

(1930) 07 BOM CK 0019

In the Bombay High Court

Case No : Letters Patent Appeal No. 22 of 1929

Kashinath Mahadev Mahajan

APPELLANT

Vs

Gangubai Keshav Nagarkar

RESPONDENT

Date of Decision : 30-07-1930

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : (1930) 32 BOMLR 1687 : 129 Ind. Cas. 741

Hon'ble Judges : Patkar, J; Barlee, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Patkar, J.—One Gopal Vyankatesh died in 1892 leaving behind him his widow Radhabai and some daughters of whom the plaintiff is the surviving one. He made a will, Exhibit 57, in the year 1883, and directed his widow to make an adoption, and in case she did not, he directed that all his property should be utilized in trust for a religious purpose. After his death the widow did not take anybody in adoption and made a will, Exhibit 58, in 1898, by which excepting one house given absolutely to her daughter, the present plaintiff, she gave the remaining property in trust for a religious institution and appointed two executors, Vinayak Thakar and Gangabai Barde. In 1904 there was a compromise and an award decree between the plaintiff and the executors by which the plaintiff was not to urge her claim as heir to the plaintiff property, that she was to get one house and had to give back the other house which she had obtained under the will of her mother, and after the death of the trustees the management of the trust was to revert to the present plaintiff. The plaintiff applied for execution of the award decree and obtained possession of the house which was given to her by the award decree, but did not hand over possession of the other house which she had obtained under the will of her mother. Gangabai Barde, one of the executors, died in July 1919, and the other executor Vinayak Thakar died on March 26, 1921. Defendants Nos. 1 and 8 are the sons of

Mahadev, the divided nephew of Gopal.

2. The plaintiff filed the present suit for possession of the plaintiff property on two grounds, firstly, basing her claim on the award, decree under which she was to get the management of the trust property after the death of the executors, and, secondly, as the heir of the original founder entitled to manage the property on the death of the appointed trustees. The defendants on the other hand claimed that defendant No. 1 was appointed trustee by Vinayak and had taken possession of the property from the nephew of Vinayak in March 1921.

3. The learned Subordinate Judge held that defendant No. 1 was validly appointed trustee, and therefore the plaintiff's right to manage the trust property did not arise, and further that in virtue of her conduct in denying the endowment and asserting her personal right to the trust property, she was disqualified to be appointed a trustee, and therefore dismissed the suit.

4. On appeal, the learned Assistant Judge came to the conclusion that defendant No. 1 was not in fact appointed trustee by the executors, and that they had no power to appoint a successor. He held that the plaintiff as the daughter and heir of the original founder was entitled to the management of the trust property on the death of the trustees. With regard to the question as to whether she was disqualified on account of her retaining one of the properties in her possession and not handing it over to the trustees, the learned Judge came to the conclusion that the question did not arise in this suit which was between the plaintiff who was entitled to the management as the heir of the founder and the defendant who was a trespasser, and further expressed an opinion that in a properly instituted suit in the District Court the question of disqualification of the plaintiff might be raised and decided. With regard to the alternative claim based on the award decree the lower Court held that the arbitrator had no power to appoint a successor after the death of the executors in respect of a trust of a public character.

5. On second appeal Baker J. confirmed the decree of the lower Court. Defendants have appealed under the Letters Patent.

6. On appeal it is urged that the plaintiff's right as heir of the original founder is not an unconditional right as held by the Privy Council in *Mohan Lalji v. Gordhan Lalji Makaraj* ILR (1913) All. 283: 15 Bom. L.R. 600. and that the plaintiff should not be allowed to get possession of the property on account of her denial of the trust and retention of one of the houses in her possession.

7. According to Mayne's Hindu Law, page 619 :

Where a trust has been created, in default of evidence that he has disposed of it otherwise, the law will vest the trust in the founder and his heirs, unless there has been some usage or course of dealing or some circumstances to show a different mode of devolution, or unless such a mode would be inconsistent with the purpose of the foundation. Where the founder has made a disposition of the

trusteeship outside of his own family, but the succession to the office of trustee has wholly failed, it has been held that the right of management reverts to the heirs of the founder.

In *Peet Koonwar v. Chuttur Dharee Singh* (1870) 13 W.R. 396 : 5 B L.R. 181 it was held that where the mutawallee of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property. This decision has been approved by the Privy Council in (1889) L.R. 16 I.A. 137 (Privy Council) and in *Maharaja Jagadindra Nath Roy v. Rane Hemanta Kumari Debi* (1904) L.B. 31 I.A. 203 : . 6 Bom. L.R. 765. The question has been fully discussed by the Calcutta High Court in *Ananda Chandra, Chuckerbutty v. Braja Lal, Singh* ILR (1922) Cal. 292. The decision in *Ghelabhai Gavrishankar Vs. Uderam Ichharam*, is consistent with this view.

8. Stress has been laid on behalf" of the appellant on the remark of the Privy Council in *Mohan Lalji v. Gordhan Lalji Maharaj* that (p. 288) "this rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship." In that case the plaintiffs, who were the daughter"s sons of the founder, were bold not entitled to the right of sebaiship on the ground that they were not capable of acting as ministers of the cult established by Ballavacharya Maha Pirbhuj, and the claim of the plaintiffs was disallowed on the ground that their appointment would defeat the purpose of the founder of the institution. It is not suggested in the present case that the devolution, in the ordinary line of descent of the right of management to the plaintiff, is inconsistent or opposed to the purpose of the founder. In *Gauranga Sahu v. Sudevi Mata* ILR (1917) Mad. 612 *Srinivasa Ayyangar J.*, while criticising *Mussamat Jai Bansi Kunwar v. Chattar Dhari Sing* (1870) 5 B. L.R. 181 : 13 W.R. 396 was constrained to hold, in view of the Privy Council decisions, that the right of management would pass to the heirs of the founder by inheritance, and dissented from the view of the majority of the Full Bench only on the point of the competency of the heir in whom trusteeship has vested to create a new line of trustees, The plaintiff "is not precluded by reason of her sex from acting as the manager of a religious endowment in the absence of any usage to the contrary: *Keshavbhat v. Bhagiratkibai* (1866) 3 B.H.C.R. 75 and *Meenakshi Achi v. Somasundaram Pillai* ILR (1920) Mad. 205.

9. In the present case the plaintiff was in possession of one house given to her absolutely by the mother and obtained another house in virtue of the award decree. She executed the award decree and obtained possession of the house given to her under the award decree, but the executors failed to execute the decree, so far as it was in their favour, in respect of the house given to her under the will of her mother. The present suit is brought by the plaintiff, who, under the authorities to which I have referred, is prima facie entitled to the management of the trust property, to recover possession of the trust property from the defendant, who, on the finding of the lower Court, is a trespasser. The present

suit is not u/s 92 of the CPC for the appointment of the plaintiff as a trustee or for the removal of any other persons as trustees. She claims the right of management on the ground that she is prima facie entitled to it as the heir of the founder, and that right is not lost by reason of any previous conduct of hers which has not been proved to our satisfaction to be such as would prevent the vesting of the right of management of the religious endowment in her as the heir of the founder. In case it is (subsequently found that the plaintiff is by reason of her conduct disqualified from continuing as trustee of the religious endowment, it would be open to the defendant or any other person interested in the institution to apply to the Collector or the Advocate General and bring a suit u/s 92 of the CPC for her removal. On the findings based on the evidence in the present case we think that the view taken by the lower appellate Court is right and this appeal must be dismissed with costs.

Barlee, J.

10. I agree, The question in this case is whether the right to the managership of the religious endowment set up by the will of the plaintiffs' mother is vested in the plaintiff. If it is vested in the plaintiff it is quite clear that this Court has no jurisdiction to consider whether she is a fitting person to manage it, but that all questions of that nature must be considered in a suit instituted with the consent of the Advocate General or the Collector of the District, in the District Court u/s 92 of the Civil Procedure Code.

11. The general rule is laid down in the case of Peet Koonwar v. Chuttur Dharee Singh (1870) 13 W.R. 396 to the effect that "where the mutwallee of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property". This rule has been adopted by their Lordships of the Privy Council in several cases and it must be taken to be firmly established. But on behalf of the appellant, who is in possession of the endowment property, it has been urged strenuously that the rule is subject to exception, and the exception suggested is that the person claiming as heir must be a person competent to carry on the duties of the office. The learned advocate has relied on a remark of Mr. Amir Ali in the case of Mohan Lalji v. Gordhan Lalji Maharaj ILR (1913) All. 283 : 15 Bom. L.R. 606. After quoting the dictum of Lord Hobhouse in the Privy Council case of Gossami Sri Gridhariji v. Romanlalji Gossami ILR (1889) Cal. 3, his Lordship went on to say as follows (p. 288) :-

This rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. This qualification is in fact covered by the words used by Lord Hobhouse.

Starting from this point, the first question to determine is whether the plaintiffs suing for the joint exercise of the right of shebaitship to the temple in suit, have established their competency for the office.

12. The learned advocate relying on the word "competency" has contended that since in every case the person claiming to be entitled to a religious office must show that he or she is competent, in this case it is clear that the plaintiff must fail, because her incompetency is shown by her conduct in the past, which shows, he urges, that she has an interest adverse to the religious endowment. But I am unable to agree that his Lordship was referring to qualifications of a personal nature. The word " competency " must be interpreted with reference to the preceding sentences of the judgment cited. There is first of all the ruling of Lord Hobhouse that the shebaitship vested in the heirs of the founder (p. 20) "in default of evidence that there has been some usage, course of dealing, or some circumstances to show a different mode of devolution." I lay stress on the words "mode of devolution." Then there follows the comment that this rule must be subject to the condition that the devolution in the ordinary line of descent is not consistent with the purpose the founder had in view. Clearly their Lordships were laying down a general rule of the special law of succession to religious offices and not speaking of competency in a personal sense. The facts of the case of Mohan Lalji v. Gordhan Lalji Maharaj show that the competency they were concerned with was the competency of the claimants to perform the rites and ceremonies of the temple and that was determined not by their personal qualifications but by their status, i. B., the cult or sect to which they belonged. I agree, then, that this passage cannot be a foundation for any such rule as we have been asked to adopt, that under Hindu law the devolution of an estate can possibly depend on the conduct or the personal qualifications of the heir.