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The case must go back to the Court of first instance for retrial upon its merits.

The respondents must pay to the appellant the costs of the proceedings in all the Courts so far as they have gone, inasmuch as it was at their instance that the preliminary objection has been allowed.

*Appeal allowed.*

## PRIVY COUNCIL.

P. C.* 1882 *November* 17. *December* 9.

JANOKI DEBI (PLAINTIFF) *v.* GOPAL ACHARJIA GOSWAMI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Fort William in Bengal.]

*Hindu Law—Endowment—Succession to the management of a religious endowment, as sebait—Usage of the institution.*

On a claim to succeed to the management, as sebait, of a religious institution endowed with property, it was contended that in the absence of prescribed rule, or of established usage, succession took place according to the ordinary rules of the Hindu law of inheritance, where the sebait led a family life.

*Held*, that, where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage. In the present instance the usage did not support the claim; and, upon the evidence, the claimant, who was out of possession, failed to make a title.

APPEAL from a decree of the High Court (29th January 1877), upholding a decree of the Subordinate Judge of Manbhoom (31st August 1874), whereby appellant's suit was dismissed.

The appellant claimed to succeed to the management of a religious endowment, as sebait, and set up a title relying on the application of the ordinary rules of the Hindu law of inheritance.

Whether those rules were applicable to the succession to the management of this institution, and also, whether a title under them had been made out, were questions decided, among others, in the judgment of the High Court (1), forming the subject of this appeal.

(1) *Janokee Debia* v. *Gopal Acharjea*, I. L. R., 2 Calc., 365.

*Present:* LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

The endowment, of which the appellant claimed to have inherited the maurasi right of management, with possession, comprised 57½ villages, described in the plaint as brahmottar and debattar lands, in Pergunnah Chauriau in Manbhoom, valued at more than 2½ lakhs of rupees.

These had been granted by former Rajahs of Panchkot or Pachit, for maintaining the Séba, or worship, of Keshab Rai, a local deity worshipped at Bero by the gurus of the family of the Rajah for the time being. The principal respondent who asserted his right to the guddi of the institution was Sri Gopal Acharjia Goswami, the natural father of the appellant's deceased husband, Bijai Lakhan. According to the appellant's case, Bijai had been duly adopted in infancy by Lakhan, formerly a sebait of the institution, who died in 1859. Bijai died in 1863, a minor and childless, leaving the appellant his widow, also then a minor, on whose behalf, as she now alleged, the Déb Séba was performed by her relations; and according to a ruffanama, with which she now declined compliance, part of the income of the institution was set apart for her.

As to the validity of the adoption of Bijai Lakhan, which had been disputed on the ground of his having been the eldest son of his natural father, there was no appeal preferred against so much of the judgment of the High Court (1) (MARKBY and MITTER, JJ.) as held the adoption not to have been thereby invalidated.

As to another question, *viz.*, whether, inasmuch as the institution at Bero had been endowed by the Pachit Rajahs, the title of any sebait was complete without confirmation of it by the Rajah of the day (the present Rajah having intervened as a defendant), both the Indian Courts had found against the Rajah's having any such right.

All the facts material to this report are stated in their Lordships' judgment.

On this appeal,—

Mr. *Cowell* appeared for the appellant.

Mr. *C. W. Arathoon* for the respondents.

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For the appellant it was argued that, where (as here) the sebait led a family life, in the absence of any rule prescribed for the succession to the head-ship of the institution by those who had endowed it, and also in the absence of any established usage in the matter, the office of sebait descended in the family according to the ordinary rules of inheritance of Hindu law. Reliance was placed on the words of Sir T. Strange (1), who, after distinguishing lands endowed for religious purposes as not inheritable at all, as private property, adds: "Though the management of them, for their appropriate object, passes by inheritance subject to usage, as in the case of many of the religious establishments in Bengal, where the superintendence is, by custom, on the death of the incumbent, elective by the neighbouring 'mohants' (2), or principals of other similar ones." In the case of this institution the right of management of the property forming the endowment was not severed from the religious office; and no such usage as was referred to in the above, and in *Greedharee Doss* v. *Nundokissore Doss Mohunt* (3), had been proved. Without such proof of special usage the widow's claim, founded on the ordinary rules of inheritance, could not be defeated, and her title was complete. The burden of proving either prescribed rule, or special usage, was on the defence, and neither of them having been proved the canon of descent by Hindu law must prevail.

Reference was also made to Strange's Hindu Law, Vol. I, Chap. IX; and to Vol. II, appendix to Chap. IX, a note by Colebrooke; Mayne's Hindu Law and Usage, s. 364; *Widow of Rajah Chutter Sein* v. *Younger widow* (4); *Jotindro Mohun Tagore* v. *Ganendro Mohun Tagore* (5); *Rajah Chundernath Roy* v. *Kooar Gobindnath Roy* (6); *Mussamut Jai Bansi Kunwar* v. *Chattardhari Singh* (7); *Rajah Ramalinga* v. *Perianayagam Pillai* (the *Ramnad case*) (8); *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (9).

(1) 1 Strange, Hindu Law, Chap. VI, p. 151.

(2) In the evidence in this case the Bengali word "sebait," and the Hindustani "mohant" were used indifferently.

(3) 11 Moore's I. A., 403.

(4) 1 Sel. Rep., 180.

(5) 9 B. L. R., 377.

(6) 11 B. L. R., 86

(7) 5 B. L. R., 181.

(8) L. R., 1 I. A., 209.

(9) 12 Moore's I. A., 523; 8 B. L. R., P. C., 13.

For the respondents Mr. *C. W. Arathoon* argued that the ordinary rules of the Hindu law of inheritance were not applicable in this case; and that, had they been so, the appellant had failed to show a good title according to them. If the ordinary rules of inheritance prevailed, a title traced through four succeeding daughters could not be said to accord with any rule of Hindu law. But both the Courts in India had found that the succession in this case was not regulated by the Hindu law of inheritance, and thus the claim was not maintainable. As a general rule, moreover, a woman could not hold the office of sebait; and, if this institution was to be considered an exceptional one, proof of its being so should have been given by the plaintiff. On the contrary, however, the weight of the evidence showed that no one except the *Raj Guru of the Pachit family* could be the sebait of the institution at Bero. Again, the defendant Sri Gopal Acharjia had a title supported by family arrangement, and equity favored such arrangements, when made *bonâ fide*, as this had been. On the question, how the office of sebait should be disposed of, where, from circumstances, there could be no recourse to any rule of the foundation, reference was made to *Mahdo Das* v. *Kamta Dass* (1); *Niranjan Barthi* v. *Padarnath Barthi* (2).

Mr. *Cowell* replied.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The appellant in this case brought a suit to recover possession of certain properties which she alleged in the plaint to be partly brahmottar and partly debattar, the latter being dedicated to certain deities of the names of Keshab Rai and others, and also for the possession of the deities themselves from the hands of the first defendant, Sri Gopal Acharjia Goswami. Although the plaintiff described part of the properties claimed as her own brahmottar, which had devolved upon her by right of inheritance, it appeared on the hearing before the first Court, and was admitted by both parties, that the whole of the properties claimed belonged to the deities.

The plaintiff's case was that the properties were in the possession of Lakhan Acharjia Goswami as sebait of the idols; that he

(1) I. L. R., 1 All., 539.

(2) 1 S. D. A. (N. W. P.) 1864, p. 512.

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having no son of his body, took the plaintiff's husband, Bijai Lakhan Acharjia, in adoption, and died in October or November 1859; that Bijai Lakhan being then a minor, his mother took possession of the properties on his behalf, the right of sebaitship having devolved upon him in the same way as any other property of the deceased would have devolved upon him by right of inheritance; that the idols were established by a remote ancestor of her husband, and the right had devolved from one person to another, following the rule which governs the succession of an ordinary heritable property.

The plaintiff further alleged that the mother remained in possession, on behalf of her minor son, up to 1863, when he died, and the right of sebaitship devolved upon the plaintiff, as his widow, but she being then a minor her mother-in-law managed the Déb Séba for her up to the time of her death, which occurred in March 1864; that upon the death of her mother-in-law, the first defendant, Gopal Acharjia, one of the respondents in this appeal, who was the natural father of Bijai Lakhan, attempted to take possession of the properties along with the Déb Séba, and was opposed on her behalf by her father and maternal uncle, the second and third defendants and also respondents, and that a compromise was effected between them, which the plaintiff sought to set aside as collusive. As the father and uncle do not appear to have had any legal authority to act as the plaintiff's guardians, and the compromise has not been relied upon, it is unnecessary to notice it further.

The defence of Gopal Acharjia was, that the suit was barred by the law of limitation; that the adoption of the plaintiff's husband was not valid according to Hindu law; that the plaintiff, being a female, was not competent to perform the duties which ordinarily devolve upon a sebait, and to fill the office; and that, according to the usage of the family, and the rules regulating the appointment of mohants to the guddi, he was entitled to succeed to the Déb Séba estate on the death of Bijai Lakhan, and the plaintiff had no right whatever; that originally the Déb Séba was founded by an ancestor of the present Rajah of Pachit, and the title of sebait was not complete unless he was confirmed in his appointment by the Rajah of Pachit for the

time being; and that Rajah Nilmoni Sing Deo, the present Rajah, had made the confirmation in his favor. Rajah Nilmoni Sing Deo was added as a defendant, and put in a written statement to the same effect as the last allegation.

The first Court decided the question of limitation in the plaintiff's favour, and the defendants did not appeal from that decision. It then found that the plaintiff's husband Bijai was duly adopted by Lakhan Acharjia, and the customary ceremonies of adoption were performed, but that, he being the eldest son of Gopal Acharjia, his adoption by Lakhan was invalid.

The suit was dismissed, and the plaintiff appealed to the High Court, which held that the lower Court was wrong in holding that the adoption of the plaintiff's husband was invalid by reason of his having been the eldest son of his natural father; but upon the question whether the plaintiff was entitled upon the death of her husband to succeed as sebait, the Court held that, although there was no satisfactory evidence that the appointments of sebait had been made by the Rajah of Pachit, the evidence did not establish the plaintiff's right to succeed under the Hindu law of inheritance. The appeal was therefore dismissed.

The plaintiff has appealed to Her Majesty in Council, and it has been contended on her behalf that, in the absence of prescribed rules, or usage, the ordinary law of inheritance applies.

It appears to follow from the judgments of their Lordships in *Greedharee Doss* v. *Nundokissore Doss Mohant* (1), *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (2), and *Rajah Vurmah Valia* v. *Rajah Vurmah Mutha* (3), that when, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage.

The greater part of the villages in dispute were dedicated to the idols more than a century ago, by the then Rajah of Panchkot or Pachit, and from time to time other villages have been added to the endowment. The first sebait was Rungraj

(1) 11 Moore's I. A., 428. (2) L. R., 1 I. A., 209.
(3) L. R., 4 I. A., 76 (see p. 83): S. C. I. L. R., 1 Mad., 235.

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Goswami, who left an only daughter, Auchuma, who married, and had issue an only daughter, Beucooma; she married, and her only issue was a daughter, Lukhipria, and according to the plaintiff's case Lukhipria had an only daughter, Kedro Bibi, who married Lakhan Acharjia, and had a son, Srinibash, the grandfather of the plaintiff's husband. The plaintiff asserted that the four daughters succeeded each other as sebaits; the defendant Gopal on the contrary asserted that their husbands were the sebaits. It appeared, however, that Lukhipria held the guddi for nearly 60 years, her husband having died first, which is inconsistent with the latter contention. Now, whether the four daughters succeeded each other or their husbands were the sebaits, the succession was not according to Hindu law, as a daughter's daughter is not an heir except in certain cases of stridhan, and a son-in-law has no right of succession. There is no doubt considerable difficulty in ascertaining what is the rule of succession to this office, but it is certain that the usage has not been according to the ordinary rules of inheritance under Hindu law. Not only does the usage not support the plaintiff's claim, but it is opposed to it. It is not for their Lordships to consider whether there is any infirmity in the title of the respondent Gopal, who has been in possession many years, with the consent, if not by the appointment, of the Rajah. The plaintiff being out of possession must recover upon the strength of her own title, and not on the weakness of that of the defendant. Their Lordships have, therefore, only to consider whether the appellant has made out her title, and they are of opinion that the High Court was right in holding that she had not. They will humbly advise Her Majesty to confirm the judgment of the High Court, and to dismiss the appeal. The costs will be paid by the appellant.

*Appeal dismissed.*

Solicitors for the appellant: *Messrs. Barrow and Rogers.*
Solicitor for the respondents: *Mr. T. L. Wilson.*