PRIVY COUNCIL.

P.C.*
1912

Oct. 31.

TRIPURARI PAL
v.
JAGAT TARINI DASI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Will—Construction of will—Period of distribution of property bequeathed—Succession Act (X of 1865), s. 111—Hindu Wills Act (XXI of 1870)—Absolute gift to son on attaining majority—Bequest contingent on son's death which did not happen till after period of distribution.

The right of the appellant to succeed to the *shebaitship* of certain *debutter* properties depended on the construction of his grandfather's will, and on the nature of the right which his father took in those properties. After declaring the properties to be *debutter* for the maintenance of the family idol, the testator in his will stated that "my present begotten son" (the appellant's father) "will be *shebait* for performance of the ceremonies." And after making provision for his own death during the minority of his son, in which case his widow was to be the *shebait* as his son's guardian, the testator continued, "and my son on attaining majority will personally conduct the work of the *sheba*. God forbid, if during my life or after my death, my said son dies, then my widow will be the *shebait*, and after her my daughters by her" (the respondents) "will be *shebaits* . . . . . Moreover, for carrying out the directions under this will until my minor begotten son comes of age, my wife" (and two male persons named) "will be executors : . . . . . and on my said begotten son attaining majority the said executors will be discharged, and the said son by continuing in his present faith will go on performing the *sheba*, etc., of the said idol :

Held (reversing the decision of the High Court), that, on the true construction of the will, there was an absolute gift of the *shebaitship* to the appellant's father on his attaining his majority, and it was not cut down by anything that followed. There were provisions in case of his death as a minor, but no cutting down of the absolute gift to him. The appellant

* *Present* : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

therefore, and not the respondents, succeeded on the death of the testator's son, who had attained his majority and held the *shebaitship* until his death.

APPEAL from a judgment and decree (19th August 1907) of the High Court at Calcutta, which reversed a judgment and decree (20th September 1905) of the Court of the Subordinate Judge of Nadia.

The plaintiff was the appellant to His Majesty in Council.

The only question for determination on this appeal was as to the true construction of the will of one Shib Chandra Pal, dated 20th February 1883 (9th Falgun 1289), under which his grandson, the plaintiff, claimed to be entitled to possession of certain *debutter* properties as the *shebait* of the idol Lakshmi Janardan.

The testator died in *Pous* 1290 (December 1883 or January 1884), leaving a widow Brajamati Dasi, a son Mukunda Murari Pal, two daughters Nistarini and Jagat Tarini, and an adopted son Jadunath (who however had relinquished his rights, and admittedly was not entitled to any of the property in suit). By the will the property in dispute was declared to be *debutter* for the maintenance of the family idol, and by the terms of the will Mukunda Murari Pal was to be *shebait* of the idol on attaining his majority.

At the time of his father's death Mukunda Murari Pal was a minor aged three years and three months, and during his minority his mother, Brajamati Dasi, conducted the worship of the idol and acted as *shebait*. Probate of the will was granted to the two executors Ram Chandra Gangopadhya and Bhusan Chandra Pramanick, and to the executrix Brajamati Dasi, by the District Court of Nadia on 21st March 1886. The two executors died in 1899 and 1903, respectively.

Mukunda Murari Pal attained his majority in October 1897, and he then took possession of his

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father's estate and acted as sole *shebait*, and as such held possession of the *debutter* properties up to the date of his death. He died on 22nd Kartick 1307 (November 1900), leaving his son Tripurari Pal, a minor, and his widow, respectively, him surviving. On his death Brajamati Dasi again took possession of the estate and of the *debutter* properties, and acted as *shebait* thereof.

On 5th September 1904 the plaintiff (now appellant) by his next friend filed the suit, out of which the present appeal arose, against Brajamati Dasi, Nistarini and Jagat Tarini (now respondents); and other persons were, on the death of Brajamati Dasi, shortly after the institution of the suit, substituted for her on the record, namely, the sons of one of the other executors, both of whom had died.

The plaintiff in his plaint claimed that the defendants had no right to the *shebaitship*, or to the *debutter* properties, or to the estate of the testator under the will; and that the sole right thereto had vested absolutely in his father, Mukunda Murari Pal, on his attaining majority, and on the subsequent death of his father became vested in him (the plaintiff) as his heir. He prayed, *inter alia*, for possession of the properties, for accounts, and for costs.

The defendants denied the plaintiff's right to the *debutter* properties or to the *shebaitship*, and claimed that under the terms of the will they were entitled to them. No defence was raised as to the plaintiff's right to the properties other than those which were *debutter*, and which formed the estate of the testator, and no question now arose on this appeal in regard thereto.

The following was the material portion of the will to be construed:—

"My present begotten son Mukunda Murari will be *shebait* for the performance of those ceremonies. If during the minority of the said

Mukunda Murari Pal I die, then my second wife Srimati Brajamati Dasi, who gave birth to Mukunda Murari, will be *shebait* as his guardian, during the time of the said Mukunda Murari's minority, and Mukunda Murari, on attaining majority, will personally conduct the work of the *sheba*. God forbid, if during my life time or after my death, the said Mukunda Murari dies, then the said Brajamati Dasi will be *shebait*, and, after her death, Srimati Nistarini Dasi and Srimati Jagat Tarini Dasi, daughters born of the said Brajamati Dasi and of my loins, will be *shebaits*. And if the said Brajamati Dasi dies during the minority of the said Nistarini Dasi and Jagat Tarini Dasi, the guardians of the said Nistarini Dasi and Jagat Tarini Dasi for the time being will conduct the said work of the *sheba*, and no *shebait* shall have power to make a gift or sell, or waste or destroy, or transfer by mortgage, etc., the property of the said idol, beyond carrying on the work of the *sheba*. Moreover, for carrying out the directions under this will, till my minor begotten son Mukunda Murari comes of age, my wife the said Brajamati Dasi, Srijukta Ramkanai Goswami and Ram Charan Gangopadhya of Santipur, and my son-in-law Srijukta Bhusan Chandra Pramanik of Haripur, will be executors, and all or most of the executors, after settling how the work of the *sheba* will be carried on, will have the work of the *sheba* performed by Srimati Brajamati Dasi . . . . . and on my said begotten son Mukunda Murari Pal attaining majority the said executors will be discharged and the said Mukunda Murari Pal, by continuing in his present religious faith, will go on performing the *sheba*, etc., of the said idol."

The Subordinate Judge held that on the proper construction of the will the plaintiff was entitled to act as *shebait* of the *debutter* properties, and he made a decree in his favour for possession of them. The Subordinate Judge, after reading the above extract from the will, said :—

"The above extract, together with the fact that a former will in favour of the adopted son was revoked on the birth of a natural son and the general tenor of the will, shows that the testator was anxious to preserve his properties intact in his direct male line, and had no intention to allow it to pass to strangers. It was with this intention that he purposely made no arrangement for the management of the property after the natural son attaining his majority. For the will stops short upon the happening of that contingency. The *shebaitship* not being otherwise disposed of, the property should pass to the plaintiff, who is the direct heir of the original donor and testator. Again, the earlier portion of the will contemplates the death of Mukunda Murari *before attaining his majority*. Though the

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language used in the will, if strictly construed, does not bear out that limited interpretation, yet the insertion of the clause in the place it stands and the possibility of the widow's death during the minority of her daughters, amply supports that theory. It could never have been the intention of the testator to deprive and divest his direct legal heirs, the sons of his natural son Mukunda, in the manner suggested by the defendants. Under the above circumstances, the proper interpretation of the provision of the will for appointment of the widow, and, after her death, of the daughters as *shebaits* in succession to Mukunda Murari was that the above should come to effect should Mukunda die a minor, unmarried and childless."

From this decision the defendants appealed to the High Court, the only ground raised by them relating to the construction of the will in reference to the *shebaitship* and the *debutter* properties.

The High Court (RAMPAINI, *Acting* C. J., AND SHARFUDDIN J.), in reversing the decree of the Subordinate Judge, said :—

"The plaintiff's pleader urges that the provision that the widow was to become *shebait* would only apply, if Mukunda Murari died before attaining majority, and that according to the will Mukunda, on attaining majority, became absolute owner of the *shebaitship*.

"We are unable to agree to these contentions of the plaintiff's pleader. They can only be supported by importing into the will words which do not occur there, and an intention on the part of the testator which cannot, we think, be gathered from the will.

"The testator, it seems to us, was anxious to provide, *not* for the descent of his property to his son and his son's heirs, but for the maintenance and worship of his family idol, with a view probably to his own spiritual benefit. If he had wished his property to descend to his son and his son's heirs as the family is one governed by the Dayabhaga Law, he had only to make no will at all. The fact of his making a will showed that he had another object in view. Then, the will nowhere gives the son Mukunda Murari an absolute right to the *shebaitship* on attaining majority. We consider he had only under the will a right to the *shebaitship* for his life. Nor does the will provide that it is only if Mukunda Murari dies before attaining majority that the widow is to succeed as *shebait*. The testator says, 'God forbid, if during my life time or after my death, the said Mukunda Murari dies.' This does not seem to us to mean 'if the said Mukunda Murari dies when a minor.'

"The testator had already provided for the case of his dying and Mukunda Murari being then a minor, and in the words immediately preceding this extract he had provided for the case of his dying leaving Mukunda a minor, and of Mukunda subsequently becoming a major, when he was at once to become *shebait*, apparently for his life. So that when the testator says 'God forbid, etc'., he must rather have had in his mind the contingency of Mukunda being a major than of his being still a minor.

"We, therefore, cannot interpret the will as the Subordinate Judge has interpreted it, or as the plaintiff's pleader invites us to do. We are of opinion that the will is an imperfect will. The testator thought only of the worship of his family idol and of arranging for its worship by the members of his family who survived him. He did not contemplate or provide for what was to happen after they had all died, or perhaps he intended that in that case the *shebaitship* should descend according to the ordinary law of inheritance applicable to the family. However this may be, we have only to apply the terms of the will to existing circumstances.

"When the plaintiff instituted his suit, the testator's widow, Brajamati Dasi, was alive. While she lived, the plaintiff had no right to the *debutter* property. She is now dead, but the right of *shebait* devolves on the defendant Jagat Tarini and her sister Nistarini."

On this appeal, which was heard *ex parte*,

A. M. Dunne, for the appellant, contended that, on the true construction of the will, the appellant's father Mukunda Murari Pal took an absolute estate in the properties in dispute on the death of the testator: and that the title to the *shebaitship* and the *debutter* properties passed to the appellant on the death of his father. The testator only intended that Brajamati and the respondents should take the properties and the *shebaitship* in the event of the appellant's father dying before he attained his majority. The gift over to the respondents never took effect, as Mukunda Murari Pal did attain his majority. Reference was made to *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1); and section 111 of the Succession Act (X of 1865) which was extended to Hindu wills by the Hindu Wills' Act (XXI of 1870).

(1) (1896) I. L. R. 23 Calc. 563; L. R. 23 I. A. 18.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that in this case the decision of the High Court cannot be supported. There is, in their Lordships' view, an absolute gift of the *shebaitship* to the son Mukunda Murari on his attaining majority, and it is not cut down, as far as they can see, by anything that follows. There are provisions in the case of his death as a minor, but no provision cutting down the absolute gift to him. The words are: "My present begotten son Mukunda Murari will be *shebait* for the performance of those ceremonies."

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, and the judgment of the Subordinate Judge restored.

There will be no order as to the costs incurred in the High Court, except that any costs paid under the order appealed from must be returned, and there will be no costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *W. W. Box & Co.*

J. V. W.