies had been obstructions leaving little space for passage, injurious to the pavement and dangerous to the public using the ghat. In their Lordships'' view, the reasons given by the learned Judges in their judgment fully justify their order for removal of the obstructions, and their rejection of the defendants'' claim to have acquired any rights in this ghat whether by custom, prescription or grant. The defendants have not appealed from the High Court''s decree.

7. But the full bench set aside the trial Judge''s decree of ejectment and the injunction granted by him on the ground that such relief would interfere with the right of "the bathing public" to take to the ghat persons who may help in the proper performance of "spiritual ablutions" and ceremonies. It would be inconvenient, in a suit not constituted for the purpose, that an attempt should be made to define with exactness the extent of the user which the public have as of right in this ghat. But if

it be assumed that any bather may bring with him his own priest or his own friend to assist in ceremonial ablutions, this is not in their Lordships'' view a valid reason for refusing to the plaintiff an order in ejectment together with a properly framed injunction. The defendants have been sitting on the ghat for the purpose of carrying on their occupation there and have claimed to be entitled to exclusive possession of parts of the ghat as a right of property. If the plaintiff''s ownership and possession entitle her to relief, then, upon it appearing that the defendants have no such rights as they claim, she is as well entitled to an order that the defendants should remove themselves as to an order for removal of their canopies. They are not persons who come with bathers to the ghat but persons who cumber the ghat in order to intercept the bathers and who do so continuously habitually and as an occupation or profession. A right to stand, sit or squat on the ghat for the purposes of exercising the profession of ghatias may be acquired by consent of the plaintiff, but as matters stand it is not the right of any of the defendants.

8. As the rights claimed by the defendants have not been established, it is not clear that they have anything to gain by disputing whether the plaintiff is owner of the ghat or is merely the hereditary superintendent of a religious endowment. In either case she would be entitled to maintain a suit in respect of the grievances complained of, and to obtain the same or similar relief. But as the plaintiff sued as owner and as the full bench appear to have held that she was a mere manager or mutawalli, it is right to consider whether the trial Judge''s declaration of the plaintiff''s ownership was well founded.

9. A bathing ghat on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a dharamsala or a math, notwithstanding that it be not dedicated to any particular deity. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal school of Hindu law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object, but also, as Mr. Mayne in his well-known work was careful to notice, "where the owner retained the property in himself but granted the community or part of the community an easement over it for certain specified purposes" (Hindu Law and Usage, 6th edn., 1900, Section 438, p. 567). In Jaggamoni Dasi v. Nilmoni Ghosal ILR (1882) Cal. 75 the plaintiff''s

ancestor had built a temple and bathing ghat, as well as a room and another ghat for use by persons at the point of death. The defendant having used the ghat for the landing of goods, Field J. observed (p. 76):--

There is here no deed of endowment, and no evidence has been taken as to the exact purpose and object of this so-called endowment. The first question which suggests itself is whether the plaintiff''s father, in building these temples, this antorjoli room, and this ghat, intended to give to the Hindu community a right of easement over the soil, or intended to transfer the ownership of the buildings as well as the Ownership of the soil to such community. It by no means necessarily follows that, because the plaintiff''s father erected this ghat and this antorjoli-room, and allowed the Hindu community to use them for the purposes set out in the plaint, he intended to divest himself of the ownership of thesoil,&c

10. The judgment of the full bench in the present case is open to criticism in respect that it does not take due account of this distinction. Speaking of the tolls collected from shopkeepers on the ghat at festivals, the learned Judges, though noticing that no trustee or managen had ever been appointed and that the plaintiff and her predecessors had bought the land, built the masonry steps and had always looked after and repaired the ghat, say:--

The ghat having been dedicated to the public, it is not conceivable that the plaintiff or her predecessors could have ever wished to appropriate its income to their private use, nor has the plaintiff made any attempt to show that its income was ever appropriated by her or her predecessors. It therefore appears that the plaintiff and her predecessors realised the income of the ghat and made repairs as a manager or mutwalli and not as an absolute proprietor. The plaintiff is not entitled to a declaration of an absolute proprietary title in the ghat, as the same has been dedicated to the public, and the plaintiff has only the right of reversion if ever the ghat ceases to be used as such.

Another passage deals with the right of the defendants as follows:--

The ghat having been dedicated to the public, the defendants could not have acquired any right under any grant or prescription which might interfere with or limit, the rights of the public. As already stated, there is no difference in principle between the dedication of a ghat to the public and the dedication of a highroad.

11. Now there is the very broadest distinction between saying that the plaintiff''s ownership is not absolute because it is qualified by the public''s right of user for purposes of bathing, and saying that the plaintiff is not the owner at all, but a mere mutawalli in whom nothing vests because her predecessor had dedicated the ghat in the full sense of divesting himself completely of all interest therein. When in English law the owner of land is said to have dedicated it for a highway it is not intended or implied that his right of ownership has been divested. On the contrary if any member of the public exceeds the permitted user, a right of action in trespass

arises to the dedicator or his successor in title by virtue of his ownership and possession: St. Marry, Newington v. Jacobs (1871) L.R. 7 Q.B. 47 and Harrison v. Duke of Rutland [1893] 1 Q.B. 142. Dedication in the full sense known to the Hindu law is a different matter. In the usual case of complete dedication made to an idol, for example, the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is however by no means the only form of dedication known to the Hindu law and is very different from anything that could ordinarily be inferred from the public user of a highway. From the standpoint of the Hindu law "it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated." The Chairman, Hawrah Municipality v. Khetra Kristo Mitter (1906) 10 C.W.N. 1044(per Mookerjee J., at p. 348). When the dedication is only partial the property in some parts of India might none the less in common parlance be described as devottar; but whether it be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it would descend and be alienable in the ordinary way; "the only difference being" as Mr. Mayne observes in the passage already referred to in this judgment "that it passes with the charge upon it." (Hindu, Law and Usage, 6th edn., 1900, Section 438, p. 567).

12. The conclusion of the full bench that the plaintiff had only the right of reversion if ever the ghat ceases to be used as such appears to have been drawn from the mere fact that the ghat was "dedicated to the public." But a review of the history of the ghat and the conduct of the plaintiff and her predecessors is required to determine whether the river bank at this spot was dedicated in such sense as to make an end of private ownership therein. The written statements of the defendants set up that "the land on the bank of the holy River Ganges between the two confluents of Baruna and Assi rivulets in the city of Benares is waqf property from time immemorial the same having been dedicated to the Hindu community at large." The exceeding sanctity of the river is not of itself a reason why a pious benefactor of the public should do more than provide access to its waters. Whether the question be limited to the ghat in suit or be enlarged by consideration of the evidence about neighbouring ghats, it seems to their Lordships that there is no substantial ground for holding that the plaintiff''s predecessors or any of them had divested themselves of all property in this ghat and had accepted the position of having a mere right of management. No express dedication has been proved by production of a deed of endowment or otherwise. No manager has ever been appointed. Not one instance has been shown in which the plaintiff or any predecessor has purported to act as superintendent, sebait or mutawalli. On the contrary they have been treated as owners whenever by disrepair the ghat has attracted the attention of public authority. They have repaired and substantially

improved the ghat at their own expense. They have closed it to bathers on proper occasions and have levied tolls on the keepers of shops at festivals. That their expenditure upon the ghat has exceeded their receipts and that they would not wish to make a profit from the tolls is probable enough, but in no way tends to prove that they have parted with all right as owners of the soil. The evidence as to agreements taken from ghatias upon nearby ghats is strong to show that in them the proprietors have retained their rights of ownership notwithstanding that the ghats are public bathing places. The learned trial Judge very reasonably thought that the evidence was overwhelming to show the plaintiff''s proprietary right, and their Lordships, though bearing well in mind that there was a bathing ghat at this spot before the purchase of the plaintiff''s predecessor in 1814, think that there is little to support a contrary view. The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu: but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication: rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety. It may well be doubted whether a complete abandonment of the owner''s rights is at all usual in the case of public bathing ghats: though it might be common enough in the case of tanks dedicated to the public for bathing purposes: even then the ownership of the banks would be another matter.

13. Their Lordships are of opinion that the declaration made by the trial Judge as to the plaintiff''s ownership as well as his order of ejectment against the defendants was correct. They think that the terms of the permanent injunction to be granted to the plaintiff should restrain the defendants from frequenting the Prayag ghat, without the consent of the plaintiff or her successor in title, for the purpose of acting as ghatias thereon, and from sitting or squatting upon the same without such consent in the exercise of the profession or occupation of ghatias.

14. They will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dated January 3, 1936, be set aside and that the decree of the Additional Subordinate Judge of Benares dated June 25, 1930, be restored, with the variation mentioned as to the terms of the permanent injunction. The respondents will pay the costs of the plaintiff in the High Court and of the appellants in this appeal. The appellants must, however, pay to the respondents the costs of the application to restore the appeal, which had been dismissed for non-prosecution, as directed by the Order in Council of July 25, 1939, and there must be a set-off as regards these costs.