

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

CSOS 5 of 2019

Asis Mitra

Versus

Sibani Dutta & Ors.

Mr. Malay Ghosh, Senior Adv.

Mr. D. Sen

Mr. S. Chatterjee

Ms. Suchismita Chatterjee

Mr. Malay Kumar Seal

.....For the Plaintiff

Mr. Rudraman Bhattacharyya

Ms. Amrita PanjaMoulick

.....For the defendants 1, 2 & 3

Mr. Arindam Paul

Ms. Parna Mukherjee

....For the defendants 4, 6 & 7

Heard on : 19.09.2022

Judgment on : 03.11.2022

Krishna Rao, J.:

The plaintiff by filing the instant proceeding praying for determination of the following issues:

- (a) *Whether there has been only a partial dedication to the Deity Shree Shree Thakurani Durgamata Jew?*
- (b) *If so, whether the plaintiff may carry out daily seva puja in accordance with the provisions made by the Settlor as it apparent from Clause 5 of the Codicil dt. 15.07.1919 out of own fund as agreed by the Shebait.*

OR

In the alternative, whether the Shebait may set apart a sum of Rs. 2.5 Crores for the Deity in a highest interest bearing account of a Nationalized Bank for the purpose.

- (c) *Whether the Shebait may sell the properties being 25, Raja Dinendra Street adjoining 27, Raja Dinendra Street, 29A, Raja Dinendra Street, 23A and B, Raja Dinendra Street and 49 Garpar Road, Kolkata – 700 009 keeping aside a sum of Rs. 2.5 Crores for the religious rituals of the deity to be carried on in the manner as stipulated by the Settlers in the Will and the Codicil of the deceased Baikuntha Nath Dutt and divide the rest equally amongst themselves?”*

Now, the defendants being the other Shebait of the Deity have consented with regard to the above issues in the meeting held on 02.09.2019 which reads as follows:-

"The minutes of the meeting dt. 02.09.2019 of the Shebait of Thakurani Shree Shree Durga Mata Jew was held at No. 25, Raja Dinendra Street, Kolkata, the following decisions have been taken in the said meeting which reads as follows:-

The Shebait are carrying on the activities related to the Debutter Estate in terms of the Will of Late Baikunthanath Dutt and/or the orders passed by the Hon'ble High Court at Kolkata from time to time. "...In terms of the Will and Codicil of the Settlers i.e. Late Baikuntha Nath Dutta, the religious expenses constituted a charge upon the Estate only and all the Shebait agreed to hold the instant meeting to discuss the most vital issue i.e. proper preservation and/or steps to be taken in connection with the properties belonging to the Estate, namely premises no. 23A, 23B, 29A, Raja Dinendra Street and 49 Garpar Road which are totally tenanted and under occupation of either tenant or trespassers whereas the Premises No. 25 and 27, Raja Dinendra Street are virtually one residential Premises along with Shrine for the Deity in view of the various local threats either to encroach upon or creating third party interest illegally and wrongly so as to cause serious damages of the Estate."

Mr. Asis Mitra who has been looking after the affairs of the Estate with the concurrence and support of over Shebaites express in the meeting as regard various illegal wrongful activities relating to the properties of the estate for which Shebaites had to move different Court of law and numbers of litigations are still pending which have arisen out of the preventive activities of the Shebaites for protection and preservation of the same properties. However, Asis Mitra stated aspects which are being cropped up by the passage of time and is being increased day by day resulting in serious local threats of the estate as a whole , more so considering age and consequent difficulties of the Shebaites and in future number of Shebaites will be increased and will be coming from various over families and their lies, the seed of this agreement among the Shebaites in future.

The Shebaites after detailed deliberations express their serious concern as regards protection and preservation of the properties of the estate. More so, as the properties are of more than 100 years of age and are required to be maintained properly which involves huge costs and expenses in the present day scenario that to after eviction of the occupants from a number of properties in due process of law resulting in huge cost and time as well.

The Shebaites discussed in detail, the position of the occupied premises where earning of the Estate is negligible while expenses on account of maintenance etc. are huge. Further the tax and/or other outgoing of the properties of the Estate are getting enhanced astronomically causing serious pain to the Estate. Moreover, due to shortage of male members, it is becoming difficult for the Shebaites to keep control over the same.

After prolong discussion and/or deliberation, the Shebait decided to approach this Court as regards the step for selling the properties and to have the sell proceeds equally divided among the Shebait equally in line of the different branches they are representing. The Shebait they have been able to come to such decision in view of the facts that Asis Mitra offers to take a charge of the Deity exclusively and to perform all the pujas and rights as per the last wish of the Settlor without taking any fund from any other Shebait who shall not have any say relating thereto.

In such view of the matter, Shebait have discussed and have agreed that all the other Shebait shall take steps or having the litigations, civil or criminal filed either against the Estate or against any of the Shebait withdrawn and resolved once for all. Hence, it is resolved that :-

“The Shebait will move the Hon’ble High Court at Kolkata for necessary order as regard to selling of properties of the Estate and to have the sale proceeds distributed among the Shebait subject to the terms has agreed upon in the minutes of meeting dt.02.09.2019 in the facts of the case.”

By Codicil dt. 15.07.1919, the Settlor amended Clause 5 of the Will dt. 30.07.1916 to the following effect :

“To pay out of said income as remuneration only to the Shebait or Shebait appointed by the Codicil as hereinafter provided and I hereby direct that after defraying the various expenses and directed as also mentioned below whatever surplus there may be left will be payable among the heirs and Shebait for their maintenance and use as may deem advisable to the then Shebait/ Shebait subject to certain monthly legacies and other charges and hereinafter mentioned.”

Since, the expenses of the Estate exceeds the income, one of the properties left behind by the Settlor being 93, Narkeldanga Main Road, Kolkata – 700011 was required to be sold and on an application filed before this Court in the year 2009 by the then Shebait, the sale was confirmed by the Order dt. 29.10.2009 in favour of one Geeta Ganesh Promoters Limited, pursuant to a memorandum of understanding dt.29.04.2009.

It is submitted by the Shebait jointly i.e. premises no. 23A, 23B, 29A of Raja Dinendra Street as well as 49 Garpar Road are tenanted while premises no. 29A Raja Dinendra Street, is the residence of Shebait which is involved in a lot of litigation. The details of litigation in respect of all properties of the estate is mentioned in the affidavit-in-reply filed by the plaintiff in the instant suit dt.20.07.2021.

The properties are thus either wholly tenanted or under occupation of trespassers. The Deity is consecrated in premises no. 27, Raja Dinendra Street.

It is jointly submitted by the parties that since the Shebait are all senior citizens, barring the two who are not staying in Kolkata i.e. defendant no. 3 and 7, it is difficult for the Shebait to protect and preserve the properties. The Shebait are finding it difficult to maintain the properties which are embroiled in multiple litigations. That apart there have been constraint threats of further encroachment by the outsiders in the locality as also from the trespassers who are already in wrongful possession or occupation of the portion of the said properties.

In terms of the memorandum of understanding between the Shebaites as contained in the minutes of meeting held on 02.09.2019, the Shebaites are willing to sell the properties subject to charge of the said Deity for the purpose getting the sanction of this Court, the plaintiff has relied upon the sketch plan being Annexure –“F” to the affidavit in reply to show that the properties are located in such a manner that the same have to be sold together in one lot on “as-is-where-is” basis.

The plaintiff undertakes to continue to perform with the daily puja of the Deity, with the consent of other Shebaites, in the same manner as contemplated in the Will dt. 30.07.1916 as modified by the Codicil dt. 15.07.1919 as mentioned in paragraph 3B of the affidavit in reply.

On the basis of the submissions and on the basis of the settlement arrived by the Shebaites as recorded in the minutes of meeting held on 02.09.2019, this Court has called upon to answer the question raised by the plaintiff in the originating summons as mentioned above.

The issue (a), whether there has been only a partial dedication in favour of the Deity, needs to be analyzed by looking into the Will as well as the Codicil. The change that is introduced by way of Codicil holds the key to the intention of the Settlor in the backdrop of death of his four and youngest daughter Bibhabati Dassi at Deoghar on 01.11.1918 due to influenza coupled with the death of her husband Janapriya Mitra, who succumbed to the same deceased four days after on 05.11.1918, leaving under the care of the Settlor, three infant orphans daughters then aged about 11 years, 8 years and 4 years respectively. In the words of Settlor himself - “*as these my*

three unmarked granddaughters have to be brought up married dower and provided for by me it is absolutely, necessary for me to make certain alteration and changes in Shebaitsship of the settlement and under my said Will to my family Goddess Shree Shree Shree Doorga Mata Jew – (i) therefore, under this Codicil make the following alterations in the testamentary charges and declaration in my said last Will.”

It appears to me that it is now well settled that whereby a grant a mere charge or trust is created in favour of idol, dedication is partial or qualified. In the case of Jagadindra vs. Hemanta Kumari Devi in (1904) 31 Ind App. 203 at pages 209 and 210 referred by the plaintiff, it was held that in case of partial debutter, the property descends and is alienable and partible in the ordinary way, but subject to the trust or charge in the idol” favour. Dr. Bijan Kumar Mukherjea in his book expresses the same view. It will appear from the page no. 175 of the book that in the case of partial dedication, a Deity does not become the owner but is in the possession of charge holder. The property does not become extra commercium like debutter property so called. It can even be attached and sold in execution of a decree. Who gets the property, take its burden with the charge of religious trust.

The amended Clause 5 of the Will as modified by way of Codicil, expressly provides for the following : -

- (i) *To pay out the income as remuneration only to the Shebait/Shebait appointed by this Codicil.*
- (ii) *After defraying various expenses whatever surplus there may be left will be payable and divisible among the heirs and Shebait for their maintenance and use as may be deemed*

advisable amongst the heirs and Shebait or Shebaites subject to certain monthly legacies and other charges hereinafter mentioned :-

“A. My second daughter Sreemutty Indumati Dassi to be paid Rupees twenty five per month from the date of my death during the term of her natural life.

B. The unmarked daughters at the time of my death of my fourth and youngest daughter the Late Sreemutty Bibhabati Dassi (otherwise known as Khookie Baboo) to be paid each Rs. 5,000/- only as dowry at their respective marriages and I direct my Trustees to set apart all surplus income of my estate after defraying all the above mentioned expenses which I believe cannot be less than Rs. 200/- a month and create a separate Fund for meeting the above dowries for the said unmarried daughters.

C. The four daughters.... of my said fourth and youngest daughter Bibhabati Dassi to be paid Twenty-Five only each per month during natural terms of their lives directly after the marriages of all the daughters of my fourth and youngest Sreemutty Bibhabati Dassi.”

I also hereby declared that all the above charges on the residue of my estate and on the surplus of the income of my above Debutter Trust Property after defraying all necessary Poojan Expenses and the expenses of up-keep of the properties and payment of taxes, rates and ca.”

In view of the above, discussion and having due regard to the provision of the Codicil, which provides, inter alia, - *“After defraying expenses towards daily seva puja of the Deity, the surplus is given to the heirs and Shebaites in the manner as may be advised by the Shrebaits”,* accordingly the first issue raised is answered in the affirmative.

The second issue is also answered in affirmative for the following reason:-

“(i) The codicil provides inter alia that the manner in which the surplus is to be distributed amongst the heirs and Shebaites would be solely on the basis of the advice given by the Shebaites.

(ii) In the instant case, the Shebaites have unequivocally entered into a terms in the form of Memorandum of Understanding held on

02.09.2019 acknowledging the fact that the Plaintiff Shebait namely Asis Mitra will have the right to carry out daily Seva Puja in accordance with the provisions made by the Settlor as it apparent from Clause 5 of the Codicil dt.15.07.1919 out of his own fund.”

The third issue which this Court is called upon the answer relates to granting permission to the parties who are all Shebait to sell the properties mentioned in the originating summons. It has been submitted, the properties are either by fully tenanted or incumbent and occupied by trespassers. The properties are also having embroiled in litigation. It has also been submitted that as things stands at present at the entire burden of protection and preservation of the Estate as fallen on the shoulder of one Shebait alone who is not in a position to discharge the onerous burden specifically in view of the constraint threats of further encroachment on the said properties make out By outsiders in the locality and trespassers already in illegal occupation in portion of the properties. Hence, the other Shebait have mutually consented to the sale of such properties as prayed for in the originating summons.

After having considered the facts of the case, the law on the subject and the terms as agreed upon by and between the Shebait as recorded in the minutes of meeting dt. 02.09.2019, this Court answers the third issue also in affirmative subject to the following directions which are to be complied by the parties:-

(a) It is directed that sale to be conducted on public auction after giving an advertisement of the proposed sale in two daily widely circulated newspapers, one in English daily and other in Bengali daily for inviting bids from the interested buyers.

- (b) *A reasonable period not less than 30 days should be given for opening of bids from the date of publication of the advertisement and on the day so fixed, all the Shebaites shall open the received bids and entered into a deed of sale with the highest bidder. For such purpose, an earnest money being 10 % of the total sale consideration would be deposited by the highest bidder within a week from the date of opening of bid failing which the earnest money deposited by the first successful bidder would be forfeited and the second highest bidder would be entitled to enter into a deed of sale, subject to acceptance of the rate quoted by the second highest bidder by all the Shebaites.*
- (c) *In case the second highest bidder rate is much low than that of the first Successful bidder and all Shebaites are not agree to accept the rate of the second highest bidder, in that case, the first bidding process should be cancelled and a fresh bidding process by way of advertisement on the same conditions as mentioned above shall be conducted.*
- (d) *The plaintiff will conduct all the process with the consent of all Shebaites and the expenditure shall be borne for the said process out of the Estate?*
- (e) *It is made clear that in the event all attempts made by the parties to sell the properties by way of public auction fails, the parties may sell the properties by entering into a Private Treaty with the consent of all Shebaites.*

In view of the above, **CSOS 5 of 2019** is **disposed of**. Decree be drawn accordingly.

(Krishna Rao, J.)