APPELLATE CIVIL.

Before Woodroffe and Cuming JJ.

GAURIKUMARI DASEE.

v.

RAMANIMOYI DASEE.*

1922

July 4.

Debattar—Founder's right to alter line of succession of shebait in contravention to deed of endowment.

The creator of a *debattar* (trust) is not entitled to make a change in the order of succession of *shebaits* unless he made a reservation to that effect in the deed of gift.

SECOND APPEALS by Gaurikumari Dasee, the plaintiff.

These three appeals arose out of three suits for the recovery of arrears of house-rents. The three holdings in respect of which the arrears were due were *debattar* properties within the Burdwan Municipality. The creator of the *debattar* died leaving two widows. The younger widow brought one of these suits as the *shebait* and the other widow the remaining two suits. The elder widow claimed to be the *shebait* and made the younger widow a *pro formâ* defendant in the suits instituted by her. Similarly the elder widow was made a *pro formâ* defendant in the other suit. Each suit was hotly contested by the rival widows, each asserting her own right to receive rent as *shebait*. The tenants in some of the suits submitted that they were ready to pay rent but that payment could not be made

* Appeals from Appellate Decrees, Nos. 1416, 1514 and 1515 of 1920 against the decrees of Parada Kinkar Mukherjee, District Judge of Burdwan, dated March 31, 1920, reversing the decrees of Hem Chandra Mitra, Munsif of that place, dated Jan. 29, 1919.

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because demands were made by both the widows. One of the issues in the suits was—was the plaintiff entitled to get rent.

The Munsif decreed the suit by the younger widow and dismissed the other suits, holding that the younger widow was the *shebait* legally appointed by the donor.

The elder widow appealed in all the suits. The District Judge, on a construction of the deed of gift held that the donor had no right to appoint the younger wife the *shebait* in contravention of the terms of the deed. He therefore decreed the appeals.

The younger widow appealed to the High Court, making the other widow and the tenants respondents.

Dr. Dwarka Nath Mitra (with him *Babu Bankim Chandra Mukherji*), for the appellant. In this case the appointment of the first wife as *shebait* had not taken effect. The founder of the endowment could, during his life time, make a provision for the devolution of the office of *shebait* after his death. It would be unreasonable to say that the founder, if he found that the *shebait* whom he had nominated would not be able to perform the duties of a *shebait*, would not be able to change the line of succession of the *shebait*. In the present case, moreover, there is a clause in the deed of endowment by which Umacharan reserved to himself the right to make arrangement for the devolution of the office of *shebait* by another document if he liked. In the next place, Umacharan was the *shebait* during his life time. There is nothing to prevent Umacharan from making arrangements for the management of the *debattar* properties during his life time; as such my client would be entitled to the rent during his life time. There is a finding by the Court of first instance, which is not displaced on

appeal, that my client was bearing the expenses of worship of the deity.

Babu Mahendra Nath Roy (with him *Babu Gopendra Nath Das* and *Babu Pramatha Nath Bandopadhyaya*), for the respondents. The founder has no right to alter the line of succession to *shebaitship* unless there was an express reservation in the original deed of endowment. In the present case the reservation could only operate after the death of the two widows and in default of son, whether natural born or adopted. There was no power of reservation so far as the two widows were concerned.

Babu Bankim Chandra Mukherji, in reply.

WOODROFFE J. These are three appeals, Nos. 1416, 1514 and 1515 of 1920, which are analogous, though a question arises in the second and the third appeals as to whether an appeal lies, a question which does not arise in the first appeal.

The first appeal arises out of a suit brought by the second wife of one Umacharan Dey for recovery of rent. An objection was taken by the defendants in that suit that the plaintiff-appellant had no title to sue as the *shebait* and that the title of *shebait* was in the elder widow of Umacharan Dey. Umacharan Dey executed a deed of gift in respect of his movable and immovable properties, constituting the same *debattar*, in the year 1915 and making himself the first *shebait*. That document provided for the devolution of the office of *shebaitship* as follows: "After my demise my eldest wife, Srimati Ramankumari Dasee, shall be the *shebait* of the deities and after her my youngest wife, Srimati Gourikumari Dasee, shall be the *shebait*. After the death of my both wives, if there be any son born from the womb of my said wives, then that son will be the *shebait*, and, for want of

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that, if I take any son as *dattak*, the said *dattak* son shall be *shebait*. If through misfortune there be no son born of me and in case I could not take a son as *dattak*, then the *shebait* or *shebaits* selected by me, by a will or any other document of my properties, he or they shall be *shebaits*. The *debattar* properties will be managed by the *shebaits* after me." Now it is clear law that Umacharan Dey could not make any change in the order of succession of *shebaits* unless he had made a reservation to that effect in this deed and the question before us in this appeal is whether upon a true construction of this document there had or had not been such a reservation as entitled him to appoint, as he subsequently did, his second wife as *shebait*. In my opinion he had no authority to appoint his second wife as *shebait* as he did in the year 1917. Upon the construction of this document I think that after the death of Umacharan Dey, his eldest wife was to be the *shebait* and after her his younger wife and after the death of both of them either the natural son or the adopted son of the creator of the trust, and it is only after the two wives had taken in the order mentioned in the document and in the absence of any natural or adopted son that provision was made in the deed for selection of a *shebait*. In my view, therefore, Umacharan Dey was not competent to pass over the eldest wife who was the *shebait* under the deed of 1915 and to make an appointment in favour of the younger wife by the deed of 1917.

But then it is said that for 19 months of the period for which rent is claimed the rent accrued due during the lifetime of Umacharan Dey. It is then argued that even if Umacharan Dey could not validly appoint his second wife to succeed him after his death, he might have appointed his second wife to act during his lifetime. Assuming that he could have done this

and assuming that the plaintiff-appellant could have during the life time of Umacharan sued to recover on behalf of the deity the rent accruing due during the lifetime of Umacharan Dey, we have it as a fact that no such suit was brought. Now there is an arrear of rent for the period as mentioned. The question arises who is entitled to sue for recovery of such arrears which involves the discussion of the question with which I have already dealt and the answer to which is that only the senior widow can sue to recover such rent on behalf of the deity.

Therefore, in my opinion, this appeal fails and must be dismissed with costs.

As regards two other appeals, a further objection is taken on the ground that no second appeal lies and I am disposed to think that there are some grounds for this contention. But it is not necessary to decide this question because on the merits the two appeals must fail for the reasons which I have given in dealing with the construction of the deed of dedication in the first appeal. The second and third appeals are also dismissed with costs.

The connected Rules are discharged. No order is made as regards the costs of the Rules.

CUMING J. I agree.

Appeals dismissed.

S. M.