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This, however, is by no means in favour of the present applicant. That was a mortgage suit to which sections 88 and 89 of the Transfer of Property Act of 1882 applied. There it was held that a decree under section 88 of the Transfer of Property Act, 1882, was only a decree *nisi* and not a final decree, and that the suit in which such a decree is passed does not terminate until an order absolute is made under section 89. Whether the law laid down there was correct or incorrect, it is clear that the law, as it now stands, since the present Code of Civil Procedure came into force, is in accordance with that decision. The suit is clearly still pending. Rule 4 of order XXII clearly does apply. The court of first instance was wrong in applying rule 10, and we therefore disallow the present application with costs.

Application dismissed.

PRIVY COUNCIL.

JADU NATH SINGH AND ANOTHER (PLAINTIFFS) *v.* THAKUR SITA RAMJI AND ANOTHER (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

P. C.* 1917 *April*, 24.

Hindu law—Endowment—Construction of deed of endowment—Deed contended to be invalid as being not a real dedication to idol—Appointment of members of donor's family as mutawallis—Deed held valid as creating an endowment.

The question in this appeal was as to the construction of a deed of endowment executed and registered by a Hindu on the 20th of July, 1898. In a suit after his death to set aside the deed, the appellants, as next reversioners, claimed that no valid endowment had been created, or was intended to be created by it.

Their Lordships in dismissing the appeal distinguished the cases of *Sonatun Bysack* v *Jugguttsoondree Dossee* (1) and *Ashutosh Dutt* v. *Doorga Churn Chatterji* (2), cited in support of the appellants' contention, on the ground that, although nominally there was a gift to the idol, that gift was so cut down by subsequent disposition that there was no gift to the idol such as to make the property pass as an absolute and entire interest in its favour.

Held that there was no such cutting down in the present case. There was in the beginning a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple, and the rest of the disposition

* *Present*:—Viscount HALDANE, Lord ATKINSON, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1859) 8 Moo., I. A., 66.

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

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was only a gift to the idol by a direction that of the whole estate which had already been given, one half was to be applied for the upkeep of the idol itself, and the repair of the temple, and the other half was to go for the upkeep of the *mutawallis*. There was no reason why the donor should not nominate the members of his family as the *mutawallis* of the temple, and he had done so. And there was nothing in that which militated against the propriety of his ear-marking a certain part of the money to remunerate them as managers so long as they should so continue.

By the registration of the deed the executant showed that it represented an intention which he desired to treat as carried into execution.

APPEAL No. 86 of 1915, from a judgement and decree (24th of November, 1913) of the court of the Judicial Commissioner of Oudh which reversed the judgement and decree (25th of October, 1911) of the Additional Judge of Hardoi.

The only material question for determination in this appeal was as to the construction of a deed of endowment, dated the 20th of July, 1898, executed by one Darshan Singh, dedicating the property in dispute to an idol, Thakur Sita Ramji, the first respondent.

The appellants were the reversionary heirs of Darshan, and the property in dispute belonged originally to Darshan Singh and his brother Kanchan Singh who lived together jointly.

Darshan Singh had a son, Ram Ghulam, who died in his lifetime leaving a widow, Musammat Jasoda, but no issue. He had also two daughters, Musammat Janki and Musammat Lilawati both of whom were widows and had no male issue. Kanchan Singh had a wife, Musammat Net Koer, and a daughter, Musammat Newal Koer, whose husband was living. Darshan Singh and Kanchan Singh built a temple at mauza Karhar, the place of their residence, which was dedicated to Thakur Sita Ramji. On the 5th of June, 1889, they executed a will whereby they directed that after their deaths, the estate should be entered in the revenue papers in the name of Thakur Sita Ramji and that Musammat Jasoda and Musammat Net Koer and after them the daughters of the testators and their issue should hold the property and apply the income to defraying the expenses connected with the temple and maintaining themselves. The will further provided that Musammat Net Koer and Musammat Jasoda and the daughters of the testators should have no power of

alienation, and that in case Kanchan Singh had a male child born to him after the execution of the will, he would be the owner of the property devised to the exclusion of everybody. Kanchan Singh died after executing this will without any male issue. Darshan Singh succeeded him by right of survivorship.

On the 20th of July, 1898, Darshan Singh executed the deed of endowment, wherein, after referring to the will previously executed by him and his brother, he declared that he wanted to put the arrangements then made in force in his life-time, with certain changes which the altered circumstances of his family necessitated. He accordingly made a gift of the entire property in favour of the idol, and made provision for the expenses of the temple and for the support and protection of the rights of the members of the family in the following words :—

"(1) I dedicate my whole property, detailed below, to and in favour of the temple of Sita Ramji. I shall apply for mutation of names in favour of Sita Ramji and get mutation effected in its favour. (2) I shall, during my life-time, manage and administer the estate of the temple. (3) After me Musammat Jasoda, my daughter-in-law, will act as manager and administrator like myself, and after her my daughters, Musammat Janki and Musammat Lilawati, and the daughter of my deceased brother, Musammat Newal Koer, shall jointly remain managers and administrators and shall live in my house and properly manage the estate. (4) The dwelling house will remain reserved for the abode and comfort of the *mutawalli* and manager belonging to the family, who should occupy the same. (5) After the payment of Government revenue and the expenses of collection, half the net income of the estate shall be applied towards the performance of religious ceremonies and charities, the offering of food to the deity and the repairs of the temple. (6) The remaining half shall go to the support of the managers (of the temple) belonging to the family. (7) After Musammat Jasoda and the daughters, any issue born of those daughters would be the *mutawalli* and manager of the endowment and the temple. If Musammat Newal Koer, who is still capable of bearing a male child, gives birth to a male child, he shall be the manager thereof like myself and not the daughters of the daughters. (8) Half the net income shall be expended in a proper manner in the upkeep of the temple and an account of the same shall be kept by the manager, which the Government for the time being shall inspect and supervise. (9) None of the managers or administrators shall have any power to alienate the house and the property endowed. (10) If by the will of God none of the persons enumerated in paragraph 3 remain, the Government for the time being shall act as the manager and administrator of the temple and the property endowed, and in that event the whole income of the property, after excluding the expenses of managing the estate, shall be expended exclusively for the

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purposes of the temple, and the expenses of the temple, as detailed above, and the cost of feeding *fakirs* and indigent people shall be defrayed in the manner the Government for the time being may deem fit. (11) If, as mentioned above, there arise any difference among the daughters or their issue in respect of the management or administration of the estate, the Government for the time being shall appoint a manager (*sarbarakar*), who shall act in conformity with the directions above given. Wherefore this deed of endowment is executed in favour of the temple of Sita Ramji situated in village Karhar to serve as a *sanad*."

Darshan Singh died on the 17th of November, 1898, but he apparently never applied for mutation into the name of the idol, nor was the deed acted upon by him during his life. On his death his daughter-in-law Jasoda took possession of all his property as manageress under the deed, and was still in such possession on the 15th of November, 1910, when the appellant and his brother Bisheshar Singh (father of the minor appellant Partab Bhan Singh) brought the present suit against the idol and Jasoda claiming to be the reversionary heirs of Darshan Singh, alleging in their plaint that no valid endowment in favour of the idol was created or intended to be created by the deed of the 20th of July, 1898.

The defendant Jasoda pleaded (*inter alia*) that the deed was valid and that Darshan Singh at his death had no property which any one could claim as heir.

The Additional Judge of Hardoi decided in favour of the plaintiffs, who, he held, were entitled to the property subject to the charge of defraying the expenses of the temple to the extent of half the proceeds of the property, and a decree was made to that effect.

An appeal by the defendant to the court of the Judicial Commissioner was heard by L. STUART (First Additional Judicial Commissioner) and KANHAIYA LAL (Second Additional Judicial Commissioner) who held that the deed of the 20th of July, 1898, was a valid dedication of the property to the idol. They therefore reversed the decision of the trial Judge and dismissed the suit.

Pending the appeal to the Privy Council the defendant Musammat Jasoda died and the present respondent, No. 2 was substituted for her on the record.

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On this appeal:—

Sir *W. Garth* and *H. N. Sen*, for the appellants, contended that the deed of the 20th of July, 1898, did not constitute a complete and valid gift of the property in favour of the idol. The deed, though purporting to be a complete gift to the idol, was in intention an attempt to prevent the exclusion of Darshan Singh's daughters from inheritance. If it was operative at all, the deed in any case only created a charge on the property for the expenses of the temple to the extent of half the income of the property. Reference was made to *Sonatun Bysack* v. *Juggutsoondree Dossee* (1); and *Ashutosh Dutt* v. *Doorga Churn Chatterji* (2). The deed was not, it was submitted, otherwise effective as an endowment, and it was consequently invalid. It was never treated by Darshan Singh as divesting him of his rights, and though he might have done so before he died, he never applied to have the property put into the name of the idol. The accounts too would have shown that the property was dealt with by Darshan Singh after the deed was executed just in the same way as he dealt with it before the so-called endowment was made. That was the reason why the respondents did not, though called upon to do so, produce the account books. They would have disclosed his real object in executing the deed, which was to benefit the ladies of his family, to whom he gave one half of the income of his property while making them *sebaits* of the idol. Reference was made to *Brojosundery Debi* v. *Luchmee Koonweree* (3) as being a case similar to the present, in which there was no real endowment, but only a charge created for the support of a family idol, and no dedication of a public shrine.

DeGruyther, K. C., and *B. Dube*, for the respondents, were not called upon.

1917, April 24th:—The judgement of their Lordships was delivered by Viscount HALDANE:—

Their Lordships think this is a very plain case, and they propose to intimate at once the advice which they will tender to the Sovereign.

(1) (1859) 6 Moo., I. A., 66.

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

(3) (1873) 15 B. L. R., 176, *note*.

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The whole question arises on the construction of a deed of endowment executed by one Darshan Singh on the 20th of July, 1898. There had been a joint family, and he and his brother, the heads of the joint family, had made a joint will and the brother had died before him. Darshan Singh was desirous by this date of making a disposition of the property, which was now his as head of the joint family, which should be devoted to religious purposes, and he executed this deed and afterwards registered it, by registering, showing that it represented an intention which he desired to treat as carried into execution. The deed begins by saying that he dedicates his whole property to and in favour of the temple of Sita Ramji; then he goes on to say that during his life-time, he himself will manage and administer the estate of the temple; after that, he provides that his daughter-in-law is to act as manager and administrator, and, after her, his own daughters, Musammat Janki and Musammat Lilawati, and a daughter of his deceased brother shall jointly remain managers and administrators, and shall live in his house and properly manage the estate. The deed proceeds: "The dwelling-house will remain reserved for the abode and comfort of the *mutawalli* and manager belonging to the family, who should occupy the same." Then, after the payment of Government revenue and the expenses of collection, half the net income is to be applied towards the performance of religious ceremonies and charities, the offering of food to the diety, and the repairs of the temple. The remaining half is to go to the support of the managers of the temple belonging to the family, that is to say, of those who are members of the family. Then, after the daughter-in-law and the daughters, any issue born of those daughters would be the *mutawalli* and managers of the endowment and the temple. If the daughter of his deceased brother, who is still capable of bearing a male child, gives birth to a male child, he shall be the manager thereof like Darshan Singh himself, and, if not, the daughters of the daughters. Then, "Half the net income shall be expended in a proper manner in the upkeep of the temple, and an account of the same shall be kept by the manager, which the Government for the time being shall inspect and supervise." Then, "None of the managers or administrators shall have any

power to alienate the house and the property endowed." Then, if none of the persons enumerated remain, the Government is to act as the manager and administrator of the temple and property endowed, and in that event the whole of the income of the property is to be expended for the purposes of the temple after the expenses of the management of the estate are paid, and the expenses of the temple shall be defrayed in the manner the Government for the time being may deem fit.

The question that arises is this: The heirs, the persons who would succeed, were it not for this deed, as being the nearest male relations of Darshan Singh, claim that this is not a real endowment of the property to the temple. If it had been a real endowment, they admit that, according to Hindu law, it was a valid disposition of Darshan Singh's property. But they say: "No, it is not a reality; it is merely a mode, a specious device, of making a provision for the daughter-in-law and daughters which Darshan Singh could not otherwise have made," and they say it is bad as against them. The answer made is: "No, here is a deed which ought to be read just as it appears, and there is no reason why it should not be construed as meaning simply what the language says, a gift for the maintenance of the idol and the temple, under which the idol is to take the property, and, for the rest, the family are to be the administrators and managers, and to be remunerated with half the income of the property. If the income of the property had been large, a question might have been raised, in the circumstances, as throwing some doubt upon the integrity of the settlor's intention, but, as the entire income is only 800 rupees, it is obvious that the payment to these ladies is of the most trifling kind, and certainly not an amount which one would expect in a case of this kind.

Now it is said that, according to previous decisions of this Board, there is authority for reading the terms of this deed in some very different way from what it would naturally be assumed to be if properly read. We have been referred to a decision of Sir GEORGE TURNER in a case of *Sonatun Byack* v. *Juggutsoondree Dossee* (1) and to *Ashutosh Dutt* v. *Doorga Churn Chatterji* (2).

(1) (1859) 8 Moo., I. A., 66. (2) (1879) I. L. R., 5 Calc., 438: L. R., 6 I. A., 182.

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On looking at those cases, the first was a case in which Sir GEORGE TURNER held that, although nominally there was a gift at the beginning to the idol, that gift was so cut down by subsequent disposition as to leave it clear that the subsequent disposition ought to prevail rather than the earlier one, and that consequently there was no gift to the idol such as to make the property pass as an absolute and entire interest in its favour. The second case was also a decision of this Board, and came to very much the same thing. It was a question of the construction of a will, taken as a whole, and it was said there was not a complete gift to the idol; it was cut down by the subsequent disposition to the family. Here there is no such cutting down. There is, in the beginning, a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple, and then the rest is only a gift to the idol *sub modo* by a direction that of the whole, which had already been given, part is to be applied for the upkeep of the idol itself and the repair of the temple, and the other is to go for the upkeep of the managers. There was no reason why the disposer should not nominate the members of his family as his managers, and he has done so. And there is nothing in that which militates against the propriety of his ear-marking a certain part of the money to remunerate them as managers so long as they should so continue.

Their Lordships are of opinion that the judgement of the Court of the Judicial Commissioner, which proceeded substantially upon these grounds, is right, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

J. V. W.

Solicitors for the appellants: *Watkins & Hunter.*

Solicitors for the respondents: *T. L. Wilson & Co.*