

(1952) 01 CAL CK 0013
In the Calcutta High Court
Case No : A.F.O.D. No. 129 of 1951

Gokul Chand De and Others

APPELLANT

Vs

Gopi Nath Dey and Others

RESPONDENT

Date of Decision : 16-01-1952

Acts Referred:

Calcutta High Court Rules, 1914 — Rule 1

Citation : AIR 1952 Cal 705

Hon'ble Judges : Harries, C.J.; Das, J

Bench : Division Bench

Advocate : A.K. Sen, for Defendants Nos. 11 to 14 and H. Chakravarty, for Defendant No. 3, for the Appellant; S.D. Banerjee and M.K. Banerjee, (for Defendant No. 15) and A.K. Sarkar, for the Respondent

Final Decision : Allowed

Judgement

Das, J.—This appeal arises out of an application under chap. XIII of the Rules of this Court (Original Side).

2. The applicant was Gopinath Dey describing himself as one of the trustees and shebais under the Trust created by Srimati Chuni Moni Dasi.

3. The trust was created by a deed dated 18-9-1901. By the deed the said Chuni Moni Dasi conveyed certain properties to her three sons, Gour Mohan Dey, Satcowrie Dey and Tincowrie Dey as trustees. By the deed of Trust, the settlor Sreemati Chuni Moni Dasi after reciting that she had built a temple for Thacoorbatty and established and located therein deities Sree Sree Juggernath Jiu and Sree Sree Radha Gobind Jiu as her own separate family deities, conveyed and transferred unto the said Gour Mohan Dey, Satcowrie Dey and Tincowrie Dey, their heirs, executors, administrators and assigns; certain properties which she described as her stridhone property, to have and to hold the same

"upon the following trusts namely upon trust for the said Thacoors Sree Sree Jagannath Jee and Sree Sree Radha Gobind Jee. And upon Trust to permit and

suffers the sebaits or sebaits for the time being of the said Thacoors to use and employ the said house and temple lands and premises and household furniture ornaments and effects respectively and the rent issues and profits to be derived by letting out the said premises No. 6 Gobind Chandra Sen's Lane for the purposes of the daily and periodical worship and service of the said Thacoors Sree Sree Jagannath Jee and Sree Sree Radha Gobind Jee and so that the portion of the said premises No, 6/1 Gobind Chunder Sen's Lane that may be used for the locations and worship of the said Thacoors may be used as a place of public worship accessible to all members of the Hindoo community for the purposes of worshipping."

4. The deed next provided that the trustees should discharge all revenue grants and other outgoings and provide for repairs, and directed the trustees

"to pay the residue of such interest or income and rent issues and profits to or to permit the same to be received by the shebaits of the said Thacoors for the time being for the purposes hereinafter mentioned." And it was further agreed and declared that "the said Sreemutty Chuni Moni Dasi doth hereby direct that the said shebaits of the said Thacoors shall" with and out of the balance of the said interest or income and rents issues and profits so directed to be paid to them as aforesaid provide for and perform the daily worship and other periodical festivals including the annual Ratha Jatra and Dole Jatra of the said Thacoors at the said temple and in accordance with the scale of expenditure fixed by the said Sreemutty Chuni Moni Dasi which is hereunto annexed and marked A of any substituted and revised scale of expenses which may hereafter be determined by the said Sreemutty Chuni Moni Dasi by any writing under her hand and attested by two witnesses and in connection with the said worship and festivals shall daily at the said temple feed not less than five atithis or religious mendicants but so that the number of such religious mendicants may from time to time at the discretion of the said shebaits be increased or reduced as they shall think fit or expedient."

5. The deed then laid down the succession to the shebaits right as follows :

"And the said Sreemutty Chuni Moni Dasi doth hereby declare that her said three sons the said Gour Mohan Dey, Satcowrie Dey and Tincowrie Dey shall during their lifetime jointly and after the death of any of them-his sons or other nearest remoter male descendants in the male line shall jointly with the survivors or survivor of them and with the sons or other nearest remoter male descendants in the male line of such of them as shall be dead and after the death of all of them the sons or other nearest remoter male descendants in the male line of her said three sons respectively for the-time being shall be and act as the shebaits of the said family Thacoors."

6. The deed then provided for the carrying on of the worship of the deities. The provision runs-as follows:

"She doth hereby appoint them such shebaits accordingly and doth hereby direct

_____ | | | | Adaitya=Jayabroto
D.9.1.1923 Naderchand D. 24.2.1985 Gopinath B. 19.3.1901 Gokal D. |
_____ | _____ B.11.2.1920 Nemaichand D | | | B.
1916 Nobin D Ratan D Mohan D. B. 14.5.1924 B.6.4.1926 B. 28.4.1928 12.
The application stated that the applicant Gopinath, defendant 1 Jiban and
defendant 2 Goloke have been acting as joint trustees since the death of
Satcowrie on 21st November 1942.

13. Differences having arisen amongst the trustees, an originating summons was
taken out by Jiban and Goloke, giving rise to S. N. 1393 of 1946.

14. The suit was disposed of on 17-8-1947, the costs of all parties were directed
to come out of the trust estate.

15. The application then proceeded to state that the applicants' costs have not
been paid & that the other 2 trustees are not allowing the applicant to carry on
the management of the trust estate.

16. The application then recited that Nemaichand defendant 15 filed 2 Suits : 622 and
624 of 1945 for partition of the estate of Satcowrie Dey ; that the suits were
decreed on consent of parties.

17. The decree provided inter alia :

"That instead of the Commissioners of Partition framing the scheme as directed
by the aforesaid decree Messrs. E. K. Dey and D, C. D'utt, Solicitors are hereby
appointed Special Referees on the same terms as their appointment as
Commissioners of Partition to frame a scheme of the management, of the said
properties of the deity defendant and of the division of the turn of worship of the
said Satcowrie Dey deceased of the deity defendant and also of the deities Badha
Gobinda Jiu and Jagannath Jiu established by the late Sreemati chuni Moni Dasi."

18. The application then stated that Sm. Chuni Moni Dasi had divided the turn of
worship of the deities, and the turn of worship of Satcowrie Dey commenced
from 1st Baisakh 1356; that Sreemati Jayabati Debi acting as the guardian of
Nemaichand Dey who had meanwhile become a lunatic, made an application in
the said Suits Nos. 622 and 624 of 1945 for a direction on the trustees to allow
her to perform the worship of the deities.

19. The application ultimately came up for hearing before P. B. Mukherji J., who
made the following order on 1st December 1949 :

"Without prejudice, the plaintiff to carry on sheba of the deity for the rest of the
Bengali year under supervision of the trustees. If the plaintiff's right as shebait
is declared in subsequent proceedings this turn of worship will be taken in
account in dividing the pala of Satcowrie's heirs. Costs out of the estate.
Certified for counsel."

20. The application then stated that

"unless the rights of the heirs of Satcowrie Dey as to the worship of the deities Sree Radha Gobinda Jew and Jagannath Jew established by Sreemutty Chuni Moni Dasi are construed in conformity with the provisions contained in the said deed of trust, the Special Referee appointed in the said suit cannot divide and partition the turn of worship of the said deities during the turn of pala of Satcowrie Dey under provisions contained in the decree made in the said amalgamated Suits Nos. 622 and 624 of 1946."

21. On the aforesaid allegations the applicant Gopinath Dey prayed that the following questions be determined by this Court and that the following directions be given:

"(1) Upon the construction of the said Deed of Trust whether sons of the said three sons of the said Chuni - Moni Dassel who were not born at the time of execution of the deed of trust are entitled to perform the sheva or worship of the deities on the death of their respective fathers.

(2) Whether the grandsons of each of the sons of the said Sreemutty Chuni Moni Dasi are entitled to perform the sheva along with their uncles i. e., sons of Sm.. Chuni Moni's sons in the turn or pala of such sons.

(3) Whether the line of Shebaiti right as laid down in the said Deed of Trust is valid in law.

(4) Who are the present shebaites of the said deities?

(5) Whether in view of the disagreement, and difference which have arisen between the present trustees, the Official Trustee should be appointed the sole trustee of the trust created by Sreemutty Chuni Moni Dasi,

(6) Necessary directions may be given to the trustees for payment of all the costs awarded under order dated 17th July 1947 in Suit No. 1393 of 1946.

(7) Such direction for the management of the trust estate may be given as this Hon"ble Court may think proper.

(8) Such advice and direction for costs or otherwise be given as this Hon"ble court may think fit and proper."

22. That by an order filed on 3rd February 1950, this Court directed the service of summon³ on the defendants for a determination of the above questions.

23. An affidavit in opposition was filed by Gokulchand Dey, Nabinchand Dey, Mohanchand Dey and Ratanchand Dey.

24. Another affidavit in opposition was filed by Srimati Jayabati Dasi.

25. Another affidavit in opposition was filed by Jiban Krishna Dey and Golokenath Dey.

26. The originating summons came up for hearing before Sarkar J. By his

judgment dated 7th May 1951, the learned Judge answered the first question, in the negative viz., that upon the construction of the deed of trust, the sons of the three sons of Sreemati Chuni Moni Dasi who were not born at the time of the execution of the deed of trust were not entitled to perform the sheva or worship of the deities on the death of their respective fathers.

27. The learned Judge answered the second question as follows: The grandsons of the sons of Chuni Moni Dasi may act as shebaites along with their fathers' brother and cousins under certain circumstances.

28. The learned Judge was of opinion that the third question did not arise; for no line of succession to the shebaites was created by the deed.

29. Questions Nos. 4 and 5 were not pressed; the learned Judge being of opinion that their decision depended on questions of fact which were not appropriate to be decided on the summons.

30. As regards Question No. 6, the learned Judge directed that the trustees should pay the costs directed to be paid by order-dated 17th July 1947, made in Suit No. 1393 of 1946.

31. It does not appear that the learned Judge answered questions (7) and (8).

32. The learned Judge held that the principle of the decision in *Levis v. Green* (1905) 2 Ch. 340 was not applicable and that the summons was properly issued.

33. The costs of the summons were directed to be paid out of the trust estate.

34. Defendants 11 to 14 have appealed: Mr. Sen, learned counsel for the appellants has raised the following contentions:

(1) The originating summons was not maintainable in the facts of this case.

(2) Upon a true construction of the deed of trust, the provisions contained therein in so far as it lays down the devolution of the shebaiti right is bad in law, and that all the heirs of Srimati Chuni Moni Dasi would become the shebaites.

(3) That as the dispositions regarding the shebaiti right are contained in a deed of trust vesting the properties in the trustees, the shebaites are mere holders of office and the principle of *Jattendramohun Tagore v. Ganendromohun Tagore ind.* App. Supp. vol. p. 47 would not apply.

(4) That the order for costs of the present proceedings is not according to law.

35. Mr. Banerjee learned counsel appearing for defendant 15 has supported the appellants.

36. Mr. Chakravarti learned counsel for tire defendant 3 has supported the view taken by the learned Judge.

37. Mr. Sarkar learned counsel for the plaintiff has supported the view of the trial Judge and has advanced some additional grounds which will be discussed in the

course of this judgment.

38. The first question which requires consideration is whether the present application is maintainable. It was contended by Mr. Sen that the question of construction of the deed of trust was wholly unnecessary in the present case, because the parties are barred (1) by the decision in Suits Nos. 622 and 624 of 1945 from raising the question, and (2) by a plea of adverse possession.

39. The jurisdiction of this Court to entertain proceedings by way of originating summons is contained in chap. 13 of the Rules of this Court (Original Side)

40. The material portion of R. 1, chap. 13 runs as follows:

"The executors or administrators of a deceased person, or any of them, and the trustees under any instrument, or any of them, . . . may take out, as of course, an originating summons.....for such relief of the nature or kind following, as may by the summons be specified, and the circumstances of the case may require (that is to say), the determination without an administration of the estate or trust, of any of the following questions or matters :

(a) any question affecting the rights or interest of the persons claiming to be creditors, legatees, heir, legal representative or beneficiary;.....

(b) to (d) omitted;

(e) directing the executors or administrators or trustees to do or abstain from doing, any particular act in their character as such executor, administrator or trustee ;

(f) omitted ;

(g) the determination of any question arising in the administration of the estate or trust,"

41. The procedure under the above rule is akin to that in England under O. 55 Rule 10 of the Rules of the Supreme Court.

42. In my opinion, the true import of the rule is that the Court will consider in each case, whether the question asked, or the reliefs sought are such, as the Court can conveniently deal with on an originating summons

43. Mr. Sen contended that in the facts of the present case, the procedure by way of an originating summons is inconvenient and inadequate because the answers given by the learned Judge did not dispose of the contention of the parties as regards the matters in controversy between them. It was pointed out that a plea of estoppel on the ground of compromise entered into previous proceedings as also a plea of adverse possession would require a decision by the Court. It was therefore contended that if the latter pleas, which cannot however be decided on a petition by way of originating summons, are disposed of in favour of the appellants, the Court would not be called upon to decide the question of construction of the deed of trust executed by Srimati Chuni Moni

Dasi. It was accordingly urged that in the present case, the parties should be relegated to a suit.

44. Reliance was placed on the following observations of Warrington J., in *Lewis v. Green* (1905) 2 Ch. 340 :

"It (the procedure under Order 54-A) is only intended to enable the Court to decide questions of construction where the decision of these questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction, which, if they are decided in one way only, will settle the dispute between the parties, should come up for decision on an originating summons. It would be most inconvenient to resort to the order in a case where it is quite uncertain what may be the ultimate decision on the point of construction, and where if the decision is in one way it involves further litigation."

45. The above observations fully support the contention raised by Mr. Sen.

46. In an earlier case, viz., *In re Powers; Lindsell v. Phillips* (1885) 30 Ch. D. 291, the creditor took out a summons for administration of the estate of E. P. The representatives of E. P. disputed the debt as having been barred : *Bacon v. C.* dismissed the summons on the ground that the discretion vested in the Court under Order 55 Rule 10 of the Rules of the Supreme Court should not be exercised in the case as it involved a disputed debt. The decision was affirmed by the Court of Appeal, *Cotton, L. J.* observed that if the question depends on a question of law, it ought to be answered, otherwise if the question is one of fact.

47. In the present case, the dispute between the parties cannot be disposed of merely by a construction of the deed of trust. Before the rights of the parties can be decided, the Court will have to decide at least two other questions viz., a plea of estoppel and a plea of adverse possession. These questions are not pure questions of law. Even if we apply the principle enunciated by *Cotton L. J.*, in the last case the procedure by way of an originating summons is not the proper remedy in the facts of the present case.

48. Mr. Sarkar learned counsel for the plaintiff respondent contended that the decision in *Lewis v. Green* (1905) 2 Ch. 340, was not of universal application and that the mere fact that certain questions of fact might require a decision is not conclusive of the matter. Reference was made to the following observations of *Astbury J.*, in the case of *Earl of Harrowby v. Leicester Corporation* (1915) 114 L. T. 129:

"If the Court is asked to determine on a summons under Order 54A, the true construction of a written instrument, the fact that the parties may after a decision on the question of construction, litigate further on a question of fact with which the summons is not concerned, is not a sufficient reason for the Court to refuse to determine such question of construction under E. 4 of that Order. The order ought to be interpreted in a liberal sense, and it is sufficient if it appears to

the Court that its answers satisfy the proceedings then at issue,"

49. The above observations do not really assist the respondents : The questions of fact which require a determination in the present case, have reference to the questions raised by the summons, and the answers on the construction of the deed of trust, do not satisfy the proceedings in issue between the parties.

50. In the present case, the answers given by the learned Judge on the question of construction, have not disposed of the summons and have left certain questions unanswered. Moreover, in the facts of the present case, the pleas in bar raised by the opposite parties, if sustained, might render the question of construction unnecessary.

51. On the above grounds, I am of opinion that the Court should not have adopted, the procedure by way of an originating summons, but should have relegated the parties to a suit. The first contention of Mr. Sen, therefore, succeeds. The above finding is sufficient to dispose of the appeal, but for the sake of completeness I proceed to record my opinion on the other points raised by the appellants.

52. The second point raised by the appellants relates to the question of the validity or otherwise of the line of devolution to the shebaiti right as provided in the deed of trust.

53. I have already quoted the relevant provisions of the deed of trust. According to the deed of trust, the shebaitship first goes to the three sons of the settlor Sm. Chuni Moni Dasi. The deed then says that on the death of any of the sons, his sons or other nearest remoter male descendants in the male line would come in place of the deceased son and become joint shebaits with the surviving son or sons. The deed then says that after the death of all the sons, the sons or other nearest remoter male descendants in the male line of the three sons of the settlor respectively "for the time being" shall be shebaits.

54. The question is whether the above provisions lay down a line of succession to the shebaiti right or whether they constitute independent gifts to the sons or other nearest remoter male descendants in the male line for their lives till the last of the sons of the settlor dies, with a gift over absolutely to the then nearest remoter male descendants of the sons respectively.

55. The learned Judge has accepted the latter view.

56. It is a fundamental rule of construction that the literal sense of the words used by the settlor should be accepted and that in case of doubt, that interpretation should be accepted which accords most with the expressed intention of the settlor appearing from the deed.

57. In the present case the apparent intention of the settlor undoubtedly was to exclude cognatic relations and to appoint nearest male descendant in the male line as shebait.

58. Let us first of all consider the literal meaning of the passage. The learned Judge was of opinion that the words "for the time being" meant "at a given point of time" and such time, according to the learned Judge, was the death of the last surviving son of the settlor.

59. The observation of Lord Westbury L. C, in the case of *Ellison v. Thomas* (1862) 1 Deg. J. & S. 18, quoted by the learned Judge, lay down that the expression "for the time being" may refer either to a particular point of time or several periods of time; and that the interpretation to be adopted in each case depended on the context. It seems to me that in the relevant passage the words "for the time being" should in the context, be construed as referring to the different periods of time whenever a question of succession would arise. Even if the passage was capable of different interpretations, that interpretation which would accord with the general intention of the settlor should be accepted.

60. The interpretation put by the trial Judge would result in an apparent incongruity in that while the nearer female relations and cognates would be excluded, the remoter female or cognatic heirs of the male descendants who might take absolutely on the death of the last surviving son of the settlor, would come in as shebaites. Such a construction would run counter to the plain intention of the settlor.

61. That the view taken by me is the true meaning of those words, would also gain support from the provision for palas in case of difference of opinion amongst the coshebaites, In such a contingency, the settlor clearly provided for division only amongst her nearest remoter male descendants as is apparent from the use of the words "and so on".

62. The above discussion makes it abundantly clear that the provisions regarding devolution of shebaiti right laid down a line of succession and did not constitute independent gifts with a gift over absolutely, as found by the learned Judge.

63. The learned Judge was of opinion that the decision in *Madhavrao Ganpatrao v. Balabhai Raghunath* 55 I A 74 (P. C.) was applicable to the facts of the present case. In my opinion, the decision is clearly distinguishable.

64. In the case, the facts were as follows : The settlor had 8 children, Krishnabai, Poottabai, Raghunath and Kashibai. He conveyed his property to trustees upon trust to pay the income to the settlor for life and after his death, upon certain trust. The material portion of the deed, which concerns the share of Krishnabai runs as follows :

"and as to one quarter of the said rents, dividends and profits upon trust to pay the same to my daughter Krishnabai wife of Ganpatrao Moroji Zaoba during her life for her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike."

65. The settlor died on 14-7-1894 and Krishnabai died in 1897 leaving 6 sons who were all alive at the date of the settlement. The heirs of the settlor

contended that the limitations in favour of only the male heirs of Krishnabai were contrary to Hindu Law and void, as a new line of succession was laid down after Krishnabai's death. The sons of Krishnabai, on the other hand, contended that there was an independent gift in favour of persons who answer the description of "the male heirs of Krishnabai at the latter's death."

66. The trial Judge accepted the latter contention. Upon appeal to the High Court, the decision was reversed. Upon further appeal to the Privy Council the judgment of the High Court was reversed and that of the trial Court restored.

67. In repelling the contention that the words quoted connote a descendible quality of estate their Lordships observed as follows :

"They are of opinion that the estate that Krishnabai took was defined and limited by her life-interest, and that it was not by descent from her but by virtue of a wholly independent gift that her male heirs were beneficiaries under the deed. These male heirs being in fact living at the date of the gift, no difficulty arises."

68. In the present case, as I have already indicated, the words used indicate that a new line of succession to each son, as regards the shebaiti right, was intended by the settlor Srimati Chuni Moni Dasi.

69. The line of succession thus laid down contravened the rule of Hindu Law of succession to property and was void : Tagore v. Tagore, Ind. App. Supp. Vol. p. 47; Monohar Mocher v. Bhupendra Mukerji 60 Cal. 452 (F. B.); Ganesh Chandra v. Lal Behary 63 I A 448 (P. C.).

70. The result is that there is a failure of the line of succession to the shebaiti right after the death of the sons of the settlor, and as such, after the death of the sons of the settlor, the shebaiti right would devolve on the heirs of the settlor Srimati Chuni Moni Dasi. See Bhabatarini Debi V. Ashalata Debi 70 I A 57 (P.C.).

71. I proceed to deal with the third contention of Mr. Sen; this point does not appear to have been raised before the learned Judge. It raises a question of some importance.

72. The argument is that as the endowed property was vested in trustees who had full powers of management and the shebaits had no control over the endowed property and were merely entitled to receive certain sums of money for the performance of the worship of the deities with a liability to account to the trustees for the sum so received, the principles enunciated in Monohar Mukherjee's case 60 Cal. 452 (P. B.) and approved by the Privy Council in Ganesh Chandra Dhur's case 63 IA 448 (P.C.) have no application.

73. In order to appreciate the above contention, it is necessary to consider the ratio decidendi of Monohar Mukherjee's case (60 Cal. 452 F.B.) cited

74. Mukerji J. opens his discussion of the question referred to the Full Bench by postulating that they depend upon the question whether shebaitship in Hindu Law is property of any kind to which Tagore v. Tagore, Ind. App. Supp. Vol. p. 47

(P. C.) may apply or is merely an office to which the founder of an endowment is competent to appoint or nominate persons in any order of succession.....

75. After an exhaustive examination of the texts, textbooks and judicial decisions, the learned Judge observed :

"Shebaitship in its true legal conception involves two ideas : the ministrant of the deity and its manager; it is not a bare office but an office together with certain rights attached to it."

76. The learned Judge then opines that the position of a shebait is not similar to that of a trustee in English Law and then says that :

"the shebait deals with the property in his custody or management as if he has some property, though not the full rights of property in it, the legal property vesting in the idol."

77. The learned Judge then refers to the qualified powers of disposal enjoyed by a shebait and to the fact that the right of suit is not in the idol but in the shebait and that it is the minority of the shebait which counts for the purpose of limitation and that the idol has the right to have the conduct of the worship and his own custody placed in the hands of the rightful shebait.

78. The learned Judge then observes as follows:

"Such being the nature of the right of a shebait in Hindu Law, it is impossible to regard it as anything else than property within the meaning of the law."

79. The case of Ganesh Chander Dhur 63 I A 448 (P. C.) merely approved of the above decision.

80. Again in Bhabatarini's case (70 I A 57 P. C.) B. K. Mukherjea J., whose opinion was accepted by the Privy Council, *eo nomine* 70 I A 57 (p. C.) thus expressed himself:

"To me it seems that both the elements of office and property, of duties and personal interest, are mixed up and blended together, in the conception of shebaitship; one of the elements cannot be detached from the other."

81. In the above case, Bhabatarini's case 70 IA 57 (p. c.) Sir George Rankin delivering the opinion of the Board said:

"Still, it must be remembered that the shebait must completely represent the idol or endowment-the deity, religious purpose, the debutter property."

82. Mr. Chakravarti referred us to Mulla's Hindu Law Section 414 which also emphasises that the shebait is the administrator of the property attached to the temple of which he is the shebait.

83. It must also be borne in mind that the English conception of equitable estate is unknown in India.

84. In the facts of the present case, the shebait has not even a qualified right to the endowed property. The legal title is in the trustees, and full powers of management or disposal are all vested in the trustees. The shebait has merely a right to receive a fixed sum for carrying on the worship of the deities with a liability to account, even the scale of expenses for the worship can only be varied with the consent of the trustees. In such a case, it is difficult to apply the rule enunciated in *Monohar Mulcherjee's* case (60 Cal. 452 F. B.) and to hold that the principle in *Tagore v. Tagore*, Ind. App, Supp. Vol. p. 47 (P. C.) should be applied.

85. The third contention of Mr. Sen therefore, succeeds.

86. Mr. Sarkar learned counsel for the plaintiff respondent urged, relying on the recital in the deed of trust, that the succession to shebaiti right should be determined on the footing that the disputed property is stridhona property of Sm. Chuni Moni Dasi. This point of view was not put forward before the trial Judge. It depends on evidence. In my opinion such a contention which depends on questions of fact cannot be raised at this stage.

87. I shall now summarise the result of the above findings on the view that the questions can be answered on this summons.

88. Questions (1) and (2) cannot be answered categorically. As I have already found upon the construction of the deed of trust after the death of the three sons of Srimati Chuni Moni Dasi, the heirs of Srimati Chuni Moni Dasi will succeed to the shebaiti right absolutely.

89. In view of what I have already stated, question (3) must be answered in the negative.

90. Questions (4) and (5) depend on questions of fact and cannot be answered on the present originating summons.

91. Question (6) has been correctly answered by the learned Judge. No point was made by the appellant so far as this is concerned.

92. Questions (7) and (8) cannot be answered and directions cannot be given. In fact no directions have been given by the trial Judge and neither of the parties made any such points before us.

93. As regards costs of the summons, the learned Judge directed that they might be taxed as of a suit for a day's hearing and might be paid out of the estate.

94. Mr. Sen, learned counsel for the appellant, contested the propriety of the latter part of this direction. The whole object of the summons was to establish the personal right of the plaintiff respondent. There is no reason why the trust estate should be liable for the costs of the plaintiff respondent. In my opinion, the above order for costs should be set aside.

95. In the result the appeal succeeds. The plaintiff respondent will pay the costs of the defendants appellants in this Court and in the Court below.

96. Certified for 2 counsel.

Harries C. J.

97. I agree.

21st January 1952.

98. By the Court.-The respondents 4 and 12 will get their costs paid out of the estate.

99. The costs of the lower Court and in this Court will be taxed as in a suit and an appeal from the same.