had some bearing upon some parts of the case; but so far as this is concerned the respondent owns no duty to the appellants, but to the Court.

As the appellants made no application to us before the judgment was pronounced, we think we cannot, after delivery of judgment, allow him leave to amend his memorandum of appeal, and that under the provisions of section 582, Code of Civil Procedure, we ought to restrict our award to the amount stated in the memorandum of appeal, *plus* the amount allowed by the Lower Court, and the usual statutory allowance.

Under the circumstances, we make no order as to the costs of these applications.

Decree modified.

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30 C. 521 (=7 C. W. N. 121).

[521] ORIGINAL CIVIL.

NOGENDRA-NANDINI DASSI *v.* BENOY KRISHNA DEB.*

[20th, 21st and 28th August, 1902.]

Hindu Law—Dayabhaga—Will, construction of—Idol—Bequest to Idol not in existence—Inheritance—Stridhan—Unchastity—Consanguinity—Spiritual benefit.

A bequest to an idol not in existence at the time of the testator's death is void.

Unchastity does not debar a Hindu woman from inheriting the *stridhan* property of her female relatives.

Ganga Jati v. *Ghasita* (1), followed. *Ramnath Tolapattro* v. *Durga Sundari Debi* (2), *Ramananda* v. *Raikishori Barmani* (3), distinguished.

Under the Bengal School of Hindu Law, inheritance depends on consanguinity so far as the near relatives are concerned, but in the case of remoter relations the law falls back on the principle of spiritual benefit.

[(1) Hindu Law—Bequest to Idol not in existence. **Over.** 37 C. 123; **Ref.** 12 C. W. N. 808=8 C. L. J. 489. 10 C. L. J. 355=14 C. W. N. 18.

(2) Unchastity—No ground of seclusion from inheritance to stridhan. **Ref.** 31 M. 100=18 M. L. J. 70=2 M. L. T. 533.]

ONE Chander Kally Ghose, a Hindu inhabitant of Calcutta, died in the month of January 1897, leaving him surviving his sole widow and heiress, Sreemutty Patit Pabani Dassee. The deceased left a will dated the 29th January 1893, whereby after bequeathing certain legacies to various persons devised and bequeathed the residue of his property, both real and personal, to Patit Pabani Dassee, and appointed her the sole executrix and trustee of his will. On the 10th April 1897, Patit Pabani obtained probate of the will.

A year later, on the 16th April 1898, Patit Pabani died childless leaving her surviving, her mother, Nogendra-Nandini Dassee the plaintiff, and her husband's eldest brother. Patit Pabani left a will dated the 4th April 1898, and appointed the defendant, Raja Benoy Krishna Deb, her sole executor.

By her will, after giving certain pecuniary legacies, Patit Pabani directed that a *Shiva Thakur* be established, and dedicated [522] certain property for the benefit of that idol; and she further directed that if there be any surplus of the dedicated funds, such money should be accumulated and set apart for the feeding of the poor.

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* Original Civil Suit No. 524 of 1899.

(1) (1875) I. L. R. 1 All. 46.
(2) (1878) I. L. R. 4 Cal. 550.
(3) (1894) I. L. R. 22 Cal. 347.

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On the 27th May 1898 the defendant, Benoy Krishna, proved the will of Patit Pabani Dassee, and on the 6th July 1898 obtained probate thereof. The plaintiff then instituted this suit for construction of the will of Patit Pabani for administration of her estate, and to have her rights and the rights of the defendant ascertained and declared, and for a declaration that the deceased died intestate with regard to the greater part of her property.

The defendant in his written statement alleged that the plaintiff was unchaste, and that she had an illegitimate son; and left it for the Court to determine whether the plaintiff was under the circumstances entitled to succeed to the property of the testatrix as her heiress; and that one Prosonno Kally Ghosh, the elder brother of the testatrix's husband, was the next heir in default of the plaintiff. The defendant denied the charges of maladministration of the property of the testatrix, and contended that the dispositions in the will were valid.

Two preliminary points were raised at the hearing:—

(*a*) Whether there was an intestacy under the will, the gift being to an idol not in existence at the time of the testator's death; and

(*b*) Whether unchastity on the part of a Hindu mother was a bar to the inheritance of *stridhan* property of her daughter.

Mr. *Chakravarti* (Mr. *J. G. Woodroffe* with him) for the plaintiff. A disposition in favour of a *thakur* or idol to be established is bad. When an idol is not in existence any gift to it cannot be valid gift: see *Upendra Lal Boral* v. *Hem Chunder Boral* (1), and *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2).

In the case of an intestacy the competition can only be among the brother, father, mother and husband, but they, except the mother, being dead, the property goes to the mother: see Shama Charan's *Vyavastha Darpana*, p. 262. It is, however, alleged by [523] the other side that she was living in a state of unchastity at the time of the death of her daughter, and cannot therefore inherit the *stridhan* property of her daughter. I contend that on the existing authorities she can inherit. In the case of *stridhan* property the childless widow is preferred to all others. Unchastity is no bar to acquiring *stridhan* property; see *Mussamat Ganga Jati* v. *Ghasita* (3), which was approved of by Sale, J. in the case of *Toolsee Das Seal* v. *Luckhymoney Dassee* (4). According to the Dayabhaga school of Hindu Law, by which this case is governed, inheritance to *stridhan* property is determined by consanguinity on the part of the recipient, and not on the doctrine of spiritual benefit: see Mayne's Hindu Law (6th Edition), page 875, and the case of *Sarna Moyee Bewa* v. *Secretary of State for India* (5) and *Advyapa* v. *Rudrava* (6).

Mr. *S. Bonnerjee* (Mr. *Sinha* with him) for the defendant. The case of *Upendra Lal Boral* v. *Hem Ckandra Boral* (1) referred to by the other side is distinguishable from the present case. The will bequeathes no property to the idol, though it is true an idol is to be established in the temple. The case of *Rojomoyee Dassee* v. *Troyluckho Mohiney Dassee* (2) is similar in every respect to the present case. Clause 17 of the will directs that the surplus of the testator's estate is to be employed for the keeping up of the temple directed to be built; this is a valid bequest, not being a bequest to an idol. There is an express direction

(1) (1897) I. L. R. 25 Cal. 405.
(2) (1901) I. L. R. 29 Cal. 260.
(3) (1875) I. L. R. 1 All. 46.
(4) (1900) 4 C. W. N. 743.
(5) (1897) I. L. R. 25 Cal. 254.
(6) (1879) I. L. R. 4 Bom. 104.

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in the will for the establishment of a temple, but no actual gift to an idol. I submit, therefore, that full effect can be given to the terms of the will.

Mr. *Sinha* (on the same side). The question is, how far unchastity is or is not a bar to succession to *stridhan* property. As to succession from males, not only does an unchaste wife become unable to inherit, but an unchaste daughter and an unchaste mother cannot inherit: see *Ramnath Tolapattro* v. *Durga Sundari Debi* (1).

[524] The doctrine of spiritual benefit does not enter into the question of *stridhan* property: *Ramananda* v. *Raikishori Barmani* (2). Succession to *stridhan* property in Allahabad is different from that in Bengal, and therefore the case of *Ganga Jati* v. *Ghasita* (3) does not apply here. If a woman cannot inherit through her son and father, can she inherit through her daughter? I submit she cannot. See Mayne's Hindu Law (6th Edition), page 878.

If a degraded woman dies leaving property, the daughter does not inherit unless in a degraded position: see *In the goods of Kamineymoney Bewah* (4) and *Sarna Moyee Bewa* v. *Secretary of State for India* (5). So far as this Court is concerned, the cases are uniform. As to the construction of the will, the testatrix intended that a *thakur* should be established in a temple. A temple is not inseparable from a *thakur*. Before the case of *Tagore* v. *Tagore* (6) no one ever imagined that there was such a rule as a gift to an unborn person being invalid. For the extension of that rule to the deity, there is no authority in Hindu law.

Mr. *Chakravarti* in reply. There is no question of degradation, for the mother is not a prostitute. The cases referred to by the other side are those in which prostitutes are parties. Unchastity is no bar to inheriting *stridhan*: Banerjee's Hindu Law (2nd Edition), page 344. Mr. Justice Banerjee in the case of *Sarna Moyee Bewa* v. *Secretary of State for India* (5) goes further and holds that even in the case of a prostitute, the ordinary Hindu law of succession applies. The cases cited by the other side are all cases of inheriting from males. No Bengal authority has been cited, or can be cited, against my contention.

Cur. adv. vult.

STEPHEN, J. In this case I have to decide upon the construction of the will of Sreemutty Patit Pabani Dassee, a will of which the defendant obtained probate as executor in July 1898.

Two preliminary points have been taken before me.

[525] It is admitted that the property affected by the will is *stridhan* property, and that the plaintiff in case of intestacy is the heiress of the testatrix as her mother.

In the first place, I have to decide whether there is an intestacy under the will. In the next, whether, supposing there is unchastity on the part of the mother, such unchastity debars her from inheriting.

The unchastity is not admitted and no evidence is given in relation to it; but if I decide in favour of an intestacy, and if I decide that unchastity is in this case no bar to inheritance, the case need go no further.

The clauses of the will as to which it is alleged that there is intestacy are numbers 4, 5, and 6. By clause 4 it is directed that "if any spot close to the place where the funeral rites of my deceased husband were

(1) (1878) I. L. R. 4 Cal. 550.
(2) (1894) I. L. R. 22 Cal. 347, 354.
(3) (1875) I. L. R. 1 All. 46.
(4) (1894) I. L. R. 21 Cal 697.
(5) (1897) I. L. R. 25 Cal. 254.
(6) (1872) 9 B. L. R. 377.

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performed and the place were his remains were cremated can be purchased from the Municipality or from any other person, then a *Shiva Mandir* (temple of Shiva) and two small rooms attached thereto shall be built on that spot. Rupees 4,000 in all (shall) be spent for this (purpose). This is my desire. If the spot aforsaid be not available, then this *mandir* shall be erected at Ishwar Kashidham. A *Shiva Thakur* shall be established under the name of Chandra Nath in that *mandir*."

By clause 5 certain property is dedicated for the benefit of the said *Shiva Thakur*, and at the end of that clause it is added, "a Brahmin and *atithi* (guest) should be entertained and fed from the said money."

By clause 6 it is provided that if there is any surplus of the dedicated funds after the performance of the bequests to which I have referred, then the said money being accumulated, there should be feasting of beggars and Brahmins according to means on the anniversaries of her husband's death.

It is admitted that, according to well-known law, the bequest to the *thakur*, which was not instituted at the time of the testatrix's death, is void.

It is suggested, however, that the bequest is good so far as it refers to the building of the temple and to the other objects.

[526] Reading the clauses together and considering the testatrix's intention, and looking to the practical effects which such a reading of the will would produce, I cannot agree with this contention, as the institution of the *thakur* is plainly the essential bequest to which the others are only ancillary. When it fails they fail too.

I therefore hold that there is an intestacy under the clauses in question.

I may perhaps add that by clause 15 of the will Rs. 2,000 are left to the testatrix's mother, and by clause 17 it provided that her heirs are to have no title to the surplus of the dedicated money after payment of the expenses of the temple.

It remains to be considered what is the effect of the alleged unchastity of the mother.

In the first place, it appears that this unchastity has not the same legal effect as prostitution, which produces degradation and outcasting.

The difference between the two seems to be marked in the cases decided, on the one hand, *Ramnath Tolapattro* v. *Durga Sundari Debi* (1) and *Ramananda* v. *Rai Kishori Barmani* (2), and on the other *In the goods of Kamineymoney Bewah* (3).

The exact form of the alleged unchastity in the present case has not been gone into; but it is admitted that it does not amount to prostitution.

Under these circumstances I think this case is governed by the case decided in *Mussammat Ganga Jati* v. *Ghasita* (4) summarised by Mr. Justice Banerjee in his work on the Hindu Law of Marriage and Stridhan at page 344 as follows:—

"It was held that unchastity will not disqualify a woman from inheriting the *stridhan* of her female relatives."

It is unnecessary that I should quote further from the judgment to support this summary. I may point out that this account of the law

(1) (1875) I. L. R. 4 Cal. 550.
(2) (1894) I. L. R. 22 Cal. 347.
(3) (1894) I. L. R. 21 Cal. 697.
(4) (1875) I. L. R. 1 All. 46.

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is consistent with the cases which were cited before me. In *Ramnath Tolapattro* v. *Durga Sundari Debi* (1) and *Ramananda* v. *Rai Kishori Barmani* (2) the question was [527] one of inheritance from a male and not of *stridhan* property.

A further point, however, arises in the judgment in the Allahabad case (3). It is suggested in the judgment of Mr. Justice Oldfield that the right of succession to *stridhan* is intimately connected in Bengal with the principle that inheritance depends upon spiritual benefit to be conferred upon ancestors, and that the capacity to confer such benefit is lost by unchastity, though a later passage seems to limit this extension of that principle, at all events as far as the present case is concerned.

This matter seems to be explained by certain passages in the *Dayabhaga* to which my attention has been drawn, and which seem to show that the question of spiritual benefit does not apply in the present case. By paragraph 29, Chapter 4, section 3, property goes first to the whole brothers, then to the mother, then to the father, and then to the husband.

By paragraph 31 various persons, whom I need not name, on failure of heirs down to the husband are said to be similar to mothers, and section 37 provides for the inheritance of persons who claim through such mother. Such inheritance, it appears, depends on the principle of spiritual benefit.

The conclusion would seem to be that the characteristic doctrine of the Bengal Law is that, as far as the near relatives are concerned, inheritance depends on consanguinity ; but in the case of remoter relations the law falls back on the principle of spiritual benefit.

Under these circumstances, it is plain that the doctrine of spiritual benefit does not apply in the present case. The alleged unchastity of the mother therefore discloses no bar to her inheritance.

Judgment for plaintiff.

Attorney for the plaintiff : *P. N. Sen.*

Attorneys for the defendant : *Morgan & Co.*

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30 C. 528 (=7 C. W. N. 450.)

[528] APPEAL FROM ORIGINAL CIVIL.

ELOKESHI DASSI *v.* HARI PROSAD SOOR. * [23rd January, 1903.

Practice—Probate, application to recall—Citation—Proof of will—Genuineness of will.

On an application by a Hindu widow for an order that the probate obtained by her husband's brother of a will alleged to have been made by her husband be recalled, she not receiving any intimation of the application for probate ; and that the will be proved in her presence :—

Held, that such an application ought to be granted, and that the probate of the will must be recalled and kept in the record until the case is decided.

[Ref. 10 C. L. J. 263=3 I. C. 178.]

APPEAL by the petitioner, Elokeshi Dassi, from an order of AMEER ALI, J.

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* Appeal from Original Order No. 24 of 1902.

Appellate Bench : Sir Francis W. Maclean K. C. I. E., Chief Justice, Mr. Justice Hill and Mr. Justice Stevens.

(1) (1878) I. L. R. 4 Cal. 550.
(2) (1894) I. L. R. 22 Cal. 847.
(3) (1875) I. L. R. 1 All. 46.