
(1980) 07 CAL CK 0049
In the Calcutta High Court
Case No : Matter No. 57 of 1979

Sathyanarayan Bagla

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 14-07-1980

Acts Referred:

Estate Duty Act, 1953 — Section 5, 7(4)

Citation : (1982) 133 ITR 710

Hon'ble Judges : Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : B.K. Bachwat, R.N. Dutta and R.P. Mitra, for the Appellant; B.L. Pal and A.N. Bhattacharjee, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this reference u/s 64(1) of the E.D. Act, 1953, the following questions have been referred to this court:

"1. Whether, on the facts and in the circumstances of the case and on a proper interpretation of the relevant deeds, the Tribunal was justified in holding that the deceased was only a shebait and not also a trustee of the Mukhram property ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the shebaitship is a property, the value of which has to be included in the principal value of the estate left by the deceased ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the residential portion of the Mukhram property occupied by the deceased passed on the death of the deceased and the value thereof was includible in the principal value of the estate left by the deceased ?"

2. In order to appreciate the questions before us, it is necessary to state that the dispute about the assessability under estate duty arose due to the death of one Kumargangadhar Bagla (hereinafter referred to as "the deceased") on September 20, 1964. The father of the deceased, late Raja Shew Bux Bagla, by a deed dated January 11, 1888, dedicated the properties situated at No. 41, Cotton

Street, Calcutta, and Bisweswar Phatak, Varanasi, to Sri Sri Satyanarayan Jew and other deities appointing him as the sole shebait and trustee. It is instructive, to appreciate the controversy, to refer to certain parts of the said document. After reciting the necessary facts, the document provides as follows :

"Whereas the said Shewbux Bagla is desirous of severing for ever the said houses at Calcutta and Benaras and the said articles and furniture from all secular purposes and concerns and of converting the same into absolute debuttar property and limitation reservation or restraint and whereas the expenses of the said Sheva or worship and for the maintenance of the said Chutter at the scale at which they are now performed and worked being considerably larger than the income derived or derivable from the said house and the said Shewbux Bagla with a view to maintain the said Sheva and the said Chutter or their present scheme and scale is desirous of making such provisions therefore as are hereinafter contained, Now This Indenture witnesseth that in pursuance of the said premises and for effectuating the said intention he the said Shewbux Bagla with the consent and concurrence of the said Ganpat Roy testified by his being party to and executing these presents doth hereby grant convey assure unto the said Shewbux Bagla as Shebait of the said idols Sree Sree Iswar Suttynarainjee and the auxiliary Deities hereinbefore mentioned and to his successors in the office of Shebait..... "

3. Thereafter, the deed gives the description of the properties in question and the habendum clause reads as follows :

" To have and to hold the said temples houses lands hereditaments and other premises hereby granted or expressed or intended so to be unto the said Shewbux Bagla as such shebait as aforesaid and his successors in the office of such shebait upon trust that the said Shewbux Bagla as such shebait as aforesaid and his successors in the office of such shebait shall stand seized and possessed of the said temple houses lands hereditaments and premises and place keep locate and put up the said idols in that portion of the said houses and premises No. 51, Cotton Street, Calcutta, namely, in the same set of rooms where the said idols are at present kept located and put up and to use the said hereditaments and premises as the consecrated temples or places or worship of the said idols to let out or demise such other portions rooms or set of rooms of the same house and premises namely the house and premises No. 51, Cotton Street, hereby conveyed and consecrated or any parts thereof as to the discretion of the said shebait or shebait can be conveniently let out and demised for any term or period upon and subject to such rents covenants and conditions as the said shebait or shebait shall think fit and out of the income arising or to be derived therefrom in the first place to keep the said house hereditaments and premises in due and proper repairs and to pay and spend the balance in the manner hereafter provided set out and appointed modifying and verifying the said expenses according to and in due proportion with the increase or diminution of the said income with full and sufficient power and liberty to the said shebait or

shebait to set apart and accumulate such portion of the said income as the said shebait or shebait shall in his or their discretion shall think fit in order to create a reserve fund therein against any sudden emergency or unforeseen accident in connection with or concerning or relating to the said house and premises or to keep up and maintain the sheba or worship of the said idols in a regular or systematic mode and manner as hereinafter prescribed..... "

4. The deed provides for the different pujas and celebrations and thereafter provides, inter alia, as follows :

".....Sree Sree Suttanarainjee such funded property investment or money shall be deemed taken or considered to all intents and purposes as Debuttar property and for ever absolutely and completely severed from the secular properties of the said Shewbux Bagla his heirs representatives or assigns or the descendants of any or either of them and shall be absolutely and completely subject to the provisions limitations and reservations of these presents and dealt with accordingly provided always the discretion hereinbefore reserved to the shebait or shabait for the time being to vary and modify the expenses and to create a fund for providing against future contingencies shall not be so exercised as to diminish the monthly and periodical expenses lower than rupees four thousand two hundred sixty-nine and thirteen annas annually or in other words to make the expenses less than rupees three hundred fifty-five and thirteen annas per year provided always and it is hereby agreed and declared that in case the said houses lands hereditaments and premises or any portion thereof taken up by Government or taken up for any public purposes according to any law for the time being in force or in case any landed property or any portion thereof to be hereafter dedicated or consecrated under the provisions hereinbefore to that effect contained be taken up by Government or for any public purpose then and as often as the same may happen the shebait or shebait for the time being shall with all convenient speed substitute for the lands or houses or any portion thereof so taken up lands or houses of similar income by purchase or otherwise with the moneys received by the then acting shebait or shebait as compensation for the lands or houses or any portion thereof so taken up as aforesaid and it is hereby agreed and declared that the said Shewbux Bagla as such shebait as aforesaid shall have power and authority at any time or times during the term of his natural life to appoint by deed or deeds in writing any person or persons to act as substitute or substitutes for himself as such shebait or shebait and at his discretion to revoke such appointment and to replace or reappoint new shebait or shebait in the place or stead of the displaced or dismissed shebait or shebait and in default of such appointment by the said Shewbux Bagla up to the time of his death or if the said Shewbux Bagla departs this life without making any such appointment then and in that case his next of his kin shall succeed in his place and stead provided always that in the succession of next of kin the male should be preferred to a female and the elder successors shall commit or be guilty of any breach of the trusts conditions covenants directions or proviso herein contained and it is hereby agreed and declared that if so often any future shebait

or shebait shall die or go to reside abroad or shall desire to retire from or refuge or become incapable to act in the trusts of these presents it shall be lawful for the eldest male descendants or representative or next of kin. of the said Shewbux Bagla or if there be no such female next of kin then for the retiring or refusing shebait or the male nearest of him of the last acting shebait to constitute or appoint not shebait or shebait in the place of the shebait or shebait dying going to reside abroad or desiring to retire or refusing or becoming incapable to act as aforesaid with liberty upon any such appointment to increase or diminish the number of shebait and upon every such succession or appointment the hereditments and premises and all additional properties hereby dedicated consecrated settled secured and consigned or which shall be hereafter dedicated consecrated settled assured and consigned under the provisions of these presents shall be so transferred or stand transferred as to become vested in the said shebait or shebait as the case may require and....."

5. The deed concludes at p. 23 providing as follows :

"Provided and it is hereby agreed and declared that the heirs and descendants of the said Shewbux Bagla or any or either of them shall have full power to increase and schale(?) of the said Sheba or worship or of the said chutter by making a suitable provision therefore but not otherwise and it is hereby agreed and declared that all persons of Hindu persuasion shall have right to worship the said idols Sree Sree Suttynarainjee or to make any presents to it at their own cost and the shebait or shebait shall not be competent to refuse admittance to any Hindoo desirous of performing the worship of the said idol or to accept any offering presented to it at his own cost and the said Gunpatroy Bagla doth hereby declare that money paid as, consideration for the purchase of the said house No. 51, Cotton Street, and also the said house at Benaras was the proper money of the said Shewbux Bagla and that he the said Gunpatroy Bagla has no interest to the said property or claim or demand to the said moneys or to the said properties namely and the said house and premises at 51, Cotton Street, Calcutta, or the said house and premises at Bisseswarnath Phatak..."

6. In this capacity as shebait the said Raja Shewbux Bagla purchased the property at 19, Mukhram Kanoria Road, Howrah (hereinafter referred to as "Mukhram property"). The said document recites the dedications and thereafter the agreement for purchase states that the properties were purchased as shebait and trustee and provides in the habendum clause as follows:

".....To Have And To Hold the hereditaments and premises hereby granted or expressed so to be unto and to the use of the said purchaser his heirs and successors-in-office and the said vendors do and each of them doth hereby for themselves himself and herself their his or her heirs executors and administrators covenant with the said purchaser his heirs and successors-in-office. That notwithstanding any act deed or thing by the said vendors or any of them done or executed or knowingly suffered to the contrary they the said vendors are lawfully, rightfully and. absolutely seized and possessed of or

otherwise well and sufficiently entitled to the said land hereditaments and premises hereby granted or expressed so to be and every part thereof for a perfect and indefeasible estate or inheritance without any manner or condition use trust or other thing whatsoever to alter defeat encumber or make void the same and that notwithstanding any such act deed or thing whatsoever as aforesaid the said vendors have good right to grant the hereditaments and premises hereby granted or expressed so to be unto and to the use of the said purchaser his heirs and successors in manner aforesaid. And the said purchaser his heirs and successors-in-office shall and may at all times hereafter peaceably and quietly possess and enjoy the said hereditaments and premises and receive the rents issues and profits thereof without any lawful eviction interruption claim or demand whatsoever from or by the said vendors or any person or persons lawfully or equitably claiming from under or in trust for them And that free from all encumbrances whatsoever made or suffered by the vendors or any person or persons lawfully or equitably claiming as aforesaid and Further that they the said vendors and all persons having or lawfully or equitably claiming any estate or interest in the said hereditaments and premises or any of them or any part thereof from under or in trust for them the said vendors or any of them shall and will from time to time and at all times hereafter at the request and cost of the said purchaser his heirs and successors-in-office do and execute or cause to be done and executed all such acts deeds and things whatsoever for further and more perfectly assuring the said hereditaments and premises and every part thereof unto and to the use of the said purchaser his heirs and successors-in-office as shall or may be reasonably required."

7. By another deed dated August 1, 1909, the said Raja Shewbux Bagla declared the Mukhram property to be used as Dharmashala for the Hindus and also kept certain portions therein for the aforesaid deities. After reciting the facts of appointment as stated hereinbefore, it declared as follows :

"it is hereby declared and made known to all that any person or persons professing following or having faith in Hindoo religion shall at all times ordained or appointed by the Hindoo shastras as proper times for the performance of religious acts be entitled as a matter of right and not as a matter of favour without any permission consent or concurrence of the said Raja Shewbux Bagla his heirs representatives or shebait or she-baits for the time being to enter and have free access into and occupy a seat or seats in the said temple or place of location of the said deity and worship and perform all religious acts rites and ceremonies Jages and Jags daily or periodical in the mode method and manner prescribed recommended or observed by the Baistab Sect or class of the Hindus and shall adore make offerings say prayers and perform religious and divine service usually or generally done or performed by followers of Baistab faith in Hinduism and shall recite read peruse or chant .all divine or religious works books or compilation such as the sacred Vedas, Upanishads, Ramayan, Mahabharat, Srimat Bhagbat Gita, Bhagbat and other sacred works revealed from divine inspiration of the rishis of antiquity for atonement and absolution

from sins or salvation of souls and shall partake engage or join or take part in any feasts festivals offerings celebrated performed or observed in the said temple without any special invitation and quite uncalled for without any opposition hindrance obstruction or interruption by the said Raja Shewbux Bagla his heirs representatives shebait or she-baits for the time being or their employees appointees and persons deriving authority from him or them or acting under his or their orders Provided Also Always and it is the true intent and meaning of these presents that it shall be lawful for all Hindoo worshippers or persons of Hindu persuasion to exercise the same rights of free worship and free privilege or partaking and enjoying the ceremonies and festivals not repugnant to the Baistab faith and to avail of the accommodation and refreshments afforded or yielded by the auxiliary or subservient institution at Howrah mentioned and described aforesaid and which is hereby declared to be a part and parcel and forms a member of the said principal institution or temple of the said deity at No. 61, Cotton Street Provided further that the endowment or gift to the deities hereby and by the said several indentures dedicated or consecrated and the issue and profits thereof including Vetī, Brith, and Chanda, Pranami and Darsani to be recovered in connection with the said deities shall be considered deemed and taken as public endowment or debutter in which the Hindu community at large and following the Baistab faith shall have a full free and unfettered right of worship without any obstruction opposition or interruption by the said Raja Shewbux Bagla his heirs representatives or by the shebait or shebaits for the time being or their successors in office appointed under the provisions of the said recited indenture of the 11th day of January 1888 as hereinbefore contained and not merely as a private one in which the heirs and representatives of Rajah Shewbux Bagla shall only be concerned or interested in exclusion of the general Hindoo public and it is hereby declared that it shall not be lawful for the heirs and representatives of the said Raja Shewbux Bagla or the shebait or shebaits for the time being or his or their or appointees appointed under the provisions of the said recited indenture to prevent obstruct hinder or interrupt any person or persons of Hindoo faith from worshipping and performing religious acts and ceremonies or in partaking feasts and festivals and doing religious service in manner they have been hereinbefore authorised and empowered to do or to amend alter or modify the provisions dispositions arrangements routine or scale of expenses the scheme of worship and the mode and manner of performance of rites of ceremonies powers and privileges granted and conferred to the public at large herein and by the said recited indenture noted mentioned described and delineated nor shall they have power right or authority collectively or separately jointly or severally to change the character or nature of the hereditaments and premises or any portion thereof hereby and by the said indenture endowed dedicated or consecrated or to convert the same or any portion thereof into secular use in any manner whatsoever it being the intention object and meaning of the said Raja Shewbux Bagla that the hereditaments and premises hereby and by the said indenture endowed dedicated or consecrated shall be and remain for ever as debuttar properties according to the true sense of Hindoo law and shall

be treated behaved and used as such anything herein contained interpreted and construed by the light of the English law or any other law to the contrary notwithstanding Provided further that if by any chance or accident or circumstances there shall and remain a surplus income including Vetī, Brith, Chanda, Pranami and Darsani after all the usual and routine expenses such income shall be applied and appropriated towards creating a fund either for augmenting increasing or enlarging the bulk of the debutter or endowed property or for meeting any future exigency or contingency in relation to or in connection with the said Deb Sheba and not and under no circumstances an increment or accumulation of the secular property of the said Raja Shewbux Bagla his heirs and representatives....."

8. During his lifetime the said Raja Shewbux Bagla and the member of his family used to reside in a portion of the Mukhram property. Before his death on October 5, 1908, by a deed dated July 11, 1907, the said Raja Shewbux Bagla appointed his wife, Rani Mohari Bibi and his son, the deceased, as joint shebait and/or trustees for all the aforesaid properties. Rani Mohari Bibi died on June 5, 1910, and from that date onwards the deceased became the sole shebait and/or trustee of the aforesaid three properties. The deceased and the members of his family continued to reside in the said Mukhram property. The deceased died, as mentioned hereinbefore, on September 20, 1964.

9. During the course of assessment proceedings, the question arose about the accessibility of the privilege of the right of residence of the deceased to be included in the value of the property to be taxed as estate duty under the E.D. Act. The Assistant Controller of K.D. came to the conclusion that shebaitship was a right and the value of such right had to be included in the principal value of the estate left by the deceased for the purpose of computation of the estate duty. The Assistant Controller estimated and included Rs. 2,88,000 in the principal value of the estate, being the value of the dwelling house portion of the shebait and his family. He did not, however, give any relief as contemplated u/s 33(1)(n) of the K.D. Act, 1953.

10. There was an appeal before the Appellate Controller of K.D. and the Appellate Controller by his order dated August 1, 1975, accepted the submissions made on behalf of the accountable person for the reasons mentioned in his order.

11. Being aggrieved by the order of the Appellate Controller, the revenue went up in appeal before the Tribunal. The Tribunal referred to the book of Dr. B. K. Mukherjee on Hindu Law of Charitable and Religious Trusts and came to the conclusion that the expressions "shebait and trustee ", "shebait or trustee", "shebait" and "trustee" were indiscriminately used without meaning any precise import. The Tribunal was of the view that the late Raja Shewbux Bagla merely intended to dedicate the properties to Satyanarayan Jew and other deities and appointed shebait to manage the deities. That was the true intent of the documents, as we have referred to. On the question whether the shebaitship is a right, the value of which could be included in the principal value of the estate left

by the deceased, relying on the relevant authorities, the Tribunal was of the view that it was a right which devolved or passed on the death and, therefore, the value of that right was assessable to duty. So far as Section 33(1)(n) of the Act is concerned, the Tribunal, however, agreed with the view of the Appellate Controller that that section would be attracted. In so far as the valuation of the right of the residential portion of the Mukhram property is concerned, the Tribunal directed the matter to be gone into by the Appellate Controller, after giving opportunities to both the parties. After this, the aforesaid three questions mentioned hereinbefore have been referred to this court.

12. Before we enter into the merits and demerits of the rival contentions urged before us it would be necessary for our purpose to refer to certain relevant provisions of E.D. Act, 1953. Section 2(15) of the Act defines "property" as follows :

" "Property" includes any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale and also includes any property converted from one species into another by any method,

Explanation 1.--The creation by a person or with his consent of a debt or other right enforceable against him personally or against property which he was or might become competent to dispose of, or to charge or burden for his own benefit, shall be deemed to have been a disposition made by that person, and in relation to such a disposition the expression " property " shall include the debt or right created.

Explanation 2.--The extinguishment at the expense of the deceased of a debt or other right shall be deemed to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished, and in relation to such a disposition the expression "property" shall include the benefit conferred by the extinguishment of the debtor right."

13. Section 5 on the basis of which duty has been imposed in this case is important and Section 5(1) is relevant for our purpose. It provides as follows :

"5. (1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the territories which immediately before the 1st November, 1956, were comprised in the States specified in the First Schedule to this Act, and in the Union Territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry, which passes on the death of such person, a duty called, "estate duty" at the rates fixed in accordance with Section 35. "

14. Section 7 of the Act deals with the interest ceasing on death and for our present purpose it will be necessary to refer to Sub-section (4) of Section 7, the

relevant portion of which provides, inter alia, as follows :

" (4) The provisions of Sub-section (1) shall not apply to. the property in which the deceased or any other person had an interest only as holder of an office or recipient of the benefits of a charity, or as a corporation sole..... "

15. Section 10 is not very relevant. It deals with gifts whenever made, where the donor was not entirely excluded. It provides that whenever a property is made and taken under any gift, that should be deemed to pass, on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. Section 10 is not relevant for our present purpose, but we were, however, referred to some of the decisions, which had reference to Section 10.

16. Section 22 deals with property held by the deceased as trustee and provides that the property passing on the death of the deceased shall not be deemed to include property held by the deceased as a trustee for another person under a disposition, not made by the deceased or under a disposition made by the deceased where (whether by virtue of the original disposition or of a subsequent surrender of any benefit originally reserved to the deceased or otherwise) possession and enjoyment of the property was bona fide, assumed by the beneficiary at least two years before the death and thenceforward retained by him to the entire exclusion of the deceased or of any benefit to the deceased by contract or otherwise. There is a proviso to Section 22, which is not necessary for us to refer to.

17. Section 33(1)(n) excludes residential premises up to the value of Rs. 1 lakh from the computation of the value of the property upon which duty is leviable.

18. The main question, as we have mentioned before, is whether any property as contemplated u/s 2(15) of the E.D. Act read with Section 5 of the Act has passed on the death of the deceased. This naturally brings us to the question as to whether the residence which the deceased had along with the members of his family in a portion of the debuttar property is a right which comes within the purview of property which passes on the death of the deceased. Now, in our opinion, it is not necessary to go into the broad question as to whether shebaitee is a right or property which is heritable on death, which is a question upon which and upon which only the Tribunal seems to have proceeded. We are not concerned with the general question of whether shebaitee as such is a right or a property which passes on the death to the next incumbent. This problem must be examined, in view of the provisions in Hindu law, in the background of the facts and circumstances and the intention of the parties as envisaged in the documents and the conduct of the parties thereafter.

19. About the nature of shebaitee, Dr. B.K. Mukherjee in his Tagore Law Lectures on Hindu Law of Religious & Charitable Trusts, 3rd Edn., p. 156, noted that "The exact legal position of a shebait or manager cannot be said to be altogether

beyond the range of controversy, though much of the earlier theories has now been discarded. It is now settled by the pronouncement of the Judicial Committee in *Vidya Varuthi v. Balusami* [1921] LR 48 IA 302; AIR 1922 PC 123, that the relation of a shebait in regard to the debuttar property is not that of a trustee to trust property under the English law. In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of the cestui qui trust. In a Hindu religious endowment, the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person and the shebait or mahant is a mere manager. The Judicial Committee further pronounced that a trust in the sense in which the expression was used in English law, was unknown in the Hindu system pure and simple. Hindu piety had found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system. Under the Hindu law the image of a deity of the Hindu pantheon was a juristic entity, vested with the capacity of receiving gifts and holding property. Religious institutions known under different names were regarded as possessing the same juristic capacity and gifts were made to them eo nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahminism was essential for bringing the Dravidian people under the name of Math were founded under spiritual teachers of recognised sanctity (sic). When a gift was directly to an idol or temple, the seisin to complete the gift was necessarily effected by human agency. Called by whatever name, he was only the manager and custodian of the idol or the institution. In almost every case he was given a right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor was he a " trustee " in the English sense of the term, although in view of the obligations and duties resting on him, he was answerable as a trustee in the general sense of mal-administrator."

20. In the same book at page 157, the learned author has noted that in the conception of shebaitship both the elements of office and property, of duties and personal interest are mixed up and blended together. Undoubtedly the duties of a shebait are to be regarded as the primary thing whereas the emoluments or beneficial interest enjoyed by him are only appurtenant to the said deities (see in this connection *Nagendra Nath Palit Vs. Robindra Narain Deb*,). Neither of these elements, however, can be detached from the other, and in dealing with the law relating to the rights and obligations of the shebait, both these elements would have to be kept in view.

21. For our present purpose, it is, therefore, important to remember that emoluments, if there be any, or beneficial interest, if there be any, enjoyed by the shebait are only appurtenant to the duties to be performed by the shebait and one cannot be detached from the other. In this connection, Dr. B. K. Mukherjee has referred to the observations of Lord Hob house in the case of *Gossamee Sri Gridhariji v. Romanlalji Gossami* [1889] LR 16 IA 137; ILR 17 Cal 3

(PC).

22. Shebaitee right is not alienable and so far as the shebait's right of residence. is concerned, Dr. Mukherjee in his lecture on Hindu Law of Religious and Charitable Trusts, 4th Edn., at p. 250, noted that as regards the shebait's right of residence in the house dedicated to the deity, the usual practice is to make provision regarding it in the deed of dedication itself. As had been said in the lecture (3rd Edn.), a direction by the founder that the shebait for the time being would be entitled to reside in the house set apart for the deity does not make the dedication in any way invalid or improper. On the other hand, such arrangements are considered to be extremely proper and convenient. The Privy Council observed in *Gnanendra Nath Das v. Surendra Nath* [1920] 24 CWN 1026, that " it is a perfectly reasonable arrangement to secure that the man in whose hands the supervision of the whole estate is vested shall have associated with his duties the right to reside in the named dwelling house". Even if there is no provision in the deed of endowment, the learned lecturer noted at p. 250 of the 4th Edn., that it seems that such right of residence would be implied in law unless there is any prohibition to that effect in the deed of endowment. Not only the general feeling of the Hindu community is in favour of giving the shebait a right of residence in the deity's house, but such right is really appurtenant to the duties which the shebait has got to discharge in regard to the spiritual and temporal affairs of the idol.

23. There are deeds where the shebait is given a right or share in the usufruct or given emoluments from the usufruct of offerings of the deity as part of the compensation for the acts that they perform. It has been held and it must be construed that a shebaitship as such is a property. The fact that the property is dedicated to the deity and the property belongs to the deity in the legal sense does not detract from the fact in the Hindu law apart from the right over the property; shebaitship as such is a property which is heritable property. But the question really is, in this case, as it was submitted before us, that the premises in question was purchased by the shebait as shebait and/or trustee. It was, therefore, urged that if the shebait, in this case, was holding the property as a trustee, then in view of Sub-section (4) of Section 7 of the E.D. Act, the properties in question were held by the shebait, which were supposed to have passed on the death of the deceased, as mere holder of office and, therefore, were not exigible to duty. In respect of property there cannot be two legal owners. The premises in question cannot belong to two separate and independent legal owners apart from the question of joint owners. Juristically speaking> either the property belongs to the deity or the legal title belongs to the trustee. Now, the expression " trustee " or " to hold it in trust" in the English law conveys as it does under the Indian Trusts Act that the legal title to the property vests in the trustee. But the Hindu law says that when there is a complete and absolute dedication, the legal title vests in the deity. Therefore, the expression " trustee " must be construed to have been used in the sense that the shebait purchasing the property or performing the duties of shebait would act

and perform as a trustee, that is to say, for the benefit of and on account of the deity as the human ministrant of the spiritual divine who cannot act in the temporal matters, but must act through the human agency. For action for the spiritual divine by human agency the expressions "trust" and the "trustee" are very often used. Therefore, we are unable to accept the contention urged on behalf of the accountable person that in this case, the property having been purchased and having been given to the shebait, the right of the shebait being as of a trustee, that right could not have devolved on the death of the deceased, in view of Section 7(4) of the said Act. We accept the view of the Tribunal that the expression "trustee", in the facts and circumstances of this case, has been indiscriminately used without meaning the precise. The late Raja Shewbux Bagla had intended to dedicate to Sri Satya Narayan Jew and other deities the properties in question and the legal title vested in the deities and the shebait was only a manager of the said deities. In that view of the matter, question No. 1, in our opinion, should be answered in the affirmative and in favour of the revenue.

24. The next aspect is, whether shebaitship is a property. In our opinion, as we have indicated, in that broad view, it is not necessary for us to determine whether shebaitship is a property, the value of which is to be included in the principal value of the estate left by the deceased. Shebaitship is a property of a nature in the sense that the shebait has certain duties to be performed by him and attached to those performances of the duties there are certain rights attached. But these rights are attached or are heritable, according to the provisions of the deed, or by the general law of succession and in that sense it can be said to be a property. But the question that really falls for consideration is whether the property of all nature comes within the purview of Section 2(15) of the Act and would attract the mischief of Section 5 of the Act. All properties cannot be said to pass on the death. For example, a Government servant has property right to the pension but on his death that right does not devolve on his heirs. The question is, whether right, as described in this case, could it be called a right, which devolves on the death of the deceased, merely because, by the fact of the death of the deceased. On behalf of the accountable person, it was urged by the learned advocate that, in this case, there was an express exclusion of the right of residence of the shebait. He drew our attention to the different portions of the deed, which we have set out hereinbefore, to emphasise the contention that the Hindus have been given access to the entire dedicated property and the shebait had been prevented from making any use of the property for the secular purposes. He, therefore, emphasised that where there is an express exclusion of the right of residence, the right of residence which normally follows the right of a shebait will not be attracted in this case. It is true that in this case access to the entirety of the dedicated property has been given to the Hindus of all communities. It is also true that the secular use of the premises of the dedicated property by the shebait had been prohibited by the express terms used in the deed. But from this, it does not follow that there is either an express prohibition of any right of residence of the shebait or the

general principles had been excluded. In this connection, it has to be stated that learned advocate for the accountable person emphasised, and emphasised greatly, to bear in mind the use of the expression trustee. We find neither any express prohibition for the shebait residing in the dedicated property nor any such prohibition by necessary implication thereof. But then the main question which still remains is that though shebaitship is property in some cases and it is heritable if there are certain rights given for the performance of duties, including the right of limited alienation for the discharge of the duties, for the preservation of the dedicated building, for the performance of the pujas and for meeting other temporal needs of the spiritual divine, whether those benefits or rights could be said to be rights within the purview of Section 2(15) of the Act read with Section 5 of the Act. Now, in this case, it has to be borne in mind that in the deeds, there is no right given as such to the shebait to any portion of residence. It has, secondly, to be borne in mind that in this case, by the original deed, the right of appointment of the succeeding shebait had been given, and up to the death of the deceased that right had always been exercised by the succeeding shebait, who had been holding office by virtue of the appointment made pursuant to the power reserved in the original deed, though it has to be borne in mind that in the absence of such appointment the ordinary line of inheritance would have to be followed provided, however, the shebait kept on performing seva, that is to say, they were residing in India, they had not forsaken the Hindu religion, it being provided that a male was to be preferred to a female, the first one should be preferred. The third factor that has to be borne in mind and the reason why we are stating this is in view of certain decisions of this court, which we shall presently notice, that the portion in which the late Raja, and the members of his family as qua shebait, dwelt, was significantly small having regard to the largeness of the property dedicated. In this document as the dwelling of the shebait in the property dedicated to the deity for the performance of the duties to be discharged by the shebait is provided, can that dwelling be considered to be the property ? Now, it was urged on behalf of the accountable person that it was not a right but a privilege. Term as you may, the fact is that there were the original shebait as well as the succeeding shebait dwelling in the dedicated properties along with the members of their families for the performance of the duties of shebait. Now, before we proceed to consider the question further it would be necessary for us to refer to certain decisions.

25. Our attention was drawn on behalf of the revenue to the Finance Act of 1894 of England which dealt with the estate duty in Part I of the said Act and provided in terms more or less similar to Section 5(1) of the Act. That section is set out hereunder :

"1. In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called " Estate Duty " at the graduated rates hereinafter mentioned and the

existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such Estate Duty."

26. This provision came up for consideration before the House of Lords in the case of *Scott v. IRC* [1936] 3 All ER 752 ; 2 EDC 579. The question in dispute in that case was whether estate duty became payable on the death of the sixth Earl Cadogan in respect of property comprised in two settlements which were executed respectively on 26th and, 27th July, 1889. By these two settlements dated July, 1889, certain estates were settled to the use of A, for life, with remainder to the use of B, for life with remainder to the use of B's sons successively in tail male and in default of such issue to the use of C for life and after his decease to the use of his sons successively in tail male with remainders over in default of such issue. In 1893, C's contingent reversionary life estate was purchased by A, and in 1894 was conveyed by A to trustees and settled upon trust that, in the events which happened, the trustees should hold the settled property upon discretionary trusts for the benefit of C, his wife and children and accumulate the surplus (if any) and should apply the accumulations towards the payment or satisfaction of any debts or encumbrances for the time being charged upon the premises, and, subject thereto, should hold the said accumulations for the trusts and purposes of one of the said settlements dated July, 1889. B died in 1908, and his only son died in 1910, an infant and unmarried. A died in 1915 and C died in 1933. On C's death, the settled property vested in C's eldest son, as tenant in tail. Estate duty was claimed upon the death of C in respect of the property comprised in the settlements on the footing that such settled property passed upon the death of C within the meaning of the Finance Act, 1894, Section 1, which we have set out hereinbefore. It was held by the House of Lords that as the settled property as a whole did actually change hands upon the death of C with the result that C's eldest son became entitled to receive the whole income of the estate which immediately before the death of C was primarily applicable for the benefit of the objects of the discretionary trust, there was a passing of the property within the meaning of Section 1 of Finance Act, 1894, and the estate duty, therefore, became payable upon C's death. We are afraid this decision will not be of much assistance to us in resolving the present controversy. The dispute in that case was about the passing of the property on death for the purpose of estate duty. The question in that context was whether the same person was interested in the property both before and after the death. The question was, before the death, this was one of the objects of discretionary trust under which he could receive the whole income but after the death he became the tenant in tail in possession of the property. In these circumstances, it was held that there was passing of property on death. In that case, there was certainly a passing on death because though the benefit of the property accrued to the same person both before and after, the nature of benefit, that is to say, the tenant in tail in possession attached on discretionary trust changed, a change which was occasioned by the death. Such a controversy has not arisen or fall for our consideration in the instant case.

27. We must also refer to the decision in the case of Khatizabai Mohomed Ibrahim Vs. Controller of Estate Duty, Bombay, . There, the Division Bench of the Bombay High Court dealt with a deed of Wakf-al-aulad. By that deed, the settlor had created a wakf of certain immovable properties and a sum of Rs. 1 lakh under which the ultimate benefit to charity was postponed until the extinction of the descendants of the settlor; The settlor reserved for her maintenance during her lifetime $62\frac{1}{2}$ per cent. of the net income of the immovable properties and directed that $3\frac{1}{8}$ per cent. of the income was to be given to her daughter for her maintenance and the remaining $34\frac{1}{2}$ per cent. for her daughter's children in certain specified shares. After the death of the settlor $12\frac{1}{2}\%$ of the net income was to be paid to her daughter and the remaining $87\frac{1}{2}$ per cent. of the income to the daughter's children. The sum of Rs. 1 lakh was to be held in a separate account called the " extraordinary heavy repair fund " to be utilised for repairs and construction but during the lifetime of the settlor the income from that fund also was enjoyed by the settlor, her daughter and her grandchildren in the same proportion in which they enjoyed the income from the other properties. On the death of the settlor, the Controller brought the entire immovable properties as well as the sum of Rs. 1 lakh to assessment. It was held that the entire wakf properties including the sum of Rs. 1 lakh was chargeable to estate duty under s, 5 read with Section 3, Sub-section (3), and Section 12 of the E.D. Act. The court also reiterated that the scheme of the E.D. Act of India and of the Finance Act, 1894, of England were substantially the same. From the narration of the facts of that case, in our opinion, it would be clear that the said decision has very little to do with the facts with which we are concerned. In this case, there was no reservation of any beneficial interest by the original dedicator or the subsequent shebait unto themselves.

28. The next decision to which we must refer is the decision of this court and it has some relevance to the present controversy, that is, in the case of Pran Krishna Das Vs. Controller of Estate Duty, West Bengal, Calcutta, . There, the Division Bench of this court held that where a person dedicated his properties to his family deity and constituted himself the shebait of the debuttar property where he retained some sort of interest in the debuttar estate expressly under the deed of endowment, viz., right of residence in a part of the property and where he did not do so but merely constituted himself as a shebait, that fact alone would endow the shebait with some sort of beneficial interest in the dedicated property and by functioning as a shebait he would be enjoying some beneficial interest in the properties dedicated to the deity. This would attract the mischief of Section 10 of the ED. Act because it could not be said that the shebait by dedication ceased to have any benefit or enjoyment in the dedicated property and the dedicated properties would pass on the death of the deceased. The Division Bench further observed that even if the deceased did not reserve the right of residence in one of the properties even then, in law, he would have deemed to have retained some beneficial interest in the property dedicated to the deity and such retention of interest would have the effect that the dedicated

property would be deemed to be the properties which passed on his death. It is, however, to be borne in mind that that decision was rendered in the context of the controversy that, on the original settlor dying, as to whether Section 10 of the E.D. Act, which we have set out hereinbefore, was attracted or not, whether while making an original settlement, the original settlor by having; a right of residence either by express terms or by necessary implication detained the beneficial interest, it could be said to pass on his death, a question which does not fall for our consideration, because in this case we are not concerned with the controversy of the property passing on the death of the original settlor or original dedicator. This question might or might not have arisen on the death of Raja Shew-bux Bagla. But we are concerned with the subsequent shebait's dwelling in the dedicated properties, for the performance of the duties of shebait and that right or privilege going to the subsequent shebait on the death of the deceased. According to the decision, the Division Bench had no occasion in that case to construe the effect of Section 5. Furthermore, it is to be borne in mind that the question which was posed was as follows :

"Whether, on the facts and in the circumstances of the case, all or any of the following properties covered by the arpannama dated 12th December, 1938, have been rightly included in the estate as property deemed to pass on the death of the deceased u/s 10 of the Estate Duty Act, 1953?"

29. There, by a Bengali arpannama dated 12th December, 1938, the deceased had dedicated in favour of his family deity Sri Sri Lakshmi Narayanji, 13 items of properties indicated in the judgment. The question was whether such properties could have been deemed to have passed on the death of the deceased. The Division Bench, however, considered the general position of the right of residence and observed at p. 147 (of 69 ITR) that, under the conception of Hindu law, it was in an ideal sense that the dedicated property vested in an idol, for, in the nature of things, the possession and the management of the same must be entrusted to some person called shebait or manager. The Division Bench referred to the decision of the Privy Council in the case of *Prosunno Kumari Debya v. Golab Chand Baboo* [1875] LR 2 IA 145, where the Privy Council observed, it would seem to follow that the person so entrusted must of necessity be empowered to do whatever might be required for the services of the idol and for the benefit and preservation of its property, at least, to a great degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted and hitherto discontinued for want of necessary funds to preserve and maintain them. Referring to Dr. B.K. Mukherjee's Tagore Law Lecture on the Hindu Law on Religious and Charitable Trusts, the Division Bench observed, even if there was no provision in the deed of endowment, it seemed that the right of residence would be implied in law unless there was prohibition to that effect in the deed of endowment and in that context the Division Bench considered the applicability of Section 10. As we have noted, in view of the nature of the privilege of the right that we have found in the instant case by the subsequent holder of the office of shebait, subsequent to the original settlor, for

the purpose of performance, whether such a right or privilege can be termed to be the property passing on the death u/s 5 of the Act read with Section 2(15) of the Act did not fall for consideration before the Division Bench. The next decision to which we must refer is the decision of the Patna High Court in the case of Umesh Narain Puri Vs. The Controller of Estate Duty, B. and O., , where the court held that where the property was not within the disposing capacity of the deceased holder of the estate, no estate duty could be levied on such property in the hands of any one who succeeded to such property. The properties of the Math which were vested in and managed by the Mahant were in the nature of a private trust to which Section 22 of the Indian E.D. Act would be applicable. The Mahant did not have powers of disposal over such properties u/s 6 of the Act on the death of the Mahant which might not be deemed to have passed on to the successor. Such property was, therefore, not liable to estate duty under the Act. Here again, the controversy was a little different and though, for example, Dr. Mukherjee, as we have noticed in the lecture, had treated the Mahant and the manager or shebait of a dedicated property on the same basis, the shebait up to a point had the right of alienation for the benefit of the deity and for the purpose of performance of his duties but he had no right, as such, of alienation or disposing of all the properties for his personal benefit. If the test, as laid down by the Division Bench of the Patna High Court, referred to hereinbefore, that is to say, the disposing capacity of the deceased holder is an essential ingredient of the right to property which could be said to pass on the death of the deceased u/s 5 then of course the ratio of the principle of the Patna High Court would be applicable to the facts of the instant case and the property cannot be said to have passed on the death of the deceased. It is not, however, necessary for us to decide in the instant case, whether the disposing power, as contemplated u/s 6 of the Act, is the same in order to construe Section 2(15) of the Act read with Section 5 of the E.D. Act.

30. In the case of Controller of Estate Duty, Madhya Pradesh, Nagpur Vs. Smt. Usha Devi Patankar, , the Madhya Pradesh High Court had considered this question in the context of a muafi cash grant in the place of the jaghir. There, in pursuance of an arrangement made at the time of the marriage of R to the daughter of Maharaja of Gwalior, R's father, M, was granted a property in jaghir. Subsequently, the jaghir was taken back and the cash used to be paid to him by way of maintenance. Later, R used to be paid Rs. 10,000 monthly by the Maharaja. On R's death, his adopted son, T, was paid Rs. 5,000 per month. After T's death, his son, N, the deceased, was granted a cash muafi of Rs. 38,844 per annum. After the death of N on October 13, 1957, the Government of Madhya Pradesh substituted the name of his son, T, for cash muafi of Rs. 38,844. In the assessment proceedings for estate duty of the property passing on the death of N, the Assistant Controller of Estate Duty and the Appellate Controller included the value of the muafi grant of Rs. 38,844 in the estate of N passing on his death on the ground that the muafi grant was a hereditary grant. On appeal, the Appellate Tribunal held that the cash muafi was not heritable and did not pass on

the death of N within the meaning of Section 5(1) of the E.D. Act, 1953, and was not liable to estate duty.

31. There, it was held by the Division Bench of the Madhya Pradesh High Court that the muafi grant held by the deceased, N, was a property as it gave a right to a sum of money, but it was held by the deceased, N, for his life only and did not "pass" on his death within the meaning of Section 5(1) of the E.D. Act. Since the jaghir was normally for the lifetime of the holder and lapses on his death, the burden was on the revenue to produce material to show that the grant was heritable. The Division Bench of the Madhya Pradesh High Court further held that the word "passes" as it occurs in Section 5(1) of the Act means "changes hands". As the muafi lapses on the death of N, it did not pass on his death.

32. In this case, even if the right of dwelling or right of residence be property which a shebait can enjoy and does enjoy even if there is no specific grant in his favour in the deed of endowment and the office of shebaitship is heritable as a property passing on his death, the next incumbent enjoys the right or the privilege of dwelling in the debuttar property not qua the successor of the last holder, but qua shebait for the performance of his temporal duties to the deity. It is the right to be the shebait that is heritable, but the right of residence is given to the holder of the office and that right, as we have noticed in this case, is only limited for the purpose of performing duly and efficiently the duties and obligations given to the shebait for performance of his temporal duties to the deity.

33. Reliance was placed on a decision in the case of Controller of Estate Duty Vs. Kasturi Lal Jain and Mohini Devi Muju, , where the Jammu & Kashmir High Court had to construe Section 5 of the E.D. Act, 1953. There, the facts, however, were entirely different. There was no question of any property passing on the death, but a property arising as a result of the death. But in construing Section 5, the Division Bench of the Jammu & Kashmir High Court observed that before a property could pass to the heirs of a deceased person u/s 5 of the E.D. Act, 1953, it must fulfil the following conditions :

(i) that the property must be in the power, possession and control (actual, constructive or beneficial) of the deceased ;

(ii) the deceased must have an interest, whether in praesenti or contingent, in the said property ;

(iii) the property must be in existence during the lifetime of the deceased or at the time of his death;

(iv) the deceased must have power of disposition over the property. In this case, as we have mentioned before, damages paid to a deceased heir resulted by an air accident was not in existence at the time of death of the deceased. As a matter of fact, right to get damages accrued on the death of the deceased. On the background of the facts of the instant case, that case is not of much

assistance except the ratio that for one of the ingredients, the deceased must have a power of disposition over the property. In this case, the shebait has the right of appointment, but only up to the extent and for the purpose of performing the seva as provided in the deed of endowment. He did not have an actual right of alienation or dominion over the property for the purpose of using for his temporal and beneficial purposes.

34. The Division Bench of this court in the case of Usha Kumar Banerjee and Others Vs. Controller of Estate Duty, , was dealing with a trust. There, by a deed of trust dated June 27, 1939, the deceased P's father, who died in April, 1941, settled certain properties in trust. The preamble to the trust deed was to the effect that he was making the trust so that his properties might not be wasted by his heirs and representatives and that provision might be made for the puja and worship of the deities in his absence. Clause 1 of the trust deed provided that one-fourth of the net income, after defraying expenses for taxes, repairs, etc., should be spent for preserving the houses included in the trust estate and for litigation charges. Clause 2 provided that one-half of the surplus income left, less one-fourth, of the said income should be spent for puja and the worship of deities, sradhs, etc., entirely for religious work. Clause 3 provided that the trustees would be competent to spend the remaining one-half in accordance with the procedure laid down by themselves, like payment of remuneration at Rs. 25 per month to the trustees, defraying the joint family expenses, payments to servants, maintenance of carriages and car, etc. The remaining directions were for meeting the expenses on account of the marriages of the daughters, provision for maintenance of any daughter-in-law in the settlor's line who might become childless widows, etc. The Dy. Controller held that the provisions of the trust were such as to keep the properties tied up in perpetuity without any power of alienation and that since the purpose for which the trust was created was not a public or charitable one, the trust as a whole was void; and, accordingly, on the death of the settlor, the deceased P, being his sole heir, became entitled to the properties comprised in the trust and as such, the properties passed on the death of the deceased u/s 5 of the E.D. Act. The order was confirmed by the Board on appeal. On a reference, this court held that the deceased P's father created a trust by which the properties were vested in trustees absolutely and irrevocably for the worship of idols and for various other purposes. The dominant intention of the settlor was to make provision for the idols. So long as the trust was valid, no estate duty could be attracted to the properties comprised in the trust, on the death of the deceased. Further, the gross income from the properties in 1955 was a sum of Rs. 5,883 only, that is to say, a little over Rs. 250 per month, and the heirs and other family members of the settlor were entitled to enjoy only a trifling portion of this small income. Therefore, the properties comprised in the trust were not correctly included in the estate of the deceased as property passing on his death u/s 5 of the Act.

35. In this case, it must be noted that there the Division Bench was concerned with the validity of a trust. Here, we are not concerned with the question of the

validity of a trust or the question of the property passing on the death of the trustee. In considering the validity of the trust, whether the benefit given to the settlor or to the members of his family was trifling or not might or might not be relevant. But where a property is deemed to pass on the death, then the fact that the benefit was trifling, in our opinion, was not much of relevance, except that it might be of relevance in considering the benefit given to the holder of the office for performing his duties only for the purpose of determining whether the benefit given was trifling having regard to the extent of the property, so that it was necessary for the performance of the duties only, so that it was a benefit attached to the benefit given to the holder of the office. Keeping that aspect in view, though the ratio of the principle of that decision is not applicable, we think that this principle can be attracted. Having regard to the right of dwelling in the debuttar property was not disproportionate with the performance of their duties as shebait in this case. Therefore, it was only the requirement for the purpose of performance of the duties to the deities. We must, however, observe that this, decision went up in appeal and the decision was reversed on appeal by the Supreme Court. In this connection, reference may be made to the decision of the Supreme Court in the case of *The Controller of Estate Duty, West Bengal, Calcutta Vs. Usha Kumar and Others*, .

36. There, the Supreme Court held that the portion of the income from the trust properties which had been directed to be used for religious purposes could reasonably be taken to be one-half of the total income, and the remaining one-half was permitted to be used by the trustees for the purpose of defraying the joint family expenses, etc. The dominant intention of the author in creating the trust was to benefit the members of the family and to see that the properties were not alienated by them for, ever. There was only a partial dedication for religious purposes and, therefore, the properties retained their private and secular character and were only subject to a charge for religious purposes. The provision for the benefit of the trustee and other heirs and relatives failed as it was hit by the rule against perpetuities. But this did not affect the validity of the religious endowment. The transfer of one-half of the properties corresponding to one-half of the income directed to be utilized by the members of the family in contravention of the rule against perpetuities was void and the said one-half of the properties continued to be the properties of the author of the trust notwithstanding the execution of the trust deed. Only one-half of the properties covered by the trust passed on the death of the deceased u/s 5 of the E.D. Act, 1953, and the other half pertaining to religious purposes did not pass, according to the Supreme Court. The Supreme Court further held that if the terms of the document under which the properties or their income were gifted or bequeathed or settled amount to their complete dedication for religious or charitable purposes, then any part thereof which was given away by way of gift or bequest or settlement to any person contrary to the rule against perpetuities or the rule against accumulations enured to the benefit of the endowment and became a part of the properties endowed. But, on the other hand, if the dedication was

partial, such part which was hit by the rule against perpetuities or the rule against accumulations reverted to the executant of the document or his heirs.

37. In this case, the dedication was completely in favour of the deity. The right or the privilege, even if it is inherent in the Hindu law, the document must prove the right of dwelling of the shebait in the debuttar property, and the nature of the duties to be performed, in our opinion, is only for the benefit for the performance of the duties and was only an appurtenant to the holder of the office.

38. In the case of *Gnanendra Nath Das v. Surendra Nath Das* [1920] 24 CWN 1026, the Privy Council was concerned with the question of shebaitship and observed that a provision permitting the shebait to reside with his family in a part of a house dedicated to and specially set apart for the accommodation of the idols was a perfectly valid and reasonable provision. The word "family", according to the Judicial Committee of the Privy Council, was elastic and capable of different interpretations, but in the bill under construction there was no reason for extending it to include people other than those existing when the testator died.

39. According to the Judicial Committee, where the will clearly stated that the revenues and rents of stated properties were to be applied in a certain manner, with a direction for accumulation of surplus income, and then continued with a provision that out of the income of such fund the shebait should have power to celebrate religious ceremonies, the words "such fund" included the added accumulations and was not confined to the original debuttar fund. The decisions which assigned a particular meaning to any word in a will only assigned that meaning in connection with the terms of the will and that meaning was always capable of modification and alteration if it be seen that the limited meaning was not intended. At p. 1030 of the report, the Judicial Committee reiterated that gift is only a perfectly reasonable arrangement to secure that the man in whose hands the supervision of the whole estate was vested should have "associated with his duties the right to reside in the named dwelling place". Therefore, the right or the privilege of residing for his family is only associated with the duties to be performed by a shebait, according to the Judicial Committee.

40. In the case of *Profulla Chorone Requite v. Satya Chorone Requite*, , the Supreme Court was considering the shebaitship being property was of the view that the devolves like any other species of heritable property and in any disposition of shebaitee rights in the endowment created by the founder. In that context, it was held that shebaitship devolved on heirs of founder under the Hindu law in the absence of any usage or custom of different nature. This case has nothing to do with the controversy with which we are concerned. But the main question as the Supreme Court noted at p. 1685 of the report (para. 15)--the principal question that fell to be determined in this appeal was, whether the settlor had constituted the same set of persons as shebait as well as trustees--and, in that context, they construed the provision. We cannot draw much

assistance from the said decision.

41. Our attention was drawn to a decision of the Supreme Court in the case of *Sree Sree Ishwar Sridhar Jew Vs. Sushila Bala Dasi and Others*, , where Mr. Justice B.K. Mukherjea observed that the dedication might be either absolute or partial. The property might be given out to an idol or it could be subjected to a charge in favour of the idol. The question whether the idol itself could be considered to be the true beneficiary subject to a charge in favour of the heirs or specified relative or the testator for their upkeep or that on the other hand these heirs should be considered to be the true beneficiaries of the property subject to a charge for the upkeep of worship expenses of the idol was a question which could only be settled by a conspectus of the entire provision of the will. But, in that case, the right of residence given to the shebait did not, it was held, detract from making the dedication an absolute trust. The Supreme Court observed that the right given to the servant did not detract from the absolute character of the dedication. The right in this case, if it be called a right and not a privilege, merely was given as human ministrant to the divine deity.

42. Reliance was placed on behalf of the accountable person on the decision of the House of Lords in the case of *Public Trustee v. IRC* [1960] 1 All ER 1 ; [1961] 43 ITR 19. There, by a will, the testator A was appointed to be one of his executors and trustees and directed that the income of his residuary estate to be divided among the number of persons of whom A was one, in the specified shares, although when one beneficiary died the total income was divided among the survivors or survivor. The income was directed to be paid to A or expressed to be given to him in respect of acting as executor and trustee by way of remuneration for his so doing. At the time of his death, A was receiving 6/99ths of the income of the residuary estate and the estate duty was claimed on 6/99th of the capital of the fund u/s 1 of the Finance Act of 1894. It was not disputed that a proportion of the capital passed on A's death within the meaning of Section 1 of the Act of 1894, but it was contended by the trustee that the claim was precluded by virtue of Section 2(1)(b) of the Act, which is similar to Section 7(4) of our present Act, which excluded certain properties from the properties deemed by Section 2(1)(b) to be included in the property passing on the death of the deceased. It was held that the property passing on the death of A was excluded from charge to estate duty by the words of exception u/s 2(1)(b) of the Finance Act. If we hold, as we are inclined to hold, that in the facts and circumstances of the case the privilege that was given for dwelling in the property was only for the performance of a duty and only as a holder of the office of the shebaitship such a property, in our opinion, cannot be said to have passed on the death of the deceased as we could only reiterate the concept from the observations of Dr. Mukherjee, which we have referred to hereinbefore; thus in the conception of shebaitship although the elements of office and property, all duties and personal interest were mixed up and blended together, undoubtedly the duties of a shebait to be regarded as a primary thing from which flows certain rights and those rights are only as a holder of office and for performance

of duties. In the view we have taken we answer question No. 2 as follows : viz., that though the shebaitship is a property but in the facts and circumstances of the case the right or privilege of residence or dwelling being of the nature, as we have indicated, the value of such right was not includible in the principal value of the estate left by the assessee.

43. Accordingly, we also answer, in the facts and circumstances of the case, question No. 3 in the negative and in favour of the accountable person.

44. In the facts and circumstances of the case, each party will pay and bear its own costs.

Sudhindra Mohan Guha, J.

45. I agree.