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against his predecessor fraudulently. Even if the decree be not fraudulent, he has a right to follow the property of the idol, and to put to proof of title any one who has it and claims a right to it. A *sebait* of an idol has no estate; the property is that of the idol, and the *sebait* is merely manager of it: see *Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh* (1), and this without admitting the analogy to the relation of guardian and ward. The evidence shows no necessity for the expenses of the Rajah, which if it existed ought to be very clearly shown. A *sebait* has no power of alienation; the plaintiffs would be entitled to have any conveyances prior to their tenure of office set aside—*Jewun Doss Sahoo* v. *Shah Kubeerooddeen* (2). Where a person has no power to create a charge, the court will not create one for him. At any rate an alienation or charge could only be made to such an extent as not to interfere with the worship and keeping up of the idol—*Juggernath Roy Chowdhry* v. *Kishen Pershad Surma* (3), *Rumoene Debia* v. *Baluck Doss Mohunt* (4)

(1) 10 Moore's I. A., 454.
(2) 2 Moor's I. A., 390.
(3) 7 W. R., 266.
(4) *Before* Mr. *Justice Phear and* Mr. *Justice Mitter.*
The 4th July 1870.

RUMONEE DEBIA AND ANOTHER (PLAINTIFFS) *v.* BALUCK DOSS MOHUNT (DEFENDANT)*

Sebait—Debutter Property—Alienation.

Mr. *Montriou* (with him Baboos *Sree Nath Dass*, *Romesh Chunder Mitter* and *Rajendro Nath Bose*) for the appellants.

Baboos *Onoocool Chunder Mookerjee* and *Ukhil Chunder Sen* for the respondnt.

THE judgment of the Court was delivered by

PHEAR, J.—After the best consideration which we can give to this case, we are unable to resist the conclusion that the property which is the subject of suit is in truth *debutter* property dedicated to the idol. It is even proved we may say to be so from the evidence on which the plaintiff himself relies.

This being the case, whatever remedies the plaintiff may have against the *sebait* for fraud or misrepresentation we think that he cannot claim the land itself under the mortgage-deed of the defendant which was altogether *ultra vires*.

We are, therefore, of opinion that the decision of the lower Court upon this point is right, but we think that the defendant is bound to pay the plaintiff the costs which he has incurred in this Court and in the Court below.

The plaintiffs' suit is dismissed, but the defendant must pay the plaintiffs' costs in both Courts.

* Regular Appeal, No. 274 of 1869, from a decree of the Subordinate Judge of Chittagong, dated the 6th September 1869.

and *Goluck Chunder Bose* v. *Rughoonath Sree Chunder Roy* (1). If a *sebait* cannot alienate the property, can the same effect be

(1) B*efore Mr. Justice Kemp and Mr. Justice Glover.*

The 7th March 1872.

GOLUCK CHUNDLR BOSE(ONE OF THE DEFENDANTS) *v.* RUGHOONATH SREE CHUNDER ROY PLAINTIFF).*

Sebait—Debutter Property—Alienation.

Baboos *Obhoy Churn Bose* and *Umbica Churn Banerjee* for the appellant.

Baboos *Chunder Madhub Ghose* and *Nil Madhub Sen* for the respondent.

THE judgment of the Court was delivered by.

KEMP, J.—We do not think it necessary in these cases to call upon the pleader for the respondent. The case No. 943 was taken up first, and t is admitted that one judgment will govern both appeals.

This case was remanded by this Court to the Judge of Cuttack to find, 1st, whether the plaintiff's father had resigned the *sebaitship* of these endowed lands to the plaintiff; 2ndly, whether the plaintiff had proved possession, as he came into Court for confirmation of his possession; and, 3rdly, whether he was the *sebait* of the *thakur* or not. The judge has very carefully considered the case, and he found that the plaintiff's father did relinquish the *shebaitship* and the endowed lands to the plaintiff; that the plaintiff was in possession; and that the possession of Gobind Churn, the judgment-debtor of the special appellant, was a mere *benami* possession.

The grounds taken in special appeal are, 1st, that the relinquishment to the plaintiff by his father is found only on the written statement of the father; that the written statement of one defendent is no evidence as against a co-defendant and, therefore, there being no other evidence but that written statement, that point has not been established; 2ndly, that both Courts having found that the holding of Gobind Churn, the special appellant's judgment-debtor, was a *benami* one, the plaintiff cannot set up his father's fraud.

On the first point, it is very clear that there is evidence independent of the written statement of the plaintiff's father, and on that evidence the lower Court, after carefully considering the whole case, has come to the deliberate conclusion that the plaintiff's father did relinquish the *sebaitship* and the endowed lands to the plaintiff.

On the second point, it appears that the whole of the property was endowed property. It is now therefore such a property as the plaintiff's father could sell burdened with a trust. It is resumed rent-free *debutter* lands, lands endowed, and the proceeds of which are appropriated to the service of the idol. The plaintiff succeeds his father as trustee of that property,' and he is not in any way bound by any acts of his father done in fraud of the trust.

The appeal must, therefore, be dismissed with costs.

* Special Appeals, Nos. 743 and 943 of 1871, from the decrees of the Judge of Cuttack, dated the 15th March 1871, affirming the decrees of the Munsif of that district dated the 6th July 1870.

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obtained by a personal decree against him, that is, can that be done indirectly which he has no power to do directly? The plaintiffs do not claim through the Rajah against whom the decrees were made; to estop them it is necessary that they should. There ought to have been an inquiry as to whether the decrees had been satisfied.

Mr. *Woodoroffe* in reply (was called on only on the question of whether there ought to be an enquiry as to the satisfaction of the debt out of the income of the *debutter* property.) An inquiry is not asked for, nor is any suggestion that one is necessary made in the case. The evidence does not show the decrees are discharged.

The judgment of the Court was delivered by

MARKBY, J. (who, after stating the facts, continued:)—Now, before going to the judgment of the Court, I will state shortly what the two previous suits were, and what were the judgments passed in them. The first was a suit brought by Golab Chand Baboo, who is the defendant in this suit, against Rajah Baboo, who is described as an inhabitant of Lakhee Bazar, and Jotton Coomaree Dabee, mother and guardian of Gobordhun Baboo, a minor, and several other persons. We have not before us the record of that suit in the first Court, but only the judgment of the Appellate Court which however sets out pretty fully what the nature of the case was. It appears that the suit was brought upon what is called a *kabinnama* or deed of mortgage and a *tamassuk* on the allegation that a loan of Co.'s Rs. 4,000 was taken for the purpose of repairing the *dalan*, &c. of the idol Lukhee Narain. The defence set up was in the first place that the money had been repaid. But it was stated that the main dispute between the parties was whether the money could be recovered from the property pledged or not. Now the question as to whether the money had been paid or not was fully decided by the Principal Sudder Ameen in favor of the plaintiff, but when he came to decide the other question as to whether the money could be recovered from the property mortgaged or not, he said that this point could be settled in the execution department. The plaintiff Golab Chand, who is now

defendant in the present suit, was naturally dissatisfied with that decision, an preferred and appeal to the Judge complaining that the decision of the Principal Sudder Ameen had left the main question between the parties undetermined. He stated very properly that the points to be decided were whether his allegation that the money was borrowed for the purpose of repairing the *dalan* of the idol was true? and if that was true, whether he was entitled to recover the money from the *debutter* property? In the appeal of the respondent, joint issue, upon those two questions which were raised in various forms in the issues drawn up by the Appellate Court. Then the effect of the judgment of the Court is this:—The Judge points out that Rs. 4,000 was borrowed upon a *kabinnama* and also upon a bond, and that both the documents state that the money was borrowed for purposes connected with the temple. The Judge then having taken the opinion of the pundit of the Court comes to the conclusion that, inasmuch as there was no provision made in the grant of the *debutter* land authorizing the sale or mortgage thereof, the *kabinama* could not be supported. The Judge then goes on to say with regard to the bond that it has been proved that the money borrowed was expended for the purposes therein stated, that is to say, for the purposes of repairing the *dalan* of the idol; and that notwithstanding the objection of the then defendant Rajah Baboo and the other objectors that the property cannot be pledged for a debt, and therefore its produce cannot be attached on account of a debt contracted by the *sebait*, the *debutter* property is liable for that bond debt; and the Judge gives a decree directing that the money should be realized from the proceeds of the *debutter* land.

The second suit was brought by the same Golab Chand Baboo, the present defendant, against Kishen Pershad Surma, *alias* Rajah Baboo, whom he described as *sebait* of the idol Luckhee Narain Thakoor. There we have a full abstract of the plaint which shows that the plaintiff in that case alleged that the money was borrowed by the then defendant Rajah Baboo as *sebait* of the idol for the purpose of certain ceremonies connected with the worship of the idol, and for carrying on the necessary expenses of a certain litigation which was then going

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on in Court, and he prayed that the amount of the claim with interest thereon be awarded to him from the *debutter* property. The substance of the answer is that the defendant had not taken the money for the purposes of the idol worship, or for the costs of the litigation, that there was ample money out of the income of the idol to pay for the daily worship and other festivals, and also for all other purposes connected with the temple, and that the real truth was that the defendant had certain private transactions with the plaintiff for which the money was received. Issues were raised with reference to the allegations on both sides, and the Judge found that the money was borrowed by the defendant to defray the costs of the suit of *debutter*, &c., and it was declared that, if the defendant failed to pay the amount personally, it should be realized from the proceeds of the *debutter* mehal. Nothing certainly upon the face of it can be clearer than those proceedings are that the very point which is now raised in this case was raised by Rajah Baboo himself in both the former suits and also in the first suit by persons who, as far as we know, were quite independent of Rajah Baboo.

Now I find it a little difficult to understand how the Subordinate Judge has dealt with these decrees. He says, and perhaps says rightly, that, inasmuch as there is at any rate an allegation in the plaint that the decrees are fradulent, the suit cannot be treated as barred by s. 2, Act VIII of 1859. But of course it was obviously necessary for him to go on and determine whether or not they were fraudulent, and I am not certain whether he means to say that there was any fraud in the mode in which those decrees were obtained, or whether he assumes that that was so, because in his opinion the transactions which led up to them were fradulent. The appellant, in drawing the petition of appeal, however seems to presume that the question of fraud in obtaining the decrees has not been disposed of by the Subordinate Judge. In his fourth ground of appeal, he says (*reads*) (1). Now that is by no means the only question in this case disposed of by the Subordinate Judge, and raised for our consideration in this appeal. One question

(1) See *ante*, p. 334.

which the appellant was desirous to contend was whether or not these lands were *debutter;* and there were also other questions which would have to be considered where it necessary to go into the whole appeal. But we were of opinion that the fourth ground of appeal was well-founded in law, and if it could not be displaced, it would be a complete answer to the whole suit. We therefore thought that it was a convenient course to call upon the other side to support the judgment of the Subordinate Judge upon that point. In doing so, Baboo Romesh Chunder Mitter, who argued the case in the first instance on behalf of the respondent, raised three very clear contentions. He contended in the first place, and no doubt he had a right to contend, that the Subordinate Judge had found, and the evidence established, that those decrees were fradulently obtained; secondly, he argued that the decrees were not in such a form as to be binding on any person but Rajah Baboo himself; and, thirdly, that, independently of any question of former decree, a decree against a *sebait* could be no more than *primâ facie* evidence against his successor.

Now, with regard to the question of fraud, it would of course be a great help to us to have a clear finding by the Subordinate Judge upon that point. The real question, however, which we have to consider is as to whether or no the evidence supports that allegation. (The learned Judge went through the evidence as to the decrees being fraudulent and continued):—I feel bound to say that, even if the Subordinate Judge did think the decrees were fraudulently obtained, I find no sufficient evidence on the record to justify him in coming to that conclusion. I think, therefore, that upon that question we ought to hold that the decrees were obtained *bonâ fide;* that the parties were really at arm's length, and that Rajah Baboo was doing his best to get those suits dismissed. Throughout this case we have not heard a single word that could suggest that the other persons who were defendants in the first case had been implicated in any fraud with Rajah Baboo, and there is no direct evidence whatever of any fraud in connection with the second decree.

Then I pass on to the next point. It has been argued (and

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this objection will only apply to the first of those cases) that Rajah Baboo had not been, as far as we have any evidence before us, described in the plaint as *sebait* of the idol, and that therefore that decree is not binding upon the *sebaits*, his successors. But it is perfectly clear, from the abstract of the claim given in the decree, that Rajah Baboo was sought to be made liable as the *sebait* of the idol, and it is also clear from the abstract of the answer that he had defended that suit as *sebait*. No doubt, as a matter of form, he ought to have been described in the plaint as *sebait*; but I do not think that that alone would be sufficient ground for saying that the decree is not binding upon any person except Rajah Baboo himself.

The last point is that which has been most strongly argued, namely, whether or not the decree against a person as *sebait* of the idol is binding on his successor. Now upon that point we have the authority of a Division Bench of this Court, *Kissnonund Ashrom Dundy* v. *Nursingh Doss Byragee* (1), and it has not been attempted by either of the Counsel for the respondent to distinguish that case or the case of *Juggut Chunder Sein* v. *Kishnanund* (2) on which that case was founded, and which was also cited by Mr. Woodroffe. Those cases establish that a decree obtained honestly against a *sebait* is binding on his successor, and we see no reason to doubt the correctness of those decisions. A great deal of argument has been imported in this matter as to whether a *sebait* could alienate *debutter* property, or how far he would be barred by limitation, or whether an arrangement made by a person in charge of such property in reference to the property would be binding on his successor. All that as it appears to me has nothing to do with the present case. The question which we have now to consider is whether the decrees which were obtained against Rajah Baboo are binding upon the present plaintiffs, and in deciding that point, we have no hesitation in following the decision of Norman and Kemp, JJ., in *Kissnonund Ashrom Dundy* v. *Nursingh Doss Byragee* (1), unless there is any superior authority to the contrary. But the decisions of the Privy Council which have been

(1) Mar. Rep., 185. (2) 2 Sel. Rep., 126.

referred to do not appear to me to have any bearing upon that question. The decision in *Jewun Doss Sahoo* v. *Shah Kabeer-ooddeen* (1) was actually before Norman, J., when he delivered his judgment, and what the question there was appears in page 421, namely, whether a *matwali* has a right to alienate or transfer *wukf* property by gift or otherwise. And no doubt this case is an authority that he cannot do so; but it has nothing to do with the question which we have to consider. Then with regard to the case of *Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh* (2), if the circumstances of that case are looked at, it is plain that it has no bearing upon this case. What is binding is a decree of Court properly obtained, and not a mere agreement which the parties have entered into for their own purposes and embodied in a decree, drawn up by consent. In that case what happened was that a previous arrangement having been made between the parties for their own purposes, the suit was commenced on one day, and on the following day a compromise was made and a decree given, and Lord Chelmsford in dealing with it says:—"You get a cognovit for Rs. 54,000 on an advance of Rs. 26,986, borrowed according to your argument to save the estate, but under that cognovit or confession of judgment, you force a sale yourself and actually buy in the minor's estate: can that stand?" The use of the word "cognovit" shows how the Privy Council looked at it; and of course that is not an instance of a decree for the purposes of the question which we are now considering. The only other case quoted is *Maharanee Shibessuree Debia* v. *Mothooranath Acharjee* (3). There is nothing in that case very precisely bearing upon the present question. I think however that it is quite enough to cite one passage in it. The Privy Council say in giving judgment that, "if the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata*, binding on the parties and those claiming under them." It seems to me that the Privy Council would never

(1) 2 Moore's I. A., 392.
(2) 10 Moore's I. A., 454, see 459.
(3) 13 Moore's I. A., 270, see 275.

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have used that language had they intended to intimate an opinion adverse to the opinion expressed by Norman and Kemp, JJ., in the case I have referred to.

This being the view that we take of the case, all the other questions which have been taken in this appeal, and which were raised in the Court below, are questions upon which we need not express any opinion whatever. We confine our judgment entirely to the objection taken in the fourth ground of appeal, and hold that the decrees which the plaintiffs seek to set aside, were fairly and honestly obtained as far as appears on the evidence before us, and that therefore they are binding upon the parties, and that the proceedings taken with reference to those decrees are also binding upon them.

There were two other questions raised by the Advocate-General in this case. One was that the order for attachment and appointment of a manager which had been made in execution of those decrees was not authorized by Act VIII of 1859. But no such point was raised in the Court below, or in this Court by cross-appeal, and I think it is sufficient to say that nothing has been shown to us upon which we can say that there was anything wrong in the proceedings that have been taken. The other point was that there ought to be an enquiry now to ascertain whether the amount covered by those decrees has been realized from the profits of the property through the manager. We think it is unnecessary to consider this point. It is quite sufficient to say that no such prayer has been inserted in the plaint. If the plaintiffs wish to have an enquiry made upon this point, it must be in a proceeding properly framed for that purpose.

The result is that the decree of the lower Court ought to be reversed, and the plaintiffs' suit dismissed. The appellant is entitled to his costs both in this Court and in the lower Court.

Appeal allowed.