1910.

SAKRAPPA BIN LINGAPPA HEBSUR v. SHIVAPPA.

ground of the inequality of benefit which either party may eventually have received from it." Having dealt with the question from that point of view, their Lordships go on to say:—"Under all these circumstances, the true amount of the relative rights of the litigant parties must be considered as having been doubtful, whether the law or the fact be regarded." And merely because the view which the arbitrators took of the law differs from that which a Court would take after a more careful investigation of the rights of the parties, it cannot be said that the agreement when it was entered into was not a fair subject of compromise of disputed and doubtful rights.

As the present case falls within the principle above quoted, the decree of the learned District Judge must be reversed and the suit dismissed with costs throughout upon the respondents.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

1910. *October* 4.

DASSA RAMCHANDRA PRABHU (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARSINHA AND ANOTHER (SONS AND HEIRS OF ORIGINAL DEFENDANT 1), RESPONDENTS.*

Gift burdened with an obligation—Alienation by donee—Restrictions on alienation.

When it is doubtful, whether a deed embodies a complete dedication of property to a religious trust or merely creates a gift of that property, subject to an obligation to perform certain services, the question should be decided by reference to the deed itself. In the former case the property would be inalienable and in the latter alienable, subject to the obligation, and notwithstanding restrictions as to selling or mortgaging the said property.

APPEAL under section 15 of the Letters Patent against the decision of Scott, C. J., in Second Appeal No. 355 of 1908.

Suit for a declaration that the property in question was not liable to sale in execution of a decree.

* Appeal No. 14 of 1909 under the Letters Patent.

The lands in dispute along with other property belonged to one Wette Prabhu bin Krishna Prabhu. He had five sons, namely, Raya *alias* Ramchandra Prabhu, Vithoba Prabhu, Bhiku Prabhu, Hari Prabhu and Appa Prabhu. On the 13th February 1890 he effected a partition of his immoveable property between himself and his sons, reserving one share to himself and giving one to each of his five sons. The following is the material portion of the deed of partition (exhibit 59) :—

These plots the income whereof has been settled to be 10½ khandies of rice and 2,200 cocoanuts should from this day be enjoyed by Vithoba Prabhu who should from the current year 1899 pay to Government the assessment Rs. 14-8-0 and local fund cess Re. 0-14-6 in respect of the same and hand over to me the (following) profit, namely, 8½ khandies of rice, Rs. 17 in cash and 920 cocoanuts in my life-time. I am to maintain the divine services mentioned above, with the (help of the) same. Vithoba Prabhu should take these profits after me and perform the said divine services on the respective occasions by inviting all his brothers and in the same manner as hitherto on the day of this *Samaradhan*, the *Santarpan* (rite) should be performed, each of the brothers giving whatever help he can (in respect of the same). Should Vithoba Prabhu be at any time unable to conduct the divine services, such of the other brothers as might be willing, may take the said profits from Vithoba Prabhu and perform the services. Some money has to be spent on plot Survey No. 42. Should Vithoba Prabhu spend it and get the land improved and raise extra produce, none can claim (from him) either that more should be spent for divine services than what has been now settled, nor that (any) profits are due (to him, *i.e.*, one of them). Vithoba Prabhu has no right whatever to convey these plots either by mortgage, sale or mulgeni. Every sharer should bring and give two Hingari (betel-nut flower) branches for the purposes of *Anant Vrita* (festival). Should they be unwilling to regularly perform this festival in the family and the same be made over to a mutt, &c., all brothers should equally contribute towards the 1½ khandies of rice, Rs. 8 in cash and 70 cocoanuts settled in respect of it. Should the assessment of these lands be increased or diminished in the Revision Survey, Vithoba Prabhu should bear the same and hold these lands upon those conditions from generation to generation. But he must not allow the plots to deteriorate. Should Vithoba Prabhu think that he does not want them, he may give them into the possession of such of the other brothers as might be willing, to whom these very conditions would then apply.

Subsequently one Damodar Shrinivas Bhatta obtained a decree against Vithoba Prabhu and the lands in dispute were attached in the execution proceedings. Raya *alias* Ramchandra Prabhu,

1910.

DASSA RAMCHANDRA PRABHU v. NARSINHA.

alleging himself to be the purchaser of Vithoba Prabhu's interest, applied for the removal of the attachment but his application was dismissed. He, therefore, brought the present suit against Damodar Shrinivas Bhatta, as defendant 1, and his brothers, as defendants 2-5, for a declaration that the property in suit was not liable to attachment in execution of the decree obtained by defendant 1 against defendant 2, Vithoba Prabhu. The plaint alleged that the property was reserved by the family of the plaintiff and defendants 2-5 for the performance of certain religious observances or ceremonies; they were, therefore, not alienable to outsiders and could not be sold in execution.

Defendant 1 answered *inter alia* that the property was liable to be sold subject to the performance of certain religious observances and that it was not a trust property.

Defendant 2, Vithoba Prabhu, was absent.

Defendant 3, Bhiku Prabhu, answered that the property was kept with defendant 2, but he failed to perform the religious observances; therefore, the property was made over to the plaintiff, and that it was not liable to be sold to an outsider.

Defendant 4, Bapu Prabhu, put in a similar defence.

The Subordinate Jude of Honavar found that the transfer by defendant 2 of his interest to plaintiff was fraudulent, that the property was liable to sale subject to the costs of religious performances and that it was not a trust property. He, therefore, dismissed the suit.

On appeal by the plaintiff the District Judge of Karwar found that the arrangement evidenced by the deed of partition, exhibit 59, was a good trust; therefore, the property was not liable to sale and that the transfer by defendant 2 was not fraudulent and without consideration. He, therefore, reversed the decree and awarded the claim.

Defendant 1 preferred a second appeal, No. 355 of 1908.

Nilkanth A. Shiveshvarkar for the appellant (defendant 1).

P. M. Vinekar for the respondent (plaintiff).

The second appeal was heard by Scott, C. J., and his Lordship delivered the following judgment on the 12th February 1909:—

1910.

DASSA RAMCHANDRA PRABHU v. NARSINHA.

SCOTT, C. J.:—The question in this case is whether the plaintiff is entitled to a declaration that the property in suit is not liable to attachment and sale in execution of the decree obtained by the 1st defendant against the 2nd defendant.

The District Judge has held that no portion of the corpus of the estate can be applied in satisfaction of the decree obtained by the defendant. That decision is based upon the assumption that the case is governed by the decision of the Privy Council in *Bishen Chand Baswat* v. *Nadir Hossein*[1].

The material facts relating to this property are that it was, on the occasion of the partition between the owner and his sons, assigned to one of the sons named Vithoba and it was provided that out of the yearly produce which then amounted to 10½ khandies of rice and 2,200 cocoanuts, 8½ khandies, Rs. 17 in cash and 920 cocoanuts should during his life-time be given to the father for the maintenance of certain religious services, and that after his death those religious services should be performed by Vithoba, but Vithoba was to be at liberty to improve the property and raise extra produce without anyone having any claim upon him for such extra produce, and if the assessment was raised or diminished, he was to bear the burden or reap the benefit of that rise or diminution. From this it appears that the expenditure upon the religious ceremonies was to be defrayed by a charge upon this particular property and that subject to that the produce was to be for the benefit of Vithoba.

In the case in *Bishen Chand Basawat* v. *Nadir Hossein*[1] to which I have above referred the facts were different. There the whole of certain property was assigned to a person as trustee. He was to be allowed to draw a trustee's monthly wage of Rs. 40, and the whole of the yearly profits of the estate were to be expended by him in the manner provided by the trust-deed. It was held by the Judicial Committee in that case that the corpus so dedicated in trust could not be sold in execution of trustee's debt although it might be as suggested by the High Court that the emoluments of the trustees might be attached and sold in execution. This distinguishes the case altogether from

(1) (1887) 15 Cal. 329.

1910.

DASSA RAMCHANDRA PRABHU v. NARSINHA.

that now before me. The cases cited by Mr. Nilkanth, *Basoo Dhul* v. *Kishen Chander Geer Gossain*(1) and *Futtoo Bibee* v. *Bhurrut Lall Bhukut*(2) are more in point. The head note of the first case is as follows:—"A property wholly dedicated to religious purposes cannot be sold; but where a portion only of its profits is charged for such purposes the property may be sold subject to the charge with which it is burdened."

The decree of the District Judge must be set aside and that of the Subordinate Judge restored, and this appeal allowed with costs in this Court and in the lower appellate Court.

Against the above decision the plaintiff appealed under section 15 of the Letters Patent and the appeal was heard by Batchelor and Rao, JJ.

D. A. Khare, *P. M. Vinekar* and *P. N. Pandit* for the appellant (plaintiff):—

The deed of partition, if properly construed, will show that no attachable interest was left in Vithoba. There was a complete dedication of the property to the family idol. The deed left some little profit to be enjoyed by Vithoba but that circumstance would not detract from the character of the dedication as a complete trust. The extra income was left to Vithoba as remuneration for his trouble. The present case is similar to that of *Rupa Jagshet* v. *Krishnaji Govind*(3). See also *Bishen Chand Basawat* v. *Nadir Hossein*(4).

Nilkanth A. Shiveshwarkar for the respondents (defendants):—

Reading the partition deed through, it will appear that there was no dedication to the family idol. There are several passages in the deed which make this circumstance clear. Whoever may be the person holding the lands, he will hold them burdened with that specific charge. The cases relied on are distinguishable. In *Bishen Chand Basawat* v. *Nadir Hossein*(4) there was a complete trust and in *Rupa Jagshet* v. *Krishnaji Govind*(3) the question was whether a particular endowment was a religious endowment.

(1) (1869) 13 W. R. 200.
(2) (1868) 10 W. R. 299.
(3) (1881) 9 Bom. 169 at 171.
(4) (1887) 15 Cal. 329.

1910.

DASSA RAMCHANDRA PRABHU v. NARSINHA.

BATCHELOR, J.:—This was a suit in which the plaintiff prayed for a declaration that the property in question was not liable to attachment and sale in execution of a decree obtained by the 1st defendant against the 2nd defendant inasmuch as it was property reserved for the performance of a certain religious trust.

The learned Subordinate Judge in the Court of first instance dismissed the suit holding that the document relied upon as constituting the trust did not constitute a trust but showed that there was here only a gift burdened with an obligation.

In the Court of appeal however the learned District Judge took another view, and was of opinion that there was a good complete trust of the property which in consequence was not liable to attachment and sale.

Against the District Judge's decree an appeal was presented to this Court; it was heard and decided by the Chief Justice who accepted the Subordinate Judge's view of the case as correct and restored his decree reversing that of the District Judge.

Now finally from the Chief Justice's decree an appeal is made to us.

The case at first sight may present some little difficulty in determining which side of the line it ought to be considered to fall, but now that it has been fully argued on both sides, we are unable to entertain any doubt whatever but that the correct view is that which was taken by the Chief Justice. The controversy turns upon the meaning of the partition-deed exhibit 59. Is there by that deed a complete dedication of this property to a religious trust or is there merely a gift to Vithoba of the property subject to an obligation to perform certain services? If there was a complete dedication, then admittedly the property is not liable to attachment. If there was merely a gift burdened with an obligation, then an attachable interest was admittedly left in Vithoba. The cases illustrating the two extremes are *Bishen Chand Basawat* v. *Nadir Hossein*[1] and *Basoo Dhul* v. *Kishen Chunder Geer*[2]. The question really is

(1) (1887) 15 Cal. 329. (2) (1869) 13 W. R. 200.

1910.

DASSA RAMCHANDRA PRABHU v. NARSINHA.

where, between these extreme points, does this case fall, and the way to ascertain that is, we think, to look to the deed itself. It is a deed to which the whole family were apparently parties, and it sets out in tabular form the details of the divine service to be performed annually in the household and the particulars of the expenses required for maintaining them. The total of these expenses comes to 8½ khandies of rice, Rs. 17 in cash and 921 cocoanuts.

Thereafter the deed goes on, "These plots the income whereof has been settled to be 10½ khandies of rice and 2,200 cocoanuts should from this date be enjoyed by Vithoba Prabhu who should from the current year 1899 pay to Government the assessment Rs. 14-8-0 and local fund cess Re. 0-14-6 in respect of the same and hand over to me the following profits, namely, 8½ khandies of rice, Rs. 17 in cash and 920 cocoanuts in my life-time. I am to maintain the divine services mentioned above with the help of the same. Vithoba Prabhu should take these profits after me, (that is, after my death), and perform the said divine services on the respective occasions."

Now pausing there, we see that what is given is given to Vithoba Prabhu and consists of 10½ khandies of rice and 2,200 cocoanuts. But out of this entire gift a reservation is made of part, and the reservation is imposed as a burden or obligation upon the donee. But after the discharge of the burden so imposed, the donee is left in beneficial enjoyment of considerable property which works out at Rs. 50 or upwards.

Then another clause in the deed recites "some money has to be spent on plot Survey No. 42. Should Vithoba Prabhu spend it and get the land improved and raise extra produce, none can claim from him either that more should be spent for the divine services than what has been now settled or that any profits are due to him (the claimant)." Again in a later clause it is provided, "should the assessment of these lands be increased or diminished in the Revision Survey, Vithoba Prabhu should bear the same and hold these lands upon these conditions from generation to generation." That is to say, whatever increase in the profits Vithoba can secure by prudent cultivation

goes not to the endowment but into his own pocket, and any increase or decrease in the Government assessment is in the same way to damnify or to benefit Vithoba personally and not the endowment.

It seems to us clear from the particular words in this deed that all that is given to the endowment is that specific amount 8½ khandies of rice, Rs. 17 in cash and 920 cocoanuts which is expressly stated in more than one passage and that endowment is merely a burden placed upon the larger gift which is made to Vithoba. If we are right in thinking that that is the meaning of the deed considered as a whole, our opinion need not be shaken by the clause in which it is sought to prohibit Vithoba Prabhu from mortgaging or selling the lands in question. For that clause would merely be an attempt to impose restrictions repugnant to the gift such as are frequently made in such documents and would be of no avail.

For these reasons we are of opinion that the decree already made by this Court is the right decree.

We affirm it and dismiss this appeal with costs.

Appeal dismissed.

G. B. R.

CRIMINAL REVISION.

Before Mr. Justice Batchelor and Mr. Justice Rao.

IN RE BAI PARVATI.*

1910.
September 23.

Criminal Procedure Code (Act V of 1898), section 209—Magistrate—Inquiry—The case not committed to the Court of Session for want of sufficient grounds—Appeal against the order—Order reversed by the Sessions Judge—Commitment when to be made—Discharge of accused.

Where a Committing Magistrate finds that there is no evidence whatever or that the evidence tendered for the prosecution is totally unworthy of credit, it is his duty under section 209 of the Criminal Procedure Code (Act V of 1898) to discharge the accused.

* Criminal Revision No. 182 of 1910.