ORIGINAL CIVIL.

Before Lort-Williams J.

1932

Nov. 24;
Dec. 7, 8.
1933

Jan. 9.

KANDARPAMOHAN GOSWAMI
v.
AKSHAYCHANDRA BASU.*

Hindu Law—Deed of dedication—Construction—Shebâitship, *if a property—Rules as to succession of* shebâitship—*Gift—Inheritance—Estate descendible to eldest male heirs only—Provision of a rule of inheritance unknown to Hindu law—Validity of provision—Frame of suit.*

Shebâitship is a kind of property and not merely an office and the rules for succession laid down in *Tagore* v. *Tagore* (1) apply to it. Thus a settlor can provide for succession to it by deed or will, so long as he does not attempt to create an estate unknown to Hindu law.

Monohar Mukherji v. *Bhupendranath Mukherji* (2) followed.

By a deed of dedication the settlors, who were Hindus, dedicated certain property to a deity and appointed themselves as *shebâits* for their lives with power to appoint their successors by deed or will and it was provided that, in default of such appointment, their respective named spiritual guides, or, in case of death of either of them, his eldest male heir, was to act jointly with the surviving settlor—and, after the death both settlors, the two spiritual guides or their eldest male heirs were to act jointly and thenceforth their eldest male descendants. It was also provided that every future *shebâit* could appoint, by deed or will, his successor in office. One of the settlors acted as a *shebâit* and died without appointing her successor, when her spiritual guide became a *shebâit* and continued as such until his death. His eldest male heir K. now claims to be a *shebait* under the terms of the deed. The other settlor never acted as a *shebâit* and, on her death, since her spiritual guide was then dead, his only son A. claimed a *shebâitship.*

Held: (1) on a construction of the deed of dedication, that the settlors attempted to provide for succession to *shebâitship* partly by way of gift and partly by way of inheritance;

(2) that A. took the *shebâitship* by way of gift;

(3) that as the deed did not provide for a gift over of *shebâitship* to K. upon the death of his father, K. could only take by way of inheritance from his father who was validly appointed.

Madhavrao Ganpatrao v. *Balabhai Raghunath* (3) distinguished;

(4) that the provision in the deed for succession to a *shebâit* by certain of his heirs to the exclusion of others who would otherwise have rights of inheritance is an attempt to create a line of inheritance unknown to Hindu law and is, therefore, invalid and so K. has not been validly appointed as a *shebâit*;

*Original Suit, No. 837 of 1931.

(1) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.
(2) (1932) I. L. R. 60 Calc. 452.
(3) (1927) I. L. R. 52 Bom. 176; L. R. 55 I. A. 74.

(5) that a gift of a *shebâitship* direct to K. upon the the death of both the settlors the trustees under the terms of the settlement having power to appoint a *shebâit* at the death of K's father in default of appointment by him, would be of an uncertain and shifting character and was never intended by the settlors :

Tagore v. *Tagore* (1) referred to ;

(6) that the suit, though not brought in the name of the idol, was brought by the plaintiff in his representative capacity as the *shebâit* of the named idol and was not thereby badly framed.

ORIGINAL SUIT.

The relevant facts and arguments of counsel are set out in the judgment.

J. C. Hazra and *S. Hazra* for the plaintiff.

S. N. Banerjee, *H. C. Majumdar* and *S. N. Banerjee* (Jr.) for the defendant, Akshaychandra Basu.

Cur. adv. vult.

LORT-WILLIAMS J. By a deed of settlement, dated the 13th September, 1916, Surabala Dasee and Sarojabala Dasee dedicated a certain piece of land and a temple and a house erected thereon to a certain deity, which they had installed and consecrated therein, and appointed themselves as *shebâits*, and conveyed to themselves, as such *shebâits*, the said properties upon trust, to supervise and manage the *shebâ* and periodical festivals thereof, and defray the expenses out of money to be paid to them by trustees of the temple, derived from properties to be settled thereafter for the maintenance of the *shebâ*. The *shebâits* were to have no proprietary interest in the temple, land or house, but were to be entitled to a share of the daily offerings. The deed further provided that the settlors should be the *shebâits* for their lives, with power by deed or will to appoint their successors.

In default of such appointment by the said Sreemati Surabala Dasee her spiritual guide, Babu Mahendranath Chatterji of Salkea, or, in case of his death, his eldest male heir, and, in like default by the said Sreemati Sarojabala Dasee, her spiritual guide, Babu Harimohan Goswami, or, in case of his death, his eldest male heir, jointly with the suvivor of the said settlors, and

(1) (1872) 9 B. L. R. 377 ; L. R. I. A. Sup. Vol. 47.

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after the death of both of the said settlors, and, in default of such appointment as aforesaid, the said two spiritual guides or their or his eldest male heir shall act as joint *shebâits* of the said deity, and thenceforth the future *shebâits* shall consist of the eldest male descendant of the said Mahendranath Chatterji and the said Harimohan Goswami, provided always that every future *shebâit* of the said deity shall have like power to nominate and apoint by deed or will his successor in office.

In case any *shebâit* should become incapable or unfit, he could be removed, and the person next entitled to become *shebâit* was to succeed in his place, and, on failure thereof, the trustee or trustees for the time being of the temple and the dedicated properties was to nominate and appoint a proper *shebâit* in the office, it being the intention of the settlors that at no time should there be less than two *shebâits* of the deity.

By an indenture made at the same time, Sarojabala Dasee, in order to provide for the maintenance of the *shebâ*, settled the whole of her property, including certain property in Calcutta, on trust, and appointed the defendant Akshaychandra Basu to act as trustee, with power to manage the said property and to supervise the management of the *shebâits* appointed under the deed of dedication, and apply the income to be derived from the settled property as therein directed, and appoint *shebâits* in case of failure under the terms of the deed of dedication.

By her will, dated 29th December, 1916, Sarojabala Dasee left all her property on trust to the said Basu, to secure an income for the maintenance of the *shebâ*, and, by a further settlement, dated the 13th March, 1917, she made a further settlement dedicating the Calcutta property to the deity.

Sarojabala acted as *shebâit* until she died in April, 1917, without appointing her successor. Thereupon, the said Harimohan Goswami acted as *shebâit*. Surabala never acted as *shebâit*. On the 19th July, 1921, Harimohan Goswami died, without having appointed any successor. Thereupon, the plaintiff acted as *shebâit* in his place. On the 20th April, 1931, Surabala died, without appointing her successor.

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In this suit, the plaintiff, who is the only son and, therefore, the eldest male heir of Harimohan Goswami, alleges that he is the *shebâit* under the terms of the deed of dedication, and sues the first defendant, A. C. Basu as trustee of the *Thâkur*, and of Sarojabala's property, and the second defendant, Abinashchandra Chatterji, as *shebâit*, on the ground that he succeeded Surabala under the terms of the deed, being the eldest male heir of Maneendranath Chatterji. Both the plaintiff and Abinashchandra Chatterji were alive at the time when the three deeds and the will were made.

The plaintiff states that the first defendant has failed to carry out the directions contained in the deeds of settlement and dedication, and claims various reliefs against him. No relief is claimed against the second defendant. Further, he makes a claim against the first defendant in respect of another idol, which belongs to the first defendant. In my opinion this claim cannot be made in this suit, which is brought against the first defendant in his representative capacity only, by the plaintiff as the *shebâit* of a different idol.

By his written statement, the first defendant asks the Court to construe the deeds and decide whether the plaintiff and Abinashchandra Chatterji or either of them is entitled to be *shebâit*. He further alleges that the plaintiff is a person of licentious and criminal habits and unfit to be a *shebâit*, and that he has brought this suit to forestall the first defendant, who was about to take steps to remove him from the office of *shebâit*. The second defendant says that the plaintiff has wrongfully excluded him from acting as *shebâit*.

The following issues were raised :—

(1) That the plaintiff is not a *shebâit*, and has no right to sue because

(*a*) the settlors were not the founders of the *shebâ* ;

(*b*) the deed of dedication prescribes a line of inheritance unknown to the Hindu law.

(2) That the plaintiff is not a *shebâit*, on the ground that, as no property was given to the idol, the dedication was not valid.

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(3) That the suit was not brought in the name of the idol as it should have been.

(4) That the suit is time-barred.

(5) That the plaintiff has been paid already more than he is entitled to, and that it is for him to account to the defendant and not *vice versa*.

(6) That the personal claim with regard to the other idol cannot be included in this suit.

I have already decided the last issue in favour of the defendants. Issue No. 5 is a matter of account and I have not investigated it. No 4 has not been pressed and, in my opinion, the suit is not barred by limitation. I find No. 3 in favour of the plaintiff. It is sufficient in this case, for the plaintiff to bring the suit in his own name, but in his representative capacity as *shebâit* of the named idol. There is no substance in No. 2, which I find in favour of the plaintiff. Apart altogether from the property settled in the hands of the trustees, the deed of dedication vested a temple, a dwelling-house and a piece of land in the hands of the *shebâits*. As to issue No. 1 (*a*), I hold that Surabala and Sarojabala were the founders of the *shebâ* as appears from the deed of dedication.

There remains to be decided the issue No. 1 (*b*), upon which the first defendant has mainly relied. This raises questions which are not free from difficulty, but certain rules are now beyond dispute. The settlors were Hindus, and the deeds must be construed, so far as is possible, in accordance with Hindu law. The office of *shebâit* is a kind of property and not merely an office, and the rules laid down in the case of *Tagore* v. *Tagore* (1) apply to it. *Manohar Mukherji* v. *Bhupendranath Mukherji* (2). Thus, although the settlors may provide for succession to the office, they must not in so doing attempt to create an estate unknown to Hindu law, and a provision that the succession is to be held by certain heirs of the founder to the exclusion of others in a line contrary to the Hindu law of inheritance is invalid. This rule, in my opinion, applies equally to

(1) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.

(2) (1932) I. L. R. 60 Calc. 452.

a provision for succession by certain heirs or descendants of a *shebâit*, who has been validly appointed, to the exclusion of others among his heirs or descendants, who, but for the provision, would have rights of inheritance. Subject to certain statutory exceptions, which are immaterial in the present case, a gift cannot be made to a person who is not in existence at the time of the gift.

On the other hand, a document ought to be construed in such a way that the intention of the maker shall be given effect to, so far as his meaning can be ascertained from the document, and so far as his intention is in accordance with law. If, therefore, a gift is made to a certain person and his heirs according to a line of succession, not in accordance with the law of inheritance, the gift may be valid so far as those persons are concerned who are qualified to take as a gift, though not by way of inheritance.

Applying these principles to the facts of this case, it is clear that the settlors attempted to provide for succession to the office of *shebâit*, partly by way of gift and partly by way of inheritance, and that the latter part is invalid because it is contrary to law. The former part is valid, because it provided that at the death of Sarojabala, and in default of appointment by her by deed or will, her successor in office should be Harimohan Goswami, with a like power to appoint, and Harimohan Goswami was alive at the time of her death and accepted the gift. Similarly, in my opinion, the second defendant A. C. Chatterji was validly appointed. The deed provided that at the death of Surabala, Maneendranath Chatterji, or, in case of his death, his eldest male heir, should be her successor. This, in my opinion, means, that if Maneedranath Chatterji is dead at the time of Surabala's death, then his eldest male heir is to take by way gift. Maneendranath Chatterji was dead at that time, and A. C. Chatterji was his eldest male heir, and was then alive, and accepted the gift, and acted as *shebâit*, so far as he was allowed to do so by the plaintiff.

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The only question, therefore, which remains is whether the plaintiff can be said to have taken by way of gift over upon the death of his father Harimohan Goswami, or whether he could only take by way of inheritance, under a provision which was and is invalid. That depends upon whether an intention that he should take by way of gift over, can be ascertained from the document. He was alive, and was the eldest male heir of Harimohan Goswami at the time when the settlement was made, and, therefore, may have been within the contemplation of the settlors as an individual, apart from his heirship.

In my opinion, the deed does not provide for a gift over to the plaintiff upon the death of Harimohan Goswami. It means only, as I have already stated, that if Harimohan Goswami happens to be dead at the time when Sarojabala dies, without having made any appointment, then his eldest male heir is to take by way of gift, but not otherwise. If Harimohan Goswami happens to be alive, then he is to take by way of gift, and after his death his eldest male heir is to take by way of inheritance. This distinguishes the present case from *Madhavrao Ganpatrao* v. *Balabhai Raghunath* (1).

It is just possible to argue, though this argument was not raised by counsel on behalf of the plaintiff, that, although the gift vested in Harimohan Goswami at the death of Sarojabala, and upon his death, without having made any appointment, the right of appointment then vested in the trustees as provided in the deed; yet the deed further provided that, after the death of both the settlors, and, in default of appointment by them, the two spiritual guides or their or his eldest male heir should act as *shebâits*, and, therefore, the *shebâitship* vested in the plaintiff by way of gift upon the death of Surabala. Such a gift would be of an uncertain and shifting

(1) (1927) I. L. R. 52 Bom. 176; L. R. 55 I. A. 74.

character, somewhat similar to that which was described in *Tagore* v. *Tagore* (1), and, in my opinion, was never intended by the settlors.

The result is that the plaintiff has not been appointed validly as *shebâit*, and is not a *shebâit* under this settlement. Consequently, he cannot bring this suit, and there must be judgment in favour of the defendants with costs.

Attorney for plaintiff: *B. P. Bhattacharya.*

Attorneys for defendant: *K. Ghosh, L. M. Dhar.*

G. K. D.

(1) (1872) 9 B. L. R. 377 (410); L. R. I. A. Sup. 47 (79, 80).