APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Birch.

1873 *May* 22.

GOLAB CHAND BABOO (DEFENDANT) *v.* SREEMUTTY PROSONNO COOMARY DABEE AND ANOTHER (PLAINTIFFS).*

Sebait—Idol—Decree against Sebait—Successor in Sebaitship—Res-judicata

A decree obtained *bonâ fide* against the *sebait* of an idol is binding on his successor.

See also 14 B.L.R. 451

THIS was a suit to have certain *debutter* properties released from an attachment made in execution of certain decrees obtained by the defendant against the plaintiffs, to have the said decrees set aside on the ground that they had been fraudulently obtained, and to have set aside a certain summary order passed in reference to the execution of the said decrees. The plaint was filed on 20th September 1871. The plaintiffs alleged that the properties in suit among others were granted on rent-free tenure for the purpose of the worship of the idol Sri Sri Issur Luckhee Narain Thakoor, established by Bheekun Lal Thakoor, and for the purpose of distributing alms; that at first Bheekun Lal Thakoor, and after him by the approval of the Sudder Board, Gopal Pershad Baboo, were appointed *sebait*; that after their death Kishen Pershad Surma, *alias* Rajah Baboo, was appointed *sebait* in their place; that the said Rajah Baboo was addicted to sensual enjoyments and incurred debts to defray his extravagant expenses, whereupon the defendant, on the fradulent allegation of such expenses being necessary acts connected with the worship of the idol, caused bonds to be executed by Rajah Baboo on false pretences, and, having lent him certain sums of money, assisted him in his acts of extravagence; that on account of those debts the defendant improperly obtained two decrees on 27th February 1852 and 25th July 1854, with directions that the decrees should be

* Regular Appeal, No. 117 of 1872, from a decree of the Officiating Subordinate Judge of Dacca, dated the 10th April 1872.

realized from the *debutter* properties; that by virtue of the said decrees, the defendant had been appropriating the profits arising from the *debutter* properties through the manager appointed after attachment in execution of the decrees, and was thereby throwing obstacles in the way of the accomplishment of the objects for which the grant was made; that the plaintiffs were appointed *sebaits* of the said idol on 20th January 1868 by order of the Sudder Board, and became aware of the above-mentioned circumstances after the death of the said Rajah Baboo; that the plaintiffs had put forward an objection for the release of the *debutter* properties, on the ground that those properties were not liable for the debts incurred by Rajah Baboo; that there was no necessity for such expenses, and that the *sebait* was not competent to spend any amount of money larger than the amount of income by raising loans and making the *debutter* properties liable for the same, more especially as the acts done by the said Rajah baboo ended with the determination of the office of *sebait* which he held, but the said objection was rejected by the Court on 29th June 1871, on the ground that the matter could not be settled in the summary department; and that they consequently brought the present suit praying for an order directing the exemption of ths *debutter* properties from liability under the decrees, and the discharge of the manager appointed after attachment.

The defendant in his written statement stated that in the suits in which the decrees had been obtained, the plaintiffs' predecessor Kishen Pershad Surma, *alias* Rajah Baboo, had among other points raised the objection that the money covered by the bond had not been expended for the purpose of the worship of the idol, but such objection had been disallowed, and that the plaintiffs who were representatives of the said Rajah Baboo having brought the present suit on the same basis on which the said objection had been preferred, *viz.*, that the said money was not expended for the purpose of the worship of the idol, the suit was barred under s. 2 of Act VIII of 1859; that the plaintiffs, although they had been *sebaits* for more than three years, had done nothing towards getting rid of the decrees; that, inasmuch as the plaintiffs' objection raised in the

1873

GOLAB CHAND BABOO v. SREEMUTTY PROSONNO COOMARY DABEE.

execution-case had been disallowed, a regular civil suit to set aside the said order was not maintainable; that the suit was barred by the law of limitation; that the property was not *debutter* property; and that the bonds in which the decrees had been obtained were executed *bonâ fide*, and the amount covered by the decrees had been taken and expended for the performance of the worship of the idol.

At the trial before the Officiating Subordinate Judge, the following issues (among others) were raised:—

"Whether or not the provisions of s. 2, Act VIII of 1859, are publicable to this suit?

Whether or not the decrees in question are collusive? and whether or not, for the satisfaction of the said decrees, the properties in dispute can be held liable in any way?"

The Judge held that s. 2 of Act VIII of 1859 did not bar the suit; and that the decrees were collusive, and the properties in suit were not liable to attachment under the decrees. He therefore gave a decree in favor of the plaintiffs.

The defendant appealed to the High Court.

The fourth ground of appeal was that, "in order to nullify the decrees, the plaintiffs were bound to prove that the decrees themselves were tainted with fraud, and were mere colorable proceedings, and not adjudications in real suits *bonâ fide* brought and really contested."

Mr. *Woodroffe* (Baboos *Mohes Chunder Chowdhry* and *Kallykissen Sein* with him) for the appellant.

The *Advocate-General* offg. (Mr. *Paul,*) (Baboos *Romesh Chunder Mitter* and *Doorgamohun Doss* with him) for the respondents.

Mr. *Woodroffe* contended that the question of the liability of the *debutter* property had been decided in the two suits in which the decrees now sought to be set aside were obtained, in favor of the present defendant, and the same question could not now be raised; Act VIII of 1859, s. 2—*Kissnonund Ashrom Dundy* v. *Nursingh Doss Byragee* (1), *Jùggut*

(1) Mar Rep., 485.

Chunder Sein v. *Kishnanund* (1), and *Maharanee Shibessuree Debia* v. *Mothooranath Acharjee* (2). A decree against a *sebait* binds his successors, and is not a decree against the individual personally—*Maharanee Shibessuree Debia* v. *Mothooranath Acharjee* (2).

The questions whether *debutter* property was liable to alienation; and whether this suit was maintainable under s. 11, Act XXIII of 1861, or whether the proceedings ought not to have been by way of appeal, were also argued.

The respondents were called upon to support the judgment of the Court below with reference to the fourth ground of appeal.

Baboo *Romesh Chunder Mitter* contended that the evidence supported the finding of the lower Court that the decrees had been fraudulently obtained; that the decrees were not binding on the property, but were personal decrees against the Rajah himself, and not as *sebait* of the idol; and that a decree against a *sebait* would not be absolutely binding on his successors, but at most was only *primâ facie* evidence against them. The property is *debutter* property, and is not liable to attachment; it cannot be alienated—*Jewun Doss Sahoo* v. *Shah Kubeeroodden* (3). These decrees do not bind the plaintiffs—*Boykuntnath Chatterjee* v. *Ameeroonissa Khatoon* (4); see also *Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh* (5). Notwithstanding the decrees the plaintiffs are entitled to show that the transactions which preceded the decrees were of such a nature that the plaintiffs are not bound by them, that is, were collusive and fraudulent. The case of *Maharanee Shibessuree Debia* v. *Mothooranath Acharjee* (2) is distinguishable.

The *Advocate-General* on the same side (6).—A *sebait* succeeding to the charge of an idol has a right to question a decree made

(1) 2 Sel. Rep., 126
(2) 13 Moore's I. A., 270.
(3) 2 Moore's I. A., 390; see 421, 422,
(4) 2 W. R., 191; see 195.
(5) 10 Moore's I. A., 454.
(6) He was not in Court at the beginning of the argument for the respondents.

1873

GOLAB CHAND BABOO v. SREEMUTTY PROSONNO COOMARY DABEE.

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.