

(1970) 01 OHC CK 0005
In the Orissa High Court
Case No : Second Appeal No. 476 of 1963

Guru Charan Jena

APPELLANT

Vs

Satyanarayan Jew Thakur and Others

RESPONDENT

Date of Decision : 09-01-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 13, Order 22 Rule 3, 9

Citation : (1970) 01 OHC CK 0005

Hon'ble Judges : S.K. Ray, J; R.N. Misra, J

Bench : Division Bench

Advocate : B. Mohapatra, for the Appellant; N. Mukherji, for the Respondent

Final Decision : Dismissed

Judgement

K.N. Misra, J.—This appeal was referred to a Division Bench for disposal by a learned Single Judge and that is how it has come before this Bench.

2. The defendant is the appellant against a reversing judgment of the learned Third Additional Subordinate Judge, Cuttack, in a suit for ejectment and for recovery of rent until the termination of the tenancy and damages for use and occupation until delivery of possession.

3. The disputed property is a residential house within the town of Cuttack and the plaintiff, a deity, admittedly owned it. It has now been found that there was previously a suit between the parties (T. S. No. 98 of 1949) and had ended in a compromise. As per the terms of the said compromise a monthly rent of Rs. 60/- was payable. The defendant happens to be an Advocate of this Court. He failed to pay the rent and fell into arrears. The suit was instituted after notice u/s 106 of the Transfer of Property Act was given. It was filed on 11-2-58, but during the pendency of the suit the Orissa House Rent Control Act, 1958 was enforced and the jurisdiction in respect of eviction was taken away from the civil court. The suit, therefore, proceeded on the basis that the defendant continued as a tenant

and was confined to the claim for recovery of rent only.

4. Several defences were taken with which the present appeal is not concerned. No objection was taken in the written statement about the defect in the frame of the suit on account of some shebait of the deity not having joined. It, however, transpired during the trial from the cross-examination of some of the witnesses for the plaintiff-deity that the two sebaits who had been impleaded as plaintiffs 4 and 6 had already died during the pendency of the suit. An attempt was made to delete them on the basis that the deity was the actual plaintiff and the others were only sebaits representing it. By an order dated 11-7-61 the learned Munsif directed the expunging of plaintiffs 4 and 6 from the record and subsequently allowed the amendment of the plaint which was to the effect that the deity was to be the sole plaintiff and was to be represented by a set of sebaits. On 17-7-61, the order directing the amendment was recalled and on the following day the application for amendment was rejected.

5. The trial court found that the monthly rent was Rs. 60/- and the defendant was in arrear for the period between 1-1-55 and 3-12-57. It, however, found against the plaintiffs on account of the fact that the legal representatives of the deceased plaintiffs 4 and 6 had not been duly substituted and on account of the abatement of the suit as against the said two sebaits the suit was not competent.

6. Before the lower appellate court an application was made on 16-9-61 by the deity appellant who was being represented by plaintiff No. 2 alone to bring the legal representatives of the deceased plaintiffs 4 and 6 and certain other legal representatives of one Banwarilal Moda whose son plaintiff No. 2 was on record, as pro forma respondents. The other plaintiffs who had joined in the suit in the court below were also impleaded as pro forma respondents in the memorandum of the appeal. The learned District Judge by his order dated 16-9-61 directed as follows:--

"The appellant puts in a petition stating that the appellant No. 2's father having died his legal representatives being respondents Nos. 14 to 16 and plaintiffs No. 6's being respondents 8 to 12 be made respondents in this appeal for further litigation as they relinquished the marfatdarship of the deity. Put up on 26-9-61 in presence of lawyers."

On 30-10-61, further order was passed to the following effect:--

"Heard Advocate for appellant. He states that Respondents 3 to 6, 8 to 12 and 14 to 16 are legal representatives of plaintiffs 4 and 6. Let notice along with appeal notice go to these new respondents for such objections as they may put forward."

As it appears, respondents 3 to 6 and 8 to 12 were added as legal representatives of plaintiff No. 4 and plaintiff No. 6 respectively and respondents 14 to 16 were sought to be added as the other heirs of the deceased Banwarilal Moda. In the application dated 16-9-61 it was indicated that before Banwarilal was dead he had given up the marfatdarship of the deity and it was only plaintiff

No. 2 who was looking after the affairs of the deity on behalf of Banwarilal and his heirs. Similarly, the legal representatives of plaintiffs 2 and 4 were not interested in the deity's affairs and did not take any interest in the affairs of the deity or claim any interest in the marfatdari right.

7. The appeal, in due course, was made ready and on 22-6-63 the lower appellate court passed the following order:--

"Respondents 2 to 16 file a petition to the effect that they have full consent to the appellant No. 2 to represent the deity appellant No. 1 for filing the appeal as managing trustee. For objection of respondent No. 1 and appellants 1 and 2 if any."

The material portion of the petition filed by respondents 2 to 16 was to the following effect:--

"That during the lifetime of Banwarilal Moda at his last illness the appellant No. 2 became the marfatdar and was managing the affairs of day to day and Sri Banwarilal Moda relinquished his marfatdari right shortly before his death and appellant No. 2 continued as managing marfatdar of the deity also thereafter and with the consent of all the then marfatdars and these respondents, he was the managing marfatdar and the respondents 14 to 16 did not become the marfatdars and relinquished whatever right they had agreeing appellant No. 2 to act as marfatdar of the deity.

That at the time of filing of the suit in the trial court plaintiff No. 2, Gouri Sankarlal Moda, 3. Baridas Moda. 4. Gopiram Moda, 5. Gangaram, 6. Mandanlal, 7. Brahmananda were the 16 annas marfatdars who all joined in filing the suit and all of them had their consent.

That during the pendency of the suit plaintiff No. 4 Gopiram Moda and plaintiff No. 6 Mandanlal died and sometimes after the institution of the suit and before their death they during their last illness relinquished their marfatdari rights and their heirs, namely, respondents Nos. 3 to 6 and respondents 8 to 12 refused to act as marfatdars and cut off all connections with the deity and agreed that appellant No. 2 shall be managing marfatdar.

That these respondents aver that whatever decree would be passed in this case would bind the deity and conceding that these respondents have any interest in the same the decree would also bind the said interest of these respondents."

The prayer was to the following effect:--

"It be ordered that the suit was properly instituted with all the 16 annas marfatdars and with their consent and the decree in this suit shall bind all these respondents who have got full consent for the appellant No. 2 to represent the deity appellant No. 1 alone."

The learned Appellate Judge ultimately held that the suit was properly constituted and, therefore, passed a decree. The defendant has come in appeal

against the said judgment and decree of the lower appellate court.

8. Mr. Mohapatra, learned counsel appearing for the appellant, contends that the lower appellate court went wrong in holding that the suit was maintainable and had not been affected on account of the non-substitution of the legal representatives of plaintiffs 4 and 6. He also contends that the non-inclusion of one Masudilal who was admittedly a co-sebait and respondents 14 to 16 who were admittedly the legal representatives of Banwarilal, father of plaintiff No. 2, affected the maintainability of the suit. On the submissions made by Mr. Mohapatra, the point that arises for determination is as to whether the suit in the instant case was not maintainable for non-inclusion of one Masudilal and the present respondents 14 to 16 who were the other legal representatives of the deceased Banwarilal. It has also to be determined as to whether on account of the abatement of the suit as against plaintiffs 4 and 6 the suit ceased to be a properly constituted one.

9. The main plank for the support is drawn by Mr. Mohapatra from the observations of the Judicial Committee in AIR 1945 23 (Privy Council) . Sir Madhavan Nair, speaking for the Board, came to hold,

"The position in 1526 with regard to the trustees was this:-- Lalta Bibi had under her "will" of 1907 appointed three trustees, respondent 1, Gopi Nath and Jugal Kishore to manage the affairs of the idol. Of these, Jugal Kishore had died during the pendency of suit No. 141 of 1919, and Gopi Nath had "apparently ceased to act" -- as mentioned by the High Court -- though he remained a trustee. Thus, only respondent 1 continued to interest himself in the suit property in 1926. So far, their Lordships have been testing with reference to the evidence of the correctness of the High Court's finding that he did not represent the trustee in the suit transaction and was acting only for himself. This finding, if correct, would show that he cannot by his execution of the document convey the property of the idol to the appellant. Even if their Lordships accept the finding of the Subordinate Judge that respondent 1 was the de facto manager and trustee entitled as such to act in emergency, still in law, the execution by him alone of the deed would be ineffective in conveying a valid claim to the suit property. In this connection attention may be drawn to the following statement of the law from Lewin on Trusts, Edn- 14, page 196:

"In the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the acting trustee, but the Court knows no such distinction; all who accept the office are in the eye of the law acting trustees. If any one refuses or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court. However, the act of one trustee done with the sanction and approval of - a co-trustee may be regarded as the act of both, But such sanction or approval must be strictly

proved."

Their Lordships consider this to be a correct statement of the law applicable in England and that the same doctrine applies in India also."

This view of the Judicial Committee has been referred as the basis for the views of the learned Author of the Hindu Law of Religious and Charitable Trust by Dr. Mukherjea. After quoting the views of the Judicial Committee, the learned Author at page 232 of the book states:--

"Thus the act of a majority of Shebaites cannot bind the dissenting minority, nor the Debutter estate. In the Privy Council case quoted above the property belonging to an idol was mortgaged by a number of persons who claimed it as their personal property and one of the mortgagors was one of the trustees and managers of the deity; in fact, he was the sole de facto manager. On behalf of the mortgagee a contention was raised that the idol was bound by the mortgage inasmuch as the sole Shebait and trustee joined in it and purported to alienate whatever interest he had in the property. This contention was negatived and it was held that even if the mortgage was executed by one of the trustees as such, it would not pass a valid title unless the act was done with the sanction and approval of his co-trustees. As all the Shebaites form one body in the eye of law, the deity is represented by all of them acting together and no one Shebait can be said to represent the deity in part or to possess interest as such Shebait in any particular portion of the idol's property. Consequently, when one of the Shebaites purported to alienate the Debutter property to the extent of the share which he had as Shebait in respect of the same, the alienation was held to be void."

10. The principles of other decisions have been referred to by Mr. Mukherjee in his book and after referring to these cases he has come to conclude.

"The position, therefore, is that ordinarily all the Shebaites must figure as plaintiffs in a suit brought on behalf of the deity. If some of them refuse to join as plaintiffs or had done some act precluding them from being plaintiffs, one or more of the Shebaites can maintain a suit without joining the others as plaintiffs, but making them parties defendants. The nature of the suit or the allegations made therein may also furnish exceptions to the general rule that all the Shebaites must appear as plaintiffs."

Mr. Mohapatra thereafter contends that the right of suit in respect of the property of the deity vests in the sebaits alone. He draws support for his proposition from another portion of the said book. At page 237. Dr. Mukherjea has stated:

"An idol is certainly, a juristic person and as the Judicial Committee observed in *Pramatha Nath Mullick v. Pradyumnakumar Mullick* : "It has a judicial status with the power of suing and being sued." An idol can hold property and obviously it can sue and be sued in respect of it. But the idol is the owner of the Debutter property only in an ideal sense; its ideal personality is always linked up with the

natural personality of the Shebait. The Privy Council held in *Maharaja Jagidindra Nath Roy v. Rani Hemanta Kumari* (1904) 31 IA 203 that the possession and management of the dedicated property belong to the Shebait; and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the Shebait and not in the idol." This right is a personal right of the Shebait and separate from any right which the deity may have of instituting a suit as a juristic person through a proper representative."

At page 238 of the said book, Dr. Mukherjea refers to a

"Bench decision of the Allahabad High Court in the case of *Thakur Raghunathji v. Shah Lalchand* ILR (1897) All 330 where the Allahabad High Court held that a suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple. The plaintiff in such suit must be the manager of the temple. This decision was overruled by a Full Bench decision of the said High Court in *Jodhi Rai v. Basdeo* ILR (1911) All 375 and it was held that inasmuch as an idol is a juristic person capable of holding property, a suit respecting the property in which an idol is interested is properly brought or defended in the name of the idol, although ex necessitate rei the proceedings in the suit must be carried on by some persons who represent the idol usually the manager of the temple in which the idol is installed. It seems that the attention of the learned Judges was not drawn to the pronouncement of the Judicial Committee in (1904) 31 IA 203 and in view of that decision the proposition of law laid down in such broad form cannot possibly be supported."

On the aforesaid view of the matter Mr. Mohapatra contends that it is the entire body of sebaits who could be the plaintiffs and the moment the suit abated against two of them, the irresistible conclusion that follows is that the suit is no more maintainable.

11. The learned Appellate Judge, according to Mr. Mohapatra, examined only one aspect of the matter, namely, that the suit had been properly constituted at the time of institution as all the sebaits had joined. Did it become not maintainable on account of the fact that two of the sebaits died and their legal representatives were not brought on record ? According to Mr. Mohapatra. there was another aspect of the matter, namely, that the suit had never been properly constituted as the other legal representatives of Banwarilal excepting plaintiff No. 2 and one Masudilal had not been joined as parties. This aspect of the matter was never discussed by the lower appellate court. He, therefore, canvasses these two questions and wants us to hold that the suit was not properly constituted at the time of institution and became further affected on account of the fact that two of the plaintiffs died and there was no substitution though admittedly these two plaintiffs left behind legal representatives.

12. It has already been noticed that no objection was raised in the written statement that the suit was not properly constituted on account of the fact that

some sebaits had been left out. The fact that Masudilal was one of the marfatdars was to the knowledge of the defendant. As a matter of fact, the decree of the earlier suit (T. S. 98 of 1949) clearly indicates the name Masudilal. It has already been stated earlier that the defendant is an advocate of this Court. We must impute sufficient knowledge about the legal position in the matter to him. In view of the fact that he was aware of the fact that Masudilal who was one of the sebaits had not been added it was open to him to raise that objection. We further find that on the earlier occasion Banwarilal was one of the marfatdars to represent the deity. When Banwarilal died during the pendency of that suit, it was only plaintiff No. 2 alone who was substituted. No objection was raised on that occasion on the ground that certain other persons had been left out, nor was any objection taken in the written statement of the present suit that Banwarilal had left behind other heirs who were also marfatdars of the deity. It is a well-known rule that objection regarding non-impletion of parties should be taken at the earliest opportunity. In fact as Order 1, Rule 13, C.P.C. prescribes it has to be done at a time prior to the raising of issues. If this objection had been raised in the written statement, it was quite possible that an explanation could have come on the record as to why and under what circumstances these persons had not been added. It is difficult to find any material on record that Masudilal is alive and continues to be a marfatdar. If this objection had been raised, it is quite possible that the plaintiffs would have placed materials on record to show that Masudilal and the other legal representatives were no more continuing as sebaits. As Dr. Mukherjea puts it in his book at page 290.

"A shebait, it seems, is not bound to continue to act as shebait once he has accepted the office. He can, if he so chooses, resign his office voluntarily and give up the trust. In English law a trustee can retire when there is a provision to that effect in the trust deed, or if his retirement is consented to by all the beneficiaries or sanctioned by the court. There is no such restriction in the Indian law fettering the right of the Shebait to resign or relinquish his office and the word "resignation" occurring in the third column of Articles 134-B and 134-C in Schedule 1 of the Limitation Act makes it clear that the Legislature contemplates the cessation of office of shebait or mohunt by voluntary resignation. When a shebait relinquishes his office, the result is that he thereby accelerates the succession to the office of the next shebait."

In another portion of the said book it has also been indicated,

"If the right of a co-shebait is denied he need not be joined as a party."

It is not difficult to conceive of such similar explanations to have been made available on the record in case objection on such score had been taken in the written statement,

13. The interest of the plaintiff would not have also been affected if timely objection had been raised on this score. The court could have proceeded to do what was indicated as a proper measure by a Division Bench of the Calcutta High

Court in *Probir Chandra Pal and Others Vs. Panchanan Choudhury, . Das Gupta J.*, as he then was, stated:

"The proper view to take in such a case would in my view be that the known shebait is competent to bring the suit in the name of the deity and for the purpose of the particular suit must be held to represent the deity completely, but that would not affect the interest of any other person who may be shebait. Where a dispute arises on the question whether or not there are other shebait in addition to those mentioned in the plaint, it may sometimes be proper for the court to appoint at the outset some person or persons as the next friend of the deity to carry on the litigation, instead of allowing the delay in deciding the dispute on the question who are the shebait, to defeat the deity's interest."

On account of absence of objection in the written statement on the ground that Masudilal and the other legal representatives of Banwarilal had not been impleaded and, therefore, the suit was defective, we do not propose to entertain that objection in second appeal. We would, therefore, hold that the suit as instituted was by the entire body of marfatdars and was properly constituted when it was filed.

14. The only other question that remains for consideration is as to whether though properly constituted at the time of institution, the suit became non-maintainable on account of non-substitution of the legal representatives of plaintiffs 4 and 6 who died during the pendency of the suit. The learned Appellate Judge relied upon a Bench Decision of the Patna High Court in *Sadhu Charan Parija and Others Vs. Krishnamani Dei and Others, .* As the report shows, a money decree had been obtained by a deity. There appeared to be 23 marfatdars and the suit had abated against one, but the decree had been passed. An objection was taken during the execution proceeding that the decree was a nullity the suit having abated on account of the death of one of the shebait. The question that engaged the attention of the Division Bench in the said case was as to whether in the facts of the case the decree was not a valid one. Meredith, J. spoke thus:--

"The question as to the effect of the death of one of the shebait before the trial has been argued at great length. The contention on behalf of the appellants is that the shebait form a corporate body, and can act only as a whole; every one of them is a necessary party to the suit, if not as plaintiff, at least as defendant. In support of this contention a number of rulings have been cited, going back to the Privy Council case of *Rajendranath Dutta v. Shaikh Mohamed Lal* ILR 1882 Cal 42. Of the remaining rulings cited, it will suffice to notice *Bechu Lal v. Oliullah* ILR 1885 Cal 338, where it was held that all the mutwallis of the endowment should be made parties to a suit for recovery of property; *Kokilasari Dasi v. Mohunt Rundranand Goswami* (1907) 5 CLJ 527, where it was held that where the administration of a trust is vested in several trustees, they all form, as it were, but one collective trustee and their interest and authority being equal and undivided they cannot act separately, but all must join; *Abdul Gafur Mandal and*

Another Vs. Uma kanta Pandit, , where it was held that joint shebait is, in some respects, joint trustee, in order to succeed in the suit both shebait should have joined as plaintiffs, or plaintiff should have made out a case that he was authorised by his co-shebait to maintain the suit on her behalf; Thina Shanmugha Mooppana v. Mona Chuna 70 Ind Cas 645 : (AIR 1922 Mad 317), where it was held that if several persons have a joint right of action all must join in suing, if any will not come in as plaintiffs, they must be joined as defendants, and co-trustees form one collective trustee, and cannot act separately; Thina Shanmuga Mooppanar Vs. Mona Chuna Nana Subbayya Mooppanar and Another, , where the Privy Council held that one of several co-shebait cannot sue for his own share of rent. Lastly it is pointed out, on the authority of the Privy Council in ILR 1905 Cal 129 that, however, the suit may be worded, actually the right to sue for "the protection of the dedicated property vests in the shebait, and not in the idol."

The Court thereafter referred to the application for substitution and expressed the view that as the suit was already disposed of there could be no substitution in the execution proceeding so as to remove the defect of the decree in the suit, and thereafter formulated the question thus:--

"The crucial question is, what is the effect of the death upon the suit, must it be held to have abated as a whole, or can the deity be regarded as having been substantially and sufficiently represented by the remaining twenty-two she-bait."

The answer came in the following way:--

"In my opinion, that can be done. It must be noted that this is not a case of a suit improperly constituted at its inception. At the time the suit was filed all the shebait were parties, and the suit was properly constituted. Had the deceased shebait never joined in the suit. then the rulings cited would be strictly applicable. But what we have to consider is not the effect of any improperly constituted suit, but the result of one of the plaintiffs dropping out in a properly constituted suit. The case is more closely analogous to one where after consultation amongst themselves it is arranged among the shebait that some should act on behalf of all; for we know from the fact that the deceased shebait joined in the suit he must have approved of the suit, and we know also from his son's application to be joined as plaintiff that he also approves of the suit and would support the claim on behalf of the deity. Hence this is a case where the Court can be satisfied that all the shebait are of the same mind. There are rulings in which it has been held that in such cases the interest of the deity can be held to have been sufficiently represented. For example, in Kunhan v. Moorthi ILR 1911 Mad 406 it was laid down that the rule that in the case of charitable trusts, the act of the majority will be binding on the minority only applies when such act is done after full opportunity given for mutual discussion. Where the act is done after mutual discussion, by all the members when the minority had an opportunity to record their dissent it will be the act of the whole body."

Examining the facts of another case in ILR 53 Mad 790 : (AIR 1930 Mad 881) (Veliapalli Sekhara Menon v. Narayanan) his Lordship said:

"A distinction was drawn between a suit not properly constituted at its inception owing to the absence of some of the uralans and a case originally properly constituted where on the death of one of the trustees his successor had not been substituted in his place, and authorities were quoted for the proposition that in order that a decree may bind the devaswam it is not necessary to have all the trustees or uralans as parties, provided that the litigation was conducted bona fide in the interests of the devoswom by those uralans who were parties. The ratio decidendi in these cases seems to be that the deity can be held to be substantially and sufficiently represented by the majority of the shebait where there are materials to show that they are acting with the approval of all, bona fide, in the interests of the deity and there is no possibility of any conflict of decrees."

15. Before we proceed with the other cases and further examination of the point, we think it proper to notice one feature in the present case. An application was made by respondents 2 to 16 before the lower appellate court which has been extracted in extenso already. It purported to say that plaintiff No. 2 had their consent to continue the litigation and they further unequivocally stated before the court that they would be bound by the decree to be passed. We refer to this feature in the present litigation on account of two reasons. In the Patna decision their Lordships utilised the fact that the son of the non-joining shebait had come up with an application to be added as a party during the execution proceeding and therefrom it was available that he accepted the representation of the deity by the other shebait. If that was permitted at the execution stage, it must certainly be held that the consent available to the lower appellate court is a just basis for concluding that all the shebait had consented to the institution of the suit. We must also hold applying the principle indicated in the decision of the Privy Council in AIR 1945 PC 23 that approval which was required to be strictly proved has been proved by the said application made to the court. After all, for proving such a fact there can be no better mode than the shebait appearing in a body and making a statement to the court. The manner of proof is not prescribed and satisfaction of the court being the real purpose, in the absence of any material to hold that such approval or consent is not tainted or collusive, it has got to be found that such approval has also been established by the application made to the lower appellate court. It has not been indicated to us that what is required is approval prior to the suit as a condition precedent. Even if objection had been taken in the written statement it was open to the plaintiff to prove consent or approval and, therefore, in that background the application made to the lower appellate court must be taken to be a sufficient compliance squarely coming within the dictum indicated by the Judicial Committee in the aforesaid decision.

16. We next proceed to find out whether the right of suit is in the shebait or in

the deity. It is true that the learned Author in his book referred to above has stated that that right inheres in the shebait. Dr. Pal, J. in AIR 1945 23 (Privy Council) has stated thus:--

"Before proceeding further it would be advisable to keep in mind that as the rule of law now stands, there are several distinct rights of suit in respect of the endowed property, viz.:--

- (1) the idol itself as a juristic person has the right of suit like all other owners;
- (2) the shebait, the recognised human agency through which the idol must, from its very nature, act, has a distinct right, distinct from, and, in normal cases in supersession of the idol's right of suit;
- (3) the prospective shebait as persons interested in the endowment have a right of suit;
- (4) worshippers and members of the family have right of suit."

Nasim Ali, J., who was the other learned Judge of the Division Bench, in the aforesaid Calcutta case in his judgment indicated the difference between a Hindu idol as a juristic or artificial person and a natural person who is a minor. Explaining the sense in which the Judicial Committee referred to the right of suit to vest in the shebait in the case of ILR 1904 Cal 129 the learned Judge stated,

"From the above it is clear that there is some analogy between a minor and a Hindu idol but the latter is neither a minor nor a perpetual minor. Although in law an idol has the power of suing, it has no physical capacity to sue. This absence of physical capacity is perhaps referred to by the Judicial Committee when they said in (1904) 31 IA 203 that the right of suit is not vested in the idol.On the analogy of the power of the legal guardian of an infant, the shebait of a Hindu idol has the right to sue on behalf of the idol, for the protection of its interests. In this sense it may be said, as was said by the Judicial Committee in (1904) 31 IA 203 that the right of suit vests in the shebait. It has been held by this Court that a suit for a declaration that illegal alienations of private debutter properties by a shebait are invalid is maintainable at the instance of a prospective shebait or any member of the founder's family who is entitled to worship the idol. A Hindu idol, as has been already stated, is a juristic person having its own interests apart from the interests of its worshippers. (1904) 31 IA 203 and 52 IA 245 : (AIR 1925 PC 139) are authorities for the proposition that its power of suing for protecting its own interests is to be exercised by it through its de jure or de facto shebait."

This question received further consideration in the hands of another Division Bench of the Calcutta High Court in *Pramatha Nath Mullick v. Pradyumnakumar Mullick*. Examining this aspect of the question Biswas, J. spoke thus:

"The appellant's sheet-anchor is the dictum of Sir Arthur Wilson in the Privy Council case in (1904) 31 IA 203 that the right of suit is vested in the shebait,

and not in the idol, but as has been explained in various decisions this does not and cannot mean that a Hindu idol is incapable of suing. The power of suing (as also of being sued) undoubtedly resides in the idol, though ex necessitate rei the power must be exercised by and through a sentient being representing the idol. As was pointed out by Pal J. in ILR 1941 Cal 477: (AIR 1941 Cal 99, where this question is discussed, the suit in (1904) 31 Ind App 203 was not by the idol represented by its shebait but by the shebait himself as such to enforce the proprietary right of the idol in certain properties. The High Court had dismissed the suit as barred by limitation on the ground that as the interest was admitted to be in the idol, there was nothing to prevent a suit being brought on behalf of the idol by the plaintiff's mother during his minority, but the Judicial Committee reversed the decision, holding that as the possession and management of the dedicated property belonged to the shebait. and this carried with it the right to bring whatever suits were necessary for the protection of the property, the right to sue accrued to the plaintiffs and as he was a minor at the time, he could bring the suit within three years after he attained majority u/s 7 of Act 15 of 1877 (corresponding to Section 6 of the present Limitation Act.) It is in this connexion that Sir Arthur Wilson made the observation on which the appellants rely."

Examining the question further his Lordship said:

"In 52 IA 245 : (AIR 1925 PC 139) dwelling on the nature of a Hindu idol, Lord Shaw, delivering the judgment of the Judicial Committee, expressly recognised it as a "juristic entity", and observed that "it has a juridical status with the power of suing and being sued". In *Pramatha Nath Mullick v. Pradyumnakumar Mullick* , again, their Lordships of the Judicial Committee drew a clear distinction between a suit in which the idol itself is the plaintiff and a suit in which the plaintiffs are shebaits of the idol. It is quite true that a Hindu idol is a juridical person capable of holding legal rights only in an ideal sense, and it may also be, as was indicated by Sir George Rankin in the Privy Council decision in 67 IA 251 : AIR 1940 PC 116 that the procedure of our Courts only allows for a suit in the name of an idol, but nevertheless the position remains incontestable that a Hindu idol may be a competent plaintiff in a suit in respect of property held or claimed by it, and that this is a right quite distinct from that which belongs to its shebait or shebaits to sue on its behalf. In our opinion, the law was correctly laid down by a Full Bench of the Allahabad High Court in AIR 1940 116 (Privy Council) :

"An idol has been held to be a juristic person who can hold property.

Therefore where a suit is brought in respect of property held by an idol, it is the idol who is the person bringing the suit or against whom the suit is brought the idol being the person beneficially interested in the suit. No doubt, in every suit the party bringing it or the party against whom it is brought must, when he is suffering" from an incapacity, be represented by some other person, as in the case of an infant or a lunatic. Therefore when a suit is brought on behalf of or against an idol, there must be on the record a person who represents the idol".

Discussing the matter further his Lordship concluded:

"In our opinion, therefore, the only reasonable interpretation which can be placed on the statement that the right of suit is vested in the shebait " and not in the idol, is that the idol is incapable of suing except through a person entitled to represent it, and such person is normally the shebait."

17. Having examined the law on this aspect of the matter, we are led to hold that the view expressed by their Lordships of the Allahabad High Court in the Full Bench decision referred to above seems to correctly state the law. The criticism advanced by Dr. Mukherjea against the ratio decidendi of the aforesaid Full Bench decision on the supposition that it runs counter to the dictum of Sir Arthur Wilson in (1904) 31 IA 203 does not seem to be justified. The right of suit actually vests in the idol and the idol has always been accepted in this country as a legal entity. Because it suffers from an incapacity it has always been required to be represented by a person to act on its behalf. If the right of management of the deity's affairs vests in more than one person, the entire body of such persons has been required to represent the deity more for convenience and expediency than on account of any legal requirement. We will presently examine this aspect of the matter further.

18. The view expressed by the Division Bench of the Patna High Court in the reported decision referred to above, in our opinion, has sized up the legal position correctly, and in view of the fact that the right of suit vests in the deity, if there is adequate representation there can be no scope for abatement. This aspect of the matter from a little different angle also came to be examined by the Division Bench of the Calcutta High Court in the case just referred to (AIR 1945 Cal 268). The facts of that case, as far as relevant for consideration of this point, were as follows: The suit was by the deity represented by shebait, but it was brought by only two of the shebait Nirmal and Tushar Ranjan, the third one Harimohan being joined as pro forma defendant on the allegation that by his conduct he had forfeited his shebaitship. In point of fact Harimohan also gave up his office and appointed Jyoti Prasad in his place by the Niyogapatra of 11-8-1925 and as Jyoti Prasad's appointment was ultimately upheld as valid by the judgment of the High Court Sri Sri Iswar Sridhar Jieu Thakur represented by his shebait Jyoti Prasad Bandopadhyaya Vs. Jahor Lal Mukhopadhyaya and Others, he was deemed to have been a competent shebait at the date of the suit. He had, however, not been brought on record till 3-2-38 which was admittedly long after the claim and it became barred by limitation. The question that arose was whether the suit instituted by two out of the three shebait as representing the deity was a suit by the deity. The question that arose for determination before the Calcutta High Court is the very same question that has come before this Court though with slight variation, namely, while in the said suit one of the shebait had not joined, in the present suit the shebait having joined has now ceased to continue on account of death and consequent abatement. The line of approach that appealed to the learned Judges of the Patna High Court answered

the point in one way. The manner of examination of the question in a little different setting by the Calcutta High Court was yet from another angle. The Court held:

"It is well settled that where there are more trustees than one, none of them can, save in exceptional cases, act otherwise than jointly with the others, for the authority of trustees is a joint and not a several authority. Shebaitis are not trustees in the strict sense of the term as understood in English law, but the same principle of unity among co-trustees has been extended to the case of co-shebaitis, and it has accordingly been held that where there are several shebaitis, they are deemed to constitute one body, as it were, in the eye of law, and none of them can claim to represent the deity in part or to possess any specific share or interest in the deity's property. Ordinarily, therefore, all the shebaitis should, if possible, join in a suit on behalf of the deity, and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs. As is, however, recognised, in many of those cases, and is in fact implied in the statement of the rule, it cannot be maintained as an absolute rule of law that all the co-shebaitis must join in representing the deity. The rule is subject to exceptions, and circumstances may exist in which the deity may be validly represented by some only of the shebaitis, and even by a person who is not a shebait. Where a suit is a suit by the deity represented by some of its shebaitis, the question whether or not the other shebaitis should be joined as parties is often, in the last analysis, a mere question of procedure and expediency; the test is whether or not, having regard to all the circumstances of the case, the interest of the deity may be said to be sufficiently represented."

As would appear from the judgment of their Lordships, the interest of the deity was considered to be paramount and it was indicated that the requirement of procedure must be subservient to the interest of the deity which was of the paramount consideration.

19. The legal position that emerges out of the discussion can now be stated thus. A deity is entitled to sue and be sued in law. Normally the deity has to be represented by the entire body of shebaitis, but a suit by some of the shebaitis, if it is in the interests of the deity, can be maintained in certain special circumstances. If the suit at its inception had been properly constituted by the deity being represented by all the shebaitis, there can be no abatement particularly because the consent of all shebaitis to the institution of the suit can be presumed from the fact that they had all come to represent the deity when the suit was filed. It is open to the plaintiff, if dispute is raised about maintainability of the suit on the ground that all shebaitis had not been impleaded to represent the deity, to prove that the suit as filed was with the consent or approval of all and if the court is satisfied that the claim made in the suit is with the consent of all, the suit must be held to be perfectly in order. As to whether the deity represented by some of its shebaitis is adequately represented

or as to whether the suit proceeds with the consent and approval of the entire body of shebait is in the final analysis a mere question of procedure and expediency and is meant more to protect the interest of the she-bait than of the deity itself. Therefore, if the court is satisfied keeping in view the facts of the particular case before it that the deity is adequately represented and on account of non-impletion of some of the co-shebait the deity is not affected, the suit cannot be thrown out. Wherever such a dispute is raised, it is convenient to follow the rule indicated in *Probir Chandra Pal and Others Vs. Panchanan Choudhury*, than to enter into an unnecessary battle as to who should be the proper representatives of the deity. After all, the court would be more interested in protecting the interest of the deity than in determining collaterally as to who should represent the deity. There may be disputes where the rights of the shebait inter se would arise for determination. There the scope of enquiry would be different and what the court would be called upon to decide would not be the interest of the deity, but the interest of the shebait in the deity's properties.

20. Keeping the aforesaid position of law in view, we would hold that the suit in question has been properly constituted. It did not abate on account of the death of plaintiffs 4 and 6 and non-substitution of their legal representatives; the suit was not affected on account of non-impletion of certain other shebait; the interest of the deity had been adequately represented and there was enough material on record for the Court to be satisfied that the claim laid in the suit was with the approval of all the shebait.

21. The only conclusion that can follow out of these findings is that the suit has been rightly decreed by the lower appellate court and the appeal is liable to be dismissed. We would, therefore, dismiss this Second Appeal and direct that the plaintiffs are entitled to costs throughout.

Hay, J.

22. I agree.