1927.
December, 19

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Wazir Hasan.

MAHARAJA JAGATJIT SINGH (DEFENDANT-APPELLANT) *v.* BRIJ MOHAN DAS (PLAINTIFF-RESPONDENT.)*

Grant of land to mahant of a temple as occupancy tenant with the condition super-added "as long as the temple would last"—Settlement court decree, construction of—Grant whether to temple or individual—Construction of documents—Act XIV of 1920, *application of—Essence of a trust for public or religious purposes*—Res judicata—*Attaching of legal meaning to the words of a judgment, whether a question of law.*

Where a settlement court decree while giving the mahant and his heirs rights as occupancy tenants without the right of transfer, without any condition as to the purposes to which the income of land was to be devoted, without any reference to their being mahants of a particular temple, and without suggesting that the temple was to benefit from their possession super-added the condition "as long as the temple would last" and there were no other conditions requiring the mahant and his successors to devote any portion of their income towards the expenses of the temple, *held*, that the grant was not a grant to the temple, but a grant to individuals, subject only to the condition that they were to retain it so long as the temple was in existence, and that the land was not *waqf* property given for religious and charitable purpose, and was not governed by Act XIV of 1920.

The legal meaning to be attached to the words of a judgment and decree constitutes a question of law, and cannot be considered binding on a subsequent court, specially when nothing turns on that decision, and does not operate as *res judicata* in a subsequent suit between the parties.

There can be a valid tenure in law where a person holds property as an owner burdened with a charge for the support

* First Civil Appeal No. 67 of 1927, against the decree of Gulab Singh Joshi, Subordinate Judge of Kheri, dated the 16th of February, 1927, decreeing the plaintiff's claim.

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of a religious foundation, and further there can be a valid tenure in law when the owner of a property holds it subject to certain obligations for the maintenance of a religious institution.

Per HASAN, J. :—The essence of a trust for a public or religious purpose lies in its characteristic of permanency. The possibility of such a trust cannot be concieved where the tenure can come to an end on default, or even on the exercise of volition on the part of the trustee. Where, therefore, the right of occupancy which the plaintiff's predecessors obtained in the land in suit from the settlement court was liable to be extinguished altogether in the event of non-payment or refusing to pay rent to the superior proprietor, the case was not one of trust within the meaning of Act XIV of 1920. *Muhammad Raza* v. *Yadgar Husain and others* (1), and *Ashutosh Dutt v. Doorga Churn Chatterjee* (2), relied upon.

Messrs. *Bisheshwar Nath Srivastava, Ali Zaheer* and *Bhagwati Nath Srivastava,* for the appellant.

Messrs. *A. P. Sen* and *S. C. Dass*, for the respondent.

STUART, C. J. :—The suit, out of which this appeal arises, came to be instituted in the following manner. There is, in the district of Kheri, a small town called Dhaurahra, which was formerly a portion of what was known as the Dhaurahra estate, which was held by certain Jangre Thakurs. This estate was confiscated after 1857, and divided amongst certain grantees, the portion which included Dhaurahra town being granted to Captain John Hearsey. Captain Hearsey sold this village to a Colonel Boileau, and Colonel Boileau sold it to the Maharaja of Kapurthala, the predecessor-in-interest of the present defendant-appellant. According to tradition Tulshi Das, the author of the Ramayana, visited Dhaurahra in the seventeenth century. It is admitted on both sides that in connection with this alleged visit

(1) (1924) L.R., 51; I.A., 192. (1) (1879) L.R., 6 I. A., 182.

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a temple came into being. In the First Regular Settlement of the Kheri district Mahant Gobind Das, who was manager of this temple, applied to the Settlement Officer in respect of rights in Dhaurahra. His claim included two prayers: one in respect of rights to lands in Dhaurahra which, he asserted, were in his possession, and the other in respect of rights to lands in Parauri which, he asserted, had formerly been in his possession, but from which he had been subsequently dispossessed. His claim was against Colonel Boileau, who was then the owner of the village. We are not concerned with the decision as to the rights in Parauri. We have, however, to note that the latter only were the rights which, according to the mahant, had been granted by a certain Raja Arjun Singh who, as far as we can gather from the wajib-ul-arz, was in possession of the estate from 1837 to 1855. The rights in Dhaurahra, he stated had been granted by a King of Oudh. Colonel Boileau took the position in respect of the Dhaurahra rights that they had been granted by a taluqdar in the time of the Kings of Oudh, and not by a King. The order of the Extra Assistant Commissioner on this application was passed on the 18th of March, 1871. It is filed as exhibit A9. The decree, in accordance with the order, is filed exhibit 1. It is of the same date. The order on the decree can be stated practically in full. It is very short:—

> "Four hundred and thirty-four bighas, 10 biswas of land, as detailed, were awarded to Mahant Gobind Das in occupancy right on condition that he paid the land revenue assessed upon those lands, together with 15 per cent. to Colonel Boileau, the superior proprietor."

That is all which the decree states, but the judgment states that Mahant Gobind Das and his heirs are entitled to remain in possession of this land "as long as

the *thakurdwara* (i.e., the temple) exists." It further stated that their rights should be heritable, but not transferable. Mahant Gobind Das remained in possession accordingly. We find that on the 16th of September, 1916, he executed a registered deed of agreement in favour of Brij Mohan Das, the present plaintiff-respondent, who was his disciple. In this he stated that of his own will he transferred to Brij Mohan Das all his rights in the lands in question. In this document he stated very clearly, that the grant of the rights in these lands had been made by a Raja of Dhaurahra in the name of the temple, that he (Mahant Gobind Das) was, as mahant, the manager of the temple, and that the grant had been made for the expenses of the temple, and for its maintenance. The agreement laid down very clearly that no manager had the right of transfer. This agreement is exhibit A4. It is somewhat surprising, after having read the averments of Mahant Gobind Das in exhibit A4, to find that in 1919 it was ascertained that he himself had been alienating the property freely. In that year there was decided, in the Court of the Subordinate Judge of Kheri, a suit between the Maharaja of Kapurthala as plaintiff, and Mahant Gobind Das and Brij Mohan Das, with others, as defendants. Mahant Gobind Das had made three transfers prior to the 16th of September, 1916, of what he had himself described as temple property for a total consideration of more than Rs. 3,200. This was a suit, which purported to be brought by the Maharaja of Kapurthala as superior proprietor, for a declaration that certain transfers made by Mahant Gobind Das and Brij Mohan Das were invalid and ineffective. The suit was decided on the 29th of May, 1919. It was dismissed, although it was found that these transfers had been made, and that these persons had no right to make the transfers, because it was found that the plaintiff was not

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entitled to a declaration. We find on reference to our registers that the Maharaja of Kapurthala appealed against this decision, and that his appeal (First Civil Appeal No. 55 of 1919) was dismissed on the 27th of May, 1920, by the Judicial Commissioner, but there is no exhibit on the record to show the judgment in that appeal. In 1921 there was a further litigation. The Maharaja again brought a suit for a declaration that certain other transfers made by Mahant Gobind Das and Brij Mohan Das were invalid. On this occasion he obtained a decree from the Subordinate Judge of Kheri on the 22nd of September, 1922. This is exhibit 3. Some of the defendants appealed against this decree to the Court of the Judicial Commissioner. Their appeal was dismissed on the 17th of December, 1923. The decision is exhibit A1. It is to be noted that there is a slight misdescription in this judgment, it being stated there that the property had been granted by Raja Arjun Singh. As we have shown, it was never suggested that the Dhaurahra property was granted by Raja Arjun Singh.

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The next proceedings were proceedings by the Maharaja against Brij Mohan Das alone under the provisions of Act XIV of 1920. Under section 3, the Maharaja applied to the District Judge of Sitapur on the ground that the Dhaurahra temple was the property of a trust created or existed for a public purpose of a charitable or religious nature, for directions that Brij Mohan Das should furnish, through the court, particulars as to the nature and objects of the trust and other particulars. Brij Mohan Das, apparently asserting that there was no such trust, undertook to institute within three months a suit for a declaration to that effect. The District Judge ordered stay of proceedings, and the suit, out of which this appeal has arisen, was instituted. It has been decreed. The present appeal is preferred.

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We have been put to some difficulty in understanding the form of the suit. Act XIV of 1920 provides only for such a suit being instituted, when the existence of the trust is denied, or when there is a denial that it is a trust, to which the Act applies. Brij Mohan Das has not asked for a declaration to either effect. He has asked for a declaration that the land which was covered by the settlement decree (exhibit 1) is not *waqf* property given for religious or charitable purposes, and is not governed by Act XIV of 1920, but that the said property was given for the maintenance of the ancestors of the plaintiff and his successors, and that the plaintiff is the occupancy tenant of the land. He has received a declaration to this effect. Although we should have been in a better position to decide the suit had we known how the plaintiff came to ask for such a declaration, we note that the defendant took no exception to the form of the suit either in the lower court, or in appeal. It would have been advantageous if the application of the plaintiff before the District Judge and the District Judge's order had been proved before us. They have not been proved before us. We must, however, consider the suit as maintainable in view of the action of the parties. We have further to note that exhibit 4 is a certificate of the Local Government, granting the plaintiff permission under section 86 of Act V of 1908 to bring a suit against the defendant (who is a Ruling Prince) for a declaration that the plots of land known as Chak Ram Patti, situated in village Dhaurahra, pargana Dhaurahra, district Kheri, which are in his possession, are not trust property. We, therefore, propose to deal with this appeal upon its merits. The first point which I wish to note is, that it is clear upon the evidence and the admissions of parties that the temple came into existence many years before the grant was

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made. It clearly came into existence about the seventeenth century, and the grant could not have possibly been made at the earliest until the eighteenth century, as it was made either during the rule of the Kings of Oudh or possibly of the Nawabs. The next point upon which I lay stress is, that there is absolutely no evidence to show the nature of the grant prior to the decision of the Settlement Court in exhibit A9. The evidence afforded by the decision of the Settlement Court as to the nature of the grant is simply this. Mahant Gobind Das and his heirs were to hold this land as occupancy tenants without power of transfer so long as the temple existed. It was nowhere said that they were to hold it as mahants of the temple. It was nowhere said that the temple was the grantee. It was not even said that any portion of the income from these lands was to be devoted towards the maintenance of worship, or other objects connected with the temple. It is further to be noted that here there was nothing in the nature of a college or *asthan*. There was a sole mahant who nominated a disciple as his successor. The evidence afforded by the settlement proceedings would certainly go to show not only that the grant was not made to the temple, but that the grant was made to Mahant Gobind Das as long as the temple existed. It is true that in the subsequent agreement (exhibit A4) Mahant Gobind Das makes a distinct assertion that the grant was to the temple and not to himself. It is clear that he could have no personal knowledge on the subject. The settlement proceedings, to which he was a party, show that he was absolutely vague even as to the time when the grant was made, and that he did not know who had made it. Further, the value of his assertions that the property was temple property is nullified by the fact that, before he made those assertions, he had been dealing with the property as though it was his own; in fact contravening the terms

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of the decree which gave him title. That had given him heritable but non-transferable rights. It is admitted by the plaintiff-respondent that the temple in question is a temple to which the public have access, but we are not dealing here with the question as to whether the temple is a public trust. We are dealing with the question as to whether this particular grant was a grant to the temple, or a grant to Mahant Gobind Das and his heirs. There are in the grounds of appeal pleas that the plaintiff's suit was barred on the principle of *res judicata* and on the principle of estoppel. I can find nothing to bar it on the principle of *res judicata*. It is true that in the judgment (exhibit A8) the learned Subordinate Judge decided that the Maharaja of Kapurthala's predecessor-in-title had given the land and the groves in suit by way of *muafi* to Mahant Gobind Das's ancestor for the purpose of meeting the expenses of the *thakurdwara*. But this decision was based entirely upon the interpretation of the judgment of the Settlement Court to which I have already adverted. The learned Judge said: "the fact that the judgment decreed that the defendant No. 1 and his predecessors were to hold possession so long only as the *thakurdwara* remains in existence clearly goes to show that the land was granted for the expenses for the maintenance of the *thakurdwara* which is in existence in this *patti*." It was for that reason, and for that reason alone, that he decided this issue in this manner, and his decision is no more than the statement of the legal meaning which he attaches to the words of the Settlement Court judgment and decree. The legal meaning to be attached to these words constitutes a question of law, and cannot be considered in my opinion binding on a subsequent court, especially as nothing turned on this decision. Although this point was decided in favour of the Maharaja of Kapurthala, his suit, as has already been stated, was

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dismissed, and the dismissal was upheld on appeal. In the second litigation there was no decision on the point in question. Further, I can find no ground of estoppel. I consider the evidence afforded by Mahant Gobind Das's statement in exhibit A4 of no value at all, and I find myself in consequence confined for the decision in this appeal to the interpretation which I place upon the settlement proceedings. There is no other evidence that I can see of value in the matter. Although there are decisions to the effect, that the evidence as to the manner in which property has been treated by the heads of religious institutions is valuable to show that the property in question pertains to the institutions and not to the heads in their individual capacity, none of these decisions assist particularly towards determining the nature of the title in the property in question. There is, however, a recent decision of their Lordships of the Judicial Committee which is of very great value as a guide towards the determination of the point. I refer to the decision in *Muhammad Raza* v. *Yadgar Husain and others* (1). There is a case very similar to this where the Chief Commissioner of the Central Provinces had ordered that certain villages were to remain revenue-free, as long as a certain *imambara* was in existence, on the condition that the income arising from the *muafi* was properly spent, and reports of management were submitted to Government for sanction, their Lordships decided that the grant was not *waqf* but a personal grant, subject to a condition. I do not think that I am falling into the error of construing the terms of one document from the meaning attached to the terms of another in arriving at the conclusion that the doctrine laid down by their Lordships in this decision assists materially to the decision of the present appeal. Here we find that the Settlement Officer while giving Mahant Gobind Das and his heirs rights as occupancy tenants without a right of

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(1) (1924) L.R., 51 I.A., 192.

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transfer, without any condition as to the purposes to which the income of the land was to be devoted, without any reference to their being mahants of a particular temple and without suggesting that the temple was to benefit from their possession super-added the condition as long as the temple would last. In the case before them their Lordships held that the grant was a grant *sub conditione*, although the temple benefited very largely from the grant. The expenses of the temple had to be defrayed from the revenue, and the income arising from the *muafi* had to be properly spent and reports of management had to be submitted to Government for sanction. Nevertheless they held that the grant was not a grant to the temple, but a grant to an individual on the condition that he satisfied certain expenses of the temple from the income of the property granted. Here the case is very much stronger, for here there are no conditions requiring the mahant and his successors to devote any portion of the income towards the expenses of the temple. They are granted the property subject only to the condition that they may retain it so long as the temple is in existence. For the above reasons I consider that the suit of the plaintiff-respondent has been rightly decreed, and would dismiss this appeal with costs.

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HASAN, J. :—This is the defendant's appeal from the decree of the Subordinate Judge of Kheri, dated the 16th of February, 1927.

The suit, in which this appeal is made, arises out of proceedings taken by the appellant against the plaintiff-respondent under Act XIV of 1920. The purpose of the suit is to obtain a declaration that the property in suit is not trust property within the meaning of the said Act. That Act deals with "express or constructive trust created or existing for a public purpose of a charitable or religious nature." It is not contended that the case before us can

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be a case of constructive trust. If the matter at all falls within the purview of Act XIV of 1920, then the present case must be a case of express trust. The trial court is of opinion that no such trust has been established, and has, therefore, granted the decree which is now being challenged in appeal.

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The learned CHIEF JUDGE has, if I may respectfully say so, exhaustively and ably dealt with the question in issue, and I have very little to add as I entirely concur with him in his opinion that the appeal should be dismissed.

It seems to me that there can be a perfectly valid tenure in law where a person holds property as an owner burdened with a charge for the support of a religious foundation—*see* the case of *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1); and further there can be a valid tenure in law where the owner of a property holds it subject to certain obligations for the maintenance of a religious institution—*see* the case of *Muhammad Raza* v. *Yadgar Husain* (2). I think that the present case is of the latter character. Whatever might have been the nature of the title on which the property now in suit was held as a subordinate tenure prior to the confiscation of the soil of Oudh under Lord Canning's proclamation of March, 1858, the title and its nature must now be sought in the decree of the Court of Settlement passed in the present case on the 18th of March, 1871 (exhibit A9). I construe this decree to mean that the plaintiff's predecessor-in-interest obtained under it a right of occupancy with the incidents of heritability and non-transferability attached to it. To this right of his was added the obligation of maintaining the *thakurdwara*. It need hardly be said that the essence of a trust for a public or religious purpose lies in its characteristic of permanency. I cannot concieve the possibility of such

(1) (1879) L.R., 6 I.A., 182. (2) (1924) L.R., 51 I.A., 192.

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a trust in a tenure where the tenure can come to an end on default or even on the exercise of volition on the part of the trustee. In the present case the right of occupancy, which the plaintiff's predecessor had obtained in the lands in suit from the settlement court, was liable to be extinguished altogether in the event of non-payment, or refusing to pay rent to the superior proprietor.

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BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

TIKAI CHOBAY (DEFENDANT-APPLICANT) *v.* FIRM SHEO DAYAL AND RAMJI DAS (PLAINTIFF-OPPOSITE PARTY).*

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Civil Procedure Code (Act V of 1908), order XXIII, rule 1 and section 115—Permission to withdraw a suit with liberty to bring a fresh suit, when to be granted—Withdrawal of suit with the object of instituting it afresh and producing the evidence he omitted to produce—Revision—Section 115 of the Code of Civil Procedure, applicability of.

Before the trial court can grant the plaintiff permission to withdraw from the suit with liberty to institute a fresh suit it is necessary for it to be satisfied that the suit must fail by reason of some formal defect, or that there were other sufficient grounds *ejusdem generis* for permitting them to institute a fresh suit.

Where the plaintiff endeavoured to produce documentary evidence at a period when it could not be admitted, and petitioned the court that he did not want to produce any further evidence and preferred to withdraw the suit and to bring it again, and then to produce the evidence which he

* Section 115, Application No. 35 of 1927, against the order of Bhudar Chandra Ghosh, Subordinate Judge of Bahraich, dated the 15th of August, 1927, allowing withdrawal of suit.