

(1969) 08 CAL CK 0021
In the Calcutta High Court
Case No : F.M.A. No. 170 of 1965

Sree Kalimata Thakurani of Kalighat and Another APPELLANT
Vs
Ram Chandra Chatterjee and Others RESPONDENT

Date of Decision : 20-08-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 32 Rule 4(1), Order 32 Rule 4(2), 115, 2(2)
Doctrine of Representation of the People Act, 1951 — Section 81

Citation : AIR 1970 Cal 373 : 75 CWN 1

Hon'ble Judges : Salil Kumar Datta, J; Bijayesh Mukherji, J

Bench : Division Bench

Advocate : Nalini Ranjan Bhattacharyya, for the Appellant; Samarendra Krishna Deb, (for Nos. 1-7 and 9-12), Dwijendra Nath Lahiri, (for No. 8), Arun Prokash Chatterjee, (for No. 13), Narayan Chandra De, (for No. 15) and Tarak Nath Roy, (for No. 16), for the Respondent

Final Decision : Dismissed

Judgement

Salil Kumar Datta, J.—This is an appeal by Ranada Kanta Das, a worshipper of Sree Sree Kalimata Thakurani, for self and as the next friend of the said deity, against an order passed by the District Judge of 24-Parganas on May 12, 1964.

2. The appeal arises in connexion with Title Suit No. 85 of 1949 instituted on December 5, 1949, u/s 92 of the Code of Civil Procedure, for proper management of the seva puja of Sree Sree Kalimata Thakurani and her associated deities and for proper management of the Debatter properties. The District Judge, in whose Court the suit was instituted, settled a scheme regarding the aforesaid matters, and, on appeal, the High Court made some amendments to the scheme. An appeal, however, was taken to the Supreme Court by the deity Sree Sree Kalimata Thakurani, and the Supreme Court, while dismissing the appeal, by its judgment dated November 1, 1961, in Sree Kalimata Thakurani Vs. Jibandhan Mukherjee and Others, made some modifications in the scheme and gave specific directions to the High Court for incorporation of the said

modifications in the scheme. The High Court again by its judgment dated February 19, 1962, finally framed the scheme in the light of the directions of the Supreme Court.

3. On November 30, 1962, Ranada Kanta Das, the appellant No. 2 in this appeal, filed an application before the District Judge in the said suit for setting aside the election of three persons namely, Probhat Kumar Mukherjee, Chhenu Lal Ganguly and Amiya Kumar Halder as members of the Kalighat Temple Committee and also for certain amendments to the scheme. The said application was opposed by Probhat Kumar Mukherjee, Chhenu Lal Ganguly and others. On May 25, 1963, an application was filed on behalf of the deity represented by the Kalighat Temple Committee for granting leave to one Gobinda Das Banerjee alias Prokas Chandra Banerjee, the then Secretary of the Kalighat Temple Committee, to represent the deity after striking out the name of the next friend Maniklal Banerjee who so long represented the deity as her next friend. The said application was allowed by the District Judge by Order No. 215 dated June 5, 1963. Thereafter on February 10, 1964, an objection to the aforesaid application of the appellant was filed on behalf of the deity, by Prokash Chandra Banerjee, Secretary of the Kalighat Temple Committee, while other objections were also filed by some of the shebaites even before. On March 31, 1964, the appellant filed an application of "preliminary objection" for vacating the aforesaid Order No. 215 dated June 5, 1963, on a finding that the said Prokash Chandra Banerjee had no locus standi to represent the deity in the said proceedings. The said application was directed by Order No. 251 dated May 6, 1964, to be heard on May 20, 1964, while the main application of the appellant was taken up for hearing on that very date and was also heard on May 7, 1964. By Order No. 253 dated May 12, 1964, the said application filed by the appellant on November 30, 1962, was dismissed on contest with costs. The application of the appellant dated March 31, 1964, was taken up for hearing on July 15, 1964, and by Order No. 264 dated July 17, 1964, the said application was also dismissed on contest.

4. The appellant preferred this appeal in this Court on July 25, 1964, and, along with the memorandum of appeal, an application was also filed on the same day, for appointment of the petitioner as guardian ad litem (next friend ?) of the deity and for permission to prosecute the said appeal. This appeal was filed as an appeal against an original order and was admitted by this Court under Order 41, Rule 11 of the Code of Civil Procedure. The appeal with the application has now come up before us for hearing.

5. Mr. Samarendra Krishna Deb, the learned Counsel for some of the respondents, raised a preliminary objection as to the maintainability of the appeal on the following grounds:

(a) No appeal lies against the order dismissing the application of the appellant Ranada dated November 30, 1962.

(b) The application for setting aside the election of three persons under Clause

17 Sub-clause (A) of the Scheme, to the Kalighat Temple Committee has become infructuous in view of the subsequent elections to the said Committee.

(c) The appellant Ranada is not competent nor has he any right to represent the deity in this appeal.

6. Elaborating his arguments, Mr. Deb contended that the order dated May 12, 1964, impugned in this appeal, rejecting the appellant's application for amendment of the scheme, not being a decree nor having the effect of a decree, is not appealable. In support of such contention, Mr. Deb relied on the following observations of Dr. B. K. Mukherjea in his Tagore Law Lectures --1936 (delivered in August, 1951) on the Hindu Law of Religious and Charitable Trust -- Second Edition 1962 -- (hereinafter referred to as Dr. Mukherjea's Tagore Law Lectures) at page 436:

"An order amending a scheme cannot, strictly speaking, be treated as one u/s 47, C. P. Code. There is authority in support of the view that under certain circumstances it might have the effect of a decree and be appealable as such. The better view seems to be that the order amending the scheme is not appealable and its propriety can only be challenged by way of revision u/s 115 of the C. P. Code."

7. There is no dispute to the proposition that a Court, which has sanctioned a scheme for administration of a religious or charitable trust, is competent from time to time to vary and amend the scheme as the exigencies of the case may require. In fact, provision has been made in the scheme settled by the High Court in accordance with the directions of the Supreme Court, for alteration or modification of or addition to the scheme by application to the District Judge. Clause 56A of the scheme bears:

"56A. The provisions of the scheme may be altered, modified or added to by application to the District Judge, Twenty-Four Parganas."

There is also no dispute to the proposition that when the Court has seisin of a case relating to charitable and religious trust involving the framing of a scheme, the correct, appropriate and speedy remedy would be by way of an application rather than the cumbrous procedure of a suit in case a modification is required in the scheme owing to change of circumstance. It was also observed by Dr. Mukherjea in his "Tagore Law Lectures" page 436 as follows:

"The power of the Court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision which makes the scheme alterable by the Court in future. If the scheme is amended subsequently by the Court within the limits laid down by the decree itself, the Court is really giving effect to its own decree rather than amending it."

8. Mr. Nalini Banian Bhattacharjee; the learned Counsel for the appellant Ranada, has contended that it is now settled law that an appeal lies against any order allowing an application for varying and altering a scheme, and the same

principles will apply even when such application is rejected as in the instant case. In support of his contention he relied on Clause 57 of the scheme which bears:

"57. Orders passed by the District Judge 24 Paryanas in respect of matters directed under this scheme to be decided, sanctioned or approved by him., shall be deemed to be orders passed by the District Judge in continuation of the proceedings of the original suit u/s 92 of the Code of Civil Procedure."

9. Mr. Bhattacharjee" in support of his contentions also referred to the decision in *Srijib Nyayatirtha, Secretary and Others Vs. Sreemant Dandy Swami Jagannath Ashram, Mohunt Moharaj and Others*, , where it was held on earlier authorities as also on a concession that any order modifying a scheme is an order in the suit which is kept pending under the scheme for the purpose and such order determining rights of the parties in the proceedings, viz., the mahant and the Committee, would have the effect of a decree and as such appealable. Mr. Bhattacharjee also relied on the decision in *Raje Anandrao Vs. Shamrao and Others*, where it was held, accepting the Calcutta view, that it is

"both appropriate and convenient that A scheme should contain a provision for its modification, as that would provide a speedier remedy for modification of the manner of administration when circumstances arise calling for such modification than through the cumbrous procedure of a suit."

It was also held that Section 92(2) of the Code does not bar an application for modification of a scheme in accordance with the provisions thereof, provided such a provision is made in the scheme itself.

10. Mr. Bhattacharjee then referred to the decision in *Bhogaraju Venkata Janakirama Rao Vs. The Board of Commissioners for Hindu Religious Endowment Andhra Pradesh*, , in which case it was held as follows:

"..... The scheme-decree itself might have contained a provision granting liberty to a party to the decree to move the Court by an "application" for the modification of the scheme in stated contingencies. If in pursuance of such liberty reserved an application were made to amend the scheme decree, the resultant order though passed on an "application" would certainly be an amended decree against which an appeal would lie u/s 96 of the Civil Procedure Code. We need only add that the legality of such a reservation of liberty has recently been upheld by this Court. If the reservation of power or the liberty in the decree would produce such a result and render the amendment of the scheme an amended decree so as to satisfy the definition of a decree within Section 2(2) of the Civil Procedure Code, it appears to us that it makes no difference that such a liberty to move the Court to modify the decree is conferred not by the scheme-decree but by an independent enactment such as the Act now before us. In the circumstances we consider that the appeal by the Board to the High Court was competent and that the learned Judges had jurisdiction to entertain and deal with the appeal."

11. The decision of the Supreme Court holding the order on an application modifying a scheme as a decree and as such appealable, is the law of the land and the observations of Dr. Mukherjea in his Tagore Law Lectures that the better view is that such order is not appealable and its propriety can be challenged by way of revision u/s 115 or the CPC appear, therefore, to be no longer good law.

12. Even then a question has been raised about the maintainability of the appeal in view of the dismissal of the application by the District Judge. A decree is defined in Section 2 Sub-section (2) of the Code as

"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint....."

In this case the propriety of certain elections in the Kalighat Temple Committee as also the suggestion for amendments of the scheme have been the matters in controversy and the District Judge upon consideration of the materials on record has thought it fit to reject the contentions of the appellant Ranada Kanta Das. There has been thus a final adjudication on the issues raised by the said appellant, and, in so far it goes, the matters have been conclusively determined. Such determination embodied in the formal expression of the order, in our view, is a decree as contemplated under provisions of Section 2 Sub-section (2) of the Code and as such appealable. The preliminary objection, on this point, must therefore be overruled.

13. In view of our conclusion, as stated above, an appeal against the order passed on an application for amendment or modification of a scheme, settled in a suit u/s 92(1) of the Code of Civil Procedure, must be held to be an appeal from the original decree. Accordingly, the provisions of Article 17 (VI) of Schedule II of the Court-fees Act (VII of 1870), as amended in its application to West Bengal, will be applicable. The appellant's memorandum of appeal bears a court-fee of Rs. 5/-. But, in the view we take, a balance court-fee of Rs. 10/- is payable, in respect of the appeal, the total court-fee payable being Rupees 15/- only. We have been assured by Mr. Bhattacharjee that his client Ranada Kanta Das is ready and willing to deposit further court-fee as may be directed. And we direct, as Mr. Bhattacharjee wants us to do, that the said amount of court-fee i.e., Rs. 10/- be put in by the appellant Ranada within one week from today.

14. The next preliminary objection of Mr. Deb relates to the maintainability of the appeal in the events that have happened since the filing of the application by Ranada on November 30, 1962, Mr. Deb's contention is that while this appeal is concerned with the election of three named persons in the Kalighat Temple Committee in or about 1962, there have been subsequent elections of shebaitas to the Kalighat Temple Committee on or about April 5, 1964, April 10, 1966, and March 31, 1968. The appeal in view of the said elections has become infructuous and the question of the validity of, the election of the three persons to the

Kalighat Temple Committee in 1962 is now only of academic interest.

15. Mr. Bhattacharjee's contention is that this point was not taken in the trial Court and must be deemed to have been waived. More, his client in his application of November 30, 1962, has contended that the said three persons are not shebaites at all and cannot be elected as members to the said Committee. Under provisions of Clause 17 of the scheme, finally settled, 5 persons are to be elected from the Council of Shebaites to the Kalighat Temple Committee, If the Court finds that the said three persons have no right to be shebaites or to be included within the Council of Shebaites they will never have the right to be elected as members of the Kalighat Temple Committee at any time. So the subsequent elections to the Kalighat Temple Committee cannot render the appeal infructuous, when the right of the said persons to be shebaites has been assailed.

16. On a consideration of the submission of the respective parties, we are of opinion that there is much force in the contentions of Mr. Bhattacharjee. In view of the issues involved, that is, the right of the said three persons to be shebaites of the Kalighat Temple, thereby to be included in the Council of Shebaites, who in turn elect five members to the Kalighat Temple Committee, we are not in a position to say that the subsequent elections of shebaites to the Kalighat Temple Committee have rendered the appeal infructuous. For, the appeal will be concerned with the determination of their claim as shebaites, on the basis whereof only, they can be elected to the Kalighat Temple Committee. The second preliminary objection must also therefore be overruled.

17. The last preliminary objection of Mr. Deb is that the appellant Ranada Kanta Das cannot act as the next friend to Sree Sree Kalimata Thakurani of Kalighat, or represent the" deity without an order of the Court appointing him as such. In support thereof, he relied on the following passage in Dr. Mukherjee's Tagore Law Lectures at p. 250:

"Where the joinder of the idol is necessary or desirable, there is a difference of opinion as to whether the provisions of Order 32 of the CPC could, by analogy, be applied to such a suit, and whether it is open to a person to constitute himself as the next friend of the idol and institute the suit on its behalf. The better opinion is that the provisions of Order 32 cannot be extended to a suit on behalf of the idol, as there is no real analogy between an infant and an idol, that a suit by a person other than the shebait could be instituted on behalf of the idol only when the Court grants permission therefore, and that such permission should, as a rule, be given only after hearing the persons interested."

Mr. Deb has strongly relied on the above passage and has contended that in absence of any permission by the Court, granting permission to Ranada Kanta Das, the appellant, to act as the next friend of the deity, the appeal at least on behalf of the deity is incompetent.

18. There is no doubt, and it has not been disputed either, by Mr. Bhattacharjee, that, in view of the position at law as stated above, it is not competent for any

person to constitute himself as the next friend of the deity for institution of a legal proceeding except with the permission of the Court granting him leave to represent the deity in such proceeding. Mr. Bhattacharjee draws our attention to the application filed on July 25, 1964 the same day on which the present appeal was presented by Ranada Kanta Das the appellant No. 2, praying, inter alia, that he be appointed as the next friend of the deity for prosecuting the instant appeal on her behalf. The said application came up for hearing before the Registrar of this Court, who, by his order dated 22-3-1965, directed that the application along with the connected affidavits be placed before the Court at the time of hearing of the appeal. This application was thus pending, and was heard along with the appeal, on merits. This preliminary objection, in the aforesaid circumstances, appears to be without substance.

19. Before we deal with the appeal itself, we shall deal with the application filed on July 25, 1964, by the appellant No. 2 along with the appeal. It appears that under the scheme as finally settled, a Committee known as Kalighat Temple Committee has been constituted. In such Committee there are to be eleven members, five of them to be appointed from public, by different public bodies and one to be nominated by the District Judge of 24-Parganas, while five others are to be elected from the Council of Shebaitis. Under Clause 36 of the Scheme the Committee will have a Secretary and under the authority conferred on such Committee by Clause 41 of the Scheme, the Committee shall have powers to institute or defend all suits and proceedings relating to Debattar estate and to manage and control the affairs of the endowment. As will appear from the memorandum of the appeal, She Kalighat Temple Committee has been rightly impleaded as Respondent No. 15, re-presented in this appeal by the learned Counsel, Mr. Narayan Chandra De. In this state of affairs, we consider that the deity has been duly and sufficiently represented before us by the said Committee who naturally look after her interest in this appeal, to the extent necessary. Accordingly we do not consider it necessary or proper to grant leave to Ranada Kanta Das to represent the deity in this appeal. We, therefore, reject the application filed by the said appellant for grant of leave and to prosecute the appeal on behalf of the deity.

20. In the normal course, in view of the rejection of the application of the appellant No. 2 to represent the deity, we would have made the deity a respondent in the appeal and ensured her proper representation in this proceeding before the decision in the appeal was given. As we have already stated, we find that the Kalighat Temple Committee under the scheme finally settled by the Supreme Court is the real and only authority given powers thereunder to institute or defend all suits and proceedings relating Debattar estate and also to take all necessary steps to implement the scheme and manage and control affairs of the endowment. Accordingly we are of opinion that interest of the deity is sufficiently represented in this proceeding by the Kalighat Temple Committee through its Secretary and there is no necessity for any separate representation of the deity in this appeal which will only involve unnecessary

delay.

21. Mr. Bhattacharjee has also made a grievance that on May 25, 1963, an application was filed by the Kalighat Temple Committee for permission to represent through its Secretary the deity Sree Sree Kalimata Thakurani in the connected proceedings in place of the next friend Sri Maniklal Mukherjee, who, it appears, is not a member of the said Committee, but represented the deity in the earlier proceedings culminating in the appeal before the Supreme Court and thereafter in the High Court finally settling the scheme. The said prayer was allowed by the District Judge by his Order No. 215 dated June 5, 1963, and the Kalighat Temple Committee through its Secretary was permitted to represent the deity, the name of Maniklal Mukherjee as the next friend of the deity having been directed to be struck out. Ranada Kanta Das filed an objection to the same on March 31, 1964, for vacating the said order, -the main objection being that the Secretary Govindadas Banerjee alias Prokash Chandra Banerjee was personally disqualified for such appointment because of his interest being adverse to the deity and of the necessity of compliance with the mandatory provisions of Order 32, Rules 3 and 4 of the Code of Civil Procedure, before any appointment could be made.

22. The Committee also filed an objection to the same and the said application filed by Ranada Kanta Das was directed to be heard on May 20, 1964, while the main application of Ranada Kanta Das dated November 30, 1963, was taken up for hearing and heard on May 6, 1964, and also heard on May 7, 1964. No objection was taken by Ranada on the day, when his said application was being heard, to the effect that his application filed on March 31, 1964, being a preliminary objection as contended, should have been heard earlier before the disposal of his main application. This subsequent application was heard on July 15, 1964, and was rejected on July 17, 1964.

22A At its highest, the action of the District Judge in taking up on July 15, 1964, and not before the hearing of the main application the application filed by Ranada Kanta Das on March 31, 1964, may be irregular, but, again, there was no justification for Ranada in filing his application so late as on March 31, 1964, for vacating the Order No. 215 passed on June 5, 1963, and in not raising an objection when his main application was being heard, while the hearing of his other application was deferred by the Court to a subsequent date. The said Order No. 215 dated June 5, 1963, has also been challenged in this appeal on the above grounds, and we, on our part, find nothing wrong with the order. Order 82 of the CPC does not in terms apply to the representation of the deity in suits, u/s 92 of the Code, (see Dr. Mukherjee's Tagore Law Lectures pp. "249-50) so that the question of the removal of a next friend already appointed, under the provisions of Rule 4 Sub-rules (1) and (2) of Order 32 of the Code, is not necessary before an appointment is made. In the scheme framed by the Court, as already stated, the Kalighat Temple Committee has been constituted and the said Committee has been given the power and authority to institute and defend

the proceedings relating the debattar estate and to manage and control the affairs of the endowment. The said Committee is acting through its Secretary in the proceeding and is the only body to represent the deity in such proceeding in which the Court is considering the proposed amendments to the scheme relating the debattar estate. There are no specific allegations or any allegations of any breach of duty on part of the Committee in the application filed on November 30, 1962, and the allegations personally against the Secretary and the Committee in the latter application are too vague and indefinite to merit any consideration. Further such appointment of the Kalighat Temple Committee as the next friend of the deity again cannot be challenged collaterally as is sought to have been done by the appellant Ranada Kanta Das.

2.3. Coming now to the appeal, we find that the appeal has two distinct issues which have been agitated before the District Judge and also before us. The one relates to the election of three members who claim to be shebaites to the Kalighat Temple Committee and the other concerns certain amendments to the scheme. We shall first deal with the objections of the appellant Ranada to the elections to the Kalighat Temple Committee. Mr. Dwijendra Nath Lahiri, the learned Counsel for the respondent No. 8, Probhat Kumar Mukherjee, has contended that the appellant Ranada has no locus standi to challenge the elections to the Kalighat Temple Committee. According to Mr. Lahiri, the election could be challenged by any candidate at the election or any elector i. e. any member of the Council of Shebaites. In support he referred to Section 81 of the Representation of the People Act, 1951 (Act XLIII of 1951), and contended that Ranada is neither a candidate to the impugned election nor an elector, Mr. Bhattacharjee opposing the said contentions, has submitted that his client being interested in the endowment and a party to the proceedings, has the inherent right to challenge such elections ultimately to the Kalighat Temple Committee which is entrusted with the management of Seva Puja of the deity and also of the properties. On our part, we also think that the procedure of the elections to Loka Sabha and State Legislatures provided in the Representation of the People Act, 1951, can have no comparison to the elections to the Kalighat Temple Committee and the principles and, procedures of election laid down in the said Act should not be extended to the elections under consideration in this appeal. It must also be remembered that the shebaites form only a small section of worshippers while the votaries to the deity are the Hindus all over India and beyond India too. The Hindu public cannot be kept away from challenging elections to the body of management of a public endowment in appropriate cases on the doctrine of the Representation of the People Act, 1951.

24. On merits, Mr. Bhattacharjee has contended that order No. 75 dated February 20, 1957, including the names of the three persons in the Council of Shebaites, was void, passed as it was when the Court had no longer any jurisdiction over the matter. The District Judge by his judgment and decree dated March 3, 1935, in Title Suit No. 85 of 1949, disposed of the suit itself, approving a scheme, and thereafter the matter went up in three appeals in the High Court.

The High Court again by its judgment and decree dated December 21, 1956, allowed the appeals in part, making certain amendments to the scheme and the scheme was approved u/s 92 of the Code of Civil Procedure. An appeal, as already stated was taken to the Supreme Court by the deity but it does not appear from the records as to whether the application for certificate of fitness for appeal to the Supreme Court was pending on February 20, 1957, when the impugned order was passed.

25. There is no dispute that Title Suit No. 85 of 1949 is to be deemed to be continuing for the purpose of implementing and working out the scheme. At or about the time, the impugned order was made, the District Judge was in seisin of the suit, and in absence of any order restraining him from passing orders impugned herein, it cannot be said that the District Judge was functus officio, while passing the order. On March 11, 1964, Chennu Lal Ganguly, by his petition, of objection, stated that as his name was omitted from list "C", he was moving the Court for inclusion of his name in the list of the shebait. And after perusing relevant papers and documents, the District Judge, by his Order No. 75 dated February 20, 1957, directed inclusion of his name in the list of shebait Schedule "C". The said order was never assailed by any one until the application by Ranada bearing date November 11, 1962. There is nothing to show that it was a case of inclusion of name by devolution of interest on the death of a shebait. And, at this belated stage, there is no scope for interference with the order, whereby Chennulal Ganguly was included in Schedule "C" raised collaterally in connexion with the election of the Kalighat Temple Committee.

26. Mr. Bhattacharjee has also contended that the application for inclusion of the name of Chennu Lal Ganguly in List "C" was not maintainable, as only applications relating to matters of administration and management of the Debatter estate, and not applications relating to other matters, could be made in the said suit. It appears, however, to be clear that the matter of inclusion of a person in List "C" is, as in the instant case, ultimately connected with the election of shebait to the Kalighat Temple Committee which under the scheme manage and administer the Debatter estate. That being the position, it cannot be said that such application for inclusion of name in List "C" has nothing to do with matters of administration or management of Debatter estate. However, at this belated stage, as already indicated, we are not inclined to interfere with the said order, which has become final, conclusive and binding, challenged, as it has not been in a manner warranted by law.

27. Mr. Bhattacharjee's most formidable contention is that the shebaiti right in this public endowment is only the right to office and not any right to property. Accordingly there could be no devolution or transfer of interest of shebaiti right of a shebait to his heirs or any other person. It is further contended that list of shebait in Schedule "C" was inviolable and there could not be further additions or substitutions in the said list.

28. The contention of Mr. Bhattacharjee is completely belied even by the

provisions of the scheme finally settled by the Supreme Court. Clause 3 of the scheme is one such provision:

"3. All the Shebaites and Paladars shall for the time being constitute the Council of Shebaites. Such of the Shebaites as are minors or are of unsound mind shall be represented by his or her natural or certificated guardian."

Clause 6 of the scheme is another:

"6. A register of the Shebaites and Paladars will be maintained under the direction of the council at the office giving their names and addresses described under five branches as at present. For the election to the First Temple Committee, the District Judge, 24 Parganas, will take such steps as are deemed necessary to prepare the register of Shebaites.

Under the direction of, and the Rules framed by, the Council, necessary amendments in the register in case of death or devolution of offices etc., will be made in the register. No transfer except one sanctioned by law will be mutated in the register."

Such provisions militate against the contention put forward by Mr. Bhattacharjee, We are informed that no rules have been framed by the Council of Shebaites. But as Shebaitship is property, it devolves like any Other property, according to the ordinary Hindu Law or inheritance (Dr. B. K. Mukherjee's Tagore Law Lectures p. 199) and legal representatives of any Shebait, on his death automatically become Shebaites of the deity.

29. The Supreme Court, dealing with the same arguments, as raised here, while settling the scheme, observed as follows:

"It is wrong to call Shebaites as mere pujaris or archakas. A Shebait, as has been pointed out by Mukherjee, J. (as he then was), in his Tagore Law Lectures on Hindu Law of Religious and Charitable Trusts, is a human ministrant of the deity while a pujari is appointed by the founder or the shebait to conduct worship. Pujari thus is 8 servant of the shebait. Shebaitship is not mere office, it is property as well. The present body of shebaites and their predecessors have been functioning as such without question, as already stated, for a long time. They have been in fact managing the property, that is, doing something which no pujari or archaka can claim to do. Therefore, they cannot be treated as mere pujaris or archakas even assuming that they are not do jure shebaites."

The Supreme Court further observed:

"The second point is that shebaites, whose turn it is to perform the worship, transfer their turns for consideration to others and that this is impermissible because shebaitship being an office is not transferable. He (Mr. Bhattacharjee who appeared for the appellant deity before the Supreme Court) also says that shebaitship terminates on death and is not heritable and that consequently appropriate directions in regard to these matters should have been made in the

scheme, it is sufficient to say that these are not matters with respect to which any direction should be made in the scheme. The right of shebait, as already stated, is a right in property and if any person wants to challenge the right of a person to act as a shebait it is open to him to pursue such remedy as may be available to him at law."

30. In view of the conclusion of the Supreme Court, there is no scope in this appeal for agitating the issue over again. It is obvious that the shebaiti right of the endowment is both property and office, and, Ranada Kanta Das having been a party to the proceedings, in any event, his application on this issue is barred by *res judicata*.

31. Mr. Bhattacharjee's further contention is: Chennu Lal Ganguly and Amiya Kumar Halder are not shebaits at all, they are not parties defendants to the suit, nor their names have been included in the list of shebaits in Schedule "C" of the scheme settled ultimately by the Supreme Court, and there could therefore be no addition to list "C" which was confirmed by the Supreme Court. Amiya Kumar Halder in his petition of objection stated that his father Jitendra Nath Halder was a shebait, his name having been included in list "C", and, on his death on May 22, 1959, he along with other heirs of his father, became she-baits, of the deity.

32. It may be noted, however, that Clause 2 of the Scheme provides as follows:

"2. The persons who are now entitled to turns (palas) of Sheba and Puja of the deity are the Shebaits and Paladars of the Goddess and the associated deities. A list of the present Shebaits and Paladars are set out in the list enumerated herewith and marked Schedule "C". All Shebaits and Paladars for the time being as in the register to be maintained as hereunder will be considered for the purpose of this scheme to be the shebaits of the deity.

(a) The word "Shebait" wherever it occurs in this scheme shall be deemed to include "Paladar".

This clause was not altered in any manner by the Supreme Court. It is obvious therefrom that there cannot be any finality in the list of shebaits and it was expressly provided that all Shebaits and Paladars from the time as in the register to be maintained as provided in the scheme will be considered for the purpose of this scheme to be she-baits of the deity. Clause 6 again, as already stated, provides for necessary amendments in the register in case of death or devolution of offices etc. subject to the only limitation that no transfer except one sanctioned by law will be mutated in the register. The observations apply with equal force to Chennu Lal Ganguly even if his case is one of succession by inheritance. The objections of Mr. Bhattacharjee against Chennu Lal Ganguly and Amiya Kumar Halder being shebaits have no substance and must therefore be overruled.

33. Mr. Bhattacharjee has again contended that Probhat Kumar Mukherjee has been consistently claiming his personal and secular title to lands within 595

bighas and 9 cottahs which belong to the Debattar estate as was adjudicated in the earlier proceedings. His personal interest thus clashes with his duties as trustee, thus making him unfit to hold the office of a trustee. In support thereof, he relied on the decision in *Iswar Kalimata Vs. Manager Bijni Raj Court of Wards Estate in Assam and Others*, , where it was held that the said 595 odd bighas of land belonged to the deity. The Supreme - Court considered the above decision, as also another decision, in which the High Court set aside the finding of the lower Court, declaring title of the deity to the said land, observing as follows:

".....It seems to us, however, that the provision made by the High Court in the scheme with respect to properties other than those described in Schedules A and B to the plaint is sufficient for that purpose.... As we have already stated the bulk of the lands are in the hands of transferees who are not parties to the proceedings u/s 92 of the CPC and of course are not parties to the appeal either. Their inclusion in the schedules to the scheme as being debutter property will not affect the rights of those persons in any way and the fact that they are debuttar properties will have to be established if and when appropriate proceedings are taken for obtaining their possession. We, therefore, decline to interfere with the direction made by the High Court in the scheme respecting the properties."

It is obvious that there was no adjudication in the said decision of the title of the deity to the said lands, which question was kept open by the Supreme Court, to be decided if at any time appropriate proceedings are taken.

34. There cannot be any dispute to the proposition, as submitted by Mr, Bhattacharjee, that under the Trusts Act, 1882 (II of 1882) or under the laws applicable to Hindu religious endowment, the action of a trustee setting up his title adverse to the trusts, amounts to a breach of trust and prima facie may justify his removal, In view of the aforesaid decision of the Supreme Court, which is conclusive, it cannot be said that Probhat Kumar Mukherjee, by asserting his personal title to the said lands as alleged, assuming such allegation to be true, was, in any way, setting up adverse title against the deity, thereby disqualifying himself to be a member of the Kalighat Temple Committee, as the title of the deity to the said land was neither accepted nor established. The objection of Mr. Bhattacharjee on this score must, therefore, fail.

35. We shall now consider the proposed alterations to this scheme framed under the direction of the Supreme Court. On the basis of *Ahmad Adam v. M. E. Makhri* AIR 1964 SC 107 Mr. Bhattacharjee's submission is that when any representative suit is brought by persons u/s 92 of the CPC and a decree passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and therefore are constructively barred by res judicata from reagitating the matters directly and specifically in issue in the earlier suit. The similar result follows if a suit is either brought or defended under Order 1, Rule 8 of the Code. It was further held that, while considering the propriety of the changes in the scheme, if the scheme is framed in a suit brought u/s 92, it should not be changed unless

there are strong and substantial reasons so to do. It was also held that a scheme framed under direction of the Court should not be disturbed upon merely a speculative view, but upon substantial grounds and clear evidence, not only that the scheme has not operated beneficially, but that it can by alteration be made to do so consistently with the object of the foundation. Further, even when a scheme is framed in a suit properly instituted u/s 92, if supervening considerations justify its alteration or modification, the bar of res judicata cannot be pleaded against such alteration or modification.

36. Under the direction of the Supreme Court, only on February 19, 1962, the scheme was framed by this Court, and the present application was filed by the appellant on November 30, 1962. In fact, there has been little time given to examine the working of this scheme, far less to give it a fair trial. On top of that in the application the appellant Ranada did not refer to any specific instance, nor is there any evidence that the scheme is not operating beneficially or that there has been any supervening consideration justifying any alteration or modification. It was stated that the alterations were necessary to avoid any inconsistency and complication, and also in the interest of the endowment and for good and smooth administration thereon. We are not impressed by the reasons which have been given for such alteration or modification, after so short a period of time that has elapsed in between. We shall, however, proceed to examine, on merits, the specific alterations suggested. Mr. Narayan Chandra De, appearing for the Kalighat Temple Committee, respondent No. 15, has contended that the proposed amendments are wholly unnecessary, other learned Counsel for the respondents adopting Mr. De's contention.

37. Mr. Bhattacharjee has submitted that after the words "Civil Court" in Clause 30 of the scheme the following should be added:

"Or who has got any interest, direct or indirect, adverse to that of the deity."

Clause 30 of the scheme runs:--

"30. No person shall be elected or nominated as a member of the Kalighat Temple Committee who has not; at the date of election or nomination, attained the age of 35 years, or who is of unsound mind or who is a member of the salaried staff under the Kalighat Temple Committee or the Council of Shebaitis or who has been convicted by any criminal court of an offence which in the opinion of the District Judge, 24-Parga-nas involves moral turpitude or who was been adjudged an insolvent by a competent Civil Court. Any member who ceases to be a- Hindu or incurs any of the disabilities during the term of his office shall cease to be a member of the Committee."

In agreement with the District Judge and accepting argument of Mr. De, we hold that there is sufficient provision in Clause 32 of the scheme for protection of interest of the deity and the proposed amendment is unnecessary. Clause 32 of the scheme bears:

"32. No member of the Kalighat Temple Committee shall, as a member, be present at the meeting when any matter in which he is either directly or indirectly concerned or interested is being considered or vote upon it. Such a member will not be deemed during the consideration of such a matter in the meeting to be present to be counted for the purpose of forming a quorum at the time of any such vote....."

38. The appellant Ranada next wants the word "immovable property" in Clause 42 of the scheme to be made more specific by adding thereafter "appertaining to the 595 Bighas and 9 cottahs of land mentioned in Mr, Heysham"s list". Clause 42 of the scheme reads as follows:

"42. No Immovable property or Government Securities, Stocks and Shares belonging to the Debattar estate are to be sold or Immovable property leased out for a period exceeding 5 years, except with the express permission of the Court of the District Judge, at Alipore previously obtained."

Mr. De has seriously contested the inclusion of these words as purporting to elucidate the Immovable property belonging to the deity. As we have seen, there is as yet no decision of any court in an appropriate proceeding that the said lands appertain to the Debattar estate and that the Supreme Court expressly declined to interfere with the directions made by the High Court in this scheme representing the said properties. The directions of the High Court approved by the Supreme Court are as follows:

"The first question which was raised on behalf of the deity and a few of the other shebaites was that the properties described as Debattar property should be expanded. It appears from the records of this case as also the Judgment of this Court at the previous stage that the total area of Debattar property was 595 bighas 9 cottahs in Mouza Kalighat. In course of the resumption proceedings started in 1859 the lands covering that area were released. Reference was also made to claims in 1797 for a revenue free grant of a similar area. An attempt was made on the previous occasion to have the whole of that area declared as Debattar, This Court declined to make a declaration as a very large portion of that area was in the occupation of third parties who were not party defendants in that suit. A similar prayer has been made before us also. The present suit is one for preparing a scheme and not for going into the question of preparing an exhaustive list of all properties belonging to the deity. Certain properties were declared by the Court on the previous occasion as appertaining to the Trust. They are enumerated in Schedules A and B attached to the plaint on the present occasion. They are described in Schedules A and B of this judgment with some clarifications and modifications and they are declared to be the properties of the deity subject to what is mentioned in Clause 1 of the scheme. We have made it clear in the scheme that this description does not in any way affect the right of the deity to recover any other properties which may hereafter be found by a competent Court as properties in which her title subsists."

In view of the above observations, approved by the Supreme Court, there is no scope for further addition of words in respect of the Immovable properties as proposed by the appellant.

39. Mr, Bhattacharjee has next proposed that a new clause should be inserted after Clause 42 as 42A as follows:

"42A. Any of the shebait violating any of the terms herein contained or committing breach of trust shall be liable to be removed from the shebaitship by application to the District Judge."

The proposed amendment, which is also opposed, is unnecessary, for, if a shebait is ever guilty of committing an act which renders him unfit to hold the office, he can always be removed from that office by an application made to the District Judge for the purpose.

40. Mr. Bhattacharjee has next submitted that on a misreading and misconstruction of Clause 48 of the scheme the Shebait and Paladars instead of taking one half of the cash offering left after reimbursement of the bhog rag and seba of the deity and the expenses of Kalighat Temple Committee are collecting one half of the total offering as their remuneration irrespective of whether the other half would be sufficient to meet the said charges, which, it is apprehended, will lead to the ruination of the endowment. More, Shebait and Paladars get a sum of Rs. 15 which is not warranted by this scheme. In the premises Mr. Bhattacharjee has submitted that after Clause 48-A (a) the following words be added:

"After setting apart the portion thereof for the bhog rag and seba puja of the deity including the establishment charges of the institution."

41. The respondents, shebait and also the Kalighat Temple Committee, oppose the proposed amendment which, in their view, will cut down the remuneration of the shebait fixed by the High Court and approved by the Supreme Court. It is further contended that while Rs. 80 as costs of seba puja of the deity, after shebait have taken away their share, is always available, the same suggestions were also made before the said Courts in the earlier proceeding and the same were rejected.

42. The High Court while considering the question of Shebait and Paladars' share of offerings held as follows:

"The scheme which had been put Forward on behalf of the shebait in the present case, was that the entire usufruct was available to them subject to the amount which was spent for the worship of the deity. That contention has been negatived. Considering the length of time during which a large body of shebait had got a portion of the usufruct we have to consider what should be reasonable and proper in the circumstances of this case. It is unquestionable that the entire income of the Debattar estate, including all offerings to the deities and the gifts belong to the deity absolutely. Out of the same some portion is to be set apart

for the worship and for payment to the shebait for ministering to the deities. We have made two principal alterations in the directions given by the District Judge. No portion of the offerings in gold should, go to the shebait. Further what amount will be required for the actual Bhog Rag per them was fixed at Bs. 80. We have retained that figure, but we have omitted the maximum which had been put, leaving it to the Committee to decide what in changed circumstances the amount should be. Any variation in the payment to the shebait will have to be decided, according to the principles laid down by us, by the members of the Temple Committee. Increasing the rate will also require the approval of the District Judge.

43. The Supreme Court while dealing with this part of the scheme observed as follows:

"The present body of shebait and their predecessors have been functioning as such without question, as already stated, for a long time. They have been in fact managing the property, that is, doing something which no pujari or archaka can claim to do. Therefore, they cannot be treated as mere pujaris or archakas even assuming that they are not de jure shebait. They have, in fact, to bear the expenses for bhog rag and seva of Sree Sree Kalimata and are thus entitled to be reimbursed not only for the service they perform but for the expenses which they incur. The High Court, which must be cognizant of the local situation, was in a more advantageous position than this Court can be to judge what would be the proper measure of recompense for the service rendered and expenses incurred by the shebait whose turn it is to perform the worship of the deity. In the circumstances we decline to interfere with the direction in this regard made by the High Court in the scheme."

44. In view of the above observations, there is no scope for agitating the question over again, as is sought to be done by Mr. Bhattacharjee, all the more so, as, in the course of his arguments, he concedes that the existing provisions are clear, but that he is after a little more clarification. At the same time, if there is any malpractice or the collections are insufficient to meet the charges of which there is no evidence, and the Kalighat Temple Committee is negligent in looking properly after the collections or the disbursement in accordance with the scheme or even in not implementing the scheme, the remedy in proper forum is available to any worshipper. The amendment of the scheme as proposed is no substitute for preventing the alleged practices for implementing the scheme.

45. Mr. Bhattacharjee has lastly contended that the poor attendance of members, particularly non-shebait members at the meeting of the Kahghat Temple Committee, is not conducive to the healthy administration of the endowment. For achieving the proper administration as also better supervision of the day to day administration of the endowment Mr. Bhattacharjee has proposed that the following words underlined (herein " ") should be inserted before the existing provisions of Clause 27 of the scheme.

"27. "Any member failing to attend 3 consecutive meetings of the Committee shall cease to be a member thereof and the vacancy caused as such and." Any casual Vacancy occurring by death, resignation or otherwise in the Kalighat Temple Committee will be filled up by the appointing authority within two months of the date of intimation and the person so chosen shall be subject to retirement on the footing that he had become member from, the date of such appointment."

46. The Supreme Court while dealing with the constitution of the Kalighat Temple Committee, in modification of the scheme of the High Court which had 12 shebaites and 6 persons from the public in a 18-member Committee provided a perpetual majority for the members of the public in a 11-member Committee with 5 shebaites from 5 groups and 5 members from the public bodies and one member nominated by the District Judge. Further the District Judge's nominee is to be the Chairman of the Managing Committee who would have a casting vote in addition to his own vote.

47. We agree with the District Judge that strict enforcement of the proposed amendment, if incorporated in the scheme, would lead to unnecessary difficulties as renominations by public bodies will involve delay and complications. The minutes of the proceeding of the meetings of the Committee which, at our direction, were produced in Court, show that the meetings were invariably presided over by the nominee of the District Judge, Sri Chandidas Charterjee, a senior Advocate of the Alipore Bar and the Government Advocate. We hope that the persons who will be nominated by the public bodies to be members of the Kalighat Temple Committee will make it convenient to attend its meetings for ensuring the proper administration of the endowment of this ancient institution revered by the millions of the Hindu votaries of the country.

48. During hearing of the appeal, we called upon Mr. Tarak Nath Boy the learned Counsel appearing for the Council of She-baites, to produce the register of shebaites and "Paladars as required under Clause 6 of the scheme. No register was produced before us but several lists of the shebaites were reproduced instead. The said lists which are printed ones showed the names of shebaites as amended and corrected up to particular dates e. g. the latest being March 8, 1968. We are told that no register of shebaites is maintained nor any rules have been framed but amendments consequent on death or devolution of office of shebaites are recorded in the minutes of the proceedings of the meetings of the Council of Shebaites and, on the basis of resolutions passed at such meetings, lists of the shebaites and paladars in the Council of Shebaites are published from time to time. This system appears to us to be irregular and contrary to the provisions of the scheme. A register of the she-baites of the Council of Shebaites in our opinion should be maintained wherein should be recorded the amendments caused by death or devolution of offices etc. as required by Clause 6 of the scheme on the basis of the resolution of the Council of Shebaites. For convenience of the shebaites and paladars, the list may be printed from time to time, though not enjoined by the scheme. We also hope that the Council of shebaites shall

frame rules regarding inclusion of names in the list of the Council of Shebaita consequent on death of its members or devolution of offices etc., as required by the Clause 6 of the scheme.

49. As the contentions raised by the appellants fail, the appeal is dismissed, but in the circumstances there will be no order as to costs. We record our appreciation for the assistance received from the bar.

Bijayesh Mukherji, J.

50. I agree that the appeal fails.

51. The sebaity qua property descends by inheritance in like manner as secular property. So considered, to make the list of sebaity inviolable, as Mr. Bhattacharjee seeks to do, is to defy the law of inheritance and to make the list self-defeating. Self-defeating, because none in the list of sebaity are immortal. So, when all of them die, the list becomes useless, doing no duty, and even when some of them die, the list fails the very purpose for which it is made. That apart, the inviolability, contended for, comes to a head on clash with the provisions of the scheme approved by the Supreme Court and, therefore, beyond any manner of an attack by any one. Clause 6 is one such provision, as pointed out by my learned brother,--a provision which clearly lays down that the register of shebaity or list of sebaity, call what you may, shall have periodic amendments, necessitated by death, devolution and transfer sanctioned by law. The transfer of sebaity interest for consideration is no doubt void: *Prasanna Deb Raikat Vs. Bengal Duars Bank, Ltd.*, . But you cannot compel an unwilling sebaity to continue as a sebaity as held by Rankin C. J, in *Panchanan Banerjee and Another Vs. Surendra Nath Mukerjee and Others*, . The transfer of sebaity in favour of the remaining sebaity or surrender thereof affects no policy of Hindu Law, as pointed out by Dr, Bijan Kumar Mukerjee: *Tagore Law Lectures on The Hindu Law of Religious and Charitable Trust* at page 235.

52. But that is not for which I am adding this little to the judgment just delivered by my learned brother. Why I am doing so is to meet the contention raised by Mr. Bhattacharyya that a view as this on heritability and the like contravenes Clauses (b) and (d) of Article 26 of the Constitution which provide, in so far as it is material here for understanding Mr. Bhattacharyya's contention:

" * * * every religious denomination or any section thereof shall have the right--

X X X X X

(b) to manage its own affairs in matters of religion;

x x x x x

(d) to administer such property in accordance with law."

such property meaning property, movable and immovable, any religious denomination or a section thereof may own or acquire: just what Clause (c) of

Article 26 prescribes.

53. How this freedom guaranteed by Article 26 to every religious denomination or a section thereof can avail the appellant beats us. The appellant has the freedom to manage his own affairs in matters of religion. His autonomy to decide what rites and ceremonies are essential according to the tenets of the Hindu religion he subscribes to -- and these are all matters of religion -- remains unfettered. Sure enough the scheme we see before us puts no fetters upon it. And sure enough again, the mode of representation to the Temple Committee and all that is not a matter of religion either. Article 26, Clause (b), of the Constitution, therefore, fails the appellant.

54. So does Clause (d) thereof. The property of Sri Sri Kali Mata Thakurani is being administered in accordance with the mandate of the highest court of the realm, such mandate itself being law binding upon us all.

55. The matter appears to be so free from doubt or difficulty that it is hardly necessary to refer to any authority. And authorities there are.

56. Hence I am for dismissing the appeal as my learned brother is, and in the manner proposed by him.