

(1951) 09 CAL CK 0008
In the Calcutta High Court
Case No : A.F.O.D. No. 220 of 1945

Brojobala Dassi

APPELLANT

Vs

Shebaita of Sri Sri Saradiya Durgamata Thakurani

RESPONDENT

Date of Decision : 06-09-1951

Acts Referred:

Citation : AIR 1953 Cal 285 : 57 CWN 74

Hon'ble Judges : R.P. Mookerjee, J;K.C. Chunder, J

Bench : Division Bench

Advocate : Atul Chandra Gupta and Panchanon Pal, for the Appellant; Bireswar Chatterjee and Gouri Prosad Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Mookerjee, J.—Debendra Nath Mukherjee, the predecessor of the plaintiffs respondents who have sued as representing Sri Sri Saradiya Durgamata Thakurani, was the owner of a number of immovable properties including Pargana Kismet Maharul within Pargana Kulbaria Touzi No. 371 of the Murshidabad Collectorate and a two anna share of Dihi Hilara, Touzi No. 486 of the same Collectorate. Debendra had been performing the Saradiya Durga Puja from 1921. In September 1929 he executed an Arpannama (Ex. 2) in favour of Sri Sri Durgamata Thakurani Jew for the due performance of the annual puja of the said Goddess. An image of the Goddess Durga would have to be made ready according to the shastras, every year during the autumn season from, out of the income of the properties endowed, the deity is to be worshipped either at the dwelling house of the settlor at Gorabazar in Murshidabad or at Benares. Directions were also given as to how the income accruing from the said two properties was to be disbursed on the occasion of the annual puja. On 5-1-1932 Debendra executed two deeds. In the first deed (Ex. E) described as a deed of cancellation of the Arpannama (Ex. 2) referred to above he stated inter alia that the latter deed was a benami document and that the income from the property included within the Arpannama had never been spent specifically for the puja. It

was further stated therein that he had been financially embarrassed and had executed the Arpannama to avoid any embarrassment that his creditors create in respect of the said properties. As he intended to sell the property to pay up his debts he was declaring by this later deed (Ex. E) that the earlier deed of settlement was a benami one and had not been acted upon. He further declared that he had every right to transfer the properties which were the subject-matter of the settlement and that by the deed of cancellation he was revoking the so-called deed of settlement.

2. Simultaneously on the same date Debendra executed a conveyance (Ex. D) in favour of Brajobala Dassi, who is the defendant in this suit and the appellant in this Court, conveying to her Kismet Maharul being one of the two items of property included in the Arpannama (Ex. 2). Debendra died six years after in December, 1938. The suit, out of which the present appeal arises, was filed by the widow and the son of Debendra, describing themselves as Shebaites of Sri Sri Saradiya Durgamata Thakurani for a declaration that the properties which had been included in the Arpannama (Ex. 2) still belonged to the deity and that in respect of Kismet Maharul, purported to have been sold to the defendant Brajobala Dassi, the latter had got no title to the same. The defendant was further to be ejected from Kismet Maharul. Some other reliefs also were prayed for.

3. The defence was that Debendra had not, at the time when the Arpannama was purported to have been executed, any intention to create a debuttar. The transaction was really one to defraud the creditors of Debendra, and so an attempt was made to put certain properties of his beyond the reach of his creditors. The alleged puja of the Goddess Durga had not been regularly performed and even after the execution of the Arpannama the property had not been treated by the settlor as belonging to the Deity. The Arpannama was a mere paper transaction and the right, title and interest of Debendra had not been affected by that document. The deed of cancellation was really the clearest proof of the intention of Debendra.

4. The learned Subordinate Judge decreed the plaintiff's suit holding inter alia that Debendra had, from the year 1921, when the annual Durga Puja celebration was started by him, the intention to make necessary provision for the proper performance of the Puja not only during the life time but for the continuance of the same by his successors after his death. Debendra was in possession of a large estate and for the total amount of debt which he owed at the time when the Arpannama was executed there was no evidence of any pressure at that stage. His only creditor was the Maharaja of Cossimbazar. There was no motive for creating any benami document and the Arpannama was a valid and binding one. Neither the alleged deed of cancellation nor the subsequent financial embarrassment, if any, of Debendra could have the legal effect of modifying or affecting the Arpannama previously executed. The defendant purchaser was at the time of her purchase fully aware that the properties were debuttar ones. The

suit was accordingly decreed, the claim for mesne profits to be adjudged in separate proceedings.

5. The first question for consideration is whether Debendra had dedicated the property in suit in favour of Sri Sri Saradiya Durgamata Thakurani by the Arpannama executed on 12-9-1929. Did he divest himself of the ownership of the property, or in other words, was the Arpannama a real valid and bona fide document?

6. It is unquestionable that if the Arpannama was a valid and bona fide document creating a Debuttar in favour of the Deity, the subsequent and so-called deed of cancellation (Ex. E) dated 5-1-1932 can have no legal effect. Mr, Gupta appearing on behalf of the defendant-appellant did not contest this proposition but contended that this Deed of Cancellation was only a piece of evidence to show what the real intention of Debendra was at the time when the Arpannama had been executed. To appreciate the circumstance under which the Arpannama had been executed by Debendra, reference may be made to the substance of the evidence as adduced by the parties.

7-12. (His Lordship reviewed the evidence and continued:)

13. Reference, however, has been made to certain circumstances immediately following the execution of the Arpannama and between the period of the creation of the endowment and the execution of the Deed of Cancellation. Before we refer to such evidence, reference may be made to a statement made by Debendra in the Arpannama which was not quite accurate. It was stated that though no endowment had actually been created till 1929, Debendra had been treating the two properties as having been endowed already. But the Puja accounts which had been produced for some of the years before the execution of the Arpannama viz, for 1921 to 1923 and 1925 show that the amount actually spent for the Puja varied between about Rs. 500 and Rs. 650. The annual income from the two properties subsequently endowed was about Rs. 1000/-. It was, therefore, not correct to state in the Arpannama that the income from, the two properties had from 1921 been utilised for the Puja. There is further no evidence to show how the balance of the income from the two properties was being utilised, whether before the Arpannama was executed or thereafter. Certain account papers which have been produced in Court purporting to be for 1929-1931 are on the face of those papers altered in material places. We are satisfied that the papers produced are not for the years 1929-31. These papers were found in the office almirah and how, when, and by whom these alterations had been made has not transpired in evidence.

The learned Subordinate Judge also had come to the conclusion that the account papers purporting to be for the period immediately following the execution of the Arpannama could not be relied upon. No doubt this raises a suspicion and we have to bear this in mind when other pieces of evidence adduced in this case are considered. The learned Subordinate Judge was correct in not relying upon these

account papers for deciding the issue. There is no doubt that the account papers for 1929 to 1931 would have been a very material evidence to show how the property was being treated by Debendra after the endowment was created and before the execution of the Deed of Cancellation. The defendant could not for obvious reasons adduce any evidence on this point. The suit has been brought by the widow and the son of Debendra as representing the Deity and they alleged that all such papers as were available, had been produced.

14. We shall now proceed to consider each of the following circumstances, which were relied upon on behalf of the appellant in support of the case that the Arpannama executed in 1929 did not create any real endowment but was a simulate one.

1. As Debendra was in debts he made an attempt to save these properties from the creditors. The evidence indicates that he had one creditor only and that creditor again was Maharaja Mahindra Chandra who did not put any pressure on the debtor. Though he had been indebted to the extent of about Rs. 20,000/- the value and extent of the properties of which Debendra was then the owner show the futility of a suggestion that the execution of the Arpannama was in the nature of a benami transaction. If any attempt were to be made by him to save the properties from the hands of the creditor it would be only reasonable to think that the debtor would try to save the more valuable house properties which included his valuable residential house,

2. The income from the two endowed pro-parties had not been proved by the plaintiffs to have been spent for the Pujas even after dedication and that no proper accounts had been either kept or produced. As has already been indicated there are no papers before us from which it can be shown that the entire income was being utilised for the purpose of the Trust. It is no doubt the correct proposition that the mere execution of a Deed although it may purport or, the face of it to dedicate property to an idol is not enough to constitute a valid endowment. The validity of the deed would depend on proof that the executant had divested himself of the property dedicated. Whether he had done so or not is to be determined by the acts and conduct of the parties. Application of the entire income where an absolute de-buttar is being created is one of the tests and not the sole criterion.

15. As regards the performance of the Puja in successive years from 1921 and the continuance thereof after the execution of the arpannama has been satisfactorily proved on behalf of the plaintiffs. Evidence led on behalf of the plaintiffs and believed by the learned Subordinate Judge justifies the conclusion that the Puja was continued from 1921 onwards. We agree with the trial Court in the conclusion reached. The conduct of Debendra in getting the name of the deity mutated in the Collectorate records and in making collections in the name of the deity from and after 1929 supports the case of a true endowment. The registration of the deity's name in the Collectorate and payment of land revenue & cesses by Debendra as shebait proved the intention of Debendra at the crucial

moment. This state of things continued from 1929 till 1939.

16. As stated already there is no evidence before us from which it can be ascertained what amount was being spent for the Pujas. If the other circumstances led us to the conclusion that Debendra had intended to create an endowment in 1929 even if it be supposed that the entire income from the endowed properties was not being utilised by Debendra for the purpose of the endowment, that by itself would not justify the conclusion that no real endowment was intended to be created. Non-utilisation of the entire income for the purpose of the Trust would clearly be a dereliction of duty on the part of the shebait. Once we reach the conclusion on other facts and circumstances that Debendra intended to create and actually created an absolute debuttar in 1929 the subsequent lapses of his would not convert the debuttar into a revocable one. The title which had been created in favour of the deity cannot be affected by such acts on the part of the shebait.

17. It is more significant that Ex. E -- the Deed of Cancellation dated 5-1-1932, mentions in the schedule only one of the two properties included within the Arpannama. Kismat Maharul is only mentioned, presumably because that was the property which was being sold on the same day by Debendra in favour of the plaintiff. If the alleged Deed of Cancellation be read with reference to the schedule it revokes the endowment in respect of one only of the properties and this makes the defendant's position still weaker. No doubt there are expressions of a general nature in the Deed of Cancellation which touch the Arpannama as a whole but the mention of one of the properties indicate unmistakably the purpose for which this cancellation was being made. Necessity had arisen in 1932 to sell one of the properties and the cancellation was accordingly being, made.

18. One of the reasons why this cancellation was being made in 1932 may be that the total income of the two properties was not being required for the annual Puja and Debendra thought of withdrawing one of the properties originally endowed. Thus, the income which was not being required for the Puja could be sold for clearing off at least a portion of the debts due to the Maharaja. This mental attitude or change of front will not entitle Debendra to put out of action the Deed of Endowment originally made.

19. On the evidence and on a proper consideration of the circumstances in this case there is no doubt that the endowment created by Debendra in 1929 was a real and absolute Debuttar in favour of the Deity Saradiya Durgamata Thakurani. Debendra had no right to take out any property out of the said endowment or to transfer the same in favour of the defendant. Both the properties would continue to be the properties of the Deity and the plaintiffs as representing the Deity are entitled to have a declaration to that effect. He agrees with the learned Subordinate Judge as to the estimate of evidence and the conclusion reached to him.

20. On behalf of the defendant it has been urged that Ex. 2 the Arpannama could

not in law create a debuttar. The Arpannama purports to make a gift in favour of Sree Sree Saradiya Durgamata Thakurani -- for the annual performance of the puja during the autumn--each year. In the case of Saradiya Durga Puja the deity is made ready for the annual puja and the idol is worshipped after consecration. On the conclusion of the worship the idol is immersed in water. A new idol is made every year and after the puja it is dropped into water. It is contended that an endowment to be a legal one must be in favour of a deity which has a continued existence. This objection had not been taken in the Court below in the form as stated above. As this is a pure question of law we allowed this ground to be urged and we proceed to consider the same.

21. The principle in Hindu Law which invalidates gifts other than to a sentiment being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death nor does it make such a bequest void. "Bhupati Nath v. Ramlal Maitra" 37 Cal 128 (FB). It is contended that though there may be a bequest for the worship of an image to be established in future, the deity to be the recipient of a gift must be particularised. A dedication is to be in favour of a personal God and not to the "Parama Brahman". Reliance is placed in this connection on an observation of the Judicial Committee in -- "Pramatha Nath v. Pradhyumna Kumar" 52 Ind App 245 (PC) at p. 250 where Lord Shaw relies upon the description given by Mookerjee J. in -- "Rambrama v. Kedar Nath" 36 C L J 478 at p. 483. How the normal type of continued worship of a consecrated image is performed is thus described: "the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessities and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food and the retirement to rest."

22. This description of the services to be rendered to a consecrated deity applies with equal force and relevancy to the various items of puja and ministration irrespective of the fact whether the deity is or continues to be physically manifested whether during particular periods or occasions, or throughout the year and from year to year. The deity consecrated and worshipped during a particular period or periods does not cease to be a personal God of the person so worshipping.

23. There is no doubt that the deity to be the recipient of a gift must be particularized -- "Purna Chandra v. Kalipada Roy" 46 C W N 477. Mentioning the deity to be worshipped periodically is nonetheless the deity particularised.

24. In -- "Ashit Mohan v. Nirode Mohan" 20 C W N 901 an opinion was given casually that the absence of a permanent image does riot in a"ny way affect dedication to a deity. In -- "Bhupati Nath v. Ramlal Maitra" 37 Cal 128 Mookerjee J. (at page 161) made it clear that --

"It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in course of the year."

Chatterjee J. at pages 169-170 in -- "Bhupati Nath"s case referred to the fact that bequests for the performance of the periodical puja of different deities and for celebrations of festivals like "Dole", Rashjatra had been accepted" by the Courts for a long time

"If a gift in favour of a deity whose image is to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all except for any reason any reconstruction coming to pass, should be invalid."

25. The same view was expressed by B. K. Mukherjee J. in -- "Purna Chandra v. Kalipada Roy" 46 C W N 477: "The dedication of the deity of Saratkali who has no permanent image but who is worshipped only four days in the year on constructing an image which is afterwards immersed in river is perfectly valid in law."

26. For the performance of the periodical worship of deities like Sri Sri Durga, Sri Sri Kalimata etc. or for the celebration of periodical festivals like the Doljatra, Rasajatra by the Vaishnavas have from very old times been given effect to by our Courts. Reference may in this connection be made to -- "Ramtonoo Mallick v. Ramgopaul Mullick" 1 Knapp 245; -- "Ashutosh Dutt v. Doorga Churn Chatterjee" 6 Ind App 182 : 5 Cal 438 at p. 442 (PC).--"Hemangini v. Nobin-Chand" 8 Cal 788; -- "Jairam Narronji v. Kuverbai" 9 Bom 491; --"Gokool Nath v. Issur Lochun Roy" 14 Cal 222; -- "Monohar Ganesh v. Lakshmiram Govindram" 12 Bom 247; -- "Bhuggobutty Prosonna v. Gooroo Prosanno". 25 Cal 112 at p. 124; -- "Prafulla Chundra v. Jogendra Nath" 1 C L J 605; -- "Bisseswar Prasana v. Bhag-bati Prasanna" 3 C L J 606 at p. 63L

27. Endowments for the performance of occasional worship or for the observance of religious ceremonies held once or twice a year may be treated (?) from very ancient times as it appears from some of the old copper plate grants and from references in commentaries as well. It is not necessary to refer to the various original texts which have all been collected by Mookerjee, J. and Chatterjee, J. in -- "Bhupati Nath v. Ramlal Mitra" 37 Cal 128 (FB).

28. It is now too late in the day to contend that endowments created for the performance of annual "pujas" of deities which are consecrated temporarily for the worship and then consigned to the water or for casual performance of Doljatra, Rasajatra etc. are not countenanced by the Hindu law givers. This contention must accordingly be overruled.

29. This appeal is accordingly dismissed with costs.

K.C. Chunder, J.

30. I agree.