APPELLATE CIVIL

Before Mr. Justice A. H. deB. Hamilton, and Mr. Justice R. L. Yorke

1940
MARCH 13

GAURI SHANKAR AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* MOHAN LAL (DEFENDANT-RESPONDENT)*

Hindu Law—Religious endowment—Will—Bequest to idol with direction to spend income in "bhog" and "Nek Kam" —Direction whether vague—Dedication whether void for vagueness—Construction of deeds of endowment.

The principle applicable for the construction of dedications to a deity is that if the real intention of the testator is to benefit the idol and there is clear dedication then the idol becomes the owner of the property; but if, on the other hand, the dominating intention is to benefit individuals and not a deity then the whole transaction would be a mere colourable imitation of dedication or at most there might be a charge in favour of the particular idol.

Where a testator in his will stated "Badeen lehaz kul jaedad ghair manqula ba nam zad Sri Thakur Ji Maharaj key karkey likhe deta hun ki kul jaedad ko intizam R. R. ko aur niz Jauza-i-mankuha apne ko deta hun aur amdani munafa se Thakur Maharaj ka bhog lagakar sab log yani zouja waghaira minmunqir wa jisko ki zouja minmuqir wa R. R. munasib samjhen parvarish karen aur jo munafa baqi rahe usse Thakur Maharaj ka kharch jo munasib ho ya jo nek kam tajwiz kiya jawe karte rahen," *held*, that the will is altogether so vague that it is not possible to say for certain that the testator intended a permanent dedication to the idol absolutely. No valid trust was therefore created by the will and at most there was a charge or trust in favour of the idol for "*bhog*". *Bai Bapi* v. *Jamna Das Hathisang* (1), *Jadu Nath Singh* v. *Thakur Sita Ramji* (2), *Srinibash Das* v. *Manmohini Das* (3), *Manohar Mukherjee* v. *Bhopendra Nath Mukerjee* (4), *Jagadindra Nath Roy v. Hemanta Kumari Debi* (5), *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (6), and *Pande Har Narayan* v. *Surja Kunwari* (7), referred to.

*First Civil Appeal No. 4 of 1937, against the order of K. R. Damle, Esq., I.C.S., Sessions and Civil Judge of Lucknow, dated the 28th October, 1936.

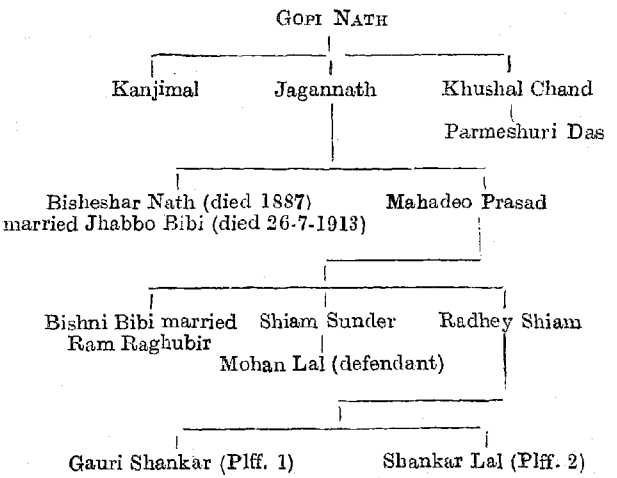
(1) (1897) I.L.R., 22 Bom., 774.
(2) (1917) L.R., 44 I.A., 187.
(3) (1906) 3 C.L.J. 224.
(4) (1932) A.I.R., Cal., 791.
(5) (1904) I.L.R., 32 Cal., 129.
(6) (1859) 8 Moore's I.A., 66.
(7) (1921) L.R., 48 I.A., 143.

Messrs. *Ghulam Hasan, Makund Behari Lal* and *Harish Chandra,* for the appellants.

Messrs. *P. L. Banerji, Rajeshwari Prasad* and *Ranapat Ram,* for the respondent.

HAMILTON and YORKE, JJ.:—This is a first appeal by plaintiffs against a decision of a Civil Judge of Lucknow dismissing a suit with costs.

To understand the appeal the following pedigree is necessary:



On the death of Bisheshar Nath the nearest reversioner was either Parmeshuri Das or Shiam Sunder according to whether Bisheshar Nath had or had not been adopted by Kanjimal. Various members of the family held different views, but for practical purposes this question was set at rest by a deed of relinquishment by Parmeshuri Das in favour of Shiam Sunder if Parmeshuri Das was in fact the nearest reversioner, that is to say, if Bisheshar Nath had been adopted by Kanjimal which Parmeshuri Das denied.

Bisheshar Nath executed a will Ex. 1, dated the 20th November, 1887, and the case of the plaintiffs was that that will left the property of the testator absolutely to an idol to which we shall refer as Thakurji, the managers being Mst. Jhabbo Bibi and Ram Raghubir who

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will be found in the pedigree. The plaintiffs then alleged that Shiam Sunder came into possession adversely or if he was a *mutwalli* then he did not perform his duties properly. Consequently the plaintiffs were entitled to the following reliefs:

(*a*) that plaintiffs 1 and 2 be appointed *mutwallis* of Thakurji and Mohan Lal, son of Shiam Sunder, defendant, be ordered not to interfere with the plaintiffs, or

(*b*) that if the defendant is a *mutwalli* then he be required to render accounts and a decree be passed for any amount found due after payment of additional court fees, if necessary;

(*c*) that if the plaintiffs alone be not appointed trustees then they should be appointed trustees jointly with the defendant;

(*d*) that if reliefs (*a*) and (*c*) be not granted then a perpetual injunction be issued to the defendant to the effect that he should not prevent plaintiffs 1 and 2 from worshipping the Thakurji and taking offerings and taking part in the management, and finally.

(*e*) that any other relief consonant with justice be also passed in plaintiffs' favour.

The learned Civil Judge came to the conclusion that the will was duly executed, that there was no valid trust in law creating an endowment in favour of the Thakurji because at every stage of the will one comes upon different possible interpretations and taken as a whole the will certainly reserves a substantial portion of the income for the *Shebait* and his favourites and that it is vague and uncertain about the disposition of the property bequeathed. The property would, therefore, devolve on the heirs-at-law of the testator subject to a charge for the daily *bhog*, periodical *utsavs* and other incidental expenses of the Thakurji.

In the appeal the learned counsel for the plaintiffs has argued that an absolute interest was given to the

idol and so the property did not go by inheritance to the heir-at-law of the testator and even if the defendant be regarded as the manager for the idol, his conduct in denying the rights of the Thakurji and in appropriating to himself income which should have gone to the Thakurji entitles the plaintiffs to be substituted as managers in the place of the defendant. The whole decision of this appeal must, therefore, be based on a consideration of the terms of the will and the legal effect of it.

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In this will the following passages occur:

"Badeen lehaz kul jaedad ghair manqula jo ki bila shirkat ghaire wa bila masalihat digre hai aur ba qabza wa dakhal malikana hamare ke hai, kisi warisan ya azizan ka koi haq nahin hai, lihaza bahalat sehat-i-nafs wa sabat-i-aqal bila ikrah was jabar, ba durusti hawas khamsa ba namzad Sri Thakur Ji Maharaj key karkey iqrar karta hun aur likhe deta hun ki kul jaedad ka intizam mawaziat wa jaedad ghair manqoola ka iktiar Lala Ram Raghubir wald Bhairon Prasad damad apne ko aur niz Musammat Jhabbo zauja-i-mankuha apne ko deta hun ki be sarabarahkari mukhtiar hamare ke kul jaeded ka intizam karen aur jis kadar qarza dena hai uska hal bahi-khata wa niz dastawezat se zahir hoga wa munafa amdani mowaziat se ada kia jawe aur mulazmin hamare badastur qaem rakkhe jawen. Aur amdani munafa se Thakur Maharaj ka bhog lagakar sab log yani zouja waghaira minmuqir wa jisko ki zouja minmuqir wa Lala Ram Raghubir munasib samjhen parwarish karen. Aur jo munafa baqi rahe usse Thakur Maharaj ka khharch jo munasib ho ya jo nek kam tajwiz kiya jawe karte rahen. Illa jaedad ghair manqula ke ekhtiar bai wa rahan ka na zauja minmuqir ko aur na damad hamare ko hasil hoga, agar barkhilaf iske kiya jawe to batil wa na-masmu ho."

The learned counsel for the plaintiffs states that we should place ourselves in the armchair of the testator and construe the will so as to give effect to the intention of the testator by suitably construing passages in the will which are not obviously plain, so as to give them the meaning which the testator would have given them. He urges that intestacy should be avoided whenever possible. We agree generally with what he

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has urged, but we must say that there are cases when a court with the best of intentions cannot understand what was the intention of the testator, and further, when the testator has used plain language, we cannot give a meaning contrary to this plain language even if to give such contrary meaning might give effect to what, from other parts of the will, might be believed to be more probably the intention of the testator. The learned Judge has taken separately the sentence starting *"badin lihaz kul jaidad ghair manqoola"* and ending *"banamzad Shri Thakurji Mahraj ke karke"* as showing the intention of the testator to dedicate the whole of the immovable property to the Thakurji Mahraj. We think, however, that this sentence must be construed with what follows because the whole of the will must be considered together to arrive at the meaning of it. The words *"ba nam zad Sri Thakurji Mahraj ke karke"* are ungrammatical, but we think they can be read as corresponding to *"Sri Thakurji Mahraj ke nam men karke"*. We note then that no word showing absolute interest without limitation of time appears. The idol is not made "malik" nor is it said that he shall have the full powers which the testator had. It would perhaps not be an unfair translation to say that the testator is putting this property in the name of the idol without saying exactly what right the idol shall have. This is the first example of vagueness. Next Ram Raghubir wrongly described as "son-in-law" and Mst. Jhabbo the widow are given the management of the property, *"ba sarbarkari mukhtiar"*. They are not called *"shebaits"* or *"mutwallis"* or any similar words. Nothing is said as to who is to succeed, and it is a remarkable omission if the Thakurji was being given the property for ever and ever. This is not even a case where the persons appointed had heirs who would obviously succeed them at their death. Jhabbo Bibi had no son while Ram Raghubir was not of the family except that he married a daughter of Mahadeo Prasad, brother of the testator, and

there is nothing to show that he had any son to succeed him. This made it especially remarkable that the testator should not provide for successors when as he says in the beginning his intention in making this will was to avoid future litigation.

Coming now to other duties of these managers, we come to that sentence *"aur amdani munafa se Thakur Maharaj ka bhog lagakar sab log yani zouja waghaira minmuqir wa jisko ki zouja minmuqir wa lala Ram Raghubir munasib samjhen parwarish karen"*. There are two possible readings of this (1) that the two managers should make offerings to the idol in the shape of *bhog* and distribute those offerings, after presentation to the idol, to the wife of the deceased, to persons described as *"waghaira minmuqir"* and also to any other persons chosen by the two managers or (2) that they should give offerings and after doing that they should maintain the wife etc. not merely from the offerings.

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The learned Judge has adopted this second reading and has, therefore, held that the testator really meant to provide food, clothing etc., for the wife and other persons. This would certainly be a considerably greater expenditure than giving offerings to the Thakurji and could easily swallow most, if not all, of the income of the property.

This idol was with two other idols kept in a room in the upper storey of the house of the testator which upper storey was composed otherwise of female apartments. There is evidence to the effect that the custom of *bhog* in families like that of the testator consists in presenting to the idol the daily food of the family which is afterwards eaten by the family. This would in fact be submitting for the blessing of the deity the daily food and would not involve the provision of food beyond that required by the family. We note in this connection that in the accounts maintained by the testator as expenses of the idol there is an average of under Rs.40 consisting of expenditure on two festivals a year, but

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nothing for daily *bhog* so that it appears that there was no custom of feeding strangers with the *bhog*. The idol had no separate temple nor did this will order any temple to be built and only such persons as were chosen by the two managers were entitled to the *bhog* besides the widow *waghaira*. Unless, therefore, the two managers went out of their way to select persons to receive *bhog*, the expenditure on *bhog* would be very little. An example of obscurity here is the use of the term "*waghaira minmuqir*". No manager could possibly decide looking at the will alone who constituted this "*waghaira*". He might guess that the testator meant the persons residing in the house who in his life-time ate the daily food, but this would be mere guess work. If we hold that by this sentence the testator meant that a certain number of people were merely to share the *bhog*, we find the difficulty that the term "*parwarish karen*" is an every day expression which means far more than mere giving food to persons, and includes the provision of clothes and other reasonable expenses. We find it quite impossible to say which of the two alternatives the testator intended, and we certainly cannot say that the view held by the learned Civil Judge is manifestly incorrect and the other view is manifestly preferable. If the words "*parwarish karen*" mean maintaining and not merely feeding from the *bhog* a number of persons composed solely in all probability of what we might call dependants of the deceased, if no one else was chosen by the managers and they need choose no one else, the result would be that the income of this property which was to stand in the name of the Thakurji would be devoted almost wholly to the upkeep of the family and not for the benefit of the Thakurji: After this *bhog* and maintenance or maintenance by *bhog*, whatever the meaning be attached to it, the directions are as follows:

> "Aur jo munafa baqi rahe usse Thakur Mahraj ka kharch jo munasib ho ya jo nek kam tajwiz kiya jawe karte rahin."

We are asked by the learned counsel for the appellants to insert the words *"Thakurji Mahraj ke"* after *"nek kam"* so that the alternative would be expenditure for the benefit of the idol for *"kharch"* or for *"nek kam"*. We find it quite impossible to do this. Two alternatives are there, either spending money on or for the Thakurji as appears suitable to the managers, or performing *"nek kam"* which can well be translated as "good works". If by *"kharch"* be meant expenditure *on* the Thakurji, in the circumstances it would have been very little seeing that in the time of the testator it was composed of expenditure at two festivals amounting to an average under Rs.40 a year and there is no reason to expect that the two managers would think it proper to spend more than the testator did himself. If by *"kharch"* is meant expenditure *on behalf of* the Thakurji it would include good works unless they were independent of the Thakurji so that *"nek kam"* in the second part of the sentence can only be taken to mean good works independent of the Thakurji. If, therefore, the managers chose to spend the money on good works, they could do so in preference to spending it for or on the Thakurji and the only expenditure for the benefit of the Thakurji would be *"bhog"* which was really *"bhog"* to the Thakurji and was not expenditure for the benefit of the family or of dependants and not of the Thakurji. The term "good works" is certainly exceedingly vague and in *Bai Bapi* v. *Jamna Das Hathisang* (1) a similar provision was held to be void for uncertainty.

It appears from the evidence on the record that Shiam Sunder, father of Mohan Lal, was treated more or less as a son by the testator, but at the time that this will was executed he was only about 20 years of age and, therefore, possibly in the opinion of the testator unsuitable to have absolute disposing power over the property of the deceased. The testator may also have considered it dangerous to leave his wife in the position of a Hindu

(1) (1897) I.L.R., 22 Bom., 774.

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widow and, therefore, he may have intended nothing more than making a temporary arrangement by appointing two managers of the Thakurji to be in reality guardians of Shiam Sunder. This might well explain why he did not clearly say that the idol was to be *"malik"* and why there was no provision for the appointment of managers after the death of the two actually named by the testator.

The learned counsel has referred us to certain cases as supporting his argument that this was a genuine dedication for ever and ever of the whole property of the deceased to the Thakurji. The principle in all such cases is clear: if the real intention of the testator was to benefit the idol and there was clear dedication then the idol becomes the owner of the property. If, on the other hand, the dominating intention was to benefit individuals and not a deity then the whole transaction would be a mere colourable imitation of a dedication or at most there might be a charge in favour of the particular idol.

The first case that the learned counsel relies on is *Jadu Nath Singh* v. *Thakur Sita Ramji* (1). Here a Hindu dedicated the whole of his property to a temple. Half the income was to be enjoyed by the managers without power of alienation and upon the death of the named managers the Government was to become manager and the whole net income was then to be applied to the expenses of the temple. Their Lordships of the Privy Council said that there was in the beginning a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple and the rest was only a gift to the idol *sub modo* by a direction that of the whole which had already been given part was to be applied for the upkeep of the idol itself and the repair of the temple and the other was to go for the upkeep of the managers. The shares were half and half and the entire income was

(1) (1917) L.R. 44 I.A., 187.

only Rs.800. We would here add that even this provision for the managers was a temporary one for eventually the Government was to be the manager. Obviously the facts there are very different from those in the present case where the expenditure on the idol which the managers could not avoid could be reduced by them to a very small sum while the income of the property amounted to at least Rs.5,000 annually. We might also note that there was a temple there and not an idol in one room of a residential house as is the case here.

Srinibash Das v. *Manmohini Das* (1), was a case of an absolute gift to an idol after certain legacies of fixed amounts and it was held on the facts that there was no colourable intention but a real dedication.

Manohar Mukherjee v. *Bhupendra Nath Mukerjee* (2) has also been cited as it is there laid down that the direction that the *shebait* shall spend any surplus income on certain charitable objects or pious acts does not make the dedication incomplete. The dedication if merely colourable would be bad, but the provisions in question in that case affected the surplus income only and were subordinate to the main religious purpose and a Hindu God may be allowed to do some works of charity.

This does not help us in the present case because "*nek kam*" or good works is vague and not necessarily an expenditure on a charitable object and apart from that it was not merely a small surplus that could have been devoted to such a purpose but the whole income after "*bhog*" and as we have said "*bhog*" might have involved only a very small expenditure.

The learned counsel for the respondent has cited cases to support his argument that in the present case there was either no dedication at all or at most only a trust or charge for the benefit of the idol.

(1) (1906) 3 C.L.J., 224. (2) (1932) A.I.R., Cal., 791 at 793.

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In *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1) their Lordships of the Privy Council laid down that in dedications of the completest kind an idol is rightly regarded as a juridicial person capable as such of holding property; but there are less complete endowments in which notwithstanding a religious dedication property descends (and beneficially) to heirs subject to a trust or charge for the purposes of religion.

In *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (2), although the testator declared that he had granted to a certain idol which he had established in the house the whole of his moveable and immoveable property, it was held that the bequest to the idol was not an absolute gift and the four sons of the testator were entitled to the surplus of the property after providing for the performance of the ceremonies and festivals of the idol.

In *Tande Har Narayan* v. *Surja Kunwari* (3), the will provided that the property of the testator should be considered to be the property of a certain idol, but further provisions such as that the residue after defraying the expenses of the temples should be used by the legal heirs to meet their own expenses, and the circumstances, such as that the ceremonies to be performed were fixed by the will and would absorb only a small proportion of the total income, might indicate that the intention was that the heirs should take the property subject to a charge for the performance of the religious purposes named.

We do not think it necessary to refer to other cases which have been cited because while the principle to be applied is what we have stated above, no two wills are the same and so decisions are only a guide to the application of the principle.

We find in the present case that the will is altogether so vague that it is not possible to say for certain that

(1) (1904) I.L.R., 32 Cal., 129. (2) (1859) 8 Moore's I.A., 66.
(3) (1921) L.R., 48 I.A., 143.

the testator intended a permanent dedication to the idol absolutely. Supposing, however, that the words "*ba nam zad Sri Thakurji Mahraj*" could be held to denote, in the absence of anything else, an absolute dedication, yet the succeeding clauses show either that the testator really meant to benefit the family and not the idol, or he intended the managers to spend practically as much as they liked on good works which were independent of the idol and which form a provision too vague to be given effect to, for good works are not necessarily confined to charitable purposes.

We agree, therefore, with the learned Civil Judge that no valid trust was created by the will and that at most there was a charge or trust in favour of the idol for "*bhog*" which need be no more than the ordinary daily food of the family. We are satisfied that the defendant has spent more for the benefit of the idol than was spent by the testator himself and at least as much as was spent by the original managers or by the defendant's own father. Even if, therefore, there was a trust and the defendant was the manager of it, he has done nothing contrary to the terms of the trust and, therefore, the plaintiffs are not entitled either to replace him as managers or to be joined with him in the management of this property.

The learned counsel for the plaintiffs-appellants urges that the suit was brought *bona fide* and the costs should be met from the estate, i.e. the property disposed of by the will. Presuming that this could be done, it appears to us that the real object of the plaintiffs was to displace the defendant in order to have themselves as managers the very wide powers given by the will if such powers could validly be conferred, that is to say, the plaintiffs were suing for their own advantage and not for the benefit of the idol. In the circumstances we see no reason why they should be granted costs.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.