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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

SUBMISSION NO.3
BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

COMPILATION CONTAINING EXTRACTS FROM B.K. MUKHERJEA: THE HINDU LAW OF RELIGIOUS AND CHARITABLE TRUSTS

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

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B.K. Mukherjea

The Hindu Law of Religious and Charitable Trusts

TAGORE LAW LECTURES

Fifth Edition

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CHAPTER 1

FUNDAMENTAL IDEAS UNDERLYING RELIGIOUS AND CHARITABLE TRUSTS IN HINDU LAW

I. HISTORY

1.1. Religious Trust.—Religious and charitable trusts are found to exist, in some shape or other, in almost all the civilized countries and their origin can be traced primarily to the instincts of piety and benevolence which are implanted in human nature. The form and nature of these trusts undoubtedly differ according to the spiritual and moral ideas of different nations, and even among the same people, the ideas are seen to vary—often to a considerable extent—at different stages of their religious and political history. Thus Imperial Rome under the Christian Emperors was dissimilar in many respects to Pagan Rome, and the religious and charitable institutions in England undoubtedly took a different shape when she abjured Catholicism and became Protestant. The popular Hindu religion of modern times is not the same as the religion of the Vedas though the latter are still held to be the ultimate source and authority of all that is held sacred by the Hindus. In course of its development the Hindu religion did undergo several changes, which reacted on the social system and introduced corresponding changes in the social and religious institutions. But whatever changes were brought about by time—and it cannot be disputed that they were sometimes of a revolutionary character—the fundamental, moral and religious ideas of the Hindus which lie at the root of their religious and charitable institutions, remained substantially the same; and the system that we see around us can be said to be an evolutionary product of the spirit and genius of the people passing through different phases of their cultural development.

It would be my endeavour to discuss with you, in course of these lectures, the different aspects of the law relating to religious and charitable trusts among the Hindus as it is administered at the present time in India.

1.2. Paucity of materials on the subject of endowments in Hindu law.—It strikes one as somewhat anomalous that notwithstanding the existence of richly endowed Hindu temples and religious institutions all over India, the

subject of endowment should receive a most niggardly treatment in the hands of the Smriti writers. It is not one of the eighteen topics of litigation into which the sphere of substantive law is divided by Hindu jurists and commentators ever since the days of Manu. There is no statement of law, directly on the subject, in any of the Smriti works. Stray passages having only an incidental bearing on the matter occur here and there in the midst of dissertations on other topics, and no workable law could be constructed on the basis of scanty materials like these. Some of the later commentators, indeed, have paid a little more attention to the subject than what their predecessors did and they have drawn largely on the Pouranic literature; but what they talk of is not law but religion and rituals and it is often difficult to extricate any legal rule from a mass of religious rites and ceremonies.

The meagreness of original authorities on the subject of endowments did not escape the notice of early English writers on Hindu Law, and Sir T. Strange in his chapter of "Property" observed as follows—"Of the property of religious institutions, and of that partaking of *Jura Regalia* something will be incidentally said in parts of this work in which a reference to them connects with other subjects of discussion; materials concerning them, that are accessible, being too scanty to admit of any extended investigation".[1] One explanation for this somewhat unusual state of affairs was suggested by Sir Gurudas Banerjee, J. in course of his judgment in *Girijanand* v *Sailajananda*.[2] The learned Judge expressed the opinion that "the high reputation for purity and piety of character justly enjoyed for the most part by the priestly class in ancient India, who had the management of the shrines was deemed a sufficient safeguard against breach of duty so as to render detailed rules to regulate their conduct unnecessary". I would be inclined to think that in such matters, a good deal was left to be regulated by unwritten laws or usages, whose authority and binding force are regarded by orthodox Hindus as scarcely inferior to written Smriti texts. Manu lays it down as one of the duties of the King, to enquire into the particular laws and usages of classes, communities and societies, and adhere to them, if they are not repugnant to the laws of God.[3] Having regard to the extreme conservatism of Hindu society it could be fairly expected that the people who were in charge of administering the benefactions did not go against the traditions and usages which grew up in respect of the same. It is also not unlikely that the pious donors, who only hoped to acquire spiritual merit by making gifts, were generally indifferent as to the further use and employment of the properties given, and it was only in extreme cases when the waste or maladministration was of a scandalous character that the interference of the ruling authority was sought for.

1 Strange's *Hindu Law*, Vol. I, p. 62.
2 ILR 23 Cal 645 at p. 650.
3 Manu, Chap. VIII verse 41.

1.3. Law of Hindu religious & charitable trusts mainly a judge-made law.—As the materials to be found in the writings of the Hindu law-givers on the subject of religious and charitable trusts are extremely scanty, it goes without saying that the law which is found administered today in India, is to a large extent the creation of Judges.[3a] Ever since the establishment of British Courts in India, an array of eminent Judges both English and Indian brought their legal learning and strong common sense to bear upon this delicate and somewhat abstruse branch of Hindu law, and attempted to evolve out of the few cryptic writings of ancient Hindu sages, a sufficiently well-developed body of rules and principles. This development was in a sense necessitated by the demands of the time and the prevalent social and moral ideas, and it cannot be denied that it was influenced to a great extent by the notions and principles of English law. How far this judge-made law fits in and harmonises with the original Hindu ideas, I will attempt to examine as I proceed with these lectures. In this first and introductory lecture it is my intention to analyse the fundamental ideas of religious and charitable trusts as they were conceived by the Hindus, from the point of view of modern jurisprudence. For this purpose it would be necessary to study the nature and history of Hindu religious and charitable institutions from the earliest times to modern times and to examine, at the same time, the scattered sayings of Hindu sages and commentators with a view to discovering, if possible, from what appears to be merely moral precepts or discussions of ritualistic observances, germs of true legal ideas.

II. Religious and Charitable Trusts—Meaning

1.4. Religious & charitable purposes.—But, before we proceed with this investigation, you should try to have a clear idea as to what is meant by the expression "Religious and charitable trusts" in its proper juristic sense. For this purpose a little excursion into the yields of English and Roman law is necessary. A trust would obviously be denominated a religious or charitable trust if it is created for purposes of religion or charity. Two things, therefore, require to be considered in this connection, viz., (1) what are religious and charitable purposes? and (2) what is a trust?

Now, as is well-known, "religion" is absolutely a matter of faith with individuals or communities, and it is not necessarily theistic (e.g., Buddhism). All that we understand by religious purpose is that the purpose or object is to secure the spiritual well-being of a person or persons according to the tenets of the particular religion which he or they believe in. This may imply belief in a future state of existence where a man reaps the

3a See *Ashim Kumar* v *Narendra Nath*, (1972)76 CWN 1016, 1025 para 42.

a better and more perfect system of law than the Romans, and for the purpose of appreciating the Hindu conception of religious and charitable trust, it would be worthwhile enquiring what legal forms were adopted by the Roman lawyers for the purpose of giving effect to their ideas on this subject.

IV. ROMAN LAW

1.7. Religious and charitable institutions in Roman Law.—In Roman law properties dedicated to gods formed a species of *res Publicae*; they were *res extra commercium* and lay outside the pale of private law altogether. They were not the objects of ownership or transfer, and no action could lie in respect of them in a court of law. They were protected by the State through some forms of administrative procedure. As Sohm observes in his *Institutes of Roman Law*: "In regard to *res sacrae* the idea was not that they were the private property of a Juristic person, e.g., the gods or some religious institution, but rather they were excluded from all private ownership".[12] In fact, as the same writer points out, the conception of a Juristic person did not make its appearance in early Roman Law. The old *Jus Privatum* was exclusively a law for the individual, and none but natural persons could be the bearer of legal rights and obligations. There were societies indeed like *Collegia* or *Sodalitates* but they could not hold property as juristic persons. The properties intended for such societies had to be formally vested in an individual and treated as such.

The only juristic person recognised in early Roman Law was the State or *Populas Romanus*, but it was a public and not a private person, and all its transactions were governed not by private law but by *Jus Publicum*.

The idea of a corporate body as a new subject of rights and duties distinct from all its members was fully recognised in Rome during the Imperial period. Towards the end of the Republic a system of municipal governments was introduced in Rome, and the municipalities were conceived of as legal persons competent to hold their properties like private persons. After the example of Municipalities other lawful societies were also recognised to have proprietary capacity for purposes of law. Finally the Roman State in the form of the "Fiscus" came to be regarded as a sort of private Juristic person though it enjoyed many privileges which were denied to ordinary corporate bodies.[13] What is relevant for our present purpose is that with the growth of the idea of Juristic personality in Imperial Rome, important developments took place with regard to the law relating to religious and charitable endowments.

12 Sohm, *Institutes of Roman Law*, 2nd Edn. Art. 37, p. 198.
13 Vide Sohm's, *Institute of Roman Law*, 2nd Edn. pp. 195-199.

In the early Empire, we find that certain specified deities such as Tarpeian or Capitoline Jupiter, Ephesian Diana and Gallic Mars, to whom the privilege had been specially given by a *Senatus Consultum* or Imperial constitution, might be instituted heirs under a testament.[14] It is difficult to say who was thought to be the actual owner of the property. Buckland[15] thinks that it was probably the State, as the administration was carried on by Magistrates and not by the temple priests. After the adoption of Christianity by the State, Emperor Constantine authorised gifts by will to the Christian church. All church properties were contemplated as belonging to the church as a whole, though the ownership was a sort of Eminent domain and in each community the church property was regarded as a separate patrimony. It was administered by the Bishop and Oecononus, for the ownership was supposed to reside in the entire religious group.[16]

1.8. Rattigan's view.—"Under the Christian Emperor", says Rattigan,[17] "the institution of a saint or the deity as heir was held to vest the property in the church; and Justinian (530 A.D.) decided that the institution of Jesus Christ as heir was to be understood to indicate the church of the testator's domicile; of an archangel or martyr, the church dedicated to such saint in the testator's place of residence, and if no such church existed in the latter place, then to the church so dedicated in the metropolis of the province; if there be many so dedicated, the one to which the testator had shown preference in his lifetime, and in default of such the poorer one received the benefit of such bequest."

Thus, the church was a Juristic person *par excellence*, under the Christian Emperors, and as Christianity was the religion of the State, the church was really a State institution. The theory of Roman law was that the privileges of a juristic person could be enjoyed by State institutions, and by only those private institutions to which recognition was accorded by the State. Property given or left to a church by a private individual to be applied for charitable purposes, e.g., for hospitals, alms houses, orphanages, etc., vested ordinarily in the church of the place where the donor resided, though in theory it belonged to the church as a whole; and if the endowment was of a permanent character the Bishops set up an establishment for proper management of the same. A further step was taken in the development of the law on the subject when charitable institutions were allowed to be made by private individuals without reference to the church.

14 Rattigan on *The Roman Law of Persons*, page 214.
15 Buckland, *Text Book of Roman Law*, page 177.
16 Buckland, *A Text Book of Roman Law*, page 177.
17 Rattigan, *Roman Law of Persons*, page 215.

1.9. Sohm's view.—"During the later Empire", says Sohm[18] "..... from the fifth century onwards—foundations created by private individuals came to be recognised as foundations in the true legal sense, but only if they took the form of *Pia Causa*, i.e., were devoted to 'pious uses' only, in short, if they were charitable institutions. Whenever a person dedicated property whether by gift *inter vivos* or by will—in favour of the poor or the sick, or prisoners or orphans, or aged people, he thereby created *ipso facto* a new subject of legal rights—the poor house, the hospital and so forth and the dedicated property became the sole property of the new subject—it became the property of the new juristic person whom the founder had called into being. ..... A *pia causa* did not require to have juristic personality conferred upon it. According to Roman law, the act—whether a gift *inter vivos* or a testamentary disposition whereby the founder dedicated property to charitable uses—was sufficient without more to constitute the *pia causa* a foundation in the legal sense, to make it, in other words, a new subject of legal rights".

1.10. Nature of pia causa in Roman law.—It will be notified that this is a very advanced conception. It allowed a private individual to create a juristic person in the shape of a foundation, without any authorisation from the State. Some writers are of opinion that as *pia causa* was an ecclesiastical institution, it was really a part of the church and was hence included in the concession given to the latter. This view is, however, negatived by the fact that it was possible for the founder to give directions regarding the administration of the fund without any interference by the church, although the Bishop had a general right of supervision.[19] The better view seems to be that as gifts creating charitable institutions were authorised by the State, the State sanction to clothe such institution with the character of a juristic person was impliedly given.

1.10A. Two types of charitable endowments in Roman law.—Thus, so far as charitable endowments are concerned, the Roman law recognised two kinds of juristic persons. One was a corporation or aggregate of persons, which owed its juristic personality to State sanction. A private person might make over property by way of legacy or gift to a corporation already in existence and might, at the same time, prescribe the particular purpose for which the property was to be employed, e.g., feeding the poor, or giving relief to the sick or distressed. The receiving corporation would be in the position of a trustee and would be legally bound to spend the funds for the particular purpose. The other alternative was for the donor himself to create an institution or foundation. This would be a new juristic person, which depended for its origin on nothing else but the will of the

18 Sohm, *Institutes of Roman Law*, p. 208.
19 See Buckland, *Text Book of Roman Law*, pages 178-179.

founder, provided it was directed to a charitable purpose. The foundation would be the owner of the dedicated property, and the administrators would be the trustees bound to carry out the object of the foundation.

I will now proceed to analyse the Hindu concept of religious and charitable trust, from such materials as we possess, and it would be interesting to enquire as to whether the Hindu system recognised any of the ideas which were so well known to the Romans.

V. Hindu concepts of Istha and Purtta

1.11. Hindu concepts of religious and charitable gifts—Istha and Purtta.—Hindu religious and charitable acts have been from the earliest time classified under two heads, viz., *Istha* and *Purtta*. The two words are often used conjointly, and they are as old as the *Rigveda*. The compound word *Istha-Purtta* has been retained in the writings of all Brahminical sages and commentators down to modern days, and although the connotation of these two expressions was extended to some extent in course of time, the fundamental ideas involved in them remain practically the same. By "*Istha*" is meant Vedic sacrifices, and rites and gifts in connection with the same; "*Purtta*", on the other hand, means and signifies other pious and charitable acts which are unconnected with any *Srauta* or Vedic sacrifice. The meaning of the two expressions has been discussed elaborately by Pandit Pran Nath Saraswati, in his Tagore Law Lectures on the *Hindu Law of Endowments*, and for my purposes I will cull a few texts to which reference has been made by the learned author in this connection.

In the *Rigveda*, which is the earliest record of Aryun culture, *Istha* and *Purtta* are described as the means of going to heaven. There is a verse in the 10th Mandala of the *Rigveda*[20] where the seer describes the dead man as going to the highest heaven, along with the *pitris*, as a result of the *Istha* and *Purtta* works done by him in this world. The celebrated commentator Sayana in commenting on this passage says that by *Istha-Purtta* are meant gifts bestowed in *Srauta* and *Smarta* rites. The same commentator in explaining these very words which occur in Taittiriya Aranyaka[21] observes that the word *Istha* denotes Vedic rites like Darsa, Purnamash etc. and *Purtta* means *Smarta* works like tanks, wells etc. The two texts of Manu, where the merit of *Istha* and *Purtta* is extolled and which have been referred to by subsequent commentators, stand as follows:

"Let each wealthy man continually and sedulously perform sacred rites (Istha) and consecrate pools and gardens (Purtta) with faith since these

20 *Rigveda*, 10th Mandala 14, 8.
21 Taittiriya Aranyaka Pro. X. Anu. 1, 6.

two acts accomplished with faith and with riches honestly gained, procure an unperishable reward".

"If he meets with fit objects of benevolence, let him constantly bestow gifts on them, both at sacrifices and consecrations (*Istha & Purtta*), to the best of his power and with a cheerful heart.[22]

1.12. Following a text of Sankha quoted by Hemadri, Pandit Pran Nath Saraswati makes the following enumeration of *Istha* works: viz., (1) Vedic sacrifices etc., (2) gifts offered to priests at the same, (3) preserving the Vedas, (4) religious austerity, (5) rectitude, (6) Vaiswadev sacrifice and (7) hospitality.[23] The *Purtta* works not only signified such works of public utility as excavation of tank, wells, etc., but included all acts which either conferred some kind of benefit on those who were in need of it, or were regarded as meritorious from the spiritual or religious point of view. From the numerous Smriti texts bearing on the point, Pandit Pran Nath Saraswati has compiled a list of *Purtta* works which are generally recognised as such by Brahminical writers. These are: (1) Gifts offered outside the sacrificial ground, (2) gifts on the occasion of an eclipse, solstice and other special occasions, (3) the construction of works for the storage of water, as wells, tanks, etc., (4) the construction of temples for the gods, (5) the establishment of procession for the honour of the gods, (6) the gift of food and (7) the relief of the sick.[24]

The list is by no means exhaustive; dharmasalas, rest houses, *mutts* for the residence of ascetics, planting of trees and dedication of groves are also *Purtta* works mentioned by the commentators. From the list of *Istha* and *Purtta* works given above it will be noticed that construction of a temple for the worship of an idol is an instance of *Purtta* work, whereas hospitality is regarded as one of the *Istha* acts. The reason is that the construction of temple has no connection with a Vedic sacrifice; it is a thing of later origin and hence is regarded as a *Smartha* act of piety. Worship of guests on the other hand is one of the sacrifices which is enjoined on every householder by the Vedas. Hospitality therefore is associated with *Srauta* or Vedic rites and comes under the category of *Ishta* works.

1.13. No distinction between religion & charity in Hindu Law.—In the Hindu system there is no line of demarcation between religion and charity. On the other hand charity is regarded as part of religion. The Hindu religion recognises the existence of a life after death, and it believes in the law of Karma according to which the good orbad deeds of a man produce corresponding results in the life to come. All the Hindu

22 Manu IV 226 & 227.
23 P.N. Saraswati, *Tagore Law Lectures on Endowment*, p. 21.
24 P.N. Saraswati, *TLL on Endowment*, p. 21.

sages concur in holding that charitable gifts are pious acts *par excellence*, which bring appropriate rewards to the donor, and the seer in the *Rigveda* says in the clear accents that "He who gives alms goes to the highest place in heaven".[25] According to the Smriti writers, charity is the supreme virtue in this (Kali) age. Thus Manu says: "In the *Creta* the prevailing virtue is declared to be in devotion, in *Treta* divine knowledge, in the *Dwapara* holy sages call sacrifice the duty chiefly performed; in the Kali liberality alone".[26] The same verse occurs in Parasara.[27] It may be mentioned here that charity is not only regarded by Brahminical writers as a means of securing happiness in after life, it is also one of the forms of expiation prescribed for those who have committed sinful acts. "By forgiveness of injuries", says Manu, "the learned are purified; by liberality those who have neglected their duties".[28] As we have already seen,[28a] the expression *Purtta* is not confined to secular charities alone, but includes various acts (e.g. erecting a temple) which are regarded as meritorious only from the religious point of view. The sole distinction between *Istha* and *Purtta* lies in the fact that the former relates to Vedic sacrifices which the latter do not. As the Vedic sacrifices fell into disuse and became confined to comparatively few persons, the *Purtta* works became more popular, particularly as they were open to the Sudras as well. This is why later Smriti writers extol the merits of *Purtta* works and regard them as the means of securing salvation.[29] Even as regards Vedic sacrifices it may be pointed out, as has been observed in the Chhandogya Upanishad, that "the offerings to the God are really offerings for the benefit of all human beings."[30] The position therefore is that in the Hindu system, religion and charity overlap each other and do not admit of any differentiation. They are both integral parts of 'Dharma' or the rule of righteousness which the Hindu sages regard as the upholder of the entire fabric of the universe, both in its physical and moral aspects.

The enumeration of *Istha* and *Purtta* works as given in the Smritis would give us an idea of the religious and charitable gifts that were recognised and encouraged by the Hindu sages. The fact however that a man performs sacrifices or makes gifts to a pious Brahmin either on the altar of the sacrifice or on some other auspicious occasion would not create a religious or charitable trust. Such a trust could arise only when a property or fund is dedicated or set apart for any particular object of religion or charity. Many of the *Istha* works mentioned above are synonymous

25 Max Muller, *Chips from a German Workshop*, Vol. 1, p. 46.
26 Manu I, 86.
27 Parasara Institutes 1, 22.
28 Manu V. 107.
28a Paras 1.11 and 1.12 supra.
29 Vide Yama, "Heaven is attained by Istha, by Purtta one enjoys emancipation".
30 Chhandogya Upanishad Chap. V. pr 24, K 2-5.

with moral virtues and others are exhausted as soon as the sacrifice is completed or the gift made. There is no obligation imposed on any person to do or continue to do something for the accomplishment of a particular purpose. Similarly, as regards *Purtta* works only when an institution is founded for the benefit of the poor or the distressed, or a temple or monastery is dedicated to pious purposes or when somebody is entrusted with the duty of performing any pious act, then a trust, properly speaking, can come into being. According to Devala gifts are of four classes, viz., they may be (1) *Dhruba* or eternal such as *Prapa* or the construction of places for supplying water, or *Arams*, rest houses and the like; (2) *Ajasrika* or daily charity; (3) *Kamya* or gifts made with a particular object; and (4) *Naimittika* or occasional gifts made on auspicious occasions.[31] Of these only Dhruba gifts can ordinarily create trusts or endowments in perpetuity.

VI. Vedic Religious Worship

1.14. No temple or monastic institutions existed in Vedic age.—It is difficult to say to what extent the charitable and religious endowments as we see in modern times existed in the early Vedic period. The earliest Vedic literature which is known by the name of *Samhitas* throws very little light on this point. It seems fairly certain that at this period there were no temples for worship of idols as we find in subsequent time, and an institution like the *mutt* or *monastery* of later days was also unknown. "The religion of the Vedas", says Max Muller, "knows of no idol. The worship of idols in India is a secondary formation, a later degradation of the more primitive worship of ideal gods."[32] Dr. Bollensen on the other hand is of different opinion and according to him the Vedic Rishis not only assigned human forms to their gods, they represented them in a sensible manner. It is said by the learned author that "From the appellation of the gods as *divonaras* (men of sky) or simply naras (men) and from the epithet *Nr pes* (having the form of man) we may conclude that the Indians did not merely in imagination assign human forms to their gods, but also represent them in a sensible manner."[33]

It seems to me that the view taken by Prof. Max Muller is right.

1.15. No idol worship in Vedic times.—There is a difference of opinion amongst scholars as to whether the religion that is embodied in the Vedas was at all polytheistic. A number of gods indeed are named, but there are various passages in the *Rigveda* which expressly declare that the various

31 See J.C. Ghosh, *Law of Endowment*, p. 17.
32 Max Muller, *Chips from a German Workshop*, Vol. 1, p. 38.
33 Journal of the German Oriental Society, XXII, 587ff.

gods are only different names of that "which is one". Max Muller calls the religion, "henotheism". The gods to whom the hymns of the *Rigveda* are addressed are idealised beings, who represent the beneficient and radiant powers of nature, e.g., sun, air, earth, sky, dawn, etc. But the Vedic seers had, from the beginning, a glimpse of the infinity behind these finite forces, as is shown by the conception of 'Aditi' the mother of the gods which, as Max Muller says, was the earliest name invented to express the infinite.[33a]

They soon realised the existence of one among many. The different gods were now spoken of as different aspects of the same entity which transcends all the manifestations of nature but yet lies immanent in them all. But, whatever the early forms of religion might have been, one thing is certain, that Vedic religion at no time was idolatorous. "In this respect" says Ragozin,[34] "the Aryans of India were in no wise behind their brethren of Iran: nature was their temple; they did not invite the deity to dwell in houses of men's building, and if in their poetical effusions they described their Devas in human forms and with fanciful symbolic attributes, thereby unavoidably falling into anthropomorphism, they do not seem to have transferred it into reproduction more materially tangible than the spoken word—into the eidolon—which becomes the idol."

The strongest argument in support of this view is furnished by the form of worship prevalent in the Vedic age.

It was quite different from the modern form of adoration of gods which is described in the *Puranas* or *Agamas*. The worship detailed in the hymns of *Rigveda* consisted of offerings, prayers and praises in honour of the gods. The offerings were mainly of clarified butter which was poured on the sacred fire and of fermented juice of the Soma plant which was sprinkled either on the fire or on Kusa grass, some quantity always being kept for the worshippers themselves. Whichever deity was involved, it was the sacred fire which was to carry the oblation to Him. This is why Agni or fire was called Hutavaha (the carrier of oblation),—"a messenger between the two worlds" or the 'two races' (of gods and men), the mediator through whom alone constant intercourse between gods and men was kept up.[35] He was the intermediary, because he consumed the sacrifice and carried it to the gods.[35a]

There are detailed rules in the Vedic literature regarding the construction of the altar and the various forms of oblation including animal sacrifice, and there is a description also of the different kinds of priests who were to preside over different parts of the sacrifice; but there was no other

33a This conception is also shown by the questions raised as to Agni—"Was there only one Agni or were there many Agnis?" See Basham, *Wonder that was India* (1967) page 237.

34 Ragozin, *Vedic India*, page 133.

35 Ragozin, *Vedic India*, page 158.

35a Basham, *Wonder that was India* (1967) page 237.

visible symbol of worship[35b] except the sacred fire and no place for performing the sacrifice except the altar which existed in the householder's own residence, or was constructed temporarily when sacrifices on a big scale were contemplated.

1.16. No mention of monastic institution in Vedas.—There is also no mention of monastic institution in the Vedic literature. According to the Vedic *Grihya Sutras*, which regulated the life of man, there were the institutions of four *Asramas* prescribed for all persons belonging to the twice born castes. Man's life was divided according to this scheme into four *Asramas* or stages. The first stage was of *Brahmachari* or student who was to live in the house of his preceptor and study the Vedas living a life of utmost austerity and discipline. In the second stage he married and became a householder or *Grihastha* and his duty was to perform the religious and secular works that were prescribed for this stage of life. In the third which was the *Banaprastha* stage, he was to live the life of a recluse, and in the last stage he became a *Jati* or ascetic. Ordinarily therefore a man after finishing his period of studentship would marry and become a householder, and compulsory celibacy was never encouraged or sanctioned by the Vedas. A man, however, who was not inclined to marry might remain what is called a *Naisthik Brahmachari* or perpetual student and might pursue his studies living the life of a bachelor all his days. Although the Vedic religion was not in any sense a monastic religion, yet it cannot be denied that the germs of monachism were there.[36] It afforded the example of a saintly mode of life and if we could conceive of the *Naisthik Brahmacharis* or the ascetics in the fourth stage of life forming groups or societies of some sort and framing disciplinary rules for their guidance, we get all the elements necessary to constitute a monastic order. Whether this thing actually happened, we are not in a position to say. Monastic institutions were firmly established in India from the time of Buddha. But we hear of various sects of wandering ascetics even before Buddha was born. Thus the Jaina sects of *Nirgranthas* and *Ajivakas* are frequently mentioned in Buddhist literature, though both of these were heretical sects and did not believe in the authority of the Vedas.[37]

1.17. Propatha or rest house in Vedic time.—As I have said above,[37a] hospitality was one of the principal virtues enjoined by the Vedas. There are passages in the *Rigveda* which go to suggest that there were probably institutions like *Sarais* and resting places in the Vedic period. A hymn addressed to the *Marut* (winds) speaks of refreshments "being ready at the

35b See also para 1.32, *infra.*
36 Vide Kern's *Manual of Buddhism* p. 74.
37 See Rhys Davids, *Buddhist India*, p. 146.
37a Para 1.12 *supra.*

resting places on the road".[38] This, says Wilson, indicates the existence of accommodation for the use of travellers. "The Propatha", observes the learned author, "is the Choultry of the south of India, the *Sarai* of the Mahomedans, a place by the roadside where the travellers may find rest and provision".[39] It is true that in the passage in which they are named the refreshments are said to be provided for the *Marut* or the winds but in this, as in the case of the cities of *Asuras* the notion must have been derived from what really existed; *Propathas* or Choultries were not likely to be pure mythological inventions; those for the *Maruts* must have their prototypes on earth.[40]

The first period of Vedic literature was the period of Samhitas or collection of hymns and prayers, and this was followed by that of Brahmanas which are treatises in prose dealing with ceremonials and various other theological matters. The third and the final stage was the period of Suttra literature which consisted of aphoristic compositions dealing with Vedic rituals on the one hand and customary laws and domestic duties on the other. There were several kinds of Suttras. The *Srauta* Suttras dealt mainly with rituals; the *Grihya* Suttras or house aphorisms related to household ceremonies, while the *Dharma* Suttras were concerned with legal and social usages and hence are regarded as the oldest source of Hindu Law. The Suttra literature, according to Prof. Macdonell, was developed between 500 to 200 B.C.[41] Prof. Max Muller places it slightly earlier, viz. 600 to 200 B.C.[42]

VII. Temples in Suttra Period

1.18. Temples during Suttra period.—Although there is no mention of temples in the *Samhita* of the Vedas it seems fairly clear that temples in some form or other were known during the Suttra period. Even in one of the Brahmanas known as *Abhuta Brahman*, the words देवायतन and देवप्रतिमा occur.[43] But the age and authority of this work are uncertain, and it is a book purporting to deal with bad omens and portents. The evidence furnished by the Gautama Dharma Suttra is however more definite. Of all the Dharma Suttras this is supposed to be the oldest,[44] and we may take the date of its composition to be roughly about 500 years before Christ. Gautama mentions a temple of God in more than one place in his Dharma Suttra. It is stated to be one of the objects which destroys sin.[45]

38 *Rigveda Asthaka*, 4 Adhaya, Anubak 23 § 9.
39 Wilson's *Rigveda*, Vol. 2 p. 151.
40 Wilson's *Rigveda*, Vol. 1 Introduction p. XVI.
41 Vide Macdonell's *History of Sanskrit Literature* Ch. 2, pp. 28, 36.
42 *Cambridge History of India* p. 149.
43 Vide P.N. Saraswati—*Hindu Law of Endowment* p. 38.
44 This is the opinion of Dr. Bulher, Dr. Jolly and Prof. Macdonell.
45 Gautama Chap. 19, sec. 14.

Again while laying down the rules of प्रदक्षिण or Perambulation, Gautama says that temples of gods should be passed to the right.[46] These passages indicate clearly that there were temples at the time when the Suttra literature was composed though we have no means of knowing what images, if any, were worshipped in them. Another passage in Gautama Dharma Suttra is worth noticing: while enumerating the various things which cannot be partitioned, Gautama says "Water for pious uses and sacrifices and prepared food shall not be divided".[47] The expression used is चीगक्षम which has been differently interpreted by different commentators. Viramitrodaya takes it to mean those who perform sacrifices and charitable works.[48] The interpretation given by Mitakshara seems to be the best and it stands as follows:— "The term Yogacshema is a conjunctive compound resolvable into *Yoga* and *Cshema*. By the word *Yoga* is signified cause of obtaining something not already obtained, that is, a sacrificial act to be performed with fire consecrated according to the Veda and the law. By the term *Cshema* is denoted an auspicious act which becomes the means of conservation of what has been obtained, such as the making of a pool or a garden, or the giving of alms elsewhere than at the altar. Both these, though appertaining to the father, or though accomplished at the charge of the patrimony, are indivisible; as *Laugaoshi* declares: "The learned have named a Purtta conservatory act *Cshema*, and a sacrificial one Yoga; both are pronounced indivisible; and so are the bed and the chair."[49] If this interpretation is correct, it is proved beyond doubt that benefactions like wells, gardens and charitable dwellings like Dharmashalas, etc., were in existence at the time when Gautama composed his *Dharma Suttra*. We do not know how these endowments were created or maintained at this period, but this much is certain that the idea of grants of land for charitable and pious purposes was already well established.

VIII. Buddhist Period—The Rise of Monasteries

1.19. Religious and charitable institutions during the Buddhist period.— The next period in the history of religion and culture in India is the period of Buddhism. Buddhism, as you know, came in as a protest against the ritualism and sacrifices of the Vedas. It was a non-theistic religion, and Buddha in the course of his numerous dialogues never hinted at any intelligent First Cause of the universe. The fundamental principles of the Buddhist religion are expressed by what are known as four Aryan truths, which postulate first, that there is evil and suffering in the world; secondly, that the

46 Gautama Chap. 9, sec. 66.
47 Muller's S.B.E. Vol. 2, p. 306.
48 Viramitrodaya, Chap. 7, sec. 2.
49 Colebrooke's *Mitakshara*, pp. 275-276.

the worship of the Hindu gods and goddesses described in the Purans was becoming more and more popular, and for some time at least there was a sort of rivalry between the Hindu and Buddhist gods. By the end of the seventh century A.D. in India, Buddhism became a decadent religion. It had lost is primitive purity and moral grandeur and had degenerated into Tantricism, associated with degraded forms of Yoga practices and secret rites having affinity to Black art and other ignorable things.

Besides, as I have earlier pointed out, in the 8th century, the concept of Sunyavada, which was the main contribution of Buddhism, was adopted by Shankar and converted into Mayavada. This diminished the appeal of the Sunyavada concept to the contemporary elite world.

1.25. Decay of Buddhism and Hindu revival.—The decline of Buddhism in India was followed by the revival of Hinduism, and, from this time onwards, the religious thoughts and ideas of the Hindus were shaped by a galaxy of religious teachers who can be said to have founded the various sects and sub-sects of the Hindu religion which exist even at the present day. It would be out of place for me to deal in this lecture with the religious history of the Hindus from the decline of Buddhism upto modern times, or to dwell on the lives and teachings of various saintly persons who built up different schools of thought within the folds of Hindu religion. I will touch upon only a few general features of the Hindu renaissance which began at about the 8th century A.D just to show in what way it influenced the growth of Mutts and Temples, the two religious institutions which, in the language of Sir Subramania Ayyer, O.C.J., stand supplementary to each other in the Hindu ecclesiastical system.[10]

IX. The Age of Sankara—The Monasteries

1.26. Establishment of Mutts, Sankaracharya and his order.—In the 8th century A.D., there was born in southern India, of Brahmin parents, a person by the name of Sankaracharya—a most remarkable person of whom any country could be proud. He was one of the world's greatest philosophers and spiritual leaders, a matchless dialectician and a born reformer. The theory of absolute monism which he propounded on the authority of the *Upanishads* is still a wonder and a puzzle to the philosophic world. He stood at the vanguard of movement for the revival of Hinduism, and succeeded in combating and crushing the remnants of effete Buddhism and re-establishing the religion of the *Vedas*. Like all leaders of new thought he combined rare spiritual excellence with sound practical wisdom and foresight. What he tried to bring back was not so much the rituals and sacrifices of the Vedic religion as the true philosophy of the *Vedas* as embodied in the

10 *Vidya Purna* v *Vidyanidhi*, (1904) ILR 27 Mad 435.

Upanishads. Though opposed to Buddhism he was in favour of the ascetic ideal which Buddha had preached and it was he who introduced the Buddhist monastic institutions into the Hindu system. The Mutts or monasteries which he founded were all modelled on the Buddhist Vihara or Sangharama and many of the rules of his monastic order were taken from the Vinaya Pitaka. What he attempted to do was to give the institution a Vedic garb. As I have said already,[10a] life-long asceticism was not in accordance with Vedic doctrines and a person belonging to the twice-born case was enjoined ordinarily to marry and become a house-holder after finishing his period of studentship. Exceptions were however made, as in the case of life-long students and there is a text in the Vedas which lays down generally that the moment a man develops non-attachment to the things of the world he is at liberty to renounce the world (यदहरेव बिरजेत्, तदहरेव प्रब्रजेत्). This text was relied on by Sankar in support of the institution of monks which he founded and which is known by the name of *Dasnamis*. These *Sanyasis*, according to Sankar, represent the fourth stage or Asram of the *Vedas*. Though his own religion was highly philosophic, Sankar did not prohibit the worship of Pouranic gods, and many of his followers were known to be worshippers of Siva. For the purpose of strengthening and maintaining the doctrine of non-dualistic philosophy which he preached, he established four *mutts* or monasteries at the four extremities of India viz. the *Jyotir Mutt* at Badrinath in the north, *Sarada Mutt* in Gujarat, *Sringeri Mutt* in South India and *Gobordhan Mutt* at Puri in the east, and each one of them was placed in charge of one of his ascetic disciples. After the death of Sankaracharya many of his disciples, of whom some adopted his name, established mutts at various places and the original *mutt* at Sringeri was in course of time divided into six institutions.

1.27. Ramanuja and his order.—The practice of establishing Mutts or centres of theological learning, the heads of which were pious ascetics, was followed by other religious teachers who came after Sankar. Ramanuja is one of such great teachers who was born in the middle of the eleventh century A.C. and was the founder of the religious sect known as Sri Vaishnab, which counts its adherents by thousands at the present day. The philosophical theory propounded by Ramanuja is known as *Visistadwaita* or qualified non-dualism as distinguished from pure non-dualism of Sankar. According to Sankar, there is no other reality except God and consequently the world or creation is nothing but an illusion. Ramanuja, on the other hand, tried to establish that God and His creation together constitute one integral whole and in that sense alone the creation is not different from the creator. Ramanuja was an advocate of the worship of Narayan or Vishnu as the only symbol of God. He is said to have established seven

10a Para 1.16, *supra*.

hundred *mutts* of which a few only remain at the present day. One of them is at Melkottai, which is called the Badarikasarm of the south.

1.28. Ramananda.—Ramananda, reputed, though not correctly, to be one of the followers of Ramanuja, founded a different school of Vaishnavism. His followers worshipped Ramchandra as an incarnation of Vishnu and are known by the name of Ramaths. They abound in northern India and there are several Mutts of celebrity belonging to this order at Benaras.

1.29. Madhwa.—Madhwa was another religious teacher who founded the sect named after him. This is a purely dualistic school which recognises an eternal distinction between man and his creator. The eight *mutts* at Udipi where Madhwa lived, which are all centres of Dwaita system of thought, were admittedly established by him.

1.30. Nimbarka, Ballavacharya and Srichaitanya.—Among other important Vaishnava sects we might mention those founded by Nimbarka, Ballavacharya and Srichaitanya Mahaprovu of Bengal. Each one of these sects has its religious institutions on the model of the *mutts*[10b] founded by Sankara, though there are differences in the matter of initiation of disciples, succession to headship and other allied matters which I shall discuss later on.[10c]

1.31. Sudra ascetics of South India.—The Sudra ascetics of Southern India also followed the example of the Brahmans, and the pious and learned amongst them, actuated by a "desire to disseminate religious knowledge and promote religious charity, established *mutts* in Tinnevelly, Madura, Trichinopoly, Tanjore and elsewhere."[11] The practice of establishing *mutts* spread to other dissenting sects like Kabir Panthis, Jangamas and Lingayets of southern India, and they also constructed *mutts* or *asthals* for the propagation of their particular tenets.

A detailed discussion of the characteristics and legal incidents of the different types of Maths I will reserve for a future chapter.[11a] At this stage, I will pass on to say a few words regarding the other important kinds of Hindu religious institutions, viz., temples and idols.

X. Worship of Idols amongst Hindus

1.32. Idol worship in India.—It is difficult to say at what period of time idol worship was introduced among the Hindus. There is no mention of

10b Para 1.26, *supra*.
10c Chapter 7, *infra*.
11 *Vide Giyana Sambandha* v *Kandusami*, (1887) ILR 10 Mad 375.
11a Chapter 6, *infra*.

idols in the early Buddhistic literature. As I have said already,[11b] there is some reference to idols in the Gautama *Dharmasuttra*, but the age of the work is unknown, and it does not specify any particular idol or idols. The gods that are popularly worshipped by the Hindus at the present day are, for the most part, Pouranic deities, descriptions of which occur in the various Puranas;—though, in some parts of India, e.g., Bengal, there is an admixture of Tantric rites in the form of worship. The "Puranas" literally mean ancient legends. They constitute a class of epic literature, didactic in character, which deal with various matters including cosmogony, the genealogies and exploits of gods, sages and kings, accounts of the different Avatars or incarnations of Vishnu, as well as the rites of worshipping gods by prayers, fasting, votive offerings, pilgrimages, etc.[12]

The Puranas are believed to be eighteen in number and all of them are attributed to the sage Vyasa. Their age is uncertain. But most of them seem to be post-Buddhistic compilations. The Pouranic gods became popular in India after the rise of the northern School of Buddhism, and from the beginning of the fourth to the middle of the 6th century A.D. the Gupta Emperors did much towards the propagation of the Pouranic faith. The Purans are sectarian, in the sense that some of them extol the merits of worshipping Vishnu, while many prefer Siva worship. The Upanishads which embody the philosophical concept of the Vedas describe Brahman or the Supreme Being as "that from which all things are born, that by which when born they live and into which they enter at death." These creative, preservative and destructive functions or aspects of the divinity constitute the Trinity of the Puranas and are symbolised respectively by Brahma, Vishnu and Siva. The Puranas say expressly that Brahma, Vishnu and Siva though three in form really constitute one entity and there is no difference amongst them except that of attributes. The reason is that each of the functions of creation, preservation and destruction implies the others and contains the others in a latent form. The worship of Brahma is not very popular, and I am not aware of any temple being dedicated to this creative deity except one at Pushkar, seven miles to the north-west of Ajmer in Rajasthan. The images that are worshipped are generally those of Siva or Vishnu in their various forms or manifestations. The worship of Sakti or the female principle which is described as the consort of Siva in the different forms of Durga, Kali etc. is also popular and is the special feature of the Tantric system. Besides Siva, Vishnu and Durga, the other deities, who are generally adored by the Hindus, are Ganesh and Surya (Sun), and the numerous temples that adorn the various sacred places of the Hindus are dedicated for the most part to one or other of these five gods or *Pancha Devata* as they are called.

11b Para 1.18, *supra.*

12 Macdonell's *History of Sanskrit Literature*, page 299.

1.33. Idols representing same divinity.—One thing you should bear in mind in connection with image worship viz. that the different images do not represent separate divinities; they are really symbols of the one Supreme Being, and in whichever name and form the deity might be invoked, he is to the devotee the Supreme God to whom all the functions of creation, preservation and destruction are attributed. In worshipping the image therefore the Hindu purports to worship the Supreme Deity and none else. The rationale of image worship is thus given in a verse which is quoted by Raghunandan:

"चिन्मयस्याद्वितीयस्य निस्कलस्याशरीरिण
साधकानां हिनाथयि ब्रह्मणी रूपकल्पना ।"

"It is for the benefit of the worshippers that there is conception of images of Supreme Being which is bodiless, has no attribute, which consists of pure spirit and has got no second."

Temples and *mutts* are the two principal religious institutions of the Hindus. There are numerous texts extolling the merits of founding such institutions. In *Sri Hari Bhaktibilash* a passage is quoted from Narasingha Purana which says that "whoever conceives the idea of erecting a divine temple, that very day his carnal sins are annihilated; what then shall be said of finishing the structure according to rule ..... He who dies after making the first brick obtains the religious merits of a completed Jagna".[13]

1.34. Other kinds of religious and charitable benefactions.—"A person consecrating a temple", says Agastya, "also one establishing an asylum for ascetics also, one consecrating an alms house for distributing food at all times ascend to the highest heaven".[14]

Besides temples and *mutts* the other forms of religious and charitable endowments which are popular among the Hindus are excavation and consecration of tanks, wells and other reservoirs of water, planting of shady trees for the benefit of travellers, establishment of *Choultries, satras* or alms houses and Dharamsala for the benefit of mendicants and wayfarers, Arogyasalas or hospitals, and the last, though not the least, Pathshalas or schools for giving free education. Excavation of tanks and planting of trees are Purtta works well known from the earliest times. I have already mentioned that there is a mention of rest houses for travellers even in the hymns of the *Rigveda*. The Propatha of the Vedas is the same thing as Choultrie or sarai and the name given to it by subsequent writers is प्रतिश्रयगृह. They were very popular during the Buddhist time. In *Dana Kamalakara*, a passage is quoted from Markandeya Puran which says that one should make a house of shelter for the benefit of travellers; and inexhaustible is his religious merit which secures for him heaven and liberation.[15] There are more passages

13 P.N. Saraswati's *T.L.L. on Endowment*, p. 43.
14 Quoted in G. Shastri's *Hindu Law*, 8th Edn., pp. 656-657.
15 Mandalik's *Hindu Law, Appendix* 21, p. 334.

than one in the Puranas recommending the establishment of hospitals. "One must establish a hospital furnished with valuable medicines and necessary utensils placed under an experienced physician and having servants and rooms for the shelter of patients.[16] This text says further that a man, by the gift of the means of freeing others from disease, becomes the giver of everything. The founding of educational institutions has been praised in the highest language by Hindu writers. Hemadri in his *Dankhanda* has quoted a passage from Upanishad according to which gifts of cows, land and learning are said to constitute अतिदान or gifts of surpassing merit. In another text cited by the same author, it is said that those excluded from education do not know the lawful and the unlawful; therefore no effort should be spared to cause dissemination of education by gift of property to meet its expenses.[17]

XI. LEGAL IDEAS UNDERLYING THE ENDOWMENTS

1.35. Legal ideas underlying the various endowments.—I will now attempt to trace the legal ideas underlying the various types of Hindu religious and charitable institutions and try to see how far elements of trust could be discovered in them. I have said already[17a] that the Smriti writers have said almost nothing on the subject of endowment and the matter has only been incidentally touched upon in connection with enumeration of the duties of the King or the topics relating to gifts or resumption of gifts. The passage of Manu extolling the sanctity of *Istha* and *Purtta* works I have set out already.[17b] Yajnavalkya in his Acharadhyaya or chapter on rituals has enumerated the various objects of charity and has specified, besides others, "the affording of relief to fatigued guests, the service of sick men, the honouring of gods and providing asylum to travellers."[18] Narada has mentioned seven kinds of valid gifts, one of which is gift for religious purposes.[19] According to Manu a man who breaks a temple can be killed without hesitation.[20] Yajnavalkya says likewise that such man could be impaled on a stake.[21] Both Narada and Yajnavalkya have laid down that a Sanyasi who becomes an apostate could be reduced to slavery by the King[22]; and this suggests, though in a vague way, that the King had some sort of jurisdiction over religious bodies and institutions. None of these texts, however,

16 Quoted from Nandi Puran, G. Shastri's *Hindu Law,* 8th Edn., pp. 656-657.
17 Hemadri, cited in G. Shastri's *Hindu Law,* 8th Edn., pp. 659.
17a Para 1.2, *supra.*
17b Para 1.11, *supra.*
18 Yajnavalkya, Chapter I, verse 209-210.
19 Narada, Chapter IV, section 8.
20 Manu, Chapter IX, 280.
21 Yajnavalkya, Chapter II, 273.
22 Yaj: Chap. II, §183 and Narada S.B.E. Vol. 33, p. 137.

Mayukha of Nilkantha and *Pratistha Tattwa* of Raghunandan. Mandalik has given an excellent summary of the various modes of dedication laid down by different authors in one of the appendices to his learned treatise of *Hindu Law*.[34] In every act of dedication there are two essential parts, one of which is called *Sankalpa* or the formula of resolve, and the other *Utsarga* or renunciation. The ceremonies, as Mandalik points out, always being with a *Sankalpa,* which after reciting the time of gift with reference to age, year, season, month etc. states what object the founder has in making the gift. *Utsarga,* on the other hand, completes a gift by renouncing the ownership of the founder in the thing given.

1.38. Different formulae of dedication in different cases.—In the case of dedication of tanks the formula has undergone some alterations in course of time. In the earlier treatise the formula was "May the gods, the ancestors and men be satisfied." The words "and the rest" were added by Aswalayan after "men". In later works the dedication is made in favour of all living beings.[35]

1.39. Sankalpa in dedication of tanks and gardens.—The *Sankalpa* in dedication of tanks as prescribed by Utsarga Mayukha is as follows:—"I have given the water to all beings in common, may all beings enjoy by bathing, drinking and swimming."[36] The ceremonies are much the same when trees, gardens and groves are dedicated.

1.40. Dedication of 'mutts'.—In case of *mutts* there are different forms of dedication laid down by different authors. Kamalakar is of opinion that the gift can be made as usual by libation of water but if there is no particular recipient, e.g., when the *mutt* is to be used by ascetics in general, the offering water is to be thrown into a pot.[37] In the Utsarga Mayukha, on the other hand, the gift of a *mutt* is described as a gift to a specified Brahmin or ascetic. There is thus a definite donee and the object is also specific.[38] Lastly, there is passage in Kalika Puran quoted by Hemadri which goes to show that all *mutts* are to be dedicated to God Sankara.[39] In other words this is to be regarded as a sort of public dedication, and the same idea is conveyed by certain text of Baraha Puran which describes in detail how a *mutt* is to be gifted. The passage runs thus:—"A *mutt* should, by person having faith in the Sastras, be made three-storied or two-storied, consisting of different apartments, accommodated with places for meditation, for study, for burnt offering to consecrated fire and the like ..... And he should

34 Appendix II, p. 331.
35 P.N. Saraswati's, *T.L.L. on Endowment,* p. 202.
36 Mandalik, *Hindu Law,* Appendix II, p. 336.
37 Ibid, pp. 334-335.
38 Ibid, p. 336.
39 Quoted in G. Shastri's *Hindu Law,* 8th Edition, p. 657.

endow a village or sufficient land for meeting the expenses, so that the ascetics and the travellers getting shelter (there) may receive sandals, shoes, umbrellas, small pieces of cloth, and also other necessary things. Thus having established an asylum beneficial to persons practising austerities, and also to other poor people seeking shelter, he should declare—"I am endowing this asylum—May He who is the support of the universe be pleased with me."[40]

1.41. Dharmasalas.—Dharmaṣalas, rest houses, and *satras* which are known by the name of प्रतिश्रय occupy a position analogous to that of *mutts*, and they are generally dedicated for the benefit of travellers and ascetics. The *Bahni Puran* thus describes the dedication of प्रतिश्रयगृह: "Having caused to be made an auspicious and spacious asylum of burnt bricks, with strong pillars, and large compound, accompanied with distinctive mark, covered with plaster, guarded, equipped with comfortable apartments, and conferring endless religious merit—should dedicate to the Saiva and the Vaishnava ascetics. And having caused to be made an auspicious, spacious and beautiful house, furnished with good food, and equipped with pure drinking water, and possessed of an auspicious gate should dedicate it for the benefit of the poor and helpless and travellers."[41] All these are intended for the benefit of public or certain sections of the public and there is no specific donee by whom the gift is to be accepted.

1.42. Temples.—There are elaborate rituals prescribed by Smriti writers which have got to be observed when a donor wants to consecrate a temple and establish a deity in it. I may refer to some of these rituals in a subsequent chapter.[41a] It is enough to say here that according to *Pratistha Mayukha* the Sankalpa in case of establishment of an idol is of two kinds: one is for the accomplishment of a particular object which the founder may have in view; the other is simply for the love of God. It is pointed out by Mandalik that *Pratistha Mayukha* there is no Utsarga in case of consecration of a temple except in special cases, and this means that there is no renunciation of the ownership of the founder as in other types of endowments.[42] Other books on rituals however expressly lay down that before removing the image into the temple, the building itself should formally be given away to the deity for whom it is intended. The Sankalpa or formula of resolve makes the deity itself the recipient of the gift and the usual formalities of gift are followed in this case also, and the gift is made by the donor taking in his hand water sesamum, kusagrass etc.[43] According to Pandit Pran Nath Saraswati this is the ceremony which divests the proprietorship of the temple from the donor and vests it in the idol.

40 Quoted in G. Shastri's *Hindu Law,* 8th Edition, p. 658.
41 *Ibid,* p. 659.
41a Para 4.4.
42 Mandalik, p. 339.
43 P.N. Saraswati's, *T.L.L. on Endowment,* p. 127.

The question as to the rituals that have to be performed in the consecration of a temple and the installation of an idol was considered by the Supreme Court in *Deoki Nandan* v *Muralidhar.*[44] After observing that there could be a valid dedication of a temple without the performance of any particular ceremony, the Court observed, "the ceremonies relating to dedication are Sankalpa, Utsarga and Prathista. Sankalpa means determination, and is really a formal declaration by the settlor of his intention to dedicate the property. Utsarga is formal renunciation by the founder of his ownership in the property the result whereof being that it becomes impressed with the trust for which he dedicates it. ..... It would therefore follow that if Utsarga is proved to have been performed, the dedication must be held to have been to the public." It was then pointed out that Utsarga had to be performed only for charitable endowments like construction of tanks, rearing of gardens and the like and not for religious foundations, and that "Prathista takes the place of Utsarga in dedication of temples". It was accordingly held that where there was Prathista, that is formal installation of the deity, the dedication was complete and valid notwithstanding that Utsarga had not been performed. In the case[45] the Surpeme Court considered the gift of property for religious endowment where the owner constructed the temple and installed the deity and made gift of property but there was no dedication of property before the gift. It was held that the gift passed interest to the donee who subsequently converted it to Debuttar by constituting himself a Shebait and his heirs were entitled to become Shebait in law.

1.43. Grants for temples.—For the purpose of perpetuating the worship of the deity it is usual for the donor to make grants of land. Sometimes the gift of lands is made to pious Brahmins who received the Brahmottar for carrying on the worship of the idol. This generally happens in the case of public temples and this is how the priests or *archakas* attached to particular temples came into existence. But gifts of lands are usually made to the deity itself. Hemadri in his Dankhanda has quoted texts from different Puranas extolling the merits of making gifts of land to Vishnu, Siva and other Gods. In the Vishnu Puran it is said that the donor of land for the erection of a temple attains the abode of the particular deity to whom the temple is dedicated. In the *Sivadharma* it is declared that he who dedicates to Siva cultivated land dwells in bliss in the *Rudraloka* as many kalpas as there are poles of land found on measurement. In the *Baraha Puran* the bestower of a skin of land to Vishnu is promised fortune and prosperity for seven births.[46]

44 1956 SCR 756: AIR 1957 SC 133.
45 *Smt. Shahzad Kunwar* v *Raja Ram Karan Bahadur,* AIR 1956 SC 254.
46 P.N. Saraswati's, *T.L.L. on Endowment,* pp. 136-137.

1.44. In whom does the property vest after dedication?—In all the types of endowment spoken of above we get the purpose of the founder clearly expressed in the *Sankalpa* while the *Utsarga* or renunciation divests the founder of his rights in the property dedicated. In whom then does the property vest? When there is specific donee, as for example when the head of a monastic establishment accepts the gift on behalf of the congregation or order, the property might vest in the order or congregation itself as a juristic person and the head of the establishment for the time being would be entrusted with the duties of managing the property and spending its income for purposes of the congregation. As I have said already, the idea of an order of monks or fraternity of ascetics being clothed with a sort of juristic personality was not unknown in India. The Buddhist Sangha itself furnishes a most striking illustration. The gift of *Jetavana Vihar* to Buddha was really a gift to the Sangha and Buddha accepted it on behalf of the Sangha as its head and representative. The same thing happens when a mutt is dedicated to a monk or Guru as representative of a particular order of Sanyasis. The idea of a corporate personality as distinct from that of the individual members was recognised by the Smriti writers. A *Gana* or Guild according to Yajnavalkya could hold property and employ agents.[47] He gives a strict injunction to uphold the rights and privileges of corporate bodies even among heretics.[48] It seems that the different corporate bodies had their own laws and regulations which were enforced by the King. The Buddhist literature and the inscriptions of the Second Century B.C. show clearly the flourishing condition of corporate life in ancient India.[49] When a *mutt* is dedicated for the use of ascetics in general or those who belong to a particular sect, and there is no definite donee who accepts the gifts, different considerations undoubtedly arise. The libation of water which is the indispensable ceremony in all gifts according to Hindu sages is in such cases poured over an earthen pot, or on the earth itself. This signifies that the gift or dedication is of a public character. Institutions like Choultries, Dharmasalas, Satras etc. occupy a similar position. In all these cases the beneficiaries are an indefinite number of persons who constitute either the entire public or certain sections of it. The question is who becomes the owner of such property after the founder parts with his rights?

1.45. Requisites of a valid gift according to Mitakshara & Dayabhag.—According to Vijnaneswar gift consists in the relinquishment of one's own right and the creation of the rights of another, and the creation of another's right is completed on that other's acceptance of the gift and not otherwise.[50] According to Dayabhag the gift is completed as soon as the donor relinquishes

47 Yajnavalkya Chap. II, 187, 190.
48 *Ibid* pp. 191-192.
49 K.P. Jaysawal, *Manu and Yajnavalkya*, p. 212.
50 Mitakshara Chap. III, 5-6.

his rights in favour of the donee who is a sentient person.[1] Donation according to Dayabhag is an act of the giver, and the concurrence of or acceptance by the donee is not essential. But even in Dayabhag although the ownership of the donor ceases to exist in consequence of abandonment, yet if the particular person for whom the gift is intended does not accept it, then as all the conditions of abandonment are not fulfilled, the ownership does not terminate. The position is that the gift cannot take effect when no acceptance by a sentient donee is possible. How can therefore the gift take effect when the founder dedicates a *satra* for feeding of the poor, or an asylum for residence of ascetics, or when he builds a temple and dedicates it for the worship of an idol? In the first two cases there is no specific donee and in the third the donee is not a human being but a deity.

XII. Acceptance and Vesting

1.46. Not applicable to gifts for religious purposes.—The view of the Hindu Jurists seems to be that in case of gifts to a deity or for religious purposes no acceptance is necessary to complete the gift. The following observations of Sir Asutosh Mookerjee, J. in *Bhupatinath* v *Ramlal*[2] sums up the views of the commentators on this point: "It is clear from these passages", thus observes the learned Judge, "as well as from other passages from Sreenath, Achyutananda and other commentators on the Dayabhag, that they understood the rule about the acceptance of a gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing". Thus renunciation or Utsarga by the donor is sufficient to complete the gift when the property is given to a deity or for religious purpose, and in such cases no acceptance by a sentient being is necessary.

1.47. In whom does the property vest when there is no specific donee? But the question starts up again, in whom does the property vest after dedication? If it becomes *res nullius* and belongs to nobody, it can be appropriated by any person, even though he would incur sin by so doing, and the very object of the donor would be frustrated. It may be argued that even though the owner loses his proprietary right after dedication he may still retain custody and control of the thing dedicated. This argument is founded on the following passage of *Viramitrodoy*: "But ownership so far as protection is concerned, does exist in the donor even when his ownership consisting of the power of disposition at pleasure had been withdrawn (by renunciation) until the final accomplishment of the purpose of the donor,

1 Colebrooke's *Dayabhag* Chap. I, p. 21.
2 10 CLJ 355 at p. 375; ILR 37 Cal. 128.

who seeks a certain merit according to precepts; for the act imported by the word "Gift" will not be complete until the ownership of another has arisen. The ownership will in this instance (exist), in the same way as it does in the case of substances sacrificed, lest sin arising out of the prohibition about their being touched by prohibited (animal or person) should stick (to the sacrificer); in this way the possibility of a stranger appropriating a thing given and of the forbidden being precluded will not arise, although the ownership of another has not arisen. The practice of the learned in both cases in respect of protection is based on that (limited form of ownership)."[3] This obviously contemplates a temporary arrangement; the donor is allowed the right of protection in respect of the thing given till the ownership of another arises. It does not support the view that the thing becomes *res nullius*. Ownership therefore must vest in somebody.

1.48. Does property vest in the foundation as juristic person?—As has been pointed out[3a] already, the Roman Law recognised the foundation or institution itself as juristic person. Under the Roman Law an individual by dedicating property for a charitable purpose could bring into existence a foundation or institution which in law would be regarded as the owner of the dedicated property. A similar conception is present in the German "Stiftung" where a fund earmarked for a special purpose is deemed to be its own owner. There is no such conception in English Law which recognises only one class of legal persons viz. the corporations which are really personifications or groups or series of individuals, and are classified into corporation aggregate and corporation sole. Obviously neither a Hindu religious institution nor a Hindu idol can come within the scheme of artificial persons as framed and adopted by English Law. Mr. Justice West in his classic judgment in *Monohar Ganesh* v *Lakhmiram*[4] pointed out that "the Hindu Law like the Roman Law and those derived from it recognises not only corporate bodies with rights or property vested in the corporation apart from its individual members, but also jurisdical persons and subjects called foundations." The religious institutions like *mutts* and other establishments obviously answer to the description of foundations in Roman law. The idea is the same, namely, when property is dedicated for a particular purpose, the property itself upon which the purpose is impressed, is raised to the category of a juristic person so that the property which is dedicated would vest in the person so created. And so it has been held[5] that a *mutt* is under the Hindu law a juristic person in the same manner as a temple where an

3 Viramitrodoy 1, 67, Mandalik p. 337.
3a Para 1.7 *supra.*
4 ILR 12 Bom p. 247.
5 *Krishna Singh* v *Mathura Ahir*, AIR 1972 All 273; *Ongole Byragi Mutt* v *Kannayya*, AIR 1960 AP 98.

idol is installed, and that a suit instituted by the managing trustee on its behalf without impleading the other trustees was properly constituted, and further that the suit does not abate under the provisions of Order 22 of the Civil Procedure Code, on the death of the manager pending the action, as the real party to the suit is the institution.[6]

1.48A. Principle as to personality of institutions.—Apart from natural persons and corporations, which are recognised by English law, the position under Hindu law is that if an endowment is made for a religious or charitable institution, without the instrumentality of a trust, and the object of the endowment is one which is recognised as pious, being either religious or charitable under the accepted notions of Hindu law, the institution *will be treated as a juristic person capable of holding property.*

A striking application of this principle in relation to educational institutions is seen in a Punjab case holding that a school (the Sarvadanand Anglo Sanskrit Higher Secondary School) which is meant for imparting general education to the public at large is a charitable institution within the purview of Hindu law.[6a]

If the object of the educational institution or the school is such as is recognised as charitable or religious under the Hindu law, such an educational institution or school will be regarded as possessing a juristic personality and will be capable of holding property.

1.48B. Idols.—The position as to idols is of a special nature. In the Hindu Debuttar, it seems, the position is slightly different, and not the whole endowment, but the idol which as an embodiment of a pious or benevolent idea, constitutes the centre of the foundation and is looked upon as the juristic being in which the Debuttar property vests. After all, juristic personality is a mere creation of law and has its origin in a desire for doing justice by providing, as it were, centres for jural relation. As Salmond says: "It may be of as many kinds as the law considers proper," and the choice of the corpus into which the law shall breathe the breath of fictitious personality is more a matter of form than of substance.

1.48C. Temple not a juristic person.—While an idol is a juristic person, a temple is not a juristic person. It is for this reason that a suit relating to the affairs of a temple must be brought by the deity in whom the property is vested.[6b]

6 *Gajanan* v *Ramrao,* ILR 1954 Nag. 302.

6a *D.A.V. College* v *S.N.A.S. High School,* ILR (1972)1 Punj 533; AIR 1972 Punj & Har 245 (following AIR 1922 PC 123).

6b *Laxman Prasad* v *Shrideo Janki Raman,* (1973) MPLJ 842 (cited in the Yearly Digest for 1973, columns 890-891).

XIV. IDOL AS ENTITY

1.49. Can property reside in the aim or purpose?—According to the principles of modern jurisprudence, the owner of a right must be a person. There is, indeed, a class of writers like Brintz, Bekker and Duguit who maintain that property may vest in and belong to an 'aim' or 'purpose.' They are, however, unwilling to give the aim or purpose the status of a juristic person. According to them, the maxim "no person, no property" is not a justifiable assumption, and property may not only belong to and be held by a person; it may also belong to an 'aim' or 'purpose' as well, but without the purpose being recognised as a juristic person. The position is that these authors eliminate the "person" as the owner of a legal right from their scheme altogether.

As a theory, this is undoubtedly opposed to the accepted principles of modern jurisprudence, and in practical results it is likely to create difficulties and complications of a rather serious type. Once the property goes out of the ownership of a person and vests in the purpose or aim, the whole thing is placed at the mercy of the State, which can do whatever it likes with this ownerless right, and there remains no person entitled in law to enforce the intentions of the donor. On the other hand, if the State regards the foundation or institution which aims at carrying out certain objects, as a legal person, the latter, acting through its agents, can always enforce the right. This was precisely the conception of Roman lawyers.

The scheme of Brintz, Bekker and others, though not a tenable scheme, certainly contains some important juridical truths. In the first place in the case of property dedicated to a particular purpose it lays stress on the purpose of the donor as the supreme factor which should be given the controlling hand in the management and administration of the property. At the same time these writers admit that a purpose or aim cannot rank as juristic person in law, and this led them to adopt the untenable position that a right can remain without an owner. The innate practical sense of the Roman Jurists found a way out of this difficulty. They indeed were fully conscious of the fact that the purpose or intention of the founder was the primary thing in an endowment, but as purpose without any material basis could not figure as a legal person they personified the endowment itself which was dedicated for a particular purpose. Though these principles are nowhere expressly discussed by the Hindu Jurists, it seems that institutions like *mutts* and *satras* which were not gifted to any particular donee or fraternity of monks were regarded as juristic persons in Hindu law to which the endowed property of these institutions belonged. With regard to Debuttar, the position seems to be somewhat different. What is personified here is not the entire property which is dedicated to the deity but the deity itself which is the central part of the foundation and stands as the material symbol and embodiment of the pious purpose which the dedicator has in view. "The dedication to deity", said Sir Lawrence Jenkins in *Bhupati*

v *Ramlal,*[7] "is nothing but a compendious expression of the pious purpose for which the dedication is designed". It is not only a compendious expression but a material embodiment of the pious purpose and though there is difficulty in holding that property can reside in the aim or purpose itself, it would be quite consistent with sound principles of Jurisprudence to say that a material object which represents or symbolises a particular purpose can be given the status of a legal person, and regarded as owner of the property which is dedicated to it.

1.50. The idol as a symbol and embodiment of the spiritual purpose is the juristic person in whom the dedicated property vests.—As you shall see later[7a] on the decisions of the Courts of India as well as of the Privy Council have held uniformly that the Hindu idol is a juristic person in whom the dedicated property vests. "A Hindu idol", the Judicial Committee observed in one of its recent pronouncements, "is according to long established authority founded upon the religious customs of the Hindus and the recognition thereof by Courts of Law, a juristic entity. It has a juridical status with the power of suing and being sued."[8] You should remember, however, that the juridical person in the idol is not the material image, and it is an exploded theory that the image itself develops into a legal person as soon as it is consecrated and vivified by the *Pran Pratistha* ceremony. It is not also correct that the Supreme Being of which the idol is a symbol or image is the recipient and owner of the dedicated property. The idol as representing and embodying the spiritual purpose of the donor is the juristic person recognised by law and in this juristic person the dedicated property vests.[8a]

1.51. Deity owner in a secondary sense.—The discussions of several Hindu sages and commentators point to the conclusion that in case of dedicated property the deity is to be regarded as owner not in the primary but in the secondary sense. All the relevant texts on this point have been referred to by Sir Asutosh Mookerjee in his judgment in *Bhupati* v *Ramlal*[9] and I will reproduce such portions of them as are necessary for my present purpose.

Sulapani, a reputed Brahminical Jurist, in his discourse on *Sraddha* thus expresses his views regarding the proper significance of gift to Gods:—"In 'Donation' having for its dative case, the Gods like the Sun, etc., the term 'donation' has a secondary sense. The object of this figurative use being

7 10 CLJ 355, 369; ILR 37 Cal 125.
7a Chapter 4, *infra.*
8 *Promotha* v *Pradyaumma,* LR 52A AP 245.
8a As to the personality of idol, see *H.R. Board* v *Veeraraghava,* AIR 1937 Mad 750; 1937 MLJ 368.
9 ILR 37 Cal 128; 10 CLJ 355.

extension to it of the inseparable accompaniment of that (gift in its primary sense), viz. the offer of the sacrificial fee etc. It has already been remarked in the chapter on the *Bratis* that such usage as *Devagram, Hastigram,* etc., are secondary."[9a] Sree Krishna[9b] in commenting on this passage thus explains the meaning of the expression *Devagram*: "Moreover, the expression cannot be used here in its primary sense. The relation of one's ownership being excluded, the possessive case affix (in Devas in the term Devagram) figuratively means abandonment for them (the Gods)". Therefore, the expression is used in the sense of "a village which is the object of abandonment intended for the Gods". This is the purport. According to Savar Swami, the well-known commentator on Purba Mimansa, Devagram and Devakhetra are figurative expressions. What one is able to employ according to one's desire is one's property. The Gods however do not employ a village or land according to their use.

1.52. These discussions are not free from obscurity but the following conclusions I think can be safely draw from them:—(1) According to these sages the deity or idol is the owner of the dedicated property but in a secondary sense. The ownership in its primary sense connotes the capacity to enjoy and deal with the property at one's pleasure. A deity cannot hold or enjoy property like a man, hence the deity is not the owner in its primary sense. (2) Ownership is however attributed to the deity in a secondary or ideal sense. This is a fiction (उपचार) but not a mere figure of speech, it is a legal fact; otherwise the deity could not be described as owner even in the secondary sense. (3) The fictitious ownership which is imputed to the deity is determined by the expressed intentions of the founder; the debutter property cannot be applied or used for any purpose other than that indicated by the founder. The deity as owner therefore represents nothing else but the intentions of the founder. Although the discussions of the Hindu Jurists are somewhat cryptic in their nature, it is clear that they did appreciate the distinction between the spiritual and legal aspects of an idol. From the spiritual standpoint the idol might be to the devotee the very embodiment of Supreme God but that is a matter beyond the reach of law altogether. Neither God nor any supernatural being could be a person in law. So far as the deity stands as the representative and symbol of the particular purpose which is indicated by the donor, it can figure as a legal person and the correct view is that in the capacity alone the dedicated property vests in it.

1.53. Ownership of tanks and trees after dedication.—The dedication of tanks and trees occupies, in my opinion, a somewhat different position.

9a Sulapani cited in *Bhupati* v *Ramlal,* ILR 37 Cal 128.
9b Sree Krishna cited in *Bhupati* v *Ramlal,* ILR 37 Cal 128.

The water of a dedicated tank ceases to be private property according to Hindu idea and can be enjoyed not only by every human being but also by every animate creature. According to Raghunandan, the consecrator by relinquishing his rights makes the water of the tank common property like that of a river.[10] There are certain writers who are of opinion that the dedicator himself cannot use the water of the tank dedicated by him. Raghunandan however controverts that view and according to him the dedicator can use the water as a member of the public. The subsoil in a tank may remain with the owner if he chooses to retain his rights in it, but, subject to this, a tank becomes public property and private ownership ceases altogether. There is no question here of the property vesting in a corporate body or any institution. As private ownership cease with dedication the only duties that can still remain with the owner are the duties of preservation and repair. No question of administration of such dedicated property, strictly speaking, arises.

XV. Endowments

1.54. Administrators or managers of endowments are trustees in the general sense.—With regard to all other types of endowment it is necessary for the purpose of carrying out the intentions of the donor that somebody should be entrusted with the management or administration thereof. As was observed by Mukherji, J. in *Monohar* v *Bhupendra,*[11] in ancient times, except in cases of property dedicated to a brotherhood of ascetics, all endowments were administered ordinarily by the founder himself and after his death by his heirs. This was the case not only with regard to temples but also in respect of non-religious charitable institutions like Choultries, Sadabrats etc. It was only in case of public temples that the practice of appointing shebaits was generally resorted to. But whoever may be the person in whom the duty of administration is vested, whether it is the shebait or *archaka* of a temple or the Mohant of a religious institution and whether or not such person is the heir of the original founder, he must be deemed to be in the position of a trustee with regard to the endowed property. As I have said already, he may not be a trustee in the sense in which that expression is used in English law. To quote the language of the Judicial Committee in *Vidyavaryathi* v *Baluswami*[12] "as in no case is the property conveyed to or vested in him he is not a trustee under the English law'; but it was pointed out by the Privy Council that in view of the obligations resting on him he is answerable as a trustee in the general sense. I have already pointed out that the word "Trust" in English law involves a highly

10 Vide P.N. Saraswati's, *T.L.L.* 205.
11 37 CWN p. 29; ILR 60 Cal 432.
12 LR 48 IA p. 302.

prevents a Hindu from disposing of his property in such a way as to create any interest in favour of an unborn person. It is not also permissible for a Hindu to create a line of succession unknown to Hindu law. For a time it was the subject matter of some controversy in our courts of law, whether the principle of the *Tagore* case applies to provisions made by the founder of a Hindu Debutter regarding succession to the office of a Shebait. In a Patna case the deed of endowment stated that 'K' would be the manager and after his death his eldest son would be the manager and in this way only eldest son and daughter's son would be manager. The line of succession was held to be invalid on the ground that such line of succession is unknown to Hindu law.[40a] Similarly, in *Anath Bandhu* v *Krishna Lal*[40b] a line of succession to the office of the Shebait in tail male was held to be void. Even a compromise decree cannot validate a line of succession opposed to Hindu law.[40c]

5.8. The rule in Tagore v Tagore applies to such dispositions.—In *Gnanasambanda* v *Velu Pandaram,*[41] the Judicial Committee observed in course of their judgment that "the ruling in *Tagore* v *Tagore*[42] is applicable to hereditary office and endowment as well as to other immovable property." The main question raised in this case was one of limitation under Article 144 of the Indian Limitation Act, and the point canvassed was whether each Shebait succeeding to his predecessor could claim a fresh start for purposes of limitation, inasmuch as he derived his title, not from his predecessor, but from the original donor. The Privy Council negatived this contention and held that the creation of successive life estates in regard to shebaiti right was repugnant to Hindu law. Different views were expressed by different Judges in India regarding the interpretation to be put upon the observation of Their Lordships quoted above. One set of decisions took the view that gift of devise of shebaiti right which contravenes the rule in *Tagore* v *Tagore*[43] is bad in law and cannot be enforced. The case of *Promotho Nath* v *Anukul Chandra*[44] may be taken as a type of such pronouncements. In this case, a Hindu by his will made a gift of certain properties to an idol and appointed some persons Shebaits of the endowment. He further provided that after the death of the aforesaid Shebaits, the seniormost in age amongst their legal heirs would be the Shebait. It was held that the principle of law enunciated in *Tagore* v *Tagore*[45] and extended to an hereditary office and endowment by *Gnanasambanda* v *Velu*[46] was applicable

40a *Sitesh Kishore* v *Ramesh Kishore,* AIR 1981 Pat 339.
40b AIR 1979 Cal 168.
40c *Ibid.*
41 LR 27 IA 69.
42 9 BLR 377.
43 9 BLR 377.
44 29 CWN 17.
45 9 BLR 377.
46 LR 27 IA 69.

to this case and consequently the bequest, so far as it provided that the person senior in age amongst the heirs of the first Shebaits shall succeed as a Shebait failed, and the shebaitship reverted to the heirs of the founder. On the other hand in *Mathura Nath* v *Lakhi Narain,*[47] Richardson, J. expressed the view that the rule in *Tagore's* case is only a general rule to which there are several exceptions, and the nomination of Shebait may be taken as one of the exceptions. The observation in *Gnanasambanda's* case was held to be a mere *obiter* which had little or no hearing on the particular question decided in that case. In *Sreepati* v *Krishna,*[48] Chakravarty, J. definitely held that as the shebait has no right to property, and is a mere holder of an office with the rights and limitations applicable to the guardian of a minor, the rule in *Tagore's* case could not properly be extended to appointment of a Shebait. The controversy so far as the Calcutta High Court is concerned has been set at rest by the Full Bench decision in *Monohar* v *Bhupendra,*[49] where it has been held that shebaitship is not merely an office, it is property as well and in regard to disposition of shebaiti right the rule in *Tagore* v *Tagore*[50] is applicable. The same view has been taken by the Judicial Committee in *Ganesh Chandra* v *Lall Behary,*[1] and later on in *Bhabatarini* v *Ashalata.*[2] The position now is that the founder of a Debutter is competent to lay down any rules to govern succession to the office of the Shebait subject to this restriction that he cannot create any estate unknown or repugnant to Hindu law. In *Monohar* v *Bhupendra*[3] the founder Jagamohan who created the Debutter provided, by his will, that his eldest son should be the first Shebait and that after his death his other sons one after another would be Shebait in the order named. After the death of all the sons of the testator, the office of the Shebait was to be held from time to time by the eldest male member of the family for the time being, and no daughter or daughter's son could ever hold the office. The appellant Monohar claimed shebaitship on the ground that he was the eldest male member of the family. It was not disputed that he was the eldest member; but the fact was that he had not been born during the lifetime of the testator. It was held that the provision in the will to the effect that the eldest male member of the testator's family should be the sole Shebait, was ineffective in law to entitle such a male member to the office when he was not in existence till after the testator's death. Rules for succession to shebaitship cannot be valid if they provide for the office to be held by

47 ILR 50 Cal 426.
48 41 CLJ 22.
49 37 CWN 29.
50 9 BLR 377.
1 LR 63 IA 448; AIR 1936 PC 318.
2 ILR (1943)2 Cal 137; LR 70 IA 57.
3 37 CWN 29; ILR 60 Cal 432.

someone among the heirs of the founder to the exclusion of others in a succession differing from the line of heirs according to Hindu law.[3a]

5.9. In *Ganesh Chandra* v *Lal Behary*[4] a testator by his will appointed his two sons *K* and *R* to be Shebaits, and further 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 descendant of *K* or *R* should act as a Shebait in his place, it being his intention that the eldest for the time being in the male line of the said two sons shall always remain joint Shebaits. At the time of the suit *K and R* were dead, but there were living *N*, the son of *K*, and four sons of *R*, of whom the eldest was *L*. *N* and *L* were both in existence at the time of the testator's death. The question was which of the sons of *K* and *R* were entitled to shebaitship? It was held by the Judicial Committee that the provision in the will in so far as it related to the holding of the office after the respective deaths of *K* and *R*, constituted an invalid attempt to lay down a line of succession not permissible under Hindu law, and on their deaths the succession to the office and the income of the estate would be according to the Hindu law of succession. It was held further that there being no independent gift of the office for life in favour of persons who were to take respectively on the death or retirement of *K* and *R*, even *L* and *N*, who were born during the testator's lifetime were not entitled to come in as Shebaits.

5.10. In *Gokul Chand Dey* v *Gopi Nath Dey*,[5] the settlor had, after making an endowment, provided that her three sons should be Shebaits, and that after them their sons or other nearest remoter male descendants in the male line should succeed to the shebaitship, the apparent intention of the settlor being to exclude cognatic relations. It was held that the line of succession provided by the settlor was void as it was not in accordance with the rule of succession to property under the Hindu law, and that accordingly on the death of the sons who were named as Shebaits, the shebaiti right devolved on the heirs of the settlor. Similarly where the settlor had appointed two of his daughters and a nephew as Shebaits, and provided that after them, their male descendants should succeed to the office, it was held, on a review of the authorities, that shebaitship being itself property, it was not open to the settlor to prescribe a rule of succession different from that laid down under the Hindu law, that the provision that only male descendants should succeed to the office was void, and that the plaintiff who claimed as heir on an intestacy was entitled to succeed.[6]

3a See also *Jagannath Deb* v *Byomkesh*, AIR 1973 Cal 397.
4 LR 63 IA 448; 41 CWN 1.
5 AIR 1952 Cal 705.
6 *Sm. Raikishori Dasi* v *Official Trustee*, AIR 1960 Cal 235.

5.10A. The rule in Tagore case inapplicable where office does not amount to property—Case of Dharmakarta.—The rule in the *Tagore* case,[6a] to which I have already referred, does not, however, apply to bare offices which are not property, and which have not necessarily to be hereditary but may be made hereditary by the founder who has a right to provide a special case of succession for the office. The restrictions laid down in the *Tagore* case do not, therefore, apply to the office of Dharmakarta which has no emoluments or profits attached to it. It has been so held[10b] by the Madras High Court.[6c] The successor to the office of the Dharmakarta in such cases does not take the office solely in his right as heir to his predecessor, but as a direct nominee under the rule of succession laid down by the founder.

5.11. Shebaitship can be given absolutely or for life. Successors of hereditary Shebait are his heirs.—As shebaitship is property it can be given absolutely or for a limited period. If it is given absolutely it would be a case of hereditary Shebait and after the death of the grantee his heirs and not the heirs of the grantor would become Shebaits.[7] If it is given for a limited period, e.g. for the lifetime of the grantee, the heirs of the founder would come in as Shebaits after his death.

5.12. Heirs of founder succeed after the death of a Shebait for life. How to ascertain the heirs of the founder at that time?—A difficulty arises sometimes regarding the method of ascertaining as to who the heirs of the founder are; ordinarily the expression 'heirs of the founder' would mean those persons who would be the nearest heirs of the founder if he had died at the moment when the question of succession to shebaitship arose. If this method is applied, the position would be that a Shebait appointed for his lifetime would be deemed to hold his office in the same way as a Hindu widow holds her husband's estate. No other person would have anything like a remainderman's interest so long as the Shebait is alive, and the next Shebait would be the nearest heir of the founder existing at the date of his death. This was the view taken in *Kunjamoni* v *Nikunja.*[8] In this case the founder was one Jasamant and the endowment was created by a will which provided that all the properties of the testator would devolve on his family deity Shamsundar. The testator appointed his second wife Bhagirathi, his youngest son Jagadanand, and another son Brojendra successive executor and Shebaits, and although he had four other sons at the time of

6a *Tagore* v *Tagore,* LR (1872-1873) IA (Supp) 47; 9 Beng LR 377, para 5.7, *supra.*
6b *Manathunatha Desikar* v *Sundarlinga,* (1970)2 MLJ 156, 182, 183 (FB).
6c *Manathunainatha Desikar* v *Gopala,* (1943)1 MLJ 434; ILR (1943) Mad 858 overruled.
7 Vide *Tripura* v *Jagat Tarini,* LR 40 IA 37; *Panchanan* v *Surendra,* 50 CLJ 382; *Kunjamoni* v *Nikunja,* 22 CLJ 404.
8 22 CLJ 404.

his death, he gave no further directions regarding the devolution of shebaitship after Brojendra's death. Brojendra, the last Shebait under the will, died in 1887, and at that time Raimohan. Pyarimohan, Jogendra and Sarada, the four sons of the founder were his next heirs under the Hindu law. In 1910, a suit was instituted by Nikunja, the son of Pyarimohan for establishment of his title as Shebait to the extent of four annas' share by inheritance from his father and his claim was allowed by both the courts below, and upheld on second appeal by the High Court. Now if Brojendra had the shebaitship absolutely in him, there is no doubt that after his death his heirs and not the heir of the founder would be the next Shebaits and his heirs were his four brothers who were actually living at the date of his death. The High Court in one part of the judgment took the view that Brojendra was a Shebait not for life but absolutely, and consequently his heirs and not the heirs of the founder would come in as Shebaits after his death. The learned Judges however proceeded further and said that even if Brojendra was a Shebait for life, the claim of the plaintiff could not be defeated. It is to be noted that the contention raised on behalf of the appellant Kunjamoni, the widow and heir of Jogendra, was to this effect that as Bhagirathi, Jagadanand and Brojendra, had each a life interest in the shebaiti, the remainder of the right remained vested in all the six sons who were the heirs of the founder, and consequently the plaintiff Nikunja was not entitled to more than one-sixth share of the shebaiti right which his father had under law. This contention was overruled and Asutosh Mookherjee, J. in course of his judgment observed on this point as follows:—"We are of opinion that this contention is unsound and that the principle of vested interest while the actual enjoyment of the expected interest is postponed till the termination of the life estate, as expounded by Their Lordships of the Judicial Committee in *Rewan Pershad* v *Radha Beeby*[9] has no application to cases of the description now before us. No doubt a Shebait holds his office for life..... but this does not signify that he has a life interest in the office with the remainder presently vested in the next taker. The entire office is vested in him.... The position of a Shebait is analogous to that of a Hindu female.... in possession of the estate of the last full owner, rather than to the holder of a life estate."

5.13. The propriety of this part of the judgment was doubted by B.K. Mukherjea, J. in *Bhabatarini* v *Ashalata,*[10] and was finally upset by the Judicial Committee in the appeal taken to it against the judgment of the High Court in that case. It must be taken to be settled by the decision of the Privy Council that when the founder makes only a limited grant of shebaitship, the residue still remains in him and his heirs as an estate of inheritance. When the limited shebaitship ends, the nest Shebait would be

9 4 MIA 137.
10 ILR (1943)2 Cal 137; LR 70 IA 57.

the person in whom this residuary estate of the founder was vested at the date of the termination of the limited shebaitship. In *Bhabatarini* v *Ashalata*[11] the material facts were as follows:—S, a Hindu, established in his lifetime certain family idols and dedicated to them certain properties by a deed which provided that he and his wife would be the first joint Shebaits, and on the death of the survivor among them their son *p* should be the Shebait. There were further provisions relating to succession of shebaitship after the death of *P* but they were invalid law. The wife of *S* died first, and then *S* died leaving a daughter *B,* and his son *P*. *P* then died leaving his wife *A*, and three daughters. The question was as to who as between *B* and *A* would be entitled to shebaitship after the death of *P*. Mr. Justice Khundkar sitting in the original side of the Calcutta High Court decided in favour of *B* as she was the nearest heir of the founder when *P* died, and the learned Judge relied entirely upon the decision in *Kunjamoni* v *Nikunja*[12] referred to above. On appeal the decision was reserved by Derbyshire, C.J. and Mukherjea, J. Mukherjea, J. expressed the view that as *P* had not the shebaiti right absolutely vested in him the residuary right still remained in *S* and his heirs, and as *P* was the sole heir of *S,* both the limited and the residuary rights were united in him. His position therefore was that of an absolute Shebait, and after his death, his heirs and not the heirs of the founder would be entitled to succeed as Shebaits. On appeal to the Privy Council, the judgment of the appeal bench was affirmed, though Their Lordships somewhat broadened the ground upon which the decision of Mr. Justice Mukherjea was based. The view of the Privy Council seems to be that as there was no provision for devolution of Shebaitship after the death of *P,* the residuary right remained from the beginning in *S,* the founder, and it went on devolving as species of heritable property on his successors in the order laid down by Hindu law. When *P* died, this residuary right was vested in *A,* his widow, and the office which terminated with *P* would then revert to *A* as the nearest heir of the founder.

The expression "heirs of the founder" would, therefore, mean not the persons who would have the right to succeed if *S* had died at that moment, but it would mean those in whom the residuary Shebaiti right, which was in the founder from the very beginning, had come to vest at that time by successive devolutions under the Hindu law of inheritance.

As I have said above,[12a] it is open to the founder to dispose of the Shebaitship in any way he likes, and such dispositions would be given effect to if they are not contrary or repugnant to Hindu law. The founder may appoint one person or a number of persons as Shebaits; he may give it to a single family or a number of families; and he may empower a Shebait to nominate his successor or vest the power of nomination in somebody else.

11 ILR (1943)2 Cal 137; LR 70 IA 57.
12 22 CLJ 404.
12a Para 5.7, *supra.*

If the founder of the debutter lays down any mode of devolution of the office of shebait, the office devolve according to that mode, in the absence of such laying down of the mode of devolution, the office devolves in accordance with the Hindu Law of Succession, that is, the office of shebait is a hereditary one. Thus in *Anath Bandhu* v *Krishna Lal*[12aa] the founder directed in his will that the shebait for the time being was to appoint his immediate successor. The shebait appointed his four sons one after another and thereafter created a line of succession contrary to the mode laid down by the founder. Held that except for the appointment of the shebait's eldest son, the other appointments and the line of succession prescribed were invalid. The office held reverted to the heirs of the founder and the sole heir (only son) of the last nominated shebait could not lay claim to the office since there was no independent gift of the office in his favour.

5.14. Founder cannot alter or revoke the appointment after it is made, unless such powers are reserved by him.—Once the appointment is made and the line of devolution laid down, is it competent for the founder to alter or revoke it afterwards? On the authorities as they stand, the answer has to be in the negative, unless the right of revocation or alteration has been reserved at the time when the grant was made. This is so even if the provision in the deed of dedication as to succession to Shebaitship is invalid in law and the Shebait reverts to the founder.[12b]

In *Gouri Kumari* v *Indra Kumar,*[13] Woodroffe, J. observed: "It is clear that the donor of a Debutter property can make no change in the order of succession of Shebaits as laid down in the deed of endowment in the absence of a reservation to that effect in the deed," This decision was followed by Graham and Mitter, JJ. in *Monoroma Dasi* v *Dhirendra Nath,*[14] and still later, by Mukherji and Ghosh, JJ. in *Narayan Chandra Dutt* v *Bhuban Mohini.*[15]

In *Narayan Chandra Dutt* v *Bhuban Mohini,*[15a] the founder, by his first Arpannama, which created the endowment, appointed himself the first Shebait, his wife, should she survive him, the next Shebait, and thereafter his heirs in the order of succession. The wife of the founder died during his lifetime, and then he made a fresh Arpannama by which he appointed a cousin of his as a Shebait of the Debutter after him, and after the death of the latter, his sons according to primogeniture. There was, in the first

12aa AIR 1979 Cal 168.
12b *Ganesh Chander* v *Lal Behary Dhur,* AIR 1936 PC 318.
13 *Gouri Kumari* v *Indra Kumar,* ILR 59 Cal 1971; AIR 1923 Cal 30.
14 *Monoroma Dasi* v *Dhirendra Nath,* (1930)34 CWN 1087.
15 *Narayan Chandra Dutt* v *Bhuban Mohini,* 38 CWN 15; AIR 1934 Cal 244. See, in this connection, *Radhika* v *Amrita,* AIR 1947 Cal 301 (B.K. Mukherjea & Sharpe, JJ.).
15a *Narayan Chandra Dutt* v *Bhuban Mohini,* 38 CWN 15; AIR 1934 Cal 244 (Mukherji & Ghosh, JJ.).

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Arpannama, no reservation of any power to alter or amend the rule of devolution of Shebaitship. It was held that the second Arpannama was invalid, and on the death of the founder his legal heirs would succeed as Shebaits. Two principles, it seems, have been invoked by the Judges in support of the proposition that the appointment, once made, cannot be altered unless the authority to make any alteration was reserved by the founder. The first is that when the gift or dedication to the deity is complete and the founder without any reservation has appointed the line of Shebaits, becomes *functus officio* as founder and the only rights which he might retain are those that appertain to the office of Shebait.[16] His rights as founder being gone, he has *qua* Shebait no right to alter the line of Shebaitship. The other principle which seems to have been relied on is that the provision relating to the appointment of a Shebait is an integral part of the grant itself and the deity in accepting the grant accepts it with the condition, relating to the appointment of a Shebait, attached to it. As the grant itself is irrevocable, the stipulation attached to the grant also becomes irrevocable.[17]

5.15. In *Sreepati* v *Krishan,*[18] Chakraburtty, J., commented on the decision in *Gouri Kumari* v *Indra*[19] referred to above,[19a] and the learned Judge expressed his view that these provisions regarding appointment of a Shebait, relating as they do to the management of the endowment, could be altered by the founder provided he has not expressly precluded himself from doing so, and provided such alteration does not affect any right of property of the Shebait so appointed or the interest of any third party. This expression of opinion has been held to be a mere *obiter,* and the decision on the main point has been pronounced to be wrong by a Full Bench of the Calcutta High Court.[20]

The point seems to have been canvassed in some cases that even without reservation, there is, under the Hindu law, a residue of power left in the founder after he has made a dedication, and he should be allowed in exercise of this residuary power to make a change in the appointment of Shebaits, if such a course is claimed to be just and proper. As I have told you in my first lecture,[20a] Hindu law givers do admit that the dedicator, even after he has parted with ownership in the thing dedicated, does retain some general powers of control or guardianship over it which entitle him to take

16 Vide the observations of Page, J., in *Chandi Charan* v *Dulat,* 30 CWN 930, 937.
17 Vide the observations of Mukherji, J. in *Narayan* v *Bhuban Mohini,* 38 CWN 15, 23.
18 *Sreepati* v *Krishna,* 41 CLJ 22.
19 *Gouri Kumari* v *Indra,* (1923)ILR 50 Cal 197.
19a Para 5.14, *supra.*
20 *Monohar* v *Bhupendra,* 37 CWN 29 (FB).
20a Para 1.47, *supra.*

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steps, if necessary, to prevent it from being defiled or wasted.[21] Mr. Justice Mitter in *Monorama* v *Dhirendra,*[22] expressed his opinion that such a right exists only in the case of public endowments and not in private Debutter. I do not think that it is stated anywhere that such powers exist in the case of public endowments only; be that as it may, as I have told you already in my first lecture, this power is given only temporarily to prevent any misuse of the dedicated property till the person legally entitled to hold it comes and takes charges of it. This power cannot possibly be invoked to alter the line of succession to shebaitship,[33] When a power of revocation has been reserved by the grantor, certainly he can alter the appointment previously made in exercise of such powers. When the dedication was made by two persons jointly and in the deed of endowment a power was reserved in favour of both of them to make any alteration with regard to shebaitship, the powers should be exercised jointly by both, and one of them cannot exercise them after the death of the other.[24]

5.16. In *Ramaswami* v *Madras Hindu Religious Endowments Board*[25] the question was considered whether the founder had the right after he had renounced all his rights in the endowment to appoint a trustee therefor. After referring to the statement of the law made *supra,* the learned Judges held that when once the founder had appointed a trustee and laid down the line of devolution, it was not thereafter competent for him to alter or revoke, it unless such a right had been reserved at the time when the grant was made, and that where the founder had renounced all his rights in favour of the Devasthanam Committee, it was no longer competent for him to appoint a trustee by a will. In *Sankatha Pandey* v *Brij Mohan Pandey,*[26] the founder of the endowment had executed a will appointing certain persons as Shebaits after him, and later on executed another will appointing a different set of trustees. The question having been raised whether the settlor could alter a line of succession laid down by him, it was held that the office of a Shebait would vest in the founder or his heirs unless disposed of by them, that when once it was disposed of, it could not be altered, unless a power to do so had been reserved at the time of appointment, and that when the appointment was made by a will, such a reservation could be implied, as, in law, a will could be revoked.

5.17. It would be clear from what has been said above, that it is only the founder who can appoint Shebaits and lay down the line of devolution of shebaitship, and once he has made the appointment, he cannot alter or

21 See Mandlik Vyavahara Mayukha, page 337.
22 *Monoroma* v *Dhirendra,* 34 CWN 1087.
23 Vide the observation of Mukherji, J. in *Narayan* v *Bhuban,* 38 CWN 15 ,
24 *Chhotey Lal* v *Gopaljee,* AIR 1940 All 252.
25 AIR 1954 Mad 1110.
26 AIR 1958 All 371.

revoke the same in the absence of a reservation of power to that effect in the deed of dedication. *A fortiori* a Shebait, as such, cannot alter the line of succession to the office of a Shebait as laid down by the founder. It may be noted that a person does not necessarily become a founder by joining in the deed of endowment. If a Hindu widow makes a dedication and the reversioners join in the deed in token of their consenting to the transfer, the reversioners do not thereby become founders.[27] Questions of alteration of the line of Shebaits arise sometimes when subsequent to the establishment of a Debutter, additional grants of property are made to the foundation by a Shebait or any other person interested in the same and the donor in making the gift appoints a new line of Shebaits for the management of the property dedicated by him. The matter came up for consideration on more occasions than one before our courts of law and it is necessary that we should discuss briefly the law relating to additional endowments.

5.18. Additional endowments and alteration of the line of Shebaits.— Additional endowments in favour of the family deity are frequently made by the descendants of the original owner, who may be the Shebaits themselves and obviously such grants are beneficial to the deity. It is settled law that the persons who subsequent to the foundation furnish additional contributions do not thereby become joint founders, and their benefaction is regarded as nothing but an accretion to an existing endowment,[28] No difficulty arises if such additional gifts are made by a donor without any condition attached to it. The gift would become the property of the idol and whoever the donor might be, the existing Shebait of the idol would have the powers to manage the property on behalf of the idol.[29] Where, therefore, lands had been dedicated by the State to an existing temple, it was held that that did not convert in into a State temple so as to vest the power of appointing Shebaits in the State.[30] Complications are created when the donor, in making the gift, purports to give directions which would alter the devolution of the office of the Shebait, making the course of succession to depart either from the terms of the original grant, or in the absence of a grant, that which is in accordance with ordinary rules of Hindu law. The question arises in such cases, whether in giving effect to the additional gift, effect has to be given to the new directions given by the donor regarding the right of management of such property.

In *Sripati* v *Krishna*[31] one Mangobind who was one of the Shebaits and as such held a *Pala* of worship of certain family deities made gifts of property to the idols on two occasions during his lifetime, and on each occasion

27. *Chandra Choor* v *Bibhuti Bhusan,* AIR 1945 Pat 261.
28. Per Mookerjee, J. in *Ananda Chandra* v *Brojolal,* ILR 50 Cal 292; 36 CLJ 356. See also *Lalit Mohan* v *Brojendra,* ILR 53 Cal 251.
29 *Dyamayi* v *Shankar Nath,* 42 CLJ 30.
30 *Prem Ballabh* v *State of Rejasthan,* AIR 1954 Raj 193.
31 41 CLJ 22.

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instituted a new line of Shebaits who were not existing Shebaits of the deities. It was held by Chakravarty, J. (Greaves, J. concurring) that a Shebait for the time being cannot create a new line of Shebaits of property already dedicated to an ancestral deity, but he could appoint new Shebaits so far as his own endowment was concerned. With regard to the position of such a new Shebait, it was held that he would be allowed to manage the properties added to the endowment and should ordinarily place the income of such properties in the hands of the Shebait appointed by the founder. If the original Shebait agrees, the new Shebait may act jointly with him. This view was not accepted by Page, J. in *Lalit Mohan* v *Brojendra.*[32] There one Gopal Chandra Seal who was entitled to a *Pala* of the worship of his family idols for four months in the year, in order to make further provision for the endowment, of which he was a Shebait, but not the founder, dedicated by way of an absolute trust, a house property situated in Calcutta. By the deed of Arpannama which was executed on 22nd February, 1897, Gopal Chandra laid down a new line of Shebaits which was different from that laid down by the founder. The question arose whether it was permissible for a person, who was a Shebait and not the founder to alter the existing line of Shebaits. Page, J. held that apart from usage or a consensus of opinion among those interested in the worship of the idols, in favour of such a course, a Shebait is incompetent of his own will and pleasure to alter the line of Shebaits laid down by the founder or by the common law of the land. It was held further that if the direction in the additional grant relating to a change in the line of Shebaits amounted to a condition subsequent, such condition was void and the offending provision could be expunged without affecting the validity of the gift itself. This decision was affirmed on appeal by Rankin, C.J. and C.C. Ghosh, J.[33] though it does not appear that all the reasons given by Page, J. were accepted by the appeal bench. C.C. Ghosh, J., who delivered the judgment, observed that the conflict of opinion noticed in the judgment of Page, J. was more apparent than real. "It is undoubtedly open," thus observed the learned Judge," to persons interested in the maintenance and worship of family idols to create additional endowments for the benefit of such idols. It is also undoubtedly open to such donors to lay down rules for the management of the subsequently endowed properties and to nominate the persons who should be the managers thereof. But such managers, although they may be described by the donor as Shebaits, do not become Shebaits of the family idols in the sense in which the Shebaits nominated by the original founder are, not do they become entitled to interfere in the management of the original endowed properties."

5.19. The question again came up for consideration before a Division Bench of the Calcutta High Court consisting of the same two Judges *to wit*

32 ILR 53 Cal 251.
33 45 CLJ 41.

Rankin, C.J. and C.C. Ghosh, J. in the case of *Ashutosh Seal* v *Benode Behary*,[34] In this case also there was a gift of certain additional property to the family deity by a Shebait with a condition attached to it which varied the line of Shebaits laid down by the founder. The Subordinate Judge who heard the suit, relying on the decision Page, J. in *Lalit* v *Brojendra*[35] held that the gift which was an accretion to an existing foundation was quite valid, and was not in any way affected by the condition relating to appointment of new Shebaits which was void in law. This decision was reversed in appeal and Rankin C.J. who delivered the judgment proceeded upon a ground which was quite different from that adopted in the earlier decision to which also he was a party. The learned Chief Justice pointed out that the true principle to be applied to a case like this is not to uphold the gift and discard the condition attached to it as bad in law. The provisions regarding the devolution of the office of the Shebait which was incorporated in the additional gift, was in His Lordship's opinion, not as unessential or superadded direction by which the gift was not affected as by a term or qualification; such conditions cannot also be regarded as conditions subsequent which are void for impossibility, but rather constitute a part of the very texture of the donor's gift. The true principle according to the Chief Justice which would serve as a guide to the decision of such cases is that enunciated by the Judicial Committee in *Goswami* v *Romanlalji*.[36] The provision relating to Shebaits, being an essential condition attached to the additional gift, the idol, or those who are entitled to speak for it on earth, would be put to election and would have to choose whether the gift together with the condition attached to it should be accepted or not. The representatives of the idol if they so choose might reject the gift, but if they decide to accept the gift the condition attached to it must be observed. They cannot have the gift and at the same time repudiate the condition. This decision may thus be regarded as setting the law on the point. Ordinarily two questions arise for decision in the cases of this description: (1) whether the appointment of a new line of Shebaits is a condition attached to the additional grant and (2) if so, whether the deity or his representatives elected to accept or reject the gift. If acceptance is proved the condition must be obeyed. In this case it is further pointed out that a Shebait making additions to an existing foundation cannot himself accept the gift with the condition attached to it, even if it be for the benefit of the idol. It is the will of the idol which is to decide the matter. The question then arises, how is the will of the deity to be expressed. The deity can express its desire only through human agents, and obviously it is the Shebait who is entitled to speak on its behalf on earth. If the Shebait for the time being is himself the donor, the will of the deity should be expressed through all

34 34 CWN 177.
35 ILR 53 Cal 251.
36 LR 16 IA 137.

those who are interested in the worship of the idol, and in the case of family Debutter they would include all members of the family, male and female.[37] Election need not be express, it may be implied also. If it is proved that for many years the deity enjoyed the rents and profits of the additional properties, and treated them as part of the original endowment, a presumption may arise that it has elected to accept the gift.

5.20. As has been said already, if no condition is attached to an additional contribution to the Debutter estate, by way of alteration of the existing line of shebaits, the additional gift simply becomes an accretion to the existing Debutter, and its management would vest in the Shebaits of the original endowment. In *Raisundary* v *Benode Behary*[38] it was held that this was not an absolute rule, and the question would have to be decided with reference to the facts of each case. In this case there was division of the turn of worship amongst two branches of the founder's family according to which one branch was to worship for 19 days every month and the other for 11 days. This arrangement continued for many years and then the head of one branch made a will by which he directed that on certain eventuality, all his properties should be devoted to the worship of the idol. It was held that the intention of the testator was not to make a general and absolute gift in favour of the idols, but to direct the application of his properties to the carrying on of his own turn of worship and consequently succession to the management of the additional properties would follow the line of the heirs of the dedicator.

It is difficult to support this decision on the principles discussed above, which seem to be quite well settled. The testator here did not attach any condition to the gift he made, by way of directing that the management with regard to the additional properties would remain in his own line, and consequently no question of election arose. The shebaiti right again vests in law in the whole body of Shebaits, even though for purpose of convenience a division of the turns of worship is permissible. The contribution made by the testator in this case should have been treated as an accretion to and part of the original endowment, and the turns of worship agreed to with regard to the original endowment ought to have been extended to it. It was accordingly held in *Indol Baldauji* v *Medh Rajput Association,*[39] that properties granted to an existing religious institution could only be regarded as an accretion to the original foundation, that the grantors did not acquire any right of shebaitship by reason of such grant and that the shebaitship must follow the line provided by the original founder.

37 Vide *Promotha* v *Pradyumna,* LR 52 IA 245; *Satya Dev* v *Behariji Maharj,* AIR 1980 All 220, 223.
38 39 CWN 1264.
39 AIR 1959 Madh Pra 330; *Satya Deb* v *Behariji Maharaj,* AIR 1980 All 220, 224.

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III. DISABILITIES BASED ON SEX

5.21. Devolution of shebaitship. Disability of successor by reason of caste, sex, age or other disqualification.—As shebaitship is property, it devolves like any other property according to the ordinary Hindu law of inheritance. If it remains in the founder, it follows the line of founder's heirs; if it is disposed of absolutely in favour of a grantee, it devolves upon the heirs of the latter in the ordinary way and if for any reason the line appointed by the donor fails altogether, shebaitship reverts to the family of the founder.[40] In the matter of appointment of a Shebait, the discretion of the founder is unfettered. No Hindu would indeed think of appointing a person as manager of a temple who is a follower of different religion, but there is nothing in law which prevents him from appointing as a Shebait a person of different or inferior caste.

In Southern India, Sudras are managers of several public temples and it seems that there is no restriction regarding the appointment of a female. The question whether a person is incompetent to succeed to shebaitship by reason of sex, age or any other disqualification has come up for consideration before our courts on more occasions than one. So long as shebaitship was regarded as an office pure and simple, divergent opinions seem to have been expressed by the courts on these points. Now that shebaitship has been definitely held to be property, much of these discussions would have no more than academic value at present; and barring exceptional cases arising out of special customs or usages, we may take it that the right of management of an idol follows the same line of succession as any other private property.

5.22. Woman's right to succeed to shebaitship.—As succession to shebaitship is governed by the ordinary law of inheritance, it scarcely admits of any doubt that a woman can succeed to shebaitship. The Supreme Court of India has held that shebaitship is 'property' within the meaning of the Hindu Women's Right to Property Act; consequently, in a case to which the Act applies, the widow and the son of the last Shebait would succeed jointly to the shebaiti rights held by the latter. It has been held further that even if the expression 'property' in the Hindu Women's Right to Property Act is to be interpreted as meaning property in its common or accepted sense and is not to be extended to any special type of property which 'shebaitship' admittedly is, as succession to shebaitship follows succession to ordinary secular property the general law of succession under Hindu Law to the extent that it has been modified by the Hindu Women's Right to Property Act would also be attracted to devolution of shebaiti rights.[41]

40 See *Ashutosh* v *Binod* 34 CWN 177.
41 *Angurbala* v *Debabrata,* AIR 1951 SC 293.

In one of the very early cases on the point[42] which went up to the Privy Council, the right of a female heir to succeed to shebaitship of an idol was disputed. The endowment in that case was a private one, and Their Lordships of the Judicial Committee quoted the following passages from the judgment of the trial Judge with which they apparently agreed: "That the properties in question do not admit of any partition among the co-sharers is a fact which must be admitted by me; but I do not see any reason why a widow of the family should be incapacitated from superintending the service of the gods. It is not urged by the defendants that any such rule has been laid down in the family and that under it the widows have been excluded from the above superintendence; on the other hand, among the Hindus, persons belonging to no other caste except that of Brahmins can perform the service of a god, with his own hands, that is, worship the idol by touching its person. Men of other castes simply superintend the service of the gods and goddesses established by themselves, while they cause their actual worship to be performed by Brahmins. Thus, when persons of the above description can conduct the service of idols in the above-mentioned manner, why should not the widows of their family be able to carry on worship in a similar way?...."

In another case[43] decided by the Calcutta High Court, the matter, it seems, was approached from a different standpoint. There a female plaintiff laid claim to shebaitship of certain Debutter property as heir to her husband who was the last Shebait, and one of the questions raised was whether a woman could succeed to shebaiti rights. The learned Judges did not accept the view that females by reason of sex were excluded from succession to shebaitship, but they held nevertheless that having regard to the history of this particular endowment, the plaintiff could not prove affirmatively that succession to shebaitship in the past, was governed by ordinary Hindu Law. This decision was affirmed by the Judicial Committee[44] and their Lordships seem to have taken the view that succession to shebaitship would in the first instance depend upon the provisions made in the grant, and failing such directions of the grantor it would be regulated by usage. Unless therefore an usage was proved, according to which devolution of shebaitship would take place according to the ordinary rules of inheritance, these general rules would not apply. On the actual facts of the case the decision can probably be justified, but having regard to the subsequent development of law on the point it could not be stated as a broad proposition of law that the ordinary rules of inheritance would not govern succession to shebaitship unless a usage to that effect is proved to exist. The true view is that the ordinary rules would apply unless a usage to the contrary is established.

42 *Radhamohan* v *Jadoomonee*, 23 WR 369.
43 *Jankee* v *Gopal*, ILR 2 Cal 365.
44 LR 10 IA 32.

5.23. In *Kalipada* v *Palani Bala*[45] the nature of the estate taken by a widow when she succeeds to the office of shebaitship was considered in some detail. The facts were that one Haran who held a share in the office of a Shebait died leaving as his heir his widow, Rajlakshmi. She transferred the right of shebaitship to a stranger by a deed dated 7-11-1921. Shortly after her death which took place on 22-12-1943 the reversioners filed a suit for recovery of possession of the one-third share in the shebaiti right which had belonged to Haran. The contention of the defendant was that when Rajlakshmi inherited the office, she did not hold it with the limitations of a widow's estate under the Hindu law, that she had all the powers which a male Shebaiti would have in respect of the office and that as the alienation of shebaitship was illegal, the possession of the transferee was adverse from the date of the alienation and that the suit was barred by limitation. Rejecting this contention, B.K. Mukherjea, J. (as he then was) delivering the judgment of the court observed: "Whatever might be said about the office of a trustee, which carries no beneficial interest with it, shebaitship, as is now well settled, combines in it both the elements of office and property. As the shebaiti interest is heritable and follows the line of inheritance from the founder, obviously when the heir is a female, she must be deemed to have, what is known, as widow's estate in the shebaiti interest. Ordinarily there are two limitations upon a widow's estate. In the first place, her rights of alienation are restricted and in the second place, after her death the property goes not to her heirs but to the heirs of the last male owner. It is admitted that the second element is present in the case of succession to the rights of a female Shebait. As regards the first, it is quite true that regarding the powers of alienation, a female Shebait is restricted in the same manner as the male Shebait, but that is because there are certain limitations and restrictions attached to and inherent in the shebaiti right itself which exist irrespective of the fact whether the shebaitship vests in a male or female heir." It was further held that though the alienation of a religious office in favour of a stranger was void, as Rajlakshmi took only a widow's estate in the office, the possession of the alienee did not become adverse during her lifetime and that the suit accordingly in time.

5.24. It is a custom prevailing in many parts of India that even a Brahmin woman is not capable of performing certain religious rites associated with the worship of a deity. This disqualification by itself cannot stand in the way of her succeeding to shebaitship. A Shebait is not bound to worship the deity personally, and in cases where the founder or Shebait does not belong to the twice-born castes, the actual worship has always to be performed by employing a Brahmin priest. The position may however be different where the peculiar doctrines of a sect may preclude a woman married into a different sect from performing the duties of the temple or

45 1953 SCR 503.

religious institution belonging to the former sect. The disability in such cases arises not because the heir to the last Shebait is a woman but because she having been taken into another family by marriage is not competent to hold the office of the Shebait of the religious institution belonging to the family of her birth. This is illustrated by the decision of the Judicial Committee in *Mohanlalji* v *Gordhanlalji*.[46] This case arose out of a suit for establishment of a shebaiti right and for possession of a temple belonging to the Ballavacharya Gosains, founded by one Muttuji, the maternal grandfather of the plaintiff's appellants. The defendant respondent resisted the suit alleging that the ordinary Hindu law was not applicable, and that daughter's sons were excluded by custom. The contention of the defendant was given effect to, and it was held that the rule, that all the heirs of the founder succeed to shebaitship, as laid down in *Goswamee Sree Greedhareejee* v *Raman Laljee*[47] was, as there implied, subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. In the present case the plaintiffs being *Bhats* and not belonging to the *Gossain Kul* were not competent to be Shebaits of a Ballava temple where the rites were performed according to Ballava rules which the plaintiffs admittedly could not perform. To allow their claim would defeat the very purpose which the founder had in view in creating the endowment. Following this principle, in a recent case, the claim of a married daughter of the last Shebait to succeed to the office was dismissed on the ground that she had passed out of the family.[48] Subject to these exceptions which rather prove the rule, we may take it to be a settled doctrine that a woman is not disqualified by reason of her sex to succeed to the rights of Shebait of an idol according to Hindu law. When a woman succeeds as a Shebait she taken like a Hindu female heir a limited interest in the shebaiti right; in the sense that after her death, the next male heir of the last Shebait succeeds to the office.[49]

5.25. Can a woman succeed to a purely religious or priestly office? Degraded social position of Archakas amongst the Hindus.—The question has been raised in several cases[49a] whether a woman even though not disqualified to succeed to shebaitship can inherit a purely religious or priestly office to which emoluments might be attached. To public temples, particularly in Southern India, there are attached hereditary priests who are called Archakas, who hold grants of land of considerable value made in their favour by the founders. As was pointed out by Shesagiri Ayyer, J.

46 LR 40 IA 97.
47 LR 16 IA 137.
48 *Sankareswar* v *Bhagabaty,* AIR 1949 Pat 193.
49 *Anuragi* v *Paramanand,* AIR 1939 Pat 1.
49a For Supreme Cout decisions see para 5.27, *infra.*

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in *Annaya Tantri* v *Ammakka,*[50] Brahmins who perform worship of deity as hired priests in consideration of money given by another are considered to be degraded in Hindu society. Thus, the sage Satatapa says "A *vipra* (Brahmin) who performs *pooja* for the sake of money for a period of three years is known as the Devalaka; such a person becomes incompetent to participate in the usual *Havya* and *Kavya* rites enjoined on Brahmins."

"A *vipra* who, though he may be well versed in the four Vedas is desirous of getting money, and who performs the worship of the gods for the sake of another will be considered equal to a Chandala." As Archakas are thus looked down upon by the Hindu society, it was necessary for the founders to offer liberal grants of land and promises of other perquisites to induce them to accept the position of priests. These grants of land were intended and in most cases expressed to be from generation to generation. The question is whether a female descendant who by reason of her sex cannot perform the rites of worship herself could succeed to the office of the Archaka and claim the emoluments attached to the office.

5.26. In *Sundarambal* v *Yogavangurukkul*[1] it was held by Sadasiva Ayyer, J. to be a settled custom that females by reason of their sex are permanently disqualified from performing the duties of an *Archaka* in a *Saivite* temple. It was held further that she cannot inherit the office and enjoy the emoluments whilst at the same time delegating the duties to others.

The decision was overruled by a Full Bench of the Madras High Court in *Annaya Tantri* v *Ammakka,*[2] which arose out of a reference made by Shesagiri Ayyer and Napier, JJ., disagreeing with the views expressed in *Sundarambal* v *Yogavanagurukkul*[3] and it was held by a majority of the Judges (Sadasiva Ayyer, J. dissenting) that according to the practice and precedents obtaining in the Madras Presidency, a Hindu female is not incompetent by reason of her sex to succeed to the office of Archaka in a temple and to the emoluments attached thereto.

In the order of reference Shesagiri Ayyer, J. critically examined the reasons given by Sadasiva Ayyer, J. in favour of the view that female, who by custom was incapable of performing religious rites, should be held incompetent to inherit the religious office.

"It may be assumed," thus observed the learned Judge, "that the donors were not over-anxious to make hereditary grants to the donees' family without regard to the latter's capacity to perform religious worship; but the law would not have permitted them to stipulate that the property shall be enjoyed only by those competent to minister in the temple. They must have

50 ILR 41 Mad 886 (FB).
1 ILR 38 Mad 850.
2 ILR 41 Mad 886 (FB).
3 ILR 38 Mad 850.

trusted to chance to see the descendants of the donees carried on the good work for which their predecessors were given grants. Mr. Justice Sadasiva Ayyer asks why, if that must be presumed to have been the intention of the donor, should the inheritance go to persons who by themselves are incapable of discharging their duties. The answer is that courts and even legislatures must trust to the same chance which the founders calculated upon when they endowed the Archaka office. What reason have courts for holding that reversioner would be a more welcome minister of religion that the Gumasta employed by a widow to perform the services? It would be an ideal to be sought after if the community interested in temple worship were to be permitted to select on the death of an Archaka, a person competent to fill his place. Even in this view, there is no guarantee that a nominee of the community would be a better Archaka than the proxy of the widow..... Under such circumstances, there cannot be much room for doubt that society would prefer that the secular rights with the obligations to do or get done the spiritual duties should vest in the line of heirs to whom private property would descent."

Wallis, C.J. who presided over the Full Bench, based his judgment mainly on usage relating to the Archakas as it prevails in the Madras Presidency. "It is not disputed," thus observes the learned Chief Justice, "that in this part of India the user in the case of temple *Archakas* is that the office is hereditary and descends in the ordinary course of succession to women who are not themselves competent to perform the duties of the office by ministering in the temple and perform them by deputy.... We should not in my opinion by justified in overruling... the numerous decisions of this court in which the usage has been recognised and enforced, unless its mischievous character had been established beyond all doubt or controversy." This view can be said to be the accepted view in all courts in India. As a matter of fact there is no decided authority earlier than *Sundarambal* v *Yogavangurukkul*[4] where it has been held that a female is not entitled to inherit a priestly office and its emoluments. The weight of authorities is obviously in favour of giving females the right to hold religious office.[5] It should be noted that even according to Sadasiva Ayyer, J. a woman would not be incapacitated from succeeding to shebaitship which involves no performance of religious duties by the Shebait personally.

5.27. The right of a female heir to succeed to a religious office has since been considered by the Supreme Court in *Raj Kali Kuer* v *Ram Rattan.*[6] In that case a widow claimed to succeed to the office of Pujari as heir to her husband. The court, while observing that it was well established that women were under incapacity to discharge in person the duties

4 ILR 38 Mad 850.
5 See in this connexion *Mahamaya* v *Haridas,* ILR 42 Cal 455.
6 *Raj Kali Kuer* v *Ram Rattan,* 1955 (2) SCR 186.

of a Pujari, held that there was no reason why they should not get them performed through a deputy. It was accordingly held, on a review of the authorities, that the widow was entitled to succeed to the office of a Pujari and share in the emoluments after getting the services performed by a deputy.

IV. Other Disabilities

5.28. Other disqualifications regarding succession to shebaitship.— As regards other disqualifications which would incapacitate a person from inheriting shebaiti right, it may be stated generally that those physical and mental defects which exclude a person from inheritance under the ordinary Hindu law would exclude the right to succeed to shebaitship as well. It would be necessary therefore that these grounds exclusion should exist at the time when the succession opens. A subsequent disqualification would not occasion forfeiture of rights already acquired.[7]

Under Hindu law persons who are born blind, deaf or dumb or are devoid of any limb or organ cannot inherit any property. Lunacy to be a ground of exclusion need not be congenital; it is enough if it existed at the time when the succession opened. Leprosy also excludes a man from inheritance provided it is of a virulent or incurable type.[8]

An unchaste wife cannot succeed to her husband's estate, but once the estate has vested in her—which could only be if she was chaste at the time of her husband's death—it cannot be divested by her subsequent unchastity.[9] Under the Dayabhag law not only the wife but all other female heirs must be chaste to entitle them to succeed to the property of a male. Under Mitakshara, the disability attaches to the wife alone.[10]

All these rules would be applicable to devolution of shebaiti right. A person therefore who was of sound mind when shebaitship devolved upon him would not forfeit his rights by subsequently becoming insane.[11] In *Vidyapurna* v *Vidyanidhi*[12] the question arose whether the Mohant of a religious institution would cease to be a Mohant by reason of his subsequently becoming a lunatic. The plaintiff in that case claimed the headship of a "Mutt" by virtue of an appointment made by a certain authority, on the previous Mohant having been adjudged a lunatic. If the lunacy of the Mohant was a ground of forfeiture of his rights, the plaintiff would succeed in the suit assuming that the person who appointed him had the requisite

7 Vide *Nirmal* v *Jyoti Prosad,* 45 CWN 709.
8 Mulla's *Hindu Law,* 11th Ed. p. 103.
9 Mulla's *Hindu Law,* 11th Ed. p. 101 sec. 96; *Moniram* v *Kolitani,* ILR 5 Cal 776; LR IA 115.
10 Mulla's *Hindu Law,* page 101, sec. 96.
11 *Nirmal* v *Jyoti Prosad,* 45 CWN 709.
12 ILR 27 Mad 435.

authority to do so; but if on the other hand there was no vacancy on account of the lunacy of the Mohant the plaintiff's suit would fail. The trial court held that there was no vacancy by reason of the lunacy of the Mohant and the decision was upheld on appeal by the Madras High Court. The two learned Judges who heard the appeal delivered two separate but concurring judgments in which they elaborately discussed the legal position of the head of a "mutt." For our present purpose, these discussions are not material, but it would be useful to quote the following passages from the judgment of Bhashyam Ayyangar, J. where the learned Judge gives his reasons as to why unlike trustees, a new Mohant cannot be appointed when the existing Mohant became incapable of acting by reason of unsoundness of mind. "I am, however, of opinion," thus observes the learned Judge "that the head of a Mutt as such is not a trustee in the sense in which that term is generally understood in the law of trusts, and the decision of the question under consideration cannot therefore properly be governed by the principles regulating the appointment of new trustees or by analogies derived therefrom. I may also add that in the case of hereditary trustees in India and other trustees having a beneficial interest in the trust property, the principles of the English law of trusts—embodied in the Indian Trusts Act—as to the appointment of new trustees, when a trustees becomes incapable of acting by reason of unsoundness of mind are inapplicable." This reasoning, if I may say so, is perfectly sound, but it is somewhat curious that the learned Judge while holding that Mohant does not forfeit his rights by reason of lunacy made a distinction in the case of *Dharmakarta* or manager of an idol, and expressed the opinion that the *Dharmakarta* of a temple would lose his rights in case of lunacy. According to the learned Judge the reason for this distinction is that in the case of temple the ideal person is the idol itself while in the case of Mutt the ideal person is the office of the spiritual teacher which has the same legal status as a corporation sole in English law. A Mohant is not a mere trustee, he has an estate for life in the permanent endowments of the Mutt, and an absolute property in the offerings. It is presence of this personal interest which would distinguish him from a mere trustee under the English law who would lose his office the moment he is found incapable of discharging his duties. So far as the Dharmakarta of a temple is concerned, the learned Judge observes that he is a mere custodian of the property which vests absolutely in the deity, and as he has no beneficial interest in the endowment his incapacity to perform his duties should work forfeiture of his rights. This expression of opinion is undoubtedly an *obiter* as no question arose in the case as to whether a Dharmakarta would lose his rights if he subsequently became insane, and the actual decision is certainly right to which no exception can be taken. Still it must be pointed out that the opinion expressed by the eminent Judges regarding the legal position of a Dharmakarta cannot be supported in view of the subsequent pronouncement of the Judicial Committee in

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Vidyavaruthi v *Balusami.*[13] As the law has been laid down by the Judicial Committee, the Mohant of a Mutt as well as the Shebait or Dharmakarta of a temple, are both managers and not trustees in the English sense, and the ideal person in which the endowed property is vested is the institution itself in one case, and the idol in the other. Then again both the Mohant and the Shebait have personal interest in the endowed property which depends on usage or terms of the grant. It is this personal interest which certainly distinguishes a Mohant from a mere office-holder, but this personal interest is present in the case of a Shebait as well, and that is why shebaitship has been held to be property. A Division Bench of the Calcutta High Court has now held on a review of all authorities that a Shebait does not forfeit his rights by reason of his subsequently becoming a lunatic.[14] But if a Shebait becomes a lunatic or is otherwise incapable of doing his duties, who is to exercise his functions so long as his disability lasts? The answer has been given by Bhasyam Ayyanger, J. in the case referred to above.[14a] The learned Judge points out that in such cases the proper course for the purpose of securing the due discharge of the spiritual functions of the office, and the management and preservation of the endowment and its income is to provide a suitable agency for the purpose. The learned Judge is of further opinion that when a court of law has already appointed a manager of the lunatic, that manager might take charge of the endowed property on behalf of the lunatic and provide for conduct of necessary worship and religious ceremonies of the institution by appointing persons duly qualified for the purpose.

5.29. Shebaitship and change of religion.—Does a change of religion operate as a disqualification in the matter of succession to shebaiti right? Under the old Hindu law apostasy was certainly a disqualification in the heir and excluded him from inheritance. This was removed by Act XXI of 1856, and with regard to ordinary property the fact that a Hindu has become a convert to some other religion does not entail forfeiture of his heritable rights. The question is whether the same principles should apply to devolution of shebaitship as well. Obviously the secular duties of a Shebait can be performed even by a Christian or a Mahommedan, and as regards spiritual duties the Hindu law allows the Shebait to perform them through a proxy or substitute. But even then in the matter of carrying on the worship of a deity, the intentions of the founder have got to be given effect to as far as practicable. A pious Hindu when he establishes a deity cannot possibly conceive of its sheba and puja being carried on under the supervision of a non-Hindu. Usages do exist in almost all Hindu religious institutions and if succession of a non-Hindu Shebait is contrary to such

13 LR 48 IA 302.

14 *Nirmal* v *Jyoti Prosad,* 45 CWN 709.

14a *Vidyapurna* v *Vidyanidhi,* ILR 27 Mad 435.

usage, it cannot certainly be allowed.[15] But when a successor is a Hindu, the mere fact that he belongs to the Aryasamaj and does not believe in idol worship is not material. It is enough if the rites are performed by a duly qualified person.[16]

5.30. Shebait's right of nominating his successor.—The founder of an endowment can always confer upon a Shebait appointed by him the right of nominating his successor. Without such authority expressly given to him, no Shebait can appoint a successor to succeed to him in his office. The power of nomination can be exercised by the Shebait either during his lifetime or by a will, but he cannot transfer the right of exercising this power to another person.[17]

5.31. Extinction of the line of Shebaits.—When the line of Shebaits laid down by the founder is extinct, or when the Shebait to whom a power of nomination is given does not exercise the power, the managership reverts to the founder who endowed the property or his heirs.[18]

In case the line of Shebaits is extinct, there is always an ultimate reversion to the founder or his heirs, and strictly speaking, no escheat arises so far as the devolution of Shebaitship is concerned. But cases may theoretically be concerned where the founder also has left no heirs; and in such cases the founder's properties may escheat to the State together with the endowed property. In very rare circumstances like these, the right of the State would possibly be the same as those of the founder himself, and it would be for the State to appoint a Shebait for the Debutter property. It cannot be said that the State receiving a dedicated property by escheat can put an end to the trust and treat it as secular property.

Some observations occur in the judgment of Muthuswami Ayyar and Shephard, JJ. in *Millan* v *Purusothoma,*[19] which would seem to suggest that the Government getting the property by right of escheat can put an end to an arrangement made by the original owners under which a certain property was kept undivided for being used for the worship of a deity. There is, however, no finding in this case that the property was actually dedicated to the deity, and from observations of the High Court it appears that there was only a personal arrangement between the co-sharers under which it was excluded from partition.

15 See in this connection *Venkatachalapati* v *Subbarayadu,* ILR 13 Mad 293.
16 *Issur Radhakanta* v *Khettra Ghosh,* AIR 1949 Cal 253.
17 *Rup Narain* v *Junko,* 3 CLR 112.
18 *Sabitri Thakurani* v *F.A. Savi,* ILR 12 Pat 359; *Jagannath* v *Ranjit Singh,* IIR 25 Cal 354.
19 *Mallan* v *Purusothoma,* ILR 12 Mad 287, 291.

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V. TRANSFER OF OFFICE—GENERAL OBSERVATIONS

5.32. Shebaiti right not alienable in law.—Although Shebaiti right is heritable like any other property, it lacks the other incident of proprietary right, viz., the character of being freely transferable by the person in whom it is vested. The reason is that the personal proprietary interest which the Shebait has got is ancillary to, and inseparable from, his duties as a ministrant of the deity, and a manager of its temporalities. As the personal interest cannot be detached from the duties, the transfer of Shebaitship would mean delegation of the duties of the transferor—which would not only be contrary to the express intentions of the founder, but would also contravene the very policy of law. A transfer of Shebaitship or, for the matter of that, of any religious office has nowhere been countenanced by Hindu lawyers.

5.33. The leading pronouncement on this point is the decision of the Judicial Committee in *Rajah Vurmah* v *Ravi Vurmah.*[20] In that case, the appellant Rajah claimed the *uraima* right of the Tracharmana Pagoda and its subordinate chetroms under an assignment from the four *urallers* of that religious foundation. The assignment in question was dated the 10th of May 1868 and was executed by the four *urallers* in favour of the appellant. It recited that the Pagoda and its dependent institutions belonged to the *urallers* and the latter had incurred debts to the extent of Rs. 46,000. As the Rajah paid this sum of Rs. 46,000 for the satisfaction of these debts, and a further sum of Rs. 10,000 to the *urallers* personally, the latter transferred all their rights to the Rajah. The Rajah got possession of the landed properties, but could not get certain jewellery belonging to the Pagoda, the claim to which was resisted by the respondent. This led to the institution of the suit. It was held by the Judicial Committee in concurrence with the decision of the courts below that the suit must fail inasmuch as the assignment was void in law and could not create any rights in favour of the appellant. An assignment of a religious office, for the pecuniary benefit of the holder of the office, was held to be against public policy and contrary to the express intentions of the founder. Such transfer, it was pointed out, would amount to a delegation of delegated authority, and, being against public policy, could not be sanctioned on the footing of custom. This decision has been followed in numerous cases all over India and its propriety has never been questioned in any subsequent decision.

5.33A. Transfer of Shebaitship—Gift or will.—The principle found illustration in a Calcutta case,[20a] where it was held that the distinctive feature

20 *Rajah Vurmah* v *Ravi Vurmah,* (1877) ILR 1 Mad 235; 4 IA 76 (PC).

20a *Sm. Sovabati Dasi* v *Kashi Nath Dey,* AIR 1972 Cal 95, 100, 101, 102, paras 6, 9 and 11.

of a shebaiti right is that it cannot be absolutely alienable like other properties, inasmuch as it is an office enjoining certain religious and spiritual duties to be performed. At the same time, as there is an element of property also in the concept of a shebaiti right, the view that it cannot be transferred at all, cannot be accepted.

After a review of the case law, the limitations under which such transfer is permissible, were set out as follows:

(*a*) The transfer of shebaiti right is permissible if such transfer is not contrary to the intentions of the founder as expressed in the deed of endowment, unless an ancient or reasonable custom or usage has been followed to the contrary.

(*b*) Where there is perpetual or hereditary line of succession of shebaitship prescribed by the founder in his deed of endowment, a particular Shebait cannot change the line of succession by any deed of transfer unless the Shebait transfers the totality of his rights in favour of the succeeding Shebait or Shebaits during his lifetime.

(*c*) A transfer of a shebaiti right is also permissible for the benefit of the idol or the deity or for imperious necessity under special circumstances.

5.34. The same principle applies to lease and mortgage of a religious office.—It may be noted that in *Rajah Vurmah's* case, [20b] the transfer was by way of sale; the same principle, it is held, would be applicable when the transaction is by way of lease or mortgage. In *Ayancheri* v *Acholathil,*[21] there was a transfer of a right to manage a Malabar temple and its lands by way of lease for a sum of money, and the court pronounced the transaction to be illegal.

In *Lakshmana Swami* v *Rangamma,*[22] the holder of an office attached to a temple mortgaged his right to the office together with other property, and in a suit to enforce the mortgage a compromise was arrived at by the mortgagor, who agreed that his right to the office and its emoluments should be sold in satisfaction of the mortgage debt. A decree was passed in terms of the compromise; and when the decree was put into execution, objection was raised that the compromise being unlawful, a decree based on the same was incapable of execution. This contention was upheld and the High Court dismissed the application for execution on the ground that the decree was a nullity, being passed by the court without jurisdiction. The propriety of this decision is open to doubt.

It seems plain that the court which recorded the compromise and passed a decree on the basis of the same had jurisdiction to decide whether the compromise was lawful or not. If it erred in its decision the proper course

20b *Rajah Vurmah* v *Ravi Vurmah,* para 5.33, *supra.*
21 *Ayancheri* v *Acholathil,* ILR 5 Mad 89.
22 *Lakshmana Swami* v *Rangamma,* ILR 26 Mad 31.

for the aggrieved party was to challenge it by way of appeal. The executing court had clearly no jurisdiction to go behind the decree. It will be noticed that this comment does not disturb the validity of the proposition of law that a compromise which directs the sale of a religious office should not be sanctioned by a court.

5.35. A compromise which directs alienation of religious office is unlawful and cannot be recorded.—In *Sundarambal* v *Yoganvanagurukkul*[23] there was a suit instituted in respect of half share in the *Archaka* right of a Siva temple; pending the suit the parties entered into a compromise by which one of the parties alienated, for a pecuniary benefit, a portion of his right to the office in favour of the other party (who was a female) and the latter applied to the High Court to pass a decree in accordance with the compromise. It was held that the compromise was not lawful and no decree should be passed in accordance with it under Order 23, Rule 3, Civil Procedure Code. Sadasiva Ayyar, J. in course of his judgment reiterated the proposition of law enunciated by Their Lordships of the Judicial Committee that "an alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld even if a custom is set up sanctioning such alienation."

Where a purchaser of the shebaiti right got into possession of the office pursuant to the sale, it was held that as the transfer was void, his possession was adverse to the Shebait, and that having been in possession for the statutory period, he acquired a right to the office itself by prescription.[24] It was held in *Bansidhar* v *Upendra Mohan,*[25] that where the transfer was made by the founder who happened to be the first Mutawalli it was not void, but held good during the lifetime of the founder, and that the possession of the transferee became adverse to the persons entitled to the office under the original deed of settlement only after the lifetime of the founder. It is submitted that an alienation of the office of Shebait would be void, whether the alienating Shebait is the founder or some other person appointed by him.

5.36. Involuntary alienation of shebaiti right is invalid.—In *Srimati Malika Dasi* v *Ratanmoni,*[26] a Shebait mortgaged his *Pala* or turn of worship in favour of a stranger. In a suit to enforce the mortgage it was held that the mortgage was illegal and the mortgagor was not precluded from raising the question by way of defence in the suit. If private alienation of religious office is bad, involuntary alienation must be regarded as still worse. This has been held from very early time by the Calcutta High Court.[27] The

23 ILR 38 Mad 850.
24 *Bala Krishan Kar* v *Ganesh Prasad,* ILR (1952) Cuttack 81.
25 ILR (1952) 31 Pat 382.
26 1 CWN 493.
27 *Jaggannath* v *Krishan Pershad,* 7 WR 266; *Dabo Misser* v *Srinibash,* 5 BLR 617; *Kali Charan* v *Bangshi Mohan,* 6 BLR 727.

main reason put forward is that the purchaser of the rights of the Shebait may be of different religion and may not be competent or disposed to perform the services, and thus the object of the endower in creating the endowment may be defeated and rendered null and void.

VI. Transfer of office—Exceptions

5.37. Exceptions to the general rule against alienation of shebaiti right.—Though the general proposition laid down in the case referred to above has never been disputed, yet there are decisions of different High Courts in India in which the rule against alienation of shebaiti right has been relaxed to some extent by reason of certain special circumstances. For instance, alienation in favour of next shebait or one in favour of the heir of the transferor, or in his line of succession, or in favour of a co-shebait particularly when it is not against the presumed intention of the founder has been held to be valid in several decisions.[27a] The circumstances in which rule against alienation of shebaiti right has been relaxed may be conveniently grouped under three heads: (1) Where the transfer is not for any pecuniary benefit, and the transferee is the next heir of the transferor or stands in the line of succession of shebaits and suffers from no disqualification regarding the performance of the duties. (2) When the transfer is made in the interests of the deity itself and to meet some pressing necessity. (3) When a valid custom is proved sanctioning alienation of shebaiti right within a limited circle of purchasers, who are actual or potential shebaits of the deity or otherwise connected with the family. I propose to take up these three things one after another.

5.38. Alienation in favour of next Shebait or one in the line of succession or to a co-shebait.—On the first point, there seems to be some divergence of judicial opinion. The Bombay High Court has definitely decided that an alienation of shebaiti right is valid if the alienee stands in the line of succession of Shebaits and is not disqualified to discharge the duties.

The leading decision on this point is that in *Mancharan* v *Pransankar*[28] where reliance was placed on an earlier decision of the same High Court in *Sitaram Bhat* v *Sitaram.*[29] In *Mancharan* v *Pransankar*[30] the alienation was of the right to worship a goddess and receive a share of the offerings by the holder of the office to his sister's son, who was in the line of succession. The alienation was upheld. Mr. Justice Melville in delivering judgment points out that two considerations which are urged against the validity of

27a *Profulla Chorone* v *Satya Choron,* AIR 1979 SC 1682 at p. 1687.
28 ILR 6 Bom 298.
29 6 Bom HCR 250.
30 ILR 6 Bom 298.

such alienation are: (1) that such transfer is against the presumed intention of the founder, and (2) that the alienee might be a person unwilling or incompetent to perform the spiritual services. Neither of these grounds apply when the transferee is in the line of succession of Shebaits and suffers from no disqualification regarding the performance of the duties. In the earlier case of *Sitaram Bhat* v *Sitaram Ganesh*[31] the transfer was to the grandchildren of the holder of the office, who were eventually to succeed to the transferor as his heirs, and the grandfather did not really do more than relinquish his interests in their favour. There was also evidence of previous dealings with the office of a similar character which was relied upon as indication of an usage justifying the alienation. The view of the Bombay High Court as laid down in *Mancharan's* case has not been accepted in its entirety by other High Courts in India.

Apart from any question of custom the Madras High Court recognises only one exception to the rule against alienation of religious office, and that is where the transferee is the sole and immediate successor of the holder of the office who makes the transfer. In *Kuppa Gurakal* v *Dorasami,*[32] there was sale of religious office to a person who was not in the line of office, but was otherwise qualified to perform its duties. This was held to be invalid. "It is argued," so runs the judgment, "that in the present case the alienee is of the same caste and sect as the family of the alienor, and that no objection as to fitness to perform the worship exists in this case. But we are not disposed to hold that this of itself will validate such an election. To hold so would lead to public mischief in inducing needy incumbents of hereditary offices who desired to sell them to give a dishonest recognition to qualifications, which, in fact, were not the qualifications demanded by the nature of the office."

In *Narayayana* v *Ranga,*[33] the office of a pujari was hereditary in the plaintiff's family, the last incumbent being the plaintiff's uncle. In 1880, he transferred the office to plaintiff's father, in succession to whom the plaintiff claimed the right. The High Court called for a finding as to whether the plaintiff's father was the sole heir and next in succession to the last Shebait. The finding was that he was not the sole heir, and he had three other brothers who were the immediate heirs along with him. On this finding the court held that the transfer of the office to the plaintiff's father was invalid. "Unless the alienee is the sole heir," thus observed the court, "the alienor might be under the temptation to make the office the subject of bargain and thereby defeat the intentions of the founder." This view has been affirmed in subsequent cases, and the opinion of the Madras High Court definitely is that in the absence of a special usage, the alienation of

31 6 Bom HCR 250.
32 ILR 6 Mad 76.
33 ILR 15 Mad 183.

a religious office would not be valid, if made in favour of any person other than the sole and immediate heir of the transferor.[34]

5.39. So far as the Calcutta High Court is concerned, the decisions are not quite uniform, but the trend of authorities seems to be more in favour of the Madras doctrine than that of the Bombay High Court. In one of the earliest cases of the Calcutta High Court[35] one of the members of a joint Hindu family who was a joint Shebait of a deity transferred his turn of worship together with its emoluments to a person who was a stranger to the family but being a Brahmin was not incompetent to perform the services of an idol. The alienation was held to be invalid. "It is of the essence of a family endowment of the Hindus," thus observed the learned Judges, "that no stranger shall be permitted to intrude himself into the management of the endowment." The deed, it was said, could be valid during the lifetime of the assignor, as the latter was competent to carry on the worship so long as he was alive, through a proxy, but it could not be operative after his death. In *Gobind Kumar* v *Debendra K. Roy,*[36] the antealienation doctrine was applied in all its rigour and a Shebait was held incapable of transferring his rights even to a co-shebait or to one who was next in succession to the transferor. The point was considered again in *Nirod Mohini* v *Shibdas,*[37] where the owners of a turn of worship of an idol transferred the same to a co-shebait, the latter being on account of his place of residence and other advantages, better able to perform the *sheba* than the transferors. It was held that in view of the special circumstances of the case, viz. (1) that the alienation was not for pecuniary gain, (2) that it was in favour of a co-shebait who had more interest in the worship than anybody else; and (3) that the arrangement was clearly beneficial to the deity, the transaction could be upheld. The learned Judges in arriving at their decision relied upon the pronouncement of the Bombay High Court in *Mancharan* v *Pranshankar*[38] and certain observations occurring in *Khetra Chandra Ghosh* v *Haridas*[39] and *Rajeswar Mullick* v *Gopeswar Mullick.*[40] In course of his judgment in *Mahamaya* v *Haridas*[41] it was observed by Mookherjee, J. that "there is 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" and in connection with it the learned Judge referred among others to the cases of

34 *Muthu Kumar Shami* v *Sabbraya,* AIR 1931 Mad 505.
35 *Ukoor Das* v *Chander Sekhar Das*, 3 WR 152.
36 12 CWN 98.
37 ILR 36 Cal 975.
38 ILR 6 Bom 298.
39 ILR 17 Cal 557.
40 12 CWN 323.
41 ILR 42 Cal 455.

Mancharan v *Pranshankar*[42] and *Nirod Mohini* v *Shibdas*[43] referred to above. The observation could not have any higher authority than a mere *obiter,* as it was not necessary for decision of the case, where the point for consideration was whether a custom for transfer of *Palas* of the Kalighat temple within a limited market was established by evidence and if established was valid in law. In *Mancharan* v *Pranshankar*[44] no question of custom was raised and the point for decision was whether under the general rules of Hindu law, there could be a transfer of religious office in favour of one who stood in the line of succession of the holder of the office. It is to be noticed that in the subsequent case of *Radharani* v *Doyal*[45] the observations of Mr. Justice Mookherjee point to the conclusion that the alienation of shebaitship in favour of one who stands in the line of Shebaits can be supported only on the footing of a custom. Strictly speaking, there is no specific authority of the Calcutta High Court, where apart from any custom, a transfer of shebaitship to one in the line of Shebait has been held to be valid.[46] Of course when the transferee is the sole and immediate heir of the transferor, the transfer can be looked upon as a surrender of the office in favour of the next heir, and such surrender does not offend either against the presumed intentions of the founder or the general policy of Hindu law. A Shebait like a trustee cannot delegate his duties to another person, but he is not bound to accept his office, and if he renounces his duties which he always can, then even if the renunciation be in the form of a transfer in favour of the next heir, it can be held valid in law. This is the view of the Madras High Court, and this is exactly the view taken by Mr. Justice Page in *Nagendra Nath* v *Rabindra.*[47] A transfer by one Shebait to the remaining Shebaits may also be justified on the same principle. A transfer by one of the Shebaits of his rights in favour of the grantor can scarcely be supported and has been expressly held to be invalid in a Bombay case.[44] It has been pointed out by the learned Judges in that case, that if any one of the Shebaits intends to get rid of his duties, the proper thing for him to do would be to surrender his office in favour of the remaining Shebaits. When the transfer is in favour of the remaining Shebaits, or the sole and immediate heir of the transferor, it can safely be said that no policy of Hindu law is likely to be affected, nor can such transaction be held to be against the presumed intentions of the founder. This view of the Bombay High Court has been approved by the Supreme Court in *Profulla Chorone's* case.[48a] Within these limits therefore the alienation of a religious office can be legally permitted.

42 ILR 6 Bom 298.
43 ILR 36 Cal 975.
44 ILR 6 Bom 298.
45 33 CLJ 141.
46 See the cases reviewed in *Baneswar* v *Anath,* AIR 1951 Cal 490.
47 ILR 53 Cal 132.
48 *Raghu Nath* v *Purnanand,* ILR 47 Bom 529.
48a AIR 1979 SC 1682 at 1687.

It goes without saying that whatever the form of transfer may be, it cannot be by will, for nothing which the Shebait has, can pass by his will which operates only at his death.[49]

5.40. Alienation on grounds of necessity or benefit to the deity.—The doctrine that alienation of shebaitship can be upheld if it is justified by necessity or the deity is benefited by such transfer is sought to be supported on the basis of certain decisions of the Calcutta High Court. A careful examination of the cases however shows that they are of doubtful authority, and are to a great extent based upon misconstruction of certain pronouncements of the Judicial Committee.

The earliest Calcutta case where the doctrine of benefit to the deity was assigned as a ground in support of alienation of shebaiti right is that of *Khettra Chandra Ghosh* v *Hari Das.*[50] The facts of this case are rather peculiar. It was a case of private or family endowment, and the Ghoshes who were the Shebaits of the deity made over the idol together with the endowed property to the plaintiff's predecessors, the reason being that the Ghoshes were unable to carry on the worship of the idol with the income of the Debutter, and the plaintiff's predecessors were willing and able to take charge of the deity and its worship. The question was whether the plaintiff's predecessors acquired a valid right to the endowment. The question was answered in the affirmative by the courts below, and the High Court in second appeal agreed with that decision and dismissed the appeal. Banerjee J. in delivering judgment pointed out first of all that although sale of an idol was prohibited in Hindu law, a gift was not. That question however was held to be immaterial, and the learned Judge held the transfer to be valid mainly on the ground that the arrangement was for the benefit of the idol. He relied upon the decision of the Judicial Committee in *Prosonna Kumari* v *Golap Chand*[1] where Their Lordships enunciated the proposition of law that a Shebait 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. Reliance was also placed upon the observation of the Judicial Committee in *Doorga Nath* v *Ram Chandra*[2] that in the case of land dedicated to a family idol the consensus of the whole family might give the estate another direction." "If that is so" thus observes Banerjee, J. "we see no sufficient reasons why the arrangement made in this case in 1254 by the Shebaits who were all the members of the Ghosh family, for the purpose of preserving the property of idol, and preventing the discontinuance of its worship should not be held to be valid."

49 *Rajeswar* v *Gopeswar,* ILR 35 Cal 226.
50 ILR 17 Cal 557.
1 14 BLR 450; LR 2 IA 145.
2 ILR 2 Cal 341.

5.41. At the time when the case was decided, the observation of the Judicial Committee in *Doorga Nath* v *Ram Chandra*[3] was supposed to be an authoritative statement of law, whereas, it is scarcely disputed now that it cannot rank higher than a mere *obiter*. At any rate, the decision of Banerjee, J. if it can be supported at all, can be supported only on the ground that the consensus of all the members of the family gave the endowment, not a secular, but a different turn. One must say however that the decision in *Prosonna Kumari* v *Golap Chand*[4] was thoroughly misapplied. As has been pointed out by Page, J. in the subsequent case of *Nagendra Nath* v *Rabindra,*[5] the rule of necessity formulated in a series of decisions of the Judicial Committee extends only to an alienation of the temporalities of the idol. It does not and cannot apply to an alienation of the spiritual rights and duties, the fulfilment of which is the primary function of the Shebait. In the words of Page, J. the doctrine is "a hearsay which has crept into the Hindu Law" and ought to be exposed and eradicated. The next authority where the doctrine of necessity or benefit to the deity seems to have been adverted to, is the case of *Rajeswar* v *Gopeswar*[6] which was decided by a Bench of three Judges consisting of Maclean, C.J., Mitter and Woodroff, JJ. The actual decision in the case was that a hereditary Shebait cannot alienate his office by will, and Maclean, C.J. in course of his judgment disapproved of the law laid down in *Mancharan* v *Pranshankar.*[7] The learned Chief Justice stressed the distinction between a will and a transfer *inter vivos,* and pointed out that there was no interest in the Shebait which could pass by will. Mitter, J. agreed with this view and further observed in his judgment that a Shebait has no power of alienation except for necessity or benefit to the Thakur, and no such necessity or benefit was proved in the case. Neither the Chief Justice nor Mr. Justice Woodroff touched this point at all. As the judgment of Mitter, J. is extremely short, and no reference was made to any of the decided authorities, it is difficult to say what exactly the learned Judge had in mind. It may be that he too overlooked the distinction between the temporalities of the idol and the spiritual office and its duties; at any rate as the decision of the court was not based on that ground, not much value could be attached to the incidental observation of one of the learned judges comprising the Bench. This decision of Mitter, J. was referred to and relied upon in *Nirod Mohini* v *Shibdas,*[8] which I have discussed already. The facts of that case are somewhat different; there the alienation of shebaitship was made in favour of a co-shebait who was better able to perform the *sheba* than the transferors themselves. The learned Judges, it seems, where greatly influenced by the

3 ILR 2 Cal 341.
4 14 BLR 450; LR 2 IA 145.
5 ILR 53 Cal 132.
6 ILR 35 Cal 226.
7 ILR 6 Bom 298.
8 ILR 36 Cal 975.

decision of the Bombay High Court in *Mancharan* v *Pranshankar*[9] and benefit to the deity was put forward as a mere additional reason in support of this decision. As I have said already, the right view has been taken by Page, J. in *Nagendra Nath* v *Rabindra,*[10] that the entire doctrine of benefit to the deity as a justification for alienation of the office is based upon a misconception of some of the pronouncements of the Judicial Committee. Reference may be made in this connection to the case of *Nirmal Chandra Banerjee* v *Jyoti Prasad,*[11] where under somewhat peculiar circumstances the transfer of his rights by a Shebait was held to be valid. Under the terms of the endowment in this case the Shebait had the right to nominate his successor. He did nominate his successor and then relinquished his office taking some monetary help from the appointee who was left in charge of the Debutter. The learned Judges of the High Court held that the transfer was not by way of a sale and although the Shebait received pecuniary assistance from the appointee, that was not the consideration for the transfer. As in the circumstances of the case the appointment was conducive to the interest of the idol, it was held to be valid. The propriety of this decision is extremely doubtful. It is true that under the terms of the grant the Shebait was given the power of nominating his successor. That normally contemplates the nomination of a person who was to succeed to the office after his death. But even assuming that such nomination was permissible as a preliminary to the Shebait's contemplated retirement from office, the relinquishment of his office coupled with taking a substantial sum of money from the person appointed looks very much like the sale of the office. In my view, the question of the deity being benefited or not by this arrangement, does not appear to be at all relevant. These observations were relied on in *Biranchi Narayan* v *Biranchi Narayan,*[12] where it was held that a transfer of Marfatdari rights by one Marfatdar in favour of his co-Marfatdars was void if it was for consideration and that it was wholly irrelevant whether the transaction was for the benefit of the institution or not. In *Raghunath* v *Shyam Sundar,*[13] it was held that the transfer for consideration by a Shebait of his office was void and did not bar his son from claiming the same by right of succession. It was also held that the son who became the follower of a different sect was not disqualified for that reason from holding the office so long as he was a Hindu, unless there was a custom to the contrary. In *Narayanam Sheshacharyulu* v *Narayanam Venkatacharyulu,*[14] the question of the validity of a transfer by an Archaka of his office in favour of the other Archakas of the temple came up for consideration, and it was held that so long as it was gratuitous it would be valid, provided it

9 ILR 6 Bom 298.
10 ILR 53 Cal 132.
11 42 CWN 1138.
12 ILR 1953 Cut 508; *Bhikari* v *Madan Mohan Jiu,* AIR 1953 Orissa 73.
13 *Raghunath* v *Shyam Sundar,* AIR 1961 Orissa 157.
14 AIR 1957 Andh Pra 876.

was in favour of the remaining Archakas or those who were standing in the line of heirs, but that it would be bad if it was for consideration. On the authorities mentioned above, the transfer would be bad even if it was for no consideration, if it was not in favour of those next in the line of succession.

5.42. Alienation of shebaiti right on footing of custom.—The last question is whether a relaxation of the rule against alienation of shebaiti right is permissible on the footing of a custom. A valid custom, if it is proved to exist, would certainly override the rules of general law. In order that a custom may be valid, it must have all the four essential attributes laid down by Tindal, C.J. in *Tyson* v *Smith*[15] *to wit* first, it must be immemorial, secondly, it must be reasonable, thirdly, it must have continued without interruption since its origin, and lastly it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. As has been said above, the sale of a religious office to an outsider has been pronounced to be void altogether, and as it is opposed to public policy, no custom to the contrary could validate it in law. In other words, even if such custom has all the other attributes, it would lack the attribute of reasonableness, without which it could not be enforced in law.

In the case of *Mahamaya* v *Haridas*[16] the question of custom in respect to alienation of religious office was elaborately considered by the Calcutta High Court and Mookherjee, J. in course of his judgment explained what is meant by unreasonableness in regard to a custom. The mere fact that a custom is against the general law is not sufficient to condemn it as unreasonable since all customs involve some inconsistency with ordinary rules of law. The reason referred to in the rule, that a custom should be reasonable, is not, as the learned Judge explained, every unlearned man's reason but artificial and legal reason warranted by authority of law. In *Mahamaya* v *Haridas* the point in dispute was the transferability of *Palas* or turns of worship in the celebrated Kalighat temple. It was proved by evidence that during a period of 90 years at least, the *Palas* of Kalighat temple had been sold, mortgaged, leased and were the subject-matter of partition and devise, though in a limited market which those alone could enter who were qualified to become Shebaits by birth or by marriage. The time when the custom originated was not known. In these circumstances, it was held that the custom was valid in law, and could not be regarded as unreasonable. It was held in *Hemanta Kumar* v *Prafulla Kumar,*[17] following the decision in *Mahamaya* v *Haridas,* that a sale of *'Pala'* by a Shebait of the Kalighat temple in favour of a hereditary priest or *pujari* of the Goddess was valid as being within the scope of the custom recognised and affirmed in that decision.

15 9 Adx E 406.
16 ILR 42 Cal 455.
17 AIR 1957 Cal 685.

5.43. It is difficult to lay down any hard and fast rule regarding the validity of a particular custom with respect to alienation of religious office. Each case would have to be decided on its own merits. As a practical rule it can be stated that alienation of religious office can be justified on the footing of a custom, provided it does not offend against the policy of the Hindu law of endowment, and the alienation is confined to such persons who are either actual or potential Shebaits according to the scheme of the founder. In *Jogesh Chandra* v *Dhakeswari*[18] a custom was set up under which the Shebaits of a private temple could transfer their *Palas* or turns of worship to anybody subject to this restriction that the transferee must profess the Hindu religion and belong to one of the three higher castes. It was held by the Calcutta High Court that even if such a custom was proved, it was bad and unreasonable being prejudical to the interests of the deity, opposed to the presumed intention of the founder and embarrassing to good management of the properties of the endowment. A transfer of the right of management for consideration and in favour of a stranger can never be validated by custom.[19]

A question arose in a later case[20] whether the *Palas* of Kalighat temple which were saleable in a limited market could be attached under the provision of Order 38 Rules 5 and 6 of the Civil Procedure Code. The question was answered in the affirmative. Difficulties might undoubtedly arise if such *Palas* are put up to sale in execution of a Civil Court's decree. The bidders may not be the persons, in whose favour private alienation is allowed, and if the sale is restricted to bidders of a particular class only, other inconveniences may arise.[21] The proper course in such cases, I think, would be to follow the procedure indicated by the Judicial Committee in *Nawab Bahadur of Murshidabad* v *Karnani Industrial Bank Limited,*[22] and appoint a receiver in respect of the income of the Shebait with reference to the *Palas* held by him. Even when a property is not liable to be attached and sold by reason of any provision of law, a receiver can always be appointed to liquidate a decree from the profits of the property.[23]

VII. PARTITION

5.44. Partition of shebaiti right.—The only other point that requires consideration in this chapter is whether the rights and duties of the Shebait

18 45 CWN 809.
19 *Bhagawan* v *Narayan,* AIR 1946 Pat 27.
20 *Haridas Haldar* v *Charu Chandra,* 37 CWN 978.
21 Vide *Ram Saran* v *Iswar,* 17 Pat L Times 77.
22 LR 58 IA 215.
23 Vide *Monohar Singh* v *Hakim,* 150 IC 665.

are divisible when there are more Shebaits than one. The Shebaits like trustees must act jointly and when there are more than one Shebait the office vests in them collectively. *Prima facie* the office of a temple manager is neither alienable nor divisible, but customs have undoubtedly grown up in many places, which sanction such partition as can be had of such property by means of performance of the duties of the office and the enjoyment of emoluments by the different Shebaits in rotation. It must always be remembered that though some sort of division among the Shebaits *inter se* may be and are allowed on grounds of convenience, yet the Shebaits can only remain one body in the eye of law. The deity is represented by all of them acting together, and no one Shebait can be said to represent the idol in part or to possess any interest in any fractional share of the idol's property.[24]

5.45. Management by turns.—It is now settled by the decision of the Judicial Committee in *Ramanathan* v *Murugappa,*[25] that when the management can, without detriment to the trust, be held by turns, it is open to the Shebaits to agree to do so in such order as they think proper. If in order to avoid confusion, or any unseemly scramble, the parties interested arrange themselves for the due discharge of the functions belonging to the office, in turn or in some other settled order of sequence, there is no breach of trust in such an arrangement nor any improper delegation of the duties of a trustee.[25a]

The position, however, seems different if the Shebaits themselves cannot agree as to how their functions are to be divided, and the question arises in such cases, whether any one or more of them can, in the absence of an agreement, come to the court and pray for a partition of the shebaiti right. Certain old decisions of the Calcutta High Court are frequently referred to in this connection in support of the proposition that in such circumstances the court can pass a decree directing that the shebaiti right might be exercised in rotation by the different Shebaits.

In *Anandamoyi* v *Boykuntha,*[26] the question arose in regard to some joint place of worship and sacrifice. The judgment does not show whether there was a Debutter endowment proper or a dispute about the rights of the Shebaits. The court held that places of worship and sacrifice are indivisible, but that the parties, unless they agreed to a joint worship, might have the right of worshipping by turns, and this right was declared by the decree. In *Ram Sundar* v *Tarack Chandra,*[27] which is the next case in order of

24 See *Iswar Lakhi Durga* v *Surendera,* 45 CWN 665.
25 *Ramanathan* v *Murugappa,* (1916) LR 33 IA 139.
25a This passage as appearing in the 2nd Ed., pages 222-223, was referred to with approval in *Laxmidhar* v *Rangabah,* AIR 1967 Ori 90, 92.
26 *Anandamoyi* v *Boykuntha,* 8 WR 198.
27 *Ram Sundar* v *Tarack Chandra,* 19 WR 28.

time, the primary question for decision was the removal of an idol. The High Court agreed with the views of the court below that the idol could be removed by the plaintiff to his own house at Khatra, and to keep it there during his turn of worship. The High Court pointed out further that the court below, before making any declaration regarding the plaintiff's right or removal, should define the period during which the plaintiff was entitled to worship. In neither of these cases, did the question directly arise as to whether a joint Shebait was entitled as a matter of right to demand a division of the shebaiti right. In the third and the last of the series which is that of *Nittakanta* v *Neerunjan*[28] the point seems to have been raised and considered. The question was whether the right of worship of an idol could be made the subject-matter of partition. The question was answered in the affirmative and Couch, C.J. in course of his judgment observed as follows:—"We think that the reasons for which it has been held that one of several joint owners of a property is entitled to a partition, apply to this case. The circumstance that it is a right to perform the worship of the idol, is not one which deprived any of the joint owners of the right to a partition and compels the court to say that they shall be obliged to perform the services jointly and to undergo the many inconveniences which might arise from such a state of things." It was held that to entire the plaintiff to a division of the right of worship it was not necessary that there should be an agreement binding upon the parties that there should be this division. It was also not necessary that there should be quarrels and disputes between parties to justify the court in making a decree for partition. This was followed by the Bombay High Court in *Simba* v *Rama*[29] and it was held that a suit would lie in a civil court for declaration of the plaintiff's right to officiate in alternative years as priest in a temple and receive the offerings to the idol. All these cases were considered and discussed by the Allahabad High Court in *Sir Raman Lalji* v *Gopal Lalji.*[30] It was held that the right as joint trustees to the management and superintendence of worship at certain temples—when none of the trustees had any personal interest in the temples or the income thereof—could not be made the subject of partition by a civil court; that is to say, a civil court is not competent to grant a decree declaring that each of such trustees in rotation should for a definite period exercise exclusively the rights of management and superintendence. In the opinion of the learned Judges, if the managers have any personal interest in the management of the temple, and there is a question of shares in the emoluments, it might be said that there is a dispute as regards property and the civil court would be competent to direct division in such ways as it thinks proper. But where the trustees have no pecuniary interest in the

28 22 WR 437.
29 ILR 13 Bom 548.
30 ILR 19 All 428.

subject-matter of the trust, none of them can approach the court and ask for a mere partition of their duties; they must discharge their duties jointly as directed by the founder. This decision was followed by the same High Court in the subsequent case of *Puranmal* v *Brijlal.*[31]

You would remember that usually under the terms of the grant, or on the basis of custom the Shebaits or managers do enjoy a personal interest in the endowment. In the majority of cases therefore even according to the views of the Allahabad High Court, a division of the shebaitship could be demanded by one or more Shebaits. It is only in these exceptional cases where Shebaits have duties merely and no personal interest in the endowed property that the strict rule of the Allahabad High Court would apply.

31 ILR 39 All 651.

CHAPTER 6

ADMINISTRATION OF DEBUTTER: RIGHTS, DUTIES AND POWERS OF A SHEBAIT

I. SCOPE

6.1. Scope of the Chapter.—In the last lecture I have described the essential characteristics of a Shebait's right, the mode in which it devolves and the extent to which it is capable of being divided and alienated. I shall now discuss in detail the rights and duties of a Shebait in relation to the Debutter endowment; for, it is with the rights and obligations of the Shebait—his powers and disabilities—that the administration of the Debutter is inseparably connected.

The ideal personality of the deity, as already stated, is lined up with the natural personality of the Shebait, and it is through the agency of the latter that the Debutter estate is managed and the deity receives its services as provided by the founder. As the ingredients of both office and property are blended in the shebaiti right and a Shebait combines in himself a fiduciary position as well as that of the holder of an office or dignity, his rights and duties are, in a sense, mixed up together, and in fact, the rights which the Shebait enjoys are necessary, for the most part, to enable him to discharge his duties properly. In the language of Sadasiva Ayyar, J.[32] "it is the rights that are subordinate and appurtenant to the duties and it is not the duties that are subordinate and appurtenant to the rights."[32a] According to the decision in *Sridharji* v *Income Tax Officer*,[33] the word "trustee" in connection with a Shebait of a Hindu deity is used in the large sense in section 41(1) of the Income Tax Act, 1922, and therefore includes a Shebait of a Hindu deity.

6.2. Duties of a Shebait.—The duties of a Shebait are both spiritual and temporal. "Sheba" (Sanskrit word is सेवा) literally means service, and whenever an image is set up, a Shebait is necessary to render services to the deity. It is the paramount duty of the Shebait to take the image into

32 *Sunderambal* v *Yogavanagurukkul*, (1915) ILR 38 Mad 850.

32a The decision in *Sunderambal* v *Yogavanagurukkul* was overruled on another point in ILR 41 Mad 886.

33 *Sridhar Jiew* v *Income Tax Officer*, AIR 1966 Cal 494, 500, para 17.

his charge or custody; he must see that the idol is given a bath and fed, clothed and tended properly and that due provision for its worship is made.[34] When the Shebait is himself the Archaka, the pujas have also to be performed by him. Otherwise it is not necessary that the Shebait should conduct the worship himself; he can appoint a priest for the purpose; but the responsibility always is his to see that the religious ceremonies are properly performed. There are usages in certain religious establishments that the food (Bhog) that is offered to the deity must be cooked by persons belonging to particular families or by the head of the institution himself, and in some cases, particularly in public temples, none but persons affiliated to particular religious sects are entitled to touch, annoint or decorate the idol. When such usages exist, they would undoubtedly have to be observed scrupulously. It would appear[34a] that in the absence of such usages Shebaits are entitled to carry out their duties and manage the properties in such order as they think fit.

II. Rights of Shebaits

6.3. Custody of idol and the right of removal.—The custody of the idol is always in the Shebait. If the idol has no temple or residence of its own, it is for the Shebait to decide how it should be housed or located and the right of custody would normally carry with it the right of removal. When the idol has no fixed place of residence and there are a number of Shebaits who by mutual agreement are entitled to worship the deity by turns, any one of the Shebaits can remove the idol to his place of residence during his turn of worship provided he reconveys it to the place from which it was taken as soon as his period of worship expires.[35] If the deity has a residence of its own and there are more Shebaits than one, difficulty sometimes arises regarding the possession of the Thakur Bari. Neither the deity nor any place of worship is susceptible of partition.[36] In case of partition of the family property amongst the cosharers, the place of the deity should be kept undivided and possession of it may be given to the senior member of the family, liberty being given to the other members to have access to it for the purposes of worship.[37] In *Promotha* v *Pradyumna*,[38] the question arose as to whether one of the three brothers, who were joint Shebaits of an idol located in a house built by a previous Shebait, was entitled to remove the deity to his own house during his turn of worship. It was held by the Judicial Committee that the idol could not

34 *Nagendra* v *Rabindra*, 30 CWN 389, 396 (Page, J.).
34a *Jagannath Deb* v *Byomkesh*, AIR 1973 Cal 397.
35 *Ramsundar* v *Tarrack*, 19 WR 28.
36 Vide Manu, Ch. IX V 219.
37 *Damodar Das* v *Uttamram*, ILR 17 Bom 271.
38 LR 52 IA 245.

be treated as a chattel and with regard to location the will of the idol expressed through its proper representative should be respected. "If, in the course of a proper and unassailable administration of the worship of the idol by the Shebait," thus observed Their Lordships, "it be thought that a family idol should change its location, the will of the idol itself expressed through his guardian must be given effect to. This is in accordance with what would appear to be the sound principle of the position and it is further in accord with the authority on the subject." The case was remitted to the court below in order that the idol might appear by a disinterested next friend to be appointed by the court.

This was a case of a family idol and the Judicial Committee held that all the members of the family including the female members who have the right of worship would have a say in the matter as to where the deity should be located. In case of an idol in a public temple, the position would seem to be that the Shebait would not be able to remove the deity if the majority of the worshippers object to it.[39] It was held in a Madras case that the court would not interfere where a removal of a public idol was found to be beneficial to the community at large and was favoured by the general body of devotees.[40]

6.4. Shebait to use reasonable care.—The Shebait, as said above, is entitled to possession and custody of the Debutter estate. In fact, it is his duty on acceptance of the office to acquaint himself without delay with the nature and circumstances of the endowed property, and to take steps to get in debts due to the Debutter or other funds invested in insufficient securities. Shebaits are not insurers and except where any particular duty has been imposed upon them by the deed of endowment, they are only bound to use such diligence and care in the management of the Debutter estate as a man of ordinary prudence and vigilance would use in the management of his own affairs.[41] If, however, by reason of his negligence or default in proceeding against the debtor in proper time a loss occurs to the Debutter estate, he would be bound to make good the loss.[42] These are the duties of a trustee under English law and the position of the Shebait is almost identical in these respect.

6.5. Shebait not entitled to any remuneration.—Like the trustee in English law, a Shebait has to act gratuitously and he cannot charge the Debutter estate for any remuneration on account of the time and labour he spends over his affairs. The position would certainly be different if there is a provision in the deed of dedication to that effect, or in the absence

39 *Hari* v *Antaji*, ILR 44 Bom 466.
40 *Venkatachala* v *Sambasiva*, 52 Mad LJ 288.
41 *Brice* v *Stokes*, 2 W & T 633.
42 *Thackersey* v *Hurbhum*, ILR 8 Bom 432 at p. 465.

of any deed of endowment there is a usage sanctioning such remuneration to the Shebait. The law is well established that in the absence of any provision in the deed of dedication or any usage to that effect, a Shebait has no right to take any portion of the income of the Debutter estate nor even the surplus that remains after meeting the expenses of the deity.[43] In this income would be included not merely the rents and profits of the Debutter property but the offerings which are made to the deity by its devotees. As a matter of fact, however, such provisions usually occur in the deed of dedication and where no document exists "in almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of usufruct depending upon usage or custom."[44] In fact, it is entirely consistent with Hindu ideas to give the Shebait some sort of personal interest in the endowment, whatever its exact nature might be.[45]

If the deed of endowment provides as to what part of the usufruct of the endowed property would go to the Shebait as his remuneration, no difficulty arises. I have already told you that in a case[45a] which went up to the Privy Council[46] the founder provided that half of the income should be applied for temple purposes and the other half would be enjoyed by the Shebait; and the Privy Council said that as the income was not very large, such provision was quite natural and did not affect the validity of the endowment in any way. When there is no deed, obviously we have only to look to customs and usages in particular religious institutions for the purpose of finding out whether the Shebait can retain any portion of the income of the Debutter property for his own personal use.

6.6. Shebait's right to the offerings.—As said above,[47] the income of the Debutter property would include the offerings which are given to the deity by the worshippers. In various public temples which are resorted to by a large number of persons, these votive offerings constitute a substantial portion of the income of the deity, and cases have frequently come up before our courts where the Shebaits or Archakas have laid claims to these as their own personal property.

In the well-known *Dakore* case,[48] the plaintiffs, as parties interested in the worship of God Sri Ranchhodji, brought a suit, *inter alia*, for making the defendants, who were Sevaks of the temple, accountable for the numerous offerings consisting of cash, ornaments, clothes and the articles which were made to the deity by thousands of pilgrims on every full moon day. The

43 Vide *Monohar* v *Bhupendra*, ILR 60 Cal 452 at p. 478.
44 Vide *Vidyavarati* v *Balusami*, LR 48 IA 302.
45 *Monohar* v *Bhupendra*, ILR 60 Cal 452.
45a Para 4.26, *supra*.
46 *Jagu Nath* v *Thakur Sitaram*, LR 44 IA 187.
47 Paras 6.3 to 6.5, *supra*.
48 *Manohar Ganesh* v *Lakhmiram*, ILR 12 Bom 247.

defence was that the defendants were the owners of the idol and the idol's properties and consequently were not accountable for the offerings which they collected at the shrine. This contention was negatived by the High Court, and it was held that the Sevaks were not the owners of the offerings and they were responsible for their due application to the purposes of the foundations.

In the course of his judgment, West, J. observed as follows:

"It is indeed a strange if not wilful confusion of thought by which the defendants set up the Sri Ranchod Raiji as a deity for the purpose of inviting gifts and vouchsafing blessings, but as a mere block of stone, their property for purpose of their appropriating every gift laid at its feet."

The Hindu law nowhere says that the offerings become the property of the Shebait or Archaka can be squandered away by him or devoted to purposes foreign to the endowment. The position in law, consequently, is that the offerings that are made to the deity do become the property of the deity, and the Shebait or Archaka who claims the right to any share in them must prove affirmatively his right by evidence of usage.[49]

6.6A. Ornaments and weapons.—Questions have sometimes arisen[49a] as to ornaments and weapons. It has been held,[50] for examples, by the Orissa High Court, construing a compromise, that the "Trisul" of Lord Shiva is an ornament, and not a mere weapon. It belongs to Lord Shiva, and not to the Shebait.

6.7. Exceptions to rule as to offerings.—The only exception to the rule[50a] as to offerings—and these are exceptions more apparent than real—exist when an idol is set up temporarily for worship or where the offerings are of a perishable nature. When an image is set up temporarily for a particular purpose, no endowment in the real sense of the word is created, and such image is more or less in the nature of a chattel which is owned by the person who set it up. Except for such rare cases where the element of endowment is absent, in all cases of endowment, the claim by the Shebait that the idol itself is his property and therefore offerings made to the idol constitute his property are wholly inconsistent with the concept of dedication, and thus seem to show how human nature in its selfishness is apt to ignore the very foundation of the religious theories which create the shebaitship and confer power and imposes obligation on the custom.

In *Girijanund* v *Sailajanund*,[50b] where the question raised related to the right of the head priest or Ojha of the celebrated Baidyanath temple to the offerings or Charaos made to the deity, Banerji, J. observed as follows:

49 *Kalayana* v *Kasturi*, 20 MLJ 490.
49a Discussion as to ornaments has been added in the 4th Edition.
50 *Lokenath* v *Balakrishna*, AIR 1953 Ori 115, 117 para 8 (Narasimham, CJ).
50a Para 6.6, *supra*.
50b *Girijanund* v *Sailajanund*, (1896) ILR 23 Cal 645.

"When an idol is set up temporarily for worship, or where the offerings are of a perishable nature, such as articles of food, the priest in attendance, as the nearest Brahmin available, generally appropriates are offerings; and the same is the case where the idol itself is the private property of the priest. But where, as in this case, the idol is an ancient one permanently established for public worship and the offerings are generally of a more or less permanent character, being coins and other metallic articles, in the absence of any custom or express declaration by the donor to the contrary, they are, as they ought to be, taken to be intended to contribute to the maintenance of the shrine with all its rights, ceremonies and charities and not to become the personal property of the priest." Regarding the question of a custom as to the right of the head priest to appropriate the surplus, His Lordship observed as follows: "The purposes again to which they (offerings) are required to be appropriated in the first instance, that is, the trust with which they are said to be charged, are of an indefinite character and may exhaust them completely and the only definite right which the Ojha seems to have in them is to maintain himself and the dependent members of his family out of them. Such being the case, it would be reversing the order of things to say that the offerings constitute the property of the Ojha subject to certain religious trust, when the correct view to take is that they constitute the property of the idol subject to certain rights of the Ojha." The exact nature of the rights of the Ojha in the Baidyanath temple to the offerings made to the deity again came up for consideration in *Shailajanunda* v *Umeshanunda*[1] and it was held by Harrington and Mookerjee, JJ. that it was not correct to say that after the expenses of the deity were satisfied the surplus of the offerings were at the absolute disposal of the Ojha. The surplus was also the property of the deity and the Ojha was entitled out of it to recover reasonable and necessary expenses incurred for his own purposes.

6.8. The right of the founder or the Shebait to the surplus that remains after meeting the expenses of the deity can certainly be established on the basis of a custom. This is illustrated by the case of *Kumaraswami* v *Lakshamana.*[2] In this case a *pujari* founded a public temple and bought lands partly in the name of the deity and partly in his own name with the offerings made by the devotees. Part of the income was spent for purposes of the temple and the rest for his own benefit. This mode of expenditure continued during the lifetime of his son and grandson who also acted as *pujaris*. A suit was brought under section 92 of the Civil Procedure Code *inter alia* for framing a scheme and for a declaration that the lands and the offerings belonged to the deity. It was held that when there is no deed of endowment, usage is relevant evidence to determine whether the lands

1 2 CLJ 460.
2 ILR 53 Mad 608.

and offerings were after their acquisition endowed entirely for the temple or were only burdened with the actual expenses thereof, the surplus being held by the *pujari* for his own benefit; and such usage if established would not be in any way contrary to the Hindu law.

It is not possible to enumerate exhaustively the various usages that obtain in different religious institutions in the matter of appropriating the devotee's gifts to the deity, nor can it be said that the usages are always in conformity with the presumed intentions of the founder. In certain public temples the offerings given by the devotees are divided between the trustees and the Archakas, the latter being given a share in consideration of the services which they render to the temple. It may be noted that valuable presents are often made by the devotees to the Archakas themselves partly as acts of piety in holy places and partly as remuneration for services which the Archakas render to the devotees. As these gifts are not meant for the deity at all, the cannot become the property of the deity and must be regarded as personal belongings of the Archakas themselves. This question came up for consideration in *Gouri Shankar* v *Ambika Dutt*[3], and the law was thus stated: "As a general rule, where offerings are made by a devotee to a Hindu idol, the gift is *prima facie* for the benefit of the idol and the *pujari* or trustee of the idol has no interest or title in it.....But the general rule is subject to the exception that where there is proof of usage, the *pujari* or Shebait may be allotted a share of the offerings. Again, when the idol is set up temporarily for worship and where the offerings are of perishable nature, such as articles of food, the *pujari* as the nearest Brahmin available may appropriate the offerings". In *Badri Nath's* case[3a] it has been held that the predecessor of the plaintiff was entitled to the offerings even though he was neither the shebait nor the *pujari* of the temple.

6.9. Shebait's right of residence.—As regards the Shebait's right of residence in the house dedicated to the deity, the usual practice is to make provision regarding it in the deed of dedication itself. As has been said in a previous lecture, a direction by the founder that the Shebaits for the time being would be entitled to reside in the house set apart for the deity does not make the dedication in any way invalid or improper. On the other hand, such arrangements are considered to be extremely proper and convenient. As the Privy Council observed in *Jnanendra* v *Surendra*,[4] "it is a perfectly reasonable arrangement to secure that the man in whose hands the supervision of the whole estate is vested shall have associated with his duties the right to reside in the named dwelling house." Even if there is no provision in the deed of endowment, it seems that such right of residence would be implied in law unless there is any prohibition to that effect in the

3 AIR 1954 Pat 196, 198, 199.
3a AIR 1979 SC 1314.
4 24 CWN 1026.

deed of endowment. Not only the general feeling of the Hindu community is in favour of giving the Shebait a right of residence in the deity's house, but such right is really appurtenant to the duties which the Shebait has got to discharge in regard to the spiritual and temporal affairs of the idol.

6.10. Shebaits must act jointly.—When there are more Shebaits than one, they constitute one body in the eyes of law, and all of them must act together. The management may be for practical purposes in the hands of one of the Shebaits who is called the managing Shebait or the Shebaits themselves may exercise their right of management by turns; but in neither case it is competent for one of the Shebaits to do anything in relation to the Debutter estate without the occurrence either express or implied of his co-Shebaits. This is, of course, subject to any express direction given by the grantor. The Judicial Committee, in one case.[5] quoted a passage from Lewin's *Law of Trusts*, which in their opinion applied equally to Shebaits in India. The passage runs as follows:

"In the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the acting trustee, but the court knows no such distinction; all who accept the office are in the eyes of the law acting trustees. If anyone refuses or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the court. However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved."

Thus, the act of a majority of Shebaits cannot bind the dissenting minority, nor the Debutter estate. In the Privy Council case quoted above,[5a] the property belonging to an idol was mortgaged by a number of persons who claimed it as their personal property, and one of the mortgagors was one of the trustees and managers of the deity; in fact, he was the sole *de facto* manager. On behalf of the mortgagee a contention was raised that the idol was bound by the mortgage inasmuch as the sole Shebait and trustee joined in it and purported to alienate whatever interest he had in the property.

This contention was negatived and it was held that even if the mortgage was executed by one of the trustees as such, it would not pass a valid title unless the act was done with the sanction and approval of his co-trustees. As in the eyes of law, all the Shebaits form one body, the deity is represented by all of them acting together and no one Shebait can be said to represent the deity in part or to possess interest as such Shebait in any particular portion of the idol's property.

5 *Lala Manmohan* v *Janki Pradad*, 49 CWN 195.
5a *Lala Manmohan* v *Janki Pradad*, 49 CWN 195.

Consequently, when one of the Shebaits purported to alienate the Debutter property to the extent of the share which he had as Shebait in respect of the same, the alienation was held to be void.[6]

6.10A. Shebaits must be co-plaintiff in suits brought on behalf of deity.— When a suit is brought on behalf of a deity either to recover possession held adversely by a stranger or for recovery of money or any money payable to the Debutter estate, all the Shebaits must join as plaintiffs.[7] Where there are more Shebaits than one, they constitute one body in the eye of law, and all must act together. The management of the trust properties may, for practical purposes, be in the hands of one of the Shebaits, who is called the managing Shebait, or the Shebaits themselves may exercise their right of management by turns. But in neither case is it competent for one of the Shebaits to do anything in relation to the Debutter estate without the concurrence—either express or implied of his co-Shebaits. This is, of course, subject to any express direction given by the grantor.[7a]

6.11. Suit for rent.—One of the co-Shebaits cannot maintain a suit for recovery of rent to the extent of his share. In *Barabani Coal Co.* v *Gokulanand*,[8] four Shebaits of a family deity had executed a mining lease of the idol's interest in a Mouza. A suit being instituted by one of the Shebaits against the lessee for a four anna share in the royalties, it was held that such was not maintainable and that the irregularity was not cured by making the other Shebaits parties defendants. One of the Shebaits, however, can file a suit to recover the entire rent on making the other Shebaits parties defendants, if the latter are unwilling to join as plaintiffs.[9] The position, therefore, is that ordinarily all the Shebaits must figure as plaintiffs in a suit brought on behalf of the deity. If some of them refuse to join as plaintiffs or had done some act precluding them from being plaintiffs, one or more of the Shebaits can maintain a suit without joining the others as plaintiffs, but making them parties defendants. The nature of the suit or the allegations made therein may also furnish exceptions to the general rule that all the Shebaits must appear as plaintiffs. When a Debutter property is improperly alienated by one of the Shebaits, the other Shebaits can certainly bring a suit to set aside the alienation. In such a suit the alienatingShebait who had misconducted himself may not be in a position to join as

6 See *Iswar-Kali Durga* v *Surendra*, 45 CWN 655.
7 *Bechulal* v *Oliullah*, IRR 11 Cal 538; *Kokilesari* v *Mohunt Rudranand*, 5 CLJ 527; *Narendra* v *Atul Chandra*, (1917)27 CLJ 605; 41 IC 837 approved in *Barabani Coal Concerns*, *supra*.
7a *Laxman Prasad* v *Shrideo Janki Raman*, (1973) MPLJ 842; (1973) Jubbulpur Law Journal 904; (Year Digest, 1973) (AIR 1967 SC 1044 referred to).
8 *Barabani Coal Concerns* v *Gokulanand* (1934) LR 61 IA 35; AIR 1934 PC 58.
9 *Narendra* v *Atul*, 27 CLJ 605.

a co-plaintiff but he must be a party defendant.[10] In *Nirmal Chandra* v *Jyoti Prasad*,[11] one of the three Shebaits brought a suit to remove the other two from office on grounds of misappropriation and breach of trust. In such a case the offending Shebaits, against whom charges of misfeasance and neglect of duties were brought, could not possibly be invited to join the suit as plaintiffs and they could not but be defendants in the suit. If the right of a co-Shebait is denied, he need not be joined as a party, but if the denial turns out to be unfounded, the suit is liable to be dismissed. In *Abdul Gofur* v *Umakanta*[12] one of the two Shebaits of an idol instituted a suit for enhancement of rent in respect of a Debutter property making the other Shebait a pro forma defendant but alleging that the latter had ceased to reside in the village and was no longer interested in the endowment. The co-Shebaits defendant also in her written statement supported the allegations of the plaintiff and pleaded that she had no longer any connection with the Debutter. On evidence, however, this remuneration on the part of the defendant Shebait was not proved and as there was no case of agency made out, it was held that the suit was not maintainable in law.

6.12. When all the Shebaits are parties to the suit, either as plaintiffs or as defendants, is it necessary for the plaintiffs to aver and prove in all such cases that his co-Shebaits, who were made defendants, were invited to join as plaintiffs and on their refusal to do so, had to be made defendants? Would the suit necessarily fail if it is established that the defendant co-shebaits were not previously consulted and their opinion taken before the suit was brought? In a Full Bench case of the Madras High Court[13] one of the two co-Uralans brought a suit to redeem a mortgage without averring and proving that the other Uralan, who was a defendant in the suit, had been asked to join in the suit as a plaintiff. It was held that the suit was maintainable and it was impossible to hold otherwise in view of the provisions of sections 91 and 85 of the Transfer of Property Act which gave even a person interested in a fractional share of the equity or redemption the right to bring a suit for redemption. In a subsequent case of the Madras High Court[14] which also arose out of a suit for redemption, the propriety of the Full Bench decision referred to above was assailed on the ground that section 91 of the Transfer of Property Act does not contemplate the interest of one of the co-Shebaits who has no personal interest in the property. Without deciding this question finally, the learned Judges held that even apart from the provisions of the Transfer of Property Act upon which a suit for redemption was held to be maintainable at the instance of one of the co-Shebaits such suit could be maintained on general principles

10 *Rajendra Nath* v *Seikh Mohammad*, ILR 8 Cal 42 PC.
11 45 CWN 709.
12 19 CWN 260.
13 *Karattoli* v *Unni*, ILR 26 Mad 649.
14 *Kunhan* v *Moorthi*, ILR 34 Mad 406.

of law which govern actions instituted by joint owners or joint contractees. It was pointed out that in the cases of joint owners and joint contractees, some of them may sue persons who infringe their rights making the other co-owners or co-contractees parties defendants without consulting them at all before the institution of the suit; and it should not make any difference that the joint owners were trustees. It was observed by the learned Judges that "in cases where no remedial right accrues to the trustees until a majority after mutual consultation have signified their will, it cannot be competent to some of the trustees or even the majority to institute an action without such consultation.....But where the right to the relief claimed has accrued to the joint trustees, the institution of a suit by some only without having consulted the remaining trustees even where they have not perversely refused to joint, cannot, it appears to us, be a sufficient ground for dismissal of the suit." There is much to be said in support of this view. Unless the plaintiff in suit asserts a sole right of shebaitship in himself adversely to the co-Shebait defendants, it is always possible for the court to transfer these co-Shebaits to the category of plaintiffs so that a decree may be passed in favour of them all. In any case, a decree would have to be made in all suits where the plaintiff happens to be one of the co-Shebaits for the benefit of the entire endowment represented by all the parties to the suit.[15]

6.13. In a case decided by the Calcutta High Court[16] a suit for ejectment in respect of a property belonging to the deity was brought by some of the Shebaits making the rest pro forma defendants on the ground that they were not willing to join as plaintiffs. The procedure was held to be unexceptionable, but it transpired that the notice to quit prior to the institution of the suit was given by the plaintiffs only and that the co-Shebait defendants were no parties to it. The learned Judges held that this was a fatal defect, and unless it was shown that exceptional circumstances existed which would make the act of some of the Shebaits binding on the rest, normally all the Shebaits must join in an act of management relating to the Debutter and that the notice would not be a valid notice by simply proving that the other Shebaits were not willing to join in it. In *Sri Sri Ishwar Mahamaya Rajrajeshwari Debi Thakurani* v *Raghabendra Narayan Ray*,[17] it was observed that it was legitimate for a number of Shebaits to carry on Deb-sheva in turns or *palas*, that an arrangement amongst them to do so did not involve any breach of trust, and that where separate groups of Shebaits held separate shares of the Debutter estates with separate accounts in the Collectorate, each group represented the deity so far as the share held by it was concerned, and that a manager appointed by one group of Shebaits could maintain an action against the members of that group for recovery

15 See *Peary Mohan* v *Kedar Nath*, ILR 26 Cal 409 FB.
16 See *Radha Charan* v *Shree Shree Iswar Joykali Bigraha*, 46 CWN 94.
17 *Sri Sri Ishwar Mahamaya Rajrajeshwari Debi Thakurani* v *Raghabendra Narayan Ray*, ILR (1951)2 Cal 151.

of monies advanced by him in the course of the management of Debutter properties without impleading the Shebaits of other groups.

III. Suits on behalf of deity

6.14. Rights of suits in regard to deity's property.—I will have to advert presently[17a] to the more important question as to whether the deity has a right apart from the rights of the Shebait to sue on its behalf and can be a competent plaintiff in a suit in respect of the property held or claimed by it. When the suit is brought in the name of the deity and the deity purports to act through some of the Shebaits only, the question arises whether the remaining Shebaits are necessary parties to the suit. It was held by Gentle, J. in *Sree Sree Sridhar Jew* v *Kanta Mohan Mullick*,[18] that the rule that when there are more Shebaits than one, all of them must join as co-plaintiffs, except under special circumstances, is applicable, whether the suit is in the name of the idol or in the names of the Shebaits. A Division Bench of the same High Court, on the other hand, had held[19] that when the suit is by the deity represented by some of the Shebaits, the question whether the other Shebaits should be joined as parties is often a question of mere procedure or expediency, the test being whether in all the circumstances of the case the interest of the deity can be adequately represented. A distinction undoubtedly exists between a suit by a Shebait and one by deity, but what legal consequence, if any, flow from this distinction can be considered more appropriately when I discuss the broader and the more general question, viz., in whom is the right of suit in respect of the deity's property vested? Is the deity to be regarded as a sort of perpetual infant who must act through a guardian in the same manner as persons under disability? Has the Shebait any right in him to conduct a suit or proceeding in his own name apart from the rights of the deity? What other persons besides the Shebait can represent the deity in suits or proceedings and, if so, under what circumstances and with what results? I will take up all these questions together.

6.15. Hindu idol is not a perpetual infant.—A Hindu idol is sometimes spoken of as a perpetual infant, but the analogy is not only incorrect, but is also positively misleading. There is no warrant for such a doctrine in the rules of Hindu law, and, as was observed by Rankin, C.J. in *Surendra* v *Sri Sri Bhubaneswari*[20] it is an extravagant doctrine contrary to the decision

17a Para 6.16, *infra*.

18 *Sree Sree Sridhar Jew* v *Kanta Mohan Mullick*, AIR 1947 Cal 213-219, para 35; 50 CWN 14 (Gentle, J.) following *Nirmal Kumar*, AIR 1941 Cal 582.

19 *Jyoti Prasad* v *Jahar Lal*, AIR 1946 Cal 268; 49 CWN 37 (DB).

20 LR 37 IA 147.

of the Judicial Committee in such cases as *Damodar Das* v *Lakhan Das*.[21] It is true that the deity like an infant suffers from legal disability and has got to act through some agent and there is a similarity also between the powers of the Shebait of a deity and those of the guardian of an infant. But the analogy really ends there. For purposes of Limitation Act the idol does not enjoy any privilege and regarding contractual rights also the position of the idol is the same as that of any other artificial person. The provisions of the Civil Procedure Code relating to suits by minors or persons of unsound mind do not in terms at least apply to an idol; and to build up a law of procedure upon the fiction that the idol is an infant would lead to manifestly undesirable and anomalous consequences.[21a]

6.16. Shebaits right of suit.—An idol is certainly a juristic person and as the Judicial Committee observed in *Promotha* v *Pradyumna*,[22] "it has a juridical status with the power of suing and being sued." An idol can hold property and obviously it can sue and be sued in respect of it. But the idol is the owner of the Debutter property only in an ideal sense; its ideal personality is always linked up with the natural personality of the Shebait. The Privy Council held in *Maharaja Jagadindra Nath Roy* v *Rani Hemanta Kumari*[23] that "the possession and management of the dedicated property belong to the Shebait; and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the Shebait and not in the idol." This right is a personal right of the Shebait and separate from any right which the deity may have of instituting a suit as a juristic person through a proper representative. In *Jagadindra* v *Rani Hemanta Kumari*[24] the suit was not by the idol represented by the Shebait but by the Shebait himself who claimed to recover possession of the property in suit as belonging to the deity. Both the courts below held that title to the property was in the plaintiff but the High Court held that suit to be barred by limitation on the ground that the plaintiff did not claim proprietary interest in himself with regard to the lands in suit but as Shebait of the idol, and *qua* Shebait was not entitled under section 7 of the Limitation Act to any exemption of the period of limitation by virtue of his minority. This decree was reversed by the Judicial Committee and it was held that, as the plaintiff was a minor at the time when the cause of action arose, he was entitled to claim exemption under section 7 of the Limitation Act. This decision, therefore, establishes three things:—

(1) That the right of suit in respect of the deity's property is in the Shebait;

21 ILR 60 Cal 54.
21a See *Ashim Kumar* v *Narendra Nath*, 76 CWN 1016.
22 LR 52 IA 245.
23 LR 31 IA 203.
24 LR 31 IA 203.

(2) this right is a personal right of the Shebait which entitles him to claim the privileges afforded by the Limitation Act; and

(3) the Shebait can sue in his own name and the deity need not figure as a plaintiff in the suit, though the pleadings must show that the Shebait is suing as such.

In *Thakur Raghunath* v *Shah Lalchand*,[25] it was held by a Division Bench of the Allahabad High Court that a suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple. The plaintiff in such suit must be the manager of the temple. This decision was overruled by a Full Bench of the same High Court in *Jodhi Rai* v *Basdeo*,[26] and it was held that inasmuch as an idol is a juristic person capable of holding property, a suit respecting the property in which an idol is interested is property brought or defended in the name of the idol, although *ex necessitate rei* the proceedings in the suit must be carried on by some person who represents the idol, usually the manager of the temple in which the idol is installed. It seems that the attention of the learned Judges was not drawn to the pronouncement of the Judicial Committee in *Jagadindra* v *Hemanta Kumari*[27] and in view of that decision the proposition of law laid down in such broad form cannot possibly be supported. A suit does lie in respect of the deity's property at the instance of the Shebait alone and it is not necessary that the plaintiff in such a suit should be the deity represented by the Shebait or manager. But though a suit would lie at the instance of the Shebait, it does not mean that the idol as a juristic person is deprived of its right of suit altogether. The exact scope of the doctrine laid down in *Jagadindra's* case is certainly not free from doubt. Right to sue is a necessary adjunct of the proprietary right, and if the property vests in the deity the right of suit cannot obviously be divorced from it. The view underlying the decision in *Jagadindra's* case seems to be that as an idol suffers from perpetual incapacity to engage itself in juridical acts, the natural personality of the Shebait supplies this legal deficiency in the idol. For all juridical purposes, it is the Shebait and Shebait alone that has the right to represent the idol and this creates what may be said to be a personal right in the Shebait to institute a suit in respect of the idol's property. It is idle to say that such suits is not on behalf of the deity and is on behalf of the Shebait personally. In substance, it is the suit of the deity and the deity is fully bound by the result of it. But as nobody else except the lawful Shebait can exercise this right on behalf of the deity, in a sense it is a right personal to the Shebait. Where no Shebait is lawfully in office or when he is unwilling to act or his interest is hostile and adverse to the deity, the deity can certainly file a suit through some person other than the Shebait. The principle in *Jagadindra's* case therefore applies when there is a Shebait

25 ILR 19 All 330.
26 ILR 33 All 375 (FB).
27 LR 31 IA 203.

actually in office and ready and willing to do all acts necessary for the protection of the deity's interest. In these normal circumstances the deity's right of suit can be said to have for practical purposes no independent existence apart from the rights of Shebait, as it is through the Shebait alone that the right could be exercised. The position, therefore, seems to be that when a Shebait is in existence and functions normally, the deity's rights lie dormant. But as soon as the Shebait ceases to act properly in the interest of the deity or asserts a claim adversely to the idol, the deity's rights can certainly be exercised independently of the Shebait and even against the Shebait himself.

In normal cases where the Shebait is willing and able to act on behalf of the deity, the suit, as has been said already, can be brought in the name of the Shebait himself. But it is really a technical matter whether the suit is brought actually in the name of the deity represented by the Shebaits or the Shebaits figure as plaintiffs describing themselves as Shebaits of a certain deity which is not made formally the plaintiff in the suit. It is a question of form only and not of substance at all. As Sir George Rankin observed in *Masjid Sahidgunj* v *Shiromoni Gurdwara*,[28] "the procedure of our courts allows for a suit in the name of an idol or deity though the right of suit is really in the Shebait." If this is the correct position, the view of Gentle, J. referred to above[28a] that when the deity is suing through the Shebait, no matter whether such suit is brought in the name of the idol or not, all the Shebaits must join as plaintiffs except where circumstances exist which allow an exception to be made in the application of the ordinary rule seems to be quite sound.

6.17. In *Shri Shri Kalimata* v *Nagendranath*,[29] a suit was instituted in the name of the deity by her next friend Basanta Kumari and by Basanta Kumari herself as worshipper, for a declaration that a certain deed executed by Shebaits Suresh, Nagendra and others revoking an earlier deed of trust executed by Suresh, whereby the properties had been dedicated to the deity, and the subsequent mortgage by Suresh was not binding upon the deity. It was held that the suit was not maintainable at the instance of the deity or a worshipper as the right to sue was in the Shebait and it was not proved definitely that Nagendra in his capacity of Shebait had declined to institute the suit. The enunciation of law by the learned Judge on the basis of *Jagadindra*'s case may not be open to objection, but he certainly misapplied it to the facts of the case. All the Shebaits including Nagendra were parties to the deed which was challenged on behalf of the deity as being detrimental to its interests. In such circumstances it is difficult to say how Nagendra or the other Shebaits could be expected to file the suit as

28 LR 67 IA 251.
28a *Sree Sree Sridhar Jew* v *Kanta Mohan Mullick*, 50 CWN 14.
29 44 CLJ 522.

plaintiffs. After all, the interest of the deity is the object of paramount consideration by the court and as Nagendra and other Shebaits were parties defendants to the suit, any one or all of them could have been transferred to the category of plaintiffs if they were willing to take the carriage of the suit in their hands. Pauper suit with respect to private institution was the main issue in the case.[30] It was held that that complicated and controversial matters should not be decided at the stage of pauper application and should property be left to be determined at the trial.

6.18 Right of suit for persons other than the Shebaits—Private trust.— When a Shebait declines to bring a suit or by his conduct places himself in such a position that he could not be expected to bring a suit, the question arises what other persons can file a suit to protect the interests of the deity. The answer to this question depends on whether the endowment it private or public. In the case of a private endowment the members of the family of the founder are persons interested in protecting the interests of the Debutter, and the law is well settled that they can sue to enforce the rights of the deity. In *Manohar Mukherji* v *Rajah Peary Mohan*,[31] the suit was brought by an heir of the founder upon whom the management of the Debutter would devolve if the actual incumbent was removed for misconduct and it was held that the founder or his heirs could, under the law, "sue for the enforcement of the trust, for the removal of the old trustees, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties," and it was further observed that the restriction imposed by section 92 of the Civil Procedure Code as to the mode of institution of such suits applied only to public trusts and that the rights of the founder of a private trust or of his heirs remained unimpaired. In *Girish* v *Upendra*,[32] it was laid down by a Division Bench of the Calcutta High Court that when a private Debutter or family endowment has been created for the worship of a deity, a prospective Shebait or any member of the family of the donor is entitled to maintain a suit for a declaration that certain properties do not belong to the Shebait for the time being but are trust property or that an alienation made by a Shebait was not binding on the deity. The same principle was laid down in *Panchkori* v *Amodelal*.[33] An opinion was expressed in the last named decision that even a *de facto* Shebait will be entitled to bring a suit for such purpose. But, as on the facts of that case, it was held that the plaintiff was not a *de facto* Shebait at all, the opinion expressed by the learned Judge cannot rank higher than an *obiter*. These decisions were followed in *Jangi Lal* v *Panna Lal*,[34] where

30 *Gobardhan Das Babaji* v *Raghunandan Das Babaji & Ors.* AIR 1968 Orissa 213.
31 24 CWN 478.
32 35 CWN 768.
33 41 CWN 1349.
34 AIR 1957 All 743; *vide* also *Sri Iswar* v *Gopinath Das*, AIR 1960 Cal 741.

the question was whether the great-grandson of the settlor was entitled to maintain a suit for enforcing the rights of the deity. In holding that he was, the court held that a suit in respect of endowed property could be filed (1) by the idol itself as a juristic person, (2) by the Shebait acting on behalf of the idol, (3) by the prospective Shebaits as persons interested in the endowment, and (4) worshippers, and members of the family in their own right. The Supreme Court in *V.R. Reddy* v *K.S. Reddy*[35] decided three important points of principle, viz. (1) the scope of sec. 42 of the Specific Relief Act and held that in that suit where the plaintiff-worshipper asked for a declaration that the compromise decree under which certain temple properties were declared to be private property of the defendant-trustee was not binding on the deity, such a declaration of that character was outside the purview of section 42 of the Specific Relief Act and was governed by the general provisions of the Code of Civil Procedure like section 9 and Order VII, Rule 7; (2) under sec. 20 of the Madras Hindu Religious and Charitable Endowments Act, 1951 although the Commissioner was vested with the power of superintendence and power over the temple yet he had no authority to represent the deity in proceedings before the District Judge under section 85 of the Act, and (3) the declaration that properties in dispute were personal properties of the petitioner's family and not the properties of the temple were outside the purview of section 84(2) of the Madras Hindu Religious and Charitable Endowments Act, 1951. The Supreme Court also decided in favour of the right of a suit for worshippers if a Shebait has improperly alienated the trust property.

6.19. In the case *Biswanath* v *Thakur Radhaballavji*,[36] the three conditions for invoking section 92 of the Civil Procedure Code are laid down, namely (1) the trust is created for public purposes of a charitable or religious nature, (2) there was a breach of trust or a direction of court is necessary in the administration of such trust, (3) the relief claimed is one of the reliefs enumerated therein. In that case the relief in the suit was declaration that the property belonged to the trust which was not one of the reliefs enumerated in section 92 of the Civil Procedure Code and therefore section 92 did not apply. In recovering the possession of the property belonging to the idol from a person who was in illegal possession thereof, the idol is enforcing its private right and therefore section 92 of the Civil Procedure Code is not applicable to such a suit instituted by the Idol for recovery of its property. The Supreme Court also laid down that when an alienation has been effected by the Shebait acting adversely to the interest of the Idol, even a worshipper can file the suit.

6.20. *Ram Ratan Lal* v *Kashinath Tewari*[37] discusses how far the disputed religious endowment was illusory and not intended to be acted upon.

35 *V.R. Reddy* v *K.S. Reddy*, AIR 1967 SC 437.
36 *Biswanath* v *Thakur Radhaballavji*, AIR 1967 SC 1044.
37 *Ram Ratan Lal* v *Kashinath Tewari*, AIR 1966 Pat 235.

The court discussed the relevant considerations and evidence to decide such a question. Secondly, this case decides that a deed of dedication does not become invalid merely because a person who had no title to the property had also joined in its execution. Thirdly, this case discusses the question how far the absence of the name of the deity in the deed of endowment will make the endowment trust invalid for uncertainty, but on the fact it concluded that the deity was sufficiently identified. Fourthly, the case holds that even the religious ceremony of Sankalpa or Samarpan is not essential for a valid dedication, even though such ceremonies are sometimes performed. Fifthly, the case decided when a dedication is partial or absolute, holding that if the documents provide that the balance of the proceeds of the estate may, after defraying the expenses of the idol be enjoyed by the testator's heirs, and where the fact that the actual expenses of the idol were only a small proportion of the total income, there might be an inference that there was only a partial dedication by way of creating charge. Lastly, the case decides that if the Shebait was negligent in alienating Debutter property in breach of trust, not only a prospective Shebait under the terms of the grant but any member of the family in case of a family endowment even though not appointed by the court as guardian, may maintain a suit on behalf of the deity in order to recover the property.

6.21. Rights of other persons in case of public endowments.—But where the endowment is a public one, the question arises how far the rights of persons other than Shebait to take proceedings are affected by section 92 of the Code of Civil Procedure, 1968. This section applies to public trusts and provides that a suit against a trustee for the reliefs mentioned in the section could be instituted only in the manner provided therein. It has accordingly been held[38] that, where members of the public sue as persons interested in the endowment to enforce the rights of the idol as against the trustee and claim the reliefs mentioned in the section, the suit must be brought in conformity with that section and a suit under the general law is barred. But even in respect of public trusts where the suit is not against trustees but against strangers, or where the reliefs claimed fall outside the section, the rights of persons interested in the endowment to maintain a suit for vindicating the rights of the idol under the general law are unaffected. Thus, it has been held[39] that a suit by Vaishnavaite Bairagis for whose benefit the institution had been founded, for a declaration that an alienation of the endowed properties by the Shebait was not binding on the institution, was maintainable because it was not one of the reliefs mentioned in section 92.

38 *Shivaji Maharaj* v *Barati Lal*, AIR 1956 All 207.
39 *Mukaremdas* v *Chhagan Kisan*, AIR 1959 Bom 491.

6.22. Suit by worshippers.—In all these cases the suits were brought by the prospective Shebait, the worshippers or persons interested in the endowment in their own names and not in the name of the idol. It cannot be denied[39a] that a worshipper or a prospective Shebait has an interest of his own quite apart from that of the deity and his right to worship and the maintenance of the object of worship.[40]

It was held by Pal, J. in *Tarit Bhusan* v *Sri Sri Iswar Sridhar Salgram*,[41] that the rights of worshipers, members of the family of the author or prospective Shebaits are personal rights of these persons and they could be exercised quite independently of the idol's right to sue for protection of its own interest. The learned Judge rightly pointed out that there is a substantial distinction between a suit by certain interested persons as such in their own names and a suit by a person in the name of the idol as its next friend. In the former case, the consequences of the suit will be binding on the persons suing or on the persons whom they represent. In the latter case, the idol itself will be affected as a jurisdical person and the decision will be conclusive and final. In *Tarit Bhusan's* case, a suit was instituted in the name of the idol represented by its next friend Anupama. Anupama, though a daughter of the then Shebait, was not a Shebait herself either actual or prospective and was a mere worshipper. The suit was for a declaration among others that the suit properties were Debutter and could not be sold in execution of a mortgage decree obtained by the defendant against the Shebait who mortgaged the same as secular properties. The execution case started by the mortgagee decree-holder was pending at that time. During the pendency of the suit, the execution proceeding was dismissed for default and after that the suit was also dismissed under Order 9, Rule 8, Civil Procedure Code and an application for restoration of it under Order 9, Rule 9 failed. The mortgagee decreeholder then started a fresh execution case, and thereupon a fresh suit was brought by the idol represented by one of its Shebaits for a declaration that the properties in dispute were Debutter properties and were not liable to be sold in execution of the mortgage decree. The question was, whether this fresh suit was barred under Order 9, Rule 9, Civil Procedure Code. The question was answered in the negative. Both the learned Judges, who heard the case, were of opinion that:

(1) the previous suit was not the deity's suit as Anupama, who was a mere worshipper, had no right to represent the deity; and

(2) the cause of action in the subsequent suit was different.

Nasim Ali, J. went further and said that even if the previous suit was

39a Passage in 1st Ed., page 263, approved in *Jangi Lal* v *Panna Lal*, AIR 1957 All 743, 743, para 9 (Beg, J.).

40 Vide also *Mahadoba Devasthan* v *Mahadoba*, AIR 1953 Bom 38; *Jangi Lal* v *Panna Lal*, AIR 1957 All 743; *Sri Iswar* v *Gopinath Das*, AIR 1960 Cal 741.

41 45 CWN 932.

a suit by the idol and the cause of action was the same, the present suit was maintainable on the analogy of a suit in similar circumstances by a minor who could sue for setting aside the previous order of dismissal on the ground that the guardian who purported to represent the deity was grossly negligent in the discharge of his duties. In this view, however, the other learned Judge (Pal, J.) did not concur. If the cause of action in the two suits was different, obviously the bar under Order 9, Rule 9, Civil Procedure Code, would not apply. But the decision of the learned Judges on the other point, viz., as to whether the previous suit was the deity's suit or not is calculated to raise questions of a somewhat difficult nature. Nasim Ali, J. seems only to have observed that as Anupama was neither a *de jure* nor a *de facto* Shebait, she had no right to represent the deity; and if she purported to exercise certain powers which she did not possess in law, the deity would not be bound by the result of the exercise of such powers. Pal, J. on the other hand definitely took the view that nobody else except the Shebait can legally and effectively represent the deity in a suit unless he is appointed by the court to represent the idol. Anupama was not appointed as the next friend by the court, but as she had undoubtedly the rights of a worshipper, she must be presumed to have exercised those personal rights when she brought the suit. To elucidate these points it would be necessary to discuss thoroughly the nature of the deity's right to sue as a juristic person.

6.23. Deity's right of suit as a juristic person.—The deity as a juristic[41a] person had undoubtedly the right to institute a suit for the protection of its interest. So long as there is a Shebait in office, functioning properly the rights of the deity, as stated above, practically lie dormant and it is the Shebait alone who can file suits in the interest of the deity. When, however, the Shebait is negligent or is himself the guilty party against whom the deity needs relief, it is open to worshippers or other persons interested in the endowment to file suits for the protection of the Debutter.[42] In *Behari Lal* v *Thakur Radhaballabh Jiu*[43] it was held by the Allahabad High Court, relying on the above observations and the observations following them, that where a Shebait was unable to act or his own act was questioned, persons having a beneficial interest in the endowment could take steps to protect the interests of the idol, and that where the suit was filed questioning an alienation made by a manager, a person who was assisting the manager in managing the temple could institute a suit to establish the rights of the idol, and that further a *de facto* Shebait had also a right to sue on behalf of the deity as also a person having a beneficial interest, such as a worshipper.

41a Para 6.16, *supra.*

42 Vide *Upendranath* v *Nilmony*, AIR 1957 Cal 342, where the observations were relied on.

43 *Behari Lal* v *Thakur Radhaballabh Jiu*, AIR 1961, All 73, 77, para 14.

In *Sri Thakur Krishna Chandrama Jiu* v *Kanhayalal*,[43a] it was held that while a person who had a beneficial interest in the endowment could, as held in *Behari Lal* v *Thakur Radhaballabh Jiu*, sue on behalf of the idol, a person who had only a benevolent interest could not sue. It is open to the deity also to file a suit through some person as the next friend for recovery of possession of property improperly alienated or for other relief. Such next friend may not unoften be a person who as a prospective Shebait or a worshipper is personally interested in the endowment. How then are we to distinguish between those two classes of cases and ascertain whether it is a suit by the deity or by the worshipper personally? The answer would certainly depend upon the nature of the suit and the nature of the relief claimed. If the suit is not in the name of the deity, it cannot be regarded, as a deity's suit, even though the deity is to be benefited by the result of the litigation.

It would be the personal suit of the worshipper, the family member or the prospective Shebait as the case may be. Again, these persons are not entitled to claim any relief for themselves personally, e.g., by way of recovery of possession of the property improperly alienated or adversely possessed by a stranger. Now, in *Tarit Bhusan's* case the suit was instituted in the name of the deity and the deity purported to be represented by Anupama as its next friend. Anupama was the daughter of Jogesh, the then Shebait, who had mortgaged the disputed properties as his own personal properties and against the mortgagee obtained a decree. In such cases, where the deity wanted relief against the Shebait himself, it cannot possibly be expected that the Shebait would represent the deity in the suit. If the deity has any right of suit at all, it must be exercised through some other person as next friend. Mr. Justice Pal's opinion seems to be that no person other than the Shebait can legally or effectively represent the deity unless he has been specially appointed by the court. As Anupama was not legally appointed by the court, her suit could be regarded as a suit instituted by her on the basis of her own personal rights and not a suit by the deity at all. There is much to be said in favour of the view taken by Pal, J., though judicial opinion on this point is neither clear nor uniform. There is no specific provision in the Civil Procedure Code relating to suits by or against idols and the provisions of Order 32, Civil Procedure Code, are not in terms applicable to such cases. If the provisions of Order 32, Civil Procedure Code, are held to regulate suits brought by or against an idol, obviously no appointment by the court is necessary before a suit could be filed by the idol through its next friend.

6.24. Appointment of guardian by court to represent the deity.—The idea of having a guardian appointed by the court to represent the deity in

43a *Sri Thakur Krishna Chandrama Jiu* v *Kanhayalal*, AIR 1961 All 206, 214, para 39 (Gurtu and Dwivedi, JJ.).

litigations in which it is interested seemed to have originated from the pronouncement of the Judicial Committee in *Mallick* v *Mallick.*[44] In that case there was a quarrel between the Shebaits themselves who would ordinarily represent the deity regarding the right of removal of the deity to the place of residence of one of the Shebaits during his turn of worship. The Privy Council held that in such matters the will of the deity is to be respected; and as the deity was not a party to the litigation, the suit was remitted to the court below in order that the idol may be represented by a disinterested person appointed by the court to express its will in regard to the matter in dispute. In *Kanhiya Lal* v *Hamid Ali*,[45] there was a suit for possession of a plot of land upon which the defendants had erected a Thakurdwara. The Judicial Committee being of opinion that the appeal could not be property disposed of in the absence of Sri Thakurji Maharaj, whose interest was involved in the litigation, followed the same procedure as was indicated in *Mallick* v *Mallick*[46] and remitted the case to the Chief Court for a re-hearing after addition of parties. In none of these cases, however, there was any question of any deity filing a suit for protection of its own interest by next friend. In *Administrator General of Bengal* v *Balkissen*,[47] Mr. Justice Page of the Calcutta High Court expressed the opinion that although after the appointment of a Shebait it is the Shebait who has the right to sue in respect of a deity's property, yet so long as the Shebait is not appointed it may be permissible to file a suit in the name of the deity and the court should appoint some person as agent *ad litem* for the deity. Apart from the fact that the expression 'agent *ad litem*' is something unheard of, the learned Judge did not indicate under what provision of law such appointment could be made.

6.25. The point came up for consideration before Lort Williams, J. sitting singly in *Sharat Chandra Shee* v *Dwarkanath Shee*[48] and the learned Judge held that in the case of a private religious trust, with regard to mismanagement of which the members of the public cannot intervene and the Shebait cannot be expected to bring a suit against himself, it is necessary and desirable that the idol should file a suit by a disinterested next friend appointed by the court. In this case the suit was for removal of the defendant who was Shebait under the will of Baidya Nath Shee. The persons who were interested in the endowment under the terms of the will were all dead and the suit was filed by grandsons of a brother of the founder. Mr. Justice Lort Williams appointed the first plaintiff the next friend of the deity. Mr. Justice Pal substantially accepted this procedure as correct

44 LR 52 IA 245.
45 LR 60 IA 263.
46 LR 52 IA 245.
47 ILR 51 Cal 953.
48 ILR 58 Cal 619.

in *Tarit Bhusan* v *Sridhar Salgram.*[49] The reason that weighed strongly with the learned Judge was that if a suit could be instituted on behalf of the idol by any person as its next friend, it would really be an invitation to all sorts of persons to come and meddle in the affairs of the idol and if the idol is to be bound by the result of such suit or proceeding, it would be disastrous to its interests. In the opinion of the learned Judge the provisions of Order 32, Civil Procedure Code could not be applied to the case of a deity as the deity is not a minor in law and moreover, these provisions would not safeguard the interest of the idol at all. If anybody has any interest in the endowment and purports to institute a suit as by the court, the suit could be regarded as his own suit and not the suit of the idol. The view was accepted and followed by Gentle, J. in *Sri Sri Sreedhar Jew* v *Kanto Mohan.*[50] On the other hand, Sen, J. held in *Thakur Sri Sri Annapurna* v *Shiva Sundari Dasi*[1] that appointment by the court could not be an essential prerequisite to enable the next friend to institute a suit on behalf of the idol. If the defendant contested the fitness of the next friend to act for the deity, it would be open to the court to investigate the matter and decide the question one way or the other. All these decisions were reviewed by Das, J. in *Gopal Jew* v *Baldeo*,[2] and it was held by the learned Judge that as on the authorities already well established it is competent to a Shebait to act as a next friend of an idol without appointment by the court, there was no reason why the same right of suing as the next friend of the deity without any appointment by court should not be allowed to other persons interested in the endowment like the worshippers and prospective Shebaits. In the opinion of Das, J. there being no definite procedure laid down by law relating to suits of idols, the provisions of Order 32 of the Civil Procedure Code should be applied as far as possible, and these provisions, according to him, would safeguard the interest of the idol, at least no less effectively than an *ex parte* order of appointment made by the court. In *Sushama Roy* v *Atul Krishna*[3] a Bench of the Calcutta High Court dissented from the above view and held that it was not in the interest of an idol that any person other than the Shebait should have the right to file a suit on its behalf constituting himself as its next friend, on the analogy of the provisions in Order 32 relating to suits on behalf of infants, that as the decision in a suit brought on behalf of the idol would be binding on it, it was necessary for the purpose of protecting its interests that such a suit should be permitted to be instituted only with the permission of the court and that in proper cases the court might issue notice to all persons interested before granting permission. In *Sri Iswar* v *Gopinath Das*[4] it was again laid

49 45 CWN 932.
50 50 CWN 14.
1 ILR (1944)2 Cal 144.
2 51 CWN 383.
3 AIR 1955 Cal 624.
4 AIR 1960 Cal 741.

down on a review of the authorities that though a suit could be instituted on behalf of an idol by a person other than the Shebait, that could be done only when that person is appointed to act as next friend by an order of the court.

6.26. The question does not seem to have been raised in this form in any of the other High Courts in India. In *Dashan Lal* v *Shibji Maharaj*,[5] the idol filed a suit through a next friend who was a priest of the temple and looked after the management of the temple affairs. He was not in the position of a manager or trustee or even of a worshipper in the proper sense of the word. It was held by the learned Judges of the Allahabad High Court that they were not prepared to accept as a correct proposition of law that any person claiming benevolent interest in the affairs of the idol would be permitted to maintain a suit in the name and as the next friend of the injured idol. If the provisions of Order 32, Civil Procedure Code, are taken to apply to suits of idols, the difficulty would certainly arise in cases where the next friend is not a party interested in the endowment at all, but is a perfect stranger and takes what the Judges of the Allahabad High Court have said, a mere benevolent interest in the affairs of the deity. In a later case the same High Court has held that the analogy of a deity being treated as a minor is very imperfect analogy and cannot be carried far enough to make Order 32, Civil Procedure Code, applicable.[6] As the position of an idol is admittedly different from that of an infant, there is no particular reason why the procedure laid down in Order 32, Civil Procedure Code, should be made applicable to an idol's suit. When the Privy Council suggested the idea of having the deity represented by a disinterested person in the case of *Mallick* v *Mallick*,[7] they were not thinking certainly of the provisions of Order 32 or of any other provision in the Civil Procedure Code. The rule was laid down as a matter of expediency and for safeguarding the interest of the idol. The rules of the procedure after all are only means to serve the ends of justice, and if the appointment of a next friend by the court is calculated to safeguard the interest of the deity, there could be no real objection to the procedure suggested by Mr. Justice Pal in *Tarit Bhusan's* case. If a new procedure has got to be invented, it is not safe to rely upon mere analogy and invoke the provisions of Order 32 of the Civil Procedure Code when the principle well recognised is that an idol does not occupy the position of an infant in law. Anyway, these questions ought to be settled finally, as otherwise the lower courts would experience considerable difficulties in dealing with such matters with regard to which different Judges of the High Courts have taken different views.

5 ILR 45 All 215.
6 *Doogar Sen* v *Tir Bhawan*, ILR (1947) All 263.
7 LR 52 IA 245.

6.27. Receivers.—In a Calcutta case,[7a] the question of appointing a receiver was considered, and the following propositions were enunciated:[7b]

(*i*) Where the deity's interest is not likely to be affected by the litigation, where the parties claim only the benevolent interest in the affairs of the idol and do not claim against the interest of the deity, and where the suit is not really the suit by the deity and the court does not feel the necessity of the presence of the deity before it, the court is not precluded by the absence of the deity from appointing a Receiver, in respect of the properties covered by a Hindu Religious Endowment, be it public or private. Of course, a receiver is appointed only when the provisions of Order 40 of the Code of Civil Procedure, 1908, are satisfied, and if the facts of a particular case otherwise justify, in the interest of justice, the appointment of a Receiver.

(*ii*) However, the court has to consider whether interference with possession of the property is required, and whether there is a well-founded fear that the property in question will be dissipated or wasted or that irreparable mischief to the same may be caused unless the court gives protection in the shape of appointment of a Receiver.

(*iii*) The submission that no order for appointment of a Receiver in respect of a Hindu Religious Endowment can at all be made does not appear to be correct.

(*iv*) In deciding whether a member of the settlor's family is an interloper or a trespasser in relation to the endowed property, the court should bear in hand the basic principle that there is a distinction between one who is an absolute stranger to a Debutter estate and one who is not a stranger but claims adversely to the deity.

6.28. Deity not a necessary party in all suits relating to Debutter.—It would be clear from what has been stated above that the deity is not a necessary party in all suits relating to Debutter. The case of *Jagadindra* v *Hemanta Kumari*[8] is itself an authority for the proposition that it is open to a Shebait to institute a suit in his own name to recover property belonging to the deity, and the deity need not be made a party to such a suit. If a worshipper brings a suit in his own name for declaring certain properties as Debutter, he need not make the deity a party to such suit apart from the Shebait.[9] If the deity is vitally interested in the result of a suit or its wishes have to be expressed through a disinterested person or if the Shebaits have any interest adverse to that of the deity, it is necessary that the deity should be made a party to such litigation. It was so held in a Patna case,[10] where it was observed that where the Shebait denied the right

7a *Ashim* v *Warandra*, AIR 1972 Cal 213.
7b The paragraph as to receivers has been added in the 4th Edition.
8 *Jagadindra* v *Hemanta Kumari*, LR 31 IA 203.
9 *Sashi* v *Dhirendra*, 45 CWN 699.
10 *Sri Ram* v *Chandeshwar Prasad*, ILR 31 Pat 417; AIR 1952 Pat 438.

of the idol to the dedicated properties, it was desirable that the idol should file the suit through a disinterested next friend appointed by the court; and where the suit was for altering certain provisions in respect of the *sheba* of a deity contained in a will under which the endowment was made, it was held[11] that the deity had a right to be heard, and would not be bound by any alteration made behind its back.

In a suit brought for framing a scheme of a private Debutter, the deity is not always a necessary party, but it should be made a party if its interests are likely to be affected in any way.[12] In *Upendra Nath* v *Nilmony*,[12a] that the deity was not a necessary party in a suit for the framing of a scheme unless its interests were likely to be affected by the scheme proposed.

When the only question in controversy is as to whether the plaintiff has established his rights as Shebait of the suit properties and neither the plaintiff nor the defendant denies the title of the deity to the properties, the idol is not a necessary party;[13] and, thus, when the suit was for the removal of a trustee on the ground that he was guilty of breach of trust and has misappropriated the funds of the endowment and the trust was admitted, the deity was held to be not a necessary party.[14]

6.29. Points summed up.—The result of the foregoing discussion may be summed up as follows:

(1) An idol is a juristic person in whom the title to the properties of the endowment vests; but it is only in an ideal sense that the idol is the owner. It has to act through human agency and that agent is the Shebait, who is, in law, the person entitled to take proceedings on its behalf. The personality of the idol might, therefore, in one sense, be said to be merged in that of the Shebait.[14a]

(2) Where, however, the Shebait refuses to act for the idol, or where the suit is to challenge the act of the Shebait himself as prejudicial to the interests of the idol, then there must be some other agency which must have the right to act for the idol. In such cases, the law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol.[14b]

(3) Where the endowment is a private one, the members of the family are the persons primarily interested in its upkeep and maintenance, and they are, therefore, entitled to act on behalf of the deity; but where the endowment

11 *Shri Mahadeo Jew* v *Balkrishna*, AIR 1952 Cal 763.
12 *Bimal Chandra* v *Gunendra*, 41 CWN 728; *Upendra* v *Baikuntha*, 33 CWN 96.
12a *Upendra Nath* v *Nilmony*, AIR 1957 Cal 342; *Bimal Chandra* v *Gunendra*, 41 CWN 728.
13 *Haripada* v *Elokeshi*, AIR 1940 Cal 254.
14 *Hangi Mal* v *Panna Lal*, AIR 1957 All 743.
14a Paras 6.14 to 6.16, *supra*.
14b Para 6.18, *supra*.

is a public one, section 92 of the Civil Procedure Code prescribes a special procedure when the suit is against the trustee, and the reliefs claimed fall within that section. Such a suit can be brought only in conformity with that section, and the rights of the members of the public, who are interested in the endowment as worshippers or otherwise, to institute proceedings on behalf of the idol are to that extent abridged. Where, however, the suit does not fall within the ambit of section 92, the right of the worshippers or persons interested in the endowment to vindicate the rights of the idol under the general law remains unaffected.[14c]

(4) Once it is found that the plaintiffs, whether they be Shebaits or the founder or the members of his family, or the worshippers and members of the public interested in the endowment, are entitled to maintain the suit—and that is a matter of substantive law—the further question whether an idol should be impleaded as a party to it or whether the action should be brought in its name is one purely of procedure. Such a suit is really the suit of the idol, instituted by person whom the law recognises as competent to act for it, and the joinder of the idol is unnecessary. Indeed, it may even result in embarrassment. But where the matters in controversy in a suit would affect the interests of the deity, as for example when the trust is denied or is sought to be altered, it is desirable that it should also be impleaded as a party.[14d]

(5) Where the joinder of the idol is necessary or desirable, there is a difference of opinion as to whether the provisions of Order 32 of the Civil Procedure Code could, by analogy, be applied to such a suit, and whether it is open to a person to constitute himself as the next friend of the idol and institute the suit on its behalf. The better opinion seems to be that the provisions of Order 32 cannot be extended to a suit on behalf of the idol, as there is no real analogy between an infant and an idol, that a suit by a person other than the Shebait could be instituted on behalf of the idol only when the court grants permission therefor, and that such permission should, as a rule, be given only after hearing the persons interested.[14e]

6.30. Rights of a 'de facto' Shebait.—Before I close this topic, it may be pertinent to say a few words as regards the position of a *de facto* Shebait[14f] in the matter of instituting suits on behalf of the deity. A *de facto* Shebait may be described as one who is in possession of the endowed property and exercises all the functions of a Shebait though the legal title is lacking.[15]

The statement of law in *Jagadindra's* case that the right to sue in respect of the deity's property is vested in the Shebait cannot possibly be extended

14c Para 6.19, *supra.*
14d Para 6.21, *supra.*
14e Paras 6.22 and 6.23, *supra.*
14f As to *de facto* Mohunts, see para 7.57, *supra.*
15 Vide the observations of Mukherjea, J. in *Panchkori* v *Amode*, 41 CWN 1349.

mortgage. To pay off these liabilities, *C*, who had proved the will and had been acting as the guardian of the minor and manager of the Asthal property, obtained leave from the District Judge to sell, and, accordingly, sold a share of the Asthal property, sold in order to pay off the liabilities. It was held that *C*, who was acting as executor to the will of *J* or as guardian of the minor Mohunt, did not possess larger powers than the actual Mohunt, and that in the absence of proof that the original debts were binding on the Asthal, the sale must be set aside.

The pronouncement of the Judicial Committee can be said to have settled the law on the point. Leave of the court by itself does not help the alienee in any way, and such leave cannot have the effect of enlarging the powers of a manager or his guardian. The utmost that can possibly be said is that the purchaser in proving that he made enquiries could, to a certain extent, rely upon the fact that an application was made to the court, and that the court made an order on the application, as part of the evidence in support of his case, though they are not by themselves sufficient to absolve the purchaser or the mortgagee from making enquiries into the matter.[42]

VIII. LIMITATION[42a]

Introductory

6.69. Limitation for suits to set aside unauthorised alienations by manager of endowed property.—The law of limitation relating to suits to set aside unauthorised alienations of endowed property by a Shebait or a Mohunt has undergone successive changes in the course of time. It was previously governed by the Indian Limitation Act, 1908. That Act was amended in 1929, as a result of judicial decisions. The matter is now governed by Limitation Act of 1963. Chronologically, the main periods in the development of the law on the subject are as follows:

(*a*) Before 1929, the Act of 1908 contained the law on the subject.

(*b*) It led to a number of controversies amongst the High Courts.

(*c*) The decision of the Judicial Committee in *Vidyavaruthi* v *Balusami*[43] settled a few points.

(*d*) After this decision the Legislature made, in 1929, certain amendments in the Indian Limitation Act, 1908, by adding a new paragraph to section 10 and also by introducing Articles 134A, 134B, 134C, and 48B in the First Schedule to the Act.

(*e*) The Limitation Act of 1963 contains the present law on the subject.

42 Vide the observations of Kania, J. in re, *Dattatreya Govinda Holankar*, (1932) ILR 56 Bom 519, 525.

42a The entire session as to limitation has been rewritten in the 4th Edition.

43 *Vidyavaruthi* v *Balusami*, (1922) LR 48 IA 302 (PC).

It would be convenient, for our purpose, first of all to refer briefly to the law as it stood under the Act of 1908 prior to the amendments of 1929 mentioned above, and then to indicate to what extent the amendments altered the law on the subject. After this, the position under the Act of 1963 will be stated.

(a) Act of 1908

6.70. Position before 1929.—Prior to 1929 and under the Act of 1908, Articles 134 and 144 were the principal articles of relevance to religious endowments. There was considerable diversity of judicial opinion in India on the question of limitation in respect of suits for the recovery of endowed property improperly alienated by the manager of an endowment.

Article 134 of the Act of 1908 (before amendment) was as follows:

134.	To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by by the trustee for a valuable consideration.	Twelve years	The date of the transfer. (The termination a quo amended in in 1929 to read, "when the transfer becomes known to the plaintiff").

Article 144 read—

144.	For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

(b) Decisions on the articles up to Vidyavaruthi

6.71. The prevailing view[43a] seemed to be that when a Mohunt or a Shebait transferred property belonging to a *mutt* or idol to a stranger, the matter was governed by Article 134, and not by Article 144. The period of limitation would begin to run from the *date of alienation,* and not from the date on which the succeeding Shebait or Mohunt came into office. Representatives of this view were the cases of *Nilmony Singh* v *Jagabandhu,*[44] *Dattagiri* v *Duttatraya,*[45] *Narain* v *Sri Ram Chandra*[46] and *Beharilal* v *Md. Muttaki.*[47] There were, however, decisions[47a] to the contrary which applied Article 144.

43a See case law reviewed in *Pratap Mull* v *Iswar Gopal Jiew,* AIR 1944 Cal 211, 217.
44 *Nilmony* v *Jagabandhu,* (1896) ILR 23 Cal 536.
45 *Dattagiri* v *Duttatraya,* (1903) ILR 27 Bom 363.
46 *Narayan* v *Sri Ram Chandra,* (1903) ILR 27 Bom 373.
47 *Beharilal* v *Md. Muttaki,* (1898) ILR 20 All 482 (FB).
47a See case law reviewed in *Pratap Mull* v *Iswar Gopal Jiew,* AIR 1944 Cal 211, 217.

(*i*) The majority of the decisions proceeded on the view that the person who alienated endowed property was in the position *of a trustee,* and consequently time ran from the date of transfer. Article 134 was applicable according to this view.

(*ii*) Since the transfer was regarded as void and possession was adverse from the start Article 144 was held to be the proper article to apply by some decisions. Thus, in *Nilmony* v *Jagabandhu,*[48] Banerjee, J. observed as follows:

"The idol is juridical person capable of holding property, as has been authorised settled by the decision of the Privy Council in the case of *Shibessuree* v *Mathoora Nath,*[49] and the possession of the defendants who profess to derive title not from the idol, but ignoring its rights, must be taken to have become adverse to the idol from the dates of the two alienations which are more than twelve years from the date of the present suit."

(*iii*) There were, however, certain cases, although few in number, which adopted the view that a Mohunt who had at least a life interest in the property could not create any interest superior to his own, and an alienee from the Mohunt could take only an interest commensurate with the Mohunt's life, and it is only if he remained in possession after the death of the Mohunt, that the successor would have a cause of action from the date of his election as Mohunt,[50] because after the transfer or Mohunt's death, the transferred possession became adverse.

The decision of the Privy Council in *Vidyavaruthi* v *Balusami,*[1] however, excluded the applicability of Article 134 in such cases, and overruled the prior view taken by the High Courts. This position necessitated the amendment of 1929.

(*c*) *Decisions on section 10 up to Vidyavaruthi*

6.72. Section 10 before 1929.—In connection with limitation, section 10 of the Limitation Act, 1908, was also of importance. In general, the right to follow *trust property* is either not barred by limitation—this was expressly provided in section 10 of the Indian Limitation Act, 1908, for cases falling within that section—or was governed by a specific article—such as Article 134 in this Act.

6.73 Decisions before 1922.—A decision before 1922 shows the nature of the controversy that emerged on the question whether the head of a Hindu religious institution is a trustee. In *Jnana Sambandha* v *Velu,*[2] the Privy Council after referring to the suggested distinction between the office

48 *Nilmony* v *Jagabandhu,* (1896) ILR 23 Cal 536.
49 *Shibessuree* v *Mathoora Nath,* (1873)13 MIA 270.
50 *Mohunt Ram Sarup* v *Khashee Jha,* (1869) 20 Weekly Reporter 471 (Cal).
1 *Vidyavaruthi* v *Balusami,* (1921) LR 48 IA 302; ILR 44 Mad 831; 41 MLJ 346 (PC).
2 *Jnana Sambandha* v *Velu,* (1899) ILR 23 Mad 271 (PC).

of managership of a Religious Endowment and the property attached to it, pointed out that assuming the distinction to be well-founded, it may be that Article 144 of the Limitation Act would apply for the recovery of the *property,* while for the office, Article 124 would apply. No final opinion was, however, expressed. On the basis of the distinction, Jenkins, C.J. in *Dattagiri* v *Dattatraya,*[3] after pointing out that though property given for the maintenance of a *mutt* or temple is, as a general rule, inalienable in the absence of special circumstances, observed, (following the well-known case of *St. Mary Magdalene, Oxford* v *Attorney General),*[4] that it by no means follows that such property cannot be lost by the operation of the Statute of Limitation. He, therefore, held that Article 134 would apply to a suit by a Guru or Manager of suit to recover property improperly alienated by a previous Guru of the *mutt.* In this regard the High Court followed *Behari Lal* v *Muhammad Muttaki.*[5]

6.74. In *Ram Prakash Das* v *Anand Das,*[6] the Privy Council regarded the Mohunt or the Head of a *mutt* as owner of the *mutt* property, and the nature of the ownership was said to be an ownership *in trust* for the *mutt* or institution itself. In *Balusami* v *Venkataswamy,*[7] the Madras High Court, following this decision of the Privy Council, held that the head of a *mutt* was a "trustee" within the meaning of this article, and an alienation made by him would be governed by this article. On appeal from that case in *Vidyavaruthi* v *Balusami,*[8] the Privy Council reversed that decision, and held that an alienation by a manager or superior of a Hindu or Mahomedan pious institution cannot be treated as the act of a trustee to whom property had been "conveyed in trust" and who by virtue thereof had the capacity vested in him which is possessed by a trustee in English law. The exact conception about a Mohunt or a Mathadhipathi was, however, in no way indicated, though the principle of some decisions of the High Courts was expressly disapproved.

In fact, it was observed in *Vidyavaruthi* v *Balusami Aiyar,*[9] that the language of section 10 gives the clue to the meaning and applicability of Article 134 that the article referred to cases of only a *specific trust,* and related to property conveyed in trust.

3 *Dattagiri* v *Dattatraya,* (1902) ILR 27 Bom 363.
4 *St. Mary Magdalene, Oxford* v *Attorney-General,* (1857)6 HLC 189.
5 *Behari Lal* v *Muhammad Muttaki,* (1898) ILR 20 All 482 (FB).
6 *Ram Prakash Das* v *Anand Das,* (1916) LR 43 IA 73; ILR 43 Cal 707; 31 MLJ 1 (PC).
7 *Baluswami* v *Venkataswamy,* (1916) ILR 40 Mad 745; 32 MLJ 24.
8 *Vidyavaruthi* v *Balusami,* (1921) LR 481 IA 302; ILR 44 Mad 831; 41 MLJ 346 (PC).
9 *Vidyavaruthi* v *Balusami Aiyar,* (1921) ILR 44 Mad 831; LR 48 IA 302; 41 MLJ 346 (PC).

6.75. The result[10] of the Privy Council decisions—particularly *Vidyavaruthi*—was that such persons could not be described as persons to whom the properties were "conveyed or bequeathed in trust" within the meaning of Article 134 as it stood prior to the amendment of 1929.

The reasoning of the above decisions equally applied to exclude those persons from the category of persons in whom the properties are "vested in trust" within the meaning of section 10. This was the position in general,—although there were rulings taking a different view for special situations,[11] for example, where the trustees for a Parsi Anjuman purchased property for a specific purpsoe,[12] or where there was a specific order of the court reform.

6.76. Decisions after 1922 and before 1929.—A few later decisions of the Privy Council threw further light as to how far invalid alienations made by heads of *mutts* or shebaits of temple would give rise to prescriptive title on the theory of adverse possession. Thus, in *Srinivasachariar* v *Evalappa,*[13] it was held that a Dharmakartha of a Hindu temple is only a manager, and his rights are not higher than those of a mere trustee.

In *Subbiah Pandaram* v *Muhammad Mustapha Marcayar,*[14] the Privy Council distinguished the case in *Vidyavaruthi* v *Balusami Aiyar,*[15] by pointing out that a permanent lease by a Mohunt may be set aside after the lifetime of the lessor trustee, for, the possession of the lessee would not be adverse to the trustee of the *mutt* during the lifetime of the lessor trustee, and therefore the succeeding trustee can recover from the lessee after his lifetime. The Privy Council observed that the same principle would not be applicable to a sale, in which case the vendee's possession must be held to be adverse to the institution *from the very outset.*

But it must be noted that *Subbiah Pandaram* v *Muhammad Mustapha Maracayar,*[16] did not relate to the property of a *mutt*. There was a specific trust for a charity in that case.

The later decision in *Abdur Rahim* v *Narayan Das,*[17] merely adopted the

10 See also *Allah Rakhi* v *Shah Mahomed Abdur Rahim,* (1934) LR 61 IA 50.

11 *Jamshedji Pestonji* v *Dorabji Kuverji,* AIR 1934 Bom 1 (Position held to be different in the case of Parsis).

12 *Baidyanathji* v *Urmila Devi,* (1942)1 MLJ 8; ILR 21 Pat 96 (PC), High Priest of temple appointed by Court under section 539, CPC.

13 *Srinivasachariar* v *Evalappa,* (1922) LR 49 IA 237; ILR 45 Mad 565 (PC).

14 *Subbiah Pandaram* v *Muhammad Mustapha Maracayar,* (1923) LR 50 IA 295; ILR 46 Mad 751; 45 MLJ 588 (PC).

15 *Vidyavaruthi* v *Balusami Aiyar,* (1921) LR 48 IA 302; ILR 44 Mad 831; 41 MLJ 346 (PC) (Sale in execution of a decree against a trustee of a charity; suit brought by succeeding trustee more than twelve years from the date of sale, barred).

16 *Subbiah Pandaram* v *Muhamamd Mustapha Maracayar, supra.*

17 *Abdur Rahim* v *Narayan Das,* (1922) ILR 50 Cal 329 (PC).

view in *Vidyavaruthi* v *Balusami Aiyar,*[18] and, in fact, it was admitted by the counsel in that case that this article would not apply in the case of an alienation of wakf property.[19]

6.77. Prior to the decision of the Privy Council in *Vidyavaruthi's* case, the Indian courts had been generally taking the view that such persons could be regarded as coming under the expression "persons in whom the properties are vested in trust."[20]

It was also held that such person held that properties "for a specific purpose" as required by the section—which, of course, may consist in the performance of several acts from time to time.[21]

On this view, the properties of such endowments can always be recovered *without any bar of time* from such persons or their representatives or assigns not for consideration.[22]

6.78. Indian decisions after Vidyavaruthi on section 10.—After the decision in *Vidyavaruthi,* the Indian courts held that the suit against even the managers of the religious endowment would not fall within section 10—except, of course, in cases where there was a creation of a trust specifically in the English sense of the term. Suits for accounts or for recovery of money received by them were, accordingly, held to be outside the scope of section 10,[23] and would be governed by the appropriate articles, like Articles 62 and 120,[24] of the Act of 1908. Generally suits for recovery of immovable properties were held to be governed under Article 142 or 144 and, although, speaking broadly, a manager in possession of the endowed properties is really holding them on behalf of deity who is in legal possession through its manager, it is possible in law for such persons to disclaim the fiduciary character and to hold the properties by open disclaimer adversely to the deity. Even if there should be any doubt as to the possibility of such a course as regards the original manager, in the case of persons who succeed

18 *Vidyavaruthi* v *Balusami Aiyar,* (1921) ILR 44 Mad 831 (PC).

19 See also *Wahid Ali* v *Mahboob Ali Khan,* (1935) ILR 11 Luck 297, 299.

20 *Cf. Dattagiri* v *Dattatraya,* (1902) ILR 27 Bom 363; *Behari Lal* v *Muhammad Muttaki,* (1898) ILR 20 All 482 (FB); *Nilmony Singh* v *Jagabandhu Roy,* (1896) ILR 23 Cal 536; *Virasami Nayudu* v *Subba Rau,* (1882) ILR 6 Mad 54; *Jagamba Goswamini* v *Ram Chandra Goswami,* (1903) ILR 31 Cal 314; *Ram Kanai Ghosh* v *Sri Hari Narayan Singh Deo,* (1905)2 CLJ 546.

21 *Sethu* v *Subramania,* (1887) ILR 11 Mad 274.

22 *Jagamba Goswamini* v *Ram Chandra Goswami,* (1903) ILR 31 Cal 314; *Shama Charan Nandi* v *Abhiram Goswami,* (1906) ILR 33 Cal 511, reversed on another point in *Abhiram Goswami* v *Shyama Charan Nandi,* (1909) LR 36 IA 148; ILR 36 C. 1003.; 19 MLJ 530 (PC).

23 See *Rangacharya* v *Guru Revti Raman Acharya,* AIR 1928 All 689.

24 *Jaisth Madho Achariyaji* v *Thakur Sri Gat Ashram Narainji,* (1927) ILR 50 All 265.

him it is more easily possible, and there may, therefore, be a possible acquisition of title to such properties by adverse possession for the statutory period. So also in the case of a stranger donee or devisee. For an instance of this sort, see *Ganga Prosad* v *Kuladanada.*[25] But wherein *Rama Reddy* v *Rangadasan,*[1] it was held that manager, and even purchasers from them for consideration, can never hold the endowed properties adversely to the deity and there can never be adverse possession leading to an acquisition to title in such cases. The reason was that the alienation is valid during the alienor's term of office.[2]

6.79. As I have already verdict decisions of the Privy Council in *Vidyavaruthi* v *Balusami*[3] and *Abdur Rahim* v *Narayan Das,*[4] have held that the general properties of Hindu and Mahomedan religious endowments were legally vested in the deity of "The Almighty God," and did not *vest in trust* in the persons variously styled as Dharmakarta, Shebait, Mohunt, Mutawalli, Sajjadanashin, etc. Those persons were only custodians and managers for the idol or deity, in whom the ownership resides.

(d) Decision in Vidyavaruthi

6.80. In *Vidyavaruthi* v *Balusami,*[5] the Judicial Committee, definitely laid down that Article 134 of the Act of 1908 had no application to cases of this description. It was said that neither under the Hindu law nor under the Muhammedan law is *any property* conveyed to a Shebait or Mutawalli in the case of dedication, nor is any property vested in him.

Whatever property the Shebait or Mohunt holds for the idol of the institution, he holds as manager, with certain beneficial rights which are regulated by custom or usage. An alienation by Shebait or Mohunt cannot, therefore, be treated as an act of a "trustee" to whom the property has been conveyed in trust within the meaning of Article 134 of the Limitation Act of 1908. As Article 134 had no application, such cases would fall within Article 144 of the Act of 1908, and the question would arise as to when the possession of the alienee becomes adverse to the endowment. On this point, it was held by the Judicial Committee that the possession of the alienee did not become adverse during the lifetime of the alienating Mohunt, as he was competent to create an interest commensurate with his life; on his death, the possession of the alienee would become adverse, but, if the

25 *Ganga Prosad* v *Kuladananda,* (1925)44 CLJ 399; 94 IC 235.
1 *Rama Reddy* v *Rangadasan,* (1925) ILR 49 Mad 543.
2 See, however, *Charu Chandra Pramanik* v *Nahush Chandra Kundu,* (1922) ILR 50 Cal 49.
3 *Vidyavaruthi* v *Balusami,* (1921) 48 IA 302.
4 *Abdur Rahim* v *Narayan Das,* (1922) LR 50 IA 84; ILR 50 Cal 329; 44 MLJ 624 (PC).
5 *Vidyavaruthi* v *Balusami,* LR 48 IA 302; AIR 1922 PC 123.

alienation was by way of lease, and the lessee's possession was consented to by the succeeding manager, there would be no adverse possession till a fresh succession took place.[6]

6.81. Position under Act of 1908.—The position, therefore, after *Vidyavaruthi* was that Article 144 was the proper article which would govern[7] suits for the recovery of possession of property improperly alienated by the manager of an endowment, and the period of limitation was 12 years, commencing from the point of time when the possession of the alienee became adverse to the endowment. This point of time depends primarily on the nature of the transfer sought to be challenged.

6.82. Case of leases and sales.—It may be repeated that this point of time depended on the nature of the transfer. In *Vidyavaruthi's* case,[8] the transfer was by way of permanent lease, and it was held by the Judicial Committee that the possession did not become adverse until the determination of the office of the alienating manger by death or otherwise.

Soon after the decision in this case, a question arose as to whether the same principle was applicable when the transfer was not by way of a lease, but by way of an out and out sale.

On this point there was some conflict of opinion expressed on by the Indian High Courts; but the conflict was set at rest by the Judicial Committee in *Mohant Ram Charan* v *Naurangilal,*[9] and it was held that in the case of a sale out, and out of particular items of endowed property, the possession of the transferee would not be adverse until the alienating manager ceases to be the manager by reason of death, retirement or otherwise. The same view was taken by the Privy Council in *Mahadeo Prasad* v *Bharathi.*[10]

6.83. The general principle that the possession of the alienee would become adverse as soon as he is without any title to the property received a two-fold elaboration.

(*a*) If the transfer is void *ab initio,*[11] the possession of the transferee is adverse from the date of the transfer.

(*b*) If, on the other hand, the transfer is not void *ab initio,* but voidable merely at the instance of the succeeding manager, the possession cannot be adverse until the office of the transferring manager ceases.[12]

6 See the whole law discussed in *Pratap Mull* v *Iswar Gopal Jiew,* 48 CWN 172; AIR 1944 Cal 211, 217.
7 See *supra.*
8 *Vidyavaruthi* v *Balusami,* LR 48 IA 302 (PC).
9 *Mohant Ram Charan* v *Naurangilal,* (1933) LR 60 IA 124; AIR 1933 PC 75 (On appeal from AIR 1930 Pat 455).
10 *Mahadeo Prasad* v *Bharathi,* (1935) LR 62 IA 47.
11 See *supra.*
12 *Hemanta Kumari* v *Iswar Sridhar Jiu,* 50 CWN 629; AIR 1946 Cal 473.

6.84. Void transfer.—With reference to category (*a*) above,[13] it may be stated that circumstances under which a transfer by a manager is void *ab initio,* have been already dealt with.

(*i*) In the first place, if the transfer is not of particular items of property, but of *the entire endowment* with all its properties, the possession of the transferee is unlawful from the very beginning. The decisions in *Jnana Sambandha* v *Valu Pandarum*[14] and *Damodar Das* v *Lakshman Das*[15] are illustrations of this type of cases.

(*ii*) In the second place, if the manager transfers the property as his own property and not as the property of the deity, the transfer would be void, and limitation would run from the date of the transfer.

(*iii*) As has been explained already, the same principle applies to sales in execution of a mortgage decree against the Shebait when the mortgagor purported to mortgage the property not as Debutter property *but as belong to him personally.*[16]

(*iv*) In other cases—for example, where the mortgage is by the Shebait as such,—time would certainly run from the date when the office of the mortgagor ceases by death or otherwise.[17]

(*v*) In a sale in execution of a money decree against the Shebait *personally,* the possession of the execution sale purchaser is void from the very beginning, and possession being adverse, time runs in his favour from the date of the sale.[18]

6.85. Application of Article 134B of execution sale.—This was the law which governed cases where the articles of the Indian Limitation Act, 1908, newly inserted in 1929, were not applicable, and it may be stated here that the new Article 134B, as its language showed, did not apply to a sale of Debutter property in execution of a decree. This was laid down, and quite correctly, by the Privy Council in *Sundarsan Das* v *Mohant Ram Kripal,*[19] referred to above.[20]

As Lord Radcliffe pointed out in that case, to apply Article 134B to an execution sale would involve a reading of that article which would construe the words "transfer by previous manager for a valuable consideration" as being an execution sale under court processes and the word "transferor" as extending to the judgment-debtor whose land is sold. Such a construction

13 See *supra.*
14 *Jnana Sambandha* v *Valu Pandarum,* (1900) LR 27 IA 69.
15 *Damodar Das* v *Lakshman Das,* (1910) LR 37 IA 147.
16 See *Hemanta Kumari* v *Iswar Singh Jiu,* 50 CWN 629; AIR 1946 Cal 473.
17 *Subbiah* v *Mustapha,* (1923) LR 50 IA 295.
18 *Subbiah* v *Mustapha,* (1923) LR 50 IA 295; *Thakurji* v *Muthro,* AIR 1941 Pat 354; *Sudarsan Das* v *Mohant Ram Kripal,* LR 77 IA 42 (PC).
19 *Sudarsan Das* v *Mohant Ram Kirpal,* (1956) LR 77 IA 42 PC.
20 See *supra.*

was manifestly unsound. All cases for the recovery of possession of immovable endowed property sold in execution of a decree would, therefore, be governed by Article 144 of the Limitation Act, even though the sales took place after the 1st January, 1929, when the new articles became operative.

The operation of the new articles was, thus, confined to voluntary alienation only.

(e) *Position before 1929—Summing-up*

6.86. Position before 1929.—To recapitulate in brief, prior to *Vidyavaruthi's* case,[21] a Shebait or Muttawalli was treated as a "trustee" within the meaning of Article 134, and alienations by him of the Debutter or wakf property were held to be governed by that article. The Privy Council having overruled that view in *Vidyavaruthi's* case, such cases fell thereafter to be decided on the footing that the residuary Article 144 applies. By the amending Act I of 1929 (adding a new paragraph to section 10), managers of religious and charitable endowments (Shebaits etc.) were placed in the same position as express trustees, and alienations by them were specially provided for by the new Articles 48B, 134A, 134B and 134C. The operation of Article 134 was, therefore, in general, restricted to cases of mortgaged property and ordinary (i.e., secular) trusts. The following recommendation of the Civil Justice Committee may be noted[22] in this connection:

"In view of certain recent decisions, the alienation of property vested in the head of a religious institution raises special problems for limitation purposes and should be specially provided for."

In pursuance of this recommendation,[23] in section 10 of the Indian Limitation Act, 1908, the second paragraph was added by Act I of 1929 and the following articles were newly inserted:

134A.	To set aside a transfer of immovable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve year	When the transfer becomes known to the plaintiff.
134B.	By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endow-ment to recover possession	Twelve years.	The death, resignation or removal of the transferor.

21 *Vidyavaruthi* v *Balusami,* (1922) LR 48 IA 302 (PC).
22 Civil Justice Committee Report (1924) p. 490.
23 U.N. Mitra, *Law of Limitation,* (1949), pp. 129, 130.

	of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.		
134C	By the manager of a Hindu Muhammadan or Buddhist religious or charitable endowment to recover possession of of movable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years	The death, resignation or removal of the seller.

(f) Amendment of 1929

6.87. Position under Article 134B.—After the insertion of Article 134B in 1929, a suit by the manager of a religious or charitable endowment to recover possession of immovable property comprised in the endowment which had been transferred by a previous manager for valuable consideration, being governed by Article 134B, must be brought within 12 years from the date of death, resignation or removal of the transferor.[24] When the property sold is movable property in an endowment, Article 134C, inserted in 1929, laid down the period within which a suit for the recovery of possession of such property should be instituted. The period was also 12 years from the date of death, resignation or removal of the seller. The *terminus a quo* for the period of limitation in suits of this description was the date of death, resignation or removal of the transferor. In a sense, the legislature adopted the principle which the Judicial Committee enunciated in *Vidyavaruthi's* case,[25] though it deliberately avoided all questions of adverse possession (Article 144). It rigidly set the starting point of limitation at the date of death or cessation of office of the manager. It is also immaterial that there was an interval of time between the death of the manager who transferred the property and the appointment of his successor. Time began to run not from the date when the successor assumed office, but from the date when his predecessor vacated.

6.87A. Articles 134A and 48B.—Article 134A of the Act of 1908 as inserted in 1929 related to suits filed not by the succeeding manager of the

24 For history of Article 134B, see *Venkateshwara* v *Venkatesa,* AIR 1941 Mad 449 (FB).
25 *Vidyavaruthi* v *Balusami, supra.*

endowment who seeks to recover possession of the property alienated by his predecessor, but by persons interested in the endowment to set aside alienations made by the manager. Apparently, such suits could be instituted even during the life-time or tenure of office of the alienating manager, and the period of limitation prescribed was twelve years from the date when the transfer became known to the plaintiff. It seems that in a suit of this description, the plaintiff could not claim recovery of possession of the property himself. Whether he could claim that possession may be restored to the endowment was debatable point, in respect of which there appeared to be no clear authority, either one way or the other. If the law is settled that the transfer is operative, at least, for the period of office of the transferor, it is difficult to see how any interested person can claim restoration of possession of the property so long as the alienating manager remains in office. A suit contemplated by Article 134A was really in the nature of one which the reversioner can institute during the lifetime of the widow and which was justified on the ground that material evidence on the question of legal necessity might be lost if the suit is brought after the death of the transferor. Article 48B was the counterpart of Article 134A as regards movable property sold by the manager, and the period of limitation was three years from the date when the fact of sale became known to the plaintiff.

6.87. Article 134C was also added by the Amendment Act of 1929. It related to suits of the same description as were contemplated by Article 134B, but applied to movable property, while Article 134B applied to immovable property.

6.88. Section 10, as amended in 1929.—So much as regards the articles inserted in 1929. Section 10 (as amended in 1929) placed managers of religious endowments (i.e. Shebaits, etc.) in the same position as express trustees, and no length of time would bar a suit against him or his assigns (not being assigns for valuable consideration) for the purpose of following the endowed property in his or their hands, or for the proceeds thereof or for an account. Thus, in the case of a gift of the endowed property by the Shebait, the donee (being a mere volunteer) does not come within the exception in section 10 (relating to "assigns for valuable consideration"), and therefore the succeeding Shebaits may sue to recover possession of endowed property from the hands of the donee at any distance of time without being time-barred. Indeed, "valuable consideration" forms the essence both of section 10 and Article 134B.

As regards assigns for valuable consideration, (by way of permanent lease or sale) from the Shebait, they were expressly excepted from the operation of section 10, and under the new Article 134B,[26] the succeeding

26 See *supra*.

Shebait was bound to sue to recover possession from such alienee within 12 years of the "death, resignation or removal" of the alienating Shebait and not within 12 years of the date when the plaintiff succeeded to or was appointed to the office as Shebait. After this period (i.e. the 12 years' limitation prescribed by Article 134B) has run out, the alienee would, by operation of section 28 of the Act, acquire a statutory title to the endowed property.

6.89. Strangers.—As regards strangers, (i.e. persons who are not alienees from the Shebait), it would seem that, notwithstanding the amended section 10, it was still competent to a person who is an outsider and a mere stranger to acquire a title by 12 years' adverse possession as against the idol, though of course, the Shebait himself (being now an express trustee), was precluded, howsoever long he may have been in possession of the idol's property, from setting up adverse possession as against the deity.

6.90. Article 134A, suits by worshipper.—Prior to the introduction of Article 134A (by amending Act of 1929), there was apparently a conflict of opinion as to the period of limitation applicable to a suit by a worshipper as to the invalidity of an alienation made by the manager (e.g. Shebait). Cases of this type were, after 1929, governed by the new Article 134A,[27] which, in effect, rendered it possible for the worshippers to take timely measure (e.g., section 92) for setting aside alienation.

6.91. Effect of section 10, explanation inserted in 1929.—As to section 10, the legislature added a paragraph in 1929 to that section. Section 10 thereafter applied to suits against managers of Hindu religious endowments.

The amendment to section 10 not only covered religious endowments, but also took in charitable endowments. It applied not only to Hindu and Mahomedan religious endowments, but also to Buddhist religious endowments. The managers of the property were deemed to be trustees, and the properties were deemed to vest in them for a specific purpose.

Thus, the Act of 1929 brought Hindu, Mahomedan and Buddhist religious as well as charitable endowments within the scope of section 10, by amending section 10, and inserting new Articles 48B, 134A, 134B and 134C.

6.92. Operation of the amending Act of 1929.—The amending Act I of 1929, being the amendment of a statute of limitation, was ordinarily retrospective in its operation, both as regards the period and as regards the *terminus a quo*, and consequently, where transfers took place within 12 years of the commencement of the amending Act and the right had not become barred by lapse of time when the Act came into force, the amending Act would apply.[28]

27 See *supra*.
28 See *Palanibala* v *Kali Pada*, (1950) 54 CWN 960.

6.93. Section 10, as amended in 1929.—The new paragraph[29] added in section 10 was as follows:

"For the purposes of this section, any property comprised in a Hindu, Mahomedan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

Thus, although the manager of a Hindu, Mahomedan or Buddhist religious or charitable institution was not a trustee, yet, for the purposes of section 10, the endowment was deemed to be property vested in such a manager as trustee for specific purposes and the manager shall be deemed to be trustee thereof.

The result was that as against the manager and his legal representative or assigns, not being assigns for valuable consideration, the suits to follow the trust property in his or their hands or the proceeds thereof or for an account of such property or the proceeds thereof would not be barred by any length of time. The question may have to be discussed further in a later lecture, when we come to deal with remedies for breaches of trust on the part of the Shebait or manager.

6.94. Act of 1963.—The Act of 1908, as amended in 1929, governed the law on the subject until 1963. In 1963, the Limitation Act, 1963, was passed.

(g) *Act of 1963*

6.95. Section 10, Act of 1963.—Section 10 of the Limitation Act, 1963, now reads:

"10. Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representative or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, for an account of such property or proceeds, shall be barred by any length of time.

Explanation.—For the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof."

6.96 Articles of the 1963 Act.—The following articles[30] relevant to religious trusts in the Act of 1963 may be cited:

29 See para 6.58, *supra*.
30 Articles 92 to 96, Limitation Act, 1963.

	Description of suit	Period of Limitation	Time from which period begins to run
92.	To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.
93.	To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
	Article 134A, Act of 1908.		
94.	To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
	Article 48B, Act of 1908.		
95.	To set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
	Articles 34B and 34C, Act of 1908.		
96.	By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years	The date of death, resignation or removal of *the date of appointment of the plaintiff as manager of the endowment, whichever is later.*

This elaborate discussion will show how the legal position of the relevant question of limitation has gone through a tortuous process of conflicting judicial decisions leading to amendment of the material articles of the limitation from time to time. It is to be hoped that there may not be any occasion of conflict or confusion in judicial approach to the vexed problem.

Article 96 of the Act of 1963 replaces Articles 134B and 134C of the previous Act. The new article gives two alternative starting points of limitation.

These provisions put an end to a long controversy discussed at length in a learned judgment[31]

IX. Duties and Disabilities

6.97. Shebait cannot assert adverse title.—After this discussion of points of limitation, let me now proceed to consider the Shebait's duties and disabilities. A Shebait who has accepted the office of a Shebait or acknowledged himself as such, is incapable of asserting any hostile title against the idol or setting up *jus tertii* in others. This disability is, in law, implicit in any person who holds a fiduciary position in relation to another. Furthermore, unlike a human beneficiary, an idol cannot act except through a natural person, and normally, the personality of the idol is bound up with that of the Shebait. As was pointed out by Rankin, C.J., in *Surendra Krishna Ray* v *Shree Shree Ishwari Bhubaneshwari Thakurani,*[32] if after a Shebait has accepted the trust, there is a change in an intention with which he holds the deity's properties, and he applies the rents and profits of the property to his own purposes, the idol's title cannot be affected thereby. Any change of intention on the part of the Shebait can be brought home to the idol by means of the Shebait only, and the idol can react to it through the Shebait. Adverse possession in such circumstances is a notion wholly devoid of content. Suppose that the Shebait of a family deity goes on appropriating the income and profits of the Debutter solely to his own purposes; the other members of the family can certainly bring a suit against such Shebait on behalf of the idol, but such persons have no legal duty to protect the endowment, and until the Shebait is removed or controlled by the court, he alone can act for the idol. In *Sree Sree Iswar Sridhar Jew* v *Mst. Sushila Bala Dasi,*[33] the Supreme Court approved of the above decision and the observations therein and held that so long as a Shebait held the office of Shebait, it was not open to him to acquire a title against the deity by adverse possession. The principle that a trustee cannot acquire title by adverse possession was, in *Venkatanarasimha* v *Gangamma,*[34] held to be applicable equally to *quasi* or constructive trustees, managers of religious endowments and, in fact, to all persons who stand in a fiduciary relationship to others. If, however, initially the Shebait did not accept the trust at all, there is no bar to his

31 *Surendra Krishna Roy* v *Shree Shree Ishwari Bhubaneshwari Thakurani,* (1932) ILR 60 Cal 54.

32 *Surendra Krishna Ray* v *Shree Shree Ishwari Bhubaneshwari Thakurani,* (1932) ILR 60 Cal 54, 77.

33 *Sree Sree Iswar Sridhar Jew* v *Mst. Sushila Bala Dasi,* (1954) SCR 407.

34 *Venkatanarasimha* v *Gangamma,* AIR 1954 Mad 258.

holding the property adversely to the deity, for it is plain that a man is not born responsible as Shebait and does not become Shebait against his will.

6.98. Death of Shebait also holding personal properties.—A somewhat difficult question arises when a man holding the office of a Shebait as well as personal properties of his own, dies, and both his secular properties and the rights of the Shebait devolve upon his successor under the ordinary law of inheritance. If the successor takes possession of the trust property, can he claim to hold it adversely to the deity? The answer to this question, it seems, would depend upon the question as to whether the trust was accepted by him or not. As has been said above, nobody is born responsible as a Shebait. If, before taking possession of the Debutter property, he repudiated the trust, and purported to take possession of the property in his own right, adverse to the deity, there is nothing in law which stands in the way of his asserting an adverse title; but once he has taken possession of the property in the character of a Shebait, it would not be competent to him to deny the trust, and assert the rights of a secular owner. This seems to be the implication of the decision in *Surendra Krishna* v *Shree Shree Ishwari Bhubaneshwari,*[35] referred to above.[36] In that case, Satya who was one of the heirs of the last Shebait, upon whom the office devolved under the law of inheritance, was held capable of acquiring title by adverse possession against the deity as he never accepted the position of the Shebait and acted as such. If a trustee does obtain a proper discharge from the position of a trustee with which he clothed himself, there are authorities to show that he can after the discharge assert a title of his own even against the trust.[37]

6.99. Shebait not to profit by trust property.—A Shebait, like trustee in English law,[38] must not use or deal with the Debutter property for his own private advantage. He must no import the trust money into his own business or use it for his own financial gain. If he does so, he will be regarded as a constructive trustee for the profits he made. He cannot lend the idol's money to himself, and generally speaking, he cannot enter into any engagement or contract in which his personal interest may conflict with his duties. As a corollary to this doctrine, a shebait cannot purchase a debutter property of which he is the shebait even when the sale is in execution proceedings, and the shebait has paid the full market value of the property.[39]

35 *Surendra Krishna* v *Shree Shree Ishwari Bhubaneshwari,* ILR 60 Cal 54 (Para 6.97, *supra*)

36 Para 6.97, *supra.*

37 See *Srinivash Moorthy* v *Venkata,* ILR 34 Mad 257.

38 See Underhill on *Trusts,* 7th Ed. p. 315; *Webb* v *Earl of Shaftesbury,* 7 Ves. 480; *Ex parte Lacey,* 6 Ves. 625.

39 *Peari Mohan* v *Monohar,* ILR 48 Cal 1019 PC; LR 48 IA 258.

6.100. It is a rule of law firmly laid down by the Equity Courts in England that a trustee for sale is absolutely incapacitated from purchasing the trust property, either through himself or through his colleagues, however fair that transaction may be.[40] The question whether the trustee has in such cases made an unfair gain or advantage does not arise for determination at all. The *cestui que trust* is always at liberty to set aside the sale and take the property back. A trustee may, indeed, acquire property from beneficiaries who are *sui juris,* but he can do this if he has made the fullest disclosure to them of the relevant and material facts within his knowledge affecting or likely to affect the value and advantage of the estate, and it has to be proved further that he and the beneficiaries were at arms length and no confidence was reposed on him[41] In *Peari Mohan* v *Monohar,*[42] there was a decree against the debutter to the extent of Rs. 49,500. In execution of this decree, one of the debutter properties was put up to sale, and it was purchased for a sum of Rs. 1,56,600, the ostensible purchaser being the son of the shebait himself. A suit being instituted by a presumptive shebait to set aside the sale and to remove the shebait from his office, it was found that the purchase was made *benami* by the shebait himself in the name of his son, though the price paid was quite adequate. The trial court dismissed the suit. On appeal, it was held by the Calcutta High Court that the sale was not operative against the debutter, and it was held by the Judicial Committee that though "shebait" and "trustee" are not identical terms, the rule forbidding the purchase of an estate by a person who stands in regard to his dealings with it in a fiduciary relationship is general in its application, and applies to receivers and other persons clothed with fiduciary authority. Stress was laid by Their Lordship upon the fact that the shebait in this case attempt to conceal the fact that he was the real purchaser by making the purchase in the name of his son. Such thing might easily be made a cloak for improper and dishonest transaction, and following the principle laid down in *Lewis* v *Hillman,*[43] it was held that such purchase should not be allowed to stand.

6.101. **Duty of Shebait to keep regular accounts.**—As recipient of the income of the debutter property or the offerings that are made to the deity, the shebait is responsible for the due application of the deity's income and is bound to render accounts of his management. He is bound to keep regular accounts of the income and the expenses. The way in which the accounts are kept depends to a large extent upon the custom obtaining in a particular institution, and the usual custom may be followed so long as it does not serve as a cover to fraud or dishonesty.[44]

40 *Fox* v *Macreth,* 2 White and Tudor Leading Cases 709.
41 Underhill on *Trusts,* Art. 54.
42 ILR 48 Cal 1019 PC.
43 (1852)3 HLC 607.
44 Vide *Thackersay* v *Hurbhum,* ILR 8 Bom 432, 470.

6.102. Shebait not to mix deity's money with his own.—A Shebait must take care not to mix the idol's money with his own private funds. When such a mixture has taken place either through inadvertence or design, the rules laid down by Equity Courts in England in the matter of following mixed funds in the hands of trustees can be applied. Where the trust money is capable of being traced or identified, the fiduciary will have a charge or lien on the whole mixed fund.[45] If it is incapable of being traced, the trustee can only be proceeded against personally.[46]

6.103. Right to reimbursement—In preparing accounts, the shebait is entitled to claim reimbursement for what has been properly spent by him in the preservation of the endowment, in performing the duties imposed upon him by the grantor, and also in defending own position as shebait.[47] A trespasser who usurps the position of a shebait or mohunt cannot certainly claim reimbursement, and he has no authority to charge the debutter estate for any payments that he might have made.[48] But when a person in possession of the debutter property, under the decree of a court, makes necessary payments for the preservation of the estate and the decree is subsequently reversed and the right of shebaitship is adjudged to his opponents, he should be recouped for what he has so paid, to his opponents who ultimately were benefited by such payments.[49]

6.104. 'De facto' Shebait not a trespasser nor a constructive trustee.—In this connection, I desire to warn you that you must not regard a *de facto* shebait as a trespasser. I have already said that a *de facto* shebait can maintain an action for recovery of possession of debutter property. A *de facto* shebait is one who is in possession of the debutter as a shebait and manages the property as such though the legal title may be lacking. His position is quite different from that of a trespasser who asserts a title of his own adverse to the deity. Both a *de jure* and a *de facto* shebait can be an express trustee, and it is not correct to say that a *de facto* trustee or a trustee *de son tort* is in the eyes of law a constructive trustee. A constructive trust, as was pointed out by Woodroffe, J. in *Badridas* v *Choonilal,*[50] is a trust which arises not by act of parties, but by operation of law, where a trustee gains some personal advantage by availing himself of his position as such.

6.105. Title to office of Shebait by adverse possession.—If any person, without any title to the office of Shebait, holds it for a length of time adversely

45 See in re *Hallet's Trust, Knatchbull* v *Hallet,* 13 Ch. D. 696.
46 Underhill on *Trust,* Art. 87.
47 See *Peari Mohan* v *Narendra,* LR 36 IA 37.
48 *Ram Churn* v *Nanhoo,* 14 WR 47.
49 *Dakshinamohan* v *Sarada,* LR 20 IT 160.
50 ILR 33 Cal 789.

to the rightful claimant, he can acquire a title to it by such adverse possession under Article 124 of the Limitation Act[1] if the office was a hereditary one.[1a] A trusteeship with power to appoint a successor is an estate well known and recognised by law and may be prescribed against,[2] and such rights can be claimed and acquired not only by the individual but also by or on behalf of a joint family as such.[3] Where the office is non-hereditary the period of limitation is governed by Article 120(*a*).

After I have dealt with the other form of endowment, known as Math, I will discuss remedies open to parties interested in the Math, when a Shebait commits breach of trust. I will close this lecture by describing to you briefly the circumstances under which the office of a Shebait comes to an end.

X. Termination of Office by Death

6.106. Termination of the office of Shebait by death.—The office of a Shebait naturally comes to an end upon his death. As has been said in the previous lecture, when an idol is founded, the office of a Shebait remains vested in the founder and his heirs in the absence of evidence to show that he has disposed of it otherwise. When the founder has appointed a Shebait, and the appointee dies, whether the shebaiti right would go back to the founder and his heirs, or would devolve upon the natural heirs of the Shebait would depend upon the terms of the grant. Where the appointment is only for the lifetime of the grantee, obviously on his death, the rights would revert to the grantor and his heirs. In case the right was made heritable in the appointee, it would devolve like any other species of heritable property upon his heirs at law. A Shebait cannot nominate his successor unless such powers are expressly given by the grant or are recognised by the rules and usages of the foundation.[4] When the Shebait having the powers of nomination dies without exercising the powers, the endowment reverts to the founder.[5] The same result follows if the line of succession originally indicated by the founder fails or comes to an end.

6.107. By resignation or relinquishment of office.—A Shebait, it seems, is not bound to continue to act as Shebait though he has accepted the office voluntarily and he can give up the position as a Shebait. In English law a trustee can retire when there is a provision to that effect in the trust deed, or if his retirement is consented to by all the beneficiaries or sanctioned by the Court.[6] There appears to be no such restriction in the Indian

1 Article 124, Indian Limitation Act, 1908
1a *Palanibala* v *Kalipada,* 54 CWN 960.
2 *Annasami Pillay* v *Ramkrishna,* ILR 24 Mad 219.
3 *Bhagaban* v *Narain,* AIR 1946 Pat 27.
4 *Narayan* v *Shiromoni,* 52 CLJ 78.
5 *Sitaldas* v *Protap Chandra,* 11 CLJ 2.
6 Vide Underhill on *Trusts,* Art. 68.

law fettering the right of the Shebait to resign or relinquish his office, besides the word "resignation" occurring in the third column of Article 134B and 134C in Schedule I of the Limitation Act[7] makes it clear that the Legislature contemplates the cessation of office of Shebait or mohunt by voluntary resignation. When a shebait relinquishes his office, the result is that he thereby accelerates the succession to the office of the next Shebait. The same principle applies under which a Hindu widow can surrender her estate in favour of the next reversioner.[8] No particular form of relinquishment is necessary and it would be enough if the intention to walk out of the office without any reservation is established by proper evidence.

It has been held in a Calcutta case[9] that a Shebait being manager loses his office if he ceases to manage the property and carry on the worship of the idol. The proposition, it seems, has been stated rather too broadly. The fact that a shebait does not perform his duties properly may be a ground of removing him from his office, but by itself, it would not be sufficient to terminate his office except that it may be treated as evidence of relinquishment. To establish relinquishment in law, an actual relinquishment must be proved.

6.108. By subsequent disability.—A shebaitship, as has been explained already,[9a] is a property, and once it has vested in a person, he cannot be divested of it by reason of subsequent disability. In *Nirmal Kumar* v *Jyotiprosad,*[10] it was held that a Shebait who was of sound mind when the shebaitship devolved upon him does not lose his rights by subsequently becoming insane, nor do his rights remain suspended so long as disability lasts except in cases where the duties imposed upon him are of such a character that they cannot be discharged by a representative. The effect of apostasy or change of religion upon the rights of a shebait has already been discussed. It has been held that unchastity of woman is not a ground for removal from the office of Shebait.[11]

6.109. By removal.—A Shebait who is guilty of misconduct or abuse of his position as a trustee can be removed by the court in a proper judicial proceeding. What reasons are sufficient to justify removal of a Shebait cannot be formulated exhaustively. The matter is within the exercise of a sound judicial discretion by the court. There must, however, be a clear necessity for interference to save the endowed property.[12] It was observed

7 Articles 134N and 134C, Indian Limitation Act 19 of 1963. See now the Limitation Act, 1963.
8 *Girish* v *Upendra*, 35 CWN 769.
9 *Bhuban* v *Narendra,* 35 CWN 478.
9a Para 5.5, *supra.*
10 ILR (1941)2 Cal 148.
11 *Girish* v *Upendra*, 35 CWN 769.
12 See *Monohar* v *Peari Mohan*, 30 CLJ 177, 189.

by the Judicial Committee in *Gulzarilal* v *Collector of Etah*[13] that "the standard of rectitude and accuracy expected from every trustee of charitable funds is of the highest, and that standard must in all circumstances be maintained by the court if the safety of property held upon such trusts is not to be imperilled throughout British India." In that case, there were concurrent findings by both the courts below that there was misappropriation of trust funds by the trustee and conversion of trust property to his own use, and in view of these findings, the Judicial Committee declined to interfere with the decree appealed against even though it was proved that the trustee had at an earlier stage rendered services of immense value to the trust estate. The assertion of a right to treat the endowed property as his own property or a claim to apply the trust funds to his own private purpose would be enough to justify a removal.[14] It is a sufficient ground for removal, if in the exercise of his duties, the Shebait places himself in a position, in which the court thinks, he can no longer discharge the obligations of the office faithfully.[15] When there is a gross abuse of his fiduciary position, it is not necessary that there should be actual misappropriation or that the deity must actually suffer loss.[16] These questions would have to be taken up again in a later lecture where remedies for breaches of trust by shebaits would come for consideration.

13 35 CWN 699.
14 *Chintamoni* v *Dhando*, ILR 15 Bom 612.
15 See *Peari Mohan* v *Monohar*, ILR 48 Cal 1019.
16 See *Nirmal* v *Jyoti*, ILR (1941)2 Cal 128.