APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Beachcroft.

RAJ KRISHNA DEY

v.

BIPIN BEHARI DEY.*

1912

July 18.

Religious Trust—Deed of endowment—Sole shebait—Appointment of new shebait in case of death—Appointment how to be made—Receiver pendente lite.

Trusts will not be allowed to fail for want of a trustee, and, consequently, if the nominee dies before qualifying or afterwards, the Court will appoint a trustee.

In re Orde (1), *Re Ambler's Trust* (2), *Gunson v. Simpson* (3), *In re Smirthwaite's Trusts* (4) referred to.

Where a *shebait* is dead and there is no provision in the deed of endowment about the mode in which the office is to be filled up, the Court will not read into the deed of endowment a provision for appointment to the office of *shebait* which is not to be found therein. It becomes incumbent upon the representatives of the founders to make an appointment to the office of *shebait*, and upon failure to do so the Court has power to appoint a new trustee, and will exercise this power whenever there is a failure of a suitable person to perform the trust either from original or supervenient disability to act.

Sital Das Babaji v. *Protap Chandra Sarma* (5) referred to.

The appointment of a fit and proper person to be a new trustee is not a matter of arbitrary discretion of the Court. The appointment must be made subject to well known and defined rules.

In re Tempest (6) referred to.

Where a receiver appointed *pendente lite* was directed by the Subordinate Judge to continue to manage the properties on the scheme laid down in the deed of endowment, pending an agreement between the parties to appoint a *shebait* :—

* Appeal from Original Decree, No. 118 of 1910, against the decree of Rajendra Nath Dutt, Subordinate Judge of Midnapore, dated Aug 23, 1909.

(1) (1883) 24 Ch. D. 271.
(2) (1888) 59 L. T. N. S. 210.
(3) (1868) L. R. 5 Eq. 332.
(4) (1871) L. R. 11 Eq. 251.
(5) (1909) 11 C. L. J. 2.
(6) (1866) L. R. 1 Ch. App. 485.

1912

RAJ KRISHNA DEY v. BIPIN BEHARI DEY.

Held, that the proper course to follow was, either to dismiss the suit, or, if the parties so desired, to appoint a *shebait* and place the properties in his hands. This latter order could be properly made only after amendment of the prayer in the plaint.

APPEAL by Raj Krishna Dey, the plaintiff.

The parties to the suit were originally members of a joint Hindu family governed by the Bengal School of Law. In 1887, one of the members of this family brought a suit for partition of all the joint family properties against the rest of the members. On the 5th December 1888, during the pendency of this partition suit, the parties filed a petition of compromise, and a decree in terms of the compromise was accordingly passed. Under the *solenamah* (deed of compromise) it was agreed, *inter alia*, that certain specified properties were to be set apart for the worship of the family deity and for the performance of various religious duties in connection with the worship, that the *shebait* was to manage the properties in the modes prescribed, to render accounts and to apply the income for the benefit of the endowment in the way defined in the instrument, that the *debutter* properties should for ever remain undivided, that one male member only of the family was to be appointed *shebait*, that should any *shebait* neglect the services of the deity, or cause any injury to the estate, the other co-sharers, or a majority of them, were to be competent to remove the *shebait* and to appoint another member of the family as *shebait*, who would be governed by the rules set out in the *solenamah*, and that one Nemai Chand Dey, a member of the joint family, was appointed the first *shebait*. No provision, however, was made for the succession to the office of *shebait* in the contingency of death of the first *shebait*. On the 5th December 1900, the parties to the petition of compromise executed and registered

a deed of endowment, or *arpannama*, embodying the terms of the *solenamah* and confirming the endowment previously intended to be created. Under this *arpannama* Nemai Chand Dey was to continue in his office of *shebait*. Nemai Chand Dey died on the 15th November 1907, and on the 7th February 1908 a majority of the co-sharers unanimously elected Raj Krishna Dey as *shebait* under the *arpannama* and duly executed a *neojpatra*, or deed of appointment, in his favour. Bipin Behary Dey, one of the sons of Nemai Chand Dey, however, did not join in this appointment, and, subsequently, got his name registered in the books of the Collector as a joint *shebait* along with Raj Krishna Dey. Thereupon, on the 10th July 1908, Raj Krishna Dey brought a suit against him for a declaration of his, the plaintiff's, title as sole *shebait*, for a declaration that Bipin Behary Dey was neither the exclusive nor a joint *shebait*, and for a declaration that the registration of the name of Bipin Behary Dey in the books of the Collector was illegal, and that he should be prohibited from interfering with the plaintiff performing his duties as *shebait* and managing the *debutter* properties, and made the rest of the members of the joint family *pro formâ* defendants. This suit was dismissed by the Subordinate Judge, who held that the plaintiff was not lawfully appointed *shebait* of the idol, and that the proper procedure to follow was for the parties to agree to the appointment of a *shebait*. Pending such agreement, the Subordinate Judge placed the endowed properties in the hands of the receiver, who was originally appointed receiver *pendente lite*. The plaintiff, thereupon, appealed to the High Court.

Babu Mahendra Nath Roy and *Babu Hara Kumar Mitra*, for the appellant. There is no express

1912

RAJ KRISHNA DEY v. BIPIN BEHARI DEY.

provision in the *arpannama* for the appointment of a *shebait* in case of death, but there is a distinct provision that the office should be held by a single male member of the family. There is sufficient indication as to how the appointment should be made, and the power to make such an appointment has been duly exercised by the majority of the members of the family in favour of the appellant, who has been elected *shebait* under a deed of appointment, on which I rely.

Babu Tarak Chandra Chukerbutty, for the respondents, did not, at the suggestion of the Court, object to a suitable person being appointed *shebait*; and the case was remanded to the Court below.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal on behalf of the plaintiff in a suit for declaration that he is the sole *shebait* of an idol Lakshmi Barahaji Thakur, and that the first defendant is not entitled to act as *shebait*, either jointly with him or separately. It appears that, on the 5th December 1888, in the course of a litigation between some of the present parties and the predecessors of the others, a petition of compromise was filed, by which the parties agreed to dedicate specified properties for the benefit of the idol. Under that petition of compromise one Nemai Chand Dey was appointed the first *shebait*. Twelve years later, on the 5th December 1900, the parties to the petition of compromise executed a deed of dedication, called an *arpannama*, by which the endowment previously intended to be created was confirmed. Under the *arpannama* Nemai Chand Dey was to continue as the *shebait* of the idol. It was further provided that, if the *shebait* was found guilty of neglect in the performance of the worship, or of causing any injury to the estate, the

other co-sharers, or a majority of them, would be competent to dismiss him and appoint another member of the family as a *shebait*. The modes in which the properties were to be managed, the accounts rendered and the income applied for the benefit of the endowment were also defined in this instrument. It was finally stated therein that the rules regarding the office of *shebait* would apply to the present *shebait*, as well as to the *shebait* who might succeed to that office in future. There was no provision made, however, for succession to the office of *shebait*; the parties contemplated the removal of a *shebait* by reason of default or misconduct; but they made no provision for the contingency, which was sure to happen, namely, the death of the first *shebait*. Nemai Chand Dey died on the 15th November 1907, and shortly afterwards the plaintiff obtained from the majority of the members of the family a *neoggpatra* (or deed of appointment), whereby he was installed as *shebait* of the idol. The first defendant, one of the sons of Nemai Chand Dey, however, did not join in this appointment, and subsequently got his name registered in the books of the Collector as a joint *shebait* along with the plaintiff. Thereupon, on the 10th July 1908, the plaintiff commenced this action for declaration of his title as *shebait*, and for a further declaration that the defendant was neither the exclusive nor a joint *shebait*. The Subordinate Judge has held, that the plaintiff has not been lawfully appointed *shebait* of the idol. He has further held, that the proper procedure to follow is for the parties to agree to the appointment of a *shebait*. Pending such agreement amongst the representatives of the founders, the Subordinate Judge has by his decree placed the endowed properties in the hands of a receiver, who was originally appointed receiver *pendente lite*. The

1912

RAJ KRISHNA DEY v. BIPIN BEHARI DEY.

plaintiff has now appealed to this Court, and has argued that under the *arpannama* of the 5th December 1900 the representatives of the founder were competent, upon the death of the first *shebait*, to make an appointment to the vacant office, and that such power has been validly exercised in his favour by the majority of the members of the family under the *neoggpatra* of the 7th February 1908. In our opinion there is no foundation for this contention.

As we have already stated, the founders omitted to provide for the contingency which has happened, and might easily have been foreseen. There is no provision in the *arpannama* of the 5th December 1900 for the devolution of the office of *shebait*, and, in circumstances like these, the Court will not read into the deed of endowment a provision for appointment to the office of *shebait*, which is not to be found therein. It was faintly suggested at one stage of the argument, that the clause which provides that the rules regarding the office of *shebait* shall apply to the then *shebait*, as well as to the *shebait* who might succeed to that office in future, was wide enough to meet the present contingency. It was fully realised by the appellant, however, that this provision was of no avail because the rule for the appointment of a successor to the office of *shebait* could not possibly apply to the then *shebait* who had been appointed as such twelve years previously. The position, therefore, is that the *shebait* is dead, and there is no provision in the deed of endowment about the mode in which the office is to be filled up. The principles applicable to a case of this description were formulated in the case of *Sital Das Babaji* v. *Protap Chandra Sarma* (1). These principles are threefold: *first*, the devolution of the trust upon the death or default of each trustee depends

(1) (1909) 11 C. L. J. 2.

upon the terms on which it was created, or the usage of the particular institution where no express trust deed exists; *secondly*, when the worship of an idol is founded, the office of *shebait* is vested in the heirs of the founder, in default of evidence to show that he has disposed of it otherwise; *thirdly*, where a *shebait* appointed by the founder fails to nominate a successor in accordance with the condition or usage of the endowment, the management reverts to the representatives of the founder, even though the endowment has assumed a public character. In the case before us, therefore, upon the death of the original *shebait* it became incumbent upon the representatives of the founders to make an appointment to the office of *shebait*. This they have failed to do, because they are not unanimous as to the person to be appointed. It cannot be held, that an appointment by the majority is valid in the absence of a provision in the deed of endowment to that effect. Consequently the Court is called upon to appoint a *shebait*. It cannot be disputed that the power of a Court to appoint a new trustee is very wide; it exists, and will be exercised, whenever there is a failure of suitable person to perform the trust, either from original or supervenient disability to act. It is an elementary principle that trusts will not be allowed to fail for want of a trustee, and, consequently, if the nominee dies, before qualifying or afterwards, the Court will appoint a trustee. If any authority is needed for this elementary proposition, reference may be made to the cases of *In re Orde* (1), *Re Ambler's Trusts* (2), *Gunson* v. *Simpson* (3), and *In re Smirthwaite's Trusts* (4). The appointment of a fit and proper person to be a new trustee is, however, not a matter of arbitrary discretion of the

(1) (1883) 24 Ch. D. 271.
(2) (1888) 59 L. T. N. S. 210.
(3) (1868) L. R. 5 Eq. 332.
(4) (1871) L. R. 11 Eq. 251.

1912

RAJ KRISHNA DEY v. BIPIN BEHARI DEY.

Court. The appointment must be made subject to well known and defined rules. These rules are stated in *In re Tempest* (1) where Lord Justice Turner formulated the following three principles: *first*, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected therefrom; *secondly*, that the Court will not appoint a trustee with a view to the interest of some of the persons, beneficially interested under the trust, in opposition either to the wishes of the founders, or to the interest of the other *cestuis que trusts*; and, *thirdly*, that the Court, in appointing a trustee, will have regard to the question, whether the appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into excution. In the case before us, the deed of appointment makes it clear that the founders had two things in view: *first*, that there should be only one *shebait*; and, *secondly*, that the *shebait* should belong to the family which had founded the endowment. Consequently, in appointing the next *shebait*, the Court will select the most suitable person amongst the members of the family. But the materials on the record are not sufficient to enable us to make an order in this behalf.

The result is that this appeal is allowed, the decree of the Subordinate Judge discharged, and the case remitted to him, in order that he may appoint a suitable person from amongst the members of the family of the founders as the next *shebait*.

We may point out, that the Subordinate Judge had no authority to place the endowed properties permanently in the hands of a receiver. If, in his opinion, the plaintiff was not validly appointed *shebait*, the

(1) (1866) L. R. 1 Ch. Ap. 485.

proper course to follow was, either to dismiss the suit, or, if the parties so desired, to appoint a *shebait* and place the properties in his hands. This latter order could be properly made only after amendment of the plaint. The plaintiff has accordingly asked for permission to amend the plaint by the insertion of an additional prayer clause to the following effect: that if the title of the plaintiff as *shebait* under the *arpanmama* be held invalid, the Court may appoint a suitable person as *shebait*. This application is not opposed by the respondent, and is granted. The plaint will be amended accordingly.

The costs of this litigation up to the present stage will be borne by the parties themselves; the costs subsequent to the remand may, if the Subordinate Judge so directs, be paid out of the estate.

O. M. *Appeal allowed; case remanded.*

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Chapman.

VISMADEV DAS

v.

SITA NATH ROY.*

1912

Aug. 14.

Transfer—Appeal—Powers of Court to whom case is transferred for trial—Limitation—Practice.

When an appeal has been transferred for trial by a District Judge to a Subordinate Judge, the Subordinate Judge has, for the purpose of disposing of the appeal, under the Bengal, North-Western Province and Assam Civil Courts Act, all the powers which could be exercised by the District Judge.

* Civil Rule, No. 5901 of 1911, against the order passed by S. C. Ganguli, Subordinate Judge of Faridpur, dated Aug. 8, 1911.