

(2015) 09 CAL CK 0048
In the Calcutta High Court
Case No : ACR No. 4 of 2014

Seth Soorajmul Jalan Trust

APPELLANT

Vs

Tolaram Jalan and Others

RESPONDENT

Date of Decision : 01-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92(1)
Hindu Succession Act, 1956 — Section 14
Trusts Act, 1882 — Section 70, 71, 73, 74, 75

Citation : (2015) 4 CALLT 1

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Pradip Kumar Ghose, Senior Advocate, Suchismita Ghosh Chatterjee and Promode Bagaria, for the Appellant

Final Decision : Disposed off

Judgement

Soumen Sen, J—One Soorajmull Jalan prior to his death on 15th August, 1938, transferred a sum of Rs. 5 Lac to Mohanlal Jalan, Banshidhar Jalan, Baijnath Jalan, Chiranjilal Bajoria, Nandlal Bhuwalka and Onkarmal Shroff with the direction to hold the said sum in trust. All the aforesaid persons executed a deed of trust in the name of "SETH SOORAJMULL JALAN TRUST" in respect of the said sum.

2. The maximum and the minimum number of trustees are six and five respectively.

3. The trust shall be known as "Seth Soorajmull Jalan Trust". There shall be not less than five and not more than six trustees appointed in the manner stated in clause 3 of the Deed. The first trustees were named in clause 4 of the Deed. Under Clause 5 of the said deed the said Trustees were to hold the sum of Rs. 5 lacs together with all accretions and accumulated income thereof for the objects mentioned in Clause 6. In Clause 7 it was declared that the building to be constructed out of the trust fund shall be used for the purpose mentioned in the

said clause. In Clause 8 it was declared that the Trustees would invest a sum of Rs. 2 lacs for maintenance of the institutions mentioned in the said deed. However, in Clause 8 it was also declared that after spending Rs. 2 lacs for purchasing and constructing of building as stated therein and investing a sum of Rs. 2 lacs for maintenance of the institutions to be established in the said building, the trustees shall spend the balance sum of Rs. 1 lac for such other charitable object or objects as the trustees may in their discretion consider suitable and proper.

4. The objects have been mentioned in Clause 6 and the implementation of the objects by utilizing the building to be constructed have been set out in Clause 7. The trustees were empowered to spend the income of the trust fund to carry out the object of the trust and Clause 14 specifically states that on the death, retirement, disability or unwillingness of any of the Trustees to act as Trustee, a new Trustee will be appointed in the manner stated in the said Clause 14. Clause 17 further provides that a Trustee shall cease to be a Trustee if he absents himself from meetings for more than twelve months without sufficient reasons and in such case another Trustee may be appointed in his place by the persons entitled to select a Trustee in his place.

5. The procedure for appointment of the six trustees has been indicated in Clause 3 of the said deed which states:--

"i) One shall be the senior most male member let the time being of the family of the said Soorajmull Jalan;

ii) Two to be appointed from amongst the family of the Hardeodas Jalan, deceased, in addition to the said senior most male member hereinbefore referred to;

iii) One shall be the senior most male member of the family of Nagarmull Bajoria, deceased;

iv) One to be appointed by the Trustees of the Ratangarh Charity Trust either from amongst themselves or an outsider;

v) And the sixth shall be appointed by the remaining five Trustees."

6. However, no person shall be eligible to be appointed as a trustee who does not belong to the Marwari Agarwalla community professing Hindu religion.

7. The first trust consists of the following trustees:--

"i) Mohanlal Jalan, the senior most male member of the family of the said Seth Soorajmull Jalan, deceased;

ii) Bansidhar Jalan

iii) Baijnath Jalan

As the nominees of the adult male members of the family of Hardeodas Jalan,

deceased;

iv) Chiranjilal Bajoria, the senior most male member of the family of Nagarmull Bajoria, deceased;

v) Nandlall Bhuwalka, the nominee of the Ratangarh Charity Trust;

vi) Onkarmull Shroff appointed by the other five Trustees."

8. In view of substantial accumulation of surplus funds in the hands of the trustees, the trustees are desirous of utilizing the said funds for poor and backward section of the society.

9. Mr. Pradip Kr. Ghose, the learned Senior Advocate appearing on behalf of the plaintiff submitted that with the change in social environment and outlook without disturbing the objects of the said trust as stated in the said deed of declaration of 1938, the trustees are seeking advice of this Hon''ble Court under Section 7 of the said Act of 1920 that the trustees are desirous of extending the benefits to a larger section of the society and to render assistance for the development and upliftment of the poorer and backward section of the society who are unable to attain their objects or goal in life because of financial constraints and other circumstances which prevent them from pursuing and achieving their objects in life. The plaintiffs are further desirous of adding to the said Declaration of Trust the following additional objects in addition to the existing objects:--

"a) To render relief to the less fortunate people, by providing education, medical relief and advancement of any other object of general public utility.

b) To establish, promote, support, maintain and/or grant aid or other financial assistance to schools, colleges, hostels, libraries, reading rooms, lecture halls, museums and other establishments and institutions for the development of education and diffusion or useful knowledge.

c) To grant scholarship, stipends, free studentship, prizes, rewards, and allowances or other financial assistance to students having meritorious records and/or belonging to the poorer section of the Society for prosecution of their studies.

d) To establish, promote, support, maintain, help, run and grant aid and/or other financial assistance to dispensaries, hospitals, old age homes, sanatorium, mobile medical units, ambulances, medical and/or surgical camps and other establishments for giving medical relief to the public.

e) To renovate, repair, open, found establish and contribute for centers for moral, cultural, social and spiritual activities and upliftment.

f) To open, found, establish and contribute for the establishment or maintenance of rest houses, athithi niwas for the use of visitors or common people.

g) To establish and maintain hospitals and/or other institutions for the reception

and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation and generally to do all things and acts for the upliftment of the common people."

10. Each of the objects mentioned are of charitable in nature rendering assistance and reliefs by upliftment of moral and cultural character of the public at large and also providing medical assistance to the needy and deprived section of the society, who are unable to afford the high cost of medicine and medical treatment.

11. In clause 8(ii) of the deed of declaration, the trustees have been empowered to spend the balance amount for such charitable object or objects as the trustees may in their discretion consider suitable and proper. Thus discretion is already vested in the trustees in enlargement of the objects with the expression used "other charitable object or objects". It is submitted that it is not confined only to the objects enumerated in clause 6 and clause 7. The words other charitable object or objects necessarily mean apart from objects set out in clause 6 and clause 7, the trustees are empowered to utilize the fund for objects deemed charitable. Thus it is submitted that this Hon'ble Court will render the advice in the affirmative.

12. Mohanlal Jalan, son of Soorajmull Mal Jalan to honour the legacy of his father made the said declaration of trust so that the name of Soorajmull Jalan remain enshrined with charitable activities. With this object the trustees were chosen from Jalan family. Soorajmull Jalan had two brothers viz. Banshidhar Jalan and Baijnath Jalan all sons of Hardeodas Jalan, deceased. For that reason Mohanlal Jalan chose his uncles Banshidhar Jalan and Baijnath Jalan to be first trustees of the charitable trust. Nagarmull Bajoria was related to Jalan family through marriage. For that reason Chiranji Lal Bajoria was chosen as one of the first trustees of the said charitable trust. After the death of Chiranji Lal Bajoria, Bajoria family nominated Shyan Lal Bajoria and thereafter B.P. Bajoria who died on 20th February, 2012. After the death of B.P. Bajoria, the Bajoria family had not nominated any person to serve as a trustee in the said charitable trust and for last 3 (three) years no trustee is functioning in his place and stead.

13. Mohanlal Jalan acted as the catalyst for the establishment of the trust to honour the legacy of his father Soorajmull Jalan. He was the only son of Soorajmull Jalan, since deceased. It was Mohanlal Jalan who persuaded his other relatives to become trustees to carry out the religious and charitable work which the Late Soorajmull Jalan desired to be carried out and for which the said Soorajmull Jalan set apart a sum of Rs. 5 lacs for fulfillment of his desire for religious and charitable work. Mohanlal Jalan died leaving behind three sons, namely, Tolaram Jalan, Mahabir Prasad Jalan and Bajrang Prasad Jalan. The said Tolaram Jalan and Babulal Jalan were appointed as trustees. It is stated in the petition that apart from the family of Mohanlal Jalan the trustees representing their other relatives took lesser interest in the running of the trust. The other

branches of the Jalan family and the Bajoria family have set up different trusts and it was mutually agreed that the said Seth Soorajmull Jalan Trust would be looked after, managed and run by the heirs of the said Mohanlal Jalan, since deceased.

14. The deed of trust stipulates that "the Trustees shall not be entitled to alter modify or change the objects of the trust for any reason whatsoever." It is submitted that the embargo on the trustees is not to alter modify or change the objects of the trust, but the proposed modifications in no way would result in altering, modifying or changing the existing objects of the trust. On the contrary, it is submitted that it would facilitate in advancing and implementing the objects of the trust in a more effective manner and such additional objects if allowed to be included would result in meaningful and effective implementation of the objects of the trust which was established, inter alia, to impart education of persons professing Hindu religion.

15. Pursuant to the order of this Court a copy of the application was also served upon Bajoria and Jalan, families which had been duly received. None appeared pursuant to such notice. As on date, no one is functioning on the Board of Trustees representing the Bajoria family and Bansidhar Jalan and Baijnath Jalan families.

16. After the death of Babulal Jalan son of Banshidhar Jalan no one was nominated from the family of Banshidhar Jalan, deceased since 8th December, 1970. The said Baijnath Jalan's family has also not nominated any person for a long time past. In the circumstances the three sons of Mohan Lal Jalan (deceased) being Tola Ram Jalan, Mahabir Prasad Jalan and Bajrang Prasad Jalan functioned as the trustees of the said charitable trust. The said Bajrang Prasad Jalan died during the pendency of this application leaving one son Sandeep Kumar Jalan who has no male issue. Ratangarh Charitable Trust has nominated to the Board of Trustees viz. Sita Ram Bhuwalka, the Petitioner No. 3. The trustees have appointed in 2002 Ram Gopal Saraf, the petitioner No. 4 as a trustee chosen from Marawari Agarwal family professing Hindu religion.

17. Since the family of Banshidhar Jalan deceased and Baijnath Jalan deceased have ceased to take any interest in the running of the charitable trust and have not nominated any trustee for long time past, clearly expressing their unwillingness to participate in the running of the trust to keep the said charitable trust properly administered, the petitioners are seeking advice of this Court as to the amendment of Clause 3 of the deed whereby the heirs of Tola Ram Jalan, Bajrang Prasad Jalan (deceased) and Mahabir Prasad Jalan (deceased), could be appointed as trustees and they would be allowed and permitted to appoint suitable persons from Marawari Agarwal community professing Hindu religion.

18. In clause 14 it is mentioned that if there is unwillingness of any of the trustees to act as a trustee, a new trustee shall be appointed in the manner set out in the said clause 14. On a conjoint reading of clause 14 and clause 17 and

on true and proper construction of the same, it is submitted that when a trustee has ceased to be a trustee by absenting himself for more than 12 months and/or evinced unwillingness to act as trustee, then the present trustees can appoint trustee from the descendents Mohanlal Jalan family and/or from amongst Marwari Agarwal Hindu Community as mandated by the Trust.

19. In these circumstances the present trustees are seeking advice of this Court that the trustees of the Jalan family be chosen from the members of the family of Tola Ram Jalan, Mahabir Prasad Jalan, Bajrang Prasad Jalan, all sons of Mohan Lal Jalan. Since Bajrang's son Sandeep does not have any male issue, therefore, the trustees are seeking advise of this Hon"ble Court that the trustees for the time being be permitted to appoint female members of the Jalan family if and when situation arises.

20. The originating summons has been taken out by the trustees of Seth Soorajmull Jalan Trust for determination of the following questions:--

"A. Can the Trustees add additional objects of the trust as mentioned in paragraph 20 hereinbefore?

B. Can the trustees modify the appointment of trustees from the families of Tolaram Jalan, Bajrang Prasad Jalan and Hemant Kumar Jalan in the manner stated in paragraph 29 hereinabove?

C. Can the Trustees amend Clause 3 of the Deed of Trust in the manner as mentioned in Paragraph 29 hereinabove?"

21. In order to answer Question A it would be necessary to consider the existing Clauses 6, 7 & 8 and the additional objects proposed to be added to the trust deed. Clauses 6, 7 & 8 of Trust Deed and additional objects as mentioned in Paragraph 20 of the Petitioner are stated below:--

"Clause 6. The Trustees shall:

(a) establish and worship the Deity Sree Sree Ramchandra Ji and shall arrange for daily Ramayan Kathakatha at the place where Deity shall be located;

(b) establish and accommodate a Bastu Bhandar to keep stores of articles and utensils which shall be lent to the Marwari Hindus for their temporary use in connection with marriage and other religious ceremonies;

(c) establish a Sanskrit, Hindi and Bengali public library and Reading Room for the use of persons professing the Hindu religion;

(d) establish a Mahajani School for Hindu students to teach them book-keeping and Mahajani in Hindi and Bengali and to teach them English upto the middle standard and also establish Ratri Pathshala (night school) for Hindus to teach them Hindi and Bengali and establish a Day School for Hindu girls to teach them Hindi, Sanskrit and Bengali.

(e) Shall spend a sum not exceeding Rupees Two Lacs out of the Trust Fund in

the purchase of suitable plots of land or lands in the town of Calcutta and erecting thereon a suitable Five or Six storied building."

Clause 7. The building so to be erected shall be utilized as the Trustees consider suitable and proper for the following purposes that is to say:--

(i) On the ground floor to establish and worship the said Deity Shree Shree Ramchandrajee and to arrange for daily Ramayan Kathakata there and also to accommodate the said Bastu Bhandar to keep stores of articles and utensils.

(ii) On the first floor to establish the said Sanskrit, Hindi and Bengali Public Library and Reading Room for Hindus.

(iii) On the Second floor to establish the said Mahajani School to teach Hindus Book-keeping and Mahajani in Hindi and Bengali and to teach them English upto the Middle standard and the said Night School (Ratri Pathsala) for Hindus to teach them Hindi and Bengali.

(iv) On the Third floor to establish Day School for Hindu girls to teach them Hindi, Sanskrit and Bengali.

(v) Use the Fourth floor for such Trust purpose or purposes as the Trustees shall in their discretion think fit.

(vi) On the top floor to provide lodging and cooking place for Marwari Agarwalla Hindus who cook their own meals.

Clause 8. The Trustees shall:--

(i) invest a sum of Rupees Two lacs or thereabout in such manner as they shall think fit and apply the income thereof for the maintenance of the institutions hereinbefore mentioned,

(ii) and spend the balance of Rupees One Lac for such other charitable object and objects as the Trustees may in their discretion consider suitable and proper.

Provided always that the Trustees shall not be entitled to alter or modify or change the objects of the Trust for any reason whatsoever."

"Paragraph 20.

(a) To render relief to the less fortunate people, by providing education, medical relief and advancement of any other object of general public utility.

(b) To establish, promote, support, maintain and/or grant aid or other financial assistance to schools, colleges, hostels, libraries, reading rooms, lecture halls, museums and other establishments and institutions for the development of education and diffusion or useful knowledge.

(c) To grant scholarship, stipends, free studentship, prizes, rewards, and allowances or other financial assistance to students having meritorious records and/or belonging to the poorer section of the Society for prosecution of their

studies.

(d) To establish, promote, support, maintain, help, run and grant aid and/or other financial assistance to dispensaries, hospitals, old age homes, sanatorium, mobile medical units, ambulances, medical and/or surgical camps and other establishments for giving medical relief to the public.

(e) To renovate, repair, open, found establish and contribute for centers for moral, cultural, social and spiritual activities and upliftment.

(f) To open, found, establish and contribute for the establishment or maintenance of rest houses, athithi niwas for the use of visitors or common people.

(g) To establish and maintain hospitals and/or other institutions for the reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation and generally to do all things and acts for the upliftment of the common people."

Charitable purpose has been qualified in four principle division:--

"a) relief of poverty,

b) advancement of education,

c) advancement of religious,

d) other performance beneficial to the community."

22. Mr. Ghose, the learned Senior Counsel appearing on behalf of the plaintiff has submitted that the aforesaid four principles are based on Pemsel classification as laid down by the House of Lords in The Commissioners for Special Purposes of the Income Tax v. John Frederick Pemsel reported at 1891 Appeal Cases 531 at 583. In Halsbury's Laws of England, 4th Edition, re-issue Volume 5 at Paragraph 13 it is stated:--

"13. There are four divisions of charity:--

Charitable purposes, in the legal sense, derived from the ancient statute of Elizabeth 1, have been classified into four principal divisions:--

1) the relief of poverty

2) the advancement of education

3) the advancement of religion

4) other purposes beneficial to the community not falling under any of the preceding heads.

All claims to bring a purpose under the head of charity must assert that it comes within one or more of these four divisions. Where a trust is described merely as

being for charitable purposes, and a class of objects to be benefited is defined, the purposes of the trust cannot be taken to be confined to that particular charitable purpose which would render a trust for that class valid as a charity, but rather the purposes must be construed as being all the four traditional categories of charitable objects, and the trust must be interpreted in the light of the application of all four categories to the class of objects to be benefited."

23. The aforesaid four classification of charities laid down in Pemsel case also finds place in the most authoritative book on the subject, namely, Hindu Law of Religious and Charitable Trust, a celebrated work by the Fourth Chief Justice of our Republic Late Bijan Kumar Mukherjee, 4th Edition, Page 56 which reads:--

"2.5. Different classes of charity. - Lord Macnaghten in his celebrated judgment in Commissioners of Income Tax v. Pemsel, laid down that the charitable purposes which come within the language or spirit of the Statute of Elizabeth could be grouped under four heads, to wit:--(1)relief of poverty, (2) education, (3) the advancement of religion, (4) other purposes beneficial to the community not coming under any of the preceding heads. All purposes falling within these divisions are prima facie charitable, provided they are of a public nature, that is to say, when the object is to benefit the community or some part of it, and not merely particular private individuals or a fluctuating on this definition formulated by Lord Macnaghten, Russel, J., said in Re Hummeltenberg, "no matter under which the four classes of gift may prima facie fall, it is still in my opinion necessary (in order to establish that it is charitable in the legal sense) to show- (1) that the gift will or may be operative for the public benefit, and (2) that the trust is one, the administration of which the court itself could, if necessary, undertake and control."

24. According to commentators on Hindu Law all objects which benefit the community are regarded as charitable. The said clauses are not in conflict with the existing clauses and conform to Pemsel Classification. Even otherwise the said objects are supplemental to the existing objects and addition of such objects would benefit the community and advance the clause for which such trust was created. In view thereof Question A is answered in the affirmative.

25. In order to answer Question Nos. B and C it is required to consider Paragraph 29 of the affidavit in support of the summons. In Paragraph 29 the plaintiffs have prayed for amendment of Clause 3 of the Deed of Trust in the manner following:--

"3 (a). The number of Trustees shall not be less than 3 and not more than 7.

3 (b). The eldest male members from the family of Tolaram Jalan, Bajrang Prasad Jalan and Hemant Kumar Jalan (son of Mahabir Prasad Jalan, since deceased) shall be the Trustees for the life time. If the said Tolaram Jalan, Bajrang Prasad Jalan and Hemant Kumar Jalan or any trustees appointed in their place, die or to reside abroad or shall desire to retire from the office or refuse or become incapable of acting or unfit to act, the continuing trustees shall appoint the eldest male member of the respective Trustee to act as Trustee in his place.

If, however, such eldest male member is unfit or not willing to be appointed as Trustee on his behalf or if there is no male member or if all the male members of the family of retiring trustee are unwilling to act as Trustee for any reason or to continue, the trustees shall appoint the eldest female member of that branch of Jalan family or their eldest direct descendant.

3 (c). The present trustees from time to time can appoint any person from Hindu Community in their absolute discretion as Trustee, but in no case the member of the Trustee shall exceed as fixed aforesaid."

26. Mr. Ghose has tried to draw analogy of a shebait in debuttar property with the office of Trustee in order to persuade me to hold that female members of the Jalan family may be appointed as trustees if and when situation arises. The learned Senior Counsel has referred to Page 159 of Justice Mukherjee's book 4th Edition and The Law of Hindu Endowments and Religious Institutions 2nd Edition by Late Jogendra Chandra Ghose and submitted that it has been authoritatively stated in the works of the celebrated authors that a shebait in debottor property is not a trustee in the sense in which it is used in English Law, however, shebait is a trustee in the general and ordinary sense of the term. Shebaitship has also been considered not a mere office but a property as well. In J.C. Ghose's book dealing with the nature of office of shebait it is stated that the shebait is strictly a trustee for carrying on worship for a deity. The shebait being an officer to whom the management of the property is vested.

27. Mr. Ghose in this connection has relied upon the decision of Full Bench of Calcutta High Court in Manohar Mukherji Vs. Bhupendranath Mukherji and submitted that in this case the settler gave a direction in the endowment creating a debuttar to the effect "that after the death of all of his son the eldest male in the family should be sole shebait and that no daughters son or daughter should hold the office." In this decision of the Full Bench it was held that rules for successions to the office should be rendered invalid by reason that they provide for office to be held by some among the heirs of the founder to the exclusion of others differing from the line of Hindu inheritance.

28. It further appears that right of female to make endowment for charitable purpose was gradually recognized on the basis of Smriti Chandrika. The widow on the death of her husband could claim independent ownership and she can perform charitable and religious work not only for the spiritual benefit of her husband but also for her own which found favour with Bombay High Court. (Ganpat Dhaku Teli v. Tulsiram Ukha Dhangar; ILR 36 Bom 88)

29. Calcutta High Court also held the widows power of disposition for religious and charitable purpose are greater than those for temporal purposes, as all such acts benefit the deceased husband. Then the question arose whether a widow or daughter could create charitable endowment. It was held that such females can create such endowment with consent of reversionary irrespective of the question of necessity. (Khub Lal Singh And Anr. v. Ajodhya Misser; 22 CLJ

30. This view also finds support from J.C. Ghose's Law of Endowment, 2nd Edition Page 82, 83 which states:--

"Page 82:-- What is meant probably is that except for Sradh purposes the widow and the daughter have no power. But it does appear that the rule is not well founded in true Hindu Law which allows the widow to make small alienations for religious or charitable purposes.

The Smriti Chandrika, on the authority of Vrihaspati, says that the wife has a right to the husband's property of a dependent character, which becomes independent ownership on his death and she can, therefore, perform religious and charitable works, like digging of tanks, not only for the spiritual benefit of her husband but also of her own self. This view has recently found favour in the Bombay High Court as being consistent with the observation of the Privy Council that a widow has to lead the life of ascetic privation and hence the law gives her a power of disposition for religious or charitable purposes, which is denied to her for other purposes.

Page 83:-- There is a further question namely whether a widow or a daughter can create a charitable or religious endowment with the consent of the next reversioner. It has been held in Calcutta that the consent if the reversioner is only evidence of necessity. It is an untenable position. The simple rule laid down by the Privy Council should be adopted and widows and daughters should be allowed to make valid alienations with the consent of reversioners irrespective of the question of necessity. So far as making endowments for religious and charitable purposes are concerned to deny such power to the widow and the daughter, jointly with the reversioners, seems unreasonable."

31. The gradual development of the Hindu Law giving more and more emancipation to the females in the matter of creating or making endowment for charitable purposes took place from the early part of the 20th century. The right of female to be shebait was also taking place culminating in the well-known decision in Monohar Mukherjee (supra) and subsequent decisions. The rights of female was gradually recognized and enlarged in course from the early part of the 20th century. The interpretation of Smriti Chandrika and of those progressive and liberal Smritikars culminated in the formation of Hindu Law Committee which was appointed in 1941 to examine Hindu Law and codification thereto particularly with regard to intestate succession and marriage.

32. Mr. Ghose has referred to Principles of Hindu Law by Mulla, 21st Edition, by Satyajee A Desai where the development of Hindu Law over the ages have been lucidly explained. The Smritikars were great jurists. The smriti texts evince profound acute thinking of sages. The logical acumen of Smritikars helps them to harmonize rules not easily reconcilable. In their desire to adapt the more ancient law to progressive conditions, they sometimes resorted to progressive contrivance of the jurist by evolving a number of beneficent and elegant fictions.

The Hindu law was not static or staid but was empiric and progressive. The slow and steady process of development of Hindu law was the result of innovations, often imperceptible, as happens when old and obsolete rules become gradually displaced by growing usages and customs. The leading commentators and nibandhakars did not permit themselves to be fettered by Orthodox prejudices and showed liberal readiness to move with the times. The purpose of referring to the passages from Mulla was to impress upon this Court that the Courts of law should exercise the same freedom of interpretation in moulding the law as did the ancient commentators even when the interpretation was not deductible from the earliest authority. Dry traditionalist view should be replaced by progressive approach and thoughts so as to keep the law in harmony with their environments and in general respond to changing ideas, customs and the march of time.

33. Prior thereto the Hindu Woman Rights to Property Act of 1937 introduced important changes in the law of succession to confer new rights on certain categories of females. The gender bias was tilted in favour of female on introduction of several statutes in 1950s e.g. Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Adoption and Maintenance Act, 1956. In this manner the right of the female to take property as security instead of limited estate in the property was gradually removed culminating in Section 14 of the Hindu Succession Act, 1956. (See Mulla Principles of Hindu Law, 21st Edition, Pages 16 to 88 and Pages 1076 to 1077)

34. Post-independent India has witnessed legislations where the disparity and the gender bias to a large extent was removed. Late Jogendra Chandra Ghose an eminent pleader in his book *The Law of Hindu Endowments and Religious Institution*, Tagore Law Lecture, 1904 by referring to the decision of the Privy Council said that widows and daughters should be allowed to make valid alienation with the consent of reversioners irrespective of the question of necessity. So far as making endowments for religious and charitable purposes are concerned to deny such power to the widow and the daughter, jointly with the reversioners, seems unreasonable. The learned Author refers to the *Smriti Chandrika* which on the authority of *Vrihaspati* says that the wife has a right to the husband's property of a dependent character, which becomes independent ownership on his death and she can, therefore, perform religious and charitable works, like digging of tanks, not only for the spiritual benefit of her husband but also of her own self. It refers to the observation of the Privy Council which says that a widow has to lead the life of ascetic privation and hence the law gives her a power of disposition for religious or charitable purposes, which is denied to her for other purposes. In dealing with the nature of office of the shebait at page 301, the learned Author said that the shebait is strictly a trustee for carrying on the worship of a deity. Literally, the word means a person in whom the service of a deity is vested. Sheba means service. Shebait means an officer to whom the service of a deity and the management of his property are vested. There are no doubt certain features which distinguish the position of a shebait from that of an ordinary trustee. But there is an essential similarity. A Hindu, however,

superstitious knows that the land is to be held in reality by the shebait in trust for the worship of the deity. It will serve no good purpose to base rules of law on fictitious ideas. But inasmuch as very frequently the Shebait or Mohunt has a personal interest, that is, can spend and does spend a large portion of the profits for his own pleasure he cannot be considered strictly a trustee. But when there is a bare trust carrying no beneficial and heritable interest he may be considered as a trustee but not a trustee for a specific purpose, as the purpose very often has no specific character. The simple rule is that the shebait is an ordinary trustee for the purpose of keeping up worship for all time. The law recognizes such a trust and makes the rule of perpetuities inapplicable to it, so far as it is necessary for giving effect to the trust. The Privy Council in *Ramanathan Chetty v. Muragappa Chetty* reported at ILR 29 Mad 288 have rightly laid down that both in respect to public and private religious endowments, the Shebait, Mohunt or, Manager "is by virtue of his office the administrator of the property" but "as regards the service of a temple and the duties that appertain to it, is rather in the position of a holder of an office or dignity and "as regards the property is in the position of a trustee." (J.C. Ghose on The Law of Hindu Endowments and Religious Institutions, 2nd Edition, Pages 301,302)

35. In the light of such progressive legislation recognizing the right of a female Hindu, Mr. Ghose submitted that the right of female to manage and administer charitable trust as a trustee or as a shebait is now acceptable universally.

36. In this connection, reference was made to the recent pronouncement of this Court in *Thakurani Shree Shree Durga Mata New Trust and Asis Mitra Vs. Sibani Dutta and Others*, (2014) 3 WBLR 627 where the settler in the deed of settlement held that shebait to be appointed only from the male lineal descendents and those clauses have been struck down. The court has long ceased to recognize that the rights of woman are not at par with the rights of male as succession or performance of any religious obligation. Females have been given full freedom in exercise of such right at par with male and gender bias has been eroded by judicial decision.

37. It is well-settled that in case of charitable trust of debuttar endowments, the settler cannot exclude female members from becoming shebaites. Under all law of endowments the property vests in the deity and not in the shebaites. The religious estate vest in the deity. The office of shebaitship is also hereditary.

38. However, in case of trusts which are private in nature and the instrument creating the trust sets out the devolution of the office of the trustees, can the line of succession be changed? If the settlement in the instrument of trust has said that the male members of the family will be trustees to the exclusion of the females, can the trustees change the line of succession by allowing female members to becoming trustees? It is true that normally the line of devolution is prescribed in the instrument. However, when the person to be nominated is unwilling/declines to act, question would arise who could be appointed as a trustee. The answer in this connection can be found in Indian Trust Act, 1882

which lays down the circumstances under which a trustee may be discharged which contemplates inter alia discharge as prescribed by the instrument of trust; or by appointment under this Act of a new trustee in his place.

39. The provisions of the Indian Trust Act relevant for the present purpose are:--

"S. 70. Office how vacated.--The office of a trustee is vacated by his death or by his discharge from his office.

S. 71. Discharge of trustee.--The trustee may be discharged from his office only as follows:---

- (a) by the extinction of the trust;
- (b) by the completion of his duties under the trust;
- (c) by such means as may be prescribed by the instrument of trust;
- (d) by appointment under this Act of a new trustee in his place;
- (e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or
- (f) by the Court to which a petition for his discharge is presented under this Act.

S. 73. Appointment of new trustees on death, etc.-- Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from [India], or leaves India] for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by--

- (a) the person nominated for that purpose by the instrument or trust (if any), or
- (b) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of

a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

S. 74. Appointment by Court.--Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under section 73, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly. Rule for selecting new trustees.

Rule for selecting new trustees.--In appointing new trustees, the Court shall have regard (a) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust; (b) to the wishes of the person, if any, empowered to appoint new trustees; (c) to the question whether the appointment will promote or impede the execution of the trust; and (d) where there are more beneficiaries than one, to the interests of all such beneficiaries."

40. In India the courts have observed, "the rule of equity is that a trust will never be allowed to fail for want of a trustee" (Sharf-uz-Zaman v. Sir Henry Stanyon; AIR 1923 Oudh 80). "The trusts will fasten upon the conscience of whoever holds the property". Even when court directs the trustee to hand over trust property to donor it does not extinguish the trust; it makes the donor himself a trustee.

41. The death of a trustee or trustees does not extinguish the trust. The office of the trustee/trustees as well as the trust estate survives to the surviving trustee or trustees. They can carry out the trust and exercise all such powers as were given to the original trustees. Upon the death of the last surviving trustee, the trust property devolves on his legal representative. (Sections 75 and 76 of the Indian Trust Act)

42. Section 92(1), C.P.C. lays down that (a) "in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or (b) where the direction of the court is deemed necessary for the administration of any such trust,two or more persons having an interest in the trust.....may institute a suit.....to obtain a decree removing any trustee.....".

43. There is no reason why a similar statutory provision should not have been made in respect of private trusts which can as well be for charitable purposes. In Monohar Mukherjee v. Raja Peary Mohan; 24 Cal WN 478: 54 IC 6 the court held "a removal of a trustee of a private trust to be within the sound judicial discretion of the court which is guided by the considerations of the welfare of the beneficiaries and of the trust estate and there must be a clear necessity for interference to save trust property". ((Kosuri) Gopalacharyulu and Another Vs. Gadde Lakshminarayana and Others, AIR 1929 Mad 87 : 114 Ind. Cas. 650 . In the absence of statutory provision the courts are having to pronounce that

"removal of a trustee of a private trust is within the jurisdiction of the court".

44. The expression by such means as may be prescribed by the instrument of trust reference may be made to Agnew who has quoted at p.332 from the 12th Edn. of Lewin's treatise on Trusts p.805 as follows:--

"The person who created the trust may mould it in whatever form he pleases. He may provide that -

- On the occurrence of certain events and on the fulfilment of certain conditions, the original trustee may retire and a new trustee be appointed.

"The form most commonly used is that -

- in case the trustees appointed by the instrument of trust, or to be appointed under the power of any of them shall die or be abroad for twelve calendar months, or be desirous of being discharged from, or refuse, decline, or become incapable to act in the trusts, it shall be lawful for the cestui que trust to whom the power may be given, or (as the Proviso is frequently worded) for the surviving or continuing trustees, or the Executors or Administrators of the survivor by deed or writing to nominate some other person be a trustee....The trust estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees; and that the new or substituted trustee shall either before or after the trust estate shall have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement."

45. The instrument, therefore, may indicate how the office of the trustee may be filled in when vacancy occurs for the various causes, but so far as "discharge", in the sense of release from responsibility is concerned shall be governed by law as stated in *S. Darshan Lal Vs. Dr. R.E.S. Dalliwall and Another*, AIR 1952 All 825 : (1952) 22 AWR 345 or in *Sri Vedagiri Lakshmi Narasimha Swami Temple Vs. Induru Pattabhirami Reddy*, AIR 1967 SC 781 : (1967) 1 SCR 280 .

46. In any case the form as given by Lewin is really based on English law on "Devolution of the office and estate on death of trustees" as summarized by Underhill in Article 74. Indian law is contained in sec.73 and the instrument would be moulded in conformity with it. (Mukherjee on Indian Trusts Act, 1882, 5th Edition)

47. The right of a female to be a shebait as has been noticed earlier is now well-recognized. In this modern world when we speak about gender justice the vice of inequality and discrimination should go and the time has come to recognize the right of a female to participate in all matters and to give them their rightful place in the society. Initially, there were inhibitions and orthodox dogmatism negating and disowning the right of a female either in respect of the property or any other matters concerning the right of a female in the society. India has seen pre-independence legislation concerning women's right to property and other significant legislations largely due to the social reforms initiated by social

reformers and advent of Western Education which helped the nation to look back to its glorious past. The celebrated decisions of Privy Council in *Tagore v. Tagore* and the subsequent decisions recognize the females to act as shebait.

48. The office of shebait may be gifted or devised subject to the rules of Hindu law regarding the persons who may take and the estates that may be created by a deed or will.

49. The well-known *Tagore* case [(1872) IA Supp.47(PC)] laid down two separate principles: (1) that a person capable of taking under a Will should be such a person as would take a gift inter vivos and therefore must either in fact or in contemplation of law be in existence at the death of the testator, and (2) that all estates of inheritance created by gift or Will so far as they are inconsistent with the general law of inheritance are void.

50. In *Gnanasambanda Pandara Sannadhi vs. Velu Pandaram* and 4 CWN 329 (Privy Council) it was held by the Privy Council that the second ruling in the *Tagore* case was applicable to a hereditary office and endowment as well as to other immoveable property. This decision was followed in *Manohar Mukherji Vs. Bhupendranath Mukherji* where it was held that (1) the founder of a Hindu debutter is competent to lay down rules to govern succession to the office of shebait, subject to the restriction that he cannot create any estate unknown or repugnant to Hindu law, (2) a person succeeding to the shebaiti is a grantee or donee of property and his right to succeed to the office is subject to the rule that a gift cannot be made by a Hindu to a person not in existence at the time of the gift, and (3) rules for succession to the office of shebait may be rendered invalid where they provide for the office to be held by some among the heirs of the founder to the exclusion of others in a succession differing from the line of Hindu inheritance. In *Ganesh Chunder Dhur vs. Lal Behary Dhur and Others* AIR 1936 318 (Privy Council), the Privy Council considered the law on the point well settled and held on the construction of the clause in the will before them that (in so far as it related to the holding of the office of shebait), it constituted an invalid attempt on the part of the testator to lay down a line of succession which was not permissible under Hindu law and consequently the succession to the office must go by the ordinary law of succession. All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu Law no person can succeed thereunder as heir to the estates described in the terms, which in English Law would designate estates tail and the rule is applicable to a hereditary office and endowment as well as to other immovable property.

51. In *Anath Bandhu De Vs. Krishna Lal Das and Others*, AIR 1979 Cal 168 : (1978) 1 CALLT 42 : 83 CWN 125 : (1978) 2 ILR (Cal) 412 a Division Bench of this Court held that prescribing a line of succession to the office of the shebait in tail male being opposed to Hindu Law would be void.

52. The views expressed the Full Bench in *Monohar Mukherjee* (supra) was

approved by the Hon^{ble} Supreme Court in Angurbala Mullick Vs. Debabrata Mullick, AIR 1951 SC 293 : (1951) 2 SCR 1125 . In dealing with the nature and character of the office of a shebait Mujherjea, J. observed:--

"11. The exact legal position of a shebait may not be capable of precise definition but its implications are fairly well established. It is settled by the pronouncement of the Judicial Committee in Vidya Varuti v. Balusami [48 I.A. 302] that the relation of a shebait in regard to debutter property is not that of a trustee to trust property under the English law. In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of cestui que trust. In a Hindu religious endowment on the other hand the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person and the shebait or mahant is a mere manager. But though a shebait is a manager and not a trustee in the technical sense, it would not be correct to describe the shebaitship as a mere office. The shebait has not only duties to discharge in connection with the endowment, but he has a beneficial interest in the debutter property. As the Judicial Committee observed in the above case, in almost all such endowments the shebait has a share in the usufruct of the debutter property which depends upon the terms of the grant or upon custom or usage. Even where no emoluments are attached to the office of the shebait, he enjoys some sort of right or interest in the endowed property which partially at least has the character of a proprietary right. Thus, in the conception of shebaiti both the elements of office and property, of duties and personal interest, are mixed up and blended together; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property. This was elaborately discussed by a Full Bench of the Calcutta High Court in Manohar Mukherji v. Bhupendra Nath Mukherji [I.L.R. 60 Cal. 452] and this decision of the Full Bench was approved of by the Judicial Committee in Ganesh Chunder Dhur v. Lal Behary [63 I.A. 448] and again in Bhabatarini v. Ashalata [70 I.A. 57]. The effect of the first two decisions, as the Privy Council pointed out in the last case, was to emphasize the proprietary element in the shebaiti right, and to show that though in some respects anomalous, it was an anomaly to be accepted as having been admitted into Hindu law from an early date. "According to Hindu law," observed Lord Hobhouse in Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee [16 I.A. 137]:

"when the worship of a Thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

Unless, therefore, the founder has disposed of the shebaitship in any particular manner - and this right of disposition is inherent in the founder - or except when usage or custom of a different nature is proved to exist, shebaitship like any

other species of heritable property follows the line of inheritance from the founder."

53. There have been two other decisions, namely, *Kandarpa Mohan Gossain Vs. Akhoy Chandra Bose and Another*, AIR 1934 Cal 379 : 150 Ind. Cas. 179 and *Raikishori Dassi Vs. Official Trustee of West Bengal and Others*, AIR 1960 Cal 235 : 64 CWN 646 , holding as a matter of construction that there was an invalid attempt to lay down a line of succession which is not permissible. (Commentary on Hindu Law by J.V. Gupta Volume I, AIR Publication, 4th Edn.)

54. In the premises I am of the opinion that the continuing trustees in the present trust can appoint a suitable person irrespective of, gender as new trustee/trustees for the smooth running, administration and fulfilling the object of the trust.

55. Although the settlor by the deed restricts the line of succession and confined it to his families but having regard to the object and purpose of the Trust and having regard to the fact that other branches are unwilling and have absented themselves for long in attending meetings and participating in the functioning of the trust if the answer to questions B and C are not allowed in the affirmative the trust would fail which was never the intention of the settlor.

56. It may be true that the settler had never intended to have any trustee appointed apart from the three groups as mentioned in Clause 3. However, in view of the changed circumstances and keeping in view the beneficial and charitable object of the trust Clause 3(c) as proposed would enable the trustees to implement the object of the trust.

57. In case of an appointment of new trustee or trustees of any trust whether charitable or otherwise vacancy should be filled by persons who are best likely to discharge the duties imposed upon them by the trust. When express power for the appointment of new trustees is contained in the instrument the same is required to be construed as directory in making an appointment of new trustees.

58. In the premises I accept the submissions of Mr. Ghose that the amendment of Clause 3 of the Trust Deed as stated in paragraph 29 of the affidavit is to be allowed and appoint suitable persons from Hindu community.

59. Such amendments have all the more become necessary in view of the fact and circumstances stated hereinabove because the Bajoria family and the Baijnath Jalan and Bansidhar Jalan families have not nominated any trustees for past several years. Such amendment is also necessary because Sandeep Kumar Jalan son of Bajrang Prasad Jalan has no male issue and his family is required to be represented on the Board of Trustees through female heirs in absence of a male descendant. The principle in *Monohar Mukherjee* (supra) is applicable *mutatis mutandis* because in that case also the female is permitted to become shebait. Under the present case the work of charitable trust also involves carrying out the sheba of the deity Shri Shri Ram Chandra Ji now famous Ram

Mandir, at Chittaranjan Avenue. The law has also changed after 1947 as women are given equal rights with male members in the inheritance as also to be nominated to the office of trustee in any form or trust private or public. The embargo to female succession is done away with.

60. I accordingly answer the question raised in this originating summons as follows:--

"The question No. A is answered in the affirmative.

The question No. B is answered in the affirmative.

The question No. C is answered in the affirmative."

61. This originating summons, accordingly, disposed of. There shall be no order as to costs.

62. Urgent certified photocopy of this judgment, if applied for, be given to the parties on usual undertaking.