Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Juggutmohini Dossee v. *Shokemonee Dossee and others, from the High Court of Judicature at Calcutta: delivered 9th December,* 1871.

Present:

SIR JAMES W. COLVILE.
JUDGE OF THE ADMIRALTY COURT.
SIR MONTAGUE SMITH.

SIR LAWRENCE PEEL.

THIS is an Appeal from a Decree passed by Mr. Justice Kemp and Mr. Justice Campbell, forming a Division Bench of the High Court of Calcutta, affirming a Decree of the Judge of East Burdwan, by which the suit of the Plaintiff, now represented by the Appellant, was dismissed.

The Judges of the High Court differed in opinion on the effect of the evidence; Mr. Kemp expressed his to be in favour of the Plaintiff as to part of the relief which he prayed against Kallidoss, the only Respondent who appears on this Appeal, but as the Judges were not unanimous the decision given in the Court of First Instance stands unreversed.

The Plaintiff's suit was for possession, but not for possession in the ordinary character of proprietor of lands; he made title to the possession of these lands, for which he sued on this special ground, that they had been dedicated to the religious service of the family idol, by virtue of two Instruments of Dedication in the Christian years 1813 and 1820, which still, at the time of the suit, impressed on the lands a trust, which by

his suit he sought to have declared. This was the foundation and main character of his claim, though somewhat inconsistently with the nature of the dedication he sued for a certain proportion only, as though the suit had been one in respect of private interest. The Court could not have so dealt with the possession, under these instruments of dedication.

He asked also to be appointed Sebait. His plaint embraced other charges of breach of trust, relating to other properties, which are no longer insisted on. The properties which this Appeal relates to are one called Lot Pilkhundee to which Respondent makes title as a purchaser, *bonâ fide*, for value without notice, and certain other lands enumerated in a schedule to the plaint, which were once claimed to be held as Lakeraj, were resumed by the Government as held under an invalid Lakeraj title, and were permanently settled for with Government by Sookhemony Dossee. The Appeal against her was heard *exparte*. All these properties were comprised in, and dedicated by, the two instruments of dedication before mentioned.

The first Sebait was the husband of Shookemoney, and after his death she held a portion at least of the dedicated lands by the title of Sebait in succession to her husband. Notice of the trust, if it be valid, is clearly established against her.

Her claim as to the lands resumed, is advanced under her settlement with the Government, the nature and effect of which will be subsequently considered.

The title of Kalidoss to Lot Pilkundy is derived through successive alleged alienations under a deed, which will be described as a second deed of partition, by which, as he contends, a valid partition of the family property was first constituted.

He admits that a deed, purporting to be one of partition between the five brothers who constituted the joint family, had been executed some years before, and that the dedication insisted on by the Plaintiff had been in fact made under those instruments of dedication before-mentioned, but he seeks to avoid the effect of all upon the same

grounds which were unsuccessfully advanced on the Case lately decided by their Lordships on Appeal, when the earlier deed was established as the valid deed of partition of the family property. This decision, which is partly stated in the Appellant's case, and which was read in full on the argument, need not be further referred to, except to state, that the facts there decided cannot be considered to have been established against Kalidoss, who was not a party to that suit. Their Lordships, therefore, will proceed to consider the facts of the case solely upon the evidence which this case presents.

The nature of the suit must be borne in mind, in considering certain questions which arise in the cause as to the burthen of proof, the general Law of Limitation, the special Law of Limitation under Act 13 of 1848, the claim to possession, and the limitation of that claim to a portion or share of the whole property dedicated.

The suit, although it seeks to set aside the mutation of names, and to have possession decreed to the Plaintiff, seeks that relief as incident to the establishment of the trust. Although that relief cannot in the present state of litigation, as the proceedings have been instituted and conducted, be allowed, still it must be considered that the suit is brought to establish a religious trust. The trust is created by the instrument of 1813, confirmed by that of 1820. It is not constituted by the first partition deed. If any vice existed to defeat this partition deed, that vice would not affect the dedication of the property under the antecedent instruments to the religious trust, if they show a real and not merely a colourable dedication.

The two deeds which create and confirm the dedication are *primâ facie* valid. Nothing is proved to lead to the belief that they are at variance with the usages of the country, or family, or that regard being had to the value of the property dedicated and to the property at that time of the family, there is any excess in the appropriation to the religious services of the family, of the portion of the family property thus set apart, such as to generate distrust of its reality.

It was argued that such dedications of property without the assent of the State, should be regarded

as merely revocable appropriations, which the founders might vary the use. No authority whatever was adduced in support of this position, which strikes at the root of most modern endowments of the like nature.

A family trust of this nature has never in modern times, at least, been held to require such an assent. The cases supporting such trusts are too numerous for citation. They are collected in Norton's Leading Cases on Hindu Law, part ii, p. 406.

The argument of Mr. Leith, founded on the non-registration of these instruments of dedication at the time or shortly after the time of their execution, and on the subsequent registration of them at the time of the registration of the first deed of partition, viz., that they constituted in effect one instrument, and rested on the sole foundation of the first deed of partition, was not urged in the Courts below, and appears to have no foundation of fact to support it, since the mere contemporaneous registration of the three furnishes no ground for presuming such union. There is abundant evidence that all were acted on.

The trust declared on appears then to be established as to the lands dedicated by these two prior instruments; and it lies on the Respondents to show some subsequent legal conversion of the lands to the ordinary uses of property.

The second deed is said to work this conversion, and the question arises which of the two deeds of partition is to prevail.

The first deed of partition is an instrument which but for the existence of the second, would have been exposed to no suspicion.

A partition is favourably viewed by the Hindu religion and law. It wants no extrinsic support.

The alleged presumption against the first deed that it may have been a mere device because one member of the family was indebted may more reasonably be removed than maintained by due attention to that fact. Such a state of things often leads to partitions, but to fair and honest ones. It would be a prudent course in the members of a joint family to prevent, by a partition, the interference of strangers in their family arrangements, and an inquiry into the state, con-

dition, extent, and uses of their joint property; and no suggestion has been made that the partition under the first deed was unequal.

The second deed, however, does afford ground for suspicion. It makes no reference whatever to the first deed; it professes to be the ordinary partition of a, till then, joint family property; it appoints as a Sebait one whom no prudent person would appoint a trustee, one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindu family having several and more competent members, from the fear of the scrutiny to which it might lead if the creditors of the Sebait traced the property to his possession. Again, as a dedication, in fact, was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which this deed seeks to effect. All comparison, therefore, supports the deed prior in time, which priority alone, in a balanced state, would establish the first instrument.

It was urged with great force in the argument that every Judge and Court that has hitherto dealt with this second deed has either actually declared it invalid or stated it to be subject to grave suspicion. A decision against the Plaintiff generally in this suit would be, in substance, deciding against a trust, *primâ facie*, well established, on evidence of a subsequent deed of revocation not only not proved but on every judicial examination of it, discredited. Their Lordships, therefore, think that a trust was created by the deeds of dedication of the Pilchoondy property.

It remains to be considered whether the Respondent can support the Decree in his favour upon the ground that he is a purchaser for value without notice. Now the very origin of his title, as well as the contention on the mutation of names, prove that he must have had notice of the original trust. The devolution of the title to him from Gooroochurn under the second deed is, until the conveyance to himself, accompanied with very suspicious circumstances at every stage of it, such as ordinarily accompany an attempt in a Hindu family to put property out of the reach of an apprehended claim. He is not shown to have

made any inquiries as to the grounds for supposing that the trust was legally at an end; and, therefore, he cannot exonerate the property from the trust which attached to it.

The principal claim of Sookemony to hold the resumed lands free from this trust on the grounds advanced by her, is destitute entirely of legal foundation. She did not rest her title so much on the operation of the second deed of partition as a revocation of the first, as on the effect of the resumption proceedings and the settlement for revenue with her. Such a settlement does not establish proprietary right in the land, but is made with Government as to their claim to their Keraj, or revenue. The settlement and the possession under it being evidence of a right to possession, are also so far evidence of proprietary right, but do not necessarily constitute it. *A fortiori*, they could not devest and destroy trusts to which the settlor was subject. The claim supposes a mere settlement for revenue to have the same effect in clearing away preceding titles which a sale under the Revenue Laws works; but antecedent trusts have, in certain cases, been impressed by the decisions of Courts of Justice, including this tribunal on estates, acquired even under these revenue sales. (See the cases referred to in Mr. Justice Macpherson's work on Mortgages, p. 86, 5th edition.) Sookemoney could not get rid of her Sebait title and possession by the machinery of this settlement, though it was in terms made with her as a private person. Therefore the claims of the Plaintiff, so far as he seeks to have the trust established as to the property, receives no answer whatever from the laws as to limitation of suits, or from the terms of the settlement for revenue with her.

It remains to consider one argument which was addressed to their Lordships on one part of the evidence, which seems not to have been formerly distinctly advanced.

It was urged that the evidence shows that the family had, in several instances under the first deed, dealt with other portions of the property included in the dedication instruments as though they were private property. This argument was thus met, that there was no proof that the properties so dealt with were dedicated properties,

since the identity of the name was perfectly consistent with properties held separately under Malguzari and under Lakeraj titles, which might both bear the same description; that a disposition of part might not be to the prejudice of the trust necessarily; and that changes of property not designed otherwise than for the benefit of the endowment would not be questioned in a Court of Justice. The correctness of each position cannot be gainsayed, and the argument for the Respondent on this point, which is conjectural, is conjecturally answered. How the real facts may be, it is not possible for their Lordships, on the evidence, to decide; but this is to be observed, that a former abuse of trust, in another instance, cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as Sebait. The Court could not with any propriety say, we will decline to protect the property and leave it further exposed to loss, and decline to make a declaration that it is trust property, merely because they would not trust the Plaintiff with its administration.

The title being one founded on trust, and the contention of the holders being that it is not now in their hands subject to the trusts, *primâ facie* at least, attaching to it, the onus of the proof was on them. They did not discharge themselves by proving a deed as to which Mr. Justice Campbell declares that he probably would not have made it the foundation of a decree in their favour. The learned Judge appears further to have mistaken the nature of the change of possession, which he considered to have prejudiced the Plaintiff's case. The old Sebait title was recorded in the Collector's Registry. A mutation of names—in itself a change—was applied for on the part of Kallidoss, and resisted on the part of the Plaintiff, claiming as trustee. The Plaintiff was, in effect, referred to a civil suit, and the very reason of such a reference, viz., that the matter is not in the jurisdiction of the revenue officer, cannot, either in reason or law, invert the ordinary

course of proof and presumption in a civil suit to establish a trust. Their Lordships think the judgment of Mr. Justice Kemp, on the facts of the case, correct, and the decree which, but for the supposed Law of Limitation, Mr. Justice Kemp would have given as to the resumed lands, as well as to Pilkhundie, is that which their Lordships will humbly advise Her Majesty to make.

Their Lordships will, therefore, humbly advise Her Majesty that the Appeal be allowed; that the decrees of the High Court and of the Court below be reversed, so far only as they dismiss the claim of the Plaintiff to set aside the alienation of Lot Pilkhundie, and to have the trusts of the dedication instruments declared, and that it be declared that the lands specified in the schedule to the plaint, and the said Philkundie were and continue dedicated under the instruments of dedication of 1813 and 1820 to the religious uses specified in those instruments of endowment; and now add a declaration that this Decree is to be without prejudice to any further suit or proceedings for the enforcement of the religious trusts declared on the appointment of a proper Sebait.

Their Lordships think that the costs in the Courts below should be allowed to the respective parties, according to the usual course of proceeding in those Courts when a Plaintiff recovers part of his demand, and that the Appellant should have the costs of this Appeal.

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