should interfere with that finding. It is a finding for which there is foundation in the evidence, and, in my opinion, it was erroneous to disturb it. We must, therefore, reverse the judgment and restore the decree of the lower Appellate Court.

The appellant before us must have the costs of the two appeals in the High Court.

MOOKERJEE, J. concurred.

S. M. *Appeal allowed.*

LETTERS PATENT APPEAL.

Before Jenkins, C.J. and Mookerjee, J.

BIJOYCHAND MAHATAB

v.

KALIPADA CHATTERJEE.*

1913

June 11.

Hindu Law— Endowment for worship of an image—Destruction of image, how it affects endowment.

An endowment of land, the income of which is meant to be applied for the purposes of the service of an image of *Shiva* is not affected by the destruction or mutilation of the image. The religious purpose survives the destruction or mutilation.

A new image may be established and consecrated in order that it may be worshipped as intended by the original founder.

Purna Chandra Bysack v. *Gopal Lal Seti* (1) and *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (2) referred to.

A tenure dedicated to the service of an image of an idol comes to an end if the person entrusted with the worship repudiates his obligation in that behalf.

Hurrogobind Raha v. *Ramrutno Dey*(3) and *Ansar Ali Jemadar* v. *Grey*(4) followed in principle.

---

* Letters Patent Appeal No. 21 of 1911, from the decision in Appeal from Appellate Decree, No. 1367 of 1909.

(1) (1908) 8 C. L. J. 369.

(2) (1909) I. L. R. 37 Calc. 128.

(3) (1878) I.L.R. 4 Calc. 67.

(4) (1905) 2 C.L.J. 403.

1913

BIJOYCHAND MAHATAB v. KALIPADA CHATTERJEE.

LETTERS PATENT APPEAL by Maharajadhiraj Sir Bijoychand Mahatab, the plaintiff, from the judgment of Coxe, J.

The facts of the case are fully set out in the judgment of Coxe, J., which was as follows:

"This is a suit of an unusual nature. It is said that long ago the plaintiff's predecessor consecrated an idol by the name of *Trilokeswar* and made over the lands in suit to one Nrisingharam in order that the cost of the service of the idol might be defrayed from the profits. Nrisingharam afterwards made over the lands to the defendant with the charge to carry on the worship and pay for the costs out of the proceeds of the property. The river then swept away the temple. There is some conflict of evidence as to what happened to the idol, but it is clear that it is not forthcoming now. The plaintiff has now consecrated another idol under the same name, and erected another temple for it. He now wants that the proceeds of the land shall be devoted to the service of this new idol. The Court below has dismissed the suit and the plaintiff appeals.

"The munsif held that the allegations in the plaint were wholly unproved, that it was not proved that this land was ever dedicated to the idol *Trilokeswar* or given to the predecessor of the defendant in order that he might pay the cost of worship. All that was shown, in the Munsif' opinion, was that the defendant held this land *debutter*, and that the deed assigning it to him indicated that he held it for his maintenance and for worshipping his family idols, including *Trilokeswar*. The learned Subordinate Judge, in appeal, does not come to any definite finding that the plaintiff has failed to prove that these lands were subject to a charge for the worship of *Trilokeswar*. He apparently accepts the deed of assignment as showing that principal holder of the land got the property in suit as *debutter* to enable him out of the proceeds thereof to carry on the worship of the idol *Trilokeswar Shiva* and family idols.

"It seems to me that even if the lands were given in trust for the worship of the idol, the plaintiff could not succeed unless he showed that this second idol could fairly be regarded as the continuation of the first. Clearly the plaintiff could not by the simple expedient of calling the idol by the same name erect a temple in Calcutta half a century later and call on the defendant to dedicate the proceeds of the land to its service. On the other hand if the new temple had been erected immediately after the destruction of the old and so close to the original situation as was possible, there could be little doubt that if the land was originally liable to the charge of the service of the old idol it continued liable to the charge of the service of the new one.

"Now, in the present case, the Subordinate Judge finds that the old temple was swept away 40 years ago and that 'this is practically a new *Shiva* with an old name.' Even supposing, therefore, that the land was given in trust originally, the plaintiff cannot, in my opinion, call on the defendants to defray the cost of the service of the new idol.

"As for the prayer for the resumption of the land, the plaintiff must establish affirmatively that the land was originally given in trust. The learned Subordinate Judge is not so definite, but the passage I have quoted indicates to my mind that he did not intend to displace the Munsif's finding and thought the evidence insufficient.

"Accordingly the appeal is dismissed with costs."

Babu Basanta Coomar Bose (with him *Babu Sherashi Charan Mitra*), for the appellant. Defendant's own document shows that plaintiff's predecessor dedicated the property for the worship of the image *Trilokeswar*. That image having been broken could no longer be worshipped: see *Ashtabingsatitattwa Smriti*, Bengali edition, p. 648, 2nd paragraph. The same sloka is quoted in the *Shabdakalpadruma*. A new image was, therefore, necessary and was established in the same village, though after 40 years. The images may be different, but the deity is the same: *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*(1) and *Purna Chandra Bysack* v. *Gopal Lal Sett*(2). No question of limitation can arise; it is either a trust or a service tenure. Non-performance of the trust or service was due to the absence of the image, and the defendant cannot claim exemption when the object of the trust or service is re-established. My client is willing that the defendant should retain the land if he performs the *puja* and provides the articles for worship, or even pays the expenses of the worship at Rs. 31-8 per annum. If he refuses he must give up the land.

Babu Karunomoy Bose, for the respondent. The *arpannama*, which is the sole evidence relied on by

(1) (1909) I.L.R. 37 Calc. 128. (2) (1908) 8 C.L.J. 369, 390.

1911

BIJOYCHAND MAHATAB v. KALAPADA CHATTERJEE.

the plaintiff, does not prove dedication, endowment or trust. Reads the document. It mentions three sets of properties and recites that they were given to the vendor's ancestor by the Maharaja for the *sheba* of *Trilokeswar Shiva* and other family idols of the grantee. The use of the word *debutter* is not sufficient: *Jagamba Goswamini* v. *Ram Chandra Goswami* (1) and *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur*(2). For the nature of proof required to establish dedication, see G. Sarkar's "Hindu Law", 4th ed., pp. 496-7, and Saraswati's Tagore Law Lectures, p. 139. Here there is no proof of endowment, judged by this test. The *arpannama* evidences only a grant subject to a direction to spend a portion of the usufruct for *sheba*. The amount to be spent is, moreover, left to the discretion of the grantee. The land in dispute is only one of the three properties mentioned in the *arpannama*. Nothing is stated as to how much should be spent for *sheba*, or what amount should be leviable from which of the properties. It is all too vague and indefinite: *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury* (3).

The plaintiff wants to pick out one of the three properties and have it declared that the same was dedicated exclusively to *one* of the several images referred to in the deed. This is against the findings, and there is no evidence to support it.

The very fact that the property was transferred absolutely by the alleged trustee to my client and that the transfer itself is not impeached shows that it was no trust property: *Konwar Doorganath Roy* v. *Ram Chunder Sen* (4). Only a moral duty was imposed and

(1) (1903) I.L.R. 31 Calc. 314.
(2) (1905) 2 C.L.J. 546.
(3) (1907) 12 C.W.N. 98, 102.
(4) (1876) I.L.R. 2 Calc. 341; L.R. 4 I.A. 52.

not a legal one: Mayne's "Hindu Law", 6th Edition, pp. 566-7.

Next, assuming that it was originally a trust property, it was a private trust. Subsequent conduct of the donor may allow it to be treated as secular property: *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury*(1). Here the conduct of the plaintiff's ancestor for 40 years shows that it was treated as a secular property.

Then, again, the trust cannot attach in favour of a new idol established at a different place half a century after the demolition of the old image. Use of the same name also cannot constitute the identity of this new image with the original one: see *Hayasheersha* quoted in Babu Golap Chandra Sarkar's "Hindu Law" at p. 493. The re-establishment should be at the same place and not more than three days after demolition of the old image. The material, colour, size and features of the new image should be exactly like the old; the fiction of identity of the two images must be kept up. Here it is entirely a new image, and the findings of the Court below are in my favour on this point. In *Doorga Proshad Dass* v. *Sheo Proshad Pandah*(2) doubts were thrown out as to whether any reconstruction is allowable or not. There is absolutely no precedent for any reconstruction of an image at a different place, specially after such a lapse of time.

Lastly, the question of limitation does not arise. Even if all the findings are against me, section 10 of the Limitation Act can only apply for enforcing the trust only to the extent of enforcing payment of Rs. 30-8 per annum to meet the expenses of the worship; but the lands cannot be resumed after such a long period. That section applies to resulting

(1) (1907) 12 C.W.N. 98, 102. (2) (1880) 7 C.L.R. 278, 280.

1913

BIJOYCHAND MAHATAB v. KALIPADA CHATTERJEE.

trusts: *Mathurdas Damodardas* v. *Vandrawandas Sunderji*(1) and *Bhurabhai Jamnadas* v. *Bai Ruxmani*(2). The case of service-tenures is different. They are conditional grants. *Komargowda* v. *Bhimaji*(3) is distinguishable. Here it is a case of grant subject to a charge. In case of conditional grant, the grant fails on the condition failing. In case of charge, the charge failing, grantee takes free of charge.

MOOKERJEE, J. This is an appeal by the plaintiff in a suit which has been described by the Courts below as a suit of a novel description. The defendant is in possession of land which originally belonged to the predecessor of the plaintiff, the Maharaja of Burdwan. More than half a century ago, the then Maharaja established an image of *Shiva* and named it *Trilokeswar Shiva* after himself. The allegation of the plaintiff is that the land in dispute was made over to the predecessor of the defendant in order that the income might be applied for the worship of the image so established. The Maharaja asserts that about 40 years before the commencement of this litigation, the site on which the temple of *Shiva* stood was washed away by the river Bhagirathi, that the image itself was broken to pieces, that since that time the broken image has been worshipped by the predecessor of the defendant, that the Maharaja has recently established a new image of *Shiva* in a newly constructed temple in the same village, and that the defendant has refused to perform the worship of this image. The plaintiff, therefore, asks for relief in the alternative in this manner: he prays, in the first place, that the defendant may be compelled to perform the

(1) (1906) I. L. R. 31 Bom. 222. (2) (1908) I. L. R. 32 Bom. 394.
(3) (1899) I. L. R. 23 Bom. 602.

1913

BIJOYCHAND MAHTAB v. KALIPADA CHATTERJEE.

MOOKERJEE J.

worship of the newly established image; in the second place, that the defendant may be called upon to provide out of the income of the land in his possession the articles necessary for the worship of the image, and finally, that if the defendant refuses to perform the worship or to supply the articles necessary in that behalf, a decree may be made against him for ejectment.

The defendant repudiated his liability to perform the worship. His case was that the land had been granted to his predecessor for the worship of his family idols and that neither he nor his predecessor was ever under any obligation to perform the worship of the image *Trilokeswar Shiva*. The suit has been dismissed by all the Courts below.

On the present appeal it has been contended that, upon the facts found, there is no answer to the claim. The defendant has produced an *arpannama* executed in his favour by his predecessor in 1882. In so far as this deed of transfer contains an admission by his predecessor, it may be used against him. The *arpannama* recites that the land had been granted by the Maharaja of Burdwan to the predecessor of the defendant in order that the income thereof might be applied for the worship of his family idols and also of *Trilokeswar Shiva*.

It has been argued on behalf of the defendant-respondent in this Court that this at best indicates that the dedication, if any, was for the benefit of the family idols of the defendant, as also of the image established by the Maharaja. It is answered that the defendant cannot use in his favour an admission by his predecessor in his own interest. Under the circumstances, it is clear that the property must have been made over by the Maharaja to the predecessor of the defendant in order that the income might be

1913

BIJOYCHAND MAHATAB v. KALIPADA CHATTERJEE.

MOOKERJEE J.

applied for the worship of the image *Trilokeswar Shiva*. The question consequently arises whether this trust came to an end when the temple was washed away and the image was broken.

On behalf of the respondent, it has been contended, on the authority of a text of *Hayasheersha*, quoted and translated in Shastri Golapchandra Sarkar's "Hindu Law", fourth edition, page 471, that when an image has been mutilated or destroyed, it may be renewed of the same material, of the same size and in the same place, and that this renewal must be made on the second or on the third day. In our opinion this text does not assist the contention of the respondent. This text shows that when an image has been mutilated or destroyed, the religious purpose does not come to an end, and as pointed out by this Court in the case of *Purna Chandra Bysack* v. *Gopal Lal Sett*(1), the endowment is not affected by the destruction or mutilation of the image. The religious purpose still survives, and a new image may be established and consecrated in order that it may be worshipped as intended by the original founder. Were the contention of the respondent to prevail, the endowment would come to an end, if, as has happened in this case, the land upon which the temple stood was washed away by the action of the river. This view is not supported by any text or any principle of the Hindu law which has been brought to our notice. It is, on the other hand, clearly opposed to the principle recognised by a Full Bench of this Court in the case of *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*(2). If, then, the endowment was not destroyed when the land upon which the temple stood was washed away and the image was broken, what has happened since then to alter the position of the

(1) (1908) 8 C. L. J. 369.

(2) (1909) I. L. R. 37 Calc. 128.

parties? The defendant is in the same position as if he held a service-tenure. The land was given to him for a definite purpose, namely, that he might apply the income thereof for the purposes of the service of the image established by the Maharaja. That image has ceased to exist and a new image has been installed and consecrated by the successor of the Maharaja, and it has been named after the original founder, *Trilokeswar Shiva*. It is in the same village. There is no conceivable reason why the defendant should decline to apply the proceeds of the property in the worship of the idol. This he has deliberately refused to do. The Court cannot compel him to perform the worship when he repudiates his obligation in that behalf. The only course which the Court can adopt under such circumstances is to hold that the service-tenure has come to an end, and the defendant is not entitled to retain possession of the land. This is clear from the decision of this Court in *Hurrogobind Raha* v. *Ramrutno Dey* (1), and in *Ansar Ali Jemadar* v. *Grey*(2).

The result, therefore, is that this appeal must be allowed and the decrees of the Courts below discharged; the suit will stand decreed, and the defendant must deliver possession of the property to the plaintiff. The plaintiff will be entitled to his costs in all Courts. The claim for mesne profits is abandoned.

JENKINS, C.J. concurred.

S. M. *Appeal allowed.*

(1) (1878) I. L. R. 4 Calc. 67. (2) (1905) 2 C. L. J. 403.