APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Teunon.

JATI KAR

v.

MUKUNDA DEB.*

1911

Aug. 14.

Usufructuary mortgage—Turn of worship in a temple—Transfer of Property Act (IV of 1882), s. 59—Mortgage-bond creating right to worship, whether requires attestation.

A turn of worship is not an interest in immovable property. Therefore an usufructuary mortgage-bond creating an interest in a turn of worship does not require attestation by witnesses under section 59 of the Transfer of Property Act.

Eshan Chunder Roy v. *Monmohini Dassi* (1), referred to.

SECOND APPEAL by the plaintiff, Jati Kar, *shebait* of Thakur Surja Narain Deb.

This appeal arose out of an action brought by the plaintiff for a declaration that he was entitled to perform the *sheba* of Thakur Surja Narain from the 13th to 20th of every month by virtue of an usufructuary mortgage-deed, executed by Radhamoni Bewa on behalf of her minor sons (defendants Nos. 3 and 4) on the 14th of July, 1879. The plaintiff alleged that on the strength of this usufructuary mortgage he performed the *sheba* of the idol for upwards of 25 years; and that the Raja of Puri (defendant No. 2) recognised this right of his in suit No. 248 of 1888 instituted against him by one Balkrishna; but, notwithstanding all this, defendant No. 1 was permitted

* Appeal from Appellate Decree, No. 1209 of 1909, against the decree of S. C. Ganguli, Subordinate Judge of Cuttack, dated Feb. 27, 1909, reversing the decree of Behary Lal Banerjee, Munsif of Puri, dated Jan. 28, 1908.

(1) (1878) I. L. R. 4 Calc. 683.

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by the manager to the Raja of Puri to perform the *sheba* of the idol during those very days; and therefore he brought the present suit.

Defendants Nos. 1 and 2 pleaded, *inter alia*, that the right was not transferable, that the plaintiff was not recognised as *shebait* in place of defendants Nos. 3 and 4, that the grand-father of defendants Nos. 3 and 4 was the original *shebak*, but he had in 1865 made a gift of this turn of worship in favour of the father of defendant No. 1, and that the plaintiff was performing the *sheba* as a paid servant only.

The Court of first instance decreed the plaintiff's suit. On appeal, the learned Subordinate Judge reversed the decision of the first Court, holding that regard being had to the provisions of section 59 of the Transfer of Property Act, and section 69 of the Evidence Act, the usufructuary mortgage-bond was not legally proved.

Against this decision the plaintiff appealed to the High Court.

Babu Lalit Mohan Mukherjee, for the appellant. A mortgage of a turn of worship does not require attestation or registration, as it is not an interest in immovable property. The mortgage-bond was sufficiently proved. The Transfer of Property Act of 1882 has no application to the present case, as the bond was executed in 1879: see Ghosh's Law of Mortgage, 2nd edition, page 198, and Regulations I of 1798 and XVII of 1806, which contain the old law on the subject of mortgage, and do not make any provision for attestation by witnesses. My client has adverse possession as against all persons except his mortgagors, defendants Nos. 3 and 4. I rely on the cases of *Jagannath Das* v. *Birbhadra Das* (1), and

(1) (1892) I. L. R. 19 Calc. 776.

Jagannath Prasad Gupta v. *Runjit Singh* (1). As to alienation to a *co-shebak*, it has been held to be legally void : see *Nirad Mohini Dassi* v. *Shibadas Pal Dewasin* (2), and *Baroda Charan Dutt* v. *Hemlata Dassi* (3).

Babu Jatindra Narain Chowdhury, for the respondent. The bond may not require attestation, but it must be proved. Plaintiff cannot succeed as the document has not been proved. Besides the Lower Appellate Court has not decided the question of possession in favour of the plaintiff. A *shebaitship* is not alienable.

Cur. adv. vult.

CHATTERJEE AND TEUNON JJ. The plaintiff brought this suit for the recovery of possession of a turn of worship in a certain temple for eight days in the month from the 13th to the 20th by virtue of a usufructuary mortgage from the mother and guardian of defendants Nos. 3 and 4, on the allegation that he had been dispossessed of the same by the manager of the defendant No. 2, the Raja of Puri, who is supporting the claim of defendant No. 1. The defendant No. 1 admits that the grand-father of defendants Nos. 3 and 4 was the original *sebak*, but says that he had in 1865 made a gift of this turn of worship in favour of his (defendant No. 1's) father, and that during his minority plaintiff had been employed as a *khatnihar*, or paid servant, on his behalf and used to pay him a certain amount of money every year

Defendants Nos. 3 and 4 did not contest the plaintiff's claim, but both defendants Nos. 1 and 2 did on various grounds. The Court of first instance decreed

(1) (1897) I L. R. 25 Calc. 354. (2) (1909) I. L. R. 36 Calc. 975.
(3) (1908) 13 C. W. N. 242.

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the suit for recovery of possession, but the learned Subordinate Judge has dismissed the same. It is contended in second appeal that the learned Subordinate Judge is wrong.

In the first place, the learned Subordinate Judge finds that the usufructuary mortgage-bond is not proved, because the evidence is not in conformity with the requirements of section 59 of the Transfer of Property Act and section 69 of the Evidence Act.

A turn of worship is not an interest in immovable property: see *Eshan Chunder Roy* v. *Monmohini Dasi* (1). Section 59 of the Transfer of Property Act, which is applicable to mortgages of immovable property only, has therefore no application. Then again the document in question was executed in 1879, three years before the Transfer of Property Act came into force, and under section 2, clause (*c*), the Act had no application. There is no other law which required that a document like the one in question should have been attested by witnesses.

Then the learned Subordinate Judge says: "No doubt the plaintiff was allowed to perform the *debsheba* from 13th to 20th of every month without a hitch, but that, in my opinion, does not create any right in plaintiff's favour, since the plaintiff has not been able to prove satisfactorily that he was doing the *sheba* from the 13th to 20th of every month as a *shebait*." We are unable to follow the reasoning of the learned Subordinate Judge. The plaintiff claims as the mortgagee of a *shebak* and not as a *shebak*; if he had possession as such mortgagee, that would be quite sufficient to make out a *primâ facie* title as such mortgagee. In the case of *Jagannath Das* v. *Birbhadra*

(1) (1878) I. L. R. 4 Calc. 683.

Das (1), it was held that the plaintiff who had acted as *shebait* for 10 years had acquired a complete title against the defendants who had not sued to oust him within six years under Article 120 of the second Schedule to the Limitation Act. Although the learned Subordinate Judge finds that he had no doubt the plaintiff had held possession for over 20 years, he distinguishes this case because the period was not 10 years.

Then the learned Subordinate Judge says: "It does not lie in the mouth of the defendant No. 2 to set up the right and possession of No. 1 defendant's father, Kangla, since the Raja's predecessor admitted plaintiff's possession by Exhibit 2;" and in the next sentence "Exhibit 2 does not show that plaintiff's possession or his over-right was ever admitted, since it distinctly mentioned that plaintiff was in possession on behalf of defendants Nos. 3 and 4." As the plaintiff claims as mortgagee only, the possession claimed by him in 1880 must have been as mortgagee only, and if that possession was recognised, that possession could not now be impeached by defendant No. 2 or his manager.

The plaintiff is himself one of the recognised *shebaks* on other days, and if in the case of such a *shebak*, on the acquisition of an additional turn of worship the ceremony of *shariti* be at all necessary, it is difficult to see how after undisputed possession for 20 years, and express recognition by or on behalf of defendant No. 2, the question can be raised in the present case. Then again, although the learned Subordinate Judge finds in the early part of his judgment that plaintiff was undoubtedly in possession of the *sheba* from the 13th to the 20th of every month, in a later part he says it was for the plaintiff to prove that

(1) (1892), I. L. R. 19 Calc. 776.

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the turn of worship of defendants Nos. 3 and 4 was from the 13th to the 20th, and in conclusion finds the second issue against the plaintiff.

The judgment of the learned Subordinate Judge is a curious combination of bad law and worse reasoning, and we have no hesitation in setting aside the same. As the judgment is full of contradictions, it is difficult to make out what has been found for, and what found against, the plaintiff. The case must, therefore, be remanded to the District Judge to try it himself. Costs to abide the result.

Appeal allowed; case remanded.

S. C. G.

PRIVY COUNCIL.

P.C.*
1911

June 19, 20; *Nov.* 9.

MIR SARWARJAN

v.

FAKHRUDDIN MAHOMED CHOWDHURI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Specific Performance—Right to minor of specific performance of contract entered into on his behalf by his guardian and manager of his estate—Contract for purchase of immovable property, and sale of it to minor—Power of guardian and manager—Want of mutuality.

In a suit for specific performance by a minor of an agreement for the purchase and sale to him of certain immovable property, entered into by the manager of the minor's estate and his guardian on his behalf :—

Held, by the Judicial Committee, that it was not within the competence, either of the manager of the minor's estate or of the guardian of the minor, to bind the minor or the minor's estate by a contract for the purchase of immovable property; that as the minor was not bound by the contract, there was no mutuality; and that consequently the minor could not obtain specific performance of the contract.

* *Present:* LORD MACNAGHTEN, LORD SHAW, LORD MERSEY and MR. AMEER ALI.