

PRIVY COUNCIL

Gopal Lal Sett

Vs.

Purna Chandra Basak

(Lord Buckmaster, Sir John Edge, J. Mr. Ameer Ali and Sir Lawrence Jenkins. JJ.)

20.12.1921

JUDGMENT

Lord Buckmaster J.

1. The history of the litigation of which these appeals form part, extending over a period of sixty-five years, has been carefully and minutely examined in the judgment of the learned Judges of the High Court of Judicature at Fort William in Bengal, from which these appeals have been brought.

2. Their Lordships, therefore, do not propose to attempt a repetition of the facts, except so far only as may be necessary to explain the reasons for the opinion they have formed.

3. Several questions of interest and of importance have indeed been raised and argued upon these appeals, but the true construction of the will of the testatrix, Bhaggobati Dasi lies at the threshold of the dispute, and on the view taken by their Lordships of the true meaning of this document, these larger questions do not arise.

4. The testatrix, who died on the 29th May, 1841, was the second wife, and at her death had been for thirty years the widow, of one Gobind Chand Basak, a Hindu governed by the Bengal school of Hindu law. By him she had three sons and two daughters. The eldest of these sons was Pran Krishna Basak, who predeceased his mother and left two children, Monmohini Dasi and Udoy Chand Basak. The second son, Joy Krishna, was found to be a person of unsound mind in 1838, but he was not a congenital lunatic. The third son, Raj Krishna, died in 1821, leaving no children.

5. The eldest daughter, Tripura Sundari Dasi, died before her mother, leaving a son, Radha Kanta, and the second, Golab Dasi, or, as she is sometimes called, Golapmoni, survived. By the first marriage of Gobind Chand Basak there had been two sons, Radha Krishna Basak and Sri Krishna Basak, both of whom survived the widow. From

them there have been numerous descendants, who will be referred to merely by way of description as the Basak Branch of the family. In truth the real quarrel in the present case lies between the two branches of the same family descending from the two wives. Bhaggobati's will was executed on the day of her death. Some question has arisen as to the true translation of the will.

6. The differences do not seem vital, but in any case their Lordships accept the official translation Ex. A in the suit No. 711 of 1907. It is addressed to Udoy Chand Basak, her grandson, and contains on the face of it the following statement:-

"Reliance on the feet of Sri Hariji.

Joy Gopal. Shiba Thakur's.

Anandamovi Thakirani's.

Gopal Lal Ji's."

7. This fact that it is addressed to Udoy Chand is important to bear in mind in construing the provisions of the will, for the duties that it imposes are clearly placed on him. It relates first to certain property which is referred to as the Company's Paper standing in the name of the testatrix, and directs that out of the income " ' you ' " (that is Udoy Chand)

"Shall perform the sheba (worship, and Co.) of Sri Sri Iswar and the sheba of the ancestral Sri Sri Iswar, 'you' shall perform the sheba of the said Iswarjew out of the income of the ancestral garden called Iswar Gopal Lal Ji's garden, purchased in his name. 'You' shall be the person in charge of the sheba of all the deities,"

8. There is then introduced a separate and definite gift with regard to two houses, namely a house at Chowringhee and a house at Pathuriaghata, out of which was directed there should be performed the sheba of Sri Sri Iswarjew " as it is at present," and that the remainder of the income should be divided between three people, namely, Monmohini, Radha Kanta, the son of Tripura, and Golapmoni, thus making provision for each one of the surviving branches of her own family except Joy Krishna, who was insane.

9. The testatrix then refers again to the balance of the interest accruing from the Company's Paper, and directs how that is to be dealt with, in connection with religious services. There is no definite gift of the residue.

10. The first question that arises is whether the gift is a gift to the Idols, or whether there was a gift to any other person or persons charged with the maintenance of the

Idols. The will is most obscure, but their Lordships think that there is certainly no direct gift of the whole property to the Idols, nor in the circumstances ought one to be implied. It is consequently necessary to see in what capacity and by virtue of what right the worship of the Idols is to be carried out. The person on whom the duty was cast was undoubtedly Udoy Chand, and the conclusion which their Lordships have reached, is that if, as they think, there is no gift to the Idols, it is only possible to give effect to the provision of the will by treating it as conferring the property upon Udoy Chand. The will is addressed to him; upon him throughout all the burdens of performing different duties are cast, and this necessarily involves the ownership of the property.

11. Their Lordships agree with the High Court in thinking that no heritable Shebaitship was established by the will. Udoy Chand was to be shebait during his lifetime, and so far as the sheba of Iswar Thakurani was concerned, he was directed to perform the ceremonies " according to the existing arrangements of the sheba" in concert with his stepmother, Shiba Sundari; but after his death no express provision was made for the worship, and the necessary duties will have to be performed by persons properly appointed for that purpose.

12. Although this has never been declared the true interpretation of the will, it is the construction that has in effect been acted upon for a considerable period of time, for Udoy Chand died on the 8th July, 1842, and upon his death administration proceedings were instituted by Golap Dasi asking for the usual administration relief. It is unnecessary to pursue the whole course of this suit. Shiba Sundari was, on the 14th December, 1857, appointed, jointly with the executors of Udoy Chand, to take charge of the Idols, and on her death on the 14th August, 1858, members of the branch of the family known as the Basak Branch were introduced into the suit, and from that time down to now some of them have been associated with the performance of the duties.

13. The result of litigation and other expenses, however, has, as the Board is informed, completely exhausted the greater part of the moneys derived from the Company's Paper set apart for the worship of the Idols, and the claim has consequently been put forward for the balance of the rents from the two houses, on the ground that the whole of the property was dedicated for the worship of the gods. It is unnecessary for their Lordships to determine whether the effect of the gift in the will which gave the income of this specially appropriated property to the three named beneficiaries without any limitation of time, would be sufficient to create an absolute gift, for on the 14th December, 1857, by an order made in the administration proceedings, the Court

declared that out of produce of the houses belonging to the estate of the testatrix, situate at Chowringhee and Pathuria ghata, the worship of Sri Joy Gopal should be performed, and that the surplus of the said produce should be paid as follows, namely, to the representatives of Radha Kanta Sett, deceased, one equal third part; to the representatives of Srimati Gopal Dasi, deceased, one equal third part; and to Srimati Monmohini during her life time and to her representatives after her death the remaining one equal third part or share. This order, although it contains no express words to that effect, amounts to a clear and effective declaration by the Court as to the absolute interests taken by each of the three named beneficiaries in the will, for the payment to the representatives of the named beneficiaries admits of no other explanation, but to this order the Basak Branch of the family were not parties. They were, however, parties to a suit instituted in 1881, upon which an order was made on the 15 th March, 1888, when it was directed that the sum of Rs. 6,849 should be regarded as the surplus income derived from the property set apart for Sri Joy Gopal, and it was ordered that the trustees should divide and pay the same between the parties entitled in the proportions mentioned in the decree of the 14th December, 1 57, that is to the representatives of the three named beneficiaries in equal shares. There has consequently been an order binding all parties, based upon the view that the property in which the three beneficiaries mentioned were interested was segregated from the rest of the estate and set apart for the up keep of the named idol (Sri Joy Gopal Jee), the surplus belonging to them absolutely in equal shares. This disposes of the whole matter in dispute upon appeal.

14. The learned Judges of the High Court who carefully examined all these proceedings, thought that the question as to the absolute interests of the three named beneficiaries had never been definitely raised and decided, and that the directions already mentioned were only made pending the administration suit. But there is no such limitation in the terms of the order, and such, a direction given in an administration suit as the effect of an order binding all parties and determines the construction to which it gives effect, so that after the lapse of time necessary for appeal, it becomes final and conclusive. *Peareth v. Marriott* ¹

15. The questions raised as to whether Joy Krishna was prevented from inheriting by virtue of his lunacy, and the point decided by the High Court as to the true reading of the Dayabhaga do not arise, and their Lordships make no pronouncement upon these points. It is only necessary to add that both from the terms of the will of Bhaggobati herself and from the information afforded by the documents, it would appear that one

at least of the idols mentioned in the will was ancestral, but even if that were the case, their Lordships agreed with the High Court in thinking that there is not sufficient evidence to prove any endowment prior to her death.

16. Their Lordships see no reason to doubt that the Court executing the duty of appointing trustees would pay due regard to the claims of that branch of the family with whom the worship was established and by whom the services performed, but they regard the gift as in effect a private trust to which the provisions of Section 92 of the Code of Civil Procedure would not apply, and consequently the establishment of a scheme for its administration, as provided by the decree of the High Court, is inappropriate.

17. The appellants have to a certain extent succeeded, but they have gained a barren victory; they have moreover, taken 14 years to bring this matter before the Board since the judgment of the High Court. Their Lordships will, therefore, make no order as to their costs. The cross-appellants, represented by Sir George Lowndes, have failed.

18. Mr. Parikh's client appears in the same interest. The only persons who have succeeded at all are the representatives of the three original beneficiaries; but although the point on which they succeed was undoubtedly raised and argued in the High Court for reasons that it is not easy to understand, the point was never clearly and definitely raised before this Board, and no complaint was made by them against the judgment of the High Court, although it was adverse upon the point. There was, however, sufficient mention of the matter in the respondents' case to permit of its argument, and, when argued, no answer to it could be found. Their Lordships are not prepared in the circumstances to allow them any costs.

19. Their Lordships will, therefore, humbly advise His Majesty (1) that the appeal No. 169 of 1919 should be allowed in part and the cross-appeal No. 170 of 1919 dismissed ; (2) that the decree of the High Court of Judicature at Fort William in Bengal dated the 10th day of January, 1908, should be varied by (a) discharging so much thereof as directs a scheme to be submitted for carrying out the trusts created by the will of Srimati Bhaggobati Dasi deceased, (b) by declaring that according to the true construction of the said will, the whole of the property of the testatrix, with the exception of the houses at Chowringhee and Pathuriaghata, was given absolutely to her grandson Uday Chand Basak, charged with the performance of the worship of the deities mentioned in the said will except the deity Sri Sri Iswarjew, and (c) by further declaring that it appearing that by virtue of two decrees dated the 14th day of

December, 1857, and the 15th day of March, 1888, the residue of the income arising from the said houses has been directed to be paid in proportions to the three named beneficiaries, Monmohini, Radha Kanta and Golapmoni and their respective representatives, the question as to the absolute interests taken by the said beneficiaries under the said will is *res judicata* between the parties to these appeals; and (3) that there should be no order as to the costs of these appeals.

Decree varied accordingly.

Cases Referred.

1 (1883) 22 Ch D 182 : 31 WR 68 : 52 LJ Ch, 221 : 48 LT 170.