1951

March 14.

SREE SREE ISWAR GOPAL JIEU THAKUR

v.

PRATAPMAL BAGARIA AND OTHERS.

(Civil Appeal No. 95 of 1949)

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v.

SREE SREE ISWAR GOPAL JIEU THAKUR.

(Civil Appeal No. 96 of 1949)

[SAIYID FAZL ALI, S. R. DAS and CHANDRASEKHARA AIYAR JJ.]

Religious endowments—Alienation by trustee—Legal necessity —Old transactions—Original parties and witnesses not available— Value of recitals—Permanent lease—Not questioned by successive trustees—Presumption of validity.

Where the issue is whether there was legal necessity for a particular transaction, if all the original parties to the transaction and those who could have given evidence on the relevant points have passed away, a recital consisting of the principal circumstances of the case assumes greater importance and cannot be lightly set aside.

Banga Chandra Dhar Biswas v. *Jagat Kishore Chowdhuri* (43 I.A. 249) referred to.

Where the validity of a permanent lease granted by a shebait has remained unquestioned for a very long time since the grant, although it is not possible to ascertain fully what the circumstances were in which it was made, the Court should assume that the grant was made for necessity so as to be valid beyond the life time of the grantor.

Baiwa Magniram Sitaram v. *Kasturbhai Manibhai* (49 I.A. 54) referred to.

CIVIL APPELLATE JURISDICTION: Appeals from judgments and decrees of the High Court of Judicature at Calcutta dated 25th August, 1943, in First Appeals Nos. 20 and 173 of 1939 which arose out of a decision of the President of the Calcutta Improvement Tribunal in Case No. 95 of 1935.

Civil Appeals Nos. 95 and 96 of 1949.

Panchanan Ghose (*Upendra Chandra Mullick*, with him) for the appellant in Civil Appeal No. 95 and respondent in Civil Appeal No. 96.

S.P. Sinha (*Nagendra Nath Bose*, with him) for respondents Nos. 1 to 3 in Civil Appeal No. 95 and appellants Nos. 1 to 3 in Civil Appeal No. 96.

S. N. Mukherjee, for respondent No. 4 in Civil Appeal No. 95.

1951. March 14. The judgment of the Court was delivered by

Fazl Ali J.

FAZL ALI J.— These appeals are directed against the judgment and decree of the High Court of Judicature at Fort William in West Bengal, confirming a decision of the President of the Calcutta Improvement Tribunal, which modified an award of the First Land Acquisition Collector of Calcutta, made under the Land Acquisition Act in respect of the acquisition of two premises, which may conveniently be referred to as Nos. 140 and 141, Cotton Street.

In order to understand the points of contest between the various claimants to the compensation awarded in the case, it seems necessary to refer to certain facts showing how they came to be interested in the premises which are the subject-matter of the land acquisition proceedings. These premises belonged at one time to one Sewanarayan Kalia, and afterwards they became the property of a deity, Sree Sree Iswar Gopal Jieu Thakur, installed by Sewanarayan Kalia at Chinsurah in the district of Hoogly. Sewanarayan, who had three wives, died in 1836, leaving behind him his third wife, Muni Bibi, two daughters by his

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predeceased wives, these being Jiban Kumari and Amrit Kumari, and a mistress named Kissen Dasi. On the 23rd August, 1836, these persons executed a deed of solenama which was in the nature of a family arrangement, by which the remainder of the estate of Sewanarayan (*i.e.*, what was left after excluding the dedicated properties) was divided in the terms of his will, with the result that Muni Bibi got subject to certain conditions, among other properties, the premises described as 140, Cotton Street, and Jiban Kumari got the contiguous premises, No. 141, Cotton Street. Muni Bibi and Jiban Kumari also became the shebaits of the Thakur or deity with power to appoint their successors. On the 20th January, 1848, Muni Bibi by an arpannama dedicated 140, Cotton Street, to the Thakur. It is recited in this deed, among other things, that on account of annual droughts and inundation and consequent diminution in the produce of the lands, certain properties dedicated to the sewa of the deity had been sold for arrears of revenue, that "Jiban Kumari had been making advances from her private funds for the expenses of jatra, mahotsob etc., of the deity, when the amount fell short, this being against the provisions laid down by her late husband", that the house known as 140, Cotton Street, having been let out, was yielding a rent of Rs. 30 p.m., that after deducting the necessary expenses the surplus income left was Rs. 20 p.m., and that "if this amount was included in the expenses for the sheba etc., of the deity every month, the provision made by her deceased husband may remain in force." After reciting these facts, it is stated that the rental of the house "shall be permanently and perpetually included in the expenses of the sheba." About 20 years later, on the 30th September, 1869, Muni Bibi created a permanent (maurasi mokrari) lease of the premises bearing No. 140, Cotton Street, in her capacity as a shebait in favour of one Nehal Chand Panday (who was admittedly a benamidar for one Bhairodas Johurry), at a rental of Rs. 25 p. m. (See exhibit L—a kabuliyat executed by Nehal Chand in favour of Muni Bibi). In the same year, on the 8th

December, Jiban Kumari granted a permanent lease to Bhairodas Johurry, in respect of the premises known as 141, Cotton Street at a rental of Rs. 90 p. m. (See exhibit K—a kabuliyat executed by Johurry in favour of Jiban Kumari). The main question which has been raised in this case is whether the two ladies were competent to give debutter properties by way of permanent lease to another person. In 1870, Muni Bibi died, and, on the 15th January, 1872, Jiban Kumari appointed Gourimoni Devi a shebait by a registered deed and dedicated the premises known as 141, Cotton Street, to the deity. Both Jiban Kumari and Gourimoni Debi died shortly afterwards, and Gopal Das, a minor son of Gourimoni, became the shebait of the idol. During his minority, his father, Raghubar Dayal, became his certificated guardian, and, in that capacity, he executed a usufructuary mortgage deed in respect of the Cotton Street properties to one Lal Behari Dutt, on the 31 August, 1878. After the death of Raghubar Dayal one Ajodhya Debi and after her one Kalicharan Dutta became the certificated guardian of Gopal Das, and, on the 17th August, 1890, the latter mortgaged some debutter properties including 140and 141, Cotton Street, to Lal Behari Dutt for a sum of Rs. 2,230. On attaining majority, Gopaldas executed on the 17th January, 1896, a usufructuary mortgage deed in respect of all debutter properties including the Cotton Street houses in favour of Lal Behari Dutt for paying the previous mortgage dues which amounted on that date to Rs. 4,955 and odd. This deed provided among other things that the mortgagee was to collect rents, outgoings, carry on the sheba of the deity, and that whatever balance was left out of the income of the property was to go towards the satisfaction of the mortgage dues. Gopaldas died in 1900, leaving behind him surviving his widow, Annapurna, who also died in 1905. By 1918, Lal Behari Dutt also was dead, and his interest in the mortgaged properties, to which reference has been made, was sold to one Naba Kishor Dutt on the 12th December, 1918. On the 17th November, 1933, Naba Kishor assigned the mortgagee's

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interest in the mortgaged properties to two of the Bagarias, respondents 1 and 2 in appeal No. 95, and in the same year the three respondents (1 to 3) also acquired the lessee's interest in the Cotton Street houses. The land acquisition proceedings, which have given rise to these appeals, were started about the year 1934 in respect of the premises bearing Nos. 140 and 141, Cotton Street, as well as two adjoining premises with which we are not concerned in this case. In these proceedings, the following claims were put forward by three sets of persons:—

1. The Bagarias (respondents 1 to 3 in appeal No. 95) at first claimed the entire amount of compensation on the allegation that they were the absolute owners of the premises in question, but later on they claimed only as mortgagees and permanent lessees of those premises.

2. On behalf of the deity, the entire amount of compensation money was claimed by Deosaran Singh and Ram Lakshman Singh, who alleged themselves to be shebaits, on the basis that the premises in question were debutter properties of the deity, and the Bagarias had acquired no interest therein either by the assignment of the usufructuary mortgage or the alleged purchase of the tenant's rights in the properties.

3. Respondent No. 4 claimed compensation as a lessee for 99 years on the basis of a lease alleged to have been given to him by the original landlords.

In the present appeals, we are concerned with the first two claims only, and we shall briefly state how they were dealt with by the Collector and the courts below. On the 22nd May, 1935, the Collector awarded Rs. 31,740 as compensation for landlord's interests, to be shared by the deity as owner and two of the Bagarias, respondents Nos. 1 and 2 in appeal No. 95 in their capacity of usufructuary mortgagee, and awarded a sum of Rs. 1,58,000 to the respondents Nos. 1, 2 and 3 as compensation for their rights as permanent tenants of the premises in question. Subsequently, 3 separate petitions of reference were filed

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by the 3 claimants against the Collector's award and the reference made by the Collector in pursuance thereof was registered as apportionment case No. 95 of 1935 in the Court of the Calcutta Improvement Tribunal. Meanwhile, Deosaran Singh and Ram Lakshman Singh, who had put in claims as shebaits, retired from the contest, and the President of the Tribunal appointed one Narendra Nath Rudra as the next friend of the deity to represent and protect its interests. On the 31st August, 1938, the President of the Tribunal gave his decision, by which he substantially upheld the award of the Collector, but modified it in one respect only. He held that the usufructuary mortgage, on the basis of which respondents 1 and 2 had put in a claim, had been paid off and therefore they were not entitled to any compensation, and the whole sum of Rs. 31,740 should be paid to the deity. Respondents 1 to 3 however were held entitled to the sum of Rs. 1,58,000 as permanent tenants, on the ground that leases had been created for legal necessity and therefore were binding on the deity. He also held that the deity was not entitled to question the leases by virtue of article 134 (a) of the Limitation Act. Regarding costs, he directed that all costs incurred on behalf of the deity should be paid out of the compensation money lying in deposit in court. Two appeals were thereafter preferred to the High Court by the two main contesting parties and ultimately both these appeals were dismissed, and the High Court upheld the decision of the Tribunal. Subsequently, the present appeals were preferred to this Court, the deity having obtained a certificate granting leave to appeal from the High Court, and the Bagaria respondents having obtained special leave from the Privy Council to prefer a cross appeal.

The main questions which arise in these appeals are:—

(1) whether the two mourasi mokrari leases, to which reference has been made were justified by legal necessity; and

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(2) whether the mortgages on the basis of which the Bagarias had laid their claim to compensation had been satisfied.

The first question arises in Appeal No. 95, and the second question arises in Appeal No. 96.

So far as the question of legal necessity is concerned, there are concurrent findings of the Tribunal and the High Court against the appellant in appeal No. 95, but we allowed his counsel to argue the question at some length, because it was urged before us that on the facts of the case the point in issue was not a question of fact but one of mixed fact and law, especially as the decision of the High Court turned upon the construction of the leases and the inference drawn from the fact that the permanent nature of the tenancy had remained unquestioned for a very long period.

The tenancy in question came into existence as long ago as 1869, and it is not surprising that no direct evidence bearing on the issue of legal necessity is available now. We have therefore to fall back upon the recitals in the documents, to ascertain the circumstances under which the documents, exhibits L and K, were executed, because it is well settled that if all the original parties to the transaction and those who could have given evidence on the relevant points have passed away, a recital consisting of the principal circumstances of the case assumes greater importance and cannot be lightly set aside. [See *Banga Chandra Dhar Biswas* v. *Jagat Kisore Chowdhuri*(1)]. It appears to us that the recitals in the documents afford valuable evidence, because the tenancies were created by two pious ladies who were keenly interested in the sheba of the deity and with regard to whom it was not suggested that they expected to derive any personal advantage from the transactions in question. It seems to us most unlikely that they would be parties to any untrue recitals merely to support the transaction. It may be recalled here that in 1848, certain properties belonging to the deity had been sold for arrears of rent, and Jiban Kumari

(1) 43 I.A. 249.

had been supplementing the income of the residue from her own properties for meeting the expenses of performing certain essential services to the deity, such as jatra, mahotsob, etc. We also find from the arpannama that the value of the property which is the subject matter of the mokrari kabuliyat dated the 30th September, 1869 (exhibit L) was Rs. 2,000 in 1848, that it was not in the khas possession of Muni Bibi but had been let out to a tenant and that its net income was Rs. 20 p.m. At the time when the arpannama was executed, Muni Bibi clearly thought that the sum of Rs. 20 p.m., if included in the expenses for the sheba of the deity, would enable the sheba to be carried on without any extraneous help. From the recitals in exhibit L, it appears that the house bearing No. 140, Cotton Street, was in a dilapidated condition and had collapsed in the rains of 1270 B.S. (1868 A.D.), and Muni Bibi was unable to bear the expenses of constructing a new building at the place. The problem before her therefore was whether the deity should go without any income from this property, or she should enter into such an arrangement as would secure a permanent income for the expenses of the deity, which should not in any case be less than the income which the property had theretofore yielded. She decided to choose what must have appeared to her to be the better and more prudent course, with the result that she got a sum of Rs. 500 cash for the deity as the price of the materials which were sold to the lessee, and also secured a regular monthly income of Rs. 25. There can be no doubt that the transaction was in the best interests of the deity and clearly beneficial to it.

A reference to the arpannama shows that the house was in the possession of a tenant even in 1848, and from the recitals in the document it is clear that what Muni Bibi contemplated was that the house should continue to remain in the possession of a tenant, and the rent of the house should be used for the sheba of the deity. At that time, she did not contemplate any other mode of using the property she was going to dedicate. We do not know who was the tenant of the

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house in 1848 and what were the commitments of Muni Bibi at that time, but, even apart from these facts, it is difficult to believe that a devout person like her, who was not only a shebait but also the widow of the founder of the deity and who had shown such keen interest for the upkeep of the worship of the deity, should have entered into the transaction in question unless she considered it absolutely necessary to do so. The contention put forward before us is that it has not been shown that there was no other course open to Muni Bibi than to grant a permanent lease in respect of the property, but it is manifest that at this distance of time no evidence can be available to show the actual pressure or necessity which impelled Muni Bibi to adopt the course she did. It is now well settled that where the validity of a permanent lease granted by a shebait is called into question a long time after the grant, although it is not possible to ascertain fully what the circumstances were in which it was made, the court should assume that the grant was made for necessity so as to be valid beyond the life of the grantor. [See *Bava Magniram Sitaram* v. *Kasturbhai Manibhai*(1)]. In the present case, the circumstances which can be gathered from the recitals together with the fact that the document has remained unquestioned for more than half a century, seem to us to be quite sufficient to support the conclusion that the grant was made for legal necessity and is binding on the deity. On the facts narrated, it would appear that there were several shebaits between the death of Muni Bibi and the commencement of the present litigation, but the lease was never impugned as being beyond the power of the shebait who granted it. On the other hand, we find that the permanent character of the lease was recognized in a deed executed by Gourimoni on the 18th October, 1873 (exhibit Y), and in a mortgage deed executed by Raghubar Dayal, the guardian of Gopaldas, on the 31st August, 1878. The properties in question were subsequently mortgaged by Kali Charan Dutt and Gopaldas, but neither of these persons nor

(1) 49 I.A. 54.

the mortgagees ever came forward to question the permanent nature of the tenancy.

The counsel for the appellant relied upon exhibit VI, which is a copy of the judgment of the High Court in a suit instituted by Nabakishore Dutt in 1925 against the Administrator-General of Bengal for the rent of the house in question. It appears from this judgment that the tenancy was admitted by the defendant and it was also admitted by him that rent was due, but he claimed that he was entitled to insist upon a receipt specifying the money to have been paid as mourasi mokrari rent. The learned Judge, who dealt with the case, however, thought that the point raised by the defendant did not strictly speaking arise in a suit for rent, which according to him could not be converted into a suit for declaration of title, and on that basis, he passed a decree in favour of the plaintiff. The judgment does not say in so many words that Nabakishore resisted the claim as to the tenancy being mourasi mokrari, but, however that may be, assuming that such an assertion was really made by him, it cannot affect the character of a tenancy which had remained unquestioned for nearly half a century.

The legal position with regard to 141, Cotton Street, is almost identical with that of the adjoining premises with which we have already dealt. As has been already stated, a mourasi mokrari tenancy was created by Jiban Kumari on the 8th December, 1869, as is evidenced by exhibit K. This document recites among other things that the house which was the subject of the lease, "stands in need of repairs and for want of such repairs there is chance of some portion thereof breaking down during the year." It also recites that whatever income was derived till then from that house was derived by letting it out on rent and that the mourasi tenancy was being created for the purpose of repairing the house and keeping it in existence. At the end of the document, it is stated that "the shebait shall keep the kabuliyat and patta in force and shall on taking the sum of Rs. 90 as rent, defray the expenses of the sheba of the deity." It is

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noteworthy that the actual dedication of this property took place on the 15th January, 1872, more than 2 years after the kabuliyat. On that date, a registered deed of gift was executed by Jiban Kumari in favour of Srimathi Gourimoni Debi and it was recited therein that the income of the house was being dedicated by the former to the sheba of the deity. There was also a further clause in that deed to the following effect :—

"In accordance with the terms of the solenama the expenses of the Iswar seba shall be met from the income of those properties which have been dedicated for the performance of the work of the said seba and the amount by which the expenses for the festivals would fall short and the expenses which would be incurred for repairs to house for sheba of the said Thakur shall be met and the Tahailia (attendant) and the Brahman cook and the Brahman priest (now) employed and to be employed hereafter shall get (their) salaries, from the income of the said property." On reading this document along with the solenama and the mokrari lease granted by Jiban Kumari, it appears that she dedicated the property after having created a mokrari lease, that what she purported to dedicate was the income derived by way of rent from the mourasi mokrari tenancy, and that she had dedicated this income for specific purposes with the object of making up the deficit in the income received from other debutter properties. If it is held that Jiban Kumari was an absolute owner of the property at the time the mourasi mokrari lease was granted and afterwards she dedicated only the income of the property, then the permanent lease cannot be assailed. If, on the other hand, it is held on reading the solenama that Jiban Kumari had only a life estate in the house and it was one of the terms of the solenama that after her death the expenses of the deity were to be borne out of the income from the house, then in that case the question may arise as to whether she was entitled to create a lease beyond her lifetime. Such a question however does not need an elaborate answer, because the same considerations which apply to 140, Cotton Street, will

apply to this house, and the presumption as to necessity which is raised by the long lapse of time, would arise here also. This presumption is considerably strengthened here as well as in the case of the lease granted by Muni Bibi, by the fact that the grantor of the lease was so devoted to the object of the endowment that it does not seem likely that she would have granted a permanent lease unless she was impelled to do so by absolute necessity. It seems to us therefore that the view taken by the High Court is substantially correct and the respondents Nos. 1 and 2 are entitled to compensation as permanent lessees. In this view, Appeal No. 95 must fail, and it is dismissed.

As to Appeal No. 96, it has been concurrently found by the President of the Tribunal and the High Court that the appellants have failed to prove by proper evidence that there is any money still due to them on the usufructuary mortgage executed by Gopaldas in 1886. In arriving at this finding, they have dealt with every possible argument that could be urged and was urged on behalf of the appellants to show that the mortgage had not been satisfied. This court has repeatedly held that it will not generally interfere with concurrent findings on a pure question of fact, and nothing has been shown on behalf of the appellants to induce us to depart from this rule. In the result Appeal No. 96 also is dismissed.

Having regard to the circumstances of the case, we shall make no order as to costs in either of these appeals.

Appeals dismissed.

Agent for the appellant in Civil Appeal No. 95 and respondent in Civil Appeal No. 96 : *Sukumar Ghose.*

Agent for respondents Nos. 1 to 3 in Civil Appeal No. 95 and appellants Nos. 1 to 3 in Civil Appeal No. 96 : *S. C. Banerjee.*

Agent for respondent No. 4 in Civil Appeal No. 95 : *P. K. Chatterjee.*