

(1959) 09 CAL CK 0016
In the Calcutta High Court
Case No : Suit No. 318 of 1959

Sm. Raikishori Dassi

APPELLANT

Vs

Official Trustee of West Bengal and Others

RESPONDENT

Date of Decision : 21-09-1959

Acts Referred:

Citation : AIR 1960 Cal 235 : 64 CWN 646

Hon'ble Judges : G.K. Mitter, J

Bench : Single Bench

Advocate : Niren De and Sambhu Ghose, for the Appellant; Sabyasachi Mukharji, for Gora Chand Dutt, Defendant No. 2, Samar Deb, for Defendant No. 1 and Sanat Mukherjee, for other Defendants, for the Respondent

Judgement

G.K. Mitter, J.—This is a suit for a declaration that the plaintiff has become a shebait of certain deities in the place of the deceased, Tarag Dassi and Kristo Moti Dassi, for construction of the Will of Pulin Behari Dutt dated March 5, 1934 for the purpose of ascertaining succession to the shebait-ship of the deities mentioned in the plaint, for a declaration that the purported consent decree dated August 7, 1936 in Suit No. 1695 of 1935 and the purported order dated August 23, 1941 in Suit No. 14 of 1941 are not binding on the plaintiff, for an injunction restraining the defendant Gora Chand Dutt from preventing the plaintiff from acting as a shebait and for other reliefs.

2. The defendants in this suit are (1) the Official Trustee of West Bengal, (2) Gora Chand Dutt, a nephew of the Testator, Pulin Behari Dutt, (3) Premchand Sen, (4) Dunialal Dhur (5) Kedar-nath Dhur, (6) Gopal Chand Dhur and (7) Kalidas " Dhur, being daughters sons of the said testator and lastly (8) Sree Sree Lakshmi Mata Jew, a Hindu Idol located at 43, Bancharam Akrur Lane, Calcutta. The plaintiff is the only surviving daughter of the testator. A genealogical table showing the relationship of the parties is given below :

X

_____|
_____| | Rash Behari Dutt (dead) Pulin

Behari Dutt | (Testator) died 11.8.1984 | X Gora Chand Dutt (Defdt. No. 2)
Sm. Saibalini (d. 28.1.48)

_____ | | | Sm. Tarakdassi Dassi (dead 19.10.50) Sm. Raikishori Dassi
(Plaintiff) Sm. Kristomati Dassi X Jugal Kishore Sen (dead) (dead 26.3.49) | |
Premchand Sen (Defdt. No. 3) | _____

_____ | | | | Dunialal Dhur Kedarnath
Dhur Gopal Ch. Dhur Kalidas Dhur (Defdt. No. 4) (Defdt. No. 5) (Defdt. No. 6)
(Defdt. No. 7)

3. The testator Pulin Behari Dutt executed a Will on March 5, 1934 appointing his youngest daughter Kristomati Dassi, his nephew, Gora Chand Dutt and one Ajit Kumar Roy as the executrix and executors of his Will. The Will recites that the testator had five immovable properties namely (1) 18, Thakurdas Lane, (2) 16, Chaitan Sen Lane, (3) and (4) 13 and 13/1/1, Hidaram Banerjee Lane, (5) a plot of land situate at Kayatolla Road, Bally-gunge. Excepting the last mentioned property all the others are situated within the original jurisdiction of this court.

4. The material portions of the relevant provisions of the Will are as follows :

Clause 3 -- "I have established the deity or Thakur Sree Lakshmi Mata Jew at present located at 33/2D Sankaritolla East Lane to be removed to my own house at premises No. 18, Thakurdas Palit Lane as hereinafter provided."

Clause 4 -- "I give devise bequeath and dedicate unto the said deity all that the messuages lands hereditaments and premises No. 18, Thakurdas Palit Lane for ever and absolutely and I hereby appoint my eldest daughter Sreemutty Tarak Dassee, my youngest daughter Sreemutty Kristomati Dassee and my nephew Gora Chand Dutt jointly to be the shebait of the said deity or Thakur Sree Sree Lakshmi Mata Jew for their respective life or lives and after their death the lineal male descendant or descendants of the said shebait shall be the shebait of the said deity or Thakur".

Clause 5 -- "I hereby direct my executors and trustees to keep the said premises No. 18, Thakurdas Palit Lane in Calcutta in good repair and habitable condition and to pay the Municipal Taxes, Government Revenue and other outgoings in respect of the said premises out of the income of my estate."

Clause 6 -- "I hereby further direct my executors and trustees to collect the rents issues and profits of my estate including the said premises No. 18, Thakurdas Palit Lane and to pay there out" the repairs, municipal taxes, Government revenue and other outgoings and also to pay the expenses of the daily and periodical Sheba or worship of the said deity to the said shebait in the manner mentioned in Schedule "A" hereunder written and the surplus to be invested in Government Promissory Notes or Municipal Debentures which shall merge in Debutter Estate."

5. By Clauses 7 and 8 the testator directed the executors and trustees to allow

his wife and his youngest daughter with her family to reside in a portion of the said premises No. 18, Thakurdas Palit Lane during the term of their natural lives.

6. By Clause 9 the testator directed his executors and trustees to pay out of the income of his " estate a sum of Rs. 30/- per month to his wife Sreemati Saibalini Dassee for her maintenance during the term of her natural life.

7. The testator, by Clause 10, directed the executors and trustees to pay out of the income monthly sums of Rs. 12/- to each of the three daughters for their lives.

8. By Clause 11 a direction was given to the executors and trustees to sell all the immovable properties excepting premises No. 18, Thakurdas Pa-lit Lane and to pay out of the sale proceeds certain legacies to the three daughters. By Clause 12 the executors and trustees were directed to invest the balance of the sale proceeds in Government Promissory Notes or Municipal Debentures,

9. By Clause 13 the testator bequeathed and dedicated unto the said Deity or Thakur the said Government Promissory Notes or Municipal Debentures to be purchased out of the balance of the sale proceeds of the immovable properties mentioned and all his moveable properties for ever and absolutely.

10. By Clause 14 the testator directed his executors and trustees to stand possessed of the Government Promissory Notes or Municipal Debentures and premises No. 18, Thakurdas Palit Lane, in trust for the said Deity or Thakur upon trust to collect the rents, issues and profits thereof and to pay there out the repairs, taxes and other outgoings and to apply the surplus towards the expenses of the daily and periodical Sheba or worship of the said Deity or Thakur in the manner mentioned in Schedule "A" with a direction that the balance left after meeting the aforesaid expenses was to be invested in Government Promissory Notes or Municipal Debentures which were to merge in the De-butter Estate.

11. By Clause 15 the testator gave his executors and trustees the right to make additions alterations and improvements to the premises No. 18, Thakurdas Palit Lane for the benefit of the De-butter Estate.

12. By Clause 16 the testator directed the executors and trustees to construct a new building in place of the existing building at No. 18, Thakurdas Palit Lane according to the specification shown in the plan sanctioned by the Corporation of Calcutta and for that purpose to spend out of the sale proceeds of the other properties a sum not exceeding Rs. 10,000/- in case the said building was" not constructed by the testator during his lifetime.

13. Clause 20 relates to the appointment of new trustees.

14. Schedule "A" to the Will shows that the daily sheba of the Deity was to be performed at a cost of Rs. 20/- per month, periodical shebas at Janmastami at a cost of Rs. 50/- and for Lakshmi Puja during the year Rs. 60/-.

15. Although he displayed extreme carefulness verging on parsimony as regards the directions for the sheba of the Deity the testator little realised that he was making liberal provisions for the benefit of lawyers by his Will. As was to be expected his death was followed by successive crops of litigations with respect to the properties left by him. In the year 1935 the youngest daughter Kristomati Dassi filed a suit in this court purporting to act as the next friend of the Deity against her co-executors, her sisters and her mother for construction of the "Will, declaration of the rights of the parties and administration of the estate. This suit was numbered 1695 of 1935. On August 7, 1936 a scheme which had the consent of all the parties except the plaintiff herein was placed before the Court and a consent decree obtained in terms of the said scheme. By it the trustees were directed to sell the immovable properties, to construct a building at 18, Thakurdas Palit Lane at a cost of Rs. 6,500/- to pay maintenance to the widow Saibalini and the arrears of annuities to the daughters including the plaintiff besides Rs. 30/-, to Kristomati Dassi in lieu of her right of residence. A further direction was given that the balance left in the hands of the trustees should be invested in Government Promissory Notes : the turns of worship of the shebaites were also laid down in the scheme. The plaintiff complains that the said decree was obtained without her knowledge and consent and as such is not binding on her.

16. An order was made "in the Goods of Pulin Behary Dutt" by this Court on January 27, 1938 whereby the Official Trustee of West Bengal was appointed a sole trustee under the Will in the place and stead of the above trustees and he has been in possession of the estate of Pulin Senary Dutt, deceased, ever since. The procuring of this order seems to be the only wise thing done by the descendants of the testator. Thereafter the immovable properties of the estate except 18, Thakurdas Palit Lane were sold and the balance of the sale proceeds after the disbursements directed by the Will was invested in Government Securities with the result that the income yielded was found to be very much in excess of the expenditure and outgoings, leading to accumulation in the hands of the Official Trustee. Between 1948 and 1950 the widow and the eldest and the youngest daughters of the testator died. The plaintiff complains that although an order was made in a suit filed by the executor Ajit Kumar Dey against the widow and others on August 23, 1941 directing payment of all arrears of annuities she was not paid the arrears of annuities due to her and that a sum of Rs. 340/2/7 still remains due and payable to her for annuity in terms of the Will for the years 1936 to 1941. As all the parties are agreeable that she should be paid the said arrears no issue was raised on this claim.

17. The substantial question for determination in this suit is based on the allegations made in, paragraph 20 of the plaint. The plaintiff contends that by Clause 4 of the Will the testator purported to lay down a line of succession to the shebaitship unknown to Hindu Law which is accordingly invalid. In paragraph 22 of the plaint she contends that upon the death of the testator the remainder and/or reversionary interest in the shehaiti which was not disposed of under the Will

became vested in the testator's widow for life and on her death it passed to the testator's daughters for their respective lives. As the widow and the other daughters are dead the plaintiff claims to have become a shebait of the deity. In paragraph 24 of the plaint it is stated that the shebaiti having been acquired by the plaintiff by inheritance as a female heiress and the same having vested in her in possession in the circumstances mentioned in the plaint she is entitled to claim and to hold the same as a full and absolute owner along with Gora Chand Dutt, defendant No. 2, by virtue of the provisions of section 14 of the Hindu Succession Act of 1956. In paragraph 25 of the plaint it is stated that a sum of Rs. 55,000/- or thereabouts has accumulated in the hands of the defendant No. 1. In paragraph 26 of the plaint the plaintiff submits that the amounts specified for the Debsheba and periodical worship of the Deity are unreasonably small, that directions for investment of the balance of income as contained in the Will is an attempt to create accumulations in perpetuity and as such invalid and void. She claims to be entitled to the said accumulations as undisposed of residue by virtue of her being the sole surviving daughter and the only heiress of the testator.

18. In paragraph 31 of the plaint a complaint is made that the defendant Gorachand has wrongfully removed the Deity from the Thakurbati to his own residence at 43, Bancharam Akrur Lane in violation of the terms of the Will and is wrongfully obtaining the entire Debsheba expenses excluding the plaintiff therefrom. In the result she has filed this suit for reliefs mentioned.

19. On May 2, 1959 the Official Trustee filed his written statement in which there is reference to other litigation not mentioned in the plaint. He denies that a sum of Rs. 55,000/- has accumulated in his hands and states that he has been paying the expenses for Deb Sheba to the defendant No. 2 as a sole shebait.

20. Gorachand Dutt filed his written statement on May 1, 1959. He disputes the claim of the plaintiff to be a shebait and denies that she is entitled to any relief. The defendants 4, 6 and 7 filed written statements. A voluntary written statement has also been filed on behalf of the Deity by its guardian-adlitem.

21. Leaving out of account the question of the arrears of annuities about which there was no dispute the following issues were settled :

Issues :

1. Does the provision of Clause 4 of the Will of Pulin Behari Dutt attempt to lay down a line of succession to shebaiti not permissible in Hindu Law?

2(a). On the proper construction of the Will of Pulin Behari Dutt is the plaintiff the present she-bait of the Deity?

(b). If so, is the plaintiff in possession of the shebaiti as contemplated by Section 14 of the Hindu Succession Act?

3(a). Is the provision in Clause 12 of the Will invalid for the reasons given in

paragraph 26 of the plaint?

(b). Is the plaintiff entitled to the accumulated funds in the hands of the defendant No. 1?

4. To what relief, if any, is the plaintiff entitled?

22. Mr. Dey, learned counsel for the plaintiff gave up issue No. 3 (a) and (b) and did not press issue No. 2(b) as he admitted that the plaintiff was not in possession as a shebait although she was entitled to be a shebait under the Will. No objection was taken to this course.

23. The only two questions which have to be determined, therefore, are (i) whether the provision for the appointment of shebait after the death of those appointed for life is repugnant to Hindu Law and void and (ii) whether the plaintiff has become a shebait of the Deity on the death of the two Shebait out of the three originally appointed for life by the Will.

24. The question therefore resolves itself into one of ascertaining the rights of the named she-bait and finding out their successors under the Will. An argument was advanced on behalf of the defendant No. 2 that the rights given to the persons designated as shebait in this case were not the full shebaiti right as understood in the Hindu Law and therefore the decisions in *Ganendra Mohun Tagore v. Juttendro Mohun Tagore* (I A Sup Vol. 47) (PC), and *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* 27 IA 69, would not apply to this case. This argument was adopted by defendants 4, 6 and 7. The defendants Nos. 3 and 5 have neither filed Written Statements nor appeared at the hearing of the suit while counsel for the defendant No. 8 left the matter to court.

25. It becomes necessary therefore to examine the provisions of the Will and find out the rights given to the persons called shebait. It will be noticed that premises No. 18, Thakurdas Palit Lane was given absolutely and for ever to the Deity by Clause 4 of the Will which not only named three persons to be shebait for life but provided for the succession to the office after their death. By Clauses 5 and 6 of the Will the executors and trustees were enjoined to keep the said property in good repair and habitable condition, to collect rents, issues and profits of the said property and to pay the expenses of repair and outgoings as also those for the sheba of the Deity. The management of the property is thus taken out of the hands of the shebait so long as the executors and trustees function. With regard to the other items of immovable property they were to be sold by the executors and trustees who were directed to pay out of the sale proceeds certain legacies, invest the surplus in Government Promissory Notes which were to become the absolute property of the Deity. The trustees were directed to collect rents, issues and profits of 18-, Thakurdas Palit Lane and the Government Promissory Notes and to apply the surplus left after all outgoings towards the sheba of the Deity as laid down in Schedule "A" to the Will and invest the balance in Government Promissory Notes after constructing a house at 18 Thakurdas Palit Lane unless it was erected by the testator himself. One

central idea pervades the whole of the Will, namely, that everything the testator left -- mostly immovable to start with to be made moveable by conversion -- was to belong exclusively to the Deity subject to the payment of the legacies and the annuities mentioned. The testator did not evidently contemplate his descendants having any personal interest in the properties left by him except as shebait of the Deity, It is true that it was his intention that the properties should be in the hands of the trustees who would make over to the shebait the monies directed to be spent for such sheba. It would not however be correct to say that the interest of the shebait under the Will was wholly dissimilar to their ordinary rights as known to Hindu Law. IE it chanced to happen that at any time all the trustees were dead and had not appointed any fresh trustees the shebait would, in my view, be entitled y-to exercise their full legal rights as shebait under the Hindu Law. Notwithstanding the fact that the shebait were not to have the right to manage the properties of the deity so long as the trustees functioned they were still the shebait with all the attendant rights and obligations excepting that of management which was entrusted to the trustees. They were not something less than shebait as understood by that expression.

26. From time to time attempts have been made to define the position and the powers of a shebait and the nature of his interest in the dcbutter estate. In *Prosunno Kumari Debya v. Golab Chand.* 2 IA 145, the Judicial Committee held that

"it was competent for the shebait of property dedicated to the worship of an idol, in the capacity as shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects." The authority of the shebait was said to be analogous to that of the manager for an infant heir, as defined in the judgment of the Board in *Hunooman Persaud Pandey v. Mt. Munraj Koonweree* 6 IA 393 (PC). The Board observed in that case.

"it is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as shebait, or manager"

27. In 27 IA 60, the respondent Velu Pandaram sued in 1892 to establish his right to the management of an endowment connected with a temple and to the possession of the land forming its endowment jointly with the respondent Chockalinga on the ground that the deeds of sale executed in 1868 were not binding on them. The Judicial Committee observed that there

"is no distinction between the office and the property of the endowment. The one is attached to the other; but if there is, Article 144 of the same schedule (of the Limitation Act) is applicable to the property."

They rejected the plea that each member of the family succeeded to the management per formam dodi and held that the rule in *Tagore v. Tagore*, (I A

Sup Vol 47) (PC), was applicable to an hereditary office and endowment as well as to other immovable properties, and that the Hindu Law of inheritance did not permit the creation of successive life estates in the endowment. It was pointed out in *Vidyavaruthi v. Balusami Ayyar*, 48 Ind App 302, that the relation of a shebait in regard to de-butter property was not that of a trustee to trust property under the English Law. In English law the legal estate in the trust property vests in the trustee who holds for the benefit of the cestrum que trust while in Hindu religious endowment, the entire ownership of the dedicated property is transferred to the deity or the institution as a juridical per-son and the shebait is a mere manager.

28. The question as to whether shebaiti was only an office or whether it also partook of the nature of property was settled finally by a Full Bench judgment of this Court in *Monohar Mukherjee Vs. Bhupendra Nath Mukherjee and Others* ; *Manohar Mukherji Vs. Bhupendranath Mukherji* , and approved of in later judgments of the Judicial Committee of the Privy Council. Delivering the leading judgment in that case Mukherji, J. observed at page 44 (of CWN) : (at p. 799 of AIR) that

"the idea of a manager or custodian of the idol or its endowed property having a right to a part of its usufruct, far from being repugnant to the Hindu notion of a religious endowment, is but a normal feature of it."

After reviewing the authorities on the point his Lordship said

"some amount of personal interest, wherever it is, permissible either by the terms of the grant or by custom or by usage of the institution, has never been regarded as militating against the essence of a Hindu religious endowment."

It was pointed out at page 50 (of CWN): (at pp. 603-804 of AIR) that

"in ancient times, except in cases of property dedicated to a brotherhood of religious all endowments ordinarily were administered by the founder himself and after him his heirs. The idea of appointing a shebait is of more modern growth. When a Hindu creates an endowment, its management is primarily in him and his heirs, and, unless he appoints a shebait, he himself fills that office and in him rests that limited ownership, -- notwithstanding that, on the one hand, he is the donor and, on the other, the recipient on behalf of the deity, the juridical person-- which has to be exercised until the property offered to the deity has been suitably disposed of x x x x In the distribution of *prasad* and matters of that character, the shebait has in practice a very large discretion. The discretion must necessarily, from the very nature of things, be much larger in the case of a private than in the case of a public debutter. This idea of limited ownership is the essence of the position of the Manager or custodian of a dedicated property, by whatever name he may be called." His Lordship classified private debutter into three classes, namely, (1) where the whole property and its income are dedicated to the idol, (2) where properties are dedicated to the idol but a portion of the usufruct is given to the beneficiaries including the shebait and (3) where

the secular property is charged with the expenses of the worship of the idol and observed at p. 57 (of CWN): (at p. 808 of AIR) that

"the extent of the right which a shebait enjoys in respect of each of these classes of endowment is different, but I venture to think that the nature of the right in respect of all these classes is fundamentally of the same character. In some cases the she-bait has a larger discretion than in others and in some cases again he has also a proprietary right to the usufruct or a part of it upon the very terms of the endowment which he has not got in others, but in all such cases he has, as such shebait, certain rights of a limited character in the endowed property," and again at p. 59 (of CWN): (at p, 809 of AIR)

"of course, if there are specific trusts, the she-bait-will have to carry them out to the letter, or if any specified amounts are to be spent for some particular items of worship, they too have to be spent in the manner directed; but if the only provision is that the worship is to be carried on, the shebait, so long as he does carry them on in accordance with the usage of the particular debutter or such custom as may have attached thereto and has not committed acts which may amount to mal-ad-ministration or mis-management, must naturally have a very large discretion as to what to spend and in what way. The expenses to be incurred must, of course, be consistent with the dignity of the endowment. The deity would not take or consume anything; and to take an extreme case, if offering the income to the worship of the deity, the shebait distributes it amongst the beneficiaries, there is hardly any reason to say that he has not discharged his duty."

His Lordship summed up the position of a shebait at p. 61 (of CWN) : (at pp. 810-811 of AIR) in the following sentences:

"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. A shebaifs position towards the debutter property is not similar to that in England of a trustee towards the trust property; it is only that certain duties have to be performed by him which are analogous to those of trustees ... A shebait deals with the property in his custody or management as if he has some property, though not the full rights of property, in it, the legal property vesting in the idol. .. It is in him and not in the idol that the right of suit is vested, and it is his minority that counts for the purpose of limitation."

In the result, his Lordship took the view that it was impossible to regard the right of a shebait in Hindu law as anything else than property within the meaning of that law. Accordingly his Lordship held that the rule in *Tagore v. Tagore* (I. A. Sup Vol. 47) (PC) namely that a private individual who attempts by gift or will to make property heritable otherwise than as the law directs, is assuming to legislate and the gift must fail and that a person who-is to take a gift must either in fact or in contemplation of law be in existence at the time when the gift or bequest is to take effect.

29. In AIR 1936 318 (Privy Council) , a Hindu governed by the Dayabhaga School executed a Will closely resembling the Will in this suit. He gave his residuary estate to his executors and trustees upon trust to pay the balance of the income of his estate to the shebait for the time being of the deity established by him at his family dwelling house to be applied by the shebait towards the expenses of daily Sheba and periodical festivals with a direction that after the death of all the legatees under the will the executors and trustees were to make over the whole of the corpus and undrawn income of the estate to the shebaits for the time being of the said Thakur upon the trusts mentioned- By Clause 10 of the will he directed that the shebait for the time being of the Thakur would be entitled to live in the family dwelling house. By Clause 11 he appointed his sons Kartick and Ram to be she-baits of the Thakur and directed

"that upon the death, retirement or refusal to act of any of them or any of the future shebaits the then next eldest male lineal descendant of Kar-tick Chunder Dhur or Ram Chunder Dhur shall act as a Shebait in place of the deceased or retiring Shebait or Shebaits refusing to act as such -- it being my intention that the eldest for the time being in the male line of my said sons Kartiek Chander Dhur and Ram Chunder Dhur shall always remain as joint Shebaits and in the event of the death or refusal to act of any Shebait the then next male member of the branch to which the She-bait dying or refusing belonged shall act as a She-bait in his place and stead,"

The testator completely left out his second son Ganesh Chandra from the succession to the She-baiti. On the death of Kartick and Ram the Administrator General of Bengal who had been granted letters of administration *de bonis non* brought an originating summons for the construction of the will of the testator and the determination of the persons entitled to act as shebaits in the events which had happened. It was contended by Lal Bahari and Netyo the eldest sons respectively of Ram and Kartick that they had become entitled to act as shebaits and to the income of the estate by virtue of a gift for We to them under Clause 11 mentioned above. The Judicial Committee re-affirmed the rules in *Tagore v. Tagore*, (I A Sup Vol 47) (PC), and approved of the judgment of the Full Bench in *Monohar Mukherjee Vs. Bhupendra Nath Mukherjee and Others* ; they further held that the second rule in *Tagore v. Tagore*, (I. A. Sup Vol 47) (PC), was applicable to an Hereditary office and endowment as well as to other immovable property as laid down in *Gnanasambanda's* case 27 IA 69. They rejected the plea that a separable gift had been made by the testator in favour of the sons of Kartick and Ram who were in existence at the date of the Will. With regard to Clause 11 they observed that

"the testator combines the whole series of changes in the succession in one sentence, "upon the death, retirement or refusal to act of any of them (Kartick or Ram) or any of the future she-baits", and additional force is given to this observation by the term of the declaration of the testator"? intention in the latter part of the Clause, which also covers the whole series of changes in the

succession."

The Board did not agree that the decision in the case of 116 Ind. Cas. 387 (Privy Council) , was applicable to facts before it. The Board came to the conclusion that

"on the deaths of Kartick and Ram respectively, the succession to the office of Shebait and the in come of the estate must be according to the ordinary Hindu Law of succession."

30. These cases were reviewed in the case of AIR 1943 89 (Privy Council) . By a deed of arpannama one Sital Chandra Banerjee dedicated a number of properties to his family deities, made himself and his wife the first shebait and directed that on his death his only son Panchanan should be Shebait in their stead. This appointment of Panchanan was followed by provisions purporting to lay down who should succeed him in the Shebaiti; but these were found ineffective- Upon the death of Panchanan, Bhabatarini, his sister, filed a suit against Panchanan's widow Asmantara and her daughters as persons wrongfully in possession of the debutter properties. The trial court upheld Bhabatarini's claim but in appeal the suit was dismissed by Derbyshire, C. J. and Mookherjee, J. The Judicial Committee upheld the judgment of the appeal Court. Sir George Rankin who delivered the judgment of the Board quoted with approval extensively from the judgment of Mookherjee, J. and in particular the , " dictum that

"the elements of office and property, of duties and personal interest, are mixed up and blended together in the conception of shebaitship. One of the elements cannot be detached from the other." They discounted the argument that the law as to shebait had altered in material respects by reason of the discussions which ended in the Full Bench case of Monohar Mukherjee Vs. Bhupendra Nath Mukherjee and Others . They observed

"the effect of that case and of the Board's decision which confirmed it -- AIR 1936 318 (Privy Council) --was however to emphasise the proprietary element in shebaiti right, and to show that though in some respects anomalous, it was an anomaly to be accepted as having been admitted into Hindu Law from an early date. Taking their stand upon the proposition that the entire office is vested in the person who holds it at any given time they arrive at the conclusion that it is impossible to give recognition to any interest as vested in another x x x x x it must be recognised that the shebait must completely represent the idol or the endowment -- the deity, the religious purposes, the debutter property, x x x x x 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 debutter property but the idol is the owner of the property and the limit set to the shebait's power of disposition is set not to preserve the interest of the next shebait but to maintain and preserve by proper management the endowment or religious institution-

On the question as to succession to the office Sir George Rankin observed at page 66 (of Ind App): (at p 93 of AIR) that

"It seems possible in theory to lay down a series of rules for determining which person in a family should succeed to the office of shebait to the family idol without assuming that the office is property at all. Such rules might be made to follow more or less completely the same course as the line of succession to the property of a Hindu male owner. This however is no more than a fancy to be mentioned only for distinction's sake and to be put aside as soon as mentioned. It is not a theory which anyone maintains nor would it serve the appellants' purpose to suggest it. It must now be taken that shebaiti is property, that it is not a catena of successive life estates, but is heritable -- heritable property which in the first instance is vested in the founder, x x x x x x x It is only with some difficulty that any theory can successfully hold together the two elements of "office" and "property", but the shebaiti right involves both and neither element is to be discarded."

31. With regard to the difficulty which would be likely to arise by admitting the possibility that an interest in remainder could be vested in the founded or an heir of the founder Sir George Rankin posed the question ;

"What is the class of cases in which it is thought that the existence of this right will prevent the she-bait from representing the idol with that completeness which has hitherto, been ceded to him?"

He went on to observe that

"Rights to prevent mis-management, to preserve the foundation, can be asserted by anyone having an interest therein. Questions may arise which affect the title to the shebaiti right itself. But what claim to interference with the idol's worship or property can be based upon a right which has not vested in possession? Why in any case should the element of "office" be regarded so little or disregarded so completely? The Courts need give no countenance to such suggestions. If the office is heritable property and may be the subject of a grant limited to the period of the donee's life, the grant may be regarded as disabling the founder and any heir of his from having or asserting during the donee's life any right to represent the idol or manage its affairs or from impairing in any manner the right of shebaiti which has been granted and which has long been well defined by the law and practice of Hindus."

32. On the facts of this case it was held that the only valid disposition of the shebaiti by Sital being in favour of Panchanan who survived him as his only son, the interest given to him could not defeat his heritable right and exclude his heirs.

33. The position of a shebait was expounded by Mukherjee J. in Angurbala Mullick Vs. Debabrata Mullick, . His Lordship pointed out that

"even where no emoluments are attached to the office of shebait he enjoys some sort of right or interest in the endowed property which partially at least has the character of a proprietary right."

34. From the above_ it appears, clear that she-baiti is not merely an office but

partakes of the nature of property descendible according to the ordinary rules of Hindu law. Even if by the inter-position of a trust the management of the endowed " properties is confided to a set of trustees shebaiti does not lose altogether the characteristics of property. Indeed the shebait has been said to have a right of property in his office. The owner of the endowed property is the idol and indeed by the will in this case all the properties, movable and immovably have been made the subject matter of absolute gift to the deity, the trustees having no more than a mere right of management. The shebait is only denuded of his right to the extent the same is carved out in favour of the trustees but he does not lose altogether his beneficial interest in the property. It is he who can assert the right of the deity if the trustees are negligent or delinquent. It is for him to protect the Thakur if there be any threat of injury to it. As I have already said if all the trustees died without appointing fresh trustees or refused to act the full rights of the shebait would again come into play. Even when the trustees are functioning it is the shebait alone who can spend the income directed to be made over to him for the purposes of the daily sheba and the periodical worship. He is not accountable to the trustees. Even if he is deprived of the right to manage the properties on behalf of the deity he has an interest in some part of the income of the debutter property. In my view therefore the rules in *Tagore V. Tagore* (i,A. Sup. Vol. 47) (P.C.) will apply to the office of the shebait in this case.

35. Although the point was not argued inasmuch as no issue was raised on the question it appears to me that the Thakur is entitled to the entire income of the endowed properties. When the entire properties are dedicated absolutely to the idol, the latter is entitled to the entire income thereof and the Clause directing the trustees to make over to the shebait only a fraction of the income and accumulate the balance appears to be void.

36. I have no hesitation in coming to the conclusion that the provision for appointment of shebaits to succeed the two daughters and the nephew is invalid according to Hindu Law. In my opinion the direction that after the death of the named persons "the lineal male descendant or descendants of the said shebaits shall be the shebait of the said deity," infringes the rule of succession in Hindu Law. The testator sought to appoint Only the descendants in, the male line of the named shebait to function after their death. The expression "lineal male descendants," certainly suggests a continuous line of descendants limited to males. It suggests a line or a chain and a line or chain of a particular character, viz., the line of the males. The obvious intention of the testator was that only the male descendant or descendants from generation to generation of the named shebaits should hold the office after their death to the exclusion of females. Although there is some difference between the relevant clause of the will in this case from that of clause 11 of the will in AIR 1936 318 (Privy Council) the intention of the testator as evidenced by Clause 4 of the will is the same as that in *Ganesh Chandra's* case. The intention certainly was more boldly expressed in *Ganesh Chandra's* case than in the case before me, but to me it appears that it was the same in both the cases.

37. In Ganesh Chandra's case the Judicial Committee held that the decision in 55 IA 74: (AIR 1928 PC 33) was not applicable to the will of Lakhi Narayan Dhar and in my view that decision cannot apply to the will before me. In Madhav Rao's case 55 IA 74: (AIR 1928 PC 33) the settlor was making provisions by a deed of trust primarily for his children and it is apparent that he had in his mind not only the children but also the male grand children. He had three daughters and a son all of whom were married and had children living at the date of the deed. He directed that one fourth of the amount of net rents, dividends and profits were to be paid to his son Raghunath during his life time and from and after his decease the same should be paid to all the male heirs of the said Raghunath share and share alike and as to one-quarter of the said rents, dividends and profits to pay the same to his daughter Krishnabai during her life for her sole and separate use and "after her death in trust for the male heirs of the said Krishnabai share and share alike." Lord Buckmaster, who delivered the judgment of the Board, said that the male heirs of Krishnabai did not take by inheritance from her. According to the learned Judge

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

38. In my view a voluntary settlement by a man of his property who has children and grandchildren and who intends primarily to provide for them cannot be looked at in the same light as a man who creates an endowment and wants to provide for the sheba and worship of the deity. In the case of a voluntary settlement by way of a trust where the first donee is given a life interest only with a direction that after his or her death the income should be paid to his or her male heirs share and share alike it is clear that the settlor intended to benefit at least such of the male children (who would ordinarily be the male heirs) of his issue who were in existence at the date of the deed but when a man by his will intends to provide for the sheba and worship of the deity it is the Thakur about whose interest he is primarily solicitous and it would be reasonable to think that he would be providing for the sheba for all time to come so that the deity would never be in want of a ministrant; this is more so in a case like this where the intention obviously was that the shebait should not be allowed the ordinary right of management which the Hindu Law gives him. In my view the testator in the case before me was not thinking at all of the sons of his daughters or nephew but he was only thinking of the preservation and aggrandisement of the debutter estate and attempting to provide a continuous line of persons who would perform the worship. He was not thinking of any particular male descendant or descendants at all but was thinking of successive generations of male descendants who would look after the Thakur--the only person he was providing for subject to the payment of the legacies. The testator never intended to make any independent gift to any one in particular after the death of the named shebait.

39. An argument was advanced by Mr. Mukharji, counsel for Cora Ghand Dutta that the rule in *Tagore v. Tagore* (I A Sup Vol. 47) (PC) ought not to be made applicable to this case because the she-bait really had no personal or beneficial interest in the debutter properties and his interest cannot be said to be property. Reference was made to the case of *Gokul Chand De and Others Vs. Gopi Nath Dey and Others*, ; in this case Das J. who delivered the judgment of the appeal bench of this Court sitting with Harries, CJ. observed that the principle in *Tagore v. Tagore* (Ind App Sup Vol. 471 (P.C.) and the rule in *Monohar Mukherjee Vs. Bhupendra Nath Mukherjee and Others* , would not be applicable where the shebait has not even a qualified right to the endowed property and the legal title was in the trustees who had full powers of management or disposal, the shebait having merely a right to receive a fixed sum for carrying on the worship of the deity with a liability to account. Although all his judgments command great respect I find myself unable to concur in the above views expressed by Das, J. which are to be found at page 180 (of Cal LJ): (at p. 711 of AIR) of the above report. From the judgments from which I have quoted rather copiously it is established beyond question that a shebait has some kind of property in the office and some beneficial interest in the debutter property even if there are no emoluments attaching to the office. Further, shebait's office has been described as property descendible according to the ordinary rules of Hindu Law. The highest tribunals have held that it is not possible to separate the two elements of office and property. More curtailment of the right to manage the property which a shebait would otherwise have, would not in my opinion, make shebait's office a right or property of a kind to which the ordinary rules of succession in Hindu Law are inapplicable.

40. In the result I hold that the attempt by the testator to confine the shebait's office to the lineal male descendants of the persons named in Clause 4 of the Will is repugnant to the Hindu Law and as such void. There is no independent gift in favour of any of the male descendants of the said named persons.

41. The question still remains; has the plaintiff a right to be declared a shebait of the deity along with Gora Chand Dutt? This will depend upon the interpretation of Clause 4 as to whether the appointment of the named persons "jointly to be shebait of the said deity meant that they became joint tenants as understood in the English Law with a right of survivorship. In my view there can be no question of such a right of survivorship in a case like this. In *Jogeswar Narain Deo v. Ram Chandra Dutt* 23 IA 37, the Judicial Committee of the Privy Council laid down that "the principle of joint tenancy appears to be unknown to Hindu Law, except in the case of coparcenary between the members of an undivided family", and observed that there was no justification in importing into the construction of a Hindu Will an extremely technical rule of English conveyancing. In this case a Hindu testator had left a four anna share of his estate to his daughter and her son for their maintenance with powers of alienation by gift or sale and the question was whether a perpetual lease of her own share granted by the daughter was binding beyond her life time. The principle was reiterated by the

Board in the case of AIR 1933 72 (Privy Council) where on the construction, of the grant before them the Board took the view that there was nothing to suggest that the Government intended to make a grant to a joint family. In my view there is nothing in the case of *Sree Iswar Lakshi Durga Hat Tatneswar v. Surendra Nath*, 45 Cal. W.N. 665 which establishes anything to the contrary. There a Bench consisting of Mukherjee and Biswas, JJ. pointed out that the shebait of a deity when there was more than one, form one body in the eye of law. The deity was represented by all of them acting together so that no one shebait could be said to represent the idol in part or to possess any specific interest in any share of the idol's property. It was held as long ago as 1889 by Lord Hothouse in *Gossarni Sri Gridhariji v. Romanlalji Gossami* 16 IA. 137 that

"when the worship of a thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstance to shew a different mode of devolution"

(see at page 144).

In AIR 1943 89 (Privy Council) the Judicial Committee quoted with approval from the judgment of Mukherjee, J. of this court laying down that

"the entire rights remain with the grantor when a deity is founded and it is open to him to dispose of these rights in any way he likes. If there is no disposition, shebaitship remains like any other heritable property in the line of the founder and each succeeding shebait succeeds to the rights by virtue of his being an heir to the immediate predecessor and not to the original grantor. If it is disposed of completely and absolutely in favour of another person there remains nothing in the grantor except the possibility of a reversion when there is a failure or extinction of the line of shebaites indicated by him. If on the other hand the testator has parted with his rights only in a partial manner for the lifetime of the grantee, the residue still remains in him and his heirs, and on the death of the grantee, the heir of the founder living at the time is entitled to the shebaitship."

As soon therefore, as any of the named shebait dies his or her interest vests in the heirs of the founder living at the time. The heir of the founder in this case on the deaths of Tarakdassi and Kristomati Dasi would include the plaintiff and therefore I must hold that she has become entitled to act as a shebait of the deity on the death of her sisters.

42. It was argued that the Will could not be construed so as to give right to somebody whom the testator wanted to exclude. It is true that the testator evidently did not intend his second daughter, the plaintiff to be a shebait of the deity and it may be because he had, in Clause 18 of the Will which I have not set forth above, purported to appoint her along with another sister to be the shebaites of the family deities of his maternal grandfather. However, that may be, the rules of succession must be given effect to and if the testator had intended to lay down a line of succession not allowed by law the fact that a person, not intended

by the testator to receive the same benefit, gets it, cannot be helped.

43. The issues therefore are answered as follows: Issue No, 1: Clause 4 of the Will of Pulin Behari Dutt purports to lay down a line of succession to shebaiti not permissible in Hindu Law. The gift of shebaiti to the lineal male descendant or descendants after the death of the persons named as shebaiti for life is bad.

Issue No. 2(a): The plaintiff is entitled to be a present shebait of the deity.

Issue No. 4: There will be a declaration of the plaintiff's right as mentioned above and an injunction restraining the defendant No. 2 from preventing the plaintiff from performing the sheba of the deity along with him.

44. In furtherance of the unexpressed wishes of the testator I direct that the costs of all parties appearing must come out of the debutter estate. The Official Trustee will get his costs as between attorney and client while the others will get it as between party and party.