

## CALCUTTA HIGH COURT

Mahamaya Debi

Vs.

Haridas Haldar

(Mookerjee, J.)

06.07.1914

### JUDGMENT

#### **Mookerjee, J.**

1. Take the question of estoppel first.
2. It does not arise at all. A former abuse of trust cannot be pleaded against a trustee who seeks to prevent a repetition of that abuse, even if he were formerly implicated in the same indefensible course against which he is seeking to protect the trust property: *Juggut Mohini v. Sokheemoney*<sup>1</sup> and *Mallika v. Ratanmani*<sup>2</sup>
3. What do you say as to the case of *Doe v. Horne*<sup>3</sup> In that case the mortgagors were empowered to raise money on mortgage, while here the palms cannot be alienated.
4. There was no issue on estoppel; that question has been raised here for the first time.
5. Here the transfer is void under Statute, i.e., Scripture of Hindu Law. For the principle against estoppel, see Bigelow p. 514, Ch. 17, Section 1.
6. Next, as regards the second contention of the appellant, I submit that the custom of transferring a pala or selling the office of a shebait: even to a person of the same caste or sect can never be reasonable and valid: see *Kuppa v. Dorasami*<sup>4</sup> *Juggurnath v. Kishen*<sup>5</sup> and *Raja Vurmah v. Ravi Vurmah*<sup>6</sup>
7. To validate such a custom would tend to public mischief in inducing needy incumbents of hereditary religions offices who desire to sell them to give a dishonest recognition to qualifications, which in fact were not the qualifications demanded by the nature of the office. I submit that no custom can validate an act which is clearly against public policy. The offerings made by Hindus to a public shrine constitute a public trust, in which the trustee can never have any beneficiary interest, and any appropriation by them of the same would be a clear breach of

trust; no custom recognizing such appropriation can alter the character of such a transaction, or validate the same.

8. See *Rajeshwar v. Gopeshwar*<sup>7</sup> which lays down the

<sup>1</sup>(1871) 14 Mad. I. A. 289 : 17 W. R. 41, 44

<sup>3</sup>(1842) 3 Q. B. D. 760, 766 : 61 R. R. 397

<sup>2</sup>(1897) 1 C. W. N. 493

<sup>4</sup>(1882) I. L. R. 6 Mad. 76

<sup>5</sup>(1867) 7 W. R. 266

<sup>7</sup>(1907) I. L. R. 35 Calc. 226, 229

<sup>6</sup>(1876) I. L. R. 1 Mad. 235 : L. R. 4 I. A. 76

rule that shebait cannot bequeath their office by will to non-shebait. See also *Mitta Kunth v. Neerunjun*<sup>8</sup> Even if the owners of private temples may alter the character of the trust to a certain extent by family arrangement, still the trustees of the Kalighat temple can never do so, because, as both the Courts below have found, it is a public temple.

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9. Then you have been abusing your trust, and you now want the Court" to put you in a position to continue doing so.

10. Further, the alleged custom of transferability of palas does not bear the requisite characteristics of a valid legal custom. For it is not certain, reasonable, immemorial, legal or moral. The earliest instance of transfer of a pala goes back only to 4th October 1819 or about 90 years before the institution of this suit; not even to the beginning of the establishment of regular Courts of Record in British India, while the foundation of this Trust is lost in the oblivion of mythical ages.

11. The transfer of palas is an abuse of trust, and by implication, mis-appropriation: *Raja Vurmah v. Ravi Vurmah*<sup>9</sup> For the personal debt of a shebait, trust property cannot be sold; of. the position of the manager of an infant heir.

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12. There is great danger in developing superficial analogies.

13. If this custom be upheld, extravagance among shebait will be encouraged. Public policy must be vindicated, whether the plaintiff lose her money or not.

### **Mookerjee J.**

14. But you have not got beyond extravagance, encouraged by any possible decision of ours.

15. Misappropriation does not alter the character of the trust. Even a mourasi mokurari lease of landed property granted to a co-shebait has been held to be void. Regarding the Baidyanath Temple case, is pala or turn of worship the same as charao?. No custom was pleaded there;

*Girijanund v. Sailajanund*<sup>10</sup>

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16. The contention of the other side is not that the Kalighat temple palas are transferable, as a matter of right under Hindu Law, but that they are so by custom.

17. Even if such a custom is proved, it is bad in law: see *Mallika v. Ratanmani*<sup>11</sup>

18. Instances of continued abuse of trust for 90 years will not make the custom valid.

<sup>8</sup>(1874) 14 B. L. R. 166

<sup>10</sup>(1896) I. L. R. 23 Calc. 645

<sup>9</sup>(1867) 7 W. R. 266

<sup>11</sup>(1897) 1 C. W. N. 493

19. *Kuppa v. Doraswami*<sup>12</sup> custom was not pleaded there. See also Golap Ch. Sastri's Hindu Law, p. 486, 491.

20. The custom found by the District Judge to be in existence relates to private and not public endowments: *Janokee v. Gopau*<sup>13</sup> See also K. K. Bhattacharyya on Hindu Law, p. 453. A turn of worship, cannot be called a shape. [Mayne's Hindu Law paras, 437, 438.]

21. As to a foreclosure decree, I submit that a pala or turn of worship has been held in all the reported cases to be moveable property. As a foreclosure decree can only be made with respect to mortgages of immovable property, the provisions of the Transfer of Property Act which refer to foreclosure of mortgages of immovable property only, and Order 34 of the Civil Procedure Code of 1908 (applying also to mortgages of immovable property) are inapplicable to mortgages of palas. There is no provision of Indian Law for granting a decree for foreclosure in the case of pledge, or mortgage of moveable's.

22. Balm Mahendra Nath Roy, in reply. It has been urged, that we cannot have a foreclosure decree because a pala is not immovable property. See Fisher on Mortgage, 6th Edition, Article 985, p. 505. A pledge presupposes delivery of possession. (Contract Act, Sections 172. 148.)

23. For the difference between a pledge and a mortgage, I refer to pages 107 and 320 of Ghose's Mortgage. A pledgee can realize his money by sale of the pawn: *Harrold v. Plenty* (1). Regarding foreclosure of a mortgage of moveables, see Coote on Mortgages, 7th edition. Ch. 49, para I, p. 1019.

24. [Babu Atul Krishna Roy. See Halsbury's Laws of England, Vol. I, p. 123. Section 58 of the Transfer of Property Act refers to mortgages of immovable property.]

25. An regards, the second question, it has riot been disputed on behalf of the mortgagee that in

the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder: *Raja Vurmah v. Ravi Vurmah*<sup>14</sup> *Rama Varma v. Rama Nayar*<sup>15</sup> *Kantian v. Nila Kandan*<sup>16</sup> *Lakshmanaswami v. Rangamma*<sup>17</sup> *Gnanasambandha v. Velu Pandaram*<sup>18</sup> *Sarkum v. Rahaman*<sup>19</sup> *Narayana v. Ranga*<sup>20</sup> *Subharayudu v. Kolayya*<sup>21</sup> *Alagappa v. Sivaramasundara*<sup>22</sup> *Rajeshwar v. Gopeshwar*<sup>23</sup> *Durga v. Chanchal*<sup>24</sup> *Rup Narain v. Junko*<sup>25</sup> *Mallika v. Ratanmani*<sup>26</sup> *Rangasami v. Ranga*<sup>27</sup> *Rajaram v. Ganesh*<sup>28</sup>, *Ukoor v. Chunder*<sup>29</sup> *Juggurnath v. Kishen*<sup>30</sup> *Kali Charan v. Bangshi*<sup>31</sup> *Dubo v. Srinibas*<sup>32</sup> *Ramanathan v. Murugappa*<sup>33</sup> *Trimbak v. Lakshman*<sup>34</sup> *Kuppa v. Dorasami*<sup>35</sup>

<sup>12</sup>(1882) I. L. R. 6 Mad. 76

<sup>14</sup>(1876) I.L.R. 1 Mad. 235 : L.R. 4 I.A.76

<sup>16</sup>(1884) I. L. R. 7 Mad. 337

<sup>13</sup>(1877) I. L. R. 2 Calc. 365

<sup>15</sup>(1882) I.L.R. 5 Mad. 89

<sup>17</sup>(1902) I. L. R. 26 Mad. 31

<sup>18</sup>(1899) I.L.R. 23 Mad. 271; L.R. 27 I.A. 69

<sup>20</sup>(1891) I.L.R. 15 Mad.183

<sup>22</sup>(1894) I. L. R. 19 Mad. 211

<sup>19</sup>(1896) I. L. R. 24 Calc. 83

<sup>21</sup>(1892) I. L. R. 15 Mad. 389

<sup>23</sup>(1907) I.L.R. 34 Calc. 828; I.L.R. 35 Calc. 226

<sup>24</sup>(1881) I. L. R. 4 All. 81

<sup>26</sup>(1897) 1 C. W. N. 493

<sup>28</sup>(1898) I. L. R. 23 Bom. 13

<sup>25</sup>(1878) 3 C. L. R. 112

<sup>27</sup>(1892) I. L. R. 16 Mad. 146

<sup>29</sup>(1865) 3 W. R. 152

<sup>30</sup>(1867) 7 W. R. 266

<sup>32</sup>(1870) 5 B. L. R. 617

<sup>34</sup>(1895) I. L. R. 20. Bom. 495

<sup>31</sup>(1871) 6 B.L.R. 727; 15 W.R. 339

<sup>33</sup>(1903) I. L. R. 27 Mad. 192

<sup>35</sup>(1882) I. L. R. 6 Mad. 76

There is also authority for the proposition that alienation of a religious office may be validly made in favor of a person standing in the line of succession and not disqualified by personal unfitness, *Sitarambhai v. Sitaram*<sup>36</sup> *Mancharam v. Pranshankar*<sup>37</sup> *Annasami v. Ramakrishna*<sup>38</sup>, *Nirad Mohini v. Shibdass*<sup>39</sup> But the appellant does not invite us to go even as far as this proposition. She asks us to assume that a pala or turn of worship is not alienable, except by custom, and contends' that the custom which has been proved in this case should be recognised by the Court: *Raja Vurmah v. Ravi Vurmah*<sup>40</sup> *Gnanasamandha v. Velu Pandaram*<sup>41</sup> This raises the question, whether the custom possesses the characteristics deemed essential for the validity of a custom. These essential attributes were specified by Tindal C. J., in *Tyson v. Smith*<sup>42</sup> in these terms; "A, custom, to be valid must have four essential attributes: first, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin; and fourthly, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect." See also *Hurpurshad v. Sheo*<sup>43</sup> *Raja Vurmah v. Ravi Vurmah*<sup>44</sup> *Lutchmeeput v. Sadaulla*<sup>45</sup> *Ghasiti v. Umrao*<sup>46</sup> In the case before us, the custom obviously satisfies the first, third and fourth requirements. The time when the custom originated is unknown; all that has been ascertained is that, as far as the evidence can be carried back, it has "been in existence. This takes the case out of the rule formulated by Willes J., in *Mayor of London v. Cox*<sup>47</sup> that "a custom originating within time of memory, even though existing in fact, is void at law." There is no force in the contention that the proof of the existence of the custom should have been carried back by direct evidence to 1793 when the first Regulations were passed by the Indian Legislature, if not to the year 1773, when the Supreme Court was established. It is well settled, that evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption, though only a rebuttable presumption, as to the immemorial existence of the

custom. As Tindal, C.J., said in *Bastard v. Smith*<sup>48</sup> on cannot reasonably expect to have it proved that the custom did in fact exist before time of legal memory; but you are to require proof, as far back as living memory goes, of a continuous, peaceable and uninterrupted use of the custom. To the same effect is the observation of Farwell, J., in *Mercer v. Denne*<sup>49</sup> (1): "not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right." It is interesting to note that Vijnaneswara in his *Mitakshara* enunciated a similar rule (Yajnavalkya, Book 11, 27). On the authority of a text of Katyayana, he holds that "time within the memory of man extends as far as a hundred years", as a man has, according to Sruti, a hundred years' duration of life. (*Mitakshara*, trans., Gharpure, p. 50). Apararka, in his commentary on the same text of Yajnavalkya, treats a period beyond three generations (that is one hundred and five years) as time immemorial, and, refers to an earlier text to show that a period beyond sixty years might be treated as time beyond human memory. In any event, it is well settled that if the existence of the custom has been proved for a long period, the onus lies on the person seeking to disprove the custom, to demonstrate its impossibility; in this

<sup>36</sup>(1869) 6 Bom. H. C. R. 250    <sup>38</sup>(1900) I. L. R. 36 Calc. 975    <sup>40</sup>(1876) I.L.R. 1 Mad. 235 : L.R. 4 I.A. 76

<sup>37</sup>(1882) I. L. R. 6 Bom. 298    <sup>39</sup>(1909) I. L. R. 36 Calc. 375    <sup>41</sup>(1899) I.L.R. 23 Mad. 271 : L.R. 27 I.A. 69

<sup>42</sup>(1838) 9 Ad. & E1. 406    <sup>44</sup>(1876) I.L.R. 1 Mad. 235: L.R. 4 I.A. 76    <sup>46</sup>(1893) I. L. R. 21 Calc. 149

<sup>43</sup>(1876) L. R. 3 I. A. 259    <sup>45</sup>(1882) I. L. R. 9 Calc. 698    <sup>47</sup>(1867) L.R. 2. H.L. 239, 258

<sup>48</sup>(1837) 2 Moo. & R. 129, 136

<sup>49</sup>[1904] 2 Ch. 534, 550

case, the mortgagors have entirely failed to meet the evidence of the custom adduced by the plaintiff. There is also no room for serious controversy as regards the certainty and continuity of the custom. The only question, consequently, for consideration is, whether it is reasonable as the appellant contends or unreasonable and opposed to public policy as the respondent asserts. It is indisputable that if a custom be against reason, it has no force in law; but as explained in *Co. Litt.*, 62a, the reason here referred to is not to be understood as meaning every unlearned man's reason, but artificial and legal reason warranted by authority of law; or, as Blackstone puts it, (*Commentaries*, Vol. I, p. 77) it is sufficient if no good legal reason can be assigned against it. When, however, it is said that a custom is void, because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times. *Salisbury v. Gladstone*<sup>50</sup> It is also well settled that the period for ascertaining, whether a particular custom is reasonable or not, is the time of its possible inception; this is in accord with the observation in the *Tanistry Case* (1608) *Davis* 29, 32.: "the commencement of a custom (for every custom hath a commencement, although the memory of man doth not extend to it, as the river Nile hath a spring although geographers cannot Audit) ought to be upon reasonable ground and cause, for if it was unreasonable in the original, no usage or continuance can make it good: Quod ab initio non valuit tractu temporis non convalescet." When tested in the light of these principles, no good ground can be assigned why the custom should be condemned as unreasonable. There is no force in the

contention of: the respondents that because the custom contravenes the rule that a religious office is inalienable, it must be pronounced to be against public policy; if this argument were to prevail, all customs would be unreasonable. Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim, the fact of this inconsistency is not of itself a ground for holding the custom unreasonable and bad: *Tyson v. Smith*<sup>51</sup> Thus in the Tanistry Case (1608) Davis 29, 33., it is said that "several customs which had been adjudged void in our books as being unreasonable against common right or purely against law, if their nature and quality be considered, will be found injurious to the multitude and prejudicial to the Commonwealth. To the same effect is Co. Litt. 113a; "Consuetudo ex certa causa rationabili usitata privat communem begem." Is there then anything to show that the custom is injurious to the endowment or to the Commonwealth? One of the mortgagors has a turn of worship or pala; he is entitled in this character to collect the offerings made to the goddess on the day on which his turn falls; he applies a portion of the income for the worship of the goddess and appropriates the remainder for his personal use. It is not material to consider whether he should not apply the whole of the income for religious and charitable purposes; but let us assume that he and every shebait like him who has a pala may be compelled to do so. He transfers his turn of worship to a person who, in certain contingencies, might in his own right, have been a shebait and might, have held a pala. The transferee, as holder of the pala, is under precisely the same obligation to the endowment as the transferor himself. It is difficult to appreciate how a custom which recognizes and validates a transfer to members of a limited circle under these circumstances can be detrimental to the endowment or to the public. There is no question that a pala of the Kalighat temple is heritable, and it is immaterial whether the heir is a

<sup>50</sup>(1861) 9 H. L. C. 691, 700, 701

<sup>51</sup> (1838) 9 A. & E. 406, 422

male or female; the custom in this respect is established' beyond doubt: *Janokee v Gopaul*<sup>52</sup> There is also no question that though probably religious offices were originally indivisible, they are now deemed partible: *Trimbak v. Lakshman*<sup>53</sup> *Mitta Kunth v. Neeranjan*<sup>54</sup> *Elder Widow v. Younger Widow*<sup>55</sup> *Sethuramaswamiar v. Meruswamiar*<sup>56</sup> *Damodardas v. Uttamram*<sup>57</sup> *Nagiah v. Muthacharry*<sup>58</sup> *Limba v. Rama*<sup>59</sup> *Raman v. Gopal*<sup>60</sup> *Rajeshwar v. Gopeshwar*<sup>61</sup> *Anund v. Boykantnath*<sup>62</sup> *Ram. v. Taruck* <sup>63</sup>*Debendro v. Odit*<sup>64</sup> *Eshan Chunder v. Monmohini*<sup>65</sup> *Goopee v. Thakoordas*<sup>66</sup> Indeed, the very name pala or turn of worship shows that the right is partible. This involves, by necessary implication, the attribute of transferability as amongst the members of the family of shebaits; partition signifies the surrender of a portion of joint right in exchange for a similar right from the co-owner. There is further no question that a pala has not only been deemed heritable and partible; it has also been treated as devisable, as is illustrated by the case of the 'Mister of the first defendant, who obtained a, pala under the testamentary devise of her father. This, again, involves the recognition of the transferable character of a pala; the exercise of thy right to make a bequest implies an assertion of the right to make a transfer inter vivos. It follows, consequently, that the customary right to make a sale, mortgage, gift or lease of a, pala in favor of persons within a limited circle is closely associated with and possibly developed out of the heritable, devisable, and partible character of a pala. A

custom of this description clearly cannot be characterized on any rational ground as unreasonable or opposed to public policy, it is further worthy of note that this is not a novel view of the true character of such a custom; for, as early as 8th August 1810, the validity of a conditional mortgage of a pala effected on the 18th February, 1835, was upheld in a contested litigation. Since every custom sanctioned by the Courts must be reasonable, it follows that every case where a custom has been upheld by the Courts is an example of a reasonable custom. When the evidence is examined from this point of view, the case for the mortgagee is materially strengthened; for, as is clear from the record, not only the existence but also the validity of the custom has been repeatedly recognized by the Courts during at least 70 years prior to the institution of this suit, while no single instance has been found where its reasonableness has been successfully assailed. The diatom of transferability of a pala in favor of a limited circle of transferees must accordingly be held valid, and no good reason has been assigned why it should be deemed unreasonable or opposed to public policy.

26. As regards the third question, it has been argued on behalf of the mortgagors respondents that as Order 34 of the Civil Procedure Code of 1908 applies only to mortgages of immoveable property, the plaintiff is not entitled to a decree for foreclosure; and in this connection, reference has been made to *Eshan Chunder v. Monmohini*<sup>67</sup> and *Jati Kar v. Mukunda Deb*<sup>68</sup> to show that a pala or turn of worship is not immoveable property. There is no substance in this contention. It is well settled that foreclosure is a remedy of the mortgagee which is not confined to mortgages of land; it is equally applicable to mortgages of chattels, as

<sup>52</sup>(1877) I.L.R. 2 Calc. 365, 372

<sup>54</sup>(1874) 14 B.L.R. 166; 22 W.R. 437

<sup>56</sup>(1909) I. L. R. 34 Mad. 470

<sup>53</sup>(1895) I.L.R. 20 Bam. 495

<sup>55</sup>(1807) 1 Mac. Sel. Rep. 180

<sup>57</sup>(1892) I.L.R. 17 Bam. 271

<sup>58</sup>(1900) 11 Mad. L.J. 215, 222

<sup>60</sup>(1897) I.L.R. 19 All. 428

<sup>62</sup>(1867) 8 W. R. 193

<sup>59</sup>(1888) I.L.R. 13 Bam. 548

<sup>61</sup>(1907) I.L.R. 34 Calc. 828

<sup>63</sup>(1872) 19 W. R. 28

<sup>64</sup>(1878) I.L.R. 3 Calc. 390

<sup>66</sup>(1882) I. L. R. 8 Calc. 807

<sup>68</sup>(1911) I. L. R. 39 Calc. 227

<sup>65</sup>(1878) I. L. R. 4 Calc. 683

<sup>67</sup>(1878) I. L. R. 4 Calc. 683

decided by the *House of Lords in Harrison v. Hart*<sup>69</sup> *Tancred v. Potts Fonblnque on Equit*<sup>70</sup>, *Kemp v. West-brook*<sup>71</sup> The case before us is cleanly not that of a pledge of a moveable; such a pledgee, as pointed out *Harrold v. Plenty*<sup>72</sup> is in a very different position from an ordinary mortgagee, as he has only a special property in the thing pledged and may obtain a sale but not a foreclosure. The plaintiff is a mortgagee, not of immoveable but of intangible property, and he is entitled to foreclose the mortgagor quite as much as a mortgagee of chattels. [Jones, on Chattel Mortgages, 1908, Sections 699 and 776.] It is worthy of note that, as early as 1181, Glanville described in detail a remedy applicable to chattel mortgages which is substantially equivalent to the modern procedure for foreclosure and order absolute on failure of the mortgagor to redeem within the period fixed by the Court [Glanville, Tr. Beames, Book X, Ch.. 6-8; Ed. Beale, 1900, pages 201-210]. It may be added that if the contention of the mortgagors were to prevail, they might find themselves in a worse position, than what they would occupy under a foreclosure decree; for, if the procedure for foreclosure, with its consequent opportunity to the mortgagor to redeem, is not applicable, the mortgagee may very well contend that the contract between the parties must be strictly enforced and that, as the time for repayment has passed away, the title of

the mortgagee to the mortgaged property has become absolute; such a result could hardly have been contemplated by the mortgagors.

27. The result is that this appeal is allowed and the decree of the District Judge discharged. On account taken of the sum due on the conditional mortgage in suit on the 16th. November next, it transpires that the mortgagee will be entitled to ₹ 3,421 for principal and interest up to that date. The decree will direct that if the defendants pay this sum, together with costs of all the Courts with 'interest' thereon (as specified in the decree of this Court) on or before the 16th November 1914, the mortgage will stand redeemed. On default, the mortgage will, be foreclosed after the decree absolute has been made by the Primary Court in due course. The hearing fee in this Court is assessed at thirty gold mohurs.

### **Beachcroft J.**

28. I agree with the proposed order on the second ground discussed by my learned brother. On the question of estoppel, I prefer to reserve my opinion.

<sup>69</sup>(1726) 1 Comyn. 393; 2 Eq. Cas. Abr. 6  
<sup>70</sup>5th Ed., 261,

<sup>71</sup>(1749) 1 Ves. Sen. 278  
<sup>72</sup>(1901) 2 Ch. 314