

(1960) 03 AHC CK 0008
In the Allahabad High Court
Case No : First Appeal No. 42 of 1949

Sri Thakur Krishna Chandramajiu

APPELLANT

Vs

Kanhayalal and Others

RESPONDENT

Date of Decision : 18-03-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 3
Evidence Act, 1872 — Section 65, 74(2)
Transfer of Property Act, 1882 — Section 41

Citation : AIR 1961 All 206

Hon'ble Judges : S.N. Dwivedi, J; R.N. Gurtu, J

Bench : Division Bench

Advocate : S.B.L. Gour and H.C. Sharma, for the Appellant; K.C. Mittal, K.C. Agrawal and A. Banerji, for the Respondent

Final Decision : Dismissed

Judgement

Gurtu, J.—This is a first appeal by the plaintiff in the action. The plaintiff is a deity, Shri. Thakur Krishna Chandramajiu installed at Lala Babu's temple in the holy city of Brindaban by its next Mend, Swami Satyananda Tirtha (since deceased and after him, his Chela Swami Shiyanand Tirtha), disciple of Swami Shankar Hari Har Tirtha Jiu, residing at Brindaban, Lala Babu's temple, district Mathura.

2. The plaintiff prays (a) that a decree be passed declaring the properties in suit as absolute debutter of the plaintiff deity and that the same are unaffected by the mortgages, dated the 22nd June, 1925 and 24th December, 1925 and the decree thereon in suit No. 1365 of 1927 of the High Court of Judicature at Fort William, in Bengal in its ordinary original Civil Jurisdiction and that the sales held thereunder be declared to be void, ultra vires, without jurisdiction, illegal and invalid and not binding on the plaintiff and (b) that a decree for Khas possession in favour of the plaintiff on the eviction of the defendant No. 1 from the properties in suit be passed.

3. The defendant No. 1 in the suit was Kedar Nath Kezdiwal, the auction-purchaser. He has died since and is now represented by his heirs specified in the plaint. The second defendant is Arun Chandra Singh who is the heir of Krishna Chandra Singh alias Lala Babu (i.e. the mortgagor of the two mortgage deeds dated 22-8-1925 and 24-12-1925) and is said to be the shebait of the plaintiff deity.

4. During the pendency of the appeal Swami Satyananda Tirtha died and an application for substitution of his Chela, Swami Shivanand Tirtha was made and, as indicated above, he was brought on the record in place of Swami Satyananda Tirtha subject to objections being taken at the hearing of the appeal and which objections, having been taken during arguments, will be dealt with by us subsequently.

5. The controversy in the appeal mainly is whether the properties, affected by the aforesaid mortgage deeds, decree and auction sales, and which are specified in the plaint along with the other property compendiously known as "Qasba Anupshahr" and comprising altogether 54 villages which were purchased or owned by Lala Babu constitute an endowment in favour of the plaintiff Thakur.

6. The case of the defendants is that they were secular properties owned and possessed by Lala Babu and his heirs and successors. The further defence of the defendants with which we are now concerned is that the suit was barred by Section 41 of the Transfer of Property Act and by limitation. It is also disputed that Swami Shivanand Tirtha has the right to continue the appeal. The area of the controversy in the suit itself is apparent from the issues framed in the case by the court below which may be reproduced as below :

1. Did Krishna Chandra Singh make any will as alleged in the plaint?
2. Were the properties in suit dedicated for Sewa and worship of the plaintiff by Krishna Chandra Singh? Is plaintiff owner of the same?
3. Were the properties in suit treated as absolute debutter properties of the plaintiff?
4. Was the income of the properties in suit ever used for the Sewa and worship of the plaintiff?
5. Were names of Krishna Chandra Singh's descendants and successors, recorded in papers on the properties in suit in their own right or as Shebait of the plaintiff?
6. Was defendant No. 2 Shebait of the plaintiff? Was he in possession of the properties in suit as such Shebait?
7. Was defendant No. 2 competent to execute the mortgage deeds dated 22nd June, 1925 and 24th December, 1925?
8. Were above mortgage deeds executed in breach of the trust?

9. Did defendant No. 1 obtain the mortgage decree against defendant No. 2 fraudulently and collusively?
10. Was the decree ultra vires, void, without jurisdiction, illegal and invalid?
11. Were suits 3 of 1930 and 19 of 1931 brought in this court fraudulent and collusive?
12. Were plaintiff's next friends in those suits guilty of gross negligence and misconduct? If so, its effect?
13. Is the plaintiff entitled to take possession and get the mesne profits claimed?
14. Is the plaintiff's next friend in this case not a proper person to bring this suit for him?
15. Was the will relied upon by plaintiff not genuine?
16. Did properties in suit belong to Krishna Chandra Singh and other members of joint Hindu family?
17. Was Krishna Chandra Singh not competent to execute a will with regard to these properties?
18. Did Krishna Chandra Singh become an ascetic before execution of the Will?
19. Did his Will remain a dead letter?
20. Was court-fee paid insufficient?
21. Is suit barred by Section 92 of C. P. C.?
22. Is suit barred by time?
23. Is suit barred by Section 11 of C. P. C.?
24. Was this suit barred by Religious Endowments Act?
25. Is this suit barred by Article 144 of Limitation Act?
26. Is suit barred by Section 41 of Transfer of Property Act?
27. Is this suit barred by estoppel?
28. Is this suit not cognizable by this court?
29. Is this court not competent to declare the decree of Calcutta High Court invalid and illegal?
30. Is this suit barred by Court of Wards Act?
31. Is the suit vexatious? Is defendant entitled to get special costs u/s 35A of C. P. C.?

The findings of the court below on these issues, except to the extent indicated in the course of our judgment, have not been discussed before us for if there was

no endowment the suit would in any case fail. The court below has summed up its findings in the following words :

"To sum up, it is clear from the above that no Will of Lala Babu has been proved, that even if the translation of the Will relied upon by the plaintiff is taken to be correct and duly proved translation of the original will of Lala Babu, it does not dedicate and vest the properties in dispute to and in the plaintiff and that the plaintiff was never in possession or owner of these properties. No probate of this Will was ever taken. The utmost the plaintiff has been able to prove is that some of the incomes from Pargana Anupshahr was sent to Mehman Chander, a Karinda of Lala Babu's estate at Brindaban but we do not know for what purpose and we cannot draw any inference that it was for the benefit of the plaintiff and that in the Wajibular-zes prepared in 1870 an admission was made by the Karinda of the Court of Wards that the income from these villages was earmarked for the expenses of the plaintiff, though the ownership vested in descendants of Lala Babu. On the other hand, we have absolutely no evidence on record to show how the income from these properties was dealt with by the descendants of Lala Babu during other years from 1821 to 1889, but we know that their names were recorded in the Khewats as owners and the plaintiff's name was never recorded over them. After the award of 1893 in the partition suit between the descendants of Lala Babu, the properties dedicated to and vested in the plaintiff were clearly named and a scheme was prepared for their administration but the properties in dispute were not among those and these properties in dispute were clearly, since then, treated as the secular properties of the descendants of Lala Babu and its income was never applied for the benefit of the plaintiff. It is not possible for us to hold on this evidence only that the properties in dispute were ever dedicated to and vested in the plaintiff. Also if the Will is not taken to be proved it has to be found out in case these properties are held to be dedicated to and vested in the plaintiff as to when they were so dedicated to and vested in him. It is impossible to find out from the above evidence when such dedication to and vesting in the plaintiff took place. In the present case, there is no deed (if we ignore the alleged Will) which even directs that the profits of the properties in dispute are to be applied for the benefit of or be applied to the plaintiff. In *U.P. Government Vs. Redhey Lal*, it has been held by Allahabad High Court that where a deed directs that the profits of a village should be paid to the idol but it also clearly says that the persons who executed the deed and their heirs and successors should remain recorded as proprietors of the properties in the register of proprietors and the inheritance should be governed by the ordinary rules, then there is no dedication of the property and it does not vest in the idol, and the deed also does not create any charge in favour of the idol, and at the most what actually happened in the present case is the same as has been directed by the deed in the above-mentioned case. In case we assume that the income of the properties in dispute was always spent for the benefit of or paid to the plaintiff deity then this conduct of the owners by itself would not create any dedication of the properties in dispute in favour of the plaintiff, nor will it create any charge in his favour."

7. Sri S. B. L. Gaur, counsel for the appellant, has contended that the findings on the question of endowment, which were in favour of the defendants, were incorrect and he contended that it is clearly established that Lala Babu created an endowment by a testamentary document namely a Will dated the 17th day of Kartic 1224 B.S. corresponding to 1-11-1817. In this connection, he has relied upon a translation of the alleged Will for it is the certified copy of the translation and not the original Will which has been produced in this case.

He has further contended that the Will was acted upon and has in this connection referred to the account-books for the period between 11-6-1867 to 19-6-1870 of a firm of bankers and to the corresponding entries in the account-books produced by the defendants at the plaintiff's instance. He also relied upon copies of certain Wajibularzes which were drawn up during the Settlement operations carried on by Mr. Currie, and on certain Khewat entries. Coupled with this, he has also referred to certain oral evidence.

8. The contention on behalf of the defendants, is that all these documents and oral evidence relied upon by the plaintiff to establish the endowment are either not admissible or are not of any value. The defendants, on the other hand, have relied upon the dealings with the property to show that it was always treated as secular property.

9. We will, first of all, take up the question of the translation of the Will and determine whether it i.e. the translation is admissible in evidence and, if it is, what probative value should be attached to it and, secondly, what is the correct interpretation of the Will. The Will, as already pointed out, has not been filed in original. What has been filed is a certified copy of its translation. It appears from the record that Lala Babu died sometime in 1821 A.D. leaving his widow, Rani Katyani and a minor son, Sri Narain Singh who later died in 1836.

As has been indicated above, Lala Babu had purchased 54 villages, including the 7 in suit, in Pargana Anupshahr before his death. After Lala Babu's death, it appears, the widow, Rani Katyani, moved the Court of Wards for the estate of the deceased Lala Babu to be taken under the superintendence of the Court of Wards. To the application, which was made to the Court of Wards, there was attached an alleged Will of Lala Babu either in the original or a copy thereof.

It appears that a translation was caused to be made by the Court of Wards of the said Will as attached by Rani Katyani to her application and that this translation, which was forwarded along with the Board's recommendation to the Governor-General-in-Council was in the custody of the Historical Department of the Government of Bengal from where a certified copy thereof was caused to be produced and filed in this case. The plaintiff has alleged that the Will in the original was registered on or about the 20th of December 1817 A.D. at Agra.

This fact was not established. The plaintiff also took steps to lay ground for the production of secondary evidence of the original Will by summoning the same from the descendants of Lala Babu. Having thus laid the foundation for the

introduction of secondary evidence, the plaintiff sought in the court below to put in the translation thereof as secondary evidence of the original Will. They had summoned the translation in the original from the department but were supplied with a certified copy thereof which they have filed

Alternatively, in this Court they wish to rely upon the translation as a public document u/s 74 of the Indian Evidence Act and the certified copy thereof as its secondary evidence. Reliance on behalf of the plaintiff was placed on Section 65(c) and (e) of the said Act, Sri Gaur attempted to argue that the translation itself constituted a public document as being either an act or record of the sovereign authority u/s 74(1)(i) of the Evidence Act or being a public record, kept in any State, of a private document u/s 74(2) of the said Act.

10. The court below, after pointing out that Exhibit 26 is the certified copy of a translation of the alleged Will, referred to the evidence of Binod Behari Chakrawarty, the Keeper of the records of the Historical Department of the Government of Bengal, who said that he could not say whether the translation was made from the original or from a copy of the original or who made it. The learned Judge, therefore, recorded a finding to the effect that the utmost that had been proved was that there was a translation in the record room of the Bengal Government which purported to be the translation of a portion of the Will of Lala Babu or of its copy and that the document of which it was a translation or the copy of which it was a translation was filed along with an application by Rani Katyani to the Board of Revenue for taking the property of Lala Babu wider the Court of Wards.

The learned Judge then referred to the suggestion of the learned counsel for the plaintiff that the heading of the translation showed that it was a translation of a deed of assignment executed by Sri Krishna Chandra Singh land had rejected the contention that this heading showed that it was necessarily a translation direct from the original deed. He also referred to the contention that the translation in question being endorsed as a true translation by one Mr. G. Warde, Secretary, it must be presumed to be a correct translation u/s 90 of the Indian Evidence Act as the document was prepared more than 30 years ago and came to the conclusion that, at the most, the court could only presume that this document was sent by Mr. G. Warde, Secretary, Bengal Government, and that it was a true translation of a Will alleged to be of Lala Babu or of its copy and that it could not be presumed that there was, in fact, a proper will executed by Lala Babu and that this translation was made from it.

11. We are of the view that the conclusions of the learned Judge of the court below, as indicated above, are correct except that it cannot be said with certainty that the translation is necessarily true. There is no evidence whatsoever of any person who saw the alleged original Will being executed or read the contents of the alleged original Will, nor does it appear from the relative document of the Court of Wards or the resolution of the Governor-General-in-Council that any direct examination was made of the question as to whether, in fact, Lala Babu

had executed such a Will. It cannot, therefore, be said that there is any proof that an original Will was executed by Lala Babu. Even though in 1817 no attestation of a Will was necessary, there is no proof that Lala Babu affixed his signature to any such Will.

12. The first question is whether this translation which is not proved to be even a translation from the original document and which might be a translation from a copy of the original document would be secondary evidence or not of the original document? It cannot be placed above a copy at a copy and that is not secondary evidence. The next thing to be noted is that the translation itself indicates that there were schedules attached to the Will which have not been translated.

Therefore, it cannot be said that the translation on the record contains all the matter which existed in the original Will. Moreover, although the translation is certified as a true and correct translation by Mr. G. Warde, the name of the translator is not given, nor is there any evidence to show what was the extent of Mr. Warde's knowledge of the language in which the original Will was framed or whether a translation having been put up before Mr. Warde, he just certified it mechanically as a true translation. Had the certificate been given by a Bengali officer it could have been assumed that the certificate was correct.

In these circumstances, apart from the fact that it is doubtful if a translation may be treated as secondary evidence, in regard to this particular translation, which obviously is not a full translation of a document (the appendices are missing and it is not possible to say to what extent they controlled the rest of the document) by a person in regard to whom there is definite knowledge that he was sufficiently familiar with the language of the original document so as to be able to translate it in order to bring out its exact effect, it cannot be said that, this translation is such a reliable evidence on which the Court may act, even if one could treat it legally as secondary evidence. We are not going into the question whether the certified copy of the translation would be secondary evidence, We may note that a prayer, was made to summon the original translation in this Court.

13. We now come to the question whether this translation itself can be said to be a public document a certified copy whereof can be admitted in evidence. Sri Gaur contends that it forms an act of a sovereign authority or alternatively, of a public officer who was charged with the duty of making a translation of original Wills or copies thereof sent along with applications for estates to be taken over by the Court of Wards and the fact that the translation was made for the purpose of being sent to the Governor-in-Council shows that it must have been made under the authority of some law.

Sri Gaur has not shown us any law whereunder any public officer of the sovereign authority was, at the relevant time, required to make such a translation and was required to retain it on the record. As observed in *Secy. of State v. Chimanlal Jamanadas*, AIR 1942 Bom 161--

"It is only a public document, and not merely a record copy for the private use of Government Officers which it is not the duty of the Government to maintain, that can be admitted in evidence as a public document u/s 74."

It is thus evident that unless it is shown in regard to a document that it is the duty of the Government servant to make a translation thereof, the document would not become a public document u/s 74(1) of the Evidence Act.

We may point out that clearly either the original Will or a copy of the original Will had been sent along with Rani Katyani's application. Therefore, obviously it was the original Will or a copy thereof which was required to be sent along with such application and making of the translation appears to be merely for the convenience of the Officers concerned and does not appear to be directed by any statute. If that original or copy, as sent, were available and it was shown that it had to be retained under the law then such original or copy of original might have been a public document within the meaning of Section 74(2) of the Evidence Act. We will now refer to the cases cited by Shri. Gaur.

14. The first case relied upon by him is *Rajendra Narayana Singh v. Bihari Lal*, AIR 1932 Pat 157. This is a case in which the plaintiffs wanted to establish their talabi brahmatter rights to a certain Mauza and they produced in evidence certain certified copies prepared from, a register of Sarsikan papers in the Manbhum Collectorate. It was held that since the record room in which the originals were kept had been destroyed, therefore, in the circumstances, the register in the Manbhum Collectorate should be treated as the original document and the entire entries therein could be proved by certified copies thereof which the plaintiffs had produced. It is apparent from the judgment of the cited case that the register must have been maintained under authority of law.

15. The next case relied upon is *Munshi Ram v. Baisakhi Ram* AIR 1947 Lah 335. In that case, the original document which was proved in the previous suit had been proved to have been lost. It was held that a copy of its transliteration was admissible as secondary evidence and it was competent for the signatory of the original document to prove it. This does not appear to be a case where Section 74 of the Evidence Act was applied.

16. In *Katikineni Venkata Gopala Narasimha Rama Rao Vs. Chitluri Venkataramayya*, , the question was whether the private documents of an assessee which the Income Tax Officer himself had called for and which were admitted to the record for the purpose of assessment could be considered to be documents forming acts or records of the acts within the meaning of Section 74(1) of the Evidence Act. On the one hand, the argument was that such documents would not fall u/s 74(1). On the other hand, the argument was that they would.

The Full Bench accepted the argument that they would, But it must be observed that those documents had come on the record because the Income Tax Officer had himself called for and put them on the record which in law he was authorised

to do. There is nothing to suggest that, in this case, the translation produced was called for from Rani Katyani. As a matter of fact, Rani Katyani's application itself shows that no translation was attached by her. The translation was made probably at the instance of Mr. G. Warde. Under what authority is not known and so the present case is clearly distinguishable from this Full Bench case of the Madras High Court.

It seems to us that the statements of profit and loss and a statement showing the details of net income, filed by an assessee in support of his return of income furnished u/s 22, Income Tax Act may be public documents because such statements are furnished in support of the assessee's return as in the Full Bench case of Madras referred to above, but in the instant case no translation was called for, nor was it furnished in support of Rani Katyani's application.

17. In *Naim Singh Vs. Tikam Singh and Others*, , it was held that the Income Tax returns are public documents within the meaning of Section 74, Evidence Act and hence the certified copies of the Income Tax returns are admissible in evidence u/s 76 thereof. The decision in that case is on facts which are entirely different from those of the instant case.

18. The case of *Raja Goundan v. Raja Goundan* ILR Mad 134. relates to the admission of a copy of horoscope which was kept on the public record for a long time. The copy was filed before a Tahsildar earlier and was then initiated by him. This copy was proved by evidence to be a copy of the original produced before the Tahsildar. The copy was admitted in evidence. It was observed that it came from a public record. There is no finding that it was a public document. The objection to its admissibility was taken on the ground that it was not admissible u/s 32 of the Evidence Act. It was, however, held that Sections 17 and 18 of the Evidence Act were applicable. To sum up we do not consider that any of the cases referred to by Mr. Gaur would lead us to conclude that the translation becomes a public document merely because it is produced from the record room of the Historical Records of the Bengal Government.

19. As the document attached to the application of Rani Katyani to the Court of Wardh may not have been the original but a copy so this translation will be the translation of a copy. In our view, it could not be placed on any better footing than a copy of a copy and would not be admissible in evidence even as secondary evidence of the original Will, (See AIR 1948 114 (Privy Council)) We may state that principally Mr. Gaur tried to bring this translation in as a public document and not as secondary evidence of a private document.

But we doubt whether a purported translation of a document taken by itself would constitute secondary evidence unless there were other circumstances to show that it was indeed a correct and full translation of the whole of the document leaving no part of it untranslated. In *Tarit Kanti Biswas*, In the matter of AIR 1918 Cal 988 (SB), it has been laid down that a translation does not constitute secondary evidence of the original document. This translation of the

will of 1817 must, therefore, be excluded from evidence.

20. We now come to the account books of the period between 11-6-1867 to 19-6-1870. These are the account books of the firm Jugal Kishore Beni Shankar Sahukars of Anupshahr and are to be found at pages 562, 563, 583, 596, 609 and 617 of the printed record. They show that the income of Anupshahr property was transmitted to Brindaban where the temple is situate. (His Lordship considered the evidence whether the remittances were for the temples and continued.) In our view, the evidence detailed above is quite insufficient to show that the income from Anupshahr villages was being directed towards and was being spent on the temple.

21. We may point out that in the list of properties schedule "C" annexed to the award of 24th of June 1893 item No. 2 is shown as "Brindaban Basabati" which seems to suggest that there was some sort of residence of the family there also but this matter has not been cleared up. The remittances in the three years in question may thus have been sent for other purposes.

22. We now come to the entries in the revenue records which have been relied upon by Mr. Gaur. The Khewat entries are at pages 451, 453, 455, 457 459, 465, 473, 475, 477, 479, 481, 485, 487, 491, 493, 495, 499 and 500. In all these Khewat entries, however, the idol is not accorded as a Zamindar, nor is there any reference to an endowment or to a Shibati holding of the property. (There is an error in the English translation at page 473. The word is not "mutwalli" in the original but "Mutwalli").

23. On the other hand in respect of village Hatiya in the Mathura district which is admitted on all hands to be a dedicated village, there are clear entries in the remarks column showing that it was dedicated (see the entries at pages 468 to 471 of the paper book). These entries are settlement entries.

24. It is, therefore, evident that in the revenue records the property of Anupshahr was recorded as being secular property, by no oversight.

25. We now come to the Wajibularzes, We find from the Gazetteer of the district that the Wajibularzes of Anupshahr were prepared during the currency of R. C. Currie's settlement which closed in 1865. The Wajibularzes are at pages 425 to 427, 429, 431, 433, 435 and 437. Sri Na-rain died in 1836 and Ishwar Chandra on the 24th of March 1861 and Puran Chandra died on 18-9-1866. It appears that the Wajibularzes were prepared round about 1862. Girish Chandra and Puran Chandra alone were then majors and Kanti Chandra and Inder Chandra Singh were the other minor heirs of Lala Babu's estate.

The Wajibularzes which have been filed, however, do not indicate the date of their preparation although the evidence as stated indicates that they were prepared in 1862 or thereabouts. The copies of Wajibularzes are not complete. They do not show who made the statements that are recorded therein. We do not know whether at that time Puran Chandra and Girish Chandra were taking

any active interest and whether they were themselves directly responsible for making the statements. On the other hand, we find that Wajibularzes of 1870 which are in continuation of Curries' Settlement show that the Karindas dictated the subject-matter (see pages 441 to 443 of the record). We cannot, therefore, be certain by whom the earlier Wajibularzes were dictated.

26. The Wajibularzes relied upon are not the record of customs in regard to which information may be generally held but they purport to embody a statement on the basis of which it is sought to establish a dedication and so it is important to know who gave the information. The Wajibularzes lose their value because one does not know precisely who gave that information which was embodied therein. No doubt they were prepared when Bengal Regulation 7 of 1822 was in force and therefore, matters other than that of custom could be entered therein. But the Wajibularzes do not constitute absolute proof. Their value would depend upon the circumstances which come out in regard to how they were recorded. In view of what we have said, we are not disposed to attach any great importance to those Wajibularzes particularly as out of the four brothers two at least were minors.

27. We need not discuss such oral evidence as bears on the endowment. Not much emphasis was laid on it. It is clearly of a flimsy and unreliable character.

28. We will now examine whether the alleged will of 11-8-1817 creates a clear endowment. It is printed at page 95 of the paper book. The alleged words of dedication are in paragraph 7. It runs as follows :

"I have assigned Mauza Hattia pargana Shabaz in Zilah Akhburabad which is my rent free property and also shops and other houses purchased by me in Brindaban and Muttra for the purposes of defraying the expenses of Shri. Kishen Chander Man Jeo. The particulars are detailed in separate statement. And I further direct that a list of that property be inscribed on a white stone to be fixed up in the temple and whatever other property may be there purchased shall in like manner be added to the inscribed list. Besides the above I have devoted Mauza Roghopure and Roopneea in the district of Purnea which is my granted hereditary istamararee property for the purpose of defraying the charges incurred in the maintenance of the Byragees and Byshnos and also of the friendless and widows and all denominations of strangers who may visit Brindaban. I have executed a separate formal deed to this effect but as the value of the property is inconsiderable I am not satisfied that it will be sufficient to provide for the expenses of these two extensive establishments. I therefore allot pargana Anupshahr which is my purchased zamindari for the sole purpose of aiding the funds for the expenses of the Thakoor. To this intent I desire that whatever is now derived from the pargana on account of Malikhana or from other sources (which neither my heir nor my wife shall ever receive or appropriate) shall be disbursed in the purchase of landed property in aid of the expenses of the worship of Sri Kishen Chandra Man Jeo at Brindaban and if no amount shall be accumulated from that source and funds shall still be wanting, they shall in

such case be supplied from the profits of other estates according to the disposition specified in the schedule verified with my signature."

Let us, consider the effect of paragraph 7 :

29. After stating that he had specifically assigned and executed separate formal deeds in regard to other property the testator uses words which seem more compatible with the creation of a charge on the Anupshahr villages rather than to create an absolute endowment thereof. Neither the word "trust" nor the word "endowment" nor the word "Waqf" nor any such clear word as shows a divestment of the ownership and vesting it in the Deity appears." The "word used is "allot".

The allotment is for the purpose of aiding the funds for the expenses of the Thakur. The amount of the income then derived is to be invested in the purchase of other property and is not to be given directly to the temple; further the directions are that profits of other unspecified properties, in case the funds are still wanting and no sum is accumulated from Anupshahr property, are to be applied in the same way. A prohibition on utilising the income of Anupshahr is put only on his heir and his wife and on no one else.

It appears that the testator was thinking in terms of a charge on the property for a specified period i.e. during the life of his wife and heir and only on whatever (income) "is now derived", not any expended income, so that other property may be bought out of the income of Anupshahr and the funds required for aiding the temple might thereafter be made available out of the newly purchased property. This purchasing of new property had not to go on for ever.

The word used is "heir" in the singular and not "heirs". Earlier it is indicated that property that may be purchased should be inscribed on a white stone. There is no such express direction for Anupshahr property. In our view, paragraph 7 does not create an absolute endowment of the Anupshahr pargana (within which the disputed villages are also constituted) in favour of the deity, nor vest the property in it. It is to be noted that no evidence has been produced to show that additional property was bought in the name of the temple.

30. We now come to the language of the Wajibularzes.

31. All those Wajibularzes are identical so far as the words placed in brackets hereunder are concerned and we may quote one of them, (Paragraph 5 pertaining to transfer of properties) :

"Some of the property of this qasba does not stand transferred. As all this ilaqa dehat in Anupshahr, being my zamindari property, has been dedicated to the Thakurdwara of Shri. Krishna Chandrama Jeo situate at Bindraban and as the income from this qasba after payment of Government revenue and meeting other expenses is spent on the Thakurdwara, I have no right to make a transfer thereof.

In future, in the event of there being no issues, I or my wife may adopt anyone and he shall be considered to be our own begotten son. After him, his descendants shall become the owners, but no heir shall have power to withhold this Charity."

32. The language used clearly shows that the maker of the statement (whoever he was) was clear in his mind that the Zamindari was his that the descendants would continue to remain the owner of the property but they would have no right to withhold the charity. It seems to us that there is shown no desire to divest the heir or holder of the ownership on the part of the maker of the statement in the Wajibularzes but that a limitation is set on the right of transfer, and on the utilisation of the income. We cannot, therefore, say that on the basis of the will of 1817 and the language of the Wajibularzes it is clearly made out that there had been a dedication of the Anupshahr property so as to pass the corpus of the Anupshahr Pargana to the deity.

33. We may here note that in the Wajibularzes of Mauza Hattia, which is undoubtedly dedicated property, this is clearly stated (see Exhibit 19) that the village is endowed.

34. It will be interesting now to see how this property has been dealt with by the heirs of Sri Krishna Chandra Singh. As already indicated, 54 villages were purchased by Lala Babu. On 24th of June 1893 there was an award in a suit relating to the property left by Lala Babu between his heirs and that award which was given by Sri R. C. Mitter awarded 32 villages comprising Anupshahr as non-secular property to Indra Chandra Singh. The other villages went as non-secular property to another. Of these 32 villages the branch Administrator of Bengal sold 5 villages to meet some outstanding debts (see page 78 of the paper book). The four sale-deeds are printed in the paper book at pages 169, 175, 168 and 153.

Of the remaining 27 villages out of the 32 villages 19 went to the share of Arunchand Singh defendant No. 2 in the present suit by an award in suit No. 380 of 1908 dated 4-7-1911 and 8 of the 27 villages were given to the share of the heirs of Smt. Sarswati (see pages 203, 213 of the paper book). There after of the 19 villages which came to Arunchand Singh, he sold away 12 villages in 1924. Some of the sale deeds are printed in the paper book though not all. Thus seven villages remained with Arunchand Singh and these were mortgaged to Kedar Nath in 1925 who ultimately purchased these in execution of his mortgage decree and entered into possession in 1933. These 7 villages are the villages in suit. It will thus appear that the villages comprised in Anupshahr have been treated all along as the property of the heirs of Krishan Chandra Singh.

35. Sri S. B. L. Gaur contends that the award given on 24-6-1893 in the suit of partition No. 41 of 1899 filed by Sri Sarat Ghandra was given after Sri R. C. Mitter considered all the evidence adduced before him but that he has not referred to the history of the temple of Brindaban and, therefore, there could be no certainty that the will of Lala Babu was shown to Sri Mitter. We cannot say

what was shown to Sri Mitter or what was not shown to Sri Mitter and the only importance of this award is that by it Anupshahr was treated as secular property. The subsequent history also shows that it was treated as secular property.

36. We may now refer to the fact that there have been previous attempts to establish that the Anupshahr properties were dedicated. Two previous suits were filed by a next friend of the idol but they were both dismissed for want of prosecution. It is said that those suits were fraudulently brought; be that as it may.

37. After examining the oral and documentary evidence in this case carefully with the help of the counsel we have come to the conclusion that it is not established that the villages in suit were dedicated to the temple. We, therefore, agree with the conclusion of the court below.

38. We may now come to the question as to whether the suit is barred by Section 41 of the Transfer of Property Act. We think that the suit is not so barred. It was not possible for the idol which was not a sentient to allow or not to allow the mortgagee Shebait to act as ostensible owner. Moreover, the evidence of Bhagwati Prasad clearly shows that he had seen the Wajibularz of Curries" Settlement and so he must have at least been put on his guard.

39. We now come to the last question as to whether Shivanand Tirtha, who has applied to be substituted in the appeal in place of Swami Satyanand Tirtha, and seeks to continue the appeal as the next friend has a right to continue it and whether we should appoint him as the next friend. In First Appeal No. 87 of 1948. Behari Lal Vs. Thakur Radha Ballabh Ji and Another, . It was held that where the acts of the alleged Shebait are being impugned then the idil may sue through a next friend who has a beneficial interest in the property. But it was also held that a person who has a mere benevolent interest is not entitled to sue. In this case, upon the death of Swami Satyanand Tirtha during the pendency of this appeal, an application was made for the removal of his name and the substitution in his place of the name of Swami Shivanand Tirtha chela of Swami Satyanand Ji Tirtha. In the affidavit it was stated in paragraph 3 that,

"Shri. Swami Satya Nand Ji Tirtha died about 10 months ago when I was away on pilgrimage to various places and on my return I learnt about his death. As a disciple and Chela of Swami Satya Nand Ji Tirtha and being Vashavanite and also because my Guru aforesaid had directed me to prosecute the cause of Shri. Thakurji Maharaj aforesaid it is my duty to carry out the wishes and directions of my Guru and being his Chela and also his legal representative."

It will be observed that Swami Shivanand Tirtha did not allege in this affidavit that he was an actual worshipper or had a right to worship either. When this application came up before the learned Application Judge he directed that the application be allowed subject to such objections as the respondent may take at the time of the hearing of the first appeal itself. Objection has been taken on behalf of the respondent. In the counter-affidavit the assertions of Swami

Shivanand Tirtha made in his above affidavit were denied.

In the rejoinder affidavit which was filed, Swami Shivanand Tirtha only emphasised the fact that he was the Chela of Swami Satyanand Tirtha deceased. He also said that he was a member of the Hindu Public and as a Vaishvanite mendicant having a right to worship the deity he was entitled to be appointed as a next friend of the deity and to continue the appeal for want of a better claimant. Even in the rejoinder affidavit he does not say that he has been actually worshipping in the temple but he only asserts a right to worship.

We may point out that at the end of Mr. Gaur's arguments in reply, an application was made that this Court should put the conduct of the appeal in the hands of Swami Shivanand Tirtha. An affidavit was filed along with this application sworn not by the Swami but by a Pairokar to the effect that the Swami carried on worship at the temple. We think that step by step Swami Shivanand Tirtha has tried to show that he has a beneficial interest, but, in point of fact, he has no more than a benevolent interest.

We, therefore, hold that he has no right to act as the next friend of the idol or to be entitled to conduct the appeal. Accordingly this suit and appeal should now fail also for this reason that Swami Shivanand Tirtha was not the proper person to represent the temple. No endowment, as alleged, has been proved either in favour of the idol. This suit is not for the enforcement of a charge and we are not called upon to go into this aspect.

40. We have dealt with all the points raised before us. We need not go into the question whether the Decrees and Orders Validation Act V of 1936 would bar the jurisdiction of the Court to question the validity of the decree.

41. Accordingly this appeal fails and is dismissed with costs.