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responsible for these several works. I am not satisfied that Piari Lal can in any sense be considered to be the 'occupier' of this temple. The Municipal Act is a penal Act and must be strictly construed in favour of the subject. The offence of which Piari Lal has been convicted is not established by the evidence. I set aside the conviction and order passed under section 274 of the Municipalities Act. The fine, if paid, will be refunded.

Conviction quashed.

APPELLATE CIVIL.

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January, 4.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

SURJA KUNWARI AND ANOTHER (DEFENDANTS) *v.* HAR NARAIN RAM AND OTHERS (PLAINTIFFS).*

Construction of document—Will—Dedication of property for religious purposes—Expenditure on religious objects amounting to only a small portion of the income, the rest being assigned for the maintenance of the testator's family.

The will of a Hindu provided that the worship of certain idols should be maintained out of the property dealt with thereby, but the rest of the property was assigned to the maintenance of the heirs of the testator generation after generation. The income of the property was about Rs. 7,000 annually, but the customary expenses of the religious rites and ceremonies amounted to only some Rs. 500 per annum.

Held on a construction of the will, that it created a charge on the estate for the expenses of the idols, and that, subject to that charge, the property was to go to the testator's legal heirs, who were fully entitled to appropriate all the income of the property. *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1) and *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (2) referred to.

THE facts of this case were as follows :—

One Babu Sukhmangal Singh Deo executed a will, dated the 29th October, 1903, of which the material portions are given below. The plaintiffs, with the permission of the District Judge, brought the suit, out of which this appeal arose, under Act No. XX of 1863 on the allegation that the will created a waqf of certain properties for the benefit of Hindus in favour of the

* First Appeal No. 56 of 1915, from a decree of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 11th of February, 1915.

(1) (1859) 8 Moo., I. A., 66. (2) (1880) I. L. R., 5 Calc., 428.

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deities mentioned therein, that the defendants first party, who were widows of the deceased testator, had been setting up a proprietary title to the waqf properties, that they had been misappropriating the income of those properties and that they, both as Hindus and as persons authorized under the will to interfere in case of mismanagement, had a right to sue. The material reliefs sought were that certain properties might be declared to be waqf properties and that the defendants might be dispossessed and the plaintiffs or some person nominated by them as mutwalli might be put in charge of those properties.

The material provisions of the will were—

Para. 1 . . . During my life-time I shall in every case have power to modify or correct the will or to transfer or make a gift of the whole or part of the property . . .

Para. 3. I want to remain in possession of the property during my life-time. After my death, if there be no child living, both the wives should unite and remain in possession in my place of the property now existing, provided both the wives unite and do not raise a dispute . . . The marriage of the daughter shall also be performed out of the income of this very property. Cash and grain would according to position in life be expended as has been done from the time of ancestors. The expenses of our funeral ceremonies or the marriage and funeral ceremonies, etc., of our children, if any, would be defrayed out of the income of the same property as has been done heretofore. After my death no heir shall have power to sell, mortgage, make gift of or transfer in any way the said property, if he does so, it shall be null, void and invalid.

Para. 4. My ancestors constructed a Thakurdwara close to their house . . . In the Thakurdwara I have enshrined the idols of Sri Ganeshji, Sri Ram Chandraji . . . Every manager shall have to celebrate the Janam Asthami and Ram Naumi festivals, etc., as has all along been done, out of the income of my property . . .

Para. 5 gave details of expenses which used to be incurred for the Thakurdwara and recited that "nothing more nor less than what is done at present should be done, hereafter."

Para. 6. All the movable and immovable property which stands in my name or is in my possession or has been purchased by my ancestor, and all such property, possession of which could not be recovered as against the mortgagee for want of money (required to pay) the principal amount of consideration due to the said mortgagee, but which I or my heirs may acquire by paying up the said amount to the mortgagee, shall be considered to be the property of Sri Thakurji. There is a village called Mauza Saraura . . . which stands in the name of my brother . . . and also in my own name . . . . But my brother and also his son . . . died a natural death. The said village will now be included in the waqf property and declared to be such. This waqf is such that whatever money and grain produced by the *sir* land still remain after meeting the requirements of *rajbhog* of Thakurji, shall be used and appropriated by my successors, generation after generation. It shall not be used and appropriated by anyone else . . . But only I and no one of my successors will have power to make transfer by sale, mortgage or gift, etc. But whatever profit will remain after meeting the expenses of the Thakurdwara, the costs of its repairs, the pay of the servants connected with it and the costs of repairs of other buildings, out of the said profits, shall be spent on the estate.

Para. 7. My heirs will, in case of most urgent necessity, have power to hypothecate or mortgage the share of only two villages out of all the villages . . . If they want to execute any kind of document for this reason, they will have power to do so. If a famine should occur or the government revenue of all the villages fall into arrears . . . and they (my heirs) begin to die of starvation, they may support themselves by hypothecating or mortgaging the two houses which I have in muhalla Bakshipur. If even this be insufficient or if some other village of another co-sharer be offered for sale, and sufficient money be not in hand for the payment of the whole amount of the sale consideration, in that case the amount of sale consideration should be made up from the mortgage etc., of a portion of the shares in the said two villages and that village should be purchased in the name of Sri Thakurji. . . .

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Para. 8. Babu Sumer Bahadur Shah . . . and Babu Rup Narain Shah . . . my brothers-in-law (wife's brothers) will after my death also continue to make collections etc., pay the government revenue, and make over the profits to my two wives as long as they (the managers) live and obtain receipts for full payment from both of my wives . . . These two gentlemen will be given Rs. 36 a year each from the Ilaqa of Sri Thakurji, besides food and clothing. If any of these two gentlemen should after my death prove unfaithful in any way or commit embezzlement or misappropriation, I authorize Harnarain Ram Pande and Gobind Narain Pande (plaintiffs) . . . to dismiss him in that case and turn him out of the estate of Sri Thakurji and appoint others who are capable and honest . . . They should continue the management just as it is at present and get *rajbhog, utsava etc.*, carried on. And our successors should be maintained as they are maintained at present. The money which may be saved after defraying all these expenses should be deposited and a *bhandara* given in my name at Gorakhpur and Sri Ajudhiaji every year . . .

Para. 9 . . . The daughter who is now two years old and is unmarried and all other sons or daughters who may be born (in future) will be married into high-caste Brahman families and their *chatti*, *barhi* and marriage ceremonies will be performed and dowries etc., given according to the old custom . . . The daughters will, till their marriage, be maintained by our successors in the same way in which girls have been brought up up to this time. In the event of my successors having no issue, my wives, and those successors will remain in possession, and when the wives also cease to exist, my daughters will remain in possession and occupation during their life-time, and after performing the *rajbhog*, and the repairs of the Thakurdwara and of my houses etc., shall use the saving for their own maintenance. My successors shall not in any generation have power to sell or otherwise alienate in any way the property entered in this deed . . .

If the manager mentioned above also die, this Thakurdwara and the property mentioned above shall be managed under the direction of the pious *raises* so that Sri Thakurji may suffer no

inconvenience and their property may not be interfered with in any way. If the pious *raises* of the city pay no attention to this matter, the Sovereign of the time may graciously and generously manage the same according to the desire of me, the executant . . . Be it known that all this waqf property shall be considered to be the property of Thakurji, Sheoji, Ganeshji, etc., installed in the temple at Ismailpur. Whatever may be saved after defraying the expenses of the temple and the pay of the servants shall be used by our legal heirs to meet their own expenses . . . If any of my heirs act against my wish and direction in future every son of a Hindu in the city will have power to force him to carry out the conditions by bringing a suit or seeking a remedy in some other proper manner, or some manager other than these heirs may be appointed by the court.

The lower court decreed the claim. The defendants appealed.

The Hon'ble Pandit *Moti Lal Nehru* (with him Mr. *Abdur Raoof*), for the appellants :—

The will is really an attempt to create a perpetuity in favour of the descendants of the testator and makes no dedication of any property to the idol. Although it speaks of the whole property as waqf yet it provides that the dowries and other marriage expenses of the daughters are to be defrayed from the income, which is also to be devoted to other household purposes. The whole income of the property is about Rs. 7,000 annually whereas the expenses specified in the will for the maintenance of the worship in the temple do not exceed Rs. 400 a year. The surplus is directed to be used for the maintenance of the family. A similar will was construed by their Lordships of the Privy Council in *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1). The case of *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (2) is also in point. It was held in these cases that there was no dedication of the property and the heir-at-law took an absolute interest subject to the payment of the expenses provided for in the deed.

The Hon'ble Sir *Sundar Lal* (with him Pandit *Lakshmi Narain Tiwari*), for the respondents :—

(1) (1859) 8 Moo., I. A., 66. (2) (1880) I. L. R., 5 Calc., 438.

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Besides the expenses of the idol, the will provides for the maintenance of an annual *Bhandara* in the name of the deceased. It speaks of the property as belonging to Thakurji and directs that other properties which may be purchased out of the income, shall be purchased in the name of the Thakurji. These facts show that the executant really intended to make a waqf and not to create a trust in perpetuity in favour of his descendants.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit which purports to have been brought under Act No. XX of 1863. The plaintiffs, who are two members of the community, sought a declaration that certain property is endowed property, and they prayed that the defendants might be dispossessed of the property and the plaintiffs or some other persons nominated by them might be appointed mutwalli or manager of the property and placed in charge of it. The plaint contains other prayers also to which it is not necessary to refer. The property belonged to one Sukhmangal Singh, the husband of the defendants who are appellants before us. On the 29th of October, 1903, he made a will, and it is urged on behalf of the plaintiffs that under this will he endowed the property in question to certain idols. The plaintiffs allege that the defendants have got their names recorded in the revenue papers as owners of the property, that they have made lease of the property and that they have misappropriated the income of the property and not devoted it to purposes of the endowment. The court below has decreed the claim. The defendants have preferred this appeal mainly on two grounds, namely, that Act XX of 1863 had no application to the present case and the suit could not be maintained under that Act, and, secondly, that under the terms of the will no endowment was created, but a charge was placed on the property of the deceased for the purpose of meeting the expenses of the upkeep of a certain temple. In the view which we take on the second question raised by the appellants we do not deem it necessary to decide whether the suit was maintainable under Act XX of 1863. We are of opinion that the contention that no endowment was created by the will of Sukhmangal Singh is well founded. The will, no doubt, states that a waqf was created, but from the clauses contained in it, it is manifest

that what was intended by Sukhmangal Singh was that the idols should be maintained out of the income. The value of the property is stated in the plaint to be Rs. 50,000. From the evidence of the witnesses for the plaintiffs themselves it appears that the profits arising from the property amount to about Rs. 7,000 annually. The expenses of the idols, provided for in the will, as specified in paragraph 9, amount to about Rs. 500 a year, more or less. So that it is clear that the amount of the expenses bears a very small proportion to the total income of the property. In the will itself the testator provides that "whatever money and grain produced by the *sir* land still remained after meeting requirements of *rajbhog* of Thakurji shall be used and appropriated by his successors generation after generation. It shall not be used and appropriated by any one." It futher provides that "whatever profits would remain after meeting the expenses of the Thakurdwara, the costs of its repairs, the pay of the servants connected with it and the costs of repairs of other buildings out of the said profits shall be spent on the *estate*" of the testator. The vernacular word used is "*riasat*," that is, his family property. Further down (in clause 7 of the will) he confers authority on his heirs to effect mortgages in certain events. Again, in paragraph 9 it is provided that after the expenses of the *rajbhog* and the repairs of the Thakurdwara and of the houses have been met, the savings shall be appropriated by his heirs "for their own maintenance." The expenses connected with the marriages of female members and dowries to be given on the occasion of their marriages were also provided for out of the estate. All this is inconsistent with the dedication of the property to the idols. On the contrary, the inference to be drawn from the will read as a whole is that it created a charge on his property for the expenses of the idols. Subject to that charge the property was to go to his legal heirs who were fully entitled to appropriate all the income of the property. This case is very similar to that of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1), decided by their Lordships of the Privy Council. See also *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (2). We are of

(1) (1859) 8 Moo., I. A., 66. (2) (1880) I. L. R., 5 Calc., 438.

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opinion that the decision of the court below is erroneous and the suit of the plaintiffs ought to have been dismissed. We accordingly allow the appeal, set aside the decree of the court below and dismiss the suit with costs in both courts.

Appeal decreed.

1917
January, 5.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BHAIRON PRASAD AND OTHERS (DEFENDANTS) *v.* SOMWARPURI (PLAINTIFF.)*

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), section* 36—*Act (Local) No. II of* 1901 *(Agra Tenancy Act), section* 41—*Exproprietary tenant—Enhancement of rent.*

The tenant of an ex-proprietary holding, whose rent had been fixed by the Collector under section 36 of the United Provinces Land Revenue Act, entered into an agreement with the zamindar to pay an enhanced rent. The agreement was effected by means of a registered instrument, and the enhanced rent was not in excess of the beneficial rate mentioned in section 10 of the Act, but it was made within the period of ten years from the fixation of rent by the Collector. *Held* such agreement was not open to any legal objection.

THE facts of this case were as follows :—

The defendants having sold their proprietary rights became ex-proprietary tenants of the *sir* lands under the provisions of section 10 of the Tenancy Act. An application was made to the Collector to fix the rent on the ex-proprietary holding under the provisions of section 36 of the Land Revenue Act. The rent was fixed at the sum of Rs. 50. Subsequently by a registered agreement between the plaintiffs and the defendants the rent was enhanced to the sum of Rs. 72-6-0. The plaintiff brought a suit in the Revenue Court to recover this rent. The defendants, amongst other pleas, raised the defence that no rent save the rent fixed by the Collector could be recovered until after the expiration of 10 years from the time of the creation of the ex-proprietary tenancy. The Revenue Court held that the plaintiff was entitled to recover the enhanced rent. An appeal was taken to the District Judge, who confirmed the decree of the court of first instance. The learned District Judge found that the agreement was entered into because the plaintiff was about to take steps to get rid of the order of the Collector by an application in revision or by an application for enhancement.

* Appeal No. 55 of 1916, under section 10 of the Letters Patent.