Before Mr. Justice Chitty.

1907
May 13.

RAJESHWAR MULLICK
v.
GOPESHWAR MULLICK.*

Hindu Law—Will—Endowment—Shebaitship—Validity of Bequest—Intention of Foundress—Usage—Custom.

Where the intention of the foundress of a private religious endowment was that all her lineal descendants should hold the *debutter* property and jointly perform the worship of the idol, and the testator (one of her descendants) bequeathed the *pala* or turn of worship to his wife and on her demise to one of his two nephews, grandnephew and their lineal descendants to the exclusion of the other nephew :—

Held, that the bequest was not in accordance with the intention of the foundress, nor the Hindu law; and that there was no established usage or practice in the family to justify it.

The office of *shebait* is not devisable except by custom.

THIS was a suit by one Rajeshwar Mullick against his brother Gopeshwar Mullick to have his rights under the will of his uncle, Lolit Mohan Mullick, ascertained and declared.

A private religious endowment was created by a Hindu lady, Chitra Dasi, by a Bengali deed dated the 25th May 1820 and a postscript thereto dated the 27th February 1822. Subsequently by her will dated the 8th December 1842 Chitra Dasi confirmed the endowment. She died on the 29th October 1855, leaving her surviving five sons, one of whom was a lunatic. She appointed by her will the wife of the lunatic son and the four other sons *shebaits* and directed as follows:—"You five persons being unanimous will do all the business and the representatives of you five persons and your sons down to posterity according to these directions will do all the business." The following attempts were made by various members of the family to dispose of their right to the worship by will (i) Lokenath by his will dated the 30th January 1862 appointed his widow, Chandan, Coomaree, in his

* Original Civil suit No. 836 of 1906.

place. By a decree of the High Court dated the 7th of July 1862, Chandan Coomaree was by the consent of all the members of the family appointed *shebait* in Lokenath's place. (ii) Cossinath by his will dated the 24th of April 1864 appointed a stranger, his *guru's* grandson. By a decree dated the 26th of August 1882 this disposition was declared invalid. (iii) Kali Kumar died without issue, and by his will dated the 8th of January 1871 appointed his two widows. (iv) Taranath by his will dated the 8th of February 1875 appointed his widow Joymoni. Taranath had no son. (v) Haranath by his will dated the 28th August 1876 appointed his two sons. (vi) Lalmohan by his will dated the 18th February 1892 appointed his three sons. (vii) Lalit Mohan's disposition was in favour of his widow and after her death to one of his heirs to the exclusion of the other heir. The last disposition was contested in this suit by the excluded heir.

The *shebaitship* devolved either by order of Court or by amicable arrangement between the members of the family on the heirs of the *shebaits* as they died from time to time, and in case of two or more heirs, the *shebaitship* was exercised by turns.

Mr. Chakravarti and *Mr. S. R. Das*, for the plaintiff, contended that the disposition by Lalit was valid (i) under the law, and (ii) under the family custom. Under the law a disposition in favour of a member of the family would be good unless prejudicial to the idol. Each member of the family got a definite turn and *qua* that turn, he and his branch would be entitled to deal with that in the same way as all the members were entitled to deal with the whole. In this respect there is no distinction between secular and endowed property. Right of worship is property and has all the incidents of property. There is a custom among Subarnabanik caste, to which these people belonged, recognizing the right of disposition; at any rate, the members of this family always believed they had the right and they acted on that belief, and the practice of disposition by will was recognized in the family. The following cases were referred to in the course of argument:—*Mancharam* v. *Pranshankar*(1), *Sitarambhat* v. *Sitaram*

(1) (1882) I. L. R. 6 Bom. 298.

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Ganesh(1), *Khetter Chunder Ghose* v. *Hari Das Bundopadhya*(2), *Mitta Kunth Audhicarry* v. *Neeranjun Audhicarry*(3), *Limba bin Krishna* v. *Rama bin Pimplu*(4), *Moro Mahadev* v. *Anant Bhimrji*(5), *Radhabai* v. *Anantrav Bhagvant*(6), *Gopal Chunder Bose* v. *Kartick Chunder Dey*(7), *Ramanathan Chetti* v. *Murugappa Chetti*(8), *Sibessuree Dabia* v. *John Beckwith*(9), *Kuppa* v. *Dorasami*(10), *Narayana* v. *Ranga*(11), *Alagappa Mudaliar* v. *Srirama Sundara Mudaliar*(12), *Anasami Pillai* v. *Rama Krishna Mudaliar*(13), *Mallika Dasi* v. *Ratanmani*(14), and *Tagore* v. *Tagore*(15).

Mr. B. C. Mitter and *Mr. B. L. Mitter*, for the defendants, contended that under the Hindu law right of worship is inalienable unless sanctioned by custom. The cases where alienation has been recognized by Court are cases of relinquishment, whereby inheritance has been accelerated. No custom has been proved to exist in this family. All attempted dispositions were made in favour of heirs, and when a different course was adopted it was declared invalid by the Court. Right of worship is property only in determining the order of succession and not for all purposes. The following cases were referred to: *Rango Balaji* v. *Mudiyeppa*(16), *Janoki Debi* v. *Gopal Acharjia Goswami*(17), *Manally Chenna* v. *Mangadu Vaidelinga*(18), *Kamini Debi* v. *Asutosh Mukerji*(19), *Khetter Chunder Ghose* v. *Hari Das Banerjee*(20), *Rajah Vurmah Valia* v. *Ravi Vurmah*(21), and *Gnanasambanda Pandara* v. *Velu Pandaram*(22); and also Ganapathi Iyer's "Hindu and Mahomedan Religious Endowments," pp. CLXV, CCXXV and CCXXVI.

Mr. S. R. Das, in reply.

(1) (1869) 6 Bom. H. C. 250.
(2) (1890) I. L. 17 Calc. 557.
(3) (1874) 14 B. L. R. 166.
(4) (1888) I. L. R. 13 Bom. 548.
(5) (1896) I. L. R. 21 Bom. 821.
(6) (1885) I. L. R. 9 Bom. 198.
(7) (1902) I. L. R. 29 Calc. 716.
(8) (1906) I. L. R. 29 Mad. 283.
(9) (1865) 3 W. R. 152.
(10) (1882) I. L. R. 6 Mad. 76.
(11) (1891) I. L. R. 15 Mad. 183.
(12) (1895) I. L. R. 19 Mad. 211.
(13) (1900) I. L. R. 24 Mad. 219.
(14) (1897) 1 C. W. N. 493.
(15) (1872) 9 B. L. R. 377.
(16) (1898) I. L. R. 23 Bom. 296.
(17) (1882) I. L. R. 9 Calc. 766.
(18) (1877) I. L. R. 1 Mad. 343.
(19) (1888) I. L. R. 16 Calc. 103.
(20) 1890) I. L. R. 17 Calc. 557.
(21) (1876) I. L. R. 1 Mad. 235.
(22) (1899) I. L. R. 23 Mad. 271.

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CHITTY J. This is a suit by Rajeshwar Mullick against his brother Gopeshwar Mullick and his nephew Gorachand Mullick to have the rights of the plaintiff under the will of his uncle Lalit Mohan Mullick ascertained and declared. The second defendant Gorachand has not appeared to defend the suit, and the contest has therefore been between the two brothers, Rajeshwar and Gopeshwar. The sole question in the case is as to the validity of clause 5 of the will of Lalit Mohan Mullick, whereby he directed as follows:—"My wife Srimatee Sudevi Moni Dasi shall on my demise take the money which I have been receiving for the expenses of services, according to my turn.....to Sri Sri Ishawar Radha Gobind Jee established by my grandmother, the late Chitra Dasi, and perform the said services during her lifetime, and I confer on my wife Sudevi Moni Dasi the same right that I now have to the Ishawar Jew's jewellery, plate, etc., and on her demise I confer on my nephew Sriman Rajeshwar Mullick Babaji the right, etc., in respect of the expenses, jewellery, etc., of the said service. He and his son's son, etc., in succession shall enjoy by performing this service." The endowment, the *shebaitship* of which is now in question, is a private endowment founded by Chitra Dasi, widow of Ram Lochan Mullick, by an *ikrar* dated 25th May 1820, a postscript dated 27th February 1822, and her will dated 8th December 1842. The following pedigree table shows the family and descendants of Chitra Dasi: [For the *pedigree*, see the next page.]

I do not propose to set out in detail the facts, as to which there is no dispute, for they appear sufficiently from the plaint and from the various documents which have by the consent of parties been laid before the Court. The will of Lalit Mohan was made as far back as 1891, but his widow, Sudevi Moni Dasi, did not die until May 1906. The question as to the validity of the bequest in plaintiff's favour has therefore only recently arisen. The simple question is whether Lalit Mohan had power to dispose of his own right of worship, and the turn (or *pala*) which he had enjoyed, in favour of the plaintiff to the exclusion of the defendants, who would in ordinary course have succeeded to such right of worship and *pala* by inheritance along with the plaintiff. There are no longer any emoluments attached to the offices, and it herefore only the bare right of service which is in dispute.

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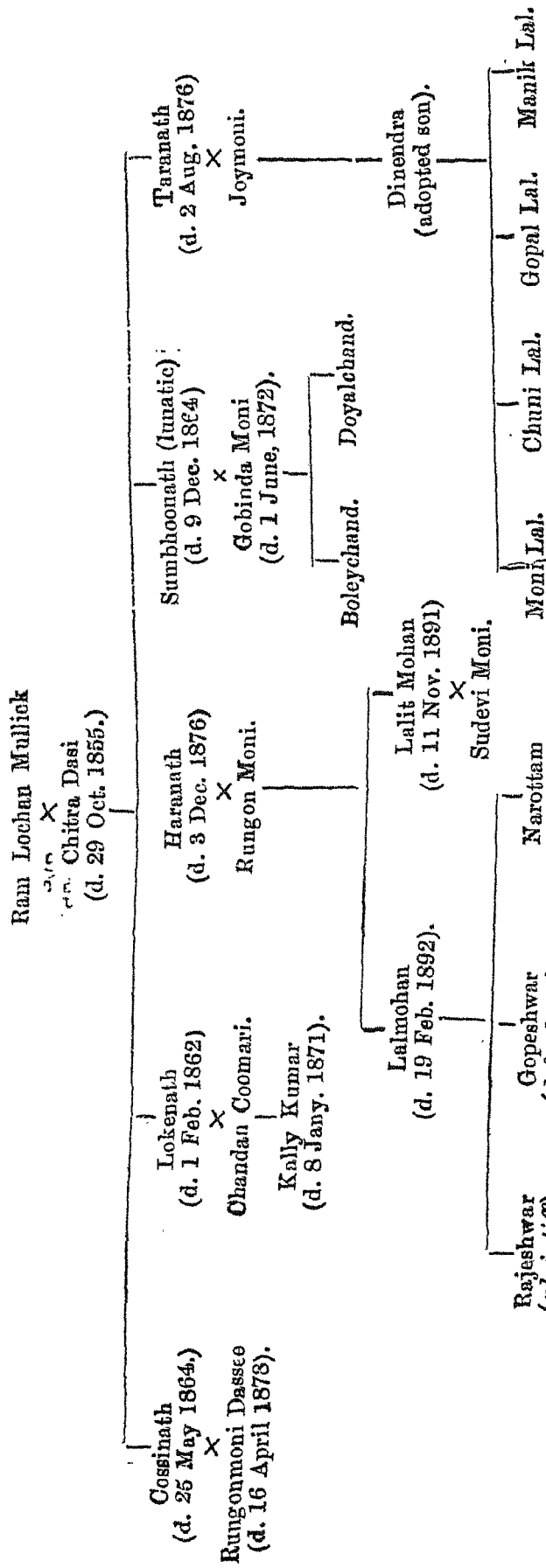

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A large number of cases were cited by counsel relating to religious endowments, but it was frankly conceded that there was no direct authority for or against the proposition which the plaintiff lays before the Court. It would therefore serve no good purpose to discuss those authorities in detail. The law on the subject will be found in Chapter XII of Mr. Mayne's work on Hindu Law, and in the Introduction to Ganapathi Iyyer's work on Religious Endowments at pp. clxi—clxiii and ccxi *sqq.* where all the cases are given. The general conclusions I draw from the authorities may be stated in a few words. Originally both partition and alienation both of the property devoted to a religious purpose like the present, and also of the *shebaitship* or right of worship were alike forbidden custom, however, and convenience intervened, and the right to partition of a *shebaitship* came to be recognised. I may point out that it has been accepted by the family with respect to the present endowment, and has been recognised by this Court in the several judgments and decrees which are now before me. The worship has for a long time past (since the days of Chitra Dasi's sons) and still is carried on by the various *shebaits* in *palas*. It is in respect of one only of such *palas* that the present suit is brought. Turning to alienations, it was pointed out by Ranade J. in *Rajaram* v. *Ganesh*(1) that a distinction has always been drawn between alienations to strangers and those to members of the family, and also between compulsory and private alienation. The learned Judge also indicated that as to private alienations no general rule prohibiting them can be laid down. It must depend on each case, *first*, on the expressed intentions of the founder (if any) and, *secondly*, and failing that on any custom or usage of the family substantiated by evidence. The two cases most relied upon by plaintiff's counsel were *Sitarambhat* v. *Sitaram Ganesh*(2) and *Mancharam* v. *Pranshankar*(3). In the first, an alienation of a temple-office by a grandfather to his grandchildren by way of relinquishment was upheld. In the second, the alienation was by will to a sister's son, the widow of the testator, who was his next heir, expressing her acquiescence in

(1) (1898) I. L. R. 23 Bom. 131. (2) (1869) 6 Bom. H. C. 250.
(3) (1882) I. L. R. 6 Bom. 298.

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the bequest. It is obvious that cases of relinquishment stand in a different footing, for there is no exclusion of some third person.

In the second case cited it is not stated what were the terms of that particular endowment, and the learned Judges expressed their opinion in somewhat qualified terms. Neither case exactly meets the present. In the case of *Khetter Chunder Ghose* v. *Hari Das Bundopadhya*(1) an alienation of a private idol with its endowed land was upheld by this Court: but in that case the alienation was made by the consent of the whole family of *shebaits* to another family, the object being for the benefit of the idol, to secure a continuance of the worship in accordance with the wishes of the founder, which the alienors through poverty were unable to maintain.

In the present case the intention of the foundress was that all her lineal descendants should hold the *debutter* property and jointly perform the *sheba*. The only alienation which she contemplated was the gift or sale by one of her sons to one or more of the others, the property being in any event retained in the same *gotra*. So whether by the foundress's express direction or by the ordinary rule of Hindu Law, the property and right of worship may be regarded as being in the first place hereditary. The question then arises whether there has been any modification of that principle by the usage of the family.

This is not pleaded and no evidence has been given of any such usage. Many members of the family have purported to deal with their right of worship by will, but the effect of that has certainly not been to establish any uniform usage or practice. Indeed in only one case, that of Cossinath, was an attempt made to divert the right of worship from the persons who would be entitled to it in ordinary succession. In that case the attempt failed, and his five nephews as his heirs were by the decree of this Court, dated 26th August 1882, declared to be entitled to the right.

In Lokenath's case his widow, Chandan Coomari Dasi, was preferred to his son Kali Kumar. There was in this case also a suit and the matter was settled by arrangement. This I think is clear from the decree of 7th July 1885. Some question may arise in respect of the disposition under Kali Kumar's will. but

(1) (1890) I. L. R. 17 Calc. 557.

that cannot happen until the death of his step mother Chandan Coomari Dasi.

Haranath bequeathed his right of worship to his sons Lalmohan and Lalit Mohan, who would in any case have succeeded him. Taranath's will was to the same effect as he purported to appoint his widow Joymoni Dasi. She was then his next heir, as his son Dinendra was not adopted till after Taranath's death.

Lalmohan, again, directed that his three sons should perform his share of the worship jointly. It is only in Lalit Mohan's will that we find a desire to exclude altogether some of those who would be the heirs in the ordinary course, and favour one individual at the expense of the rest.

Under these circumstances, it appears (i) that this disposition in Lalit Mohan is not in accordance with the wishes and intentions of the foundress, and (ii) that there is no established usage or practice in the family which could justify it. The initial presumption in the case was against the plaintiff, and the burden of proving such a usage as I have mentioned was upon him. It is evident that he has neither rebutted the one nor discharged the other. The suit therefore fails and is dismissed. The first defendant must have his cost of suit on scale 2.

Attorneys for the plaintiff: *G. C. Chunder & Co.*

Attorneys for the defendant: *Rutter & Co.*

J. W. O.