

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Prosunno Kumari Debya and another v. Golab Chand Baboo, from the High Court of Judicature at Calcutta ; delivered 3rd February, 1875.

Present :

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE Appellants sued in the Court of the Judge of Zillah Dacca as Shevaits of an idol called Lukshuri Narain Thakoor to set aside two decrees dated respectively the 27th February, 1852, and the 25th July, 1854, obtained by the Respondent against their immediate predecessor, the Shevait Rajah Baboo, and to have the dewuttur property of the idol released from the attachment issued in execution of these decrees.

It was alleged in the plaint that the above decrees were obtained by fraud and collusion, and an issue was framed on this charge. The Zillah judge gave a judgment on this issue, from which, although somewhat ambiguous and obscure, it may be inferred that he considered the charge of fraud had been sustained.

The High Court, however, on appeal, came to the distinct conclusion, and in their Lordships' opinion rightly, that this charge was unsupported by any evidence. The learned Counsel for the Appellants having admitted at the Bar that he could

not on this point successfully impeach the judgment of the High Court, it is unnecessary to consider it further.

It should be observed *in limine* that the case does not come before their Lordships by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside.

The facts which led to the suit in which the first of the two decrees was obtained are found in the judgment of the Judge of the Civil Court of Dacca. It appears that Rajah Baboo, who was a man of profligate habits, having spent the income of the dewuttur property on his own pleasures, borrowed 4,000 rupees from the Respondent to defray the expenses of the worship of the idol, and of repairing the temple. As security for this advance he gave a bond to the Respondent, and also a rahinama, by which he pledged the dewuttur property for the repayment of the borrowed money. In both securities it is stated that the money was borrowed for the service of the idol and the expenses of the temple.

The Respondent brought his suit against the Shevait Rajah Baboo on these documents, and issues were raised and evidence gone into upon the question of fact, whether the money was *bond fide* borrowed and expended for the service of the idol, and also upon the questions of law, whether Rajah Baboo could pledge the dewuttur property for money so borrowed and expended, and whether the profits of it could be attached for payment of such a debt. It appears that the Principal Sudder Ameen gave the Respondent a decree for the debt and interest, but ordered the amount "to be realized from such private property of Rajah Baboo as is not prevented from being sold by auction," intimating that the question whether the dewuttur property could be so sold might be determined at the time of the execution of the decree.

The present Respondent appealed from this decision to the Zillah judge. In disposing of the issue of fact this judge came to the conclusion that the money had been borrowed and expended for the service of the idol. On the other questions he held, first, in conformity with the opinion of the pundit of the court that the rahinama or specific pledge of the property could not be enforced; but secondly, that a decree founded on the bond for the money

so borrowed might be given, to be realized from the rents of the dewuttur lands. He accordingly so framed the decree.

The second decree now sought to be set aside was obtained in a suit instituted by the Respondent in the Court of the Principal Sudder Ameen of Dacca against Rajah Baboo on a bond for 2,700 rupees, given by him for money which the bond states was borrowed for the service of the idol, part of it being to defray the necessary expenses of a law-suit affecting the dewuttur lands. Issues were framed as in the former suit, with respect to the purpose for which the money was borrowed, and the liability of the dewuttur property to be attached for the debt. These issues the Principal Sudder Ameen found in favour of the Respondent, and decided that the debt should be paid by Rajah Baboo, or else realized from the profits of the dewuttur mehal.

The above two decrees are entitled to the force due to judgments of competent courts. The determination of the issues is *res judicata*, and their Lordships think that in the absence of proof of fraud and collusion, the High Court was right in holding that it could not re-open and review the judgments founded upon them. Nor need their Lordships now say whether the judge in the first case was right in holding upon the evidence of title before him that Rajah Baboo had no power to make a specific pledge of the dewuttur property, since they are not sitting in appeal to determine whether his conclusions of fact or of law are right or wrong. They can now properly deal only with the operation and effect of the decrees as they stand.

The question, however, how far these judgments are binding upon the Appellants, the successors of Rajah Baboo, remains, and has been argued at the Bar.

It was first contended that, according to the true construction of the decrees, they were *ex facie* intended to bind Rajah Baboo alone, and not succeeding Shevaits; but their Lordships, during the argument, stated that in their opinion the plain meaning of the decrees was that the entire debts should be realized out of the profits of the dewuttur lands.

The main point for decision remains, whether these decrees can now be legally carried into effect, which raises the question whether the profits of

dewuttur lands can be attached and appropriated during the incumbency of succeeding Shevairs by virtue of judgments obtained against a former Shevair in respect of debts properly and necessarily incurred by him for the service and benefit of the idol.

It is to be observed that the question is not raised whether the lands themselves could be sold under the decrees.

There is no doubt that, as a general rule of Hindoo law, property given for the maintenance of religious worship and of charities connected with it is inalienable.

In an appeal, which not long ago came before this tribunal, a question arose as to the validity of a grant of a Mouroosee Pottah at an invariable rent of dewuttur lands. Lord Chelmsford, in delivering the judgment, said :—

“ The Talook itself, with which these jummas were connected by tenure, was dedicated to the religious service of the idol. The rents constituted, therefore, in legal contemplation, its property. The Sebair had not the legal property, but only the title of manager of a religious endowment. In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage.”

And this Committee having regard to the presumption arising from this state of things, and other facts appearing in the evidence, held that the pottah was not, in fact, established. (See *Maharane Shibessouree Debia and others v. Mothooranath Acharjo*, 13 Moore L. A. 270).

But it is to be observed that this Committee, whilst considering that the grant of such a pottah by a Shevair would be *prima facie* a breach of trust, expressed an opinion that if the grant had been affirmed by a judgment, the succeeding Shevairs would have been bound by it; probably for the reason that after a judgment it must be assumed either that such a pottah was warranted by the terms of the original endowment, or by usage, or was in some way beneficial to the interests of the Trust. It is said :—

“ 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.”

But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in

their Lordships' opinion, competent for the Shevait of property dedicated to the worship of an idol, in the capacity as Shevait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the Shevait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir, which was thus defined in a judgment of this Committee, delivered by Lord Justice Knight Bruce :—

“The power of the manager for an infant heir to charge an estate not his own is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt.” (See *Hunooman Persand Pauday v. Mussumat Babooee Munraj Koonweree*, 6 Moore's I. A. 243.)

It is only in an ideal sense that property can be said to belong to an idol ; and the possession and management of it must in the nature of things be entrusted to some person as Shevait, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them.

Assuming, then, that a Shevait may incur debts, or borrow money for necessary purposes, in the sense above explained, it appears to be right and reasonable that judgments obtained against a former Shevait in respect of debts so incurred should be binding upon succeeding Shevait, who, in fact, form a continuing representation of the idol's property.

If such debts, and the judgments founded on them, were not held to be thus binding on successors, the consequence would be that no Shevait would be able to obtain assistance in times of need; for, on an opposite state of the law, he might defeat the creditors who had afforded it, by at once transferring the property to other Shevait, as was actually done in the present case by Rajah Baboo, who, after the decrees were obtained against him, appointed the Appellants, his wife and nephew, Shevait in his place.

The above view is consistent with what appears to have been the opinion of this Committee in the passage already cited from 13 Moore's Indian Appeals, and with two decisions in India (Juggut Chunder Sein and another *v.* Kishwanund and others, 2, Select Reports, 126; and Kissnonund Ashroon Dundy *v.* Nursingh Doss Byragee, 1, Marshall's Rep., 485).

Before, however, applying the principle of *res judicata* to judgments of this character, the courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them. These conditions appear to have been fulfilled in the present case.

It is to be observed that execution of the judgments sought to be set aside is decreed, and in their Lordships' view rightly, only against the rents and profits of the dewuttur lands. Whether the judgments have been satisfied by the profits already received, or whether some provision ought to be made out of such profits, during the pendency of the attachments, for the continuance of the worship of the idol, are questions not raised in this appeal. The object of the present suit is to have the properties released from attachment on the ground that the decrees were obtained by fraud, and were in no

way binding on the succeeding Shevaits. In deciding against this claim their Lordships do not desire to prejudice the determination of the questions above adverted to, if they should be hereafter raised.

In the result their Lordships will humbly advise Her Majesty to affirm the Judgment of the High Court, and to dismiss this Appeal with costs.

