ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

1887 *March 7.*

KALLY DOSS SEAL (PLAINTIFF) *v.* NOBIN CHUNDER DOSS (DEFENDANT).*

Sale by Registrar—Title to property purchased at Registrar's Sale—Doubtful title, Enforcement of—Endowment—Rent charge.

The Court will not enforce a doubtful title on a purchaser where (*a*) there is a reasonable probability of litigation resulting; or (*b*) where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court.

Case in which the title sought to be enforced did not fall within these rules.

THIS was an application on notice made by one Kally Doss Seal, the plaintiff in the suit of Kally Doss Seal *v.* Nobin Chunder Doss, to vary or discharge a certain report of the Registrar, dated the 29th November, 1886, made in pursuance of an order made in the above-mentioned suit.

The reference on which the said Report was founded was one to enquire and report whether a good title could be made to certain property purchased by one Kristo Mohun Sen.

The evidence taken before the Registrar disclosed that certain properties, being No. 19, Baboram Seal's Lane, and No. 10, Carra Doss's Gully (the latter being now No. 5, Muddun Dutt's Lane), were formerly purchased by one Jogul Kishore Doss, the ancestor of Ram Chunder Doss and Nobin Chunder Doss; that these properties were alleged to have been dedicated by him to the sole purpose of the worship of a certain idol; the only documentary evidence of this dedication produced previous to 1858 was an extract from the Collector's register, showing that on the 22nd May, 1802, a pottah was granted to the idol, and that the alleged dedicator was the shebait; that after the death of Jogul Kishore Doss his sons Ram Chunder Doss and Nobin Chunder Doss agreed to partition the said properties, and that for this purpose they entered into a deed of partition, dated the 11th March, 1858, under

* Original Civil Suit No. 512 of 1884.

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which, as the deed witnessed, Ram Chunder Doss, his family and descendants, took No. 19, Baboram Seal's Lane "to live and reside in for ever as permanent tenants to the ancestral idol, paying for the same the rent at the due rate of Company's Rs. 5 per month;" and Nobin Chunder, his family and descendants, took No. 10, Carra Doss' Lane (No. 5, Muddun Dutt's Lane) "to reside in for ever as perpetual tenants of the said ancestral idol, paying for the same the rent of Rs. 5 per month;" that the deed further witnessed that the two brothers should take turns in performing the worship of the said idol, the idol being removed from one brother's house to the other in rotation; and that in the event of the party or representatives of the party whose turn it should be to perform the said worship not performing it, it should be optional to the other party to perform the same at the expense of the defaulter. The evidence further disclosed that the worship of the idol was still continued and the Rs. 5 a month paid; that the grandfather of defendant performed the shiva; that the Collector had refused to grant a pottah with regard to the property to Nobin Chunder Doss.

Subsequently Nobin Chunder Doss mortgaged the house No. 5, Muddun Dutt's Lane to Kally Doss Seal, Nobin Chunder alleging in his evidence that he had informed Kally Doss Seal that the property was *debutter*; this, however, was denied by Kally Doss Seal.

Kally Doss eventually brought a suit on the mortgage, and the house No. 5, Muddun Dutt's Lane, was sold by the Registrar and purchased by one Kristo Mohun Sen. Kristo Mohun then employed an attorney of the High Court to investigate the title to the house, and on such investigation it was discovered that there were no title deeds to the house, save and except the mortgage and the deed of partition of 1858. The purchaser on, as he said, discovering from this deed that the property purported to be *debutter* property, refused to carry out his purchase, and the matter was by an order of Court referred as above-mentioned to the Registrar to report on the title.

On the 29th November, 1886, the Registrar reported that after considering the evidence adduced before him in the presence of the attorneys for the purchaser and for the plaintiff, the defendant not appearing, he found that a good title could not be made.

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Kally Doss Seal thereupon took exception to this report, submitting that the report ought not to be accepted or acted on, the Registrar being wrong in directing upon the evidence adduced before him that a good title could not be made.

At the hearing of the application to vary the report—

Mr. *Bonnerjee* and Mr. *O'Kinealy* for the plaintiff.

Mr. *Bonnerjee*.—There is no proof of any actual dedication which distinguishes the case from *Nollit Mohun Doss* v. *Khetter Mohun Doss* (1). Consent of the parties might put an end to the endowment. See *Konwur Doorganath Roy* v. *Ram Chunder Sen* (2).

As to what is or is not sufficient to constitute an endowment see *Brojo Soonderee Debia* v. *Ranee Luchmee Koonwaree* (3); *Ram Pershad Doss Adhikaree* v. *Sreehuree Doss Adhikaree* (4).

There could have been no partition if the dedication was good. As to the question that it was the duty of the Court to find out whether the objection taken was good or bad, I refer to *Hamilton* v. *Buckmaster* (5); *Alexander* v. *Mills* (6); and an unreported case Suit No. 567 of 1874, *Radhanath Mookerjee* v. *Turaknath Mookerjee*, decided by Phear, J., on 12th March, 1875; and submit that the other side can at most show that there was a charge on the property of Rs. 5 per month, but to whom that charge was payable is not clear.

Mr. *Kennedy* for the purchaser.—The title is so doubtful, if not actually bad, that the Court ought not to enforce it on a purchaser—*Blosse* v. *Clanmorris* (7).

Unless the title is a reasonable one the Court ought not to enforce it; the Collector's receipts show that the original grant was made as if there had been a dedication; it is impossible to obtain the deed of dedication which took place some time in 1802. [TREVELYAN, J.—Suppose the property had been purchased in the name of the idol, the Collector would have given a pottah in his name.] The presumption must be that the title is in agreement with the documents produced; the recitals in the deed of 1858 are

(1) Unreported.
(2) L. R., 4 I. A., 52, 58.
(3) 2 B. L. R., A. C., 155; 11 W. R., 13; S. C. on appeal 15 B. L. R., 176 note; 20 W. R., 95.
(4) 18 W. R., 399.
(5) L. R., 3 Eq., 323.
(6) L. R., 6 Ch., 124.
(7) 3 Bligh, 63.

evidence against the mortgagee. We have the persons having full power to deal with the property, dealing with it as *debutter*; we have the creation of a rent payable out of the property. [TREVELYAN, J.—Can the descendants of either of those persons be sued for the rent?] There is a sufficient covenant for the payment of rent during the entire term; and even if there were a difficulty in law equity would give assistance. The word "paying" has been held sufficient to create a rent charge. See *Cupit* v. *Jackson* (1). Coke, 47*a*, shows the words necessary to create a rent charge. [TREVELYAN, J.—The question I have to consider is whether there is a rent charge, and whether the family cannot do away with the endowment.] There is no allegation that the endowment was put an end to by the family. With regard to the case of *Brojo Soonduree Debia* v. *Ranee Luchmee Koonwaree* (2), there the property was dealt with from the commencement as the Maharajah's own property; and in *Ram Pershad Doss Adhikaree* v. *Sreehuree Doss Adhikaree* (3), the plaintiff failed to prove his case. In *Konwur Doorganath Roy* v. *Ram Chunder Sen* (4), the Court found that there was no evidence of endowment.

In the case of *Rajender Dutt* v. *Sham Chund Mitter* (5), there was a similar deed to ours; see also *Ashutosh Dutt* v. *Doorga Churn Ghatterjee* (6). As to the old rule of forcing a title on a purchaser, see *Rogers* v. *Waterhouse* (7); *Simmons* v. *Heseltine* (8); *Pyrke* v. *Waddingham* (9).

Mr. *Bonnerjee* in reply.

TREVELYAN, J.—In this case I have to consider whether a good title can be made to a certain house which has been sold in pursuance of a mortgage decree.

The matter was in accordance with the rules of the Court referred in the first instance to the Registrar, who has reported that a good title cannot be made out to the property.

Counsel on both sides have cited cases to me as to what sort of title the Court can force on an unwilling purchaser.

(1) 13 Price, 729.

(2) 2 B. L. R., A. C., 155; 11 W. R., 13; S. C., on appeal 15 B. L. R., 176 note; 20 W. R., 95.

(3) 18 W. R., 399. (4) L. R., 4 I. A., 52, 58.

(5) I. L. R., 6 Calc., 106. (6) I. L. R, 5 Calc., 438; L. R., 6 I. A., 182.

(7) 4 Drewry, 332. (8) 5 C. B., N. S., 554 (571). (9) 10 Hare, 1.

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The result of recent cases on this subject is laid down with precision in the last edition of Fry on Specific Performance, p. 388. On examining the title I will refer afterwards to what is there laid down.

The abstract of title started with the mortgage, which recited that the mortgagor was possessed of, or otherwise well and sufficiently entitled to, the house and premises.

On investigation the purchaser discovered a deed of the 11th of March, 1858, made between the mortgagor and his brother Ram Chunder Doss and referring to this and other properties. This deed recites that one Jogul Kishore Doss, who was the paternal grandfather of these brothers, purchased in his lifetime (in the name of and appropriated for the sole purpose of the worship of a deity called "Muddun Mohunjee" established by him) two houses, one of which is the house in question.

The first question I have to decide is whether there was any endowment prior to the deed of 1858; the second question is whether the deed of 1858 created an endowment; and the third question is whether, if on the materials before me I come to the conclusion that there has been no endowment, there are circumstances in the title such as to prevent me forcing this title upon an unwilling purchaser. I think the case of *Alexander* v. *Mills* (1) shows that I must come to a conclusion on the first two questions. There Lord Justice James says: "As a general and almost universal rule the Court is bound as much between vendor and purchaser as in every other case to ascertain and determine, as it best may, what the law is and to take that to be the law which it has so ascertained and determined."

As to the first question I have come to the conclusion that there is no evidence from which I can be satisfied that there was an endowment prior to the deed of 1858. Much reliance is placed upon an extract from the Collector's register, showing that on the 22nd of May, 1802, a pottah was granted to the idol; that Jogul Kishore, the alleged dedicator, was described as shebait of the idol; and that in 1853, Ram Chunder and Nobin Chunder, the parties to the deed of 1858 and grandsons of Jogul Kishore,

(1) L. R., 6 Ch., 131.

were described as shebaits. There is no evidence of the terms of the alleged dedication, and except the recital in the deed of 1858 which is in vague terms, there is nothing to show that the profits of the houses were appropriated to the use of the idol. The fact that the house was purchased in the name of the idol, and that the purchaser was described in the Collector's books as the shebait, proves nothing. I cannot be satisfied that there was an endowment until I know what the terms of the endowment were. In the case of *Brojo Soonderee Debia* v. *Ranee Luchmee Koonwaree* (1) there was a conveyance to the idol and the shebait, but there was no evidence of the objects of the alleged endowment.

It is true that it is difficult to prove the terms of an old endowment, but there is no definite evidence as to what took place before 1858, from which I could infer the terms of the endowment. There is no doubt that the deed of 1858 is inconsistent with the alleged anterior endowment, and that since 1858 the parties have acted on the deed of that year.

I think I must hold that prior to the deed of 1858 there was no endowment. In this conclusion I agree with the Registrar. Does the deed of 1858 create an endowment? The first paragraph of the deed recites the partition of the movable property of the two brothers. The second and third paras. are as follows: "That the said Ram Chunder Doss, his family and descendants, shall alone occupy and live and reside in the said house and premises No. 19, Baboram Seal's Lane in Mullungah aforesaid, and shall continue to do so for ever as permanent tenants to the said ancestral idol called 'Muddun Mohunjee,' paying for the same as hereinafter mentioned the rent at the rate of Company's Rupees Five per month, commencing from the first day of the present month of Magh in the Bengalee year One thousand two hundred and sixty-four, and the ground-rent and house-tax, including the expenses for the repairs of the said last-mentioned house and premises, shall be paid and borne by him the said Ram Chunder Doss and his descendants.

"That the said Nobin Chunder Doss, his family and descendants, shall in like manner occupy and live and reside in the house

(1) 15 B. L. R., 176 note: 20 W. R., 95.

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and premises No. 10, Carra Doss' Lane in Mullungah aforesaid, and shall continue to do so for ever as perpetual tenants of the said ancestral deity called 'Muddun Mohunjee,' paying for the same as hereinafter mentioned the rent at the rate of Company's Rupees Five per month, commencing from the said first day of the present month of Magh One thousand two hundred and sixty-four, and the ground-rent and house-tax, including the expenses for the repairs of the said last-mentioned house and premises, shall be paid and borne by the said Nobin Chunder Doss and his descendants."

These are the two houses said to be endowed.

The fourth paragraph recites the payment of Rs. 1,000 for the purpose of adding buildings to the house No. 10, Carra Doss' Lane, that sum being the difference in value between the two houses.

The 5th and 6th paras. are as follows: "That the said Ram Chunder Doss and Nobin Chunder Doss, respectively, and each of their heirs and representatives, will and shall perform the said worship of their said ancestral deity called 'Muddun Mohunjee,' each doing so turn by turn for the space of one year, the said Ram Chunder Doss doing so first, commencing from the first day of the present month of Magh One thousand two hundred and sixty-four, and the said Nobin Chunder Doss doing so in the following year, and the said Ram Chunder Doss doing so the next following year, the said Nobin Chunder Doss the then next following year, and so on year by year, and for the purpose of such worship the party or the heirs and representatives of the party whose turn it shall be to perform the same, shall be at liberty to take and keep with him and them the said idol, together with all jewels and other furnitures belonging to the said idol, to his usual place of abode as aforesaid during the year of his own turn, and in the event of the party, or the representatives of the party whose year or turn it shall be for him to perform the said worship, not performing the same, it shall be optional to the other party or his representatives to perform the same during that year at the expense of the defaulter.

"That each of them, the said Ram Chunder Doss and Nobin Chunder Doss respectively, and their and each of their heirs

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and representatives, shall, during his and their own turn of worship, apply himself and themselves towards the charges and expenses of such worship as aforesaid, the said monthly rents of the above-mentioned two several houses and premises payable by each of them and his heirs and representatives as aforesaid, together with the additional sum of Company's Rupees Five per mensem to be paid during his and their own turn of worship out of his and their own pocket, and in case any surplus shall remain in the hands of the said parties of the first and second parts, or their heirs or representatives after defraying charges and expenses attendant on the daily worship of the said idol, or for the periodical religious ceremonies thereof throughout the year during his and their turn of worship, the same shall be applied towards the making of some property or other of the said idol."

There then come mutual releases.

I think this deed does not create an endowment or a charge of any kind. It is only an attempt to tie up the property for the benefit of the heirs of the brothers. The Rs. 5 a month is called rent, but this is merely a name. It is not a rent charge. The deed itself (para. 5) provides the remedy in case of non-payment of this so-called rent. The ordinary remedies for the recovery of a rent charge are therefore excluded.

The house is not given to the idol. There is no valid gift of the house to any one. The Rs. 5 a month is not payable by the occupier of the house. It is only payable by the mortgagor and his descendants.

The cases of *Rajender Dutt* v. *Sham Chund Miller* (1), and *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (2), relied upon by Mr. Kennedy are distinguishable from the present case. In the former of those cases there was an express gift to the idol, and in the latter there was an express charge in favor of the idol.

The next question is whether, having come to the above conclusions, I must still refuse to force the title on the purchaser.

At page 388 of the last edition of Fry on Specific Performance, the cases in which a Court would consider a title

(1) I. L. R., 6 Calc., 106.

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

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doubtful are summarised. The only two which can have any application here are numbers 1 and 4. These are:—

(1) That there is a reasonable decent probability of litigation; and

(4) Where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court.

I do not see that there is any reasonable probability of litigation. No one seems to have disputed the mortgage or to have asserted any claim on behalf of the idol. I do not think that any Court could have a reasonable doubt as to the construction of this document. There is in it no trace of a gift or charge in favor of the idol.

In the result I must hold the title to be a good one. As the state of the title has only been disclosed by the enquiry, the purchaser must have his costs up to and including the Registrar's report.

These will be paid by the plaintiff and added to his claim. The purchaser must pay the plaintiff's costs of the exceptions and of the hearing before me. The rest of the plaintiff's costs must be added to his claim.

Application dismissed.

Attorneys for plaintiff: Messrs. *Ghose & Ghose.*

Attorney for purchaser: Mr. *Carruthers.*

T. A. P.

Before Mr. Justice Trevelyan.

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June 2.

IN THE MATTER OF THE PROPOSED SUIT OF COLLETT AND ANOTHER *v.* ARMSTRONG.

Leave to sue—Small Cause Court Presidency Towns Act, (XV of 1882) *s.* 18—*Discretion, Exercise of—Refusal of leave to sue—Jurisdiction—Defendant residing outside jurisdiction.*

A tradesman in business in Calcutta sued his debtor, a resident at Lucknow, to recover a sum of Rs. 23 for goods sold in Calcutta and forwarded by the E. I. Ry. Co. for delivery at Lucknow.

The plaintiff applied under s. 18 of Act XV of 1882 for leave to sue the defendant in the Calcutta Court of Small Causes. The Court refused to grant such leave, apparently on the ground that the defendant was living