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there is another consideration which appeals to me as one of considerable weight. In my experience where a serious question of jurisdiction is raised and argued in the first court, if the case is heard out and decided on all points, merits as well as the question of law, it not infrequently happens that both parties are satisfied with the result and the question of jurisdiction becomes purely academic.

BY THE COURT.—Order of the Court therefore is that the appeal is allowed, the decrees of the courts below are set aside, and the case is sent back through the lower appellate court to the court of first instance with directions to hear and dispose of it on the merits. Costs here and hitherto will abide the result.

Appeal allowed and cause remanded.

Before Mr. Justice Piggott and Mr. Justice Ryves.

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June, 25.

BHARAT DAS (DEFENDANT) *v.* NANDRANI KUNWAR (PLAINTIFF).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 158—*Act (Local) No. III of* 1901 *(United Provinces Land Revenue Act), section* 84—Muafi *grant —Resumption—Grant to mahant of temple.*

Held that section 158 of the Agra Tenancy Act, 1901, and section 84 of the United Provinces Land Revenue Act, 1901, apply to land granted rent-free for charitable purposes to the mahant of the temple. Where, therefore, land so granted has been held for more than fifty years, and by two or more successors to the original grantee, it cannot be resumed.

THE facts of this case are set forth in the following order referring the appeal to a Division Bench:—

MUHAMMAD RAFIQ, J.—This appeal arises out of a suit brought by the plaintiff respondent for resumption of a *muafi*. She is the lambardar of mahal Kishun Sahai, she stated in her plaint that the land in suit measuring 62 bighas 11 biswas was a rent-free grant and was liable to resumption under sections 150 and 154 of the Rent Act. She did not state distinctly, but her allegation in the plaint implied, that the land in suit was held at the pleasure of the grantor. The defendant who is the Mahant of a temple was not sued as a *mutwalli* of the temple but in his personal capacity. He defended the suit on various grounds.

* Second Appeal No. 1484 of 1915, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 7th of September, 1915, confirming a decree of Mohini Mohan Lal, Assistant Collector, first class, of Fatehpur, dated the 7th of October, 1914.

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He said that the land in suit was really *waqf* which was made more than 100 years ago in favour of Sri Thakur Radha Krishanji, the idol installed in the temple. But if the land was granted *muafi* to the mahant of the time, then more than fifty years had elapsed and more than two successors to the original grantee had held the said land. The first court held that the land was not resumable but was liable to pay rent. It accordingly fixed rent on the land. The defendant preferred an appeal. The lower appellate court held that the land was not resumable, but as it was granted rent-free to the deity who does not die, the questions of the lapse of time and of succession do not arise. The decree of the first court was accordingly upheld. In second appeal to this Court the defendant contends that the land in suit was dedicated to the god and is therefore *waqf* and is not resumable. On the other hand if it be said that it was granted as *muafi* to deity, then the questions of lapse of time and of succession to the original mahant ought to be taken into consideration. The questions raised in the appeal are whether the terms of the grant amount to a *waqf* and whether the provisions of section 158 of Act II of 1901, apply to the grant of a *muafi* which is made to the idol of a Hindu temple. The latter question is of great importance and is not free from difficulty. I therefore consider it advisable to refer the case to a Bench of two Judges and I do so accordingly.

The case then came up for hearing before a Bench consisting of PIGGOTT, and RYVES, JJ.

Babu *Piari Lal Banerji*, for the appellant:—

If the grant amounted to a complete dedication of the land to the idol, the property should be treated as *waqf* and would not be subject to the provisions of the Tenancy Act; nor would any proprietary right be left in the plaintiff. No deed of grant is forthcoming; but having regard to the entries in the wajib-ul-arz and to the fact that the idol is nowhere mentioned in the revenue papers, it cannot be argued that there was a grant to the idol itself as a juristic person. It must follow, therefore, that the grant was made to the then mahant of the temple as trustee for the purposes of the temple. There could be no grant *to a temple*. The land has been held rent-free for over fifty

years and by more than two successors to the original mahant. Section 158 of the Tenancy Act applies to the case and the land must be deemed to be held in proprietary right. As a question of principle there is no reason why rights which could be secured by individuals could not be secured by managers of temples for the purposes of the temple. The word "successors" in section 158 of the Tenancy Act should be interpreted in a liberal sense, and it is the tendency of this Court to construe it in a wide sense; *Sundar Singh* v. *The Collector of Shahjahanpur* (1) and *Dayalpuri* v. *Narain Datt* (2). A consideration of section 34 of the Land Revenue Act (III of 1901), which is an enactment on a subject-matter cognate to that of the Tenancy Act, also throws some light on this question. When the Mahant of a temple who holds property in a mahal dies, it is incumbent on his *chela* or successor to take steps to obtain mutation under section 34 of Act III of 1901, on the ground that there has been a case of "succession." The word "successors" in section 158 of the Tenancy Act should be deemed to include every case of "succession" within the meaning of section 34 of Act III of 1901; that is to say, it should include every person who would have to apply for mutation under section 34 of Act III of 1901.

Munshi *Damodar Das*, for the respondent:—

The real grantee was the idol in the temple and the real defendant in the suit was that idol. The fact that Bharat Das was made defendant and described to be the *muafidar* or rent-free grantee was a mere misdescription which could be amended at any time. Such an amendment would not change the nature of the suit: *Jodhi Rai* v. *Basdeo Prasad* (3). The contention that the land was *waqf* was definitely found against the defendant by the lower courts as a finding of fact. Both the courts found that it was a case of a rent-free grant for the benefit of the temple, the land being held by the temple as beneficial owner. The temple or the idol became the tenant. There is nothing to prevent a temple or an idol from holding a tenure: *Parmanand Singh* v. *Mahant Ramanand Gir* (4). There was no grant to the mahant; he was not the "original grantee" within the

(1) (1911) I. L. R., 33 All., 553. (3) (1911) I. L. R., 33 All., 735.

(2) (1916) 14 A. L. J., 878. (4) (1913) I. L. R., 35 All., 474.

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meaning of section 158 of the Tenancy Act. The successors of the mahant are not the successors of the "original grantee," and so the requirements of section 158 have not been fulfilled. The original grantee, namely the temple or the idol, has remained the same, and there has been no succession in any sense of the term. The legal position and status of an idol and the legal character of the Manager of a *math* or temple have been discussed in the following cases:—*Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1) and *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (2).

Babu *Piari Lal Banerji* was not heard in reply.

PIGGOTT and RYVES, J.J.:—In this suit the plaintiff came into Court alleging that she was the lambardar and zamindar of a certain mahal. The defendant, who was described as Bharat Das, disciple of Rikhi Das, *muafidar* of the said mauza and mahal, was alleged to be a *muafidar* of 62 bighas, 12 biswas, of land in suit granted for charitable purposes. The suit was brought for resumption of this grant. In reply the defendant pleaded, first, that the land itself had been dedicated to the temple of Sri Radha Krishnaji and was therefore *waqf* property appertaining to an endowment in favour of the said temple of which the defendant was the manager. He repeated this plea in a slightly different form, alleging that the *muafidar* against whom the suit should have been brought was Sri Thakur Radha Krishnaji, the idol worshipped in the temple above referred to. The next plea, in the alternative, raised by him was that, if he was in fact himself the *muafidar* as alleged in the plaint, then this land had been held rent-free for more than fifty years and by more than two successors to the original grantee, the grant having been made in the first instance in favour of mahant Priya Das from whom the defendant was the fifth mahant in succession. The case went to trial on these pleadings. The Assistant Collector found that the land in suit had in fact been granted for the benefit of the temple, more than fifty years prior to the institution of the suit and in the time of mahant Priya Das. It appears to be correct that the defendant is the 5th successor of mahant Priya Das in the line of mahants. The

(1) (1903) I. L. R., 27 Mad., 435. (2) (1887) I. L. R., 12 Bom., 247.

Assistant Collector, however, held that the grant having been for the benefit of the temple and not for the benefit of the mahant as such, it could not be regarded as a grant in favour of the latter, but as a grant in favour of the temple, so that there had been no succession, and the provisions of section 158 of the Tenancy Act could not apply. The learned District Judge has affirmed this decision on appeal. There seems to have been some question raised in argument before the District Judge as to whether the entire area in suit formed part of the original grant made in the time of mahant Priya Das. The District Judge expresses himself somewhat doubtfully on this point; but the documentary evidence on the subject seems clear enough, and apparently the difficulty felt by the District Judge was due to his confining his attention to the records of a single mahal. The plaintiff came into Court alleging that the defendant was a rent-free grantee of the entire area in suit and there was no suggestion in the plaint that this area had been granted at two different times, nor does there seem room for any such supposition on the evidence on the record. The findings therefore we take to be these :—The grant was made for the benefit of the temple, but there was no dedication either of the land itself or of income from the land to the deity worshipped in the said temple, regarded as a juristic personality. The name of the idol has never appeared in the village papers as the grantee. The grant being for the benefit of the temple must necessarily have been made to some manager or trustee, and it was made to the mahants of the institution now represented by the present defendant as such manager. It is certain that there have been more than two successors to the original mahant in whose time the grant first was made. Under these circumstances it seems to us that the provisions of section 158 of the Tenancy Act, No. II of 1901, apply to this case. It is quite clear in respect of any land the proprietary rights in which have been granted to the mahant of a particular institution, not for his own benefit but for religious or charitable purposes, as an endowment, for instance, of a temple maintained by the institution of which the mahant is the head, that on the death of one mahant his successor in office is regarded as having

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obtained possession of such land by succession within the meaning of section 34 of the Land Revenue Act, No. III of 1901. There seems no reason why there should not equally be considered to be a succession to the original grantee in respect of a rent-free grant. For these reasons we accept this appeal, and, setting aside the orders of the courts below, we direct that the land in suit shall be deemed to be held in proprietary right by the defendant mahant and by the successors in his mahantship, in trust for and on behalf of the temple in question. The Assistant Collector should proceed to determine the land revenue payable by the said trustee in respect of this land. The defendant is entitled to his costs throughout.

Appeal decreed.

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June, 28.

Before Mr. Justice Piggott and Mr. Justice Ryves.

BAKHTAWAR LAL AND ANOTHER (DEFENDANT) *v.* SHEO PRASAD AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), *order XXVI, rules* 9, 16, 17 *and* 18—*Act* (*Local*) *No. II of* 1901 (*Agra Tenancy Act*), *section* 164—*Suit for profits—Commissioner appointed to report as to actual collections—Evidence—Admissibility of report.*

Held that the report of a commissioner appointed by a Court of Revenue to ascertain the amount of actual collections in a suit for profits under section 164 of the Agra Tenancy Act is admissible in evidence having regard to rules 9, 16, 17 and 18 of order XXVI of the Code of Civil Procedure.

THIS was a suit for profits under section 164 of the Tenancy Act. The first court allowed profits calculated on 90 per cent. of the gross rental. On appeal, the District Judge remanded the case with directions to calculate and allow profits on the basis of actual collections. The plaintiffs then made an application in the first court for the issue of a commission to ascertain the amount of actual collections. The court appointed a commissioner and gave him certain directions in accordance with which he was to prepare an account of the profits. The commissioner held a local inquiry and submitted his report in which he came to the conclusion that the collections were full, with no

* Second Appeal No. 548 of 1916, from a decree of F. D. Simpson, District Judge of Budaun, dated the 7th of December, 1915, reversing a decree of Shaukat Ali Khan, Assistant Collector, first class, of Budaun, dated the 1st of May, 1915.