APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Mitra and Mr. Justice Woodroffe.

1907
Dec. 20.

RAJESHWAR MULLICK
v.
GOPESHWAR MULLICK.*

Hindu law—Hereditary Shebaitship, alienation of—Alienation by will or inter vivos.

A *shebait* is a manager, or *quasi* trustee for the benefit of the idol and therefore has no power to alienate the hereditary office of *shebaitship* by will.

Mancharam v. *Pranshankar*(1) disapproved.

Per MITRA J. A *shebait* has no power to alienate hereditary *shebaitship* except for necessity or clear benefit to the *Thakur*.

APPEAL by the plaintiff, Rajeshwar Mullick, against the judgment of CHITTY, J.

This was a suit brought by the plaintiff Rajeshwar Mullick against his brother Gopeshwar Mullick, and nephew Gora Chand Mullick for construction of the will of his uncle Lalit Mohan Mullick. On the 11th November 1891, Lalit Mohan Mullick died leaving him surviving Sreemati Sudevi Moni Dassee his sole widow and heiress. Clause 5 of the will (the only clause necessary for the purpose of this case) was as follows:—"My wife Sreemati Sudevi Moni Dassee shall on my demise take the money which I have been receiving for the expenses of services according to my turn out of the profits of the properties placed in charge of the Receiver Saheb by order of the Honourable High Court for services to Sree Sree Issur Radha Gobind Jew established by my grandmother (father's mother) the late Chitra Dassi and perform the said services till her lifetime, and I confer on my wife Sreemati Sudevi Moni Dassee the same right that I now have to the Issur Jew's jewellery, plate, etc., and on her demise I confer on my nephew Sriman Rajeshwar Mullick Babajee the right, etc., in respect of the expenses, jewellery, etc.,

* Appeal from Original Civil, No. 33 of 1907, in suit No. 836 of 1906.

(1) (1882) I. L. R. 6 Bom. 208.

of the said service. He and his son and son's son, etc., in succession, shall enjoy by performing the service. To this import, I out of my free will and without inducement give in writing this instrument of will."

On the 10th May 1906, Sreemati Sudevi Moni Dassee died leaving a will by which she appointed Gopeshwar Mullick and Doyal Chand Mullick her executors. Thereafter disputes and differences arose between the parties as to the plaintiff's right under the will of Lalit Mohan Mullick and as to whether he had any power to devise his right and interest in the worship of the idol, Radha Gobind Jew. The plaintiff's contention was that the deceased Lalit Mohan was entitled to deal with his turn of worship by will and by the custom of his family, as also of his caste and by the custom of the Hindus of Bengal, and that he was now entitled to the turn of worship of the deceased Lalit Mohan Mullick.

The defendant denied the existence of any custom of the family, or of the caste to which the plaintiff belonged, or any custom of the Hindus of Bengal which entitled the deceased Lalit Mohan to devise his turn of worship by will, and contended that clause 5 of the will was invalid.

The suit originally came up for trial before CHITTY J., and his Lordship 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 custom in the family to justify it. The judgment of CHITTY, J. is reported in I. L. R. Vol. 34 of the Calcutta Series at p. 831.

From that judgment the plaintiff appealed.

Mr. Garth (*Mr. Chakravarti* with him), for the appellant. The question in this case is whether a shebaitship can be bequeathed by will. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(1), referred to.

[MACLEAN, C. J. Is it your argument that this gift of the foundress is bad?]

Yes. The attempt to create a life estate is bad. The case of *Gnanasambanda Pandara* v. *Velu Pandaram*(1) has been followed

(1) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69, 77.

1907

RAJESHWAR MULLICK v. GOPESHWAR MULLICK.

in the case of *Gopal Chunder Bose* v. *Kartick Chunder Dey*(1). Ganapathi Iyer on Endowments, pp. xci and clxiv, cited. The estate is alienable by will, and if so, is alienable in the same way as alienation *inter vivos* but the alienation must be to a person standing on the line of succession: *Mancharam* v. *Pranshankar*(2) following *Sitarambhat* v. *Sitaram Ganesh*(3), and approved in *Khetter Chunder Ghose* v. *Hari Das Bundopadhya*(4). See also *Mullika Dasi* v. *Ratanmani Chakervarti*(5).

The case of *Rajaram* v. *Ganesh* (6) discusses how far the right of shebaitship can be alienated.

[MACLEAN, C. J. Is there any authority for the proposition that it could be alienated by will?]

Only in the case of *Mancharam* v. *Pranshankar* (2). Ganapathi Iyer in his book on Endowments at pp. clxviii, clxix, deals with endowed properties, and says a shebaitship may be a hereditary office.

[MITRA, J. The position of a *shebait* is the same as that of a manager.]

I submit his position is higher than a manager. There is no authority which questions *Mancharam* v. *Pranshankar* (2).

[MITRA, J. The case of *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (7) is against you.]

That was a case of a public temple and is distinguishable from the present case which is an alienation privately to one of the family, the testator preferring not to sub-divide by alienating to two others. The case of *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury* (8) is clearly distinguishable; it was a land acquisition case, and the judgment decided that the property is not debutter property at all. Any decision here as to whether the property is debutter is clearly *obiter dictum*, and the Court is wrong in supposing that the case conflicts in any way with *Mancharam* v. *Pranshankar* (2): see also *Prosunno Kumar Adhikari* v. *Saroda Prosunno Adhikari* (9). The case of *Narayana* v.

(1) (1902) I. L. R. 29 Calc. 716, 721.
(2) (1882) I. L. R. 6 Bom. 298.
(3) (1869) 6 Bom. H.C. (A.C.J.) 250.
(4) (1890) I. L. R. 17 Calc. 557.
(5) (1897) 1 C. W. N. 493.
(6) (1898) I. L. R. 23 Bom. 131, 134.
(7) (1899) I. L. R. 24 Bom. 50; L. R. 26 I. A. 199.
(8) (1907) 12 C. W. N. 98, 101.
(9) (1895) I. L. R. 22 Calc. 989.

1907

RAJESHWAR MULLICK v. GOPESHWAR MULLICK.

Ranga (1) is against me, but the decisions in Madras are much stricter than any other decisions in India. I submit there can be an alienation of the private office of shebaitship, and the office of shebaitship in this case has been alienated by will by each successive *shebait* with one exception only. If any alienation is allowed at all, it should be by will.

Mr. Sinha (*Standing Counsel*) and *Mr. B. C. Mitter*, for the respondents, were not called upon.

MACLEAN, C. J. The question which arises on this appeal is a very short one; and, I think, it may be properly stated thus, whether Lalit Mohan Mullick, who was the *shebait* of a certain idol, was entitled to deal with it by his will as he purported to do.

It appears that the endowment of the idol was created many years ago by the will of one Chitra Dassi, and eventually the said Lalit Mohan became *shebait*. He purported to bequeath by this will the shebaitship after his death, first to his widow and then to his nephew, Rajeshwar Mullick, the present plaintiff. Lalit Mohan died; and Rajeshwar now brings the suit to have it declared that he is entitled to the shebaitship. He is opposed by his brother, Gopeshwar Mullick, who says that Lalit Mohan had no power to bequeath the shebaitship by his will. That is the whole question in the suit.

No doubt, there are cases and authorities for the proposition that a *shebait* may by an act *inter vivos* alienate the shebaitship; but I think I am fairly stating the result of those cases when I say that such alienations are not regarded with much favour, and that somewhat special circumstances must exist to support them. I need not go through the authorities which I think substantiate that proposition. But all of them relate to alienations *inter vivos*, and with the exception of one authority to which I will refer in a moment, there is none for the proposition that a *shebait* can by his will bequeath the shebaitship. On principle, I do not see how he can do so; for, the question at once arises, what has he to bequeath or alienate under his

(1) (1891) I. L. R. 15 Mad. 183.

1907

RAJESHWAR MULLICK v. GOPESHWAR MULLICK.

MACLEAN C.J.

will? A *shebait* is a manager or a *quasi* trustee for the benefit of the idol. His office endures only for his life: his will only comes into operation on his death. What is, there, then for him to alienate by his will? Nothing. In the case of *Mancharam* v. *Pranshankar* (1), on which the learned counsel for the appellant relies, the alienation no doubt was by will: but the learned Judges seem to have proceeded on the view, that because in certain cases there may be an alienation by *shebait* by act *inter vivos* so equally there can be an alienation by a *shebait* by his will. But the distinction is obvious. There is nothing to pass under the will, but there is something which can pass by an alienation *inter vivos*, viz., the then existing interest of the *shebait*. I am, therefore, with great respect, unable to concur in that decision. I think that there was nothing which Lalit Mohan could pass by his will so far as relates to the *shebaitship*. As the title of the plaintiff is dependent upon this supposed alienation by Lalit Mohan, his case must fail.

Then it is suggested that there is some usage in the family relating to the particular worship of this idol and to the *shebaitship* which would justify the alienation by will. I do not think that is made out. The learned Judge of the Court of first instance did not think so. It appears from the proceedings in this case, that attempts have been made from time to time by certain members of the family to deal with this *shebaitship* by will. It is clear from the terms of the decree dated the 26th of August 1882 referred to in the proceedings, that the alienation thus made by will failed. It is suggested that that was a case of alienation made by a will to a stranger. That may be so but the alienation in fact failed. As regards the other cases which are referred to, they seem to have been cases in which the bequest—if I may rightly so call it—was to those who would have been the *shebaits* in the ordinary course of descent. Consequently, there was no object in challenging the will. On the point I do not think any usage or established practice in the family has been made out to justify the alienation.

In my opinion, the view taken by the Court of first instance is right, and this appeal must be dismissed with costs.

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

1907

RAJESHWAR MULLICK v. GOPESHWAR MULLICK.

MITRA, J. I am of the same opinion. The case is one of hereditary *shebaitship* both under the will of Chitra Dassi and under the general law. The status of Lalit Mohan was that of a *shebait*, and as such he was in the same position as a manager of an infant heir. He had no power to alienate except for necessity or clear benefit to the *Thakur*. No case of necessity or benefit to the *Thakur* has, however, been pleaded or attempted to be made out by the evidence. The evidence of a family usage as giving the power to bequeath *shebaitship* by will is also very meagre. Lalit Mohan's right to manage as a *shebait* must cease with his death and he had, in fact, nothing to bequeath.

WOODROFFE, J. I agree that Lalit Mohan could not alienate the office of *shebaitship* by will. I wish to express no opinion on the question whether the office of *shebaitship* may be alienated by transaction *inter vivos* or, if so, under what conditions; and I think that the question of usage does not affect the matter which is now before us. I agree that this appeal should be dismissed with costs.

Appeal dismissed.

Attorneys for the appellant: *G. C. Chunder & Co.*
Attorneys for the respondents: *Rutter & Co.*

R. G. M.