Privy Council Appeal No. 57 of 1940

Bhabatarini Debi (since deceased) – – – – *Appellant*

v.

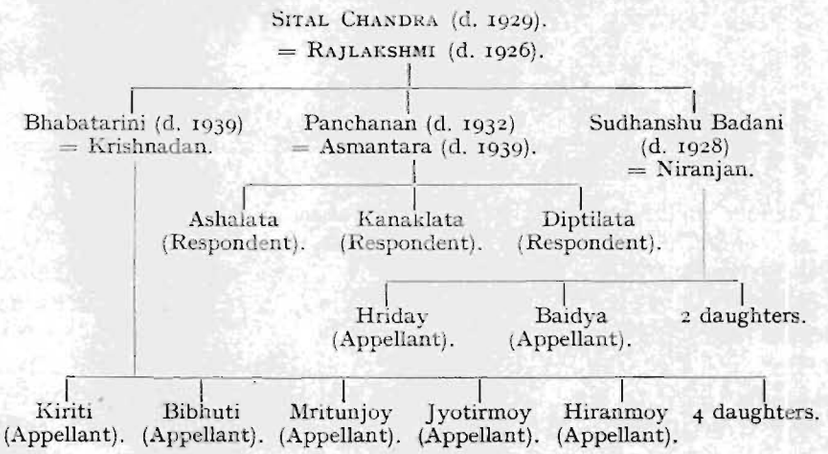
Ashalata Debi and others – – – – – – *Respondents*

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 22ND JANUARY, 1943

Present at the Hearing:
LORD THANKERTON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR
[*Delivered by* SIR GEORGE RANKIN]



This suit was brought in the High Court at Calcutta on the 22nd August, 1933. The plaintiff was Bhabatarini daughter and only child then surviving of one Sital Chandra Banerjee, a Hindu governed by the Dayabhaga, who had died in 1929. He had in his lifetime established certain family idols and had dedicated to them considerable properties movable and immovable. His only son Panchanan had died in 1932 leaving a widow Asmantara and three daughters.

By her suit Bhabatarini claimed to have become on the death of Panchanan entitled to the sebaiti of the idols and to the management of the debutter property. She impleaded Asmantara and her daughters as persons wrongfully in possession of the debutter properties and falsely claiming to be sebaits: though as between themselves the widow on ordinary principles of succession would of course take before the daughters. Bhabatarini and Asmantara have both died while the present appeal to His Majesty was pending, the former on the 15th February and the latter on the 18th January, 1939. The question to be answered is whether on Panchanan's death the sebaiti devolved upon his heirs—that is, in the first place, upon his widow—or whether it went to Bhabatarini as the person who at that date was the nearest surviving heir of the founder Sital Chandra. The learned trial Judge Khundkar J. took the latter view

and by his decree of 26th August, 1937, found in favour of Bhabatarini, but on appeal Derbyshire C.J. and Mukherjea J. found in favour of Asmantara and their decree of 11th July 1938 dismissed the suit. The same principles apply on the death of these two ladies. On the view taken by the trial Judge the sebaiti is now vested in the sons of Bhabatarini and of the sister who had predeceased her—the seven appellants. On the view taken by the Appellate Bench it has devolved upon Panchanan's daughters, the three respondents.

The terms of the dedication made by Sital are to be found in an *arpannama* or deed of dedication dated 31st March, 1922. Seven years afterwards he purported to cancel this instrument and to rededicate the same properties on different terms by a deed dated 13th February, 1929; but the High Court have found and it is now accepted by both parties to the present appeal that this deed of 1929 had in law no effect upon the previous dedication. The provisions made by Sital for the devolution of the sebaiti are to be found solely in the deed of 1922. Those which became effective in the events which happened are that Sital and his wife Rajlakshini should be the first sebaits and that on the death of Sital (who survived his wife) Panchanan should be sebait in his stead. This appointment of Panchanan was followed by provisions purporting to say who should succeed him in the sebaiti, but these provisions were in law of no effect. Upon the death of Panchanon in 1932 the specific provisions validly made by Sital as founder with respect to the succession to the office of sebait became exhausted.

What happened then to the sebaiti right? Cases are not wanting in which it has been said that it goes to the heirs of the founder. Of these the leading authority is perhaps *Gossami Sri Giridharji* v. *Roman Lal Ji Gossami* (1890) L.R. 16 I.A. 137, 144, where Lord Hobhouse said:

> " According to Hindu law when the worship of a thakoor has been founded the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

The case itself was one in which a custom of primogeniture obtained in the plaintiff's family. The principle thus enunciated was said to be illustrated by the case of *Peet Koonwar* v. *Chutter Dharee Singh* (1870), 5 Ben. L.R. 181, 13 W.R. 390, where the founder had appointed his sister sebait and provided that each sebait should appoint his or her successor. The sister having died without making any appointment it was held by Bayley and Dwarkanath Mitter JJ. that " the managership must revert to the heirs of the person who endowed the property." To point to the founder as the person from whom descent was to be traced was enough to end the case as the suit was brought by the sister's husband's brother claiming as her heir and the defendants were the founder's widows. The language of Lord Hobhouse above cited was restated by Sir Arthur Wilson in *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi* (1904), L.R. 31, I.A. 203, 208, in the form " that the title to the property, or to the management and control of the property, as the case may be, follows the line of inheritance from the founder."

Save for one case, however, no decision appears to have been directed to declaring for the purposes of any case like the present, the exact method of determining the individual person or persons who should be the first takers after those specifically nominated to the office by the founder. The decision which deals with this precise question is *Kunjamani Dasi* v. *Nikunja Behari Das* (1915), 22, Calcutta Law Journal 404, 20 C.W.N. 304, a decision of Mookerjee and Richardson JJ. In that case the founder left a widow and six sons. He nominated his widow and two sons to be successively sebaits after his death and gave no further directions. When the last of the three nominated sebaits died, it was held that the next takers were " the heirs of the founder at the time "—namely, the four sons then surviving. It was argued to the contrary that on the death of the founder all his sons took a vested interest subject to the right of the nominated persons—that is, a remainder subject to

three successive life estates in the office. This view was however rejected, Sir Asutosh Mookerjee saying:

> " We are of opinion that this contention is unsound, and that the principle of vested interest while the actual enjoyment of the expected interest is postponed till the termination of the life estate, as expounded by their Lordships of the Judicial Committee in *Rewun Pershad* v. *Radha Beeby* (1846), 4 M.I.A. 137, has no application to cases of the description now before us. No doubt a shebait holds his office for life (*Rajeshwar* v. *Gopeshwar* (1907), 1 L.R., 35 C. 226); but this does not signify that he has a life interest in the office with the remainder presently vested in the next taker. The entire office is vested in him, though his powers of alienation are qualified and restricted. . . . The position of a shebait is analogous to that of a Hindu female (widow, daughter or mother) in possession of the estate of the last full owner rather than to that of the holder of a life estate. When a Hindu female is thus in possession she represents the estate completely and though her powers of disposition may be of a restricted character, no one else has a vested interest in the estate during her lifetime. Similarly, when a founder has given valid directions as to the devolution of the shebaitship, as in the present case, upon the death of the last shebait, the office vests in persons who at the time constitute the heirs of the founder, provided the last shebait has not taken it absolutely; when the office has so vested in them, upon the death of each member of the group it passes by succession to his heir. . . ."

This is the principle for which Mr. Pringle on behalf of the appellants now contends—that the necessity of treating the sebait in office as completely representing the idol and its property prevents the recognition of any other person as having a vested interest in remainder; and thus prevents any interest in the sebaiti from being, as the learned trial Judge expresses it, " carried along the straight line of inheritance from the founder," during the time that the office is held by any person to whom the founder has granted the sebaiti but not absolutely or so as to devolve upon his heirs.

The learned trial Judge in a very clear and careful judgment followed the decision in *Kunjamani's* case. The learned Chief Justice took the view that, subject to the right given to Panchanan by the deed of 1922, " the sebaitee and the right of disposing of it " remained vested in Sital, and on Sital's death passed to Panchanan as his heir. " Panchanan then had not only a ' life ' sebaitee but the right of disposing of the sebaitee: he had the complete heritable and descendible rights of a sebait," so that his rights passed to his heirs under the Hindu law. Their Lordships do not appreciate that any question arises in this case as to a right of disposing of the sebaiti, and they do not here discuss this somewhat special subject-matter. Mukherjea J. addressed himself to the reasoning of *Kunjamani's* case. He was critical of " the observation that there is no vested remainder in anybody in such cases." He pointed out that a Hindu widow is regarded as a surviving half of her husband, and observed that the idea that there can be no residuary right in anybody so long as a sebait is actually in office can be supported only on the principle that sebaiti is an office pure and simple and not a property. His conclusion was thus expressed:

> " To me it seems that both the elements of office and property, of duties and personal interest, are mixed up and blended together in the conception of Sebaitship. One of the elements cannot be detached from the other. The entire rights remain with the grantor when a deity is founded and it is open to him to dispose of these rights in any way he likes. If there is no disposition, Sebaitship remains like any other heritable property in the line of the founder and each succeeding Sebait succeeds to the rights by virtue of his being an heir to his immediate predecessor and not to the original grantor. If it is disposed of completely and absolutely in favour of another person, there remains nothing in the grantor except the possibility of a revertor when there is a failure or extinction of the line of Sebaits indicated by him. If, on the other hand, the founder has parted with his rights only in a partial manner for the lifetime of the grantee the residue still remains in him and his heirs, and on the death of the grantee, the heir of the founder living at the time is entitled to the Sebaitship. If the grantee in such cases happens to be the sole heir of the founder upon whom the residuary right devolves at the

> same time and he becomes the Sebait under law as well, then, whether or not we invoke the technical doctrine of merger or coalescence of the particular estate with the residue, his position in my opinion is that of an absolute Sebait whose rights devolve upon his heirs and not upon the heirs of the founder at his death. If there was no grant in his favour, he would have been entitled to an estate of inheritance under law as regards the Sebaitee, and the fact that there is a grant in his favour of a limited right cannot make his position worse, and take away from him the higher rights which he had irrespective of the grant. It would be opposed to all principles of law to require that in such cases on the death of the Shebait who was himself the heir of the grantor, the successor can come in only to use the technical phrase *per formam doni*.

The fact that the person nominated by the founder to succeed him was not a stranger but his only son appears at first sight at least to put a special element of difficulty in the way of the appellants. But their Lordships are not of opinion that this case can or should be dealt with by distinguishing it from *Kunjamani's* case without examining the principles therein laid down. It was the decision of two learned Judges of distinction, one of whom as a Bengali lawyer of wide experience had very exceptional qualifications for forming an opinion upon the matter. The authority of the decision is not in their Lordships' view impaired by reason that the same result might have been arrived at on an alternative ground—namely, that the sebaiti had been given absolutely to the last of the nominated persons. Nor can it be fairly said that the law as to sebaits has of late altered in material respects by reason of the discussions which ended in the Full Bench case of *Monohar Mukherjee* v. *Bhupendra Nath Mukherjee* (1932), I.L.R., 60 Cal. 452. The effect of that case and of the Board's decision which confirmed it—*Ganesh Chunder Dhar* v. *Lal Behary Dhar* (1936), L.R., 63 I.A., 448—was however to emphasise the proprietary element in sebaiti right, and to show that though in some respects anomalous, it was an anomaly to be accepted as having been admitted into Hindu law from an early date. It must be noticed however that though certain cases are referred to in the judgment in *Kunjamani's* case the learned judges do not profess to be following any previous decision as covering the particular point now in question. Taking their stand upon the proposition that the entire office is vested in the person who holds it at any given time they arrive at the conclusion that it is impossible to give recognition to any interest as vested in another. Abstract reasoning of this character is never without its perils in matters of first impression. Before the results can be accepted a careful regard must be had to practical consequences and to competing analogies or principles. This is all the more advisable in the present case since there are elements in the Hindu law of idol and sebait which the ordinary Hindu law of property finds somewhat intractable. Their Lordships cannot but agree with the remark of Mukherjea J. that analogies—tenant for life, tenant in tail, Hindu woman's estate—however helpful can be pushed too far.

Reference was made by the trial Judge and in the argument before their Lordships to the case of *Ganesh Chunder Dhur* v. *Lal Behary Dhur* (*supra*), and it may be as well to notice that no question as to the correctness of the rule in *Kunjamani's* case was raised by the facts or considered by the Board. The testator Luckey Narain left three sons, two of whom, Kartick and Ram, were appointed by him to be the first sebaits and the provisions of his will marked out an invalid and illegal line of descent to take effect upon their death. On the death of these two sons, there survived the remaining son, Ganesh, one son of Kartick, and four sons of Ram. Ganesh was not so uninstructed as to claim that he alone inherited the sebaiti right but only claimed that he was one of the persons entitled as heirs of his father. This was made clear by the sixth paragraph of his affidavit of 15th August, 1933, and it was accepted that, as Lort-Williams J. put it in his judgment, " Ganesh would succeed along with the heirs of Ram and Kartick as joint heirs of the testator." Under the Dayabhaga as under the Mitakshara grandsons whose father is dead take simultaneously with sons and *per stirpes*. The Board having held over-ruling the Appellate Bench that the line of descent prescribed by the testator to take effect upon

the death of Kartick and Ram was illegal, applied " the ordinary Hindu law of succession " and restored the decree of Panckridge J. that the persons to succeed the nominated sons were " the heirs of the testator."

The case now before the Board is not one where the founder has made no disposition with respect to the sebaiti nor has he disposed of it absolutely and completely in favour of another. It requires an intermediate case to raise the difficulty which is here presented—a case where the only disposition made by the founder is that he has made a grant to X, or to X and Y in succession, of the office of sebait without intending or at least without effectively directing that the heirs of either are to take. Had no such nomination been made it is clear that the sebaiti would have devolved in the line of the founder in like manner as property inherited from a male owner who had held it in severalty and that the next heir if a male would become a fresh stock of descent. Unless therefore there be cogent reason to the contrary, the principle to be applied to the intermediate case would seem to be that the course of devolution prescribed by the ordinary law should give way so far as is necessary to let in the persons nominated by the founder but no further. It is here that the analogy of the Hindu woman and the reversioner is apt to be misleading. The Hindu widow is not the only person who can have a Hindu woman's estate and the point that she is said to be a surviving half of her husband might perhaps be overstressed. But the Hindu widow—first of all the female heirs in the table of succession—never takes in the presence of son, grandson or great grandson: and when upon her death the estate devolves upon the person who is the nearest living heir of her husband, this cannot operate to cut out heirs of a son or grandson who survived him. What the appellants seek in the present case is to cut out the daughters of Panchanan who are the heirs of Sital's surviving son, since they are not heirs of Sital at all. Disparate are the results of analogy.

Still, it must be recognised that the sebait must completely represent the idol or the endowment—the deity, the religious purpose, the *debutter* property. As laid down by the Board in a case already cited (*Jagadindra's* case (1904), L.R. 31, I.A. 20), the right of suit is in the sebait in such sense that if the sebait be a minor the period of limitation is postponed in view of his incapacity. It would be intolerable that the office should be duplicated by including with the incumbent his successor or that third parties should be required to deal both with sebaits and with presumptive sebaits. This is a practical requirement and proceeds from reasons which have not much in common with the case of a Hindu woman's estate. The Hindu woman " represents her husband's estate " in the sense that she is owner of it—though a limited owner; having a power of disposition which is limited by reason that she is not herself a stock of descent and has a duty to protect the reversion. The reversioner when he succeeds to the estate may deal with it at his pleasure. The sebait has certainly a right of property in his office and it may be correct to say that he has some sort of beneficial interest in the debutter property but the idol is the owner of the property and the limit set to the sebait's power of disposition is set not to preserve the interest of the next sebait but to maintain and preserve by proper management the endowment or religious institution. The nature and extent of the power of alienation for necessity is laid down in *Hunooman Persaud* v. *Mussammat Babooee* (1856), 6 M.I.A., 393—perhaps the most often cited of all the cases in the Indian reports; for the principles expounded by Lord Justice Knight Bruce apply not only to the sebait and the Hindu widow but to the *karta* of a joint family acting on behalf of minor members and to a mother acting as guardian of the property of her minor son.

The question remains to be answered on its merits: If it be recognised that the sebait must completely represent the idol, does it follow that nothing save a *spes successionis* can be attributed to anyone else? If the founder appoints X to be the first sebait but not absolutely or so as to carry any interest to any heir of X, has he left no interest in himself? Their Lordships agree with the Appellate Bench of the High Court that these questions cannot be answered as the appellants' case requires. They

think that *Kunjamani's* case should on this point be overruled. It seems possible in theory to lay down a series of rules for determining which person in a family should succeed to the office of sebait to the family idol without assuming that the office is property at all. Such rules might be made to follow more or less completely the same course as the line of succession to the property of a Hindu male owner. This however is no more than a fancy to be mentioned only for distinction's sake and to be put aside as soon as mentioned. It is not a theory which anyone maintains nor would it serve the appellants' purpose to suggest it. It must now be taken that the sebaiti is property, that it is not a *catena* of successive life estates (*Gnanasambanda's* case (1899), L.R. 27, I.A. 69, 78), but is heritable—heritable property which in the first instance is vested in the founder. It must further be accepted that the founder may direct that a designated person should hold the office during that person's life either immediately or on the death of a previous holder; and that such direction—subject to the relevant conditions as to perpetuity, whatever these may be—will be good although it carries no right to the heirs of the grantee and does not amount to a complete disposal of the sebaiti.

If then on the death of the grantee the sebaiti goes to the founder or his heirs, this is because the right of the founder is heritable and he has not completely disposed of the interest which he has therein. It is impossible to represent this as a *spes successionis*. It is a right in the founder and his heirs. It is the same estate of inheritance as the founder held at the date of the grant. The grant did not exhaust it or terminate the founder's interest. On the death of the grantee the sebaiti " reverts " because the heritable interest of the founder has ceased to be qualified by the grant.

It is only with some difficulty that any theory can successfully hold together the two elements of " office " and " property," but the sebaiti right involves both and neither element is to be discarded. Their Lordships are not certain that they have succeeded in forming a precise notion of the difficulty that is apprehended from admitting the possibility that an interest in remainder can be vested in the founder or an heir of the founder during the incumbency of the grantee.

What is the class of case in which it is thought that the existence of this right will prevent the sebait from representing the idol with that completeness which has hitherto been ceded to him? Rights to prevent mismanagement, to preserve the foundation, can be asserted by anyone having an interest therein. Questions may arise which affect the title to the sebaiti right itself. But what claim to interference with the idol's worship or property can be based upon a right which has not vested in possession? Why in any case should the element of " office " be regarded so little or disregarded so completely? The Courts need give no countenance to such suggestions. If the office is heritable property and may be the subject of a grant limited to the period of the donee's life, the grant may be regarded as disabling the founder and any heir of his from having or asserting during the donee's life any right to represent the idol or manage its affairs or from impairing in any manner the right of sebaiti which has been granted and which has long been well defined by the law and practice of Hindus.

Applied to the facts of the particular case before the Board, the argument for the appellants though presented with great clearness and ability by Mr. Pringle remains unattractive. Panchanan, Sital's only son, survived him. Sital's only valid disposition of the sebaiti was in favour of Panchanan. His attempts to confer any interest to take effect after Panchanan's death were illegal and ineffective. Yet the interest given to Panchanan is said to defeat his heritable right and to exclude his heirs. Their Lordships cannot accept such doctrine, which they regard as correctly refuted by the passage which they have cited from the judgment of Mukherjea J.

They will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs.

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