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It is impossible not to see that the pressure of the criminal prosecution was the real ground, and difficult to doubt that the acts of the arbitrators, the complainant and the Sub-Magistrate, conjointly conduced and were intended to conduce to the admission of a liability which a conclusive decision of a competent Court had decided not to attach to the defendant. On the facts of the case, therefore, it seems impossible to doubt that the note was executed as a consideration for getting rid of these criminal proceedings, and as such a consideration is not only null but vicious, the decree of the Civil Judge must be reversed and the original suit dismissed. There will, however, be no costs throughout.

Appellate Jurisdiction(*a*)

Regular Appeal No. 40 *of* 1871.

RA'JAH RA'JAH VARMA VALIA RA'JAH OF CHERAKAL KOVILAGOM..... } *Appellant.*

KOTTAYATH KIYAKI KOVILAGATH REVI VARMA MOOTHA RA'JAH AND 2 OTHERS... } *Respondents.*

Plaintiff (the Cherakal Rájah) sued to establish his right to the custody, management and appropriation for the purposes of a pagoda, of certain jewels, &c., used in the religious ceremonies performed in the pagoda, which jewels he alleged had been assigned to him by the Urallers of the pagoda. The Civil Judge dismissed the suit.

Upon Regular Appeal by the plaintiff

Held, by KINDERSLEY, J.—That the trustees of a pagoda cannot lawfully alienate the trust property subject to all the trusts attaching to it.

By HOLLOWAY, J.—That while seeing no reason to doubt that a religious office cannot be made the object of sale, the present case is a much more simple one—Here the plaint is for certain jewels which are materials used in religious worship, to the custody of which the alleged vendor is entitled and to the careful custody of which he is bound. That these articles are by all systems of law, and by the Hindu law almost more emphatically than by any other, absolutely "extra commercium."

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THIS was a Regular Appeal against the decision of J. W. Reid, the Acting Civil Judge of Tellicherry, in Original Suit No. 3 of 1869.

In this case the plaintiff (the Cherakal Rájah) sued to establish his right to the custody, management, and appro-

(*a*) Present: Holloway and Kindersley, JJ.

priation for the purposes of the Trachurmana pagoda, of certain jewels, &c., used in the religious ceremonies performed in the pagoda, which jewels, he alleged had been assigned to him by deed of 10th May 1868 by the urallers of the pagoda. Defendants, the holders of Muppu Stanom and Elama Stanom, denied the right of the urallers who executed the deed sued upon to assign the property in question.

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The judgment of the Civil Judge contained the following:—

"The points to be determined in this case are:—Has the plaintiff acquired by purchase the rights of the urallers,—and (2nd) Do those rights, validly acquired, give him the power, which he wishes to enforce, of possession, uncontrolled by the defendants, of the Bhanarom property, and the power to remove the Bhanarom from its present place of custody? The document under which the Cherakal Rájah claims the rights now sought to be enforced is E. It is signed by the 4 urallers, and they admit their signatures, and that they got it registered. It is dated 29th Medom 1043, (10th May 1868.) On the 13th Edavom (24th May) of the same year, the Rájah executed F to them (urallers).

E is a *Tir* or transfer deed. In it is *recited* that the Tracharamana pagoda, the Kottiyur pagoda included in it, the Kundem pagoda, the Karimpanakal gopuram, and 6 other chetrums are the property of the four tárwáds; that certain lands, the property of the pagoda, had been sold for the debts contracted in the conduct of ceremonies by auction; others sold by private contract, and others mentioned in list A were passed on kánom; that over and above there is a debt of Rupees 46,000, personal debts, and others secured by hypothecation for the payment of which the urallers are pressed; that the present income of the pagoda is insufficient to carry on the ceremonies; that if the affairs of the chetrum remain in their hands, the debts are liable to increase; that the Rájah was willing to perform the ceremonies with the income, and defray the deficiency out of his own pocket; and it is *declared* that the urallers having received from the Rájah to pay off those debts Rupees 46,000 and for themselves, Rupees 10,000, *relinquished*

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to the Rájah Tracharamana chetrum valued at Rupees 100,000, and chetrums mentioned above included in it and the land mentioned in list A as the properties of the temple situated in the French territory and in 23 British Amshoms lands and parambas, forest, hill, tank, &c., an elephant worth Rupees 2,000 pledged for Rupees 1,550—the Bhanarom including silver, gold, pewter, &c., belonging to Tracharamana temple, and used for the temple, worth Rupees 48,000, described in schedule B, which is secured in Karimpanakal gopuram; and after *reserving* the duty performed by them in conjunction with the "Adiyandara yogan" and the pecuniary rights connected therewith particularized below as Rupees 750, relinquishing to the Rájah all their rights over the properties not passed on kanom and those to be redeemed the right to take the offerings, pay the revenue, to manage all ceremonies, to enjoy and exercise all authority: reciting also the delivery of deed box and deeds, and *stipulating* that the urallers were to pay all the debts, personal and on hypothecation, existing against the temple with the sum aforesaid to have been given by the Rájah, and that in default their private property and themselves were to be responsible, not the Rájah and the dévaswom properties.

[The Civil Judge then commented on the evidence given in the case and proceeded.]

I next come to the point whether the urallers may sell their rights. The defendant has produced against this a decree of Mr. Holloway in *Appeal Suit* 118 *of* 1861 in which the Cherakal Rájah was plaintiff, and in which he sought to enforce the transfer to him of an uraima right. Mr. Holloway's opinion was expressed in the following words: "The plaintiff has acquired no rights whatever under the deed of the trustees (urallers) their duties are not to the plaintiff (in that one having a melkoima right) but to the followers of the Hindu religion entitled to the services of the pagoda. The whole public so entitled are the *cestui que* trusts; the duties to be performed are the protection of the property devoted by the piety of former ages to the services of religion against all invasions. The property itself is by the principles of all law that of no in-

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dividual whatever. A trustee cannot by any act of his own denude himself of his character of trustee until he has performed his trust (*Sir T. Plumer* in *Chalmer* v. *Bradley*, 1, J. & W., at p. 68). It is manifest that where the trust is one of perpetual obligation, where the *cestui que* trust are the whole Hindu community, where the property is extra commercium, in no sense the subject either of bargain or sale * * * the attempt of trustees to surrender the trust property and thus throw off their character would be a gross breach of trust, but would be quite powerless to vest any rights in the person in whose favor they had committed such breach of trust. On all the points I am satisfied that plaintiff has appeared in Court without a shadow of title." (*Appeal Suit No.* 118 *of* 1861.)

Now this decision of Mr. Holloway is of much weight in the settlement of this point of law, which, doubtless, is one of immense importance to the followers of the Hindu religion in Malabar. The counsel for the plaintiff, however, argued per contra that the decision rested on English law; that the English trustee, and the Malabar urallen are very different; that the trustee is personally trusted; that the reason the English trustee cannot get rid of his trusteeship is because the confidence of the precator in the trustee is the result of knowledge; that in England there are no such hereditary trusteeships as the uraima of Malabar, and that the question of personal confidence does not enter into the question. He, however, refers to other rulings. One being *Regular Appeal No.* 64 *of* 1861, being an appeal from Mr. Cook, Civil Judge of Calicut. The part relied on is.—" It is disputed that the property being attached to a pagoda is inalienable. The pagoda, however, is itself the property of the family in question, and by the custom of Malabar the lands are alienable as any other lands." This decision is a little aside the question, as it is not a question in this case of alienating a certain piece of land as the property of the pagoda, but alienating the trusteeship. For purposes of the tárwád, a karnavan may sell the lands of the tárwád, but he could not alienate the karnavastánom, and so a piece of land belonging to a dévaswom may be sold in its interests,

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but that does not affect the question whether the trusteeship or uraima may be sold. Another case quoted was Special Appeal, from the Principal Sadr Amín of Tellicherry, No. 574 of 1860 (p. 30 of last Volume of *Special Appeal Reports.*) It, as the other case, concerns a piece of land attached to a pagoda, not the uraima itself.

The third case cited by Mr. Mayne was a Judgment of Justices Innes and Collett in *Special Appeal No.* 390 *of* 1868 from the Civil Court of Tranquebar, that there was nothing in Regulation VII of 1817, nor in any other provision of the law to prevent the manager of a teruvassel, or charitable endowment, from selling either the land attached to and burdened with the trust, or the management of it.

It certainly is, apparently, a strong case in plaintiff's favor, but there is a difference, I think, between the case of a charity which feeds the destitute and ministers to the supply of merits, as he would think, to the founder, and of lands given in the immemorial past to maintain a temple resorted to by the Hindus of all Malabar. In the latter case, to repeat the words of Mr. Holloway—"the whole public (or followers of the Hindu religion entitled to the services of the pagoda) are the *cestui que* trusts," and to make such a matter of bargain and sale would be to let in confusion, and leave the Hindu religionists in utter uncertainty to whom they should look. The uraima might pass from hand to hand like a bank note, and to whom then could the worshippers appeal? After mature deliberation, I am quite of opinion that Mr. Holloway's Judgment is one founded on equity. The trust was one imposed on the urallers by the original endowers of the lands, and those urallers cannot treat the trust as they wish. They must discharge it, and if they wish to be rid of it they cannot. It may be said—in that case they have no remedy: what are they to do? This is a point for the Legislature to decide, and which it has not done. Act XX of 1863 only provides for Committees in cases where formerly the Board of Revenue had the nomination of trustees. In making the above remarks it will be seen that I utterly disbelieve the

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assertions of the interested witnesses as to their powers as urallers and their alleged freedom from responsibilty to any one but their tárwád.

The real owners are the Hindu worshippers. Uraima is a trust in its strictest sense."

He dismissed the suit with costs.

The plaintiff appealed upon the following grounds, among others :—

The Civil Judge was wrong in holding that the sale by the urallers was invalid.

He was wrong in law and upon the evidence in holding that the urallers could not remove the Banarom.

Mayne, (Acting Advocate-General) for the appellant.

The Civil Judge is wrong in deciding that urallers cannot sell their uraima right. I hope to be able to show that uraima rights are as saleable as any other rights. [He then read the Judgment of Mr. Holloway, referred to by the Civil Judge.] That is so, no doubt, in English law. Mr. Lewin *(on Trusts)* at page 205, says, "The office of Trustee, being one of personal confidence, cannot be delegated." But the moment you allow the idea of a hereditary trusteeship, you can no longer speak of personal confidence; for the next hereditary trustee may be an infant, and in that case the trust would have to be executed by his guardian, or he may be utterly unfit by reason of his character, &c., for the office.

He cited the following Authorities in support of his proposition.

Decisions of 1862, p. 30.

„ „ p. 90. [HOLLOWAY, J.—In this case it was found a private trust, not a public one.]

1, M. H. C. R., 262.

4, Mad. Rev. Register, 109.

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Privy Council Record, p. 13.

Sloan, (with him *Sanjiva Rau*) for the respondents.—The case reported at p. 109, 4, Mad. Rev. Register, had reference to a private pagoda and not to public property. I submit that the Court, in that case, took a wrong view of Regulation VII of 1817.

[HOLLOWAY, J.—As far as I understand this case it decides that the corpus of the charity can be alienated subject to the trust, and that there is nothing in the Regulation against it.]

In 1, Morley's Dig., 550, it is laid down that "Lands duly endowed for religious purposes are not subject to private alienation."

[HOLLOWAY, J.—Mr. Mayne distinguishes this case, and what he says is, "You cannot sell altogether, but you can sell subject to the duties of the trust."]

Morley's Dig., N. S., p. 351.

Strange's Hindu Law, Vol. 1, p. 151.

Mayne, in reply.—Mr. Sloan has not encountered the only position I put forward. I do not say the urallers might have sold this property for their own benefit or for the benefit of the Cherakal Rájah, or that they could have encumbered it. I say the property can be transferred subject to the trusts and cannot be transferred without them. Whenever you come to the idea of a hereditary trust, you must dismiss every principle of law which depends on personal trust, confidence, or selection. The cases cited on the other side go only to the point that property cannot be alienated so as to destroy the trust. The case in M. H. C. R., Volume 1, was decided by Judges who had large Malabar experience.

[HOLLOWAY, J.—The ratio decidendi of that case is that when four people are jointly interested, they must all join to dispose of the property.]

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The case in the Revenue Register is strongly in my favor. Mr. Sloan says that it turns only on Regulation VII of 1817, but that Regulation imposes no new duty.

Before finally disposing of the case, the High Court remitted it to the Civil Court in order that the parties might have an opportunity "of placing on record all the information that can be collected as to the nature of the foundation, its object, the duties to be discharged, and all matters connected with its mode of foundation which can be ascertained."

The Civil Judge found "that the foundation was established by a portion of the Hindu Community, for the purpose of keeping up the yearly ceremony, and that the duties to be discharged are those connected with the performance of that ceremony."

The Court delivered the following judgments:—

KINDERSLEY, J.—The question appears to be, whether the urallers of the pagoda in question can lawfully convey to the plaintiff the pagoda and all the property thereto belonging upon the same trusts and subject to the same duties as devolved upon themselves. The conveyance in the present case was made in consideration that the plaintiff should pay debts due by the pagoda. And the plaintiff seems to have been a wealthy person, probably in a better position to set the affairs of the pagoda in order than the urallers themselves. The conveyance to the plaintiff may, therefore, possibly have been advantageous to the pagoda, and the office of urallen having been hereditary, no question of personal fitness arises. The question, therefore, is reduced to this; can the trustees of a pagoda lawfully alienate the trust property subject to all the trusts attaching to it. I am of opinion that we ought to determine this question in the negative. There seems to be no judicial decision directly on the point, and I have not been able to find any Hindu authorities to help us. But I believe that the traditions and feelings of the peo-

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ple of this country are quite opposed to such alienations. I am, of course, aware that such alienations have now and then taken place. But the rule remains unaltered, however often it may have been broken; and it would not be safe to gather the ancient law of religious institutions from the practice in an age characterized by the decay of such institutions, and by a general relaxation of moral and religious obligations. It is probable that the rule of the old Hindu law was not less strict against the alienation of religious trusts than that of the ancient Romans. In many cases there are so many persons interested, as holders of different offices connected with the pagoda, that it is hardly possible to imagine that the property could be alienated without the consent of all. And where the office of urallen is hereditary in particular families, it is difficult to conceive that the founder intended to confer a power of alienation. The actual infrequency of the alienation of religious trusts is a strong argument that the lawfulness of such alienations has always been doubted; for it may be assumed that if we were to decide in favor of such alienations, they would become much more common. That a trustee should be able at pleasure, by the sale of a religious office, to divest himself of a duty which he owes to the public, is, of course, opposed to our western notions of law. And, although such alienations might in some cases tend to the benefit of the religious endowment, it is obvious that we could not sanction the alienation of a religious trust without opening a very wide door to fraud. On the other hand, if we decide that the trustees of a pagoda cannot lawfully alienate their trust, I believe that our decision will be in accordance with the law, as generally understood by the people of this country, and by the people of all civilized countries. I would, therefore, confirm the decree of the Civil Court, and dismiss the appeal.

HOLLOWAY, J.—While I see no reason to doubt that a religious office cannot be made the object of

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sale, the case before us is a much more simple one, and much of the argument before us is altogether beside the question.

Here the plaint is for certain jewels, which are materials used in religious worship, to the custody of which the alleged vendor is entitled and to the careful custody of which he is bound. That these articles are by all systems of law, and by the Hindu law almost more emphatically than by any other, absolutely "extra commercium," there exists no doubt, and on this simple ground I would affirm the decree of the Civil Judge and dismiss the appeal with costs.

Appeal dismissed.

Appellate Jurisdiction(a)

Special Appeal No. 310 *of* 1872.

VENKAPPA CHETTI and another.....*Special Appellants.*

AKKU.....*Special Respondent.*

Plaintiff sued for cancellation of the sale of certain lands, made to defendants in 1841. In 1843 defendants executed an agreement (A) to plaintiff, giving her a right of re-purchase. The language of the document was—"If you and your posterity pay in a lump the 175 Rupees, we will hand over the lands to you." Upon the question of limitation—*Held*, in Special Appeal, that the plaintiff's claim was barred, more than 12 years from the date of the cause of action (1843 at latest) having elapsed before suit.

1873. *March* 7. *S. A. No.* 310 *of* 1872.

THIS was a Special Appeal against the decision of R. Vasudéva Rau, the Additional Principal Sadr Amín of Mangalore, in Regular Appeal No. 569 of 1870, reversing the decree of the Court of the District Munsif of Mangalore in Original Suit No. 427 of 1867.

Plaintiff sued for the cancellation of a sale deed executed by herself and her brother to the ancestors of the defendants on the 18th June 1841, on the ground that she was entitled to re-purchase at any time, under the conditional agreement A, dated 14th February 1843.

(a) Present: Innes and Kernan, JJ.