Smt. Nirupama Ghosh

Vs

Smt. Purnima Ghosh and Another

Civil Appeal No. 553 of 1967

(K. S. Hegde, P. Jagmohan Reddy, D. G. Palekar JJ)

25.01.1972

JUDGMENT

PALEKAR, J. -

1. This appeal by special leave filed by defendant No. 1 arises out of a judgment and decree for partition and accounts passed by the learned Subordinate Judge of 24 Parganas (Title Suit No. 37 of 1956) and confirmed by the High Court of Calcutta in Appeal No. 295 of 1960.

2. Respondent No. 1 was the plaintiff in the suit. Defendant No. 1 is her step-sister. Their father Gyanendra Krishna Ghose had two wives. The name of first wife was Saradindu Nivanani Dasi and from her he had six daughters. The name of the second wife who predeceased Gyanendra was Anil Probha Dasi. The plaintiff Purnima was her daughter. Gyanendra died in about 1940 and his first wife Saradindu Nivanani Dasi died in October, 1955. At the time of her death the plaintiff Purnima and defendant No. 1, Nirupama were the only two unmarried daughters and were thus entitled to the estate of Gyanendra Krishna Ghose. Defendant No. 1 had challenged in the suit the plaintiff's paternity but both the courts have held that she was the daughter of Anil Probha Dasi, the second wife of Gyanendra Krishna Ghose and it is not disputed before us that both the plaintiff and defendant No. 1 should be regarded and the heirs of Gyanendra Krishna Ghose.

3. Gyanendra Krishna Ghose left behind him some immovable property in Calcutta but we are concerned in this appeal with only one of them. That property is at present described as premises No. 49-B, Girish Mukherjee Road and premises No. 15-B, Ramesh Mitter Road. They adjoin each other - the first one being to the North of the second. Together they are part of what was formerly known as premises 49, Girish Mukherjee Road. Later the northern portion of premises 49 was described as premises 49-A, Girish Mukherjee Road and the southern portion was described as premises 15-A, Ramesh Mitter Road. Gyanendra had a brother named Prafulla Krishna Ghose and by an arrangement between them, in 1937, the properties were partitioned. The northern portion described as premises 49-A, was divided into two parts - the western part measuring 8 kattas 3 chittaks along with the built portion over it going to share of Gyanendra Krishna Ghose and the eastern portion measuring 5 kattas 3 chittaks and 27 square feet going to the share of Prafulla Krishna Ghose. Premises No. 15-A was also divided into two parts. The southern portion of it admeasuring 12 acres 1 chittak and the northern part of it admeasuring 6 kattas. This portion measuring 6 kattas is now designated as premises No. 15-B. The original No. 49-A, Girish Mukherjee Road continued to be the number of the premises therein which went to the share of Prafulla Krishna Ghose and similarly the original No. 15-A, continued to be description of its southern portion after the division.

4. The portion now bearing the description 49-A and 49-B, Girish Mukherjee Road and No. 15-B, Ramesh Mitter Road altogether measuring 19 kattas 6 chittaks 27 square feet which formerly formed one compact part of premises No. 49 was dedicated by a registered deed of settlement by Gyanendra's father, Jiban Krishna Ghose on November 1, 1918 for the service and worship of his titulary deity Sree Sree Radha Krishna Deb and for other minor religious charitable objects. He constituted himself as the first shebait and trustee of this endowment and by other provisions in the settlement deed he directed that his sons, his sons' sons and their representatives in succession would be the shebaits and trustee after him, carry on the worship and other religious ceremonies and live in the house as shebaits from generation to generation. Detailed instructions were given as to how the expenses were to be met and how his two sons Prafulla Krishna Ghosh and Gyanendra with their families should live in the house. The settlor Jiban Krishna died in 1912 and thereafter his sons Prafulla Krishna Ghosh and Gyanendra Krishna Ghose lived in that house with their families and carried out the instructions of their father with regard to the performance of worship and the ceremonies as mentioned in the settlement deed. In course of time which their growing families the two brothers found it difficult and inconvenient to perform the acts is terms of the directions given by the father and so after consulting lawyers, relations, friends and other members of the family, they entered into an agreement, also described as a Deed of Settlement, on October 6, 1937. They construed the earlier Settlement Deed of the father as a settlement of the whole of the property on them burdened with the charge for the proper worship and observances as directed by the father. For the sake of convenience they set apart premises No. 15-B for being hired out to tenants the receipts from whom were earmarked for the expenses of the worship and other religious ceremonies. The rest of the property which contained their dwelling house was divided into two parts and as already stated the eastern portion was allotted to Prafulla Krishna and the western portion to Gyanendra Krishna. They also arranged between themselves that the worship should be carried out by them separately every alternate year. This is how it went on from 1937.

5. Gyanendra died in 1940 and his widow Saradindu died in 1955 and their only heirs at the time were the plaintiff Purnima and respondent No. 1 Nirupama. Nirupama went into possession after her mother's death and she excluded the plaintiff. The plaintiff, therefore, filed the suit in 1956, out of which the present appeal arises.

6. The plaintiff's suit was for the partition and possession inter alia of properties 49-B and 15-B, according to her share and for accounts of the income of the property of which she had been deprived. Defendant No. 1, Nirupama contested the suit on two principal grounds. One was that the plaintiff was not the daughter of Gyanendra and the other was that the property in spite of what happened in 1937 was Debuttar property in which the plaintiff could not claim any share. She contended that the absolute interest in the property was vested in the deity and the charities subject only to the right of the shebait, for the time being, to reside in a part of the property. Both these contentions were rejected by the Trial Court and the High Court.

7. The only point argued before us by Mr. Sen on behalf of appellant Nirupama was that both the courts were in error in holding that the property in suit was not an absolute dedication but a partial dedication. It was contended that on a proper construction of Ext. 1, the Settlement Deed, dated November 1, 1918, made by Jiban Krishna Ghose there can be no doubt that the dedication was absolute in favour of the deities and the charities and the shebaits for the time being had no more than a duty or right to live in the premises. If the dedication was absolute the character of the dedication could not be changed by the internal arrangement of 1937, between the brothers Prafulla Krishna and Gyanendra Krishna. On a careful consideration of the contentions of Mr. Sen, we are not satisfied that the construction of the document Ext. 1, by the two courts is erroneous.

8. Where a settlor owns a large number of properties and settles one or two of them absolutely on a deity or a charity in unambiguous language there is generally no difficulty in construing such a document. But the difficulty arises when a pious settlor with a large family but few properties is torn between his desire to make a dedication in the name of his titulary deity, on the one hand, and his natural inclination to make a provision for the members of his family after his death, on the other. Bearing both considerations in mind he executes a Deed of Settlement which sometimes bristles with ambiguities. A favourite device with such settlors is to constitute his heirs as shebaits of the deity and give them a right of residence permanently though in the capacity of shebaits. The question in such cases often arises whether the dedication in favour of the deity is an absolute dedication coupled with a right or duty of the shebaits to mere residence therein or whether it is really an absolute grant in favour of his heirs with charge on the property for the proper worship of the deity associated with the duty of residing in the premises for that purpose. The contention on behalf of the plaintiff was that the Settlement Deed Ext. 1, effected an arrangement whereby the property of Jiban Krishna was divided between two objects - one object arising out of his desire to provide a permanent residence for his sons and their heirs and the other object being the performance and maintenance of the worship of certain deities and the observances of certain religious ceremonies on a permanent footing. In other words Jiban's heirs were made the real beneficiaries of the property subject to a charge in favour of the deities. It is not disputed that in all such cases courts must decide principally on the wording of the Settlement Deed whether the settlor intended to create an absolute dedication in favour of the deities or only a partial dedication.

9. On a perusal of the Settlement Deed it would initially appear that the property which was described in detail was dedicated to the deity :

> "I do by this Deed dedicate for the purpose of daily Sheba Puja, etc. of my titulary deity Sree Sree Radha Krishna Deb as well as for the performance of Puja, etc. on the Janmastami, Radhastami, Rashjatra, Dolejatra and other festivals as also for the due performance of the Puja of Sree Sree Luxmi Debi installed in my house every year in the months of Vadra, Kartick, Pous and Chaitra and also for the performance of Sree Sree Saraswati Puja, Sree Sree Ganga Puja, Sree Sree Manasha Puja, and Puja during Sree Sree Siva Ratri and Sree Sree Ram Navami as well as for the annual Sradh of my deceased revered father and deceased revered mother and for the performance of my annual Sradh after my death and also for small charities to the indigents and beggars... These properties will be perpetual trust properties allotted and endowed for all the above mentioned Deb-Sheba, religious and charitable purposes... I or my heirs cease to have and shall have no right or title whatsoever to create any encumbrance, or make gift of or sell or transfer in any way or make a partition of this property or of any portion thereof and this property shall not be attached or sold for any debt of any one. I and my heirs cease to have or shall not have any personal right to this property."

If the Deed of Settlement had rested there, there could be little difficulty in holding that it was an absolute dedication in favour of the deity and the charitable and religious objects mentioned. What follows in the long Settlement Deed, however, creates doubt about the real intention and since the document must be real as a whole to determine what exactly the settlor intended, we shall have to consider the more important portions of the rest of the document. The settlor proceeds to say that so long as he lived, he will live in the house but as a shebait and trustee. As far as the expenses of the religious observances are concerned, he said he will meet them from the income to be derived by letting out and settling on rent some portion of this property as far as possible. He has also

undertaken to set apart a portion of the house to be let out permanently to tenants so that he will get sufficient income to defray the expenses of the worship and other religious ceremonies. For the purpose he envisaged that certain portions of the house would have to be repaired and altered. In short, while he himself and his family live in the house, he had intended to set apart a portion of it to meet the expenses of the worship. He then proceeds to say that after his death his two sons would become the shebaits and trustees and in that capacity reside in the house with their families and carry on the worship as already mentioned. After the demise of the sons, the sons' sons and other representatives in succession would become shebaits and trustees and they also are expected to live in the house and let out a portion from the income of which the religious ceremonies were to be met. It is clear from this disposition in the Settlement Deed that his sons, sons' and their descendants were expected to live in the house from generation to generation. This he has reiterated a number of times in the rest of the document.

10. Details are thereafter given with regard to the installation of the deities, their worship and service and an idea of the total expense that might have to be incurred for that purpose. That comes to about Rs. 200/- a year. However, he warns :

> "As it is essentially necessary for daily regular performance of all the above mentioned Debsheba and religious performances as well as for the preservation of this property that the shebaits and trustees shall reside with their families in this house, they will be entitled to reside and shall reside in this house in successive generations."

11. He could well see that the families of sons and sons' sons may become very large in course of time and the house may not be able to accommodate them all. So he suggested that his heirs will construct new rooms at their own cost on the space adjoining the portions as present occupied by them and they would be entitled to live in the rooms constructed by them from generation to generation. Only, those rooms will remain as accretions to the Debuttar Trust Property. So that there may be no room for misunderstanding, he repeats "whoever of them will so construct anything at his own cost will have the right to enjoy and occupy the same for ever for himself and his heirs." Having said so he felt it necessary who should live where in the house. He directed that his wife and youngest daughter will be entitled to live and will live in this house during their life-time as shebaits and his eldest daughter will also be entitled to come and live in the house from time to time. Having constituted himself the sole shebait in his life-time and his sons the shebaits after his demise, his declaration that his wife and youngest daughter also will be shebaits during their life-time and his eldest daughter was entitled to come and live in the house is rather difficult to appreciate. It appears that the settlor was keen to see that his wife and daughters are not denied residence in the house by his sons when they became shebaits and in order to accommodate them they have been given a right of residence which they under the Hindu law would normally enjoy in the settler's property. Their description as shebaits is really unmeaning. Then he proceeds to allot rooms to the various members of the family and it is rather interesting to see that no particular room has been allotted for the installation of the deities, not even the titulary deity Sree Radha Krishna Deb which was still to be installed. Some parts of the house like the upper storey corridor and the northern verandah are kept apart for joint enjoyment by all the members of the family whenever they are not required for occasional celebrations or religious worship. In fact the whole of the house is directed to be utilised by the member of the family for residence and beneficial enjoyment and only a portion of the house which he had let out and was going to let out after effecting the necessary repairs and alternation was to be set apart for getting some income. Finally he directs that if the income was found to be insufficient for the purpose of meeting the expense the shebaits were required at their own cost to

repair and reconstruct the rooms in their respective possession according to their own will.

12. The High Court has pointed out that the house itself comprised 7 to 8 rooms but none of these rooms was specifically allotted either to the deity Sree Laxmi which was already installed in the house or to the idol Sree Radha Krishna which was still to be installed. Specific portions of the house were allotted to the settlor's sons and also his grand-sons. It was stated that whatever was allotted now by him must be enjoyed by them from generation to generation. As to the portions which are not specifically allotted, the shebaits were to possess the same jointly or separately according to their convenience. By insisting that the shebaits will be his descendants and the shebaits should continue to live in the house from generation to generation the settlor had unmistakably shown a desire that his descendants must have the beneficial enjoyment of the house. Indeed he is careful to say that this enjoyment will be as shebaits only but the veil is thin as already pointed out in the case of his wife and daughters who, though not strictly shebaits, under the Deed are given a right to live in the house during their life-time and for that purpose are described as shebaits. Moreover if the property was completely or absolutely dedicated to the deities and their worship, one would expect that a major portion of the house would be allocated for the purpose of worship and other observances and only a minor portion for the residence of the shebaits for the time being. There is no doubt that under the law shebaits have a right and, perhaps, the duty also of living in the premises dedicated to the deity. But it would be strange if the shebaits themselves should be in a position to enjoy the whole of the dedicated property to the detriment of the deity. In a genuine absolute dedication the settlor would take care that a fund is created for the repair and upkeep of the deity's abode from year to year and for that purpose direct that as much of the house as possible should be let out so that, in a place like Calcutta and round about, the deity may get a decent income not only for the routine Pujas and observance but also for the maintenance and repairs of the house in which the deity is installed. The settlor was well aware that by letting out a small portion of the house to the tenants, neither he nor the future shebaits would be able to meet even the small expense of the religious observances directed by him. If fact he exhorted his heirs that they should, out of their own pocket, spend for the repairs and maintenance of the house. Shebaits are merely managers of the deity and are not expected to spend out of their pocket for the upkeep of the deity. They might spend out of devotion to the deity, but there is no legal obligation on them. In these circumstances, a settlor intending an absolute dedication in favour of a deity or charity would not be more concerned that his heirs live in the house from generation to generation along with their families, but would be more concerned for the welfare of the deity and the permanent maintenance of the building in which the deity is housed. In our opinion, the Settlement Deed has actually settled the bulk of the property on his heirs and we are in agreement with the High Court that the real intention of the donor was not only to provide for the worship of his family deity and the religious and charitable purpose mentioned in the Deed but also to provide the heirs from generation to generation a permanent habitation in the property. The provision is inconsistent with an absolute dedication in favour of the deity and the charitable purposes. The High Court, therefore, is right in holding that this was a partial dedication. That is also the way the settlor's sons and other members of the family interpreted and gave effect to the Settlement by the arrangement they arrived at on October 5, 1937 (Ext. 1-A).

13. On that finding the appeal is liable to be dismissed. It is, however, clarified that the property was charged not merely for the expense of the religious and charitable objects mentioned in Ext. 1, but also for the residence of the shebait for the time being. Subject to this clarification the order passed by the High Court is confirmed and the appeal is dismissed with costs.

</html