Mohesh Chandra Roy and Others Vs Gossain Ganpat Gir, Plaintiff, and Others

Court: Calcutta High Court

Date of Decision: Sept. 1, 1916

Final Decision: Dismissed

Judgement

1. These appeals arise out of a suit instituted by the Plaintiff, Gossain Ganpat Gir, as shebait of the deities Salgram and Shi Thakur to recover

possession of the properties in dispute, alleged to be the debutter of the said Thakur, after setting aside the alienations thereof said to have, been

improperly made by the Defendant No. 1, the former shebait. One Amrita Gir who belonged to the sect of "" Giri,"" one of the ten classes of

Dasnami Gossains, established the Thakur Salgram and Shiva at Arapur in the District of Maldah. Persons belonging to the sect to which he

belonged are bound to observe celibacy but can acquire properties and are succeeded by chelas or disciples. Amrita Gir acquired certain

properties and by his Will dedicated the properties acquired by him to the said deities, the exact nature of the dedicai being one of the main

questions in this case. By his Will he directed that on his death his chela Bissonath Gir would be the shebait and executor, and on the death of the

latter his chela grandson Alimgir Gossain, and on his death Adit Narain Gir, the chela of Bissonath, would be appointed to the office and carry on

the sheba, and perform other acts mentioned in the Will according to the custom and usages of the family. There were other provisions in the Will

which will be noticed later on. Alter Amrita Gir''s death, his chela Bissonath Gir obtained probate of his Will on the 30th April 1878, carried on the

trusts, and with the surplus income of the properties acquired certain other properties. On his death his chela Udit Narain Gir succeeded him as

shebait. Udit Narain made a Will on the 5th Chait 1910 (18th March 1910) by which he appointed his gurubhai Ram Narain (the Defendant No.

1) as the shebait after his death. Earn Narain accordingly succeeded Udit Narain on his death, and obtained probate of his Will on the 14th June

1904. He appears to have been a man of immoral character. He neglected the debsheba and other trusts of the mutt, and contracted debts. On the

9th August 1905, he applied under sec. 90 of the Probate and Administration Act to the District Judge for permission to sell certain properties and

having obtained the permission sold the properties in respect of which permission was granted as well as some other properties. Some other

properties were sold to the Defendants Nos. 2 and 3 and some others to the Defendants Nos. 6 and 7, practically all the debutter properties have

been sold away.

It is alleged by the Plaintiff (who belongs to the same order of Gossains) that the other Gossains belonging to the same community in the District of

Maldah assembled, and having found that the Defendant No. 1 was guilty of misconduct and had wasted the debutter properties, excommunicated

him, and by a punchnama, dated the 20th November 1906, removed him from the shebaitship, appointed the Plaintiff as shebait as being the

nearest and most preferential gotia in the family to which Amrita Gir belonged. The Plaintiff then applied for revocation of the probate granted to

the Defendant No. 1 and was appointed administrator pendente lite but subsequently (on the 26th May 1908) was permitted to withdraw his

application for letters of administration with liberty to make a fresh one. He was also directed to vacate the office of administrator pendente lite.

The Plain-.tiff brought the present suit on the 8th November 1908 for declaration that the properties in suit are debutter, that he is the shebait, (hat

the Defendants had not acquired any right under their purchase, and for recovery of possession of the properties and for other reliefs. The suit was

decreed by the Court below and the Defendants Nos. 2 and 3 have preferred Appeal No. 22 of 1913 and the Defendants Nos. 6 and 7 (and

Defendant No. 19 who was, subsequent to the institution of this suit, added as a Defendant) have preferred Appeal No. 23 of 1913.

2. The questions for consideration in these appeals are :-

1. Whether the debutter created by Amrita Gir was an absolute debutter.

2. Whether the right of the Defendant No. 1 as shebait had been legally put an end to and whether the Plaintiff is entitled to be shebait even if the

Defendant No."l had been validly removed.

3. Whether the alienations of the properties made by the Defendant No. 1 in favour of the Defendants Nos. 2, 3, 6 and 7 can be set aside.

With regard to the first question ""it is contended on behalf of the Appellants that the trust is a private one and there being no direction as to the

surplus after meet-in the debsheba and other expenses, which moreover were left uncertain (nothing being stated as to the amount to be spent in

the debsheba or other acts) the shebait could appropriate the residue, and that being so, it was not an absolute debutter, but that the shebait had a

disposing power over the properties subject to the trusts. We are of opinion, however, that the Will of Amrita Gir created an absolute debutter.

The Will purports to deal with all the properties and clearly states that all the properties, moveable and immoveable, and the profits of the said

properties, will be deemed as the debutter properties of the two deities Sal-gram and Shiva Thakur. It then provides for succession tott The"" office

of the shebait who is to carry on the sheba and """" entertain guests according to the custom and usages of my family and will maintain as usual the

other dependents, and perform acts of conferring spiritual benefits to myself and my ancestors. None of the properties left by me will be liable to

be sold or be subject to any charge for any debts contracted by the said three persons or by any person who will be appointed to that office after

them. If any such thino-happens, the same will be liable to be set aside by the next shefyait executor according to law.

3. It is to be borne in mind that Amrita Gir belonged to a religious order, and persons belonging to the order cannot marry or have children. The

expression "" family "" or "" ancestral Gods "" is not to be understood in the same sense when applied to ordinary persons, but refers to the spiritual

family and relationships of the sect to which he belonged. No beneficial interest in the properties is reserved for the successors, and having regard

to the fact that the successors would be ehcla-(disciples) there is no reason to think that any beneficial interest was intended to I"" given to them.

The Will in unambiguous language dedicates all the properties together with the profits thereof to the deities, to be appropriated for their service

and for the other objects mentioned in it. We have been referred to the case of Ashutosh Dutt v. Doorga Charan Chatterjee I. L. B. 5 Cal. 488 (P.

C.) (1879). That case, however, is clearly difitinguishable. There a Hindu lady left, by Will to her sons, lands belonging to her to support the daily

worship of an idol and defray the expenses of certain other religious ceremonies with a provision that in the event of there being a surplus after

those uses had been satisfied out of the revenue of the said land such surplus should be applied to the support of the family, and the Judicial

Committee held that it could no! be said that the proper! was wholly debutter, but that the Will created a charge upon the property for the

expenses of the daily worship of the idol as it was performed at the time of the death of the testatrix, and of the other religious ceremonies for

which provision was made by the Will. Their Lordships in referring to the provision in the Will that "" if there be surplus then the family will be

supported therefrom,"" observed : "" Their Lordships not without some doubt and hesitation have come to the conclusion that these words amount to

a bequest of the surplus to the members of the joint family for their own use and benefit."" In the present case there was no provision in the Will that

any person was to enjoy any portion of the income of the properties and the whole of the properties together with the profits thereof were

dedicated for the maintenance of the trusts and for those only. The word " dependents " apparently refers to persons connected with the mutt for

the performance of the trusts.

4. It is pointed out that the Will provides for carrying on the debshebas and entertainment of guests and other acts according to the custom and

usages of Amrita Gir"s family, that there is no evidence as to how much was spent in the time of Amrita Gir, and that the income of the properties

is about Rs. 1,500, whereas the expenses of the debsheba is only Rs. 430 a year as would appear from the judgment of the Court below. But the

said sum of Rs. 430 is stated to be the expenses connected with the daily debsheba only as it was carried on during the time of Ram Narain. It

does not include the expenses connected with the entertainment of guests nor the occasional festivals.

5. It appears from the evidence that the debsheba in time of Amrita Gir, Bisso-nath Gir and Udit Gir consisted of cooked rice, dal and vegetables,

etc., in the morning and loochi, rooti and sweets in the evening, and there were expenses connected with the occasional festivals which were

performed with some eclat, but that since a year after the Defendant No. 1 became the shebait they had been stopped, and the figure Rs. 430

represents the expenses to which they had been reduced by the Defendant No. 1 when he was wasting the properties and the debsheba appears

to have dwindled down to the mere performance of the worship without offering of proper bhog for the deities. It is not at all clear that there would

be any surplus left if the trusts enjoined by the Will were performed in the same manner as they were performed during the time of Amrita Gir and

his immediate successors which, according to the witness, consisted in not only performing the worship, but also of daily offerings of bhog to the

deities, the celebration of occasional festivals and the entertainment of guests (which includes persons belonging to religions orders and

mendicants).

6. The fact that Bissonath Gir and Udit Narain had to borrow monies from time to time for meeting the expenses of the trust (as shown by the

documents filed in the case) go to support the view that generally no surplus used to be left. Some surplus might be left in some years which the

shebaits would be expected to keep as a reserve fund, or to apply in the acquisition of other properties for the debutter as appears to have been

done by Bissonath Gir who purchased some properties from the income of the debut for estate.

7. It is further contended that the successors of Amrita Gir treated the properties as if they were secular properties. The evidence however does

not establish that they were so treated. A large number of documents, Buoh as mortgage bonds, ijara kabuliyats and dakhilas have been produced

in the case to show how the properties were dealt with. With the exception of three all the documents expressly recognise the debutter character of

the properties dealt with by them, and in most of them the executants are described as shebaits of the deities Salgram and Shiva Thakur. The

properties are described as debutter and some legal necessity is alleged in the documents. The mere fact that the former shebaits borrowed monies

on mortgages or leases of the properties does not show that they were treated as secular properties, as a shebait can raise loans for legal necessity.

The alienations made by the Defendant No. 1 cannot be relied upon to show that the properties were not dealt with as debutter. They were made

the foundation for removal of the Defendant No. 1 from the office of shebait, and for the institution of the present suit for recovery thereof on the

ground that the properties had been improperly alienated, and even some of those documents describe the properties as debutter and recite

necessity for the alienations. The three documents in which the debutter character of the properties dealt with by them was not stated and no legal

necessity was alleged, were mortgage bonds executed by Bissonath or Udit Gir, but having regard to the numerous documents in which the

debutter character was recognised and the alienations were made as shebait alleging legal necessity, we do not attach any importance to the said

documents.

8. The next question is whether the right of the Defendant No. 1, Ham Narain, as shebait had been legally put an end to, and whether the Plaintiff is

entitled to be shebait even if the removal of Ram Narain was valid. It is contended on behalf of the Appellants that the trust being a private one,

succession is governed by the rule laid down in the deed creating the endowments, and in the absence of such rule by the ordinary rules of

inheritance governing the family and the Defendant No. 1, Ram Narain, having succeeded Udit Narain could not be removed by the punch, and

that so long as Ram Narain was not removed from the shebaitship by a Court of law the punch had no power to appoint the Plaintiff as shebait. It

is further contended that although the punch might excommunicate a person of their order for misconduct, such excommunication cannot deprive

him of his civil right. -But in the first place it must be borne in mind that these persons are not ordinary grihasta (householders) but belong to the

order of sanyasis who, although they may engage in secular pursuits, cannot marry, and are governed by the rules of the community to which they

belong. They are supposed to lead a strictly religious life and succession to their property is through chelas or disciples. The ordinary rides of

inheritance in their entirety cannot apply to such persons, for, although the succession is through chelas, any question as to preference between

chelas (when it is not provided by the guru) must be decided by the customs and usages of the community to which they belong, and the

representatives of the community are the proper persons to decide such matters. Secondly, although the secular property of a guru may be

inherited by the chela, the properties in this case were absolute debutter. The Will of Armita Gir speaks of the succession to the office of shebait

and lays down that after his death his chela Bissonath Gir, and on his death his chela grandson Alimgir and on the death of the latter, Udit Gir, chela

of Bissonath, would be the succeeding shebait s respectively. The further order of succession (after Udit Gir) is not laid down in the Will, but it

states "" None of the properties left by me will be liable to be sold or be subject to any charge for any debts contracted by the said three persons or

by any person who will be appointed to the office after them. If any such thing happens the same will be liable to be set aside by the next shebait

executor according to law. Be it also known that if the aforesaid persons or any one who will be appointed to that office after them acts contrary to

the custom or usage of my family or acts arbitrarily according to his wishes or becomes extravagant or is found by the punch of our community to

be guilty of any grave offence he will be removed from the office of the shebait, and the person next referred to will be appointed in his place, and

take possession of all the moveable and immoveable properties from him and carry on the duties as aforesaid and he shall not be competent to

raise any objection to the same."" The punch of the community would naturally be the proper persons to decide the question what constitutes grave

offence, or acts contrary to custom or usages of the family, which means the sect to which he belonged.

9. There is no doubt that the Will gives the power to the punch to enquire into misconduct not only of the three succeeding shcbaits expressly

mentioned in the Will, but also of those who may be appointed after them, and impliedly recognises the authority of the punch of the community to

enquire into the misconduct of the shebait.

10. It appears that there were two meetings of the punch of the community. The first was held at the annual meeting at the time of Ganga Puja at

the house of Protap Gir who appears to be most influential and the richest of the "" landed Gossains "" residing in the district of Maldah. It is said that

Prayag Gir complained at that meeting that Ram Narain used to drink, visit prostitutes, and was wasting the debutter properties, and the Gossains

present asked Ram Narain about his alleged misconduct, whereupon he said "" I do all this, what of that to them,"" and thereupon he was

excommunicated. There was a second meeting held at the house of the Plaintiffs at Fulbari when an enquiry was held as to the misconduct of Ram

Narain, and the punch by a punchnama removed him from the shebaitship and the Plaintiff was appointed in his place. It is contended on behalf of

the Appellants that Ram Narain was condemned before trial. No doubt the proceedings of these Gossains did not take place in the regular manner

in which proceedings take place in a Court of law. But :the fact appears to be that when Ram Narain on being asked about his misconduct did not

deny it and defied the authority of the punch, they took that as a confession of his guilt and at once excommunicated him. Subsequently, they

thought of making a formal inquiry before depriving him of his right as shcbait, and for that purpose the second meeting was held at Fulbari. One

Balkissen Gir (who is said to be the hotwal) was deputed to make the enquiry, and he reported that the charges were true. However that may be,

the evidence about the misconduct of Ram Narain is overwhelming. There is no doubt that he used to drink wine, eat meat, visit prostitutes, neglect

the sheba and the other trusts, and wasted the properties; and even"" sold the bricks of the Thakurbari. Although, according to the Defendants''

witness No. 11, Luchmi Narain Gir, many of the Gossains keep Baishnavis as concubines, and do not lose their guddi, the Defendant No. 1

appears to have offended against all the rules of the order to which he belonged and as some of the witnesses put it he was "" as bad as possible.

A person guilty of such misconduct could not be retained as shcbait of a religious institution, and the punch were quite justified in removing him.

11. It is contended that even if the punch had any power of removing the shcbait, all the representative Gossains were not present at the meeting of

the punch.

12. it appears from the evidence that there are seven mutts besides those of the Plaintiff and Ram Narain in the locality, that the Gossains of all the

-mutts with the exception of three, viz., Luchmi Narain, Bissumbhiir and Protap""Narain, were present. Jadunandan, another Gossain, was

represented by his chela, and Balkissen-, the hotwal, was also present. Out of 11 Gossains, eight were present. There is no evidence on behalf of

the Defendants that there was any other Gossain who could take part in the punch, and there is no doubt that the majority of the Gossain punch

took part in the meeting.

13. The case of Ram Narain v. Junko Bye 30. L. B. 112 (1878)., relied on by the Appellants, is distinguishable. There a shebait gave authority to

a punch, and the inhabitants of the neighbourhood, but he himself had no such power and even assuming he had, the authority was to be exercised

by all the inhabitants. Luchmi Narain was at Benares at the time, and he was then under ban of excommunication, Bissumbhar was on pilgrimage,

and Protap Narain Gir was insane. The rule seems to be that when a member of the punch is unable to attend on account of his illness or being on

pilgrimage, the other members of the punch can act.

14. The Defendant No. 1 was served with notice to appear, but he did not appear, and the punch gave their award by the punchnama which was

signed by the Gossains.

15. The evidence as to the presence of some of the Gossains, the enquiry held, the signing of the punchnama and as to the fact of Pryag Gir having

charged Ram Narain at the first meeting with misconduct has been attacked on behalf of the Appellants. The evidence has been considered by the

learned Subordinate Judge and.believed by him. We think the evi-ence has been rightly appreciated by him. Some of the Gossains are persons of

substance, Protap Gir being the most influential among them with an income of Rs. 16,000 a year. Nothing has been said against his character, and

he has no chance of succeeding to the mutt. Some of the Gossains are very old men, and there does not appear to be any sufficient reason why

these Gossains should Join in a conspiracy and perjure themselves.

16. It is said that the proceedings of the punch were not bond, fide, that the Gossains finding that the properties of a mutt were alienated to

strangers, put their heads together, and that it was merely an attempt to take out the properties alienated by Ram Narain and to restore the same to

the mutt. That no doubt was the object of the punch, but that does not show that the proceedings of the punch were not bond fide. There being no

doubt about the misconduct of Ram Narain and (he waste of the dcbutter properties by him we are unable to hold that the proceedings of the

punch for removal of Ram Narain and attempt at restoration of the dcbutter properties were not bond fide. The Court below finds "" then it is

proved by the evidence of all the Gossain witnesses of Plaintiffs'' side, and not rebutted by those on Defendants'' side, that the punch had authority

to excommunicate a Gossain for misconduct and to remove him from the guddi and appoint his successor. Even in Amrita Gir''s Will, there is a

provision that if any shebait would be found guilty of misconduct and extravagance in the judgment of the punch, then he should be deposed.

17. Reliance is placed, however, upon certain statements of Gossain Ganga Gir, Gossain Jadunandan Gir and Protap Chandra Gir to show that the

punch had no power to remove a shebait or appoint another in his place according to* the rules of their community and independently of the

power given in the Will. Gossain Ganga Gir says "" On having the Will read out to us we came to know that we had that power. If there were no

such provisions in the Will, we would not have given the punchnama to the Plaintiff. He would have done what he liked.

18. Protap Chandra Gir says that they came to know of the terms (relating to the removal of the shebait by the punch) on reading, the Will and

Jadnnandan Gir"s evidence is to the same effect. It is contended that this evidence negatives the case that according to the rules of the community

the punch had the power to remove a shebait and appoint another in his place. It is further contended that the Plaintiff cannot rely upon the

punchnama, because in the Court below he rested his case as to the power of removal of Ram Narain, and his own appointment by the punch,

under the customary rule of the community, and on that ground was exempted from payment of stamp duty (under Art. 7 of Sch. 1 of the Stamp

Act), and penalty on the punchnama as would appear from the order of the Court below, dated the 24th July 1909. But none of the Gossain

witnesses says that independently of the Will of Amrita Gir, the punch had no power to deal with such matters. All that some of them said was that

they came to know from Amrita Gir"s Will that they had been given the power to remove shebait for misconduct and appoint another in his place,

and that were it not for that power they would not have interfered in the matter and executed the punchnama.

19. The power of the punch to deal with such matters is recognised in the Will of Amrita Gir executed more than 30 years before this suit, and

Amrita Gir, who presumably knew the rules of the community to which he belonged, would not have made the provisions in the Will, had not the

punch the authority to deal with such matters. But even if it be held that independently of the power conferred in Amrita Gir"s Will, the punch had

not the power to remove a shebait for misconduct or appoint another in his place, we do not see why. the Plaintiff should be debarred from relying

on the power of the punch to do so under the terms of the Will. The Court below by its order, dated the 23rd July, held that the punchnama

reouired a stamp of Rs. 15 under Art. 7 of Sch. 1 of the Stamp Act and a penalty of Rs. 150, and on the next day on a reconsideration of the

matter held that under the Will there was no power given to the punch to appoint a new shebait, that the appointment of the Plaintiff by the

punchnama was made under the customary rule of the community and that therefore the punchnama did not come under Art. 7 of Sch. 1 of the

Stamp Act. We are of opinion that the Will not only gave the punch the power to enquire into the misconduct, of a shebait, and to remove him

from the - office of shebait, but also to appoint a new shebait, at any rate, impliedly, and that the punch appointed the Plaintiff as shebait according

to the customary rules of the community under the powers conferred by the Will though not clearly so stated in the punchnama. We accordingly

directed the Plaintiff-Respondent to pay the stamp duty of Rs. 15 and a penalty of Rs. 150 and the same has been paid. That being so, the

punchnama becomes admissible for the purpose, and the Plaintiff can rely upon the authority of the punch, as derived under the Will, not only to

enquire into the misconduct of Ram Narain and to remove him from the office of shebait, but also to appoint him- (the Plaintiff) in his place.

20. Moreover, there being no doubt as to the power of the punch under the Will of Amrita Gir to enquire into the misconduct of Ram Narain and

to remove him from the shebaitship, and of their having acted in those matters in exercise of their power as conferred by the Will, we think that

once Ram Narain is removed the Plaintiff steps into his place by yirtue of his being the nearest preferential gotia according to the rules of their

order, and does not require the appointment by the punch to the office of shebait.

21. It is urged that it is a case of a private trust, and if Bam Narain was guilty of misconduct, the matter ought to have been brought into Court, and

investigated by it, and if found guilty, the Court might have removed him from the office of shebait, and the community had no power to do so. But

we have found that it was an absolute debutter, the shebait for the time being having beneficial interest in the estate. We do not think that even in

the case of a private trust there is anything to prevent the founder from giving to a particular class of persons, such as the punch of the community,

the power to enquire into misconduct of a shebait which disqualifies him from holding the office of shebait and to remove him from such office. The

punch may not have the power to enforce the removal, and if resistance is offered by the shebait, the successor may have to go to a Court of law

for obtaining relief. Such considerations, however, do not render the action of the punch invalid in so far as their award is concerned. In the present

case the Plaintiff, after the punchnama was given by the punch, applied to the District Judge for revocation of the probate granted to Bam Narain

and was appointed administrator pendente lite. He entered upon the office of shebait. It is true that he was removed from the office of

administrator pendente lite, but he continued to perform the sheba and puja of the deities as shebait.

22. We were referred to certain letters written by Bam Narain in July 1908 to the Plaintiff before this suit was instituted, and to the fact that Bam

Narain at first put in a written statement on the 28th November 1908 contesting the claim and subsequently (on the 23rd April 1909) admitted the

Plaintiff"s claim and also to the statement of the witness Jadunandan Gir that when Bam Narain was told that he was deposed, he seemed to be

pleas as showing that the removal of Bam Narain, the appointment of the Plainlitl and the present suit were the result of collusion between Bam

Narain and the Plaintiff, with the object of recovering the properties from the purchaser Defendants. But we are not disposed to attach any

importance to the above matters because Bam Narain had by his profligacy and extravagance ruined the debutter estate, he could never get back

the estate, and it might be that he was glad if some one of his order got back the estate by his removal, and even might be disposed to help the

Plaintiff. If Bam Narain was validly removed, it''does not matter that he wrote such letters to the Plaintiff, or filed a written statement and

subsequently admitted the claim.

23. The next question is whether the Plaintiff was entitled to succeed Bam Narain even if his removal was valid.

24. Upon this point the finding of the Court below is as follows :-"" Both the Plaintiff and the Defendant belong admittedly to the sect of Girs or ''

Giris '' who form one of the ten classes of Dasnami Gossaim which came to be constituted after the institution of mutts by Sankar Acharjya. It has

been proved on the evidence of Plaintiffs'' witness No. 2, Bangali Boy Bhat. who is the professional herald keeping the pedigree of the Gossains

from the District of Mirzapore on the west to the Province of Bengal to the east, that Sankar ''Acharjya had four disciples who founded four mutts,

one of which was called Joshi, and from these four mutts branch out fifty-two murines, and that the Plaintiff and the Defendant No. 1 as well as the

latter''s predecessors, Amrita Gir, Bissonath Gir and Udit Narain Gir, belonged to the Kumush Nath Murhi, i.e., descendants from the common

predecessor Kumush Nath as recorded in the pedigree book proved by the Bhat as transmitted to him by his forefathers. From the Bhat''s

evidence with reference to the pedigree book, Plaintiff appears to be 13th descendant from Behari Gir, while Defendant No. 1, Ram Narain Gir, is

the 15th in descent from the same Behari Gir. Plaintiff, his witness No. 2, the Bhat, Plaintiff''s witness No. 1, Balkissen Gir, kotwal, Plaintiff''s

witness No. 17, Baldeb Narain Gir, as well as the two old Gossains, Jadunandan Gir and Ganga Gir and Protap Gir, the richest of landed

Gossains in the District of Maldah (the last three examined by commission) as also the Defendant''s witness No. 1, Isuchmi Narain Gir, prove the

fact that the Plaintiff and the Defendant No. 1 are descended from the common ancestor, and that amongst Gossains, if one dies leaving no chela,

his nearest gotia succeeds him, the ascendant being preferred to the descendant as Plaintiffs'' witness No. 17, Baladeb Narain Gir, deposes. Of the

other gotias of Defendant No. 1, there appear Bam Chandra Gir, 13th in descent, Protap Narain Gir, 15th in descent, and Prayag Gir, 16th in

descent, from Behari Gir. But Ram Chandra Gir branched off from the original guddi (as Plaintiffs'' witness Nos. 2 and 3 depose), sold off his

properties, and spent the money in dissipation and has been afterwards excommunicated and was also present at the punch, but did not sign the

punchnama (Ex. I) saying that he himself had sold all his properties like Defendant No. 1. As for Protap Narain Gir he is mad and Prayag Gir is not

in the original mutt and earns his livelihood by selling pice in the bazar. So the Plaintiff is the nearest guddinashin gotia and is therefore most

preferential as alleged in the plaint. The case in the plaint was distinctly set forth, the Plaintiff alleging himself to be " the most preferential'' gotia of

Defendant No. 1 and the ground of the preference is made out in the evidence and is no after-thought.

25. We agree in the above finding and would add that the case of the "" guddinashin gotia "" being entitled to preference, if there are more than one

gotia of the same class, was not started for the first time in the Bhat''s evidence, when it was found that there were two persons of the same rank,

as contended on behalf of the Appellant, but the case of "" guddinashin gotia "" being entitled to preference was put to and proved by the most

respectable Gossains who were examined by commission in 1909, about two years before the Bhat was examined in Court, and in the plaint the

Plaintiff distinctly set up the case that the nearest and the most preferential gotia succeeds, though the ground for such preference, viz.,

guddinashin gotia'' 7 was not stated. The case of "" guddinashin gotia "" being entitled to preference, therefore, is not an afterthought as has been

rightly pointed out by the Court below.

26. We are referred to the statements of Gossain Protap Chandra Gir to show that where there are two chelas, the worthier of the two succeeds,

and this is settled by the guru, but that if both are equally worthy, they act together and in case of disagreement and in the absence of any provision

by the guru, they partition the property between themselves. In the present case, the only other gotia of the same rank with the Plaintiff is Ram

Chandra Gir but, as already stated, the Plaintiff being the "" guddinashin gotia "" is entitled to preference according to the custom of the sect, apart

from the fact that Earn Chandra sold away the properties of his own mutt which was a sufficient disqualification. The statements of Protap Chandra

Gir probably refer to the succession of secular property left by a guru among his chclas, and not to the shebaitship of absolute debutter properties

which cannot be partitioned. It is unnecessary however to consider the question as the Plaintiff being the guddinashin gotta was entitled to

preference.

As regards Plaintiff''s character the learned Subordinate Judge says He is a substantial Gossain keeping his own mutt at Fulbari and even the

Defendant''s witness No. 1, Lachmi Narain Gir, admitted that the Plaintiff was a man of good character, and the insinuations on Defendants'' side

about Plaintiff keeping a woman are not at all proved, but merely suggested on hearsay evidence, and Subjan Misfcry, who is said to have been

the source of the information, was asked no questions about it. It appears however that the Plaintiff only gave some property for the maintenance

of Basanti Debya, two of whose younger sons she gave as chelas to Plaintiff, her eldest son Seuraj as Plaintiff''s pujari at the mutt at Arapur. This

cannot prove that the Plaintiff ever kept her as his concubine as insinuated by the defence.

27. The Plaintiff, it appears, was excommunicated once, for what reason does not appear, but he was re-admitted into the community. The age of

the eldest son of Basanti Debya ib about 40 years, and the Court below has found, and we think rightly, that it was not proved that she was the

concubine of the Plaintiff as insinuated of behalf of the Defendants. So far as character is concerned, the Plaintiff ''does not appear to be below the

average, run of persons of the order, many of whom, as the evidence shows, do not possess a good moral character. It may be mentioned that the

Appellants in this Court have not attacked the Plaintiff''s character. On the whole we agree with the learned Subordinate Judge in holding that

according to the long-established usage of the Gossain community as proved by the evidence the Plaintiff appears to be the most eligible person to

succeed the Defendant No. 1 to the shebaitship.

28. The last question is whether the sale to the Defendants Nos. 2 and 3 and 6 and 7 is protected by the sanction given by the District Judge under

sec. 90 of the Probate Act.

29. Before dealing with the above question we will notice an argument advanced by the learned Pleader for the Respondent, viz., that no probate

could be granted of the Will of Udit Narain and that as such the sanction given by the District Judge was ultra vires. It is contended that Udit

Narain had no personal interest in or power of disposal over any of the properties, the properties acquired after the death of Amrita Gir having

been acquired by Bissonath Gir out of the profits of the properties left by the former. It is urged Udit Narain by his Will merely affirms! the

debutter character of the properties and appointed his shebait and successor, and we have been referred to the case of Chaitannya Gobinda Pujari

Adhikari v. Dafjal Gobinda Adhikari I L R. 32 Cal. 1082 : s. c. 9 0. W. N. and Muharaju Jagadindra Nath Roy v. Madhu Sudan Dass Mohunt

1021 (1905). (4) 20 C. L. J. 307(1912). to show that where a Will merely appoints a shebait, the document is not a Will and cannot be admitted

to probate. But whatever right Udit Narain might have in the properties, he described them in the Will as his own. He pro- fesses to give a power

to his successor to alienate certain properties (those acquired after Amrita Gir''s death) in case of necessity, and under the circumstances, it cannot

be said that he did not make any disposition about his properties and merely appointed a shebait. The case relied upon is therefore distinguishable

and we are unable to hold that the probate proceedings were ultra vires.

30. The Will of Amrita Gir as well as the Will of Udit Narain provided that the shebait would not be able to alienate any property. Udit Narain''s

Will gave power to alienate only the four properties specifically mentioned in the Will, but that was only in case of necessity. Earn Narain obtained

permission of the District Judge under sec. 90 of the Probate Act to sell some of the properties, and the Appellants contend that they are fully

protected by the sanction. The sanction however appears to have been obtained by misrepresentation. In the application, dated the 9th August

1905, for permission to sell the properties it was stated that the deceased (Bissonath Gir and Udit Gir) left debts of about Rs. 3,800, out of which

Rs. 1,000 was due to Jadab Chandra Choudhury, Rs. 1,500 to Kunja Lall Marwari and Rs. 1,300 to Gopi Charan Sen, that the creditors were

about to institute suits, and that if suits were brought it will enhance costs and interest, and all the properties belonging to the estate would be sold.-

It was further stated that ""the three nro-perties mentioned in the Schedule, if sold, may fetch about Rs. 4,000 and in that case the debts will be paid

off and the remaining properties of the estate saved. Rajani Babu and Protap Satiar of Maldah and the said creditors Nos. 2 and 3 are willing to

purchase the said properties for the prices mentioned in the Schedule.

31. Now, the sanction for sale was given on an ex parte application"" by the Court apparently without enquiry into the matter, on the very same

day. It was not pointed out in the application that the properties were debutter. It has been proved that the debts mentioned in the application had

no existence at all. The learned Subordinate Judge has gone into the question fully and has shown that there were no such debts, and that finding

has not been challenged in this Court. Then, again, the three properties which were stated in ""the application "" may fetch about Rs. 4,000 "" were

sold for Rs. 7,500. That Ram Narain obtained the sanction by misrepresentation of facts and by practising fraud upon the Court is not seriously

disputed in this Court, but it is contended that the purchasers, at any rate the Defendants Nos. 2 and 3, were not privies to, and had no knowledge

of the same. It is true the Defendants Nos. 2 and 3 are not shown to have been concerned with the application for permission, and negotiations

about their purchase appear to have commenced about a fortnight after permission was obtained. The three properties for the sale of which

permission was obtained from the District Judge were, first, a mourasl jote (valued in the application at Rs. 1,000), a mangoe garden (valued at Rs.

1,000) and third, a putni mahal (valued at Rs. 2,000). The Defendants Nos. 2 and 3 purchased the mourasi jote and the putni mahal together with

six other plots of land (not covered by the permission) for Rs. 7,500 on the 26th October 1905 by the deed of sale (Ex. C). The Defendant No. 2

did not examine himself, but the Defendant No. 3, Chandra Mohan Ray, has been examined. He admits in his deposition that Ram Narain showed

him certified copies of his application for permission to sell and the Judge''s order giving the permission.

32. The application, as already stated, mentioned three debts, Rs. 1,000 due to Jadab Chandra Chaudhury, Rs. 1,500 to Kunja Lall Marwari and

Rs. 1,300 to Gopi Charan Sen.

33. The Defendant No. 3 says that the debts due to Kunja Lall Marwari and Gopi Charan Sen were paid by Earn Narain in his presence, and the

latter took'' back the registered mortgage bonds. But he admits that he knew Earn Narain from his boyhood as a chela of Bissonath Gir, and that

he had Thakurbari at Arapur. Those facts are sufficient to put a purchaser on his guard but he says that he did not make any enquiry as to what

right Earn Narain had in the properties, and whether he had other properties left and how the sheba of the Thakur was maintained. He did not take

the mortgage-bonds when the creditors were paid off. The Defendants did not call for those documents from Earn Narain nor take certified copies

from the Eegistration Office. As a matter of fact these debts had no existence at all as found by the Court below, but if, as stated by the Defendant

No. 3, the creditors were paid off in his presence he would certainly have taken the bonds. Then the permission granted by the District Judge was

to sell three properties worth Es. 4,000. The Defendants Nos. 2 and 3 purchased two of the said three properties (together with a few other plots

of lands not covered by the permission) for Es. 7,500, and it is alleged that they had to redeem an ijara on the putni mahal at a cost of Rs. 3,400.

The Defendant No. 3 says that they did not make any enquiry as to why properties "" more in value than the debts to be paid off were going to be

sold "" nor thought it necessary to have permission taken from the District Judge for that purpose. Then, again, they purchased the first six plots of

land of their kobala without the sanction of the District Judge.

34. Having regard to all the circumstances we are unable to hold that the Defendants Nos.. 2 and 3 were bond fide purchasers, and although there

is no evidence to show that they were privy to the fraud practised by Earn Narain upon the Court before the permission of the Judge was

obtained, there is no doubt that they purchased with knowledge of the misrepresentation upon which the permission was obtained.

35. As regards the Defendants Nos. 6, 7 and 19 they purchased certain properties by a kobala (Ex. 23) for Rs. 1,450 on the 9th May 1906, i.e.,

about ten months after permission was obtained from the District Judge. Only 10 bighas out of 14 bighas of Plot No. 4 of their kobala was

covered by the permission and no sanction was obtained with respect to any of the other properties but properties Nos. 1, 2 and 3 of Sch. kha

were among those which Earn Narain was authorized by Udit Narain''s Will to sell in case of necessity.

36. Jadab Chandra Choudhury was mentioned in the application for permission as one of the intending purchasers. The kobala was taken by him

in the names of his sons the Defendants Nos. 6 and 7, and it expressly states that all the properties were debutter of the deities Salgram and Shiva

Thakur. The application for permission stated the debts for the liquidation of which the properties were to be sold as having been left by Bissonath

Gir and Udit Narain Gir, and mentioned Jadab Chandra Choudhury as one of the creditors to whom about Rs. 1,000 was due. In the kobala of

Defendants Nos. 6 and 7 however two debts contracted by Earn Narain himself were recited, one being upon a mortgage-bond, dated the 16th

Chait 1312 (March 1906) for Es. 597 and the other upon a hath-chita, dated the 25th Baisakh 1313 (8th April 1906) for Rs. 175, the total

amount due on the date of the sale being stated to be Rs. 806-4-0. Deducting the said amount of Rs. 806-4-0, the balance Rs. 643-12-0 was

received in cash. There is no mention of the debt of Jadab Chandra Chou-dhury for Rs. 1,000 in the kobala and the two debts recited in it were

contracted by Earn Narain himself in March and April 1906, i.e., several months after the permission of the District Judge was obtained on the 9th

August 1905.

37. The Defendants Nos. 6 and 7 were examined in the case and they mentioned debts other than those mentioned in the kobala. The former says

that Udit Narain and Earn Narain borrowed Es. 300 on a mortgage-deed (Ex. E) in 1900 and that the same with interest amounted to Rs. 806-4,

while his brother the Defendant No. 7 says that the debt was due by Bissonath Gir upon the mortgage-bond (Ex. G), dated 16th Magh 1300

(February 1893). The facts that a debt of Rs. 1,000 was stated in the application for permission as one of the debts left by Bissonath Gir and Udit

Gir and due to Jadab Choudhury and the hobala mentioned two debts contracted by Earn Narain himself several months after the application for

permission, in which Defendant No. 6 mentioned a debt due by Earn Narain upon a mortgage-bond executed in 1900, and his brother the

Defendant No. 7 mentioned a debt due by Bissonath Gir and Udit Gir in 1893 show that the existence of the debts at the date of the application

was an absolute myth.

38. It appears from the evidence of the Defendant No. 7 that his father had money-lending transactions from the time of Bissonath Gir, and their

house is only half a mile from the Arapur Thakurbari. There cannot be the least doubt that they were aware of everything, and there is no pretence

for saying that they were bond fide purchasers without notice of the fraudulent misrepresentation upon which the permission of the District Judge

was obtained.

39. The learned Subordinate Judge has found that there is no reliable evidence to show that Bissonath Gir or Udit Gir left any debts, and we

concur in the finding. No attempt has been made in this Court to show that there was any legal necessity for the sales to the Defendants. So that,

apart from the permission of the District Judge, the purchase by the Defendants cannot stand, and the permission was obtained by fraudulent

misrepresentation. That being so, the alienations have been rightly set aside. It may be mentioned that the Appellants complained in this Court that

they were prejudiced by reason of the Court below having tried the cases of the two sets of Defendants together, but no such objection was raised

in the Court below, nor any application made under Or. II, r. 6, for trial of the cases of the two sets of Defendants separately. In this Court the

cases of both sets of Defendants were argued by the same pleader. On the whole we agree with the Court below, and the appeals must be

dismissed with costs, the hearing fee in Appeal No. 22 being assessed at Es. 250 and in No. 23 at Es. 64. The Respondents will bear three-

fourths of the costs of the Eespondents" portion of the paper-book, the Appellants paying one-fourth of the said costs, the amount of such costs

being divided between the two appeals in the proportion of 4 to 1.