

*Privy Council Appeal No. 92 of 1946*

*Bengal Appeal No. 59 of 1944*

**Jogindra Nath Dutta and others - - - - - Appellants**

*v.*

**The Administrator-General of Bengal 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 19TH JANUARY, 1948**

---

*Present at the Hearing :*

LORD UTHWATT

LORD NORMAND

LORD OAKSEY

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

*[Delivered by LORD NORMAND]*

---

This is an appeal by special leave of His Majesty in Council from a judgment and decree of the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, affirming with certain modifications a judgment of that Court in its ordinary original Civil jurisdiction.

The questions argued by the appellant arise out of the will of the deceased Manick Lall Dutt, a Hindu of the Subarnabanick Community, governed by the Dayabhaga School of Hindu Law, who died on the 3rd January, 1928. The testator, on the narrative that he had no son or daughter and that he was a widower, and intended to make a gift of his whole estate for charitable and religious purposes for the special benefit of himself and his ancestors, revoked all previous wills, appointed the Administrator-General of Bengal and his successor or successors in office for the time being to be the sole Executor and Trustee of his will and bequeathed to him his whole moveable and immoveable estate upon trusts created by the will. The testator then directed the Administrator-General as his Executor and Trustee to sell and convert into cash his whole moveable and immoveable properties with specified exceptions and to invest the same in Government securities. He declared that he had established and installed deities or Thakoors Radhakanto Jew and Gopal Jew in his house in Calcutta and directed his Executor and Trustee to spend out of the estate a sum not exceeding Rupees forty-five thousand on the purchase of land and the construction thereon of a building suitable as a Thackoorbati or on the purchase and adaptation of a building suitable as a Thackoorbati, and he declared that the new Thackoorbati and the land appertaining thereto should be the absolute property of the Deities. (The Executor and Trustee subsequently carried out the direction by purchasing premises in which the deities were located after October, 1931). The testator next directed his Executor and Trustee to hold Rupees one Lac and seventy-five thousand to be invested in Government securities which were to form

the Radhakanto Jew and Gopal Jew Debutter Fund, which also was to be the absolute property of the two Deities. Out of the income of this fund the Executor and Trustee was directed to pay for the periodical repairs and upkeep of the Thackoorbati, to pay monthly a sum of rupees two hundred and fifty to the Shebait to meet the expenses for the daily Sheba, worship and Dhoga of the Deities. He also directed that the balance of the income should be spent on specified charitable and religious purposes, and that his Executor and Trustee should in consultation with the Shebait frame a scheme for the administration of the fund and that he should be at liberty to provide for a reserve fund up to the limit of Rupees ten thousand out of the surplus income. He provided that a widowed niece should be entitled to live in the Thackoorbati and that she should attend to the Sheba and be maintained out of the income of the Debutter fund. He further directed that none of his Shebait or other relatives should have any right to reside in the Thackoorbati. The following provisions of the will (being clauses 11 and 12 and part of clause 14) are set out in full and in the testator's own words because it is on them that the questions to be considered turn.

" 11. I appoint my brother Upendra Nath Dutt, my nephew (sister's son) Hira Lall Seal son of Hari Pado Seal Chandranagore, my cousin Jogendra Nath Dutt son of Joy Gopal Dutt deceased and my cousin Manick Lall Dutt son of Radha Nath Dutt deceased and the Secretary for the time being of the Subarnabanick Samaj now of No. 8, Hidaram Banerjee Lane aforesaid to be the Shebait of the said Thackoors.

12. I direct that upon the death of any one of the first named four Shebait the adult eldest male lineal descendant of the shebait dying shall be and become a shebait in his place and stead and so on. In case any of the said four shebait or their successors shall die without leaving any lineal male descendant or in the case of any of them being unable or unwilling to act the surviving shebait (including the Secretary for the time being of the Subarnabanick Samaj) shall appoint a fit and proper person from the Subarnabanick community as a shebait in the place and stead of the shebait so dying or being unable or unwilling to act and in case of difference of opinion amongst the surviving shebait as to the person to be appointed the opinion of the majority will prevail and the majority of such surviving shebait shall make the appointment. I further direct that in case any of the shebait dies leaving a lineal male descendant who happens to be a minor the surviving shebait shall appoint a shebait in the manner aforesaid who shall be and continue to be a shebait till such minor shall attain age and upon such minor attaining age he shall become a shebait of the said Thackoors and the shebait who shall have been so appointed to act as a shebait during the minority of such lineal male descendant shall cease and be discharged from further acting as a shebait. I further will and direct that the number of the Shebait shall always be five including the Secretary of the Subarnabanick Samaj. I also direct that in case of difference of opinion amongst the shebait with reference to the management and carrying on the Seba of the said Thackoors and the festivities the opinion of the majority of the Shebait shall prevail. In case there be no majority amongst the Shebait or the Shebait cannot agree as to the management and carrying on the Seba the shebait shall submit their points of variance to Babu Surendra Lall Pyne attorney at law whom I hereby appoint as the supervisor over the shebait and the decision of the said Surendra Lall Pyne shall be final and binding. I further direct that in case of death of the said supervisor or his incapacity or unwillingness to act as such supervisor my Executor and Trustee shall appoint a fit proper and respectable disinterested person from the Subarnabanick community as such supervisor. I will and direct that the Shebait shall carry on the Seba and festivities of the said Thackoors jointly and not by turns and if any of the shebait disagree and become opposed to joint management and carrying on of the sheba and festivities or offers any resistance thereto such dissentient shebait or shebait shall retire and the surviving shebait or the majority of them in case of difference of opinion shall appoint a shebait or shebait from the Subarnabanick Community as the case may be in his or their place and stead. It is my desire that the shebait appointed by me or those that may hereafter be appointed shall form a

committee of management. I further will and direct that in the event of any disagreement amongst the shebait and until the same is adjusted in the manner aforesaid my Executor and Trustee shall pay the monies required for the performance of sheba Bhoga and other festivities of the said Thackoors as aforesaid to at least two of the shebait for the time being on receipt or receipts signed by them and countersigned by the Supervisor for the time being.

14. I further direct my said Executor and Trustee to invest a sum of Rupees Twenty thousand in Three and a half percent Government securities and set apart the same styled as "Golapmony Dasse Fund" named after my mother. I will and direct that my Executor and Trustee shall pay and apply the net income of the said fund after payment of his commission in respect thereof for college fees of three or four poor Bengali Hindu students of the Subarnabanick community to be selected and nominated by the Executive Committee of the Subarnabanick Samaj and in case such Samaj be not existent by four respectable members of the Subarnabanick community to be appointed for that purpose by my Executor and Trustee for giving free Medical education in the said Charnichael Medical College or some other Medical College or Institution affiliated to the Calcutta University throughout the whole course of studies."

The Subarnabanick Samaj is a body registered under the Indian Societies Registration Act, 1860, the regulations of which provide for two Secretaries. Accordingly on the 3rd March, 1931, the Administrator-General as Executor and Trustee applied by originating summons to the High Court of Calcutta for interpretation of the Will and for directions. He called as defendants the two Secretaries of the Samaj and the four Shebait appointed by the testator. The Summons was heard by Mr. Justice Panckridge who dealt with it by declaring that the appointment of the Secretary for the time being of the Subarnabanick Samaj was void from uncertainty and that neither of the Secretaries was appointed a Shebait either severally or jointly with his co-secretary, and that the number of the Shebait should not be five but four. Since the date of the decree pronounced by Mr. Justice Panckridge the number of Shebait has consistently been four. In July, 1932, as two of the original Shebait, Upendra and Hira Lall Seal, also known as Dharendra, were unwilling to act and relinquished their appointments, the Executor and Trustee (the first respondent in this appeal) requested the remaining Shebait (the first and second appellants in this appeal) to fill up the vacancies. This they did by a purported appointment, dated 31st July, 1932, in favour of Tarini Charan Seal and Tustu Charan Pyne. Subsequently Tarini Charan Seal ceased to act and by an instrument dated the 28th June, 1935, the first and second appellants and Tustu Charan Pyne purported to appoint Dulal Chand Dutt (the fifth appellant and a son of the second appellant) as Shebait. Tustu Charan Pyne became unable to act as Shebait from the 1st March, 1935. The acting Shebait were then the first, second and fifth appellants and they by an indenture dated 20th July, 1935, purported to appoint Tinkori Dutt (the sixth appellant and son of the first appellant) a Shebait in place of Tustu Charan Pyne.

Differences arose between the Shebait appellants and the first respondent (the Executor and Trustee). He therefore instituted the present suit by originating summons in the High Court in Calcutta. Among the questions which he prayed the Court to determine were the following:—

(3) On a proper construction of the said Will have the defendants Dulal Chand Dutt and Tinkori Dutt been properly appointed Shebait of the said Thakurs?

(4) Can the future Shebait of the Thakurs be drawn from the lineal descendants of Jogindra Nath Dutta and Manick Lall Dutt (except in the case of their deaths)?

(5) If question No. 4 is answered in the negative should the future Shebait during the life time of the defendants Jogindra and Manick Lall be drawn from the Subarnabanick Community?

The learned judge of the High Court at the hearing on 26th January, 1944, added the following question: " No. 6. Is the provision in Clause 12 of the Will for succession to the original Shebait by the eldest male lineal descendants of such Shebait and so on invalid wholly or partly, and, if partly, to what extent? "

After procedure which need not be narrated Mr. Justice Sen held that as the power to appoint in place of Shebait who were unable or unwilling to act was a joint power committed to the four named Shebait (or their successors) and the secretary of the Subarnabanick Samaj it could not be exercised without the participation of the secretary and that the appointments of Dulal and Tinkori (the fifth and sixth appellants) were invalid. He also held that on a true construction of the will the testator had attempted to settle the Shebait in tail male; that it is incompetent for a Hindu to create an estate tail male in property; that the Shebait is property or, as regards the power to settle in tail male, subject to the same restriction as property; and therefore that the four original Shebait took merely a life-estate in the Shebait and that on the death of any of them his share in the Shebait would revert to the heirs of the testator. He accordingly answered the questions in the case as follows:—

" 3. The answer is in the negative.

4. The answer is in the negative; the future Shebait shall be the heirs of the testator.

5. No answer is required in view of the answer given to question 4 and in view of the fact that the Shebait have no longer any power of appointment.

6. The provision in clause 12 for the succession to the four named Shebait is wholly bad."

The learned judge by a direction removed the appellants Dulal and Tinkori from the Shebaitship.

The appeal was heard by Chief Justice Derbyshire and Mr. Justice Gentle, who agreed generally with Mr. Justice Sen, but qualified his answer to question 4, to the extent that " as long as Jogindra Nath Dutt and Manick Lall Dutt remain alive or either of them remains alive they or he are or is the Shebait," and that it is only on the death of the last survivor of them that the heirs of the testator shall become the Shebait.

The question whether the adult eldest male lineal descendant of a Shebait dying in office shall be entitled to become a Shebait in his place has not yet arisen and may never arise. It is therefore premature and may never be more than academic, and cannot be decided now. If it ever becomes an immediate and practical question the eldest male lineal descendant claiming to take the place of the deceased Shebait will be entitled to be heard upon it.

The validity of the appointment of the fifth and sixth appellants depends on the construction of the will. The power to appoint which the Shebait purported to exercise is the first of those conferred in the 12th clause. The testator no doubt intended to confer a joint power on the Shebait but the question is whether he intended that the Secretary of the Subarnabanick Samaj should be a Shebait *sine quo non*.

In clause 11 of the will the testator's appointment of each of the named individuals is necessarily subject to the implied condition " if he should survive me and be willing to accept office " and it is reasonable to construe the appointment of the Secretary of the Subarnabanick Samaj as similarly subject to the implied condition, that he should be available and willing to accept office. The non-existence therefore of anyone answering to the description of " the Secretary " had no further result than to make the appointment of the Secretary ineffective.

The wording by which the first power of appointment in clause 12 is conferred is maladroit and not self-consistent. The conditions for the operation of the power are the death or the inability or the unwillingness to

act of any of the four named Shebaita or their successors, and the power to appoint is given "to the surviving Shebaita (including the Secretary for the time being of the Subarnabanick Samaj)." Here the word "surviving", which is inappropriate when the power is brought into operation by the inability or unwillingness to act of one of the four Shebaita named by the testator or their successors, must be construed as "other." But if the words "surviving Shebaita" are read in relation to the event to which alone they are appropriate, the death of one of the four named Shebaita or their successors, they must mean the named Shebaita or their successors other than the predecessor. It is in order to prevent the word "surviving" from having the effect of excluding the Secretary of the Subarnabanick Samaj from taking part in an appointment of a new Shebaita that the words in brackets may be supposed to have been added. The intention is not to make the appointment competent only if the Secretary is a member of the appointing body, but to give him a voice in the joint appointment if he is a Shebaita at the time when it falls to be made.

There is nothing in the remainder of the will which is inconsistent with this. The direction a few lines lower in clause 12 that the number of the Shebaita shall always be five including the Secretary of the Subarnabanick Samaj means only that the number shall always be four excluding the Secretary, for it is clear from the terms of clause 14 that the testator contemplated that the Subarnabanick Samaj might cease to exist and its secretary with it.

For these reasons their Lordships are of opinion that the impugned appointments were competently made by the Shebaita acting at the time when they were made although there was no one existent answering the testator's description of Secretary for the time being of the Subarnabanick Samaj.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed to the effect of setting aside the direction for the removal of the appellants Dulal and Tinkori from the Shebaitship, discharging the answers to questions three, four, five and six annexed to the originating summons, answering question three in the affirmative and striking out questions four, five and six, and that the parties should be allowed the costs of the appeal proceedings in India as between attorney and client as of a defended suit, and the costs of this appeal as between solicitor and client, all such costs to be paid out of the estate of Manick Lall Dutt, deceased.

In the Privy Council

---

JOGINDRA NATH DUTTA  
AND OTHERS

9.

THE ADMINISTRATOR-GENERAL  
OF BENGAL AND OTHERS

---

DELIVERED BY LORD NORMAND

Printed by His Majesty's Stationery Office Press,  
DRURY LANE, W.C.2.  
1948