Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Srimati Kamini Debi v. *Asutosh Mookerji and others, and cross appeal from the High Court of Judicature at Fort William in Bengal; delivered 3rd May* 1888.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

THEIR Lordships do not think it necessary to call upon counsel for the Respondents; but they are of opinion, after hearing the very elaborate and careful argument of Mr. Doyne, that they are bound to decide that the greater portion of the matter comprised in these appeals has been decided in a former suit.

The question arises under the will of the testator Ramkomul, which contains a gift of the residue of his estate to a family idol. Then he appoints four persons, his three brothers and one of his wives, to be shebaits of the idol, and he directs them to perform certain matters of ceremony and worship, and after that he says, "the family of us five brothers shall be supported from the *prosad*," which is translated "the offerings to the deity." That is the whole of the will that contains any gift, excepting specific and pecuniary legacies, to the members of his family.

The testator died in the year 1845, and the property was managed apparently in accordance with the will by one or other of his brothers, who

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were shebaits until October 1879. The survivor of the brothers was named Modhu Soodun, and he remained in the management for a great number of years. He died in 1879, and then his son Asutosh, the Defendant in the present suit, took the office of shebaitship and the management of the estate, and has managed it ever since. There seems to have been no quarrel or litigation in the family until the year 1863, when the Plaintiff's mother, who was one of the shebaits, died, and the Plaintiff became the heir-at-law of the testator. Immediately after that event she applied for a certificate of the usual kind authorising her to collect the assets of the testator, on the ground that she was entitled to the property; that is to say, she challenged the validity of the will. This and other causes seem to have led to the suit of 1863, which is the suit that bears on the present case.

Now the construction of that suit was in this fashion. The then shebait was Modhu Soodun. The sons of Modhu Soodun, of whom the principal appears to have been the present principal Defendant Asutosh, complained that he had made improperly a sale of part of the testator's property to one Adhur Chunder Banerji. They also complained that a person of the name of Bissumbhur, who was an execution creditor of Ramkomul, was improperly attaching his assets, and they made Modhun Soodun, Adhur Chunder, and Bissumbhur defendants to the suit, attacking the purchase of Adhur Chunder and the execution proceedings of Bissumbhur. But they also made the present Plaintiff, the heir-at-law, and the other members of the family, parties to the suit, and the suit was in effect one for establishing the will against everybody concerned. The prayer was, "That the court on giving effect to "the above will may be pleased to set aside the "purchase by the Defendant Adhur," release the

items attached by the decree holder, and prohibit the Defendant Modhu Soodun "from infringing the terms of the will hereafter."

The present Plaintiff appeared to defend that suit, and in her defence she raised the question of the genuineness of the will. She prayed the court "to dismiss this unjust claim and uphold "rights which I have to the properties left by "my deceased father." She claimed as heir-at-law, and on the face of her written statement there does not appear to be any ground stated excepting the charge as to the genuineness of the will. But when the issues came to be stated a wider question was propounded. There was not only an issue as to the genuineness of the will, but a further issue whether or no the Plaintiffs had any right to have instituted the suit. That is a very vague issue, and might mean much or little, but what it did mean is plain from the judgement delivered in the suit. In dealing with that particular issue the Principal Sudder Ameen says this: "The court is decidedly "of opinion that the Plaintiffs have a right of "action, inasmuch as their vested right has been "infringed upon by the acts of the trustees," that is of the shebaits; and again, "That the "Plaintiffs have as well a vested right of maintenance from the '*prosad*' of the idol, as a "contingent one of superintendence and management of the endowed property cannot if the "will is genuine be doubted for a moment." That is to say, he held that the Plaintiffs had a right of action, not because anything was given directly to them, but because they had a right of maintenance through the "*prosad*" of the idol. If they had not that right they could not have sued, but he maintains the gift to the family which is made through the sides of the idol from the offerings given to the idol. To support his finding upon that issue he has to

examine the will very elaborately. He does so, and examines the authorities which are applicable to the case, and the conclusion he arrives at is this. It is stated several times over in the judgement, but it is only necessary to quote one passage from page 65 of the Record. "The "gravamen of the Defendant's contention now is "that the endowment was illegal, as far as the "Hindu law was concerned, and it was only "nominal, it being got up by the brothers of the "testator, who were chiefly interested in giving "effect to the will. On carefully weighing these "objections and considering all the surrounding "circumstances of the case, I am of opinion that "the provisions of the will are no more repugnant "to the principles of the Hindu law than was "the endowment created by it nominal." Then he refers to a decision of this Board, and in applying it to the present case goes on: "The "will under review, after providing for legacies, "created an endowment on behalf of the family "idol, and directed to appropriate the surplusage, "if any, for the benefit of the children of the "trustees. Viewing then the will in its true "light, and analysing its provisions with reference "to the principle recognized in the above autho-"ritative ruling, I am of opinion that the will is "perfectly legal," and he decrees accordingly: "That the suit be decreed; that the will be "declared genuine," and so forth, and he gave costs against the present Plaintiff. He could not have decreed that suit unless he had held that there was, first, a valid gift to the idol, and secondly, that the Plaintiffs in that suit, who were not heirs of the testator and had nothing given to them excepting through the idol, had a valid gift made to them.

The present Plaintiff was not satisfied with that decree and she appealed to the High Court, and one of the grounds of appeal was thus

stated: "The alleged will of Ramkomul Mookerji, "even if genuine, was revoked by his conduct, "and is invalid under the Hindu law, and "indefinite and incapable of being carried out "with reference to the different provisions of it, "the trust being nominal;" that is illusory. Another ground was "that the rights of all "parties under the will, if genuine, have not "been properly interpreted." Upon that the High Court again examine the question of the validity of the will. It appears to have been argued on behalf of the Defendant Bissumbhur more than on behalf of the Defendant Kamini, the present Plaintiff, but it was argued before them "that while holding the "will to have been really signed and registered "by Ramkomul, we should consider it as a "scheme for retaining property which was in "reality joint in the hands of all the members, "and for holding the creditors of the estate or of "any member of the family at defiance." They examine the arguments against the validity as distinguished from the genuineness of the will, and hold that it is valid, and they sum up thus:— "On the whole then we think that the arguments "both for Kamini and for Bissumbhur, that "the will is either a nullity or a disguise to "throw dust in the eyes of creditors, fail when "weighed against" the considerations that they mention; and they conclude "that the decision "of the Principal Sudder Ameen is in every "point of view fit for confirmation." They therefore dismiss the appeal with costs.

Their Lordships take that to be a decision that the will contains a gift of the entire property to the idol; that the members of the family take only maintenance from the offerings made to the idol, and that it is a legal and valid gift in every respect.

Now what is the present suit? The present suit appears to their Lordships to be founded upon the total, or at least the partial, invalidity of the will. The first prayer of the plaint is:— "That upon a proper interpretation of the will "of the said Ramkomul Mookerji the Court will "be pleased to determine and settle those "provisions which are valid and lawful, and "those which are illegal and invalid." Unless something in the will is illegal and invalid the Plaintiff has no title whatever to get accounts or possession, or to do anything but to make a claim to the shebaitship. That she may do on the supposition of the entire validity of the will. It is not alleged that she has not received proper maintenance out of the offerings to the idol. She sues on the ground that there is some invalidity somewhere in the will, and that she, as heir-at-law, is entitled to take advantage of it.

Upon that view of the suit the Subordinate Judge held that the matter must be taken to be *res judicata*, having regard to the issues decided in the suit of 1863, and he ordered that the Plaintiff's claim to get the estate of her deceased father by right of inheritance be dismissed. He also dismissed the Plaintiff's claim for a partition, and he declared that the heirs and descendants of the five brothers, "who are by Hindu "law entitled to maintenance from them, shall "be entitled to participate in the daily *prosad* "of" the idol, and to reside in a certain dwelling-house which was another matter in dispute. Her claim to be the preferential shebait of the idol was dismissed, not as *res judicata*, but as not warranted by the will.

An appeal was preferred from that decree to the High Court, which differed in opinion from the Subordinate Judge. On reading the

judgement of the High Court it does not appear that they noticed the suit of 1863 at all. They do notice the Plaintiff's application for a certificate in 1863, but the suit they leave entirely unnoticed. Why that happened is not explained, but it is a matter complained of in the cross appeal presented by Asutosh. Their Lordships are left without any means of understanding how it was that the judgement came to be delivered without any observation upon the suit of 1863. However, the matter has been fully argued now, and their Lordships are of opinion that the view of the Subordinate Judge was right.

The case is governed by section 13 of the Act X. of 1877, and the question is whether the point now raised is a point heard and decided by the Court in 1863; in a suit in which the present Plaintiff was Defendant, and the present Defendants were Plaintiffs. Their Lordships' reasons have been assigned for thinking that the question of the invalidity of the will was a point decided in that suit; that it was decided that the will was wholly valid, and passed the entire estate to the idol; and that the same question cannot now be raised.

Their Lordships express no opinion whatever whether they agree or disagree with the High Court on the construction of the will of Ramkomul. It may be that the opinion of the High Court now expressed is preferable to the opinion of the High Court expressed in the suit of 1863, but they consider that that question is not open to them. The matter was decided between the parties, and never can be reopened.

Then there remains only one question to be decided in the suit, and that is whether the Plaintiff has a preferential title to be shebait. That depends upon one sentence in the will, which was written in Bengali, and their

Lordships have only the English translation. The English translation is by no means easy to interpret. It seems there is some difficulty also in the Bengali original, but the Subordinate Judge was able to criticise the Bengali grammar, and he delivered as his opinion that the effect of the will was to constitute as shebait the senior in age of the heirs of the original shebaits. The actual senior has disclaimed. The Defendant Asutosh is the next senior in age, and therefore the Subordinate Judge held that Asutosh is the proper shebait. The High Court, without discussing the matter, have agreed with him, and their Lordships, being unable to appreciate the exact sense of the Bengali sentence, can only say that no reason has been assigned to them why they should differ from the opinion of both the Courts below.

The result is that the appeal of the Plaintiff wholly fails and the cross appeal wholly succeeds. The High Court in their Lordships' opinion ought to have dismissed the appeal to them with costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect, and the usual consequences will follow. The Appellant Kamini must pay the costs of the appeal and the cross appeal.