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QUEEN-EMPRESS v. MANNU.

Banerji, J.

learned Chief Justice has animadverted would not have taken place. The conclusion at which I have arrived is fortified by the ruling of McDonnell and Field, JJ., in *The Empress* v. *Jhubboo Mahton* (1); of Mitter and Macpherson, JJ., in *In the matter of Mahomed Ali Hadji* v. *The Queen-Empress* (2); Trevelyan and Hill, JJ., in *Bikao Khan* v. *The Queen-Empress* (3); Trevelyan and Rampini, JJ., in *Sheru Sha* v. *The Queen-Empress* (4), and of my brother Aikman and Mr. Justice Blennerhassett in *Queen-Empress* v. *Rudr Singh* (5). I see no reason for holding that so many learned Judges have come to an erroneous conclusion, a conclusion which, in my humble judgment, will further the administration of justice instead of retarding it, and is not inconsistent with anything contained in the Code of Criminal Procedure.

As regards the other matters argued before us and dealt with by the learned Chief Justice, I agree with him. I also concur in the order which he proposes to pass in this particular case.

BY THE COURT.—This appeal is allowed. The conviction is set aside. The appellant is acquitted, and the Court directs that he be at once released.

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April 15.

APPELLATE CIVIL.

Before Mr. Justice Knox, and Mr. Justice Burkitt.

SRI RAMAN LALJI MAHARAJ (PLAINTIFF) *v.* SRI GOPAL LALJI MAHARAJ AND OTHERS (DEFENDANTS).*

Trust—Joint trustees of temple—Suit for partition of rights as trustees.

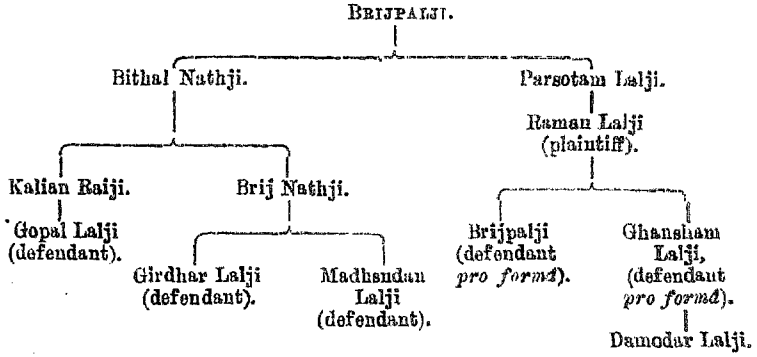
Held that rights as joint trustees to the management of and superintendence of worship at certain temples, none of the trustees having any personal pecuniary interest in the temples or their income, could not be made the subject of partition by a Civil Court, that is to say, that a Civil Court was not competent to grant a decree declaring that each of such trustees in rotation should for a certain definite period enjoy exclusively the rights of management and

*First Appeal No. 104 of 1895, from a decree of Maulvi Aziz-ul-Rahman, Subordinate Judge of Agra, dated the 14th March 1895.

(1) I. L. R. 8 Calc. 739.
(2) I. L. R. 16 Calc. 612, note.
(3) I. L. R. 16 Calc. 110.
(4) I. L. R. 20 Calc. 642.
(5) Weekly Notes, 1896, p. 193.

superintendence. *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (1), *Mancharam* v. *Pranshankar* (2), *Limba bin Krishan* v. *Rama bin Pimpla* (3), *Anandamoyi Chaudrani* v. *Raikant Nath Rae* (4), *Pranshankar* v. *Prannath* (5), and *Ram Soondur Thakur* v. *Turuck Chunder Turkoruttna* (6) referred to.

THIS appeal arose out of a suit relating to two temples situated in Muttra and Gokul. The parties to the suit were members of the same family as indicated in the following genealogical table :—



The plaintiff came into Court alleging that he and the defendants were descendants of a common ancestor, as shown in the above genealogical tree, whose two sons Bithal Nathji and Parsotam Lalji were joint managers of the temples in suit, together with other temples and a large amount of property; that the plaintiff was the son of Parsotam Lalji and the defendants grandsons of Bithal Nathji; that after the death of the two brothers the plaintiff and Kalian Raiji and Brij Nathji, sons of Bithal Nathji became owners and managers of the temples and other properties and in possession of the same in the same manner as their ancestors; that on the 4th of March 1888 an agreement to refer to abitration was entered into between the plaintiff on the one part and Kalian Raiji and Bithal Nathji on the other part, in consequence of which an award was made on the 15th of March 1888, whereby all the other temples and

(1) 14 B. L. R., 166.
(2) I. L. R., 6 Bom., 298.
(3) I. L. R., 13 Bom., 548.
(4) 8 W. R., 193.
(5) 1 Bom., H. C. Rep., 12.
(6) 19 W. R., 28.

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properties belonging to the parties were divided between them, the temples and properties now in suit remaining joint.

The plaintiff further alleged that in consequence of misunderstandings and disagreements between the parties the temples and properties appertaining to them were not being properly managed, and that there was a likelihood of further disagreement and disturbances. The plaintiff accordingly prayed that the Court might pass an order directing that each party should remain in possession of the temples and other properties in suit for a certain specified period, and, secondly, that orders should be passed by the Court regarding the protection of the goods and other effects and properties belonging to the said temples, and regarding the appointments, dismissal and performances of duties of the servants attached to the temples in suit, and also regarding the mode of residence of the parties in the buildings attached to the temples and as to their repairs.

The defendants objected to the plaintiffs' claim *in toto*, denying that the properties in suit were joint or that the plaintiff had any right in them, and alleging that the succession to the temple properties was by primogeniture. There were also various technical pleas raised.

The Court of first instance (Subordinate Judge of Agra) dismissed the suit so far as the first relief claimed by the plaintiff was concerned; but drew up a general scheme for the management of the temples and the property belonging to them.

From this decree the plaintiff appealed to the High Court.

Pandit *Sundar Lal*, Babu *Satya Chandar Mukerji* and Munshi *Kalindi Prasad* for the appellant.

Mr. *D. N. Banerji*, for the respondents.

BURKITT, J. (KNOX, J., concurring):—This is an appeal by the plaintiff against a decree of the Subordinate Judge of Agra. The parties are the descendants of two brothers whose family from time immemorial had been the hereditary trustees and managers of certain temples at Muttra and Gokul and of the endowments appertaining to them. It appears that some time

before suit most of the landed property had been by a friendly arbitration divided between them, but that the temples were left joint. In the 10th paragraph of the plaint it was alleged that for some time there had been disagreements between the parties as to the employment and dismissal of servants, the distribution of offerings made at the temple, the expenses of daily worship, &c., &c., and that there was an apprehension of disturbances, loss of property, &c. The plaintiff therefore prayed the Court to declare that each party was entitled to manage and superintend the temples *in turn* and to give proper instructions for the custody of the property appertaining to the temples, for the appointment of servants and such matters, and for the mode of living of the parties in the houses appertaining to the temples as well as for the repairs of the houses.

As to the last mentioned matter, the plaintiff during the hearing of the suit explained (*vide* No. 506 of the record, at p. 49 of the respondents' printed book) that the dwelling-houses in question belong to the temples, that the plaintiff did not desire to have them partitioned, but wished that the parties should live in them as hitherto and that the Court should give directions as to their repair. A similar disclaimer of any desire to partition was made as to certain *baithaks*, or sitting-rooms.

On the following day (March 7th, 1895) another and most important admission was made on behalf of the plaintiff, and was concurred in on behalf of the defendants. According to that admission neither party has any personal pecuniary interest in the income of the temples, whether from property belonging to them or from offerings made by worshippers; all the income is declared by both parties to belong to the temples and to them only. This admission has the effect of correcting a statement made in the 7th paragraph of the plaint to the effect that "if there be any surplus income the parties appropriate it." It further is clear that in this case there is no dispute between the parties as to their right to share in the performance of the worship of the idols in the temples. The ceremonies of public worship are, as appears

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from the plaint, performed by the servants attached to the temples and the parties are at liberty to take whatever share they please in them. Accordingly, on the allegations of the plaint and on the admission of the parties, it is clear that these temples are trust property in which none of the parties have any pecuniary interest, and that from time immemorial the management has been joint in the hands of the family to which the parties belong.

Thus the main relief asked for in the plaint narrowed itself down to a prayer that the Court would partition their duties as trustees and managers between the parties, and would fix stated periods during which each party in turn would hold exclusive possession of the temples and carry on the management. It was suggested that a period of six months in each year should be assigned to each.

The Subordinate Judge who tried the suit refused to grant to the plaintiff the relief he asked for. In a carefully considered judgment the Subordinate Judge pointed out most properly that this suit was not one for a declaration of plaintiff's right to share in conducting public worship at the temple and to a participation in the offerings. As to that matter he showed there was no dispute whatever, the real dispute being as to plaintiff's claim to hold the management "in turn."

The plaintiff appeals, contending that the relief asked for by him should have been granted. That was the only one of the grounds of appeal which was argued before us.

In support of his contention the learned vakil for the appellant cited to us several cases from the Bombay and Calcutta reports, *e.g. Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (1). This case clearly is not in point in the present appeal. It was a case in which a person, who possessed jointly with others a right to worship at a certain shrine and to participate in the offerings, prayed to have his right partitioned from those of his co-sharers and to have periods fixed during which he might exercise it. The High Court held that such a right was a property

(1) 14 B. L. R., 156.

which could be partitioned like other kinds of property. In *Mancharam* v. *Pranshankar* (1) the Bombay High Court held that a transfer by a divided Hindu of his right to perform public worship and to participate in the offerings at the temple was not invalid. The cases *Limba bin Krishna* v. *Rama bin Pimplu* (2), *Anandamoyi Chaudrani* v. *Baikant Nath Rae* (3) and *Pranshankar* v. *Prannath* (4) were cases in which the plaintiffs set up their right to conduct public worship and to receive a share in the offerings made at the temples, and *Ram Soondur Thakoor* v. *Taruck Chunder Turkoruttun* (5) was a suit in which to establish similar rights the plaintiff sought to be authorized to remove an idol to his house.

All the above cases differ essentially from the present case in that in all of them there was a dispute as to the plaintiffs' right to share in the manner set up by them in the performance of public worship and to receive a share in the offerings. Such cases cannot be considered as in any way laying down a rule applicable to the present case in which there is no such dispute.

The parties here are the joint managing trustees of the temples, whose duty it is as such to manage the affairs to the best of their united abilities, a duty which they undertook to perform when they accepted the trust. They have no rights of property or any personal pecuniary interest in the subject-matter of the trust. Is then one of such trustees entitled to ask a Court to partition the duties of the trust between himself and his co-trustees, and, *e.g.*, to give to him the exclusive management of, and possession of, the trust property for, say, six months in each year, putting the other trustees entirely aside during his period of management? We think not. We regard the body of trustees as being each of them not merely entitled, but also as being obliged by his acceptance of the trust to act jointly at all times with the others in the management of the trust property. The duty incumbent on the trustees is one incumbent on them acting jointly, and is not a "*property*"

(1) I. L. R., 6 Bom. 298.
(2) I. L. R., 13 Bom. 458.
(3) 8 W. R. 193.
(4) 1 Bom. H. C. Rep. 12.
(5) 19 W. R. 28.

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personal to any one of them individually or to all of them jointly. As it is not a personal property. it does not come under the rule as to partition laid down in the first of the cases cited above. Such a duty cannot in our opinion be partitioned.

Something was said at the hearing as to the partition by arbitration which had already been made by the parties. No issue was raised before us as to that partition. It is therefore unnecessary for us to express any opinion as to whether it is a valid instrument or not. We concur with the lower Court in holding that the appellant is not entitled to partition in this case. We therefore dismiss this appeal with costs.

Appeal dismissed.

1897
April 23.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BALKISHAN DAS AND OTHERS (DEFENDANTS) *v.* W. F. LEGGE (PLAINTIFF).*

Mortgage by conditional sale—Sale with a right of repurchase—Conditional sale effected by two contemporaneous deeds—Evidence dehors the documents admissible to show what the transaction really was.

The plaintiff and the defendants executed upon the same day two documents. The one purported to be a deed of absolute sale of a certain estate by the plaintiff to the defendants. The other was an agreement by which the defendants covenanted, upon payment of a certain sum by a specified date, to reconvey the property sold by the first mentioned deed.

Held that evidence was admissible *dehors* the documents to show that the intention of the parties was not to effect an out and out sale with merely a right of repurchase under certain conditions left in the vendor, but to constitute a mortgage by conditional sale, or *bai-bil-wafa*.

The mere fact of a deed of absolute sale being accompanied by another deed giving a right of repurchase will not, for that reason alone, constitute the transaction one of mortgage, but the intention of the parties must be gathered from the terms of the deeds or from the surrounding circumstances or from both.

Alderson v. *White* (1), *Lincoln* v. *Wright* (2), *Bhagwan Sahai* v. *Bhagwan Din* (3), *Ali Ahmad* v. *Rahmat-ullah* (4), *Ramasami Sastrigal* v.

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* First Appeal No. 52 of 1895, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 8th February 1895.

(1) 2 De G. and J. 105.
(2) 4 De G. and J. 16.
(3) L. R. 17 I. A., 98; s.c., I. L. R., 12 All., 387.
(4) I. L. R., 14 All. 195.