

(1974) 08 SC CK 0032
In the Supreme Court Of India
Case No : Civil Appeal No. 1115 of 1973

Kali Kinkor Ganguly

APPELLANT

Vs

Panna Banerjee and Others

RESPONDENT

Date of Decision : 16-08-1974

Acts Referred:

Citation : AIR 1974 SC 1932 : (1974) 2 SCC 563 : (1975) 1 SCR 728 : (1974) 6 UJ 617

Hon'ble Judges : A. N. Ray, C.J.; K. K. Mathew, J

Bench : Division Bench

Advocate : A.B.M. Sinha, Salil Ganguly and Samir Roy Choudhury, for the Appellant; B. Sen, D.N. Mukherjee and P.K. Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

A.N. Ray, C.J.—This appeal is by certificate from the judgment dated 11 April, 1973 of the High Court at Calcutta dismissing the appellant's suit.

2. Two contentions were advanced on behalf of the appellant. First, a shebaiti right being both an office as well as species of property can and has been transferred in certain circumstances. Such transfer is possible if it is not contrary to the intention of (the founder as expressed in the deed or any document concerning shebaitship. Second, it is permissible for the benefit of the idol or the deity or any other pressing necessity to execute a sale deed in respect of shebaiti right.

3. The deity at the premises is popularly known as Firingi Kali. Rama-kanta Pal constructed a Shiva temple and installed the deity Shiva at the premises. Ramakanta Pal became the shebait. In 1820 Kali Prasad Pal and Gouri Prasad Pal the two sons of Ramakanta Pal orally transferred the temple together with the idol and shebaiti right of the deity to Srimanta Pandit. Srimanta Pandit carried on the sheba. He constructed a small brick built one storeyed room thereon. He installed the deities Kali, Sitala Manasha and Shaligram Shila. In 1880 Srimanta

Pandit by a registered deed transferred the temple together with the deities and the shebaiti right of the deities to Shashi Bhusan Banerjee. Shashi Bhusan Banerjee performed sheba till his death on 24 August, 1894. He left behind him two widows Paripurna Debi and Pramila Sundari Debi. Paripurna Debi after the death of Shashi Bhusan Banerjee carried on sheba puja of the deity. She died on 10 April 1905. On her death Rakhal Chandra Mukherjee brother of Paripurna Debi took possession of the temple premises and ousted Pramila Debi.

4. On 22 August, 1905 Pramila Debi filed a suit in the High Court against Rakhal Chandra Mukherjee for a declaration of her right in the temple premises and the sheba puja. On 12 February, 1907 Pramila Debi obtained a decree against Rakhal Chandra Mukherjee declaring her to be entitled to temple premises and to the right of sheba puja.

5. Meanwhile on 3 August, 1906 Pramila Debi along with one Chandra Kumar Banerjee who was the reversioner of Shashi Bhusan Banerjee sold certain properties of the estate of Shashi Bhusan Banerjee to Upendra Nath Ganguli for legal necessity. On 29 January, 1907 by a deed Pramila Devi sold one half share of her full title in the temple and the share of shebaiti right to Upendra Nath Ganguli. The legal necessity claimed in the deed was incurring expenses in connection with the litigation relating to the temple premises and the shebaiti right against Rakhal Chandra Mukherjee.

6. Upendra Nath Ganguli who came into possession of the premises carried on sheba puja till his death in 1925. On 5 November, 1922 Upendra Nath Ganguli made his first will. He appointed his brother Pramatha Nath Ganguli as the executor. Upendra Nath Ganguli bequeathed life interest in respect of temple premises to Premila Debi as shebait and after her death to the appellant Kali Kinkor Ganguly. On 15 February, 1925 Upendra Nath Ganguli made a second will by which he bequeathed to Pramila Debi all his right, title and interest in the temple premises for her life. Upendra Nath Ganguli died on 30 January, 1925. On 3 August, 1925 Pramatha Nath Ganguli applied for probate before the District Judge 24-Parganas. On 12 December, 1925 Pramila Debi filed an objection in the probate proceedings. She contended that there was a second will. The District Judge granted probate to Pramatha Nath Ganguli in respect of first will and letters of administration with copy of the will annexed to Pramila Debi in respect of the second will. By an order dated 6 February, 1928 the proceedings relating to letters of administration granted to Pramila Debi were remanded to the District Judge by a Division Bench of the High Court at Calcutta. On 17 July, 1928 probate was granted to Pramatha Nath Ganguli in respect of both the wills of Upendra Nath Ganguli.

7. On 15 September, 1947 Pramila Debi died. In 1949 Prematha Nath. Ganguli died.

8. The appellant filed this suit on 22 January, 1959. The appellant claimed a declaration that he is the sole owner of premises No. 244 Bowbazar Street,

Calcutta and is the sole shebait of Firingi Kali and other deities. The alternative prayer is a declaration that the plaintiff is entitled to an undivided half share in the said premises and to half the pala in the sheba. The allegations in the plaint are that the respondents, viz. the Banerjees who are the heirs of Shashi Bhusan Banerjee denied the appellant's right in the premises and in shebaiti rights.

9. The trial court held that the transfer of half share of shebaiti right by Pramila Debi to Upendra Nath Ganguli was for legal necessity and the transfer was binding on the defendants in the suit. The trial court passed a decree in favour of the appellant. The appellant was entitled to half share of the shebaiti right of the deities and the respondents were entitled to the other half in accordance with the deed dated 29 January, 1907 made by Pramila Debi in favour of Upendra Nath Ganguli.

10. The High Court on appeal set aside the decree. The High Court held that the transfer by Pramila Debi in favour of Upendra Nath Ganguli is invalid.

11. The center of controversy in this appeal turns on the construction of the deed dated 29 January, 1907 made by Pramila Debi in favour of Upendra Nath Ganguli. By the deed Pramila Debi sold to Upendra Nath Ganguly for consideration of Rs. 1200/- "one half share of the full title that I have in the said Kalibati together with the land underneath, the pucca building and income etc. (from the Kalibari) that is to say -/8/- eight and as share in the said Kali Mata, Her seba and pala etc. and in the Kali Mandir and Bati situate at 244, Bowbazar Street, Calcutta together with the land underneath the pucca building and in the entire income and profit therefrom. From this day share to the extent of -/8/- eight annas out of the sixteen annas in right title and interest which I had in the said property, devolves on you and you being entitled to the rights of gifts, sale etc. shall enjoy and possess the said property for ever down to your sons or heirs and representatives in succession. To that, mine or any other heirs or representatives of my husband shall not be competent to raise any kind of plea or objection".

12. The appellant contended that no one laid any claim to the deity or to the temple. The appellant contended as follows: The sum and substance of the deed sued upon is that it is a mere transfer of the personal proprietary interest of a shebaiti which is ancillary to his duties as a ministrant of the deity and the manager of its temporalities. The concept of shebaiti has both the elements of office and property. A partition of shebaiti right amongst several co-sebaiti or co-heirs can be effected under a scheme allotting different Palas. The transfer from the original founders to Srimanta Pandit in 1820 or the transfer from Srimanta Pandit to Shashi Bhusan Banerjee and the transfer from Pramila Debi to Upendra Nath Ganguli, the predecessor-in-interest of the appellant all indicate that the shebaiti exercised rights of transfer to strangers and further that the shebaiti had rights to extinguish and exhaust the line of succession. These transfers of shebaiti rights indicate that it was the intention of the founders that strangers could be taken in management and power was given by them to red-legate the

authority to such strangers. Therefore, transfer by Pramila Debi to Upendra Nath Ganguli is not contrary to the founders' intentions. Furthermore, Upendra Nath Ganguli was not disqualified to discharge the duties of the office of shebait.

13. Counsel for the appellant relied on the decision of this Court in Angurbala Mullick Vs. Debabrata Mullick, in support of the proposition that shebaitship is property. Reliance was also placed on the decisions in Mahamaya v. Haridas ILR 42 Cal. 455 and Kherta Chandra Ghosh v. Haridas ILR 17 Cal. 557 in support of the proposition that a partition of shebaiti right is possible. A corollary was drawn by counsel for the appellant that if the proprietary interest of a shebati is both heritable and capable of being partitioned, there is no reason why subject to certain limitations it should not be alienable. It was said that an alienation of a shebaiti right for necessity or benefit of the deity is permissible as well as justified.

14. In the Hindu Law of Religious & Charitable Trust, 1st Edition, being the Tagore Law Lectures delivered by Dr. B.K. Mukherjea the statement of law at page 228 is this: "Although shebaiti right is heritable like any other property, it lacks the other incident of proprietary right, viz., capacity of being freely transferred by the person in whom it is vested. The reason is that the personal proprietary interest which the shebait has got is ancillary to and inseparable from his duties as a ministrant of the deity, and a manager of its temporalities. As the personal interest cannot be detached from the duties the transfer of shebaitship would mean a delegation of the duties of the transferor which would not only be contrary to the express intentions of the founder but would contravene the policy of law. A transfer of shebaitship or for the matter of that of any religious office has nowhere been countenanced by Hindu lawyers".

15. In Rajesh Vurmah v. Ravi Burmah 4 I.A. 76 Rajah paid certain sum to the urallars (managers) of the religious foundation who transferred all their rights to the Rajah. The Judicial Committee held that the assignment was void in law and could not create any rights in favour of the Rajah. An assignment of religious office for the pecuniary benefit of the holder of the office was held to be against public policy and contrary to the intentions of the founder. Such transfer was said to amount to delegation of delegated authority and could not be sanctioned even on the footing of a custom because it would be against public policy.

16. The doctrine in Rajah Vurmah's case (supra) has been applied on transactions by way of lease or mortgage. In Sundrambal v. Yoganyanagurukkul ILR 38 Mad. 850 one of the parties alienated half share in the Archaka right for a pecuniary benefit. It was said that "an alienation of a religious office by which the alien or gets a pecuniary benefit cannot be upheld even if a custom is set up sanctioning such alienation".

17. The rule against alienation of shebaiti right has been relaxed by reason of certain special circumstances. These are classified by Dr. B.K. Mukherjea at page 231 in his Tagore Law Lectures on the Hindu Law of Religious and Charitable

Trust, 1st Edition under three heads. The first case is where transfer is not for any pecuniary benefit and the transferee is the next heir of the transferor or stands in the line of succession of shebait and suffers from no disqualification regarding the performance of the duties. Second, when the transfer is made in the interests of the deity itself and to meet some pressing necessity. Third, when a valid custom is proved sanctioning alienation of shebaiti right within a limited circle of purchasers, who are actual or potential shebait of the deity or otherwise connected with the family.

18. In the present case counsel for the appellant rested on the second exception on the ground that the transfer is made in the interest of the deity and to meet some pressing necessity.

19. The reason why transfer in favour of the next shebait or one in the line of succession or a co-shebait is permissible is that if anyone of the shebait intends to get rid of the duties the proper thing for him to do would be to surrender his office in favour of the remaining shebait. In such a case no policy of Hindu Law is likely to be affected nor can such transaction be said to be against the presumed intentions of the founder. A transfer of shebaiti by will is not permitted because, nothing which the shebait has can pass by his will which operates only at his death (See *Rajeswar v. Gopeswar* ILR 35 Cal. 226. The decisions in *Mchamaya's* case and *Khetra Chandra Ghosh's* case (*supra*) do not support the appellant's contention of sale of shebaiti right for pecuniary consideration. A shebait cannot delegate his duties to another person, but he is not bound to accept his office. If he renounces his duties the renunciation in the form of a transfer in favour of the next heir can be valid in law.

20. In *Khetra Chandra Ghosh's* case (*supra*) on which the appellant relied in support of the assignment of shebaiti right on the doctrine of benefit to the deity the question was whether the Ghoshes who were the shebait of a private family endowment could make over the idol together with the endowed property to the predecessors of the plaintiff in that case on the ground that the Ghoshes were unable to carry on the worship of the idol with the income of the Debutter. Dr. B. K. Mukherjea at pages 236-239 in his *Tagore Law Lectures* Ist; Edition examined various decisions on this aspect. In *Khetra Chandra Ghosh's* case (*supra*) the Court relied on the decision of the Judicial Committee in *Prosanna Kumari v. Golap Chand* 2 I.A. 145 where the Judicial Committee said that a shebait must, of necessity, be empowered to do whatever might be required for the service of the idol and for benefit and preservation of the property. The ratio in *Khetra Chandra Ghosh's* case (*supra*) is that all the members of the Ghosh family, for the purpose of preserving the property of idol and preventing the discontinuance of its worship gave the estate another direction.

21. In *Rajeswar v. Gopeswar* case (*supra*) the doctrine of necessity or benefit to the deity was referred to. The actual decision in the case was that a hereditary shebait cannot alienate his office by will.

22. In *Nirmal Chandra Banerjee v. Jyoti Prasad* 42 C.W.N. 1138: the transfer of shebaiti rights was not by way of a sale, but was found to be conducive to the interests of the idol. It was held to be valid.

23. Dr. B.K. Mukherjea doubted the propriety of these decisions. Shri Venkatarama Aiyar as the editor of the Second Edition of Dr. B.K. Mukherjea's *Tagore Law Lectures* also expressed the same view at pages 219-220 that even if the transfer is for no consideration the transfer would be bad if it is not in favour of those next in the line of succession.

24. Dr. B.K. Mukherjea in his *Tagore Law Lectures* has pointed out that the decision in *Prasanna Kumari's case* (supra) was that the rule of necessity extended only to an alienation of the temporality of the idol and it does not and cannot apply to alienation to the spiritual rights and duties. Dr. Mukherjea illustrated this with reference to the decision in *Nagendra Nath v. Rabindra* ILR 53 Cal. 132 and an earlier decision in *Rajeswar v. Gopeswar* (supra). The doctrine of alienation of shebaitship on the ground of necessity or benefit to the deity is said by Dr. Mukherjea to be of doubtful authority and based upon a misconception of certain pronouncements of the Judicial Committee.

25. In the present case, the appellant cannot invoke the doctrine of transfer of shebaiti right for the benefit of the deity because the transfer by Pramila Debi to Upendra Nath Ganguli is illegal for the principal reason that neither the temple nor the deities nor the shebaiti right can be transferred by sale for pecuniary consideration. The transfer by sale is void in its inception.

26. For these reasons the appeal is dismissed. We may state here that we are not in agreement with the various reasons given by the concurring judgment of the High Court.

27. Some submissions were made on behalf of the receiver about his remuneration and expenses including salary of the clerk. At the time we granted stay of the operation of the decree of the High Court we indicated that the question of remuneration and salary of the clerk would be gone into at the time of the disposal of the appeal. The receiver will be entitled to his remuneration for 16 months during the pendency of the appeal. The High Court sanctioned the receiver a remuneration of 130 gold mohurs for 7 months and salary of the clerk at the rate of Rs. 50/- per month. The High Court will fix the remuneration of the receiver for the subsequent months up to the discharge of the receiver on passing of his accounts. The High Court will also fix the salary of the clerk because it was submitted before us that the salary of the clerk was low considering that he had to attend the temple every day for long hours without any holiday.

28. The receiver will submit his accounts and will be discharged on passing of accounts. The receiver will hand over to the respondents, viz., the Banerjees all monies lying with him after deducting his remuneration, salary of the clerk and all other expenses at the passing of the accounts by the High Court.

29. The appellant will pay one set of costs to be shared by the respondents and the guardian-ad-litem.