A SITARAM AGARWAL & ANR.

v.

SUBARATA CHANDRA & DAMKRISHNA DHARA & ORS.

(Civil Appeal No. 3319 of 2008)

MAY 6, 2008

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(S.B. SINHA AND LOKESHWAR SINGH PANTA, JJ.)

Hindu Law:

Charitable endowment – Debutter property – Sale of by C *Shebait – Effect of – Property purchased by Shebait in name of deity – Record of rights showing property to have been mutated in the name of deity - Sale of by Shebait – HELD: Finding of fact arrived by first appellate court that suit property was a debutter one, and the same having been affirmed by* D *High Court there is no reasons to take a different view – Burden to prove that name of deity was written in the sale deed by mistake and transaction was 'benami' in character was on the party claiming it – Questions raised before Supreme Court were not raised before High Court – Evidence – Burden of* E *proof – Constitution of India, 1950 – Article 136.*

The suit property was purchased by the father of the respondents as a Shebait of the deity. He sold the said property to appellant nos. 1 and 2 under two separate deeds of sale. Appellant No. 2 filed Suit No. 130 of 1964 F **against the said Shebait for a declaration that the suit property was not a debutter one. The suit was decreed** *ex parte* **as the Shebait did not contest. The respondents, who were sons and daughters of the Shebait, filed another suit contending that the suit property was a debutter** G **property and the Shebait could not have executed the sale deed. The suit was dismissed by the trial court holding that the property was purchased by the said vendor from his own funds and since he was alive, the plaintiffs had no** *locus standi* **to file the suit. The first appellate court,**

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however, held the property as debutter and the vendor as merely a Shebait. The second appeal of the vendees having been dismissed, they filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The deed of sale was executed in favour of the deity through its Shebait. There is nothing in the said deed of sale to show that the Shebait intended to purchase the said property for his own benefit. The very fact that the deed of sale was executed not only in the name of deity but in the presence of other villagers clearly goes to show the intention of the said purchaser. The records of rights clearly showed that the suit property was mutated in the name of the deity. The very fact that the purchasers thought it necessary to file a suit as against their vendor is itself a pointer to show that the said suit was a collusive one. Neither the deity was impleaded as a party therein nor the State Government. [para 10 and 13] [958-D,E, 960-E,F]

Maharanee Brojosoondery Debea v. Ranee Luchmee Koonwaree & Ors. 1873 (XX) Weekly Reporter 95 – distinguished.

S. Shanmugam Pillai & Ors. v. K. Shanmugam Pillai & Ors. (1973) 2 SCC 312 – referred to.

Ram Jankijee Deities & Ors. v. State of Bihar and Ors. (1999) 5 SCC 50 – held inapplicable.

1.2 No evidence has been adduced to show as to whether the income of the said property was substantially intended to be used for the purpose of charity or for the personal benefit of the Shebait. The positive case of the appellants only was that name of the deity was written in the deed of sale by mistake. The onus was on them to prove the same. A finding of fact was arrived at by the court of first appeal that the deity was in existence. The plea of the appellant that the deity was not in existence

A **was clearly negatived. Appellants did not examine the Shebait. If the appellant raised a contention that the transaction was 'benami' in character, it was for them to prove the same. [para 17] [962-D,E,F]**

B **1.3 Furthermore, the questions which have been raised before this Court have not been raised before the High Court. No substantial question of law, as propounded before this Court had been formulated in the Memo of Appeal. Even no substantial question of law in precise terms has been taken in the Special Leave Petition. In view** C **of the finding of fact arrived at by the first appellate court which has been affirmed by the High Court, there is no reason to take a different view. There is no merit in the appeal. [para 18 and 19] [962-G, 963-A]**

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3319 of 2008.

From the Judgment and Order dated 16.2.2005 of the High Court at Calcutta in S.A.T. No. 3600/2004.

E Abrathous Majumdar, Abhisth Kumar, Archana Singh and Vibhakar Mishra for the Appellants.

D. Bharat Kumar, M. Indrani, Abhijit Sengupta and Satish Vig for the Respondents.

F The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. This petition is directed against a judgment and order dated 16.2.2005 passed by a Division Bench of the Calcutta High Court whereby and whereunder the second appeal filed G by the appellant herein from a judgment and order dated 30.7.2004 passed by the Additional District Judge, 3rd Court, Suri, Birbhum was dismissed.

3. Whether the property in question is a debuttor property H is the issue involved herein.

4. Indisputably, it belonged to Badal Das and Balaram Das. They, by reason of a registered deed of sale dated 3.5.1954 transferred their right, title and interest in favour of one Amar Chandra Dhara. He purchased the said property as a sebait of a deity Sri Sri Durgamata Thakurani. The said Amar Chandra Dhara in turn sold 2.31 acres of land in favour of the appellant No.2 and the remaining 22 cents of land in favour of the appellant No.1 by two deeds of sale 14.5.1963.

5. Second Appellant instituted a suit being Title Suit No.130 of 1964 in the court of Munsif, Dubrajpur against the said Amar Chandra Dhara for a declaration that the suit property was not a debottar one. It was decreed ex parte in his favour. Amar Chandra Dhara did not contest the suit. Respondents herein, however, who were sons and daughters of the said Amar Chandra Dhara, filed a suit contending that the property in question being a Debottar property, Amar Chandra Dhara could not have executed the said deeds of sale dated 14.5.1963.

The suit was dismissed by the Civil Judge (Junior Division), Dubrajpur holding that the property was purchased by Amar Chandra Dhara from his own funds and that plaintiffs have no locus standi to institute the suit as Amar Chandra Dhara was alive. It was opined that there exists a distinction between a deed of dedication and a deed of sale.

6. Respondents herein preferred an appeal thereagainst. By reason of a judgment and order dated 30.7.2003, the Additional District Judge, Suri, Birbhum allowed the said appeal opining that the said deed of sale dated 3.5.1954 was executed in favour of the deity and Amar Chandra Dhara was merely a sebait. The deity Sri Sri Durgamata Thakurani was in existence and in that view of the matter, the property was purchased in its name.

7. The High Court, by reason of the impugned judgment dated 16.2.205, as noticed hereinbefore, dismissed the second appeal.

A 8. Mr. Majumdar, learned counsel, in support of the appeal, would submit that the High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration that the learned District Judge wrongly opined that the said deed of sale dated 3.5.1954 was in effect and B substance a Benami transaction although the Benami Transactions Prohibition Act had no application in relation thereto. It was urged that from a perusal of the deed of sale dated 3.5.1954, it would appear that the dedication was not complete and, thus, it was open to the said Amar Chandra Dhara C to alienate the property, particularly when it was alienable in terms of the deed of sale itself.

9. Mr. Abhijit Sengupta, learned counsel appearing on behalf of the respondent, on the other hand, would support the impugned judgment.

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10. The deed of sale was executed in favour of Sri Sri Durgamata Thakurani through its sebait. There is nothing in the said deed of sale to show that Amar Chandra Dhara intended to purchase the said property for his own benefit. The very fact that the deed of sale was executed not only in the name of deity E but in the presence of other villagers clearly goes to show the intention of the said purchaser.

11. Submission of the learned counsel that by reason of the said deed of sale, the vendee acquired the right to transfer F the same which would indicate that the property was not a debottar property, in our opinion, is wholly misconceived. Such a power of alienation, in terms of the provisions of the Transfer of Property Act need not even be conferred; it is inherent. While executing a deed of sale what is essential is transfer of the G interest of the vendor in favour of the vendee. How the vendee shall deal with the property is not the concern of the vendor. If the vendee, for one reason or the other, cannot make any alienation of the property by reason of any provision of any statute or otherwise, such a restricted right cannot be overcome at the instance of what would be necessary for determination of issue H

in the ascertainment of interest on the part of Amar Chandra Dhara at the relevant time. How the deity was installed is not known. Whether other properties had been dedicated in its favour is also not known. On what basis Amar Chandra Dhara was appointed as a shebait is also not known.

Reliance has been placed by the learned counsel on *Maharanee Brojosoondery Debea v. Ranee Luchmee Koonwaree & Ors.* [1873 (XX) Weekly Reporter 95]. The said decision arose out of a judgment and order passed by the High Court of Judicature at Fort William in Bengal which decision is reported in [1869 (XI) WLR 13]. The question which arose for consideration before the Calcutta High Court and the Privy Council was as to whether the idol was set up for the benefit of public worship. In the facts of the said case, the answer to the said question was rendered in the negative, stating :

> "But the question is whether there is any evidence of an endowment properly so called. Now what is the evidence of an endowment? This was clearly not an endowment for the benefit of the public. The idol was not set up for the benefit of the public worship. There are no priests appointed, no Brahmins who have any legal interest whatever in the fund. It is not like a temple endowed for the support of Brahmins, for the purpose of performing religious service for the benefit of any Hindoo who might please to go there. It is simply an idol set up by the Maharajah, apparently in his own house, and for what purpose? Why, for his own worship. We constantly have suits claiming certain turns of worship, but here there is no turn or right of worship established. There is nothing stated in any way to show that the Maharajah intended that the idol should be kept up for the benefit of his heirs in perpetuity; and before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an

A endowment are stated. The Maharajah appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol as if it were his own property. There is no evidence at all of any of the essentials of an endowment in favour of the idol."

B No such case was pleaded. No evidence in this regard was led.

Each case, therefore, has to be considered on its own merits.

C 12. In that case, Calcutta High Court noticed that the question as to whether Maharaja Govindnath Roy knew that the properties stood in the name of the idol was itself decisive of the fact as to who was the real purchaser and who was the beneficiary. The High Court itself held that the question was one D of fact.

13. In this case, the appellants did not adduce any evidence as to how the property has been dealt with. There is nothing on record to show that the endowment was merely nominal. Whether the conduct of the parties was consistent with E the setting up of a genuine trust or not is not known.

In this case, apparently, the records of rights clearly showed that it was mutated in the name of the deity. The very fact that the purchasers thought it necessary to file a suit as F against their vendor is itself a pointer to show that the said suit was a collusive one. Neither the deity was impleaded as a party therein nor the State of West Bengal was. On what basis the entry in the record of rights was made in the name of the deity is not known. The correctness of the said entry might have been G the basis for this suit but why the deity was not impleaded as a party is not known.

14. Reliance has also been placed by the learned counsel on *S. Shanmugam Pillai & Ors. v. K. Shanmugam Pillai & Ors.* [(1973) 2 SCC 312]. This Court, therein, clearly held that H the question as to whether the dedication of a property was

complete or partial is a question of fact, stating: A

> "Whether or not a dedication is complete would naturally be a question of fact to be determined in each case on the terms of the relevant document if the dedication in question was made under a document. In such a case, it is always a matter of ascertaining the true intention of the parties, it B is obvious that such an intention must be gathered on a fair and reasonable construction of the document considered as a whole. If the income of the property is substantially intended to be used for the purpose of a charity and only an insignificant and minor portion of it is C allowed to be used for the maintenance of the worshipper or the manager, it may be possible to take the view that dedication is complete."

15. Our attention has also been drawn to a decision of this D Court in *Ram Jankijee Deities & Ors. v. State of Bihar and Ors.* [(1999) 5 SCC 50], wherein it was opined :

> "In the conception of Debutter, two essential ideas are required to be performed: in the first place, the property which is dedicated to the deity vests in an ideal sense in E the deity itself as a juristic person and in the second place, the personality of the idol being linked up with the natural personality of the shebait, being the manager or being the Dharamkarta and who is entrusted with the custody of the idol and who is responsible otherwise for preservation of F the property of the idol. The *Deva Pratistha Tatwa* of Raghunandan and *Matsya* and *Devi Puranas* though may not be uniform in their description as to how pratistha or consecration of image does take place but it is customary that the image is first carried to the snan mandap and G thereafter the founder utters the sankalpa mantra and upon completion thereof the image is given a bath with holy water, ghee, dahi, honey and rose water and thereafter the oblation to the sacred fire by which the pran pratistha takes place and the eternal spirit is infused in that particular H

A idol and the image is then taken to the temple itself and the same is thereafter formally dedicated to the deity. A simple piece of wood or stone may become the image or idol and divinity is attributed to the same. As noticed above, it is formless, shapeless but it is the human concept of a B particular divine existence which gives it the shape, the size and the colour. While it is true that the learned Single Judge has quoted some eminent authors but in our view the same does not however lend any assistance to the matter in issue and the principles of Hindu law seem to C have been totally misread by the learned Single Judge."

16. In that case, the question arose as to whether a deity should be allotted separate units in terms of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. Keeping in view the existence of the deity, this D Court held that such units should be allotted.

17. As noticed hereinbefore that in this case, no evidence has been adduced to show as to whether the income of the said property was substantially intended to be used for the purpose of charity or for the personal benefit of Amar Chandra E Dhara. The positive case of the appellants only was that name of Sri Sri Durgamata Thakurani was written in the deed of sale by mistake. The onus was on them to prove the same. A finding of fact was arrived at by the court of first appeal that the deity was in existence. The plea of the appellant that the deity was F not in existence was clearly negatived. Appellants did not examine the said Amar Chandra Dhara. If the appellant raised a contention that the transaction was 'Benami' in character, it was for them to prove the same.

G 18. Furthermore, the questions which have been raised before us have not been raised before the High Court. No substantial question of law, as propounded before us, had been formulated in the Memo of Appeal. Even no substantial question of law in precise terms has been taken in the Special Leave Petition.

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19. In view of the finding of fact arrived at by the learned Court of First Appeal which has been affirmed by the High Court, we see no reason to take a different view. There is no merit in this appeal. It is dismissed accordingly with costs. Counsel's fee assessed at Rs.25,000/- (Rupees twenty five thousand only). A

20. However, on a query made by us, the learned counsel for the respondent categorically stated the property which having since been acquired under the Land Acquisition Act, the amount of compensation payable therefor would be expended only towards the maintenance of the deity. A copy of the judgment may be sent by the Registry to the Official Trustee of the Calcutta High Court who may take necessary steps in that behalf. B C

R.P. Appeal dismissed