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was in force and was succeeded by his widow and the widow died after the coming into force of the Tenancy Act of 1926, the succession would be governed by sub-section (2) of the new Tenancy Act, and that the nearest collateral male relative in the male line of descent who shared in the cultivation of the last male occupancy tenant at his death would not be entitled to succeed under section 24 of Act III of 1926 or otherwise.

Bajpai, J.

For the reasons given above my answers to the various questions that have been referred to me for opinion are:

Question 1: The succession would be governed by sub-section (2) of the new Tenancy Act.

Question 2: No.

Question 3: No.

Question 4: No.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

NAND KUMAR DATT (DEFENDANT) *v.* GANESH DAS (PLAINTIFF)*

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Civil Procedure Code, section 60—*Property saleable in execution*—Pari *or turn to receive offerings at a temple—Unconnected with any personal services or duties to be performed—Civil Procedure Code, section* 52—*Assets of deceased person in the hands of his heir—Right to receive a periodical future income.*

Where offerings are made to a deity at a temple and the persons who have a right to receive the same have not to render services involving qualifications of a personal nature, such as officiating at the worship, as a consideration for the receipt of the offerings, such a right is transferable property and can be attached, in execution of a decree, and sold by auction to the general public. Where there is no connection between the receipt of a share of the offerings and the performance of the service at the temple, the sale is not restricted to a limited class of persons and can be made to the general public.

*First Appeal No. 102 of 1931, from a decree of J. N. Kaul, First Additional Subordinate Judge of Benares, dated the 2nd of February, 1931.

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In execution of a decree against the assets of a deceased person in the hands of his heir, the right to receive the offerings periodically in future can be attached and sold, as being such an asset, and not only the collections which have actually been made by the heir.

Messrs. *P. L. Banerji* and *Gadadhar Prasad*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a first appeal by defendant No. 1 Nand Kumar Datt against a declaratory decree of the trial court. The plaintiff Ganesh Das brought a suit for a declaration that property consisting of "*paris*" or shares in the offerings of a number of temples in Benares city was liable to attachment and sale in execution of a decree passed in favour of the plaintiff in suit No. 141 of 1922 against the assets of one Kameshwar Panda in the hands of his daughter defendant 2, Mst. Betwi. In appeal two grounds have been raised. Firstly that the lower court was wrong in holding that the sale deed of 10th September, 1919, which was prior to the decree and was in favour of defendant 1 executed by Kameshwar Panda, his brother, was a bogus transaction; and secondly that the court below wrongly decided issue No. 5 in favour of the plaintiff and that the court should have held that these "*paris*" are emoluments attached to an office and that the holder of the office can transfer his right in the office and the emoluments attached thereto to another co-sharer in the office but that the plaintiff who was a stranger and a bania could not claim the offerings as detached from the office because it was only by virtue of the services rendered as panda that the emoluments fell due.

The judgment then discussed the evidence on the question of the genuineness of the sale deed and agreed with the lower court in finding that this sale deed in favour of Nand Kumar Datt was a bogus transaction and was not intended to pass the property in question.

The point of law remains as to whether the plaintiff should receive a declaration that the *paris* in question are liable to attachment and sale in execution of the plaintiff's decree. The case was not argued exactly on the lines set out in the first ground of the memorandum of appeal, but it was claimed that the *paris* could only be transferred in favour of another co-sharer in the office so that they could not be put up for auction sale to the public. Now against this contention, in the first place there is the sale deed on which the title of the appellant is based. That sale deed sets out that the property is one "possessed by me exclusively in which I have no other co-sharer or partner and in respect of which I have got all sorts of rights of alienation". In paragraph 2 of the sale deed it is set out that the vendee "is at liberty to exercise any proprietary right he likes; he may mortgage, sell or make a gift, etc. of the same; he may do whatever he likes". These expressions clearly set out that the property is one which may be transferred to any member of the public without any limitation whatever. The case for the appellant is now entirely different and he claims that the property is only transferable to a co-sharer. This claim was not put forward in the written statement which was filed on the 22nd March, 1930. It was only a year later, on the 23rd January, 1931, that a plea was put forward as follows: "Such *paris* at temples are not attachable and saleable according to law." This was somewhat modified by a statement further down in the same pleading: "The properties in dispute consist of *paris* at temples which are *not usually* attachable and saleable according to law."

Now a certain number of rulings have been produced on each side. For the appellant reliance was placed on the case of *Durga Prasad* v. *Shambhu* (1), which was a ruling in regard to the *birt* of a mahabrahman and it was held that the *birt* of a mahabrahman is a right to

(1) (1919) I.L.R., 41 All., 656.

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personal service and cannot be sold in execution of a decree for money. That was a ruling of the year 1919. It may be pointed out that the functions of a mahabrahman as described in the ruling are those of personal service. "This *birt*, as we understand it, is the office of a mahabrahman who officiates at funerals of Hindus and performs certain ceremonies." The next ruling on which learned counsel relied was the case of *Puncha Thakur* v. *Bindeswari Thakur* (1). In that it was held that certain rights cannot be transferred because they are *res extra commercium;* for instance sacerdotal office which belongs to the priest of a particular class. Similarly a right to receive offerings from pilgrims resorting to a temple or shrine is inalienable. The chance that future worshippers will give offerings is a mere possibility and as such it cannot be transferred. In the case of *Raghunath Vithal Bhat* v. *Shrimant Purnanand Saraswati* (2) it was held that the duties of a hereditary office and the emoluments appertaining thereto remain in the family of the original grantee. If one of the members of the family wishes to get rid of his duties as well as his rights, he can only do so in favour of remaining members of the family. The alienation of the share of one member of the family to an outsider is invalid even if made in favour of the original grantor of the office. That was a case of an alienation of the rights of a pujari who had been appointed by a guru. Learned counsel further relied on the case of *Nitya Gopal Banerjee* v. *Nani Lal Mukherjee* (3). There was an alienation in that case of a *pala* or turn of worship apart from the *debutter* land, and evidence was adduced of instances of alienation along with the *debutter* land. It was held as a finding of fact that no custom of alienating the *pala* or turn of worship apart from the *debutter* land was established and that such an alienation was unreasonable. On the other hand reliance was placed for

(1) (1915) I.L.R., 43 Cal., 28. (2) (1922) I.L.R., 47 Bom., 529.
(3) (1919) I.L.R., 47 Cal., 990.

the respondent plaintiff on the case of *Digambar Tatya Utpat* v. *Hari Damodar Utpat* (1), where it was held that the interest of an *utpat* or priest's share in the net balance of the offerings to the deity can be attached and sold in execution of a decree. The ruling stated that those rulings on which the appellant relied, which referred to the right of the officiating priest to worship the idol directly and to receive the offerings directly, were in the opinion of the Court clearly distinguishable from the question of whether a share of the offerings could be transferred. In the case of *Sukh Lal* v. *Bishambhar* (2), a ruling of 1916, it was held that the rights of mahabrahmans could be mortgaged, and in the case of *Lokya* v. *Sulli* (3) it was held that *"birt jajmani"* was heritable and transferable. In the case of *Raghubar* v. *Mst. Rukmin* (4) a distinction was drawn between the office and the receiving of a share of offerings. We consider that the case which governs the matter is that of *Balmukhand* v. *Tula Ram* (5). In that case, at page 399 of the report, it has been laid down as follows: "A distinction must be drawn between cases in which emoluments are attached to a priestly office, and the cases in which the offerings are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not, in the absence of a custom or usage to the contrary, ordinarily transferable, for the simple reason that they are inseparably connected with a priestly office and it is contrary to public policy to allow such offices to be transferred to a person not competent to perform the worship, either by private sale or by sale in execution of a decree." And on page 400: "But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the

(1) A.I.R., 1927 Bom., 143. (2) (1916) I.L.R., 39 All., 196.
(3) (1920) I.L.R., 43 All., 35. (4) (1917) 20 Oudh Cases, 265(267).
(5) (1927) I.L.R., 50 All., 394.

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worship, we are unable to discover any justification for holding that such a right is not transferable. That the right to receive the offerings, when made, is a valuable right and is property, admits of no doubt, and therefore that right must, in view of the provisions of section 6 of the Transfer of Property Act, be held to be transferable, unless its transfer is prohibited by the Transfer of Property Act or any other law for the time being in force." We adopt this doctrine and accordingly we apply this rule of law to the present case. In the present case learned counsel for the appellant relied on the fact that in the sale deed it was stated: "and the *paris* (turns) of officiating at the worship of deities specified below and taking offerings made at them". Now it is to be noted that this is merely in the recitals and that when the operative portion of the sale deed is examined it does not say more than that there is a transfer of one-fifth share in the houses, the turns of the worship of the deities and the fixed-rate cultivatory holdings. It is not stipulated that the transferee should take part himself in the worship of the deities nor is there any mention of personal service. In the evidence of Nand Kumar, the appellant, there is no statement made that there is any necessary connection between the receipt of this share of the offerings and the actual performance of any worship. On the contrary he says: "There are 18 or 20 servants who look after the *paris* on our behalf. About four or five of them are regularly paid 7 or 8 rupees per month. The remaining servants get something out of the offerings." One of these servants has been produced, Ganesh, and he states: "I am in the service of Nand Kumar and look after his *paris*. . . . I get Rs.10 a month. There are two or four other servants who are also getting Rs.10 per month." Evidence was given in regard to Kameshwar and it was stated that he was a profligate person, as his brother the appellant says, and there is no statement made by the appellant that Kameshwar himself did perform any

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service. We consider therefore that in the present case it has not been proved that there is any connection between the receipt of this share of the offerings and the performance of the service in the temples. No doubt in certain cases such a connection has been proved in regard to other temples; for example in the case of *Haridas Haldar* v. *Charu Chandra Sarkar* (1) it was held that at the temple at Kalighat in Calcutta there was such a connection and therefore that a transfer must be made to a limited class and that these rights to a share of the offerings were attachable in execution of a civil court decree but the sale must be to a limited class. In the present case it has not been proved that there is any such custom or connection between the share of the offerings and the right to officiate as priest. Accordingly we do not consider that the decree granted by the lower court to the effect that the property is liable to attachment and sale should be in any way modified.

Learned counsel for the appellant has argued a point of law which is not in the grounds of appeal and was not in his written statement. The point is that although the respondent can have the right of collections which had been received during the life time of Kameshwar and which might be attachable in execution of the decree against his assets, still the share of the offerings could not be attached as those offerings were future income to accrue. We do not think that this argument can be accepted, for various reasons. For one reason the execution is sought against the assets of Kameshwar Panda in the hands of his daughter, defendant No. 2. What was in the hands of defendant No. 2, the daughter of Kameshwar, was by inheritance his share, and as the share produced a certain annual income that income may be attached as it is one of the assets of the deceased. Secondly the appellant has no right to put forward such a claim as he has not put forward any claim that he is

(1) (1933) I.L.R., 60 Cal., 1351.

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entitled to any share by inheritance from the deceased. For these reasons we cannot agree with this argument. We therefore dismiss this appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

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AMIR AHMAD AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD EJAZ HUSAIN AND OTHERS (PLAINTIFFS)*

Muhammadan law—Wakf—Mussalman Wakf Validating Act (VI of 1913), section 2(1)—What property can be made a wakf of—Right and interest of a grove-holder.

The definition of wakf as given in section 2(1) of the Mussalman Wakf Validating Act, 1913, shows that any property, whether movable or immovable, can be made a wakf of, provided there is a permanent dedication of it. The definition is quite general in its character and would certainly include a wakf of full grove-holder's rights over which the grove-holder has a permanent dominion, although he is not the proprietor of the land; the subject-matter of the wakf need not necessarily be the full proprietary interest in immovable property. The rights of a grove-holder as now recognized by the Tenancy Act are not rights of a temporary character; the grove can be maintained, by replacing all fallen trees by new ones, and in that way the land can retain its character as a grove for ever and be in the possession and enjoyment of the grove-holder and his heirs and transferees. There seems to be nothing even in the strict Muhammadan law against the dedication of such permanent rights which amount to a permanent occupation of the land and full proprietary rights over the trees.

Mr. *Shiva Prasad Sinha*, for the appellants.

Mr. *M. A. Aziz*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is a defendants' appeal arising out of a suit for recovery of possession of certain lands with trees standing upon them, on the allegation that the plaintiffs are mutwallis under a deed of wakf dated the 8th of April, 1916, executed by one Iftikhar Uddin and the defendants are trespassers who have taken a sale deed from the widow of the deceas-

*Second Appeal No. 1054 of 1931, from a decree of Zamirul Islam Khan, Subordinate Judge of Budaun, dated the 25th of June, 1931, reversing a decree of K. C. Dhaun, Munsif of East Budaun, dated the 19th of May, 1930.