1910

RAM PRASAD BHAGAL v. SUBA RAI.

language of sections 74, 75 and 76 is much wider than the language of the corresponding section in the Rent Act, XII of 1881, and that plants such as 'jasmine and bela' are included in the expression 'other products.'

The court below has not come to any finding as to the value of the plants themselves. It is therefore necessary to remit an issue under the provisions of order XLI, rule 25, Civil Procedure Code, for a finding as to the value of the plants.

We may here note that the defendants did in the written statement contest the right of the plaintiff to recover compensation for the plants.

No further evidence need be taken. Ten days will be allowed for objections on the return of the findings.

Issues remitted.

Before Mr. Justice Richards and Mr. Justice Tudball.

1910

February 28.

MOHAN LALJI AND ANOTHER (PLAINTIFFS) *v.* MADHSUDAN LALA AND OTHERS (DEFENDANTS).*

Hindu law—Succession—Religious endowment—Ballavacharya Gosains.

Held that where there is a dedication of property by a private individual for religious purposes, in the absence of any proof of disposal or direction by the dedicator, the trusteeship will vest in the latter's heirs.

Held also that as regards temples belonging to the Ballavacharya Gosain sect the ordinary rule of succession of the Hindu law does not apply; but the succession is regulated by special customs.

In the present case a custom set up by the plaintiffs by which a daughter's sons were entitled to the succession was held not to have been established. *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (1), *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (2) and *Srimati Janoki Debi* v. *Sri Gopal Acharjia* (3) referred to.

THIS was a suit to recover possession jointly with the defendants of a temple belonging to the Ballavacharya Gosain sect and certain movable and immovable property appurtenant thereto. The facts of the case are fully stated in the judgement of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

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* First Appeal No. 288 of 1907 from a decree of Siraj-ud-din, Judge of the Court of Small Causes of Agra, exercising the powers of a Subordinate Judge dated the 5th of August, 1907.

(1) (1889) I. L. R., 17 Calc., 3. (2) (1874) L. R., 1 I. A., 209.
(3) (1882) L. R., 10 I. A., 82; I. L. R., 9 Calc., 766.

1910

MOHAN LALJI v. MADHSUDAN LALA.

The Hon'ble *Pandit Sundar Lal* and The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

RICHARDS and TUDBALL, JJ. :—The suit out of which this appeal arises was brought to recover joint possession of a certain temple of the Ballavacharya Gosain sect, in which the images of Balkrishna are placed, together with a grove and the movable property, ornaments and other articles appurtenant thereto. The plaintiffs are the sons of one Ganga Betiji, a daughter of one Goswami Muttuji Maharaj. The original defendants were Anrudh Lala and Madhsudan Lala, the sons of one Gurdhana Betiji (another daughter of the said Goswami Muttuji Maharaj) and Damodar Lala, the husband of Gurdhana Betiji. When the suit was first instituted, the plaintiffs merely claimed joint possession with Anrudh Lala and Madhsudan Lala. Whilst the suit was pending, Anrudh Lala died unmarried, leaving his father Damodar Lala as his representative. Again, pending the suit, Tikait Gordhan Lalji, who is now the principal defendant and respondent, brought a suit against Anrudh Lala and Madhsudan Lala, claiming that, under the custom observed by the sect, he was entitled to possession of the temple and other property. That suit was referred to arbitration, and the arbitrators decided in favour of Tikait Gordhan Lalji and the custom set up. Gordhan Lalji was thereupon by an order of the court, dated the 25th August, 1905, made defendant to the present suit. Apparently by an oversight the plaint was not amended in the lower court, though the plaintiffs deny *in toto* this defendant's right to possession. The proper issues, however, were framed and the parties went to evidence thereon, and we have therefore allowed the plaint to be amended by adding a prayer for his ejectment.

He, Gordhan Lalji, (as also did Goswami Muttuji Maharaj) belongs to a sect called the Ballavacharya Gosains. This sect originated over four hundred years ago. It was established by a man of the name of Ballav, son of Lachman Bhat; the doctrine which he originated was opposed to that of the celibate Gosains. He held that the ideal life consisted rather in social enjoyment than in solitude and mortification, and, contrary to the ordinary rule of the celibates, he married and had two sons, Gopi Nath and

Bithal Nath. Bithal Nath had seven sons, and they founded seven temples or *gaddis* which are still in existence. These seven principal *gaddis*, which are called "the Tikait temples," have acquired considerable property representing offerings and dedications of the followers of the sect. The Maharajas (as the Ballavacharya Gosains are styled) are supposed by their followers to be personages of great sanctity, and it is even sometimes said that they are incarnations of the deity himself. They do not inter-marry on account of the objection that they are all of the same *Gotra*. Their wives are daughters of Bhats and their daughters are married to the sons of Bhats. The history of the temple in dispute is not very ancient. In the plaint it was alleged that the said Goswami Muttuji Maharaj was the owner of the property in suit. This was denied by the defendants, who alleged it to be temple property or *debutter*. The lower court found on the issue in favour of the defendants, and that finding is accepted by Mr. *Chaudhri* on behalf of the appellants in this court; but he maintains that the appellants are entitled jointly with Madhsudan Lala to the possession of the property in the capacity of *shebaits* or superintendents and managers. There is a dispute between the parties as to whether the temple was built by Muttuji or his father, but the evidence goes to show that it was the son who built it and first exercised the functions of a Gosain therein. The immovable property is comparatively speaking of small value, being confined to a small grove and the temple in dispute. No villages or landed property had been dedicated for its support. But it is probable that in this temple, like many others of its kind, the offerings of the votaries are very considerable. As to its history, the witness Chaturbhuj, a witness for the respondents, says that Dauji Maharaj (otherwise Damodarji, see pedigree at page 68R.), presented Muttuji with the idol of Madan Mohanji and that he presented the idol on the terms that "if a son or sons should be born to Muttuji's father they would regularly perform the *sewa puja* ceremonies, but if there should be none, it would be returned to him." The witness Ballu says that the building of the temple had begun before the mutiny, that Muttuji built it and that the land belonged to Girdhar Lalji and the temple was built with the latter's

1910

MOHAN LALJI v. MADHSUDAN LALA.

permission. Dauji was the grandfather of Girdhar Lalji (see pedigree at page 68R). Both of them were Tikaits, that is to say, they were the eldest male descendants in a line from one of the seven sons of Bithal Nath. The documentary evidence on the subject is exhibit A, which is a letter said to have been written by Muttuji to Girdhar Lalji. A translation of the letter is to be found at page 75R. Dauji and Girdhar Lalji were both Tikait Gosains, holding in succession a Tikait temple, and the defendant is the eldest son and successor to Girdhar Lalji. The plaintiffs claimed the property in the first instance as being their personal property by inheritance from Muttuji; it was never alleged that they or Muttuji were the dedicators of the grove, temple or idol, and we are satisfied that such a claim could never successfully have been made. The court below has found, and the finding has been accepted in this court orally by Mr. *Chaudhri* (who thereby abandoned pleas Nos. 3 and 13 in the memorandum of appeal), that the property was "*debutter*" or "*waqf*," and the real question which was argued in appeal has been whether or not the plaintiffs are entitled along with the sons of the other daughter of Muttuji to succeed to the management of the temple and the temple property. Mr. *Chaudhri* claimed that either Muttuji or his father dedicated the property to the deity, and as no scheme of management by the dedicator has been proved, the right of superintendence and management vests in the legal heirs of Muttuji. A large volume of evidence was given in the court below on both sides. The plaintiffs contend that unless the defendant Tikait Gordhan Lalji successfully proved a legal custom excluding daughter's sons, they as the heirs of Muttuji (according to the ordinary Hindu Law of inheritance in respect of private property), were entitled to succeed to the management of the temple. The court below has found upon the evidence that the defendant did prove the existence of a custom amongst the Ballavacharya Gosain sect excluding daughter's sons, and that the plaintiffs had failed to prove that daughter's sons inherited the management of Ballavacharya Gosains' temples. The contention in appeal before us was that the defendant had entirely failed to prove such a custom and that the evidence adduced on behalf of the plaintiffs demonstrated that, so far

from there being a universal custom excluding daughter's sons, the very contrary prevailed in other temples. All this argument proceeded on the basis that under the circumstances of the case the ordinary rule of Hindu Law as to inheritance prevailed, unless a custom contrary to that rule was proved, and that the onus of proving this custom rested on the defendant. We are inclined to think if this foundation of the appellants' argument was sound, a great deal might be said for the proposition that the defendant has failed to prove a universal custom excluding daughter's sons.

We propose now to consider the all-important question whether this basis of the appellants' case is well founded. It must be admitted that where there is a dedication of property by a private individual for religious purposes, in the absence of any proof of disposal or direction by the dedicator, the trusteeship will vest in the latter's heirs (*vide* I. L. R., 17 Calc., p. 3). It is contended, however, on the part of the defendant Gordhan Lalji that this rule does not apply to a case like the present, which raises the question of who shall be the *shebait*, not as between the heirs of a dedicator of property for religious purposes, but between claimants to the *shebaitship* against another person already in possession of the office and who is admittedly capable of performing the functions of the office. Their Lordships of the Privy Council observed in the case of *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (1):—"But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation and to be guided by them." This case was referred to in the case of *Srimati Janoki Debi* v. *Sri Gopal Acharjia* (2), and at page 37 their Lordships re-assert:—"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 case out of which this

(1) (1874) L. R., 1 I. A., 209, (228). (2) (1882) L. R., 10 I. A., 32; I L. R., 9 Calc., 766.

1910

MOHAN LALJI v. MADHSUDAN LALA.

appeal to their Lordships of the Privy Council arose raised also a question of succession between rival claimants to the *shebaitship*. At page 38 of the volume their Lordships further say :—"There is, no doubt, considerable difficulty in ascertaining what is the rule of succession to this office, but it is certain that the usage had 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 appointment) of the Rajah."

In the present case it was never alleged, much less proved, that Muttuji dedicated any property; on the contrary, Damodarji, the ancestor of the defendant, was the recorded zamindar of the grove and the site of the temple. Probably the property belonged to the Tikait temple of which Damodarji was the manager, and if, as alleged by a witness, the first idol was presented to Muttuji, it was probably one of the smaller idols, which had been "sitting in the lap" of the larger idol in the Tikait temple. We think under the circumstances of the present case that the onus did not lie on the defendant Gordhan Lalji to prove a universal custom excluding the daughter's sons. The evidence in the case establishes one or two matters beyond all doubt. We may mention in the first place that it has been admitted at the bar in the clearest possible manner that in the case of Tikait temples, that is, of the principal temples of the sect, the ordinary rule of Hindu Law as to inheritance does not apply, and that on the contrary the succession invariably goes by the rule of lineal primogeniture and that daughters and daughter's sons are always excluded. It is also demonstrated by evidence that there are portions of the worship in a Ballavacharya Gosain temple which cannot be performed by any person other than a Ballavacharya Gosain. The plaintiff's own witness, Goswami Deokinandan Acharya, says, at page 4A:—"*In some cases* the daughter's son does inherit his maternal grandfather's property. We, Acharyas, have a large following of disciples at different places where the disciples would object to have any body as their Acharya unless he belonged to the Ballav-Kul, and

where there is not such a large following, the Acharya *does sometimes appoint* his own relative to the *gaddi* and there are such instances. The daughter's son does not worship the Thakurji in the temples, which are not in his charge, but in cases where the temple is *given to him* (daughter's son) he does perform the worship. I mean to say that the daughter's son does not worship the Thakurji in the present times, but he used to do it in former times. The founder of Ballav-Kul was Ballav himself and Lachmanji was the father of Ballav Acharya. Lachman Das was a Bhatta. About two or three hundred years ago, the daughter's son was allowed to worship the Thakurji in the *Mandir* of Ballav-Kul even though it was not in his charge."

Question (put to the witness):—"For what reason has the daughter's son since been prohibited from worshipping the Thakurji in the temple of Ballav-Kul Maharaj?" (Objected to by Mr. Muncha Shanker as the witness cannot have any personal knowledge).

Answer (subject to objection):—"On one occasion one of the Bhatjis performed the *Arti* (light waving ceremony) without waiting for the Ballav-Kul Maharaj. Since that time we have stopped them from performing the worship, as we fear that they might do a lot of other things without our permission. The Bhatji has the right of worshipping, and in one or two *Mandirs* of my own a Bhatji does perform the worship. *It is not true that we are governed by the Hindu law. We have our own customs,* and where the Hindu Law agrees with our sectarian rules (customs) we follow it." In cross-examination the witness says:—"With the exception of the three instances I have mentioned, the custom is not to allow a daughter's son to worship the idol. * * A *Mandir* which has been given over to a Lalji or Bhatji and in which the Bhatji worships the idol, is not called the temple of Ballav-Kul at all. It is our custom that the *Mandir* and every thing *in it* which has once belonged to the Ballav-Kul does remain with the Ballav-Kul, and I have already given my reason for the same."

It is hardly necessary to mention that a daughter's son can never be a Ballavacharya Gosain. It will be seen from this evidence given by the plaintiffs' own witness that the sect is not

1910

MOHAN LALJI v. MADHSUDAN LALA.

governed by the Hindu Law, and that it is only in cases more or less rare that a daughter's son has been allowed to succeed to a Gosain temple, and the result of so succeeding has been to cause the temple to cease to be a Ballavacharya Gosain temple. Again, Gopal Lalji, another Ballavacharya Gosain witness examined on behalf of the plaintiffs, admits (*vide* A 14) that succession of a daughter's son is by no means universal, is rather rare, and there is at least a part of the office of a Ballavacharya Gosain which cannot be performed by a Bhat. There is undisputed evidence, (see pp. 6, 15A, plaintiffs' own witnesses), that in two cases daughters of Ballavacharya Gosains nominated Ballavacharya Gosains to their Ballavacharya Gosain temples, passing over their own sons who were Bhats. This, if the ordinary Hindu Law had prevailed, they would have no power to do, and the fact that they did do so is a strong ground for believing that it is unusual and improper that a Bhat should succeed to the management and superintendence of a Ballavacharya Gosain temple. It seems to us that it would be improper for the Court to establish on the *gaddi* persons who, on the admission of the plaintiffs' own witnesses, could not properly perform the office, and whose presence as *shebaits* would degrade or at least lessen the importance of the temple. We are also of opinion that the plaintiffs' own evidence and the admission at the bar as to Tikait temples demonstrate that the ordinary Hindu Law of inheritance does not apply to the succession in the case of the *shebaitship* of these temples, and that the onus lay on the plaintiffs of showing that they were the persons entitled to the office under the customary law of the sect. It is unnecessary for us to go so far as to hold with the learned Judge that the defendant proved by evidence a universal custom as to the exclusion of the daughter's son. We have not thought it necessary to deal at length with the evidence adduced by him. It has been fully dealt with by the court below. In our opinion the defendant's evidence, corroborated as it is by the plaintiffs' evidence already referred to, proves clearly that, whatever may be the custom or usage in this sect in regard to succession to the management of temples, the ordinary rule of inheritance under Hindu Law does not prevail. We have now to see whether the plaintiffs' evidence establishes any custom or usage under

1910

MOHAN LALJI v. MADHSUDAN LALA.

which the daughter's sons are entitled to succeed to the management of the temple in dispute.

We have already quoted at some length from the evidence of the only two Ballavacharya Gosains called by the plaintiffs, and that very evidence in itself shows that there is no such custom or usage in force.

The other witnesses are Bhats or other classes of Gosains. They profess to give eleven instances in which daughter's sons have inherited temples from their maternal grandfathers. The evidence is vague and leaves it in doubt whether these maternal grandfathers were Bhats or Ballavacharya Gosains.

It is unnecessary to deal at length with this evidence. It has been fully discussed in the judgement of the lower court. We agree with that court that it falls far short of proving any such custom or usage as is put forward by the plaintiffs, especially in view of the instances in which arrangements have been made in certain temples by the widows and daughters of sonless Gosains to instal other Ballavacharya Gosains on the *gaddis* to the exclusion of their own grandsons and sons, who were Bhats.

The burden of proof being on the plaintiffs, they have in our opinion failed to discharge it. Their suit was therefore properly dismissed. It is unnecessary to decide the other points raised in the case.

We therefore dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Richards and Mr. Justice Tudball.

1910

February 28.

PARSOTAM RAO TANTIA AND ANOTHER (PLAINTIFFS) *v.* RADHA BAI (DEFENDANT).*

Partition—Suit for partition of family property—Subsequent suit by one defendant against another for declaration of title—Res judicata.

Where a suit for partition, to which all the members of the family are parties, has once been finally decided, it is not competent to a party defendant to such suit to reopen the questions thereby determined in a fresh suit for a declaration of right as against a co-defendant. *Sheikh Khoorshed Hossein* v. *Nubbee Fatima* (1), *Dost Muhammad Khan* v. *Said Begam* (2), *Assan* v. *Pathumma* (3) and *Ashidbai* v. *Abdulla Haji Mahomed* (4) referred to.

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* First Appeal No. 25 of 1908 from a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 7th of January, 1908.

(1) (1878) I. L. R., 3 Calc., 551.
(2) (1897) I. L. R., 20 All., 81.
(3) (1897) I. L. R., 22 Mad., 494.
(4) (1906) I. L. R., 31 Bom., 271.