APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

1914

May 26.

KULADA PROSAD DEGHORIA

v.

KALI DAS NAIK.*

Hindu Law—Religious endowment—Shebait—Nature of debutter grants, where grantee is to enjoy properties from generation to generation on performance of sheba of the goddess—Permanent leases by grantee, validity of—Civil Procedure Code (Act V of 1908), s. 99—Ambiguity —Evidence.

In the construction of ancient grants and deeds, evidence is admissible as to the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended.

Weld v. *Hornby* (1), *Rex* v. *Osbourne* (2) followed.

The Court may call in aid acts under the deed as a clue to the intention.

Doe v. *Ries* (3) followed.

This principle does not apply unless there is an ambiguity.

Attorney-General v. *The Corporation of Rochester* (4) followed.

Consequently, while in a case of ambiguity the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the Court will not, where there is no ambiguity, accept an erroneous interpretation though consistent with usage, so as to sanction a manifest breach of trust.

Drummond v. *Attorney-General* (5) followed.

If there is a deed which says, according to its true construction, one thing you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it.

Sadlier v. *Biggs* (6) followed.

* Appeal from Appellate Decree, No. 2056 of 1910, against the decree of E. B. H. Panton, District Judge of Burdwan, dated March 12, 1910, confirming the decree of Atul Chandra Batabyal, Subordinate Judge of Burdwan, dated Jan. 2, 1909.

(1) (1806) 7 East 197 ; 8 R. R. 608.
(2) (1803) 4 East 32.
(3) (1832) 8 Bing. 178, 181.
(4) (1854) 5 De G. M. & G. 882.
(5) (1849) 2 H. L. C. 837, 861, 863.
(6) (1853) 4 H. L. C. 435, 458

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Where two ancient *debutter* grants by one of the Maharajas of Pachete were held to be ambiguous, the properties having been given to the grantee *who was to enjoy them from generation to generation* on performance of the *sheba* of the goddess, and in 1829 the successors of the grantee gave two permanent leases to the predecessors in interest of the plaintiffs :

Held, that in those circumstances the Court might determine the true character of the endowment from the manner in which the dedicated properties had been held and enjoyed.

That the properties in dispute were not absolute *debutter* properties of the goddess, but were the personal properties of the grantees subject to the charge of the worship of the goddess.

Ganga v. *Brindaban* (1), *Mudan* v. *Kamal* (2) referred to.

That the permanent leases had become indefeasible by lapse of time.

Jagamba Goswamini v. *Ram Chandra Goswami* (3), *Damodar Das* v. *Lakhan Das* (4) as explained in the case of *Madhu Sudan Mandal* v. *Radhica Prosad Das* (5) followed.

SECOND APPEAL by Kulada Prosad Deghoria, the defendant No. 1.

The facts out of which this appeal arises are briefly as follows. Towards the beginning of the 19th century the then Maharaja of Pachete made two grants of land in favour of one Deb Nath Deghoria the predecessor of the appellant (defendant No. 1). The first grant was described as a *debutter* pottah of village Jamir Kuri given for the *sheba* of the goddess Kalyaneswari, the grantee being directed to bless the grantor and to enjoy the land peacefully. In the second deed village Debipur was granted as rent free *debutter* through the grantee for the *sheba* of the same goddess, the grantee being directed to enjoy the land from generation to generation after performance of the *sheba* of the goddess. Within a few years of the grants in favour of Deb Nath Deghoria the properties were partitioned between him and his brother Shib Nath Deghoria, and

(1) (1865) 3 W. R. 142.

(2) (1867) 8 W. R. 42.

(3) (1903) I. L. R. 31 Calc. 314.

(4) (1910) I. L. R. 37 Calc. 885; L. R. 37 I. A. 147.

(5) (1912) 16 C. L. J. 349.

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on 2nd August and 14th September 1829, the representatives of the two branches of the Deghoria family executed two permanent leases (in respect of their different shares) in favour of one Kanai Gope and of Kinkar Gope and Chakar Gope respectively. These leases, which were not challenged for more than 60 years either by any of the shebaits or by the successive Rajahs of Pachete, formed the basis of the plaintiff's title, the lessees being the predecessors in interest of the co-plaintiffs. The controversy between the parties was with regard to the true nature of these grants. Further, the suit was essentially one for possession of property, the plaintiffs not praying for cancellation of any execution sale as no operative sale had ever taken place. Both the Courts below (viz., the District and Subordinate Judges of Burdwan) considering the terms of the deed at best inconclusive, referred to the manner in which the dedicated properties had been held and enjoyed, and concurrently found that the properties had been throughout held and enjoyed by the Deghorias as secular properties subject to a religious charge. The defendant No. 1 then preferred this appeal to the High Court, questioning the validity of the plaintiff's title.

Babu Golap Chandra Sarkar (with him *Babu Sarat Chandra Dutt, Babu Narendra Kumar Bose, Babu Biraj Mohan Mazumdar* and *Babu Rishindra Nath Sarkar*), for the appellant. The suit is improperly constituted, there being a misjoinder of plaintiffs; the suit is also barred by limitation, treated as a suit for declaration of title: *Mohabharat Shaha* v. *Abdul Hamid* (1) and *Legge* v. *Rambaran* (2). The dedication of the *debutter* properties was of the completest character known to law and the properties

(1) (1904) 1 C. L. J. 73. (2) (1897) I. L. R. 20 All. 35.

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vested absolutely in the goddess: *Jagadindra Nath Roy* v. *Hemanta Kumari Devi* (1). The shebaits, consequently, could not grant a permanent lease of any portion of the *debutter* grants, and therefore the leases to the predecessors of the plaintiffs were invalid. The Court was not entitled to look to the conduct of the parties for assistance in the construction of the original grants, as the properties in suit were the absolute *debutter* of the goddess: *Abhiram Goswami* v. *Shyama Charan Nandi* (2).

Dr. Rashbehari Ghose (with him *Babu Bipin Behari Ghose*), for the respondents. The question of the true character of the endowment is immaterial, because, as the permanent leases of 1829 had never been impeached, any suit now instituted for cancellation of these leases and for redemption of the properties from the lessees or their representatives would be successfully met by the plea of limitation, and the permanent leases have consequently become indefeasible: *Jagamba Goswamini* v. *Ram Chandra Goswami* (3), *Damodar Das* v. *Lakhan Das* (4), and *Modhu Sudan Mandal* v. *Radhika Prosad Das* (5). Even if the objection as to misjoinder be well founded it will not be a good ground for reversal of the decision of the learned Subordinate Judge under sec. 99 of the new Civil Procedure Code which was in force when the appeal was preferred to the District Judge of Burdwan. Besides this suit is not barred by limitation as it is essentially one for possession of property, there being no prayer for the cancellation of any execution sale, as no operative sale had ever taken place. The two deeds are ambiguous for

(1) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.

(2) (1909) I. L. R. 36 Calc. 1003; L. R. 36 I. A. 148.

(3) (1903) I. L. R. 31 Calc. 314.

(4) (1910) I. L. R. 37 Calc. 885; L. R. 37 I. A. 147.

(5) (1912) 16 C. L. J. 349.

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although the properties were described as debutter, yet they *were given to the grantee who was to* enjoy them from generation to generation on performance of the *sheba*. The Courts below have concurrently accepted the contention of the plaintiffs which was in their opinion consistent with the terms of the deeds and also the manner in which the dedicated properties had been held and enjoyed for nearly a century: see *Ganga* v. *Brindabun* (1), *Ram Chandra Mukherji* v. *Ranjit Singh* (2). Consequently these properties after the *debutter* grants retained their secular character, though they became impressed with a religious charge: *Ashutosh* v. *Doorga Charan Chatterjee* (3). Hence the leases of 1829 were not liable to be impeached and afforded a solid foundation for the title of the plaintiff.

Babu Golap Chandra Sarkar, in reply.

Cur. adv. vult.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal by the first defendant in a suit for recovery of possession of immoveable property on declaration of title. The Courts below have concurrently found in favour of the plaintiffs, and have given them a decree, on declaration that their title has not been affected by the sale in execution of a rent decree in a fraudulent suit for recovery of alleged arrears of rent. On the present appeal, one substantial question of law has been argued touching the validity of the title of the plaintiffs which is based ultimately on two permanent leases granted by a *shebait* in respect of the properties of a religious endowment. The facts antecedent to this litigation, though of a complex character, may be

(1) (1865) 3 W. R. 142.

(2) (1899) I. L. R. 27 Calc. 242, 251; 4 C. W. N. 405, 410.

(3) (1879) I. L. R. 5 Calc. 438; L. R. 6 I. A. 182.

briefly narrated in so far as such recital is necessary for the appreciation and determination of the question of law raised before us.

The disputed properties lie within the zemindary of the Maharaja of Pachete. In the early years of the 19th century, the then Maharaja made two grants in favour of one Deb Nath Deghoria, the predecessor of the appellant. The first of these grants was described as a *debutter* pattah of village Jamir Kuri given for the *sheba* of goddess Kalyaneswari. The grantee was directed to bless the grantor and to enjoy the land peacefully. In the second deed, village Debipore was granted as rent free *debutter* through the grantee for the *sheba* of the same goddess, and the grantee was directed to enjoy the land from generation to generation after performance of the *sheba* of the goddess. The controversy between the parties relates to the true nature of these grants. On behalf of the defendant, appellant, it has been contended that the dedication was of the completest character known to law, to use the language of their Lordships of the Judicial Committee in *Jagadindra* v. *Hemanta Kumari* (1); the properties consequently vested absolutely in the goddess, and it was not competent to the *shebaits* to grant a permanent lease of any portion thereof as was done to the predecessors of the plaintiffs. On behalf of the plaintiffs, respondents, it has been argued, on the other hand, that the properties, after the grants, retained their secular character, though they became impressed thereby with a religious charge, as in the case of *Asutosh* v. *Doorga* (2). The Courts below have concurrently accepted the contention of the plaintiffs, respondents, which, in their opinion, is consistent with the terms of the deeds, and also with the manner

(1) (1904) I. L. R 32 Calc. 129; L. R. 31 I. A. 203.

(2) (1879) I L. R. 5 Calc. 438; L. R. 6 I. A. 182.

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in which the dedicated properties have been held and enjoyed for nearly a century. This view has been assailed on behalf of first defendant, who claims to be the present *shebait* of the endowment, and maintains that the properties in suit are the absolute *debutter* of the goddess. In support of this view, reliance has been placed upon the decision of their Lordships of the Judicial Committee in *Abhiram Goswami* v. *Shyama Charan Nandi* (1). In our opinion, the decision mentioned does not assist the appellant. The two deeds are at least ambiguous, for although the properties are described as *debutter*, yet they are given to the grantee, who is to enjoy them from generation to generation on performance of the *sheba* of the goddess. The view may reasonably be maintained that the grants were not made to the goddess herself but were made to Deb Nath Deghoria in order that he might, on performance of the *sheba* of the goddess, enjoy the properties from generation to generation. In these circumstances, the Court may determine the true character of the endowment from the manner in which the dedicated properties have been held and enjoyed: *Ganga* v. *Brindabun* (2), *Muddun* v. *Komul* (3), *Ram Chandra* v. *Ranjit Singh* (4), *Madhub* v. *Sarat* (5), *Tulsi* v. *Siddhi* (6) and *Mohan Tikait* (7). But it has been strenuously contended on behalf of the appellant that the Court is not entitled to look to the conduct of the parties for assistance in the construction of the grants. This argument is opposed to the well-established rule that, in the construction of ancient grants and deeds, evidence is admissible as to the manner in which the

(1) (1909) I. L. R. 36 Calc. 1003; L. R. 36 I. A. 148.
(2) (1865) 3 W. R. 142.
(3) (1867) 8 W. R. 42.
(4) (1899) I. L. R. 27 Calc. 242, 252; 4 C. W. N. 405, 410.
(5) (1910) 15 C. W. N. 126.
(6) (1911) 9 Ind. Cas. 650.
(7) (1913) 19 Ind. Cas. 337.

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thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended. *Weld* v. *Hornby* (1), *Rex* v. *Osbourne* (2). As Tindal C. J. observed in *Doe* v. *Ries* (3), the Court may call in aid acts under the deed as a clue to the intention. This principle, as was pointed out by Lord Halsbury, L. C. in *The North Eastern Railway Company* v. *Lord Hastings* (4), does not apply, unless there is an ambiguity, for even usage does not justify deviation from terms which are plain: *Attorney-General* v. *The Corporation of Rochester* (5), *Attorney-General* v. *Sidney, Sussex College* (6). Consequently while in a case of ambiguity, the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the Court will not, where there is no ambiguity, accept an erroneous interpretation, though consistent with usage, so as to sanction a manifest breach of trust: *Drummond* v. *The Attorney-General* (7). The matter may be put briefly in the words of Sugden L. C. in *The Attorney-General* v. *Drummond* (8): "One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means." To this must be added the qualification formulated by Lord Cranworth L. C. in *Sadlier* v. *Biggs* (9) in the following terms: "If there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something

(1) (1806) 7 East. 197; 8 R. R. 608.
(2) (1803) 4 East. 327.
(3) (1832) 8 Bing. 178, 181.
(4) [1900] A. C. 260.
(5) (1854) 5 De G. M. & G. 797.
(6) (1869) L. R. 4 Ch. 722. Ap.
(7) (1849) 2 H. L. C. 837, 861, 863.
(8) (1842) 1 Dr. & War. 353, 368.
(9) (1853) 4 H. L. C. 435, 458.

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else, merely because the parties have gone on for a long time so understanding it." In the case before us, the terms of the deed are at best inconclusive, and the Courts below have properly referred to the manner in which the dedicated properties have been held and enjoyed. It appears that within a few years of the grants in favour of Deb Nath Deghoria, the properties were partitioned between him and his brother Shib Nath Deghoria, and on 2nd August and 14th September 1829, the representatives of the two branches of the Deghoria family executed two permanent leases in respect of their different shares. These leases were not challenged for at least 60 years, either by any of the *shebaits* or by the successive Rajahs of Pachete who are intimately concerned in the proper maintenance of the endowment created by one of their ancestors. These leases form the root of the title of the plaintiffs, and the Court will be slow to listen to the suggestion that they were granted by the then *shebaits* in excess of their authority and consequently constituted acts in the nature of breaches of trust. The Courts below have further found that the properties have been throughout held and enjoyed by the Deghorias as secular properties subject to a religious charge, and that while a part of the income has been applied for the performance of the worship of the goddess, the remainder has been used by the members of the family for their own purposes. Under these circumstances, the Courts below have rightly concluded that the properties in dispute are not absolute *debutter* properties of the goddess, but are the personal properties of the Deghorias subject to the charge of the worship of the goddess. In this view, the permanent leases of 1829 are not liable to be impeached, and afford a solid foundation for the title of the plaintiffs.

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We may add that on behalf of the respondents it was argued that the question of the true character of the endowment was immaterial, because, as the permanent leases of 1829 have never been impeached, any suit now instituted for cancellation of those leases and for resumption of the properties from the lessees or their representatives would be successfully met by the plea of limitation. This contention is supported by the decision of this Court in *Jagamba Gaswamini* v. *Ram Chandra Goswami* (1), and by that of their Lordships of the Judicial Committee in *Damodar Das* v. *Lakhan Das* (2) as explained in the case of *Madhu Sudan Mandal* v. *Radhika Prosad Das* (3). The permanent leases have consequently become indefeasible by lapse of time, and from this point of view also, there is no answer to the claim of the plaintiffs.

It was faintly suggested that the suit was improperly constituted and that there had been a misjoinder of plaintiffs. The District Judge has pointed out that there is no substance in this contention. But even if the objection were well founded, it would not be a ground for reversal of the decision of the Primary Court under section 99 of the Code of Civil Procedure of 1908, which was in force when the appeal was preferred to the District Judge. It was also sought to be argued that the suit was barred by limitation, treated as a suit for declaration of title, and reference was made to the cases of *Mohabharat Shaha* v. *Abdul Hamid* (4) and *Legge* v. *Rambaran* (5). The suit, however, is essentially one for possession of property, and the plaintiffs are not called upon to ask for cancellation of any execution sale, because no operative sale has ever taken place.

(1) (1903) I. L. R. 31 Calc. 314.

(2) (1910) I. L. R. 37 Calc. 885; L. R. 37 I. A. 147.

(3) (1912) 16 C. L. J. 349.

(4) (1904) 1 C. L. J. 73.

(5) (1897) I. L. R. 20 All. 35.

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The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

G. S. *Appeal dismissed.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

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July 14.

KAILASH CHANDRA NATH

v.

SHEIKH CHHENU.*

Receipt—Registration—Waiver—Evidence—Registration Act (III of 1877), s. 17(n)—Mortgage-bond—Receipt showing simple interest charged—Evidence Act (I of 1872), s. 92.

A receipt, which purports to show that simple and not compound interest was to be charged (though the mortgage-bond contained provision for the payment of compound interest), is admissible in evidence. Such a receipt operates as a full acquittance for the money paid and requires no registration.

Jiwan Ali Beg v. *Basa Mal* (1) followed.

SECOND APPEAL by Kailash Chandra Nath and another, the plaintiffs.

This appeal arises out of a suit for sale on a registered mortgage-bond. The plaintiffs claimed Rs. 1,346 and 14 annas, inclusive of compound interest, the principal amount advanced being Rs. 300 only. The defence was that the provision for payment of compound interest was fraudulently inserted in the

* Appeal from Appellate Decree, No. 1740 of 1912, against the decree of J. A. Dawson, District Judge of Tippera, dated April 11, 1912, affirming the decree of Shyama Charan Chakravarti, Munsif of Brahman baria, dated May 8, 1911.

(1) (1886) I. L. R. 9 All. 108.