ORIGINAL CIVIL.

Before Panckridge J.

THE ADMINISTRATOR-GENERAL OF BENGAL

1934
Jan. 4, 10.

v.

LALBIHARI DHAR.*

Hindu Law—Shebâitship, *succession to—Construction of will—Words of description and limitation—Limitations, when void.*

A testator, by his will, created a religious endowment and, in clause 11 of the will, provided for the devolution of the *shebâitship* of the *Thâkurs* in the following words: "I appoint my sons Kartikchandra Dhar and Ramchandra Dhar to be the *shebâits* of the said *Thâkurs* and I direct that, upon the death, retirement or refusal to act of any of them or any of the future *shebâits*, the then next eldest male lineal descendant of Kartikchandra Dhar or Ramchandra Dhar shall act as a *shebâit* in place of the deceased or retiring *shebâit* or *shebâit* refusing to act as such, it being my intention that the eldest for the time being in the male line of the said sons Kartikchandra Dhar and Ramchandra Dhar shall always remain as joint *shebâits* and, in the event of the death or refusal to act of any *shebâit*, the then next male member of the branch, to which the *shebâit* dying or refusing, belonged shall act as a *shebâit* in his place and stead."

Held that the words in clause 11 could not be construed to mean an independant gift to persons who answer the description of the eldest male lineal descendants of the original *shebâits* at the time of their deaths;

Held, further, that the clause attempted to lay down a line of succession which is not permissible under the Hindu law and was, therefore, invalid.

Manohar Mukherji v. *Bhupendranath Mukherji* (1) relied upon.

Madhavrao Ganpatrao Desai v. *Balabhai Raghunath Agaskar* (2) distinguished.

Kandarpamohan Goswami v. *Akshaychandra Basu* (3) relied on.

ORIGINATING SUMMONS.

The Administrator-General of Bengal, being administrator *de bonis non* of the estate of the testator Lakshminarayan Dhar, deceased, took out the

*Original Suit No. 1690 of 1933 (Originating Summons).

(1) (1932) I. L. R. 60 Calc. 452. (2) (1927) L. R. 55 I. A. 74.
(3) (1933) I. L. R. 61 Calc. 106.

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summons for determination of the following enquiries:

(1) On a true construction of the will of Lakshminarayan Dhar, is the appointment of *shebâits* after the death of Ramchandra Dhar and Kartikchandra Dhar (since deceased) and the line of succession to *shebâitship* created by clause 11 of the said will valid?

(2) If not, who are the persons at present entitled to act as *shebâits* of the deities mentioned in the said will in the events which have happened?

(3) In the events which have happened, to whom is the income of the residuary estate to be made over?

The facts of the case and arguments of counsel appear sufficiently from the judgment.

Pugh and *S. B. Sinha* for the Administrator-General of Bengal.

S. N. Banerji (*Sr.*) and *S. N. Banerji* (*Jr.*) for Lalbihari Dhar.

S. M. Bose and *N. C. Chatterjee* for Banbihari Dhar, Rashbihari Dhar and Bankubihari Dhar.

Sarkar, Advocate-General, and *P. C. Basu* for Ganeshchandra Dhar.

Cur. adv. vult.

PANCKRIDGE J. This originating summons is concerned with the legality of certain dispositions in the will, dated November 18, 1923, of Lakshminarayan Dhar, who died on March 26, 1927.

The testator left three sons, Ramchandra, Kartik, and Ganesh. Ramchandra and Kartik were appointed executors by the will. Kartik died before probate was obtained, and probate was granted on March 13, 1928, to the surviving executor Ramchandra. Ramchandra died on October 17, 1928,

and on April 25, 1929, letters of administration *de bonis non* were granted to the Administrator-General of Bengal.

By clauses 9 and 10 of the will, a religious endowment was created, and by clause 11 of the will the following provisions were made for the devolution of the *shebâitship* :—

I appoint my sons Kartikchandra Dhar and Ramchandra Dhar to be the *shebâits* of the said *Thâkurs* and I direct that, upon the death, retirement or refusal to act of any of them or any of the future *shebâits*, the then next eldest male lineal descendant of Kartikchandra Dhar or Ramchandra Dhar shall act as a *shebâit* in place of the deceased or retiring *shebâit* or *shebâit* refusing to act as such, it being my intention that the eldest for the time being in the male line of my said sons, Kartikchandra Dhar and Ramchandra Dhar, shall always remain as joint *shebâits* and, in the event of the death or refusal to act of any *shebâit*, the then next male member of the branch, to which the *shebâit* dying or refusing, belonged shall act as a *shebâit* in his place and stead.

The Administrator-General now seeks to have it decided who are the persons who are not entitled to act as *shebâits*.

The other parties to the summons are Lalbihari Dhar, Banbihari Dhar, Rashbihari Dhar and Bankubihari Dhar, who are the sons of Ramchandra, Nitaichand Dhar, who is the son of Kartik and Ganesh, the surviving son of the testator.

Ganesh contends that the provisions of clause 11 of the will are an attempt to create a line of succession to the *shebâitship* according to rules which are repugnant to the principles of Hindu law, and he relies on the decision of the Full Bench in *Manohar Mukherji* v. *Bhupendranath Mukherji* (1). If this view is correct, it follows that, as both the *shebâits* appointed by the will are dead, the *shebâitship* devolves upon the heirs of the testator. The other parties to the summons maintain that the *shebâits* are Lalbihari, the eldest son of Ramchandra, and Nitaichand, the only son of Kartik. It is argued that they succeed their respective fathers, not according to any line of succession laid down by the will, but directly under the will, as though they were

(1) (1932) I. L. R. 60 Calc. 452.

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named therein, and it is pointed out that, as they were both alive at the date of the death of the testator, their position is not affected by the rule of Hindu law, which forbids a bequest to a person not in existence when the bequest takes effect, that is, at the death of the testator. *Tagore* v. *Tagore* (1).

Before deciding this question, I must notice two preliminary points raised on behalf of Lalbihari and Nitai.

It is suggested that, by reason of a certain undertaking given by Ganesh, he is precluded from opposing the claim of his nephews to succeed.

It appears that Ganesh opposed the grant of probate to Ramchandra and filed a caveat. The matter was set down as a contentious cause, but was eventually compromised, and, by consent, probate was granted and the caveat discharged: it was also agreed that the costs of both parties as between attorney and client should come out of the estate, and, in consideration of this, Ganesh undertook "not to "bring any further suit regarding the will". Now, in my judgment, such an undertaking must be construed strictly, and I find it quite impossible to hold that for Ganesh to submit his views as to the validity and construction of clause 11 of the will, in proceedings initiated by the Administrator *de bonis non*, is a breach of an undertaking by him not to bring a suit regarding the will.

The other point has not really been insisted upon, although the learned Advocate-General has made some observations with regard to it. In August, 1928, Madanmohan Dhar, the son of Ganesh, instituted a suit claiming to be the assignee of the interest of Ganesh in the testator's estate, and asking, among other things, for the appointment of Ganesh as *shebâit*. The suit was dismissed by Buckland J. on March 27, 1930. An appeal was filed and dismissed by Rankin C.J. and Pearson J. on April 22, 1931. The judgment of the Court in its

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

appellate jurisdiction has been reported—*Madan Mohan Dhur* v. *Netai Gour Jew* (1). I have read both judgments, and it is abundantly clear that the point, now in issue, was never decided, and that the reason why the suit and appeal were dismissed, was that all the learned judges were of opinion that it was not competent for the plaintiff to enforce the rights, if any, of Ganesh to the *shebâitship*. It is true that the opinion was expressed that Lalbihari was, in any view, one of the *shebâits*, but nothing was said on the question whether his title was based upon the will or upon his being an heir of the testator.

Mr. Banerji for Lalbihari relies on the decision of the Judicial Committee in *Madhavrao Ganpatrao Desai* v. *Balabhai Raghunath Agaskar* (2). In that case, a settlor gave, subject to his life interest, one-fourth of the settled property to "my daughter "Krishnabai during her life for her sole and separate "use and after her death, in trust for the male heirs "of the said Krishnabai share and share alike." It was held that the decision of the Bombay High Court that the gift to the male heirs was bad, as creating an estate in tail male, was wrong, and that there was an independent gift to the persons who answered the description of male heirs at Krishnabai's death, subject to the exclusion of those who were not living when the deed of settlement was executed.

In my opinion, that case must be distinguished from the present case. As is pointed out in the judgment delivered by Lord Buckmaster, the gift to the male heirs was absolute, whereas here there is no absolute gift to the heirs of Ramchandra and Kartik or to their next eldest lineal male descendant. On the contrary, a perpetual succession is sought to be established, whereby on the death, retirement, or refusal to act, of the eldest male lineal descendant for the time being of either of the two original *shebâits*, the next eldest male lineal descendant succeeds to the *shebâitship*.

(1) (1931) 37 C. W. N. 801. (2) (1927) L. R. 55 I. A. 74.

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The facts of this case and the language of clause 11 of the will appear to me to resemble closely the facts in *Kandarpamohan Goswami* v. *Akshaychandra Basu* (1) and the language of the deed of settlement with which that case was concerned.

I hold, accordingly, that clause 11 cannot be construed as an independent gift to the persons who happen to answer the description of the eldest male lineal descendants of the original *shebâits* at the time of their deaths. In my opinion, the clause attempts to lay down a line of succession which is not permissible under the Hindu law and is, therefore, invalid on the authority of *Manohar Mukherji* v. *Bhupendranath Mukherji* (2).

It follows that the answer to question No. 2 in the originating summons must be that the persons at present entitled to act as *shebâits* to the deities mentioned in the will are the heirs of the testator Lakshminarayan Dhar.

This disposes of the other questions.

The Administrator-General is entitled to his costs as of a hearing out of the estate as between attorney and client.

Ganesh is also entitled to his costs as of a hearing out of the estate. The other parties to the summons may have one set of costs out of the estate between them.

I certify for counsel.

Attorneys for the Administrator-General of Bengal: *H. N. Datta & Co.*

Attorneys for Lalbihari Dhar: *P. L. Mullick & Co.*

Attorney for Banbihari Dhar, Rashbihari Dhar and Bankubihari Dhar: *M. S. Mallik.*

Attorneys for Ganeshchandra Dhar: *N. C. Boral & Pyne.*

P. K. D.

(1) (1933) I. L. R. 61 Calc. 106. (2) (1932) I. L. R. 60 Calc. 452.