SUPREME COURT OF INDIA

S. Rathinam @ Kuppamuthu

Vs.

L.S. Mariappan

(S.B. Sinha and Markandey Katju JJ.)

18.05.2007

JUDGMENT

S.B. SINHA, J:

1. Whether right to manage a temple and/or shebaitship can be a subject- matter of testamentary succession is the question involved in this appeal, which arises out of a judgment and decree dated 09.08.2000 passed by a Division Bench of the High Court of Madras in L.P.A. No. 62 of 1991, affirming a judgment and decree dated 28.01.1991 passed by a learned Single Judge of the said Court in A.S. No. 661 of 1979.

2. A private family temple known as 'Pechiamman Temple' was founded by one Palanichamy Chettiar. The genealogical table of the said Palanichamy Chettiar is as under :

PALANICHAMI CHETTIAR ---------- L.P. Lakshmanan Chettiar Shanmugam @ Palanichami Chettiar ---------- | Thangam @ Palanichami Chettiar Shanmugam @ Chellam @ Subbiah Palanichami Chettiar (Died) Ramalingam | L.S. Mariappan ---------- Rathinam @ Lakshmanan Chellam @ Subbiah Patchaimuthu Shanmugham Kuppumuthu (Died) Palanisami

3. The founder of the trust dedicated properties for the maintenance of the temple and performance of Pujas consisting of four shop rooms in the front and a few residential buildings at the back of the temple. Disputes and differences having been arisen between the two branches of the family, Thangam son of Shanmugam filed a suit, which was marked as O.S. No. 9 of 1943. The said suit was decreed, relevant portion whereof reads as under :

"Clause (iii) : That the C schedule properties be managed in turns between the Plaintiff and the Second Defendant on the one hand and Defendants 1 and 3 to 9 on the other, each branch for a period of two years.

Clause (iv) : That the said two branches also be in possession during their term of management of the temple jewels mentioned as items 1 to 6 at page 13 of the first Defendant's written statement (specified hereunder) in addition to amend as per order in I.A. No. 375 of 1944 dated 15.04.1944) the bronze Soodam, thattu with Kalias referred tol in the same page of the written statement."

4. The said decree has attained finality, pursuant whereto the branch of Shanmugam became entitled to a right of term of management for a period of two years. On or about 04.07.1956, L.P. Lakshmanan Chettiar and his two sons, however, entered into a partition deed for division of their

properties including the terms of management of the suit temple and its properties. It was agreed that Lakshmanan Chettiar himself shall hold the posts of pujari as well as trustee for two years, whereas his two sons shall hold the same for a period of eight months each.

5. In respect of the properties in question, it was averred :

"No. 1 and 2 party shall hold, possess and enjoy the rent and income derived from the C Schedule property."

6. Lakshmanan Chettiar executed a will on or about 24.05.1962 bequeathing his share in favour of his son Chellam. He died on or about 10.04.1973. It is not in dispute that after the death of Lakshmanan Chettiar, Chellam had been acting as a Pujari as also a trustee for a period of sixteen months and Shanmugam and his sons had been managing the said properties for a period of eight months. Chellam died on 10.02.1980, leaving behind Respondent No.1 herein as his heir and legal representative. Shanmugam also appears to have executed a will in favour of his sons.

7. For framing a scheme in respect of the said properties, a suit was filed by the appellants against the said Thangam and others, which was marked as O.S. No.222 of 1975. The learned Subordinate Judge dismissed the said suit by a judgment and order dated 19.02.1979. An appeal was preferred there- against, which was marked as A.S. No. 661 of 1979, to which we shall advert a little later.

8. However, after the death of Chellam, the sons of Shanmugam filed a suit, which was marked as O.S. No. 83 of 1982, inter alia, praying for a declaration that Respondent No.1 herein was not the legal heir of Chellam @ Subbiah. Validity of the said will dated 24.05.1962 was put in question. The learned Principal Subordinate Judge while holding Respondent No.1 to be the son of Chellam, also upheld the validity of the said will executed by Lakshmanan Chettiar. Aggrieved by and dissatisfied with the said judgment and decree dated 13.03.1986, an appeal came to be preferred by the appellants herein, which was marked as A.S. No.1363 of 1988. Both the appeals were heard together by the learned Single Judge of the High Court.

While holding the will to be not valid in law, a scheme was directed to be framed in respect of the management of the said properties. A Letters Patent Appeal being No. 61 of 1991 was filed by Respondent No. 1 herein, aggrieved by the direction to frame a scheme. He also preferred a Letters Patent Appeal against that part of the finding of the learned Single Judge that the will executed by Lakshmanan Chettiar was not valid in law. Respondent No. 4 herein also preferred a Letters Patent Appeal, which was marked as L.P.A. No. 128 of 1991, questioning the framing of scheme. Appellants herein also preferred a cross-objection, which was marked as Cross Objection No. 106 of 1995 as against the finding that Respondent No. 1 was the son of Chellam @ Subhiah. The appeals and the cross-objection were heard together.

9. It was accepted before the Division Bench that the scheme framed pursuant to the decision of the learned Single Judge was working satisfactorily and no interference therein was called for. The finding of the learned Single Judge to the effect that Respondent No. 1 was the son of Chellam was also not seriously disputed. In regard to the validity of the will, however, the Division Bench held the same to be valid. Consequently, it was held that Respondent No. 1 was entitled to be in the management of the suit temple and its properties for a total period of sixteen months within 24 months allotted to the branch of Lakshmanan Chettiar.

10. Three of the plaintiffs are before us, being aggrieved by and dissatisfied with the said judgment

and decree. No appeal has been preferred as against rejection of the said Cross Objection No. 106 of 1995 or dismissal of the Letters Patent Appeal arising out of A.S. No. 661 of 1979.

11. Mr. V. Prabhakar, learned counsel appearing for the appellants, in support of the appeal, submitted :

i) The right to manage a property and pujariship being a personal right, cannot be transferred being not transferable within the meaning of Section 6(d) of the Transfer of Property Act;

ii) The purported will executed by Lakshmanan Chettiar dated 24.05.1962 must be held to be invalid in law.

iii) The right to hold the office of a pujari and a trust being a personal right, would come to an end with the death of the holder of the office, whereupon the same would devolve upon his heirs and legal representatives. Reliance, in this behalf, has been placed on Kakinada Annadana Samajam etc. v. The Commissioner of Hindu Religious and Charitable Endowments, Hyderabad & Others etc.

[(1971) 2 SCJ 527 : (1970) 3 SCC 359]

12. Mr. K.K. Mani, learned counsel appearing on behalf of the respondents, on the other hand, would support the judgment. The learned counsel would contend that the issue is covered by a decision of this Court in Angurbala Mullick v. Debabrata Mullick [1951 SCR 1125].

13. It was urged that the appellants are estopped and precluded from questioning the validity or otherwise of the will as even Shanmugam had also executed a will. It was pointed out that the will executed by Lakshmanan Chettiar on 24.05.1962 was given effect to by the parties on his death which took place on 10.04.1973 and only upon the death of Chellam, the appellants herein claimed a right of reversion therein on the premise that Respondent No. 1 herein was not the son of Chellam.

14. The learned counsel appearing on behalf of Respondent No. 4 herein, would submit that the disputes and differences arose between the parties in regard to not handing over the possession of the properties in terms of the judgment and decree passed by the competent courts and in that view of the matter, this Court may issue an appropriate direction.

15. The trust in question is a private trust. As a private trust, the terms and conditions of the management of the temple, would, therefore, be subject to the desire of the founder of the trust. No document in writing was produced in this behalf. The parties, however, understood the will of the founder of the trust to the effect that holding of the office of Pujariship as also the trusteeship for a term would be permissible in law. It was so determined in the suit by the learned Subordinate Judge in O.S. No. 9 of 1943.

16. The very fact that both the branches had agreed to a term of management of two years each and had given effect to the decree passed by the learned Subordinate Judge in the said suit is a pointer in that behalf.

Furthermore, Lakshmanan Chettiar and his two sons also executed a deed of partition on 04.07.1956. It was agreed to by the parties to the said deed of partition that each of them would hold the office of Pujariship and trusteeship for a period of eight months.

17. The issue must, therefore, be determined in the aforementioned backdrop of events.

18. Before, however, we advert to the legal issue, we may notice that the plaintiffs in the suit claimed relief on the ground that upon the death of Chellam, his right has vested in them as reversioners, contending that Respondent No. 1 herein was not his son. Once a right of reversion in the said office for a particular period, namely, sixteen months in a period of two years is claimed, the existence of right in Chellam could not have been disputed. In law, the same would be deemed to have been accepted. Unless the arrangements made by the parties also and/or the devolution of the properties by reason of the said will executed by Lakshmanan Chettiar is found to be opposed to 'public policy' as envisaged under Section 23 of the Indian Contract Act, 1872, there does not exist any legal impediment in giving effect thereto, particularly when the same would depend upon the desire in that behalf by the founder of the trust.

19. A will denotes a testamentary document. It means a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It is in its own nature ambulatory and revocable during his life.

20. In Uma Devi Nambiar and Others v. T.C. Sidhan (Dead) [AIR 2004 SC 1772], it was held :

"10. Will is a translation of the Latin word "

voluntas ", which was a term used in the text of Roman law to express the intention of a testator. It is of significance that the abstract term has come to mean that document in which the intention is contained. The same has been the case with several other English law terms, the concrete has superseded the abstract obligation, bond, contract, are examples (William: Wills and Intestate Succession , p. 5). The word "testament" is derived from " testatio mentis ", it testifies the determination of the mind. A Will is thus defined by Ulpians as " Testamentum est mentis nostrae justa contestatio in id sollemniter facta to post mortem nostrum valeat ." Modastinus defines it by means of voluntas . It is " voluntatis nostrae justa sententia, de eo quod quis post mortem suam fieri vult (or velit)"; the word " justa " implying in each, that, in order to be valid, the testament must be made in compliance with the forms of law. It means, "the legal declaration of a man's intentions, which will be performed after his death". A last Will and testament is defined to be "the just sentence of our Will, touching what we would have done after our death". Every testament is consummated by death, and until he dies, the Will of a testator is ambulatory. Nam omne testamentum morte consummatum est; et voluntae testamentoric est embulatoria usque od mortem . (For, where a testament is, there must also of necessity be death of testator; for, a testament is of force after men are dead; otherwise it is of no strength at all while the testator liveth.) A "Will", says Jarman, "is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life." (Jarman on Wills , 1st Edn., p. 11.) This ambulatory character of a Will has been often pointed out as its prominent characteristic, distinguishing it, in fact, from ordinary disposition by a living person's deed, which might, indeed postpone the beneficial possession or even a vesting until the death of the disposer and yet would produce such postponement only by its express terms under an irrevocable instrument and a statement that a Will is final does not import an agreement not to change it. (Schouler: Law of Wills , S. 326). A Will is the aggregate of man's testamentary intentions so far as they are manifested in writing, duly executed according to the statute"

21. A testator by his will, may make any disposition of his property subject to the condition that the same should not be inconsistent with the laws or contrary to the policy of the State. A will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing. It is not a transfer but a mode of dovolution. [See Beru Ram and Others v.

Shankar Dass and Others - AIR 1999 J&K 55].

22. The question as to whether shebaitship can be a subject-matter of a will came up for consideration before a Four-Judge Bench of this Court in Angurbala Mullick (supra), wherein it was categorically held :

"As the Judicial Committee observed in the above case, in almost all such endowments the shebait has a share in the usufruct of the debutter property which depends upon the terms of the grant or upon custom or usage. Even where no emoluments are attached to the office of the shebait, he enjoys some sort of right or interest in the endowed property which partially at least has the character of a proprietary right. Thus, in the conception of shebaiti both the elements of office and property, of duties and personal interest, are mixed up and blended together; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property"

It was also held :

"21. Assuming that the word "property" in Act 18 of 1937 is to be interpreted to mean property in its common and ordinarily accepted sense and is not to be extended to any special or peculiar type of property, even then we think that the other contention of Mr Tek Chand is perfectly sound. Succession to shebaitship, even though there is an ingredient of office in it, follows succession to ordinary or secular property. It is the general law of succession that governs succession to shebaitship as well. While the general law has now been changed by reason of Act 18 of 1937, there does not appear to be any cogent reason why the law as it stands at present should not be made applicable in the case of devoluton of shebaitship."

23. The principle enunciated therein was considered at some details by a Division Bench of the Andhra Pradesh High Court in Narayanam Seshacharyulu and Another v. Narayanam Venkataccharyulu [AIR 1957 AP 876], but it is not necessary to advert thereto in the facts of the present.

24. In Shambhu Charan Shukla v. Shri Thakur Ladli Radha Chandra Madan Gopalji Maharaj and Another [(1985) 2 SCC 524], this Court held :

"15. The text of Hindu law and the aforesaid two decisions of this Court and the earlier decision in Angurbala Mullick case 2 show that shebaitship is in the nature of immovable property heritable by the widow of the last male holder unless there is an usage or custom of a different nature in cases where the founder has not disposed of the shebaiti right in the endowment created by him. In the present case Purushottam Lal has not made any disposition regarding shebaiti right in his Will, Ext.

A-2 dated April 14, 1944 whereby he created the endowment. No custom or usage to the contrary has been pleaded. Therefore, the widow Asharfi Devi had succeeded to the shebaiti right held by him on his death as a limited owner and that right has become enlarged into an absolute right by the provisions of Section 14(1) of the Hindu Succession Act, 1956 and she could transfer that right by a Will in favour of a person who is not a non-Hindu and who could get the duties of shebait performed either by himself or by any other suitable person. In these circumstances I hold that the second respondent has acquired the shebaiti right under the Will Ext. A-6 executed by Asharfi Devi on her death on March 7, 1963. No interference is called for in this appeal with the judgment of the

learned Single Judge of the High Court. The appeal is accordingly dismissed with costs."

25. Sabyasachi Mukharji, J. in his concurring Judgment stated the law thus :

"In my opinion it is well-settled by the authorities that shebaitship is a property which is heritable. The devolution of the office of shebait depends on the terms of the deed or the Will or on the endowment or the act by which the deity was installed and property consecrated or given to the deity, where there is no provision in the endowment or in the deed or Will made by the founder as to the succession or where the mode of succession in the deed or the Will or endowment comes to an end, the title to the property or to the management and control of the property as the case may be, follows the ordinary rules of inheritance according to Hindu law"

26. In Ranbir Das and Another etc. v. Kalyan Das and Another [(1997) 4 SCC 102], this Court stated the law thus :

"Will in the normal connotation, takes effect after the demise of the testator. But in the case of nomination of a Shebait, the nomination takes effect from the date of its execution though it is styled as a Will. Once it takes effect, the nominee becomes entitled to go into the office as a Shebait after the demise of the last chela of Hari Dass. Under these circumstances, the shebaitship being a property, vests in Rambir Dass and he could administer the property and manage the temple for the purpose of spiritual and other purposes with which Hari Dass, the original founder had endowed the property to Lord Krishna and Radha."

27. We may notice that Dr. B.K. Mukherjea in his Tagore Law Lectures, on The Hindu Law of Religious and Charitable Trust, , inter alia, observed :

"5.30. Shebit's right of nominating his successor.- The founder of an endowment can always confer upon a Shebait appointed by him the right of nominating his successor. Without such authority expressly given to him, no Shebait can appoint a successor to succeed to him in his office. The power of nomination can be exercised by the Shebait either during his lifetime or by a will, but he cannot transfer the right of exercising this power to another person."

28. In the aforementioned backdrop of events, we may test the decisions relied upon by Mr. Prabhakar.

29. In Kakinada Annadana Samajam (supra), this Court was concerned with the question as to whether a right of shebaitship can be held to be a fundamental right within the meaning of Article 19(1)(f) of the Constitution of India, as it then stood, and consequently whether the provisions of the Andhra Pradesh Charitable and Hindu Religious Endowments Act (XVII) of 1966 would be a law within the meaning of clause (5) thereof. It was held that the trusteeship and pujariship would be a property but not a property within the meaning of Article 19(1)(f) of the Constitution of India.

30. In Kali Kinkor Ganguly v. Panna Banerjee and Others [(1974) 2 SCC 563], although a Division Bench of this Court opined that 'a transfer of shebait by Will is not permitted because nothing which the shebait has can pass by his Will which operates only at his death'; but the question as to whether a will would amount to a transfer or not did not fall for consideration therein. The question which arose for consideration was as to whether the right of shebaitship, temple and the deity installed therein is a transferable. This Court while dealing with the said contention noticed :

"14. In the Hindu Law of Religious and Charitable Trust, First Edn, being the Tagore Law Lectures

delivered by Dr B.K. Mukherjea the statement of law at p. 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 proprietary 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 temporalities. 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 be 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."

31. However, yet again the court noticed that the right against alienation had been relaxed by reason of certain circumstances, stating :

"17. 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 p. 231 in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust, First Edn. 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."

32. The Calcutta High Court in Rajeshwar v. Gopeshwar, [(1908) 35 Cal.

226] opined that nomination of a successor by will may be permissible under a usage justifying the same. A somewhat different view was taken by the same High Court in Sovabati Dassi v. Kashi Nath [AIR 1972 Cal. 95]. The Bombay High Court, however, took a different view. [See Mancharam v.

Pranshankar (1882) 6 Bom. 298].

33. However, we need not enter into the said question as the law is now well-settled in view of the decision of this Court in Shyam Sunder v. Moni Mohan [AIR 1976 SC 977] [See also Nandlal v. Kesharlal AIR 1975 Raj.

226].

34. Such a nomination is also permissible being intervivos. In view of the decisions of this Court, we are of the opinion that it is not necessary for us to consider the decision of the Madras High Court, on which Mr. Prabhakar has placed strong reliance, as the said decision revolves round the question as to whether such a right is transferable or not. A will being not a transfer, the bar contained in Section 6(d) of the Transfer of Property Act, in our opinion, will have no application. We, therefore, agree with the findings of the Division Bench of the High Court that the will is valid in law.

35. Furthermore, the necessity to have a fixed term of management for the purpose of running the

temple in question has been accepted by the family for a long time. If it is to be held otherwise, the court will have to disturb even a binding decree passed by the competent court of law which is binding otherwise on the parties, rendered as far back as in 1944. It is for the said purpose that the conduct of the appellants becomes relevant. They not only accepted the right of the branch of Shanmugam but also accepted the right of Chellam. It has not been disputed that Chellam had been exercising the right of shebaitship for a period of sixteen months in a period of two years for a long time. Once the finding of the courts below to the effect that Respondent No. 1 was his son, his right of inheritance is, thus, not being disputed; in our opinion, the contentions raised in this appeal cannot be accepted.

36. We, therefore, affirm the findings of the Division Bench of the High Court. The question, however, which remains for consideration would be as to whether this Court should pass any order directing the parties to hand over possession on expiry of their term. In law, undoubtedly, they are bound to do the same. They cannot hold the office more than the period directed by the court of law. Their terms have to be fixed. We may notice that before the Division Bench of the High Court, the parties agreed to the following :

"a) The branch represented by Ramlingam (applicant herein) would manage and administer the temple and its properties for a period of two years.

b) In so far as the other branch consisting of 1st respondent on one side and respondents Nos. 2 to 4 on the other, they would be managing and administering the temple for a period of 2 years i.e. one year each."

37. This Court in a contempt proceeding initiated by Respondent No. 4, which was marked as Contempt Petition No. 550 of 2004, directed :

"Without going into the allegations and counter allegations made in the contempt petition, we direct respondent No. 1 to hand over the possession of the temple in question to the applicant herein on 11th December, 2004 at 11.00 a.m. in the presence of the bailiff of the court of Principal Subordinate Judge, Madurai who will take inventory of the movables in the temple and the same shall be signed by the applicant herein as well as the 1st respondent in the appeal. The 1st respondent will also deposit a sum of Rs.10,000/- within four weeks from today. The said amount shall be put in a fixed deposit in the name of the temple and the Managing Trustee would be entitled to withdraw only interest thereof. The compliance in this regard shall be intimated to this Court in the 1st week of January, 2005."

38. Several orders have been passed by this Court from time to time. It appears that despite such directions, one party or the other claims to hold the office despite expiry of the term. In this appeal, as has been suggested by Mr. Prabhakar, it may not be practicable for us to fix any time for taking over or handing over of possession. It, however, appears that an execution case is pending before the Additional Subordinate Judge, Madurai.

39. We, therefore, in exercise of our jurisdiction, direct the learned Trial Judge, to pass an appropriate order in this behalf. The learned Trial Judge may pass an appropriate order in regard to the amount deposited by Respondent No.1 pursuant to the said order dated 07.12.2004 or any other order that may be brought to its notice.