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plaintiff depositing in the court below within six months from this date the whole of the amounts received by her together with interest at 6 per cent. per annum, simple, as set forth in paragraph 11 of the plaint, after deducting any amount that the defendant shall have received by execution of the decree for past arrears or by a separate suit. As on the disputed points both parties have failed partially we direct that they should bear their own costs in both courts. The amounts realized by the defendant will be credited to the plaintiff on the dates of such realization and interest to that extent would cease to run from such dates. If the amount is not deposited within the time allowed, the suit will stand dismissed in both courts.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

DASAMI SAHU (DEFENDANT) *v.* PARAM SHAMESHWAR (PLAINTIFF) AND CHITTARANJAN MUKERJI (DEFENDANT.)*

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January, 24.

Hindu law—Religious endowment—Dedication to idol—Revocation—Adverse possession as against idol by donor himself.

In the absence of fraud, undue influence and misrepresentation, if a valid dedication has once been completed, there would be no power left in the donor to revoke it. And no assertion on his part or subsequent conduct contrary to such dedication would have the effect of nullifying it.

Adverse possession exercised by the donor himself, to the ouster and knowledge of the *shebait* who alone held the property on behalf of the idol, would mature into title after the lapse of the prescribed period.

Sri Thakurji v. *Sukhdeo Singh* (1) and *Ram Dhan* v. *Prayag Narain* (2), distinguished. *Jadu Nath Singh* v. *Thakur Sita Ramji* (3), referred to. *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (4), *Chitar Mal* v. *Panchu Lal* (5) and *Damodar Das* v. *Lakhan Das* (6), followed.

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* First Appeal No. 87 of 1926, from a decree of Hanuman Prasad Verma, Subordinate Judge of Benares, dated the 23rd of December, 1925.

(1) (1920) I. L. R., 42 All., 395.
(2) (1921) I. L. R., 43 All., 503.
(3) (1917) I. L. R., 39 All., 553.
(4) (1904) I. L. R., 32 Cal., 129.
(5) (1925) I. L. R., 48 All., 348.
(6) (1910) I. L. R., 37 Cal., 885.

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DASAMI SAHU v. PARAM SHAMESHWAR.

Babu *Peary Lal Banerji*, for the appellant.

Munshi *Kamla Kant Varma* and Munshi *Ambika Prasad*, for the respondents.

SULAIMAN AND KENDALL, JJ. :—This is a defendant's appeal arising out of a suit for a declaration that the house in dispute was *debutter* or trust property and was not alienable. It originally belonged to the ancestor of the defendant Chittaranjan Mukharji and was sold away at auction and purchased by a stranger in 1878. Later on it was transferred by the auction purchaser to Chittaranjan's father and has been held by the family since then. The father of Chittaranjan died when the latter was a minor, 5 years old. He was brought up by his uncle Niranjan Mukharji who was appointed a certificated guardian. About 1902 Chittaranjan attained majority, but the management of his property, which consisted mainly of this house and some Government securities, remained in the hands of his uncle Niranjan Mukharji. On the 2nd of June, 1908, a registered deed of release was executed by Chittaranjan in favour of his uncle Niranjan, stating that he had received all the accounts and received back what was due to him. On the same day Chittaranjan executed a deed of endowment dedicating the house in dispute in favour of three family idols and appointing his own mother as the *shebait* of the said idols. The deed of dedication specifically mentioned that Chittaranjan had ceased to be the owner of the property which had passed to the idols, and that possession had been transferred to his mother who was the *shebait*. It went on to provide, however, that the donor and his uncle and his heirs would have full power to see to it that the daily worship of the said idols was performed duly and regularly with the income from the said house. It is an admitted fact that no application for change of names was made in the Municipal Board of Benares,

within the limits of which this house was situated, and it is also admitted that there was no mutation of names in the revenue papers with regard to the land on which the house stood. The subsequent conduct of Chittaranjan further shows that he was paying the municipal taxes.

On the 7th of July, 1909, Chittaranjan and his mother jointly executed a mortgage-deed of this property. Chittaranjan described himself as the owner in possession of the premises, and his mother asserted that she had a charge of maintenance on it. They purported to mortgage the property in their own right as well as the *shebaits* of the idols; and the purpose for which the money was required was to carry out repairs of the house and to pay off debts which had been contracted for carrying on the worship of the idols. The deed of dedication was shown to the mortgagee.

On the 7th of March, 1910, both Chittaranjan and his mother executed a deed of revocation, stating that Chittaranjan had been in proprietary possession and enjoyment of the property always, and that it was owing to a deception practised upon him by his uncle that he had been made to execute the document of the 2nd of June, 1908, which was not enforceable, and he accordingly cancelled and nullified it by this deed of revocation, and that to this revocation his mother who had been appointed *shebait* under the deed had agreed and affixed her signature. It is stated by one witness that registered notices announcing the revocation were circulated and one of them was sent to Niranjan Mukharji and in 1911 Chittaranjan applied for and obtained permission for putting up a scaffolding.

On the 13th of May, 1914, Chittaranjan made a second mortgage of this property in favour of Shiam Sunder. Neither the previous mortgage-deed nor the

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deed of endowment nor the deed of revocation was expressly mentioned in this document. But care was taken to make the mortgagor liable in case such prior incumbrances were discovered. Shiam Sunder instituted a suit on the basis of this mortgage-deed and obtained a decree in March, 1922. This decree was put in execution and the property was proclaimed to be sold on the 20th of April, 1923. Three days before the date fixed for the sale, a mortgage in favour of the appellant was executed by Chittaranjan, viz. on the 17th of April, 1923. Under this document Chittaranjan received Rs. 165 at the time of registration, and the rest of the amount was left in the hands of the mortgagee for payment of the prior mortgagee, who was described as a creditor on the strength of a hand note, as well as the decretal amount.

The plaintiff wanted to avoid this last mortgage-deed by the declaration that the property was not transferable. The contesting defendant pleaded that there had been no valid dedication, that the said deed of endowment had been executed under undue influence and misrepresentation, and that it was never acted upon or given effect to. There was a further plea that it had been duly revoked, and in any case there had been adverse possession for more than 12 years against the idols. Lastly it was pleaded that the amount of the mortgage money had been taken for purposes of legal necessity and was binding on the trust property.

The learned Subordinate Judge has decreed the claim, holding that there was a valid dedication which could not have been revoked, and that there was no limitation. He has further held that although the amount borrowed might have been for legal necessity, the defendant had not established that he had paid the said amount.

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The plea of misrepresentation or undue influence alleged to have been exercised by Niranjan on Chittaranjan has not been pressed before us. We must therefore take it that the deed of endowment was duly executed and registered by Chittaranjan on the 2nd of June, 1908.

The question whether it created a valid dedication depends on whether there was a real intention to dedicate the property and the dedication was completed. No doubt there may be circumstances under which the mere execution and registration of a deed of endowment may not amount to a complete dedication and the proceeding may be merely a nominal one. On the other hand it is also clear that if a valid dedication has once been completed there would be no power left in the donor to revoke it, and no assertion on his part or subsequent conduct contrary to such dedication would have the effect of nullifying it. Not only the language of the document but the surrounding circumstances as well as subsequent conduct may be taken into consideration when finding whether there was a real intention to dedicate the property. The learned advocate for the appellant has strongly relied on the circumstance that no mutation took place on the strength of this dedication, and that no attempt has been made to produce accounts which would show that the whole of the income of the house was spent for the purposes of the endowment. He has strongly relied on the Full Bench case of this Court in *Sri Thakurji* v. *Sukhdeo Singh* (1). The principle underlying that decision has been followed subsequently by two of the learned Judges in *Ram Dhan* v. *Prayag Narain* (2). But the question whether there was a real intention to dedicate the property is a matter of inference from the various circumstances and by no means an abstract question of law.

(1) (1920) I. L. R., 42 All., 395. (2) (1921) I. L. R., 43 All., 503.

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We may point out that in the case of *Jadu Nath Singh* v. *Thakur Sita Ramji* (1) there had also been a dedication not followed by mutation of names and there was a non-production of accounts showing that the *waqf* had been acted upon. Nevertheless in that case their Lordships of the Privy Council upheld the dedication. In the case before us the omission to apply for mutation of names can be explained to some extent by the circumstance that this was a house property situated in the city of Benares, as regards which the mutation of names may not be of the same importance as that with regard to zamindari property. In any case this omission by itself does not necessarily show that the deed was not acted upon. The oral evidence does indicate that the mother of Chittaranjan who had been appointed *shebait* actually lived in this house, and the worship of the idols had been carried on as it had been done before.

We come next to the mortgage-deed of 1909. The phraseology of this document is very curious and in some respects it is contradictory. But it is quite clear to us that this is the result of an anxiety in the mind of the mortgagee to take the mortgage from both Chittaranjan and his mother in both their capacities of owners and trustees. It is on account of this double capacity that the document has been carefully worded. There is no suggestion that the deed of dedication was a nullity or that it has been cancelled. On the other hand it is recited that it was one of the documents which was shown to the mortgagee. The amount borrowed is also stated to have been required for the repairs of the house and to pay off debts incurred for carrying on the worship of the idols. These were purposes of the trust. Both Chittaranjan and his mother are described as *shebaits*. Although there are recitals to the effect that one is the owner in possession and the other had a charge of main-

(1) (1917) I. L. R., 39 All., 553.

tenance on the premises, we are not satisfied that there was any clear assertion in this document that the deed of endowment had been a nullity from the very beginning or that it had been revoked.

From these circumstances the court below has inferred that there had been a real intention to dedicate the property. We find ourselves unable to differ from that view. We must, therefore, hold that the deed of 1908 was not a nullity from its very inception.

The next question to consider is whether adverse possession for more than 12 years has put an end to this endowment. Under the deed possession was to pass from Chittaranjan to his mother, who was entitled to live in the house or let it out on rent as the *shebait* of the idols, and was to spend the income on the worship of those idols. We have already pointed out that no mutation of names followed, and the payment of the municipal taxes continued to be made by Chittaranjan himself. In 1910 Chittaranjan and his mother both joined in executing the deed of revocation by which it was made clear that the executants had agreed that the endowment had ceased to be effective. That deed further recited that Chittaranjan had himself been in proprietary possession and in enjoyment of the property. From that moment therefore the character of the possession of Chittaranjan over the house must be deemed to have been adverse as against the idols, of whom his mother was the *shebait*. It was after this that Chittaranjan applied to the Municipal Board as owner of the house for permission to make additions, and he did put up a scaffolding presumably at his own expense. There is nothing to show that he surrendered possession to his mother in her capacity as the *shebait* of the idols after the revocation. On the other hand, even if she occasionally

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lived in the house she might well live in it because of her relationship with Chittaranjan. For over 12 years this state of things continued, and there was no assertion made on behalf of Niranjan or his heirs to intervene, or to see that the names of the idols were duly entered either in the municipal or the revenue papers. In 1914 there was a further mortgage created by Chittaranjan on this property in assertion of his own proprietary interest. This also was a registered document. A decree was obtained on the basis of this document, and the property was put up for sale at a public auction. The present defendant advanced his money more than 12 years after the deed of revocation had been executed, and even if he had got the registration registers searched for 12 years he might not have discovered the earlier document. In any case the revocation itself had stood for more than 12 years and the possession of Chittaranjan over the house has remained for all that period without doubt.

The learned advocate for the respondent has argued before us that in the circumstances of this case there could have been no adverse possession at all. The view of the court below that there could not be any adverse possession because the idols themselves remained in the house cannot for a moment be accepted. As a matter of fact there can be adverse possession, not only as against the idols but over the idols themselves. That adverse possession can be acquired against idols in respect of property dedicated in their favour is fully clear from several cases decided by their Lordships of the Privy Council. We may refer to *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1) which was followed by this Court in the case of *Chitar Mal* v. *Panchu Lal* (2). We may also refer to the case of *Damodar Das* v. *Lakhan Das* (3).

(1) (1904) I. L. R., 32 Cal., 129. (2) (1925) I. L. R., 48 All., 348.
(3) (1910) I. L. R., 37 Cal., 885.

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In our opinion the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. So long as such possession is exercised to the ouster and knowledge of Chittaranjan's mother, who alone can hold the property on behalf of the idols, it would mature into title after the lapse of the prescribed period.

The learned advocate for the respondent has drawn our attention to the clause in the deed of dedication authorizing Chittaranjan to see to the proper carrying on of the worship. That conferred on him a right of intervention but it in no way amounted to a vesting of the trust property in him nor did it constitute him a trustee. There was therefore no bar to his exercising adverse possession or acquiring title by adverse possession over this property.

We accordingly allow this appeal and setting aside the decree of the court below dismiss the plaintiff's suit with costs.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

1929 *January*, 25.

BACHCHI LAL AND OTHERS (DEFENDANTS) *v.* DEBI DIN AND OTHERS (DEFENDANTS) AND BENI PRASAD AND OTHERS (PLAINTIFFS).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), sections* 4(1) *and* 20—*"Co-sharer"—Indefeasible interest—Full proprietary title necessary—Estoppel—Invalid transfer together with estoppel does not confer proprietary title.*

For a person to become a co-sharer within the meaning of section 4(1) of the Agra Pre-emption Act it is necessary that he should be entitled as proprietor to a share in the mahal. A right short of proprietary title will not do; nor can a person in adverse possession without actual title be said to be entitled

* First Appeal No. 157 of 1926, from a decree of Jamuna Narain Dikshit, Additional Subordinate Judge of Banda, dated the 22nd of February, 1926.