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SARODA KRIPA LALA v. HARENDRA LAL DAS.

SANDERSON C. J.

Dulhin Mathura Koer v. *Bangshidhari Singh* (1). In that case the point, which is now before us, did not arise and was not dealt with by the learned Judges. For the abovementioned reasons, in my judgment, this Rule should be made absolute. The result is that the order of the learned officiating Subordinate Judge is set aside and the order of the learned Munsif is restored. We make no order as to costs.

CHOTZNER J. I agree.

Rule absolute.

N. G.

(1) (1911) 15 C. L. J. 83.

PRIVY COUNCIL.

GOPAL LAL SETT (DEFENDANT)

v.

PURNA CHANDRA BASAK (PLAINTIFF) AND OTHERS (DEFENDANTS) (AND THE CONSOLIDATED APPEAL).

*P. C.** 1921

Dec. 20.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Hindu Law—Will—Construction—Provision for worship—Absence of gift to idols—Person to whom will addressed and charge of worship given—Shebaitship—Private charity—Civil Procedure Code (Act XIV of 1882), s. 539.

The will of a Hindu testatrix was addressed to her grandson, and provided that out of the income of specified property he should perform the worship of certain family idols, and that he should be the person in charge of the worship. The will contained no gift, express or to be implied, to the idols; and there was no provision for the worship after the death of the grandson.

Present: LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

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Held, that the will conferred the property specified on the grandson charged with the maintenance of the worship, but that no heritable shebaitship was created.

Their Lordships saw no reason to doubt that the Court in appointing trustees would pay due regard to the claims of that branch of the family with whom the worship was established and by whom the services were performed; the gift being a private trust, the settlement of a scheme of administration under section 539 of the Code of Civil Procedure, 1882, was not appropriate.

Decree of the High Court varied.

CONSOLIDATED Appeals (Nos. 169 and 170 of 1919) from a judgment and decree (January 10, 1908) of the High Court in its Ordinary Civil Jurisdiction, the suit having been heard by a Division Bench of two Judges in order to obviate the necessity of an appeal to the Appellate Jurisdiction of the Court.

One Gobind Chand Basak, a Hindu governed by the Bengal School of Hindu Law, died on February 7, 1810. Of his two wives one Bhaggobati Dasi survived him and died on May 29, 1841, having on that date made a will the construction of which was the subject of the present litigation.

The will commenced with the words "To the fortunate Srijut Uday Chand Basak, chief among the prosperous, I, Srimati Bhaggobati Dasi, endite this hukumnama;" it then proceeded to make the provisions stated in the judgment of the Judicial Committee.

The present suit was brought in 1904 in the High Court by the first respondent (deceased), a descendant of Gobind Chand Basak and his wife Kanakmoni Dasi, who had predeceased him, against numerous defendants for the construction of the will, and for a declaration that he was entitled to the shebaitship of the idols. The facts relative to the present decision of the Judicial Committee sufficiently appear from the judgment; the view taken by their Lordships made

immaterial other questions to which the argument at the hearing were addressed.

The Division Bench (Brett and Mookerjee JJ.) by their judgment delivered on 10th January 1908, held that the plaintiff and the defendants, who were descended from Kanakmoni Dasi, were not heirs of Bhaggobati Dasi, and had no right to the shebaitship or estate. The learned Judges also held that the question as to those rights had not been determined by the previous litigation and the decree therein made on 1 December, 1857, referred to in the judgment of the Judicial Committee. They further held that under the will Udoy Chand Basak was sole shebait, but that no heritable right of shebaitship was conferred upon him; that the testatrix dedicated the whole of her stridhan properties to the idols named; that the bequest of the surplus income of the two houses to Manomohini Dasi, Radhakanta Sett, and Golapmoni was limited to their life time; that the succession to the shebaitship opened upon the death of Udoy Chand Basak, and that upon that event Radha Kanta Sett was, according to Hindu Law of the Bengal School, the heir to Bhaggobati Dasi, and entitled to the shebaitship and properties, that accordingly Behari Lal Sett and others were entitled and not the present appellant Gopal Lal Sett and his brother. They further held that Joy Krishna Basak was a lunatic, and therefore excluded from succession. The learned Judges made a decree giving effect to their judgment, and directing that certain accounts should be taken, and that a scheme should be submitted by the shebaits for the approval of the Court for carrying out the religious trusts of the will.

There were two appeals to the Privy Council, consolidated, the first by Gopal Lal Sett (since deceased) one of the defendants, and the second by Purna

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Chandra Basak (since deceased) the plaintiff, and Nanda Lal Basak (also since deceased), both being members of Kanakmoni Dasi's branch.

De Gruyther, K. C., *Dunne*, K. C., *Ramsay* and *S. C. Chaudhuri*, for the representatives of the appellant deceased.

Sir George Lowndes, K. C., *E. B. Raikes* and *Dube*, for the representatives of Purna Chandra Basak, respondent deceased, and other respondents descended from Kanakmoni Dasi.

Upjohn, K. C., and *Kenworthy Brown* for respondents descended from Bhaggobati Dasi through her grandson Radha Kanta Sett.

Parikh for Khoka, minor respondent, through his guardian *ad litem*.

The judgment of their Lordships was delivered by

LORD BUCKMASTER. The history of the litigation of which these appeals form part, extending over a period of sixty-five years, has been carefully and minutely examined in the judgment of the learned Judges of the High Court of Judicature at Fort William in Bengal, from which these appeals have been brought. Their Lordships therefore do not propose to attempt a repetition of the facts, except so far only as may be necessary to explain the reasons for the opinion they have formed.

Several questions of interest and of importance have indeed been raised and argued upon these appeals, but the true construction of the will of the testatrix, Bhaggobati Dasi, lies at the threshold of the dispute, and on the view taken by their Lordships of the true meaning of this document these larger questions do not arise.

The testatrix, who died on 29 May, 1841, was the second wife, and at her death had been for thirty years the widow, of one Gobind Chand Basak, a Hindu governed by the Bengal School of Hindu law. By him she had had three sons and two daughters. The eldest of these sons was Pran Krishna Basak, who predeceased his mother and left two children, Manmohini Dasi and Udoy Chand Basak. The second son, Joy Krishna, was found to be a person of unsound mind in 1838, but he was not a congenital lunatic. The third son, Raj Krishna, died in 1821, leaving no children. The eldest daughter, Tripura Sundari Dasi, died before her mother, leaving a son, Radha Kanta, and the second, Golap Dasi, or, as she is sometimes called, Golapmoni, survived. By the first marriage of Gobind Chand Basak there had been two sons, Radha Krishna Basak and Sri Krishna Basak, both of whom survived the widow, from them there have been numerous descendants, who will be referred to merely by way of description as the Basak Branch of the family. In truth the real quarrel in the present case lies between the two branches of the same family descending from the two wives. Bhaggobati's will was executed on the day of her death. Some question has arisen as to the true translation of the will. The differences do not seem vital, but in any case their Lordships accept the official translation Ex A in the suit No. 711, of 1907. It is addressed to Udoy Chand Basak, her grandson, and contains on the face of it the following statement:—

"Reliance on the feet of Sri Sri Hariji.

Joy Gopal. *Shiba Thakur's.*

Anandamoyi Thakurani's. *Gopal Lal Ji's.*"

This fact that it is addressed to Udoy Chand is important to bear in mind in construing the provisions of the will, for the duties that it imposes are

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clearly placed on him. It relates first to certain property which is referred to as the Company's Paper standing in the name of the testatrix, and directs that out of the income "'you'" (that is Udoy Chand) "shall perform the *sheba* (worship, etc.) of Sri Sri Iswar, and the *sheba* of the ancestral Sri Sri Iswar 'you' shall perform the *sheba* of the said Iswarjew out of the income of the ancestral garden called Iswar Gopal Lal Ji's garden purchased in his name. 'You' shall be the person in charge of the *sheba* of all the deities." There is then introduced a separate and definite gift with regard to two houses, namely a house at Chowringhee and a house at Pathuriaghata, out of ~~which~~ was directed there should be performed the *sheba* of Sri Sri Iswarjew "as it is at present," and that the remainder of the income should be divided between three people, namely, Manmohini, Rada Kanta, the son of Tripura, and Golapmoni, thus making provision for each one of the surviving branches of her own family except Joy Krishna, who was insane. ~~The~~ testatrix then refers again to the balance of the interest accruing from the Company's Paper, and directs how that is to be dealt with in connection with religious services. There is no definite gift of the residue.

The first question that arises is whether the gift is a gift to the idols, or whether there was a gift to any other person or persons charged with the maintenance of the idols. The will is most obscure, but their Lordships think that there is certainly no direct gift of the whole property to the idols, nor in the circumstances ought one to be implied. It is consequently necessary to see in what capacity and by virtue of what right the worship of the idols is to be carried out. The person on whom the duty was cast was undoubtedly Udoy Chand, and the conclusion which

their Lordships have reached is, that if, as they think, there is no gift to the idols, it is only possible to give effect to the provisions of the will by treating it as conferring the property upon Udoy Chand. The will is addressed to him; upon him throughout all the burdens of performing different duties are cast, and this necessarily involves the ownership of the property.

Their Lordships agree with the High Court in thinking that no heritable shebaitship was established by the will Udoy Chand was to be shebait during his lifetime, and so far as the sheba of Iswar Thakurani was concerned, he was directed to perform the ceremonies "according to the existing arrangements of the sheba" in concert with his stepmother, Shiba Sundari; but after his death no express provision was made for the worship, and the necessary duties will have to be performed by persons properly appointed for that purpose.

Although this has never been declared the true interpretation of the will, it is the construction that has in effect been acted upon for a considerable period of time, for Udoy Chand died on the 8th July 1842, and upon his death administration proceedings were instituted by Golap Dasi asking for the usual administration relief. It is unnecessary to pursue the whole course of this suit. Shiva Sundari was, on 14 December, 1857, appointed, jointly with the executors of Udoy Chand, to take charge of the idols, and on her death on 14 August, 1858, members of the branch of the family known as the Basak Branch were introduced into the suit, and from that time down to now some of them have been associated with the performance of the duties.

The result of litigation and other expenses, however, has, as the Board is informed, completely

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exhausted the greater part of the moneys derived from the Company's Paper set apart for the worship of the idols, and the claim has consequently been put forward for the balance of the rents from the two houses, on the ground that the whole of the property was dedicated for the worship of the gods. It is unnecessary for their Lordships to determine whether the effect of the gift in the will which gave the income of this specially appropriated property to the three named beneficiaries without any limitation of time would be sufficient to create an absolute gift, for on 14 December, 1857, by an order made in the administration proceedings, the Court declared that out of the produce of the houses belonging to the estate of the testatrix, situate at Chowringhee and Pathuriaghata, the worship of Sri Joy Gopal should be performed, and that the surplus of the said produce should be paid as follows, namely, to the representatives of Radha Kanta Sett, deceased, one equal third part: to the representatives of Srimati Gopal Dasi, deceased, one equal third part; and to Srimati Manmohini during her lifetime and to her representatives after her death the remaining one equal third part or share. This order, although it contains no express words to that effect, amounts to a clear and effective declaration by the Court as to the absolute interests taken by each of the three named beneficiaries in the will, for the payment to the representatives of the named beneficiaries admits of no other explanation, but to this order the Basak Branch of the family were not parties. They were, however, parties to a suit instituted in 1881, upon which an order was made on the 15 March, 1888, when it was directed that the sum of Rs. 6,842 should be regarded as the surplus income derived from the property set apart for Sri Joy Gopal, and it was ordered that the trustees should divide and

pay the same between the parties entitled in the proportions mentioned in the decree of the 14 December, 1857, that is to the representatives of the three named beneficiaries in equal shares. There has consequently been an order binding all parties, based upon the view that the property in which the three beneficiaries mentioned were interested was segregated from the rest of the estate and set apart for the upkeep of the named idol (Sri Joy Gopal Jee), the surplus belonging to them absolutely in equal shares. This disposes of the whole matter in dispute upon appeal. The learned Judges of the High Court who carefully examined all these proceedings, thought that the question as to the absolute interests of the three named beneficiaries had never been definitely raised and decided, and that the directions already mentioned were only made pending the administration suit. But there is no such limitation in the terms of the order, and such a direction given in an administration suit has the effect of an order binding all parties and determines the construction to which it gives effect, so that after the lapse of time necessary for appeal it becomes final and conclusive. [*See Peareth* v. *Marriott* (1).]

The questions raised as to whether Joy Krishna was prevented from inheriting by virtue of his lunacy, and the point decided by the High Court as to the true reading of the Dayabhaga do not arise, and their Lordships make no pronouncement upon these points. It is only necessary to add that both from the terms of the will of Bhaggobati herself and from the information afforded by the documents, it would appear that one at least of the idols mentioned in the will was ancestral, but even if that were the case their Lordships agree with the High Court in thinking that there

(1) (1882) 22 Ch. D. 182, 191.

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is not sufficient evidence to prove any endowment prior to her death. Their Lordships see no reason to doubt that the Court executing the duty of appointing trustees would pay due regard to the claims of that branch of the family with whom the worship was established and by whom the services were performed, but they regard the gift as in effect a private trust to which the provisions of section 539 of the Code of Civil Procedure, 1882, would not apply, and consequently the establishment of a scheme for its administration, as provided by the decree of the High Court, is inappropriate.

There remains nothing but the question of costs. The appellants have to a certain extent succeeded, but they have gained a barren victory; they have moreover taken 14 years to bring this matter before the Board since the judgment of the High Court. Their Lordships will therefore make no order as to their costs. The cross-appellants, represented by Sir George Lowndes, have failed. Mr. Parikh's client appears in the same interest. The only persons who have succeeded at all are the representatives of the three original beneficiaries; but although the point on which they succeed was undoubtedly raised and argued in the High Court, for reasons that it is not easy to understand, the point was never clearly and definitely raised before this Board, and no complaint was made by them against the judgment of the High Court, although it was adverse upon the point. There was, however, sufficient mention of the matter in the respondents' case to permit of its argument, and when argued no answer to it could be found. Their Lordships are not prepared in the circumstances to allow them any costs.

Their Lordships will therefore humbly advise His Majesty (i) that the appeal No. 169 of 1919 should

be allowed in part and the cross-appeal No. 170 of 1919 dismissed; (ii) that the decree of the High Court of Judicature at Fort William in Bengal dated 10 January, 1908, should be varied by (*a*) discharging so much thereof as directs a scheme to be submitted for carrying out the trusts created by the will of Srimati Bhaggobati Dasi deceased, (*b*) by declaring that according to the true construction of the said will the whole of the property of the testatrix, with the exception of the houses at Chowringhee and Pathuriaghata, was given absolutely to her grandson Udoy Chand Basak, charged with the performance of the worship of the deities mentioned in the said will except the deity Sri Sri Iswarjew, and (*c*) by further declaring that it appearing that by virtue of two decrees, dated 14 December, 1857, and 15 March 1888, the residue of the income arising from the said houses has been directed to be paid in proportions to the three named beneficiaries, Manmohini, Radha Kanta, and Golapmoni and their respective representatives, the question as to the absolute interests taken by the said beneficiaries under the said will is *res judicata* between the parties to these appeals; and (*iii*) that there should be no order as to the costs of these appeals.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *P. W. Box & Co.; Watkins & Hunter; T. Page Thomas.*