**(1871) 03 CAL CK 0013**

**Calcutta High Court**

**Case No:** Special Appeal No. 2191 of 1870

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| Kuwar Sham Kishore Roy | | APPELLANT |
| | Vs | |
| Tayubunnissa Bibi and Others | | RESPONDENT |

**Date of Decision:** March 2, 1871

**Final Decision:** Allowed

**Judgement**

Mitter, J.

The plaintiff in this case is the purchaser of an estate paying revenue to Government at a sale held under the provisions of Act XI of 1859, and he brought this suit for the purpose of setting aside a putni tenure created by one Chandra Nath Surma in favor of the defendants, and specially registered in the Collector"s book prior to the purchase of the plaintiff under the provisions of section 39 of that Act. The plaint alleges that the property in question belonged in fact to the idol Dayamayi Debi; that Chandra Nath was simply the manager of the endowed property; that no permanent alienation like the creation of the putni which was alleged to have been made by Chandra Nath, was legally binding against the idol, who was in fact the real defaulter; and that the plaintiff was therefore entitled to recover khas possession of the property, treating the putni in question as a nullity, upon the ground that it was created by a person without any right or title whatever. The case set up by the defendants was that the property was not debutter; that Chandra Nath was the real owner of that property; and that even if Chandra Nath were the manager of the idol Dayamayi Debi, the putni was created for such purposes as would justify such alienation under the Hindu law, which is the law according to which disputes relating to the debutter property are to be determined.

2. The Court of first instance came to the conclusion that the putni was a valid putni; that the debutter was a nominal" one (using the English word nominal" in the middle of its decision, which was written in Bengali); and that the person who really had the beneficial enjoyment of it was not the idol Dayamayi Debi, but Chandra Nath, the lessor of the

defendants.

3. On appeal, the Judge, after accepting the copy of a copy of an alleged urpunamah, by which the debutter was said to have been created, came to the conclusion that the evidence on both sides was nearly balanced; that under those circumstances the burden of proof ought to be shifted on the defendants; that if the burden of proof were thus shifted, no sufficient case is made out by him to rebut the prima facie evidence given by the plaintiff; and the Judge therefore found that the property was a bond fide debutter property, of which Chandra Nath, the lessor of the defendants, was simply the manager. The Judge has further found that, according to a decision of the Privy Council, Moharanee Shibessurree Debee v. Mothoronath Acharjee, he had every reason to hold that the creation of a putni by a shebait was altogether null and void, even though it might have been made under circumstances of necessity. The Judge then goes on to say that, even if such an alienation would be justified by a special case of necessity, the case of necessity set up by the defendants was not sufficient.

4. Under the above state of facts, the simple questions which we have to determine in this special appeal are--

Firstly. Whether the finding on the question of debutter has been arrived at by the Judge on legal evidence, and in a legal manner?

Secondly, Whether, assuming the property to be a bona fide debutter property, a putni created by a shebait would be absolutely null and void in law, even though made under circumstances of special necessity?

Thirdly. Whether the case of necessity set up, and, as the Judge afterwards says, made out by the defendants in this case, is sufficient under the Hindu law to justify the alienation?

5. We think the learned Judge in the Court below has committed errors in law on all these points.

6. With reference to the first point, the Judge admits that the evidence was equally balanced, and it is clear from his judgment that he would not have thought the evidence adduced by the plaintiff was sufficient to shift the burden of proof on the defendants, if he had not accepted the copy of the copy of the urpunamah above referred to. We do not mean to say that the Judge was wrong in admitting that document in evidence in the first instance. It was offered in the Court below, and there is evidence on the record, viz., that of Chandra Nath, which has been held by the Judge to prove that there was an urpunamah, and that that urpunamah could not be found out or discovered by him on search. Under such circumstances the Judge was right in accepting secondary evidence, and as secondary evidence the authenticated copy of an authenticated copy is admissible under the rulings of the Judicial Committee of Her Majesty''s Privy Council[1]. But we are clearly of opinion that the Judge ought not to have acted upon that deed, when it is

admitted that no evidence whatever was given to prove that a deed of that description containing the terms and provisions embodied in it, had been actually executed in favor of Chandra Nath by the former owner of the property. It being clear, therefore, that the Judge was wrong in acting upon this document, we think he should not have reversed the judgment of the first Court in the absence of the urpunamah; for the duty of the Appellate Court, as laid down by the Privy Council, is not to interfere with the judgment of the first Court until it is perfectly satisfied in its own mind that the conclusion arrived at by the first Court is erroneous. If there is any doubt in the case, the benefit of that doubt ought to be given to the respondent and not to the appellant, for it must be presumed in law that the judgment of the lower Court is right until the contrary is shown. No doubt the Appellate Court may make further enquiries; but such enquiries ought to be made with discretion, and only in those cases in which the Appellate Court finds itself unable to do justice to the parties on the evidence and materials as they stand upon the record.

7. Assuming, however, that the finding on the question of debutter is correct, we cannot agree with the Judge in holding that it has been finally decided by the Privy Council that a permanent alienation, such as the creation of a putni made by the shebait of an endowed property, is absolutely null and void even though it be made under special circumstances of necessity. It is true that the idol must be treated in law as the owner of the property, and it is also true that the shebait must be looked upon in no other light than the shebait or trustee manager of that endowed property; but under the Hindu law a shebait is competent to alienate a reasonable portion of the property, if such alienation is absolutely required by the necessities of the management. This point has been so ruled by this Court, and it is therefore unnecessary for us to dwell upon it any further. The case referred to by the Judge is not at all in point. In that case their Lordships in the Privy Council had simply to deal with the question whether a certain alienation had been actually made by a person who held the property in dispute simply in the capacity of a shebait, and in dealing with that question their Lordships observed, in the course of the discussion, that such an alienation would raise a presumption of breach of trust on the part of the manager, and their Lordships would not therefore presume that the manager in that particular case had actually executed the deed in question. But this decision actually shows that there may be cases in which the grant of a putni tenure by a shebait would be valid; for if such grants were absolutely null and void, it would not have been necessary for their Lordships in the Judicial Committee to consider whether the grant in that particular case had been actually made or not.

8. On the third and last point we observe that the case of necessity set up by the defendants has not been rejected by the Judge as untrue. The Judge believes the testimony of Chandra Nath, and be expressly uses the words made out" with reference to the defendants" case, as we have already observed. Now, accepting the evidence of Chandra Nath as true, it appears that the putni in question was granted for the purpose of raising funds to repair the temple of the idol, and to restore its image, which had been destroyed by some accident after the performance of the not inexpensive ceremonies

prescribed by the Hindu law in such cases. According to these circumstances it is quite clear that the very existence of the idol was at stake; and if the destroyed image of the old idol had not been restored, and its temple, which was unfit for habitation, repaired, Chandra Nath could not have been in a position to fulfil the trust The power then of Chandra Nath to resort to an alienation of a portion of the endowed property in order to raise funds for such purposes, would necessarily follow under the Hindu law which is applicable to such trust property, for Chandra Nath was not bound to provide for such expenses from his personal funds. It has been contended that the Judge did not accept the case of necessity set up by the defendants, but this objection has been sufficiently disposed of above. On the whole then we think, in concurrence with the opinion expressed on this point by the Court of first instance, that the plaintiff is not entitled to have the putni set aside as invalid, and we accordingly reverse the decision of the Judge, and dismiss the plaintiffs suit with costs of all Courts.

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[1] See Unide Rajaha Bommarauze dhya Prasad Sing v. Umrao Sing, 6 Unid Rajaha Raje Bommarauze Bahadur vs. Pemmasamy ; and Ajoo.