

(2013) 04 PAT CK 0052
In the Patna High Court
Case No : First Appeal No. 700 of 1985

Sri Mithila Bihari Singh

APPELLANT

Vs

Sri Radha Krishna Maharaj and Others

RESPONDENT

Date of Decision : 03-04-2013

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 11, 16

Citation : (2013) 04 PAT CK 0052

Hon'ble Judges : Mungeshwar Sahoo, J

Bench : Single Bench

Advocate : Vaidehi Raman Prasad Singh and Mr. Mrityunjay Kumar, for the Appellant; Ajit Kr. Singh -1, Advocate and Mr. Awinash, for the Respondent

Judgement

Mungeshwar Sahoo, J.—The defendant appellant has filed this first appeal against the judgment and decree dated 12.8.1985 passed by the learned First Additional Sub-Judge, Sitamari in Title Suit No. 38 of 1975 whereby the lower appellate court decreed the plaintiffs respondents' suit. The plaintiffs respondents filed the aforesaid Title Suit No. 38 of 1975 for declaration that the plaintiff Nos. 2 and 3 and the defendant Nos. 2 to 4 are the original trustees and Shibaites of the plaintiff No. 1 i.e. Sri Radha Kishun Maharaj, the deity, installed in the temple in village Punaura and the endowed property as detailed in schedule 1 of the plaint belonged to the plaintiff No. 1 and the aforesaid Shibaites are the trustees with respect to it. Further for declaration that the defendant No. 1 is not the Shibait and thus he has got no right to interfere with possession of the trustees in respect of the suit properties and management of Poojapath, Rajbhog etc. Prayer for injunction was also made.

2. The plaintiffs claimed the aforesaid relief alleging that Sri Ramsagar Prasad Singh had no issue at all. He installed the deity Sri Radha Kishun Maharaj Ji in one of the rooms of his residential house for his own worship. He wanted to endow some of his property for the purpose of Poojapath, Rajbhog and Samaiya of the deity. However, he could not execute any deed of endowment and he

suddenly fell ill and died in 1942. His widow Pan Kumari Devi inherited him with mother of the deceased i.e. Most. Ram Somari Devi. During illness Sri Ram Sagar Prasad Singh instructed his wife Pan Kumari to execute endowment deed in favour of the deity. Accordingly, Most. Pan Kumari Devi for the fulfillment of the wish of her husband executed a registered deed of endowment dated 28.7.1953 in favour of the deity, plaintiff No. 1 with respect to the Schedule-I properties of the plaint. Most. Pan Kumari Devi made herself the Shibait during her life time. To avoid further complication, it was mentioned in the deed that if her mother-in-law Most. Ram Somari Devi survived in that case she would be the Shibait of the deity till her life time. If Ram Somari Devi died then a board of trustees consisting of five persons namely Sitaprasad Singh @ Lalbabu, father of plaintiff No. 2, Sri Bindheshwari Prasad Jha, father of plaintiff No. 3, Ram Chandra Prasad Singh, Hari Madhav Prasad Sahi, defendant No. 2, Sri Ram Awatar Singh, father of defendant No. 3, Kamla Singh and Sri Gajadhar Prasad Singh, father of defendant No. 4 would work as Shibait of the deity and manage the suit properties for performance of Poojapath, Rajbhog etc. In the said deed it is also mentioned that each of the trustees will have a right to nominate a trustee to work as such after his death and if any trustee died without nominating his successor trustee, one of the heirs of the deceased trustee would be nominated as trustee in place of the deceased trustee by his heirs. It is also mentioned that one of the trustees will be selected by majority decision of the trustees who will manage the trust properties and will work as Mukhiya. He will also look after the Poojapath, Rajbhog and Samaiya of the deity. The tenure of Mukhiya will be 5 years. On completion of his tenure there will be an election of fresh Mukhiya. No Shibait will transfer the property or encumbering the suit property. Whatever surplus income will be there and whenever property will be purchased out of the income will be the property of the deity. If Mukhiya will not act according to the direction contained in the deed the trustee may remove the Mukhiya and may appoint another Mukhiya amongst themselves.

3. The further case of the plaintiffs is that Most. Pan Kumar died in 1951. On her death, Ram Somari Devi became the Shibait but she also died on 27.9.1968. On her death the trustees aforesaid came in possession of Schedule 1 property and they started performing Poojapath, Rajbhog and Samaiya. Sita Prasad Singh was elected as Mukhiya who was managing the suit property. The said Sita Prasad Singh died on 19.1.1970 and then the heirs of Sita Prasad Singh elected the plaintiff No. 2 as the trustee. The plaintiff No. 2 was put in-charge of the Schedule 1 property. Sri Gajadhar Prasad Singh, another trustee died on 5.2.1971 and his heirs elected Kameshwar Prasad Singh, the defendant No. 4 to work as trustee. Bindheshwari Prasad Jha also died and his heirs selected plaintiff No. 3 as trustee. Ram Autar Singh also died and his heirs selected the defendant No. 3 as trustee. Now therefore, the board of trustees consisted of plaintiff Nos. 2 and 3 and defendant No. 2 to 4. The grandfather of the defendant No. 1 in collusion with defendant No. 2 got a deed of adoption executed by Most. Ram Somari Devi in favour of defendant No. 1 on 28.2.1961 showing the adoption of

defendant No. 1 as her son. He also got a fictitious deed of transfer of Shibaitship right executed by the said Ram Somari Devi in favour of defendant No. 1 on 28.3.1963, although Ram Somari Devi had no right to transfer Shibaitship to the defendant No. 1. The same was transferred contrary to the terms of the deed of endowment and the defendant No. 1 never came in possession nor acquired any Shibait rights. However, defendant No. 1 filed application before the circle officer, Dumra for mutation of his name in respect of suit property as Shibait of the deity in register-II in place of Ram Somari Devi. The order was passed in favour of the defendant No. 1 inspite of objection by the plaintiffs' ancestor. The appeal was dismissed and the second appeal before Additional Collector was also dismissed. According to the plaintiffs, the defendant No. 1 is not the legally adopted son by Most. Ram Somari Devi. Ram Somari Devi had no right to change the line of succession to the office of the Shibaitship. As such the deed transferring Shibaitship i.e. dated 8.2.1963 is illegal and void document. Even if the deed is held to be valid then also it will operate during the life time of Ram Somari Devi only who died on 27.9.1968. Thereafter the defendant No. 1 ceased to be the Shibait. The plaintiffs also stated that the defendant Nos. 2 to 4 are in collusion with the defendant No. 1.

4. The defendant No. 1 appellant filed contesting written statement. Besides taking various legal pleas mainly the defendant contended that Ram Somari Devi, the mother-in-law of Pan Kumari Devi was appointed as Shibait in the endowment deed itself in respect of the suit property and on the death of Pan Kumari she became the Shibait. The right of Ram Somari Devi to appoint her successor of Shibait was not restricted in the endowment deed. Ram Somari Devi adopted this defendant as her son and a registered deed of adoption was executed on 28.2.1961. Ram Somari Devi was very old and was not in a position to work as Shibait hence she appointed her son defendant No. 1 to work as Shibait in respect of the suit property and executed transfer deed dated 28.3.1963. Since then this defendant No. 1 is continuing to work as Shibait of the suit property in respect of the deity. The original trustees Sri Hari Madhav Prasad Sahi, Gajadhar Prasad and Sri Ramautar consented to the appointment of this defendant as Shibait by Most. Ram Somari Devi. The defendant denied all other allegations made in the plaint. The defendant No. 1 appellant is in cultivating possession of the suit property and his name has been mutated as Shibait. This defendant being the member of the family of Ram Somari Devi legally entitled to work as Shibait.

5. It appears that in Civil Revision No. 1913 of 1980 this court directed the court below to decide only the point as to whether the plaintiff Nos. 2 and 3 and the defendant nos. 2 to 4 are the rightful trustee and Shibait of plaintiff No. 1 or whether the defendant No. 1 is the Shibait of plaintiff No. 1.

6. In view of the above facts and the pleadings of the parties, the trial court framed the following issues:

i. Whether the suit, as framed, is maintainable ?

- ii. Whether the plaintiffs have got cause of action for the suit ?
- iii. Whether the suit is barred by the law of limitation, waiver and estoppel ?
- iv. Whether the plaintiff Nos. 2 and 3 and the defendant Nos. 2 to 4 are the rightful trustees and Shibaits of the plaintiff No. 1 ?
- v. Whether the defendant No. 1, is the Shibait of the plaintiff No. 1 ?
- vi. Whether the plaintiffs are entitled to get the reliefs sought for ?

7. The learned counsel Mr. V.R.P. Singh appearing on behalf of the appellant submitted that the appellant was the adopted son of Ram Somari Devi i.e. the mother of the Ram Sagar Prasad Singh. On the death of Pan Kumari Devi the mother-in-law Ram Somari Devi became the Shibait of the deity. When she became very old and was unable to perform the Shibaitship she transferred the right of Shibait in favour of her adopted son, the present appellant on 28.3.1963 by registered deed i.e. Ext.-C. Since after execution of this Ext.-C the appellant came in possession of the properties and was performing the duty of Shibait. So far the trustees are concerned the defendant Nos. 2 to 4 admitted that they never participated in the trusteeship or any meetings of the trustees. In the endowment deed five persons have been mentioned as trustees. Out of the said five trustees only the two original plaintiffs are claiming to be the trustee of the property and deity and so far the other three trustees are concerned, they admitted that they have got no concern. Therefore, the trustees are not performing their duties as directed in the endowment deed Ext.-F dated 28.7.1953. In such circumstances, the properties will revert back to the heirs of the husband of Ram Somari Devi. In other words the admitted son i.e. the appellant will become the Shibait and will manage the property and perform Poojapath of the deity as he is only the heir of Ram Sagar Prasad Singh the husband of Ram Somari Devi.

8. The learned counsel for the appellant submitted that in the endowment deed Most. Pan Kumari Devi has mentioned the inheritance of Shibaitship up to only particular generation. If that direction is not followed then according to the decisions the property will revert back to the family. In support of his contention the learned counsel relied upon Gokul Chand De and Others Vs. Gopi Nath Dey and Others, and 129 Indian Case 619. According to the learned counsel in the endowment deed it is mentioned that on the death of one of the trustee without nominating his successor, the heirs will appoint a person amongst them as trustee is against the settled principles of law. On the death of one of the trustee all his heirs will be Shibait. Therefore, according to the learned counsel the terms and conditions mentioned in the endowment is void. In support of his contention the learned counsel relied upon Angurbala Mullick Vs. Debabrata Mullick, , Sitesh Kishore Pandey and Others Vs. Ramesh Kishore Pandey and Others, and Raikishori Dassi Vs. Official Trustee of West Bengal and Others, . On the basis of these decisions, the learned counsel submitted that Shibaitship cannot be confined to only one of the heirs and if it is so done it will be void condition. Here the terms of the endowment deed is contrary to the general rule of inheritance

therefore, the property will revert back to the family of the founder of the trust. The further fact is that since the trustees never assume any office and did not work as trustee therefore, the Shibaitship would revert back to the family of the founder.

9. So far the adoption is concerned, the learned counsel submitted that there was actually give and take ceremony and registered deed of adoption was also executed by Ram Somari Devi in token of the adoption of the appellant as her son therefore, the Shibaitship reverted to the appellant. Further when Ram Somari Devi became very old she transferred her Shibaitship to her son, the present appellant by Ext.-C. The plaintiffs have no authority to challenge the said transfer of Shibaitship as the trustees as a whole was not in existence and there is no condition mentioned in the endowment deed that if all the trustees will not function as Shibaits then also only two of them can act as Shibait and look after the suit property. According to the learned counsel the mutation order was passed in favour of the appellant on 31.8.1967. The appeal filed by the plaintiffs was dismissed and second appeal was also dismissed. They filed restoration which was also dismissed in 1973 therefore, the suit which has been filed by the plaintiffs on 31.3.1975 is barred by law of limitation under Article 58 of the Limitation Act and in the present suit the plaintiffs cannot challenge the transfer of Shibaitship i.e. Ext. C dated 28.3.1963. On these grounds, the learned counsel for the appellant submitted that the impugned judgment and decree are liable to be set aside.

10. On the contrary, the learned counsel for the respondents submitted that the plaintiffs are the nominated trustee in the endowment deed. There is no bar that if three of the trustees will not participate or not work as trustee the remaining trustee will not be capable of functioning as trustee. In fact the defendant Nos. 2 to 4 came in the clutch of the present appellant and collided with him. According to the learned counsel Article 58 of the Limitation Act is not applicable rather Section 107 of the Limitation Act will apply and the suit is not barred because the plaintiffs are not claiming setting aside of the transfer of Shibaitship. They prayed only for declaration that they are the trustees only with regard to the property and deity as provided in the endowment deed. According to law if the Shibaitship is not transferable then the transfer of Shibaitship Ext.-C will have no effect as such. The suit cannot be barred by law of limitation. Moreover the mother of Ram Sagar Prasad Singh i.e. Ram Somari Devi has no authority to adopt the present appellant as his son and the adoption is against the law as such is illegal. There is no mention in the endowment that the Shibait will have a right to transfer Shibaitship therefore, the transfer of Shibaitship to the appellant is illegal in support of his contention. The learned counsel relied upon *Nemai Chakrabarty Vs. Banshidhar Chakravarty and Others*, and *Sital Das Vs. Sant Ram and Others*, . On the basis of these decisions, the learned counsel submitted that the Shibaitship is not transferable. The learned trial court after considering all these materials held that the plaintiffs and the defendant Nos. 2 to 4 are the trustees of the trust and rightly decreed the plaintiffs' suit.

11. In view of the above rival contentions of the parties, the point arises for consideration in this appeal is, as to whether the plaintiffs are the trustees with defendant Nos. 2 to 4 or the Shibaitship reverted back to the family of the founder i.e. Ram Sagar Prasad Singh and the defendant appellant being the adopted son became the Shibait on the basis of inheritance or even by transfer of Shibaitship by Ram Somari Devi through Ext. C and whether the impugned judgment and decree are sustainable in the eye of law.

12. In the present case the plaintiffs claimed that the endowment deed Ext. F has been executed by Pan Kumari Devi widow of late Ram Sagar Prasad Singh. This Ext.-F is with respect to 35 bigha 18 kattha 12 dhur land. In the deed itself it is mentioned that Ram Somari Devi died issueless on 3.6.1942. The property has been dedicated in the name of the deity, the plaintiff No. 1. According to the defendant appellant the trustees as mentioned in the endowment deed are not working as trustee and in fact the trust is not in existence now because three defendants who were named denied to have worked as trustee. Therefore, the property and Shibaitship reverted back to the appellant as he is adopted son. Moreover during the lifetime of Ram Somari Devi she executed the deed dated 28.3.1963 Ext. (C). Ram Somari Devi died in the year 1968. From the above facts it becomes clear that endowment deed was executed on 28.7.1953 by Pan Kumari Devi Ext.-F and the property measuring 35 bigha 18 kattha 12 dhur was dedicated to the deity by this registered endowment deed. It is mentioned that during the life time Pan Kumar Devi will be the Shibait. If she will be survived by her mother-in-law i.e. Ram Somari Devi then after death of Pan Kumari the mother-in-law Ram Somari Devi will be Shibait and on her death the five persons named i.e. (1) Sita Prasad Singh @ Lalbabu, (2) Sri Bindheshwari Prasad Jha, (3) Hari Madhav Prasad Sahi, (4) Ram Autar Singh and (5) Gajadhar Prasad Singh will constitute a board of trustee and shall work as Shibait. The trustees have been given power to nominate a trustee in his place who will work as trustee after his death. Therefore, in Ext. F this is line of succession of Shibaitship. Here admittedly the plaintiffs stated that the defendant No. 2 to 4 who are also trustee collided with the defendant appellant. Therefore, the defendant appellants are only performing the work as Shibait or the work of board of trustees. According to the defendant appellant the board of trustees is not in existence and the defendants Nos. 2 to 4 admitted that they never participated in any meeting or that they ever worked as trustee. In such circumstances, the question is what will happen to the trust and who will perform the work of Shibait and look after the property of the deity. This is the real controversy between the two plaintiffs and the present defendant appellant. According to the plaintiffs there is no bar in the endowment deed to continue to work of a trustee by two plaintiffs even if the others are not taking part. On the contrary, according to the defendant appellant since the board of trustees are not functioning according to the intention of the founder the Shibaitship will revert to the founder. So far the reversion to the founder's family is concerned, according to the respondents the defendant appellant is not a legally adopted son of Ram Somari Devi as she was

not competent to adopt a son. Here admittedly DW 16 one of the trustees has been examined by the defendant appellant who clearly stated that he never participated in the trusteeship i.e. board of trust and likewise DW 20 one of the son of the trustee has stated that he never worked as trustee and his father also did not work as trustee when he was alive. Now it becomes admitted fact that the board of trustees is not working in terms of the endowment deed Ext. F. In view of the settled principles of law that if the line of succession fails the Shibaitship will revert back to the founder of the family. The defendant appellant is claiming to be the son of Ram Somari, therefore, two questions arise here for decision. First is whether Ram Somari could have adopted the appellant or whether she was competent to adopt the appellant and secondly, whether she could have transferred the Shibaitship in favour of the appellant.

13. The defendant appellant has examined DW 2, 12, 15 and 24 in support of his contention that he was adopted by Ram Somari Devi. DW 12, 15 and 24 (the appellant) have stated about the give and take ceremony and they have also stated above the adoption deed Ext. (B) which was registered. DW 2 and DW 15 are the witnesses on the registered adoption deed Ext. (B) they have also proved that after adoption this deed was executed and registered. The learned counsel for the appellant submitted that so far the adoption is concerned, the appellant and the other defendants are not challenging. The only contention of the plaintiff is that the adoption is illegal and Ram Somari devi was incompetent to adopt the appellant. Therefore, since there is presumption of adoption in favour of the appellant as provided u/s 16 of the Hindu Adoption and Maintenance Act the appellant is adopted son of Ram Somari Devi.

14. Although this question is not directly in issue in the present case the right of the appellant is dependent on this issue. In my opinion, therefore, if it is held that the appellant is legally adopted son of Ram Somari Devi only then naturally the Shibaitship will revert back to him and he will be the Shibait. If it is held that he is not legally adopted son then he has got no authority to interfere with the trusteeship. The other aspect of the matter is that there is difference between the board of trustees. Two are the plaintiffs who claimed that they are performing the Shibaitship, Poojapath, Ragbhog and Samaiya. Whereas the other three trustees who are defendant Nos. 2 to 4 admitted that they never took part in the meetings or the work of trustees. Therefore, now the board of trustees constituted under the endowment deed Ext. F is not in existence. In other words, the board of trustee is not functioning according to the terms of Ext. (F). The question is whether in such circumstances also the plaintiff will be allowed to work as trustee in contravention the terms contained in Ext. F. These are the most important question. It appears to me that the fighting is between the trustees themselves and also with the defendant. If it is found that the board of trustee is not in existence then against the terms and conditions of the deed as mentioned in Ext. F the plaintiffs cannot be allowed to work as board of trustee and performs Shibaitship of the deity and the property and likewise if it is held that the appellant is not adopted son he also cannot be allowed to work as

Shibait.

15. So far the claim of the appellant that Ram Somari Devi transferred the Shibaitship by Ext.-C to the appellant is concerned, it is settled principles of law that it is not transferable as has been held by the Apex Court in the case of Sital Das Vs. Sant Ram and Others, and Nemai Chakrabarty Vs. Banshidhar Chakravarty and Others, . The Apex Court was dealing with regard to the Mahantship and it has been held that right of Mahantship is not transferable and in the case of Nemai Chakrabarty Vs. Banshidhar Chakravarty and Others, it has been held that the right of Shibaitship is not transferable. In the endowment deed Ext. F there is no terms and conditions mentioned that the Shibait will have a right to transfer the right of Shibaitship to a stranger. Here the word stranger is used by me because still it is to be found out as to whether the appellant is son or not. Even if it is held that he is son then also the question will be whether Shibait can transfer the right of Shibaitship. In my opinion, no as there is no such terms and conditions. Here the Shibaitship was transferred in the year 1962 by Ram Somari Devi whereas she died in 1968. The other aspect of the matter is if she transferred her right of Shibaitship then according to the terms of the endowment her right of Shibaitship was during her life time only therefore, on her death automatically the transfer deed will have no effect on the rights of real Shibait. In my opinion, therefore, the transfer of Shibaitship operated during the life time of Ram Somari Devi only and not after her death. In such circumstances, the defendant appellant will not continue as Shibait beyond the life time of Ram Somari Devi. Since the board of trustee is not in existence and as has been found the defendant trustees are not working in terms of the endowment and the wish of the founder as has been held by the decision relied upon by the appellant i.e. Angurbala Mullick Vs. Debabrata Mullick, and the other decision refereed to above Shibaitship will naturally revert back to the defendant appellant provided he is a family member i.e. legally adopted son of Ram Somari Devi.

16. The learned counsel also submitted that the name of the appellant is mutated in place of Ram Somari and Ext. G series has been produced to show that the circle officer ordered for mutation and second appeal filed by the other side has been dismissed. So far this submission is concerned, in my opinion, merely because mutation has been done no right will be created. Till he is held to be an adopted son of Ram Somari Devi he is a stranger to the family. It is settled principles of law that the revenue records or mutation orders neither creates title nor extinguish title. In my opinion, therefore, on the basis of this fact that the appellant has been mutated he cannot be held to be the Shibait of the deity.

17. So far the submission of the learned counsel for the appellant that the suit is barred by the limitation i.e. Article 58 of the Limitation Act is concerned, it may be mentioned here that the transfer deed itself is contrary to law and moreover if no right is created in favour of the appellant by the transfer deed or by adoption he cannot be allowed to work as trustee. Here in the present case, the plaintiffs

have filed the suit for declaring them to be the trustee. For this relief in my opinion, Article 58 is not applicable moreover in view of Section 107 of the Limitation Act and Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others, the limitation is 12 years.

18. Now the most important question raised by the appellant is that since the board of trust is not in existence the Shibaitship reverted to the appellant, the appellant is legally adopted son of Most. Ram Somari Devi. Although this issue is not directly involved but the claim of the appellant is dependent on the decision of the question. The appellant has produced Ext. B and examined the witnesses referred to above. For deciding the locus standi of the appellant to work as Shibait this question is to be decided incidentally. During the argument the learned counsel Mr. V.R.P. Singh gave much emphasis on this question that the appellant is the adopted son of the Ram Somari Devi, mother-in-law of Pan Kumar Devi and mother of Ram Sagar Prasad Singh. Here admittedly Ram Sagar Prasad Singh was the son of Ram Somari Devi and Pan Kumar Devi the executant of Ext. F was the wife of Ram Sagar Prasad Singh. Section 11 of the Hindu Adoption and Maintenance Act, 1956 provides that if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son living at the time of adoption. This provision has been interpreted by the Bombay High Court in the case of Amruta Babaji Mozar Vs. Kondabai, deceased by her heirs Babai Laxman Mandhare etc. and another, . In the said decision the Bombay High Court relying on the decision of the Apex Court Gurunath alias Bhimaji Vs. Kamalabai, Kom Kenchangauda Nadgaudar and Others, held that a deceased sons widow (or son) extinguish the mother's power to adopt not to be revived even on the death of son's widow or son's son. The subsequent death of another son cannot also remove the bar imposed by the existence of the pre-deceased son's widow. Such death of the other son may empower the widow of that son to adopt, but cannot confer on the mother a fresh right to adopt. Admittedly, in the present case Ram Somari Devi had a son Ram Sagar Prasad Singh. Pan Kumari was wife of Ram Sagar Prasad. Therefore, the right of Ram Somari Devi to adopt was extinguished because of presence son's widow. That power of Ram Somari to adopt as son will not revive even on the death of son's widow i.e. in the present case even on the death of son Ram Sagar Prasad Singh or even on the death of Pan Kumari Devi. In my opinion, therefore, Ram Somari Devi was not competent to adopt the present appellant. It is settled law that once the right is extinguished the same cannot be revived on subsequent event. Further Ram Sagar Prasad Singh died in the year 1942 and his widow Pan Kumari Devi who had the right to adopt on the death of her husband did not adopt anyone. Therefore, on the death of Ram Sagar Prasad Singh or on the death of Pan Kumari Devi the right to adopt which has already been extinguished that cannot be revived on the death of Pan Kumari Devi in view of the above settled principle of law laid down by the Apex Court and the Bombay High Court. On the basis of Ext. B and the oral evidence as discussed above prima facie it cannot be held that the appellant is legally

adopted son of Ram Somari Devi because Most. Ram Somari Devi herself was not competent to adopt the appellant.

19. The learned counsel for the appellant submitted that none of the parties is claiming that the trust is public trust. So far this submission is concerned, in my opinion, the nature of the trust will not depend on the claim of the persons. This claim put forth by the plaintiffs in one hand and the same is denied by the defendants on the other hand. Whether the trust is public or private will be ascertained from the construction of the documents itself. In other words, only because the parties have not raised this question it cannot be said that because neither the plaintiffs nor the defendant pleaded that it is public trust the court cannot investigate the same. I therefore, find no force in the submission of the learned counsel for the appellant.

20. Now the question is who will be the Shibait in view of the fact that neither the board of trust is in existence nor the family member is there. The property of the deity cannot be left abandoned. For this purpose it may be mentioned here that both the parties are contesting regarding the Shibaitship without alleging the question that whether the trust is private trust or public trust. Moreover, it is settled principles of law that whether the trust is private trust or public trust is not dependent upon the pleadings or evidences of the parties particularly when the primary evidence i.e. Ext. F the registered deed of endowment is available which is admitted by both the parties. In such view of the matter, now let us consider the Ext. F itself. For ascertaining as to whether the trust is private trust or public trust the document is to be construed. So far this question is concerned, it may be mentioned here that the court is not making a third case here. The only question is whether the trust is private trust or public trust which would be evident from the document itself. As stated above the nature of the trust will not dependent upon the pleadings of the parties.

21. In the case of Ramkishore Lal Vs. Kamal Narain, the five judges Bench of the Apex court have considered and laid down the principles for construction of a document and at paragraph 12 as follows:

12. The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has to a trained conveyancer a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes it happens in the case of documents as regards

disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See *Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others*,). It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously, if possible; it is only when this is not possible, e.g. where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void.

22. In the present case, admittedly Ram Sagar Prasad Singh and his widow Pan Kumari died issueless. In the endowment deed Ext. F it is clearly mentioned that Pan Kumar Devi will be Shibait till her death. Admittedly the temple has been constructed by Ram Sagar Prasad Singh. In the deed it is clearly mentioned that all the properties measuring 35 bigha 18 kattha 12 dhur is dedicated to the deity Sri Radha Kishun Maharaj installed in the temple situated in the village Punaura. It is also mentioned that whatever income will be saved after spending in performing Poojapath, Ragbhog, Samaiya and after repairing and works of the temple the same shall be the property of the deity and whatever property will be acquired out of that will also belong to the deity and no property can be transferred. It is mentioned in the deed that on the death of Pan Kumari Devi if her mother-in-law i.e. Ram Somari survived she will be Shibait till her death. On her death the board of trust will be the Shibait. Admittedly, the board is not in existence now. Therefore, the line of succession for devolution of the trusteeship came to an end. As soon as the mode of trusteeship came to an end the succession will be regulated by the ordinary rule of Mitakshara law. Here we have seen that the appellant is not legally adopted son moreover this question of inheritance of succession is concerned, it will apply to the private trust only.

23. In the case of *Deoki Nandan Vs. Murlidhar*, the Hon'ble Apex Court at paragraph 6 held that "then the question is, who are the beneficiaries when a temple is built, idol installed therein and properties endowed therefor? Under the Hindu law, an idol is a juristic person capable of holding property and the properties endowed for the institution vest in it. But does it follow from this that it is to be regarded as the beneficial owner of the endowment? Though such a notion had a vogue at one time, it is now established beyond all controversy that this is not the true position. It has been repeatedly held that it is only in an ideal sense that the idol is the owner of the endowed properties. It cannot itself make use of them; it cannot enjoy them or dispose of them, or even protect them. In short, the idol can have no beneficial interest in the endowment. Thus, the Gods

have no beneficial enjoyment of the properties, and they can be described as their owners only in a figurative sense and the true purpose of a gift of properties to the idol is not to confer any benefit on God, but to acquire spiritual benefit by providing opportunities and facilities for those who desire to worship."

24. At paragraph 7 of the aforesaid decision the Hon"ble Apex Court has held as follows:

7. When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshipers, and that the purpose of the endowment is the maintenance of that worship for the benefit of the worshipers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individual's are to have the right of worship at the shrine, or the general public or any specified portion thereof In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers.

25. In the present case at our hand admittedly, the beneficiaries are not members of a family. In the aforesaid decision the Apex Court also held that the word "family" in its popular sense means children, and when the settler recites that he has no children, that is an indication that the dedication is not for the benefit of the family but for the public.

26. In the present case, Ext. F the endowment deed is most important evidence on record from which the intention of executor and the scope of the dedication can be found out. We have also seen the terms and conditions in the said Ext. F. Admittedly, the executor have no male and female issue. The five persons constituting the board of trustee were not the family members. Out of them three trustees being the defendant Nos. 2 to 4 have never functioned as trustees. There is no restriction in the deed about the right of worship in the temple to the relations only otherwise the management of the property would not have been entrusted to trustees consisting of strangers to the family.

27. The learned counsel for the appellant submitted that there is nothing on record to show that the public at large had the right to worship. So far this contention is concerned, I do not find any force because here the primary evidence i.e. the document is available from which the intention of the executor can be gathered. Had there been no document, to ascertain as to whether the trust is private or public, the other evidence oral or document could have been considered. Admittedly, the plaintiff is not the family member as the adoption has been held to be illegal. Since the property has been dedicated to the deities and the executor died issueless the intention appears to be that it is not for the

benefit of the family. None of the board of trustees is family member therefore, in view of the above settled proposition of law here I find that the trust in question is a "public trust". Therefore, neither the plaintiff nor the defendants including the appellants are entitled for declaration that they are the trustee.

28. In view of the above settled proposition of law, in my opinion, the other evidences and materials available on record are not necessary for the decision in this first appeal. Since it has been held that the trust is public trust and the appellant is not legally adopted son of Ram Somari Devi, it is held that the appellant had no authority to claim Shibaitship and if he is in possession of the property it is nothing but is illegal possession. In my opinion, he is a stranger to the family of the executor. Since the board of trustees appointed in the endowment deed Ext. F ceased to exist and stopped the performance of the duty of Shibait in terms of Ext. F, the plaintiffs are also not entitled for being declared as trustee with defendant Nos. 2 to 4. The judgment and decree of the trial court is therefore, unsustainable in the eye of law. The trial court has not considered the settled principles of law laid down by the Apex Court refereed to above.

29. In the result, this first appeal is disposed of with the following observation:

The impugned judgment and decree of the trial court is set aside. The plaintiffs' suit is dismissed. It is held that the trust is public trust, therefore, the management of the property and performance of Poojapath, Ragbhog and Samaiya of the deities in the temple is to be performed by the Hindu Religious Trust Board, Patna/the person appointed by the Board according to law to avoid misuse and misappropriation of any kind in future. The Hindu Religious Trust Board, Patna shall recover the possession of the property from either plaintiffs or defendants immediately, whoever is in possession and act according to law. The appellant and respondents are directed to handover the possession of the endowed property to the Board immediately.

30. Let a copy of this judgment be sent to the Chairman, Hindu Religious Trust Board, Patna or may be handed over to the learned counsel Mr. Ganpati Trivedi, Advocate of the Board. In the facts and circumstances of the case, no orders as to costs.