(3) The box may be opened once in a month or oftener as desired by the pujaris but not more than once in a week.

(4) The amount found in the box may be noted by the management; the whole of it should be handed over to the chosen representative of the pujaris on behalf of all the pujaris in case the expenditure for *dhoop*, *deep* and *neivedya* for the period prior to the opening has been met by the pujaris. In case however such expenditure has been met by the management, the balance after deducting such expenses, shall be immediately paid to the chosen representative of the pujaris on behalf of them all.

The last provision has been made to make it clear that the management will not take away the money but immediately give it to the representative of the pujaris for distribution among them. The provisions of the Public Trusts Act will be satisfied, in that the management will be in a position to know how much has gone to the pujaris including the amount spent on *dhoop*, *deep* and *neivedya*. This provision will also take away any objection about there being interference with the private rights of the pujaris under the agreement of 1872.

We therefore allow the appeal, set aside the order of the High Court and restore the revised scheme subject to the modifications suggested by us above. The District Judge will see that these modifications are embodied in the revised scheme. In the circumstances of the case we order parties to bear their own costs.

Appeal allowed.

JIBON CHANDRA SARMA DOLOI

v.

ANANDI RAM KALITA AND OTHERS.

1961

February 23.

(P. B. GAJENDRAGADKAR and K. N. WANCHOO, JJ.)

Brahmottar land—If alienable—Burden of proof—Assam Land and Revenue Regulation, 1886 (Reg. I of 1886), ss. 3(g), 8(1)(a), 9.

The plaintiff-appellant filed a suit alleging that the lands in suit were unauthorisedly transferred to the predecessors in title

1961

Jibon Chandra Sarma Dolot
v.
Anandi Ram Kalita

of the respondents. His contention was that the lands were granted to the Bardeuries (officials) of a certain ancient temple in Assam in order to enable them to render service to the deities installed in the temple and as such the lands were inalienable to strangers other than the Bardeuries.

Held, that in view of the history of land tenure in Assam and by virtue of the relevant statutory provisions of Assam Land and Revenue Regulation (Reg. I of 1886) the lands must be deemed to be heritable and transferable without any restriction. The transferor Bardeuries, who held the lands described as brahmottar lands in revenue records, fell under s. 8(1)(a) and became "land holders" under s. 3(g) of the Regulation and consequently s. 9 applied to them statutorily recognising their rights in the lands to be permanent, heritable and transferable.

To prove the plaintiff-appellant's contention that the lands could be alienated only to a specified class of persons, the onus was on the appellant and not on the respondents to prove the contrary.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 105 and 106 of 1957.

Appeals from the judgment and decree dated April 8, 1954, of the Assam High Court in Appeal from Appellate Decree Nos. 41 and 54 of 1951.

L. K. Jha and *D. N. Mukherjee*, for the appellant.

Naunit Lal, for respondents Nos. 1 to 12.

1961. February 23. The Judgment of the Court was delivered by

Gajendragadkar J.

GAJENDRAGADKAR, J.—These two appeals arise from a suit instituted by the appellant in the Court of the Special Subordinate Judge, Assam Valley Districts, in which he claimed a declaration that the sale deeds of lands described in detail in the various Schedules attached to the plaint were void and for possession of the lands covered by the said sale deeds. His case was that Madhab Temple at Hajo is a very ancient temple and the Assam Rajahs had granted lands to the Bardeuries (temple officials) to enable them to render service to the deities installed in the said temple. The lands thus granted to the temple officials were endowed lands and the same had been burdened with service to the temple ; in other words, the grantees were entitled to enjoy the lands on condition that they rendered the requisite service to the temple. As a corollary of the

burden imposed on the grantees by the said grant the lands were inalienable to strangers though they could be transferred to any of the Bardeuries of the temple. According to the appellant the said lands had originally been granted to Hem Kanta Sarma and Uma Kanta Sarma who were then the worshippers at the temple. The respondents who were impleaded to the suit represented the heirs of the original grantees and assignees from those heirs. The appellant has brought this suit on behalf of the Madhab Temple at Hajo, and his case is that the alienations made by the worshippers in favour of non-worshippers were invalid and so the temple was entitled to claim a declaration as set out in the plaint and to ask for possession of the lands unauthorisedly transferred to the predecessors in title of the respondents. The lands in suit have been described in detail and specified in three Schedules called *Ka*, *Kha* and *Ga*.

The respondents denied this claim. They urged that the original grants were not burdened with service and were alienable without any restriction whatever. They also pleaded that they had purchased the lands bona fide for valuable consideration and without notice of any such burden or obligation subsisting on the lands. Besides, they added a plea of limitation in respect of the lands specified in Schedules *Kha* and *Ga*.

The trial court upheld the appellant's contention and made a finding that the lands in suit were burdened with service with the result that the impugned alienations were void. It also found that the purchasers had not shown that they had made adequate enquiries and so their plea that they were purchasers without notice could not be sustained. On the question of limitation, however, it accepted the plea raised by the respondents in respect of the lands described in Schedules *Kha* and *Ga*. In regard to the lands described in Schedule *Ka* the trial Court directed that the appellant should obtain delivery of possession of the said lands through the transferor-defendants or their heir if the latter were willing to render service to the temple; otherwise the appellant was held entitled to get independent possession and the said transferors

1961

Jibon Chandra Sarma Dolor v. Anandi Ram Kalita

Gajendragadkar J.

would be deemed to have relinquished their interest in the said lands.

This decree gave rise to cross appeals before the District Court. The said appeals were heard together and the appellate court confirmed the decree passed by the trial court in respect of *Kha* and *Ga* lands. In regard to the lands in Schedule *Ka* the appellate court maintained the declaration in favour of the appellant but discharged the conditional decree for possession because it held that in regard to the said lands the appellant must be left to move the sovereign authority to sue for resumption of the said lands.

This appellate decree became the subject matter of two appeals and cross objections before the High Court. The High Court has held that the finding concurrently recorded by the courts below in regard to the burden subsisting on the lands in question was based on evidence most of which was hearsay and the whole of which taken together was meagre and insufficient in law to sustain the said finding. The High Court has also criticised the courts below for placing the onus of proof in regard to the character of the lands on the respondents. According to the High Court it was for the appellant to prove his case in respect of the nature of the original grant. The High Court has then taken into account the fact that the evidence shows that many of the lands were transferred to strangers and that was inconsistent with the case made out by the appellant. Besides, the High Court has referred to the fact that the lands in question are described as Brahmottar lands in revenue papers and that clearly shows that the said lands are heritable and transferable without restriction. On the question of limitation the High Court has accepted the plea of the respondents that Article 144 of the Limitation Act applied. As to the declaration granted to the appellant by the District Court the High Court has observed that the said declaration was absolutely futile. In the result the suit preferred by the appellant has been dismissed with costs throughout. It is this decision which is challenged before us by the appellant with a certificate granted to the appellant by the High Court in that behalf.

The principal point which has been urged before us by Mr. Jha for the appellant is that the High Court was in error in coming to the conclusion that lands in suit which are admittedly described as Brahmottar lands in the revenue records are transferable without any restriction. In support of its conclusion the High Court has referred to the history of the lands, the nature of the initial grant and the recognition of the title of the grantees by the British Government after it conquered Assam and of the several steps taken thereafter. This history has been set out in detail in the Assam Land Revenue Manual (1). From this introduction it appears that Nisf-khiraj (half-revenue paying) estates as distinguished from Khiraj (full-revenue paying) estates form a class of tenure found only in Assam Proper and they have a special history of their own. In 1834, shortly after Assam was annexed by the Government of India it ruled that "all rights to hold lands free of assessment founded on grants made by any former Government must be considered to have been cancelled by the British conquest. All claims therefore for restoration to such tenure can rest only on the indulgence of the Government without any right." This ruling clearly and emphatically brought out the legal consequences of political conquest. Grants made by the previous Governments came to an end and their continuance after the conquest would depend upon the indulgence of the succeeding Government.

It appears that prior to the conquest of Assam under the previous regime the predecessors in interest of the then owners of Nisf-khiraj estates held their lands revenue-free and called themselves lakhirajdars. They continued to describe themselves as such even after their lands were resumed and assessed at half rates. Mr. Scott, the first British Commissioner of Assam, refused to recognise any claims to hold land revenue-free. Research made by him in that behalf showed that even prior to the Burmese conquest of Assam lakhiraj land had occasionally been assessed at five annas a pura (four bighas) in times of trouble by

(1) Vol. I, 6th Ed., p. lxvii.

1961

Jibon Chandra Sarma Doloi v. Anandi Ram Kalita

Gajendragadkar J.

the Assam Rajahs themselves. Basing himself on this precedent Mr. Scott fixed the assessment of the said land at the said rates and subsequently increased it to seven or eight annas a pura. This imposition was known as Police Barangani.

Captain (afterwards General) Jenkins became the Commissioner of Assam in 1834. The lakhirajdars objected to pay the tax imposed on their lands by Mr. Scott on the ground that Mr. Scott intended to levy the said tax temporarily and had promised to remit it. This dispute was referred by General Jenkins to the Government of India who replied that they saw no reason to believe that the tax imposed by Mr. Scott was intended to be temporary, and they added that if it was Mr. Scott's intention it would not be valid because Mr. Scott had not obtained the sanction of the Government in that behalf. Even so, the Government of India directed that a full enquiry should be made into all claims to rent-free lands on the part of Rajahs or as debotter or dharmottar or on any other plea throughout the districts of Assam and Captain Bogle was appointed Special Commissioner to make the said enquiry under Regulation III of 1818. This enquiry had to be held subject to the control and orders of General Jenkins. The Government prescribed certain principles to guide Captain Bogle in his enquiry. One of these principles was that pending the lakhiraj enquiry Mr. Scott's moderate rates were to be levied. The orders issued by the Government in that behalf clearly declared the right of the Government to assess all lands held revenue-free in Assam Proper, but subject to this right Government were prepared to grant the indulgence of restoring to the lakhirajdars all lands held by them and to confirm them in possession.

It appears that the instructions issued by the Government were not fully carried out by General Jenkins. Instead of treating all lakhiraj lands as being on the same footing and liable to assessment the General drew a broad distinction between debotter lands which were appropriated to temples and lands known as brahmottar or dharmottar, that is to say,

lands devoted to some religious purpose not being temple lands. In respect of the former he confirmed the grants revenue-free. In respect of the latter he simply confirmed the grantees in possession subject to the payment of Mr. Scott's favourable rates until Captain Bogle's enquiry was terminated and final orders passed in that behalf.

It is curious that though the enquiry of Captain Bogle went on for many years it was not formally completed till the year 1860. By that time the instructions issued by the Government of India at the commencement of the enquiry were lost sight of. No report was submitted to the Government by the enquiring officer and final orders of the Government of India were not obtained on the question whether the holders of brahmottar and dharmottar lands were to hold their lands at the rates fixed by General Jenkins. In consequence holders of these lands have ever since continued to hold at half rates without any formal decision by the Government of India having been reached in that behalf. Subsequently the holders' rights to continue to hold the lands at the said rates have been recognised and their holdings have been declared to be heritable and transferable by the Government of India in 1879.

This summary of the history of these lands which is to be found in the introduction to the Assam Land Revenue Manual shows that Nisf-khirajdar of the present day "is ordinarily a person whose lands were claimed by his ancestors revenue-free on the ground that they were granted by the Assam Rajas for some religious or charitable purpose". It appears that the word "Nisf-khiraj" was invented for the first time in 1871 and it applied to all estates which paid half the ordinary revenue rates. This word was presumably invented to avoid confusion caused by the use of the word "lakhiraj" which had been applied to them prior to 1871.

The history of this tenure is similarly stated in the Government Gazette relating to Assam as well as by Baden-Powell (Vol. III, pp. 406 following).

1961

Jibon Chandra Sarma Doloi v. Anandi Ram Kalita

Gajendragadkar J.

At this stage it would be necessary to refer to the relevant provisions of Regulation I of 1886. It is called the Assam Land and Revenue Regulation of the said year. Section 3(g) of this Regulation defines "land holder" as meaning any person deemed to have acquired the status of a land holder under s. 8; while s. 8(1) provides, *inter alia*, that any person who has, before the commencement of this Regulation, held immediately under the Government for ten years continuously any land not included either in a permanently settled estate, or in a revenue-free estate, and who has during that period paid to the Government the revenue due thereon or held the same under an express exemption from revenue, shall be deemed to have acquired the status of a land holder in respect of the land. That takes us to s. 9 which provides that a land holder shall have a permanent heritable and transferable right of use and occupancy in his land subject to the provisions contained in cls. (a), (b) and (c) of the said section. It is unnecessary to refer to the said exceptions. It would thus be clear, and indeed it is not disputed, that the transferor Bardeuries who held the lands in suit fall under s. 8(1)(a) and became land holders under s. 3(g). The inevitable consequence of this position is that s. 9 applies to them and their rights in the lands in their occupation are statutorily recognised to be permanent, heritable and transferable. This statutory position is consistent with the declaration made by the Government of India in 1879, and in view of this clear statutory position it would be difficult to sustain the plea that the lands in question are burdened with the special condition that they can be transferred only to Bardeuries and not to any strangers outside the group. As the High Court has found, and that is no longer in dispute, these lands are described as brahmottar lands in revenue records and to the said lands and their holders the statutory provisions of the Regulation to which we have just referred applied; therefore, it is impossible to escape the conclusion that by virtue of the relevant statutory provisions of the Regulation the lands must be deemed to be heritable and transferable without any restriction.

1961

Jibon Chandra Sarma Doloi v. Anandi Ram Kalita

Gajendragadkar J.

This aspect of the matter was completely ignored by the trial court and the appellate court, and so the High Court was right in correcting the error which had crept into the concurrent decisions of the courts below.

Besides, the High Court was also right in holding that in a case of this kind where the appellant urged that the lands could be alienated only to a specified class of persons, the onus was on the appellant and not on the respondents to prove the contrary. Failure to put the onus on the appellant introduced a serious infirmity in the approach adopted by the courts below in dealing with this question. That was another infirmity in their decision. It is also clear that the evidence adduced by the appellant in support of his case to which reference has been made by the first two courts is entirely unsatisfactory, and, even if it is believed, in law it would be insufficient to sustain the plea that there was a limitation on the transferability of the lands in question. We are also satisfied that the declaration granted by the District Court was futile. Therefore, in our opinion, the view taken by the High Court is absolutely correct and the grievance made by the appellant against the validity of the said conclusion cannot be sustained.

In the result the appeals fail and are dismissed with costs.

Appeals dismissed.

N. KASTURI
v.
D. PONNAMMAL AND OTHERS.

1961

February 23.

(P. B. GAJENDRAGADKAR and K. N. WANCHOO, JJ.)

Will—Construction—Bequest to K in the absence of adoption—Testator's intention to adopt K—Authority to adopt given to widow—No adoption made—K's rights, whether vested interest subject to defeasance by subsequent adoption.

A testator, who was childless, executed a will on April 28, 1937, and died on March 10, 1939, leaving him surviving his widow. In cl. 6 of the will he expressed his desire to adopt a boy and stated that in case he did not make an adoption during his life-time his wife shall adopt K. He also conferred authority on his