**IN THE SUPREME COURT OF BANGLADESH**

APPELLATE DIVISION

**PRESENT:**

**Mr. Justice Surendra Kumar Sinha, Chief Justice**

**Mrs. Justice Nazmun Ara Sultana**

**Mr. Justice Syed Mahmud Hossain**

**Mr. Justice Hasan Foez Siddique**

**CIVIL APPEAL NO.163 OF 2009**

(From the judgment and order dated 23.08.2006 passed by the High Court Division in Writ Petition No.9008 of 2005.)

Bangladesh, represented by the Secretary, Ministry of land, Secretariat, Dhaka: Appellant.

=Versus=

Abdul Hye and others: Respondents.

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|---|---|
| For the Appellant: | Mr. Mahbubey Alam, Attorney General, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record. |
| For Respondent No.2: | Mr. Probir Neogi, Senior Advocate, instructed by Mr. Zainul Aabedin Advocate-on-Record. |
| For the Respondent Nos.9-10: (on added) | Mr Zainul Abedin, Advocate-on-Record. |
| For the Respondent Nos.1 & 3-8: | N.R. |

***Date of Hearing: 12th & 19th January, 2016.***

***Date of Judgment: 19th January, 2016.***

**J U D G M E N T**

**Surendra Kumar Sinha, C.J**: This appeal by leave is directed from a judgment of the High Court Division making the rule nisi absolute declaring the letters under memos dated 12th September, 2005 and

31st October, 2005 issued by the Ministry of Land, Section 8, government of Bangladesh to be without lawful authority. It also quashed the proceedings in Sylhet Kotwali P.S. Case Nos.117 dated 27th September, 2005 and 12 dated 2nd November, 2005 initiated against the writ petitioners Abdul Hai and Ragib Ali.

Facts relevant for the disposal are as under:

Tarapur Tea Estate originally belonged to C.K. Hurdson. After his death, his son, W.R. Hurdson, inherited the tea estate who transferred it to Baikuntha Chandra Gupta by a registered deed dated 10th June, 1882. Thereafter, Baikuntha Chandra Gupta gifted the tea estate in favour of the Deity Sree Sree Radha Krishna Jieu on 2nd July 1892. In order to look after the tea estate for the said Deity a trust was formed in the name of the said Deity. Baikuntha Chandra Gupta appointed his son Radha Lal Gupta as the Shebait of the trust. Accordingly, during S.A. operation the record was correctly published in the

name of Shebait Radha Lal Gupta. In the year, 1968, the tea estate was declared as enemy property by the then Government of Pakistan. In 1971 the then Shebait Rabindra Lal Gupta, his brother Rejendra Lal Gupta and other family members were killed by the Pakistani army except the minor boy Pankoj Kumar Gupta. In the circumstances, on behalf of the only alive minor Pankoj Kumar Gupta, the then Shebait Sabita Rani Gupta, Mukul Bala Gupta and Chhaya Gupta filed Title Suit No.55 of 1971 in the 2nd Court of Subordinate Judge, Sylhet, for a declaration that the tea estate is not an enemy property. In the said suit Bangladesh Government was one of the parties. The tea estate was ultimately declared as the property of the Deity. The Shebait took control over the tea estate and subsequently, the said Pankoj Kumar Gupta attained majority, and he was appointed as the sole Shebait of the tea estate.

While he was acting as such, on 16th September, 1988 he applied to the Government for permission to

transfer the tea estate to the writ petitioners in the interest of the Deity. The office of the writ-respondent No.1 by its Memo No.Bhu: Mi/Sha-8/Khajoj/53/89/446 dated 12th October 1989 accorded permission to the Shebait to grant a long term lease of the tea estate. Pursuant to the said permission the Shebait executed a deed of lease for 99 years in favour of writ-petitioner No.1 by registered deed dated 12th February, 1990. By dint of the lease deed, the writ-petitioner NO.1 became the absolute owner and possessor of the tea estate being a lessee for 99 years. Since taking over the ownership and possession of the tea estate, the writ-petitioner No.1 invested huge amount of money for developing the tea estate in order to produce quality tea in the garden for earning foreign currency by exporting.

Some interested persons brought some false and frivolous allegations against the writ-petitioners before the Government of Bangladesh in the year 1994 alleging that they grabbed the tea estate by

fraudulent and illegal means. Writ-petitioner No.1 applied to the government for allowing him to mutate his name in the revenue record. The Ministry of Law by its Office Notes opined that writ-petitioner No.1 was legally entitled to the mutation.

Writ-respondents at the behest of some influential people, are abstaining from mutating the name of the writ-petitioners to dispossess them from the tea estate with the help of writ-respondent Nos.5-7. Writ-petitioner No.1 filed Title Suit No.91 of 2005 with a prayer for a permanent injunction against the appellants. The Government had acquired 32.91 acres of land of the aforesaid tea estate for constructing the Sylhet Divisional Stadium and Shahajalal University of Science and Technology for which an amount of Tk.30,76,189.20 was paid as compensation in 1990.

The writ-petitioner No.2 who was then the constituted attorney of the Shebait received the compensation on behalf of the Shebait and the money

was invested for the development of the tea estate. The writ-respondents are barred by the principles of estoppel from questioning the transfer of the tea estate and receipt of the compensation. While the said suit for permanent injunction was pending, the appellant No.1 issued the impugned Memo dated 12th September, 2005.

Upon receiving the said instruction, writ-respondent No.6 by his Memo No.SA/Bondo/Chaa/5-599-05/222 dated 27th September,2005 instructed writ-respondent No.7 to file a criminal case against the writ-petitioners consequent upon which Kotwali Police Station Case No.117 dated 27th September, 2005 under Section 419/420/406/467/468/471/109 of the Penal Code was filed by him. Subsequent to filing of the said F.I.R, the writ-respondent No.1 again directed writ-respondent No.5 to file a criminal case against the writ-petitioners by Memo dated 31st October, 2005. Thereafter, the writ-respondent No.5 by its Memo dated 31st October, 2005, directed writ-respondent

NO.7 to comply with the order of writ respondent NO.1. Writ-respondent No.7 again filed Kotwali Police Station Case No.12 dated 2nd November, 2005 against the writ-petitioners under Section 446/468/471/420/34 of the Penal Code referring to the letter of the Ministry of Land dated 31st October, 2005.

The High Court Division made the rule nisi absolute on the reasonings that the government had acquired 32.91 acres of land of the tea estate for constructing Sylhet Divisional Stadium and Shahajal Science and Technology University; that the writ petitioner No.2 received the compensation of Tk.30,76,189.20 which he invested for the development of the tea estate; that since the said acquisition was legal, the government is debarred from questioning the transfer of the remaining area of the tea estate; that the impugned memos have been issued without lawful authority and that the criminal proceedings initiated against the writ petitioners are also unlawful.

Learned Attorney General has taken us to the orders impugned in the writ petition and the judgment and submits that tea estate being a Debutter property, it cannot be alienated in favour of the writ petitioners for 99 years. He further submits that disputed facts having been raised in the writ petition challenging the legality of annexure 'A' series, the High Court Division erred in law in declaring the said memos without lawful authority.

Admittedly, the tea estate in question is a debutter property. The government conducted an inquiry regarding the transfer of the debutter tea estate and upon such inquiry it was detected about the creation of forged permission from the government and made the following recommendations:

> "**(ক)** ভূমি মন্ত্রণালয়ের ভূয়া পত্রের বরাতে সেবাইত কর্তৃক তারাপুর চা বাগানের জমি হস্ত
> ান্তর ছিল একটি বড় ধরনের জালিয়াতির ঘটনা। ইহাতে সরকারের বিপুল পরিমান মূল্যবান
> জমি হাত ছাড়া হওয়ার উপক্রম করিয়াছে। ভূয়া পত্রের বরাতে দলিল রেজিষ্ট্রিকরণ, জমির
> দখল গ্রহন, মেডিকেল কলেজ স্হাপন, হাউজিং এষ্টেট নির্মাণ এবং মার্কেট নির্মাণসহ

অন্যান্য প্রক্রিয়া সরকারী জমি আত্মাসাতের ঘটনায় জড়িতদের বিরুদ্ধে অবিলম্বে ফৌজদারী মামলা রুজু করিতে হইবে ।

(খ) তারাপুর চা বাগানের জমি যথা  সম্ভব শীঘ্র বিধি মোতাবেক সরকারের দখলে নেওয়ার জন্য প্রয়োজনীয় কার্য্যক্রম গ্রহন করিতে হইবে  ।

(গ) তারাপুর চা বাগান একটি দেবোত্তর সম্পত্তি  । দেবতাই দেবোত্তর সম্পত্তির মালিক । কোন সেবায়েত দেবোত্তর সম্পত্তি নিজের বলিয়া দাবী করিতে পারে না । কাজেই হস্তান্তর দলিল সম্পূর্ণরূপে অবৈধ । ইহা অবিলম্বে বাতিল করিয়া তারাপুর চা বাগানের ব্যবস্হাপনা ও পরিচালনার দায়িত্ব  জেলা প্রশাসক সিলেট কর্তৃক নিয়োজিত কোন সেবায়েত বা কমিটিকে অর্পণের প্রয়োজনীয় ব্যবস্হা গ্রহন করিতে হইবে ।

(ঘ) দেবোত্তর সম্পত্তি অধিগ্রহনের ফলে জনাব রাগীব আলীকে ক্ষতিপূরণ বাবদ প্রদত্ত ৩০,৭৬,১৮৯.২০ টাকা প্রদান বিধি সম্মত হয় নাই । বিষয়টি পরীক্ষা করিয়া ক্ষতিপূরণ বাবদ প্রদত্ত টাকা বিধি মোতাবেক আদায়ের প্রয়োজনীয় ব্যবস্হা করিতে হইবে ।

(ঙ) তারাপুর চা বাগান নিয়া বিভিন্ন আদালতে যে সকল মামলা বিচারাধীন রহিয়াছে সেইগুলিতে সরকারী স্বার্থ সংরক্ষনের উদ্দেশ্যে অবিলম্বে জেলা প্রশাসনকে পক্ষভূক্ত হইবার প্রয়োজনীয় পদক্ষেপ গ্রহন করিতে হইবে ।

(চ) যে সকল সম্পত্তি ইতিমধ্যে বিভিন্ন আদালতের রায় ডিক্রির মাধ্যমে বিভিন্ন ব্যক্তির অনুকুলে হস্তান্তরিত হইয়াছে তাহা পুনরুদ্ধার করিবার প্রয়োজনীয় আইনগত ব্যবস্হা গ্রহন করিতে হইবে ।"

It was found that the permission for transfer of the tea estate by Shebait was a product of forgery and that the writ petitioners established a Medical College, a housing estate and a market by removing tea plantations; that Tarapur Tea Estate should be taken over possession by the government; that it being a debutter property, the Deity is the owner of the property, and therefore, the transfer was totally unlawful; that the compensation money of Tk.30,76,189.20 received by Ragib Ali should be recovered and that the Deputy Commissioner should be directed to take steps for hearing of the proceedings relating to the tea estate.

Some facts are admitted in this appeal. Tarapur Tea Estate is a debutter property and it was being managed by the Shebait of the Deity before it was grabbed by the writ petitioners. Another admitted fact is that the respondents managed to obtain a long term lease deed of 99 years in respect of Tarapur Tea Estate. The respondents thereupon established a

Medical College, a housing estate and a super market by damaging the tea plantations and utilized a portion of the tea estate for purposes other than the purposes for which the property was dedicated to the Deity.

The first question to be looked into is whether a debutter property can be leased out for 99 years by the Shebait even if it is assumed that the Shebait has agreed to transfer it with prior permission of the concerned Ministry. This takes us to consider the powers of a Shebait to alienate the debutter property. The mere fact that an idol has been established does not itself create a debutter. A religious trust by way of debutter can come into existence only when a property is dedicated for worship or service of the idol. When there is an endowment in favour of an established idol, no trust in the legal sense of the term can possibly come into being - it is only the moral duty of the person who founds the Deity or his heirs to carry on the worship

in such a way as they think proper in accordance with the deed of endowment.

Therefore, if the ancestor makes no endowment, there is no legal obligation on the descendants to spend money for the worship of the idol; and if one of them spends money, he cannot bring a suit for contribution against his co-heirs. A property can be given to an idol either at the time when it is consecrated or at any subsequent period. So, question comes in about the dedication of the property. When a property is given absolutely by a pious Hindu for worship of an idol, the property vests in the idol itself as a juristic person. This is quite in accordance with Hindu ideas and has been uniformly accepted in a long series of decisions by different courts including the Judicial Committee of the Privy Council and also in the case of Kalanka Devi Sansthan V. M.R.T. Nagpur, AIR 1970 SC 439. In this case it has been observed that the 'properties of the law vest in the trustee whereas in the case of an idol or

a Sansthan they do not vest in the manager or the Shebait.'

In province of East Pakistan V. Kshiti Dhar, 16 DLR (SC) 457, it was held that under the Hindu Law no particular form or mode of creating a dedication is prescribed, but if such a dedication is not evidenced by a document of dedication it must, as pointed out by the High Court itself, by quoting from a judgment of the Supreme Court of India in the case of Manakuru Das Matharami Reddi V. Duddukuni Shubba Rao, AIR 1957 S.C. 797, be established 'by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the private secular character of the property and its complete dedication to charity. What is necessary to be established is that not only there is a clear and unequivocal intention to dedicate but also that such intention was in fact carried into effect.'

A trust would be denominated a religious or charitable trust if it is created for purposes of

religion or charity. Two things, therefore, require to be considered in this connection are, (a) what are religious and charitable purposes? and (b) what is a trust? Religion is absolutely a matter of faith with individuals or communities, and it is not necessarily theistic, i.e Buddhism. The expression 'religious purpose' is understood in a case where the purpose or object is to secure the spiritual well-being of a person or persons according to the tenets of the particular religion which he believe in (B.K.Mukherjea on The Hindu Law of Religious and Charitable Trusts).

The conception of 'trust' in its technical sense was devised by the Chancery Courts in England which as Courts of Conscience attempted to supply the deficiencies of the English Common Law, by administering what were known as principles of equity and natural justice. Lewin in his well-known treatise on the Law of Trusts defines 'Trust' to be a "confidence reposed in some other, not issuing out of

the land, but as a thing collateral, annexed in privity to the estate of the land, for which *cestui que* trust has no remedy but by *Subpoena* in the Chancery'.

Hindu concepts of religious and charitable gifts have been operative under two head '*Istha*' and '*Purtta*'. The compound word Istha-Purtta has been retained in the writings of all Brahminical sages and commentators down to modern days. 'Istha' meant Vedic sacrifices, and rites and gifts in connection with the same. 'Purtta' on the other hand, means other pious and charitable acts which are unconnected with any one or Vedic sacrifice. The meaning of the two expressions has been discussed elaborately by Pandit Pran Nath Saraswati in his Tagore Law Lectures on the Hindu Law of Endowments.

In the Hindu Law system, there is no line of demarcation between religion and charity. The Hindu religion recognizes the existence of a life after death, and it believes in the law of 'karma'

according to which the good or bad deeds of a man produce corresponding results in the life to come. If we look into the essentials of dedication for religious and charitable purposes, we will find that there are various works of this kind where the subject of gift or dedication has been elaborately discussed, among others, of Danakhanda by Hemadri, two works of Danakhanda by Hemadri, namely *Purta kamalakar* and *Dana Kamalakar* by Kamalakar Bhatta; Pratistha *Mayukha* of Nikantha and *Pratistha* Tattwa of Raghunandan (B.K. Mukherjea, ibid). In every act of dedication, there are two essential parts, one of which is called '*Sankalpa*' or the formula of resolve, and the other '*Utsarga*' or renunciation. The ceremonies, as Mandalik points out, always being with a '*Sankalpa*', which after reciting the time of gift with reference to age, year, season, month etc. states what object the founder has in making the gift. '*Utsarga*', on the other hand, completes a gift

by renouncing the ownership of the founder in the thing given.

If we examine the details on how Debutter is managed and administered, there is no doubt that it is in an ideal sense that the dedicated property vests in an idol. In Prosonna Kumari Debya V. Golab Chand Baboo, (1875) LR 2 IA 145, the Judicial Committee of the Privy Council observed that "the person so entrusted must, of necessity, be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of necessary funds to preserve and maintain them".

This human ministrant of the Deity, who is its manager and legal representative, is known by the name of 'Shebait' in Bengal and Northern India. He is the person entitled to speak on behalf of the Deity

on earth and is endowed with authority to deal with all its temporal affairs. As regards the temple property, the manager is in the position of a trustee, but as regards the service of the temple and the duties that appertain to it he is rather in the position of the holder of an office of dignity. Reference in this connection is the case of Ramanathan Chetti V. Murugappa Chetti, (1906) LR 33 IA 139. In this connection it should be remembered that a 'Poojari' is a servant of the Shebait, and no part of the rights and obligations of the latter are transferred to him. When the appointment of a 'Purohit' has been at the will of the founder, the mere fact that the appointee has performed the worship for several generations will not confer an independent right upon the members of the family so appointed and will not entitle them as of right to be continued in office as priests. (Kalikrishna Ray V. Makhanlal Mookerjee, ILR 50 Cal 233).

The exact position of a 'Shebait' or manager cannot be said to be altogether beyond the range of controversy, though much of the earlier theories has now been discarded. It is now settled by the opinions of the Judicial Committee of the Privy Council in Vidyavarathi Thirtha V. Balusami Ayyar, LR 48 IA 302 and we find no reason to depart from the same that the relation of a Shebait to the debutter property is not that of a trustee to trust property under the English law. It is held that the "endowments of a Hindu Math are not 'conveyed in trust', nor is the head of the math a 'trustee' to regard to them, save as to specific property proved to have been vested in him for a specific object." In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of the *cestui que trust*. In a Hindu religious endowment, the entire ownership of the dedicated property is transferred to the Deity or the institution itself as a juristic person, and the Shebait is mere a manager. The Judicial Committee

further held that a trust in the sense in which the expression is used in English law, is unknown in the Hindu system pure and simple. Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system. Under the Hindu law the image of a Deity of the Hindu pantheon is a juristic entity, vested with the capacity of receiving gift and holding property.

In Sreepati Chatterjee V. Krishna Chandra Banarjee, 41 CLJ 22, it was held that as the Shebait has no right to property, and is a mere holder of an office with the rights and limitations applicable to the guardian of a minor, the rule in *Tagore*'s case could not properly be extended to appointment of a Shebait. The controversy has been set at rest by the Full Bench decision in *Monohar Mukherjee V. Bhupendra Nath Mukherjee*, 37 CWN 29 (FB), where it has been held that shebaitship is not merely an hereditary

office, and the ruling in *Tagore V. Tagore,* 9 BLR 377 has been made applicable to an hereditary office.

If the founder of the debutter lays down any mode of devolution of the office of Shebait, the office devolve according to that mode and in the absence of such laying down of the mode of devolution, the office devolves in accordance with the Hindu Law of succession, that is, the office of Shebait is a hereditary one. Anath Bandhu V. Krishna Lal, AIR 1979 Cal 168.

Under the Hindu law apostasy was certainly a disqualification in the heir and excluded him from inheritance. This was removed by the Cast Disabilities Removal Act, 1850 (Act XXI of 1850), with regard to ordinary property, the fact that a Hindu has become a convert to some other religion does not entail forfeiture of his heritable rights. This Act XXI of 1850 has been repealed by section 2 of Act VIII of 1973. By this Act, namely the

Bangladesh Laws (Revision and Declaration) Act, 1973, some Laws promulgated in British India have been repealed including Act XXI of 1850. So, the consequence of such repeal is that a convert from Hinduism could inherit the property of Hindu Law by Act XXI of 1850, but after the repeal by Act VIII of 1973 he disinherits. The position stands now is that a Hindu apostasy is disqualified in the heir and succession of his paternal property. If that being so, a non-Hindu cannot become a Shebait or pujari of the Deity. He cannot carry on the worship or the management of the property of the Deity.

The same principle would apply to devolution of shebaitship as well. In the matter of carrying on the worship of a Deity, the intentions of the founder have got to be given effect to as far as practicable. When a pious Hindu establishes a Deity cannot possibly conceive of its 'sheba' and 'puja' being carried on under the supervision of a non-Hindu. Usages do exist in Hindu religious institutions and

if succession of a non-Hindu Shebait is contrary to such usage, it cannot be allowed. Reference in this connection is the case of Venkatachalapati V. subbarayadu, ILR 13 Mad 293.

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. This view will find support in the case of Rup Narain V. Junko, 3 CLR 112. If the line of Shebaits laid down by the founder is extinct, or when the Shebait to whom a power of nomination is given does not exercise the power, the shebaitship reverts to the founder who endowed the property or his heirs. Reference in this connection is the case of Jagannath Prasad Gupta V. Runjit Singh, ILR 25 CAL

354.If the founder has left no heirs, the founder's property may escheat to the state together with the endowed property. The right of the state under such circumstances would be same as those of the founder himself, and it would for the state to appoint a Shebait for the debutter Property. It cannot be said that the state receiving a dedicated property by escheat can put an end to the trust and treat it secular property (B.K.Mukherjea, ibid)

From the above discussions we may conclude as under:

(a) An idol is a juristic person in whom the title to the property of the endowment vests; but it is only in an ideal sense that the idol is the owner. It has to act through human agency and that agent is the Shebait, who is, in law, the person entitled to take proceedings on its behalf. The personality of the idol might, therefore, in one sense, be said to be merged in that of the Shebait.

(b) Where, however, the Shebait refuses to act for the idol, or where the suit is to challenge the act of a Shebait himself as prejudicial to the interests of the idol, then there must be some other agency which must have the right to act for the idol. In such cases, the law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol.

A Shebait, like a trustee in English law, cannot delegate his duty to another, no matter whether such other is a stranger or a co-trustee. The rule is founded on the maxim "*Delegatus non potest delegare*". This has been explained by Bowen, L.J. in Re, Speight. Speight V. Gaunt, 22 Ch.D. 727.

"The proposition as to trustees or agents that they cannot delegate means this simply that a man employed to do a thing himself has not the right to get somebody else to do it, but when he is employed to get it done through others, he may do so".

Therefore, where a trustee is entrusted to do a particular thing himself, he cannot authorize somebody else to exercise judgment on his behalf. It is open to a trust to appoint a sub-agent or avail himself of the services of others, whenever such employment is according to the normal course of business, but such appointment must only be as a means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment. This will find support in Shree Shree Gopal Shreedhar V. Shashee Bhusan Sarkar, ILR 60 Cal 111. So, a Shebait cannot delegate his authority even to a co-Shebait.

The next question is whether the Shebait can transfer the tea estate which is a debutter Property with prior permission of the government for the interest of the Deity as alleged. The Shebait cannot do so in view of discussions made above. Even if it is assumed that the Shebait can transfer a portion of the estate for the welfare of the Deity, he cannot

alienate the entire property of the Deity. A point may arise as to the status of the endowed tea estate after the acquisition of rent receiving interest. Section 20 of the State Acquisition and Tenancy Act deals with khas land which a rent receiver is entitled to retain in his khas, after the acquisition of his rent receiving interests under Chapter V of the Act. This section puts the maximum area of lands retainable by such rent-receiver in his possession by sub-section (2). However, a person or persons can retain beyond the retainable land for the purposes of the cultivation and manufacture of tea or coffee or cultivation of rubber or company holding land for the cultivation of sugarcane for the purpose of manufacture of sugar provided that he obtains a certificate from the Revenue Authority. Sub-section (4A) of section 20 is relevant which is reproduced below:

> "(4A) Notwithstanding anything contained in sub-section (2), a person or persons holding land

for the purposes of the cultivation and manufacture of tea or coffee or the cultivation of rubber or a company holding land for the cultivation of sugarcane for the purpose of manufacture of sugar by that company may, if he or it is no they are certified in that behalf by the prescribed Revenue Authority, retain possession of and hold such quantity of land in excess of the limit specified in the said sub-section as may be specified in the certificate granted by such Revenue Authority:

Provided that such a certificate shall be subject to revisions by the said Revenue Authority at such intervals as may be fixed in this behalf by the Government:

Provided further that for the purpose of this sub-section a derelict tea garden shall not be deemed to be land held for the purpose of the cultivation and manufacture of tea."

In respect of lands held by *debutter, waqf-al-al-al-aulad* or a trust which are exclusively dedicated to religious or charitable purposes without reservation of pecuniary benefit for any individual, the restriction imposed in sub-sections (1), (2), and (3) of section 20 shall not apply. Sub-section (5)(i)(c) provides:

> "(5) (i) Nothing in sub-sections (i), (2) and (3) of the sections shall apply –
>
> (c) to so much of the lands held under Debutter, waqf, waqf-al-al-al-aulad or any other trust as is exclusively dedicated and the income from which is exclusively applied to religious or charitable purposes without reservation of pecuniary benefit for any individual.
>
> (ii) Where, under any debutter, waqf, waqf-al-al-awlad or any other trust, the income from the lands covered by such trust is partly dedicated for religious or charitable purposes and partly reserved for the pecuniary benefit of any individual,

only portion of the lands, as may be selected in accordance with the rules to be made in this behalf by the Government, shall come within the purview of sub-clause (c) of clause (i).”

Clause (c) of Sub-section (5)(i) is concerned with the question of lands held under debutter and irrespective of the area provided are excluded from acquisition by the government. The lands which were completely dedicated for religious purposes cannot be acquired by the government. If the dedication is partly for religious or charitable purposes and partly reserved for the pecuniary benefit of any individual, only portion of the lands as has been selected shall be governed in the manner provided in rule 37 of the State Acquisition Rules, 1951.

Under this rule the portion of the land be selected under clause (ii) of sub-section (5) of section 20 shall be such as would, in the opinion of the Revenue Officer, yield an annual net income

equivalent to the amount exclusively applied annually to religious or charitable purposes without reservation of pecuniary benefit for any individual. Sub-Rule (3) provides that where the *waqf, waqf-al-al-aulad, debutter* or other trust exists for more than ten years, mean the annual average or the amounts exclusively applied to religious or charitable purposes during the last ten years, and in other cases, the annual average of the amounts so applied during the entire period elapsed since the creation of such trust; and include such remuneration of the Mutawalli, Shebait or trustee, as the case may be, as the Revenue Officer may, in consideration of the nature, extent and other circumstances of the trust determine as fair and reasonable. There is a proviso in this sub-rule which provides that in determining such annual average, the Revenue Officer shall not take into account any amount on account of remuneration of Mutawalli, Shebait or trustee, unless

the deed of trust expressly provides for payment of remuneration to him.

So, under no stretch of imagination the Shebait can transfer the entire debuttor property with the permission of the government.

Taking into consideration of the above position of law, let us consider the factual matrix of the case. In the impugned order the Divisional Commissioner upon a thorough inquiry noticed that the transfer of the tea estate was made by resorting forgery, inasmuch as, the writ petitioners procured a forged permission. Secondly, it is reported that after taking possession, the writ petitioners set up a medical college and established a housing estate and a market. Naturally they demolished the tea plantations and used the land for commercial purpose which is not permissible under any law of the land. The property being a tea garden even if it is assumed that the Ministry of Land has accorded permission for transfer, the transferee cannot utilize the land of

the tea estate for the purposes other than the purposes for which the tea garden has been dedicated. The said conversion is hit by section 20(4A), and 20(5) of the State Acquisition and Tenancy Act. The Deity is entitled to retain the property under sub-section (5) of section 20. In no way the said property can be converted and used for other purposes.

Mr. Prabir Neogi submitted that the deed of endowment permits the alienation of the property for the welfare of the Deity. He has produced a copy of the deed of endowment. In the cause title the founder Sree Baikuntha Chandra Gupta clearly stated the purpose of the creation of the deed of gift to the effect that "শ্রীহট্ট শহরের সন্নিকটবর্তী ষ্ঠার নামক চা বাগান শ্রী শ্রী রাধাকৃষ্ণ দারুমন মুত্তিদ্বয় স্হাপন করিয়াছি। উক্ত বিগ্রহ দ্বয়ের নিত্য সেবা পূজা নৈমিত্তিক উৎসবাদি এবং বার্ষিক তেহরে পর্বাদি সুনিয়মে এবং সুচারু রুপে সম্পন্ন হইবার উদ্দেশ্যে এবং তৎ সম্পর্কীয় প্রয়োজনীয় ব্যয় ও কোন কোন থেকে হিতকর কার্য্যে আয় ব্যয় নির্ধারন ..... । " So, the object of the dedication was completely for religious and charitable purposes. There is no doubt about it. He

then stated "লিখিত স্হাবর সম্পত্তি দেবোত্তর স্বরুপ বর্নিত বিগ্রহদ্বয়কে দান করতঃ দান বিক্রয়াদি অধিকারে এবং অন্যান্য স্বার্থ ও সম্পর্ক ত্যাগ করিলাম অদ্যাবধি উল্লিখিত সম্পত্তিতে বিগ্রহ দ্বয়ের স্বত্ব ও অধিকার জন্মিল। সেবাইত বা অধ্যক্ষগনকে ১ম তপসীলের প্রদত্ত অধিকার ভিন্ন দান বিক্রয়াদি কোন প্রকার হস্তান্তরেরকি দায়াবদ্ধের অধিকার প্রদত্ত হইল না।" There is thus clear recital in the deed that after the dedication he has extinguished his right, title and interest in favour of the Deity and reserved limited power of the Shebait as mentioned in schedule one. No power has been given to the Shebait to alienate the property for any other purposes. In the first schedule, it is stated that the Shebait is entitled to bear the expenses of the sebapuja of the Deity out of the income; that he shall pay the salary to the guards, scholarship to students; that if any religious school for teaching Veda (টোল) is established, to pay the expenses; to pay rent and taxes; to teach or arrange for teaching of sanskrit to Brahmin's son and to pay scholarship of Tk.50/- to his daughters till their life time annually and to maintain the tea estate.

A question may arise, by reason of reserving a scholarship of Tk.50/- annually for daughters of the founder, can the endowment be treated as exclusively for religious and charitable purposes? There is no reason to infer as such, inasmuch as, the founder has donated the tea estate on 2nd July, 1915, reserving scholarship of Tk.50/- only annually to his daughters without reserving any provision for their maintenance and also for the maintenance their heirs. So, the dedication is out and out for religious and charitable purposes. More so, the State Acquisition and Tenancy Act operated at Sylhet on 1st August, 1963 when they were not alive.

Mr. Neogi refers to schedule 7 of the said deed wherein it was recited that "ন্যাস্ত সম্পত্তির হিতকল্পে বা উন্নতি সাধনোদ্দেশ্যে দেবালয়ের সেবাইত বা অধ্যক্ষগনের এক যোগে ট্রাস্টি কোম্পানী কোন স্হাবর বা অস্হাবর সম্পত্তি ক্রয় করিতে কিংবা এরুপ সম্পত্তির চিরস্হায়ী বা স্হায়ী পাট্টা কিংবা পত্তনী দিতে বা গ্রহন করিতে এবং প্রয়োজনীয় দলিল আদি আদান প্রদান এবং সম্পাদন করিতে পারিবেন ও তৎসম্বন্ধে মতভেদ হইলে সেবাইতকের মতানুসারে কার্য্য হইবে।" Schedule second to sixth, relates to the mode of maintenance of the Deity and

the charitable works have been elaborately described. It has been revealed in the deed that the founder made a trust previously with a sum of Tk.2,90,000/- and the amount was kept in government promissory notes. It is recited that as the annual interest accrued out of Tk.2,90,000/- kept in the government promissory notes in the names of Deity's trustee M/S B.C. Gupta & Sons Ltd. was not sufficient to meet the expenses of the Deity and charitable works, he has dedicated the tea estate with for meeting the expenses. In the seventh schedule, it is provided that for the welfare and development of the endowed property, the Shebait and the trustee company conjointly may purchase or alienate any property. This clause does not relate to the alienation of the tea estate, rather it is for the maintenance of the Deity and the development of the tea estate. It relates to the purchase of property out of the income and in case of necessity, they can sell such acquired property for the welfare of the Deity.

Therefore, even if it is assumed that the Shebait has agreed to transfer the property in favour of the writ petitioner, it was beyond the powers given to him and therefore, the lease was without jurisdiction on the principle that a delegatee cannot exercise more power than the delegator.

Writ petitioners have withdrawn Tk.30,76,189.20/- which was given by the government as compensation for the purpose of acquisition of some lands of debutter property for the purpose of construction of a Divisional Stadium and establishment of the Sylhet University. The deed of endowment clearly provides that any income out of the money and the tea estate will be invested exclusively for religious and charitable purposes preserving the debuttor property intact. Ragib Ali cannot become the Shebait of the deity, and therefore, he cannot withdraw the said money. The writ petitioners claimed in paragraph 9 of the writ petition that after the execution of the lease deed 'the petitoner no.1

became absolute owner and possessor of the tea estate.....'. They treated a religious property into a secular property. This statement nakedly focused the motive behind the creation of the lease deed. It is only the legal Shebait who can withdraw the compensation money from the government and the money can be spent only for the welfare of the Deity and also for charitable purposes as per deed of endowment. Annexure "A1" to the writ petition clearly reveals that no letter under memo dated 14th August, 2005 of the Ministry of Land has been issued. Writ petitioners have annexed this letter as annexure "C" to the writ petition. It is alleged that this letter was procured by resorting forgery. On the other hand, writ petitioners claimed that the Ministry issued this letter. This being a disputed question of fact cannot be decided in a summary manner in writ jurisdiction.

Therefore, the High Court Division acted access of jurisdiction in quashing the proceedings in Sylhet

Kotwali P.S. Case Nos.117, dated 22nd September, 2009 and 12 dated 2nd November, 2015 filed against the writ petitioners. We are shocked to note that though no prayer was made in the writ petition for quashing those proceedings, the High Court Division suo moto quashed those proceedings. The rule was issued on the terms as to why the letters under memos dated 12th September, 2005 and 31st October, 2005 directing the writ respondent No.5 to take over possession, control and management of Tarapur Tea Estate and the order of recovery of Tk.30,76,189.20/- from the writ petitioners to have been issued without lawful authority. The High Court has traveled beyond the rule issuing order.

The High Court Division was of the view that since 32.91 acres of land of the tea estate belonging to the Deity has been acquired for construction of Sylhet Divisional Stadium and Shahajalal University of Science and Technology and since the compensation money of Tk.30,76,189.20 assessed for the acquisition

of the land has been given to the constituted attorney - the writ petitioner No.2, the writ respondents are estopped on the principles of estoppel from questioning the transfer of the tea estate. How fallacy the opinion of the High Court Division is in making the rule absolute without at all looking at as to whether a property which has been exclusively dedicated for religious and charitable purposes can be transferred by the alleged Shebait who is none but the manager of the Deity and that's too, by resorting of forgery? There is no legal bar in the acquisition of any debutter property under section 3 of the Acquisition and Requisition of the Immovable Property Ordinance, 1982. The bar is provided in the proviso to section 3 is that "no property used by the public for the purpose of religious worship, graveyard and cremation ground shall be acquired".

The idol of the Deity or the temple where the worship is being offered has not been acquired by the

government. Admittedly, the Deity and the temple were in existence at the time of acquisition. Therefore, this is not a legal ground for justifying the alienation of the Deity's property. Estoppel is an ancient English word which originally bore precisely the same signification as the equally ancient English word 'stop' whereof it is merely a variant. An estoppel may be said to arise when a person executes some deed, or is concerned in or does some act, either of record or in pais, which will preclude him from averring anything to the contrary. 'Estoppel by matters in pais' is defined by Blackstone as 'an assurance transacted between two or more private persons in pais, in the country, that is, upon the very spot to be transferred. Coke defined it "It is called an estoppel or conclusions, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth". The rule is founded on the equitable doctrine that it would be most inequitable and unjust if a person, who by a

representation made or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. This doctrine has no manner of application in this case.

The High Court Division was totally unmindful to the laws applicable in this case or in the alternative, it was totally confused as to the application of law in the matter and delivered a judgment which has no sanction of law. The judgment of the High Court Division is, therefore, liable to be interfered with and accordingly it is done. Accordingly, we sum up our opinion as under:

(a) a religious and charitable trust by way of debutter is created only when a property is dedicated for the worship or service of the idol;

(b) a Hindu idol is founded upon the religious customs of the Hindus;

(c) a Shebait, cannot delegate his duties to another, no matter whether such other is a stranger or a co-trustee on the principle of the maxim *'Delegatus non potest delegare'*;

(d) an idol is a juristic person in whom the title of the property of the endowment vests; but it is only in an ideal sense that the idol is the owner;

(e) the office of the Shebait being used for religious purposes under the Hindu Law, apostasy is a disqualification in the heir and execution of his inheritance as well as for holding the office of Shebaitship;

(f) when a pious Hindu establishes a Deity cannot conceive of its 'seba' and 'puja'

being carried on under the supervision of a non-Hindu religion believer;

(g) the founder of an endowment can confer upon a Shebait appointed by him the right of nominating his successor subject to the limitation that the nominee cannot be a believer of any religion other than a Hindu religion;

(h) the deed of endowment does not permit the alienation of the debuttor property i.e. Tarapur Tea Estate by the Shebait or his nominee;

(i) the transfer of the Tarapur Tea Estate for 99 years by the alleged Shebait is void ab initio.

(j) the writ petitioners are directed to Shift Ragib Ali Medical College and Hospital at a suitable place within six months from the date of the judgment so

that the academic education of the students is not hampered;

(k) The conversion of a portion of the tea estate into a medical college, a housing estate and use of the same for other purposes is totally illegal, and therefore, Tarapur Tea Estate should be restored to its original position;

(l) the Deity installed by the founder should be installed at its original place, if it is removed from its original site in the meantime;

(m) the withdrawal of Tk.30,76,189.20 as compensation money from the government by Ragib Ali was illegal and without jurisdiction. Ragib Ali is directed to refund the said amount within 7(seven) days from the date of receipt of the judgment to the legal Shebait of the

Deity and in the absence of the legal Shebait, in the account of the Deity;

(n) the writ petitioners Abdul Hai and Ragib Ali are directed to hand over vacant possession of Tarapur Tea Estate in favour of the Shebait of the Deity within 1(one) month from the date receipt of the judgment;

(o) the constructions made on a portion of the Tarapur Tea Estate should be dismantled within six months and the writ petitioners are directed to transplant tea plantations thereon. If they fail to dismantle them, the Shebait shall dismantle them with the help of police and the city corporation, and the costs be recovered from the writ petitioners by the Deputy Commissioner;

(p) In the absence of a legal Shebait of the Deity, the Deputy Commissioner is

directed to appoint a Shebait of the Deity in consultation with the ten leading Shebaits or priests of the temples of Sylhet town;

(q) The writ petitioners are directed to refund Tk.5,00,00,000/- (five crore) which they admittedly earned by exporting tea to the Shebait (Para 10 of the writ petition).

The Deputy Commissioner, Sylhet shall monitor the implementation of the directions given above. If the writ petitioners fail to comply with the direction, he shall take legal action against them and shift the medical college to a suitable place by freezing the bank accounts of the writ petitioners and withdrawing money from those accounts for the purpose of taking temporary lease of a house suitable for the medical college.

If the writ petitioners fail to make tea plantations, the Deputy Commissioner shall make

plantations by constituting a committee at the cost of the writ petitioners and the amount be realized from their moveable and immovable properties. The Kotwali P.S. Case Nos.117 dated 27.9.2005 and 12 dated 2.11.2005 shall proceed forthwith. The Chief Judicial Magistrate or the Chief Metropolitan Magistrate, as the case may be, is directed to proceed with the cases expeditiously.

The appeal is allowed with cost of Tk.5,00,000/- in the above terms.

**C. J.**

**J.**

**J.**

**J.**

*The 19th January, 2016*
*Md.Mahbub Hossain.*

APPROVED FOR REPORTING