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paid a portion of the decretal amount and obtained time to pay up the balance and the case was struck off in April, 1919. In execution of the decree some crops were attached and were placed in charge of the applicant, Kallu Khan. On the 27th of April, 1919, the judgment-debtor, Abdullah Khan, presented an application to the court in which he stated that, although he had paid a part of the decretal amount and the court had ordered the attached crops to be released, those crops had not been delivered back to him. An explanation was called for from the amin and on receipt of it, the court instituted certain proceedings and examined witnesses and in the end made an order on the 2nd of June, 1919, directing the applicant to hand over certain crops to the judgment-debtor or pay him Rs. 106, their price. There is no authority to justify the action of the Court. If Kallu Khan misappropriated the crops, the remedy of the judgment-debtor was to sue him for recovery of the crops or their value, or to bring a suit for damages against him, but the Court in proceedings like those set forth above, had no power to make a decree as it purports to have done against Kallu Khan, the man to whom the crops where entrusted. I accordingly grant the application and set aside the order of the court below. I make no order as to costs.

Application granted.

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

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March, 11.

SRI THAKURJI (PLAINTIFF) *v.* SUKHDEO SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Religious endowment—Tests for deciding whether an endowment is real and substantial or merely illusory—Attempt to establish a perpetuity in favour of the descendants of the settlor.

By a deed of endowment, so-called, executed not long prior to his death, a Hindu professed to dedicate practically the whole of his property in favour of an idol. It was provided in this deed that the settlor should apply for mutation of names in favour of the idol, and that he should use the income of the property for the expenses of *puja* and *rajbhog* and for the repair of the temple,

* First Appeal No. 167 of 1917, from a decree of Udit Narain Singh, Subordinate Judge of Benares, dated the 1st of March, 1917.

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and that he should keep regular accounts of the income and expenditure. The settlor himself was to be the first manager, after him his wife, and thereafter his daughter's sons and their descendants. Some sixteen months after the execution of this deed, the settlor died and was succeeded as manager by his wife. The widow brought a suit for a declaration that the property was endowed property, in the course of which it came to light that no attempt had been made to obtain mutation of names in favour of the manager, that no accounts were forthcoming relating to the administration of the property by the settlor, that the expenditure on the idol did not amount to more than one-tenth of the income, and that the widow was unable to account for her own dealings with property, the subject matter of the suit.

Held that in these circumstances there had been no real dedication of the property to religious purpose, but only an attempt to create a perpetuity in favour of the descendants of the settlor's daughter.

THIS appeal arose out of a suit in which the plaintiff, the widow of a Hindu, asked for a declaration that certain property specified in a deed of the 6th of November, 1912, executed by her late husband, was duly dedicated to, and became the property of, an idol installed in her house. The court of first instance found, for various reasons, that the transaction was invalid, that there had been no real and substantial dedication of the property mentioned in the deed of November, 1912, to religious purposes, but that the whole transaction was merely an attempt to tie up the property in perpetuity in favour of the descendants of the daughter of the settlor. That court accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court. A description of the alleged deed of endowment and of the conduct of the executant subsequent to its execution and of his dealing with the so-called endowed property will be found in the judgment in appeal.

Mr. *B. E. O'Conor* (with him Babu *Harendra Krishna Mukerji*), for the appellant :—

[After contesting the finding of the lower court that the temple had been built, and the idol installed, *after* the death of the donor, counsel proceeded], In the deed of endowment the donor did not specify or allocate what amount or what share was to be spent by his successors for purposes of worship, *et cetera*; that might presumably have been left to their discretion and good sense. Failure to make such specification would not necessarily vitiate the dedication. Nor would it justify the inference that the donor desired that the bulk of the income was

to go towards the personal expenses of his successors. The deed nowhere states that the main portion or even any portion of the income is to be appropriated or enjoyed by the successors themselves; there is no expression of any intention in the document other than that the income was to be employed for purposes of the idol. If, however, as a matter of fact a small fraction alone of the income was so employed and the rest appropriated by the manager, there might possibly be an action for breach of trust and removal of the manager, but that would not vitiate the endowment itself or make it illusory and void *ab initio*. Reference was made to *Asita Mohon Ghosh Moulik* v. *Nirode Mohon Ghosh Moulik* (1) *Granthi Subbiah Chetty* v. *Mandaleswara Katari* (2) and *Radha Mohun Mundul* v. *Jadoomonee Dossee* (3). On the question of the donor's real intention, there is no evidence to show that there was any motive to defraud any body. The so-called custom about the exclusion of daughters and daughter's sons has not been proved to have existed in the donor's family; and there is nothing to show that any apprehension on that score influenced his mind. Moreover, if the intention of the donor was to secure the succession to his daughter's sons, that object could have been more easily attained either by a gift *inter vivos* or by a will, without introducing the complications of a religious endowment. The lower court is wrong in holding that the deed offends against the rule about perpetuities. Providing for a hereditary line of trusteeship is not against the rule of perpetuities; for the proprietorship vests at once and for ever in the idol. In forming an opinion about the intention of the donor, between two views preference should, as far as possible, be given to the one which is consistent with the avowed object of the deed.

Munshi *Harnandan Prasad*, for the respondents:—

It is conceded that if in fact a *bonâ fide* trust was once created, the circumstance that there was a breach or misuse by the trustee would not invalidate the trust. The question is whether a genuine endowment was intended to be created and was in fact created. The mere execution and registration of a deed of

(1) (1916) 20 C. W. N., 901 (921). (2) (1908) 19 M. L. J., 905.

(3) (1875) 23 W. R., C. R., 369.

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endowment would not be sufficient by itself to dedicate the property and divest the donor of the same; the surrounding circumstances have to be taken into account in order to find whether the donor intended the deed to be real and operative. Reference was made to the case of *Watson and Co.* v. *Ramchund Dutt* (1), the facts of which were similar to those of the present case. Here, too, there was no change in the accounts, and the donor never effected mutation of names describing himself a *shebait* or manager, and there was nothing to show that there was any alteration in the state of things which could be said to have given effect to the deed of endowment. Most Hindu families worship a family idol; and it is nothing unusual that a small fraction of the income should be spent, without the existence of any endowment, upon the worship of the idol. It is not shown that any change took place, as a consequence of the deed of endowment, in the mode of enjoyment of or dealing with the property or its income, which could be regarded as giving effect to the deed. The only conclusion from these circumstances is that the deed was never intended to be acted upon and was illusory. Reference was made to *Ram Chandra Mukerjee* v. *Ranjit Singh*, (2) and *Mahbub Chandra Bera* v. *Srimati Rani Sarat Kumari Debi* (3).

Babu *Harendra Krishna Mukerji*, was heard in reply.

MEARS, C. J., BANERJI and WALSH, JJ.:—In this case Musammat Mahesha Kuar asked for a declaration that certain property specified in a deed of the 6th of November, 1912, executed by her deceased husband, Babu Bhan Singh, was duly dedicated to, and became the property of, an idol installed in her house.

The learned Subordinate Judge decided that the transaction was invalid as not being prompted by religious motives. He came to the conclusion that the object of the deed was to keep the property inalienably in the line of Bhan Singh's daughter and daughter's sons and perhaps also to exclude the operation of an alleged custom of Bhan Singh's caste whereby nephews, in default of sons, would inherit the property of the donor.

The decision of the case must turn on the question of the intention of the donor and as a guide to that intention we must

(1) (1893) I. L. R., 18 Calc., 10 (18). (2) (1899) I. L. R., 27 Calc., 242 (251).
(3) (1910) 15 C. W. N., 126 (131).

have regard to his acts and declarations and the conduct of his widow after his death.

The deed is a lengthy document, carefully drawn and is in the usual form. The points of importance are that the donor purported irrevocably to make over to the idol, then stated to be installed in his house and described in the deed as Sri Thakurji, what was substantially the whole of his property, so that from the moment of the execution of the deed he and his wife had practically no income, and property of at least the value of Rs. 30,000 passed from him to the idol.

In 1910 he had commenced partition proceedings and in the deed of endowment he undertook to make an application to the Revenue Court for mutation of names in favour of the idol whilst his name was to appear therein as manager. During his life-time he was to be the Manager and Superintendent and he bound himself always to "use the income of the *waqf* property in meeting the expenses of the *puja* of and *rajbhog* to Sri Thakurji aforesaid and of repairing the house." Also he pledged himself always to keep a regular account of the income and expenditure.

After his death, the managership was to pass to his wife, if alive, and thereafter to his daughter's sons and downwards through their lineage. The donor lived for about sixteen months after the execution of the deed.

He did not apply that the name of the idol should be entered in the revenue papers, and he used only a fractional part of the income of the property for religious purposes,—certainly not more than one-tenth and probably much less than that. The plaintiff did not produce any accounts to show in what way the income had been expended or surplus income applied. Interrogatories were drafted by the defendants on the questions, *inter alia*, of the value of the property and the expenditure of the income and the keeping of accounts. Objection was taken to these interrogatories on the ground that answering them would weaken the plaintiff's case and apparently without exercising any judgment in the matter, the order of the Judge was merely that the objection should be filed and defendant's pleader informed. The Judge ought to have required the plaintiff to answer some of the interrogatories which were directly

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relevant to the inquiry. The absence of the answers embarrassed the defendants in the lower court.

In that court a large part of the evidence was directed to tracing out the history of the building of a temple for the reception of the idol and the date of the installation of the idol. As our decision does not depend on whether the contention of the plaintiff or the defendants is the right one on these points, we need not discuss this exhaustively, but we are of opinion that there was in the life-time of the donor a family idol of Krishnaji, which was the idol indicated for worship in the deed of endowment, that the building of the temple was commenced and practically completed at least before the death of Bhan Singh and the idol duly installed, and we do not accept the story set up by the defendants that the idol was installed within one month from the date of Bhan Singh's death. The circumstance of the building of the temple and the installation of the idol cannot, however, in our view, prevail over the other facts which go to show that the donor's motive was to tie up the property and to render such property inalienable for generation after generation. He may also have wished to free it from any danger of descending to his nephews if the alleged custom should be proved as it appears to have been in one case. We think that the following facts are decisive against the religious intention of the donor—

(*a*) The transfer of what in the court below was assumed by both sides to be the whole of his property and agreed in this Court to represent practically all of it.

(*b*) The failure to obtain mutation of names.

(*c*) The failure to produce any accounts.

(*d*) The admitted fact that the expenditure on the idol was at the most one-tenth of the whole income.

(*e*) The absence of any explanation by the widow on any of the above points and of any accounts by her of her managership and dealing with the income after the death of her husband in 1914.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.