Kali Kinkor Ganguly vs Panna Banerjee And Ors on 16 August, 1974

Equivalent citations: 1974 AIR 1932, 1975 SCR (1) 728, AIR 1974 SUPREME COURT 1932, 1974 2 SCC 563 1975 (1) SCR 728, 1975 (1) SCR 728, 1975 (1) SCR 728 1974 2 SCC 563, 1974 2 SCC 563

Author: A.N. Ray

Bench: A.N. Ray, Kuttyil Kurien Mathew

PETITIONER:
KALI KINKOR GANGULY

Vs.

RESPONDENT:
PANNA BANERJEE AND ORS.

DATE OF JUDGMENT16/08/1974

BENCH:
RAY, A.N. (CJ)
BENCH:
RAY, A.N. (CJ)
MATHEW, KUTTYIL KURIEN

CITATION:
1974 AIR 1932 1975 SCR (1) 728
1974 SCC (2) 563
CITATOR INFO :
MV 1985 SC 905 (6,10,18)

ACT:
Religious endowment--Transfer of office of Shebaiti--Which permissible.

HEADNOTE:
On the death of B who had the Shebaiti right of the deities in a temple, one of his two widows, carried on the sheba puja and on her death, her brother took possession of the temple premises. The other widow filed a suit and obtained a decree in her favour declaring her right to be entitled to the temple premises and to the right of sheba puja. She sold a half share of the temple and the shebaiti right to G for meeting the expenses of the litigation. The appellant,

a legatee of G, filed a suit claiming a declaration that he was entitled to the shebaiti right, which the respondents, who are the heirs of 'B' denied. The High Court, in appeal held against the appellant on the ground that the transfer to G was invalid.

Dismissing the appeal to this Court,

HELD : Although shebaiti right is heritable like any other property, it lacks the other incident of proprietary rights, namely, capacity of being freely transferred by the person-in whom it is vested. The rule against alienation of shebaiti right has been relaxed in certain decisions of the High Courts, which are classified under three heads (a) where the transfer is not for any pecuniary benefit and the transferee is the next heir of the transferor or stands in the line of succession of shebaits and suffers from no disqualification regarding the performance of duties; (b) when the transfer is made in the interest of the deity itself and to meet some pressing necessity; and (c) when a valid custom is proved sanctioning the alienation of shebaiti right within a limited circle of purchasers, who are actual or potential shebaits of the deity or otherwise connected with the family. In the present case, the appellant rested his claim on the second exception on the ground that the transfer was made in the interest of the deity and to meet a pressing necessity. But, the appellant cannot invoke the doctrine of transfer of shebait right for the benefit of the deity, because, the transfer to G is illegal, for the reason, that neither the temple nor the deities, nor the shebaiti right can be transferred by sale for pecuniary consideration. The rule of necessity extended only to an alienation of the temporality of the idol and does not and cannot apply to alienation of the spiritual rights and duties. The doctrine of alienability of the shebaitship itself on the ground of necessity or benefit to the deity is based upon a misconception of the observations of the Judicial Committee. Such a sale is void in its inception. An assignment of a religious office by which the alien or gets pecuniary benefit is against public policy and cannot be upheld. [733C-D,H-734C, 735C-F]

Prosanna kumari v. Golap Chand 2 I.A. 145 explained.

Mahamaya v. Haridas I. L. R. 42 Cal. 455, Khatra Chandra Ghosh v. Haridas I.L.R. 17 Cal. 557, Rajah Vurmah v. Ravi Burmah 4 1. A. 76, Sundarambal V. Yoganyanagurukkul I.L.R. 38 Mad. 850, Rajeshwar v. Gopaswar I.L.R. 35 Cal. 226, Nirmal Chandra Banerjee v. Jyoti Prasad 42 C.W.N. 11 38 Nagendra Nath v. Rabindra I.L.R. 53 Cal. 132 and Di-. B.K. Mukherjea, Hindu Law of Religious and Charitable Trust, referred to.

ARGUMENTS

For the appellant-The alienation in favour of G is in same terms as the alienation under which B himself had acquired rights. The documents were understood throughout by all the parties as a mere transfer of the personal proprietary

interest of a shebait which is ancillary to his duties as a ministrent of the deity and a manager of its temporalities. There is no justification for not giving effect to the true import and substance of the document, and, indeed it was conceded before the High Court that no claim was being laid to either the deity or the temple. In such circumstances, the only question which arose for determination was whether in the fact and circumstances of the instant case the transfer to G was invalid and could not be given effect to.
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It is now well settled that in the concept of shebaiti both the elements of office and property are there. It has been held (vide Angurbala v. Devabrata (1951) SCR 1125 that shebaitship is property within the meaning of Hindu Women's Right to Property Act and was also property in the general sense and the general law of succession governed succession to shebaitship. It has also been held that a partition of the shebaiti right amongst several co-shebait or co-heirs can be suitable effected under a scheme allotting different palas or terms of worship to the different claimants (vide I.L.R. 42 Calcutta 445). If the proprietary interest of a shebait is both heritable and capable of being partitioned, there is no reason why, subject to certain limitations, it should not be alienable. To the general rule, founded on the principle that the elements of office and property, of duties and personal interests are more or less blended together, that shebaiti right was inalienable, there are, certain notable exceptions, one being that such transfer is permissible if it was neither contrary to the intentions of the Founder as expressed in the Deed of Endowment or otherwise nor was in any was obnoxious to the principles of Hindu Law, and subject always to this fundamental limitation, a shebait can always transfer his or her shebaiti interest which was an amalagam of office and property for the benefit of the idol or the deity or for any legal or pressing necessity.
Now in the instant case the following facts are either admitted or found : Either under the transfer from the original founders, or under the transfer to B and also under the transfer to the predecessor-in-interest of the plaintiff, a right of transfer to strangers was conferred expressly and each had a right to extinguish and exhaust the line of succession.
It is apparent that the intention of the founders was that strangers could be taken in management and power was expressly given by them in redelegate the authority to such strangers. Accordingly, the transfer cannot be said to be contrary to the founders' intentions, and, as the transfer has been made to a person who was in no manner disqualified to discharge the duties of the office of a shebait, the transfer comes squarely under the exception mentioned above. To impose a total ban will be contrary to the principle enshrined in Article 19(1)(b) of the Constitution and, in

any case it cannot be in consonance with a sound public policy to ban a transfer to a qualified person even in a case of dire legal necessity such as presentation of the very existence of the deities and recover them and their abode from possession of one who had taken forcible possession.

An alienation of shebaiti right for necessity or benefit of the deity was held justified in the under noted cases

1. I.L.R. 17 Cal. 557
2. I.L.R. 35 Cal. 226
3. 42 C.W.N. 1138
4. 8. I.A. 146 (152)
5. 44 I.A. 147
6. 48 I.A. 302
7. 36 I.A. 148.
8. 45 C.W.N. 809
9. I.L.R. 6 Bom. 298

Therefore, the alienation was wrongly held as invalid.

For the respondent-The earlier transfers were not challenged in the suit. It is well settled that neither the temple nor the deities can be the subject matter of any sale transactions and this proposition has not been contested by the appellant. That being so, on the face of it, the impugned transfer should fail. It is submitted that the deed should be read as a whole from which the subject matter of the sale is to be ascertained. That being so, it is not permissible to consider separately the question of transfer of the half share of her shebaiti-right. It is submitted that the 'said transfer as a whole should be held to be invalid.

Even assuming that the question of transfer of shebaiti-right can be separated, ,as contended by the appellant, the transfer of shebaite-right should be held to be

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invalid. It has been held in Raja Ravi Varma's case (4 I.A. 76) and in several other decisions that sale of shebaitship is altogether void. This subject has been dealt within detail by Dr. B.K. Mukherjee in his Tagore Law Lectures on Hindu Law of Religious and Charitable Trusts delivered in 1951 at pages 228 onwards of the Original Edition. After considering the texts and Case Law on the subject the opinion expressed by the learned author is that although alienation may be permissible in favour of next shebait or one in the line of succession or to a co-shebait the same cannot be made in favour of a stranger even on the ground of necessity. The learned author at page 235 has observed that certain decisions of the Calcutta High Court which hid purported to uphold the transfer of shabaiti-right on the ground of necessity was of doubtful authority and was to a great extent based upon misconstruction of certain pronouncements of the judicial Committee. The editor of the said Edition of Dr. Mukherjee's said Tagore Law Lectures (Mr. T. L. Venkatarama Ayyar) has also expressed the same

view. This being the legal position, it is submitted G did not acquire any right of shabaitship of the deities by the deed of' sale in his favour. Accordingly the appellant also derived no right and the High Court in appeal rightly decided the question raised before it.
For the Receiver : On behalf of the Receiver some submissions were made regarding his remuneration and expenses including the salary of his clerk.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1115 of 1973.

Appeal from the Judgment & Decree dated the 11th April 1973 of the Calcutta High Court in Appeal from Original Decree No. 52 of 1972.

A. B. M. Sinha, Salil Ganguly and Samir Roy Choudhury, for the appellant.

B. Sen and D. N. Mukherjee, for the respondents. P.K. Mukherjee, for the respondent.

The Judgment of the Court was delivered by RAY, C.J. This appeal is by certificate from the judgment dated 11 April, 1973 of the High Court at Calcutta dismissing the appellant's suit.

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

The deity at the premises is popularly known as Firingi Kali. Ramakanta Pal constructed a Shiva temple and installed the deity Shiva at the premises. Ramakanta Pal became the shebait. In 1820 Kali Prasad Pal and Gouri Prasad. Pal the two sons of Ramakanta Pal orally transferred the temple together with the idol and shebaiti right of the deity to Srimanta Pandit. Srimanta Pandit carried on the sheba. He constructed a small brick built one storeyed room thereon. He installed the deities Kali, Sitala Manasha and Shaligram Shila. In 1880 Srimanta Pandit by a registered deed transferred the temple together with the deities and the shebaiti right of the deities to Shashi Bhusan Banerjee. Shashi Bhusan Banerjee performed Sheba till, his death on 24 August, 1894. He left behind him two widows Paripurna Debi and Pramila Sundari Debi. Paripurna Debi after the death of Shashi Bhusan Banerjee carried on sheba puja of the deity. She died on 10 April 1905. On her death Rakhal Chandra Mukherjee brother of Paripurna Debi took possession of the temple premises and ousted Pramila Debi. On 22 August, 1905 Pramila Debi filed a suit in the High Court against Rakhal Chandra Mukherjee for a declaration of her right in the temple premises and the sheba puja. On 12 February, 1907 Pramila Debi obtained a decree against Rakhal Chandra Mukherjee declaring her to be entitled to temple premises and to the right of sheba puja.

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

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

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

The appellant filed this suit on 22 January, 1959. The appellant claimed a declaration that he is the sole owner of premises No. 244 Bowbazar Street, Calcutta and is the sole shebait of Firingi Kali and other deities. The alternative prayer is a declaration that the plaintiff is entitled to an undivided half share in the said premises and to half the pala in the sheba. The allegations in the plaint are that the respondents, viz. the Banerjees who are the heirs of Shashi Bhusan Banerjee denied the appellant's right in the premises and in shebaiti rights. The trial court held that the transfer of half share of shebaiti right by Pramila Debi to Upendra Nath Ganguli was for legal necessity and the transfer was binding on the defendants in the suit. The trial court passed a decree in favour of the appellant. The appellant was entitled to half share of the shebaiti right of the deities and the respondents were entitled to the other half in accordance with the deed dated 29 January, 1907 made by Pramila Debi in favour of Upendra Nath Ganguli.

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

The centre of controversy in this appeal turns on the construct' of the deed dated 29 January, 1907 made by Pramila Debi in favour of Upendra-Nath Ganguli. By the deed Pramila)Debi sold to Upendra Nath Ganguly for consideration of Rs. 1200/- "one half share of the full title that I have in the said Kalibati together with the land underneath, the pucca building and income etc. (from the Kalibari) that is to say /8/- eight annas share in the said Kali Mata, Her seba and pala etc. and in the

Kali Mandir and Bati situate at 244, Bowbazar Street, Calcutta together with the land underneath the pucca building and in the entire income and profit therefrom. From this day share to the extent of /8/- eight annas out of the sixteen annas in right title and interest which I had in the said property, devolves on you and you being entitled to the rights of gifts-, sale etc. shall enjoy and possess the said property for ever down to your sons or heirs and representatives was in succession. To that, mine or any other heirs or representatives of my husband shall not be competent to raise any kind of plea or objection".

The appellant contended that no one laid any claim to the deity or to the temple. The appellant contended as follows : The sum and substance of the deed sued upon is that it is a mere transfer of the personal proprietary interest of a shebaiti which is ancillary to his duties as a ministrant of the deity and the manager of its temporalities. The concept of shebaiti has both the elements of office and property. A partition of shebaiti right amongst several co-sebaits or co-heirs can be effected under a scheme allotting different Palas. The transfer from the original founders to Srimanta Pandit in 1820 or the transfer from Srimanta Pandit to Shashi Bhusan Banerjee and the transfer from, Pramila Debi to Upendra Nath Ganguli, the predecessor-in-interest of the appellant all indicate that the shebaits exercised rights of transfer to strangers and further that the shebait had rights to extinguish and exhaust the line of succession. These transfers of shebaiti rights indicate that it was the intention of the founders that strangers could be taken in management and power was given by them to redelegate the authority to such strangers. Therefore, transfer by Pramila Debi to Upendra Nath Ganguli is not contrary to the founders' intentions. Furthermore, Upendra Nath Ganguli was not disqualified to discharge the duties of the office of shebait.

Counsel for the appellant relied on the decision of this Court in Angurhala v. Devabrata 1951 S.C.R. 1125 in support of the proposition that shebaitship is property. Reliance was also placed on the decisions in Mahamaya v. Haridas I.L.R. 42Cal. 455 and Kherta Chandra Ghosh v. Haridas I.L.R. 17 Cal. 557 in support of the proposition that a partition of shebaiti right is possible. A corollary was drawn by counsel for the appellant that if the proprietary interest of a shebati is both heritable and capable of being partitioned, there is no reason why subject to certain limitations it should not be alienable. It was said that an alienation of a shebaiti right for necessity or benefit of the deity is permissible as well as justified. In the Hindu Law of Religious & Charitable Trust, 1st Edition, being the Tagore Law Lectures delivered by Dr. B.K. Mukherjea The statement of law at page 228 is this :

> "Although shebaiti right is heritable like any other property, it lacks the other incident of proprietary right, viz., capacity of being freely transferred by the person in whom it is vested. The reason is that the personal propreitary interest which the shebait has got is ancillary to and inseparable from his duties as a ministrant of the deity, and a manager of its temporalitics. As the. personal interest cannot be detached from the duties the transfer of shebaitship would mean a delegation of the duties of the transferor which would not only he contrary to the express intentions of the founder but would contravene the policy of law. A transfer of shebaitship or for the matter of that of any religious office has nowhere been countenanced by Hindu lawyers".

In Rajesh Vurmalh v. Ravi Burmah 4 I.A. 76 Rajah paid certain sum to the urallers (managers) of the religious foundation who transferred all their rights to the Rajah. The Judicial Committee held that the assignment was void in law and could not create any rights in favour of the Rajah. An assignment of religious office for the pecuniary benefit of the holder of the office was held to be against public policy and contrary to the intentions of the founder. Such transfer was said to amount to delegation of delagated authority and could not be sanctioned even on the footing of a custom because it would be against public policy. The doctrine in Rajah Vurmah's case (supra) has been applied on transactions by way of lease or mortgage. In Sundramhal v. Yoganyanagurukkul I.L.R. 38 Mad. 850 one of the parties alienated half share in the Archaka right for a pecuniary benefit. It was said that " an alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld even if a custom is set up sanctioning such alienation".

The rule against alienation of shebaiti right has been relaxed by reason of certain special circumstances. These are classified by Dr. B.K. Mukherjea at page 231 in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust, 1st Edition under three heads. The first case is where transfer is not for any pecuniary benefit and the transferee is the next heir of the transferor or stands in the line of succession of shebaits and suffers from no disqualification regarding the performance of the duties. Second, when the transfer is made in the interests of the deity itself and to meet some pressing necessity. Third, when a valid custom is proved sanctioning alienation of shebaiti right within a limited circle of purchasers, who are actual or potential shebaits of the deity or otherwise connected with the family. In the present case counsel for the appellant rested on the second exception on the ground that the transfer is made in the interest of the deity and to meet some pressing necessity.

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

In Khetra Chandra Ghosh's case (supra) on which the appellant relied in support of the assignment of shebaiti right on the doctrine of benefit to the deity the question was whether the Ghoshes who were the shebaits of a private family endowment could make over the idol together with the endowed property to the predecessors of the plaintiff in that case on the ground that the Ghoshes were unable to carry on the worship of the idol with the income of the Debutter. Dr. B. K. Mukherjea at pages 236-239 in his Tagore Law Lectures 1st Edition examined various decisions on this aspect. in Khetra Chandra Ghosh's case (supra) the Court relied on the decision of the Judicial Committee in Prosanna Kumari v. Golap Chand 2 I.A. 145 where the Judicial Committee said that a shebait

must, of necessity, be empowered to do whatever might be required for the service of the idol and for benefit and preservation of the property. The ratio in Khetra Chandra Ghosh's case (supra) is that all the members of the Ghosh family, for the purpose of preserving the property of idol and preventing the discontinuance of its worship gave the estate another direction.

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

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

Dr. B.K. Mukherjea doubted the propriety of these decisions. Shri Venkatarama Aiyar as the editor of the Second Edition of Dr. B.K. Mukherjea's Tagore Law Lectures also expressed the same view at pages 219-220 that even if the transfer is for no consideration the transfer would be bad if it is not in favour of those next in the line of succession. Dr. B.K. Mukherjea in his Tagore Law Lectures has pointed out that the decision in Prasanna Kumari's case (supra) was that the rule of necessity extended only to an alienation of the temporality of the idol and it does not and cannot apply to alienation to the spiritual rights and duties. Dr. Mukherjea illustrated this with reference to the decision in Nagendra Nath v. Rabindra I.L.R. 53 Cal. 132 and an earlier decision in Rajeswar v. Gopeswar (supra). The doctrine of alienation of shebaitship on the ground of necessity or benefit to the deity is said by Dr. Mukherjea to be of doubtful authority and based upon a misconception of certain pronouncements of the Judicial Committee. In the present case, the appellant cannot invoke the doctrine of transfer of shebaiti right for the benefit of the deity because the transfer by Pramila Debi to Upendra Nath Ganguli is illegal for the principaI reason that neither the temple nor the deities nor the shebaiti right can be transferred by sale for pecuniary consideration. 'the transfer by sale is void in its inception. For these reasons the appeal is dismissed. We may state here that we are not in agreement with the various reasons given by the concurring judgment of the High Court. Some submissions were made on behalf of the receiver about his remuneration and expenses including salary of the clerk. At the time we granted stay of the operation of the decree of the High Court we indicated that the question of remuneration and salary of the clerk would be gone into at the time of the disposal of the appeal. The receiver will be entitled to his remuneration for 16 months during the pendency of the appeal. The High Court sanctioned the receiver a remuneration of 130 gold mohurs for 7 months and salary of the clerk at the rate of Rs. 50/- per month. The High Court will fix the remuneration of the receiver for the subsequent months up to the discharge of the receiver on passing of his accounts. The High.

Court will also fix the salary of the clerk because it was submitted before us that the salary of the clerk was low considering that lie had to attend the temple every day for long hours without any holiday.

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

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

Appeal dismissed.

V.P.S.