Privy Council Appeal No. 99 *of* 1920.

Bengal Appeal No. 22 *of* 1919.

K. S. Bonnerji, Official Receiver - - - - - *Appellant*

v.

Sitanath Das and another - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST NOVEMBER, 1921.

Present at the Hearing:

LORD BUCKMASTER.
LORD CARSON.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD BUCKMASTER.]

On the 14th March, 1910, a document was executed by Bhupendra Sri Ghosha, purporting to act on behalf and as attorney of his father, Protap Chandra Ghosha, by which a garden at Tallah was granted to the respondents under a mokurari lease, at the annual rent of Rs. 125, and a premium of Rs. 3,000. The respondents on the execution of the lease entered into and have since remained in possession of the property.

The question raised in this case is whether the lease conveyed to them any title at all. It is challenged in the following circumstances: The property is question originally belonged to Hara Chandra Ghose, who died in 1868. He was survived by his widow, four sons and two daughters. On the 7th May, 1880, a trust deed was executed by all the interested persons, by which the property was placed in the hands of trustees for certain religious and charitable purposes. The two first trustees under the deed were the widow, Srimati Padmabati Dasi, and her eldest son, Sri Protap Chandra Ghosha. The deed contained the statement that upon the death of the widow the eldest son, Protap, should be the sole trustee, and on his death the second son, Sri Sarat Chandra Ghosha, should be the sole trustee, and so on. It also provided that during the absence of any trustee for over one

year during his life, the person entitled to be the trustee immediately in succession to him should be appointed to the office of trustee for the time being. It is unnecessary to consider the exact terms of the deed or the nature of the trust for which the property was conveyed. For the present purpose it is sufficient to say that until the deed was challenged by a family suit that was instituted in 1910, it was accepted as creating a good trust, and the persons named were assumed to be exercising the duties of trustees. On the 16th April, 1900, the widow died, and from that time Protap became, by the terms of the deed, the sole trustee. On the 31st December, 1900, he left Calcutta, and he only returned twice afterwards, the first of the two visits being after the execution of the lease. The lease was, as has been stated, executed by Bhupendra Ghosha, and all the preliminary negotiations and transactions must have been carried out by him, or someone on his behalf, because the evidence of Protab, which has been taken at some considerable length, makes plain that he had no knowledge of the matter until after it had taken place. He was asked when he was told that the land had been sold or perpetually leased to somebody, and his answer was he did not know. Then he was asked, " When did you come to know ? " and his reply was, " About the time when the High Court suit was commenced." That suit was instituted on the 31st May, 1910, after the date of the execution. Later on he is asked this " Do you know who gave the lease ? " and his answer is, " I did not know then. I came to know afterwards that it was done in my name under some power of attorney." Finally in re-examination he repeats this statement, and says, " I found my actual knowledge since I perused typewritten copy supplied to me by an outsider, which suggested many things, and made me curious." There is no evidence to which their Lordships' attention has been directed in the long and tedious deposition which Protab was called upon to make which contradicts these statements, and consequently it must be accepted that when this document was executed he had neither negotiated its contents, nor was he aware of them. The whole of the authority for the execution of that lease must be found in the power of attorney under which Bhupendra Ghosha purported to act, and the existence and extent of that authority is the chief question on this appeal.

In order, however, to see how this suit has arisen, it is necessary to go back a little in the family history. About the time of the execution of the lease, and possibly because of its execution, anxiety arose among the members of the family as to the way in which the affairs of the trust were being conducted, and in consequence a suit, to which reference has already been made, was instituted on the 31st May, 1910, by Sarat against Protab, as trustee, claiming to have the deed of trust declared void, charging Protab with misconduct as trustee, and asking for accounts against him. In the plaint this lease was challenged, though not on the ground now under consideration. The beneficiaries were made parties to the suit, and a settlement of the disputes was

ultimately effected ; but one of the parties being an infant, it was necessary to obtain the consent of the Court to the proposed terms. This was secured by a decree on the 2nd August, 1912, which declared that the general trusts of the deed were bad because the objects of the charity were far too indefinite, but the settlement of the litigation being approved by the learned Judge, his declaration was confined to the failure of the trusts, and to declaring that the properties that were the subject of the deed were merely charged with such necessary expenses as were incurred in the lifetime of the lady for the maintenance and ownership of the sradh mentioned in the third clause, and the annual service mentioned in the fourth clause. The settlement released Protab from liability to account for moneys received from the lease, but it appointed the second trustee in the order Sarat Chandra Ghosha, receiver of the estate, and express directions were reserved in these terms of settlement that he should be at liberty to take steps to recover and set aside the perpetual lease or leases granted by Protab.

The proceedings out of which this appeal has arisen were accordingly instituted by Sarat. It is unfortunately true that the plaint is not expressed in plain terms, but it does most clearly set out allegations in paragraph 5 and paragraph 6, putting forward this lease under which the defendants claim as a suggested or alleged lease, and there is nothing in the plaint to show that the lease was accepted as having in fact been properly executed. Again, the particular matter in controversy was not exactly defined in the issues that were settled, but it is certainly covered by the third issue, which was in these terms : " Was the trustee or his am-moktar competent to grant the permanent lease in question, and is it binding on the plaintiff ? " The case came on for trial before the Subordinate Judge on the 14th July, 1916, when he dismissed the suit. In the course of taking the depositions, attempts were made to give in evidence the contents of the power of attorney under which the deed had been executed, and objection was promptly taken that no such evidence was admissible because the document must be in writing, and verbal evidence as to its contents could not be given until some proper and sufficient explanation was offered as to the reason why the document itself was not before the Court. On more than one occasion, in the course of the evidence, similar attempts were made, and similar objections were taken, and in the end there was no evidence on which reliance could be placed as to what the actual terms of that document were, or whether in fact any such document was in existence or operative at the time when the lease was executed. The best evidence upon the point was that of Zatindra Muthik who was managing clerk to Bhupendra in his profession of solicitor. He is not himself a solicitor, and is now a trader in fish. He says that he read the power of attorney, and that it granted full power to execute lease, mortgage, etc., but he did not recollect the exact expressions. The power was a general power to sell, mortgage, or lease.

This evidence was objected to, and is useless for the purpose of proving the contents of a written document. Their Lordships only refer to it for the purpose of saying that had they accepted the evidence, it would not be sufficient. If any power existed in Protab to delegate authority under the trust deed it would be quite clear that the power of attorney to be granted would have to be a special power of attorney, specially referable to dealing with the estate which was subject to the trust, and not a general power of attorney, which may have been executed by Protab in favour of his son, entitling him to deal with the whole of his private property. No evidence whatever that it is properly admissible having been given of the power of attorney, it necessarily follows that there was no proof that the lease under which the defendants claim had ever been properly executed at all, and the defence failed.

The learned Subordinate Judge, who dismissed the suit, dealt with the matter in a few sentences. He seems to think that the statement in the plaint of the suit that had been compromised was sufficient to lead to the inference that Bhupendra, the son, had full power to execute the lease on Protab's behalf, and he says at page 198 of the Record :—

> " I may also point out here that Bhupendra Sri's authority to execute the lease on behalf of Protap Babu has not been challanged in the plaint, though the plaintiff knew, as the plaint in the High Court case indicates, that such a lease was granted. Bhupendra Sri Babu was alive when this plaint was filed, and this explains why the plaintiff did not consider it expedient to challenge his power."

It may be pointed out that even though Bhupendra Sri Babu had died since the suit was instituted, that would not have prevented the parties whose duty it was to obtain production of the power of attorney from taking the necessary steps either to obtain a copy of the document or to prove that that copy could not be obtained. The point raised that the matter was not specifically mentioned in the plaint does not appear to their Lordships to be sound, because although it is true that the plaint is couched in uncertain language, it is nowhere intimated in the plaint that such a lease was properly executed, and it therefore became incumbent upon the defendants to prove the title under which they held. But whatever may be said about what happened before the Subordinate Judge, the grounds of appeal to the High Court expressly suggested that the Court below had made a mistake in overlooking the fact that the alleged power of attorney had not been proved, so that the question was definitely raised, and the attention of the High Court directed to it. The High Court, who confirmed the decree of the Subordinate Judge, dealt with the question in these terms, at page 206 of the Record :—

> " There can be no doubt that Bhupendra Sri Ghosha held an Am-mokhtarnama from his father. Unfortunately neither side seems to have been at any pains to procure the production of the document or to give proper secondary evidence of its contents, if it could not be found. The evidence on the record, such as it is, indicates that that Am-mokhtarnama was registered at Bindhyachal, and that it granted full power to sell, mortgage and lease."

Their Lordships desire to point out that if a proper case has not been established for the admission of secondary evidence of the contents of a written document, and objection has been taken to the fact that the document has not been produced, it is not permissible to go to other evidence for the purpose of indicating what the contents of the written document may prove to be if once it were examined.

Their Lordships, therefore, are clearly of opinion that in this case the defence must break down through the inability of the defendants to prove the execution of the lease under which they claim by anybody having proper authority, and even if the evidence as to the existence and contents of the power of attorney were accepted, it would be inadequate for the reasons already given. Their Lordships are, however, impressed with what had been said by Mr. De Gruyther as to the defendants not being alive to this point being raised in the plaint, though they see no reason whatever for this inadvertence from the date when the notice of appeal was given to the High Court. Their Lordships, therefore, have considered what the position would be supposing such document had, in fact, been proved, and had been shown to be a special power purporting to authorise dealings with the trust estate, and they are of opinion that even in that event it could not have availed the defendants. The reason for this is plain. In whatever capacity Protab held the land in question, the capacity must have been a representative one. It was said that he was not in the strictest language a trustee ; but be it so, his position was none the less a representative one, and it being plain that he never negotiated nor considered, nor knew of the lease until after it had been executed, if what was done, was done by virtue of a power of attorney, it could only have been because the power had delegated the representative authority that he possessed to a third party. The duties of Protab, however they may be defined, were in their nature fiduciary, and fiduciary duties cannot be made the subject of delegation. If, therefore, the document had been before their Lordships it would have been impossible to have supported the contention that it conferred the power to negotiate and execute the document upon which the whole of the defendants' case rests.

Their Lordships desire to express their opinion that there is nothing to cause them to qualify the findings that have been found by both the Courts as to the defendants having acted honestly in the matter. They acted honestly, but they acted with scant wisdom, and with a strange disregard of the caution that it is essential should be observed in dealing with a person who has no authority to act on his own behalf.

For these reasons their Lordships think this appeal should be allowed, the suit should be decreed, an order made for possession of the land, an enquiry should be directed as to mesne profits, and the appellants should have the costs here and below, and they will humbly advise His Majesty accordingly.

In the Privy Council.

K. S. BONNERJI, OFFICIAL RECEIVER

v.

SITANATH DAS AND ANOTHER.

DELIVERED BY LORD BUCKMASTER.

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