Before Mr. Justice Bayley and Mr. Justice Mitter

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Mar. 2.

TAYUBUNNISSA BIBI AND OTHERTS (DEFENDANTS) *v.* KUWAR SHAM KISHORE ROY (PLAINTIFF).*

Evidence—Copy of Copy—Presumption of Law—Judgment of Lower Court—Hindu Law—Alienation by Shebait—Necessity.

An authenticated copy of an authenticated copy of a deed is admissible as secondary evidence; but proof of the execution of the deed itself must be given before the copy can be admitted.

An appellate Court ought not to interfere with the judgment of the lower Court until it is perfectly satisfied that the conclusion arrived at by the Court below is erroneous. It is a presumption of law that the judgment appealed against is right until the contrary is shown, and, when there is a doubt about it, the benefit of that doubt should be given by the appellate Court to the respondent.

Under the Hindu law a permanent alienation by a shebait of endowed property such as the creation of a putni, is not absolutely null and void. A permanent alienation by a shebait of endowed property under special circumstances of necessity is valid. Want of funds for repairing the temple and restoring the image of the idol, is a necessity sufficient under the Hindu law to warrant such an alienation.

THE plaintiff in this case was a purchaser at a sale for arrears of Government revenue of an estate. He purchased it in the name of one Krishna Charan Roy. The estate belonged to an idol, Daya Mayi Thacorani, and was under the management of Chandra Nath Surma, the shebait of the idol. Before the Government revenue fell into arrears, Chandra Nath Surma had created a putni of a portion of the estate in favor of the defendants, which had been registered in the Collectorate under the provisions of Act XI of 1859, for the registration of under-tenures. The plaintiff stated that the estate before it fell into arrears was debutter, and so the putni of a portion of it which was created by Chandra Nath the shebait was invalid. The plaintiff therefore sued to have the putni set aside, and to recover khas possession from the defendants. The defence was that the plaintiff was not competent to sue to set aside the putni and to have its registration in the Collectorate annulled, and that the creation of the putni by Chandra Nath as shebait was perfectly good, as it had been

* Special Appeal, No. 2191 of 1870, from a decree of the Officiating Judge of Rungpore, dated the 15th July 1870, reversing a decree of the Officiating Subordinate Judge of that district, dated the 14th April 1869.

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made on account of great necessity, for the image of the idol had been broken and its temple had become unfit for use.

The Moonsiff fixed (among others) the following issues:

"Had the grantor of the putni power to grant it, and was there any reasonable ground for creating such a tenure?

"Has the registration been properly and justly effected?

The Moonsiff held that the evidence showed that the property was merely a "nominal" debutter, and as such it must have all the characteristics of ordinary property. On this finding he further held that "there was nothing to prevent the alienation of a property which was nominally assigned for service of a deity."

In support of this position the Moonsiff referred to the following cases:—*Mahtab Chand* v. *Mirdad Ali* (1), *Juddonundun Burral* v. *Kalee Coomar Ghose* (2), *Narain Persad Mytee* v. *Roodur Narain Mungle* (3); he declared the putni to be valid, and held that as it had been duly registered under Act XI of 1859, before the plaintiff's purchase of the parent estate at a sale for arrears of Government revenue, and also as the plaintiff had failed to make out any of the grounds on which an auction-purchaser at a sale for arrears of Government revenue is competent to sue to set aside an under-tenure, created by the defaulting proprietor and registered before the sale under the provisions of Act XI of 1859, the plaintiff was not entitled to have this putni set aside. He dismissed the plaintiff's suit.

Against this decision the plaintiff appealed to the District Judge. The Judge held that the property was debutter, and that the defendant had not shown any strong necessity which would justfy the creation of the putni by the shebait.

On this question the Judge observed,—

"From the summing up of the evidence in favour of and against its "being a debutter in the Subordinate Judge's decision, there seems to be "about as good grounds for the one view as the other.

"There is some evidence that Chandra Nath spent some at least of "the proceeds on his own private account, but the items in the receipts "may have been on account of the idol, while the evidence that the "proceeds were spent in opium, gunja, and such things is the vaguest

(1) 5 Sel. Rep., 268

(2) S. D. A., 1852, 331.

(3) 2 Hay's Reports, 490.

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"possible; and, as I understand it, a shebait is allowed a portion of the "proceeds for his own support. Chandra Nath himself was examined "in Court, and he declared the property to be a debutter, of which he "was shebait, and that the money obtained by the putni was spent for "the benefit of the trust. There is no doubt that the property through- "out is called a debutter, and that mutation of names took place in the "Collectorate on that assumption. The deed of endowment is not forth- "coming, but there is no doubt that Chandra Nath took it back from "the Collectorate, leaving a copy in its place. Chandra Nath says he "does not know where the original deed is, and under these circum- "stances I am of opinion that the certified copy of the copy filed by "Chandra Nath may fairly be accepted. But where the evidence on "either side is nearly balanced, the point can be best decided by con "sidering on whom was the *onus* of proof. Now the plaintiff has "raised a strong *prima facie* case in favor of the property being a "debutter; and I am of opinion that it is for the defendants to rebut that "case by showing either that it is not debutter, or that it is merely "nominally a debutter. If the *onus* of proving this be thrown on defend- "ants, I think we have good ground for saying that they have not "proved it in any satisfactory manner, and that on the record the pro- "perty must be held to be debutter.

"We come then to the last point, whether the shebait could let the property in putni?

"A very late Privy Council decision, *Moharanee Shibessurree "Debee* v. *Mothoranath Acharjee* has been shown me, but only in "Bengali, which appears to hold that a shebait cannot, under any cir- "cumstances, let out debutter property in putni. But the High Court "have held the position of a shebait to be analogous to that of a Hindu "widow, and that he can let the property in putni, provided he can "prove that such a course was the best in the interest of the idol. The "case of *Prosunnol Moyee Dossee* v. *Koonjo Beharee Chowdhry* (1), "however, says that a sole shebait is in the position of trustee for the "founder, and cannot create permanent incumbrances to the injury of "the endowed property. However that point may finally be settled, "allowing, for the sake of argument that a shebait may create a putni in "case of necessity and in the interest of the idol, I cannot allow that "the case set up by the defendants is enough to prove any such neces- "sity in the present instance. I am of opinion that a very strong case "would have to be made out before such a putni could stand against an

(1) W. R., 1864, 157.

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"auction-purchaser; and the case here made out is at best a very doubtful one.

The Judge accordingly passed a decree in favour of the plaintiff. From this judgment the defendants appealed to the High Court.

Baboos *Sri Nath Das* and *Nalit Chandra Sein* for the appellants

Baboo *Debendra Narayan Bose* for the respondent.

Baboo *Sri Nath Das* contended that the *onus* of proving the property to have been a real debutter was on the plaintiff, and the Judge below had wrongly dealt with the plaintiffs' evidence in holding that he had made out a *prima facie* case of the property being debutter. He urged that the Judge was in the first place wrong in accepting as evidence the copy of a copy of the "*somarpun puttro*," or deed creating the debutter, and that even if this copy were to be treated as secondary evidence, there was nothing on the record showing that a proper reason had been assigned for accepting secondary evidence of the contents of this alleged deed of endowment, the mere allegation of the loss of the original being insufficient; nor was there anything to show that a deed of this nature had really been executed, and that as in the Judge's own estimate the evidence "was nearly balanced," he ought to have dismissed the plaintiff's suit.

In the next place he contended that assuming the property to have been a valid debutter, the facts found on the evidence by the Judge below were sufficient under the Hindu law to justify the creation of this putni. He said that the Judge had found that the image of the idol itself was broken, and its temple unfit for use, and that the money received as the bonus of the putni had really been spent to repair these damages. He contended that a stronger case of necessity could not be imagined, for the very object of the endowment was on the point of being defeated. He therefore contended that the finding by the Judge of the property being debutter was illegal, and that even if it were so, he had shown that there was sufficient necessity shown to justify the present alienation by the shebait.

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Baboo *Debendra Narayan Bose*, for the respondent, contended that as there was evidence, which the Judge believed, of the loss of the original *somarpun puttro*, he was justified in accepting secondary evidence of its contents and acting upon it, and the finding of the Judge as to the debutter character of the property being a decision on a question of fact, it was not competent for this Court to interfere with it in special appeal, particularly as there was some evidence upon which it was competent for a judge of facts to base a finding. He next contended that the defendant had not made out such a case of necessity as would warrant the shebait in creating this putni. Admitting that there was an absolute necessity to repair the image of the idol itself and its temple, still, he urged, that before the defendants could derive any benefit from this necessity it was for them to show that there was no other mode of raising money open to the shebait than resorting to the extreme measure of creating this permanent alienation of a putni.

The appellants were not called upon to reply.

The judgment of the Court was delivered by

MITTER, J.—The plaintiff in this case is the purchaser of an estate paying revenue to Government at a sale held under the provisions of Act XI of 1859, and he brought this suit for the purpose of setting aside a putni tenure created by one Chandra Nath Surma in favor of the defendants, and specially registered in the Collector's book prior to the purchase of the plaintiff under the provisions of section 39 of that Act. The plaint alleges that the property in question belonged in fact to the idol Daya mayi Debi; that Chandra Nath was simply the manager of the endowed property; that no permanent alienation like the creation of the putni which was alleged to have been made by Chandra Nath, was legally binding against the idol, who was in fact the real defaulter; and that the plaintiff was therefore entitled to recover khas possession of the property, treating the putni in question as a nullity, upon the ground that it was created by a person without any right or title whatever.

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The case set up by the defendants was that the property was not debutter; that Chandra Nath was the real owner of that property; and that even if Chandra Nath were the manager of the idol Dayamayi Debi, the pûtni was created for such purposes as would justify such alienation under the Hindu law, which is the law according to which disputes relating to the debutter property are to be determined.

The Court of first instance came to the conclusion that the pûtni was a valid putni; that the debutter was a "*nominal*" one (using the English word "*nominal*" in the midle of its decision, which was written in Bengali) and that the person who really had the beneficial enjoyment of it was not the idol Dayamayi Debi, but Chandra Nath, the lessor of the defendants.

On appeal, the Judge, after accepting the copy of a copy of an alleged *urpunamah*, by which the debutter was said to have been created, came to the conclusion that the evidence on both sides was nearly balanced; that under those circumstances the burden of proof ought to be shifted on the defendant; that if burden of proof were thus shifted, no sufficient case is made the burden of proof were thus shifted, no sufficient case is made out by him to rebut the *prima facie* evidence given by the plaintiff; and the Judge therefore found that the property was a *bona fide* debutter property, of which Chandra Nath, th lessor of the defendants, was simply the manager. The Judge has further found that, according to a decision of the Privy Council, *Moharanee Shibessurree Debee* v. *Mothoronath Acharjee*, he had every reason to hold that the creation of a putni by a shebait was altogether null and void, even though it might have been made under circumstances of necessity. The Judge then goes on to say that, even if such an alienation would be justified by a special case of necessity, the case of necessity set up by the defendants was not sufficient.

Under the above state of facts, the simple questions which we have to determine in this special appeal are—

Firstly. Whether the finding on the question of debutter has been arrived at by the Judge on legal evidence, and in a legal manner?

Secondly. Whether, assuming the property to be a *bona fide* debutter property, a putna created by a shebait would be

absolutely null and void in law, even though made under circumstances of special necessity ?

Thirdly. Whether the case of necessity set up, and, as the Judge afterwards says, made out by the defendants in this case, is sufficient under the Hindu law to justify the alienation ?

We think the learned Judge in the Court below has committed errors in law on all these points.

With reference to the first point, the Judge admits that the evidence was equally balanced, and it is clear from his judgment that he would not have thought the evidence adduced by the plaintiff was sufficient to shift the burden of proof on the defendants, if he had not accepted the copy of the copy of the *urpunamah* above referred to. We do not mean to say that the Judge was wrong in admitting that document in evidence in the first instance. It was offered in the Court below, and there is evidence on the record, *viz.*, that of Chandra Nath, which has been held by the Judge to prove that there was an *urpunamah*, and that that *urpunamah* could not be found out or discovered by him on search. Under such circumstances the Judge was right in accepting secondary evidence, and as secondary evidence the authenticated copy of an authenticated copy is admissible under the rulings of the Judicial Committee of Her Majesty's Privy Council (1). But we are clearly of opinion that the Judge ought not to have acted upon that deed, when it is admitted that no evidence whatever was given to prove that a deed of that description containing the terms and provisions embodied in it, had been actually executed in favor of Chandra Nath by the former owner of the property. It being clear, therefore, that the Judge was wrong in acting upon this document, we think he should not have reversed the judgment of the first Court in the absence of the *urpunamah* ; for the duty of the Appellate Court, as laid down by the Privy Council, is not to interfere with the judgment of the first Court until it is perfectly satisfied in its own mind that the conclusion arrived at by the first Court is

(1) See *Unide Rajaha Bommarauzadhya Prasad Sing v. Umrao Sing*, 6 B. L. Bahadur v, *Pemmasamy Venkatadry Naidoo*, 7 Moore's I. A., 128 ; and *Ajoo* R., 509.

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erroneous. If there is any doubt in the case, the benefit of that doubt ought to be given to the respondent and not to the appellant, for it must be presumed in law that the judgment of the lower Court is right until the contrary is shown. No doubt the Appellate Court may make further enquiries; but such enquiries ought to be made with discretion, and only in those cases in which the Appellate Court finds itself unable to do justice to the parties on the evidence and materials as they stand upon the record.

Assuming, however, that the finding on the question of debutter is correct, we cannot agree with the Judge in holding that is has been finally decided by the Privy Council that a permanent alienation, such as the creation of a putni made by the shebait of an endowed property, is absolutely null and void even though it be made under special circumstances of necessity. It is true that the idol must be treated in law as the owner of the property, and it is also true that the shebait must be looked upon in no other light than the shebait or trustee manager of that endowed property; but under the Hindu law a shebait is competent to alienate a reasonable portion of the property, if such alienation is absolutely required by the necessities of the management. This point has been so ruled by this Court, and it is therefore unnecessary for us to dwell upon it any further. The case referred to by the Judge is not at all in point. In that case their Lordships in the Privy Council had simply to deal with the question whether a certain alienation had been actually made by a person who held the property in dispute simply in the capacity of a shebait, and in dealing with that question their Lordships observed, in the course of the discussion, that such an alienation would raise a presumption of breach of trust on the part of the manager, and their Lordships would not therefore presume that the manager in that particular case had actually executed the deed in question. But this decision actually shows that there may be cases in which the grant of a putni tenure by a shebait would be vaild; for if such grants were absolutely null and void, it would not have been necessary for their Lordships in the Judicial Committee to consider whether the grant in that particular case had been actually made or not.

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On the third and last point we observe that the case of necessity set up by the defendants has not been rejected by the Judge as untrue. The Judge believes the testimony of Chandra Nath, and he expressly uses the words "made out" with reference to the defendants' case, as we have already observed. Now accepting the evidence of Chandra Nath as true, it appears that the putni in question was granted for the purpose of raising funds to repair the temple of the idol, and to restore its image, which had been destroyed by some accident after the performance of the not inexpensive ceremonies prescribed by the Hindu law in such cases. According to these circumstances it is quite clear that the very existence of the idol was at stake ; and if the destroyed image of the old idol had not been restored, and its temple, which was unfit for habitation, repaired, Chandra Nath could not have been in a position to fulfil the trust. The power then of Chandra Nath to resort to an alienation of a portion of the endowed property in order to raise funds for such purposes, would necessarily follow under the Hindu law which is applicable to such trust property, for Chandra Nath was not bound to provide for such expenses from his personal funds. It has been contended that the Judge did not accept the case of necessity set up by the defendants, but this objection has been sufficiently disposed of above.

On the whole then we think, in concurrence with the opinion expressed on this point by the Court of first instance, that the plaintiff is not entitled to have the putni set aside as invalid, and we accordingly reverse the decision of the Judge, and dismiss the plaintiff's suit with costs of all Courts.

Appeal allowed.