

**Rahaman Buksh and ors. Vs. Sarkum Abu Torab Abdul Waheb and ors.**

**Rahaman Buksh and ors. Vs. Sarkum Abu Torab Abdul Waheb and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/852716](http://sooperkanoon.com/852716)

**Court :** Kolkata

**Decided On :** Jul-17-1896

**Reported in :** (1897)ILR24Cal83

**Judge :** Macpherson and ;Hill, JJ.

**Appellant :** Rahaman Buksh and ors.

**Respondent :** Sarkum Abu Torab Abdul Waheb and ors.

**Judgement :**

**Macpherson and Hill, JJ.**

1. The plaintiffs in this suit pray for a decree declaring them to be the khadims of the durga of Hazrat Shah Zilal, and declaring them also as khadims to be entitled to perform the duties attached to that office for twenty one days in each month, and during the same periods to receive the offerings (nazar-niaz) made by worshippers at the durga. They also ask for an injunction restraining the principal defendants from interfering with them in the enjoyment of these offerings as well as in the performance of their khadimi duties.

2. The suit has been decreed by both the Courts below. The defendants now in appeal to this Court question the correctness of these decrees on the grounds that the suit is barred by the operation of the rule of res judicata; that it is barred by limitation; and that the rights which form the subject-matter of the suit are not

transferable either by sale or by inheritance, more particularly through a female.

3. The plaintiffs' case is that the rights which they claim of serving at the durga and of collecting and enjoying the offerings made by worshippers have devolved upon them in part by inheritance from the original khadims of the durga, and in part by purchase. They assert that the office of khadim is hereditary, and that it has always carried with it a right to share in the offerings in question, They also allege that for a long time the transferability of the khadimi rights by sale has been recognized. They deduce their immediate title from one Khair Mahomed and his sister Akhara Banu, the latter-of whom was the wife of the first plaintiff and the mother of the second, third and fourth plaintiffs. Khair Mahomed, it is alleged, was originally entitled as a khadim to a two-thirds share in the service and offerings of the durga for ten and half days in each month, his sister Akhara Banu being entitled to the remaining one-third share. On her death in the year 1280 B. S., (1873) her share, it is said, devolved upon the plaintiffs and a daughter, since deceased, as her heirs. The other ten and half days' share which goes to make up the twenty-one days' share in suit had belonged to the first defendant, but in execution of certain decrees obtained against him by Khair Mahomed and Akhara Banu, it was brought to sale on the 21st April 1875, and purchased in the proportions of two-thirds and one-third by Khair Mahomed and the heirs of Akhara Banu, respectively. In this manner Khair Mahomed became the owner ultimately of a fourteen days' share in the service and offerings of the durga.

4. This share, it is alleged, was afterwards in the year 1877 bought by the 1st plaintiff at a sale in execution of a decree held by him against Khair Mahomed.

5. According to the case thus made, it appears therefore that the first plaintiff claims to be entitled in his own right by purchase to a 14 days' share, and jointly with his co-plaintiffs to a 7 days' share, of which one-half came to them by inheritance from Akhara Banu, and the other half was acquired by purchase from the first defendant. It is alleged that the plaintiffs enjoyed the interests in the office of khadim jointly with the other khadims as they accrued to them from time to time in the manner abovementioned, until they were forcibly interfered with and unpossessed by the defendants. Various date's were assigned in the plaint in the

alternative as the date of the accrual of the cause of action. It is, however, unnecessary to specify them, since at the argument of this appeal, the 12th Assin B. S. corresponding with the 27th September 1881, was treated by both parties as the date of the plaintiff's actual dispossession, and as the date accordingly from which the period of limitation applicable to the suit would begin to run.

6. The defence to the suit raised substantially the same questions as those now raised by the pleas taken in appeal.

7. The first question for our consideration is whether the suit is barred by the rule of *res judicata*. In support of this plea it is urged that in a previous suit brought by the plaintiffs in the year 1881, shortly after their dispossession, against some of the present defendants, and the predecessors in title of the others, they claimed unsuccessfully precisely the same right which they now claim, to collect and enjoy the offerings made at the durga, and it is argued that, although in the present suit they have claimed the right on the footing that they are khadims of the durga, and in that character entitled to the offerings, while on the previous occasion they did not put forward their khadimi title, this can make no difference, since the 2nd Explanation to Section 13 of the Code of Civil Procedure would preclude them from now availing themselves of the title as being a matter which on the previous occasion they might and ought to have made ground of attack.

8. In our opinion these contentions are unsustainable, because in point of fact the subject-matters of the present and the former suit are different. It is apparent from the pleadings and decisions in the suit of 1881 that what the plaintiffs there sought was the establishment only of their right to the enjoyment of the offerings made at the durga---a right described in the course of the suit as a 'private baradari right,' independently of any title they might possess to the office of khadim. The existence of such a right was denied by the defendants, and the suit failed because the plaintiffs were unable to prove that a right of that nature existed. Such clearly was the interpretation placed both by the parties and the Courts which dealt with the case upon the issue upon which the decision of the suit turned: namely, 'Is it true that there is a specific right called baradari right in connection with the daily receipts of Shah Jalal's durga?' Passing by the judgment of the Subordinate

Judge, whose decree was in favour of the plaintiffs for the recovery of possession of the baradari right for 21 days, the ground upon which the District Judge dismissed the suit when it came before him in appeal, is thus stated in his judgment: 'I consider that the plaintiff has proved the right of himself and of his two minor sons and minor daughter by purchase as acquired from khadims to the khadimi baradari rights for 21 days in the month; but as the plaintiff has not sued under khadimi right, he and his children cannot obtain any decree for any private baradari rights.'

9. The case then came before this Court in second appeal, and the decree of the District Judge was affirmed. The learned Judges in delivering judgment thus describe the nature of the suit. 'The plaintiffs in this case seek to recover what they call a baradari right, which they claim to exercise for 21 days during each month in respect of a Mahomedan place of worship.' They then proceed: 'The defendants denied the existence of any such right, and put the plaintiffs very distinctly to the proof of the right set up by them. The origin of the right is not stated in the plaint, and there is no grant or pretended grant.' Then they go on to say: 'The Judge in the Court below, having considered the evidence, was of opinion that although this evidence might prove a baradari right in a khadim (a khadim being a person responsible for the ministration and the service of the sacred place), by that, the evidence failed to prove a baradari right of a private nature, that is a baradari right existing in and exercised by a private individual who was not connected with or responsible for the service or worship conducted at the sacred place.' Then after referring to the nature of the evidence by which possibly such a right as that claimed by the plaintiffs might have been sustained, and observing upon the absence of all such evidence, the learned Judges say: 'We do not, however, rest our decision upon this point. We decide that there is no point of law which can be raised here, seeing that the Judge below has carefully considered the evidence, and has come to the conclusion that the evidence, does not support a baradari right of a private nature and unconnected with the office of khadim, this being the right which the plaintiffs assert.'

10. In the suit now before us, what is asserted is a right to the possession and enjoyment of the office of khadim and to perform the duties and receive the

emoluments of that office without disturbance or interference on the part of the defendants; and if in fact restoration to the office involves the recovery of the enjoyment of the worshippers' offerings, that is a consideration with which in relation to the present question it does not seem to us we need concern ourselves.

11. The subject-matter of the present, and the previous suit being then distinct, the 2nd Explanation to Section 13 has, in our opinion, no application to the case. It is not a case in which the plaintiffs having on a former occasion sued for a certain relief on the strength of one title, afterwards claim the same relief on the ground of another title of which on the former occasion he might have availed himself, and it is to cases of that nature that the application of the explanation is confined.

12. Certain cases were cited by the learned vakils for the appellant in support of his argument, to which it is necessary shortly to refer. Most of them, it may be said, are cases in which the property claimed in the later suit was identical with that claimed in the earlier, and they merely afford illustrations of the application of the principle contained in Explanation II to Section 13, and may be distinguished upon that ground. Thus in *Denobundhoo Chowdhry v. Kristomonee Dossee* I.L.R. 2 Cal. 152 the question before the Full Bench was 'whether a plaintiff who has brought a suit to recover property upon the strength of one title and has been defeated in that suit can bring a suit to recover the same property upon the strength of another title of which he might have availed himself at the time the former suit was brought but which he did not set up in the plaint then filed?' This question was answered in the negative by a majority of the Full Bench. But the subject-matter of both the suits there in contemplation was identical, and the case therefore cannot be regarded as an authority in the present case. So in *Woomatara Debia v. Unnopoorina Dassee* 11 B. L. R. 158 the plaintiff claimed in the later suit the same property which she had unsuccessfully claimed in a previous suit under a different title. It was the same in *Kameswar Pershad v. Rajkumari Rattan Koer* I.L.R. 20 Cal. 79: L. R. 19 I. A. 234 where the plaintiff on the strength of an agreement between the defendant and the original debtor, who was a Hindu widow, by which the former on being placed in possession of the property held by the widow as heir to her husband had undertaken to discharge her debts, sued for the balance of a debt for which he had previously sued both the widow and the defendant, alleging

then as his cause of action against the latter that he was in possession of the property upon which the debt was charged. That suit had failed as against the defendant, and it was held that the later suit was barred as the agreement relied on ought under Explanation II to Section 13 to have been made a ground of attack in the previous suit. The subject-matter of the later suit was a portion of the debt claimed in the earlier. Similarly in *Doorga Persad Singh v. Doorga Konwari* I.L.R. 4 Cal. 190: L. R. 5 I. A. 149 the property in suit in both suits was the same. The question being whether the plaintiff, who was a party to the former suit in which the present defendant had obtained a decree for possession as against him and others as heiress of the last proprietor, was debarred from setting up in the later suit a family custom for the purpose of showing that he was entitled to possession in preference to her, and it was held that the former suit constituted a bar. The last case of this class which was cited, *Muthumadeva Naik v. Sivathmuthumadeva Naik* 7 Mad. H. C. 160 is merely another example of the same principle. The cases of *Vijaya Raghanadha Bodha v. Katamar Natchiar* 11 Moo. I. A. 50 *Soorjoomonea Dayee v. Suddanand Mahapatter* 12 B. L. R. 304: L. R. I. A. Sup. Vol. 212 and *Krishna Behari Roy v. Bunwari Lal Boy* I.L.R. 1 Cal. 141: L. R. 2 I. A. 283 were relied upon. These cases go to show that when a question has necessarily been decided in effect though not in express terms between the parties to a suit, it cannot be raised again although in a different form between the same parties in another suit. But this rule can have no application in the present case. In the suit of 1881 the question of the title of the plaintiffs as khadims was not raised either directly or indirectly. They sued then as strangers to the office, and r failed in their suit in consequence of having put their claim exclusively upon that footing.

13. Then as to the question of limitation. The suit is in substance for a declaration of the plaintiffs' right to and for possession of the office of khadim. They claim it as an hereditary office, and that that is its character has been found by the Courts below, a view from which we see no reason for dissenting. The suit therefore falls under Article 124 of the second Schedule of Act XV of 1877, and since it was instituted within 12 years from the 27th September 1881, the date of dispossession, it is within time.

14. With respect, next, to the validity of the sales upon which the plaintiffs rely and under which they seek to make title, it appears to us that, speaking generally, an office to which are attached essentially the conduct of religious worship and the performance of religious duties is not legally saleable. This principle has been followed in many cases relating to shebaitships and other offices connected with Hindu worship, though there is apparently no reported case in which the question has been decided in relation to a Mahomedan office. But the reasons which have led the Courts to refuse to recognise such sales in the case of Hindus are of general application and apply equally to the case of Mahomedans. In the case of *Juggurnath Boy Chowdhry v. Kishen Pershad Surmah* 7 W. R. 266 for example, it was sought to bring to sale, under a decree for a personal debt, the judgment-debtor's right as shebait to perform the services of a certain idol and also to sell his right to the surplus proceeds of the sheba. The Court held that rights of that nature were not so saleable, Macpherson, J., observing in delivering judgment: 'Such a sale would practically destroy the endowment, or have the effect of defeating the whole object of its creation. There would be no guarantee that the service would be properly kept up, for the purchaser, whoever he might be, even if a Mahomedan or a Christian, would have the right of performing the worship of this Hindu idol.' Again in *Kuppa Gurukul v. Dorasami Gurukul* I.L.R. 6 Mad. 76 where the sale was of a private nature, and it was sought to sustain it on the ground that the purchaser was of the same caste and sect as the vendor, and therefore qualified to discharge the duties of the office, the Court was of opinion that that consideration was not in itself sufficient to validate the sale, assigning as their reason that 'To hold so would tend to public mischief in inducing needy incumbents of hereditary religious offices, who desire to sell them, to give a dishonest recognition to qualifications which in fact were not the qualifications demanded, by the nature of the office.' So in *Mancharam v. Pranshankar* I.L.R. 6 Bom. 298, in which the alienation, which however was not by way of sale, was upheld, the Court after referring to several cases with approval in which the inalienability of religious offices had been maintained, and to the reasons upon which those decisions proceeded, remarked: 'It may be admitted also that it would not be desirable to lay down any such rule regarding such alienations as would involve the Courts in nice questions of caste distinctions bearing upon the capacity

of a particular individual to perform the worship of and prepare food for a Hindu idol.' Several other cases to the same effect were cited to us by the learned vakil for the appellant, but we have referred to these more particularly because they disclose most fully the reasons by which the Courts have been influenced in holding that such sales as those now in question are not valid. And it is clear that these reasons apply with equal force to all religious offices whatever may be the form of religious faith with which they are connected. The only case to which we were referred in which the alienation of such an office was allowed to stand was that of *Mancharam v. Pranshankar* I.L.R. 6 Bom. 298. That case was however of a peculiar nature, and the alienation was not, as has been observed above, by way of sale. The alienation took under the will of his uncle on the death of the latter. He was a member of the founder's family and stood in the line of succession to the office, and it was upon these grounds that the alienation was upheld. But it may be inferred from what was said by the learned Judges in the course of their judgment with respect to the transferability by sale of such offices, that their decision would have been otherwise if the transfer then before them had been by sale.

15. It would certainly appear from the description of the duties attached to the office of khadim contained in the plaint in the present case as well, as from the enumeration of those duties contained in the written statement of one of the defendants, the accuracy of which was not questioned, that some of the duties essentially connected with the office are of a religious nature. Among those mentioned by the plaintiffs, is, for example, 'the reading of namaz and the Koran in due form for the spiritual benefit of the Hazrat,' while in the written statement referred to among many duties which could not be performed by a person other than a Mahomedan are mentioned: 'Consecrating things offered as nazar niaz and reading durud.' It was not indeed disputed that the office is of a religious nature, and it appears to us, therefore, that in so far as the sales now in question depend for their validity upon the general law, they cannot be sustained.

16. It was, however, sought in the Courts below to support them apparently on the ground of custom. There was no issue directed specifically to this question. But the lower Courts have held the office to be transferable by sale, because instances have occurred in which it had been so transferred. We very much doubt whether a

custom or practice sanctioning the sale of a religious office for the pecuniary benefit or for the private debts of the incumbent could under any circumstances be sustained, and we may refer in this connection to what was said by the Privy Council in the case of *Vurmah Valia v. Ravi Vurmah Kunhi Kutty* I.L.R. 1 Mad. 235: L. R. 4 I. A. 76. Speaking of the duties and powers of the trustees of a religious foundation, and after quoting from the case of *Muttu Ramlinga Setupati v. Perianayagum* Filial L. R. 1 I. A. 209 the following passage: 'But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation and to be guided by them,' their Lordships say: 'Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case, and they desire to add that if the custom set up was one to sanction, not merely the transfer of a trusteeship, but, as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law.' It appears to us, however, that it is unnecessary that we should decide the question. For, assuming that the custom or practice set up could be sustained at law, the evidence to which our attention was called, and upon which the Courts below proceeded is, in our opinion, insufficient to establish a custom or practice which would validate these sales. The only instances of which evidence was given in which the transfer of the office took place by public sale appear to have been those in which the plaintiffs themselves and the persons through whom they claim immediately were concerned, and even the instances of private transfers relied upon, which however appear to us to stand on a very different footing and would seem to have been confined to the co-sharers in the office were few.

17. The result must, we think, be that in so far as the title of the plaintiff depends upon the purchase of the interests of the 1st defendant and of Khair Mahomed in the years 1875 and 1877, respectively, that is as to a 17 1/2 days' share out of the 21 days claimed, the suit fails.

18. The only remaining question is as to the 3 1/2 days' share claimed by inheritance from Akhara Banu. It was contended that Akhara Banu being a female was incapable of holding the office, and was incapable therefore of transmitting an interest in it to her heirs, and Mr. Justice Ameer Ali's work on Mahomedan Law (Vol. I., p. 348) was referred to in support of this position. It is there no doubt said that when the duty of officiating at religious festivals is attached to the office of mutwalli, for which office a woman is generally eligible, she is precluded by her sex from holding the tantial, and this is put apparently on the ground that the office of mutwalli being one of personal trust, the duties of the office cannot be discharged by deputy, so as to make a person incapacitated by sex from performing those duties herself, capable of holding the office. Whether this would be so with respect to the office of khadim may be a question, but we think we should not be justified under the circumstances of this case in deciding it. The question was decided by the Court of First Instance in favour of the plaintiffs. That Court held that Akhara Banu had succeeded to the office by right of inheritance, and that her heirs were entitled to succeed her on her death. Whether the Subordinate Judge was right in this view or not, it appears to have been acquiesced in by the defendants. At all events there is nothing to show that it was raised in the Lower Appellate Court, and we think, therefore, that we should not be well advised in allowing it to be raised again at this stage.

19. In the result the appeal will be decreed and the suit dismissed with respect to 17 1/2 days out of the 21 days' share claimed in the worship and offerings of the durga, with respect to the remaining 3 1/2 days' share the appeal is dismissed. The appellants having succeeded substantially in the appeal are, we think, entitled to their costs in this Court as well as of both the Courts below in proportion to their success. It has been agreed between the parties to the appeal that the 3 1/2 days in each month decreed to the plaintiffs shall be counted from the beginning of the terms consisting of 21 days in each month claimed by the plaintiffs by their plaint, and we decree accordingly.