PRIVY COUNCIL.

MAHAMMAD MAZAFFAR-AL-MUSAVI

v.

JABEDA KHATUN.

P. C.*
1929
Oct. 21, 22;
1930
Jan. 21.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

*Mahomedan law—*Wâkf*—Permanent lease of* wâkf *lands—Long recognition of validity—Presumption of legal origin—Consent of* kâzi*—Indian Evidence Act (I of 1872), s. 114.*

Lands belonging to an ancient *wâkf* were proved to have been held by tenants for over seventy years at an unchanged rent and as heritable property. The tenure had been described as *istimrâri mokârrâri* in receipts given by successive *mutâwâllis*, and upon court auction sales. An imperial *sanad* of 1772, appointing a *mutâwâlli* of the *wâkf*, prohibited the grant of permanent tenancies.

Held that a lawful origin of the tenure by reason of the *kâzi's* consent was to be presumed ; the tenure might have been created before 1772, but, in any case, the prohibition in the *sanad* merely stated the rule of Mahomedan law and did not abrogate the power of the *kâzi*, to relax its operation.

The presumption of a lawful origin in support of proprietary rights, long and quietly enjoyed, is not a branch of the law of evidence, but a presumption arising in law in the absence of evidence. Consequently, the absence of any evidence of an application to the *kâzi* did not, under section 114 of the Indian Evidence Act, 1872, preclude a presumption that the *kâzi* had given his consent.

Magniram Sitaram v. *Kasturbhai Manibhai* (1) followed.

Decree of the High Court affirmed.

Appeal (No. 135 of 1927) from a decree of the High Court (May 13, 1925), reversing a decree of the Subordinate Judge of Dinajpur (March 29, 1923).

The appeal arose out of a suit by the appellant, the recently appointed *mutâwâlli* of a long established *wâkf*, to recover *khâs* possession of two *mouzâs* from defendants who claimed to be permanent tenants.

The material facts appear from the judgment of the Judicial Committee.

**Present* : Viscount Sumner, Lord Atkin, Lord Thankerton, Sir John Wallis and Sir Lancelot Sanderson.

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The Subordinate Judge made a decree for possession on the ground that a *mutâwâlli* could not grant a permanent lease, and the plaintiff was not bound by the acts of his predecessors.

On appeal to the High Court, the decree was reversed. The learned judges (Greaves and Mukerji JJ.) held that, as a *mutâwâlli* could make a permanent lease with the consent of the *kâzi* or the court, the alleged tenancy could have had a legal origin, and that, in the circumstances of the present case, the presumption was that it had a legal origin.

DeGruyther K.C. and *Kenworthy Brown*, for the appellant. The grant of a permanent tenancy by a *mutâwâlli* would be an illegal act: *Vidya Varuthi* v. *Balusami Ayyar* (1). Consequently, the court should not have drawn the inference which it did: *Nainapillai Marakayar* v. *Ramanathan Chettiar* (2). The decisions in *Magniram Sitaram* v. *Kasturbhai Manibhai* (3) and *Chockalingam Pillai* v. *Mayandi Chettiar* (4) that after long possession it could be assumed that a permanent tenancy of *debattar* property had been created by the *shebâit* for necessity do not apply so as to validate a permanent tenancy created by a *mutâwâlli*. Although it is stated in Ameer Ali's Mahomedan Law, 4th Ed., i., p. 428, that a *mutâwâlli* can create a permanent tenancy with the consent of the *kâzi*, there is no recorded case of a permanent tenancy so granted; it, therefore, cannot be regarded as a likely event. Under section 114 of the Evidence Act, a fact cannot be presumed, unless it is likely to have happened; further, under that section, in the absence of evidence that the *kâzi's* consent was applied for, the fact that he gave consent cannot be presumed.

[Reference was made also to *Tulshi Pershad Singh* v. *Ram Narain Singh* (5).]

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(2) (1923) I. L. R. 47 Mad. 337 (353); L. R. 51 I. A. 83 (978).
(3) (1921) I. L. R. 46 Bom. 481; L. R. 49 I. A. 54.
(4) (1896) I. L. R. 19 Mad. 485.
(5) (1885) I. L. R. 12 Calc. 117; L. R. 12 I. A. 205.

Dunne K. C. and *Hyam*, for the respondents Nos. 1 to 4. The principle upon which in *Magniram Sitaram* v. *Kasturbhai Manibhai* (1) the Board held that a permanent tenancy of valid origin was to be presumed applies in this case. The reasoning was apart from section 114 of the Evidence Act. The appellant tried to displace the presumption by alleging that the tenancy began in 1850; but the tenancy was conclusively proved to have descended from father to son, and to have been recognized by successive *mutâwâllis*, since 1843 or earlier. Even if the *wâkf* was created by the *sanad* of 1772, its language shows that the tenancy was already in existence. But in any case, the prohibition in the *sanad* only stated the general rule of Mahomedan law and did not deprive the *kâzi* of the discretion which he formerly had to relax the law for the benefit of the *wâkf*.

DeGruyther K. C., in reply, referred to *Dalton* v. *Angus* (2).

The judgment of their Lordships was delivered by

VISCOUNT SUMNER. The appellant in this case was plaintiff in the suit. He is the hereditary *mutâwâlli* of an ancient *wâkf* of large extent, and he claimed from the defendants possession of extensive lands, as property of the *wâkf*, which he was entitled to resume. The defendants' answer was that the lands were an ancient *istimrâri* tenure, held for a long though indefinite time at a fixed rent and as heritable property, of the appellant's predecessors, who had not only never contested the title, but had frequently acknowledged it by various overt acts. Other defences of limitation and estoppel were raised, but they need not now be considered. In substance, the facts necessary to support this defence were proved, though the actual date and circumstances of the origin of the tenure were not. The tenure had been sold in court auctions for arrears of rent, and had been described

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(2) (1881) 6 App. Cas. 740, 782, 799, 800.

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as an *istimrâri mokârrâri* tenure in 1859 and in 1902; rent receipts were produced for a long series of years, in which the tenure was also thus described; and it was proved that, in 1869, the *mutâwâlli* of the day had sued unsuccessfully for enhancement of rent. Circumstances such as these are an ordinary and, *primâ facie*, a sufficient proof of the right asserted by the defendants.

Against this, the plaintiff's reply was as follows :— "Admittedly the defendants have always owed and "have often paid rent at an unchanging rate to the "*mutâwâlli* of the *wâkf*, to which the lands in question "with others appertained, but they can produce no "grant or lease in support of their claim to a "permanent tenure, and, if they could, a *mutâwâlli* "cannot alienate the lands of the *wâkf* or grant a "permanent tenure at a fixed rent, which has the same "effect."

To meet this, otherwise irrefragable, argument, the defendants contended that, by way of completing their title to a tenure actually enjoyed over so long a period of years, there ought to be presumed some lawful origin, and the existence of such facts, though unrecorded and forgotten, as would establish a lawful origin. Mahomedan law affords such an origin in the exception to the rule (whether still acted on in practice in modern times or not) that with the leave of the *kâzi* such an alienation, otherwise unlawful, is permissible to a *mutâwâlli* (Ameer Ali, Mahomedan Law, 4th Ed., i., p. 428). The Subordinate Judge declined to make this presumption, but on appeal, the High Court made it and reversed his decree for possession. Greaves J., with whom Mukerji J. concurred, observed :—

> I think that the court, under the circumstances of the present case, should make the assumption that the grant was in its origin lawful, having regard to the fact that the lease has existed unchallenged since at any rate 1843, that the rent has remained unchanged, that applications for enhancement have been made and failed, and that no *mutâwâlli* has challenged it for a period of over seventy years.

It is against this conclusion that the present appeal is brought.

This question was dealt with by their Lordships' Board in *Magniram Sitaram* v. *Kasturbhai Manibhai* (1). In that case a lease of $5\frac{1}{2}$ acres of land, which had been previously settled as part of a *math*, was granted to a tenant, upon terms which, on the true construction of the document, were held to amount to a permanent lease, terminable only on non-payment of the rent reserved. The land had been held for the greater part of a century at the original low rent continuously without any disturbance of the tenants or anything to show that either party to it regarded the right of the tenants as other than permanent, while circumstances were proved, which appeared to establish the contrary. The decision proceeded upon the assumption that the grantor of the lease had been the *shebâit*. If so, the property having been devoted to religious purposes, the power of leasing would not extend beyond a grant for the life of the *shebâit* for the time being.

The Board, relying on the established exception to this limitation of his powers, namely, that a permanent alienation of temple property is valid, when there is proved necessity for the alienation, and following the case of *Chockalingam Pillai* v. *Mayandi Chettiar* (2), came to the conclusion that, failing actual proof of such necessity, its existence ought under the circumstances to be presumed:

> "At the lapse of 100 years," says Lord Buckmaster, "when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy, which the courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made."

It is to be remarked that in the case of *Chockalingam Pillai* (2) the date and terms of the original grant of the land to the *math* were on record, the date being 1756, and that in the earlier case of *Murugesam Pillai* v. *Manickavasaka Desika Gnana Sambandha Pandara Sannadhi* (3), in which the above quoted doctrine was also invoked, the interval between

(1) (1921) I. L. R. 46 Bom. 481 (488); L. R. 49 I. A. 54 (59).
(2) (1896) I. L. R. 19 Mad. 485.
(3) (1917) I. L. R. 40 Mad. 402; L. R. 44 I. A. 98.

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the impugned grant and the suit, which challenged it, was only 25 years. Further in *Chockalingam's* case as appears at page 496 of the report, a good deal was known and proved in evidence of the circumstances existing when the grant in question was made, and this was considered by the Court as part of the material, justifying the presumption of some necessity. In the case of *Magniram Sitaram* (1), their Lordships, however, applied the presumption without debating the circumstances or the probabilities of the case, no doubt in view of the fact that so long a time had elapsed since the event that any such consideration would have been speculative.

The question then is whether this decision applies in the present case, or whether any ground exists on which it can be properly distinguished.

The presumption of an origin in some lawful title, which the courts have so often readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming, is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. Hence their Lordships cannot accept the appellant's contention that the provisions of the Indian Evidence Act, section 114, prevent the inference of a consent by the *kâzi* in the absence of any evidence of an application to the *kâzi* for leave, or some other proved fact of that kind. The matter is one of a presumption, based on the policy of the law, but even considered as an inference from proved facts, the leave presumed is a thing, which may well be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made, nor is it one which a certain class of possessor is entitled to *de jure*. In a case such as this, where it is necessary to indicate what particular kind of lawful title is being presumed, the court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed, without doing violence to the probabilities of the case. The

(1) (1921) I. L. R. 46 Bom. 481 ; L. R. 49 I. A. 54.

presumption is not an "open sesame," with which to unlock in favour of a particular kind of claimant a closed door, to which neither the law nor the proved facts would in themselves have afforded any key. It is the completion of a right, to which circumstances clearly point, where time has obliterated any record of the original commencement.

There was, however, in evidence in the present case a *sanad* of the Emperor Shah Alam, in 1772, which granted the trusteeship of the *wâkf mehâls*, within which the villages in suit are situated, to an ancestor of the appellant as *mutâwâlli*, with an express declaration that he "is not competent to give "*istimrâri* or *mokârrâri* or lease at a low *jamâ* to any "person anything appertaining to the said *parganâ*." This *sanad* was confirmed by the Nawab Nazim and the East India Company, and here, it was said, was the real legal origin of this *mutâwâllíship*, created with a specific restriction on its powers, long anterior to the earliest date to which the respondents' proof could be carried. If so, the *sanad* is in terms absolute, and reserves no right to alienate with the consent of the *kâzi*, and, even if this were otherwise, it is unreasonable to presume some leave, given by a *kâzi*, of which no record exists, the material period being comparatively modern; the intervention of a *kâzi* being, at any rate, recently little heard of, if not obsolete; and the matter not being one in which it is probable that a grant might have been lost, but rather that the existence of any such grant would have been an extraordinary and doubtful thing. For the suggestion that, although his permission validates the transaction, it would necessarily be irregular and wrong in the *kâzi* to give it, no authority was produced, and the contention itself seems to reduce the power of legal permission to an absurdity, while the argument that, in effect, the origin of this tenure was *primâ facie* a usurpation on the part of some *mutâwâlli*, and that the supposed permission would be an impiety on the part of some complainant *kâzi*, and that accordingly nothing should be presumed that

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would validate one wrong by the supposition of another, begs the question.

Their Lordships answer this as follows. Without saying that, even in regard to a period beginning not later than 1772, and ending not later than 1843, it would have been improper to make the presumption of an unrecorded grant of leave by the *kâzi* at some unknown time within those limits, it is plain in this case that no such narrow limits apply. From the terms of the *sanad* itself it is reasonably clear that the *wâkf* was one already established and subject to the general rules of Mahomedan law, and these, at least without express words, the Imperial *sanad* could not abrogate. It was admitted that the prohibition expressly stated in the *sanad* was actually identical with the prohibition, which the Mahomedan law would impose, subject always to the power of relaxation possessed by the *kâzi*. As a matter of fact, this *wâkf* was of very considerable antiquity, of which the proof did not consist solely in venerable traditions or the doubtful accounts of annalists, but also in inscriptions of ancient date and tenor, still existing upon the walls of the buildings belonging to it. The longer the period within which and the remoter the time when first a grant might be reasonably supposed to have occurred, the less force is there in such an objection as the appellant has developed in argument. Even if the leave of a *kâzi* is now obsolescent still, in more ancient times and in different social circumstances, resort to it may well have been common; otherwise, indeed, how came the rule to be recorded as existing and long established in learned and formal treatises? What is now, as is only too well known, commonly achieved only by usurpations and breaches of trust on the part of delinquent *mutâwâllis*, may in earlier and purer times have been regularly done in conformity with the prescriptions of the law. In their Lordships' opinion the presumption of a lost and unrecorded permission of the *kâzi* for the creation of the tenure of *wâkf* lands, under which the respondents claim to hold, is in itself

reasonable and proper as the natural form, which a legal origin would take. The alternative suggestion, that the creation of the tenure should be presumed to have been older than the creation of the *wâkf*, so that the subject of the settlement was the permanent rent and not the lands themselves, is one which their Lordships do not think fit to adopt.

There remains the question whether the decision of the Board in *Magniram Sitaram* v. *Kasturbhai Manibhai* (1) can and ought to be distinguished on any ground. The only possible distinction is that it was a Hindu *math* with which the case was concerned. In principle, the cases are in themselves analogous. In the language of the judgment there is nothing to suggest that the subject then under discussion was regarded as being in any sense peculiar or special. As a matter of public right, their Lordships think it would be very undesirable to introduce purposeless distinctions between the law applicable in the case of one community and that applicable to another. They are therefore of opinion that the presumption rightly made by the High Court completed the defendants' answer to the plaintiff's claim to possession and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellant: *W. W. Box & Co.*

Solicitors for the respondents Nos. 1 to 4: *Barrow, Rogers & Nevill.*

(1) (1921) I. L. R. 46 Bom. 481; L. R. 49 I. A. 54.