APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

JAGDEO SINGH

v.

RAM SARAN PANDE.*

1926.

August, 12.

Pujapat, partibility of right to perform—custom, existence of—transfer in favour of non-Brahman—validity of—turn of worship, sale of, whether must be by registered instrument.

A transfer or partition of the right to perform pujapat and take the offerings may be made where there is a custom of transferability and partibility provided the transferee belongs to the class to which the custom applies.

Mahamaya Debi v. Haridas Haldar (1), followed.

Srimati Mallika Dasi v. Ratanmani Chackervarty (2), not followed.

Where, by custom, the right of performing pujapat and receiving the offerings was shared by a number of Brahman Pandas only, *held*, that a transfer of the office in favour of a non-Brahman was invalid, and that, the transferee being incompetent by reason of his caste to share in the performance of the pujapat, he could not claim a share in the offering.

Mahamaya Debi v. *Haridas Haldar* (1), relied on.

A turn of worship not being an interest in immoveable property, it is not necessary that a sale of the right should be by a registered instrument. A purchaser, therefore, is not debarred from adducing oral evidence of the sale alleged by him.

Eshan Chunder Roy v. *Mon Mohini Dassi* (3), and *Jati Kar* v. *Mukunda Deb* (4), followed.

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* Appeals from Appellate Decrees nos. 754 and 758 of 1924, from a decision of Ashutosh Chatterjee, Esq., Additional District Judge of Patna, dated the 17th March, 1924, modifying a decision of Maulavi Saiyid Ghalib Hasnain, Subordinate Judge, Second Court, of Patna, dated the 5th June, 1923.

(1) (1915) I. L. R. 42 Cal. 455.
(2) (1896-97) 1 Cal. W. N. 493.
(3) (1879) I. L. R. 4 Cal. 683.
(4) (1912) I. L. R. 39 Cal. 227.

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The appellant in second appeal no. 754 of 1924, was defendant no. 1. In second appeal no. 758 of 1924, the appellant was defendant no. 3.

These two appeals arose out of a suit in which the plaintiff sought for the partition of the right to do worship and take the offerings in the Sital Asthan in village Maghra. The right of performing the pujapath and receiving the offerings was shared between a number of Brahman Pandas who performed the worship and took the offerings in turns varying according to extent of their share. These turns were called palas. The right had been divided into 96 kauris. One Jhandu Pandey had a 12 kauris share and had certain days and parts of days allotted to him according to this share. On his death his palas descended to his son Shiv Charan Pandey, who sold a 2 kauris odd share to the ancestors of defendant nos 1 and 2, and gave an ijara of the remaining 9 kauris odd share to one Mahabir Pandey. This ijara was redeemed by Shiv Charan in 1320. The plaintiff claimed to be the son of Shiv Charan, and it was his case that, as Shiv Charan died when he was only 8 or 9 years old, defendant no. 1, who also owned a share in the palas, was appointed as gomashta to look after the plaintiff's interest. When the plaintiff reached majority he called for an account from defendant no. 1, and then dismissed him from his service. In 1921 the plaintiff sold a 5 kauris share to defendant no. 3 who was not a Brahman. Having sold the 5 kauris share the plaintiff had only 4 kauris share left, and he sought in the suit to have this share partitioned, that is to say, to have a certain number of days allotted to him for his performance of the pujapath and his receipt of the offerings. He joined as parties defendants nos. 2 and 3. Defendants 2 and 3 did not oppose the partition, but defendant no. 1 denied, in the first place, that the plaintiff was the son of Shiv Charan, and also alleged that there could be no partition of the rights to do worship and take the offerings. Furthermore he asserted that Shiv

Charan had sold his 9 kauris odd share to defendant no 1, and, therefore, the plaintiff could have no claim to have the right partitioned.

The Subordinate Judge held that the right was partible, heritable and transferable, and also that the plaintiff was the son of Shiv Charan Pandey. He found that the plaintiff was entitled to a 9 kauris odd share and that defendant no. 1 had failed to prove that Shiv Charan had sold in 1899 the 9 kauris share to him.

On the question of possession, the Subordinate Judge held that the plaintiff was in possession of the share he claimed and was entitled to maintain the suit for possession. Defendant no. 2 was found to have no title as he did not join with defendant no. 1 in the purchase of the 2 kauris odd share from Shiv Charan. It having been objected that defendant no. 3, not being a Brahman, could have no share in the right, the Subordinate Judge found that there were instances of transfer of shares to non-Brahmans, and that defendant no. 1 himself admitted that, in cases where the holder of the share could not himself perform the pujapath he could employ a competent person to carry out the duties and could get the offerings. On the findings a preliminary decree for partition was passed in the plaintiff's favour, and it was directed that a commissioner should be appointed to allot days and parts of days to each of the three cosharers interested in proportion to their shares.

On appeal, the additional District Judge found that plaintiff was the son of Shiv Charan and was entitled to succeed to Shiv Charan's rights. As there had been many instances of partition of the rights, the lower Appellate Court held that the right was partible and transferable.

With regard to the objection of defendant no. 1, that Shiv Charan had sold 9 kauris odd share to defendant no. 1, the District Judge held that any such alienation would be invalid as it could only be made

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by a registered instrument, and in this case there was no registered instrument to prove it. He therefore found that there was no proof of the alleged alienation, and, therefore, defendant no. 1 could not succeed in his plea. He also held that defendant no 1 had not been in adverse possession of the 9 kauris share. But with regard to defendant no. 3 the learned District Judge was of opinion that, as a non-Brahman could not perform the worship, there could be no valid transfer to defendant no. 3 and so he could not claim any share. He awarded the entire 9 kauris share to the plaintiff and modified the decree of the trial Court accordingly.

G. B. Prasad and *A. Prasad*, for the appellant in Appeal no 754 of 1924, and for the respondent in Appeal no 758 of 1924.

S. M. Mullick and *Sant Prasad*, for the respondent in Appeal no. 754 of 1924 and for the appellant in Appeal no. 758 of 1924.

ADAMI, J. (after stating the facts set out above, proceeded as follows): The first question which arises is whether the right to do the pujapath and receive the offerings is partible or not. Though in the case of *Srimati Mallika Dasi* v. *Ratanmani Chakervarty* (1) it was held that a pala or turn of worship of an idol was inalienable and that it would be contrary to public policy to allow offices like this to be transferred either by private sale or sale in execution of a decree, in the case of *Mahamaya Debi* v. *Haridas Haldar* (2) Mookerjee, J., considered the whole question, and, after the examination of a great many previous decisions, held that there was no question that, though probably religious offices were originally indivisible they are now deemed partible and in fact the very existence of palas or turns of worship shows that the right is partible. In that case there was evidence to show that a pala had not only been deemed heritable and partible, but it had also been treated

(1) (1896-97) 1 Cal. W. N. 493. (2) (1915) I. L. R. 42 Cal. 455.

as being divisible. He pointed out that a custom of this description could not be characterised on any rational ground as unreasonable or opposed to public policy.

In the present case both parties have shown by the evidence they produced that there have been numerous instances in which the right has been transferred and the defendant no. 1 himself can hardly urge that the right is inalienable, since it is his own case that Shiv Charan transferred the 9 kauris share to him. Mookerjee, J., in his judgment showed that the custom of transferability and partibility can be shown and acted on where the transfers relied on are transfers to persons who are eligible to perform the religious offices required.

From the judgments of the lower Courts it is clear that there have been many cases of transferability but there is no distinct finding that all the elements necessary for the proof of custom existed in the present case. But considering that defendant no. 1 himself claims under a transfer, I do not think that the Courts were wrong in coming to a finding that on the instances given by the parties there was sufficient basis for a finding that the rights of pala in the case of the Sital Asthan could be transferred and could be partitioned.

Defendant no. 1, as I have stated, claimed that he had purchased the rights which the plaintiff seeks to partition from Shiv Charan, and both the Courts have found that, as there is no registered deed, they could not take notice of any allegation of a verbal sale such as defendant no. 1 asserted had taken place between himself and Shiv Charan. The Courts below, however, are mistaken in thinking that a registered document was necessary. In the case of *Jati Kar* v. *Mukunda Deb* (1) it was held that a turn of worship is not an interest in immoveable property, and, therefore, attestation by witnesses to a mortgage

(1) (1912) I. L. R. 39 Cal. 227.

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bond would not be necessary under section 59 of the Transfer of Property Act. The decision in *Eshan Chunder Roy* v. *Mon Mohini Dassi* (1) is to the same effect: so that it was open to defendant no. 1 to produce oral evidence of the sale alleged by him. As the lower Appellate Court has not considered such evidence as defendant no. 1 may have adduced it is clear that the case will have to go back to the lower Court for examination of the evidence and a decision whether defendant no. 1 did in fact purchase the 9 kauris share from Shiv Charan.

The second appeal by defendant no. 3 is directed against the finding of the learned District Judge that, being a non-Brahman, he had not acquired any interest under his kabala. Defendant no. 3 is a Bhumihar Brahmin and as such it is contended by defendant no. 1 that he has no right to perform the worship in the Sital Asthan. There is nothing on the record to show us whether a Bhumihar Brahman is a Brahman for the purposes of performing the worship of the idol. If he is not a Brahman and cannot perform the worship in the temple, it is clear to my mind that he is not competent to share in the palas. The case of the plaintiff and of defendant no 3 is that though defendant no. 3 does not himself perform the pujapath he employs the plaintiff who is competent, being a Brahman, to do worship for him, and himself takes the offerings, giving the plaintiff a small remuneration. It is quite true that the offerings could be shared between the parties, but it certainly is equally true that defendant no. 3 if he is not a Brahman could not share in the performance of the pujapath, and this being so, as the right to perform the religious duty is bound up with the right to receive the offerings, defendant no. 3 could not claim to share in the right. The plaintiff has been performing the worship himself, and after he had received the offerings it was open to him to arrange

(1) (1879) I. L. R. 4 Cal. 683.

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with defendant no. 3 that defendant no. 3 should get those offerings, but defendant no. 3 cannot claim a share in the right to worship, and therefore cannot claim any share in the partition of that right. Mookerjee, J. in *Mahamaya Debi* v. *Haridas Haldar* (1) has shown that where there is a custom of transferability or partibility, a transfer or partition can be made among a limited class who are covered by the custom, and it is clear that in the present case the custom, if any, is confined to the Brahmans and a custom of extending it to non-Brahmans is not established by the few instances given in evidence and it would not cover defendant no. 3 if he is a non-Brahman. Therefore I am of opinion that second appeal no. 754 of 1924 of Jagdeo Singh cannot succeed and should be dismissed with costs, but the defendant no. 3 is entitled to receive from the plaintiff his purchase money with interest from the date of delivery of possession after partition if the appeal of defendant no. 1 is eventually dismissed.

With regard to the second appeal of defendant no 1 as I have shown above the matter must go back to the lower Appellate Court for a consideration of the evidence produced by defendant no. 3 to prove an oral sale by Shiv Charan to him of the 9 kauris pala. After considering that evidence the learned District Judge will decide the case. If it is shown that there was a sale as alleged, the plaintiff's suit must be dismissed in toto, for he would then have no share with regard to which he could claim partition. If on the other hand the evidence does not prove such a sale, the decrees of the lower Courts so far as they affect the plaintiff and defendant no. 1 will be upheld. The costs of this second appeal will abide the result.

MACPHERSON, J.—I agree.

Appeal no. 754 *of* 1924 *dismissed.*

Appeal no. 758 *of* 1924 *remanded.*

(1) (1915) I. L. R. 42 Cal. 455.