Privy Council Appeal No. 51 *of* 1935.
Bengal Appeal No. 18 *of* 1934.

Ganesh Chunder Dhur - - - - - *Appellant*

v.

Lal Behary Dhur and others - - - - *Respondents*

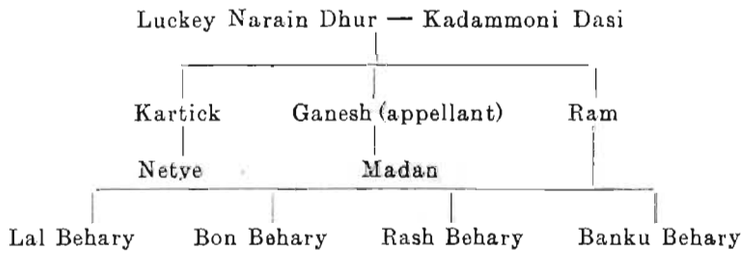
FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1936.

Present at the Hearing:
LORD BLANESBURGH.
LORD THANKERTON.
SIR SHADI LAL.
[*Delivered by* LORD THANKERTON.]

This appeal raises a question as to the validity of the provisions for the shebaitship of certain Hindu idols made by the will of Luckey Narain Dhur, who was a Hindu governed by the Dayabhag School of Hindu law, and who died on the 26th March, 1927. The following genealogical table will show the relationship of the parties :—



The testator was survived by his widow and by his three sons.

The material clauses of the will, which was made and published on the 18th November, 1923, and under which his sons Kartick and Ram were appointed executors, are as follows :—

> 9. Subject to the payments aforesaid I give the rest and residue of my estate unto my executors and trustees upon trust to pay the balance of the income of my said estate to the Shebaits for the time being of the Thacoors Netai Gour and etc., established by me and located at my family dwelling house No. 23, Sankaritolla Lane to be applied by the said Shebaits for the time being for the expenses of daily Sheba and periodical festivals and ceremonies of the said Thacoors as are usually observed and

performed in Hindu families of my caste and I direct that after the death of all the legatees under this my Will my executors and trustees shall make over the whole of the corpus and undrawn income of my said estate unto the Shebaits or Shebait for the time being of my said Thacoors upon the trusts as aforesaid.

10. It is my Will and I direct that the said house and premises No. 23, Sankaritola Lane shall always remain for the location and use of the said Thacoors and my Executors and Trustees or the Shebaits shall have no power or authority to sell mortgage or dispose of or deal with the said premises in any manner whatever and if at any time the said house and premises is acquired for any public purposes under any enactment for the time being in force them (*sic*) I direct that my executors and trustees shall with the money received for such acquisition purchase or build a suitable house in Calcutta or its suburbs for the location and use of the said Thacoors. The Shebaits for the time being of the said Thacoor shall be entitled to live with their family in the said house and premises No. 23, Sankaritola Lane or in any other house or premises where the said Thacoors may for the time being be located and my executors and trustees shall also allow my daughter Srimati Sowdamini Dassi to reside in the said premises No. 23, Sankaritola Lane during her life.

11. I appoint my sons Kartick Chunder Dhur and Ram Chunder Dhur to be the Shebaits of the said Thacoors and I direct that upon the death retirement or refusal to act of any of them or any of the future Shebaits the then next eldest male lineal descendant of Kartick Chunder Dhur or Ram Chunder Dhur shall act as a Shebait in place of the deceased or retiring Shebait or Shebaits refusing to act as such—it being my intention that the eldest for the time being in the male line of my said sons Kartick Chunder Dhur and Ram Chunder Dhur shall always remain as joint Shebaits and in the event of the death or refusal to act of any Shebait the then next male member of the branch to which the Shebait dying or refusing belonged shall act as a Shebait in his place and stead.

The testator's son Kartick died on the 24th May, 1927, leaving his son Netye, and the testator's son Ram died on the 17th October, 1928, leaving four sons as shown in the pedigree.

On the 25th April, 1929, letters of administration *de bonis non* were granted to the Administrator-General of Bengal, whereupon disputes arose as to which descendants of the testator were entitled to act as shebaits and to receive payment of the income of the estate, and the present suit was by originating summons taken out by the Administrator-General on the 1st August, 1933, for determination of the following questions:—

1. On a true construction of the Will of Luckey Narain Dhur is the appointment of Shebaits after the death of Ram Chandra Dhur and Kartick Chandra Dhur (since deceased) and the line of succession to Shebaitship created by clause 11 of the said Will valid?

2. If not, who are the persons at present entitled to act as Shebaits to the deities mentioned in the said Will in the events which have happened?

3. In the events which have happened, to whom is the income of the residuary estate to be made over?

It is agreed that there was a valid gift for life to the testator's sons Kartick and Ram respectively, but it is maintained by the appellant that the rest of the clause is invalid in respect that it attempts to lay down a line of succession which is not permissible under the Hindu law, and that the persons entitled to act as shebaits are the heirs of the testator, including the appellant.

The respondents maintain that Lalbehary and Netye, who were in life at the testator's death, and were respectively the next eldest male lineal descendants of Ram and Kartick respectively on their deaths, were entitled to act as shebaits and to the income of the estate, by virtue of a gift for life to them, which was independent of the line of succession otherwise invalidly sought to be laid down by the testator.

Panckridge J., who tried the case, upheld the contention of the present appellant, by a judgment dated the 10th January, 1934. On appeal, this judgment was reversed by Lort-Williams and Costello JJ., who held that clause 11 can be construed " as an intention to make an independent gift of the office for life to such person as happened to answer the description of 'eldest male lineal descendant' at the date of the death, retirement or refusal to act of Kartick or Ram."

Their Lordships apprehend that the law applicable to the present case is well settled, and that the question is one of construction of the will.

The well known *Tagore* case (1872) L.R. I.A. Supp 47, laid down two separate principles:—(*a*) that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator, and (*b*) that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance are void as such, and that by Hindu law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates tail. As Lalbehary and Netye were in being at the testator's death, the first of these principles presents no difficulty.

In *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*, (1899) 27 I.A. 69, it was held by this Board that the second ruling in the *Tagore* case above referred to is applicable to an hereditary office and endowment as well as to other immoveable property. This decision was followed in *Monohar Mukherji* v. *Bhupendranath Mukherji*, (1932) I.L.R. 60 Cal. 452, 37 Cal. W.N. 29.

On the question of construction, section 87 of the Indian Succession Act, 1925, provides, " The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible ". This reproduces, almost *verbatim*, section 74 of the Indian Succession Act of 1865.

Their Lordships do not find it possible, as matter of construction of the clause here in question, to find a separable gift in favour of the persons who were to take respectively on the death, retirement or refusal to act of Kartick and Ram. The testator combines the whole series of changes in the succession in one sentence, " upon the death, retirement or refusal to act of any of them (Kartick or Ram) or any of the future shebaits ", and additional force is given to this observation by the terms of the declaration of the testator's intention in the later part of the clause, which also covers the whole series of changes in the succession.

As is not unusual in such questions of construction, other cases are of little assistance, but the decision of this Board in *Madhavrao Ganpatrao* v. *Balabhai Raghunath Agaskar*, (1927) 55 I.A. 74, may be cited by way of contrast. In that case a Hindu conveyed property to trustees upon trust to pay the income to the settlor during his life and after his death, as to one-fourth share, to the settlor's married daughter Krishnabai " for her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike." The High Court held, on the death of Krishnabai, leaving six sons all of whom were alive at the date of the deed, that the intention was to create an estate descendible to male heirs only, and that the provision was invalid as an attempt to create an estate unknown to Hindu law. That decision was reversed by His Majesty in Council, and, in delivering the judgment of the Board, Lord Buckmaster said :—

> " Their Lordships are of opinion that the true interpretation is that the persons who answer the description of male heirs at the date of Krishnabai's death were the persons in whose favour an independent gift was made, but that by operation of the Hindu law there would be excluded from that class people who were not living when the deed was executed. There is nothing whatever in the words of the grant to show that the estate so conferred was anything but an absolute estate upon such persons. For there is nothing to suggest, on the one hand, that such estate was limited to their life or, on the other, that any line of descent was marked out after their death. It is true that the gift is in the form of a gift of income, but it is a gift unlimited in point of time, and if there be no restriction in the gift and no limitations beyond the actual beneficiaries at Krishnabai's death such a gift carries the whole estate."

In the present case the very elements are to be found, the absence of which were founded on in the above case as justifying the reversal of the decision of the High Court.

It was further argued for the respondents that, even if no separable and independent gift to those who would take on the death, retirement or refusal to act of Kartick and Ram respectively, it was still the duty of the Court to give effect to the scheme of succession in so far as the person entitled to take under the scheme was in fact also the person who would take under the Hindu law of succession, this being true in the case of Lalbehary and Netye. But this con-

tention is the same as a contention which was rejected by the Board in the *Tagore* case, in the following passage, at page 76 :—

> " Accordingly it has been argued in support of the will, that as it shows an intention to give an estate of inheritance of some sort, all the machinery by which the estate was to be governed and dealt with after it was created ought to be rejected, and such an estate of inheritance as the law would uphold and sanction ought to be read out of the will and conferred either upon Juttendromohun Tagore whose family was intended, so long as it produced males descended of males, to represent the estate described by the testator, by treating his life state as converted or expanded into an estate of inheritance, according to Hindu law, or at least upon his son to be begotten or adopted, as the first tenant in tail male, whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow and to some extent. In order however to arrive at this conclusion, we must find a general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process ; and we are not at liberty to invent for him a will which will have the effect of creating an estate at variance not merely in details but in substance and effect with what he has said . . . . There is no trace to be found in the will of an intention to create any other sort of estate ; and the will, as clearly as language can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guesswork as to what the testator might have said if he could be asked his meaning ; for it would be to contradict in every article what he has intelligibly expressed."

The intention of the testator in the present case not to create an estate of inheritance as defined by the ordinary law is at least as clear as in the *Tagore* case.

Their Lordships are accordingly of opinion that the decision of the Trial Judge was right, and that, on the deaths of Kartick and Ram respectively, the succession to the office of shebait and the income of the estate must be according to the ordinary Hindu law of succession, the provisions of clause 11 of the will, in so far as it relates to the holding of the office of shebait after the respective deaths of Kartick and Ram, constituting an invalid attempt to lay down a line of succession which is not permissible under the Hindu law.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court in its appellate jurisdiction dated the 20th July, 1934, should be set aside except as to the costs in that appeal, and that the decree of the High Court in its original jurisdiction dated the 10th January, 1934, so far as set aside by the above-mentioned decree, should be restored. The costs as between solicitor and client of all parties to this appeal, including the Administrator-General, to be paid out of the estate.

(37208—3A) Wt. 8136—2 150 8/36 P. St G. 338

In the Privy Council.

GANESH CHUNDER DHUR

v.

LAL BEHARY DHUR AND OTHERS

DELIVERED BY LORD THANKERTON.

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