

(1973) 04 CAL CK 0016

In the Calcutta High Court

Case No : Appeal No. 52 of 1972 and Suit No. 192 of 1959

Sm. Panna Banerjee and Others

APPELLANT

Vs

Kali Kinkor Ganguli

RESPONDENT

Date of Decision : 11-04-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 4
Limitation Act, 1963 — Article 65
Succession Act, 1925 — Section 218

Citation : AIR 1974 Cal 126 : (1975) 2 ILR (Cal) 32

Hon'ble Judges : S.C. Deb, J;B.C. Mitra, J

Bench : Division Bench

Advocate : S.D. Banerjee, K.P. Basu and P.N. De, for the Appellant;J.N. Ray, P.K. Roy, (for No. 1) and J. Mitra, for the Respondent

Final Decision : Allowed

Judgement

B.C. Mitra, J.—This appeal is directed against a judgment and decree dated November 29, 1971. The decree was passed in a suit instituted by the first respondent Kali Kinkor Ganguli in this Court for a declaration that he was the sole owner of premises No. 244, Bowbazar Street, Calcutta and was the sole shebait of Firingi Kali and the other deities installed in the premises. There is an alternative prayer in the plaint for a declaration that the first respondent is entitled to an undivided half share in premises No. 244, Bowbazar Street, and to half the pala in the sheba of the Firinhi Kali and the other deities installed there.

2. It is not disputed that this temple is the abode of the deity popularly known as Firinsi Kali and several other deities. It is necessary to trace the historical background to the dispute. One Ramkanta Pal constructed a Shiva temple, and installed the deity Shiva, on a piece of land measuring 11 Chittacks and 11 gandas at 244, Bowbazar Street, Calcutta, which stood in the name of his father Beni Madhab Pal in the records of the Calcutta Collectorate. Ramkanta became the shebait of Shiva. Thereafter in or about 1820, Kali Prasad Pal and Gouri

Prasad Pal, the two sons of Ramkanta Pal, orally transferred the temple, together with the idol Shiva, and shebaity right of the deity, to one Srimanta Pandit. Srimanta Pandit carried on the sheba of the deity after taking possession of the temple. He constructed a small brick-built one storied room thereon, and installed the idols of Goddesses Kali, Sitala. Manasha and Shaligram Shila and carried on the sheba of the deities at the temple for more than 60 years without interruption.

3. In 1880 Srimanta Pandit by a registered deed transferred the said temple together with the deities and the shebaity right of the deities to one Sashibhusan Banerjee for a sum of Rs. 60/-. Sashibhusan after purchase of the temple with the deities took possession of the temple and performed the sheba of the deities till his death on August 24, 1894. He left behind him two widows Sm. Paripurna Debi and Sm. Pramila Sundari Debi. After the death of Sashibhusan his elder widow, Paripurna Debi carried on the sheba puja of the deities during her lifetime, and on her death on April 10. 1905, one Rakhal Chandra Mukherjee brother of Sm. Puripurna Debi, took possession of the temple premises and ousted Sm. Pramila Debi from the possession of the premises and also from the shebaity of the deities.

4. On August 22, 1905, Sm. Pramila filed a suit in this Court (Suit No. 645 of 1905) for a declaration of her right in the temple premises and the sheba puja of the deities against Rakhal Chandra Mukherji. On August 3, 1906, Sm. Pramila along with one Chandra Kumar Banerjee, who was the reversioner, of Sashibhusan, sold premises No. 38/1, Champatala Lane, Calcutta, forming part of the estate of Sashibhusan, to one Upendra Nath Ganguli for legal necessity. On January 29, 1907, Sm. Pramila purported to sell half shares of the temple at 244, Bowbazar Street, together with half shares of her shebaity right of the deities to the same purchaser, namely Upendra Nath Ganguli, for valuable consideration for legal necessity. The legal necessity claimed was the expenses incurred in connection with the litigation relating to the temple premises and the shebaity right, against Rakhal Chandra Mukherjee in Suit No. 645 of 1905.

5. On February 12, 1907, a decree was passed in favour of Sm. Pramila in the said Suit No. 645 of 1905 by Chitty, J., declaring her to be entitled to the said temple premises and to the right of sheba puja of the deities.

6. It is claimed by the plaintiff respondent that since 1907 Upendra Nath who came into the possession of the premises carried on the sheba puja of the deities till his death in 1925. It appears that between 1908 and 1918 certain mutation proceedings took place under the Land Registration Act, 1876, in which the name of Upendra Nath was incorporated in the records by mutation, by deleting the name of Rakhal Chandra Mukherjee, in respect of shebaity of the deities, installed in the temple premises. On November 5, 1922. Upendra Nath executed his first Will, appointing his brother Pramatha Nath Ganguli as Executor. By this Will Upendra Nath purported to bequeath life interest in respect of temple premises to Sin. Pramila as shebait and after her death to the first respondent

Kali Kinkor Ganguli. On January 15, 1925, Upendra Nath executed a second Will, and by this Will he bequeathed to Sm. Pramila all his right and title of interest in the said temple premises for her life. It is to be noticed that in this Will both the terms were used "during her natural life" and "into my rights absolutely". Upendra Nath died on January 30, 1925. On August 3, 1925, Pramatha, the Executor of the first Will, applied for probate before the District Judge, 24 Parganas. On December 12, 1925, Sm. Pramila filed an objection in the probate proceeding, contending that there was a second Will dated January 15, 1925. On June 7, 1926, the District Judge, 24 Parganas, granted probate to Pramatha Nath Ganguli in respect of first Will and letters of administration with copy of the Will annexed to Sm. Pramila, in respect of second Will. By an order dated February 6, 1928, the proceeding relating to the letters of administration with copy of the Will annexed granted to Sm. Pramila was remanded to the District Judge, 24 Parganas, by a Division Bench of this Court. On July 17, 1928 probate was granted to Pramatha Nath Ganguli in respect of both the Wills of Upendra Nath Ganguli by the District Judge, 24 Parganas.

7. On September 15, 1947, Sm. Pramila died and the dispute arose between the appellants and respondents. In May 1949, the Executor Pramatha Nath died and thereafter appellants Nos. 2, 3, 4 and 5 were recorded as shebaites of the deities of the temple by an order of the Land Registration Officer dated April 27, 1949. In 1950, a suit was filed in this Court in which the parties were the appellants, and in this suit claims were made regarding the temple and the shebait right. In this suit a decree was passed on April 23, 1953, declaring Kumud Kishore Banerjee the original defendant No. 1 and one Durga Pada Banerjee as the shebaites of the deities and also declaring that the said premises belonged to the said deities. On 10-1-1959, Messrs. Choudhury and Choudhury, Solicitors addressed a letter on behalf of the respondent No. 1 to the appellant claiming the said premises. On January 16, 1959, the Solicitor for the appellants denied the claim made on behalf of the respondent No. 1 and thereupon the suit out of which this appeal arises was instituted on January 22, 1959.

8. Before the suit came up for trial the original defendant No. 1 Kumud Kishore Banerjee died and thereupon appellant Nos. 1-A Panna Bancrji, 1-B Bhupal Banerjee and 1-C Krishna Dhone Banerjee were substituted as heirs and legal representatives of the deceased. The deity respondents were added as party defendant to the suit by an order of the trial Court made on March 11, 1971.

9. At the hearing before the trial Court the following issues were framed:--

1. Was the said premises No. 244, Bow-bazar Street a secular property of Sashi Bhusan Banerjee?

2. (a) Was the transfer by Sm. Pramila Debi of half right title and interest in said premises for legal necessity?

2. (b) Is such transfer valid in law and binding on the defendants?

3. (a) Was the transfer by Sm Pramila Debi of half of her right of shehaitship of the said "Firingi Kali" for legal necessity?

3. (b) Is such transfer valid in law and binding on the defendants""

4. Was Upendra Nath Ganpuli openly in possession of the said premises No. 244. Bowbazar Street since 1907 until his death?

5. Did Upendra Nalh Ganpuli carry out the sheba of the "Firingi Kali" alone since 1907 until his death?

6. Did Sm. Pramila Debi take possession of the said premises and act as shebait under the said Wills?

7. Has the plaintiff become the sole Owner of the said premises?

8. Has the plaintiff become the sole shebait of "Firingi Kali"?

9. To what relief, if any, is the plaintiff entitled? The trial Court came to the conclusion that the premises No. 244. Bowbaza* Street, now known as Bipin Behari Ganpuli Street, was a public temple and an absolutely debottar property of the deities and that the transfer of the half share in the shebaity right of the deities by Sm. Pramila Debi to Upendra Nath Ganguli was for legal necessity. It was held that the transfer of the half share of the shebaity right by Sm. Pramila Debi to Upendra Nath Ganguli was binding on the defendants in the suit. It was further held that Upendra Nath carried out the sheba of the "Firingi Kali" jointly through Sm. Pramila till his death and that Pramila acted as a shebait in respect of half share under the Will of Upendra Nath. It was next held that the first respondent was entitled to half share of the shebaity right of the deities and the appellant Nos. 1 (A), 1 (B), 1 (C), 2, 3, 4 and 5 were entitled to the other half to be exercised 15 days in the month by each of the two groups of the parties, as provided in the deed dated January 29, 1907 executed by Sm. Pramila in favour of Upendra Nath. In answering issue No. 9 the trial Court gave a declaration in terms of prayer (b) of the plaint which is as follows:--

"In the alternative declaration that the plaintiff is entitled to an undivided half share in the said premises No. 244, Bowbazai Street. Calcutta and to half the pala in the sheba of Firingi Kali and other deities installed there."

A mandatory injunction was issued directing the appellants not to interfere with the right* of the respondent No. 1 in the half share of the shebaity of the deities in the temple premises. The appeal is directed against this judgment and decree.

10. Mr. J.N. Roy counsel for the respondent conceded that the trial court had held against his client with regard to the prayer (a) of the plaint namely a declaration that the respondent No I was the sole owner of premises No. 244. Bowbazar Street and was the sole shebait of Firingi Kali and other deities installed in the said premises, inasmuch as the trial court had held that the said premises was a public temple and was an absolute debottar property of the deities. As no cross-objection was filed against this conclusion of the trial court, counsel for the

respondent stated that he accepted the position that the premises was an absolute debottar property of the deities. He made it clear that his only contention was that his client was entitled to half the pala in the sheba of the deities and was not claiming any title in the premise" which had been declared to be absolute debottar property.

11. It is in this background that the contention of the parties in the appeal have to be considered. I must notice at this stage that no oral evidence was tendered by Mr. Roy's client who rested his case entirely on the documentary evidence adduced on his behalf. It is for this reason that it is necessary to refer to the two deeds by which the disputed premises together with the deity installed therein and their shebaity rights were purported to be transferred. The first of these is a deed dated June 24, 1880, executed by Srimanta Pandit in favour of Sashihhusan Banerjee. In this deed it is recited that one Benimadnah Pal constructed a Shiva temple at 244, Bowbazar Street and installed a Shiva in the land and himself carried on the sheba of the deity. He died leaving two sons Kali Prasad and Gouri Prasad who verbally gave to Srimanta the land and the deity and thereupon Srimanta became the owner in possession of the land and Deba Sheba and constructed a one storied house and installed Iswari Kali the mother, Sitala the mother and Manasha the mother and other deities. It is stated that Srimanta carried on the sheba for over 60 years and has been in possession without objection. By this deed he sold to Sashihhusan the premises and the deities including the shebaity right for Rs. 60/-. This document purported to be an outright sale of the structure that is to say the temple, the deities and shebaity right.

12. The next document to be considered is the document dated 29th January, 1907, by which Sm. Pramila purported to transfer half share of the temple premises, with half share of her shebaity to Upendra Nath for valuable consideration for legal necessity. This is a deed of sale in respect of half share of the Kali Mandir at 244, Bowbazar Street together with the land, the pucca building and the income of pala of the Thakurbari. It is recited that Rafchal Chandra Mukherjee dispossessed Sin. Pramila of the said Kalibari of which she was the owner, and therefore she filed a suit in this Court being Suit No. 645 of 1905. The said suit was pending for 2 years and she had not received any income or profit of the Kalibari. It is also stated that she was very much in need of money for recovery of the Kalibari property and she needed money for meeting the expenses of the suit and therefore she was constrained to sell to Upendra Nath for Rs. 1,200/- half share of her title in the Kalibari, her sheba and pala. It is also stated that if she won the suit she will deliver the property to Upendra Nath. It is therefore clear from the two documents that the transaction purported to be a transfer by sale of the premises on which the temple and other structure stood, the deities located therein and also their shebaity rights. In the case of transfer by Srimanta there is nothing to show that the transfer was for legal necessity. In the case of transfer by Sm. Pramila there are statements in the deed itself which show that it was made for raising funds for meeting the litigation expenses in connection with the suit filed by her for recovery of

possession of the Thakurbari and deities from Rakhal. The basic question in this appeal is the validity of the transfer of the temple and of the shebaity rights. There is no dispute about Sashibhusan's being she-bait of the deities from the date of transfer to him by Srimanta in 1880, and continuing to be such shebait until his death on August 24, 1894. On his death his first widow Sm. Paripurna Debi carried on the iheba puja of the deities upto her death. It is also not disputed that on her death her brother Rakhal claimed to be the shebait, and also claimed possession of the temple property which he alleged were transferred to him by an oral gift by Sashibhusan during his life time. The dispute between Rakhal and Sm. Pramila culminated in the suit in this Court by the latter, which was instituted on August 22, 1905.

13. The question raised by Mr. S.D. Banerjee counsel for the appellants is whether the transfer by Sm. Pramila to Upendra Nath is valid. It was argued by him that the temple, which is the abode of the deities, could not be transferred even for legal necessity. The first respondent's right to the shebaity or pala in the shebaity is entirely dependent upon the legality and validity of the transfer by Sm. Pramila to Upendara. If this transfer is invalid, the appellants who are the heirs and legal representatives of Sa.shibhusan would be entitled to sheba puja of the deities to the exclusion of the first respondent. The two questions involved in this appeal namely the right of a shebait to alienate the debottar property for legal necessity and the right of the shebait to alienate the shebaity right have received judicial attention in several decisions, I shall now proceed to deal with these decisions in order to ascertain the correct legal position relating to such questions.

14. Counsel for the appellants relied on a decision of the Judicial Committee in *Rajah Vurmah Valia v. Ravi Vurmah Mutha*, (1876) 4 Ind App 76 (PC). In that case the assignment of a right of management of a Pagoda by persons known as UraJlers came up for consideration. The assignee claimed certain jewels of the deities on the ground that they had been assigned to him by the Urallers. According to the constitution of the institution of Urallers there were 4 chief members from 4 distinct families. The question was whether apart from custom the persons holding a trust regarding management of the Pagoda could transfer the management right at their own will. The Judicial Committee held that there was no authority for such a proposition and principle and reason were against such a transfer. It was found that there was no custom which would enable the court to hold that such a transfer could not be made. The Judicial Committee concluded by observing as follows:--

"That if the custom set up was one to sanction not merely the transfer of trusteeship, but as in this case the sale of trusteeship for pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law."

It is therefore, clear that the Judicial Committee was of the opinion that a transfer of a shebaity right could not be made except on the basis of a valid

custom and also that even if there was a custom sanctioning a transfer of shebaity for pecuniary advantage of the shebaity, such a custom must be struck down as invalid.

15. The next case referred to was also a decision of the Judicial Committee viz., *Palaninppa Chetty v. Devasikamony Pandara*, 44 Ind App 147 = (AIR 1917 PC 33). In that case the question for consideration was what was meant by "benefit of the estate". A suit was instituted by the head of a Math to recover possession of land which formed part of an endowment of a Hindu temple, from persons who were in possession, and claimed under a perpetual lease, in consideration for payment of a sum of money. A perpetual lease was granted of certain lands belonging to debottar estate in consideration of Rs. 93.12. The lessee intended to erect a Rest House on the land for pilgrims irrespective of the consideration as to whether they worshipped in the temple. It was therefore a charity not connected with the temple or religious services performed therein. A shebait challenged the grant of perpetual lease by his predecessor on the ground that it was alienation of an absolute interest in a portion of property dedicated to the service of the temple, and for the purpose of an alien charity. Dealing with the question of the benefit of the estate it was held that it was impossible to give a precise definition of that term, but that preservation of the estate from extinction, defence against hostile litigation, the protection of the property from injury or deterioration of the estate and similar other objects were obviously for the benefit of the estate. The argument in that case was that there was in the locality, a local custom empowering a she-bait to do as against his successor, what according to ordinary law could not be done, namely alienation of debottar land at a fixed rent or in consideration of a premium. It was held that such a custom modified the existing law and also that no such custom had been established. On this view of the law the Judicial Committee set aside the alienation and dismissed the appeal

16. The next case relied upon by counsel for the appellants was also a decision of the Judicial Committee. *Prosunno Kumari Debya v. Golah Chand Baboo*, (1874) 2 Ind App 145 (PC). In that case the shebait of an idol spent the income of the debottar property and borrowed a sum of Rs. 4,000/- and by a bond pledged the debottar property for payment of the sum. In this bond it was stated that the money was borrowed for the service of the deity and the expenses of the temple. The two decrees obtained by the moneylender directed that the debts should be paid out of the profits of the estate. The successor of the shebait (who alienated the debottar estate) instituted a suit for setting aside the decrees and for release of the debottar property from attachment. It was held that although the debottar property was as a rule not alienable, it was competent for the shebait to incur debts and borrow money for expenses of keeping up religious worship, repairing the temple and other properties of the idols, defending hostile litigation and similar object. It was further held that the position of the shebaits of an idol's estate was analogous to that of the manager of the infant heir. The rights and obligation of a shebait in connection with the management of the debottar estate were held at p. 152 of the report to be as follows:--

"It is only in an ideal sense that the property could be said to belong to an idol; and the possession and the management of it must in the nature of thing be entrusted to some persons as shebait, or manager. It would seem to follow that persons so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of the property, at least to as great a degree as a manager of an infant heir. If these were not so the estate of the idol may be destroyed or wasted and its worship discontinued for want of necessary funds and preservation and maintained them".

It follows from these decisions that the law recognises the power of a shebait to alienate the debottar property in particular circumstances namely preservation and protection of property, the service of the idol and defence of the debottar estate against hostile litigation. But it is to be noticed that none of the cases dealt with the question whether the temple itself that is to say the abode of the deities, can be alienated by a shebait for legal necessity. That is the question which arises in this appeal for determination.

17. Reliance was next placed by counsel for the appellants on *Gnannsambanda Pandara Samadhi v. Velu Pandaram*, (1900) 27 Ind App 69 (PC). In that case the hereditary trustee of a religious endowment sold her hereditary right of management and transferred the endowed property. Two deeds of sale were executed. The sale was effected for the purpose of discharging debt incurred for the management of the endowment. Following its earlier decision in *Rajah Vurmah Valia v. Ravi Vurmah Mutha* (Supra) it was held that as there was no proof of any custom the sale was void and did not give any title to the purchaser.

18. The next case relied upon was *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, 52 Ind App 245 = (AIR 1925 PC 139). In that case an idol was consecrated as a household deity and this idol together with the rest of the property was bequeathed by the founder to his son. The son built a Thakurbari and dedicated it to the idol by a deed under which the idol was not to be removed from the Thakurbari unless another Thakurbari was provided. Upon the death of the son a partition took place among the three grandsons of the founder. The Thakurbari remained joint but annual turns of performing the worship were fixed. One of the three brothers however claimed a declaration that during his turn of worship, he had the right to remove the idol to his own house; the other brothers contended that such rights were excluded by the deed. The Judicial Committee held that the condition of the foundation that the deities were not to be removed unless another Thakurbari was provided, was binding and that the idol could not be regarded as a mere chattel and also that the will of the idol as to its location had to be ascertained and that was to be done by making the idol a party to the suit and that female members of the families having the right to worship should also be joined. Dealing with the status of the deities in Hindu law it was observed that Hindu family idols were not property in the crude sense and their destruction, declaration or injury were not within the power of the custodian.

19. Reliance was next placed on another decision of the Judicial Committee, *Vidya Varuti Thirtha v. Balusami Ayyar*, 48 Ind App 302 = (AIR 1922 PC 123). In that case it was held that shebait of the deities by whatever name he was called held as manager and custodian of the idol or the institution and that in some cases he was given the right to a part of the usufruct, the amount of the usufruct depending upon custom. It was however held that in respect of the property conveyed to him as a shebait, he could be treated as a trustee in the sense in which that term was used in English law, the obligation and duties resting upon him made him answerable as a trustee for a maladministration.

20. The next case relied upon was *Ahiram Goswami v. Shyama Charan Nandi*, (1909) 16 Ind App 148 (PC). In that case it was held that the power of a Mohunt to alienate debottar property was like the power of the manager for an infant heir limited to the case of unavoidable necessity and that a Mohunt for the time being had no power in the absence of special circumstances of necessity to grant a Mokurari Pattah of the debottar property at a fixed rent for all times.

21. Relying on the decisions discussed above counsel for the appellants argued that a shebait had no right to alienate debottar property except on the ground of un-avoidable necessity. It seems to me that this proposition is well established and cannot be questioned. But the questions involved in this appeal are firstly whether a shebait can transfer a part of the temple itself on the ground of legal necessity and also whether on the same ground a shebait can transfer half share of shebaity itself. None of the decisions discussed above dealt with the question of a transfer by a shebait on the ground of legal necessity of a part of the temple itself. On this question however counsel for the appellants relied on a Bench decision of the Allahabad High Court reported in *Mukundji Mahraj Vs. Persotam Lalji Mahraj*, . In that case it was held that it was the duty of a shebait to preserve and maintain the idol for the purpose of worship and therefore the abode of the idol was to be preserved and maintained as it was intended by the donor or founder. It was also held that property other than the temple endowed for the purpose of the idol might be alienated if it was absolutely necessary for the purpose of preservation of the idol, but the shebait had no right to alienate the temple itself. It was observed in that case that to alienate the temple itself was to cut at the root of the very existence of the idol in the abode Intended by the founder and that Hindu Sentiment viewed alienation of a temple as a sacrilege. In that case the temple was sold in execution of a decree in a suit against a Mohunt representing the idol. The conclusion of the Division Bench was that not until the idol had been removed from the temple in accordance with shastric rites and assumed a new abode and the temple abandoned as a place of worship could the temple be alienated and sold in execution of a decree and such a sale if made would be void and did not bind the idol, and that after the death or removal of the particular Mohunt, who represented the deities in the suit, the succeeding Mohunt who was not a party to the suit could challenge the validity of the decree and treat the proceedings as null and void. It appears to us that this is the only reported decision on the question of a sale of the abode of the idol.

The sale however was in execution of a decree obtained against an idol. I respectfully agree with the views of the Division Bench that the abode of the deity itself cannot be alienated unless alternative arrangements have been made for removal of the deity to a new abode and the old temple has been abandoned as a place of worship.

22. In the appeal now before us the tale by Sm. Pramila to Upendra was made for raising funds to enable her to meet the expenses of the litigation against Rakhal, who was claiming to be the sole shebait of the deities and as such took possession of the temple. It was therefore a litigation hostile to the deity and also to the debottar estate. Legal necessity for raising funds to defend the debottar estate and also the shebaity cannot therefore be questioned in this case. But the transfer of half share of the temple itself by the shebait to Upendra cannot be upheld. There is no sanction in Hindu Law for the transfer for consideration of the abode of the deity or a part of it to a stranger even for legal necessity.

23. Turning now to the question of transfer of the shebaity our attention was drawn by counsel for the appellants to a Full Bench decision of this Court. *Monohar Mukherji v. Bhupendra Nath Mukherji*, ILR 60 Cal 452 = (AIR 1932 Cal 791) (FB). In that case it was held that the religious office of shebaity itself could not be the subject of sale and that in the absence of custom and usage to the contrary a right of management of the religious endowment or a religious office attached to the temple or in other endowment could not be alienated by the holder. A similar view was also taken in a Bench decision of this Court. *Rajeswax Mullik v. Gopeswar Mullik*. (1908) 7 Cal LJ 315. In that case the question was whether a shebait was entitled to deal with the shebaity by his Will and it was held that shebaitship was not alienable by Will.

24. Our attention was also drawn to a Bench decision of this Court reported in 34 Cal LJ 319 = (AIR 1921 Cal 569) for a definition of custom. In that case it was held that a custom must be immemorial, reasonable and enjoyed without interruption from its origin and certain in respect of its nature. I do not see how this decision is of any assistance in this case inasmuch as custom, with regard to sale of either the temple or the shebaity has not been pleaded nor was any evidence led to prove existence of any such custom.

25. Our attention was also drawn by counsel for the appellants to a Bench decision of this Court reported in AIR 1930 Cal 173. In that case however the question was whether a Hindu widow was justified in making dedication of property having regard to the pecuniary circumstances of the family for the worship of the deity. I do not think this decision is of any assistance to the appellants in this case.

26. Counsel for the appellants next referred to a decision of this Court reported In AIR 1926 Cal 490. In that case it was held that in the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a

religious trust or the right of management of a religious endowment or a religious office could not be alienated by the holder, and such alienation if made was void. It was further held that the rule that debottar property could be alienated for legal necessity extended only to the temporalities of the idol and did not apply to alienation of spiritual rights and duties of the shebait and that the power of a shebait to alienate the corpus of debottar property was to be measured by the exigencies of the occasion and an alienation of property could be justified only if it became impossible to carry out the sheba and worship of the deity or to preserve the property. It was also observed that in case of unavoidable necessity compelling the thebait to alienate the property such alienation should be for the benefit of the deity and object such as a desire to increase the value of the estate by alienation by sale, mortgage or exchange would not justify a transaction, although thereby it might be that the endowment would be benefited. Relying on this decision it was contended on behalf of the appellants that the shebaity right which included the spiritual duties of the shebait could not in any event be transferred by a thebait, though the debottar property could be alienated on the ground of unavoidable necessity.

27. The next case relied on by counsel for the appellant was a Bench decision of this Court reported in (1890) ILR 17 Cal 557. In that case it was held that a gift of an idol and the land with which the idol was endowed, made with the concurrence of the whole family to another family for the purpose of carrying on regular worship of the deity, if made for the benefit of the idol was valid and was binding on succeeding shebaits. I do not see how this decision is of any assistance in this appeal as there has been no gift of the idol or the debottar property by the members of one family to another. In this case there has been transfer by sale of half share of the debottar property and a purported sale of half share of the deity. Counsel for the respondents conceded that a sale of deity could not be justified and he argued that although the documents purported to be a sale of the debottar estate and also of the deity by Sm. Pramila to Upendra, in substance and in effect it was a transfer of division of the pala or turn of worship. To this argument however I will turn later in the judgment.

28. Our attention was next drawn to decision of the Supreme Court, Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others, . In that case it was held that it was well-established that the alienation of the ahebaity right by a shebait in favour of a stranger was absolutely void in Hindu Law and could not be valid even on the footing of custom and also that the alienee of the right was a trespasser and its possession against a transferee was adverse from the beginning.

29. Relying on the decisions discussed above counsel for the appellants contended. and I think rightly that though in law transfer of a part of a debottar property would be justified if it was made for un-avoidable necessity, the transfer of the abode of the deity or the temple itself could not be made unless firstly alternative arrangements had been made for the abode of the deity and also

unless the opinion of the deity and also of the worshippers approved such a transfer. The second contention on behalf of the appellants was that the shebaity could not be transferred in any event and the transfer of the shebaity could not be upheld even if there was a custom in support of such a transfer.

30. Counsel for the respondents on the other hand raised various contentions in support of the transfer made by Sm. Pramila to Upendra. In proceeding to deal with these contentions I will refer to a few decisions on which Mr. Roy relied in support of his contentions. Reliance was firstly placed by him on a decision of the Supreme Court reported in AIR 1951 SC 214. In that case it was held that if all the original parties and those who could give evidence as to the legal necessity had died, a recital consisting of circumstances of the case, assumed greater importance and could not be lightly set aside. This decision in my view is of no assistance to the respondents in this appeal as the factum of transfer by Sm. Pramila in favour of Upendra has not been challenged by the appellants. The subject-matter of challenge is the legality and validity of the transfer.

31. Counsel for the respondents next relied upon a Bench decision of this Court, *Mahamaya Devi v. Haridas Halder*, 19 Cal WN 208 = (AIR 1915 Cal. 161 (2)) In that case a mortgage was executed in renewal of two previous mortgages. The security offered was 3 palas or turns of worship held by the mortgagee in the temple of the Goddess Kali at Kalighat. A custom was proved that the palas or turns of worship could be transferred by sale, mortgage, lease or gift and also that there were the subject-matters of the partition and testamentary devise but- such transfer had not been unrestricted. It was held that the custom was not unreasonable merely because it contravened the Hindu Law that religious office is inalienable. It was held however that in the absence of the custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple could not be alienated by the holder. I do not see how this decision is of any assistance to the respondents in this appeal as it was found that a custom existed for an alienation of a pala and the decisions rested on the existence of the custom. In the appeal now before us no such custom had been pleaded nor was there any evidence as to the existence of such a custom, and furthermore no issue was raised as to the existence of a custom.

32. On the question of evidence of alienation for necessity a reference was made to a decision of the Judicial Committee, *Bawah Magniram Sitaram v. Kasturbhai Manibhai*, 49 Ind App 54 = (AIR 1922 PC 163). In that case it was held that when the validity of a permanent lease granted by a shebait came in question a long time after the grant so that it was not possible to ascertain what were the circumstances in which it was made, the Court should assume that the grant was made for necessity so as to be valid beyond the life time of the grantor.

33. Our attention was next drawn by Counsel for the respondents to a Bench decision of this Court reported in 45 Cal WN 809 = (AIR 1942 Cal 26). In that

case it was held that the shehait's palas of worship could not be sold for the satisfaction of his personal debts and a custom of transfer of palas even if established would not support such a sale and a custom would be unreasonable. It was also held that if a transfer was made by a shebait of his turn of worship in favour of his co-shebait or to some other persons of the same family, who might in his own right have been a shebait, no injury could be done to the deity, but if a transfer of a shebaity was made to a stranger who was not in any way connected with the institution, it could not be said that the interest of the deity would not suffer.

34. The next decision to be considered on which reliance was placed by counsel for the respondents was a Bench decision of this Court reported in *Hemanta Kumar Mukherjee and Others Vs. Prafulla Kumar Bhattacharjee*, . In that case a suit was filed to declare the sale of a pala by a shebait of the Kalighat deities on the ground that the purchaser was not within limited class of persons to whom the sale could be made. It was held that the hereditary priest would be within the competent class of transferees under the recognised custom and therefore the transfer to a hereditary priest was a valid transfer. I do not see how this decision is of any assistance to the respondents in this case because it was found that custom validated the transfer of shebait to a hereditary priest of the deity.

35. The next case relied on by counsel for the respondents was a decision of the Supreme Court, *Sree Kalimata Thakurani Vs. Jibandhan Mukherjee and Others*, . In that case it was found that a body of she-baits and their predecessor had been functioning as such without challenge for a long time and had been managing the property. It was held that these shebaits could not be treated as mere pujaris as they had been acting as shebaits for a long period without challenge and therefore they could not be excluded from the management of the temple. This decision again is of no assistance to the respondents because the question of transfer of a debottar property or a shebaity was not considered by the Supreme Court.

36. The next question to be considered is whether the trial Court was right in its conclusion that by custom and usage for a long time spreading over a century the temple is transferable among a few families who are Brahmins. The learned Judge also held that the custom and usage relating to such a transfer was in vogue for a long period of over 150 years, and there was nothing unreasonable in the same and it had been carried on for efficient management of the sheba puja of the deities. Counsel for the appellants contended that the learned Judge was not justified in taking into consideration the question of custom and usage in support of the transfer. It was argued that custom had not been pleaded and no evidence was led in support of such custom. It was also argued that the existence of the custom was a mixed question of law and fact and unless there was specific pleading on the question of custom and an issue was raised on such a question the Court was not justified in making a finding on the existence or absence of such a custom in support of the transfer.

37. Counsel for the respondent on the other hand contended that although there was no pleading as to the existence of custom and although no issue was raised on this question, the Court could examine the existence of such a custom and make a finding on that basis. In support of this contention Counsel for the respondents firstly relied on a decision of the Judicial Committee, *Mohan Manucha v. Manzoor Ahmed Khan*, 70 Ind App 1 = (AIR 1943 PC 29). In that case in a suit to enforce a registered mortgage it was found that the mortgage was void because the necessary permission of the collector had not been obtained. The mortgagee thereupon abandoned the plea and claimed recovery of money advanced as a matter of restitution; It was held that the mortgagee had the right to refuse to be bound by the contract of loan when the basis of the contract was gone and could claim restitution. It was also held that in that case the Court below was unduly rigid on the question of pleading and the defendant could hardly regard with surprise a demand that the plaintiff should restore what he had received thereunder.

38. The next case relied on by Counsel for the respondent was a decision of the Supreme Court, *Central Bunk of India Ltd v. Hari Prasad Jalan*, AIR 1972 SC 1274. In that case a suit was filed for recovery of a certain sum of money for price of goods sold. There was no pleading on the question whether the goods alleged to have been damaged were delivered to the defendant but the High Court relied on oral evidence that the goods were not delivered. It was held by the Supreme Court that the High Court was not justified in the absence of any plea or issue to examine the question whether the goods were delivered to the defendant. This decision is entirely against the contention of the respondent

39. On a careful consideration of the questions of law discussed in the decisions mentioned above, it is clear to me that though the transfer of the debottar estate on the ground of legal necessity is sanctioned by Hindu Law, a transfer of the temple or abode itself on the ground of legal necessity is altogether repugnant to the law relating to the Hindu debottar endowments. Compelling circumstances may create a necessity for removal of a deity from a temple, as for instance where a temple is destroyed by fire or earthquake or other extra-ordinary events. But in such a case the temple itself is abandoned as a place of worship and a new abode of the deity has to be fixed so that the worship may be continued. But such is not the case here. What has been purported to be done in this case is the transfer of half share in the temple premises to a stranger, because that is what Upendra Nath Ganguli is to Sashi Bhusan Banerjee and his family. Quite apart from the question of sale of half share in the deities which is void according to all canons of Hindu Law the sale of the temple itself, even for legal necessity, cannot be upheld. It is true that in this case the deities remained, even after the sale, where they were, namely at the temple premises at 244, Bow-bazar Street But that circumstance in this case does not, in my view, make any difference to the question of law involved in this case, namely the transfer by sale of the share in the temple itself. To uphold such a transaction as legal, would have the effect of legalising the sale of a temple or a share therein, which may

have the effect of depriving the deities of a shelter to which they undoubtedly are entitled. Such a transaction is repugnant and repulsive to Hindu sentiment and concept of Hindu Law.

40. Turning now to the question of sale of the shebaity rights, which combine office and property, the question is whether the sale of shebaity for legal necessity has the sanction of law behind it. On an analysis of Judicial opinion, there can hardly be any doubt that a shebaity, even assuming that its temporal and spiritual rights, duties and obligations can be separated, cannot be sold even for legal necessity. Custom where such exists, has been held to justify the transfer of a shebaity to one of the limited group of persons who would otherwise be entitled to the shebaity rights. In this case so far as custom is concerned, no custom has been pleaded or proved, nor was any issue framed by the trial Court. On the pleadings and on the issues framed, the Court was not called upon to make any pronouncement on the existence or absence of such a custom. Custom is a mixed question of law and fact and where the Court is called upon to make a finding with regard to a custom in any matter, there must be specific pleading with regard to a custom alleged to exist. There is no such pleading in this case, and quite rightly because of absence of any pleading, no issues were framed on this question. The trial Court came to the conclusion that the rights of sheba puja of the deities were confined for over a century to the four families viz.. the Pals, the Pandits, the Banerjees and the Gangulis and that by custom and usage the shebaitship was transferable among a few families who were Brahmins and also that by reason of custom and usage, the shebaitship was transferable among these families. The trial Court also came to the conclusion that the custom and usage was in vogue for a long period for about 150 years and there was nothing unreasonable in the same and the transfers had been continuously carried out for efficient management of the deities installed in the temple. I am unable to uphold the views of the trial Court on this question. In the first phase the trial Court was in error in assuming that such a custom and usage is in vogue for a period of 150 years. The earliest document of transfer is dated June 24, 1880. By this document Srimanta Pandit transferred the temple together with the deities and the shebaity right to Sashi Bhusan. This transaction took place very much less than a century ago. The next document of transfer is dated January 29, 1907. This is a transfer by Sm. Pramila to Upendra Nath. From the date on which the suit, out of which this appeal arises, was filed the transaction took place merely 52 years ago. Quite apart from the question of antiquity, a single transaction of sale by Srimanta to Sashi Bhusan cannot be held to have brought into existence a custom and usage relating to transfer of a shebaity right. It is to be noticed that the second transfer dated January 29, 1907 by Sm. Pramila to Upendra Nath was the subject-matter of challenge in this suit. Secondly so far as the transfer by Srimanta to Sashi Bhusan is concerned it must be noticed that it was a transfer by the shebait to a stranger and so is the case with regard to the transfer by Sm. Pramila to Upendra Nath. This is not the case where transfer was made by a shebait to another of a limited group of persons, who are heirs of the

shebait making the transfer or would otherwise have been entitled to the shebaity. In both the cases of transfer, the transfer was made to a stranger. Such a transfer -has not, in my view, the sanction of law behind it

41. On this view of the law, with regard to sale and transfer of a temple and the shebaity the transfer by way of sale made by the deed of Junr 24, 1880 by Srimanta Pandit to Sashi Bhutan is also invalid. By that document also the vendor Srimanta Pandit sold the temple and the deities, together with the shebaity including the utensils, to Sashi Bhusan But so far as this transfer is concerned there is no challenge at to the validity of the same Secondly Sashi Bhusan enjoyed the shebaitship from the date of sale in 1880 until his death in 1894. After his death his first widow Sm Paripuma carried on the sheba puja of the deities until her death in 1905 and it was only after her death that Sm. Pramila advanced her claim to the shebaity of the deities The sale by Srimanta in 1880 not being challenged by the plaintiff respondent in the suit, this Court is not called upon to make any pronouncement on the validity and legality of the sale by Srimanta to Sashi Bhusan. The plaintiff respondent proceeded on the assumption that Sashi Bhusan as a shebait of deities was in lawful possession of the temple and lawfully enjoyed the shebaity rights. In this view of the matter, this Court is not called upon to go into questions which are not the subject-matter of disputes in the suit

42. The next question to be considered is the conclusion arrived at by the trial Court that the temple was a public temple. The Trial Court held that the Thakurbari or the temple known as "Firingi Kali" was a public temple established for the purpose of worship by public and solely meant for public worship, offering donations, and manaped by the shehairs, at least since the time of Sashi Bhusan. The learned Judge noticed the submission made by counsel for the plaintiff respondent on this point, that the Coun was not entitled to go into the question namely Whether the temple was a public temple or a private temple as that point was not taken by any of the parties in the suit T do not see any reason why the Court should po into the question, ax none of the parties were interested in that question and particularly When counsel for the plaintiff respondent made it plain that the parties were not interested in a finding on this question It is also to be noticed that there was no pleading on the question whether the temple was a public or private temple, nor was any issue raised on such a question. In that view of the matter the trial Court, in my opinion was in error in taking into consideration the question whether the temple was a private or a public temple, and thereafter holding that the temple was a public temple solely meant for worship by the public. It is not for the Court to express its opinion on various questions raised in course of arguments, when such questions are not in issue in a suit or proceeding and the parties make it plain that they are not interested in a finding on a particular question.

43. To turn now to the two Wills executed by Upendra Nath Ganguli on November 5, 1922 and January 15, 1925, By the first Will he devised the temple premises

in favour of the plaintiff respondent Kali Kinkar Ganguli and if he died as a minor, his brother Pramatha was to enjoy and look after the temple as a shebait. It was also provided by this will that so long Sm. Pramila lived, she should enjoy the property as shebait and after her death the plaintiff respondent and Pramatha Nath were to step in as provided in the Will. By the second Will Sm. Pramila was to enjoy shebaity during her natural life. After certain proceedings with regard to probate of the two Wills the District Judge, 24 Parganas, granted probate of the first Will to Pramatha Nath and letters of administration with the Second Will annexed to Sm. Pramila. Thereafter, however, pursuant to an order of this Court probate was granted to Pramatha in respect of both the Wills of Upendra by the District Judge, 24 Parganas, on July 17, 1928.

44. Upendra Nath's right, title and interest in the shebairty was derived from the deed of sale on January 29, 1907, by Sm. Pramila in his favour. As in my view the sale by Sm. Pramila to Upendra Nath of half share of the temple and the shebaity right by the deed of January 29, 1907, is invalid Upendra Nath never acquired any right, title and interest in either the temple or the shebaity right. The temple and the shebaity were not devisable by his Will, as he never acquired any right, title and interest in the same. This conclusion is inescapable having regard to the law on the question of shebaity right to transfer a temple or a part thereof or to transfer the shebaity right. It is true that Sm. Pramila set up the second Will and claimed shebaity right under the Will. But neither the grant of probate with regard to the Wills, nor the claim made by Sm. Pramila under the second Will, can affect the conclusion to which I have arrived having regard to the law on the question of transfer of a temple and shebaity of the deities, which in my view is far too wellsettled to be questioned.

45. The question of Sm. Pramila's title to the shebaity by adverse possession was raised by counsel for the appellants in the court below. This question has been gone into by the trial court and it was held that Sm. Pramila did not acquire any title to the shebaity by adverse possession, as she by her act in executing the deed of transfer in favour of Upendra Nath and also by claiming as a legatee under the Will of Upendra Nath made it clear that she had half share only in the shebaity right. It was held that the appellants were estopped from questioning the fact that Sm. Pramila was entitled only to half share in the shebaity as she had accepted the bequest for life in half share of shebaity only. In the view I have taken on the question of validity of transfer by Sm. Pramila to Upendra Nath by the deed of January 29 1907, the question of Sm Pramila's title by adverse possession is immaterial and does not arise. The transfer of half share in the shebaity right and the temple itself being invalid, there could be no question of Sm. Pramila's acquiring title in the shebaity by adverse possession.

46. The effect of the Judgment of Chitty, J., in Suit No. 645 of 1905 was taken into consideration by the trial Court. Chitty, J., came to the conclusion that no debottar or trust was proved and that in any event there could only be an imperfect trust leaving the temple property at the absolute disposal of Sashi

Bhusan. The trial Court held, and I think rightly, that the conclusion of Chitty. J., that the property was not dehottar Was not binding on the deities as they were not parties in the suit

47. On the question whether Upendra Nath was in possession of the temple since 1907 until his death, it is to be noticed that no oral evidence was adduced on behalf of the plaintiff respondent in support of the claim that Upendra Nath was in such possession. On the other hand the oral evidence of one of the witnesses called by the defendant appellants was that he had never heard the name of Upendra Nath until the suit was filed nor is there any evidence to establish that Upendra Nath carried out the sheba of the "Firingi Kali" alone since 1907 until his death. In the absence of any evidence on the question whether he carried out the sheba of the deities alone since that year it is not possible to hold in favour of the plaintiff respondent on either of these two questions.

48. I should refer to two other matters before I conclude. The first of these is the mutation proceeding in respect of the temple premises. In one of these proceedings the name of Pramatha was substituted in respect of the temple premises during the life time of Sm. Pramila and on her death in 1947. the Land Registration Officer made an order on April 27, 1949, substituting the name of the appellants Nos. 2, 3, 4 and 5 as shebaites of the deities at the temple premises. This was followed by a suit among the appellants inter se in 1950 (excluding the appellants Nos. 1-A, 1-B and 1-C but including Kumud Kishore Banerjee) In this suit a decree was passed on April 23 1953, by which it was declared that the temple premises were debottar property belonging to the deities, and that the original defendant Kumud Kishore Banerjee and one Durgapada Banerjee were the shebaites of the deities. Whatever importance may be attached to the mutation proceeding as showing the conduct of the parties with regard to the debottar estate and the shebait rights, such proceeding cannot have any effect on the validity of the transfer of the temple and the shebait rights by Sm Pramila to Upendra Nath. Recording of the names of the appellants Nos 2, 3, 4 and 5 by the Land Registration Officer as mentioned above, does not by itself create any title in favour of the appellants either in the temple premises or in the shebait rights. The title of the appellants and their claim to the shebait rights, such as it is, is derived from Sm. Pramila. In the view I have taken of the deed of transfer executed by Sm. Pramila in favour of Upendra Nath. the appellants must be held to derive that title to the shebait right from Pramila. The appellants were in enjoyments of shebait rights without interruption upon the death of Sm. Pramila when such rights were challenged by the plaintiff respondent by his Solicitor's letter on January 10, 1959.

49. The other matter to be referred to is the oral testimony of the two witnesses namely Nirendra and Indubhusan who gave evidence on behalf of the appellants. The oral evidence appears to me to be useless for determination of the question which I have discussed in this judgment. These two witnesses said that they had no personal knowledge if Upendra Nath exercised his right of shebaitship or if

Pramila acted as a shebait in respect of half share of the shebaity right of the deities during her life time. I do not think that the oral evidence adduced by the two witnesses can be relied upon for the purpose of determination of the dispute between the parties nor does such evidence throw any light on the question of validity of the transfer of the shebaity right

50. The issues therefore should be answered as follows:

Issue No. 1 ... No.

Issue No. 2 (a) ...

The transfer was for legal necessity but is invalid.

Issue No. 2 (b) ... No.

Issue No. 3 (a) ...

The transfer purporting to be for legal necessity is invalid.

Issue No. 3 (b) ... No.

Issue No. 4 ... No.

Issue No. 5 ... No.

Issue No. 6 ...

Sm. Pramila was in possession of the premises and was acting as a shebait at the death of Upendra Nath. She was entitled to the possession of the temple as a shebait and also to the shebaity in her own right though she advanced her claims to the same under the second Will of Upendra Nath.

Issue No. 7 ... No.

Issue No. 8 ... No.

51. As to the question of relief to which the plaintiff respondent is entitled I am of opinion that he is not entitled to any relief at all.

52. In the result, this appeal is allowed. The judgment and order under appeal are set aside. The respondent No. ^1 to pay to the appellants the costs of the suit and also of this appeal.

53. We are told that a substantial sum of money is lying in the hands of the Receiver appointed by this Court for the purpose of holding the offerings made to the deities until disposal of the appeal. The Receiver is directed to make over the money in his hands to the appellants. The Receiver is discharged subject to passing of his account. The appellants to pay the costs of the guardian-ad-litem of the deity respondents as between Attorney and client, out of the sum to be made over by the Receiver under this order.

54. Certified that it is a fit case for employment of two Counsel.

Deb, J.

55. I would like to give my own reasons for allowing this appeal.

56. The Counsel for the parties before us have accepted this finding of the Trial Court namely that the deities are the absolute owners of the suit property. The learned Counsel Mr. Sankar Das Banerji did not press the case of the appellants based on the alleged adverse possession of Sm. Pramila Debi as pleaded in their Written Statement.

57. The learned Counsel Mr. J.N. Roy for the respondent No. 1 and Mr. Banerji took serious objections as to the suo motu finding of the Trial Court namely that the temple in suit is a public temple. This finding was made in spite of objections of Mr. Roy in the Trial Court. He and Mr. Banerji contended before us that in the absence of the leadings and the issue in this behalf this finding of the learned Judge should be set aside. Mr. Roy and the learned Counsel Mr. P.N. De. who appeared for the appellants in the Court below, told us that they had to cite a few cases on public and private temple at the request of the learned Judge though it was nobody's case that this temple was a public temple.

58. The Counsel for the deities, however in a vain attempt to rupport this finding cited the case of Union of India (UOI) Vs. Khas Karanapura Colliery Ltd., but there the Supreme Court said nothing to justify this finding. The deities did not take this plea in their written statement. No evidence was adduced by the parties on it No issue was framed in this behalf. No such indication was even given on behalf of the deities at the time the case was opened by trial Judge. The parties did not apply their mind to it. It is not a pure question of law. Hence this suo motu finding of the Court below is hereby set aside in view of the decisions of the Judicial Committee and the Supreme Court relied on in the case of A. Akooji Jadwat Pvt. Ltd. Vs. Oriental Fire and General Insurance Co. Ltd. and Others, .

59. I further accept the contention of Mr. Banerji that it was nobody's case that this temple was established by the poet Antony Firingee and therefore the suo motu finding of the Trial Court to that effect cannot be supported. The learned Judge relied on Volume I of "Bharat Kosh" but this book is not such an authoritative book on which this Court can place any reliance. In coming to that conclusion the trial Judge also placed strong reliance on his own conviction but I am constrained to say that his conviction cannot override the documentary evidence on the record. The documents exhibited in the suit conclusively show that this temple was constructed by Ram Kanta Pal and thereafter Srimanta Pandit made it into a one storied temple. In this temple Shrimanta Pandit installed the other deities including the deity Firingee Kali and hence this finding is also set aside.

60. The Trial Court held that the sale of the suit temple was sanctioned by custom and this custom also sanctioned the sale of the shebaiti right in question. Hence, in his opinion the sale made by Sm. Pramila Debi to Uperndra Nath was valid and binding on the appellants for it was not only sanctioned by the said

custom hut also the said sale was made by her for the legal necessity of the deities. Mr. Roy contended that this custom was proved. He relied on the transfer made by the two sons of Ram Kanto Pal in favour of Srimanta Pandit. He also relied on the sale made by Srimanta Pandit to Sashi Bhusan. But I overrule his contentions.

61. The Deed of Sale executed by Srimanta Pandit recites that those two Pals gave away the deity Shiva with the Shiva temple to him. It was not a sale of the said idol not to speak of any shebaiti right. Therefore, it does not establish any custom. The sale by Srimanta Pandit to Sashi Bhusan is a solitary transaction and hence the alleged custom is not proved. Further, the alleged custom, if any, is not even pleaded in the plaint. The Trial Court should have followed the Bench decision of this Court in the case of Gopal Krishna Sil v. Abdul Samad reported in 34 Cal LJ 319 = (AIR 1921 Cal 569) and should have rejected this alleged custom put forward by Mr. Roy at the time of his argument.

62. Mr. Roy, however, relied on the case of Mohan Manucha v. Babu Manzoor Ahmed Khan reported in 70 Ind App 1--(AIR 1943 PC 29), There the Judicial Committee passed a decree for the repayment of a loan by invoking Section 65 of the Indian Contract Act, 1872 solely on the ground that it was a pure question of law. That decision of the Board does not help Mr. Roy for a custom is not a pure question of law but a mixed question of fact and the law. He then drew our attention to the case of P.V. Ayyappa Reddiar Vs. Ayyappan Pillai Janardhanan Pillai and Another, but that case is not on the point with which we are concerned and hence it does not assist Mr. Roy in any way as shown by my learned brother.

63. Mr. Roy relied on this alleged custom for the first time at the time of his argument in the Court below. There was no pleading to the effect and no issue was framed on it. No indication of it was given by Mr. Roy at the time the case was opened in the Trial Court. The parties did not apply their mind to it at all. The respondent did not adduce any evidence on it. The Witnesses said nothing on the alleged custom. The appellants did not get any opportunity to meet this case made out at the Bar against them and they were caught by surprise. In these circumstances the learned Judge should not have allowed this plea to be taken by Mr. Roy. There was a substantial miscarriage of justice in the Court below and hence I agree with my learned brother that this finding of the Trial Court must be upset

64. Further in the facts and circumstances stated above, the evidence, if, any, as to the alleged custom cannot be looked into in view of the law laid down by the Judicial Committee in the case of Siddik Mohamed Shah v. Mt. Saran reported in AIR 1930 PC 57 (1) and by the Supreme Court in the case of Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, of the report and in the case of Nagubai Ammal and Others Vs. B. Shama Rao and Others, of the report. Hence, there is no substance in the contention of Mr. Roy and therefore the finding of the learned Judge as to existence of the alleged custom must be set aside.

65. Moreover the alleged custom, if any, as to the sale of these deities is wholly void. An idol can never be the subject-matter of commerce. The sale of an idol is prohibited by Hindu Law, (See *Khettar Chunder Ghose v. Haridas Bundopadhyay*, (1890) ILR 17 Cal 557 at p. 559). A deity is not a chattel but a juridical person. No custom can ever validate a sale of any deity. The legal necessity of the deity cannot destroy the very existence of the deity by selling it in the open market. The very thought of It is opposed to the fundamental concept of the Hindu Jurisprudence. It is against public policy. It is wholly unreasonable. It is absolutely repugnant to the Hindu Law. It is so repulsive to the judicial mind that every Court is bound to strike it down in limine,

66. No one has ever heard that a deity can be served or be sold by hits and bits. The deity is indivisible. It is the Supreme Being. The deity is not a property and no one can be its owner not even its founder. The shebait is the manager of the deities though in reality they are its glorified servants. No shebait can ever be the owner of any deity. He is the custodian of the idol but this custody does not nor can it ever confer any right on him to sell the deity.

67. Srimanta Pandit was the founder of the deities other than the deity Shiva but he had no right to treat them as his private property. They are not immovable or moveable properties. Srimanta Pandit became the sole shebait, by adverse possession, of the deity Shiva. He being the founder of the other deities was their sole shebait. He was the custodian of all these deities. They are all Juridical Persons and Srimanta Pandit had no right to sell them to Sashi Bhusan and their sale was wholly illegal and void ab initio.

68. It is an admitted case that Sashi Bhusan took possession of this temple including all these deities and remained in their possession until his death. In other words, Sashi Bhusan, in exercise of its purported rights under the said void sale, publicly and continuously remained in possession of these deities and openly asserted, against the whole world, that he was the sole shebait of all these deities. This "Nee vi. nee dam. nee precario" made him the sole shebait and the custodian of these deities by adverse possession but his possession did not make him the owner of all these deities.

69. These deities became the family deities of Sashi Bhusan by adverse possession. He died intestate and on his demise his two widows became the shebait for life of all these deities under the Hindu Law. Rakhal Chandra wrongfully took possession of these deities and this temple after the death of Sm. Paripurna Debi. He was therefore rightly thrown out of possession by this Court at the instance of Sm. Pramila Debi.

70. Sm. Pramila Debi was not the owner of the deity Firingee Kali. There cannot be any widow's estate in this Goddess. She had no share in this deity. The sale to Upendra Nath of half of this deity by her was wholly null and void. The learned Judge did not apply his mind to this vital question at all. I say vital because it strikes at the very root of the alleged custom. The alleged custom, even if

proved, is unreasonable, illegal and opposed to public policy and hence this Court cannot take any notice of it.

71. Then the Trial Court held that the sale of half of this temple by Sm. Pramila Debi to Upendra Nath was valid in law but it is wholly void is the contention of Mr. Banerji. He urged that no custom nor any legal necessity can validate the sale of a temple not to speak of any part of it. In this connection he placed strong reliance on a Bench Decision of the Allahabad High Court in the case of Mukundji Mahraj Vs. Persotam Lalji Mahraj, . In that case the plaintiff deity was installed in a temple in the holy city of Mathura. The defendant purchased the half of that temple in an execution sale and took its possession. The deity brought that action for recovery of possession of the said temple from the defendant and the learned judges of that Court at pp. 81 and 82 of the report laid this:

"Whatever may be said about a permanent alienation of endowed property other than a temple, in the very nature of things, having regard to the duties of a Manager or a Shebait towards the idol or institution, there can be no necessity of alienating the temple or any portion of it in which the idol is installed. The maintenance of the entire building is the prime concern of the Manager or the Shebait.

The temple has a special sanctity distinct from other endowed property. To alienate the temple itself is to cut at the root of the very existence of the idol in the habitation intended by the founder. Hindu Sentiment views the alienation of a temple as a sacrilege. Not until the idol has been removed from the temple in accordance with shastric rites and has assumed a new habitation and the temple abandoned as a place of worship may the temple be alienated or so sold in execution of a decree.

In our opinion the sale of the temple in execution of the decree No. 503 of 1928 was totally void and it did not bind the plaintiff idol. After the death or removal of the Mahant who represented the idol in the suit in which the decree was passed, the succeeding Mahant who was no party to the proceedings can challenge the validity of the decree and treat the proceedings as null and void."

72. Mr. Banerjee also contended that a temple cannot be partitioned and he cited a Bench decision of this Court in the case of Madan Mohan v. Rakhal Chandra. reported in AIR 1930 Cal. 173 at pp. 175-176 of the report and he also relied on Khetter Chunder's case (1890) ILR 17 Cal 557 (supra).

73. Mr. Roy, however, contended, that the Allahabad High Court has recognised that a temple can be sold after removing the deity from it. He urged that a temple is a saleable property. He further contended that a temple does not stand on a different footing from the other items of the dewattur properties. He argued that as the manager of the infants estate are entitled to sell the residential house of the infant's for legal necessity there is no reason for holding that the shebait's are not entitled to sell a temple or a part of it after removing the deity from it

74. Mr. Roy's bone of contention is that the legal necessity of the deity makes the temple saleable. He placed strong reliance on *Konwar Doorganath Roy v. Ram Chunder Sen*, reported in (1876) 4 Ind. App. 52 (PC). In that case the Judicial Committee held that the property in question was not a dewattur property. Therefore, it is not an authority on the question involved before us. In that case the Judicial Committee at page 58 of the report said this:

"If the deed of endowment from Rajah Mahanond were satisfactorily proved, and it were an endowment which dedicated this mehal to the service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case."

But, with all respect I am against this obiter dictum of Sir Montague Smith. It was not followed by this Court in the case of *Chandi Charan Das v. Dulal Chandra Paik* reported in ILR 54 Cal. 30 = (AIR 1926 Cal. 1083), in the case of *Surendra Krishna Roy v. Iswar Bhubaneshwari* reported in ILR 60 Cal. 54 = (AIR 1933 Cal 286), and in the case of *Sukumar Bose and Others Vs. Abani Kumar Haldar and Others*, . In the last mentioned case, this Court, after a review of all the relevant authorities up to that date, came to the conclusion at p. 311 of the report that the above observations of Sir Montague Smith "cannot be taken any longer to be good law."

75. Mr. Roy. then, cited the following observations of Sir Montague Smith from the case of *Prosunno Kumari Debya v. Golab Chand Baboo* reported in (1874) 2 Ind App 145 at p. 152 (PC) of the report:

"It is only in an ideal sense that property can be said to belong to an idol; and the possession and the management of it must in the. nature of things be entrusted to some person as shebait, or manager. It would teem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree ax the manager of an infant heir. If Ibis were not to, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of necessary funds to preserve and maintain them".

76. Relying on these observations Mr. Roy contended that a shebait is entitled "to do whatever mavbe required for the service of the idol" and therefore his power of alienation of the endowed properties for the legal necessity of the deity is not restricted to part of the dewattur property but it extends to the endowment as a whole. This unrestricted power of the shebait, according to Mr. Roy. by necessary implication imports the power of alienating the whole temple including a part of it by removing the deity from it

77. In my opinion, *Prosunno Kumari*'s case (1874) 2 Ind App 145 (PC) (supra) must not be read in the way Mr. Roy wanted us to read. It is the preservation

and not destruction of the deity and its property is the paramount and the highest duty of each and every Shebait is the law laid down by the Judicial Committee in that case.

78. The legal necessity of the deity is not so unruly that it can rule over the deity. The alienation of the endowment as a whole is not warranted by the Hindu Law is the law laid down by the judicial Committee in (1900) 27 Ind App 69 (PC) and in the case of Damodar Das v. Adhikari Lakhan Dass reported in (1910) 37 Ind App 147 (PC). This Court also said so in the case of Sm. Hemanta Kumari Bose v. Sree Sree Iswar Sridhar Jiw reported in 50 Cal WN 629 = (AIR 1946 Cal 473).

79. The endowment as a whole can never be the subject-matter of alienation even for the legal necessity of the deity for it will destroy the very purpose and the object for which the endowment is created. It will not only destroy the endowment but will devour the deity too.

80. A temple is the residential house of the deity. Every Hindu regards it as a sacred place. Where a temple is constructed for the purpose of installing therein a deity it must be held that the intention of the founder is to make it permanent abode of the deity unless of course there is any express and specific provision in the document showing a contrary intention. In the absence of any such specific and clear provision showing a contrary intention in this behalf the temple becomes the permanent abode of the deity the moment the deity is installed therein. Similarly, in such a situation the worship of the deity in that temple is also intended to be permanent by the founder.

81. The deity is entitled to be worshipped in its permanent abode. Its permanent residence cannot be disturbed. The idol cannot be removed like a chattel from such a temple by its shebait. That temple cannot be vivisected. It is impartible. No part of it can be sold even for the deity's legal necessity. It is *res extra commercium*.

82. To sell a part of the temple is to endanger the very existence of the consecrated idol and to put an end to the sanctity attached to it. If saleable, it can be sold to any non-Hindu. He, being a dis-believer in the Hindu faith and religion, shall have no respect or regard for the sanctity attached to the place of worship. If saleable, it can be passed on from hand to hand in the open market. The very argument of Mr. Roy is a shocking inroad to the Hindu Philosophy and the Faith. It is opposed to the basic concept of the Hindu Jurisprudence. If there is any such custom it must be held to be unreasonable, illegal and opposed to public policy and should be treated as null and void.

83. Yet, it was contended by Mr. Roy that a temple can be sold after removing the deity in some other place as observed by the learned Judges of the Allahabad High Court but I protest. The deity cannot be left at the mercy of the shebait not even at the mercy of the members of the family of the founder. They have no right to remove the deity from its temple. They have no right to carry the deity like a chattel here, there or everywhere. No doubt the case of *Pramatho Nath v.*

Pradyumna Kumar reported in 52 Ind App, 245 -- (AIR 1925 PC 139) was remanded by the Judicial Committee for ascertaining the views of the members of the family regarding the removal of the deity but undoubtedly the Judicial Committee was not concerned with the removal of any deity from its permanent abode namely the temple nor this question was agitated before their Lordships.

84. It is wholly wrong to say that the consensus of the members of the family of the founder can put an end to the sanctity attached to the temple where a large number of religious minded people were and are allowed to participate in the daily worship of the deity. Neither the shebait nor the members of the family have, any right to remove the idol from its temple in such a situation and to abandon the temple. It is against the paramount intention of the founder and no Court can sanction it

85. These deities were located in this temple and they were in the custody of Rakhal Chandra when Sm. Pramila Debi sold the half of this temple to Upendra Nath. Therefore, this sale was null and void. Further, no shebait can make a temple the subject-matter of commerce. He has no right to sell any part of it. The sale of a temple or any part of it is wholly unreasonable, illegal and opposed to public policy and therefore the alleged custom, if any, for this reason must also be struck down.

86. Further, the materials on the record do not show that any part of this temple was ever sold at any point of time before Sm. Pramila Debi purported to do it. Therefore there has never been any such custom. Moreover, the said sale was void and illegal and no custom nor any legal necessity can validate that illegal and void sale. Hence, the learned Judge erred in holding that the said sale was valid in law and I overrule it including the contention of Mr. Roy advanced in support of this finding of the Trial Court.

87. Mr. Banerji, then, challenged this finding of the learned Judge namely that the sale of half of the shehaiti right by Sm- Pramila Debi to Upendra Nath was valid and hinging on the appellants. This finding was based on that alleged custom. Mr. Banerji urged that no such custom was either pleaded or proved and even if proved it is bad in law. He contended that the Hindu Law does not permit the sale of any shabaiti right and in any event the sale of the shphaiti right to an outsider is totally prohibited by the Hindu Law.

88. Mr. Roy on the other hand, contended that this custom was proved but I have already overruled his contention. Further, there is no material on the record to show that there was ever any alienation of half the shehaiti right or half the place of worship to any one before the transaction in question. Hence, it must be held that there was no such custom and the finding of the Trial Court cannot be supported even on facts.

89. Then. Mr. Roy relying on Khetter Chander's case (1890) ILR 17 Cal 557 (supra): Mahamaya Devi v. Haridas Halder, reported in ILR 42 Cal 455 = (AIR 1915 Cal 161 (2)), Jogesh Chandra Ghose v. Sree Sree Dakeswari Mata reported

in 45 Cal WN 809 = (ATR 1942 Cal 26): Hemanta Kumar Mukherjee and Others Vs. Prafulla Kumar Bhattacharjee, and Sree Kalimata Thakurani Vs. Jibandhan Mukherjee and Others, contended that the Hindu Law permits the transfer of the shebaiti right and pala of worship for the legal necessity of the deity.

99. In the case of Sree Kalimata Thakurani Vs. Jibandhan Mukherjee and Others, the Supreme Court said nothing on this question and hence I will pass on to Khettar Chunder's case (1890) ILR 17 Cal 557 (supra). In that case Sir Gurudas Banerjee, at page 562 of the report, said this:

"These cases, therefore, do not militate against the view that in the case of a private endowment an alienation of the shebait's office, made with the concurrence of the whole family, and for the benefit of the endowment, would be valid."

91. But, with all respect to this great Maiter, I am unable to agree with the above pronouncements for the reasons stated later on.

92. In Mahamaya v. Haridas, ILR 42 Cal 455 = (AIR 1915 Cal 161 (2)) (supra) two questions were involved and they were (1) Whether a custom for transfer of pala of the Kalighat Temple within a limited market was established by evidence; and (2) If so, was it valid in law. These two questions were answered in the affirmative. In that case at page 471 of the report Sir Asutosh Mukherjee observed as follows:--

"There is also authority for the proposition that alienation of a religious office may be validly made in favour of a person standing in the line of succession and not disqualified by personal unfitness.....But the appellant does not invite us to go even as far as this proposition. She asks us to assume that pala or a turn of worship is not alienable, except by custom, and contends that the custom which has been proved in this case should be recognised by the Court."

93. These observations were not at all necessary for the purpose of deciding that case and in any event they have no application to the facts and circumstances of the instant case before us. In Sree Sree Dhakeswari Mata's case, 45 Cal WN 809 = (AIR 1942 Cal 26) (supra) a similar observation was made at pp. 815-816 of the report and my comment is the same. Further, in that case on the question of sale of the shebaiti right at page 815 of the report Dr. Mukherjee said this:

"I am also of opinion that even if a custom is held to have been established by evidence in the present case, such a custom is unreasonable and should not be enforced".

94. The validity of the sale of shebaiti right and the custom to that effect were not questioned in Hemanta Kumar Mukherjee and Others Vs. Prafulla Kumar Bhattacharjee, and therefore the decision in that case has no bearing on the questions with which we are concerned.

95. In (1876) 4 Ind App 76 (PC) and in (1900) 27 Ind App 69 (PC) (supra) the

Judicial Committee said that the shebaiti right is not transferable. In the case of *Narasimma Thatha Acharya v. Anantha Bhatta*, reported in (1882) ILR. 4 Mad 391 and in the case of *Rangasami v. Ranga* reported in (1893) ILR 16 Mad 146, the Madras High Court held that the shebaiti right is not saleable.

96. In the case of *Gobinda Kumar Roychowdhury v. Debendra Kumar Roychowdhury*, reported in (1908) 12 Cal WN 98 a Bench of this Court held that the shebaiti right is not transferable.

97. In the case of *Rajeswar Mullick v. Goneswar Mullick*, reported in (1908) ILR 35 Cal 226 a Bench of this Court held that a shebait has no power to alienate the hereditary office of shebaitship by Will. In that case Macleans, C.J. and Mitter, J., observed that a shebait may alienate his shebaiti right by an act inter vivos without giving any reason for it but, in my opinion, Woodroff, J., rightly did not express any opinion on it. With all respect to their Lordships I am unable to agree with their obiter dictum inasmuch as it is opposed to the basic concept of the Shebaiti right and this concept is stated later on.

98. In the case of *Nagendra Nath V. Rabindra Nath*, reported in ILR 53 Cal 132 -- (AIR 1926 Cal 490) it was contended that the shebaiti right was saleable and it was rejected by Page, J., at p. 151 of the report in the following terms:--

"In support of this contention learned counsel for the defendant referred to the decision of this Court in *Nirode Mohini Dassi v. Shibadas Pal* in, (1909) 36 Cal 975 and the dictum of Mitra, J., in *Rajeshwar Mullick's* case, (1908) ILR 35 Cal 226. With all respect to the learned Judges who decided these cases, for the reasons which I am about to state, I am of opinion that the decision in *Nirode Mohini Dassi's* case, (1909) 36 Cal 975 and also in *Rajeshwar Mullick's* case, (1908) ILR 35 Cal 226 so far as it is founded upon the same reasoning, are not in accordance with the law of India as enunciated by the Judicial Committee of the Privy Council, and I cannot acquiesce in them".

His Lordship continues:

"The contention which learned counsel has urged upon the Court, in my opinion, is founded upon a hearsay which has crept into the Hindu Law, and ought to be exposed and eradicated. This is not the only branch of law in which the words "for the benefit" have caused error and confusion; see *Barwick V. English Joint Stock Bank*, (1867) 2 Ex 259 *Lloyd v. Grace, Smith & Co.*, (1912 AC 716). Who is to determine whether any particular alienation is "for the benefit of the deity"? is it the Founder? is it the persons interested in the worship? is it the shebait, or one or more of them? is it the Court? I do not pause to hazard a conjecture, for, in my opinion, the doctrine contravenes the Hindu Law, and in any event cannot be extended to an alienation of the spiritual rights and duties of a shebait. The genesis of the heresy may be found, I think, in a misapprehension of certain observations of Sir Montague Smith in *Prosunno Kumari's* case, (1874) 2 Ind App 145 (PC).

99. The above decision of Page, J., was approved by a Bench of this Court in the case of Panchanan Banerjee v. Surendra Nath Mukherjee, reported in AIR 1930 Cal 180. In that case Rankin, C.J., at p. 183 of the report says this:

"If a person sells religious office it is contrary to what was laid down by the Privy Council in the well known case of Raja Vurmah Valia v. Ravi Vurmah, (1876) 4 Ind App 76 (PC). The doctrine on the subject has recently been considered by my learned brother Page. J., in the case of ILR 53 Cal 132 = (AIR 1926 Cal 490)."

100. Now. on the concept of shebaiti in the Full Bench case of Monohor Mukherjee v. Bhupendra Nath reported in ILR 60 Cal 452 = (AIR 1932 Cal 791 (FB)) Sir Monmotho Nath Mukherjee at page 494 of the report say" this:

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

101. And prior to it in Gnanasambanda's case, (1900) 27 Ind App 69 (PC) (supra), at p. 77 of the report, Sir Richard Couch, speaking for the Judicial Committee, pronounced this:

"Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other."

Again Sir Monmotho Nath Mukherjee, in the case of Bhabatarini v. Ashalata, said this in this Court:

" It seems to me that elements of office and property, of duties and personal interest are mixed up and blended together in the conception of shebaitship."

The case of Bhabatarini v. Ashalata went up to the Judicial Committee which is reported in 70 Ind App 57 = (AIR 1943 PC 89) and there, Sir George Rankin, at page 65 of the report, says this:

"The shebait has certainly a right of property in his office, and it may be correct to say that he has some sort of beneficial interest in the dewattur property but the idol a the owner of the property".

102. In the case of Angurbala Mullick Vs. Debabrata Mullick, Dr. Mukherjea, at p. 296 of the report, said this:

"Thus, in the conception of Shebaiti both the elements of office and property, of duties and personal interest, are mixed up and blended together and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property. This was elaborately discussed by a Full Bench of the Calcutta High Court in ILR 60 Cal 452 -- (AIR 1932 Cal 791 FB) and this decision of the Full Bench was approved of by the Judicial Committee in Ganesh Chunder Dhur v. Lal Behary, 63 Ind App 448 = (AIR 1936 PC 318) and again in 70 Ind App 57 = (AIR 1943 PC

89)."

103. In *Angurbala Mullick Vs. Debabrata Mullick*, Dr. Mukherjea said that it is impossible to separate these two elements of Shebaiti namely the elements of property and the office. Further, the duties attached to the office of a shebait cannot be delegated by him is the decision of the Judicial Committee in the case of *Manmohan Das v. Ianki Prosad*, reported in 72 Ind App 39 = (AIR 1945 PC 23).

104. The "right of management is attached to the office, not the office to the right of management" is the saying of Page, J., in *Nagendra Nath's case* (supra) at p. 144 of the report ILR 53 Cal 132 = (AIR 1926 Cal 490). It is elementary that an office cannot be sold. The duties of the shebait are paramount. Their rights and emoluments are subordinate to their duties. Their rights and emoluments flow from their duties. Their rights and duties are inextricably mixed up together. The office and the property of the shebait in the Shebaiti are interwoven in such a manner that one cannot be taken out from the other.

105. In *Angurbala Mullick Vs. Debabrata Mullick*, which dealing with the question as to whether Shebaiti is alienable or not, at page 301 of the report, Chandra Sekhar Aiyar, J., said:

"It is *res extra commercium*". It must be so. The Shebaiti is not alienable in law but at the same time I must not be understood to say that the Shebaiti cannot be transferred if permitted by a valid custom on which I express no opinion, I must however, say that no custom can validate any alienation of the Shebaiti or pala of worship to a stranger in view of the law laid down by the Supreme Court in *Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others*, . In that case at page 127 of the report Dr. Mukherjee says this:

"The proposition is well established that the alienation of the shebaiti right by a shebait in favour of a stranger is absolutely void in Hindu Law and cannot be validated even on the footing of the custom. The alienation of the right is, therefore, *atrespasser out and out*".

106. Hence, the contention of Mr. Roy as to the alienability of a part or even the whole of the shebaiti right and a part or even the whole of a pala of worship is devoid of all substance and I overrule it

107. By the Deed of Sale dated January 29, 1907 Sm. Pramila Debi vivisected her shebaiti right into two halves. This surgical operation made by her on her shebaiti right is wholly repugnant to the Hindu Law and was and is absolutely void. The shebaiti right is not divisible in Law. The alleged custom, if any, as to vivisection of the shebaiti right including its sale is wholly illegal and void. No custom, however ancient, can make them valid. It is an unreasonable and illegal custom and therefore it cannot outweigh the law of the land, I must, however, make it clear that no such custom is proved in the instant case before us. Further, the materials on the record do not show that any shebait of these deities has ever vivisected the shebaiti right in, the manner Sm. Pramila did and hence

the contention of Mr. Roy as to the existence of the alleged custom is devoid of all merits.

108. By the said Deed of Sale, Sm. Pramila Debi not only vivisected her shebaiti right but after retaining a half of it sold the other half to Upendra Nath. The shebaiti right is not saleable and therefore that sale was wholly void. Upendra Nath was a rank outsider and hence *Kalipada v. Palinibala* (supra) overrules the contention of Ms. Roy including the finding of the Court below.

109. Mr. Roy then, contended that though the said Deed of Sale says that Sm. Pramila Debi has sold half of her shebaiti right in the deity Firingee Kali to Upendra Nath but we should say that she did not sell the half of her shebaiti right but had only sold half of her surplus income out of the offerings made by the devotees to the deity Firingee Kali.

110. I am unable to read this document in that unruly fashion. It is against all canons of construction of deeds and documents. No such intention can be spelled out from that Deed. Assuming, however, that such an intention can be gathered yet that Deed is wholly void. No shebait can vivisect his shebaiti right. He cannot abdicate any part of his duties. He cannot dissect his rights from his duties. His office is inseparable. His duties are paramount. He cannot abandon a part of his right and retain the other part. I repeat that the shebaiti is indivisible.

111. The shebait's property in the Shebaiti is not detachable from his office. He cannot divide his shebaiti right nor his pala of worship into two parts. His right to receive the surplus income flows from his shebaiti right or the pala of worship if sanctioned by usage or the documents establishing the endowments. His spiritual duties and his temporal rights are inextricably mixed up and blended together and one cannot be detached from the other. It is wholly contrary to the Hindu Law to vivisect the Shebaiti and to sell or transfer a part of it and to retain the other part.

112. No one can create a line of inheritance in his Shebaiti right except the founder but again the founder is not a Legislator. He cannot create a line of inheritance unknown to the Hindu Law. No shebait can do whatever he likes with his shebaiti right. His power is controlled by and is subordinate to the Hindu Law. The vivisection of the Shebaiti is unwarranted by the Hindu Law. He cannot, by selling a part of his Shebaiti right, create a new line of inheritance in the shebaiti right. The finding of the learned Judge stated earlier and the contentions of Mr. Roy in support of the said finding are wholly against the Hindu Law. Hence, I overrule his contention and set aside the said finding of the Trial Court.

113. Except for the legal necessity and for the benefit of the deity, the sale of the dewattur property is a breach of trust. The shebaiti right is not saleable even by the founder. The shebaiti right cannot be sold for the legal necessity of the deity or of the founder or of the shebait Sm. Pramila Debi purported to sell half of the suit property, half of the deity Firingee Kali and half of her shebaiti right for her own legal necessity and not for the necessity of the deities. The recitals of those

two Deeds of Sale executed by her in favour of Upendra Nath conclusively show that she was in need of money for protecting her own interest and her personal rights invaded by Rakhal Chandra. Further, she claimed this property as the secular property of Sashi Bhusan in that suit filed by her against Rakhal Chandra.

114. She was ousted by Rakhal Chandra from this property. Rakhal Chandra claimed to be the sole shebait of these deities. She asserted her rights and denied the claim of Rakhal Chandra who did not even set up any adverse title against the deities in relation to this property. Her necessity was not the necessity of the deities.

115. Her claim in that suit was directly adverse to the interests of the deities inasmuch as she claimed this property to be the secular property of Sashi Bhusan and not the property of the deities. The deities were not Parties to that suit. They are not bound by that decree.

116. She had no power to sell any part of the Dewattur property for her own legal necessity. She sold it in negation of the trust. She disowned the title of the deities in this property. Hence the sale of the "said half of this dewattur property by her to Upendra Nath for her own legal necessity is not binding on the deities nor on the appellants. Further, her sale of half the shebaiti right to Upendra Nath was also absolutely void.

117. Mr. Roy cited *Banga Chandra V. Jagat Kishore*, reported in 43 Ind App 249 = (AIR 1916 PC 110); *Mangiram Sitaram v. Kasturbhai* reported in 49 Ind App 54 = (AIR 1922 PC 163), and *Sree Sree Iswar Gopal Jieu Thakur Vs. Pratapmal Bagaria and Others*, in support of his contention that Sm. Pramila Debi sold the half of this temple, the half of the deity Firingee Kali and half of her shebaiti right for legal necessity. I do not dispute that she had a legal necessity but her legal necessity was not the legal necessity of the deities and hence these decisions have no bearing on the question involved before us.

118. Before going into the facts on the alleged adverse possession of Upendra Nath I would like to state a few words on the law on this aspect of the case. Shebaiti right can be acquired by adverse possession under a void sale but if the vendor had a life-estate in the Shebaiti then the title acquired by the purchaser by adverse possession under such void sale will stand automatically extinguished on the demise of his vendor and the Shebaiti will revert to the founder whose heirs will be the shebaiti unless it is otherwise validly disposed of by the founder by the document establishing the endowment. The time will begin to run against those heirs of the founder for recovery of the Shebaiti from such purchaser from the date of death of the vendor-shebait. If they do not bring the action within the time prescribed by the law of limitation the purchaser in possession will acquire an indefeasible title to the Shebaiti. This law is laid down by the Supreme Court in *Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others*, .

119. The Deed of Sale dated January 29, 1907 executed by Sm. Pramila Debi in favour of Upendra Nath is a void document. The consideration for that Deed and

its subject-matter) are not severable from each other. Its object are forbidden by the Hindu Law and they are against public policy. The sale of half of the temple, half of the deity Firingee Kali and half of her Shebaiti right are, unknown to Hindu Law. Hence, Upendral Nath did not acquire any right, title and interest in the subject-matter of that document.

120. Now, whether Upendra Nath took physical possession of this temple from Sm. Pramila Debi and whether he acted as the joint shebait with her are pure questions of fact. The Municipal records are against the Land Revenue records and therefore I am unable to give any importance to all these documents. The finding of the Trial Court that Upendra Nath was in possession of this temple through Sm. Pramila Debi and that he acted as the joint shebait through Sm. Pramila Debi are not borne out by the evidence on the record. Hence, I am against this finding. The burden lay on the first respondent to prove that Upendra Nath acted as a shebait and yet he did not give any evidence nor he called any witness to discharge this heavy burden. Further, in his two Wills Upendra Nath did not say that he acted as the shebait of the deity Firingee Kali

121. No doubt in the first Will Upendra Nath said that he was in possession of this temple but I am unable to place any reliance on it in view of his untrue statement made in that Will to the effect that he had established this temple, A man may write whatever he likes but he or the person claiming through him must prove that those writings represent the true state of affairs. It was for the first respondent to prove that Upendra Nath was in possession of this temple during his lifetime but he took no step to prove it. Further, the above finding of the trial Judge goes against the contention of Mr. Roy that Upendra Nath was in actual possession of the suit property. Similarly, that finding also shows that Upendra Nath did not personally exercise his alleged Shebaiti right in relation to the deity Firingee Kali.

122. It is true that in the absence of an ouster possession of one co-shebait is possession of all the co-shebait in the eye of law but this eye is closed to Upendra Nath for his purchase from Sm. Pramila Debi being void ab initio he did not become her co-shebait He did not even purport to act as shebait. Hence, the question of his acquiring any adverse title can never arise.

123. Even if he had acquired an adverse title it must be held that he acquired it adversely against Sm. Pramila Debi and his adverse title came to an end with his own death for she remained in possession of the temple and exercised her full Shebaiti right and in any event with the close of her life for her Shebaiti right was limited to her life only. Further, even if Sm. Pramila Debi purported to remain in possession of half of this temple and exercised the half shebaiti right of the deity Firingee Kali as a legatee under the Will of Upendra Nath yet, in my opinion, they are on no moment for her adverse title, if any, acquired under the Will of Upendra Nath stood extinguished on her death.

124. Sashi Bhusan died intestate. On the death of Sm. Pramila Debi the Shebaiti

right reverted to Sashi Bhusan. The appellants are the heirs of Sashi Bhusan and therefore they became the shebaita of these deities. The time did not run against them until the doath of Sm. Pramila Debi. Hence, there is no substance in the contention of Mr. Roy that the first respondent has acquired adverse title against the appellants who on their own right took possession of this temple immediately on the death of Sm. Pramila Debi and they are in rightful possession of this temple.

125. Now as to Srimanta Pandit, there is nothing on the record to show that those two Pals made any gift of this temple or the deity Shiva to Srimanta Pandit. Even if there was any gift of this temple and the deity Shiva to him there is nothing on the record to show the circumstances under which the said gift was made. In other words, the necessity for that gift is not established. These two Pals were not the founders of the deity Shiva. They were not even the owners of this property. The gift of this temple, if any by those two Pals was not for any legal necessity of the deity because there cannot be any legal necessity for making any gift of the endowed property.

126. There is nothing on the record to show that the members of the Pal family joined in the said gift of the deity Shiva to Srimanta Pandit. The observation of Sri Gurudas Banerjee in Khetter (Thunder's case (1890) JLR 17 Cal 557 (supra) to the effect that the gift of an idol is valid under the Hindu law is a mere obiter dictum. That observation was not at all necessary for deciding that case. No authority has been cited before us to uphold a gift of an idol except the said observation of Sir Gurudas Banerjee. Idol is not transferable. Idol is not a chattel. Idol is not even a property and there cannot be any gift of anything which is not a property in the eye of law. The deity is a juridical person and it is elementary that no juridical person can be the subject-matter of any gift or sale.

127. Srimanta Pandit, however, became the shebait of the deity Shiva by adverse possession. He established the other deities in suit. He sold all these deities to Sashi Bhusan. He also sold this dewattur property to Sashi Bhusan. There is nothing on the record to show that that sale was justified by any legal necessity. In any event, the sale of the whole endowment was void. Further, the deities are "res extra commercium". The sale of this dewattur property was inextricably mixed up with the sale of the deities and hence that sale was an outright nullity.

128. Sashi Bhusan, however, acquired an indefeasible title in the Shebaiti of these deities by adverse possession as held earlier. On his death his two widows became the shebaits. Then Sm. Pramila Debi became the sole shebait on the death of Sm. Paripurna Debi. The appellants became the shebaits on the death of Sm. Pramila Debi. Upendra Nath had no right, title, interest whatsoever in this temple or in the shebaiti of the deity -- Firingee Kali. Sm. Pramila Debi did not even purport to sell any part of her shebaiti right in the other deities to Upendra Nath and therefore Upendra Nath cannot, in any event, acquire any shebaiti right in the other deities and in this temple. Further the Shebaiti right of the appellants were not defeated by the alleged adverse possession of Upendra Nath

or of Sm. Pramila Debi

129. Mr. Roy, lastly, cited R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid, in support of his contention that a judgment of a court of competent jurisdiction is conclusive between the parties and their privies. I do not dispute it. I also do not dispute that a Probate is conclusive on the question of the valid execution of the Will. But the Probate Court has no power to go into the question of title of the testator and hence, the contention of Mr. Roy that Probate of these two Wills being granted to Promotho Nath this Court should hold that Upendra Nath became the Shebait of this deity has no substance.

130. And for all these reasons this appeal is allowed and the suit is dismissed as directed by my learned brother and I also concur with the order just now passed by him.