

CALCUTTA HIGH COURT

Rajeshwar Mullick

Vs

Gopeshwar Mullick

(Chitty, J.)

13.05.1907

JUDGMENT

Chitty, J.

1. This is a suit by Rajeshwar Mullick against his brother Gopeshwar Mullick and his nephew Gorachand Mullick to have the rights of the plaintiff under the will of his uncle Lalit Mohan Mullick ascertained and declared. The second defendant Gorachand has not appeared to defend the suit, and the contest has therefore been between the two brothers, Rajeshwar and Gopeshwar. The sole question in the case is as to the validity of Clause 5 of the will of Lalit Mohan Mullick, whereby he directed as follows:--"My wife Srimatee Sudevi Moni Dasi shall on my demise take the money which I have been, receiving for the expenses of services, according to my turn...to Sri Sri Ishawar Radha Gobind Jee established by my grandmother, the late Chitra Dasi, and perform the said services during her lifetime, and I confer on my wife Sudevi Moni Dasi the same right that I now have to the Ishawar Jew's jewellery, plate, etc., and on her demise I confer on my nephew Sriman Rajeshwar Mullick Babaji the right, etc, in respect of the expenses, jewellery, etc., of the said service. He and his son's son, etc, in succession shall enjoy by performing this service." The endowment, the shebaitship of which is now in question, is a private endowment founded by Ghitra Dasi, widow of Ram Lochah Mullick, by an ikrar dated 25th May 1820, a postscript dated 27th February 1822, and her will dated 8th December 1842. The following pedigree table shows the family and descendants of Chitra Dasi: [For the pedigree, see the next page.]

2. I do not propose to set out in detail the facts, as to which there is no dispute, for they appear sufficiently from the plaint. and from the various documents which have by the consent of parties been laid before the Court. The will of Lalit Mohan was made as far back as 1891, but his widow, Sudevi Moni Dasi, did not die until May 1906. The question as to the validity of the bequest in plaintiff's favour has therefore only recently arisen. The simple question is whether Lalit Mohan had power to dispose of his own right of worship, and the turn (or pala) which he had enjoyed, in favour of the plaintiff to the exclusion of the defendants, who would in ordinary

course have succeeded to such right of worship and pala by inheritance along with the plaintiff. There are no longer any emoluments attached to the offices, and it here fore only the bare right of service which is in dispute.

Ram Lochan Mullick X Mr. Chitra Dasi (d. 29 Oct. 1855.) |

|||| Cossinath Lokenath
 Haranath Sumbhoonath (Innatic) Taranath (d. 25 May 1864.) (d. 1 Feb. 1862) (d. 3 Dec. 1876)
 (d. 9 Dec. 1864) (d. 2 Aug. 1876) X X X X X Rnngonmoni Dassee Chandan Coomari. Rangon
 Moni. Gobinda Moni Joymoni.

(d. 16 April 1878). | | (d. 1 June, 1872).

| Kally Kumar | |
 (d. 8 Jany. 1871). | |

Doyalchand. |

| Boleycband.

|
 Dinendra

| Lalmohan | Lalit Mohan |
 (d. 19 Feb. 1892). (d. 11 Nov. 1891)
 (adopted son).

| X |
 | Sudevi Moni. |

| Rajeshwar | Gopeshwar | Narottam | | |
 Lal. Gopal Lal. Manik. Lal. | | | | |
 (plaintiff). (defendant.) (d. 22 July 1900)

|
 Gorachand
 (defendant).

3. A large number of oases were cited by counsel relating to religious endowments, but it was frankly conceded that there was no direct authority for or against the proposition which the plaintiff lays before the Court. It would therefore serve no good purpose to discuss those authorities in detail. The law on the subject will be found in Chapter XII of Mr. Mayne's work on Hindu Law, and in the Introduction to Ganapathi Iyyer's wort on Religious Endowments at pp.

clxi--clxiii and ccxi sqq, where all the cases are given. The general conclusions I draw from the authorities may be stated in a few words. Originally both partition and alienation both of the property devoted to a religious purpose like the present, and also of the shebaitship or right of worship were alike forbidden custom, however, and convenience intervened, and the right to partition of a shebaitship came to be recognised. I may point out that it has been accepted by the family with respect to the present endowment, and has been recognised by this Court in the several judgments and decrees which are now before me. The worship has for a long time past (since the days of Chitra Dasi's sons) and still is carried on by the various she baits in palas. It is in respect of one only of such palm that the present suit is brought Turning to alienations, it was pointed out by Ranade J. in *Rajaram v. Ganesh*¹ that a distinction has always been drawn between alienations to strangers and those to members of the family, and also between compulsory and private alienation. The learned Judge also indicated that as to private alienations no general rule prohibiting them can be lard down. It must depend on each case, first, on the expressed intentions of the founder (if any) and, secondly, and failing that on any custom or usage of the family substantiated by evidence. The two cases most relied upon by plaintiff's counsel were *Sitarambhat v. Sitaram Ganesh*² and *Mancharam v. Pranshankar*³ In the first, an alienation of a temple-office by a grandfather to his grandchildren by way of relinquishment was upheld. In the second, the alienation was by will to a sister's son, the widow of the testator, who was his next heir, expressing her acquiescence in the bequest. It is obvious that cases of relinquishment stand, in a different footing, for there is no exclusion of some third person.

4. In the second case cited it is not stated what were the terms of that particular endowment, and the learned Judges expressed their opinion in somewhat qualified terms. Neither case exactly meets, the present. In the case of *Khetter Chunder Ghose v. Hari Das Bundopadhya*⁴ an alienation of a private idol with its endowed land was upheld by this Court: but in that case the alienation, was made by the consent of the whole family of shebaits to another family, the object being for the benefit of the idol, to secure a continuance of the worship in accordance with the wishes of the founder, which the alienors through poverty were unable to maintain.

5. In the present case the intention of the foundress was that all her lineal descendants should hold the debutter property and jointly perform the sheba. The only alienation which she contemplated was the gift or sale by one of her sons to one or more of the others, the property being in any event retained in the same gotra. So whether by the foundress's express direction or by the ordinary rule of Hindu Law, the property and right of worship may be regarded as being in the first place hereditary. The question then arises whether there has been any modification of that principle by the usage of the family.

6. This is not pleaded and no evidence has been given of any such usage. Many members of the family have purported to deal with their right of worship by will, but the effect of that has certainly not been to establish any uniform usage or practice. Indeed in only one case, that of Cossinath, was an attempt made to divert the right of worship from the persons who would be

entitled to it in ordinary succession. In that case the attempt failed, and his five nephews as his heirs were by the decree of this Court, dated. 26th August 1882, declared to be entitled to the right.

7. In Lokenath's case his widow, Chandan Coomari Dasi, was preferred to his son Kali Kumar. There was in this case also a suit and the matter was settled by arrangement. This I think is clear from the decree of 7th July 1865. Some question may arise in respect of the disposition under Kali Kumar's will, but cannot happen until the death of his step mother Chandan Coomari Dasi.

8. Haranath bequeathed his right of worship to his sons Lal mohan and Lalit Mohan, who would in any case have succeeded him. Taranath's will was to the same effect as he purported to appoint his widow Joymoni Dasi. She was then his next heir, as his son Dinendra was not adopted till after Taranath's death.

9. Lalmohan, again, directed that his three sons should perform his share of the worship jointly. It is only in Lalit Mohan's will that we find a desire to exclude altogether some of those who would be the heirs in the ordinary course, and favour one individual at the expense of the rest.

10. Under these circumstances, it appears (i) that this disposition, in Lalit Mohan is not in accordance with the wishes and intentions of the foundress, and (ii) that there is no established usage or practice in the family which could justify it. The initial presumption in the case was against the plaintiff, and the burden of proving such a usage as I have mentioned was upon him. It is evident that he has neither rebutted the one nor discharged the other. The suit therefore fails and is dismissed. The first defendant must have his cost of suit on scale 2,

Cases Referred.

1(1898) I.L.R. 23 Bom. 131

2(1869) 6 Bom. H.C. 250

3(1882) I.L.R. 6 Bom. 298

4(1890) I.L.R. 17 Calc. 557