
(1965) 11 CAL CK 0005
In the Calcutta High Court
Case No : Suit No. 2904 of 1954

Laksmi Kanto Roy

APPELLANT

Vs

Nishi Kanto Roy and Two others

RESPONDENT

Date of Decision : 17-11-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 144
Evidence Act, 1872 — Section 65(a), 66, 90
Registration Act, 1908 — Section 31(b), 57(5), 58, 59, 60(1)

Citation : 71 CWN 362

Hon'ble Judges : Bijayesh Mukherji, J

Bench : Single Bench

Advocate : A.K. Panja, for the Appellant; R.N. Das for defendant 1, N.R. Banerji for defendant 2 and Dilip Kumar Chatterjee for defendant 3, for the Respondent

Judgement

Bijayesh Mukherji, J.—The suit in which I am now rendering judgment has been raised by Lakshmi Kanto Roy on September 8, 1954 against his two cousins of the first degree. Ninishi Kanto Roy and Radha Kanto Roy, for a twofold declaration : (i) that the two premises, one at 20 Tarak Chatlerjee Lane and the other at 3/1 Bhola Nath Kundu Lane, "from part" of the trust properties brought into being by virtue of an indenture dated January 13, 1879, between the predecessors of all, two brothers Gopal Chunder Ghose and Harray Krishna Ghose. on the one hand, and their respective wives Bhooban Mohiney and Raj Coomary, on the other, for worship or seva of the family idol, Sree Sree Lakshmi Nrisingha Dev, and (ii) that he "is entitled to possession and management of the said premises jointly with" them, no less for certain other reliefs, such as accounting and the framing of a scheme. In the alternative, the relief he prayed the Court for on the foot of the properties being secular, was a declaration of his moiety share in the said premises and allotment to him "of his divided share therein in severalty". This relief is dead now, no longer insisted on as the secular character of the properties is by either party. (See paragraphs 12, 14, 17 and 23 infra.) A suit as this dragged its slow length and came up before me for hearing

on November 11. 1964 - a little more than 10 years after its institution. One of the issues raised at the hearing was : "Is Sree Sree Lakshmi Nrisingha Dev a necessary party to the suit ?" On the third day of the hearing, namely, on November 16. 1964, the impact of so apt an issue was felt and a postponement prayed for, on behalf of the plaintiff, with a view to adding the idol, duly represented as a party, and amending the plaint accordingly. The prayer was allowed. Leave to amend the plaint as above was granted on January 15, 1965. The amendment ordered was carried out on February 1, 1965. A tortuous progress once more, as was inevitable in the circumstances. The added defendant, the deity, filed its written statement on June 10, 1965. No additional written statement was filed by the parties already on record, though they were given an opportunity to do so. And what added still more to the delay was my long absence, on duty elsewhere, from this side of the Court, where I returned on September 9, 1965, when the hearing was resumed and concluded, in presence of the plaintiff Lakshmi Kanto Roy, the second defendant Radha Kanto Roy and the third defendant (since added), Sree Sree Lakshmi Nrisingha Dev, spelt in the cause title as Sree Sree Nrisingha Dev, duly represented by a guardian ad litem and a counsel too. The first defendant Nishi Kanto Roy originally appeared in person, was represented by his counsel, Mr. R. N. Das during the hearing in November 1965, and had on September 9, 1965, appearing for him a solicitor (Mr. A. K. Chatterjee) who withdrew with the leave of the Court, on the refusal of his verbal prayer for a postponement of this much-postponed case.

2. On resumption of the hearing on September 9, 1965, no de novo trial was claimed on behalf of the deity, the added defendant No. 3, nor even the recall of the plaintiff, Lakshmi Kanto, whose evidence was concluded in the November hearing. What is more, the Court was invited to proceed on the evidence already recorded, and to be further recorded (as was recorded), on September 9, 1965. It, therefore, comes to this: Lakshmi Kanto remains un-cross-examined on behalf of the added defendant, the deity.

3. To have a clear understanding of the facts and circumstances in which this regrettable litigation has its origin, it is perhaps better to begin with the following genealogical table:

A genealogy (a little less than the one above) is set out too as an annexure to the plaint. The genealogy so set out is traversed in the written statements of all the three defendants. Nishi Kanto, the first defendant, calls it "incorrect" and puts forward Sarojini. "a daughter of Raj Kumari", (spelt Raj Coomary in the trust deed of January 13, 1879), as "an heir of Raj Kumari", (which she undoubtedly would have been, were she alive today): vide paragraph 2 of Nishi Kanto's written statement. (More of which hereafter in paragraph 8 infra.) Radha Kanto, the second defendant, avers in the second paragraph of his written statement that he, his brother Nishi Kanto and his cousin Lakshmi Kanto "are not the heirs of" Raj Coomary "who left other heirs". The deity, the third defendant,

through its guardian ad litem, "does not admit the correctness of the schedule of pedigree" given in the plaint : vide paragraph 5 of its written statement. The evidence reveals, however, that the pedigree as set out in the annexure to the plaint is not much in the realm of controversy, the contrary pleadings notwithstanding. On the foot of such evidence, as also of the ancient deed of 1879 (ext. A), which will presently be noticed (see paragraph 5 et seq. infra), I have enlarged a little the plaint's "schedule of pedigree" and made a genealogical table of my own - the one this paragraph opens with-for a better comprehension of the points at issue here.

4. On January 13. 1879, "Gopal Chunder Ghose and Harrey Krishna Ghose both of No. 5 Tarak Chatterjee's Lane in the Town of Calcutta", "being brothers and members of a joint Hindu family" and "seized and possessed of and well and sufficiently and absolutely entitled to" 20 Tarak Chatterjee Lane, "granted abined released assigned and confirmed" the same (20 Tarak Chatterjee Lane) to Bhooban Mohiney Dasse (Gopal Chunder's wife) and Raj Coomary Dasse (Harrey Krishna's wife) "and the survivor of them and her heirs and assigns", "in consideration of the sum of Rupees Ten of lawful money of British India by each of them" "well and truly paid at or before the sealing and delivery of these presents." More, as the habendum goes, "to have and to hold" the said 20 Tarak Chatterjee Lane, the two brothers, Gopal Chunder and Harrey Krishna, "granted and released or expressed and intended so to be unto" Bhooban Mohiny and Raj Coomary and "the heirs of such survivor or their or her assigns for ever" the same 20 Tarak Chatterjee Lane; but "upon trust"-

A. That Bhooban Mohiny and Raj Coomary and "the survivor of them and the heirs executors or administrators of such survivor their or her assigns or other the trustees or trustee succeeding or to be appointed as hereinafter mentioned shall and do let demise and manage" the said 20 Tarak Chatterjee Lane so assigned "as they or she shall deem most advantageous and after deducting the taxes and ground rent (if any) and the cost of repairs of the same do and shall apply the clear residue or surplus rents issues and profits" thereof "in upon and about the worship or SHEBAH of the family Idol called "Sree Sree Luckhmy Nrisingho Deb" established by the late Ram Kanye Ghose". the grandfather of the two settlers, Gopal Chunder and Harrey Krishna, "and now kept up and maintained by" the said two settlers "at their family house" at 5 Tarak Chatterjee Lane.

B. That the said trustees, the survivor of them, the heirs, executors etc., shall have "full absolute and uncontrolled power and authority" "to take and keep possession of the said Idol and all chattels and effects appertaining and belonging thereto and to nominate and appoint priests or purohits for presiding at the worship of the said Idol and also to appoint and engage Brahmins servants and attendants for performing the Shebah of the said Idol and generally to do all things needful and necessary in and about the worship of the said Idol without let hindrance or interference by or from" the two settlers, Gopal Chunder and

Harrey Krishna, their heirs, executors, administrators, assigns etc., "claiming by from through or under them or any or either of them," each of the two settlors covenanting for himself, his heirs etc., with the two trustees and their representatives etc. that "for and notwithstanding any act deed matter or thing whatsoever by them (the two settlors) or either of them made done committed or executed or knowingly or willingly suffered to the contrary" they (the two settlors) assure the trustees of their "good sure perfect absolute and indefeasible estate of inheritance in fee simple in possession without any manner of condition use trust property power of revocation equity of redemption remainder or limitation or any use or uses or any other restraint cause matter or thing whatsoever to alter charge defeat incumber revoke or make void the same." In simple language, the assurance the settlors give is that they have "good rightful power and absolute authority" to create the trust they are creating, with no power of revocation and the like.

C. That "it shall be lawful" for Bhooban Mohiney and Raj Coomary "and the survivor of them and the heirs executors administrators of such survivor and their or her assigns from time to time and at all times for ever hereafter peaceably and quietly to enter into and upon and to have hold and occupy possess and enjoy the said" 20 Tarak Chatterjee Lane "hereinbefore granted and released or expressed and intended so to be and to receive and take the rents issues and profits thereof and of every part thereof to and upon the trust and to and for the ends intents and purposes hereinbefore (declared) of and concerning the same and to and for no other intents and purposes whatsoever without the lawful let suit trouble eviction hindrance interruption denial claim or demand of or by them (the two settlors) their heirs executors administrators representatives or assigns or of or by any other person or persons lawfully or equitably claiming or to claim by from or under or in trust for them or any of them." In sum, the settlors for themselves and their posterity are effacing themselves by disabling them all for all time to come to raise any claim hostile to the trustees and the object of the trust.

No more of this indenture's padded covenants need be noticed, in the context of the litigation in hand, save one : that appointment of new trustees is provided for in the place of the old ones, unable to function, due to death, incapacity, unwillingness and the like.

5. So, that is the deed of trust dated January 13, 1879, for carrying out the worship or seba of the family idol, the first two trustees being Bhooban Mohiney and Raj Coomary. The first three paragraphs of the plaint plead almost as much, though I have drawn a little more copiously from the deed in order to have a better idea of what it really is. A series of devolutions took place one after another, as indeed was inevitable. The two settlors, Gopal Chunder and Harrey Krishna, died; when I cannot tell. Because none of the two witnesses examined at the trial, Lakshmi Kanto, aged 57 (q. No. 187), and his cousin Radha Kanto, 6 years senior to him (q. No. 23), tell me that. Gopal Chunder's wife, Bhooban

Mohiney, died in or about 1907. That follows from the evidence of Radha Kanto who was about 6 years old when she died. 63 in 1964 when Radha Kanto was giving evidence in Court, he was 6 in or about 1907. Thus, Bhooban Mohiney died at or about that time. (See qq. 104-106 to Radha Kanto in cross-examination.) Muktakeshi, the daughter of Gopal Chunder and Bhuban Mohiney, is dead too; when, evidence does not divulge. But Muktakeshi's husband, Dasarathi, died in or about 1922. On that, Dasarathi's two grandsons, Radha Kanto and Lakshmi Kanto, warring before me, are almost agreed. (See q. No. 16 to Radha Kanto who specifies the year : 1922 and q. No. 405 to Lakshmi Kanto [aged 57] who, as he says, was 14 or 15 at the time of his grandfather's death, bringing thereby the year of his death to be 1922 or thereabouts.) Of the three sons of Dasarathi, Benode Behari the father of the first 2 defendants, Nishi Kanto and Radha Kanto, died in 1936/37. That follows from Radha Kanto's evidence (qq. 2-4 and 93-95) which is : after the death of his father in 1936/37, he and his brother, Nishi Kanto, had amicably partitioned the two premises-20 Tarak Chatterjee Lane going to him and 3/1 Bholanath Kundu Lane to Nishi Kanto. The next son of Dasarathi, Nilmoni, the father of the plaintiff Lakshmi Kanto, died in 1910 (qq. 186-188 to Lakshmi Kanto). A step-son of Muktakeshi, a son of Dasarathi though, cannot bulk large in this litigation involving the seabaili office and property of Muktakeshi not of Dasarathi, as Radha Kanto rightly hints in his evidence (q. No. 76). But since this step-son's son's name (Sashi Bhusan) emerges in evidence, I have thought it fit to include him in the genealogical table to have a comprehensive view of the whole thing. Sashi Bhusan's father, that it to say, the step-son of Muktakeshi, is dead. So is Sashi Bhusan who died in 1956 or 1957, as Lakshmi Kanto says (q. No. 414: also q. No. 20 to Radha Kanto). Now, a look at the genealogical table in paragraph 4 ante, in the light of what goes before, makes it clear that the only heirs in Bhooban Mohiney's line are the three litigating parties before me - the plaintiff Lakshmi Kanto and the first two defendants, Nishi Kanto and Radha Kanto: just what the plaint's schedule of pedigree says.

6. To complete the picture, no less to keep tract of the evidence, I have shown in the table (paragraph 4 ante) Lakshmi Kanto's wife. Usha, said to be a daughter of Manoda Sundari Dassi and one S. C. Sanyal, as Lakshmi Kanto says (qq. 216-22). See also question No. 169 to Radha Kanto for the name of Lakshmi Kanto's wife, Usha. Indeed, the seed of this litigation lies, as will presently be seen, right here: in Lakshmi Kanto's marriage with Usha who has therefore a right to be included in the genealogical table. So, has Mrinalini, wife of Nishi Kanto. More of which hereafter. See, for the time being, questions numbering 125. 453 and 454 to Lakshmi Kanto who in the course of his answers thereto attributes to Mrinalini a successful effort on her part to bring the couple (Lakshmi Kanto and Usha) back "home" which Lakshmi Kanto had to leave for marrying Usha.

7. To the genealogical table again in paragraph 4 ante. Gopal Chunder's and Bhooban Mohiny's line has been noticed. To Harry Krishna's and Raj

Coomary's line now. Harrey Krishna is dead. So is his wife, Raj Coomary So are their two sons and two daughters. Ram Chandra is one such son. Another is Subal Chandra (as is the name in the plaint's genealogy) or Satish Chandra (as is the name suggested to Lakshmi Kanto : qq. 392 and 393). It does not matter which : Subal Chandra or Satish Chandra. Because whatever be the uncertainty about his correct name, there is certainty about his death. The two such daughters, now dead, are Elokeshi and Sarojini. The last-named, Sarojini died in or about 1962, leaving behind her no issue, a child-widow as she was. Elokeshi died without any issue too. It was suggested that she had four unnamed children and that Ram Chandra had left behind him a daughter, Charubala by name. Apart from being mere suggestions, they were not carried further. (See qq. 380-403 to Lakshmi Kanto.) It is, therefore, plain - and I find so as a fact - that Raj Coomary's line is extinct. Result : Lakshmi Kanto, the plaintiff, and Nishi Kanto and Radha Kanto, the first two defendants, are the only heirs in the lines of the two original trustees. Bhooban Mohiney and Raj Coomary, taken together.

8. In the light of the conclusion just come to, be recalled the deed of trust dated January 13, 1879, by Gopal Chunder and Harrey Krishna in favour of Bhooban Mohiney and Raj Coomary, and the survivor of them, the heirs, executors, administrators of such survivor, and their or her assigns - words which are the constant refrain of that document. And the plaintiff along with the first two defendants, the three heirs and survivors of the two lines - one of Bhooban Mohiney and another of Raj Coomary - were, in fact, in possession, in terms of the deed of trust, of 20 Tarak Chatterjee Lane, later bifurcated into two - 20 Tarak Chatterjee Lane and 3/1 Bholanath Kundu Lane - right up to 1940 when Lakshmi Kanto took it into his head to marry Usha. But this sort of a marriage Radha Kanto would not put up with. Lakshmi Kanto, then 33 or thereabouts, would not bend either. He determined to marry just there. And he did it though that meant his going out of the house where he was so long. But through the good offices of his cousin Nishi Kanto, 9 years senior to Radha Kanto and 15 years to Lakshmi Kanto and Nishi Kanto's wife, Mrinalini, he with his wife, could come back home where a small room was allotted to him. (See qq. 125 & 141 to Lakshmi Kanto.) But they made the place too hot for him, and by the end of 1953, he was turned out of the house along with his wife. (See qq. 124 and 126-140 etc. to Lakshmi Kanto.)

9. From evidence, I now turn once more to the plaint. I have thought it necessary to preface the case set out in the plaint, with some facts culled out from the evidence, so as to understand a little better the version the plaintiff Lakshmi Kanto comes to Court with, no less the reason of this litigation.

10. Since 1953, the first two defendants, Nishi Kanto and Radha Kanto, have been "in exclusive possession and management" of the two premises in controversy, trust premises though they are. Worse, they have been "refusing to make over the income of the said properties or any portion thereof" to Lakshmi Kanto, the plaintiff, "for the use of" Sree Sree Lakshmi Nrisingha Dev "in spite of

demands." On top of all this, they have been "wrongfully claiming the said premises as their own" and have been "converting the income thereof to their own use", and furthermore "denying and disputing" the plaintiff's "right of management and possession." This is one part of the case Lakshmi Kanto makes in paragraphs 6-8 of his plaint, wrongly numbered as paragraphs 5-7, because of the double numbering of paragraph 2.

11. The other part - and it is his alternative case - comes to this : should it be held that the premises in controversy are not trust properties, the position is that they belong to him and to the two defendants jointly, he being a co-owner to the extent of a moiety share thereof. Since the two defendants, Nishi Kanto and Radha Kanto, are denying that, he is entitled to partition and allotment of his share in the disputed premises pro tanto. (See paragraph 9 of the plaint, wrongly numbered as paragraph 8 for the same error.)

12. This, then, is the plaintiff's case. The reliefs he prays the Court for have been noticed in the paragraph this judgment opens with, and need not therefore be repeated.

13. The two brothers, Nishi Kanto and Radha Kanto, answer their cousin's suit by a separate written statement each, and each in his own way too. Whereas Nishi Kanto, appearing in person, admits in the first paragraph of his written statement the averments in the first three paragraphs of the plaint about the deed of trust and family idol (see paragraphs 5 and 6 ante) to be "substantially correct", and pleads in the sixth paragraph thereof:

..... the property is a Trust Property and not secular property and cannot be partitioned.

Radha Kanto belittles the deed of trust in the manner following in the very first paragraph of his separate written statement:

.....the alleged Deed of Trust has never been acted upon and this defendant's grandfather Dasarathi Roy deceased was in absolute possession and enjoyment of the premises No. 20 Tarak Chatterjee Lane in Calcutta as his own personal property for about 30 years up to his death sometime in 1922. This defendant is in absolute possession and enjoyment thereof for about the last nineteen years to the exclusion of the defendant No. 1.

Of the other pleas taken by Nishi Kanto and worth noticing now, one is the suit being bad for non-joinder of the deity. Limitation is also a plea Radha Kanto resists the suit with, as is indeed obvious from the averment just quoted, nothing to say of other averments too.

14. On such pleadings, the issues on which the parties go to trial are :

(1) was the deed of trust dated January 13, 1879, acted upon ever ?

(2) Is the instant suit barred by limitation ?

(3) Is the plaintiff entitled to the declarations prayed for ?

(4) What reliefs, if any, is the plaintiff entitled to ?

Additional issue-

(5) Is Sree Sree Lakshmi Nrisingha Dev a necessary party to the suit ?

15. As noticed in paragraph 2 ante, the plaint has since been amended, and the deity duly added as a party defendant, thus eliminating the fifth issue recorded above. The finding on that issue (No. 5), must therefore be that it no longer arises. The plea taken in the written statement on behalf of the deity is that the trust created in its favour "is valid, subsisting, operative and binding on the plaintiff and the other defendants." The Court is, therefore, invited to frame a scheme for proper management and administration of the trust properties. Such being the written statement of the added defendant, the issues struck before remain, barring, of course, the fifth one, as just noticed, when, on the resumption of the hearing, Radha Kanto steps into the witness-box to conclude his evidence.

16. Mr. Banerjee, the learned counsel for Radha Kanto, defendant No. 2, lightens my labour by conceding all the issues except the second - the one on limitation. Indeed, on the first issue: whether or no the deed of trust of January 13, 1879, was ever acted upon, the position, which the pleadings and evidence reveal, is such that Mr. Banerjee has had little choice left to him. Take the case of Nishi Kanto, the first defendant in this suit. By his separate written statement, paragraph 1, he admits the substantial correctness of the statements in paragraphs 1 to 3 of the plaint. Which means, by him, the admission of the existence of the family idol of Gopal Chunder and Harray Krishna down to this day, the admission of the ancient deed of trust noticed in some detail in paragraph 5 ante, and the admission of the heirs of Bhooban Mohiney and Raj Coomary becoming trustees after their death. By paragraph 6 of his written statement, he admits, the property is a trust property - not a secular property - and cannot therefore be partitioned. The written statement filed on behalf of the deity admits the trust which, it is pleaded, is valid, subsisting, operative and binding on all -Lakshmi Kanto, Nishi Kanto and Radha Kanto. Even Radha Kanto admits in a manner the deed of trust when he pleads inter alia in paragraph 1 of his written statement that "the alleged deed of trust has never been acted upon", implying thereby that there is a deed of trust. From pleadings I now turn to evidence - and the evidence of none else but of Radha Kanto - only to find just that:

Q. No. 74. You knew that Lakshmi Kanto had a right over the premises at that time (i.e. when he left in 1940) ? No; because it was taken to be trust property; he did not get any right because he never acted as a trustee.

But Mr. Panja, the learned counsel for the plaintiff, Lakshmi Kanto, cross-examining so, does not stop here :

Q. No. 75. So you accept that the suit premises are trust properties ? No; I do not accept that.

Radha Kanto then explains that, on the assumption of the property being trust property, Lakshmi Kanto never treated the same as such; just as their common grandfather Dasarathi did not ever. "So, I might say", concludes Radha Kanto, "that it is not trust property" (q. No. 76). But he does not say so, nor does he stick to the conclusion, answering questions in cross-examination by Mr. Chatterjee, the learned counsel for the deity, defendant No. 3, in continuation of his earlier evidence (qq. 80-82 and 294-295) that, after his father's death, he along with Nishi Kanto and no one else started doing the seba-puja of the family idol :

Q. No. 296. Therefore, I take it that your case is that you are applying the income of premises No. 20 Tarak Chatterjee Lane for the seba-puja of the deity Shree Shree Lakshmi Nrisingha Deb and also for the maintenance of the property - is that your evidence ? Yes,

Q. No. 297. You, do not want to say that you are appropriating the income of the said property for your own use ? I do not say that.

Q. No. 298. Therefore, you are acting as a trustee ? Yes.

He continues in this strain admitting that for the last 7 or 8 years his elder brother, Nishi Kanto, has been performing the seba-puja; whereas he has been maintaining the property, out of the income thereof (qq. 299-302). Confronted earlier by Mr. Panja with Nishi Kanto's assertion that there has been a trust deed, Radha Kanto ripostes in a hectoring tone :

I do not know anybody else's assertion except mine (q. No. 222).

But he has mellowed a lot when Mr. Chatterjee asks him just that:

Q. No. 303. Nishi Kanto also says that these are trust properties - you also know that ? Yes.

So Radha Kanto knows very much indeed somebody else's assertion : Nishi Kanto's assertion. But more is yet to come:

Q. No. 304. Therefore, may I take it that you admit the two properties - 20 Tarak Chatterjee Lane and 3/1 Bholanath Kundu Lane - are trust properties : do you admit that ? Yes.

Q. No. 305. May I take it that you want to say before my Lord that you and Nishi Kanto wanted to act as trustees and you are acting as such ? Yes.

It is thus plain to be seen that the two houses in controversy here are trust properties and that the ancient deed of trust of January 13, 1879, ext. A, has been acted upon, notwithstanding Radha Kanto's earlier assertion to the contrary. It is why I say in the beginning of this paragraph. Mr. Banerjee has had little choice in conceding what he does : that the trust is a reality and that the

deed of trust dated January 13, 1879. has all along been acted upon. I must, therefore, find the first issue in favour of the plaintiff, upon evidence coupling with pleadings, no less upon Mr. Banerjee's concession on a question of fact on behalf of his client.

17. I now turn to the second issue - the one on limitation - the only one Mr. Banerjee does not concede. But in order to decide the issue on limitation it has got to be decided first what type of property is at issue here. That takes me to the deed of trust of January 13, 1879, a document duly registered. What is before me as exhibit A is not the original deed itself, so that I may press into service section 90 of the Evidence Act 1 of 1872 and presume this document, some 85 years old, to be genuine. Exhibit A is only a certified copy of this registered deed of trust dated January 13, 1879. Even so, I see no difficulty. In the first place, the existence of a document as this is virtually admitted, as noticed already. What is admitted need not be proved. Indeed, by such admission, the secondary evidence furnished by the certified copy elevates itself to the height of a primary evidence. In the second place, foundation has been laid for reception of secondary evidence u/s 65 (a) *ibid*. The clear evidence of Lakshmi Kanto is that he had seen the original deed of trust in the possession of Nishi Kanto, the first defendant and therefore an adverse party (qq. 21 and 30). Such a one, the adverse party Nishi Kanto. must have known from the very nature of the case that he would be required to produce it. Thus, an implied notice is there under the proviso, clause (2), to section 66 *ibid*. Therefore, the requirement of section 65 (a) *ibid* is satisfied and the production of the certified copy of the deed of trust appears to be sufficient proof of the deed itself. In the third place, though u/s 90 *ibid* the production of a certified copy of the ancient document before me may not justify the presumption of its due execution, section 57(5) of the Registration Act 16 of 1908 deserves to be taken into reckoning, and by virtue thereof the copy in hand "shall be admissible for the purpose of proving the contents of the original" deed of trust. In the fourth place, another section of the Registration Act: section 60 (2), goes a long way to prove, and proves, execution even. The Registrar's certificate dated January 29, 1879. containing the word "registered", together with the number and page of the book in which the document has been copied, is there : just as section 60(1) *ibid* prescribes. This certificate, apart from being dated, is signed and sealed too by the registering officer. That being so, by virtue of section 60(2) *ibid*, such certificate shall be admissible for the purpose of proving that the facts mentioned in the endorsements referred to in section 59 *ibid* have occurred as therein mentioned. And one of the facts mentioned so, u/s 59 *ibid* read with the preceding section 58. is the admission of the execution of the document by all the four parties thereto - Gopal Chunder, Harray Krishna, Bhooban Mohiney and Raj Coomary. See (1) *Pandappa Mahalingappa v. Shivalingappa Murteppa*, AIR 1946 Bombay 193. In the fifth place, this ancient document proves it'self by the authenticity of its contents : the existence of a named idol Shree Shree Lakshmi Nrisingha Dev, the setting apart of 20 Tarak Chatterjee Lane for the idol's seva-

puja, heirs of the original trustees, Bhooban Mohiney and Raj Coomary, performing the seva-puja to this day, as provided for by the deed etc. - matters which are firmly established by the pleadings and evidence aliunde, as noticed above. An authority in point is (2) Mobarik Ali Ahmed v. State of Bombay, 1958 SCA 665, where letters and telegrams sent by Mobarik of Karachi were proved by the internal evidence afforded by their contents, Correa of Goa and Jasawalla of Bombay having had prior knowledge (limited though) of Mobarik's writings and signatures, no less of the subject-matter of the chain of correspondence. Not that this Supreme Court decision and the case in hand agree in all respects. They do not. Indeed, no two cases will agree a hundred per cent. I am simply governing myself by the principle on which Mobarik Ali's case rests.

18. The admissibility of the certified copy of the ancient deed of trust, ext. A, therefore, appears to be beyond question. But what is this document ? That has got to be looked into. At the last page - page 13 - of the certified copy, ext. A, the document is described as "Deed of Debutter Trust." That, indeed, it is, as I find from a conspectus of all its material provisions :

A. The two settlors of 5 Tarak Chatterjee Lane make a trust of a different house : 20 Tarak Chatterjee Lane.

B. In creating the trust so. they appoint their wives and their heirs, assigns etc. as the trustees, in consideration of Rs. 10 paid by each of the two wives, the first ever two trustees.

C. The trustees, as the settlors ordain it, shall let, demise and manage 20 Tarak Chatterjee Lane as they shall deem most advantageous, but after deducting the taxes, ground-rent and the cost of repairs, shall apply the clear residue for the worship or seva of the family idol. The trust property is thus "truly destined" to the family idol, and not to the settlors' heirs, as the property bequeathed by the will of the testator Sukhmangal Singh was in (3) Pande Harnarayan's case, (1921) 48 IA 143.

D. They (the trustees) shall have full power to take and keep possession of the idol staying, on the date of the creation of the trust, at 5 Tarak Chatterjee Lane, the family residence of the two settlors.

E. The trustees shall take possession not only of the idol, but also of all chattels and effects appertaining and belonging thereto. This covenant appears to be so consistent with the notion of all chattels and effects vesting in the idol itself as a juristic person and of the trustees, in the general and ordinary sense of the term, (as distinguished from the sense in which it is used in English law) - trustees entrusted with the custody and seva of the idol - retaining possession of all its moveables to carry out the very purpose of the trust: the worship of the idol.

F. The trustees shall appoint purohits, for presiding at the worship of the idol, Brahmins and other staff, for performing its seva and do all that is necessary for the seva-puja of the deity. To what they do, the settlors or their heirs, assigns

etc. shall not be able to offer any obstruction whatsoever. One more proof in aid of what the document is purported to be: a deed of Debutter trust.

G. A covenant is no doubt there conferring the right of residence upon the trustees. But it is a strictly limited right. As the covenant itself makes it clear, such right of residence, as also the right to receive rents, issues and profits, is subject to the trust, "for the ends, intents and purposes" of the trust, and for "no other intents and purposes." The ends, intents and purposes of the trust are but one: seva-puja of the deity. Once more, it must be said that the trust property is "truly destined" to the family idol.

H. The settlors have completely and effectively divested themselves of all interest they had in 20 Tarak Chatterjee Lane.

The eight features just summarised (A to H above) are merely a paraphrase of the deed's starchy provisions I have reproduced, though not verbatim everywhere, in paragraph 5 ante. The one I have not summarised so is the covenant touching appointment of new trustees : when the old ones die, become incapacitated, decline to function as such etc. The point worth noticing here is: Trustees may come and go, but the Trust remains for ever. Thus, after providing for the accountability of each individual trustee for his or her acts, receipts, neglects or defaults, as also the transfer of the trust property to the new trustees "with all convenient speed" etc. the covenant concludes that the first ever two trustees, Bhooban Mohiney and Raj Coomary, and their respective executors and administrators "shall and will faithfully perform and fulfil all and singular the trust hereinbefore in them reposed according to the true intent and meaning of these presents." The true intent and meaning of these presents are one and only one : seva-puja of the family idol, Shri Shri Lakshmi Nrisingha Dev. After such reiteration of the trust and its true intent and meaning, comes the testimonium or the testing clause beginning "In Witness Whereof" and giving particulars of the date, signing, sealing etc.

19. Hence, upon the whole of the provisions, it is clear that nothing is provided for the maintenance of the settlors' wives, their children or children's children. On the contrary, whatever remains after payment of taxes and ground-rent, if any, and after defraying the cost of repairs, shall be spent in seva-pujai of the family idol. In the persons of the first ever two trustees or their heirs (as Lakshmi Kanto and his two litigating cousins are), is seen no "true contradictor" to the rights of the idol. Is seen instead complete subservience of the trustees to the supremacy of the idol whose seva-puja they have to perform out of the income of the house, which they have to keep in good repair and free from any liability on account of taxes, rent and the like, so that it may earn the income needed for the seva-puja. Thus, the three essential formalities for the creation of a religious endowment are present here: first, the property of which the endowment is made is designated with precision - 20 Tarak Chatterjee Lane the boundaries of which are set out too; secondly, the purpose for which the endowment is made is clearly indicated - the seva-puja of a named deity: the

family idol, Shri Shri Lakshmi Nrisingha Dev; thirdly, the settlors have effectively divested themselves of all beneficial interests in 20 Tarak Chatterjee Lane in favour of the aforesaid family idol. (See page 103 of Mukherjee's Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust: 1952.) What is therefore seen here is not an arpannama (a deed of gift) straightway in favour of the deity, but a deed of trust giving the property to the trustees for holding and making use of it wholly for the deity to whom alone belong all the beneficial interests, none of which are given to anybody else. And this is a well-recognized mode of making an absolute religious trust:

It is undoubtedly possible for a founder to dedicate property in the form of a gift; he can also, if he likes, create a trust through the medium of trustees. : page 99 *ibid.*

The two settlors, Gopal Chunder and Haray Krishna, have done just that here. So, I come full circle back to the description of the document it appears at page 13 of its certified copy : ext A - a description I start with in paragraph 19 *ante*. It is a deed of Debutter Trust, the debutter being complete and absolute.

20. Once the conclusion is so - and it has to be so on a construction of the deed after submitting its telling provisions to a detailed examination, as has been my endeavour to do - it follows that the trustees are so many *sebaits*. Now, *sebaits*hip is not a mere office; it is property too :

..... in the conception of *shebaits*hip both the elements of office and property, of duties and personal interest are mixed up and blended together. : pages 200 and 201 *ibid.*

Something more is discernible here. From the ancient deed of trust of January 13, 1879, it appears that the property of *shebaits*hip has been given absolutely to Bhooban Mohiney and Raj Coomary and their heirs, assigns etc. as trustees. The rule which forbids the creation of perpetuities is not applicable here. The trust I am dealing with is a religious one. So it becomes a case of hereditary *sebaits*. And on the death of the two grantees, Bhooban Mohiney and Raj Coomary, their heirs become the *sebaits*. In fact, on things as they have turned now, Nishi Kanto and Radha Kanto, claim to be trustees or *sebaits* qua such heirs and heirs only, and so rightly too. What they claim, Lakshmi Kanto can claim too with equal right and by parity of reasoning. All the three are the grandsons of Muktakeshi, the daughter of Bhooban Mohiney. The line of Raj Coomary is extinct. (See the genealogical table in paragraph 4 *ante*.) Thus qua office, the office of *sebaits*hip I see here is an hereditary office. And qua property, *sebaits*hip per se is that, the endowed property being 20 Tarak Chatterjee Lane now split up into two - that plus 3/1 Bhola Nath Kundu Lane. (See qq. 47-49 to Lakshmi Kanto.)

21. The position so cleared, it is now time to consider which article of which Limitation Act - old or new - has to be called in aid here. The new Act, 36 of 1963, came into force on January 1, 1964 is not attracted. Because the suit in

hand, instituted on September 8, 1954, did pend on January 1, 1964 - the date of commencement of the new Act. Result: by virtue of section 31(b) *ibid*, nothing therein, i.e. in the new Act shall affect this suit pending at such commencement (January 1, 1964). The new Act is, therefore, put out of the way.

22. The old Act, 9 of 1908, accordingly governs this litigation. Let it be recalled that, on the admission made on behalf of Nishi Kanto, the first defendant, and upon the whole of the evidence too, the plaint is now truncated of its prayer (f): the alternative relief in the form of a declaration of the plaintiff's moiety share in the disputed premises and allotment to him of his divided share therein in severalty. What now remain, *inter alia*, are prayers (a) and (b). By the former, a declaration is prayed for : that the two premises in controversy (original one) form part of the trust properties. By the latter, another declaration is sought: that he is entitled to possession and management of the said premises jointly with the first two defendants. It comes to saying that the plaintiff Lakshmi Kanto qua a co-sebait lays a claim to a share in the office of sebaitship - and an hereditary office at that. So soon as that is said, his suit pro tanto is governed by article 124 which bears:

Description of suit. Period of limitation. Time from which period begins to run.

For possession of an hereditary office. Twelve years. When the defendant takes possession of the office adversely to the plaintiff. Explanation.? An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

The prayers (a) and (b) in the plaint come to saying too that the plaintiff Lakshmi Kanto, qua a co-sebait, also lays claim as such (and no more) to the endowed property : the two premises in controversy, joint possession of which immoveable property with the other two co-sebait is sought. A relief as this is resisted with the plea that Lakshmi Kanto has been out of possession thereof "since about the year 1939" - 15 years" time sufficient to bar him from recovering joint possession of the said immoveable property in his suit of 1954. So soon as that is said, his suit pro tanto is governed by article 144, a provision which is so well-known that I do not feel like reproducing it here.

23. The articles of the Limitation Act, 9 of 1908, to be applied to the suit in hand are thus ascertained. They are articles 124 and 144 : article 124 for one relief, touching the hereditary office of sebait, and article 144 for the other, touching the joint possession of immoveable property which is the endowed property here. A little more of the law has to be ascertained yet. To quote, with a little adaptation, from the observations of Sir George Rankin, while delivering the judgment of the Board in (4) *Lachmi Sewak Sahu v. Raw Rup Sahu and others*, (1943) 48 CWN 304 at page 306:

The sebaiti of the family idol here, Shri Shri Lakshmi Nrisingha Deb, descends by inheritance in like manner as secular property under the Dayabhaga. Under that law Debutter property and secular property could hardly be treated differently: in

the latter case it is clear that until something is done which amounts to an ouster of one of the heirs, the possession of one is considered to be the possession of all. That the representative of the eldest branch should, in fact, be allowed to see to the debsheba, to collect the income and to defray the proper expenses is far from being cogent proof of ouster.

24. With a clear comprehension of the whole of the law to be applied here, let me now proceed to facts. To start with, let it be assumed that the plaintiff Lakshmi Kanto is out of possession "since about the year 1939", as Radha Kanto, the second defendant, pleads in the third paragraph of his written statement, and says in his oral evidence (qq. 29-40). But the possession of Radha Kanto and his elder brother, Nishi Kanto, two co-sebait, whether of the hereditary office of sebait or of the endowed property - the two premises in controversy - is to be considered as the possession of all the three sebait of whom the suing Lakshmi Kanto is one. Mr. Banerjee, the learned counsel for Radha Kanto, however, contends that even Lakshmi Kanto's evidence contains sufficient indications of his two cousins' possession having been adverse to him, co-sebait though they are. Let such evidence be examined. It consists mainly of three parts :

A. From 1949 to 1953, Lakshmi Kanto demanded many times his share of the rents from Radha Kanto and Nishi Kanto. They said : "I (Lakshmi Kanto) had nothing to do with it. I was residing there and money was being spent." They (Radha Kanto and Nishi Kanto) denied even in 1949 Lakshmi Kanto's right to demand any account of the rents. Prior to 1949, the question would not arise. Because there was no tenant then. No money Lakshmi Kanto had ever received. (See qq. 95 and 364 to 368.)

B. In 1940 Lakshmi Kanto caused a letter to be sent by Solicitor R. C. Deb of G. C. Chunder and Company to his two cousins, Radha Kanto and Nishi Kanto, because he was ousted from exercising his right as a sebait and his right of residence too in the family dwelling house - rights which were obstructed by Radha Kanto and Nishi Kanto (qq. 441-443).

C. Right from 1940, Lakshmi Kanto faced an open hostility from his two cousins, Radha Kanto and Nishi Kanto. And that hostility continued till the filing of his suit on September 8, 1954 (qq. 445-446).

25. To read this sort of evidence in isolation, divorced from the context, will be to misread it. The context is furnished by Lakshmi Kanto's "civil marriage" with Usha, daughter of Manoda Sundari Dassi and one S. C. Sanyal, in 1940. (See paragraph 7 ante.) Whatever be the difference between the cousins, they are agreed on this : that the origin of the whole trouble is in Lakshmi Kanto's marriage with Usha. What happened was that Lakshmi Kanto, not a callow youth but a grown-up aged 33 or thereabouts in 1940, determined to marry Usha (belonging to a different caste) - a bride Radha Kanto would not let him have in any event. The reason Radha Kanto puts forward for such an adamant attitude on his part about the bride chosen by Lakshmi Kanto is as nasty as

rotten. To his thinking, Usha is the daughter of a prostitute. It is not his guess. He has personal knowledge of Usha's mother, Manoda Sundari, belonging to that ancient profession. Testing this sort of personal knowledge he speaks of, I find it is the opposite of knowledge: ignorance. Worse, such ignorance is blended with spite and meanness. Once or twice in 1924 he had seen Manoda Sundari standing at the door-step of a certain house at Durga Charan Mitra Street - an area infested with prostitutes, of which let me take judicial notice. From that, he could infer then, if at all, that she was a prostitute. But how he could infer that she was in somebody else's keeping, as he says he did, completely beats me. To run on with his story, after 1924 when he had chanced to see once or twice, while passing that way, Manoda Sundari standing at the doorstep in that red-light area of the town, he saw her in 1939 in the house of Sachin Sanyal (S. C. Sanyal) when Sanyal had called him to drop in for no particular purpose. 1924 to 1939 is 15 years. And still he could recognize at once the same Manoda Sundari whom he had seen waiting at the door-step in that disreputable locality in 1924. Age does change everybody, but not Manoda Sundari who was in 1939 just as she was in 1924. And Radha Kanto is one who cannot say a woman of 60 from a girl of 16. To say so is to say the unsayable. To run down Lakhmi Kanto's mother-in-law Manoda Sundari in the manner Radha Kanto does is thoroughly disreputable, carrying its own refutation. It pains me to find that one in the evening of his life and educated too as Radha Kanto is - he gives his evidence mostly in English - can stoop so low to cast a most undeserving slur upon his cousin Lakshmi Kanto's wife. I confess, it strikes me in the course of the evidence of Lakshmi Kanto how Manoda Sundari can be Dassi, and not Devi, though she is the wife of S. C. Sanyal, a brahmin. And I ask him so. He answers : "I cannot say how she wrote it (Dassi)" to her name. But only on this little I shall not come to so serious a finding that Manoda is a concubine of Sanyal or a prostitute. Neither Manoda owning a house nor Sanyal being a Kumar of Putia and living at Manoda's in spite of having a number of houses of his own can lead to such a conclusion. Nothing short of best evidence will enable me to find Manoda Sundari a prostitute or a concubine. And what I have before me is Radha Kanto's evidence, which degenerates itself into a false and malicious story, and Lakshmi Kanto's which boosts his father-in-law as a Kumar of Putia with several houses of his own but living at his mother-in-law's. What Lakshmi Kanto says may give rise to a little suspicion, if that, but can lay no foundation for so grave a finding that his mother-in-law was a prostitute or is a concubine. Upon the whole of the evidence, her reputation remains unsullied. I find so as a fact.

For topics dealt with in this paragraph, here are the references : (i) qq. 42, 43, 191, 264, 439, 200, 203, 214, 263, 321, 434-443, 445, 446 etc. to Lakshmi Kanto and qq. 29-37, 72, 73, 200, 201 etc. to Radha Kanto, on Lakshmi Kanto's civil marriage with Usha in 1940 and Radha Kanto's vehement opposition thereto, leading to Lakshmi Kanto's departure from the house - which Radha Kanto would put as expulsion: ("I forced him to leave", as he says) and (ii) qq.

141 to 169 to Radha Kanto coupling with qq. 214-222, 230 etc. to Lakshmi Kanto, on Lakshmi Kanto's father-in-law and mother-in-law.

26. Radha Kanto falsifies his own evidence, if it can be called evidence about Manoda Sundari, mother of Usha, having been whore ever. It that (a whore), no question of caste or opulence can arise. Nobody marries his brother or cousin to a whore's daughter, no matter how wealthy she is or what caste she belongs to. Caste and riches become then wholly irrelevant. Yet, asked by Mr. Panja about the reason why he was proclaiming in presence of all the family members that Lakshmi Kanto would forfeit his right to live with them if he would be marrying that girl, and saying so pointedly to Lakshmi Kanto's mother in particular, (qq 200 and 201), Radha Kanto says that the reason was: not only did the girl (Usha) belong to a different caste, but also she was not of a well-to-do family (q. 202), implying thereby that were she either or both, he would have had no reason to object to the marriage and to threaten his cousin with the dire consequences he did. Mr. Panja again does not stop here, as he may very well have. He suggests another reason :

Q. No. 203. Because she was a daughter of the lady of the town ? Yes.

No doubt, because of this, an otherwise good cross-examination cannot receive its full effect. Still, I cannot understand why Radha Kanto will make a point of Usha belonging to a different caste or not belonging to a well-to-do family. Once she is taken as the daughter of a prostitute - and Radha Kanto takes her so, as he says - here is an end of the matrimonial matter which neither caste nor wealth can keep alive To my mind, what in fact happened was that the very idea of an inter-caste marriage, and that again not through the usual Hindu rites, but through registration (the form a "civil marriage" takes), was too much for a conservative family like Radha Kanto's. I must not judge this sort of a departure from the norm by what I see around me today (1965): many of our children and children's children regarding parental advice in matters matrimonial as a most unwarranted interference akin to the poking of censorious fingers into their personal affairs. I should judge this by what our society was in 1940. And throwing my mind a quarter of a century back (1940), I find it to be very probable that that had caused an upheaval in this family the presiding deity of which was, and is, Shri Shri Lakshmi Nrisingha Dev. Manoda Sundari having been a common or singular harlot is a subsequent embellishment which I have little hesitation in rejecting, not only because of the quality of the evidence I have heard - so poor indeed - but also because of the quantity of the evidence before me. Radha Kanto is the only witness on the point - a witness who is too much of a partisan and, worse, addicted to manifest falsehood the stamp of which his evidence calling Manoda Sundari a woman of the town bears. What I weigh as very probable is rendered a certainty by the illuminating statements with which he concludes his evidence on cross-examination by Mr. Chatterjee, the learned counsel for the deity, the third defendant:

Q. No. 306. You do not want the plaintiff to come in ? That is so. He had never

performed the seva-puja.

Q. No. 307. Please tell us why you are so much angry with the plaintiff ? Is it because of his ultra modern marriage out of caste - he is one of your cousins ? That is the main reason.

Q. No. 308. I take it you have not got any other reasons ? That is so.

Thus, Lakshmi Kanto's marriage out of caste happens to be the main reason, the only reason, of the ostracism he has suffered : not his marriage with the daughter of a prostitute, as has been the invention for the purposes of this suit.

27. Now, in this context of ostracism which means, without more, loss of social ties only, no manner of any loss of legal rights, that part of Lakshmi Kanto's evidence Mr. Banerjee relies upon - the part I have divided into three broad categories : A, B and C in paragraph 25 ante, may be examined-

A. Before 1940, all the three - two brothers Nishi Kanto and Radha Kanto and their cousin Lakshmi Kanto - were putting up together. In the circumstances, the elderly two attending to the seva-puja, and the youngest of the three (Lakshmi Kanto) not to bothering about it, can mean no ouster of the latter. Refusal by the other two to render accounts of the rents received during 1949-53. if considered in the context of ostracism inflicted upon Lakshmi Kanto, does not mean denial of his legal right and assertion of a hostile right by his cousins. That apart, it is deserving of two more answers. One, Lakshmi Kanto's demand of his share of the rents many times cannot but be refused. He has no personal right apart from his right as a co-sebait to perform the seva-puja of the deity with the rent amount. But that is not how he had put his demand. So, refusal of a right he does not possess cannot be reckoned against him. Two, even if refusal be taken as high as that: possession, because of such refusal having been adverse to the plaintiff Lakshmi Kanto. 1949 to 1954 (when the suit was instituted) is far less than 12 years.

B. I refuse to take notice of the contents of a letter the non-availability of which is not proved in any manner whatever. Best evidence must be given. What I get instead is the worst evidence - the loss, destruction, or nonavailability of the letter of 1940 due to any other reason not being proved. Then, 20 Tarak Chatterjee Lane (in which is now included 3/1 Bhola Nath Kundu Lane) is not, and has never been, a family dwelling house. 5 Tarak Chatterjee Lane was and has been, as is more than clear from the deed of trust reviewed in paragraphs 5 and 19 ante. In 20 Tarak Chatterjee Lane there is no right of residence for any one of the three litigating parties before me for the sake of residence. The right of residence conferred by the deed of trust is a limited one - limited only to the performing of the seva-puja of Shri Shri Lakshmi Nrisingha Dev. (See again paragraphs 5 and 19 : G ante.) The sooner the litigating parties, and Nishi Kanto and Radha Kanto in particular, understand it and compose their differences, the better for them. Otherwise, the present litigation may only be a prelude to a larger one where their very right to reside in the endowed property in the

manner they are doing now may be jeopardised. Be that as it may, a solicitor's letter of 1940 demanding, if that, on behalf of Lakshmi Kanto his right of residence in the family dwelling house (which either 20 Tarak Chatterjee Lane or 3/1 Bhola Nath Kundu Lane is not) is an idle demand of a non-existent right in a non-existent family dwelling house and cannot therefore convert his adversaries' possession into an adverse possession, so far as the deity is concerned. Be it borne in mind that both Nishi Kanto and Radha Kanto acknowledge themselves to be sebaits. That being so, "a sebaite who has accepted the office of a sebaite or acknowledged himself as such is incapable of asserting any hostile title against the idol..... This disability is implicit in any person who holds a fiduciary position in relation to another." - Mukherjea's Tagore Law Lectures (supra) at page 309. True it is that though they are under a disability to declare a title hostile to the deity, they are under no such disability so far as their co-sebaite is concerned. But I get from Radha Kanto that the first ever declaration of hostile title by him against Lakshmi Kanto was in 1953. (More of which hereafter in the next paragraph). And where is the reply Nishi Kanto and Radha Kanto sent to such a letter asserting their hostile title ? At all events, for the point I am on now, oral evidence of the contents of a letter, which is not produced and for the non-production of which no explanation is forthcoming, appears to be beneath notice, though I quite see the possibility of such a letter by Lakshmi Kanto immediately after being ostracised. But I do not see the exact terms of the letter. "Of things which do not exist and which do not appear, the reckoning in a court of law is the same."

C. Who has ever denied the hostility ? It is the hostility on account of Lakshmi Kanto's civil marriage with a girl of a different caste. It is not the hostility which makes adverse possession.

28. Should any doubt linger about the possession of the two co-sebaits. Nishi Kanto and Radha Kanto, having not been adverse to Lakshmi Kanto right from 1940, though I have none whatever in my mind, that is completely resolved by the illuminating answers Radha Kanto returns to my questions towards the close of his evidence :

Q. No. 309. I take it that you had had no occasion to tell your cousin Lakshmi Kanto that he had no manner of title either to 20 Tarak Chatterjee Lane or 3/1 Bhola Nath Kundu Lane ? There was no occasion for me to tell him that. He had made some demand to us.

Q. No. 310. Please explain a little more about the demand you are speaking of ? Plaintiff's attorney informed us about his interest in the property.

Q. No. 311. Had you had any occasion to tell Lakshmi Kanto : "Look here, we are holding these two houses to your exclusion" ? I did not have any opportunity of saying that.

Q. No. 312. Had you had any occasion to repudiate openly the title of Lakshmi Kanto's right in his presence ? That we did.

Q. No. 313. When was that? Sometime in the year 1953; he had come to me and made a demand.

Q. No. 314. I repeat what I had asked you a little earlier. Had you had any occasion to repudiate openly Lakshmi Kanto's title in the presence of Lakshmi Kanto ? Yes.

Q. No. 315. That was-you say-in 1953 ? Yes. Sometime about that time.

Q. No. 316. And it was the only occasion ? Yes. Only on one occasion he had come to me and made a demand.

What remains after this to bar the plaintiff Lakshmi Kanto from recovering possession of his hereditary office of a co-sebait and from recovering too joint possession with the first two defendants, Nishi Kanto and Radha Kanto, of the endowed property - 20 Tarak Chatterjee Lane and 3/1 Bhola Nath Kundu Lane-in his suit of 1954 ? Nothing. In view of such evidence of Radha Kanto of all persons, it is unnecessary to emphasize the uphill task a co-owner or a co-sebait has to perform in order to prove his possession having been adverse to another co-owner or co-sebait. Nor is it necessary to deal with the case of (5) P. Lakshmi Reddy v. L. Lakshmi Reddy, (1957) SCA 197, Mr. Panja cites.

29. If the conclusion I have just come to is inevitable, even on the assumption that the plaintiff Lakshmi Kanto is out of possession "since about the year 1939", it becomes idle to discuss whether or no he had stepped out of the disputed premises in July 1940 when he was married - only to return there sometime that very year (1940) and to continue staying there too till 1953, when he was driven out again, as he asks me to hold. Since, however, a good deal of evidence has been led on the point and I have been addressed too thereon, I record by finding with the utmost brevity. And my finding upon the whole of the evidence is:

A. I accept Lakshmi Kanto's account of going out of the disputed premises in or about July 1940 when he married the girl of his choice, braving the opposition of his cousin Radha Kanto. But I do not accept his account of having returned the same year. Were that so, he would not have cut the sorry figure he did in the witness-box regarding his address recorded in Chitta Ranjan Seva Sadan at the time of the birth of two children of his - the birth of the first one having been in 1941-42. He cannot even say that 20 Tarak Chatterjee Lane was entered as the address of the father of the child, i.e. his own address. Absence of ration cards - rationing was in vogue then, -, engaging a flat of 4 rooms on Rs. 50 a month at 51A Jatindra Mohan Avenue towards the end of 1944. maintaining the flat to this day, a most unimpressive evidence about realization of rents from the tenants etc. negate his having come back in the manner he speaks of.

B. At the same time, making due allowance for the somewhat over-coloured account he gives, it looks probable that some sort of a reconciliation, temporary though, was made through the good offices of Nishi Kanto and his wife Mrinalini, as Lakshmi Kanto says more than once (qq. 125, 453, 454 and 464). But it was

much later: not in 1940. The best person to deny it is Nishi Kanto, a party. He appears, sometimes in person and sometimes through counsel. But he does not pledge his oath ever. Indeed, when the time comes for him to do so, his solicitor retires, and he is seen no more. Mrinalini is not examined either. Confronted with this manner of reconciliation as spoken to by Lakshmi Kanto, all Radha Kanto can say is : "Not to my knowledge" (q. No. 206). This is but a poor answer coming from one like him, full of venom against Usha, her mother and all. Reconciliation being there, Lakshmi Kanto's return would be there too, as a matter of course. And a return as that could not elude such a one's knowledge. So, merely saying: "Not to my knowledge" - leaves so many things unsaid by one whom I have found to be a wind-bag in the course of my acquaintance with him during his long sojourn to the witness-box. A poor answer as this is rendered poorer still by two documents, one of which is a memorandum dated September 20, 1948, ext. B, over the admitted signatures of Nishi Kanto, Radha Kanto, Lakshmi Kanto and Sashi Bhusan, agreeing to prosecute the necessary legal proceedings at their joint costs for bricks having been taken away from their brickkiln at Bauria in the district of Howrah. The very fact that this memorandum is coming from the custody of Lakshmi Kanto lends assurance to his version that he was left in charge of this litigation (proceedings u/s 144 of the Code of Criminal Procedure) the carriage of which he had undertaken and conducted too. 1940 to 1948 is 8 years. Time is the best healer. Presumably 8 years exercised a softening influence upon the relationship between the cousins. On no other hypothesis can be explained why the very one who was driven out would be charged to conduct a litigation on behalf of all including the one who had driven him out. The other document is the deed of sale of this very Bauria land (ext. 03), executed by all the four again on March 9, 1951. And the address of all the four including Lakshmi Kanto is put down as 20 Tarak Chatterjee Lane. Radha Kanto's explanation for insertion of an address as that of Lakshmi Kanto really explains little. Appearances are, therefore, much in favour of a reconciliation followed by Lakshmi Kanto's return, sometime ahead of September 20, 1948, to 20 Tarak Chatterjee Lane where he continued to live even on March 9, 1951, and presumably beyond. But how far beyond ? Lakshmi Kanto says : up till 1953 when he was driven out. But it is said, and with some justification too, that if things were as bad as that : a cousin driving out a cousin (Lakshmi Kanto), how is it that in solicitor Roy Chowdhury's letter dated June 15, 1954. ext. 01, on behalf of Lakshmi Kanto, not a word is there about such expulsion ? All that is stated there is a demand for partition. But the statements Lakshmi Kanto now makes are over-coloured. So little can turn on it. And to colour statements is not Lakshmi Kanto's monopoly. Take the case of Radha Kanto who would have me believe that after his father's death in 1936-37 he and his elder brother Nishi Kanto had partitioned the two houses, one of which went to him and the other to Nishi Kanto. (See paragraph 6 ante.) But Lakshmi Kanto was there up to 1939. Did he then stand by ? More, this is trust property incapable of being partitioned. At all events, Lakshmi Kanto's return to, and stay in, the disputed premises looks so probable. To put it on a low side. 1948- 1951 may safely be taken as the

time when he was there. If that is so, the suit is still less barred by limitation.

30. Upon all that goes before, I find the second issue in favour of the plaintiff.

31. Since limitation does not stand between the plaintiff and the reliefs he prays the Court for, nothing can stop him from getting the two declarations : prayers (a) and (b) : he seeks. I find the third issue so.

32. The scope of the suit being what it is, in view of the plaint, as it now stands, denuded of prayer (f): allotment to the plaintiff of his divided share in severalty - it is not for me to specify the room or rooms the plaintiff shall get into, as I am asked to do on his behalf. Joint possession he claims and gets too. I cannot travel beyond that. But I am giving specific directions for due performance of the seva-puja of the deity in terms of prayer (d) of the plaint. Accounting, the subject-matter of prayer (c). is not pressed. The plaintiff is entitled to reliefs accordingly. The fourth issue is found so.

33. In the result, the suit succeeds and is decreed as follows :

A. Declare that the two premises-

20 Tarsk Chatterjee Lane and 3/1 Bhola Nath Kundu Lane-are trust properties by virtue of the deed of trust dated January 13, 1879, exhibit A.

B. Declare that the plaintiff is entitled to possession and management of the aforesaid two premises jointly with the first and the second defendants.

C. The plaintiff shall perform the seva-puja of Shri Shri Lakshmi Nrisignha Dev for one whole year commencing from January 1, 1966. For the first 6 months of 1967, the first defendant shall perform seva-puja likewise. For the last 6 months of 1967 the second defendant shall perform seva-puja likewise. And the pala of worship will rotate in like manner thereafter.

D. Save as provided for in the aforesaid deed of trust, each of the parties will keep regular accounts of all incomes and expenditures during his term of worship.

E. Each of the parties shall pay the rates and the rents, if any, falling due during his term of worship.

F. Surplus, if any, shall be deposited in a bank the account of which will be operated by all the three.

G. Each of the parties shall have the right to inspect the accounts kept by the other during his term of worship in the first week of every month.

34. In all circumstances here. I direct that each party do pay and bear its costs, save that the guardian ad litem of the deity, defendant No. 3, shall reimburse himself of his costs, which I assess in a lump at Rs. 520, out of the debutter estate. Liberty to mention about the directions given.