Privy Council Appeal No. 92 of 1914.

K. P. L. S. Palaniappa Chetty and another - *Appellants,*

v.

Sreemath Deivasikamony Pandara Sannadhi *alias* Nataraja Desikar - - - - - - *Respondent.*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE **OF THE** PRIVY COUNCIL, DELIVERED THE 22ND MARCH, 1917.

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.
MR. AMEER ALI.

[*Delivered by* LORD ATKINSON.]

This is an appeal against a decree of the High Court of Judicature at Madras, dated the 18th October, 1910, which reversed a decree dated the 10th August, 1908, of the Additional Subordinate Judge of Madura, and restored that dated the 30th June, 1906, of the District Munsif of Sivagunga, pronounced in the original suit No. 10 of 1905.

In the village of Kunnakuddy, in this district of Madura, there are several Hindu temples; one of these, styled the Subramanisawamy Devastananan, has been endowed, for the religious service of the idol, with certain lands in and about this village, including a building site situate in one of the streets of the village, upon which site, in and previous to the year 1807, some ruins stood. The Shebait of this temple is represented by the respondent. Should the property, the subject of such an endowment as this, have been formally dedicated to the Deity or the idol for worship in the temple by a deed of endowment it would presumably contain directions as to the mode in which the property is to be used, and its income applied for the particular religious or charitable purposes mentioned in the instrument. But where, as in the present case, no deed of this kind is forthcoming, the rules according to

which the property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case (*Ram Parkash Das* v. *Anand Das*, 43 I.A. 73–78). But these rules, so to be inferred, must not in their Lordships' view be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual, as it could hardly fail to be, then the preservation and use of the dedicated property to support and maintain that worship must, they think, be assumed to have been similarly intended to be perpetual. A rule, therefore, which would authorise and empower the Shebait of such a temple, arbitrarily, at his own mere will and pleasure to alienate the dedicated property, either bit by bit or *en bloc*, would be so repugnant to the whole purpose and object of the endowment that it could not, in their view, be rationally held to embody the intention of the original endower.

In the year 1897 no rent was received out of this site; the ruins upon it had become a nuisance. Proceedings before the magistrate to abate the nuisance were either pending or about to be taken. It would, according to the report of one of the Shebait officers, have cost more than 200 rupees to have had the site walled round so as to prevent access to it by the public. In that state of things K.P.L.S. Palaniappa Chetty, one of the appellants, on the 6th April, 1897, applied to the then Shebait for the grant of a perpetual *Cowle* of this site at the rent of rupees 1 : 8 : 0 per annum for the purpose of erecting thereon buildings for an Annathanam Mutt. Other offers were apparently made for the acquisition of the site. They were, no doubt, considered by the existing Shebait, and his advisers; but on the 14th April, 1897, a perpetual *Cowle* was, in consideration of the sum of rupees 93 : 12 : 0 paid as a premium, granted to the two appellants for the purpose of erecting buildings thereon "for the said Annathanam Matam Charity." The charity contemplated was the erection of a kind of rest house for pilgrims passing through the village, irrespective of the consideration from whence they came or where they were proceeding to, and equally irrespective of whether or not they worshipped in the temple, or desired so to do, or contributed in any way to its maintenance. It was, therefore, a charity not in any sense subsidiary to or connected with the temple or the religious services performed therein, but was an entirely separate and independent charity, of a wholly different kind and character, to the support or maintenance of which none of the dedicated property or its produce could as an act of charity be legitimately applied.

The suit out of which this appeal has arisen was instituted by the respondent, the present Shebait, against the appellants

impeaching the *Cowle* so granted to them by his predecessor, and praying that, amongst other things, it might be declared to be invalid as being, in effect if not in form, an alienation of the absolute interest in a portion of the immovable property dedicated to the services of the temple, for the purposes of an alien charity; and further praying that the appellants might be directed to demolish all the building erected by them upon this site, to remove all materials from it, to restore it to its original condition, and to deliver up possession of it when so restored to the respondent. In the Courts in India the appellants made the case that they had acquired this site in the year 1880 from one Samier, and that it was not the property of this Mutt at all. That case was found by these tribunals to be false. Having regard to the documents proved in evidence, it could not well be found to be otherwise. That case was not put forward in argument on this appeal, so that the main question for the decision of the Board is whether the perpetual grant made by this *Cowle* of the 14th April, 1897, was, having regard to the evidence given in the case and the findings of the Munsif and the Subordinate Judge thereon as against the respondent, a valid disposition of the described portion of the immovable property of this Mutt. Their Lordships did not understand Mr. de Gruyther to contend on behalf of the appellants that the Shebait of the temple, such as that in this case, has, by virtue of his office, an absolute and unrestricted power to alienate the immovable property with which the temple is endowed, arbitrarily at his own will and pleasure, under any or all circumstances. His contention, as their Lordships understood it, was this: that the Shebait was not the owner of these lands, but stood towards them in a relation somewhat similar to that in which the guardian of an infant stands to the lands of the infant, and had similar powers of management and control; and that, accordingly, the Shebait has power and authority to alienate the lands in cases of necessity or for the benefit of the estate of the Mutt, and also power to carve derivative interests out of them. In support of this contention he cited the three following authorities amongst others: *Hunooman Persaud Panday* v. *Munraj Koonweree* (6 Moore's I.A., p. 393); *Prosunno Kumari Debya* v. *Golab Chand Baboo* (2 I.A., 145); and *Konwur Doorganath Roy* v. *Ram Chunder Sen and Others* (4 I.A., 52).

It is necessary in order to ascertain the sense in which such general and elastic terms as "necessity" and "benefit of the estate" were used in these authorities to examine the facts in reference to which the terms were used. In the first case a certain mortgage executed by a Ranee in her character, as was found, of the guardian of her infant son and manager of his estates, was impeached. By it these estates were charged with the payment of a debt due by the deceased father of the infant to the mortgagee, and already secured upon the property; and also charged with the payment of a sum advanced by the

mortgagee to be applied in payment of the arrears of revenue due to the Government in respect of these estates, and thus save them from sequestration. There was no suggestion that the debt of the infant's father was contracted for illegal or immoral purposes. It was not disputed that according to Hindu law a son is bound to pay his father's debts if not of this character, and that the ancestral property descending to the son may be charged by him with payment of them. Well, it is clear that no greater benefit could well be conferred upon an estate than to save it from extinction by sequestration, the payment of the arrears of revenue by the mortgagee was therefore in the nature of salvage expenditure. The case was not finally decided by the Board. It was sent back to the Court below for further enquiry on some of the many points raised; but to prevent a further miscarriage Lord Justice Knight Bruce thought it right to state the general principles to be applied to its final decision. His words so much relied upon, reported at p. 423, run as follows :—

"The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded."

He continues at p. 424 :—

"Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money."

In that particular case in reference to which this language was used the "necessity" for the loan would appear to be plain and imperative, the benefit to the estate, the preservation of its existence, obvious. Moreover, the transaction impeached was not an absolute alienation of property, but merely a pledge of it which might at any time be redeemed. The case in no way resembles the present case. In the second case the Rajah Baboo, the Shebait of an idol, a man of profligate habits, having spent the income of the debottar property on his own pleasures, borrowed a sum of 4,000 rupees from the respondent, and, by a bond and rahinama, pledged the debottar property for the payment of this sum. In both these securities it was stated that the money was borrowed for the services of the idol and the expenses of the temple. The Zillah Judge before whom the case

was tried held as a fact that the money had been borrowed and expended for these purposes. Two decrees were obtained by the respondent, the lender, against the Shebait, each directing that the debt should be paid by the Shebait personally, or else be realised out of the profits of the debottar land. The appellant, the successor in office of Rajah Baboo, instituted a suit to set aside these decrees and have the debottar property released from an attachment issued in execution of them. The point decided was that the decrees, being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, had the force of judgments of a competent Court, and were binding on the appellant, the succeeding Shebait, who was a continuing representative of the idol's property. Though the question was not raised whether the debottar lands themselves could be sold under the above-mentioned decrees, the passage from the judgment of Knight Bruce, L. J., above extracted, was quoted, and some observations were made by Sir Montague E. Smith, who delivered the judgment of the Board, touching the alienability of debottar land, which have been relied upon. First, the learned Judge said :—

"There it no doubt that as a general rule of Hindu Law property given for the maintenance of religious worship and of charities connected with it is inalienable,"

and then after quoting a passage from the judgment of Lord Chelmsford in a case to be presently referred to, he, at p. 151, proceeds thus :—

"But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the Shebait of property dedicated to the worship of an idol, in the capacity as Shebait and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power however to incur such debts must be measured by the existing necessity for incurring them. The authority of the Shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Lord Justice Knight Bruce."

On the next page he adds :—

"It is only in an ideal sense that property can be said to belong to an idol; the possession and management of it must, in the nature of things, be entrusted to some person as Shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

In the last case the grandmother of the appellant executed a mokurruri pottah to a certain person, predecessor in title of the

respondents, of certain lands, receiving a premium of 1,900 rupees and reserving the substantial rent of 325 rupees per month. She subsequently, by an instrument styled in the judgment a bill of sale, in consideration of the sum of 1,700 rupees, conveyed to a person therein named 300 rupees per month, portion of the rent so reserved. In the first of these documents it is in effect stated that the temple named was out of repair and the premium paid was required by the grantor to put it into repair, and to procure various other things requisite for the service of the idol. And in the second it was stated that the Ranee, the grantor, had, "agreeably to the instructions of her late husband, commenced to built certain temples named in the deed and others, but being in want of funds was unable to carry out her husband's instructions." The suit was brought to have these instruments set aside, on the ground that the land alienated was debottar property.

Whether it was so or not was the main issue in the case. It was held by this Board that it was not debottar property at all. No proof whatever was given that the statements contained in the deeds were true in fact, and the observations contained in the judgment of the Board at pages 62 and 64 of the report are based upon the suppositions that the land granted was in fact debottar land and that the aforesaid statements were in fact true. On these assumptions the alienations were considered to be justifiable. At page 64 of the report the following passage will be found:—

> "Here it cannot be said the grant of a mokurruri pottah was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the sustentation of the idol, and if the transaction be *bonâ fide* the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced."

So that the only specific point touching the present case actually decided in these three authorities was this, that a debottar estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description "Benefit to the Estate." It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not. Three authorities have been cited which establish that it is a breach of duty on the part of a Sebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a

fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased. These authorities are *Maharanee Shibessuree Debia* v. *Mothooranath Acharji* (13 Moore's I.A., 270, 275); *Seena Peena Reena Mayandi* v. *Chokkilongam Pillay and Others* (31 I.A., 83, 88); *Abhiram Goswami and Another* v. *Shyama Charan Nandi and Others* (36 I.A., 148, 165).

No doubt these cases dealt with agricultural lands, but no reason can be suggested why the principles they establish should not apply to a building site situate in the street of a village, as is the site in the present case. It may appreciate in value just as the land may. Moreover, if for the reasons above mentioned the grant of a lease in perpetuity of debottar lands at a fixed rent requires to be justified by unavoidable necessity, it is difficult to see why an absolute alienation in perpetuity of the same kind of land in consideration of a premium should not equally require to be justified by the same kind of necessity, since it brings about quite as completely the same prejudicial results. It has been urged on behalf of the appellants that the premium of rupees 93 : 12 : 0 if lent or invested at interest in India would bring in an income of 10 rupees per annum; that a rent of 10 rupees per annum would be quite an adequate rent for this site; that the *Cowle* of the 14th of April, 1897, must therefore be regarded as a grant in consideration of a sum equal to the capitalised value of this adequate rent, and that the charity will therefore be benefited by a transaction which put at the Shebait's disposal a sum capable of being so profitably used. But attractive and lucrative as money-lending may be in India, it is needless to point out that a Shebait would not be justified in selling debottar land solely for the purpose of getting capital to embark in the money-lending business. And no authority has been cited giving any countenance to the notion that a Shebait is entitled to sell debottar lands solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debottar land itself.

So much for the "benefit to the estate" of the charity alleged to result from this transaction. Next, as to the imperative necessity constraining the Shebait to enter into it. There is not a suggestion that he needed this sum of rupees 93 : 12 : 0 for any of the purposes of the charity he managed. Neither is there any proof that any effort was made to lease this site for a term, or even grant it in perpetuity, at a variable rent.

From the letter of the first appellant, dated the 6th April, 1897, it would appear that he was quite willing to pay an annual rent for it. No doubt the rent offered was very small, apparently because he bound himself to use the building

to be erected for an Annathanam Mutt. But as that was a charity separate and distinct from, and unconnected with, the temple and the worship of its idol, this obligation could not furnish any proper ground for accepting from him a lesser rent or a smaller premium than should be demanded from one not so bound, because a Shebait is not entitled to alienate part of the endowment of his own charity to enrich another and altogether separate and alien charity. The grant of the *Cowle* may have been an easy and convenient way of getting the nuisance upon the site abated; but in their Lordships' view the evidence does not establish that the Shebait was constrained by any necessity (as that term is in such a connection understood) to make this grant, or that any benefit accrued to the charity estate from the making of it. If the matter stood thus, their Lordships would be clearly of opinion that the *Cowle* was, as against the successor in office of the grantor, invalid, and that the appeal must fail.

It is contended, however, that the Munsif has found that there prevails in this village, and presumably in the surrounding district, at all events in this village, a local custom authorising and empowering a Shebait to do as against his successor what the ordinary law, as settled by the above-quoted authorities say he cannot legally do, namely, alienate debottar lands at a fixed rent or in consideration of a premium, whether he be constrained so to do by some necessity or the contrary, and whether the alienation be a benefit to the debottar estate or not. This is a custom entirely modifying the law. Their Lordships are of opinion that no such custom has been established here.

It has, however, been pressed on behalf of the appellants that there are two findings: one by the Munsif, and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of an ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact. The second answer is that neither of these Judges has found that any ancient custom such as modifies the law existed in this locality. The Munsif sets out, at p. 212 of the record, the finding he arrived at in these words:—

"I must find that for a very long time permanent leases of temple land are being granted, and that the alienees are in undisputed possession thereof."

The Subordinate Judge, at p. 230, states his finding in these words:—

"If custom were needed to justify such a grant, the District Munsif has found upon the evidence (and I agree in his finding) that

such local usage does obtain in the village in question. The custom is perfectly reasonable, and is not opposed to public policy."

There could scarcely be a more glaring instance of the misapplication of the word custom, or a more remarkable instance of forgetfulness of essentials of a custom which modifies the ordinary law.

Their Lordships are clearly of opinion on all the points raised that the decision appealed from was right and should be affirmed, and this appeal be dismissed; and they will humbly address His Majesty according.

The appellants must pay the costs here and below.

In the Privy Council.

K. P. L. S. PALANIAPPA CHETTY AND ANOTHER,

v.

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