

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Saugata Bhattacharyya

W.P.A. 13923 of 2018

Kunal Kumar Adhikary & Anr.

-vs-

The Kolkata Municipal Corporation & Ors.

For the Petitioners : Mr. P. P. Roy,
Mr. R. K. Dubey

For the respondent no.12 : Mr. Chayan Gupta,
Mr. Sagnik Majumdar,
Ms. Shrya Ghosh Dastidar

For the KMC : Mr. Alak Ghosh,
Mr. Fazlul Haque

Hearing concluded on : 18.09.2023

Judgment on: 18.09.2023

Saugata Bhattacharyya, J.:

In the writ petition the order of the Municipal
Commissioner communicated vide writing dated 15th

March, 2018 of the Executive Engineer (Building) Borough-VIII is under challenge.

Mr. Roy, learned advocate representing the petitioners claiming to be the Shebait of the trust property situated at 36K, Mahanirban Road under Ward No. 85 within the jurisdiction of Kolkata Municipal Corporation has alleged that the sanctioned plan obtained by the private respondents dated 3rd July, 2013 was the result of practising fraud and misrepresentation therefore under Section 397 of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the “said Act of 1980”) the said sanctioned plan dated 3rd July, 2013 needs to be set aside.

In support of such contention of the petitioners attention of this Court has been drawn to the declaration which is annexed to the affidavit-in-reply used against the affidavit-in-opposition filed on behalf of the respondent nos. 5, 6, 7, 10 & 11 in order to urge before this Court that in spite of pendency of Misc. Case No.1259 of 2010 which was preferred by the petitioners against the order dated 30th April, 2009 passed in Misc. Case No.129 of 2008 and other civil proceedings private respondents were permitted

to make construction of G+III storied building based on the sanctioned plan accorded on 3rd July, 2013.

According to the petitioners while making application seeking sanctioned plan before the concerned authority of KMC it was declared by the private respondents that no civil or criminal proceeding was pending in connection with the aforesaid premises and the premises is free from all encumbrances which should attract invocation of the provisions as contained under Section 397 of the KMC Act of 1980 since according to the petitioners this is misrepresentation and fraud on the part of the private respondents in obtaining sanctioned plan.

It has been submitted that the order passed in Misc. Case No. 129 of 2008 dated 30th April, 2009 was recalled vide order dated 20th December, 2016 passed in Misc. Case No.1259 of 2010 therefore the benefit of the order dated 30th April, 2009 cannot be extended in favour of the private respondents on the principle enunciated by the Apex Court in the judgment, reported in **2022 SCC OnLine SC 372 (Mekha Ram & Ors. -vs- State of Rajasthan & Ors.)** wherein it has been held no one can be permitted to take the benefit of wrong order passed by the

Court which has been subsequently set aside by the Higher Forum/Court and as per settled proposition of law no authority should be prejudiced because of the order of the Court.

The sum and substance of the submissions made on behalf of the petitioners based on the order dated 20th December, 2016 passed by the learned District Judge at Alipore, South 24 Parganas whereby the order dated 30th April, 2009 passed in Misc. Case No.129 of 2008 was recalled and during pendency of the Misc. Case being 1259 of 2010 the concerned authority of KMC sanctioned plan in favour of the private respondents on the basis of a declaration made in the application seeking grant of sanctioned plan that no legal proceeding was pending before the Court.

Mr. Gupta, learned advocate representing the respondent no.12 at the threshold has questioned the locus of the petitioners based on the statements made in paragraphs 2, 3 and 4 of the writ petition. According to the respondent no.12 one Surendra Nath Das was the owner of the property in question having two daughters, Prabhabavi Adhikary and Binapani Dasi and at the first instance said

Surendra Nath Das executed an Arpannama dated 8th August, 1959 B.S. whereby aforesaid two daughters were made trustees along with others but subsequently on 16th May 1962 another Arpannama was executed by said Surendra Nath Das when he was suffering from Alzheimer's disease whereby Binapani Dasi was inducted as trustee excluding Prabhabavi Adhikary and the petitioners are the descendants of Prabhabavi Adhikary. It has also been submitted relying upon the statements made in paragraphs 2, 3 & 4 of the writ petition that after executing Arpannama on 16th May, 1962 contemporaneously no steps were taken by the petitioners being the descendants of Prabhabavi Adhikary seeking necessary declaration in order to establish their right as trustees.

Another plank of submission made on behalf of the respondent no.12 is based on the application/complaint lodged by the petitioners before the concerned authority of KMC dated 18th January, 2017 for cancellation of the sanctioned plan dated 3rd July, 2013 on the alleged ground of fraud and misrepresentation in terms of Section 397 of the said Act of 1980. According to the respondent no.12

apart from pendency of Misc. case no.1259 of 2010 no other ground has been taken by the petitioners before the concerned authority of KMC in order to deliberate on the point of misrepresentation and fraud for demonstrating how provisions under Section 397 is attracted in the present case.

Lastly it has been submitted on behalf of the respondent no.12 that albeit an order was passed on 30th April, 2009 on the premise that for the benefit and welfare of the deity the private respondents/managing trustee should be permitted to develop the property in question and accordingly permission was accorded by the Court to develop the said property but on the Misc. Case being 1259 of 2010 vide order dated 20th December, 2016 the Court recalled the previous order dated 30th April, 2009 since it was found that the concerned Estate being a private Debuttar Estate, it's shebaitis are the only persons to manage the trust and deity and to take proper decision on the alienation of the trust property if at all required as a legal necessity for the welfare of the deity and it was also observed that the Court has no role to play. Such observation, as it has been contended on behalf of the

respondent no.12, was made based on the judgment dated 20th November, 2009 passed by a coordinate Bench on a writ petition being **WPA 9660 of 2006 (Smt. Shakuntala Devi Dalmia & Anr -vs- Howrah Municipal Corporation & Ors.)**.

According to the respondent no.12 in view of the law laid down by the coordinate Bench in **Smt. Shakuntala Devi** (supra) there is no necessity to obtain permission from Court for developing the aforesaid trust property since the trust in question is a private Debuttar Estate. Therefore, recalling of the order dated 30th April, 2009 vide subsequent order dated 20th December, 2016 is of no significance in view of law laid down in **Smt. Shakuntala Devi** (supra).

The Kolkata Municipal Corporation is represented by learned advocates who has made an endeavour to defend the decision of the Municipal Commissioner which has been communicated vide writing dated 15th March, 2018 of the Executive Engineer (Building) Borough-VIII on the score that whatever were available before the concerned authority of KMC, taking note of the same decision was taken pursuant to the order passed by the

coordinate Bench dated 26th October, 2017 and on the date of according sanctioned plan i.e. 3rd July, 2013 the order dated 30th April, 2009 was subsisting and accordingly, the decision was taken by the concerned authority of KMC.

Having considered the submissions made on behalf of the parties and on perusal of the relevant materials available on record, this Court is tasked to scrutinise whether order dated 20th December, 2016 recalling the previous order dated 30th April, 2009 requires fresh consideration by the concerned authority of KMC in the context of the observations made by the Court in the said order dated 20th December, 2016 that in case of private Debuttar Estate it's shebaitis are the only persons to take decision on alienation of the Debuttar Estate; it is found that it is not a case of recalling simpliciter of the impugned order dated 30th April, 2009 by the Learned District Judge but certain relevant observations have been made by the Court which makes the issue clear and also facilitates this Court to adjudicate the issue involved in this writ petition. At this stage this Court finds it apt to quote the observations made by the coordinate Bench in **Smt. Shakuntala Devi** (supra) below:-

“There are two kinds of religious trusts both of which are ancient and highly popular in Hindu society. One of them is known as debutter or endowment in favour of an idol, while the other can be described as mutt or marham, which means a religious establishment endowed for the benefit of certain classes of ascetics or religious men belonging to particular sects or congregations. An idol is not an infant, it is a juristic person. A shebait is a mere manager, not the owner of the debutter property, the idol is the owner, but only in an ideal sense. There is always a human personality linked up with this ideal personality, and the shebait or manager of the deity must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property. There is no provision that obliges a shebait to take prior permission of any court for alienating a property owned by the deity, it is only that if the alienation is challenged at a future date, the alienee, in spite of the order, will have to prove as a fact that there was legal necessity for the transfer or that he made enquiries and was reasonably satisfied that such necessity existed. A shebait is not a trustee in the proper sense of the word and the Indian Trusts Act, 1882 has no application to the case of a Hindu religious endowment. The court, therefore, has no jurisdiction to

grant an application by a shebait to sanction his transaction on the ground of necessity. (B.K. Mukherjea's The Hindu Law of Religious and Charitable Trusts, 5th ed. By A.C. Sen, paras. 4.1A, 6.15, 6.16, 6.38, 6.67 and 6.38)''

In view of the aforesaid decision of the coordinate Bench in **Smt. Shakuntala Devi** (supra), it appears that there was no necessity to obtain order dated 30th April, 2009 by instituting Misc. Case No.129 of 2008 so far Shebaitis are concerned. In absence of order dated 30th April, 2009 it was open to the Shebaitis to apply before the concerned authority of KMC for according sanctioned plan since the trust was found to be a private Debuttar Estate.

There are counter allegations so far petitioners and private respondents are concerned with regard to their status as Shebaitis in connection with the aforesaid Debuttar Estate and Court finds it not fit in the present proceeding to make any observation with regard to determination of inter se right of the petitioners and private respondents in respect of the said Debuttar Estate. Court needs to appraise legality of the order passed by the

concerned authority of KMC which has been communicated vide writing dated 15th March, 2018.

It is true that the private respondents while submitting application seeking grant of sanctioned plan before the concerned authority of KMC made a declaration to the effect that no legal proceeding was pending in connection with the said Debuttar Estate in question but in the context of the right of the private respondents being Shebait of private Debuttar Estate as decided in the order dated 20th December, 2016 and on the anvil of the decision taken by the coordinate Bench in **Smt. Shakuntala Devi** (supra) it is found that the private respondents could have approached the concerned authority of KMC even in absence of the order dated 30th April, 2009. There is nothing on record which goes to show that as on date petitioners though have claimed to be Shebaits of the aforesaid Debuttar Estate, they can function and act as Shebaits on the basis of a document/instrument or declaration made by the competent Court of law. Therefore the law laid down in **Mekha Ram** (supra) does not come in aid of the petitioners.

Since in terms of the sanctioned plan dated 3rd July, 2013 G+III storied building has already been constructed, at this stage the Court is not inclined to interfere with the decision which has been communicated vide writing dated 15th March, 2018.

Accordingly, the writ petition stands dismissed.

The compilation of documents filed on behalf of respondent no.12 is taken on record.

However, there shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Saugata Bhattacharyya, J.)