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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

COMPILATION ON SHEBAIT

BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

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SUBMISSIONS ON IDOLS, SHEBAITS, NEXT FRIEND ETC.

A. GENERAL PROPOSITIONS ON WORSHIP, IDOLS, SHEBAIT'S RIGHTS AND NEXT FRIEND

1. The ultimate aim of prayer is to worship the Supreme Being with the object of securing the spiritual well-being of a person according with the tenets of the particular religion she or he may believe in.

2. In the Vedic period, there were no idols and correspondingly, temples for worship of idols were also unknown.

   - B.K. Mukherjee, "*The Hindu Law on Religious and Charitable Trusts*", 5nd Edn., p. 13

3. In the Vedic period, prayer was addressed to beings representing the beneficient and radiant powers of nature e.g. earth, air, sky etc. with an eye on the infinity behind these finite forces. Prayer was through offerings poured into the sacred fire and charity was in the form of consecration of tanks and wells and planting frees and building rest houses for travelers. Monastic institutions were unknown.

   - B.K. Mukherjee, "*The Hindu Law on Religious and Charitable Trusts*", 5nd Edn., p. 14, 26

4. It was in the post-Vedic period that idol worship began, perhaps inspired by the respect that Buddhists paid to relics and sacred structures and later to the image of Buddha himself. The Buddhist *sangha* paved the way for monastic institutions capable of holding property.

- B.K. Mukherjee, "*The Hindu Law on Religious and Charitable Trusts*", 5nd Edn., p. 19-21

Dedication

5. The ceremonies relating to dedication of property to an idol are *Sankalpa*, *Uthsarga* and *Prathista*. *Sankalpa* means determination, and is really a formal declaration by the settlor of his intention to dedicate the property. *Uthsarga* is the 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. *Pratishtha* is the final installation of the idol. An endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies, provided the settlor has clearly and unambiguously expressed his intention in that behalf. But in certain cases, these may not be essential.

- *Deoki Nandan* v. *Murlidhar*, AIR 1957 SC 133

- B.K. Mukherjee, "*The Hindu Law on Religious and Charitable Trusts*", 5nd Edn., p. 31, 101, 153

Shebait

6. The legal character of a *shebait* cannot be defined with precision and exactitude. Broadly described, he is the human ministrant and custodian of the idol, its earthly spokesman, its authorised representative entitled to deal with all its temporal affairs and to manage its property.

- *Profulla Chorone Requitte* v. *Satya Chorone Requitte*, (1979) 3 SCC 409, para 52

7. 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, not in the idol.

- *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*, (1903-04) 31 IA 203
- *Profulla Chorone Requitte* v. *Satya Chorone Requitte*, (1979) 3 SCC 409, para 52

8. The personality of the idol can be said to be merged in that of the shebait.

- B.K. Mukherjee, "*The Hindu Law on Religious and Charitable Trusts*", 5nd Edn., p. 257-258.
- *Bishwanath* v. *Thakur Radha Ballabhji*, (1967) 2 SCR 618, para 11

9. 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.

- B.K. Mukherjee, "*The Hindu Law on Religious and Charitable Trusts*", 5nd Edn., p. 258

10. Since the shebait acts as the human agent of the idol, a suit by the shebait is in law a suit by the idol itself.

- *Profulla Chorone Requitte* v. *Satya Chorone Requitte*, (1979) 3 SCC 409, para 52

11. The only situation where some other agency can be said to have the right to act for the idol is where the shebait refuses to act for the idol or where the suit is to challenge the acts of the shebait himself as prejudicial to the interests of the idol.

- *Bishwanath* v. *Thakur Radha Ballabhji*, (1967) 2 SCR 618, para 11
- *Vamereddi Ramaraghava Reddy* v. *Kondru Seshu Reddy*, AIR 1967 SC 436
- *Tarit Bhushan Rai v. Sri Sri Iswar Sridhar Salagram,* AIR 1942 Cal 99

- *Sushama Roy* v. *Atul Krishna Roy*, AIR 1955 Cal 624

- *Chamelibai Vallabhdas* v. *Ramchandrajee*, AIR 1965 MP 167

It is necessary for protecting the interests of the idol that in cases where default of the shebait is alleged that a suit on behalf of the idol be permitted to be filed by a person claiming to be next friend with the permission of the court and the court might in proper cases issue notice to all persons interested before granting permission.

- *Tarit Bhushan Rai v. Sri Sri Iswar Sridhar Salagram,* AIR 1942 Cal 99

- *Sushama Roy* v. *Atul Krishna Roy*, AIR 1955 Cal 624

- *Sri Iswar* v. *Gopinath*, AIR 1960 Cal 741

- *Jogesh Chandra Bera* v. *Sri Iswar Braja Raj Jew Thakur*, AIR 1981 Cal 259

Compromise Between Plaintiffs in Suits 3 And 5

12. Under Section 10 of the Code of Civil Procedure, 1908, no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed. The exercise of the right to sue for protection of properties of the idol has to be either by the idol or by the shebait and not by both. Therefore, while Suit No. 3 was pending, another suit between the idol and the Muslim parties for the same relief could not be maintained.

- *Shree Mahadoba Devasthan* v. *Mahadba Ramji Bidkar*, AIR 1953 Bom 38

13. There can be no compromise between the shebait and the next friend to maintain both their suits without one of them giving up its right to sue on behalf of the idol. An admission by the shebait that a suit by a worshiper acting as a next friend of the deity is maintainable amounts to an admission by the shebait that

he has acted in dereliction of his duty or has acted contrary to the interests of the idol. In that case, the suit by the shebait must be dismissed as not maintainable as being without authority to sue on behalf of the idol. Similarly, the next friend cannot maintain a suit for the same relief if he admits on compromise that the shebait has not acted in dereliction of his duty or acted prejudicial to the rights of the idol.

B. SHEBAIT'S RIGHT TO SUE AND NEXT FRIEND'S RIGHT

Shebait not an owner or owning Trustee but has an exclusive right to sue on behalf of the idol.

X1. In *Maharaja Jagadindra v. Rani Hemanta Kumari, (1904) 31 IA 203*, suits were filed against Rani Hemanta Kumari by the Maharaja's successor claiming to be shebait under specific settlements of 1868 and 1877 and in this instance brought within 3 years of the minority of the shebait. Both courts decided in favour of the plaintiff's rights. But the High Court dismissed the suit on ground of limitation. The Privy Council resrtored the Subordinate Judge's decrees observing (at 209)

> *'There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character.'*

And (at 210)

> *But assuming the religious dedication to have been of the strictest character; 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, not in the idol. And in the present case right to sue accrued to the plaintiff when he was under age. The case therefore falls withing the clear language of s. 7 of the Limitation Act, which says that, "If a person entitled to institute a suit ..... be, at the time from which the period of limitation is to be reckoned, a minor," he may institute the suit after coming of age within a time which in the present case would be three years.'*

X2. In *Tarit Bhushan Rai v. Sri Sri Ishwar Sridhar AIR 1942 Cal. 99* (reproduced from SCC Online), a next friend brought a suit on behalf of the idol against co-shebaits and various interested parties. The property was mortgaged. A question

arose as to the minority of the idol. The Court pointed out similarities and dissimilarities. The Court took the view:

a) A Hindu idol is not a minor or a perpetual minor even though there is an analogy between the two

b) A Hindu idol, though not a minor is a juristic person only in the ideal sense

c) Where an earlier suit is dismissed in default, such dismissal would not be binding on the idol

d) A worshipper does not have the legal capacity to sue on an idols behalf. But can sue to protect his own interest in worship as the idol can in respect of its properties.

e) But such suits will lie only if these rights are not protected by the shebait by negligence.

f) A next friend's right to sue would only arise if there was 'gross negligence' of the guardian

(The differences in the individual judgments are not relevant for the purposes of this case)

g) Pal J. retained the Court's power if the next friend did not do his duty. But this is a different question altogether.

X3. *Shree Mahadoba Devasthanam v. Mahada Ramji (1952) Bom. 1071* concerned a grant of inam by the Peshwas for worship. Eventually, a suit was filed by a next friend as a vahivatdar of the idol to set aside a wrongful alienation. It was held that the wrongful alienator could not represent the idol. On the facts of the case the court observed: (at p. 1079)

> *"The next friend would of necessity be some person other than the manager or the shebait of the image or idol, and what better person can be found than the person next in order of the of succession of the shebaitship"*

It is clear that the next friend cannot be just anybody and must have appropriate credentials'

X4. *Sushamma Roy v. Atul Krishna Roy AIR 1955 Cal 624 (as reported in (1955) Online 166)* concerned a person interested (Mrs. Sushamma Roy) in puja instituting a suit on behalf of the deity even though not appointed by the Court as next friend under circumstances where differences between brothers led to a compromise concerning a private endowment to which the deity was not a party. Earlier there was a difference of opinion as to whether such a next friend must necessarily be appointed by the Court. While Justice Das in Sri Sri Gopal Jew v. Baldeo Narain (51 CWN 383) preferred the view that a next friend 'both competent and honest' it was ' "not a prerequisite" that such next friend be appointed by the Court. This view was not accepted by accepted by Justices Das Gupta and Guha in the present case of Sushamma Roy (preferring the view of Justice Pal nd Gentle in Tarit Bhushan (45 CWN 932) to the view of Sen J in *Sree Sree Annapurna v. Shiba Sundari (1944) 2 Cal. 144)* who felt that an application to the Court in the interests and justice and prevent adventures to adversely affect the interest of the deity. This is powerfully expressed in (pr. 14)

> *'With the respect that is due to so eminent Judge, as Das J., I must say that I cannot persuade myself that the Court will in the majority of cases be able to prevent intermeddling or that it will find it easy to rectify an adverse decree passed on account of the fraud or negligence of the next friend. The ways of litigation are long and tortuous and many an honest man dread to go inside the walls of the Court of law. It has to be remembered that the question of the deity suing by a next friend arises only when the shebait is unwilling or unable to do his duty. There is always the risk of the defaulting shebaits setting up one of their creatures to start a sham litigation in the name of the deity so that the adverse decree might bind the deity forever. Is it reasonable to expect that after the she-baits have failed in their duty and a suit brought by another person in the name of the deity has been unsuccessful, another person will ordinarily be found willing and able to start a fresh litigation to rectify the adverse decree? I do not think so. But even if some brave*

soul comes forward and undeterred by the ever-present clouds of adjournments, and the threat of high waves of costs launches his task on the sea of litigation, and safely reaches the harbour of success, such repeated tensions in the Court of law are bound to cause great loss to the debuttar estate.

This pro-Court appointment view has considerable merit including hearing the parties against a self styled person.

X6. In *Deoki Nandan v. Murlidhar AIR 1957 SC 133 (SCC online edition)* the suit was filed by an agnate of the defendant who was allegedly 'mismanaging the temple and denying the rights of the public therein" after the Advocate General declined to give consent under Section 92 of the CPC. Justice TLV Ayyar for the Court decided that the temple was a public temple. The issue of the locus of the plaintiff was absorbed into the finding that the temple was public.

X7. In *Sri Ishwar Radha Kant v. Gopinath Das, AIR 1960 Cal 741,* the daughter (Molini Hazra) of the nephew of the settlor (Sital Chandra Das) filed as "next friend" for herself and shebait of the deity. Later, after a compromise, defendant Rajen (dra) Sen filed as a next friend of the deity against Sital for framing a scheme of management and a consent decree was passed. It was alleged that Rajendra's suit was fraudulent. It was also alleged that the suit by Nimal Chand was also fraudulent, affecting the interests of the deity who was not represented. In this configuration, the Court ~~added~~ deprecated the manipulative actions :

'The evidence tendered in this case discloses a story which leaves a very unpleasant taste in the mouth of any one who is compelled to hear it. The plaintiff's case is that Phanilal a very clever and unscruplous attorney of this Court is the central figure who inspired and is responsible for the various fraudulent acts that ultimately led to the sale of debutter property. The first act is the lease in favour of the defendant Gopinath. The lease did not contain any recital as to legal necessity. There is no recital either that the lease was for the benefit of the deity. However dishonest and untruthful the parties involved were, they did not add to their sin by inserting a false recital in the lease that it was for

legal necessity or for the benefit of the deity. Lessor was Sital the shebait and the lessee the defendant Gopinath. Sital is dead and Gopinath in his written statement would not touch the lease even with a pair of tongs. He repudiated the lease and denies to have had anything to do with it. In evidence he condescended to say that the signature might be his but otherwise he had nothing to do with it. He did not pay Rs. 2,500/- or any other sum on account of the lease. The brunt of supporting the lease fell on Phani Lal.'

The Court held that :

a) a deity can be represented by someone other than a worshipper and family member appointed by the Court (pr. 17)

b) In this case the mortgage and alienation was fraudulent and not for necessity (pr.18 and 21)

c) The lower courts had not applied its mind after concluding that the shebait was not the right person to represent the deity (pr. 22)

d) The mortgage was not binding on the deity

This case demonstrates the danger of self styled next friends.

X8. In *Chamelibai v. Ramchandrajee AIR 1965 MP 167 (on SCC Online)* the right of a next friend (Sundarlal) concerning property but claiming to be a shebait for the entire property. Reversing the trial court, the High Court held (at pr 21)

> *'Thus the basis of Sundarlal's claim to sue as a Shebait not being made out suit filed by him ought to be treated as by an unauthorised person. No specific claim as a mere worshipper for assailing the prejudicial acts of a past Shebait on the ground that there is no Shebait or the Shebait has refused or neglected to act has been put forward. It would, therefore, seem that Sundarlal's right to file the present suit is far from clear. Indications on authorities would suggest that he could not have sued.'*

Nor could a declaratory decree be claimed (pr 24)

> *'But it would prima facie appear that a claim for a declaration with reference to substantial portion of the property including shops, Kotha, Chabutra, etc., would be barred by time as the defendant has secured title adverse to the deity in a litigation between an ex-de facto Shebait and subsequent attempt to challenge the decision had been held to be barred by res judicata. Even a claim for declaration with reference to the other shops would appear to be barred by limitation as the defendant had claimed to be in possession on his own account since long for some time as a mortgagee and later as absolute owner and more than 30 years had elapsed since then.'*

X9. In *Vemareddi v. Konduru AIR 1967 SC 436* a worshipper wanted to set aside a compromise decree as inimical to the interest of the deity in that it declared certain properties to be those of the family. Brushing aside the objection that Section 42 of the Specific Relief Act . On the locus of the worshipper in law, the Court observed at pr.13

> *As a matter of law the only person who can represent the deity or who can bring a suit on behalf of the deity is the Shebait, and although a deity is a judicial person capable of holding property, it is only in an ideal sense that property is so held. The possession and management of the property with the right to sue in respect thereof are, in the normal course, vested in the Shebait, but where, however, the Shebait is negligent or where the Shebait himself is the guilty party against whom the deity needs relief it is open to the worshippers or other persons interested in the religious endowment to file suits for the protection of the trust properties. It is open, in such a case, to the deity to file a suit through some person as next friend for recovery of possession of the property improperly alienated or for other relief. Such a next friend may be a person who is a worshipper of the deity or as a prospective Shebait is legally interested in the endowment. In a case where the Shebait has denied the right of the deity to the dedicated properties, it is obviously*

desirable that the deity should file the suit through a disinterested next friend, nominated by the court.

Note the words "nominated by the court."

This resolves the issue as to whether the next friend be appointed or approved by the Court.

X.10. In *Bishwanaath v. Sri Thakur Radha Ballabji AIR 1967 SC 1044 (SCC Online edn*) to a worshipper who had taken interest in the management of a temple filed as next friend because the shebait had not taken steps to recover the property. The Court held (at pr. 9)

> *'Three legal concepts are well settled: (1) An idol of a Hindu temple is a juridical person; (2) when there is a Shebait, ordinarily no person other than the Shebait can represent the idol; and (3) worshippers of an idol are its beneficiaries, though only in a spiritual sense. It has also been held that persons who go in only for the purpose of devotion have, according to Hindu law and religion, a greater and deeper interest in temples than mere servants who serve there for some pecuniary advantage: see Kalyana Venkataramana Ayyangar v. Kasturi Ranga Ayyangar7. In the present case, the plaintiff is not only a mere worshipper but is found to have been assisting the 2nd defendant in the management of the temple'*

But the Court also overruled the decisions of the Patna *(Kunj Behari v. Sri Sri Shyam Chand AIR 1938 Pat. 394)* and Orissa High Court (*Artatran v. Sudershan AIR 1938 Orissa 11*) that the only remedy was to remove the shebait through Section 92 of the CPC.

X11. In *Prafulla v. Satya (1979) 3 SCC 409* the Court held:

a) A shebait not willing to resume his duties transfer his duties only to an appropriate person (i.e. co-shebaits) (pr 26)

b) Only the shebait can sue for the idol's property. Any suit which does not implead all shebaits must fail (pr. 52)

This reinforces the right of the shebait

X12. In *Jogesh v. Ishwar AIR 1981 Cal 259* (SCC Online edn) the deity was represented through a next friend. It was held that the deity could sue as a pauper under Ord. 33 of the CPC. But the Court reiterated that the next friend must be appointed with leave of court (pr. 17)

> *'Since we have found upon a consideration of the authorities cited hereinbefore that a suit in the name of the deity unless brought by the shebait himself or a prospective shebait must be so instituted through a next friend appointed in that behalf by the Court, the suit as instituted by Mokshoda without obtaining such leave is incompetent. Consequently the question of granting leave in such a suit cannot arise until Mokshoda obtains the leave of the Court to institute the action. The second point urged by Mr. Roy Chowdhury therefore succeeds.'*

C. COURT APPROVAL FOR NEXT FRIEND

1. There is some controversy as to whether a next friend needs the approval of the Court.

2. The first view is that Court nomination or leave of court is necessary:

   - *Pal J. Tarit Bhushan v. Sri Sri Iswar, AIR (1942) Cal 99*
   - *Gentle J in Sree Sree Sreedhar v. Kanta Mohan, AIR 1947 Cal 213*
   - *Das Gupta J. in Sushamma Roy v. Atul Krishna Roy, AIR 1955 Cal 624*
   - *PC Mallick J in Ishwar Radha Kanta Jew v. Gopinath Das AIR 1960 Cal. 741* (citing the above cases)
   - *Vamareddi v. Knoduru AIR 1967 SC 436*
   - *Jogesh Chandra v. Sri Ishwar AIR 1981 Cal 259*

3. The seat of opposition to this proposition is to be found in judgment Das J in *Sri Sri Gopal Jew v. Baldeo Narain Singh 1950 CWN 383* that Order 32 (as for minors) applies to deities and any fraud can always be corrected in a subsequent suit. In *Sushamma Roy v. Atul Krishna Roy AIR 1955 Cal 624* strongly opposed such a view to observe:

> *'With the respect that is due to so eminent Judge, as Das J., I must say that I cannot persuade myself that the Court will in the majority of cases be able to prevent intermeddling or that it will find it easy to rectify an adverse decree passed on account of the fraud or negligence of the next friend. The ways of litigation are long and tortuous and many an honest man dread to go inside the walls of the Court of law. It has to be remembered that the question of the deity suing by a next friend arises only when the shebait is unwilling or unable to do his duty. There is always the risk of the defaulting shebaits setting up one of their creatures to start a sham litigation in the name of the deity so that the adverse decree might bind the deity forever. Is it reasonable to expect that after the she-baits have failed in their duty and a suit brought by*

another person in the name of the deity has been unsuccessful, another person will ordinarily be found willing and able to start a fresh litigation to rectify the adverse decree? I do not think so. But even if some brave soul comes forward and undeterred by the ever-present clouds of adjournments, and the threat of high waves of costs launches his task on the sea of litigation, and safely reaches the harbour of success, such repeated tensions in the Court of law are bound to cause great loss to the debuttar estate.

He then went on to prefer the view of Justices Pal to conclude :

'16. In a particular case the Court may make an ex parte order in order to prevent some imminent danger to the debattar estate but there is no reason why ordinarily the Court should not, before making the order of appointment, consider the views of the interested parties. In substance, the members of the family in the case of private debattar are the real beneficiaries and it is necessary and desirable that their views should be ascertained before any person other than the shebaits is appointed to represent the deity. Even where an ex parte order has been made, it will be possible and proper to issue notices on all interested parties and to cancel the ex parte order in the interest of the deity.

17. On the whole I am of opinion that ordinarily the interests of the deity require that nobody other than a shebait be allowed to institute a suit in the name of the deity without a previous order of the Court appointing him to represent the deity.'

D. THE STATUS OF NEXT FRIEND

1. Apart from Court approval, a Next Friend appearing on behalf the deity

   a) A next friend appearing on behalf of the deity must be a person who has a worshipper or someone with sufficient interest;

   b) Such interest cannot be adverse to that of that of the deity;

   c) Where such a person claims to be a worshipper but is not or seeking to muscle into the case for personal reasons, such a person cannot be permitted to be a next friend;

   d) Such actions must be time barred but taking account of cases where fraud is pleaded and proved.

2. The relevant cases in this regard are:

   - *Maharaja Jagadindra v. Rani Hemanta Kumari, (1904) 31 IA 203,* it was held that though the idol is a juristic person, management and right to sue are vested in the shebait. And where the plaintiff shebait is a minor the right to sue would accrue would inhere 3 years after attaining majority

   - In *Tarit Bhushan Rai v. Sri Sri Ishwar Sridhar AIR 1942 Cal. 99*, it was held that although the right to sue on behalf of the idol vested in a shebait, a worshipper's right to sue would be to protect his right to worship and the maintenance of the right of worship

     (Other questions arising from this case have been discussed separately)

   - In *Shree Mahadoba Devasthanam v. Mahada Ramji (1952) Bom. 1071,* while underlying the shebaits exclusive right to represent the deity, another person in line as manager or shebait can maintain a suit in the name and image or the idol acting as next friend. But the idol could file a suit (presumably through the shebait). But the rights can be exercised through the one or the other but not both. In this case the next friend's locus was that he was in the line of succession

- In *Sushamma Roy v. Atul Krishna Roy AIR 1955 Cal 624,* the next friend was a member of the family who had interest in the sheba-pooja to set aside a scheme in a previous suit.

  (Other aspects of this case are discussed separately)

- In *Deoki Nandan v. Murlidhar AIR 1957 SC 133,* the next friend was an agnate of the settlor, that the true beneficiaries were the worshippers, there was a difference between public and private endowments. In this case it was a public temple.

- In *Sri Ishwar Radha Kant v. Gopinath Das, AIR 1960 Cal 741,* following the sale of the debutter property, it was found that the next friend had acted fraudulently to disentitle him. The suit was, thus "wholly unauthorized ...all proceedings being including the decree must be held to be illegal and void as far as the deity was concerned". There was an absence of legal necessity

- In *Chamelibai v. Ramchandrajee AIR 1965 MP 167,* Sundarlal filed as next friend claiming to be the pujari and shebait of the 8 temples. It was held that he was not an appropriate next friend for the purposes of the case and in respect of the property.

- In *Vemareddi v. Konduru AIR 1967 SC 436,* the Court held that the shebait was the right person to bring the suit and limited the right of the worshipper as follows:

  Copy pr 11 as indicated leaving out the references

- In *Bishwanaath v. Sri Thakur Radha Ballabji AIR 1967 SC 1044,* a 'devotee and a worshipper who had taken keen interest in the management of the temple where the deity is installed" acted as next friend to challenge an alienation due to the dereliction of the shebait's duty. It was decided that the suit was maintainable.

- In *Prafulla v. Satya (1979) 3 SCC 409,* it was held that that a shebaitship is heritable and only the shebait and not the trustees could maintain a suit. In any case, all shebaits were necessary parties. The Court observed (at pr. 52)

'From whatever angle the matter may be looked at, the conclusion is inescapable that shebaitship of the family deity remained solely with the descendants of the founder; and the defendant-respondent who is admittedly a grandson of the founder had been regarded as one of the shebaits, and as such, entitled to reside in the disputed rooms. All the shebaits were therefore, necessary parties; but all of them have not been impleaded. The trustees by themselves, have no right to maintain the suit in respect of the debutter property, the legal title to which vests in the idol, and not in the trustees. The right to sue on behalf of the deity vests in the shebaits. All the shebaits of the deity not having been made parties, the suit was not properly constituted, and was liable to be dismissed on this score alone.'

- In *Jogesh v. Ishwar AIR 1981 Cal 259,* the Court held that leave of Court was necessary to maintain a next friend suit

'Since we have found upon a consideration of the authorities cited hereinbefore that a suit in the name of the deity unless brought by the shebait himself or a prospective shebait must be so instituted through a next friend appointed in that behalf by the Court, the suit as instituted by Mokshoda without obtaining such leave is incompetent. Consequently the question of granting leave in such a suit cannot arise until Mokshoda obtains the leave of the Court to institute the action. The second point urged by Mr. Roy Chowdhury therefore succeeds.'

E. STATUTORISATION

1. It will also be seen that statutory endowments now fall into two categories:

A. Under a general regulatory law

Eg:-

i. Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959

ii. Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997

B. Where a special statute is made for a special endowment

Eg:-

i. Shri Jagannath Temple Act, 1955

ii. Jammu and Kashmir Mata Vaishnodevi Shrine Act, 1988

iii. The Uttar Pradesh Shri Badrinath and Shri Kedarnath Temples Act, 1939

It should be noted that:

a) the powers of trustees, shebaits maths and protection of the idol are generally regulated; and

b) in the case of special statutes property is transferred to the statutory board which is in charge of the management.

F. NEXT FRIEND IN THIS CASE

1. The original next friend had submitted an application under Section 80 to get waiver from the requirement of giving prior notice to the Government and an application for getting himself appointed as Next Friend from the Court. Thereafter, on July 1,1989, the Civil Judge passed an order directing the suit to be registered and permitting the Plaintiff No. 3 to represent the said Plaintiffs Nos. 1 and 2 as next friend. It is on the basis of this order that the Hon'ble High Court held that Plaintiff No. 3 can validly represent Plaintiff Nos. 1 & 2. **[Para 2140 @ pg. 1305/Vol. 1 and Pgs. 3532/Vol. 3 of the Impugned Judgment]**

2. Despite the above, the following points from the testimony of the next friend – Shri Devki Nandan Agarwal (who was also OPW 2) has stated:-

   (i) He never did idol worship. **(Pg. 371/Vol. 17)**

   (ii) He states that he does not know if idols ever existed continuously in the disputed place before 1528 (**Pg. 389/Vol. 17)**

   (iii) Admits that Ram Janam Bhumi Nyas (which according to Plaint in Suit 5 has been entrusted with the responsibility of construction of the proposed temple) is connected with VHP. **[Pg. 389/Vol. 17]**

   (iv) It is relevant to note that this Hon'ble Court in *Ismail Faruqui v. Union of India* (1994)6 SCC 360 has recorded that VHP was responsible for inciting the crowd to demolish the disputed structure **[See para 6 at pg. 379]**

   (v) He has stated that he is not the kind of a devotee who went to have darshan with a mind full of devotion. **[Pg. 395/Vol. 17]**

   (vi) He states that he has been the Vice President of VHP **[Pg. 406/Vol. 17]**

3. From the foregoing, it is clear that the Plaintiff No. 3 was not a devotee of the Plaintiff Nos. 1 & 2 deities.

4. Further as per the Plaint of Suit 5, the Ram Janam Bhumi Nyas has been entrusted with the responsibility of construction of the proposed temple **[See**

paras 14-16 of the Plaint at pgs. 240-241/Vol. 72- Pleadings Volume]. In this regard it is relevant to note that :-

(a) VHP – which had a role in inciting the crowd for demolition of the disputed structure is also empowered to Nominate 14 trustees in the Ram Janam Bhumi Nyas. **[See para 6 at pg. 379 of *Ismail Faruqui v. Union of India* (1994)6 SCC 360; Also see Para 16 of the Plaint at pg. 241/Vol. 72- Pleadings Volume]**

(b) VHP has exercised its powers and nominated Plaintiff No. 3 as one of the Trustees in Ram Janam Bhumi Nyas. **[See Para 16 of the Plaint at pg. 242/Vol. 72- Pleadings Volume]**

5. In view of the foregoing, it is clear the Plaintiff No. 3 was not a worshipper of the idol at the alleged temple, and was therefore not concerned with the rights of the deity in the first place. Secondly, he was not a "*disinterested*" next friend, as he himself was a part of the Ram Janambhoomi Nyas, which would eventually get possession of the disputed site, so as to be able to construct the temple, in the event that Suit 5 of 1989 is allowed.

G. CONCLUSION

It is therefore submitted that :-

a) It is not conceded that Nirmohi Akhara has been there from times immemorial.

b) It has made an intermittent presence from about 1858.

c) In 1885, Nirmohi was denied the title of even the Ram Chabutara and only easementary right to worship at the Ram Chabutara was permitted. In the said plaint, Nirmohi had itself admitted to the existence of the mosque as well as the possession of the Muslims over the mosque as well as the inner courtyard.

d) Nirmohi played a hand in attacking the mosque in 1934.

e) Nirmohi was a part of a systematic campaign from March 19,1949 to the eventual desecration of the mosque on December 22/23,1949.

f) It cannot ~~rap~~ reap the benefits of its own wrong.

g) It has never claimed ~~the~~ rights in the inner courtyard before 1959, and even in 1959, in their suit only rights of "management and charge" are claimed.

h) Further the next friend, is hardly a comrade, since his suit is a conspiracy to usurp the rights of the shebait by one who is unworthy to be a shebait and is therefore clouded with suspicion.

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MAHARAJA JAGADINDRA NATH ROY BAHADUR. . . . . } PLAINTIFF;

AND

RANI HEMANTA KUMARI DEBI . . DEFENDANT.

J. C.*
1904
June 29, 30; *July* 29.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Idol—Sebait—Property vested in Idol—Right of Management and Suit vested in Sebait—Limitation—Act XV. of 1877, *s.* 7.

Although an idol may be regarded as a juridical person capable as such of holding property, especially where the dedication is of the completest character, yet the possession and management of the dedicated property with the right to sue in respect of it are vested in the sebait.

Where the right to sue in ejectment had accrued to the plaintiff as sebait during his minority, and suits were brought within three years of his majority:—

Held, that under s. 7 of Act XV. of 1877 they were not barred, although the plaintiff's adoptive mother had after her adoption of him as son to her husband, his predecessor in title, taken a settlement of the property in suit as sebait in her own name, and might have sued as his guardian.

CONSOLIDATED APPEALS from decrees of the High Court (Aug. 29, 1900) reversing decrees of the Subordinate Judge of Mymensingh (March 28, 1895).

They arose out of two suits, one being to recover possession, by establishment of title, of an estimated area of 1,400 bighas of land as appertaining to and included in a mehal or mouzah Gabshara, bearing No. 5249 in the Mymensingh Collectorate; the other being to recover possession of a smaller parcel of land in the same mouzah, estimated to be 340 bighas. The former was against Rani Hemanta Kumari alone, the other against Rani Hemanta Kumari and the two other respondents.

Both Courts arrived at the conclusion that the appellant had made out his title to the lands in suit.

The High Court, however, held that the suits were barred

* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

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by limitation on the ground that plaintiff did not claim proprietary interest in himself with respect to the lands in suit, but as sebait of the idol, and qua sebait was not entitled by s. 7 of the Indian Limitation Act to any extension of the period of limitation by virtue of his minority.

The material passages in the High Court judgment are as follows: "It will be observed that the plaintiff does not claim any proprietary interest in himself in respect of the lands in suit. That interest is admitted to be vested in Sri Sri Gobinda Deb Thakur, and indeed the settlements that were made by Government in 1868 and 1877 with Maharaja Gobinda Nath Roy and Maharani Braja Sundari Debi respectively were in the capacity of sebaits of the said thakur. If that is so, the question arises whether the cause of action did not arise in 1282, or in Bysack 1283, whichever be the time of actual dispossession. We ought, perhaps, here to mention that the question of limitation, as depending upon the circumstance of the proprietary interest being vested in the thakur, and not in the plaintiff, does not seem to have been raised in the Court below, nor in the petition of appeal presented to this Court. But as it is a question which arises upon the face of the plaint, and upon the settlements under which the plaintiff claims, we are bound to take cognizance of it: see s. 4 of the Indian Limitation Act."

The judgment then referred to various decisions of the Judicial Committee of the Privy Council and other decisions relative to the application of the law of limitations with reference to property held by sebaits or managers of idol or thakur property. It continued that in 1877, when Maharani Braja Sundari Debi obtained settlements from the Government, though probably she obtained them as representing the appellant (her husband's adopted son), who was then and remained until October, 1889, a minor, yet they were made with her as representing the idol, and there was consequently nothing to prevent a suit being brought on behalf of the idol represented by her as the sebait. Accordingly it could not be successfully urged that the appellant, on his attaining majority and becoming the sebait, obtained a fresh start of limitation.

The Court found that the respondents' adverse possession went on, and therefore the suits were barred by art. 142 or 144 of the Limitation Act.

The judgment then continued: "It was, however, argued on behalf of the respondent that the proprietary interest might not be wholly vested in the thakur, but that the plaintiff might have some beneficiary interest in the proceeds of the property, and that in this view he would be entitled to maintain a suit in his own right, and would be protected from the operation of limitation by the provisions of s. 7 of the Limitation Act. It was suggested that, if the question had been raised in the Court below, this matter might have been cleared up by evidence. But the matter seems to be so plain upon the face of the plaint and upon the settlement leases of 1868 and 1877, to which we have already referred, that there can hardly be any room for doubt in the matter, the proprietary interest being distinctly stated to be in the thakur, and there being no allusion whatever to any beneficiary interest in the plaintiff. We must, therefore, regard the suit as brought by the thakur, the plaintiff being only sebait."

Sir W. Rattigan, K.C., and *C. W. Arathoon*, for the appellant, contended that the High Court erred in holding that the settlements made with Braja Sundari Debi, the appellant's adoptive mother, and previously with Gobinda Nath Roy, her husband, had been made with them, not as proprietors, but merely in the capacity of sebaits to the idol. The title and proprietary right were in their predecessors, and had passed to them by inheritance. On this point reference was made to *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee*. (1) But even though the property was vested in the idol and the sebaits had no beneficial interest therein, yet the right of management and the right to sue in respect of the property vested in the sebait—that is, in the appellant immediately on his adoption. Whatever title his mother had as sebait ceased on the adoption. The right of suit was in the appellant, who was protected from limitation by s. 7 of Act XV. of 1877 until three years had

(1) (1889) L. R. 16 Ind. Ap. 137.

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elapsed from the date of his majority. It is no answer to say that the right of suit could have been exercised by his mother as his guardian. That is admitted, but it does not intercept or modify the application of s. 7, or plaintiff's rights thereunder.

[They were stopped by their Lordships.]

Cave, K.C., and *De Gruyther*, then contended that the suits were barred. They contended that there was no evidence of the terms of the dedication, and therefore it must be taken that the endowed property vested in the idol, and that his sebait could sue in respect of it. The widow was the sebait, and though on the plaintiff's adoption by her his beneficial interest accrued and her beneficial interest ceased, yet the idol could still sue through her as sebait, and the suit in ejectment was barred by adverse possession against the persona in whom the proprietary right was vested without reference to the plaintiff's minority. He did not sue in his personal right; he sued as sebait on behalf of the idol, and his right to sue in that capacity was barred because the idol was barred. Reference was made to *Prosunno Kumari Debya* v. *Golab Chand* (1); *Gnanasambhanda Pandara* v. *Velu Pandaram* (2); *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (3); Act XV. of 1877, s. 4, and Civil Procedure Code, s. 562; *Murray* v. *Watkins*. (4)

Counsel for appellant were not heard in reply.

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July 29.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. In order to appreciate the points raised on these appeals, it is necessary briefly to trace the course of proceedings in the suits out of which they arise.

The principal suit was brought by the present appellant, as sebait of an idol, against the first respondent. He alleged that "as sebait" of the idol the proprietary right in certain taluqs (which, in fact, lie within the ambit of the defendant's pergunnah Pukhuria) was in him, that mouzah Gabshara included within these taluqs long ago became diluviated, that reforma-

(1) (1875) L. R. 2 Ind. Ap. 145, 152.

(2) (1899) L. R. 27 Ind. Ap. 67.

(3) (1869) 13 Moore's Ind. Ap. Ca. 272.

(4) (1890) 62 L. T. (N. S.) 796 (Ch. D.).

tion took place, and that the reformed lands were resumed by Government, and under the designation Khas Mehal Chur Gabshara were settled with the predecessors in title of the plaintiff for different periods successively; that the lands now in dispute became part of Chur Gabshara by reformation and accretion; that in 1864 the predecessor in title of the defendant (now respondent), with others, sued the plaintiff's predecessor in title to establish title to the lands in dispute and failed, whereby the right of the plaintiff's predecessors in title became established as against those whom the defendant represents; and on the strength of this title the plaintiff claimed to recover the lands in question, of which he said he had been dispossessed.

The written statement raised many points, of which two call for mention here. It alleged that the suit was barred by limitation; and it said that the lands now in dispute were not identical with those to which the litigation of 1864 related.

The second suit was brought to recover other lands adjoining those claimed in the principal suit. To this suit all the respondents were defendants. The main circumstances of the two suits were the same, and they were disposed of by the High Court upon the same ground.

The defence of limitation was based upon the case that the plaintiff had been out of possession for more than twelve years, and such is the fact, as found in both Courts. To this it was answered that the period of limitation was sixty years, as if the suit had been brought by the Secretary of State. This view found favour with the first Court, but was rejected by the High Court. It is enough to say that on this point their Lordships entirely concur with the learned judges of the latter Court. It was answered, secondly, that the dispossession on which this suit is based occurred after the plaintiff's title accrued but while he was a minor, and that the suit was brought within three years after he attained his majority. And both Courts have found that such are the facts.

In the High Court another ground of limitation was raised, and raised apparently by the learned judges themselves. In order to follow this point it is necessary to examine the facts of the case a little more closely than has been done so far.

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Although this suit is brought by the plaintiff as sebait, there is no evidence on which any reliance could be placed as to who founded the religious endowment, or as to the terms or conditions of the foundation. The legal inference, therefore, is that the title to the property, or to the management and control of the property, as the case may be, follows the line of inheritance from the founder, as was laid down by this Board in *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee*. (1)

It is not necessary for the present purpose to go back very far in the history of the property. In 1859 a settlement for a term of years was made by Government with Maharani Krishto Moni, followed by similar settlements with Maharani Shibeswari. These ladies were members of the family now represented by the plaintiff appellant. There is nothing to shew under what right or in what capacity they obtained the settlements; nor does it appear that these settlements were expressed to be made with them as sebaits of the idol. In 1868 the property of the family now represented by the plaintiff was vested in Maharaja Gobinda Nath, and he obtained a settlement for five years of the lands in question, in which he was described as sebait to the idol. The settlement pottah contained a provision by which the rent reserved might be realized by sale according to law of all the property of the grantee. It also contained a provision that if the grantee should die during the term, the Government should have power to determine whether the settlement should be continued to his heirs.

Maharaja Gobinda Nath died in March, 1868, leaving a widow, Maharani Braja Sundari. She in December, 1869, adopted the plaintiff as son to her husband, and thus the plaintiff became heir of Gobinda Nath. In January, 1877, Maharani Braja Sundari obtained a fresh settlement of the lands in question for thirty-two years, in which she was described as shikmidar of the taluq and as sebait of the idol. This settlement, like that with her husband, purported to make all the property of the grantee liable for the jumma reserved.

After the adoption of the plaintiff, his adoptive mother,

(1) L. R. 16 Ind. Ap. 137.

Maharani Braja Sundari, was in no sense the heir or representative of her deceased husband, nor entitled to the family property. And their Lordships think the only inference that can properly be drawn is that, in taking the settlement of the lands in question, she acted as the guardian and on behalf of her adopted son, in whom the right lay. The dispossession complained of has been found to have taken place after the date of the plaintiff's adoption, and therefore the cause of action in respect of it accrued to him and to no one else, and it accrued according to the findings during his minority.

The first Court decided both cases in favour of the plaintiff. The learned judges in the High Court found in favour of the plaintiff upon every point except limitation, but they dismissed the suits as barred by limitation. Their ground was this—that the suit being brought by the plaintiff as sebait, the interest was admitted to be in the thakur, that the settlements of 1868 and 1877 were made with the grantees as sebaits, and that the suit must be regarded "as brought by the thakur, the plaintiff being only sebait." They further said: "The settlement in the year 1877 was . . . . made with Braja Sundari Debi as sebait of the thakur. It is quite possible that in taking that settlement she represented the plaintiff who was then a minor. But whichever view may be taken, it is obvious that the settlement was made with the thakur, represented, as the thakur then was, by Maharani Braja Sundari Debi. And we are unable to understand what there was to prevent a suit being brought on behalf of the thakur represented by Braja Sundari Debi as the settlement holder."

There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character. The cases of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1) and *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (2) are instances of less complete dedications, in which, notwithstanding a religious dedication,

(1) (1859) 8 Moore's Ind. Ap. Ca. 66. (2) (1879) L. R. 6 Ind. Ap. 182

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property descends (and descends beneficially) to heirs, subject to a trust or charge for the purposes of religion. Their Lordships desire to speak with caution, but it seems possible that there may be other cases of partial or qualified dedication not quite so simple as those to which reference has been made.

If it were necessary to determine the nature of the dedication in the present case, their Lordships would have felt great difficulty in doing so. On the one hand, the use of the term "sebait" in the settlement pottahs of 1868 and 1877, and in the plaint in this suit, points rather to a dedication of the completest character. On the other hand, the provisions in those pottahs which impose liability upon the grantees to the whole extent of their own property, and not merely to the extent of what they might hold as sebaits, suggest a different conclusion. And so does the clause in the pottah of 1868 empowering Government to determine the term on death.

But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belong to the sebait. 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 sebait, not in the idol. And in the present case the right to sue accrued to the plaintiff when he was under age. The case therefore falls within the clear language of s. 7 of the Limitation Act, which says that, "If a person entitled to institute a suit . . . . be, at the time from which the period of limitation is to be reckoned, a minor," he may institute the suit after coming of age within a time which in the present case would be three years.

It may be that the plaintiff's adoptive mother, with whom the settlement of 1877 was made as sebait, might have maintained a suit on his behalf and as his guardian. This is very often the case when a right of action accrues to a minor. But that does not deprive the minor of the protection given to him by the Limitation Act, when it empowers him to sue after he attains his majority. For these reasons their Lordships are unable to concur with the learned judges in thinking that these suits are barred by limitation.

On behalf of the respondents their Lordships were asked to hold that the suits had been rightly dismissed on another ground altogether. It was contended that an examination of the Amin's map in the proceedings of 1864 and of that prepared in the present cases and a comparison of the two would shew that they had been misunderstood and misapplied, and that it ought to have been held that the lands now claimed were not the same as those upon which the adjudication took place in the suit of 1864.

The question of identity is one of fact. In the pleadings that identity was alleged on one side and denied on the other. Express issues were raised upon it. The first Court found those issues in the affirmative. The question was raised again in the grounds of appeal to the High Court. And the learned judges of that Court have deliberately concurred with the finding of the first Court upon this point. Their Lordships see no sufficient reason why these concurrent findings upon a pure question of fact should not be accepted.

Their Lordships will humbly advise His Majesty that the decrees of the High Court should be discharged with costs, and that the decrees of the Subordinate Judge should be restored, with the modification that in each decree, instead of wasilat being awarded for the period of claim, it be awarded for three years before suit.

The respondents will pay the costs of these appeals.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondents : *T. C. Summerhays.*

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1941 SCC OnLine Cal 107 : (1940-41) 45 CWN 932 : AIR 1942 Cal 99

Calcutta High Court
[Civil Appellate Jurisdiction]
(BEFORE NASIM ALI AND PAL, JJ.)

Tarit Bhusan Rai and ors. ... Defendants, Appellants;
Versus
Sri Sri Iswar Sridhar Salagram Shila Thakur ... Plaintiff and ors., Respondents.*

Appeals from Original Decrees Nos. 152 and 180 of 1938
Decided on June 16, 1941, [Heard on May 27, 1941, May 28, 1941, May 29, 1941 and May 30, 1941]

*Hindu Law — **Debuttar** — Suits in respect of endowed property, classes of and persons entitled to bring — Idol's right of suit, by whom may be exercised — Suit by and on behalf of idol and suit by worship per, prospective **shebait** or other person interested, distinction between — Worshipper or person interested, suit by, for protection of **debuttar** property, if idol's suit, even when **shebait** negligent or hostile — Suit by worship per or person interested, when may be suit by idol- Appointment by Court to represent idol — Suit by worship per, foundation of and nature of legal capacity in which brought — Doctrine that right of suit vested in **shebait** and not in idol, meaning of — Rule relating to minors that any adult person of sound mind, not having any adverse interest, may act as next friend, if may be extended by analogy to idols — Minor, previous suit by dismissed for default owing to negligence of next friend, remedies of — Fresh suit on same cause of action; suit to set aside order of dismissal application for review, when lies — Rule that minor may bring fresh suit, if may be extended by analogy to idols — Juristic personality of idol, nature of and function of conception — Civil Procedure Code (Act V of 1908), Order) 9, Rule 9 — **Shebait** of idol obtaining declaratory decree that certain properties are his secular properties and mortgaging them — Mortgage decree — Execution case started — Suit by idol, represented by an worship per as next friend for declaration that properties debuttar, that several transactions and proceedings not binding and for injunction res-training execution sale — Suit dismissed for default owing to negligence of next friend — Execution case also dismissed for non-prosecution — Fresh execution case started — Fresh suit by idol, represented by one of the she baits for similar declarations, if barred — Previous suit, if suit by time Plaintiff or on same cause of action — Analogy of minor's suit in similar circumstances, if applies — Order of dismissal of previous suit, if may be set aside or declared not binding.*

Per Curiam:—*A worshipper of a Hindu idol, as such, has no legal capacity to exercise the idol's power of suing on its behalf and when he purports to exercise such power by bringing a suit in the name of the idol as represented by himself, the idol is not bound by the result. Such a suit is not the idol's suit at all.*

Consequently, when such a suit is dismissed for default, a subsequent suit by the idol on the same cause of action is not barred by Or. 9, r. 9, C.P.C., the previous suit not having been by the same plaintiff.

A worshipper's right to sue for the protection of the idol's property is founded on his own interest, i.e., his right to worship and the maintenance of the object of his worship, apart from and independently of the idol's right to sue for the protection of its own properties and interests.

A Hindu idol is neither a minor, nor a perpetual minor, though there is some analogy between the two.

Per Nasim Ali, J.:—*The doctrine that the right to sue is vested in the* shebait *means that since the idol is incapable of exercising the right itself, the same has to be exercised by the* shebait *and that the latter has the right to sue on behalf of the idol just as the guardian has a right to sue on behalf of the minor.*

Per Pal, J.:—*There are several distinct rights of suit in respect of endowed property, viz.;—.*

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(1) the idol itself, as a juristic person, has the right of suit;

(2) the shebait, *the human agency through whom the idol must act, has a distinct right, distinct from and in normal cases in supersession of the idol's right of suit; it is this right of suit which has been said to be vested in the* shebait *and not in the idol;*

(3) the prospective shebaits, *as persons interested in the endowment, have a right of suit; and*

(4) worshippers and members of the family have their own right.

There is a very substantial distinction between a suit by certain interested persons, as such, in their own names and, at least in form, in their own behalf, and a suit by a person in the name of the idol and as its next friend.

The idol's right of suit can be exercised

(1) normally, by the shebait *alone and where there are several* shebaits, *by all of them;*

(2) in special circumstances, by a co-shebait;

(3) in special circumstances, by a prospective shebait *or a worshipper or any person interested in the endowment, provided there is an appointment by the Court.*

In the last case the person other than the shebait, *appointed by the Court to represent the idol, may be under the control of the Court in the same manner and to the same extent as the guardian of a minor.*

Worshippers and members of the family cannot, as of right, represent the idol in a legal proceeding. The right which they have to sue for the protection of the debutter *is their own right and they may exercise it by suing in their own name and on their behalf, although for the benefit of the* debutter. *When they do so, even in a case where the* shebait *is hostile to the deity or negligent of its interests, the suit is their own suit and not a suit on behalf of the idol.*

Panchkari Roy v. *Amode Lal Burman*[5] explained.

The statutony rule applicable to minors, viz., *any person who is major and of sound mind and has no interest adverse to that of the minor may act as his next friend in a suit, ought not to be extended by analogy to idols.*

Per Nasim Ali, J.:—*Or. 9, r. 9 of the Civil Procedure Code is no bar to a fresh suit by a Hindu idol when the previous suit by its then next friend was dismissed for default owing to the negligence of the said next friend, even though such next friend was the* shebait *so that the Suit was the idol's suit, just as, according to the preponderance of authority, the rule is no bar to a fresh suit by a minor when the previous suit was dismissed for default owing to the negligence of the guardian.*

When the second suit is simply a fresh suit on the same cause of action without any prayer for the setting aside of the order of dismissal or for a declaration that it is not binding, such reliefs may be given in the suit when the material facts relating thereto are before the Court and not in dispute.

Per Pal, J.:—*When a suit in which the minor Plaintiff was represented by a proper guardian has been dismissed for default owing to the negligence of such guardian,*

(i) it is difficult to maintain that the minor is entitled to bring a fresh suit on the same cause of action;

(ii) the minor has generally been held to be entitled to bring a suit to set aside the order of dismissal and this rule ought not to be disturbed;

(iii) the minor may apply for review in the previous suit itself for which

negligence of the next friend would be a good ground.

Per Nasim Ali, J.:—*It is doubtful whether an application for review would lie.*

Per Pal, J.:—*An idol, however, is not a minor and if it is a juristic person it is so only in an ideal sense. Its juristic status, carrying therewith the right of suing and being sued is really notional,*

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conceived chiefly as a procedural means of developing and adjusting the legal relations between those interested in the endowment and strangers. The real material interest lies with human beings—or the matter would not be the subject of civil law—and it is the concern of persons interested, in whom really and practically is the right of suit, to see how best they will protect and preserve their interests.

The rule entitling a minor to avoid the dismissal for default of a previous suit caused by the negligence of his then next friend cannot, therefore, and ought not to be, extended to idols in cases where the idol's suit was similarly dismissed for the negligence of those representing it.

The shebait *for the time being of a Hindu idol obtained a declaratory decree that certain properties were his secular properties and then mortgaged them. The mortgagee thereafter obtained a decree and started an execution case for sale when a suit purporting to be by the idol, as represented by a worshipper, was brought, impeaching the declaratory suit, the mortgage and the decree (to neither of which was the idol a party) and praying for a declaration that the properties were* debutter *and the several transactions and proceedings were not binding on the idol and for an injunction restraining sale of the properties under the decree. The idol had always been in undisturbed possession. During the pendency of the suit, the execution case was dismissed for non-prosecution and thereafter the suit was also dismissed for default owing to the negligence of the idol's next friend. An application under Or. 9, r. 9 failed. The mortgagee then started another execution case and thereupon the present suit was brought by the idol, as represented by one of its* shebaits, *for a declaration that the properties were* debutter *and that they were not liable to be sold in the execution case then pending or in execution of the mortgage decree*:

Held :

(*Per curiam*):—

(i) That the causes of action for the two suits were not the same—the cause for each suit being the actual invasion threatened at the time—and the later suit was not therefore barred by Or. 9, r. 9, C.P.C.;

(ii) That the previous suit was not the idol's suit and therefore not a suit by the same Plaintiff and the application of Or. 9, r. 9 was therefore excluded.

Per Nasim Ali, J.:—*Even if the previous suit urns 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, and the order of dismissal of the previous suit could be set aside or declared to be not binding, although there was no definite prayer therefor.*

Per Pal, J.:—*The analogy of a similar suit by a minor would not apply.*

Case-law reviewed.

The facts of the case will appear from the judgment.

Atul Chandra Gupta and Bankim Banerji for the Appellants in No. 152 of 1938.

Panchanan Ghose, Paresh Ch. Shome,

Rabiranjan Das Gupta and Bhagirath Ch. Das for the Respondents in No. 152 of 1938.

Bhagirath Ch. Das for the Appellants in No. 180 of 1938.

Panchanon Ghose, Paresh Ch. Shome, Rabiranjan Das Gupta, Atul Ch. Gupta and Bankim Banerji for the Respondents in No. 180 of 1938.

The Judgment of the Court was delivered by

NASIM ALI, J.:— The material facts which are not in dispute in these two appeals are these:

(1) On the 21st of Aswin, 1287 B.S.—6th October, 1869, one Bhagaban Chandra Basu made a gift of 2 bighas of land (now 5 and 6, Karim Buksh Lane) to his sister Nilmoni Dassi by a registered deed of gift (Ex. 7). On the same day he and his cousin Biswanath Basu executed an *arpannama patro* (Ex. 5—deed of dedication). The material portion of this document is this:

"Now in order that the daily *Sheba* (services) and periodical festivals etc., of the idol Sri Sri Iswar Sridhar Salgram Shila Thakur, established by us which we have been carrying on all along may remain intact in future, Bhsgwan Chandra Basu in view of my (advanced) age and state of health and having no wife and children, and being apprehensive of any hindrance being caused to the said services *etc.* to the deity (Deb sheba) in future, dedicate my interest in the above property for the services of the idol (Deb Sheba) and appoint Biswanath Basu the *Shebait (thereof)*. All the properties appertaining to the sixteen annaa comprised of the respective share of both of us, mentioned above (*1, 2, 9* and *10 Karim Buksh Lane*) are dedicated entirely for *Deb sheba* (servioes to the idol). Of us, (illegible), Biswanath Basu, having appointed me and being appointed to do services to the idol we both hereby promise as follows: that I, Biswanath Basu, shall henceforth reside *etc.* in the said house and hold possession of the estate *etc.* and shall collect rent from tenants and make arrangement of collections and repair houses and do all Acts in respect of the aforesaid estate dedicated by us as well as get the same done and appropriate (illegible) the profits *etc.* and shall devote myself to the services to the deity (Deb sheba) with the help of those profits and shall perform the prescribed acts (illegible) repairs *etc.*, and (illegible) of the estate. After my death my full-sister Srimatya Nilmany Dasi and my wife Srimaty Thakur Dasi Dasi, if they survive me, shall both like myself jointly do services to the deity as my heirs and representatives and shall perform the *Puja* (worship) and daily and periodical rites *etc.*, of the deity by being appointed to do the work of *sheba* and by residing in the said house and by managing the properties dedicated for *Deb sheba*. After their death my two daughters the elder Srimaty Bhuban Mohini Dasi, the younger Srimaty Patit Pahani Dasi shall both jointly be appointed to do the work of *sheba* and being possessed of the properties dedicated for *sheba* of the Idol, they shall make settlement *etc.*, according to the aforesaid rules and shall perform the *sheba* of the idol from the income thereof and after their death their heirs shall be appointed *shebaits* and be possessed of the properties dedicated for *sheba* and shall perform the *sheba etc.*, according to all the terras *etc.* mentioned above. None of them shall ever be competent to transfer the said property and even if done it will not be allowed. And whatever building or appurtenances, etc., are made in the said house in future by us, our heirs or representatives shall also be dedioated for the *Sbeba* of the idol. None shall be competent to remove (illegible) any newly constructed building or appurtenances (illegible) or transfer the same by any machinations and even if done the same will not be allowed and be invalid. If ever for any Government purpose or any unexpected and unavoidable (illegible) (cause?) the aforesaid property is to be sold or transferred, from the consideration money thereof other properties shall be purchased and the same shall be dedicated for the services of the deity on the above terms and the work of Sheba, etc., of the deity shall be carried out from the income thereof.....To the above effect we, of our respective free will, execute this deed of dedication (Arpannamah patra) by dedicating the aforesaid land and the aforesaid house, etc., for Sheba of the idol."

(2) Biswanath Basu died in the year 1881. On 29th June, 1890, Nilmoni Dasi dedicated the properties which she obtained by gift from Bhagaban to the same deity, *viz.*, Sree Sree Iswar Sridhar Saligram Thakur. She died in 1898. The wife of Biswanath, Thakurani Dasi died in 1902. Bhuban-mohini, the eldest daughter of Biswanath died in 1913 without leaving any issue and Patit Paboni, the next daughter of Biswanath, died in 1914, leaving a son Jogesh Chandra Chandra.

(3) On the 20th of August, 1925,

Jogesh Chandra brought a suit (Title Suit No. 172 of 1925) in the Court of the Subordinate Judge at 24-Parganas for a declaration that the properties covered by the *arpannama* (Ex. 5 and Ex. 7) were secular properties and were his absolute properties (Ex. 13). In this suit his four sons, his wife, the wife of his eldest son and two sons of his eldest son were impleaded as Defendants. The idol in whose favour the *arpannmas* (Ex. 5 and Ex. 7) were executed was not made a party to this suit. On the 12th November, 1925, the Defendants in that suit filed their written statement (Ex. B). On 14th November, 1935, the suit was decreed by consent and the properties were declared to be secular and absolute properties of Jogesh (Ex. 12A).

(4) On 9th June, 1927, Jogesh mortgaged one of the properties (9 and 10, Karim Buksh Lane) covered by the *arpannama* Ex. 5—by a mortgage deed (Ex. Cl) to one Sailendra Chandra Dtitt (Defendant No. 15 in the present suit). On 23rd July, 1930, Sailen sub-mortgaged No. 9 and 10, Karim Bux Lane to Tarit Bhusan Roy and Pulin Krishna Roy (Defendants Nos. 16 and 17 in the present suit) by a deed of sub-mortgage (Ex. C). On the 30th July, 1932, Defendants Nos. 16 and 17 brought a suit (Title Suit No. 209 of 1930) in the Court of the Subordinate Judge, 24-Parganas, against Defendant No. 15 and Jogesh for recovery of money due on the sub-mortgage (Ex. 15). This suit was decreed and the mortgagee put up the mortgaged property to sale in title execution case No. 109 of 1933, 25th October, 1933, was fixed for sale. The mortgagee also obtained a decree on the basis of his mortgage in Title Suit No. 109 of 1932 in the Court of the Subordinate Judge, 24-Parganas.

(5) On 23rd October, 1933, Anupama, a daughter of Jogesh who was not a party in Title Suit No. 172 of 1925, brought a suit (Suit No. 106 of 1933) in the Court of the Subordinate Judge, 24-Parganas as next friend of the idol Saligram Thakur for a proper construction of the two deeds of dedication (Ex. 5 and Ex. 7) and for a declaration that the properties dedicated by them, *viz.*, municipal premises Nos. 1, 2, 5, 6, 9 and 10, Karim Buksh Lane were absolute *debutter* properties and that the mortgage by Jogesh in favaur of Defendant No. 15 and the sub-mortgage by Defendant No. 15 in favour of Defendants Nos. 16 and 17 in the present suit were void and inoperative and were not binding on the Plaintiff deity. In this suit there was a prayer for permanent injunction restraining the mortgagee and sub-mortgagees from selling the mortgaged properties in execution of their decrees. Jogesh, his four sons, four daughters, the wife of his son Girindra Chandra, the sons of his eldest son Srish Chandra, and the wife of his eldest son were impleaded as Defendants in this suit. *Interim* injunction was issued on 23rd October, 1933, but dissolved on 22nd November, 1933. An appeal against this order was also dismissed. Thereafter issues in this suit were settled on the 17th of May, 1934, and 6th of July, 1934, was fixed for the hearing of the suit. The Subordinate Judge while fixing the date of the hearing recorded the following order:—

"All Tadbir must be finished before the date fixed or the suit will be fixed peremptorily for peremptory hearing and no Tadbir will be allowed hereafter."

On 6th July, 1934, Plaintiff prayed for time to make *tadbir*. Thereupon the Subordinate Judge passed the following order:

"Seven days' time more is allowed for the last time. Fix 14-7-34 for fixing the date of hearing."

On 14th July, 1934, Plaintiff prayed for summons to witnesses. The Court thereupon

said:

"Fix 6.9.34 for peremptory hearing. Summons to

witnesses be is sued, parties to come ready accordingly."

On 25th of August, 1934, the suit was transferred to the Additional Subordinate Judge for disposal. On 6th September, 1934, Plaintiff prayed for an adjournment. Thereupon the Court ordered:

"Time allowed. Suit adjourned to 14th November, 1934, for peremptory hearing. The parties do come ready on that date."

On the last mentioned date Plaintiff again prayed for an adjournment. The Court thereupon made the following order:

"Heard both sides. Srimati Anupama prays for an adjournment on the ground that her husband being ill, steps could not be taken on her behalf. She had prayed for too many adjournments and all necessary papers ought to have been produced long ago. The husband is also present in Court to-day. I grant adjournment cost of Rs. 4 to each of the Defendants Nob. 16 and 17 as a condition precedent to the hearing of the suit."

On the 19th November, 1934, Plaintiff's pleader applied for time on the ground that the parties were about to come to terms. The Subordinate Judge, however, rejected the prayer and dismissed the suit for default and awarded cost to the mortgagee and the sub-mortgagees who were ready on that day to go on with the case. On 14th December, 1934, Plaintiff filed an application under Or. 9, r. 9 of the Code of Civil Procedure for setting aside the dismissal order passed on 19th November, 1934. The Subordinate Judge heard this application on the 31st of August, 1934(?), and passed the following order:

"On 14th November, 1934, the case was fixed for hearing. The Plaintiff filed the petition for time on the ground of her husband's illness and 16th November, 1934, was fixed for positive hearing. On lath November, 1934, Plaintiff's pleader applied for time on the ground that the parties were about to come to terms. Defendant No. 16's pleader said that the application was a bogus one as there was no such talk and it was clear that he was not agreeable to any terms of compromise. When there is no chance of getting an adjournment it is commonplace dodge to speak to the Court that there is a talk of compromise and so the case may he adjourned for its materialization. As there was no sufficient cause for Plaintiff's non-appearance on the date fixed for peremptory hearing there is no sufficient reason for setting aside the order of dismissal."

Title Execution Case No. 109 of 1933 was dismissed for non-prosecution after the institution of Title Suit No. 196 of 1933. Thereafter the Defendant No. 15 again put his mortgage decree in Execution Case No. 107 of 1935 and put up the mortgaged property to sale.

Jogesh died on 27th April, 1935.

On 13th January, 1936, the idol Sree Sree Iswar Sridhar Saligram Thakur, represented by his next friend Krishna Chandra Chandra, one of the *shebaits*, instituted the present suit in the Court of the Subordinate Judge, 24-Parganas. In this suit the other co-*shebaits*, the daughters of Jogesh including Anupama Dassi, the wife of Girindra Chandra Chandra, the sons of the eldest son of Jogesh, the priest of the idol (Defendant No. 14) the mortgagee (Defendant No. 15) and the sub-mortgagees (Defendants Nos. 16 and 17) were impleaded as Defendants.

The allegations of the Plaintiff so far as they are material for the purposes of the present appeal are these:

The properties which were the subject-matter of Title Suit No. 196 of 1933 were made *debutter* by the deed of dedication (Ex. 5). This suit brought on behalf of the Plaintiff deity was dismissed on the 19th of November, 1934, for default owing to and by reason of the gross negligence and laches of Anupama Dassi, the Defendant No. 9, who represented the Plaintiff deity in that suit as his next friend and that the said next friend was further guilty of gross negligence and laches in not preferring an appeal against the order of the Subordinate Judge dated 31st of August, 1935, dismissing

the application under Or. 9, r. 9 of the Code of Civil Procedure; that there was good ground of appeal against the same. The present suit is therefore not barred by Or. 9, r. 9 of the Code of Civil Procedure. Defendant No. 15 is about to sell wrongfully municipal premises Nos. 9 and 10, Karim Buksh Lane in execution of the mortgage decree obtained by him on the basis of the mortgage executed in his favour by Jogesh on the 9th July, 1927 (Ex. C1) in Execution Case No. 107 of 1935. The said mortgage constituted a breach of trust by Jogesh who was in possession of the mortgaged properties as *shebait* on the basis of an *arpannama*, Ex. 5. The mortgage as well as the decree passed on the mortgage are not binding on the Plaintiff deity. On these allegations the deity prays for a declaration that the properties which were the subject -matter of Title Suit No. 196 of 1933 are absolute *debutter* properties of the Plaintiff deity and that municipal premises Nos. 9 and 10, Karim Buksh Lane, are not liable to be sold in Execution Case No. 109 of 1935.

The suit was contested by Defendant No. 15, the mortgagee and Defendants Nos. 16 and 17, the sub-mortgagees. The defenses of these Defendants, so far as they are material for the purposes of the present appeal, are.

(1) that the disputed properties were not made absolute *debutter* (Ex. 5);

(2) Title Suit No. 109 of 1933 having been dismissed under Or. 9, r. 8 of the Code of Civil Procedure, the present suit is barred under Or. 9, r. 9 of the Code.

The trial Judge has overruled both these defences and has decreed the suit.

Hence these two appeals—one (F.A. No. 180 of 1938) by Defendant No. 15 the mortgagee and the other (F.A. No. 152 of 1938) by the sub-mortgagees (Defendants Nos. 16 and 17).

Only two grounds were urged on behalf of the Appellants in these two appeals: (1) that the properties in suit were not absolutely dedicated to the family idol but they were charged only with the expenses of *debsheba* (the worship of the idol); (2) that the suit is barred under Or. 9, r. 9 of the Code of Civil Procedure in view of the admitted fact that Title Suit No. 196 of 1933 which was instituted by the Plaintiff idol was dismissed under Or. 9, r. 8 of the Code.

First ground—The plaint properties are three in number. Ex. 5 covers the first property. Ex. 7 covers the other two properties. These two documents clearly show that the properties in suit were dedicated absolutely to the Plaintiff idol. There is, therefore, no substance in this ground.

Second ground—The reasons given by the Subordinate Judge in support of his finding that the Or. 9, r. 9 of the Code is not a bar to the present suit are:

(*a*) Plaintiff idol is a perpetual minor and is entitled to the protection given by law to the minors against the negligent actins of their guardians.

(*b*) Anupama was guilty of gross negligence in the conduct of the previous suit. The

Plaintiff deity is, therefore, entitled to re-open in the present suit the question raised in the previous suit.

Mr. Gupta's contention on behalf of the Appellants is that a Hindu idol is a juristic person like any other juristic person under the English system and not a minor or a perpetual minor.

In *Rambrahma Chatterjee* v. *Kedar Nath Banerjee*[1], Mookerjee, J., said:

"We need not describe here in detail the normal type of continued worship of a consecrated image—the sweeping of the temple, the process of smearing,

the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy, the vivified image is regaled with the necessaries and luxuries of life in due succession even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest."

These observations were approved by the Judicial Committee in *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[2].

In view of the religious customs of the Hindus which have been recognised by Courts of law, a Hindu idol, like a juristic person under the English system, has been vested with the capacity of holding properties and with the power of suing or being sued (*Ibid*).

A juristic person under the English system has no body or soul. It has no rights except those which are attributed to it on behalf of some human beings. The lump of metal, stone, wood or clay, forming the image of a Hindu idol, is not a mere movable chattel. It is conceived by the Hindus as a living being, having its own interests apart from the interests of its worshippers. It is a juristic person of a peculiar type.

The points of similarity between a minor and a Hindu idol are:

(1) Both have the capacity of owning property.

(2) Both are incapable of managing their properties and protecting their own interests.

(3) The properties of both are managed and protected by another human being. The manager of a minor is his legal guardian and the manager of an idol is its *shebait*.

(4) The powers of their managers are similar.

(5) Both have got the right to sue.

(6) The bar of sec. 11 and Or. 9, r. 9 of the Code of Civil Procedure applies to both of them.

The points of difference between the two are:

(1) A Hindu idol is a juristic or artificial person, but a minor is a natural person.

(2) A Hindu idol exists for its own interest as well as for the interests of its worshippers but a minor does not exist for the interests of anybody else.

(3) The Indian Contract Act (a substantive law) has taken away the legal capacity of a minor to contract but the legal capacity of a Hindu idol to contract has not been affected by this Act or by any other statute.

(4) The Indian Limitation Act (an adjective law) has exempted a minor from the

operation of the bar of limitation but this protection has not been extended to a Hindu idol.

From the above it is clear that there is some analogy between a minor and a Hindu idol but the latter is neither a minor nor a perpetual minor.

Although in law an idol has the power of suing, it has no physical capacity to sue. This absence of physical capacity is perhaps referred to by the Judicial Committee when they said in *Jagadindra's case*[3] that the right of suit is not vested in the idol. Who is then entitled to exercise the idol's power of suing? This is a matter of substantive law.

"Its (idol's) interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would in such circumstances on analogy be given to the manager of the estate of an infant heir." [*Pramatha Nath's case*[2]]. "The manager of the estate of an infant

heir" apparently means the legal guardian of an infant. The powers of the legal guardian of an infant include the power to sue on behalf of the infant. The *shebait* of a Hindu idol is its manager in law. On the analogy of the power of the legal guardian of an infant, the *shebait* of a Hindu idol has the right to sue on behalf of the idol, for the protection of its interests. In this sense it may be said, as was said by the Judicial Committee in *Jagadindra's case*[3], that the right of suit vests in the *shebait*.

It has been held by this Court that a suit for a declaration that illegal alienaions of private *debutter* properties by a *shebait* are invalid is maintainable at the instance of a prospective *shebait* [*Girish Chandra Saw* v. *Upendra Nath Giridas*[4]] or any member of the founder's family who is entitled to worship the idol [*Panchkari Roy* v. *Amode Lal Burman*[5], *Sashi Kumari Devi* v. *Dhirendra Kishore Roy*[6] and *Nirmal Chandra Banerjee* v. *Jyoti Prosad Bandopadhyay*[7]].

A Hindu idol, as has been already stated, is a juristic person having its own interests apart from the interests of its worshippers. *Jagadindra's case*[3] and *Pramatha Mullick's case*[2] are authorities for the proposition that its power of suing for protecting its own interests is to be exercised by it through its *de jure or de facto shebait*.

The worshippers of the idol are interested in the idol and as such are interested in the property dedicated to it for its maintenance. Their right to sue for the protection of the idol's property is founded upon their own interest, *viz.*, the right of worship apart from and independent of the idol's right to sue for the protection of its own interests and properties: They have no right to exercise the idol's power of suing.

Anupama was not a *shebait de jure* or *de facto*. She was not a prospective *shebait*. She had only the right of worshipping the idol. She brought the previous suit in her capacity as a person interested in the idol's *property*. She had no legal capacity to exercise the idol's power of suing on its behalf. If she did, the idol is not bound by the results of the exercise of such powers. The previous suit instituted by her as next friend of the idol was not, therefore, the idol's suit. Or. 9, r. 9 of the Code of Civil Procedure is not, therefore, a bar to the present suit.

"The dismissal of a suit in terms of section 102 (Order 9, rule 8 of the Code of Civil Procedure) was plainly not intended to operate in favour of the Defendant as *res judicata*. It imposes, however, when read along with section 303, (Order 9, rule 9 of the Code) a certain disability upon the Plaintiff whose suit has been dismissed lie is thereby precluded from bringing a fresh suit in respect of the same cause of Action. Now the cause of action has no relation whatever to the defence which may

be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the Plaintiff asks the Court to arrive at a conclusion in his favour." [Per Lord Watson in *Musammat Chand Kour* v. *Partab Singh*[8].

The real cause of action in the previous suit was the attempt of the Appellants to sell the *debutter* properties in execution case No. 109 of 1933. This execution case, however, was dismissed for non-prosecution after the institution of the previous suit. The cause of action of the present suit is a fresh attempt by the Appellants to sell the *debuttar* properties by starting another execution case, namely, 107 of

1935. It cannot be said, therefore, that the cause of action in the present suit is identical with the cause of action in the previous suit. In this view of the matter Or. 9, r. 9 is not a bar to the present suit.

When a suit is dismissed under Or. 9, r. 8 of the Code, the suit can be restored under Or. 9, r. 9 if there was sufficient cause for the non-appearance of the Plaintiff. Where the suit is dismissed under r. 8 for default of the Plaintiff owing to gross want of care and diligence on his part, the suit cannot be restored under r. 9. In view of the decision of the Judicial Committee in *Chajju Ram's case*[8a] it is doubtful whether the order of dismissal can be set aside by an application for review under Or. 47, r. 1 of the Code of Civil Procedure.

There is a divergence of opinion among the Judges of High Courts in India as regards the substantive right of a minor to bring a separate suit for setting aside the decree passed against a minor owing to the negligence of the next friend or guardian *ad litem* of the minor in the conduct of the suit. The reasons given by the Judges who are in favour of the view that such a suit is maintainable by a minor are these:

(1) Under the English common law such a suit is maintainable.

(2) In India there is no statute prohibiting such a suit.

(3) There is no reason why this protection given to the minors in England should not be extended to minors in India on grounds of justice, equity and good conscience.

(4) The real basis of the binding character of the decree against a minor is the effect of his having been duly represented by a proper person. If the guardian of a minor is grossly negligent of his duties, he ceases to represent the minor properly and effectively and the result is the same as if no guardian had been in existence. The wilful and wanton negligence on the part of a guardian disqualifies him—*per* Sulaiman, J. (as he then was), *Siraj Fatma* v. *Mahammed Ali*[9].

The reasons given by the Judges who have taken the opposite view are these:

(1) An infant in England has no such right.

(2) There is no just and equitable ground for conferring such a right on a minor inasmuch as

(*a*) the person who has obtained the decree against the minor is not in a position to see that the next friend or the guardian of the minor carries out his duties properly;

(*b*) if the next friend or guardian *ad litem* fails in his duty, it is difficult to see why he should be deprived of the fruits of the decree in his favour if he has proceeded in good faith in accordance with the rules of the Code. The peculiar

anxiety of Courts to protect an infant who cannot protect himself at the expense of the finality of suits against infants will cause injustice to the innocent person who has got a decree in his favour against the infant. *Per* Beaumont, C.J., *Krishnadas Padmanabhrao Chanda Varkar* v. *Vithoba Annappa Shetti*[10].

The preponderance of authority however is in favour of the view that a decree passed against a minor owing to the gross negligence of his guardian is not binding on the minor and that such a decree can be set aside or declared to be not binding on the minor in a separate suit brought by the minor.

Under Or. 32, r. 9 of the Code of Civil Procedure the Court may remove the next friend of a minor if the interest

of the nest friend is adverse to that of the minor or he does not do his duty. The effect of the decision of the Judicial Committee in *Mussammat Rasidun-Nisa* v. *Mahammad Ismail Khan*[11] is that when the interest of the guardian *ad litem* is adverse to that of the minor, the decree is not binding on the *minor*.

The power of the *shebait* of a Hindu idol to institute a suit on behalf of the idol is analogous to the power of the legal guardian of an infant to institute a suit on behalf of the minor. Anupama was not the *shebait* of the idol. Her power to bring the suit on behalf of the idol cannot be higher than that of the *shebait* of the idol. The idol, therefore, cannot be in a worse position than it would have been if the suit had been brought by the *shebait*.

Analogy is a source of judicial principles and can be lawfully followed only as a guide to the rules of natural justice in the absence of any statutory prohibition. If the view taken by the majority of the Judges of the High Courts in India, namely, that Or. 9, r. 9 of the Code of Civil Procedure is no bar to a fresh suit by a minor when the previous suit by his next friend was dismissed for default owing to the negligence of the next friend in the conduct of the previous suit is correct, there is no reason why this protection should not be extended to a Hindu idol in this country as I am aware of no statutory law in this country prohibiting the extension of such protection.

The Subordinate Judge has found that Anupama who was the next friend of the Plaintiff idol in the previous suit was guilty of negligence in the conduct of this suit. This finding of the Judge is justified by the facts and circumstances disclosed by the evidence in this case. The properties in suit are undoubtedly *debutter* properties. If Anupama had simply produced the registered deeds of dedication, there would have been an end of the defence in that suit. Mr. Gupta appearing on behalf of the Appellants did not assail the finding of the trial Judge that she was grossly negligent in the conduct of the previous suit. The allegation of the Plaintiff idol in the plaint of the present suit that Anupama was guilty of gross negligence in the conduct of the previous suit was not specifically denied in the written statement of the Appellants.

In the plaint of the present suit there is no express prayer for setting aside the order of dismissal in the previous suit or for a declaration that it is not binding on the Plaintiff idol. There is, however, no dispute about the material facts on which the Court can give such relief. There is nothing in the law which disentitles the Plaintiff idol to get these reliefs in the present suit. I, therefore, see no reason why the order of dismissal in the previous suit should not be set aside or declared to be not binding on the Plaintiff idol.

For the reasons given above I hold that the present suit is not barred by Or. 9, r. 9

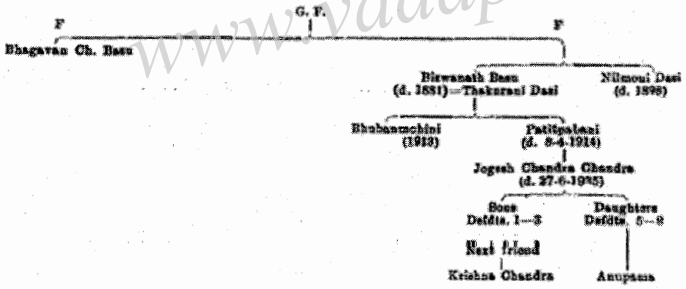
of the Code of Civil Procedure, that the properties in suit are absolute *debutter* properties and that municipal premises Nos. 9 and 10, Karim Buksh Lane are not liable to be sold in execution of the mortgage decrees obtained by Defendants Nos. 15, 16 and 17.

The appeals are accordingly dismissed with costs to Plaintiff Respondent.

PAL, J.:— This is an appeal by the Defendants Nos. 16 and 17 in a suit for declaration that the properties described in the Schedule A of the plaint constitute the absolute *debutter* properties of the Plaintiff deity and that the same is not liable to sale in the

Execution Case No. 107 of 1935 of the 2nd Court of the Subordinate Judge at Alipore, nor in execution of the mortgage decrees in Title Suit No. 209 of 1930 and Title Suit No. 189 of 1932.

The following genealogical table will be helpful in understanding the facts of the case:



The Plaintiff in the present suit is Sree Sree Iswar Sridhar Salgram Sila Thakur. It was the ancestral family deity of Bhagavan Chandra and Biswanath.

The property in suit originally belonged to Bhagavan Chandra Basu and Biswanath Basu. They dedicated the same to the deity on the 6th October, 1869.

By the deed of dedication the following scheme for the *shebaitship* of the deity was made:—

Biswanath Basu was to be the first *shebait*. After his death his full sister, Nilmoni Dasi, and his wife, Thakurdasi Dasi, would be the joint *shebaits*. After their death his two daughters, Bhuban Mohini and Patitpabani, would be the joint *shebaits*. After their death their heirs should be appointed *shebaits*.

On the 20th August, 1925, Jogesh Chandra Chandra, the then *shebait*, and father of the present next friend of the deity, instituted the Title Suit No. 172 of 1925 in the Court of the 2nd Subordinate Judge, District 24-Parganas, making his wife, adult son, minor sons and daughters, son's wife and son's minor children parties Defendants. Jogesh Chandra had three more daughters, *viz.*, the present Defendants Nos. 7 to 9. They were not made parties to this suit, perhaps because, being married, they ceased to be members of his family. The suit was for a declaration that the properties described in the schedules to the plaint were secular in character and were the absolute properties of Jogesh Chandra.

Schedule (*ka*), plots (*a*) and (*b*) and Schedule (*kha*) of that suit are the properties in plots 1, 2 and 3 respectively of the present suit.

In this suit of 1925 the Defendants appeared, filed a written statement on the 12th

November, 1925, and prayed that the suit may be decreed but with costs to the Defendants.

On the 14th November, 1925, the suit was decreed with the consent of the Defendants, declaring the properties in suit to be secular in character and also to be the absolute property of Jogesh Chandra Chandra.

On the 9th June, 1927, Jogesh Chandra Chandra borrowed Rs. 15,000 and

gave in mortgage the property No. 1 of the present plaint to one Sailen Chandra Dutta.

On the 23rd July, 1930, the mortgagee Sailen Chandra Dutta sub-mortgaged the property to Rai Tarit Bhusan Roy and Pulin Krishna Roy to secure a loan of Rs. 8,500.

Thereafter Sailen Chandra instituted Title Suit No. 209 of 1930 on the said mortgage and obtained a final decree in it.

On the 30th July, 1932, Rai Tarit Bhusan Roy and Pulin Krishna Roy instituted Title Suit No. 189 of 1932 in the Court of the 2nd Subordinate Judge at Alipore on the sub-mortgage, making their mortgagor as also Jogesh Chandra Chandra parties Defendants. They also obtained a final decree in this suit.

In 1933, Sailen Chandra proceeded to execute his decree in Execution Case No. 109 of 1933. The property was advertised for sale in execution of the decree, the date of sale being fixed on the 25th October, 1933. Thereupon on the 23rd October, 1933, the Title Suit No. 196 of 1933 was instituted in the Court of the 2nd Subordinate Judge, Alipore, purporting to be by the idol Sree Sree Iswar Sridhar Salgram Sila Thakur by its next friend Sreemati Anupama Dassi, (1) for a declaration (*a*) that the properties in suit were the absolute *debutter* properties of the Plaintiff deity, (*b*) that the mortgages and the mortgage decrees were not binding on the deity and (2) for a permanent injunction restraining the decree-holders from executing the decrees against the property. The next friend in this suit, Anupama Dasi, was one of the three married daughters of Jogesh Chandra who were not made parties in his suit of 1925. It may be noticed here that according to the terms of the deed of dedication and in the events that have happened Anupama was not and can never be a *shebait*. Her only probable interest was that of a worshipper. In fact in paragraph 12 of her plaint the only interest claimed by her was that of a worshipper of the deity.

This suit was instituted when Jogesh was still alive. He was made Defendant No. 1 in the suit. His children, wife, son's wife and son's children were all made Defendants in this suit. They were the Defendants Nos. 2 to 14. The mortgagee and the sub-mortgagees were made Defendants Nos. 16 and 17 and 18 respectively. It may be mentioned here that the Defendants Nos. 16, 17 and 18 were interested only in the first item of the properties mentioned in the plaint.

An application for a temporary injunction for restraining the Defendant No. 16 from selling the property in item No. 1 in Execution Case No. 109 of 1933 was made in that suit.

On the 22nd November, 1933, the Court refused the prayer for injunction, being of opinion that "the intended sale will not by itself prejudice the rights, if any, of the Plaintiff." He, however, directed that the property should be sold subject to a declaration that it was the subject-matter of a suit in that Court and the doctrine of *lis pendens* would apply and that the purchaser would purchase the right, title and interest of the judgment-debtor Jogesh Chandra, subject to the said lis. After several adjournments the suit was fixed for hearing on the 14th November, 1934. On this date

the next friend prayed for an adjournment and the Court made the following order:

> Heard bath sides. Sm. Anupama Dasi prays for adjournment on the ground that her husband being ill, steps could not be taken on her behalf. She had prayed for too many adjournments and all necessary papers ought to have been produced long ago. The husband is also present in Court to day grant adjournment only up to the 19th November, 1934. The suit will be heard positively on that date. Plaintiff

to pay adjournment cost of Rs. 4 to each of the defendants Nos. 16 and 17 as a condition precedent to hearing of the suit.

On the 19th November, 1934, she again prayed for an adjournment. The Court made the following order:—

> The lawyer for the Plaintiff prays for further adjournment. The grounds put forth by him are that the Plaintiff and Defendants Nos. 17 and 18 have come to terms regarding this suit and that the Plaintiff has already approached the Solicitor for Defendant No. 16 for amicable settlement and that there is a reasonable chance of a compromise being arrived at. Defendant No. 16 is present in Court and from his attitude it is clear that he is not agreeable to any compromise. The suit was definitely fixed for hearing to-day and nobody can be held responsible if the Plaintiff has not come prepared for the hearing. Adjournment is refused and case ordered to be proceeded with. The lawyer for the Plaintiff has no further instruction and no witness for the Plaintiff are (sic.) present. Suit is dismissed with costs.

Thereafter an application under Or. 9, r. 9, Civil Procedure Code was riled, purporting to be on behalf of the Plaintiff deity by the same next friend and the Miscellaneous Case No. 2 of 1934 was started.

During the pendency of this Miscellaneous case Jogesh died on the 27th April, 1935. The Miscellaneous case was heard and dismissed on the 31st August, 1935, it being held that there was no sufficient cause for default.

It appears that the Execution Case No. 109 of 1933 was allowed to be dismissed for non-prosecution during the pendency of the Title Suit No. 196 of 1933 (plaint paragraph 25). At any rate the property in question was not sold in that execution proceeding and the said execution case was allowed to be dismissed for non-prosecution.

A fresh Execution Case No. 107 of 1935 for the execution of the decree in Title Suit No. 209 of 1930 was started after the dismissal of the aforesaid Title Suit No. 196 of 1933.

On the 13th June, 1936, the present suit was instituted by the deity, this time by its next friend, Krishna Chandra Chandra, a son of Jogesh Chandra. This next friend was Defendant No. 6 (minor), represented by his mother as guardian in his father's suit of 1925, where he supported his father's claim. He was Defendant No. 5 (major) in the previous suit of 1933 (Title Suit No. 196 of 1933). By the terms of the deed of dedication he is one of the present *shebaits* of the deity, the other *shebaits* being the Defendants Nos. 1 to 3.

The idol in the present suit through its present next friend alleges that the previous suit was dismissed by the gross negligence of the then next friend. Various questions of law and fact were raised in this case in the Court of first instance. The learned Subordinate Judge found—

(1) that the *arpannama* (the deed of dedication) and the other deeds referred to in the plaint were genuine and *bonâ fide* and that they were intended to be given

effect to and were given effect to and that there was an absolute grant in favour of the deity;

(2) that the Plaintiff deity was duly installed as claimed in the plaint and had been in existence even before the time of the dedication;

(3) that the predecessors-in-title of Jogesh Chandra Chandra possessed and managed the property as *shebaits* of the Plaintiff deity and that there was no doubt that from 1869 up till 1925 the properties were managed by successive *shebaits* as the properties of the Plaintiff deity;

(4) that the properties were, and were always treated as the absolute *debutter* properties of the deity and were not the secular properties of the judgment-debtor Jogesh Chandra;

(5) that the decree in Title Suit Suit No. 172 of 1925 was not binding on the Plaintiff deity;

(6) that the mortgages in favour of the Defendants Nos. 15, 16 and 17 were not binding on the Plaintiff deity;

(7) that the decrees passed in Title Suits Nos. 209 of 1930 and 189 of 1932 were not binding on the Plaintiff; and

(8) that Jogesh Chandra having accepted the *shebaitship* could not claim adverse possession against the deity from 1925.

On these findings and being of opinion that the present suit of the deity was not barred by Or. 9, r. 9, Civil Procedure Code the learned Subordinate Judge decreed the suit in full.

The Defendants Nos. 16 and 17 have preferred the present appeal and the Defendant No. 15 has preferred the analogous appeal (F.A. No. 180 of 1938).

As has been noticed above, the Appellants are interested only in Item No. 1 of the properties involved in the suit, and the learned Advocates appearing for the Appellants confined the appeals to this item of the property only.

It is faintly contended in this appeal that the dedication as evidenced by the *arpannama* (Ex. 5) of 6th October, 1869, was not an absolute one and that the property did not become an absolute *debutter* property by that dedication. In support of this contention reliance was placed on *Surendra Keshav Roy* v. *Doorga Sundari Dassee*[12], *Hara Narayan* v. *Surja Kunwari*[13] and *Sri Sri Iswari Bhubaneshwari* v. *Brojo Nath Dey*[14]. In the first of the cases cited above there were certain directions as regards the income of the property and these did not exhaust the same. Lord Hobhouse observed:

> "There is no indication that the testator intended any extension of the worship of the family Thaknrs. He does not, as is sometimes done, admit others to the benefit of the worship. He does not direct any additional ceremonies. He shows no; intention save that which may be reasonably attributed to a devout Hindu gentleman, *viz.*, to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the Thakurs whom he veneterates most. But the effect of that when the estate is large is to leave some beneficial interest undisposed of, and that interest must be subject to the legal incidents of property."

There the property was of such a magnitude that after meeting all the charges

directed by the Will there would still be a very large surplus. In fact the testator directed that out of the surplus each adopted son would receive Rs. 1,000 monthly. But of the residue after that he said nothing. The dedication was by Will. The testator began by saying,

> "I do while of sound mind dedicate and give to Sree Sree Isshur Annapoorna Thakooranee.....all the ancestral and self-acquired movable and immovable properties, zamindaries, and *putnee*.....to which I am entitled and of which I am in possession."

Later on he proceeded to give directions regarding the disposal of the income of the same property. The testator said:

> "Out of the income of the property dedicated to the *Deb sheba*, etc. after performing the Sheba of the above named Annapoorna Thakooranee.....after performing the daily and fixed rites and ceremonies as they are now performed and made, out of the profits which shall remain each adopted son shall receive at the rate of Rs. 1,000 monthly."

Of these adopted sons the Judicial Committee observed:

> "It would require very strong and clear expressions indeed to show that a Hindu gentleman contemplated introducing as shebaits of his family Thakur persons unknown to himself and strangers to his family. There is not a trace in this Will to show any such intention....."

The monthly allowance for the adopted sons was, therefore, not a gift *sub-modo* to the idol. Consequently, though in one part of the Will, the property purported to be given absolutely to the deity, in another part the income of the property was directed to be disposed of in a manner showing that the property was not to be the absolute property of the deity. These circumstances

gave rise to an occasion for construing the Will and for finding out the real intention of the testator.

Similar was the case of *Bhubaneswari* v. *Brojo Nath*[14]. In that case also the property was found to be such that its income was more than sufficient for the worship and there was an ultimate direction for the building of houses for the residence of the *heirs* with the surplus. This was held not to be a gift *sub-modo* to the idol. Thus the facts in these cases were very different from those in the present. In the present case, however, the dedication is by a transfer *inter vivos*. The deed on the face of it makes absolute dedication to the deity. The donor absolutely divests himself of the property and the property is given over to the *shebaits in praesenti*, giving full effect to the words of conveyance contained in the deed. There is nothing in any part of the deed which would in any way affect the import conveyed by the words of absolute dedication used in the dedication.

Where the question is whether property conveyed by a deed of dedication is an absolute gift to the idol or whether it is truly reserved to the donor's own heirs, subject to a charge of maintaining the idol and meeting all its suitable expenses, no fixed and absolute rule can be set up. The question can be settled only by a conspectus of the entire provisions of the document. In the present case the deed of dedication, on the face of it, purports to convey the whole property absolutely to the deity and no circumstances have been established which would entitle us to apply the principles laid down in the above cases to the facts of the present case.

The only other substantial point urged in the appeal is that the present suit is

precluded by Or. 9, r. 9, C.P. Code, in view of the order of dismissal under Or. 9, r. 8. C.P. Code, made in the previous suit No. 196 of 1933. The learned Subordinate Judge overruled this contention for the reasons that may be summarised thus:—

1. Under the Hindu law the idol is a juridical person, in perpetual minority and capable of holding property through his manager (*shebait*).

The general principles of law which are applicable to suits by minors through the next friend are applicable to the case of such an idol.

2. It is the duty of the Court, as far as possible to prevent the minor being injured by fraud, laches or negligence of his next friend or guardian for the suit. Though a minor be properly represented by a next friend and though there be no fraud or collusion on the part of the next friend, if the next friend be guilty of gross negligence a minor is not bound by a decree or order made in a suit or proceeding to which he is a party. This rule applies not only to decrees made after a judicial adjudication on the question in issue, but also to cases where an act or omission operates as a statutory bar to the institution of a new suit.....
3. There are generally two courses open to a minor who seeks to set aside a decree or other orders on the ground of fraud or negligence. He may either apply by way of review to the Court which makes the decree or order, or he may bring a suit to set aside the decree or order. He might also apparently bring a fresh suit on the same cause of action.
4. The above rule of law is based mainly on the decision in the case of *Lalla Shea Churn Lal* v. *Ram Nandan Dober*[15]. It was held in that case that

"Gross negligence on the part of a next friend in

the conduct of a suit brought on behalf of a person under a disability prevents the effect of the bar contained in section 103 of the Civil Procedure Code to the institution of a fresh suit by such person when the disability has ceased."

5. This principle of law is deducible not from sec. 44 of the Evidence Act but from the English law on the point, as being the law of equity and good conscience applicable in India in the absence of any statutory provision as has been found by Mr. Justice Trevelyan in the case of *Lalla Sheo Churn Lal*[15].
6. The test of negligence should be the not doing of what a reasonable man, guided by prudent considerations which regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented.
7. The law as laid down in *Sheo Churn* v. *Ram Nandan*[15] remains good law even after *Venkata* v. *Kotiswara*[15a] as a protection, not of the ordinary litigants, but of the minors who had suffered loss on account of the negligence of their next friends in the previous litigation. This rule is based on principles of equity and good conscience, and can be invoked by the minors alone not under sec. 44 of the Indian Evidence Act, but under the case-laws which introduced the special protection for persons under disability.

The Appellants assail these reasons as untenable. Or. 9, r. 8, C.P.C. lays down:—

"Where the Defendant appear and the Plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless the Defendant admits the claim, or part thereof, in which case the Court

shall pass a decree against the Defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

It may be noticed here that in the previous suit No. 196 of 1933 the then Defendants Nos. 4 to 34 (the present next friend and the Defendants Nos. 3 to 8 and 10 to 13 of the present suit) filed their written statement on 3rd May, 1934, and this was accepted by the Court on 7th May, 1934. It is, however, not in evidence in the present case what was their defence in that suit and whether they admitted the claim of the Plaintiff deity. The other contesting Defendants Nos. 16, 17 and 18 (present Defendants Nos. 15, 16 and 17) were concerned only with one item of property in that suit, *viz.* Item No. (a) of Schedule *ka* of that suit which is Item No. 1 of the present suit. Or. 9, r. 9, C.P. Code, runs as follows;

"Where a suit is wholly or partly dismissed under rule 8, the Plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside and if he satisfies the Court that there was sufficient cause for the non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal...."

Assuming that the Suit No. 196 of 1933 was a suit by the present Plaintiff, it was wholly dismissed under r. 8 of Or. 9, C.P. Code, on 19th November, 1935. The present Plaintiff by its then next friend did apply for an order to set the dismissal aside under Or. 9, r. 9, C.P. Code. The dismissal was not set aside. So the Plaintiff is *primâ facie* precluded from bringing a fresh suit in respect of the same cause of action by the provisions of Cr. 9, r. 9, C.P.C. In order to invoke the aid of this bar the Defendants must show—

(1) that the prior suit was instituted by the present Plaintiff,

(2) that the present suit is in respect

of the same cause of action in respect of which the prior suit was instituted.

(3) that the prior suit was dismissed under Or. 9, r. 8, C.P. Code.

The order made in the previous suit will be relevant under sec. 40 of the Indian Evidence Act. In the present case the existence of the order is admitted by the Plaintiff in the plaint itself (plaint, paragraphs 22, 23 and 24).

In paragraphs 21 and 24 of the present plaint all the facts relevant for the purpose of determining whether or not the prior suit was instituted by the present Plaintiff, the idol, are given.

Assuming for the present that the Suit No. 196 of 1933 was a suit instituted by the present Plaintiff, if the sameness of the cause of action is established, then *primâ facie* the previous order of dismissal under Or. 9, r. 8, C.P. Code, will prevent the Court from taking cognizance of the present suit under the provisions contained in Or. 9, r. 9, C.P. Code.

Assuming that the cause of action in respect of which the present suit is instituted is the same as in the previous suit, one obvious way of removing this bar is contained in sec. 44 of the Indian Evidence Act which lays down that—

"any party to a suit.... may show that any judgment, order or decree which is relevant under sec. 40... and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

It is not alleged in the present case that the order was obtained by any fraud or collusion. The; only allegation is that the order was the result of gross negligence on the part of the then next friend of the idol. The question therefore is—

(1) Whether this negligence of the next friend affected the jurisdiction of the Court so as to render it "a Court not competent to deliver the order" within the meaning of sec. 44 of the Indian Evidence Act;

(2) Whether apart from the provisions of sec. 44 of the Indian Evidence Act, there is any principle of law by which gross negligence on the part of the next friend would affect the consequent order of dismissal so as to render it inoperative as a bar to a fresh suit under Or. 9, r. 9, C.P. Code.

In my judgment, however, the cause of action in respect of which the present suit has been brought is not the same as that in respect of which the previous suit was instituted.

As has been stated above, the present Appellants confined their appeals to the Item No. 1 of the properties in suit. So far as this item is concerned, in the *previous suit*.

(1) the title of the Plaintiff deity was based on the registered *arpannama* or deed of dedication dated the 21st Aswin, 1276 B.S. (corresponding to the 6th October, 1869) by Bhagwan Chandra Basu and Biswa Nath Basu;

(2) the Suit No. 172 of 1925 Was characterized as collusive and as not affecting the title of the deity;

(3)(*a*) the mortgage dated 9th June, 1927, by Jogesh Chandra Chandra to Defendant No. 15,

(*b*) sub-mortgage by Defendant No. 15 to Defendants Nos. 16 and 17 dated the 23rd July, 1930,

(*c*) the final mortgage decree for sale against Jogesh Chandra in Title Suit No. 209 of 1930 on the basis of the mortgage dated 9th June, 1927.

(*d*) the final mortgage decree in Title Suit No. 186 of 1932 on the sub-mortgage,

and

(*e*) the execution case No. 109 of 1933 in execution of that decree were all impeached as not binding on the

deity and not available against the property.

The cause of action was stated to be (1) the starting of the execution proceeding in Execution Case No. 109 of 1933 and (2) the existence of (*a*) of the decree in Title Suit No. 172 of 1925, (*b*) the deed of mortgage and the sub-mortgage and (*c*) the mortgage decrees. The reliefs claimed in that suit were:—

(1) declaration, on a proper construction of the deeds of dedication, that the properties constituted the absolute *debutter* properties of the Plaintiff deity,

(2) declaration that the mortgage and the sub-mortgage, the mortgage decrees in Title Suit No. 209 of 1930 and in Title Suit No. 189 of 1932 and the execution proceedings in Execution Case No. 109 of 1933 were void, inoperative and not binding in any way upon the deity,

(3) permanent injunction against the then Defendant No. 16 (present Defendant No. 15) prohibiting and restraining him from executing the said mortgage decree in Title Suit No. 209 of 1930 by the sale of the property (Item No. 1).

and

(4) permanent injunction against the then Defendants Nos. 17 and 18 (present Nos. 16 and 17) prohibiting and restraining them from executing their mortgage decree in Title Suit No. 189 of 1932 by the sale of the property (Item No. 1).

There were also prayers for the removal of the Defendant No. 1 from the position of a *shebait* and for making a scheme of management and proper, worship of the deity.

In the present suit, all the above allegations and assertions are repeated, the title of the Plaintiff is founded on the same basis and the same infringements are alleged. In paragraph 21 of the plaint it is stated why the previous Suit No. 196 of 1933 was instituted by the Plaintiff "through the Defendant No. 9—Srimati Anupama Dasi as the next friend" and in para. 24 it is stated how the said suit was dismissed for default under Or. 9, r. 8, C.P.C., through the gross negligence of the then next friend. Then in para. 25 the fresh occasion for the present suit is given and it is stated thus:—

"That, though the Defendant No. 15, got the said Ex. Case No. 109 of 1933, referred to in the 18th and 21st paragraph above dismissed for non prosecution since and after the institution of the said T.S. No. 196 of 1933, on behalf of the Plain, tiff Deity, the Plaintiff has come to learn through its next friend that the said Defendant No. 15, has again put his said mortgage Decree in T.S. No. 209 of 1930, in Execution, in Execution Case No. 107 of 1935, in the 2nd Court of the Subordinate Judge at Alipur and is about to sell wrongfully the property described in item No. 1, of the schedule 'A' below which constitutes one of the absolute *Debuttar* properties of the Plaintiff deity and which cannot be lawfully sold in the said execution case and that 15th day of January next is fixed for auction sale of the same.

That the Plaintiff deity is therefore compelled to bring this fresh suit to protect its right, title and interest in the properties in suit and is entitled to a declaration that the properties in suit described in the schedule 'A' below constitute the absolute *Debuttar* properties of the Plaintiff deity and as such the said property described in item No. 1, of the said Schedule is not liable to be sold in the said execution. Case No. 107 of 1935, pending in the local 2nd Court of the Subordinate Judge at Alipore, or in execution of the said mortgage Decrees in T.S. No. 209 of 1930 and T.S. No. 189 of 1932, referred to above and respectively obtained by the Defendant No. 15 and the Defendants Nos. 16 and 17 against the said Jogesh Chandra Chandra since deceased."

The relief claimed in the suit is a declaration—

(1) that the properties .... constitute absolute *debutter* property of the Plaintiff deity and

(2) that Item No. 1 of the said properties is not liable to sale

(*a*) in the Execution Case No. 107 of 1935 .... nor

(*b*) in execution of the mortgage

decrees in Title Suit No. 209 of 1930 and Title Suit No. 189 of 1932.

"The cause of action," in the language of their Lordships of the Judicial Committee, "has no relation whatever to the defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the Plaintiff asks the Court to arrive at a conclusion in his favour." *Musst. Chand Kour* v. *Partab Singh*[(8)]. It is a bundle of essential facts which it is necessary for the Plaintiff to prove before he can succeed in the case.

There is no doubt that the two suits are based on certain common allegations. The suit of 1925, the mortgage of 1927 and 1930, the mortgage decrees of 1930 and 1932 are the common impeachable facts assailed in both the suits. In none of these transactions, however, the idol was a party and consequently these were not such invasion of the idol's right as would render it incumbent upon it to take the help of the Court. The mortgages were all simple mortgages and none of these transactions was accompanied or followed by any overt act interfering with the possession and enjoyment of the idol. The fact that the idol has all along been in undisputed possession and enjoyment of the properties has been established in this case and is not in dispute in this appeal. The idol's right was more effectively invaded when execution against the property was taken out in 1933. This execution case having ultimately been abortive, the threat, if any, to the idol's right, was also gone. Then, again, when the present execution was taken out against what the idol claims to be its property, a fresh invasion of its right took place, giving rise to a fresh cause of action for it to come and seek the help of the Court. No doubt, though not necessary, the idol came to Court as a matter of fact on the occasion of the previous invasion of its right. Had there been any adjudication in respect of any matter in issue there, that fact might affect it in the subsequent suit. But till barred by any such adjudication it is entitled to seek the help of the. Court upon each successive invasion of its right. Each such invasion will give rise to a fresh cause of action and a suit in respect of such an invasion will be a suit in respect of a fresh cause of action and not "in respect of the same cause of action" within the meaning of Or. 9, r. 9, C.P. Code.

In *C. Ananta Hrazu Garu* v. *C. Narayan Razi Garu*[16] the Madras High Court held that though attachment of a person's land, as if it belonged to another, gives the owner a cause of action, on which he could have brought a suit, but did not, yet the sale of the same at a later date is a *fresh and greater* invasion of his right and gives him a fresh cause of action. It may be added that if the owner in such a case brought a suit on the occasion of attachment and allowed that suit to be dismissed under Or. 9, r. 8, C.P.C., his suit on the occasion of the subsequent sale would not have been affected by the provisions of Or. 9, r. 9, C.P. Code, the latter suit being in respect of a fresh cause of action.

The principle underlying the decision of the Calcutta High Court in *Najimunnessa Bibi* v. *Nacharadin Sardar*[17] also supports the same view.

The suit of 1925, the mortgages of 1927 and 1930 and the mortgage decrees of 1930 and 1932 no doubt might supply sufficient cause of action without

anything more to the idol for a declaratory relief. If a previous suit founded on such cause of action were allowed to be dismissed for default under Or. 9, r. 8, C.P.C., another suit on that cause of action alone would have been barred by Or. 9, r. 9, C.P.C. But that is not the position here. The prior suit was founded not on these facts alone but on another additional fact, *viz.*, that an execution was taken out against the property. This last-named fact was really the clear and unequivocal threat to the idol's right and supplied the cause of action on which the suit of 1933 was founded. The suit was no doubt dismissed under Or. 9, r. 8, C.P.C. But the threat was also removed by the inaction of the invader. The execution case was also dismissed for non-prosecution. After this it was not incumbent upon the idol to do anything. A fresh invasion of its rights was made by taking out a fresh execution. This was a fresh attempt to cast a cloud on the idol's title and created a new cause of action in its favour. No doubt the reluctance or prolonged failure of the Plaintiff to assert his claim

in the Civil Courts imposes on the Courts the clear and imperative duty of cautious reserve before accepting the Plaintiff's contentions. But the Plaintiff had in this case successfully discharged this heavy burden of proof to the satisfaction of the Court below and this could not be assailed in this appeal.

In my judgment the cause of action in respect of which the present suit has been brought is not the same on which the previous suit by the idol was founded and consequently the rule of bar laid down in Or. 9, r. 9, C.P. Code, is not at all applicable to it.

In this view, no other consideration does really arise in this case. The other questions would arise for consideration only if the present suit could be said to be in respect of the same cause of action as in the suit of 1933—only if the bar imposed by Or. 9, r. 9, C.P. Code was otherwise available to the defence.

Though in the plaint itself the Plaintiff states that the suit of 1933 was its own suit, all the relevant facts for the purpose of determining how and by whom that suit was instituted and in what right the then next friend purported to act as the next friend of the idol have been given in the plaint. There is no dispute about these facts, and, in my judgment, in view of them the then next friend had no right to represent and cannot be said to have represented the idol at all.

Before proceeding further it would be advisable to keep in mind that as the rule of law now stands, there are several distinct rights of suit in respect of the endowed property, *viz.*:—

(1) the idol itself as a juristic person has the right of suit like all other owners;

(2) the *shebait*, the recognised human agency through which the idol must, from its very nature, act, has a distinct right, distinct from, and, in normal cases in supersession of the idol's right of suit [*Jagadindra's case*[3]].

(3) the prospective *shebaits* as persons interested in the endowment have a right of suit;

(4) worshippers and members of the family have right of suit.

The question before us is not who else can sue in his own right but who else, other than a *shebait*, can represent the idol when the suit is in enforcement of the idol's right of suit.

Ordinarily, the *shebaits* alone will have the right to represent the idol. In special cases the Court may appoint some one to represent it. The rules of

law that can be gathered from the decided cases in this respect appear to be—

1. that normally a *shebait* alone can represent an idol in a suit or proceeding;
   (*a*) that where there are several *shebaits*, the entire body of them will represent the idol;
   (*b*) that under some special circumstances even a co-*shebait* can represent the idol; *Nirmal Chandra Banerjee* v. *Jyoti Prosad Bandopadhyay*[7].
2. that it is only under some special circumstance that the idol may be represented by—
   (*a*) a prospective *shebait*;
   (*b*) a worshipper or any person interested in the endowment;
3. that when persons other than the *shebaits* come to represent the idol, they can represent the idol only *by an appointment by the Court*.

Anupama Dasi, the then next friend, had no greater interest than that of being a possible worshipper. As such a worshipper she had the right of suit in herself. She could bring a suit for declaration that an alienation by the *shebait* was not valid. No doubt she would not have sued for possession on the ground that the alienation by the *shebait* was invalid. The circumstances that she was a devotee of the idol and was a worshipper of it were sufficient to entitle her to bring a suit complaining of a breach of trust with reference to the property belonging to the idol. In *Brojomohun Das* v. *Hurrolal Doss*[18], Sir Richard Garth, C.J. and Pontifex, J., held that as there was no public officer in this country endowed with the power of enforcing the due administration of charitable or religious trusts by information at the relation of some private individual, as is possessed by the Attorney-General in England, and as it would lead to great abuse in trusts of this nature unless some person was able to bring them under the control of the Court, the representatives of a testator, who had created such a trust, were the persons who would be entitled, if a proper case were made out, to institute proceedings for the purpose of having abuses in the trust rectified. In *Bimal Krishna Ghosh* v. *Shebaits of Sri Sri Iswar Radhaballav Jiu*[19], (M.C. Ghosh and Mukherjea, JJ.) it was observed:

> "In India, the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the *shebaits* who represent the deity are entitled to seek the assistance of the Court in case of mismanagement or mal-administration of the deity's estate and to have a proper scheme of management framed which would end the disputes amongst the guardians and prevant the *debattar* estate from being wasted or ruined. This principle was reiterated in *Robindra Nath* v. *Chandi Charan*[20]. The Privy Council itself directed the framing of a scheme in the case of a private *debattar* in *Pramatha Nath Mullick* v. *Pradytimna Kumar Mullick*[2], and the case was remanded to the trial Court expressly for that purpose. The same directions were given by this Court in the case in *Prosad Das* v. *Jagannath*[21], which was also a case of private *debattar*...."

See also *Radha Bai* v. *Chimanji*[22]. See also, in this connection, *Monindra* v. *Shyamnagar Jute Factory*[23] and *Abdur Rahim* v. *Syed Abu Md. Barkat Ali*[24]. Persons having individual rights under such endowments can bring suits to enforce such individual rights by an ordinary suit in their own name without being obliged to bring a suit in the name of the idol. This right reserved to the worshippers sufficiently

safeguards the interest of the worshippers or other persons interested in the *debuttar*. At the same time it obviates the risk of jeopardising the interest of the idol by allowing it to be affected by the intermeddling of persons whose fitness has never been enquired into and adjudicated upon. No doubt in the case of the minors the Code of Civil Procedure lays down that "any person who is of sound mind and has attained majority may act as next friend of a minor .... Provided that the interests of such persons is not adverse to that of the minor." Such a next friend, it seems, need not have any interest in the minor's interest. There is, however, no such statutory provision applicable to the case of an idol and I do not think that this rule involves any such principles of justice, practical experience and commonsense as would entitle us to extend it to the case of an idol by analogy. Analogy may indeed often serve a very useful purpose and perhaps helps the stability of the norms for decisions. This stability receives a special respect when the norms are extended not merely to like or similar cases but also to the cases that are only approximately similar. But this projection of norms to new cases on the ground that these are approximately similar is not without its danger. The case of an idol is similar to that of an infant only to this extent that

both must act through some agents. But the analogy does not seem to extend beyond this. An idol from its very nature is a perpetual dependant and its incapacity in this respect is perpetual. It would, therefore, be reasonable to expect that the law which recognised its personality must have made some provision for supplementing this perpetual incapacity. As has been pointed out above, the law recognises the *shebaits* for this purpose and appoints them, as it were, to be the persons who are to represent the idol for all juridical purposes. In fact, though the idol is recognised as the owner, it is owner only in an ideal sense. The right of suit is really in the *shebait*.

As has recently been observed by the Judicial Committee in *Masjid Shahidganj case* [25], 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*. No doubt an idol is recognised as a juridical person capable of having interests demanding legal protection. But this is so only in an ideal sense. Strictly speaking, the law of the present age at least does not concern itself with anything outside human interest and all the recognitions and protections accorded to the idol must have been thought necessary because of the existence of some ultimate human interests. In the recent case of *Panchkari* v. *Amodelal*[5] my learned brother Mukherjea, J., is said to have held that any member of the family in case of a family endowment or any person interested in the endowment may represent the idol in a suit as a next friend. As I read the judgment, he said nothing of the kind and in the particular case had no occasion for saying that. In his own language,

> "When the *shebait* himself is negligent or alienates *debaitar* 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 may maintain the suit *on behalf of the deities* to recover that property from a trespasser [vide *Giris* v. *Upendra*[4]],"

In support of his proposition he refers to a passage in Gour's Hindu Code and says "Dr. Gour in his Hindu Code lays down the law as follows:—

> "Any person interested in the endowment may sue to Bet aside an improper alienation of its property by the manager."

After this he says:

> "The question, therefore, is as to whether Bhakatram and Panchkari could be said to be persons interested in the *debattar*."

Now, it appears from the judgment that Bhakatram instituted the suit not as next friend of the idol, but in his own name and in enforcement of his own right—

(1) as the rightful *shebait*,

(2) at least as the *de facto shebait* having the custody of the idol

and

(3) at any rate, as being interested as a worshipper.

It seems abundantly clear that my learned brother Mukherjea, J., was considering the question whether such persons could sue in their own name and right and not whether they could represent the deity in a suit. My learned brother cited as an authority in support of the position the decision of the Judicial Committee in *Maharaja Jagadindra Nath Roy* v. *Rani Hemanta Kumari*[3] and quoted a passage from the judgment of the Judicial Committee to emphasise this right of suit of such persons as distinct from the right of suit of the idol itself. The passage from Gour's Hindu Code is

also relevant only for this purpose. No doubt he used the expression "on behalf of the deities." As I read the judgment, thereby he was not thinking of the frame of the suit but of the ultimate beneficial result of it. Though not in form, in substance such a suit will be on behalf of the deity, as the deity will be, as the juristic owner of the property, the person benefited by it. The authority of *Giris* v. *Upendra*[4] cited in support of the proposition also points to the same thing. That also was a case where the persons interested instituted the suit not on behalf of the idol in form but in their own name though the interest claimed was the benefit of the idol.

In my judgment there is a very substantial distinction between a suit by certain interested persons as such in their own name, and, at least in form, on their own behalf, and a suit by a person in the name of the idol and as its next friend. In the former case the consequences of the suit will be binding only on the persons suing or on the persons whom they represented in form (Or. 1, r. 8, C.P. Code). In the latter case the idol itself will be affected as a juristic person and it is, therefore, a question fraught with grave consequences demanding serious consideration as to who should be allowed to represent the idol in such a suit.

No doubt now under Or. 32 of the Civil Procedure Code very wide scope is afforded in this respect to the case of an infant. Rule 4 of Or. 32, C.P. Code lays down:

> Any person who is of sound mind and has attained majority may Act as next friend of a minor or as his guardian for the suit: Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a Defendant, or, in the case of a guardian for the suit, a Plaintiff.

This wide rule makes possible much officious meddling with the infant's interest. In my judgment such a rule of representation should not be allowed to be extended by analogy to the case of an idol. As yet there is no well-defined rule of procedure in this respect. An idol is represented by its *shebaits*. On the exceptional unfortunate occasion of the *shebaits* turning hostile to the idol, the other persons interested are given the right of suit in their own name. They may come singly or in a representative group. But let them come in their own name and right. An idol is not an infant in the Hindu conception. It has not been treated as an infant by our legislature and by the

highest judiciary in many respects. I do not see any necessity for or advantage in allowing it to be treated as an infant for the procedural purposes beyond the extent to which the Judicial Committee has already done so. When in the case of a fight between its *shebaits* it is necessary that the idol should be brought on the record, let it be brought as represented by a person by the special appointment of the Court. In *Sharat Chandra Shee* v. *Dwarkanath Shee*[26], Lort-Williams, J., held that in the case of a private religious trust, with regard to the mismanagement of which the members of the public cannot intervene, and it cannot be expected that the *shebait* will 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.

The suit was for the removal of the Defendant from the position of the *shebait* of the deity and it was found in the case that there was nobody left out of the members of the family who under the deed of endowment had any interest in the trust estate. The founder's living relatives other than Dwarka's line were excluded by the terms of the deed itself. In these circumstances Lort-Williams, J., held that the idol itself could bring a suit for the purpose and that it was for the Court to appoint a next friend for the idol on such an occasion.

In *Sri Sri Kalimata Devi* v. *Nagendranath Chakravarty*[27], Chotzner, J., held that a right of suit is vested in the *shebait* and not in the idol. In the absence of refusal by the *shebait* to institute a suit for the protection of the property of an idol, neither a worshipper nor an idol is competent to maintain a suit. The suit in question was for a declaration that a certain deed of revocation of the dedication and mortgage of the dedicated property by the settlor was not binding on the idol. The suit was instituted by a worshipper in her own name as also in the name of the idol represented by herself as its next friend. The dedication in question was made by one Suresh Chandra Chakravarty in 1922 whereby he appointed himself and his brother Nagendra to be the *shebaits* of the deity. On 6th June, 1923, Suresh and Nagendra executed the deed of revocation in question. Thereafter on 20th June, 1923, Suresh executed the mortgage in question.

Nagendra and other members of the founder's family were made Defendants in this suit. The mortgagee Defendants contested the claim. Their defence *inter alia* was that the suit was not maintainable at the instance of the present Plaintiffs. Nagendra was the only surviving *shebait* of the deity at the date of this suit. He as also the other members of the family who were made Defendants in the suit appeared and supported the case of the Plaintiffs by filing a written statement. According to Chotzner, J., the proper person to have instituted the suit was the *shebait* and nobody else. Had the position been that Nagendra in his capacity of *shebait* had definitely declined to institute the suit, it might perhaps have been open to a worshipper as the next friend of the idol to have taken the place of the *shebait*. In the absence of any such refusal by the *shebait*, neither the worshipper nor the idol was competent to sue. The suit was held to be bad. In *Surendra Krishna Roy* v. *Shree Shree Iswar Bhubaneswari Thakurani* [28], Rankin, C.J., observed:

> "The doctrine that an idol is a perpetual minor is, in my judgment, an extravagant doctrine, contrary

to the decision of the Judicial Committee in such cases as *Damodar Das* v. *Lakhan Das* [29]."

He then pointed out:

> "It is open to *shebaits* or any person interested in an endowment to bring a suit to recover the idol's property for *debattar* purposes,"

Further on at page 77 he observed:

> "I am not prepared to hold, as a matter of construction of the Limitation Act, that an idol is perpetual minor as was suggested in *Rama Reddy* v. *Rangadasan*[30]."

While considering whether the possession of two joint *shebaits* became adverse to the idol when they openly claimed to divide the property between them, Sir George Rankin observed that "*until the shebait was removed or controlled by the Court, he alone could act for the idol.*"

This case is also an authority for saying that at least in the Limitation Act the provisions in the Act as to lunatics and minors were not intended to be extended to idols. In *Sri Sri Gopal Sridhar Mahadeva, etc.* v. *Sasibhusan Sarkar*[31] the analogy of minority of deities was declared to be a pure fiction for which no authority was to be found in Hindu law and it was held that there was no conceivable principle on which on such analogy a contract otherwise good and valid could be taken out of the class of contract of which specific performance might be granted under the law.

The position may be summed up as follows:

1.(*a*) The idol is a juristic person and as such it may sue and be sued—

(*b*) From its very nature it must act through some human agency—*shebait* is such agency. Until the *shebait* is removed or controlled by the Court he alone can act for the idol.

2. Apart from the idol's right of suit, a *shebait* as such has a right of suit and may be sued. Normally he is the human agency through which the idol holds, enjoys, and manages the property and the right of suit vests in him and not in the idol: *Jagadindra's case*[3].

3. Worshippeis and members of the family have interest in the *debutter* and a right of suit is given to them also to protect the interest of the *debutter.*

(*a*) This does not mean that these persons can as of right represent the deity in a legal proceeding.

(*b*) They can sue in their own name and on their own behalf for the benefit of the *debutter.*

4. In exceptional circumstances, a deity can be represented in a legal proceeding by a person other than a *shebait* only by the special appointment of the Court: *Promotha Nath Mullick* v. *Pradyumna Kumar Mullick*[2] and *Kanhaya Lal* v. *Hamid Ali*[32].

(*a*) In such a case such person may be under the control of the Court in the manner in which and to the extent to which a next friend or a guardian of a minor is under such control under the provisions of Or. 32, C.P. Code.

In my judgment the suit No. 196 of 1933 was not a suit of the idol. The person who purported to represent the idol as its next friend was not the person entitled in law so to represent the idol, and she was never appointed by the Court so to represent the idol. At best it was a suit by Anupama in her own right as a worshipper and as such its result would not in the least affect the present suit.

Assuming that the previous suit was the suit of the same Plaintiff and was founded on the same cause of action,

Or. 9, r. 9, C.P.C., would *primâ facie* preclude the Plaintiff from bringing this present suit.

The contention of the Plaintiff Respondent is:

(*i*) that the position of an idol is analogous to that of an infant for the present purposes;

(*ii*) that the position of an infant in this respect is—

(*a*) that gross negligence on the part of a next friend in the conduct of a suit brought on behalf of the infant prevents the effect of the bar contained in sec. 103 (now Or. 9, r. 9), C.P.C.: *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*[15];

(*b*) that in the absence of any statutory provision the English rule of law in this respect applies here as principles of equity, justice and good conscience. English rule of law as enunciated by Malms, V.C., in *In re: Hoghton*[33];

(*c*) that as soon as the next friend becomes negligent in the conduct of the suit, he becomes removable by the Court as such next friend and that he ceases to be the next friend though not removed by the Court by any express order, the minor is thus unrepresented from that moment: *Siraj Fatma* v. *Mahmud Ali*[6].

There is no direct authority in this respect so far as the position of an idol is concerned.

As regards infants, the authorities are to a certain extent conflicting. The points that will require consideration are:—

1. What is the exact position of an infant in this respect;
2. Whether the rule of law applicable to an infant should be extended to the case of an idol by analogy.

As regards infants an examination of the various decisions of the several High Courts in India will disclose a clear conflict of opinion.

The views of the Calcutta High Court will appear from the following cases:

Kylash Chandra Sirkar v. *Gooroo Churn Sirkar*[34], (Jackson and Glover, JJ.); *Eshan Chunder Safooi* v. *Nnndamoni Dasi*[35], (Sir Richard Garth, C.J. and Cunningham, J.); *Raghubar Dayal Sahu* v. *Bhikya Lal Misser*[36], (Field and O'Kinealy, JJ.); *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*[15], (Trevelyan and Ameer Ali, JJ.); *Ram Swarup Lal* v. *Shah Latafat Hossein*[37], (Pratt and Mitra, JJ.); *Sheikh Abdul Kasim* v. *Thakur Das Thakur*[38], (Rankin, C.J. and C.C. Ghose, J.) and *Mahesh Chandra Bayan* v. *Manindra Nath Das*[39], (Mukherjea, J.).

The folowing opinions showing a certain amount of conflict can be gathered from these cases:

1. The bar imposed by sec. 7 of Act VIII of 1859 (corresponding, to sec. 43 of Act XIV of 1882 and Or. 2, r. 2 of the present Civil Procedure Code) was not available against a minor when the omission in the previous suit was due to the negligence of his next friend. "There is no law which prevents a minor, when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute."[*Koylash Chunder* v. *Gooroo Churn*[34]].
2. Where a Court has reason to believe that a suit is lawfully brought by a party who has a right to bring it on

behalf of a minor, the result of that suit would have precisely the same effect as that of the suit by a person of full age [*Eshan Chunder* v. *Nundamoni*[35] and *Raghubar Dayal* v. *Bhikya Lal*[36]].

(*a*) Where a decree has been made against an infant duly represented by his guardian and the infant on attaining majority seeks to set that decree aside by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian, *Raghubar Dayal* v. *Bhikya Lal*[36].

If the infant desires to have the decree set aside because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree were an *ex parte* one, the procedure adopted should be that given in the Civil Procedure Code for setting aside *ex parte* decrees: *Raghubar* v. *Bhikya Lal*[36] and *Ram Swarup* v. *Latafat Hossein*[37].

3. Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of an infant prevents the effect of the bar contained in sec. 103 of the Code of Civil Procedure, 1882 (Or. 9, r. 9 of the present Civil Procedure Code) to the institution of a fresh suit in respect of the same cause of action by the minor on attaining majority.

Fraud and negligence are on the same footing in this respect.

Sheo Churn v. *Ram Nandan*[15] and *Mahesh* v. *Mamndra*[39].

The Calcutta High Court in *Sheo Churn* v. *Ram Nandan*[15] took the view that

according to the law as administered in England the gross negligence of his next friend would entitle an infant—

(1) to obtain avoidance of proceedings taken on behalf, as also,

(2) to institute a fresh suit in respect of the same cause of action.

The rule of English law was applied here as principles of justice and equity.

The Bombay High Court has recently taken a contrary view in *Krishnadas Padmannava Rao* v. *Vithoba Annappa*[10]. The Full Bench now holds that gross negligence apart from fraud or collusion on the part of the next friend or guardian *ad litem* cannot be made the basis of a suit to set aside a decree obtained against him.

In this case Beaumont, C.J., doubted if the English rule of law in this respect was correctly appreciated by the Calcutta High Court in *Sheo Churn* v. *Ram Nandan*[15].

The views of the Madras High Court will appear from the following cases:

Gottepati Subhanna v. *Gottepati Narasamma*[40], (Sankaran Nair and Spencer, JJ.); *Chunduru Punnayyah* v. *Rajam Viranna*[41], *Kari Bapanna* v. *Yerramma*[42], *Ananda Rao* v. *Appa Rao*[43] and *Haji Mohammad Shadak* v. *Burro, Venkata Komaraju*[44].

The Madras High Court has taken the same view as in *Sheo Churn* v. *Ram Nandan* [15].

The Allahabad High Court also has taken the same view as in *Sheo Churn* v. *Ram Nandan*[15] in *Siraj Fatma* v. *Mahmud Ali*[9].

In an earlier case in *Daulat Singh* v. *Raghubir Singh*[45] the Court observed:

"Bat short of fraud being established and fraud not only on one side but on both, *i.e.*, on the part of the then Plaintiff and on the part of the present Plaintiff's then guardian, we know of no right which the present Plaintiff can now have to dispute the validity of the decree which became final.....Even if that guardian was negligent and through her negligence did not properly protect the interests of the minor in the previous suit, the minor is still bound by the Decree, so long as the guardian did not act fraudulently and in collusion with the minor's then opponent. If the law was otherwise, no person could be certain of the finality of any decree obtained against a minor, whether the minor had been a Plaintiff or a Defendant in the suit."

The Patna High Court also has taken the same view as in *Sheo Churn* v. *Ram Nandan*[15] and has further extended the rule to the case of a ward of Court in *Mathura Singh* v. *Ram Rudra Pratap*[46].

The Lahore High Court also has taken the same view and has refused to follow the Full Bench decision of the Bombay High Court. See *Punnun Mal* v. *Bishamhar Dayal*[47].

Keeping ourselves confined to the bar imposed by Or. 9, r. 9, C.P. Code, we may proceed to examine the legal position of the infant with reference to the following cases.

(1) When the minor institutes a fresh suit in respect of the same cause of action;

(2) When the minor institutes a suit for setting aside the adverse decision in the previous suit;

(3) When the minor makes an application in the previous suit—

(*a*) for a review of the adverse decision,

(*b*) for otherwise setting aside the adverse decision.

So far as the first case is concerned, it must now be taken to be the settled law that the provisions of sec. 44 of the Indian Evidence Act cannot be extended to cases of gross negligence; *Venkata Seshayya* v. *Kotiswara*[15a].

Assuming, therefore, that in the previous suit the minor was properly represented and that suit was dismissed for default under Or. 9, r. 8, C.P. Code, it seems difficult to maintain the position that a fresh suit in respect of the same cause of action would be maintainable by the minor on the ground that the previous order under Or. 9, r. 8 was due to the negligence of the next friend. The bar is a statutory one and it does not make any exception in favour of an infant.

The only way in which such a fresh suit can be urged to be maintainable in spite of the barring provision contained in Or. 9, r. 9. C.P. Code, is by holding—

(1) that as soon as the next friend or guardian *ad litem* of a minor in a suit becomes negligent, or, in the language of the statute, "does not do his duty" (Or. 52, r. 9 and r. 11, C.P. Code) and thus becomes removable by the Court under Or. 32, r. 9 or 11, C.P.C., he ceases to represent the minor in that suit, though an order removing him is not actually made;

(2) that, at any rate, as soon as by failing to do his duty a next friend or a guardian *ad litem* renders himself liable to be removed, it becomes the duty of the Court to proceed in a particular manner in that suit and the Court is not competent to proceed in any other way in that suit and therefore any order made thereafter without removing the next friend or guardian *ad litem* is an order "delivered by a Court not competent to deliver it" within the meaning of sec. 44 of the Indian Evidence Act.

Mr. Justice Sulaiman in *Siraj Fatma*

v. *Mahmud Ali*[9] seems to have taken the view that the next friend or the guardian *ad litem* ceases to represent the minor as soon as he renders himself removable by his negligence or failure to do his duty. In my opinion, this is taking an extreme view of the case and, if introduced, is likely to create an appalling confusion. This may be a very good ground for re-opening any decision or order consequent upon the negligence of the guardian or next friend by an application in that very suit. But I am not prepared to say that when a minor is once properly represented, he will cease to be represented thus without an order from the Court. The case *Shaik Abdul Karim* v. *Thakurdas Thakur*[38] is rather an authority in support of the view I am taking. There a minor and his mother were sued and they were described as Sudhamayee Debi, widow of late Ramlal Thakur, and Thakurdas Thakur, a minor by his mother and certificated guardian, the said first Defendant. *No one was formally appointed by the Court as guardian ad litem for the minor.* A pleader appeared on behalf of the Defendants for taking adjournments for filing written statements. There was a substantial defence to the suit, but that defence was never raised. The suit was ultimately decreed *ex parte*. It was held that the minor was not properly represented and the decree was a nullity.

In this case Sir George Rankin laid stress on the fact that the lady was not at all appointed by the Court as a guardian *ad litem* as was required by Or. 32, r. 3, C.P. Code.

The decision of the Judicial Committee in *Musammat Rasidunnissa* v. *Mahammad Ismail Khan*[11] is not authority for the extreme view taken by Sulaiman, J., in *Siraj Fatma* v. *Mahmud Ali*[9]. There, in one case, the guardian *ad litem*, being a married woman, was disqualified by sec. 457 of the Code of Civil Procedure of 1882 from being

appointed a guardian *ad litem* and in another case the proposed guardian was disqualified, having an interest adverse to that of the minor.

I am also not prepared to accept the contention that the Court becomes incompetent to make the order of dismissal as soon as the next friend ceases to do his duty.

As regards the second case, namely, when the minor seeks to assail the previous order or decision and brings a suit for the purpose of setting aside that order, obviously. Or. 9, r. 9, C.P. Code is no bar to such a suit. It is not a suit in respect of the same cause of action. It is the previous order itself which supplies the cause of action for the present suit. In my opinion the law that has developed in India in allowing a minor to assail by a suit the order or decision in bar on the ground of the negligence of the next friend should not be disturbed. Even if it be held that the remedy in this respect is not by a suit but by an application in the previous suit, the suit may be treated as such an application.

As regards the third case, namely, when the infant applies in the previous suit itself for a review of the adverse decision, I am inclined to the view that negligence of the next friend should afford a good ground for the purpose.

A reading of the relevant Indian decisions above referred to will show that they are ultimately based on the pronouncement of Sir R. Malins, V.C., in *Hoghton* v. *Fiddey*[33]. In that very case it was observed that an infant can be guilty of no negligence and cannot

be answerable for the negligence of his next friend. No negligence can be imputed to an infant. It might very well be said that when a suit by a minor by his next friend is dismissed for default of the next friend due to the negligence of such next friend, the minor will always have a sufficient cause for non-appearance and will thus be entitled to have the order of dismissal set aside.

The next question is to what extent this should be extended to the case of an idol which, as a juristic person, is from its very nature under perpetual incapacity to look after its own interests, if any.

It is now well settled that an idol is recognised as a juristic person capable of being the subject of legal right and duty. But this is only in an ideal sense.

In *Promotha Nath Mullick* v. *Pradhyumna Kumar Mullick*[2], Lord Shaw in delivering the judgment of the Judicial Committee observed that

> "a Hindu idol is according to long-established authority, founded upon the religions 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. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir."

His Lordship characterised this doctrine as firmly established.

In this case their Lordships likened the deity to a human being. Their Lordships observed that

> "the duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolizing the Divinity, has in the eye of the law a status as a separate *persona*. The position and rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the

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shebait custodian of the idol and manager of its estate,"

Their Lordships quoted with approval what their Lordships termed "a useful (narrative of the concrete realities of the position" from the judgment of Sir Asutosh Mookerjee, J., in *Rambrahama Chatterjee* v. *Kedarnaih Banerjee*[1] which in short shows that the deity is conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant.

Though the deity is likened to a human being, it is not clear whether the idol gets recognition as a possible subject of rights in its own interest or whether it is recognised because of the existence of some ultimate human interest of those benefited directly or indirectly by the *debutter*. The idol is recognised as a juridical entity, but its juridical personality is only the technical means of developing the juristic relations between the several human beings differently interested in the institution. The idol is the owner only in an ideal sense. Its enjoyment is an ideal enjoyment. The real material enjoyment and interest must ultimately be with some human being; otherwise it is difficult to see why law should concern itself with the matter.

In *Maharaja Jogadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Devi*[3], their Lordships observed:—

> "There is no doubt that an idol may be regarded as a juridical person capable as such of holding property though it is only in an ideal sense that property is so held."... "The possession and management of, the dedicated properties 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*, not in the idol."

It may be noticed that in this case the suit was not by the idol represented by its *shebait* but by the *shebait* himself as *shebait* in enforcement of

his right as *shebait*. The right to sue accrued to the Plaintiff when he was under age and this saved the limitation.

In *Masjid Shahidgunj* v. *Shiromani Gurdwara*[25], their Lordships of the Judicial Committee observed that the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognises certain doctrines of Hindu law as essential thereto, *e.g.*, that an idol may be the owner of property. 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*. *Jagadindra* v. *Hemanta Kumari*[3].

In *Prosanna Kumari Debya* v. *Golap Chand Babu*[48], it was observed—

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

Though an idol is thus recognised as a juristic person capable of suing and being sued, strictly speaking it has no material interest of its own. The efficient subject of the rights ascribed to an idol must ultimately be some human beings. It must be they who enjoy such rights and if law protects such rights, it is because of the existence of

such ultimate human concern. The idol as the juridical person only affords the technical means of developing the juristic, relations between those ultimately interested in the endowed property and the strangers. The so-called interest of the idol is merely an ideal interest very different from the interest which an infant has in his property. The introduction of the idol and its recognition as a juristic person are more a matter for the procedure and the procedure in India recognises the idol as having a *locus standi in judicio*; *Musjid Shahidgunj* v. *Shiromani Gurdwara*[25]. The real material interest and enjoyment lie with some human beings. It is the concern of these interested persons to see how best they will protect and preserve their interests and in this respect when the properly represented idol is brought before a Court of law, that proceeding is more analogous to the one brought by a few persons representing a multitude under Or. 1, r. 8, C.P. Code, than the suit by a next friend in the name of an infant, for the protection of that infant's own interest. Negligence of the person or persons representing the idol (or more correctly, the interest of the ultimate multitude having interest in the endowment) should not be available for the purpose of avoiding the result of that litigation: *Venkata Seshayya* v. *Kotiswara*[15a].

As I have held that the present suit is not in respect of the same cause of action as the Title Suit No. 196 of 1933 and that the idol was not properly represented in that suit, Or. 9, r. 9, C.P. Code is no bar to the present suit. The appeals, therefore, fail on this ground and I agree that they should be dismissed.

P.C.

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* Appeals from Original Decrees Nos. 152 and 180 of 1938 against the decree of the Subordinate Judge, First Additional Court, Alipore, District 24 Parganas, (Kumud Bandu Sen, Esq), in Title Suit No. 1 of 1936, dated the 22nd March, 1938.

(5) 41 C.W.N. 1349 (1937).

(1) 36 C.L.J. 478 (1922).

(2) L.R. 52 I.A. 245 : s.c. 30 C.W.N. 25 (1925).

(2) L.R. 62 I.A. 246 : s.c. 30 C.W.N. 25 (1925).

(3) L.R. 31 I.A. 203 : s.c. 8 C.W.N. 809 (1904).

(2) L.R. 52 I.A. 245 : s.c. 30 C.W.N. 25 (1925).

(3) L.R. 31 I.A. 203 : s.c. 8 C.W.N. 809 (1904).

(4) 35 C.W.N. 768 (1931).

(5) 41 C.W.N. 1349 (1937).

(6) 45 C.W.N. 699 (1940).

(7) 45 C.W.N. 709 (1941).

(8) L.R. 15 I.A. 156 (1888).

(8a) L.R. 49 I.A. 144 : s.c. 26 C.W.N. 697 (1922).

(9) I.L.R. 54 All. 648 (1932).

(10) I.L.R. [1939] Bom. 840.

(11) L.R. 36 I.A. 168 : s.c. 13 C.W.N. 1182 (1909).

(12) L.R. 19 I.A. 108 (1892).

(13) L.R. 48 I.A. 143 : s.c. 25 C.W.N. 961 (1921).

(14) L.R. 64 I.A. 203 : s.c. 41 C.W.N. 968 (1937).

(14) L.R. 64 I.A. 203 : s.c. 41 C.W.N.. 968 (1937).

(15) I.L.R. 22 Cal. 8 (1894).

(15) L.R. 64 I.A. 171 : s.c. 41 C.W.N. 257 (1936).

(15a) I.L.R. 22 Cal. 8 (1894).

(8) L.R. 15 I.A. 156 (1888).

(16) I.L.R. 36 Mad. 383 (1911).

(17) I.L.R. 51 Cal. 548 (1924).

(3) L.R. 31 I.A. 203 : s.c. 8 C.W.N. 809 (1904).

(7) 45 C.W.N. 709 (1941).

(18) I.L.R. Cal. 700 (1880).

(2) L.R. 62 I.A. 245 : s.c. 30 C.W.N. 25 (1925).

(19) I.L.R. [1937] 2 Cal. 105.

(20) 53 C.L.J. 621 (1931).

(21) 37 C.W.N. 181 (1932).

(22) I.L.R. 3 Bom. 27 (1878).

(23) 43 C.W.N. 1056 (1939).

(24) L.R. 55 I.A. 96 : s.c. 32 C.W.N. 482 (1927).

(4) 35 C.W.N. 768 (1931).

(5) 41 C.W.N. 1349 (1937).

(25) L.R. 67 I.A. 251 : s.c. 44 C.W.N. 957 (1940).

(3) L.R. 31 I.A. 203 : s.c. 8 C.W.N. 809 (1904).

(4) 35 C.W.N. 768 (1931).

(26) I.L.R. 53 Cal. 619 (1930).

(27) 44 C.L.J. 522 (1926).

(28) I.L.R. 60 Cal. 54, 73 (1932).

(29) L.R. 37 I.A. 147 : s.c. 14 C.W.N. 889 (1910).

(30) I.L.R. 40 Mad. 543 (1925).

(31) 36 C.W.N. 1108 (1982).

(2) L.R. 62 I.A. 245 : s.c. 30 C.W.N. 25 (1925).

(3) L.R. 31 I.A. 203 : s.c. 8 C.W.N. 809 (1904).

(32) L.R. 60 I.A. 263 : s.c. 38 C.W.N. 151 (1933).

(9) I.L.R. 54 All. 648 (1932).

(15) I.L.R. 22 Cal. 8 (1894).

(33) L.R. 18 Eq. 573, 576 (1874).

(15) I.L.R. 22 Cal. 8 (1894).

(34) 3 W.R. 43, 46 (1865).

(35) I.L.R. 10 Cal. 357 (1884).

(36) I.L.R. 12 Cal. 69 (1885).

(37) I.L.R. 29 Cal. 735 (1902).

(38) I.L.R. 55 Cal. 1241 : s.c. 32 C.W.N. 665 (1928).

(39) 45 C.W.N. 508 (1941).

(15) I.L.R. 22 Cal. 8 (1894).

(35) I.L.R. 10 Cal. 357 (1884).

(36) I.L.R. 12 Cal. 69 (1885).

(37) I.L.R. 29 Cal. 735 (1902).

(39) 45 C.W.N. 5081 (1941).

(9) I.L.R. 54 All. 648 (1932).

(10) I.L.R. [1939] Bom. 840.

(15) I.L.R. 22 Cal. 8 (1894).

(40) A.I.R. [1915] Mad. 384.

(41) I.L.R. 45 Mad. 425 (1921).

(42) A.I.R. [1923] Mad. 718.

(43) A.I.R. [1925] Mad. 258.

(44) A.I.R. [1940] Mad. 810.

(45) [1894] All. W.N. 141.

(15) I.L.R. 22 Cal. 8 (1894).

(46) I.L.R. 14 Pat. 824 (1935).

(47) A.I.R. [1940] Lahore 205.

(15a) L.R. 64 I.A. 171 : s.c. 41 C.W.N. 257 (1936).

(9) I.L.R. 54 All. 648 (1932).

(11) L.R. 36 I.A. 168 : s.c. 13 C.W.N. 1182 (1909).

(38) I.L.R. 55 Cal. 1241 : s.c. 32 C.W.N. 665 (1928).

(9) I.L.R. 54 All. 648 (1932).

(33) L.R. 18 Eq. 573, 576 (1874).

(2) L.R. 52 I.A. 245 : s.c. 30 C.W.N. 25 (1925).

(1) 36 C.L.J. 478 (1922).

(3) L.R. 31 I.A. 203 : s.c. 8 C.W.N. 809 (1904).

(3) L.R. 31 I.A. 203 : s.c. 8 C.W.N. 809 (1904).

(25) L.R. 67 I.A. 251 : s.c. 44 C.W.N. 957 (1940).

(48) L.R. 2 I.A. 145 (1874).

(15a) L.R. 64 I.A. 171 : s.c. 41 C.W.N. 257 (1936).

(25) L.R. 67 I.A. 251 : s.c. 44 C.W.N. 957 (1940).

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APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Chainani.

SHREE MAHADOBA DEVASTHAN (ORIGINAL PLAINTIFF), APPELLANT *v.* MAHADBA RAMJI BIDKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Hindu idol—Shebait himself not in a position to file suit as next friend of idol—Right of another person to file suit in name of idol acting as its next friend—Grant of inam for carrying on worship, Naivedya and festival of god—Grantee, his sons and grandsons enjoined that they should go on spending Akar of lands for expenses—Nature of grant—"Akar," meaning of.

Where the manager or the shebait himself is not in a position to file a suit as the next friend of an image or an idol, it is competent to another person next in succession to the office of the manager or the shebait, to file a suit in the name of the image or the idol acting as its next friend.

A Hindu image or idol is a juridical person capable of holding property and also capable of suing or being sued in regard thereto. If the suit is filed in the name of the image or idol, the image or the idol would be a proper plaintiff, though of necessity it would have to be represented in the suit by its manager or shebait. If the manager or the shebait on the other hand, chooses in vindication of his right to sue for the protection of the properties to file a suit in his own name, he may do so. But that would be no bar to the right of the image or the idol to file such a suit if it chose to do so. These rights can be exercised only by the one or the other and, not by both; so that if the cause of action was prosecuted to judgment by one of them, it would be merged in a decree properly passed in favour of the plaintiff and the defendant cannot be proceeded against any more in respect of the same cause of action.

Kazi Hassan v. *Sagun Balkrishna*,[1] followed.

Jagadindra v. *Hemanta*,[2] distinguished.

Sri Iswar Sridhar v. *Johar Lal*,[3] referred to.

In 1930, Waman the then Vahivatdar of Shri Mahadoba Devasthan Mauje Theur, Kasbe Poona, alienated some of the lands granted in inam to the Devasthan by the Peshwas. The grant was originally made in the name of one Ganoji for the purpose of carrying on the worship, Naivedya and the festival of the god, and the grantee, his sons and grandsons were enjoined that they should go on spending the Akar of the lands for the expenses connected therewith. In 1946, Waman's son Keshav, describing himself as the Vahivatdar of the Devasthan, brought a suit in the name of the idol against the alienees (defendants Nos. 1 and 2) and Waman (defendant No. 3) challenging the alienation and asking for a declaration that the lands were of the ownership of the

* First Appeal No. 434 of 1948.

(1) (1899) 24 Bom. 170.
(2) (1904) 32 Cal. 129.
(3) [1945] A. I. R. Cal. 268.

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Devasthan and that the plaintiff was entitled to recover their possession from the defendants. The trial Court holding that Waman and not Keshav was the Vahivatdar dismissed the suit on the ground that Keshav was not entitled to bring it. On appeal questions having been raised as regards the maintainability of the suit and the nature of the grant:

Held, (*i*) that the suit was properly filed in the name of Shri Mahadoba Devasthan—the image or idol—by its Vahivatdar Keshav;

(*ii*) that Waman being the person who was alleged to have unauthorisedly alienated the suit properties, could not be appointed the next friend of the plaintiff, and therefore, Keshav the next Vahivatdar after Waman rightly acted as the next friend of the plaintiff in the matter of the institution and prosecution of the suit;

(*iii*) that the grant was primarily a grant to the religious foundation, that is, Shri Mahadoba and not a grant to Ganoji for his own benefit or for the benefit of his sons, grandsons etc. with only a charge in favour of the idol.

(*iv*) that, therefore, the suit was wrongly dismissed.

Maharaja Jagadindra v. *Rani Hemalata*,[1] *Shri Ganesh Dharnidhar* v. *Keshavrao*,[2] referred to.

FIRST APPEAL from the decision of B. K. Khade, Esquire, Joint Civil Judge (Senior Division) at Poona in Civil Suit No. 36 of 1946.

Suit for declaration.

Certain lands situate in the villages of Lohagaon and Kesnand in taluka Haveli of district Poona were granted in Inam in 1772 by Shrimant Madhavrao Peshawa to the Devasthan of Shree Mahadoba Mauje Theur, Kasbe Poona. The sanad was issued in the name of Ganoji *bin* Rakhamoji Waghule as the devotee of Shree Mahadoba god. It ran as follows:—

".....Thus in all two chawars land measuring in all two hundred and forty bighas with the aforesaid boundaries together with twofold Sardeshmukhi rights both in Swaraj and Mongalai and one-third Inam together with Kulbab and Kulkanu (customary rights and rules), with the existing taxes and those that will be levied in future, together with water, trees, timber, stone and treasuretrove excluding the rights of Hakdars, has been given to you for the expenses of Puja of Shree, Naivedya and festivals by creating a new grant or agreement from the Government. Therefore you, as stated above, should get the two Chawars of land transferred to your ownership, and you, your sons and grandsons should go on spending the Akar of the aforesaid lands for the expenses in connection with the worship, Naivedya and festival of the Shree."

Ganoji and after him his descendants made vahivat of the lands as trustees in accordance with the sanad, but on January 29, 1930, Waman (defendant No. 3) who was the then

[1] (1904) L. R. 31 I. A. 203. [2] (1890) 15 Bom. 625.

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Vahivatdar of the Devasthan sold some of the lands to Mahadu and Gunaji (defendants Nos. 1 and 2) as though the lands were of his ownership. All the alienated lands excepting Survey No. 245 were later on requisitioned by the Government for Military purposes.

On June 6, 1946, while Waman was alive his son Keshav, describing himself as the Vahivatdar of the Devasthan, brought a suit in the name of the idol challenging the sale and asking for a declaration that the lands were of the ownership of Shree Mahadoba Devasthan and that the plaintiff was entitled to recover possession and mesne profits of the requisitioned lands from the Government and of Survey No. 245 from the defendants. The title of the plaintiff was as follows:

"Shree Mahadoba Devasthan Mauje Theur Kasbe Poona by its Vahivatdar—Keshav Waman Waghule."

The defendants *inter alia* pleaded that Keshav was not the Vahivatdar, Waman being the Vahivatdar of Shree Mahadoba Devasthan, that the suit properties were not the Devasthan properties, that the alienation was valid and binding on the plaintiff and that the suit was barred by limitation.

The trial Judge held the existence of the Shree Mahadoba Devasthan and the grant of the suit properties to the said Devasthan proved. He also held proved that Ganoji *bin* Rakhamoji, the anscestor of the defendant No. 3, was a trustee and his trusteeship was hereditary. He, however, came to the conclusion that Keshav was not the Vahivatdar and was not entitled to bring the suit on behalf of Shree Mahadoba Devasthan. He, therefore, dismissed the suit without going into the remaining issues regarding the validity of the alienation, limitation, etc. He observed in his judgment as follows:—

"The possession and management of the property belonging to the Deity must be in the nature of things be entrusted to some person as Shebait or manager. A Shebait is, by virtue of his office, the administrator of the property attached to the temple of which he is a Shebait. The devolution of the office of Shebait depends upon the terms of the deed by which it is created. Where there is no provision in the deed as for the succession, the title to the property or to the management and control of the property as the case may be, follows the line of his inheritance from the founder. The instrument of grant ex. 81 shows that the Office of Shebaitship and manager was bestowed upon defendant No. 3's ancestor Ganoji Rakhamaji by Shreemant Madhavrao Peshwa from generation to generation. Defendant No. 3's father Chimnaji Ravji was a Shebait and manager till his death. Defendant No. 3 is

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the Shebait and manager since 1910. The evidence shows that he is still the manager and Vahivatdar of the property of the Devasthan. So long as he holds the office of Shebait and is alive, his son is not entitled to bring a suit as Vahivatdar of the Devasthan and challenge the alienations of the property belonging to the Devasthan. The suit brought by Keshav as the manager and Vahivatdar of the plaintiff Devasthan for a declaration that the alienations are not binding upon the Devasthan and to recover possession of the alienated property is not competent. Keshav is entitled to bring a suit to recover possession of the property after the demise of his father. This is of course subject to the law of Limitation. So far as this suit is concerned, it is not competent. The next question, therefore, whether the alienations are valid or not does not survive."

The plaintiff appealed to the High Court.

S. H. Lulla with *R. N. Bhalerao*, for the appellant.

Y. V. Chandrachud, for the respondents Nos. 1 and 2.

BHAGWATI J. This is a first appeal from the decision of the learned Joint Civil Judge (S. D.) at Poona who dismissed the plaintiff's suit. The plaintiff is the Shree Mahadoba Devasthan, Mouje Theur, Kasbe Poona, by its vahivatdar Keshav Waman Waghule, and the suit was filed by the plaintiff thus described against the original defendant No. 3 who was the then vahivatdar and the father of Keshav Waman Waghule and defendants Nos. 1 and 2 who were alienees of certain properties alleged to belong to the plaintiff for two declarations, one that the sale deeds of the suit lands were void and the lands were of the ownership of Shree Mahadoba Devasthan, and two, that the plaintiff was entitled to recover possession of S. Nos. 240A, 242, 243 and 244 from the Government and recover possession of S. No. 245 from the defendants and costs of the suit. The defences which were taken up were that Keshav Waman Waghule was not the vahivatdar, defendant No. 3 being the vahivatdar of Shree Mahadoba Devasthan, that the suit properties were not the Devasthan properties, that the alienations were valid and binding on the plaintiff and that the suit was barred by limitation, the defendants having been in adverse possession of the properties for more than the prescriptive period. The learned trial Judge held the existence of the Shree Mahadoba Devasthan and the grant of the suit properties to the said Devasthan proved. He also held proved that Ganoji *bin* Rakhamoji, the ancestor of original defendant No. 3, was a trustee and his trusteeship was hereditary. He, however, came to the conclusion that Keshav Waman Waghule was not entitled to bring the suit on behalf

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of Shree Mahadoba Devasthan. He, therefore, dismissed the plaintiff's suit without recording his findings in regard to issues Nos. 5, 6, 8, 9 and 10. This appeal has been filed by the plaintiff against that decision of the learned trial Judge.

The main question which has been agitated by Mr. Lulla for the plaintiff is that even if the lower Court came to the conclusion that Keshav Waman Waghule was not the vahivatdar of the Shree Mahadoba Devasthan, the order of dismissal was not justified because the plaintiff was Shree Mahadoba Devasthan to whom the suit properties belonged, and the mere fact of the suit having been filed in the name of Shree Mahadoba Devasthan by Keshav Waman Waghule describing himself as its vahivatdar did not vitiate the suit. Shree Mahadoba Devasthan is a description of the institution where the image of Shree Mahadoba has been installed and is worshipped. The image of Shree Mahadoba is, as has been held by the Privy Council, a juridical person and capable of holding property and also capable of suing or being sued. The contention, however, which was urged by the defendants and which found favour with the learned trial Judge was that even though the image of Shree Mahadoba was a juridical person the whole management of the properties belonging to the image could be and was carried on by its shebait or its vahivatdar and the right to sue for the protection of the properties belonging to the image of Shree Mahadoba was vested in the shebait and not in the image or the idol. Reliance was placed in support of this contention on the observations of their Lordships of the Privy Council in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*,[1] where Sir Arthur Wilson observed (p. 141):

> "But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs 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, not in the idol. And in the present case the right to sue accrued to the plaintiff when he was under age. The case therefore falls within the clear language of s. 7 of the Limitation Act...."

These observations were particularly relied on for the purpose of showing that the suit for setting aside the alienations complained of could not be filed in the name of Shree Mahadoba Devasthan at all but could only be filed in the name of the shebait for the time being who was Waman Chimnaji

[1] (1904) 32 Cal. 129, s. c. L. R. 31 I. A. 203, s. c. 6 Bom. L. R. 765.

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Waghule, original defendant No. 3. These observations of their Lordships of the Privy Council were, however, made in a suit which was a suit for recovering possession of the property belonging to the idol against the persons who had dispossessed the idol of the same. The shebait of the idol was then a minor. The idol was no doubt a juridical person and capable of suing or being sued, but even there the suit could be brought in the name of the idol by the shebait and the shebait was a minor with the result that their Lordships of the Privy Council held that the right of possession and management of the dedicated property having belonged to the shebait whatever suits were necessary for the protection of the property could also be brought by the shebait. There is no doubt that the words "not in the idol" are a part of the sentence which was used by their Lordships: "Every such right is vested in the shebait, not in the idol." Their Lordships of the Privy Council were, however, concerned with a case where even if the idol being a juridical person capable of holding the property could have filed the suit for recovering possession of the property of which it was dispossessed, that suit could only have been filed though in the name of the idol by its shebait and the shebait being a minor, they had got to consider what the position would be if the shebait was the person who could and should have filed the suit in the name of the idol for recovering possession of the property. We are of the opinion that their Lordships had not their attention focussed on this aspect of the question, namely, whether a suit could have been filed in the name of the idol by the shebait apart from the shebait vindicating his right of possession and management of the dedicated property and filing a suit for the protection of the same. This dictum of their Lordships of the Privy Council was considered by a Division Bench of the Calcutta High Court in the case of *Jyoti Prasad v. Jahor Lal.*[1] In the course of the judgment Biswas J. observed as follows (p. 277):

"On the first point, the appellants' sheet anchor is the dictum of Sir Arthur Wilson in the Privy Council case in *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*,[2] that the right of suit is vested in the shebait, and not in the idol, but as has been explained in various decisions this does not and cannot mean that a Hindu idol is incapable of suing. The power of suing (as also being sued) undoubtedly resides in the idol, though *ex necessitate rei* the power must be

[1] [1945] A. I. R. Cal. 268.

[2] (1904) L. R. 31 I. A. 203, s. c. 6 Bom. L. R. 765.

exercised by and through a sentient being representing the idol. As was pointed out by Pal J. in *Tarit Bhusan Ray* v. *Sree Sree Iswar Sridhar Salgram Sila Thakur*,[1] where this question is discussed, the suit in *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*[2] was not by the idol represented by its shebait but by the shebait himself as such to enforce the proprietary right of the idol in certain properties. The High Court had dismissed the suit as barred by limitation on the ground that as the interest was admitted to be in the idol, there was nothing to prevent a suit being brought on behalf of the idol by the plaintiff's mother during his minority, but the Judicial Committee reversed the decision, holding that as the possession and management of the dedicated property belonged to the shebait, and this carried with it the right to bring whatever suits were necessary for the protection of the property, the right to sue accrued to the plaintiff, and as he was a minor at the time, he could bring the suit within three years after he attained majority under s. 7 of Act 15 of 1877 (corresponding to s. 6 of the present Limitation Act.). It is in this connection that Sir Arthur Wilson made the observation on which the appellants rely."

The learned Judge then proceeded to quote the observations of Lord Shaw in *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[3] where their Lordships of the Privy Council dwelling on the nature of a Hindu idol expressly recognised it as a juristic entity and observed that it has a juridical status with the power of suing and being sued; and also the observations of the Judicial Committee in *Radha Binode Mandal* v. *Gopal Jiu Thakur*,[4] where a clear distinction was drawn between a suit in which the idol itself was the plaintiff and the suit in which the plaintiffs were shebaits of the idol. The learned Judge then observed (p. 277):

"...It is quite true that a Hindu idol is a juridical person capable of holding legal rights only in an ideal sense, and it may also be, as was indicated by Sir George Rankin in the Privy Council decision in *Masjid Shahid Ganj Mosque* v. *Shiromani Gurudwara Parbandhak Committee, Amristar*,[5] that the procedure of our Courts only allows for a suit in the name of an idol, but nevertheless the position remains incontestable that a Hindu idol may be a competent plaintiff in a suit in respect of property held or claimed by it, and that this is a right quite distinct from that which belongs to its shebait or shebaits to sue on its behalf."

Normally speaking a manager or an agent would not be competent to file a suit in his own name in regard to the affairs of his principal and such a suit even if brought by the manager would have to be in the name of the principal. The principal in the case of an image or idol is not an entity

[1] [1941] 2 Cal 477, 531.

[2] (1904) L. R. 31 I. A. 203 s. c. 6. Bom. L. R. 768.

[3] [1925] L. R. 52 I. A. 245, s. c. Bom. L. R. 1064.

[4] (1927) L. R. 54 I. A. 238, s. c. 29 Bom. L. R. 961.

[5] (1940) L. R. 67 I. A. 251, 264, s. c. 42 Bom. L. R. 1100.

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capable of acting on its own, with the result that it has of necessity got to act through its manager or an accredited agent, who under the circumstances is the only person capable of performing these functions in the name of the idol. The shebait is in possession and management of the property belonging to the image or idol, and having such possession and management vested in him, it is only an extension of the principle of responsibility from the image or idol to the manager or to use the other words from the principal to the agent to vest the right of protection of the property which is incidental to the right of possession and management thereof by way of filing a suit in connection with the same, in the shebait. The extension of the right in the shebait, however, does not mean that the right which the image or the idol as a juridical person has by virtue of its holding the property to file a suit in regard thereto is by any process eliminated. Both these rights can exist simultaneously, so that if the suit is filed in the name of the image or idol, the image or the idol would be a proper plaintiff, though, as observed before, of necessity it would have to be represented in the suit by its manager or shebait. If the manager or the shebait on the other hand chooses in vindication of his right to sue for the protection of the properties to file a suit in his own name, he may just as well do so. But that would be no bar to the right of the image or the idol to file such a suit if it had chosen to do so. Of course these rights either by the image or the idol or by the manager or by the shebait could be exercised only by the one or the other and not by both; so that if the cause of action was prosecuted to judgment, it would be merged in a decree properly passed in favour of the plaintiff and the defendant could not be proceeded against any more in respect of that very cause of action. We are, therefore, of the opinion that the suit was properly filed in the name of Shri Mahadoba Devasthan the image or idol by its vahivatdar Keshav Waman Waghule. It was, however, urged by Mr. Chandrachud that Keshav Waman Waghule was not in fact the vahivatdar. The vahivatdar for the time being was his father Waman Chimnaji Waghule, original defendant No. 3. Normally speaking again this would be the correct position and we have the analogy of suits filed on behalf of the minors and lunatics by their next friends. Where there is a testamentary guardian or a certificated guardian, no body except such guardian could be the next friend of a minor plaintiff. But if the

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interests of that guardian were adverse to those of the minor, he certainly could not be appointed the next friend for the purpose of the suit. Applying that analogy so far it is possible to do so in the circumstances of the present case, no Court would appoint the manager or the shebait who was himself a party to an unauthorised alienation as the next friend of the image or the idol where the alienation was being challenged. The next friend would of necessity be some person other than the manager or the shebait of the image or the idol, and what better person could ever be found than the person next in order of succession of the shebaitship? In the case before us Waman Chimnaji Waghule was the person who was alleged to have unauthorisedly alienated some of the suit properties. He could certainly not be appointed the next friend of the plaintiff for the purpose of instituting and prosecuting this suit. Keshav Waman Waghule, the son of original defendant No. 3, was the next vahivatdar after Waman Chimnaji Waghule. It was therefore in the fitness of things that he acted as the next friend of the plaintiff in the matter of the institution and prosecution of this suit.

This is a commonsense point of view. If any authority was, however, needed in support of it, it is to be found in a decision of our appeal Court in *Kazi Hassan* v. *Sagun Balkrishna*.[1] In that case, the plaintiffs sued to recover possession of certain lands alleging that they had been granted in wakf to their ancestor and his lineal descendants to defray the expenses for, or connected with, the service of certain mosque. Their father and cousins who were impleaded as defendant No. 3 and defendants Nos. 4 and 5 respectively were *mutavalis* in charge of the said properties and were alleged to have illegally alienated some of these lands and also ceased to render any service to the mosque, whereupon the plaintiffs alleged that they had been acting as *mutawalias* in their stead. The plaintiffs, therefore, claimed to be entitled as such to the management and enjoyment of the lands in dispute. It was contended *inter alia* on behalf of the defendants that the plaintiffs could not sue in the lifetime of their father, defendant No. 3, he not having transferred his rights to them. And the Court held:

"that the plaintiffs were entitled to sue to have the alienation made by their father and cousins set aside and the wakf property restored to the service of the mosque. They were not merely beneficiaries, but

[1] (1899) 24 Bom. 170.

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members of the family of the mutawallis, and were the persons on whom, on the death of the existing mutawallis, the office of the mutawalli would fall by descent, if, indeed, it had not already fallen upon them, as alleged in the plaint, by abandonment and resignation"...

This case is authority for the proposition that in the absence of the manager or the shebait himself being in a position to file a suit as the next friend of the image or the idol, it would be competent to another person even the beneficiary apart from his being the next in succession to the office of the manager or the shebait to file a suit in the name of the image or the idol acting as its next friend. We are, therefore, of the opinion that the suit was properly filed and the learned Judge below was wrong in dismissing the suit on this ground as he did.

Mr. Chandrachud, however, urged before us that the order of dismissal could be maintained by him on the ground that the properties which were the subject-matter of the suit were not in fact Devasthan properties but were properties which had been given to the Waghules impressed with a charge for the worship of the image or the idol of Shree Mahadoba. He made a distinction between a complete dedication and a partial dedication. Even though in the case of complete dedication the properties would really vest in the Devasthan or the idol and the Devasthan or the idol would be entitled to maintain the suit, he urged that in the case of a partial dedication the properties belonged to the grantees and the grantees were entitled to alienate the same, though in the hands of the grantees or their alienees the properties would retain the character of partially dedicated properties and would be subjcet to a charge for the worship of the idol or the image. He relied upon the relevant passages in Mayne's Hindu Law, p. 922, s. 792, and Mulla's Hindu Law, p. 493, and s. 408 and p. 494, s. 408A. He also relied upon the observations of the Privy Council in *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*.[1] p. (209):

"There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character. The cases of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*[2] and *Ashutosh Dutt* v. *Doorga Churn Chatterjee*[3] are instances of less complete dedications, in which, notwithstanding a religious dedication, property

(1) (1904) L. R. 31 I. A. 203. (2) (1859) 8 Moo. I. A. 66.
(3) (1879) L. R. 6 I. A. 182.

descends (and descends beneficially), to heirs, subject to a trust or charge for the purposes of religion. Their Lordships desire to speak with caution, but it seems possible that there may be other cases of partial or qualified dedication not quite so simple as those to which reference has been made".

Relying upon these observations he drew our attention to the terms of the grant exh. 81 in the suit. This was a grant of certain lands comprising in the aggregate 2 chawars and measuring in all 240 bighas for the worship, Naivedya and expenses of the festival of God Shree Mahadoba Devasthan at Mouje Theur, Kasba Poona. The lands were granted with two-fold Sardeshmukhi rights both in Swaraj and Mogalai and 3rd Inam together Kulbab and Kulkanu (customary rights and rules) with the existing taxes and those that would be levied in future together with water, trees, timber, stone and treasure-trove excluding the rights of hakdars to the grantee Ganoji *bin* Rakhmaji Sali Waghule for the expenses of the Puja of Shree and Naivedya and festivals by creating a new grant or agreement from the government and the grantee was enjoyed that he should get the 2 chawars of land transferred to his Dumala and he, his sons and grandsons should go on spending the *akar* of the aforesaid lands for the expenses in connection with the worship, Naivedya and festival of the Shri. The grantee was thus to get transferred all these lands and the *akar* of the lands was to be devoted by him for the expenses of the puja, Naivedya and festivals. It was urged by Mr. Chandrachud that this was an absolute grant of the said lands to Ganoji bin Rakhamaji Waghule, that the lands were impressed with a charge to the extent of the *akar* or the assessment thereof for performing the worship, Naivedya and the festival of the Shri and there was, therefore, a partial dedication of the said lands in favour of Shree Mahadoba Devasthan. The word "Akar" is defined in Molesworth's dictionary *inter alia* as "a roughly framed statement or estimate (of expenses profits, produce, revenue)." It also means assessment but does not necessarily mean that. What connotation to give to this word "Akar" would depend upon the context in which this word is used. We are of the opinion that having regard to the context in which it has been used in this grant, exh. 81, it only means the produce or the income and not merely the assessment of these lands. The express purpose of the grant of these lands was to provide for the performance of the worship, Naivedya and the expenses of the festivals of the God Shree Mahadoba at Mouje Theur,

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Kasba Poona. These lands were set apart after the orders were sent to the subordinate officers by R. R. Madhavrao Pandit Prime Minister and they were granted to Ganoji *bin* Rakhamaji Waghule who was described as the devotee of Shree Mahadoba God for the purpose of performing worship, Naivedya and the festivals of Shree. Ganoji *bin* Rakhamaji Waghule had been carrying on the worship, Naivedya and the festival of the Shri and he, his sons and grandsons were granted these lands so that they may from generation to generation contiune to perform the Puja, Naivedya and the festival of Shri. If anything can be culled out of the terms of the grant, it is this that there was not the remotest idea of these lands being capable of alienation by the grantee or his successors in interest. The intention of the grantor was that these lands should continue in the family of Waghule from generation to generation so that the worship, Naivedya and the festival of the Shri be performed properly. No doubt the intention was that the Waghules should perform this Puja, Naivedya and the festival and that the shebaitship of Shree Mahadoba should continue in the family of the Waghules. That was in effect the creation of a hereditary shebaitship in the Waghule family, but it is a far cry from that to say that the Waghules were constituted the absolute owners of these lands which were the subject-matter of the grant. Nothing was farther from the imagination of the grantor than this alienability which has been urged upon us by Mr. Chandrachud.

The question in such cases which falls to be decided by the Court is in the words of Telang J. at p. 634 in the case of *Shri Ganesh Dharnidhar Maharajdev* v. *Keshavrav Govind Kulgavkar*[1]

> "...on the true construction of that document, the grant may fairly be taken to have been made primarily as a grant to the religious foundation, and not to the particular individuals named for their own benefit".

Looking to the terms of the grant, exh. 81, from this point of view it is abundantly clear that the grant was primarily a grant to the religious foundations, that is, Shree Mahadoba and not to Ganoji *bin* Rakhamaji Waghule for his own benefit or for the benefit of his sons, grandsons and so on. This contention of Mr. Chandrachud, therefore, cannot be sustained.

[1] (1890) 15 Bom. 625.

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In view of the above, we are of the opinion that the learned Judge below was wrong in dismissing the plaintiff's suit as he did. The appeal must, therefore, be allowed and the suit remanded to the Court below for disposal according to law.

While remanding the suit, however, we are asked by Mr. Chandrachud to reserve to his client the right to contend that S. Nos. 244 and 245 have not been identified with any of the lands which formed the subject-matter of the grant exh. 81. No issue was specifically raised in this behalf in the Court below, though on the evidence recorded before him, the learned trial Judge appears to have come to the conclusion that these two S. Nos. 244 and 245 were sufficiently identified. While remanding the case, therefore, we do reserve liberty to both the parties to adduce such further evidence as they may be advised on the issues which the learned Judge has not decided, namely, issues Nos. 5, 6, 8, 9 and 10. It would be open also to the defendants to raise a specific issue in regard to the identity of the properties S. Nos. 244 and 245, both the parties being at liberty to adduce such evidence in that behalf as they may be advised. The respondents will pay the appellant's costs of this appeal. The costs of the lower Court will be costs in the suit.

Appeal allowed.

M. W. P.

APPELLATE CIVIL

The Hon'ble Mr. M. C. Chagla, Chief Justice and Mr. Justice Gajendragadkar.

CANARA BANK LIMITED, BOMBAY *v.* THE WARDEN INSURANCE COMPANY, LTD., BOMBAY.*

1952 *Jan.* 14

Indian Limitation Act (IX of 1908), ss. 5, 29 (2)—Bombay Land Requisition Act (Bom. XXXIII of 1948), s. 8 (3)—Appeal to High Court against order for payment of compensation passed by Special Officer under latter Act—Delay in filing appeal—Whether delay can be excused for sufficient cause.

Section 5 of the Indian Limitation Act, 1908, not having been made expressly applicable to an appeal provided under s. 8 (3) of the Bombay Land Requisition Act, 1948, the Court has no power to condone any delay on the part of the appellant even for sufficient cause.

* Civil Application No. 1484 of 1951.

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1955 SCC OnLine Cal 166 : (1954-55) 59 CWN 779 : AIR 1955 Cal 624

Calcutta High Court
[Civil Appellate Jurisdiction]
(BEFORE DAS GUPTA AND GUHA, JJ.)

Sushama Roy ... Appellant;
Versus
Atul Krishna Roy and anr. ... Respondent.

AFAD No. 216 of 1949
Decided on February 22, 1955, [Hearing on: December 13, 1954 and December 14, 1954]

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The Judgment of the Court was delivered by

DAS GUPTA, J.:— This appeal raises the difficult question whether in a case where the shebaits of a deity have precluded themselves by their conduct from bringing a suit to protect the interests of the deity, a person interested in the proper sheba puja of the deity may institute a suit on behalf of the deity even though not appointed as next friend of the deity by the Court.

2. A private debuttar was created by Bhagabati Dassi for the deity Sree Sree Iswar Jugal Kishore Jiu by a deed of dedication. By the deed the lady constituted herself the first shebait and provided that after her death Bejoy Lal Roy would be the shebait, and on Bejoy's death his eldest son would be the shebait and in this way the eldest son of each successive shebait would become shebait. After the death of Bejoy disputes arose between his sons, Atul Krishna and Monmatha, over the claim to shebaiti and Monmatha instituted a suit against Atul Krishna claiming joint shebaitship with Atul and for framing a scheme in accordance with the principles laid down in the case of *Pramatha* v. *Prodyymnya* (1)

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(L.R. 52 I.A. 245) by the Privy Council. An order was passed for representation of the deity by a Pleader who was appointed by the Court. It appears, however, that on the 16th of December, 1942, the plaintiff Monmatha and the defendant Atul filed before the Court a petition of a compromise and the court passed an order in terms of the compromise in the following words:

> "This suit coming on this day for final disposal before Mr. K.M. Islam, Sub-judge, 3rd Court, Alipore, in the presence of Babu Hironmoya Mitra, Pleader for the plaintiff and of Babu B.N. Bose, Pleader for the defendant it is ordered and decreed that the suit be decreed finally in terms of petition. Petition of compromise do form part of the decree."

3. The deity did not join in the petition of compromise and there was no mention of

it in the decree of the Court. The present suit was instituted by the deity through Sm. Susama Roy who, it may be mentioned, is wife of Monmatha and as such a member of the family interested in the sheba puja of the deity. The case in the plaint was that the scheme, as framed in the previous suit, was not binding on the deity, that it was against the terms of the *arpannama* and against the interests of the deity and that a declaration should be made declaring the scheme, framed in the previous suit, void, inoperative and not binding upon the plaintiff and that a new scheme should be framed for the sheba puja of the deity and management of the properties in terms of the deed of debuttar. The defence was that the suit, as framed, was not maintainable and further that the deity having been made a party to the previous suit the scheme, as framed therein, was binding on it under the principles of *res judicata.*

4. The trial court held that the suit was not maintainable as framed and also that it was barred by *res judicata,* the scheme framed in the previous suit being binding on the deity. The learned Court below while holding that the suit was maintainable agreed with the trial Court that the suit was barred by *res judicata* and dismissed the appeal.

5. It is contended before us that the suit was not barred by the principles of *res judicata* as the deity, though a party to the proceedings, was not a party to the compromise decree that was passed.

6. In my judgment, it cannot be held in the circumstances of the case that the decision in the previous suit operated as *res judicata*. It is not possible, in my judgment, to read the decree that was passed as a decree for or against the deity. So far as the deity was concerned as a party to the suit, the Court must be held to have passed no order at all. In my judgment, therefore, the Courts below are wrong in thinking that the decree passed as on compromise between Monmotha and Atul will operate as *res judicata* as against the deity represented by a person appointed by the Court, who was not a party to the compromise and who was not mentioned at all in the decree that was passed.

7. This brings us to the question whether the suit as framed, is maintainable. It is well-settled that when the shebaits have by their conduct precluded themselves from bringing any

suit to protect the interests of the deity, the deity is not without remedy but can bring a suit through some other agency than the shebaits. This right, it has to be remembered, is distinct from the rights of the members of a family, who may be worshippers to bring a suit for the protection of their rights. It was pointed out by Mukherjea, J., in his Tagore Law Lectures, 1936 (delivered in August, 1951) as follows:

> ".....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." (p. 286)

8. If the Court appoints a person as next friend to represent the deity, there is no difficulty and the person so appointed can bring a suit on behalf of the deity. On the question whether without an order of appointment as next friend of a deity, a person can bring a suit on behalf of the deity, there has been judicial divergence. In the case of *Administrator-General of Bengal* v. *Balkissen Misser* (2) (I.L.R. 51 Cal. 953), Page, J., expressed the view that it is permissible to file a suit for possession in the name of the Idol, where a shebait has not been appointed and that the Court will in such cases appoint some person to act as agent *ad litem* for the Idol. As has been pointed out in

later decisions of this Court, the expression "agent *ad litem*" is something unheard of and the learned Judge did not indicate under what provision of law such appointment could be made. In the case of *Sharatchandra Shee* v. *Dwarkanath Shee* (3) (I.L.R. 58 Cal. 619); Lort Williams, J., held that in the case of a private religious trust, with regard to the mismanagement of which the members of the public cannot intervene, and it cannot be expected that the shebait will 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. The learned Judge did not however, go into the question whether a suit could be maintained by a person without an order of the Court, but only said,

> ".....in the circumstances of the present case, I consider that it is necessary and desirable that the idol should appear in this suit by a disinterested next friend appointed by the Court....."

and appointed one of the parties Saratchandra Shee as the next friend. In the case of *Tarit Bhusan* v. *Sridhar Thakur*, (4) (45 C.W.N. 932), Pal, J., discussed the question thoroughly and expressed his view that no person other than the shebait can legally and effectively represent the deity unless he has been specially appointed by the Court. This was followed by Gentle, J., in the case of *Sree Sree Sreedhar Jew* v. *Kanta Mohan*, (5) (50 C.W.N. 14). Prior to this, however, in the case of *Sree Sree Annapurna Devi* v. *Shiba Sundari*, (6) [I.L.R. (1944) 2 Cal. 144], Sen, J., had held that a suit in the name of a Hindu image by a person, who was not a shebait and was not appointed by the Court as next friend, but constituted herself next friend without such appointment, was properly constituted and the fact that she was not specifically appointed next friend by the Court did not render the suit bad. Referring to the view

expressed by Pal, J., in the case of *Tarit Bhusan* v. *Sridhar Thakur*, (4) (45 C.W.N. 932), Sen, J., observed:

> "It must be said that if the view expressed in this passage is to be taken to be of general application, there can be no suit by a next friend unless such next friend is specially appointed by the Court. I am not, however, inclined to hold that the view expressed in this passage is of general application. The exact point which has now been raised was not a point for decision in that case. It is obvious that circumstances may well arise when it would be impossible to expect any of the shebaits to institute a suit; for instance, all the shebaits may be misappropriating debuttar property and secularizing it, the Deity may be despoiled by all the shebaits acting in concert. In such a case it is not possible to expect of the shebaits to institute a suit to protect the property of the Deity. In those circumstances what is to happen? It seems to me that the only course open would be for some person to come 'forward and institute a suit as the next friend of the Deity'. The matter would first come up before the Court by a suit being instituted by a person claiming to be next friend of the Deity. It would be permissible for the defendants thereafter to come up before the Court and contest the fitness of the next friend to act as such. The Court would then investigate the matter and decide upon the suitability of the person instituting the suit to act as next friend, but I do not see any ground for holding that the next friend must be appointed as such by the Court, before he can institute a suit."

9. As already indicated, Gentle, J. preferred the view taken by Pal, J., in the case of

Tarit Bhusan v. *Sri Sri Iswar Sridhar Thakur*, (4) (45 C.W.N. 932), to the view expressed by Sen, J., in the case of *Sree Sree Annapurna Devi* v. *Shiba Sundari Dasi*, (6) [I.L.R. (1944) 2 Cal. 144]. Giving his reasons therefore the learned Judge pointed out that whilst there were similarities in the status of a minor and of a Thakur, there was no justification for applying the provisions of Order XXXII of the Code of Civil Procedure which related solely to a minor to an entity, who was not a minor unless, as in the case of a person of unsound, mind, there was a provision for it to be done and further observed:

> "There is, in my opinion, an additional reason against a person, who is not a shebait and who is not appointed by the Court to do so, representing a Thakur as next friend. I have previously pointed out that, although a Thakur can sue, the right of suit is vested in the shebait. No person, upon his own initiative, can exercise a right which is vested in another person. In this respect the position of a Thakur is different to that of a minor whose right of suing is not vested in some other person. That being the position, a worshipper, or any other individual, cannot exercise the right of suit which is vested in the shebait and consequently a suit in the name of a Thakur cannot be instituted by such person at his own will and pleasure. When a shebait fails or refuses to exercise his right of suit, then in a proper case, the Court can appoint any person, interested or disinterested in the Thakur or its property, to represent the Thakur as next friend and to institute a suit in its name."

10. His Lordship held in the instant case before him that the suit was not properly instituted as there had been no appointment of the person claiming to represent the deity as next friend. In the case of *Sri Sri Gopal Jew* v. *Baldeo Narain Singh*, (7) (51 C.W.N. 383), Das, J., after an exhaustive review of the cases came to the conclusion that the provisions of Order XXXII of the Code of Civil Procedure should be applied to suits by a deity, and observed:

> "..... If sub-rule 4(2) cannot, by reason of its position and explicit language be extended by analogy and applies to shebaits, then I am inclined to think that the appointment of a person other than a shebait as next friend of a deity plaintiff by the Court is not a pre-requisite for the institution of a suit by such person in the name of the deity."

11. It is quite clear that if the provisions of Order XXXII of the Code of Civil Procedure are held to regulate suits brought by or against an Idol, no appointment is necessary before a suit could be filed by an Idol through a next friend. The question is whether, when the provisions of Order XXXII of the Code of Civil Procedure do not apply in terms to a suit by a deity, it will be proper or right for the Court to apply such provisions to such suits. In deciding this question, the Court cannot but consider what procedure is likely to serve best the interests of the debuttar administration. The very fact that the shebaits are not willing or able to come to Court to protect the deity's interests makes it necessary that the way of the deity should fee made as easy as possible. It must be remembered that a suit brought by a person on behalf of the deity will be the deity's suit and an adverse decision will bind the deity forever. So, it is necessary that a person, both competent and honest should institute such suits. It will therefore be in the interests of the deity that when any person other than the shebaits wants to bring a suit in the name of the deity, he should first make an application to the Court and only if the Court, after hearing him and the other

interested persons, considers him fit and proper and appoints him to represent the deity, that he should be allowed to bring such a suit. In proper cases the Court will presumably issue notices on all interested persons, on members of the family interested in private debuttar, before deciding the fitness of a person to represent the deity.

12. In the case of *Sri Sri Gopal Jew* v. *Baldeo Narain Singh*, (7) cited above (51 C.W.N. 383), Das, J., observed:

> "..... I find it more logical and more convenient, for purposes of procedure, to extent the analogy of the minor to a Hindu deity than to invent a role of procedure which is ostensibly original and novel, but it is in reality based on the analogy of the rules relating to a minor.....".

13. After pointing out that the Court is not powerless to discourage or prevent intermeddling for it has power to remove a next friend or guardian *ad litem* if he doss not do his duty properly and that if an adverse decree has been passed in such a suit due to the fraud and possibly also the gross negligence of the next friend or the guardian *ed litem*, the Court can rectify it in a subsequent suit, his Lordship concludes thus:

> ".....On a consideration of the general principles of law and procedure I have come to the conclusion that the rules of procedure relating to a minor should, for the purposes of procedure, be applied by analogy as far as possible to a Hindu deity."

14. With the respect that is due to so eminent a Judge as Das, J., I must say that I cannot persuade myself that the Court will in the majority of cases be able to prevent intermeddling or that it will find it easy to rectify an adverse decree passed on account of the fraud or negligence of the next friend. The ways of litigation are long and tortuous and many an honest man dread to go inside the walls of the Court of Law. It has to be remembered that the question of the deity suing by a next friend arises only when the shebait is unwilling or unable to do his duty. There is always the risk of the defaulting shebaits setting up one of their creatures to start a sham litigation in the name of the deity, so that the adverse decree might bind the deity for ever. Is it reasonable to expect that after the shebaits have failed in their duty and a suit brought by another person in the name of the deity has been unsuccessful, another person will ordinarily be found willing and able to start a fresh litigation to rectify the adverse decree? I do not think so. But even if some brave should come forward and undeterred by the ever present clouds of adjournments, and the threat of high wars of costs launches his bark on the sea of litigation, and safely reaches the harbour of success, such repeated ventures in the courts of law are bound to cause great loss to the debuttar estate.

15. As against this, I can see no objection to the procedure favoured by Gentle, J., and Pal, J., that if anybody other than a shebait wishes to institute a suit on behalf of the deity, he should make an application to the Court and the suit will be maintainable only if the Court appoints him as the shebait of the deity. I have not overlooked Das, J.'s comment, that an order of appointment of a next friend made by the Court on an ex parte application on a one-sided version set forth in a petition is not really effective in protecting the interest of the deity against an improper suit brought in its name. But I do not see any reason, why the appointment should be made "ex parte" or on a

one-sided view.

16. In a particular case the Court may make an ex parte order in order to prevent some imminent danger to the debuttar estate, but there is no reason, why ordinarily the Court should not, before making the order of appointment, consider the views of the interested parties. In substance, the members of the family in the case of private debuttar are the real beneficiaries and it is necessary and desirable that their views should be ascertained before any person other than the shebaits is appointed to represent the deity. Even where an ex parte order has been made, it will be possible and proper to issue notices on all interested parties and to cancel the ex parte order in the interest of the deity.

17. On the whole, I am of opinion that ordinarily the interests of the deity require that nobody other than a shebait be allowed to institute a suit in the name of the deity without a previous order of the Court appointing him to represent the deity.

18. As there was no order in the present base, appointing Susama Roy to

represent the deity, I hold that the suit was not maintainable. I therefore find that the suit has been rightly dismissed, though on grounds different from those which found favour with the Court below.

19. The appeal is therefore dismissed with costs.

GUHA, J.:— I agree.

S.N.S.

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1956 SCR 756 : AIR 1957 SC 133

In the Supreme Court of India

(BEFORE B. JAGANNADHADAS, T.L. VENKATARAMA AYYAR, BHUVANESHWAR PRASAD SINHA AND SUDHANSHU KUMAR DAS, JJ.)

DEOKI NANDAN ... Appellant;

Versus

MURLIDHAR AND OTHERS ... Respondents.

Civil Appeal No. 250 of 1953*, decided on October 4, 1956

Advocates who appeared in this case :

A.D. Mathur, Advocate, for the Appellant;

Jagdish Chandra, Advocate, for Respondent 1.

The Judgment of the Court was delivered by

T.L. VENKATARAMA AYYAR, J.— The point for decision in this appeal is whether a Thakurdwara of Sri Radhakrishnaji in the village of Bhadesia in the District of Sitapur is a private temple or a public one in which all the Hindus are entitled to worship.

2. One Sheo Ghulam, a pious Hindu and a resident of the said village, had the Thakurdwara constructed during the years 1914-1916, and the idol of Shri Radhakrishnaji ceremoniously installed therein. He was himself in management of the temple and its affairs till 1928 when he died without any issue. On March 6, 1919, he had executed a will whereby he bequeathed all his lands to the Thakur. The provisions of the will, in so far as they are material, will presently be referred to. The testator had two wives one of whom, Ram Kuar, had predeceased him and the surviving widow, Raj Kuar, succeeded him as Mutawalli in terms of the will and was in management till her death in 1933. Then the first defendant, who is the nephew of Sheo Ghulam, got into possession of the properties as manager of the endowment in accordance with the provisions of the will. The appellant is a distant agnate of Sheo Ghulam, and on the allegation that the first defendant had been mismanaging the temple and denying the rights of the public therein, he moved the District Court of Sitapur for relief under the Religious and Charitable Endowments Act 14 of 1920, but the court declined to interfere on the ground that the endowment was private. An application to the Advocate-General for sanction to institute a suit under Section 92 of the Code of Civil Procedure was also refused for the same reason. The appellant then filed the suit, out of which the present appeal arises, for a declaration that the Thakurdwara is a public temple in which all the Hindus have a right to worship. The first defendant contested the suit, and claimed that "the Thakurdwara and the idols were private", and that "the general public had no right to make any interference".

3. The Additional Civil Judge, Sitapur, who tried the suit was of the opinion that the Thakurdwara had been built by Sheo Ghulam "for worship by his family", and that it was a private temple. He accordingly dismissed the suit. This judgment was affirmed on appeal by the District Judge, Sitapur, whose decision again was affirmed by the Chief Court of Oudh in second appeal. The learned Judges, however, granted a certificate under Section 109(*c*) of the Code of Civil Procedure that the question involved was one of great importance, and that is how the appeal comes before us.

4. The question that arises for decision in this appeal whether the Thakurdwara of Sri Radhakrishnaji at Bhadesia is a public endowment or a private one is one of mixed law and fact. In *Lakshmidhar Misra* v. *Ranga Lal*[1] in which the question was whether certain lands had been dedicated as cremation ground, it was observed by the Privy

Council that it was "essentially a mixed question of law and fact", and that while the findings of fact of the lower appellate court must be accepted as binding, its "actual conclusion that there has been a dedication or lost grant is more properly regarded as a proposition of law derived from those facts than as a finding of fact itself". In the present case, it was admitted that there was a formal dedication; and the controversy is only as to the scope of the dedication, and that is also a mixed question of law and fact, the decision of which must depend on the application of legal concepts of a public and a private endowment to the facts found, and that is open to consideration in this appeal.

5. It will be convenient first to consider the principles of law applicable to a determination of the question whether an endowment is public or private, and then to examine, in the light of those principles, the facts found or established. The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment. The position is thus stated in *Lewin on Trusts*, 15th Edn., pp. 15-16:

> "By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed public trusts and charitable trusts may be considered in general as synonymous expressions. In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained...."

Vide also the observations of Mitter J. in *Nabi Shirazi* v. *Province of Bengal*[2]. Applying this principle, a religious endowment must be held to be private or public, according as the beneficiaries thereunder are specific persons or the general public or sections thereof.

6. Then the question is, who are the beneficiaries when a temple is built, idol installed therein and properties endowed therefor? Under the Hindu law, an idol is a juristic person capable of holding property and the properties endowed for the institution vest in it. But does it follow from this that it is to be regarded as the beneficial owner of the endowment? Though such a notion had a vogue at one time, and there is an echo of it in these proceedings (vide para 15 of the plaint), it is now established beyond all controversy that this is not the true position. It has been repeatedly held that it is only in an ideal sense that the idol is the owner of the endowed properties. Vide *Prosunno Kumari Debya* v. *Golab Chand Baboo*[3]; *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*[4] and *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[5]. It cannot itself make use of them; it cannot enjoy them or dispose of them, or even protect them. In short, the idol can have no beneficial interest in the endowment. This was clearly laid down in the Sanskrit texts. Thus, in his Bhashya on the Purva Mimamsa, Adhyaya 9, Pada 1, Sabara Swami has the following:

> देवग्रामोऽ देव-व्यपसकमयेत्रमितिए उपचारमाश्रम्-पउय। योवदभिप्रेतं विनियोक्तु-उचय
> महंतिए तत्तस्य स्वम-पउय। न च ग्राम -व्यपसकमयेत्रं यावथाभिप्रायं विनियुक्के देवता।
> तस्माच्च संप्रयच्छतीति। देवपरिग्राकाणां तू ततो भूतिर्भवति देवताम्-उचय
> विद-चवेनयथत त्यवतम-पउय।

"Words such as 'village of the Gods', 'land of the Gods' are used in a figurative sense. That is property which can be said to belong to a person, which he can make use of as he desires. God however does not make use of the village or lands, according to its desires. Therefore nobody makes a gift (to Gods). Whatever property is abandoned for Gods, brings prosperity to those who serve Gods".

Likewise, Medhathithi in commenting on the expression "Devaswam" in Manu, Chapter XI, Verse 26 writes:

देवानुद्दि-त्यदेवयस्यत्यादि क्रियार्थं धनंयदुत्सृष्टं, तददेस्वम्-इत्युच्य मुख्यस्य स्वस्वामिसंबन्धस्य देवानां असंभवात्-इत्युच्य। न हि देवता इच्छया धनं नियुञ्जते।-तथुनवचन च परिपालनव्यापारस्तासां दृ-श्यदेवयते।-तथुनवच

"Property of the Gods, Devaswam, means whatever is abandoned for Gods, for purposes of sacrifice and the like, because ownership in the primary sense, as showing the relationship between the owner and the property owned, is impossible of application to Gods. For the Gods do not make use of the property according to their desire nor are they seen to act for protecting the same".

Thus, according to the texts, the Gods have no beneficial enjoyment of the properties, and they can be described as their owners only in a figurative sense (*Gaunartha*), and the true purpose of a gift of properties to the idol is not to confer any benefit on God, but to acquire spiritual benefit by providing opportunities and facilities for those who desire to worship. In *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*[6] it was held on a consideration of these and other texts that a gift to an idol was not to be judged by the rules applicable to a transfer to a 'sentient being', and that dedication of properties to an idol consisted in the abandonment by the owner of his dominion over them for the purpose of their being appropriated for the purposes which he intends. Thus, it was observed by Sir Lawrence Jenkins C.J. at p. 138 that "the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected" and that "the dedication to a deity" may be "a compendious expression of the pious purposes for which the dedication is designed". Vide also the observations of Sir Ashutosh Mookerjee at p. 155. In *Hindu Religious Endowments Board* v. *Veeraraghavachariar*[7] Varadachariar J. dealing with this question, referred to the decision in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*[2] and observed:

"As explained in that case, the purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple, by making it possible for them to have the worship conducted in a proper and impressive manner. This is the sense in which a temple and its endowments are regarded as a public trust".

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

In the light of these principles, we must examine the facts of this case. The materials bearing on the question whether the Thakurdwara is a public temple or a private one may be considered under four heads: (*1*) the will of Sheo-Ghulam, Exhibit A-1, (*2*) user of the temple by the public, (*3*) ceremonies relating to the dedication of the Thakurdwara and the installation of the idol with special reference to *Sankcalpa* and *Uthsarga* and (*4*) other facts relating to the character of the temple.

(1) The will, Exhibit A-1, is the most important evidence on record as to the intention of the testator and the scope of the dedication. Its provisions, so far as they are material, may now be noticed. The will begins with the recital that the testator has two wives and no male issue, that he has constructed a Thakurdwara and installed the

idol of Sri Radhakrishnaji therein, and that he is making a disposition of the properties with a view to avoid disputes. Clause 1 of Exhibit A-1 provides that after the death of the testator "in the absence of male issue, the entire immovable property given below existing at present or which may come into being hereafter shall stand endowed in the name of Sri Radhakrishnaji, and mutation of names shall be effected in favour of Sri Radhakrishnaji in the Government papers and my wives Mst Raj Kuer and Mst Ram Kuer shall be the Mutawallis of the waqf". Half the income from the properties is to be taken by the two wives for their maintenance during their lifetime, and the remaining half was to "continue to be spent for the expenses of the Thakurdwara". It is implicit in this provision that after the lifetime of the wives, the whole of the income is to be utilised for the purpose of the Thakurdwara. Clause 4 provides that if a son is born to the testator, then the properties are to be divided between the son and the Thakurdwara in a specified proportion; but as no son was born, this clause never came into operation. Clause 5 provides that the Mutawallis are to have no power to sell or mortgage the property, that they are to maintain accounts, that the surplus money after meeting the expenses should be deposited in a safe bank and when funds permit, property should be purchased in the name of Sri Radhakrishnaji. Clause 2 appoints a committee of four persons to look after the management of the temple and its properties, and of these, two are not relations of the testator and belong to a different caste. It is further provided in that clause that after the death of the two wives the committee "*may* appoint my nephew Murlidhar as Mutawalli by their unanimous opinion". This Murlidhar is a divided nephew of the testator and he is the first defendant in this action. Clause 3 provides for filling up of vacancies in the committee. Then finally there is clause 6, which runs as follows:

> "If any person alleging himself to be my near or remote heir files a claim in respect of whole or part of the waqf property his suit shall be improper on the face of this deed."

The question is whether the provisions of the will disclose an intention on the part of the testator that the Thakurdwara should be a private endowment, or that it should be public. The learned Judges of the Chief Court in affirming the decisions of the courts below that the temple was built for the benefit of the members of the family, observed that there was nothing in the will pointing "to a conclusion that the trust was a public one", and that its provisions were not "inconsistent with the property being a private endowment". We are unable to endorse this opinion. We think that the will read as a whole indubitably reveals an intention on the part of the testator to dedicate the Thakurdwara to the public and not merely to the members of his family.

The testator begins by stating that he had no male issue. In *Nabi Shirazi* v. *Province of Bengal*[2] the question was whether a wakf created by a deed of the year 1806 was a public or a private endowment. Referring to a recital in the deed that the settlor had no children, Khundkar J. observed at p. 217:

> "The deed recites that the founder has neither children nor grandchildren, a circumstance which in itself suggests that the imambara was not to remain a private or family institution".

Vide also the observations of Mitter, J. at p. 228. The reasoning on which the above view is based is, obviously, that the word 'family' in its popular sense means children, and when the settlor recites that he has no children, that is an indication that the dedication is not for the benefit of the family but for the public.

Then we have clause 2, under which the testator constitutes a committee of management consisting of four persons, two of whom were wholly unrelated to him. Clause 3 confers on the committee power to fill up vacancies; but there is no restriction therein on the persons who could be appointed under that clause, and conceivably, even all the four members might be strangers to the family. It is difficult

to believe that if Sheo Ghulam intended to restrict the right of worship in the temple to his relations, he would have entrusted the management thereof to a body consisting of strangers. Lastly, there is clause 6, which shows that the relationship between Sheo Ghulam and his kinsmen was not particularly cordial, and it is noteworthy that under clause 2, even the appointment of the first defendant as manager of the endowment is left to the option of the committee. It is inconceivable that with such scant solicitude for his relations, Sheo Ghulam would have endowed a temple for their benefit. And if he did not intend them to be beneficiaries under the endowment, who are the members of the family who could take the benefit thereunder after the lifetime of his two wives? If we are to hold that the endowment was in favour of the members of the family, then the result will be that on the death of the two wives, it must fail for want of objects. But it is clear from the provisions of the will that the testator contemplated the continuance of the endowment beyond the lifetime of his wives. He directed that the properties should be endowed in the name of the deity, and that lands are to be purchased in future in the name of the deity. He also provides for the management of the trust after the lifetime of his wives. And to effectuate this intention, it is necessary to hold that the Thakurdwara was dedicated for worship by members of the public, and not merely of his family. In deciding that the endowment was a private one, the learned Judges of the Chief Court failed to advert to these aspects, and we are unable to accept their decision as correct.

(2) In the absence of a deed of endowment constituting the Thakurdwara, the plaintiff sought to establish the true scope of the dedication from the user of the temple by the public. The witnesses examined on his behalf deposed that the villagers were worshipping in the temple freely and without any interference, and indeed, it was even stated that the Thakurdwara was built by Sheo Ghulam at the instance of the villagers, as there was no temple in the village. The trial Judge did not discard this evidence as unworthy of credence, but he held that the proper inference to be drawn from the evidence of PW 2 was that the public were admitted into the temple not as a matter of right but as a matter of grace. PW 2 was a pujari in the temple, and he deposed that while Sheo Ghulam's wife was doing puja within the temple, he stopped outsiders in whose presence she used to observe purdah, from going inside. We are of opinion that this fact does not afford sufficient ground for the conclusion that the villagers did not worship at the temple as a matter of right. It is nothing unusual even in well-known public temples for the puja hall being cleared of the public when a high dignitary comes for worship, and the act of the pujari in stopping the public is an expression of the regard which the entire villagers must have had for the wife of the founder, who was a pardana shin lady, when she came in for worship, and cannot be construed as a denial of their rights. The learned Judges of the Chief Court also relied on the decision of the Privy Council in *Babu Bhagwan Din* v. *Gir Har Saroon*[8] as an authority for the position that "the mere fact that the public is allowed to visit a temple or thakurdwara cannot necessarily indicate that the trust is public as opposed to private". In that case, certain properties were granted not in favour of an idol or temple but in favour of one Daryao Gir, who was maintaining a temple and to his heirs in perpetuity. The contention of the public was that subsequent to the grant, the family of Daryao Gir must be held to have dedicated the temple to the public for purpose of worship, and the circumstance that members of the public were allowed to worship at the temple and make offerings was relied on in proof of such dedication. In repelling this contention, the Privy Council observed that as the grant was initially to an individual, a plea that it was subsequently dedicated by the family to the public required to be clearly made out, and it was not made out merely by showing that the public was allowed to worship at the temple "since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away". But, in the present case, the endowment was in favour of the idol itself, and the point

for decision is whether it was a private or public endowment. And in such circumstances, proof of user by the public without interference would be cogent evidence that the dedication was in favour of the public. In *Mundancheri Koman* v. *Achuthan*[2] which was referred to and followed in *Babu Bhagwan Din* v. *Gir Har Saroon* the distinction between user in respect of an institution which is initially proved to have been private and one which is not, is thus expressed:

> "Had there been any sufficient reason for holding that these temples and their endowment were originally dedicated for the tarwad, and so were private trusts, their Lordships would have been slow to hold that the admission of the public in later times, possibly owing to altered conditions, would affect the private character of the trusts. As it is, they are of opinion that the learned Judges of the High Court were justified in presuming from the evidence as to public user, which is all one way, that the temples and their endowments were public religious trusts."

We are accordingly of opinion that the user of the temple such as is established by the evidence is more consistent with its being a public endowment.

(3) It is settled law that an endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies, provided the settlor has clearly and unambiguously expressed his intention in that behalf. Where it is proved that ceremonies were performed, that would be valuable evidence of endowment, but absence of such proof would not be conclusive against it. In the present case, it is common ground that the consecration of the temple and the installation of the idol of Sri Radhakrishnaji were made with great solemnity and in accordance with the Sastras. PW 10, who officiated as Acharya at the function has deposed that it lasted for seven days, and that all the ceremonies commencing with *Kalasa Puja* and ending with *Stha pana* or *Prathista* were duly performed and the idols of Sri Radhakrishnaji, Sri Shivji and Sri Hanumanji were installed as ordained in the Prathista Mayukha. Not much turns on this evidence, as the defendants admit both the dedication and the ceremonies, but dispute only that the dedication was to the public.

In the court below, the appellant raised the contention that the performance of *Uthsarga* ceremony at the time of the consecration was conclusive to show that the dedication was to the public, and that as PW 10 stated that *Prasadothsarga* was performed, the endowment must be held to be public. The learned Judges considered that this was a substantial question calling for an authoritative decision, and for that reason granted a certificate under Section 109(*c*) of the Code of Civil Procedure. We have ourselves read the Sanskrit texts bearing on this question, and we are of opinion that the contention of the appellant proceeds on a misapprehension. The ceremonies relating to dedication are *Sankalpa, Uthsarga* and *Prathista*. *Sankalpa* means determination, and is really a formal declaration by the settlor of his intention to dedicate the property. *Uthsarga* is the 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. Vide *The Hindu Law of Religious and Charitable* Trust by B.K. Mukherjea, 1952 Edn., p. 36. The formulae to be adopted in *Sankalpa* and *Uthsarga* are set out in *Kane's History of Dharmasastras*, Volume II, p. 892. It will be seen therefrom that while the *Sankalpa* states the objects for the realisation of which the dedication is made, it is the *Uthsarga* that in terms dedicates the properties to the public (*Sarvabhutebyah*). It would therefore follow that if *Uthsarga* is proved to have been performed, the dedication must be held to have been to the public. But the difficulty in the way of the appellant is that the formula which according to PW 10 was recited on the occasion of the foundation was not *Uthsarga* but *Prasadothsarga*, which is something totally different. '*Prasada*' is the 'mandira', wherein the deity is placed before the final installation or *Prathista* takes place, and the Prathista Mayukha prescribes the ceremonies that have to be performed when the idol is installed in the *Prasada*. *Prasadothsarga* is the formula to be used on that occasion. and the text

relating to it as given in the Mayukha runs as follows:

-सकुम्भवपतत: .....प्रासादोत्सर्गं कुर्यात्-पठेत्। तत्र मासपक्षानुल्लिख्य, इमं
[-पवेयालेष्टकादार्वादिनिर्मितं.....त-कृतअमुकदेवतालोकायाप्रिकामः, फलद्वयानुग्रहाय,
अमुकदेवतायीतये, अहमुत्सृजामीति, कु-चरेत्वावयवजलानि क्षिप्त्वा,
देवे गत्वा, ब्राह्मणान्-पठेत् मोक्ष्येदिति।-सकुम्भवप

It will be seen that this is merely the *Sankalpa* without the *Uthsarga*, and there are no words therein showing that the dedication is to the public. Indeed, according to the texts, *Uthsarga* is to be performed only for charitable endowments, like construction of tanks, rearing of gardens and the like, and not for religious foundations. It is observed by Mr Mandlik in the Vyavahara Mayukha, Part II, Appendix II, p. 339 that "there is no *utsarga* of a temple except in the case of repair of old temples". In the History of Dharmasastras, Volume II, Part II, p. 893, it is pointed out by Mr Kane that in the case of temples the proper word to use is *Prathista* and not *Uthsarga*. Therefore, the question of inferring a dedication to the public by reason of the performance of the *Uthsarga* ceremony cannot arise in the case of temples. The appellant is correct in his contention that if *Uthsarga* is performed the dedication is to the public, but the fallacy in his argument lies in equating *Prasadothsarga* with *Uthsarga*. But it is also clear from the texts that *Prathista* takes the place of *Uthsarga* in dedication of temples, and that there was *Prathista* of Sri Radhakrishnaji as spoken to by PW 10, is not in dispute. In our opinion, this establishes that the dedication was to the public.

(4) We may now refer to certain facts admitted or established in the evidence, which indicate that the endowment is to the public. Firstly, there is the fact that the idol was installed not within the precincts of residential quarters but in a separate building constructed for that very purpose on a vacant site. And as pointed out in *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*[10] it is a factor to be taken into account in deciding whether an endowment is private or public, whether the place of worship is located inside a private house or a public building. Secondly, it is admitted that some of the idols are permanently installed on a pedestal within the temple precincts. That is more consistent with the endowment being public rather than private. Thirdly, the puja in the temple is performed by an archaka appointed from time to time. And lastly, there is the fact that there was no temple in the village, and there is evidence on the side of the plaintiff that the Thakurdwara was built at the instance of the villagers for providing a place of worship for them. This evidence has not been considered by the courts below, and if it is true, that will be decisive to prove that the endowment is public.

8. It should be observed in this connection that though the plaintiff expressly pleaded that the temple was dedicated "for the worship of the general public", the first defendant in his written statement merely pleaded that the Thakurdwara and the idols were private. He did not aver that the temple was founded for the benefit of the members of the family. At the trial, while the witnesses for the plaintiff deposed that the temple was built with the object of providing a place of worship for all the Hindus, the witnesses examined by the defendants merely deposed that Sheo Ghulam built the Thakurdwara for his own use and "for his puja only". The view of the lower court that the temple must be taken to have been dedicated to the members of the family goes beyond the pleading, and is not supported by the evidence in the case. Having considered all the aspects, we are of opinion that the Thakurdwara of Sri Radhakrishnaji in Bhadesia is a public temple.

9. In the result, the appeal is allowed, the decrees of the courts below are set aside, and a declaration granted in terms of para 17 (*a*) of the plaint. The costs of the appellant in all the courts will come out of the trust properties. The first defendant will himself bear his own costs throughout.

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* (On appeal from the judgment and decree dated 14th July, 1948 of the Chief Court of Audh, Lucknow in Second Appeal No. 365 of 1945 arising out of the decree dated 30th May, 1945 of the Court of District Judge, Sitapur in Appeal No. 4 of 1945 against the decree dated 25th November, 1944 of the Court of Additional Civil Judge, Sitapur in Regular Civil Suit No. 14 of 1944)

[1] (1949) LR 76 IA 271

[2] ILR (1942) 1 Cal 211, 227, 228

[3] (1875) LR 2 IA 145, 152

[4] (1904) LR 31 IA 203

[5] (1924) LR 52 IA 245

[6] (1910) ILR 37 Cal 128

[7] AIR 1937 Mad 750

[8] 'A' (1939) LR 67 IA 1 : AIR 1940 PC 7

[9] (1934) 61 IA 405 : AIR 1934 PC 230

[10] (1875) 15 Ben LR 167, 186

18

1959 SCC OnLine Cal 80 : AIR 1960 Cal 741

Calcutta High Court
(BEFORE P.C. MALLICK, J.)

Sri Iswar Radha Kanta Jew Thakur and others ... Plaintiffs;
Versus
Gopinath Das and others ... Defendants.

Suit No. 1942 of 1956
Decided on December 4, 1959

JUDGMENT

1. This is a suit to challenge the alienation of a debutter property. The debutter was created by one Mokshadamoyee Desi by two Arpannamas. She appointed herself as the first shebait and certain named persons as subsequent shebaits. Thereafter, the shebaity was to devolve on the nephew of the settlor one Sital Chandra Das and his heirs. The shebaity devolved on Sital sometime in or about 1944. During the life time of Sital's shebaity, the debutter property was sold. Sital died in or about February 1956. His only daughter Molina Hazra as Sital's heir became the next shebait. This suit has been instituted by her for self and as the next friend and shebait of the deity. The parties impleaded are a number of persons who dealt with the debutter property. The plaint scts out all facts leading ultimately to the sale of debutter property. Sital as shebait created a lease in favour of the defendant Gopinath Das on a monthly rent of Rs. 5/-. The lease records the payment of Rs. 2,500/- as selami Gopinath subsequently assigned the lease to the defendant Nemai Chand. The defendant Rajen Sen purporting to act as the next friend of the deity instituted a suit against Sital for framing a scheme of management of the debutter property and of carrying on the Debseva. In that suit a consent decree was passed whereby a trustee was appointed with authority to create a mortgage of the debutter property. The defendant Phanilal as such trustee created a mortgage in favour of the defendant Nimai Chand Ultimately in a suit inter alia to enforce the mortgage, the property was sold and the defendant Upendra purchased the premises. It is alleged in the plaint that the lease and the mortgage was fraudulent and without consideration and the deity was not benefited either by the lease or by the mortgage, that the suit instituted by Rajendra was fraudulent, that Rajendra was not entitled to act as the next friend of the deity and that the decree was not binding on the deity, that the suit originally instituted by the Calcutta Corporation to enforce a statutory charge in which the defendant Nimai Chand was subsequently transposed as a plaintiff, was also fraudulent, that the deity was not properly represented and its interest not properly protected in this suit and that as such the decree was not binding on the deity. The defendant Upendra is alleged to have purchased with full knowledge of the above facts. A number of declarations has been claimed as to the invalidity of each of the above acts and there are prayers for setting them aside. There are prayers for injunctions and damages as well.

2. his defendant Rajen Sen did not file any written statement. The defendant Phani Lal and Nemai filed a joint written statement and the defendant Gopinath and Upendra

filed separately their own written statements. Gopinath in is written statement has denied all allegations of fraud and conspiracy alleged against him. He has further denied having obtained any lease from Sital or elected any assignment of the said lease in favour of the defendant Nemai. He denies that the signature in the lease and assignment are his signature. He has further denied to have paid any consideration for the lease or to have received any consideration for effecting the assignment. In paragraph 23 it is pleaded that Gopinath "never had anything to do with the subject matter of the suit and that he has been unnecessarily brought in this suit with ulterior motive."

3. Upendra in his written statement denied all allegations of fraud and conspiracy levelled against him. He denies all allegations of fraud and the knowledge of the fraud alleged to have been perpetrated by the other parties. He pleads that he is a bona fide purchaser for valuable consideration without notice of any defect in title. He purchased the property relving on the decrees and orders of this Court. It is pleaded that the suit is barred by res judicata, waiver, estoppel and principles analogous thereto. It is further pleaded that the suit is bad for non-joinder as well as misjoinder of parties and cause of action.

4. In the written statement jointly filed by the defendants Phani Lal and Nemai Chand, all the allegations of fraud and conspiracy have been denied. The lease executed by Sital has been alleged to be for legal necessity and also for the benefit of the deity. So also it is pleaded that the suit was properly instituted by the defendant Rajendra as the next friend of the deity and that the decree passed in the suit was a valid decree binding on the deity. So also the mortgage was valid and binding, the deity having been benefited by it. There was nothing improper or illegal about the mortgage suit and everything was done in the suit according to law. The point as to the title sought to be raised in this suit was raised in the proceedings as to title in the mortgage suit and cannot be raised over again. The plea of res judicata has been taken. The plaintiff Molina is charged with full knowledge of all facts and proceedings and all the decrees and orders in the various suits were alleged to be within her knowledge. It is contended that the suit is bad for non-joinder of the guardian-ad-litem of the deity in the mortgage suit. Plea of limitation has also been taken.

5. At the trial the plaintiff Molina tendered her own evidence and the evidence of Gokul Chandra Banerjee the priest, and of Amiya Krishna Dutt who acted as the next friend of the deity in the mortgage suit. The defendant Gopinath tendered his own evidence. Phani Lal tendered his own evidence as also the evidence of Rajen Sen. The defendant Upendra tendered his own evidence and the evidence of his attorney Birendra Nath Ghose. The defendant Nimai Chand did not enter the witness box. Besides

this oral evidence, a large number of documents have been tendered including a considerable amount of court proceedings.

6. The evidence tendered in this case discloses a story which leaves a very unpleasant taste in the mouth of any one who is compelled to hear it. The plaintiff's case is that Phanilal a very clever and unscrupulous attorney of this Court is the central figure who inspired and is responsible for the various fraudulent acts that ultimately led to the sale of debutter property. The first act is the lease in favour of the defendant Gopinath. The lease did not contain any recital as to legal necessity. There is no recital either that the lease was for the benefit of the deity. However dishonest and untruthful the parties involved were, they did not add to their sin by inserting a false recital in

the lease that it was for legal necessity or for the benefit of the deity. Lessor was Sital the shebait and the lessee the defendant Gopinath. Sital is dead and Gopinath in his written statement would not touch the lease even with a pair of tongs. He repudiated the lease and denies to have had anything to do with it. In evidence he condescended to say that the signature might be his but otherwise he had nothing to do with it. He did not pay Rs. 2,500/- or any other sum on account of the lease. The brunt of supporting the lease fell on Phani Lal.

7. Phani Lal in his evidence attempted to take upon himself the least responsibility in the transaction. He stated in-chief that he came into the picture only to attest the document on the date of the execution i.e., March 14, 1945. The first entry in his Day Book tendered in respect to the transaction is on March 14, 1945 being the date of the execution of the lease. That is the impression he sought to convey to the Court. But his own witness Rajen Sen stated that Phani Lal was acting as adviser long prior thereto. He was doing everything to defend Sital in the police court and that was sometime before March 14, 1945. He was carrying on negotiation for the lease. The title deeds were made over to him at least four or five days before March 14, 1945 and that he paid the expenses of the criminal case in the police court a fortnight before the lease. This payment of police court costs and expenses is corroborated by Phani Lal himself. 1 accept the evidence of Rajen Sen to the effect that Phani Lal came into the picture carried on negotiation in the matter long before the date of the lease, that he was advancing money to meet the expenses of the criminal case in the police court, that the title deeds were kept in deposit with him prior to the date of the lease, and that Phanilal was not merely an attesting witness.

8. The memo of consideration in the Indenture of lease indicates that Rs. 2,500/- was paid in cash as selami for the lease. Phani Lal stated in his evidence that only Rs. 800/- was paid to him, the balance was to be retained by the lessee's attorney S.N. Chunder for payment to Satyendra Nath Sinha who prosecuted Sital for cheating. Prior to the lease in favour of Gopinath, Sital granted a lease to Satyendra Nath Sinha, suppressing the fact that it was a debutter property. Satyen thereupon prosecuted Sital for cheating and there was a conviction and Sital was sentenced to a term of imprisonment. There was at the time an appeal pending. According to Phani Lal the balance of Rs. 1700/- was retained for payment to Satyen Sinha. It was arranged that Sital would register the lease, on Satyen Sinha giving an undertaking to withdraw that criminal case. The sum of Rs. 800/- paid to Phani Lal would not be paid to Sital until he vacated the premises occupied by him. In the correspondence that passed between Phani Lal and S.N. Chunder, the arrangement stated above was denied by Satyen Chunder and the criminal case was not withdrawn. According to Phani Lal the sum of Rs. 800/- paid to him was spent partly in payment of the fees to the High Court Advocate Radhika Guha, in payment of Rs. 500/- to Satyen Sinha and the balance to meet the cost of the criminal case in the Police Court amounting to Rs. 200/-. The criminal case in the Police Gourt, however, terminated by conviction long before March 14, 1945 when Phanilal came into the picture, if his story is to be accepted. According to Phanilal's own case, he was not to pay the money to Sital, before Sital vacated the premises and Sital never vacated the premises. Lastly, according to Phanilal, he was asked by Sital to return back the sum of Rs. 800/- and repudiate the lease inasmuch as Gopinath did not give the undertaking to withdraw the criminal case and in fact the case was not withdrawn. Having regard to these facts it is impossible to hold that the memo of consideration appearing in the lease proves the payment of Rs. 2,500/- in cash as selami. Apart from Phanilal's own evidence that Rs. 800/- was paid by S.N. Chunder, and his Day Book entries, there is no-evidence of payment of consideration. The most important evidence on this point is the evidence of Gopinath the lessee who is supposed to have paid the money. Gopinath's evidence is that he made no payment whatsoever. I accept this evidence of Gopinath. If this evidence is accepted, it must

be held that there was no payment of selami. I am not called upon to speculate as to whether this was a benami lease of anybody other than Gopinath and whether the real lessee might have paid the selami. No case of benami has been made either in pleading or in evidence. I hold that no payment of consideration is proved by dependable evidence. I further hold that Sital was persuaded to execute the lease so that the criminal case against him may be stifled. It was an extremely shady transaction, the responsibility for which must fall fairly and squarely on two attorneys of this court Satyen Chunder who is no dead and Phanilal Mullick. Sital was a needy tool. He was as much a victim as the deity itself. Rajen Sen was on the same intellectual level as Sital. He was used by Phanilal as his tool. Rajen according to evidence was Phanilal's tenant and I think acted as Phanilal's tout in procuring clients. Gopinath must share the responsibility of being a party to a dishonest transaction even if he did nothing more than lend his name.

9. It appears that the lessee did not take possession of the demised premises and Sital and his daughter continued to be in possession of the debutter property. By a deed of assignment Gopinath purported to have assigned the lease to one Nimai Chand Dutt on October 11, 1945, that is, about 7, months after the lease. The deed of assignment recites, that in consideration of the payment of Rs. 2,500/- in cash by the assignee the assignment is

being effected. Gopinath Pal was represented by his attorney Santoshi Kumar Pal and Nimai by Phanilal. The point to be noted in respect to this transaction is that the assignee agreed to accept the assignment and pay the full consideration of Rs. 2,500/- , even though the assignor did not and was not in a position to give possession and a suit was pending in which the validity of the lease is questioned. This is somewhat surprising. In evidence Phanilal admits that there was a further inducement to Nimai. Nimai was promised that the sum to be advanced by him would be secured by a mortgage of the demised premises later. As in the case of the lease, so in this case of assignment, Gopinath in the written statement repudiated the transaction, but at the trial admitted that the signature in the document might be his. He, however, stoutly denied having received any consideration. Nimai did not give evidence nor has any attesting witness been examined except Phanilal. I accept the evidence of Gopinath that he did not receive the consideration as stated in the document. Nimai does not state on oath that he paid the consideration. Nimai does not appear to have ever got possession, either physical or constructive. Nobody other than Phanilal supports this transaction in evidence. Nimai does not come to the box. I agree with Dr. Das, learned counsel for the plaintiff, that both the lease and the assignment are extremely shady transactions and Phanilal's responsibility in bringing about these two transactions has been established beyond all controversy. I further agree with Dr. Das that payment of consideration has not been proved and that the deity has not in any way been benefited either by the lease or by the assignment.

10. The next event of importance is the suit No. 980 of 1945 instituted by the defendant Rajen Sen on June 26, 1945 as the next friend of the deity. In the affidavit of fitness filed along with the plaint Rajen bases his claim to represent the deity as next friend on the ground that he is meeting the expenses of Dev Seva and looking after and managing the daily worship. The only defendant impleaded is Sital Chandra Das. The suit is for administration of the debutter estate and for framing a scheme, if necessary. In paragraph 7 of the plaint it is pleaded that the defendant Sital was guilty of gross misconduct, mismanagement and breach of duty in the administration

of the trust property. The various leases executed by Sital including the one in favour of Gopinath have been cited as acts of misconduct and, mismanagement. In paragraph II it is pleaded that the leases were not for legal necessity and that they were not for the benefit of the deity. The plaint was drafted by Mr. Subimal Roy, one of the most eminent counsel of this Court. On April 10, 1946, an application was affirmed by the next friend for sanctioning a scheme. The consent of Sital is endorsed on the petition. The petition is also consented to by Nimaichand Dutt, who is not a party to the suit but has obtained an assignment of the lease from Gopinath in the meantime and who, it is alleged in paragraph 14 of the petition is willing to surrender the lease provided he is paid Rs. 2500/- in full settlement. It is alleged in paragraph 16 that if a mortgage is effected for raising a loan of Rs. 4000/-, then the scheme can be given effect he and that the scheme will be beneficial to the debutter estate. The sum to be so raised would be applied in payment of Rs. 2500/- to Nimai Chand Dutt for obtaining the surrender of the lease, costs to the solicitors and Rs. 750/- for repairs of the debutter property. The scheme is set out in paragraph 17 of the petition. In paragraphs 18 and 19 of the petition the estimated income is given at Rs. 115/- and expenditure Rs. 65/-, leaving a clear margin of Rs. 50/- per month with which the mortgage can be liquidated in 5 o? 6 years' time. On the basis of this petition, a consent decree was passed on May 15, 1946 and the Court granted leave to the next friend to settle the: suit on the said terms. Usual certificate was given that the settlement was for the benefit of the deity.

11. In evidence it transpires that Sital was in jail on March 27, 1945 and came out of jail on May 18, 1945. On April 5, 1945, when Sital was still is jail, Phanilal went to Mr. Subimal Roy and instructed him to draw the plaint. Rajen in his evidence-stated that at the request of Sital he insuueted Phanilal to institute a suit against Gopinath to get rid of the lease. Rajen Sen seems to think even now that the suit was to that effect against Gopinath though the sole defendant was Sital in fact. After Sital came out of the jail, Sital himself looked alter the litigation with the assistance of Phanilal. It follows, according to this evidence, that Sital was prosecuting the suit against himself. Phanilal was advised expressly by Mr. Subimal Roy not to act as the plaintiffs solicitor and in fact D. Roy's name appears as the solicitor on record. This D. Roy sits with Phanilal in the same room having common establishment. It was suggested to Phanilal in cross-examination that D. Roy only lent his name and that Phanilal was acting as the attorney for the plaintiff. In this suit Mr. S.K. Sengupta, a member of the Bar, was appointed Receiver. Rents, however, were realised even during the period by Phanilal and not by Mr. Sengupta, it cannot, therefore, be said that Phanilal was out of the matter and this fact lends strong support to the suggestion of Dr. Das that Phanilal was acting as attorney and D. Roy merely lent his; name. D. Roy was not called to depose that he acted as attorney and was not merely a name lender. It is beyond doubt that in the matter of the suit Phanilal was doing everything even though he was not the attorney on record. That the suit was a collusive suit is beyond any doubt. That the whole object oil the suit was to get the sanction of the court to raise a loan on a mortgage in favour of Nimaichand is equally clear. I am certain in my mind that Mr. Sengupta was made first the Receiver and then the trustee without his consent. The real person pulling the string all along was Phanilal and the name of Mr. S.K. Sengupta was utilised to give an innocent lgokto this shady deal. It is, therefore, not surprising that Mr. Sengupta would refuse to continue as trustee. In fact, it does not appear that he eves acted as a trustee; he did not raise a loan by mortgage in terms of the decree. Phanilal then had to come out in the open and get himself appointed as by a consent order dated 11-7-1946 in place and stead of Mr. S.K. Sengupta in order that a mortgage could be created in favour of Nimai Chami Dutt. Five days after on 16-7-1946 the mortgage was executed by Phanilal. The mortgage was executed by Phanilal as trustee and Sital as shebait. If the

property had vested in Phanilal as trustee and he was authorised by the court to raise a loan of Rs. 4000/- on a mortgage, it is difficult to understand why Sital should be a co-mortgagor. Is it because Phanilal knew that the decree was fraudulent and void and it was safer to make Sital a co-mortgagor so that he may not repudiate the mortgage? D. Roy and Rajen Sen were made attesting witnesses. Rajen Sen is a half-wit and all along acted as a tool of Phanilal. D. Roy never came to the witness-box. The receipt of the consideration was acknowledged by the mortgagors in the document. The consent decree provided that out of the consideration money, Rs. 2500/- was to be paid to Nimai to get a surrender of the lease, Rs. 500/- was to be paid to D. Roy as costs, Rs. 250 was to be paid to Sital's attorney B.K. Ghose and Rs. 750/- to be utilised for repairs. Phanilal in his evidence stated that he spent Rs. 800/- for repairs.

12. After the mortgage, Phanilal acted as trustee for a period of about 3 years till 7-3-1949 and according to his own evidence, he went on realising the rents, effecting repairs and making disbursements. Even though in the petition to persuade the Court to sanction the mortgage, the Court was made to believe that the mortgage would be paid off at the rate of at least Rs. 50/- a month, not a single pice was paid on account of the mortgage. Phanilal stated that he as trustee filed certain accounts in Court, a copy of which was placed before me. This is not a regular account in which receipts and disbursements have been recorded as they are made. It records, for example, payment of Rs. 140/- on account of Dev Seva for 7 months at the rate of Rs. 20/- per month. It does not appear from this account on what date or dates the payments were made. Similar payment of Rs. 240/- is recorded as last item in the account of 1947. The account also shows payment of electric bills for every month at the rate of Rs. 20/- more or less. In the petition for leave to settle the suit instituted by Rajen, it was not stated that this was an important outgoing. All the parties knew it and Phanilal according to his own evidence acted as the agent of Mr. Sen Gupta. He cannot be heard to say that he did not know that electric charges were payable. This was deliberately suppressed from the Court and the Court was given the false impression that there would be a surplus of Rs. 50/- after meeting all outgoings to liquidate the mortgage liability. The account shows that from May 1946 to November 1948, that is, for about 3% years, the trustee realised Rs. 2968/0/6 on account of rent, i.e., at the rate of Rs. 850/- per year. In the petition it was stated that the rent after repair would be at least Rs. 115/- per month, that is, Rs. 1380/- per year. This is another example of misleading the Court. The account shows payment of Rs. 2500/- to Nimai, Rs. 500/- to D. Roy and Rs. 250/- to B.K. Ghose in terms of the consent decree. It shows a further payment of Rs. 206/1/3 to D. Roy under order dated 11-7-1946, whereby in place of Sengupta Phanilal was appointed trustee. Phanilal paid himself the following sums: Rs. 428/4/- plus Rs. 104/2/- alleged to have been advanced. This appears in 1947 account. Also Rs. 110/9/6 as his remuneration for collection of Rs. 221/8/-. This appears in 11948 account. All the three payments made to Phanilal himself appear to be wholly unwarranted. It does not appear when Phanilal did advance Rs. 428/8/- and Rs. 104/2/- from the account book or otherwise. Nor was he entitled in law to get any commission on collection. It must be held that Phanilal had money in his hand belonging to the debutter estate even if the decree is held to be valid in terms of which he was required to act and did purport to act. There is no account of the subsequent period i.e. from November 1948 to March 7, 1949, when Phanilal by a consent order was discharged from further acting as trustee. Phanilal was awarded the costs of the application resulting in the order for his own discharge. This amounted to

about Rs. 250/- on taxation. For the realisation of this cost Phanilal had the Official Receiver appointed Receiver of the income of the debutter property by an order dated 18-4-1950. Phanilal had money of the debutter estate in his hands and he had no justification to have a Receiver appointed for the realisation of the sums not due to him. On the date of the application and order he was indeed a debtor to the debutter estate, as indicated before. This is clearly an illegal act. It was done apparently to prevent Sital from realising the rents, out of which outgoings could be met. The result of this act was to put the debutter estate into houbles. I have no doubt that the next step in the contemplation of Nimai & Phanilal was to enforce the mortgage by instituting a suit. In the meantime, Sital to the debutter estate must be crippled financially. In evidence Phanilal stated that his reason for relinquishment of trusteeship was Sital's interference in the administration of the debutter estate. This is hardly acceptable. Phanilal knew more than enough how to deal with Sital. During the period of his trusteeship, Phanilal appears to have paid the Corporation taxes of the period, But there was arrear of taxes for period prior thereto. This appears not to have been paid. For the realisation of this arrear amounting to Rs. 186/13/- the Corporation instituted a suit claiming a declaration of statutory charge and usual mortgage decree. Phanilal wrongly described as Pannalal, Sital, Nimai, Binodini and the deity were impleaded as defendants. The suit was instituted on 15-7-1950. On an application being made by Phanilal that he was no longer trustee and that Binodini was dead, the names of Phanilal and Binodini were struck out from the category of defendants by an order dated 20-12-1950. It is to be noted that Phanilal had still trust money in his hand with which he could have paid off the Corporation's dues and finished with the suit. He did not do it. What appears to have been done was that Nimai paid off the Corporation's dues and had himself transferred to the category of the plaintiff. The suit instituted by the Corporation dispensed with the necessity of Nimai's instituting a separate suit to enforce his mortgage. Nimai took advantage of the suit by the Corporation and after payment of the Corporation's claim became the plaintiff himself. Phanilal acted as the solicitor for Nimai. This gives Phanilal as Nimai Dutt's attorney the carriage of proceedings and control of the suit. Incidentally, Phanilal as plaintiff's attorney would get substantial costs, because, in that event, the value of the suit would be over Rs. 2500/-. This fact might have inspired Phanilal to advise Nimai to pay off the Corporation's claim and have Nimai transferred to the category of the plaintiff. Then the suit ran its usual course. Sital as shebait

and trustee did not contest. Amiya Kumar Dutt who was appointed the guardian of the deity got no instructions from anybody to contest the mortgage and left the interest of the deity to the Court. In due course, preliminary and final decree for sale was passed and in the Registrar's sale the defendant Upendra, the owner of the adjacent building, purchased the property. Subsequently, Upendra was advised that a good title was not made out because the lease and the mortgage were not for legal necessity. An enquiry as to title was directed by an Order of the Court. The Registrar reported that so long as the consent decree in Rajen's suit was not set aside as fraudulent, title cannot be challenged. This report was confirmed by the Court and the purchaser thereupon was directed to pay the balance of the purchase money and complete the sale. After such completion, the purchaser applied against Sital's daughter who was in possession then to show cause why possession should not be delivered. Thereafter, the present suit was instituted. It should be noted that when the purchaser took out summons for an enquiry as to whether title has been made out, Amiya Kumar Dutt, as the guardian of the deity, supported the purchaser both in the enquiry before the Registrar and before

the Court contending that good title had not been made out. Nimai and his attorney Phanilal contended that good title had been made out. This is the final chapter of the alienation of the debutter property. Amiya Kumar Dutt as the guardian-ad-litem had no power to institute the suit. The person competent to institute a suit is the she-bait, who after Sital's death, is his daughter. But before the suit could be instituted, the purchase money put in by the purchaser was withdrawn by Nimai and Phanilal on account of the claim and costs of the mortgage decree. It appears that the money was withdrawn sometime on or about 5-12-1955.

13. That is how the alienation of the debutter property was completed and it is the plaintiff's case that this has been brought about by the fraud and conspiracy of the defendants. The central figure of this fraud and conspiracy is Phanilal and the others were co-conspirators. It is contended that title of the deity is not lost and the deity still continues to be the owner of the property. The acts by which the deity lost the property are contended to be fraudulent and illegal acts and as such do not affect the deity's title. Each and every act beginning from the granting of the lease, institution of the suit which terminated in a consent decree whereby trustee was appointed of the debutter property with power to create a mortgage, the creation of the mortgage thereunder by the trustee and ultimate sale of the mortgaged property in enforcement of the mortgage, is described as fraudulent and collusive and the alienation of the debutter property is alleged to be without any legal necessity to the knowledge of all the defendants. It is claimed that in case the alienation cannot be set aside, the deity should be damnified for the loss.

14. It now remains to be considered whether the deity has any remedy in law. Learned counsel appearing for the defendants strongly urged that the suit should be dismissed in limine because the case made is a case of fraud and fraud has not been properly pleaded with the necessary particulars. Well known cases decided by the House of Lords and the Judicial Committee of the Privy Council have been cited and relied on in support of this contention. It has been strongly urged that no proper case of fraud has been made in the plaint and the suit should be dismissed on that ground.

15. It is pleaded in paragraph 13 of the plaint that the ultimate sale is invalid and not binding on the deity and this has been brought about by various acts of the defendants. The lease in favour of Gopinath Das is stated to be fraudulent, because there was no legal necessity and the deity did not get any benefit thereunder. This, in my judgment, is enough pleading of fraud in order to make a case that the lease was not binding on the deity and the debutter property. Granting of a lease of debutter property without any legal necessity is a fraudulent act. So also the lease is in fraud of the deity, when the lease is for no consideration. This has been alleged sufficiendy in the plaint and the law of pleading, as I understand it, does not require any further averment. It is pleaded that in the matter of granting of this fraudulent lease, the parties involved were Sital, the shebait, Gopinath, lessee and Phanilal, the attorney. It is next alleged that the suit instituted in the name of the deity by Rajen Sen as next friend is a fraudulent suit and all steps taken in that suit are fraudulent. It is alleged that Rajen, a stranger to the family, was not entitled to bring a suit in the name of the deity and this fact was suppressed from the Court. In that suit a consent decree was passed which authorised the mortgage. It is alleged that this settlement was prejudicial to the deity. It is made clear that the object of the suit was to deprive the deity of the property and that the suit resulted in a decree authorising an illegal mortgage. The defendants as parties are responsible for this fraudulent suit and its consequences. It has been alleged that the consent decree is void and illegal and that the deity derived no benefit therefrom. It is alleged further that the mortgage suit is fraudulent and did not affect the deity's title to the property. In my judgment, there is enough averment in the plaint to indicate the case intended to be made in the suit,

namely, that the title of the deity in the debutter property has not been affected by all or any of the acts of the shebaits acting along with and in collusion with different people which ultimately resulted in the alienation of the debutter property. The fraud in respect to each step whereby the debutter property was ultimately sold has been stated sufficiently and even if it might perhaps have been given in a better way with fuller details, it does not entitle any Court to dismiss the suit on the ground that fraud has not been sufficiently pleaded. To insist on more than what is alleged in the plaint would be pedantry. The object of pleading is to give the defendants full notice of the case to be made, so that they are not taken by surprise. That is why the law insists that the plaint must give full particulars of the material allegations constituting the cause of action and if any fraud is to be alleged against all or any of the defendants, it must be stated with full particulars. In the instant case, the fraud alleged is that the lease and the mortgage were without legal necessity without consideration and were not for the benefit of the deity: that the object of the suit which authorised the mortgage

was to get a sanction from the Court to raise a mortgage which was neither for legal necessity nor for the benefit of the deity, and that pursuant to the decree in such a suit an unauthorised mortgage was executed which was neither for legal necessity nor for the benefit of the deity. Subsequent suit in enforcement of the mortgage is also fraudulent and the sale thereunder did not affect the deity's title. It will not do for us to forget that the object of the suit is to establish the deity's title in the debutter property and all that the deity need allege is that the alienation was without legal necessity and was not for the benefit of the deity. That averment is enough in law to enable a deity to challenge an alienation and it would be for the alienee to prove that the alienation was either for legal necessity or for the benefit of the deity or that the alienee made bona fide enquiry and was satisfied that there was legal necessity. It is not really an action in tort wherein the claim is for damages for tort and the cause of action is conspiracy to do a tortious act with respect to the property. The language used in the plaint may be loose and the suit may appear superficially a suit on tort. But as I understand it, it is purely a title suit in which the deity seeks to make a case that the debutter property has been wrongfully alienated and that the deity still retains title in the property. If for any reason the property cannot the recovered back, the deity must be damnified.

16. The legality of the lease and the question whether it is binding on the deity is not important, except for one purpose. The lease has been surrendered. The consideration for the subsequent mortgage was substantially to pay Rs. 2500/- to obtain the surrender. Whether the money to obtain surrender of the lease is a lawful consideration to create a mortgage binding on the deity is the only point to consider in respect to the lease. The lease, in my judgment, was a fraudulent document not binding on the deity. Nor has it been proved that the consideration for the lease, namely, payment of Rs. 2500/- has been made. The lease, according to evidence, was entered into to stifle a criminal offence and as such is altogether void. The lease being void, there was nothing to surrender, and if any payment is made for surrender of such a lease, such payment is without any consideration. The payment for obtaining the surrender of a void and illegal lease cannot be a good consideration for the mortgage of debutter property.

17. Suit No. 980 of 1945 instituted by Rajen Sen in the name of the deity has been challenged, on the ground that Rajen Sen had no authority in law to institute the suit.

According to Hindu Law, sebait represents the deity and he alone is competent to institute a suit in the name of the deity. In exceptional circumstances, however, where the sebait does not, or by his own act deprives himself of the power of representing the deity, a third party is competent to institute a suit in the name of the deity to protect the debutter property. Dr. Das contends that such a party must be a member of the family or a worshipper and that a total stranger, in law, is not competent to institute a suit in the name of the deity. I do not, however, consider this to be the correct view in law. A worshipper or a member of the family has no doubt his own right to institute a suit to protect his right to worship and for that purpose to protect the debutter property. That is, however, a suit by the member of the family or worshipper in his personal capacity and not a suit by the deity. The deity has also a right of its own to have a suit instituted-by a next friend. As I understand the law, the person entitled to act as next friend is not limited to the members of the family or worshipper. Anybody can act as such next friend, but the law requires that anybody other than sebait instituting a suit in the name of the deity must be appointed as such by an order of the court. That is the law as recognised by this Court. Reference may be made to the case of *Tarit Bhusan* v. *Sreedhar Salagram*, 45 Cal. WN 932 : (AIR 1942 Cal 99), *Sreedhar Jew* v. *Kanto Mohan*, 50 Cal. WN 14 : (AIR 1947 Cal 213), and *Sushama Roy* v. *Atul Krishna Roy*, 59 Cal WN 779 : ((S) AIR 1955 Cal 624).

18. This suit must, therefore, be held to be wholly unauthorised and all proceedings including the decree must be held to be illegal and void so far as the deity is concerned. It is contended by Mr. Sankar Ghose that the suit has not been challenged on this ground. But in my judgment, when the court finds that the authority to create a mortgage of debutter property is derived from a consent decree and the decree and plaint are tendered in evidence the court is bound to declare the decree to be invalid, when it finds that the suit has been instituted by one having no authority to institute a suit on behalf of the deity. The decree authorising the mortgage must be held to be wholly void and not binding on the deity at all.

19. Since evidence has been tendered as to whether the decree is fraudulent, I would better record my finding on it. In my judgment, the suit is fraudulent he its inception, continuance and termination. The suit instituted according to Rajen was at the request of Sital to get rid of the lease. Sital intended the suit to be instituted against Gopinajh. Suit, however, was instituted not against Gopinath but against Sital and not for the purpose of setting aside the lease, but ostensibly for the purpose of framing a scheme, but for the real purpose of confirming the lease and creating a mortgage. Though, the suit was against Sital, Sital was himself purporting to prosecute the suit and Phanilal was purporting to act according to the instructions of Sital. In fact, however, Phanilal was prosecuting the suit, not in the interest of Sital but in the interest of his own protege Nemai and the consent decree was obtained not in the interest of the deity nor even in the interest of Sital, but in the interest of Nemai Chand Dutt. The sanction of the court was obtained fraudulently by suppression and misstatement of facts and a gross fraud was perpetrated on the court to induce it to sanction the consent decree and to certify it to be for the benefit of the deity. I hold that Phanilal was the real attorney who was acting for the plaintiff in that suit in the name of D. Roy, even though he was warned by an eminent Counsel of this court that he could not act for the plaintiff in the suit. The suit was Phanilal's and was intended to get the sanction of the court to confirm the lease and to sanction the mortgage. In my judgment, it was a thoroughly dishonest suit, fraudulent in its inception, continuance and termination. No party can acquire

any right under such a fraudulent decree. The mortgage cannot be supported, because it was sanctioned by the Court in a fraudulent suit.

20. Can the mortgage be otherwise supported? Though the mortgage deed recites that the mortgage was being created by Phanilal as trustee appointed by the court under the authority derived from the decree passed in the suit to secure an advance of Rs. 4000/-, yet the deed recites that the mortgaged property has vested in Phanilal as trustee and Sital as sebait. Sital's sebait appears to be a co-mortgagor. It must be held on my finding that Phanilal had no authority to create the mortgage on the basis of the consent decree in Rajen's suit. But Sital as sebait could mortgage the property independently of any authority derived from the consent decree. Such a mortgage, if it was for legal necessity or for the benefit of the deity, would be binding on the deity. If, however, it is not for legal necessity nor for the benefit of the deity, it would not be binding on the deity.

21. The question to be considered is whether the mortgage in the instant case was for legal necessity or for the benefit of the deity. The mortgage was entered into primarily to pay the lessee as the price of surrender. That is the object stated in the consent petition, Rs. 2500/- to paid to the lessee to obtain surrender, costs amounting to Rs. 750/- that is, Rs. 500/- to D. Roy and Rs. 250/- to D.K. Chose, the attorneys employed in the suit and Rs. 750/- for repairs. I do not consider this to be a case of mortgage for legal necessity. The lease was not binding on the deity and I have held, on the evidence, that no payment of consideration has been proved. Further, the lease was to compound a animal offence. The payment of costs to the attorneys of the party employed in a suit which was instituted to defraud the deity and which, in any event, was a suit not of the deity, cannot be considered to be a legal necessity. Nor do I consider that a sebait is justified in raising a loan of Rs. 750/- by mortgaging the property, when that small expense can well be met out of the income of the debutter estate. It is not a case of Rs. 750/- already borrowed and spent for the purpose of repairs, but a case of borrowing the sum of Rs. 750/- on a mortgage, so that repairs and improvement can be effected in future. I hold that there was no pressing necessity for the mortgage and the mortgage cannot be binding on the deity as being one entered into by the sebait for legal necessity. Nor do I consider that the mortgage was for the benefit of the deity. Rs. 2500/- alleged to have been paid by the mortgagor to himself as the lessee and the costs of the suit can hardly be contended to be for the benefit of the deity. Phanilal in his evidence stated that he spent a sum of Rs. 800/- on account of repairs and Improvement of the debutter estate. It does not appear from the accounts filed by him as a trustee that he spent on account of repairs out of money advanced by Nemai. He was realising rent month for month and the amount spent by him was spread over the entire period during which he was in possession as a trustee. It may well be that he spent on account of repairs out of the rent he was receiving. Further, he stated that he was realising rent on behalf of Sen Gupta, who was appointed Receiver immediately after the institution of the suit. That money has not been accounted for. This money might have been utilised for the repairs and improvement, and in view of this fact, I am unable to accept the evidence of Phanilal that repairs were effected with the money borrowed on the mortgage. It is to be noted that no part of the sum of Rs. 4000/- was paid to Sital. Hence, Sital could not have spent the money for repairs and improvement. Even if Phanilal evidence is accepted, he executed the mortgage and obtained the consideration money himself and spent part of it for improvement of the debutter estate. Sital did not obtain the mortgage money or any part thereof, even though he was a co-mortgagor. Even if the mortgage is one created by the sebait, it must be held, on evidence, that he neither received any part of the mortgage money nor spent it for the improvement of the debutter property. The debutter estate cannot, therefore, be held to have been

benefited by the money advanced by Nemai to Phanilal. It must, therefore, be held that the mortgage was neither for legal necessity nor for the benefit of the deity. No case has been made either in the pleading or in evidence that Nemai made any enquiry as to the existence of legal necessity, so as to justify the mortgage. The mortgage, therefore, is not binding on the deity.

22. The other matter now left to be considered is the mortgage Suit No. 2970 of 1950 instituted by the Corporation of Calcutta to enforce the statutory charge for the realisation of the consolidated rates. The plaint is Ex. B/4 and filed on July 15, 1950. The amount claimed by the Corporation in the suit he Rs. 186/13/-. The defendants are Phanilal (wrongly described as Pannalal), the deity, Sital Binodini as sebait and Nemai. It is alleged in the plaint that the defendants are interested in the premises and/or in the right of redemption therein. The plaint appears to have been subsequently amended by an order dated October 30, 1951, whereby the names of defendants Nos. 1 and 3 (Phanilal wrongly described as Pannalal and Binodini) were struck out. It will be seen that before and after the amendment both Sital and the deity remained as defendants. The Court appointed one Amiya Kumar Dutt as the next friend of the deity. He received no co-operation or instruction from anybody and left the interest of the deity in the hands of the court and only asked for instalments under the Bengal Money Lenders Act. In the result, there was the usual preliminary and final decree and ultimately a sale of the property. The deity, at the instance of the plaintiff Nemai, was made to be represented in the suit not by the sebait but by a guardian-ad -litem appointed by the court, in the instant case, Amiya Kumar Dutt — who was not given any assistance in properly defending the suit. It has not been alleged anywhere in the mortgage proceeding why the sebait was not competent to act as the guardian of the deity. In law, sebait and nobody else is entitled to represent the deity, unless the sebait has disabled himself from so acting as sebait. In obtaining from the court an order for separate representation of the deity and not by sebait, it was the duty of the plaintiff to have placed before the court facts which disabled the sebait from representing the deity. There is nothing to indicate that the court applied its mind in the matter and after consideration came to the conclusion

that the sebait was not the proper person to represent the deity. Sebait's right to represent the deity not having been adjudicated in any proceeding in the mortgage suit, the sebait continued to represent the deity and the appointment of Amiya Kumar Dutt as the guardian appears to have been made not according to law. This order has done nothing except creating confusion. In any event, the said guardian received no co-operation from anybody, and I hold that in fact the deity was not effectively represented in the mortgage suit and the interest of the deity could not be and in tact was not protected in that suit. The responsibility for all this must be attributed to Nemai, the plaintiff, and his attorney Phanilal. The plaint appears to have been amended by an order dated December 20, 1950. Nemai was transposed from the category of defendant to be the sole plaintiff in place and stead of the Corporation. Amount of claim on account of consolidated rates is reduced to Rs. 116/1/- by deduction of Rs. 70/1/-, apparently paid previously. It is pleaded in the amended plaint that the plaintiff Nemai has paid the said claim of the Corporation and costs; it is not stated how much cost he has paid. Paragraph 3 of the plaint is substituted by a new paragraph which reads as follows:

> "The plaintiff further claims as a mortgagee of the said premises No. 6, Bhuban Sarkar Lane particulars whereof are as follows: Dated 16th July, 1946, for Rs.

4,000/- interest 6% simple." Prayer (a) is amended and reads as follows:

"Declaration of first charge on the said premise for the sum of Rs. 116/13/- and the costs incurred thereby as mentioned in paragraphs 1 and 8 thereof."

23. That is all the amendment effected when Nemai had himself substituted in place and stead of the plaintiff. Phanilal was acting as the solicitor of Nemai.

24. In law, the mortgage effected by the sebait without legal necessity and not for the benefit of the deity is not void and the mortgagor acquires some interest in the mortgaged property, that is, the interest of the sebait which enures only during the incumbency of the sebait. The sebait may alienate by way of lease, mortgage or sale the debutter property even without legal necessity and not for the benefit of the deity. Such an alienation would not affect the title of the deity. The transaction would not be void, and the alienee would be entitled to the rights of the sebait in the property so long as the sebait continued as a sebait of the debutter properties. In the instant case I have held that the mortgage was not for the benefit of the deity and the mortgage security was not therefore the debutter property but only the sebaity interest of Sital in the debutter property and the sebaity interest of Sital in the debutter property will inure during the incumbency of Sital and it will come to an end either on the death of Sital or on the termination of his sebaity. In a suit to enforce a mortgage of debutter property by a sebait, when the mortgage is neither for legal necessity nor for the benefit of the deity when a decree is passed for sale of the mortgage security in such a suit what is sold is not the mortgaged property but only the sebait's interest in the debutter property. The purchaser in such a case would not acquire title in the debutter property beyond the lifetime of the sebait and on the termination of his sebaity the title of the purchaser in the debutter property would come to an end. It would, therefore, follow that in the instant case Sital having died on February 21, 1956, the purchaser's right to the property is extinguished on that date and the deity's title to the property as owner is not affected either by the mortgage or sale in the enforcement of the mortgage.

25. It has however been argued that the deity was a party to the mortgage suit and its tide to the property has been extinguished by the decree. It is very strongly urged on behalf of the defendant that the deity is barred by res judicata or principles analogous thereto from setting up its title as against the purchaser. If that was the correct position in law then in every case of sale in execution of a mortgage decree the claim of the deity would be barred in a subsequent suit to set aside the alienation. The plea of res judicata or principles analogous thereto would be a complete answer to such a suit. But it has been held by the highest court that such a suit lies. The reason is that in a mortgage suit simpliciter, what is proceeded against is the mortgagor's interest in the property — that is the mortgage security and what is sold in execution of the mortgage decree is the right title and interest of the mortgagor in the mortgage security. The mortgage not being binding on the deity, the-mortgage security is only the interest of the sebait in the debutter property. The court in such a suit, therefore, is called upon to pass a decree or order for sale not of the debutter property but of the -right title and interest of the sebait in the debutter property. There cannot be any question, therefore, of the deity's title to the property being adjudicated by the court and in consequence the decree in the mortgage suit cannot operate as res judicata barring a subsequent suit by the deity to establish its title to the mortgaged property. The paramount title of the deity cannot be deemed to have been adjudicated in a suit simpliciter on a mortgage created without any legal necessity. The mortgage security being nothing more than a sebait's right in the mortgaged property and the suit being simpliciter to enforce the mortgage security, it must be held that the determination of the paramount title of the deity in the debutter property could not have been determined in the instant mortgage suit.

26. It may be competent for a mortgagee of debutter property to raise the question of the deity's title in a suit properly framed to enforce the mortgage against the debutter property. In such a suit it would be necessary to plead and prove that the mortgage was for legal necessity and/or for the benefit of the deity and/or the mortgagee before granting the mortgagee made reasonable enquiries as to the existence of legal necessity. In that event the question is adjudicated or is deemed to have-been adjudicated by the court in the presence of the deity properly represented when a decree is-passed and such a decree may operate as res judicata. The title of the purchaser in execution of the decree in such sale might not be challenged by the deity in a subsequent suit. In the instant case however no such point has been raised by Nemai in the plaint and the suit is simpliciter a suit for mortgage

without raising any question as to whether the mortgage was for legal necessity and as such what was intended to be sold in execution of the mortgage decree is not merely the interest of the sebait but of the deity as well. In the plaint it is not alleged that the mortgage was for legal necessity or for the benefit of the deity or that the mortgagee made the necessary enquiry and was satisfied as to the existence of legal necessity.

27. It is to be noted that in the mortgage deed itself there is no recital that the sebait is effecting the mortgage for legal necessity. The deed makes it clear that the mortgage was being executed in terms of the decree in Suit No. 980 of 1945 and that it was being executed pursuant to the authority of the court. Such authority was given to the trustee and not to the sebait. The point to be noted is that it does not appear anywhere from the deed that the sebait was creating the mortgage for legal necessity. It, therefore, follows that in the instant case where neither the mortgage deed shows that the sebait executed the mortgage for legal necessity and the plaint does not make a case that the mortgage was for legal necessity thereby raising the question of the deity being bound by the mortgage, this suit cannot be treated as anything other than a mortgage suit simpliciter in which the plaintiff has sought to enforce his security namely the sebaity interest in the debutter property. It cannot, therefore, be contended that the deity's title has been adjudicated against in the mortgage suit and the deity is debarred from claiming tide on the ground of res judicata or principles analogous thereto.

28. It is contended that the deity is a party to the mortgage suit and as such bound by the decree. The point is not whether the deity is bound by the decree but the point is what interest passes in the sale pursuant to the decree. In other words, what is the decree? For the purpose of determining what is the decree, the scope of the suit is to be ascertained from the averments in the plaint and the reliefs claimed. The plaint does not aver that the mortgage was for legal necessity and as such binding on the deity. The mortgage on which the suit is filed indicates now here that the sebait executed the mortgage for legal necessity. I, therefore, hold that the mortgage security was only the sebait's interest in the debutter property proceeded against in the mortgage suit. That being the scope of the suit, the deity was not called upon to set up its title to the property in the mortgage suit. Merely by impleading the deity improperly as a party and without making any averment in the plaint that the deity's tide in the debutter property is intended to be affected by the decree, the plaintiff is not entitled to contend that the deity's tide had been negatived when a decree is passed in the mortgage suit and the deity is in consequence debarred from having its tide determined subsequentiy in a suit on the principles of constructive res judicata.

In order that the deity's interest in a debutter property may be sold in enforcement of a mortgage of debutter property executed by a sebait, it is necessary to aver in the plaint that the mortgage was for legal necessity and/or for the benefit of the deity and/or the mortgagee made the necessary enquiry when advancing money on the mortgage. In the absence of such an averment, what is sought to be enforced in the mortgage suit is only the right tide and interest of the sebait in the debutter property. In such a mortgage suit simpliciter when there is no such averment in the plaint, the deity is not a necessary party. Merely by adding the deity as a party, the scope of the suit is not extended and the mortgage security is not indicated to be not merely the sebait's interest in the mortgaged property but-the deity's interest as well.

29. There is, however, another point to be considered. The mortgage suit was not merely to enforce the mortgage created by Phanilal and Sital on July 16, 1946 for Rs. 4000/-. It was also to enforce the statutory charge for the recovery of consolidated rates. Originally the suit was instituted by the Corporation to enforce the statutory charge. During the pendency of the suit, defendant Nemai paid the dues of the Corporation and after payment had himself transferred to the category of the plaintiff, not merely to enforce his own mortgage but also to enforce the statutory charge. For the payment of the consolidated rates the entire property was liable to be sold and in enforcement of the charge, not merely the sebaity interest in the property but the deity's interest also was liable to be sold. It follows that inasmuch as, in the instant case, the sale in the suit was not merely for the recovery of the money secured by the mortgage deed of July 16, 1946, but also for the recovery of the money for which the property was charged by the Calcutta Municipal Act, the interest that passed in the suit to the purchaser is not I merely the interest of the sebait but also that of the deity in the property. It seems that the purchaser's tide to the property on that basis cannot be challenged now in this suit. On that ground, plaintiff's tide to the property must be negatived and the purchaser's tide upheld. I have come to this conclusion with considerable amount of hesitation more particularly because the Corporation's claim is very small and the property was sold substantially in enforcement of the mortgage of July 16, 1945.

30. It appears that after the institution of the suit out of the total claim of the Corporation amounting to Rs. 186/13/-, Rs. 70/1/- was paid to the Corporation and may be the balance would have been paid in the same way and the property would not have been sold to answer this small claim of the Corporation on account of consolidated rates. Nemai no doubt by making payment of the small balance of Rs. 116/13/- claimed ta-have been subrogated and sought to enforce not merely his own mortgage but the claim for consolidated rates as well. Whether he was at all entitled to be subrogated under the Transfer of Property Act may be a nice question of law. But the fact remains that he claims to be subrogated and on that footing sought to enforce the Corporation's claim for consolidated rates on the debutter property: The entire debutter property was answerable for the realisation of consolidated rates. Inasmuch as the instant suit was not merely to enforce the mortgage dated July 16, 1945 in which the-mortgage security was only the sebaity interest but to enforce payment of the consolidated rates is well for the payment of which the property itself was

charged, the entire property came within the purview of the suit and not merely the sebait's interest in the debutter property. What, therefore, was sought to be sold in the mortgage suit is not merely the sebaity interest in the mortgaged property but the debutter property itself and what is sold is debutter property and not merely the sebaitv interest of Sital.

31. A point was raised that in the mortgage suit a proceeding was initiated by the purchaser as to whether a good title had been made out and there was an order for enquiry and the Registrar on his Report held that a good title had been made out and this had been confirmed by the court. It is, therefore, contended by Mr. B.C. Dutt the learned counsel for the purchaser Upendra that his title cannot be challenged now. Having regard to what is stated above and my finding that the tide in the debutter property has passed to the purchaser, it is not necessary to further consider this point.

32. The fact that the purchaser acquired title to the property which cannot be challenged now does not mean that the mortgage of July 16, 1945 became binding on the deity. This finding that the purchaser's title cannot be challenged now is not inconsistent with my other finding that the mortgage is not binding on the deity and the interest acquired by the mortgage is the sebaity interest only. The property is sold and the sale is upheld. There are however the sale-proceeds and the mortgage is shifted to the sale proceeds, and the question now remains to be considered who is entitled to the sale-proceeds? The sale proceeds now represent the mortgaged property. The mortgaged property was liable for the consolidated rates but not to answer the claim under the mortgage dated July 16, 1945. The sale proceeds are therefore only to be utilised for the payment of the Corporation charges and nothing on account of mortgage. The sum paid to the Corporation by the plaintiff Nemai amounting to Rs. 116/13/- is properly payable to him out of the sale proceeds. The rest except any sum paid to the Corporation on account of consolidated rates belongs to the deity. This has been improperly withdrawn by the plaintiff Nemai and his attorney Phanilal. They must refund it to the plaintiff and there will be a decree against them for the balance with interest at the rate of six per cent from October 7, 1946 uptil today.

33. I do not think that I should make any consideration in favour of Phanilal because the money withdrawn by Phanilal is on account of costs. I hold that so far as these costs are concerned, the deity should not be made liable. The cost of suit as originally instituted would have been comparatively small. The cost has become heavy because of the claim of Nemai to enforce his mortgage in this suit. The deity should not be made liable for these costs more particularly because this heavy cost incurred is attributable to the misdeeds of Nemai and Phanilal. The deity is entitled to the costs of the suit as against the defendants Nemai and Phanilal. The purchaser will pay his own costs. So also Gopinath will pay his own assets. This suit was continued as a pauper suit. My attention has been drawn to Or. 33 rule 10 and also to Ch. 12 rules 13 and 14 and Ch. 36 rules 53 and. 54 of this Court. The court-fees payable to the court in terms of the Code of Civil Procedure and the Rules referred to above would constitute a first charge on the amount payable under this decree. I direct the amount to be ascertained and out of the decretal amount this amount is to be paid in the first instance. The learned counsel who represented the deity at the request of the court and appeared throughout the proceeding is not entitled to a fee under Ch. 36 rules 53 and 54 without an express order of the court Having regard to the amount of labour put in by the learned counsel as also the solicitor for properly representing the claim of the plaintiff before me, I make a special order in favour of the attorney and the counsel and direct that fees be paid to them according to the rules.

BD/R.G.D.

34. *Order accordingly.*

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1964 SCC OnLine MP 30 : AIR 1965 MP 167

Madhya Pradesh High Court

(BEFORE V.R. NEWASKAR AND N.M. GOLWALKAR, JJ.)

Chamelibai Vallabhadas and others ... Appellants;

Versus

Ramchandrajee and others ... Respondents.

First Appeal No. 2 of 1961

Decided on July 30, 1964

The Judgment of the Court was delivered by

NEWASKAR, J.:— The suit out of which the present appeal arises was brought by plaintiff Sundarlal, s/o Manoharlal Brahmin claiming himself to be the Pujari and Shebait of a temple situated in Lohia Bazar Lashkar. The suit was brought by him as the next friend of the various idols of Ramchandraji, Seetaji, Laxmanji, etc., eight in all. According to Sundarlal the temple where all the above idols are installed is a portion of a bigger area and the entire properties situated in the area, as shown in the map filed along with the plaint, belong to the said idols and constitute a public endowment, the same having been dedicated to the said idols for the up-keep of the temple and for carrying on their worship. According to Sundarlal he used to recover rent of the properties and deposit the same with the defendant who, on the insistence of the members of the Hindu Community of the locality, had utilized part of the funds lying in deposit with him in building a Dharamshala within that area. However, it is said that the defendant in recent years has begun to claim title to the properties aforesaid to deny that of the idols. A declaration was accordingly claimed on behalf of the idols that the entire properties situated in the area belong to the idols and are their property having been dedicated for the up-keep of the temple and for carrying on worship and that any claim of the plaintiff contrary that of the idol was untenable.

2. The suit was resisted by the defendant who denied the right of the plaintiff to file the present suit on behalf of the idols. It was denied that Sundarlal Brahmin who had brought the present suit as well as his ancestors had been worshipping the various idols as Pujaris. The claim put forward by Sundarlal to Shebaitship was denied. It was denied that the properties situated in the area indicated in the map had been dedicated for the up-keep of the temple and constitute public endowment and that Sundarlal and his ancestors used to recover rent therefrom. The deposit of the income of the properties as 'AMANAT MANDIR' was also denied. It was denied that the defendant constructed the Dharmashala out of the amount lying as AMANAT on public insistence as according to him no member of the public had any such right. It was claimed by the defendant that he is in possession of the properties in his own personal and private right and do not constitute a public endowment. It was also contended that the defendant is in possession of the property in his own right for the last 50 years and a suit for a mere declaration was incompetent. The plaintiff, it is said, should have filed a suit claiming a consequential relief of possession after paying ad valorem court-fees. The plaintiff's claim was, according to the defendant, barred by res judicata due to the decision given by the Gwalior High Court in a case between the predecessor of the plaintiff and Mavasibaba a former Pujari. Bar of Section 92 of the CPC was also put forward. On the basis of these grounds it was contended that the suit was incompetent. On the basis of the pleadings aforesaid the following issues were framed by the trial Court:—

1. Whether Sundarlal had a right to file the present plaint on behalf of the idols?

2. Whether the properties excepting the actual temple where the idols are installed described in para. 3 of the plaint constitute religious endowment?
3. Whether the defendants are the trustees of the said property?
4. Whether the suit is barred by Section 42 of the Specific Relief Act?
5. Whether the suit is within time?
6. Whether the suit is barred by the principle of res judicata?
7. Whether the suit is barred by Section 92 of the CPC?

8. Whether the court-fees are sufficient?
9. Whether the defendant is entitled to Rs. 1,000 as damages for vexatious character of the suit?

3. The trial Court, after full trial, found that Sundarlal could file the present suit on behalf of the idols. The properties other than the temple, where the idols are installed, were held to be the debutter properties belonging to the idols and the defendant was held to be a trustee of the said properties. There was accordingly no bar to the present action by treason of Section 42 of the Specific Relief Act, Sections 11 and 92 of the CPC or of limitation. The defendant was held to be entitled to no damages for the alleged vexatious character of the suit as the suit was not of that description. The trial Court accordingly granted a declaration claimed on behalf of the idols.

4. This appeal is directed against that decision.

5. Mr. Chitale, who appeared for the appellant, contended that the materials on record indicated that Sundarlal, who has filed the present suit, is the nephew of one Jwalaprasad who had been appointed by the defendant as a Pujari at the temple and he was permitted to worship at the temple by reason of his relationship with Jwalaprasad. He was, it was contended, no better than defendant's employee and consequently has no light to file the present suit.

6. The learned counsel also pointed out that some of the properties claimed on behalf of the idols had been mortgaged by Mavasibaba and in a litigation that followed the properties became the exclusive properties of the defendant. The defendant has been in possession of those properties in his own right and not on behalf of the deities. The claim for mere declaration without a consequential relief of possession which was claimable on behalf of the idols, was not tenable in view of Section 42 of the Specific Relief Act.

7. It was next contended that the finding that the defendant was a trustee of the temple is not based on any reliable materials on record but is more or less conjectural. The claim of the plaintiff is also barred by limitation as the defendant had asserted his claim and denied that of the deity as far back as in the sear 1921 and the present claim for declaration filed in the year 1953 is barred by limitation.

8. In order to appreciate the contentions raised on behalf of the appellant it will be necessary to refer to oral and documentary materials on record having a bearing on the question as defendant's connection with the temple and other properties in suit.

9. First document to be considered is the entry of the year 1874–1875 of the register of Muafi of the erst-while Gwalior State. The entry referred cash-grant of Rs. 48 'Chandwad Shikka' in the name of Sukhramdas Guru Sewadas Bairagi for the Devasthan of Shriram temple. This grant was mentioned as having been, discontinued in Samvat Year 1929 but it was later continued from S.Y. 1931 in the name of Mavasi

Dafedar as he used to look after the worship of the temple until the appearance of Bankhandi Chela of Sukhramdas.

10. It thus appears that from the Samvat year 1931 Mavasi was do facto Pujari or Shebait. The origin of the temple was not clear from this. But it was clear that Sukhramdas Guru Sevadas was its Shebait.

11. The next document to be referred is a registered will executed by Mavasi alias Madhavdas claiming himself to be the Chela of Sukhramdas on 4-1-1900 appointing one Parsadi as a Pujari authorised to continue the worship and recover cash-grant and the income from the shops till the return of his Chela Ramdas after the executant's death.

12. The next document to be referred is the decision in a suit filed by Guttobai, w/o Jamnadas of the shop of Mathuradas Jamnadas against Mavasi on the basis of a registered deed of possessory mortgage, dated 20-5-1884 executed by Mavasi in respect of two shops, one Kotha, Pator together with a Chabutra at the back for Rs. 400. The claim was for the enforcement of the mortgage as the mortgagor had agreed to repay the amount with interest at the end of four years. The suit was decreed for Rs. 400 as against the property mortgaged. There was reference in the decision to other mortgages in respect of other shops for which he was to file a separate suit. There was compromise in execution proceedings with reference to the claim under the decree aforesaid on 4-1-1906 whereby the judgment-debtor agreed to give up his rights of a mortgagor in the property and making the decree-holder absolute owner of the same in satisfaction of the decree. Subsequent to this attempts were made first by one Vishnupant and later by Ramdas Chela of Mavasi to have the decree set aside. Vishnupant filed a revision petition before the then Chief Justice which was rejected on 22-12-1900 on the ground that he had no right to file the petition. Ramdas filed a suit to set aside the decree. This suit was also dismissed on the ground of res judicata on 14-10-1901.

13. It is thus clear that the defendant had become absolute owner of the properly covered by the mortgage of 1884. There was also reference to his possession as a mortgagee with reference to other shops. Suggestions were made in those proceedings indicating willingness on the part of the mortgage to return the property but they appear not to have been accepted by the defendant's predecessor. The effect of this was that the defendant's claim had become adverse to the then Shebait or de facto Shebait and his possession was in his own right as absolute owner of part of the properly and as a mortgagee as to other.

14. As regards the connection of Sundarlal with the temple property the defendant has produced and proved a document Ex. P-11. This was an agreement executed by Jwalaprasad on 21-2-1920 in favour of the defendant, who was then minor and was represented by his guardian Fulbai, consenting to worship the deities on payment of Rs. 2 P.M. as his remuneration and further acknowledging the right of the defendant to remove him any time. According to Sundarlal about 2 or 3 years before Jwalaprasad's death he began to perform Puja due to some disability having crept upon him. He admitted that there was nobody in the line of Mavasibaba. He claimed to be a nephew of Jwalaprasad and after his death he continued the worship in accordance with Jwalaprasad's desire. He accepted the fact that during the life-time of Jwalaprasad it was the defendant who recovered rent of all the shops and he continued to do so even thereafter.

He never gave him anything towards the expenses of the temple or for his

maintenance. He also did not repair the temple.

15. It is thus clear from the history of litigation between Mavasi and the defendant as also by the defendant's subsequent acts of employing Jwalaprasad as a mere servant on Rs. 2 P.M. fore worship, that the two shops had been in exclusive possession and ownership of the defendant right from the year 1900 and other shops had been in his possession as a mortgagee (sic) the person claiming as Shebait or de facto Shebait was unable to succeed in his claim against the defendant. The defendant moreover is in possession even since Jwalaprasad was appointed in 1920 as is admitted by Sundarlal. In this state of things two questions arise for consideration at the outset:—

1. Can Sundarlal, who had come in as a representative of a person appointed by the defendant as a servant to look after the worship, file the present suit against the defendant?
2. Assuming he can, is the claim for mere declaration competent and is it in time?

16. Answers to both these questions are against Sundarlal.

17. The question as to who can file a suit on behalf of a deity is discussed by B.K. Mukherjea in his book on the *Hindu Law of Religious and Charitable Trust—Tagore Law Lectures*—1962 Edition at pages 236, 239, 241, 245 and 249, at pages 236-237 it was observed by the learned author:—

> "A Hindu idol is sometimes spoken of a perpetual infant, but the analogy is not only incorrect but is positively misleading. There is no warrant for such doctrine in the rules of Hindu Law and as was observed by Rankin, C.J., in *Surendra* v. *Sri Sri Bhubaneshwari*, ILR 60 Cal 54 : (AIR 1933 Cal 295), it is an extravagant doctrine contrary to the decision of the Judicial Committee in such cases as *Damodar Das* v. *Lakhan Das*, (1909-10) 37 IA 147. It is hue 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 Code of Civil Procedure 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"

18. The learned author after discussing the position of a Shebait, a worshipper, etc., in the matter of their competency to file a suit in their own name or in the name of the idol summed up the result 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, be said to be merged in that of the Shebait.
>
> (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. The law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol.
>
> (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. Hut where the endowment is a public one, Section 92 of the CPC 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 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 S. 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.

(4) When 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—She 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 persons 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.

(5) Where the joinder of the idol is necessary or desirable, there is difference of opinion as to whether the provisions of Order 32 of the CPC should, 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 is that the provisions of O. 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 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 role, be given only after hearing the persons interested."

19. Dealing with the position of a de facto Shebait although it was recognised by the learned author that a de facto Shebait properly in possession of the office of the manager or head of the institution can maintain an action on behalf of the trust yet the mere fact that a man secures some how or other the custody of an idol and begins to worship it would not by itself make him a de facto Shebait Reference in this connection was made to the observations of Mukherjea, J., in *Panchkari* v. *Amode*, 41 Cal WN 1349 : (AIR 1949 Cal 559).

20. These observations indicate that if a person

comes forward to sue on behalf of a deity claiming himself to be the Shebait unless he makes out that claim of his he ought not to be allowed to sue so as to bind the deity by the result of the ligation. It is no doubt true that where there is no Shebait or the Shebait refuses to act by sheer difference or negligence or any other cause or where the suit is directed towards assailing the acts of the Shebait which pre-judicially affect the interest of the idol the law recognises a right of a person interested on behalf of the idol to file a suit.

21. Now in the present case Sundarlal has come forward to file the present suit claiming himself to be the Shebait. It is, however, clear from the materials on record that he came in when his uncle Jwalaprasad, who was a servant appointed by the defendant to perform worship on a salary of Rs. 2 P.M., was disabled from doing so and on his death about 2 years later continued to work presumably in much the same

capacity as his uncle. Thus the basis of Sundarlal's claim to sue as a Shebait not being made out suit filed by him ought to be treated as by an unauthorised person. No specific claim as a mere worshipper for assailing the prejudicial acts of a past Shebait on the ground that there is no Shebait or the Shebait has refused or neglected to act has been put forward. It would, therefore, seem that Sundarlal's right to file the present suit is far from clear. Indications on authorities would suggest that he could not have sued.

22. Assuming, however, that Sundarlal, as a person generally interested in the deity, can file this suit question is whether the present claim for mere declaration is competent.

23. It is clear from the relief claimed in the plaint that a declaration as to the title of the deity is sought by Sundarlal as a Shebait in respect of the entire properties indicated in the map including shops, Kotha, and Chabutra as far back as in the portion where the deities are actually installed. The history of the previous litigation indicates that the defendant had become absolute owner of two shops, Kothai and Chabutra as far back as in the year 1906. Moreover his claim to possession as a mortgagee in respect of the other shops, etc., was acknowledged by the then de facto or de jure Shebait Mavasi. Not only this the defendant has been admittedly recovering rent and it is not proved that this he did on behalf of the deity. He is clearly recovering them on his own account. In the year 1920 he even takes upon himself to appoint a servant on his behalf to worship the deity. He has admittedly not spent for the deity out of income thus recovered. The complaint in the plaint is that he is claiming title in himself. It is thus clear that the defendant is in possession of the substantial part of the property adversely to the deity. In face of this a suit for a mere declaration would be clearly incompetent in view of the provisions of Section 42 of the Specific Relief Act more especially so as the suit is filed in the name of the deity and by a person who claimed himself to be a Shebait.

24. With these findings it would be really unnecessary to record a conclusive finding in this suit whether the deities are public deities or deities of a private person, whether there is a public endowment or a private endowment. It would further be unnecessary to find which properties out of the suit properties belong to the deities and which do not. But it would prima facie appear that a claim for a declaration with reference to substantial portion of the property including shops, Kotha, Chabutra, etc., would be barred by time as the defendant has secured title adverse to the deity in a litigation between an ex-de facto Shebait and subsequent attempt to challenge the decision had been held to be barred by res judicata. Even a claim for declaration with reference to the other shops would appear to be barred by limitation as the defendant had claimed to be in possession on his own account since long for some time as a mortgagee and later as absolute owner and more than 30 years had elapsed since then.

25. In view of our findings on the first two questions the present suit is unsustainable. The appeal is, therefore, allowed and the suit is dismissed. Costs of the defendant both here and in the Court below shall be paid by Sundarlal.

IG/HGP/DVC

26. *Appeal allowed.*

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1966 Supp SCR 270 : AIR 1967 SC 436

In the Supreme Court of India

(BEFORE K. SUBBA RAO AND V. RAMASWAMI, JJ.)

VEMAREDDI RAMARAGHAVA REDDY AND OTHERS ... Appellants;

Versus

KONDURU SESHU REDDY AND OTHERS ... Respondents.

Civil Appeal No. 265 of 1964, decided on April 26, 1966

Advocates who appeared in this case :

P. Babula, K. Rajendra Chaudhuri and K.R. Chaudhuri, Advocates, for the Appellants;

P. Ram Reddy and A.V.V. Nair, Advocates, for Respondent 1;

T.V.R. Tatachari, Advocate, for Respondent 2.

The Judgment of the Court was delivered by

V. RAMASWAMI, J.— This appeal is brought by certificate on behalf of the defendants against the judgment of the High Court of Andhra Pradesh dated August 7, 1962 in Appeal Suit No. 312 of 1957.

2. In the village of Varagali, in the district of Nellore, there is a temple in which is enshrined the idol of Sri Kodandaramaswami. The temple was built in the middle of the last century by one Burla Rangareddi who managed the affairs of the temple and its properties during his lifetime. After his death, his son, Venkata Sub-bareddy was in management. By a deed dated August 19, 1898 Venkata Subbareddi relinquished his interest in the properties in favour of one Vemareddy Rangareddi whose family members are Defendants 1 to 5. The plaintiff filed a petition before the Assistant Commissioner for Hindu Religious Endowments, Nellore alleging mismanagement of the temple and its properties by the first defendant. Notice was issued to the 1st defendant to show cause why the temple properties should not be leased out in public auction and the first defendant contested the application alleging that the properties were not the properties of the temple but they belonged to his family. After enquiry, the Assistant Commissioner submitted a report to the Hindu Religious Endowments Board, Madras recommending that a scheme of management may be framed for the administration of the temple and its properties. The Board thereafter commenced proceedings for settling a scheme and issued notice to the 1st defendant to state his objections. The 1st defendant reiterated his plea that the temple was not a public temple. The Board held an enquiry and by its order dated October 5, 1949 held that the temple was a public one. On January 18, 1950 the 1st defendant filed OP No. 3 of 1950 on the file of the District Judge, Nellore (*1*) for setting aside the order of the Board dated October 5, 1949 declaring the temple of Sri Kodandaramaswamivari as a temple defined in Section 6, clause 17 of the Act, (*2*) for a declaration that the temple was a private temple and (*3*) for a declaration that the properties set out in the schedule annexed to the petition were the personal properties of his family and they did not constitute the temple properties. Originally, the Commissioner, Hindu Religious Endowment Board, Madras was impleaded as the sole respondent in the petition. The present plaintiff later on got himself impleaded as the 2nd respondent therein. Both the respondents contested the petition on the ground that the temple was a public temple and that the properties mentioned in the schedule were the properties of the temple and not the personal properties of the 1st defendant. For reasons which are not apparent on the record the petition was not disposed of for a number of years. In the

meantime Madras Act 2 of 1927 was repealed and the Hindu Religious and Charitable Endowments Act of 1951 was enacted. Then came the formation of the State of Andhra Pradesh. By reason of these changes the Commissioner of Hindu Religious Endowments in the State of Andhra Pradesh was impleaded as the 1st respondent to the petition. Thereafter there was a compromise between the Petitioners 1 to 5 on the one hand and the Commissioner, the 1st respondent on the other. The District Judge, Nellore recorded the compromise and passed a decree in terms thereof by his order dated October 28, 1954.

3. The material clauses of the compromise decree. Ex. B-11 are as follows:

"*1.* That Sri Kodandaramaswami temple, Varagali, be and hereby is declared as a temple as defined in Section 6, clause 17 of the Hindu Religious and Charitable Endowments Act;

2. That Petitioners 1 to 4 be and hereby are, declared as the present hereditary trustees of the said temple;

3. That the properties set out in Schedule A filed herewith be and hereby are, declared as the personal properties of the family of the petitioners subject to a charge as noted below;

4. That Petitioners 1 to 4 their heirs, successors administrators and assignees do pay to the said temple for its maintenance 12½ putties of good Mologolukulu paddy and Rs 600 every year by the 31st of March;

5. That the said 12½ putties of good Mologolukulu paddy and Rs 600 due every year be a charge on the lands mentioned in Schedule A given hereunder;

6. That the Petitioners 1 to 4 and their successors, heirs and assignees be liable to pay 12½ putties of Mologolukulu paddy and Rs 600 every year whether the lands yield any income or not.

* * *

10. That the H.R. & C.E. Commissioner be entitled to associate non hereditary trustees not exceeding two, whenever they consider that such appointment is necessary and in the interests of the management;

11. That the Managing trustee shall be one of the four hereditary trustees or their successors in title only and not the non hereditary trustees;

* * *

15. That the right of the 2nd respondent to agitate the matter by separate proceedings will be unaffected by the terms of this compromise to which he is not a party."

It is apparent from the terms of the compromise decree that the temple was declared to be a public temple as defined in Section 6, clause 17 of the Hindu Religious and Charitable Endowments Act and that the properties set out in Schedule A annexed to the compromise petition were declared to be the personal properties of Defendants 1 to 5. The decree created a liability on their part to deliver to the temple for its maintenance 12½ putties of paddy and pay Rs 600 cash every year. The present suit was instituted on October 31, 1955 for a declaration that the provision in the compromise decree that the lands mentioned in the schedule were the personal properties of Defendants 1 to 5 and not the absolute properties of the temple, was not valid and binding on the temple. Defendants 1 to 5 objected to the suit on the ground that it was not open to the plaintiff to seek a declaration that a part of the decree was not binding but the plaintiff should have directed his attack against the entirety of the decree. The trial court dismissed the suit on the ground that the suit was defective and that Section 93 of the Hindu Religious and Charitable Endowments Act of 1951 was a bar to the institution of the suit. Against the decree of the trial court the plaintiff preferred an appeal — AS 312 of 1957 to the High Court of Andhra Pradesh. The

plaintiff also filed CMP No. 6422 of 1962 praying for amendment of the plaint to the effect that the compromise decree in OP No. 3 of 1950 was not valid and binding on the temple. After hearing Defendants 1 to 5 the High Court allowed the amendment sought for by the plaintiff and held that the amendment cured the defect with regard to the prayer for a declaration to have the compromise decree set aside partially. The High Court further held that Section 93 of the Hindu Religious and Charitable Endowments Act was not a bar to the suit and Section 42 of the Specific Relief Act was not exhaustive and the suit was therefore maintainable. In the result, the High Court allowed the appeal and remanded the suit to the trial court for disposing the same on the remaining issues.

4. It was contended, in the first place on behalf of the appellants that declaratory suits are governed exclusively by Section 42 of the Specific Relief Act and if the requirements of that section are not fulfilled no relief can be granted in a suit for a mere declaration. It was submitted that the plaintiff must satisfy the court, in such a suit, that he is entitled either to any legal character or to any right in any property. It was argued for the appellants that the plaintiff has brought the suit as a mere worshipper of the temple and that he has no legal or equitable right to the properties of the temple which constitute the subject-matter of the suit. It was pointed out that the plaintiff has not asked for a declaration of his legal character as a worshipper of the temple but he has asked for the setting aside of the compromise decree in OP No. 3 of 1950 with regard to the nature of the temple properties. It was contended that in a suit of this description the conditions of Section 42 of the Specific Relief Act are not satisfied and the suit is, therefore, not maintainable.

5. The first question to be considered in this appeal is whether the suit is barred by the provisions of Section 42 of the Specific Relief Act which states:

> "42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
>
> *Explanation.*— A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

6. The legal development of the declaratory action is important. Formerly it was the practice in the Court of Chancery not to make declaratory orders unaccompanied by any other relief. But in exceptional cases the Court of Chancery allowed the subject to sue the Crown through the Attorney-General and gave declaratory judgments in favour of the subject even in cases where it could not give full effect to its declaration. In 1852 the Court of Chancery Procedure Act was enacted and it was provided by Section 50 of that Act no suit should be open to objection on the ground that a merely declaratory decree or order was sought thereby, and it would be lawful for the court to make binding declarations of right without granting consequential relief. By Section 19 of Act 6 of 1854, Section 50 of the Chancery Procedure Act was transplanted to India and made applicable to the Supreme Courts. With regard to courts other than the courts established by Charters the procedure was codified in India for the first time by the Civil Procedure Code, 1859, where the form of remedy under Section 19 of Act 6 of 1854 was incorporated as Section 15 of that Act which stood as follows:

> "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the civil courts to make binding declarations of right without granting consequential relief."

In 1862 the provisions of the Civil Procedure Code of 1859 were extended to the courts established by Charters when the Supreme Courts were abolished and the present High Courts were established. In 1877 the Civil Procedure Code, 1859 was repealed and the Civil Procedure Code of 1877 was enacted. The provision regarding declaratory relief was transferred to Section 42 of the Specific Relief Act which was passed in the same year. This section which is said to be a reproduction of the Scottish action of *declarator*, has altered and to some extent widened the provisions of Section 15 of the old Code of 1859.

7. It was argued on behalf of the appellants that, in the present case, the plaintiff was suing as a worshipper of the temple and that he was not suing as a person entitled to any legal character or to any right as to any property and so the suit was barred by the provisions of Section 42 of the specific Relief Act.

8. Upon this argument we think that there is both principle and authority for holding that the present suit is not governed by Section 42 of the Specific Relief Act. In *Fischer* v. *Secretary of State for India in Council*[1] Lord Macnaghten said of this section:

> "Now, in the first place it is at least open to doubt whether the present suit is within the purview of Section 42 of the Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of Section 50 of the Chancery Procedure Act of 1852 (15 & 16 Vict. c. 86) as interpreted by judicial decision. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind."

9. In *Partab Singh* v. *Bhabuti Singh*[2] the appellants sued for a declaration that a compromise of certain pre-emption suits and decrees passed thereunder made on their behalf when they were minors were not binding on them, having been obtained by fraud and in proceedings in which they were practically unrepresented. The Subordinate Judge having decreed the suit on appeal the members of the Court of the Judicial Commissioner differed upon the question whether the declaration sought should be refused as a matter of discretion under Section 42 of the Specific Relief Act. Before the Judicial Committee it was contended for the respondent that the suit having been filed for the purpose of obtaining a declaratory decree only was bad in form inasmuch as it did not pray that the decree should be set aside; but that, assuming that it was rightly framed in asking only for a declaratory decree, the Court had a discretion as to the granting or refusing such a declaration. The Judicial Committee observed that Section 42 of the Specific. The injury complained of was that the Court has, by recording the compromise in OP No. 3 of 1950, deprived the deity of its present title to certain trust properties. The relief which the plaintiff seeks is for a declaration that the compromise decree was null and void and if such a declaration is granted the deity will be restored to its present rights in the trust properties. A declaration of this character, namely, that the compromise decree is not binding upon the deity is in itself a substantial relief and has immediate coercive effect. A declaration of this kind was the subject-matter of appeal in *Fischer* v. *Secretary of State for India in Council*[1] and falls outside the purview of Section 42 of the Specific Relief Act and will be governed by the general provisions of the Civil Procedure Code like Rule 9 or Order 7 of the Rule 7.

10. On behalf of the respondents reliance was placed on the decision of the Judicial

Committee in *Sheoparsan Singh* v. *Ramnandan Prasad Singh*[3] In that case, the plaintiffs had prayed for a declaration that a will, probate of which had been granted, was not genuine and the Judicial Committee pointed out that under Section 42 a plaintiffs has to be entitled to a legal character or to a right as a property and that the plaintiff could not predicate this of themselves as they described themselves themselves in the plaint as entitled to the estate in case of an intestacy whereas, as things stood, there was no intestacy, since the will had been affirmed by a Court exercising appropriate jurisdiction. The suit was, indeed, nothing more than an attempt to evade or annual the adjudication in the testamentary suit. The suit was held to fail at the very outset because the plaintiffs were not clothed with a legal character or title which would authorise them to ask for the declaratory decree sought by their plaint. There is no reference in this case to the previous decision of the Judicial Committee in *Fischer* v. *Secretary of State for India in Council*[4]. In our opinion, the decision of the Judicial Committee in *Sheoparsan Singh* v. *Ramnandan Prasad Singh*[3] should be explained on the ground that the will which was sought to be avoided had been affirmed by a Court exercising appropriate jurisdiction and as the propriety of that decision could not be impeached in subsequent proceedings, the plaintiffs could not sue, not being reversioners.

11. The legal position is also well established that the worshipper of a Hindu temple is entitled, in certain circumstances, to bring a suit for declaration that the alienation of the temple properties by the *de jure* Shebait is invalid and not binding upon the temple. If a Shebait has improperly alienated trust property a suit can be brought by any person interested for a declaration that such alienation is not binding upon the deity but no decree for recovery of possession can be made in such a suit unless the plaintiff in the suit has the present right to the possession. Worshippers of temples are in the position of *cestui que trustent* or beneficiaries in a spiritual sense (See *Vidhyapurna Thirthaswami* v. *Vidhyanidhi Thirthaswami*[4]. Since the worshippers do not exercise the deity's power of suing to protect its own interests, they are not entitled to recover possession of the property improperly alienated by the Shebait, but they can be granted a declaratory decree that the alienation is not binding on the deity (See for example, *Kalyana Venkataramana Ayyanagar* v. *Kasturiranga Ayyangar*[5] and *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*[6]. It has also been decided by the Judicial Committee in *Abdur Rehim* v. *Mahomed Barkat Ali*[7] that a suit for a declaration that property belongs to a wakf can be maintained by Mahomedans interested in the wakf without the sanction of the Advocate-General, and a declaration can be given in such a suit that the plaintiff is not bound by the compromise decree relating to wakf properties.

12. In our opinion Section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of Section 42 of the Specific Relief Act.

13. The next question presented for determination in this case is whether the compromise decree is invalid for the reason that the Commissioner did not represent the deity. The High Court has taken the view that the Commissioner could not represent the deity because Section 20 of the Hindu Religious and Charitable Endowments Act provided only that the administration of all the endowments shall be under the superintendence and control of the Commissioner. Mr Babula Reddy took us through all the provisions of the Act but he was not able to satisfy us that the Commissioner had authority to represent the deity in the judicial proceedings. It is true that under Section 20 of the Act the Commissioner is vested with the power of superintendence and control over the temple but that does not mean that he has

authority to represent the deity in proceedings before the District Judge under Section 85 of the Act. As a matter of law the only person who can represent the deity or who can bring a suit on behalf of the deity is the Shebait, and although a deity is a judicial person capable of holding property, it is only in an ideal sense that property is so held. The possession and management of the property with the right to sue in respect thereof are, in the normal course, vested in the Shebait, but where, however, the Shebait is negligent or where the Shebait himself is the guilty party against whom the deity needs relief it is open to the worshippers or other persons interested in the religious endowment to file suits for the protection of the trust properties. It is open, in such a case, to the deity to file a suit through some person as next friend for recovery of possession of the property improperly alienated or for other relief. Such a next friend may be a person who is a worshipper of the deity or as a prospective Shebait is legally interested in the endowment. In a case where the Shebait has denied the right of the deity to the dedicated properties, it is obviously desirable that the deity should file the suit through a disinterested next friend, nominated by the court. The principle is clearly stated in *Pramath Nath* v. *Pradymna Kumar*[1]. That was a suit between contending shebaits about the location of the deity, and the Judicial Committee held that the will of the idol on that question must be respected, and inasmuch as the idol was not represented otherwise than by shebaits, it ought to appear through a disinterested next friend appointed by the Court. In the present case no such action was taken by the District Court in OP No. 3 of 1950 and as there was no representation of the deity in that judicial proceeding it is manifest that the compromise decree cannot be binding upon the deity. It was also contended by Mr P. Rama Reddy on behalf of Respondent 1 that the compromise decree was beyond the scope of the proceedings in OP No. 3 of 1950 and was, therefore, invalid. In our opinion, this argument is well-founded and must prevail. The proceeding was brought under Section 84(2) of the old Act (Act 2 of 1927) for setting aside the order of the Board, dated October 5, 1949 declaring the temple of Shri Kodandaramaswami as a temple defined in Section 6, clause 17 of the Act and for a declaration that the temple was a private temple. After the passing of the new Act, namely Madras Act 19 of 1951, there was an amendment of the original petition and the amended petition included a prayer for a further declaration that the properties in dispute are the personal properties of the petitioner's family and not the properties of the temple. Such a declaration was outside the purview of Section 84(2) of Madras Act 2 of 1927 and could not have been granted. We are, therefore, of the opinion that the contention of Respondent 1 is correct and that he is entitled to a declaratory decree that the compromise decree in OP No. 3 of 1950 was not valid and was not binding upon Sri Kodandaramaswami temple.

14. We have gone into the question of the validity of the compromise decree because both the parties to the appeal invited us to decide the question and said that there was no use in our remanding the matter to the trial court on this question and the matter will be unduly protracted.

15. For the reasons expressed, we hold that the decree passed by the trial court should be set aside and the plaintiff-Respondent 1 should be granted a declaratory decree that the compromise decree in OP No. 3 of 1950 on the file of the District Court, Nellore is not valid and binding on Sri Kodandaramaswami temple. Subject to this modification, we dismiss this appeal. The parties will bear their own costs throughout.

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* Appeal from the Judgment and Order dated 7th August, 1962 of the Andhra Pradesh High Court in Appeal Suit No. 312 of 1957.

[1] 26 IA 16

[2] 40 IA 182

[3] ILR 43 Cal 694 (PC)

[4] ILR 27 Mad 435 at 351

[5] ILR 40 Mad 212

[6] IRL 41 Mad 124

[7] 55 IA 96

[8] ILR 52 Cal 809 PC

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(1967) 2 SCR 618 : AIR 1967 SC 1044

In the Supreme Court of India

(BEFORE K. SUBBA RAO, C.J. AND J.M. SHELAT, J.)

BISHWANATH AND ANOTHER ... Appellants;

Versus

SRI THAKUR RADHA BALLABHJI AND OTHERS ... Respondents.

Civil Appeal No. 780 of 1964, decided on February 6, 1967

Advocates who appeared in this case :

M.S. Gupta, Lalit Kumar and S.N. Verma, Advocates, for the Appellants;

J.P. Goyal and Raghunath Singh, Advocates, for Respondent 1.

The Judgment of the Court was delivered by

K. SUBBA RAO, C.J.— This appeal by certificate is preferred against the decree of the High Court of Judicature at Allahabad decreeing the suit filed by the respondents for possession of the plaint-schedule property.

2. Shri Thakur Radhaballabhji, the deity, represented by Yasodanandan as next friend, filed OS No. 61 of 1946 in the court of the 2nd Civil Judge, Kanpur, against the appellants for a declaration that the deity was the proprietor of House No. 49/54 situate in Ban Bazar in the City of Kanpur, for possession thereof and for mesne profits. The case of the plaintiff (1st respondent herein) was that Lala Jagan Prasad, the 2nd defendant to the suit, was the manager and Sarvarakar of the diety, that the said manager executed a sale deed dated January 13, 1942, conveying the said property to one Lala Behari Lal, the 1st defendant to the suit, for a consideration of Rs 10,000 and that the sale, not being for necessity or for the benefit of the idol, was not binding in the deity. It was further alleged that, as the 2nd defendant had taken no steps to recover the property, no order to safeguard the rights of the idol the suit was filed through Jagan Prasad, who was one of the devotees and worshipper of the deity and who had been taking keen interest in the management of the temple where the deity is installed. To that suit the alience was made the 1st defendant and the manager, the 2nd defendant.

3. The 1st defendant set up the case that the suit property did not constitute the property of the idol but was the property of the 2nd defendant purchased by him out of his own funds. He further alleged that the suit house was in a dilapidated condition, that its rebuilding would involve the idol in heavy and unprofitable expenditure, that therefore the second defendant as its manager, acting as a prudent man, sold the same for a good price to the 1st defendant and that, as the sale transaction was for the benefit of the idol it would be binding on the plaintiff. He also questioned the right of Yasodanandan to represent the idol and to bring the suit on its behalf. Both the learned 2nd Civil Judge, Kanpur, in the first instance, and, on appeal, the High Court concurrently held that the sale was not for the benefit of the deity and that the consideration was not adequate. They also held that in the circumstances of the case the idol had the right to file the suit represented by Yasodanandan, who was a worshipper of the deity and was helping the second defendant in the management of the temple. In the result the trial court gave a decree for possession and for recovery of Rs 1400 as past mesne profits against the 1st defendant on condition that the plaintiff returned a sum of Rs 10,000 to the 1st defendant within two months from the date of the decree and also that the plaintiff would be entitled to future mesne profits at Rs 45 p.m. till the date of delivery of possession of the property. The High Court

confirmed the same. Hence the present appeal.

4. Mr M.S. Gupta, learned counsel for the appellant, canvassed the correctness of the findings of both the courts on the questions of fact as well as of law. On the questions of fact, namely, whether the impugned transaction was binding on the idol and was supported by consideration, we do not think we would be justified to permit the appellant to question their correctness, because the said findings are concurrent and are based upon appreciation of the relevant evidence. We accept the said findings.

5. The only outstanding question, therefore, is whether the suit is maintainable by the idol represented by Yasodanandan, who is a worshipper as well as a person who had been assisting the 2nd defendant in the management of the temple.

6. Two obstacles are raised against the maintainability of the suit, namely, (1) Section 92 of the Code of Civil Procedure is a bar to the maintainability of the suit, and (2) a suit for possession of the property of the idol, after setting aside the alienation, could only be filed by the Shebait and none else could represent the deity.

7. It is settled law that to invoke Section 92 of the Code of Civil Procedure, 3 conditions have to be satisfied, namely, (*i*) the trust is created for public purposes of a charitable or religious nature; (*ii*) there was a breach of trust or a direction of court is necessary in the administration of such a trust; and (*iii*) the relief claimed is one or other of the reliefs enumerated therein. If any of the 3 conditions is not satisfied, the suit falls outside the scope of the said section. A suit by an idol for a declaration of its title to property and for possession of the same from the defendant, who is in possession thereof under a void alienation, is not one of the reliefs found in Section 92 of the Code of Civil Procedure. That a suit for declaration that a property belongs to a trust is held to fall outside the scope of Section 92 of the Code of Civil Procedure by the Privy Council in *Abdur Rahim* v. *Barkat Ali*[1], and by this Court in *Mahant Pragdasji Guru Bhagwandasji* v. *Patel Ishwarlalbhai Narsi-bhai*[2] on the ground that a relief for declaration is not one of the reliefs enumerated in Section 92 of the Code of Civil Procedure. So too, for the same reason a suit for a declaration that certain properties belong to a trust and for possession thereof from the alienee has also been held to be not covered by the provisions of Section 92 of the Code of Civil Procedure: See *Mukhda Mannudas Bairagi* v. *Chagan Kisan Bhawasar*[3]. Other decisions have reached the same result on a different ground, namely, that such a suit is one for the enforcement of a private right. It was held that a suit by an idol as a juristic person against persons who interfered unlawfully with the property of the idol was a suit for enforcement of its private right and was, therefore, not a suit to which Section 92 of the Code of Civil Procedure applied: see (*Darshan Lal* v. *Shibji Maharai Birajman*[4] and *Madhavrao Anandrao Raste* v. *Shri Omkareshvar Ghat*[5].) The present suit is filed by the idol for possession of its property from the person who is in illegal possession thereof and, therefore, it is a suit by the idol to enforce its private right. The suit also is for a declaration of the plaintiff's title and for possession thereof and is, therefore, not a suit for one of the reliefs mentioned in Section 92 of the Code of Civil Procedure. In either view, this is a suit outside the purview of Section 92 of the said Code and, therefore, the said section is not a bar to its maintainability.

8. The second question turns upon the right of a worshipper to represent an idol when the Shebait or manager of the temple is acting adversely to its interest. Ganapathi Iyer in his valuable treatise on "*Hindu and Mahomedan Endowments*" 2nd Edn., at p. 226, had this to say in regard to the legal status of an idol in Hindu law:

> "The ascription of a legal personality to the deity supposed to be residing in the image meets with all practical purposes. The deity can be said to possess property only in an ideal sense and the theory is, therefore, not complete unless that legal personality is linked to a natural person."

It would be futile to discuss at this stage the various decisions which considered the

relationship between the idol and its Shebait or Manager qua the management of its property, as the Privy Council in *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*[6] has settled the legal position and stated thus:

> "There is no doubt that an idol may be regarded as a juridicial person capable as such of holding property, though it is only in an ideal sense that property is so held."

Dealing with the position of the Shebait of such an idol, the Privy Council proceeded to state:

> "...it till remains 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 vested in the shebait, not in the idol."

This was a case where the Shebait filed a suit for eviction from the dedicated property within three years after attaining majority and the Board held that, as he had the right to bring the suit for the protection of the dedicated property, Section 7 of the Limitation Act, 1877 would apply to him. The present question, namely, if a Shebait acts adversely to the interest of the idol whether the idol represented by a worshipper can maintain a suit for eviction, did not arise for consideration in that case. That question falls to be decided on different considerations.

9. Three legal concepts are well settled: (*1*) An idol of a Hindu temple is a juridical person; (*2*) when there is a Shebait, ordinarily no person other than the Shebait can represent the idol; and (3) worshippers of an idol are its beneficiaries, though only in a spiritual sense. It has also been held that persons who go in only for the purpose of devotion have, according to Hindu law and religion, a greater and deeper interest in temples than mere servants who serve there for some pecuniary advantage: see *Kalyana Venkataramana Ayyangar* v. *Kasturi Ranga Ayyangar*[7]. In the present case, the plaintiff is not only a mere worshipper but is found to have been assisting the 2nd defendant in the management of the temple

10. The question is, can such a person represent the idol when the Shebait acts adversely to its interest and fails to take action to safeguard its interest. On principle we do not see any justification for denying such a right to the worshipper. An idol is in the position of a minor when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an *ad hoc* power of representation to protect its interest. It is a pragmatic, yet a legal solution to a difficult situation. Should it be held that a Shebait, who transferred the property, can only bring a suit for recovery, in most of the cases it will be an indirect approval of the dereliction of the Shebait's duty, for more often than not he will not admit his default and take steps to recover the property, apart from other technical pleas that may be open to the transferee in a suit. Should it be held that a worshipper can file only a suit for the removal of a Shebait and for the appointment of another in order to enable him to take steps to recover the property, such a procedure will be rather a prolonged and a complicated one and the interest of the idol may irreparably suffer. That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol. It has been held in a number of decisions that worshippers may file a suit praying for possession of a property on behalf of an endowment; see *Radhabai Kom Chimnaji Sali* v. *Chimnaji Bin Ramji*[8], *Zafaryab Ali* v. *Bakhtawar Singh*[9], *Chidambaranatha Thambiran Alias Sivagnana Desika Gnanasambanda Pandara Sannadhi* v. *P.S. Nallasiva*[10] *Mudaliar*, *Dasondhav* v. *Muhammad Abu Nasar*[11], *Kalayana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar*[12], *Shri Radha Kirshnaji* v. *Rameshwar Prashad Singh*[13], *Manmohan Haldar* v. *Dibbenda Prosad Roy Choudhury*[14].

11. There are two decisions of the Privy Council, namely, *Pramatha Nath Mullick* v.

Pradyumna Kumar Mullick[15] and *Kanhaiya Lal* v. *Hamid Ali*[16], wherein the Board remanded the case to the High Court in order that the High Court might appoint a disinterested person to represent the idol. No doubt in both the cases no question of any deity filing a suit for its protection arose, but the decisions are authorities for the position that apart from a Shebait, under certain circumstances, the idol can be represented by disinterested persons. B.K. Mukherjea in his book "*The Hindu Law of Religious and Charitable Trust*" 2nd Edn., summarizes the legal position by way of the following propositions, among others, at p. 249:

> "(*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 be said to be merged in that of the Shebait.
>
> (*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. The law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol."

This view is justified by reason as well by decisions.

12. Two cases have been cited before us which took a contrary view. In *Kunj Behari Chandra* v. *Shri Sri Shyam Chand Thakur*[17], it was held by Agarwala, J., that in the case of a public endowment, a part of the trust property which had been alienated by the Shebait or lost in consequence of his action could be recovered only in a suit instituted by a Shebait. The only remedy which the members of the public have, where the property had been alienated by a person who was a shebait for the time being was to secure the removal of the shebait by proceedings under Section 92 of the Code of Civil Procedure and then to secure the appointment of another shebait who would then have authority to represent the idol in a suit to recover the idol's properties. So too, a Division Bench of the Orissa High Court in *Artatran Alekhagadi Brahma* v. *Sudersan Mohapatra*[18] came to the same conclusion. For the reasons given above, with great respect, we hold that the said two decisions do not represent the correct law on the subject.

13. In the result, agreeing with the High Court we hold that the suit filed by the idol represented by a worshipper, in the circumstances of the case is maintainable. The appeal fails and is dismissed with costs.

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* Appeal from the Judgment and Decree dated 21st December, 1959 of the Allahabad High Court in First Appeal No. 87 of 1948.

[1] (1928) LP 55 IA 96

[2] (1952) SCR 513

[3] ILR 1957 Bom, 809

[4] (1922) ILR 45 All 215

[5] (1928) 31 Bom LR 192

[6] (1904) LR 31 IA 203, 209, 210

[7] (1916) ILR at Mad, 212, 225

[8] (1878) ILR 3 Bom 27

[9] (1883) ILR 5 All 497

[10] (1917) 6 Law Weekly 666

[11] (1911) ILR 33 All 660, 664

[12] AIR 1917 Mad 112

[13] AIR 1924 Pat 584

[14] AIR 1948 Cal 199

[15] (1925) LR 52 IA 245

[16] (1933) LR 60 IA 263

[17] AIR 1938 Pat 394

[18] AIR 1954 Orissa II

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(1979) 3 Supreme Court Cases 409

(BEFORE R. S. SARKARIA AND V. D. TULZAPURKAR, JJ.)

PROFULLA CHORONE REQUITTE AND OTHERS .. Appellants;

Versus

SATYA CHORONE REQUITTE .. Respondent.

and

Vice-Versa

Civil Appeal Nos. 1873-1874 of 1970†, decided on March 2, 1979

Hindu Law — Religious endowment — Shebaitship — Not only an office but a heritable property in a limited sense which devolves according to Hindu law in absence of any stipulation in the endowment or usage or custom to the contrary — Shebaitship generally not transferrable but can be relinquished in favour of co-shebaits — Question whether shebaits can put an end to or give a different direction to the endowment, left open (Paras 20 to 27)

Hindu Law — Religious endowments — Private and public — Distinction (Para 23)

Hindu Law — Religious endowment — Shebaits — Who are — Interpretation of will creating the endowment — No express provision for shebaitship made in the wills creating absolute debutter in favour of deity enshrined in the dwelling house and providing for use of the house for residence of descendants of the testator — Among the trustees, those who were descendants, relinquishing trusteeship — On facts and interpretation of the wills, only the sons and descendants and not the trustees, held, were shebaits having right to reside in the house — Wills (Paras 29 to 52)

Hindu Law — Religious endowments — Shebaits — Right to maintain suits — Held, only shebaits and not trustees have locus standi to maintain suits in respect of debutter property — Where all shebaits not impleaded suit, held, not maintainable — Civil Procedure Code, 1908, Order 1, Rule 3 (Para 53)

One 'D' made two wills in 1898, one in respect of his dwelling house situated in the then French territory of Chandernagore and the other regarding his properties in the then British India appointing his wife, two sons and two nephews as executrix, executors and trustees. By his will in respect of his Chandernagore house, he created an absolute debutter in favour of his family deity and bequeathed to his executors and trustees the house "upon trust to stand possessed of and to hold, retain and use the premises as endowed or debutter, property for the service and worship" of the deity. In the will in respect of the properties in British India also, he intended that his "wife and sons, and sons' wives, and other relatives" would use the Chandernagore house for residence and also made provisions for the seva puja of the family idol there and for other religious festivals. The wills provided that in the event of death, retirement, refusal to act or incapacity of any of the trustees, the continuing trustees or the executor or administrator of the last acting trustee might appoint any other person in his place. Accordingly, after the death of the testator, the trustees and thereafter their successors came into possession

†From the Judgment and Decree dated July 21, 1969 of the High Court in Appeal from Appellate Decree 30 of 1967.

of the debutter property. Some time in 1934 a dispute arose among the descendants of the settlor 'D', some of whom were the then trustees, with regard to the accommodation in their residential occupation in the Chandernagore house. The dispute was referred to arbitration and the arbitrator held that the heirs of 'D' and his descendants alone, and not the trustees, had the right to act as shebaits of the deity. This award was accepted by the trustees. But subsequently, the plaintiff-trustees filed a suit for ejectment of the defendant-heir of 'D' from some of the rooms occupied by them in the Chandernagore house on the ground that the defendant was only a licensee of the plaintiff and the licence had been revoked. The defendant on the other hand pleaded that he was in occupation of the rooms in his own right as a shebait, that the plaintiffs had no right to represent the deity and had no locus standi to maintain the suit as trustees and that since all the shebaits had not been joined as parties, the suit was incompetent. The Subordinate Judge and the District Judge dismissed the suit but the Division Bench of the High Court having partially allowed the appeal, the present appeal by certificate under Article 133(1)(b) was brought by the plaintiffs. Dismissing the appeal the Supreme Court

Held :

(1) Shebait is the human ministrant and custodian of the idol, entitled to deal with all its temporal affairs and to manage its property. As regards the administration of the debutter, his position is analogous to that of a trustee; yet, he is not precisely in the position of a trustee in the English sense, because under Hindu Law, property absolutely dedicated to an idol, vests in the idol, and not in the shebait. However, in almost every case, the shebait has a right to a part of the usufruct, the mode of enjoyment, and the amount of the usufruct depending again on usage and custom, if not devised by the founder. (Para 20)

As regards the service of the temple and the duties that appertain to it, shebaitship is an office blended with property and as such, apart from the obligations and duties resting on him in connection with the endowment, the shebait has a personal interest in the endowed property. He has, to some extent, the rights of a limited owner. Shebaitship being property, it devolves like any other species of heritable property. It follows that, where the founder does not dispose of the shebaiti rights in the endowment created by him, the shebaitship devolves on the heirs of the founder according to Hindu Law, if no usage or custom of a different nature is shown to exist. (Paras 21 and 22)

Gossamee Shree Greedharreejee v. *Ramanlaljee*, 16 IA 137 : ILR 17 Cal 3, *relied on*

Although shebaitship is heritable property, yet, it cannot be freely transferred by the shebait. But some of the exceptions to this general rule are : 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. If any one of the shebaits intends to get rid of his duties, he should surrender his office in favour of the remaining shebaits. In the case of such a transfer in favour of co-shebait, no policy of Hindu law is likely to be affected, much less the presumed intentions of the founder. (Paras 26 and 27)

Nirode Mohini v. *Shibadas*, ILR 36 Cal 975 : 13 CWN 1084 : 9 IC 76; *Mansharam* v. *Pranshankar*, ILR 6 Bom 298 : 6 Ind Jur 426 and *Raghunath* v. *Purnanand*, ILR 47 Bom 529 : AIR 1923 Bom 358, *relied on*

It is, however, not yet settled as to whether the principle of English

law of trusteeship that the beneficiaries in a private trust, if sui juris and of one mind, have the power or authority to put an end the trust or use the trust fund for any purpose and divert it from its original object, is applicable in the case of shebait in private endowment or debutter created under Hindu law. (Para 24)

Doorganath Roy v. *Ram Chunder Sen*, LR 4 IA 52 : ILR 2 Cal 233 and *Pramatha Nath Mullick* v. *Pradhyumna Kumar Mullick*, 52 IA 245 : AIR 1925 PC 139, *referred to*

(2) There is a distinction between a public and private debutter. In a public debutter or endowment, the dedication is for the use or benefit of the public. But in a private endowment, when property is set apart for the worship of a family idol, the public are not interested. The present case is one of a private debutter. (Para 23)

(3) It the present case, on a combined reading of the two wills together as also from the evidence on record it appears that: the testator's intention was that his heirs and descendants would also be entitled to use the Chandernagore house as their family dwelling house and they in fact continued to live there accordingly; that although the trustees were provided with the funds for the sewa puja of the family deity and for other festivals out of the estate left by the testator, they were not expressly constituted as shebaits of the deity; that the legal title in the endowed property was expressly vested in the family idol and not in the trustee; that only the descendants and heirs of the founder, who live in the endowed house, have throughout been acting as ministrants of the family idol; and that by virtue of the arbitration award those trustees who were not descendants of the founder 'D', went out of the picture long ago and thus had validly renounced their shebaiti rights in favour of their co-shebaits who were descendants of the founder. Therefore, the defendant and other descendants of 'D' became co-shebaits of the deity by operation of the ordinary rules of Hindu law and the trustees were excluded. The defendant-respondent, being a grandson of 'D' and a shebait, was thus entitled to reside in the disputed rooms of the Chandernagore house. (Paras 41, 42, 49, 51 and 52)

(4) The trustees by themselves, have no right to maintain the suit in respect of the debutter property, the legal title to which vests in the idol and not in the trustees. The right to sue on behalf of the deity vests in the shebaits. All the shebaits of the deity not having been made parties, the suit was not properly constituted, and was liable to be dismissed on this score alone. (Para 53)

It is not necessary to decide whether the 'trust' created by the will was a continuing trust or not, or whether the mode of devolution of the office of trustees indicated by the founder in his will was or was not hit by the rule in **Tagore** v. **Tagore**, LR 1 IA Supp. 47. (Para 51)

Ganesh Chunder v. *Lal Behary*, 63 IA 448 : AIR 1936 PC 318; *Jagadindra* v. *Rani Hemanta Kumari*, 31 IA 203 : ILR 32 Cal 129 : 6 Bom LR 765 and *Monohar* v. *Bhupendra*, 60 Cal 452 : AIR 1932 Cal 791, *referred to*

R/4316/C

Advocates who appeared in this case:
Lal Narain Sinha, Senior Advocate, (*Sukumar Ghosh*, Advocate, with him), for the Appellants in C. A. 1873 of 1970 and Respondent in C. A. 1874 of 1970;
A. K. Sen, Senior Advocate, in C. A. 1874 of 1970, (*D. N. Mukherjee*, Advocate, with him), for the Respondent in C. A. 1873 of 1970 and Appellants in C. A. 1874 of 1970.

The Judgment of the Court was delivered by

Sarkaria, J.—These two appeals on certificate arise out of the appellate judgment and decree, dated July 21, 1969, of the High Court at Calcutta. The facts of the case are as follows.

1a. Late Babu Durga Chorone Requitte was the grandfather of Satya Chorone Requitte, defendant, and plaintiffs 1 and 2. He owned considerable immovable property. He was an inhabitant of Chandernagore (then a French territory). The suit property is situated in Chandernagore. Among others, it included a big residential house containing about 84 or 85 rooms with extensive grounds, gardens and tanks. In this house, which he was occupying for his residence, he had his family deity, Sree Sree Iswar Sridhar Jiew.

2. Durga Chorone made and published two wills, one dated June 4, 1898, with regard to his properties in the then British India, and the other dated June 6, 1898 with regard to his properties situated in the French territory of Chandernagore. By these two wills, Durga Chorone appointed his wife, Saraswati Dassi, his two sons, Shyama Chorone Requitte and Tarini Chorone Requitte and his nephews, Ashutosh Das and Bhola Nath Das, executrix and executors and trustees of the estate left by him. The wills provided that the trustees would hold the bequeathed properties left by the testator according to the terms of the wills for the legatees and the beneficiaries mentioned therein. The wills also provided that in case of death or retirement or refusal or incapacity to act of any of the trustees, the continuing trustees or trustee for the time being, or the executors or administrators of the last acting trustee might appoint any other person or persons to be a trustee or trustees in place of the trustee or trustees so dying or desiring to retire from or refuse, etc. But, in no case, the number of the trustees should be less than two.

3. By his will, dated June 6, 1898, Durga Chorone created an absolute debutter in favour of the said family deity and devised and bequeathed to his executors and trustees named therein, his dwelling house with gardens and tanks appertaining thereto situated in Chandernagore, "upon Trust to stand possessed of and to hold, retain and use the premises an endowed or debutter property for the service and worship of" his said family deity. By that will, he further directed that this family idol "shall be located in my said house in Chandernagore which said house and premises shall be appropriated and devoted solely and exclusively to the Thakur or idol".

4. The testator died on August 27, 1898. Thereafter, the will, dated June 6, 1898, was duly probated and the trustees came into possession of the debutter properties and carried on the administration of the estate and the seva and puja, as directed in the will.

5. Smt. Saraswati, widow of Babu Durga Chorone, who was one of the trustees named in the will, died on October 30, 1913, while her son, Shyama Chorone, another trustee, died on December 21, 1925. Thereupon, Tulsi Chorone son of Shyama Chorone was appointed a new trustee in place of his father. Bhola, the other co-trustee, refused to act as such. Therefore, his son,

Devindra was appointed as trustee by the continuing trustees. Tarani Chorone died on or about May 29, 1939 and the continuing trustees appointed his son, Profulla Chorone as a trustee. Tulsi Chorone died on August 17, 1952 and the continuing trustees similarly appointed Bhagwati, son of late Shyama Chorone as a new trustee. Debendranath Das died on or about March 7, 1956, and the continuing trustees appointed Satish Chandra Das, a son-in-law of late Shyama Chorone as a new trustee in his place.

6. In or about the year 1934, the descendants of the settlor, Durga Chorone, some of whom were the then trustees, referred certain disputes with regard to the endowed property to the arbitration of one Bhringeswar Sreemany. The disputes referred to the arbitrator included rival claims by the sons and grandsons of Durga Chorone, to their residence in the debutter property belonging to the family deity. The arbitrator made an award on September 6, 1934, whereby he allotted room Nos. 72 and 82 to Satya Chorone, respondent, which had been in their use and occupation from before. The arbitrator made similar allotments of other rooms in the said house in favour of other sons and grandsons of the settler.

7. On April 20, 1959, Profulla Chorone Requitte, Bhagwati Chorone Requitte and Satish Chorone Das, the then trustees, instituted Title Suit 28 of 1959 in the Court of the Subordinate Judge, 1st Court, Hooghly. The plaintiffs prayed for two reliefs in the plaint: (i) Possession by ejectment of the defendant, Satya Chorone Requitte, primarily from all the six rooms, alleging that the defendant had been occupying the same as licences under the plaintiffs and the said licence had been revoked; (ii) in the alternative, for possession of the four rooms mentioned in Item 1 of Schedule 'B' of the plaint, which had not been allotted to him under the award.

8. The plaintiffs' case, as laid in the plaint, was that since the dwelling house belonging to the deity had a large number of rooms the trustees allowed temporarily the sons and grandsons of Durga Chorone to occupy and use for their families some of the rooms in the said dwelling house as licensees. It was further alleged that in the year 1958, the defendant illegally and forcibly occupied room Nos. 63, 35, 46 and 57 in the aforesaid house without the knowledge and consent of the trustees causing serious inconvenience in the due performance of the religious ceremonies of the deity according to the terms of the will. It was further contended somewhat inconsistently that the dwelling house at Chandernagore being absolute debutter belonging to the deity, no person, except the trustees, has any legal right in the said house which can only be used for the sewa puja of the family deity located in the house; that the arbitration award of 1934 is not binding on the deity and/or the trustees who were not parties to that arbitration; that the award was beyond the scope of the reference and was adverse to the Trust, itself.

9. In his written statement the defendant traversed the material allegations in the plaint and asserted that he was in use and occupation of the rooms in dispute in his own right as a shebait. He further pleaded that the plaintiffs had no right to represent the deity and had no locus standi to maintain the

suit as trustees; that since all the Shebaits had not been joined as parties, the suit was incompetent.

10. The Subordinate Judge dismissed the suit, holding, inter alia, that:

(i) By his will, Babu Durga Chorone had absolutely dedicated the property in dispute to the family deity, Sree Sree Iswar Sridhar Jiew, but he had not, under that will, made any testamentary disposition of his shebaiti rights in respect of this debutter property which, on the death of the testator, devolves under Hindu Law upon his descendants, who in consequence, were entitled to reside in the house as shebaits.

(ii) The trustees were not shebaits. Only the descendants of Babu Durga Chorone had become shebaits and had shebaiti right in the endowed property.

(iii) The award made by the arbitrator, Bhringeswar Sreemany, was valid and binding upon the plaintiffs.

(iv) The plaintiffs could not recover possession from the defendant as trustees.

(v) The plaintiffs were not entitled to represent the deity and had no locus standi as trustees to maintain the suit on behalf of the deity.

(vi) the defendant had a right to occupy the rooms in suit as co-shebaits.

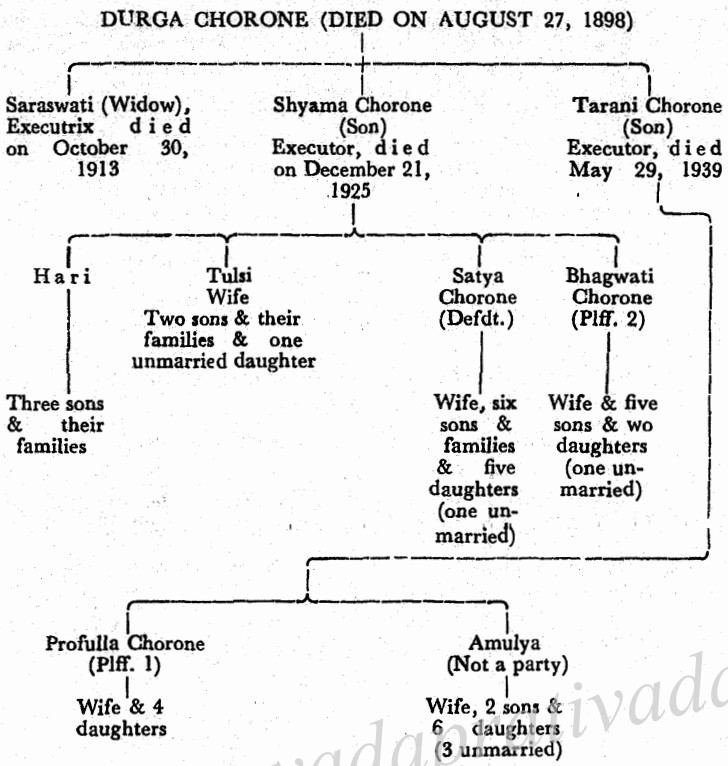
(vii) The plaintiffs having not claimed any relief in terms of the arbitration award, were not entitled to any relief in respect of room Nos. 35, 46, 57 and 63.

11. Aggrieved, the plaintiffs preferred an appeal to the District Judge, who dismissed the same and affirmed the decision of the trial Court.

12. Against the appellate decree of the District Judge, the plaintiffs carried a second appeal to the High Court at Calcutta. The Division Bench of the High Court, by its judgment dated July 21, 1969, allowed the appeal in part, and granted the plaintiffs a decree for Khas possession of room Nos. 35, 46, 57 and 63 in the said dwelling house; but not in respect of room Nos. 72 and 82 mentioned as item 1 of Schedule 'B' to the plaint.

13. After obtaining the certificate under Article 133(1)(b) of the Constitution, as it then stood, the plaintiffs have filed Civil Appeal 1873 of 1970 against the partial dismissal of their claim in respect of room Nos. 72 and 82, while the defendant has filed Civil Appeal 1874 of 1970, praying that the plaintiffs' suit ought to have been dismissed in respect of room Nos. 35, 46, 57 and 63 also. Both the appeals will be disposed of by this common judgment.

14. The following pedigree table which has been compiled from the material on record by the learned Counsel for the appellant, will be helpful in understanding the relationship of the parties and other connected facts:



15. The principal question that falls to be determined in these appeals is, whether the settlor had constituted the same set of persons as shebait as well as trustees. This question turns on a construction of the will.

16. Mr. Lal Narain Sinha, learned Counsel for the appellant in Civil Appeal 1873 of 1970, submits that the answer to this question must be in the affirmative because the settlor, Durga Chorone Requitte had by express words in the will (Ex. 6/6A), dated June 6, 1898, imposed an obligation on the trustees to hold, manage and use the suit property which he had thereby dedicated to the family idol, for the service and worship of the idol. It is maintained that although the word 'shebait' is not used in the will, yet the said obligation cast on the trustees by inevitable implication, clothed them with the character of shebaits, also.

17. As against this, Mr. Ashok Sen contends that the answer to the question posed must be in the negative. It is urged that the words "to hold, retain and use the premises . . . for the service and worship of my family deity", on which Mr. Sinha's argument rests, do not necessarily mean that the

testator had disposed of his shebaitship rights, also, and vested them in the trustees. It is stressed that there are no words in the will which, expressly or by necessary implication constituted the trustees as shebaits; that the testator has not used the word 'shebait' anywhere in the will; nor did he employ the word 'manage' or 'manager' anywhere in the will while charging the trustees to hold and use the premises as debutter property of the idol. According to the learned Counsel, if the will is construed as a whole in the light of the surrounding circumstances, it would be clear that the trust created was not a continuing trust but one which would terminate as soon as the executor-trustees handed over the bequeathed properties to the beneficiaries. It is pointed out that the two wills, one dated June 4, 1898, and the other dated June 6, 1898, should be read as complementary to each other. The necessity of executing two separate wills arose, because the properties bequeathed by the will (Ex. 6) were situated in the then French territories while those covered by the will dated June 4, 1898, were situated in British India. There were several beneficiaries under these wills, and the family idol was one of them. The recitals in these wills — according to the counsel — particularly in the will dated June 4, 1898, show that the testator had kept, intact, the right of residence of his widow and daughters-in-law and other heirs in the property dedicated to the idol. This, says Mr. Ashok Sen, is a sure indication of the fact that the founder did not want to part with his shebaiti rights, which were heritable property, in favour of the trustees, to the exclusion of his natural heirs under Hindu Law.

18. Mr. D. B. Mukherjee, appearing for the appellants in Civil Appeal 1874 of 1970, further submitted that the words "to hold, retain and use the premises as endowed or debutter property for the service and worship of my family deity", if properly construed in the context of the will as a whole and surrounding circumstances, mean that the executors and trustees would hold the property in trust for the benefit of the deity and the shebaits. In the alternative, Counsel submitted that even if it is assumed arguendo, that they were so appointed, the line of succession set out in the will would be hit by the principles laid down in **Tagore** v. **Tagore**[1]; **Ganesh Chunder** v. **Lal Behary**[2]; **Jagadindra** v. **Rani Hemanta Kumari**[3]; and by the rule against perpetuities (**Manohar** v. **Bhupendra**[4]). It is further contended that since the founder did not dispose of the shebaitship but only founded the worship of the Thakur, shebaitship would vest in the heirs of the founder. For this proposition, reliance has been placed on **Gossamee Shree Greedharreejee** v. **Ramanlaljee**[5].

19. In reply to this, Mr. Sinha submits that trusteeship with power to nominate successor is an estate recognised by law, and in such a case the founder does not create an estate of inheritance contrary to Hindu Law of Succession, nor does the question of the rule of perpetuity arise because the founder does not determine the choice of the succeeding trustees. Reference has been made in this behalf to ILR 24 Madras 219, and Underhill's treatise on "Trusts", 12th Ed. pp. 534-35 at 23-31. It is maintained that the trust in question is a continuing trust; it did not come to an end when the trustees

1. 1 IA Supp 47
2. 63 IA 448: AIR 1936 PC 318
3. 31 IA 203: ILR 32 Cal 129: 6 Bom LR 765
4. 60 Cal 452: AIR 1932 Cal 791
5. 16 IA 137: ILR 17 Cal 3

had fully performed their duties and obligations as executors of the will, that the general principle underlying Section 77 of the Trust Act is applicable to the case in hand. It is further submitted that of the two wills, the later must prevail and reference to the earlier will, for the purpose of determining whether the heirs of the settlor had been given a right of residence in the suit property, is irrelevant.

20. Before dealing with these contentions, it will be appropriate to have a clear idea of the concept, the legal character and incidents of shebaitship. Property dedicated to an idol vests in it in an ideal sense only; ex necessitas, the possession and management has to be entrusted to some human agent. Such an agent of the idol is known as shebait in Northern India. The legal character of a shebait cannot be defined with precision and exactitude. Broadly described, he is the human ministrant and custodian of the idol, its earthly spokesman, its authorised representative entitled to deal with all its temporal affairs and to manage its property. As regards the administration of the debutter, his position is analogous to that of a trustee; yet, he is not precisely in the position of a trustee in the English sense, because under Hindu Law, property absolutely dedicated to an idol, vests in the idol, and not in the shebait. Although the debutter never vests in the shebait, yet, peculiarly enough, almost in every case, the shebait has a right to a part of the usufruct, the mode of enjoyment, and the amount of the usufruct depending again on usage and custom, if not devised by the founder.

21. As regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office; but even so, it will not be quite correct to describe shebaitship as a mere office. "Office and property are both blended in the conception of shebaitship". Apart from the obligations and duties resting on him in connection with the endowment, the shebait has a personal interest in the endowed property. He has, to some extent, the rights of a limited owner.

22. Shebaitship being property, it devolves like any other species of heritable property. It follows that, where the founder does not dispose of the shebaiti rights in the endowment created by him, the shebaitship devolves on the heirs of the founder according to Hindu Law, if no usage or custom of a different nature is shown to exist. [**Gossamee Shree Greedharreejee** v. **Ramanlaljee** (supra).]

23. Then, there is a distinction between a public and private debutter. In a public debutter or endowment, the dedication is for the use or benefit of the public. But in a private endowment, when property is set apart for the worship of a family idol, the public are not interested. The present case is one of a private debutter. The distinction is important, because the results logically following therefrom have been given effect to by courts, differently.

24. According to English law, the beneficiaries in a private trust, if sui juris and of one mind, have the power or authority to put an end to the trust or use the trust fund for any purpose and divert it from its original object. Whether this principle applies to a private endowment or debutter created

under Hindu Law, is a question on which authorities are not agreed. In **Doorganath Roy** v. **Ram Chunder Sen**[6], it was observed that while the dedication is to a public temple, the family of the founder could not put an end to it, but "in the case of a family idol, the consensus of the whole family might give the (debutter) estate another direction" and turn it into a secular estate.

25. Subsequently, in **Pramatha Nath Mullick** v. **Pradhyumna Kumar Mullick**[7], the Judicial Committee clarified that the property cannot be taken away from the idol and diverted to other purposes without the consent of the idol through its earthly agents who, as guardians of the deity, cannot in law consent to anything which may amount to an extinction of the deity itself.

26. Although, shebaitship is heritable property, yet, it cannot be freely transferred by the shebait. But there are exceptions to this general rule. Some of such exceptions recognised in several decisions are: 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. See **Nirode Mohini** v. **Shiba Das**[8] and **Mancharam** v. **Pranshankar**[9].)

27. The Bombay High Court has also pointed out in **Raghunath** v. **Purnanand**[10], 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. In the case of such a transfer in favour of co-shebait, no policy of Hindu law is likely to be affected, much less the presumed intentions of the founder.

28. Now, let us deal with the problem in hand in the light of the principles cited above.

29. The first question that falls for determination is: Whether the founder's intention was to confer rights of shebaitship on the persons designated by him as 'trustees' in his will? In other words, did he by the will, dated June 6, 1898 (Ex. 6/6A), dispose of the shebaitship of the deity. also? If the answer to this question is found in the negative, shebaiti rights in this endowed property will devolve, according to Hindu law, on all the heirs of the founder, including the defendant. In that situation, the defendant with his family, like the other co-shebaits, will be taken as residing in the **debutter property**, in his own right. If, however, the answer to the said question is found in the affirmative, the further question to be considered would be with regard to the effect of the award dated June 29, 1934 (Ex. C), on the respective claims of the parties.

30. We will now take up the first question.

31. Mr. Sinha, learned Counsel for the appellants, submits that since by his will, dated June 6, 1898, the founder had "devised and bequeathed"

6. LR 4 IA 52: ILR 2 Cal 233
7. 52 IA 245: AIR 1925 PC 139
8. ILR 36 Cal 975: 13 CWN 1084: 3 IC 76
9. ILR 6 Bom 298: 6 Ind Jur 426
10. ILR 47 Bom 529: AIR 1923 Bom 358

the Chandernagore house to the plaintiff-trustees "upon trust to stand possessed of" and "to hold, retain and use the premises an endowed or debutter property for the worship of the family Thakur", his intention was to constitute the trustees as shebaits of the property having the exclusive right to manage the debutter, to serve the idol and to preserve its property. It is submitted that the founder had by these express words, invested the trustees both with the legal title and shebaitship, although the beneficial title (in an ideal sense) was vested in the idol.

32. The passage in the will on which Mr. Sinha relies for the construction propounded by him runs as under:

> I desire, devise and bequeath to my Executors and Executrix and Trustees hereinafter named . . . my dwelling house with garden and tanks appertaining thereto situate in Lal Bagan in Chandernagore. Upon trust to stand possessed of and **to hold, retain and use the premises an endowed or debutter property for the service and worship of my family Thakur or idol Shreedhar Jiew,** which thereby direct shall be located in my said house in Chandernagore which said house and premises shall be appropriated and devoted solely and exclusively to the Thakur or Idol.
> (emphasis supplied)

33. The crucial words are those that have been underlined*.

34. It may be observed that this will, in English, appears to have been drafted in pursuance of legal advice by an expert draftsman. The omission of the words "management", "manager", "custodian of the idol" or "ministrant of the idol" from the will, therefore, cannot but be intentional.

35. It seems clear to us that the underlined* words in the above extract, by themselves, merely create a trust or endowment and indicate the nature and purpose of the endowment. These words do not touch or deal with shebaiti rights. This inference receives support from the surrounding circumstances.

36. Further, in arriving at the true import of the words "to hold, retain and use the premises an endowed or debutter property for the service and worship of my family Thakur", it will not be improper to look to the conduct of the trustees and the members of the family of the founder.

37. There is no antagonism between the two wills, one dated June 4, 1898, and the other dated June 6, 1898, of the founder. Indeed, in a sense, they are complementary to each other. There is a reference in the will, dated June 4, 1898, to the testator's dwelling house at Chandernagore, which under the will (Ex. 6) was endowed to the family deity. From the following provisions in the will, dated June 4, 1898, it is clear that the testator intended that the dwelling house at Chandernagore would be used by his heirs for their residence:

> (a) I further direct my said Executors and Trustees out of the said rents and profits of the said premises number 39, Chowringhee Road to pay monthly a sum of Rupees Fifty for the maintenance to each of my daughter-in-law Smt. Gopeswari Dassee wife of my eldest son Shyama

*Herein given in bold.

Chorone Requittee and Nagendra Moni Dassee wife of youngest son Tarani Chorone Requitte during their lives respectively and provided **they reside with their respective husbands at my dwelling house in Chandernagore.**

(b) The Trustees shall pay monthly a sum not exceeding Rupees Two hundred in addition to the interest of Government securities of the nominal value of Rupees Twenty thousand hereinafter mentioned and directed to be applied for the purpose of household and other monthly expenses of my family, namely, wife and **sons and sons' wives and other relatives** of mine **who shall reside in my dwelling house at Chandernagore.**

(c) To pay and apply the net interest of Government securities on the nominal value of Rupees Twenty thousand for the household and other monthly expenses of my family, namely, wife and **sons and also sons' wives and other relatives** of mine **who shall reside in my family dwelling house at Chandernagore and also to pay** and apply the net interest of Government securities of the nominal value of Rupees Six thousand for the costs and expenses of keeping and maintaining my said family dwelling house at Chandernagore in proper repair and in payment of all taxes and assessments in respect thereof.

(emphasis supplied)

38. Looking to the general tenor of the document, it will not be inappropriate to interpret the words "wife, and sons, and sons' wives, and other relatives of mine" in the above-quoted portions of the will, as including all the descendants and heirs of the testator.

39. Thus construed conjointly, the two wills make it clear that although the entire family house, comprising 84 or 85 rooms, at Chandernagore was formally endowed to the family idol, yet the testator's intention was that his heirs and descendants would also be entitled to use this house as their family dwelling house, apart from the room wherein the idol was enshrined.

40. It may be further noted that in the will dated June 4, 1898, the testator made the following provisions for the **sewa puja** of the idol at Chandernagore and for other religious festivals:

(i) The trustees **shall** set apart interests of Government securities for the daily expenses of worship of the idol.

(ii) The trustees shall pay and apply the net interest of Government securities of the nominal value of Rs.25,000 for the yearly expenses of the Durga Puja festival at Chandernagore.

(iii) The trustees **shall** pay and apply the net interest of Government securities of the nominal value of Rs.15,000 for the yearly expenses of the Dolejatra of the family idol, Thakur Sreedhar Jiew at Chandernagore.

41. The aforesaid provisions further show that although the trustees were provided with the funds for the **sewa puja** of the family deity and for other festivals out of the estate left by the testator, but they were not expressly

constituted as shebaits of the deity. It will, therefore, be not unreasonable to infer that the intention of the testator was that these funds would be expended for the purposes indicated by him, through the shebaits.

42. Another telling circumstance appearing in evidence is that after the death of the widow and the two sons of the testator, their heirs, also, continued to live in this family dwelling house at Chandernagore.

43. It may be further noted that by the will dated June 6, 1898, no legal title in the endowed property was vested in the trustees. The title was expressly vested in the family idol to whom the property was absolutely dedicated. The testator did not create a trust estate in the sense in which it is understood in English law.

44. The above-quoted provisions from the wills further show that no rights to act as ministrant of the idol were conferred upon the trustees. On the other hand, a mere obligation to hold and use the property for the endowment indicated was imposed upon the persons designated as 'trustees'.

45. Reading the two wills together, with particular focus on the provisions extracted in this judgment, it is clear that the testator, Durga Chorone Requitte, did leave shebaitship undisposed of, presumed intention being that shebaitship should devolve on his natural heirs who would have a right to use the suit house as their family dwelling house. The rights conferred on the trustees under the will may, at the most, amount to a curtailment of the right to manage the endowed property which a shebait would otherwise have. But such curtailment by itself would not make the ordinary rules of succession in Hindu law inapplicable in regard to the devolution of shebaitship, which is heritable property.

46. The upshot of the above discussion is that in spite of the interposition of the trust for management of the endowed property, the shebaitship remained undisposed of, and, as such, the defendant and other descendants of Durga Chorone Requitte became co-shebaits of the deity by the operation of the ordinary rules of Hindu law.

47. In arriving at the conclusion that in spite of the interposition of the trust, the founder by his will left the shebaitship undisposed of, and as such, the defendant also, under Hindu law, became one of the shebaits, we are fortified by the inference arising out of the facts admitted by no less a witness than plaintiff 3, Satish Chandra Dass, himself, who alone deposed for the plaintiffs. Though he claimed that there were no shebaits of the deities and the trustees were managing the shebas, he categorically admitted the following facts:

(a) "The disputed house is a big house", having 84-85 rooms. "It is the only family dwelling house" of the sons and grandsons of Durga Chorone Requitte, who live in it, while "the deity is installed in room 66 in the first floor".

(b) The inmates of the disputed house, as far as practicable, look after the bath of the deity as also the preparation of Naibedya (tray containing the offerings) and Bhog (food) of the deity.

48. Thus even according to the plaintiffs-appellants, only the descendants and heirs of the founder, who live in the endowed house, have throughout been acting as ministrants of the family idol, which, as already noticed, is one of the vital characteristics of a shebait. In other words, the sons and the descendants of Durga Chorone Requitte, alone, have throughout been acting as co-shebaits of the family deity, to the exclusion of the 'trustees' who were not his descendants.

49. The first two courts were, therefore, right in holding that the shebaiti rights remained with the heirs of the founder.

50. Assuming for the sake of argument, that the 'trustees' were also vested with the rights and obligations of a shebait, then also, the evidence on the record shows that those trustees who were not descendants of the founder, Durga Chorone Requitte, never acted as such. They went out of the picture long ago and must be presumed to have renounced their shebaiti rights in favour of their co-shebaits who were descendants of the founder. It is in evidence that in 1934, a dispute arose among the descendants of the founder with regard to the accommodation in their residential occupation. Thereupon, the trustees agreed with the descendants of the founder by means of the agreement (Ex. E) to refer the dispute to the sole arbitration of Shri Bhringeswar Sreemany. The arbitrator, inter alia, held that the heirs of late Durga Chorone Requitte and his descendants alone had the right to act as shebaits. There is documentary evidence on the record to show that this award (Ex. G) given by the arbitrator was accepted by the 'trustees'. The present plaintiffs-appellants, by their letter dated June 18, 1950 (Ex. A/7), asserted their rights on the basis of this award and described the defendant-respondent as shebait of the deity. The letters (Exs. A-8 and A-10) also point to the same conclusion.

51. Thus, even if it is assumed that originally, the trustees were regarded as having been constituted as shebaits, then also, those among them who were not family members of descendants of the founder, renounced and relinquished their shebaiti rights, if any, in favour of the descendants of the founder. Such a relinquishment made in favour of the co-shebaits, will be valid.

52. From whatever angle the matter may be looked at, the conclusion is inescapable that shebaitship of the family deity remained solely with the descendants of the founder; and the defendant-respondent who is admittedly a grandson of the founder had been regarded as one of the shebaits, and as such, entitled to reside in the disputed rooms. All the shebaits were therefore, necessary parties; but all of them have not been impleaded. The trustees by themselves, have no right to maintain the suit in respect of the debutter property, the legal title to which vests in the idol, and not in the trustees. The right to sue on behalf of the deity vests in the shebaits. All the shebaits of the deity not having been made parties, the suit was not properly constituted, and was liable to be dismissed on this score alone.

53. In the view we take, it is not necessary to decide whether the 'trust' created by the will of Durga Chorone Requitte was a continuing trust or not, or whether the mode of devolution of the office of trustees indicated by the founder in his will, was or was not hit by the rule in **Tagore** v. **Tagore** (supra).

54. For the foregoing reasons, we allow the defendant's appeal (Civil Appeal 1874 of 1970), set aside the judgment of the High Court, and dismiss the plaintiffs' suit. In the result, Civil Appeal 1873 of 1970 filed by the plaintiffs, ipso facto fails, and is dismissed. In the circumstances of the case, there will be no order as to costs.

(1979) 3 Supreme Court Cases 423

1979 SCC (Cri) 523

(BEFORE S. MURTAZA FAZAL ALI AND A. D. KOSHAL, JJ.)

ANANTA MOHANTA .. Appellant;

Versus

STATE OF ORISSA .. Respondent.

Criminal Appeal No. 327 of 1974, decided on March 22, 1979

Criminal Procedure Code, 1973 — Sections 378 and 384 — Reversal of acquittal by the High Court justified where the trial Court after reaching a clear finding on the reliability of the prosecution witnesses disbelieved them on the basis of surmises and conjectures and for reasons wholly untenable in law (Para 1)

Criminal Trial — Witnesses — Related — If the witnesses related to the deceased are reliable and true, failure to examine independent witnesses not fatal (Para 2)

Criminal Trial — Weapons and Wounds — Failure to send the axe used for committing the murder for confirming that the blood was human blood, held, not fatal to the conviction if other reliable evidence available (Para 2)

Appeal dismissed M/4358/[S]R

The Judgment of the Court was delivered by

Fazal Ali, J.—In this appeal under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, the trial Court acquitted the appellant of the charges under Section 302 but the State filed an appeal to the High Court and the High Court reversed the order of acquittal of the appellant and convicted the appellant under Section 302, IPC, and sentenced him to imprisonment for life. We have gone through the judgment of the High Court and the learned Sessions Judge and we find ourselves in complete agreement with the view taken by the High Court. The approach made by the Sessions Judge was manifestly wrong and absolutely perverse. The High Court has pointed out in its judgment that the Sessions Judge came to a clear finding that the witnesses examined in the case, i.e. PWs 1, 2, 3 and 4 were reliable and nothing was elicited from their cross-examination which may go to discredit their testimony. In spite of this clear finding the learned Sessions Judge appears to have disbelieved the witnesses mainly on the basis of surmises and conjectures and for reasons which are wholly untenable in law. In the circumstances, the High Court was fully justified in reversing the finding of the trial Court.

2. The conviction of the appellant is based on the evidence of PWs 1, 2 and 4 before whom the deceased has made an oral dying declaration that he was killed by the appellants. It is true that these witnesses are close relations

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1981 SCC OnLine Cal 61 : AIR 1981 Cal 259 : (1981) 2 CHN 13

BEFORE ANIL K. SEN AND B.C. CHAKRABARTI, JJ.

Jogesh Chandra Bera and others ... Petitioners;

Versus

Sri Iswar Braja Raj Jew Thakur ... Respondent.

C.O. No. 3380 of 1980

Decided on April 28, 1981

B.C. CHAKRABARTI, J.:—This is a revision application at the instance of some of the defendants in a proceeding arising out of an application for leave to sue as indigent person being, Judicial Misc. Case No. 31/77 of the 1st Court of the Additional Subordinate Judge at Midnapore. The leave prayed for was granted by the impugned order dated July 5, 1980.

2. The applicant for the leave was Sri Braja Raj Jew Thakur represented by the next friend Smt. Moksboda Adhikari. It is stated in the application that the landed property described in the plaint schedule were the subject-matter of an Arpannama executed by late Jagannath Adhikary on August 18, 1975. In terms of the Arpannama Haripada Adhikary son of Jagannath Adhikary is the shebait of the deity. The properties in ka and kha schedules are debuttar properties and not subject to alienation. It is alleged in the plaint accompanying the application for leave to sue as an indigent person that Haripada who figures as defendant No. 13 in the suit has been mismanaging the debuttar estate and has alienated the properties by different documents in favour of defendants 1 to 12, misappropriating the consideration acquired by such alienations. It is further alleged that Haripada has thereby dispossessed the deity from the properties. Mokshoda Adhikary figuring as the next friend of the deity happens to be the wife of Haripada. It is alleged that she having protested against such conduct of her husband, she was driven out of the house. It is prayed in the plaint that the transfers effected by defendant No. 13 in favour of defendants 1 to 12 be declared fraudulent, collusive and inoperative and not binding on the deity. There is also a prayer for recovery of possession. In the application for leave it is stated that besides the properties described in Sch. Ga which comprises the temple, the deity possesses only some movables worth Rs. 16/-. As such it was prayed that leave may be granted to sue as an indigent person.

3. The application was opposed before the learned Subordinate Judge. He found that the requisite conditions of Order 33

have been fulfilled and as such the applicant was entitled to the leave prayed for. The contention, that the suit was mala fide and does not reveal any cause of action and that too at the instance of the wife of the present shebait were not gone into because the learned Subordinate Judge felt that these matter are not relevant for consideration in an application under O. 33, R. 5 of the Code of Civil Procedure and that they should be left open for consideration at the trial stage. Being aggrieved, some of the defendants have preferred the present application.

4. The application has been heard on contest upon notice to the opposite parties.

5. Mr. S.P. Roy Chowdhury appearing to support of the petitioners urged two points

while challenging the order impugned. Firstly it was contended that the deity is not a 'person' within the meaning of Order 33 of the Code. The next point urged was that the suit could be brought by the shebait himself or a prospective shebait or by a next friend appointed by the Court to represent the deity. Since Mokshoda was not so appointed, it was contended that the proposed plaint is misconceived and not maintainable and leave should not in the circumstances have been granted to the prejudice of the deity.

6. In support of the first contention that the deity is not a 'person' reliance was placed on a decision in the case of *Bharat Abhyudoy Cotton Mills* v. *Kameswar Singh*, AIR 1938 Cal 745. In this case the leave was prayed for by a company. It was held that the word 'person' does not include a limited company and it is not possible for and competent to such a company to sue as a pauper or to prefer an appeal as a pauper under O. 44, R. 1 of the Code. It was held that an isolated reference to the word 'person' may include a company or an artificial person as defined in Cl. (39) (or 42?) of Section 3 of the General Clauses Act, but in deciding the question of pauperism the entire scheme of the order has to be looked into, keeping in view the setting in which the word is placed, the circumstances in which it is used and above all the context in which it stands. Rule 1 as it stood prior to the amendment of the Civil Procedure Code referred to wearing apparel of the person and Rule 3 required presentation of the application in person. It was held that these acts the company is incapable of fulfilling for a company can neither require wearing apparels nor can it present an application except through an authorised agent and that too, when personal appearance is exempted. Consequently it was held that the expression 'person' does not have the extended meaning so as to include a limited company. In arriving at this conclusion reliance was placed in the case of *S.M. Mitra* v. *Corporation of the Royal Exchange Assurance*, AIR 1930 Rang 259 while a contrary view expressed in *Perumal* v. *T.J.D. Sankanidhi*, AIR 1918 Mad 362 was dissented from. It may be mentioned here that in another case of The Rangoon High Court (*D.K. Cassim* v. *Abdul Rahman*, AIR 1930 Rang 272) it was held that a firm is a person within the meaning of, O. 33 and an insolvent firm may be granted leave to appeal as a pauper.

7. In *Perumal's case* (AIR 1918 Mad 362) the question was whether a company which has gone into liquidation and a Receiver has been appointed, the Liquidator could sue as a pauper. In that case also the requirements of R. 1 and R. 3 of Order 33 were considered. In explaining the explanation to Rule 1 it was observed that the requirement that the applicant should not be entitled to property more than Rs. 100/- 'other than his necessary wearing apparel' simply allows deduction of the value of wearing apparel and can only mean that if the applicant has any wearing apparel he can deduct its value. It could not be construed to mean, it was further observed that only such person who in law can possess wearing apparel can sue as pauper. As regards R. 3 requiring personal presentation of the application it was held that where the law in consequences of personal appearance in Courts being impossible either by reason of the party being a company or an infant or a lunatic allows appearance by somebody else, appearance by such person would be sufficient. In this context analogy was drawn to the provisions of O. 32 relating to minors or persons of unsound mind which authorise appearance by a next friend. In the case of companies, the Act itself prescribes the mode of representation and therefore the Liquidator can fulfil all the obligations required of a pauper petitioner under O. 33, R. 3. Rule 3 does not cover cases in which from the very nature of the case physical appearance is impossible or where the law owing to any disability directs that all acts required by the Court should be performed by the next friend.

8. The view taken in *Perumal's case* (AIR 1918 Mad 362) was later approved by a Full Bench decision of the Madras High Court in the case of *Swaminathan* v. *Official Receiver.* AIR 1937 Mad 549 which held

that the word 'person' in O. 33 includes a natural as also a juristic person. The same view was taken in the case of *Syed Ali* v. *Deccan Commercial Bank*, AIR 1951 Hyd 124; *Gurdwara Sahib Kothi Begowal* v. *Harnam Singh*, AIR 1960 Punj 73; *East India Coal Company Limited* v. *East Indian Coal Company Limited Workers Union*, AIR 1961 Pat 15; *Kundan Sugar Mills* v. *Indian Sugar Syndicate*, AIR 1959 All 540 (FB); *Moorti Sri Behariji* v. *Premdas*, AIR 1972 All 287; *Gobardhan Das* v. *Raghunandan Das*; AIR 1968 Orissa 213. These last two cases relate directly to the question whether a deity can sue as a pauper and it was held that it can on the same reasoning on which a limited company can sue as such. In these cases the plaintiff was the deity and not the shebait or next friend through whom the deity sought permission to sue as pauper. In the case before us also the deity is the plaintiff and not Mokshoda.

9. The general trend of view taken by most of the other High Courts is that a deity as a juristic person is capable of suing as a pauper.

10. Under the amended Civil Procedure Code the reference to necessary wearing apparels in the explanation to Rule 1 has been deleted. Therefore, one of the two reasonings, on which the Calcutta view is based no longer subsists. The other requirement is as provided in R. 3 which speaks of presentation of the application by the applicant in person. That provision however still holds good. The principles of interpretation of this rule as enunciated in *Perumal's case* (AIR 1918 Mad 362) however came to be considered by the Supreme Court in the case of *N.E.L. and P. Company Ltd.* v. *K. Shreepathi Rao*, AIR 1958 SC 658 and the view taken by the Madras High Court was approved. Therefore, it seems that the Calcutta view was impliedly overruled and the law may now be taken to be well-settled that the word 'person' in O. 33, R. 1 includes a juristic as well as a natural person. There can be no controversy that a deity is a juristic person.

11. Mr. Roy Chowdhury, however, contended that the case before the Supreme Court was not a case directly on the point and as such the general observation made therein can be of no avail. In this connection reference was made to the case of *Rayal & Co.* v. *K.G. Ramachandan*, (1974) 1 SCC 424 : (AIR 1974 SC 818). It is stated in this decision that "any general observation cannot apply in interpreting the provision of an Act unless this Court has applied its mind to and analysed the provisions of that particular Act". We are however unable to accept the contention of Mr. Roy Chowdhury in this regard. The observations made by the Supreme Court in AIR 1958 SC 658 is not such a general observation as has been contended by Mr. Roy Chowdhury. Although in that case interpretation of the provisions of O. 33 was not directly involved but a principle of interpretation was laid down and in doing so the principle enunciated in *Perumal's case* (AIR 1918 Mad 362) in particular was approved.

12. In interpreting a statute the principle has to be borne in mind that the legislature is not capricious but that when it confers a right, it should be presumed that the right is conferred not only on a few persons but to all persons entitled to the right. The right to sue in forma pauperis is a privilege given to a litigant provided certain conditions are fulfilled and hence every litigant fulfilling those conditions is entitled to the benefit of those privileges. In the instant case, following the principle of interpretation laid down in *Perumal's case* and approved by the Supreme Court we are of the view that a juristic person is entitled to the privilege of suing as an indigent person within the meaning of Order 33, Rule 1. The first contention urged by Mr. Roy Chowdhury, therefore, fails.

13. In the next place Mr. Roy Chowdhury contended that it is not open to anybody to institute a suit in the name of the deity as next friend of the deity unless he has been so appointed by the Court. The idea of having a guardian appointed by the Court to represent the deity seems to have originated from the view taken by the Judicial Committee in the case of *Pramathanath Mallick* v. *Pradyumna Mallick*, 52 Ind App 245 : (AIR 1925 PC 139). The point also came up for consideration before Lord Williams, J. in the case of *Sarat Chandra* v. *Dwarkanath*, AIR 1931 Cal 555. It was held that in the case of a private religious trust, with regard to the management of which the public cannot intervene and it cannot be expected that the shebait will bring a suit against himself it is necessary and desirable that the idol should appear in the suit by a disinterested next friend, appointed by the Court, and the Court in fact appointed one of the parties as next friend. This principle was substantially accepted as correct in the case of *Tarit Bhusan* v. *Sridhar Saligram*, AIR 1942 Cal 99, where Mr. Justice Paul observed that no person other

than the shebait can legally and effectively represent the deity unless he has been specially appointed by the Court. In a later Bench decision of this Court in the case of *Suslima Roy* v. *Atul Krishna*, AIR 1955 Cal 624, it was held that ordinarily the interest of the deity requires that nobody other than a shebait be allowed to institute a suit in the name of the deity without the previous order of the Court appointing him to represent the deity. A similar view was expressed in the case of *Sri Iswar* v. *Gopinath*, AIR 1960 Cal 741.

14. Finally the Supreme Court in the case of *Ramaraghava Reddy* v. *Sishu Reddy*, AIR 1967 SC 436, held that the possession and management of endowed property with the right to sue in respect thereof, are in the normal course vested in me shebait but where the shebait himself is a guilty party against whom the deity needs relief, it is open to the worshippers or other persons interested in the religions endowment to file suits for the protection of trust properties. It was further observed that in a case where the shebait has dented the right of the deity to the dedicated property it is obviously desirable that the deity should file the suit through a disinterested next friend nominated by the Court. In coming to this conclusion reliance was placed in the case of *Promotho Nath* v. *Pradyumna* (AIR 1925 PC 139) (supra).

15. In the instant case before us the suit has been instituted by fee deity through Mokshoda Adhikari who is the wife of the shebait, making allegations of unlawful animation by the shebait to the prejudice of the interest of the deity and to the advantage of himself personally. Such allegation has been made obviously to avoid the alienations and it is alleged by Mr. Roy Chowdhury that this is a collusive action brought by the wife in collaboration with her husband with whom she is living together in the same house and whose interest is not shown to be adverse to the shebait. The question of collusion however is a matter of evidence and ought to be left to be considered at the proper stage. But the point that immediately arises for consideration is whether the suit as framed is competent and maintainable. If, on the face of it, it is found that the suit as proposed is not competent at the instance of Mokshoda posing as a next friend but not being so appointed by the Court it seems to us that this is a matter which may be properly considered at this stage and not left to be considered later during the trial. If would not be proper, as has been held by the learned Subordinate Judge that the question whether the deity has been properly represented may be conveniently gone into of the time of filing of the suit. Obviously, what he means is that at the stage of considering whether the application for leave to sue as

an indigent person should or should not be granted this is an irrelevant consideration.

16. We are however unable to accept this view. This is a question which goes to the very root of the matter. Take for instance the case of a minor without not being represented properly asking for leave to sue as an indigent person. He cannot obviously do so nor can the question of his representation be left for consideration at the trial stage. The question should be considered at the moment the suit commences. In the case of *Bijoy Pratap* v. *Dukhaharan*, AIR 1962 SC 941 a question arose whether in an application for leave to sue in forma pauperis, another person could be joined as a co-plaintiff under the provisions of O. 1, Rule 10 of the C.P.C. The Supreme Court observed that the application to sue in forma pauperis is but a method prescribed by the Code for institution of a suit by a pauper without payment of court-fees and that the suit commences from the moment an application for leave to sue as pauper is presented and O. 1, R. 10, C.P.C. would be as much applicable in such a suit as in a suit where court-fees have been duly paid. Therefore the consideration of the question as raised in the present case touching the point as to the competence of the person instituting the suit may rightly be considered in appropriate cases even at the stage of Order 33 and need not be deferred till after the application is disposed of, unless of course, it involves complicated and controversial questions of fact and law. In the instant case there is no such question.

17. Since we have found upon a consideration of the authorities cited hereinbefore that a suit in the name of the deity unless brought by the shebait himself or a prospective shebait must be so instituted through a next friend appointed in that behalf by the Court, the suit as instituted by Mokshoda without obtaining such leave is incompetent. Consequently the question of granting leave in such a suit cannot arise until Mokshoda obtains the leave of the Court to institute the action. The second point urged by Mr. Roy Chowdhury therefore succeeds.

18. The revisional application accordingly is allowed. Subject to the observations

made hereinbefore the impugned order is set aside. There will be no order for costs.

19. Let the order be communicated to the Court below forthwith.

ANIL K. SEN, J.:—I agree.

Revision allowed.

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List of Statutes

Government Control over Temples:

I. State wise Statutes:

1. Act XI of 1864 (abolishing the role of pundits in the court of law)*
2. Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987 (amended up to 2015)
3. Bengal Civil Courts Act, Act IV of 1872
4. Bihar Hindu Religious Trusts Act, 1950 (amended up to 2013)
5. Bombay Public Trusts (Gujarat Amendment) Act, 1961
6. Bombay Public Trusts Act, 1950 (subsequently renamed as Maharashta Public Trusts Act 1950) r/w Bombay Public Trusts Rules, 1951
7. Central Provinces Laws Act, 1875
8. Charitable Endowments Act, 1890
9. Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997 r/w Karnataka Hindu Religious Institutions and Charitable Endowments Rules, 2002
10. Orissa Hindu Religious Endowments Act, 1951 (Amended up to 2018)
11. Punjab Laws Act, 1872
12. The Oudh Laws Act, 1876
13. The Himachal Pradesh Hindu Public Religious Institutions and Charitable Endowments Act, 1984
14. The Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997.
15. The Madhya Pradesh Public Trusts Act, 1951 has been repealed by the Bombay Public Trusts (Unification and Amendment) Act, 1959-(Bombay Act No. VI of 1960).
16. The Madras Hindu Religious And Charitable Endowments Act, 1951
17. The Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959
18. The Travancore-Cochin Hindu Religious Institutions Act, 1949

19. The Travancore-Cochin Hindu Religious Institutions Act, 1950 (amended up to 2007)
20. Travancore-Cochin Hindu Religious Institutions (Amendment) Act, 2018.
21. Uttar Pradesh Charitable Endowments (Extension of Powers) Act, 1950
22. Uttar Pradesh Hindu Religious Institutions (Prevention of Dissipation of Properties) (Repeal) Act, 2000

II. Specific Statutes For Temples:

1. Shri Jagannath Temple Act, 1955
2. Jammu and Kashmir Mata Vaishnodevi Shrine Act, 1988
3. The Uttar Pradesh Shri Badrinath and Shri Kedarnath Temples Act, 1939
4. The Uttar Pradesh Badrinath Temple Amendment Act, 1963
5. The Uttar Pradesh Kashi Vishwanath Temples Act, 1983
6. Tirumala Tirupati Devasthanams Act, 1932
7. The Bodh Gaya Temple Act, 1949
8. The Pandharpur Temples Act, 1973
9. The Shree Sai Baba Sansthan Trust (Shirdi) Act, 2004

III. Whether land can be separated and retained while handing over temple administration to Government during process of "nationalization of temple"?

1. **Shri Jagannath Temple Act, 1955**

Section 16. Alienation of the Temple properties :–

(1) No movable property of a nonperishable nature of which the Committee is in possession and the value of which is more than Rs. 50,000 [fifty thousand rupees] and no Jewelleries shall be sold, pledged or otherwise alienated **without the previous approval of the State Government.**
(2) Save as otherwise expressly provided in this Act **no immovable property** taken possession of by the Committee shall be leased out for more than five years or

mortgaged, **sold or otherwise alienated except with the previous sanction of the State Government.**

[(3)Any transfer of immovable property recorded in the name of Lord Jagannath of Puri by any person including any institution being the Marfatdar of such property shall be absolutely null and void and of no force or effect whatsoever, unless [Chief Administrator] or any officer authorised by him in writing in this behalf, execute the deed of such transfer as one of the executant.

(4) Notwithstanding anything contained in the Registration Act, 1908 (Act 16 of 1908) no deed of transfer of any immovable property executed in contravention of the provisions of sub-section (3) above shall be accepted for registration.]

Section 16-A. Removal of encroachment of Temple Land :–

(1) The provisions contained in the Orissa Prevention of Land Encroachment 2 [Act, 1972] 2
[Orissa Act 6 of 1972] shall be applicable, as far as may be, in respect of unauthorized occupation of any land belonging to the Temple as if it were property of Government within the meaning of that Act.

(2) 1 [Chief Administrator] may with the prior approval of the Committee, make an application for taking up appropriate proceedings under the said Act to the authority -competent there under and thereupon it shall be lawful for such authority to take action in accordance with the provisions contained in that Act.

Case Law: Deben Sethi and others v. State of Orissa and others: 2012 (Supp,-I) OLR 656

(Land Committee took decision to dispose of the landed properties of Lord Jagannath to persons, who were possessing the land with permanent structure since long- Government of Orissa approved the recommendation of the Land Committee Petitioners' possession over land is disputed - Enquiry report reveals that Ac. 0.018 decimals of land was found to be lying vacant without being surrounded by fence - petitioners also could not show any document regarding their possession over Ac. 0.018 decimals - Held, no right, title and interest accrue or have accrued in favour of petitioners in respect of the land in question belonging to Lord Jagannath

2. Jammu and Kashmir Mata Vaishnodevi Shrine Act, 1988

Statement of Objects: An Act to provide for better management, maintainenance and better governance of Shri Mata Vaishno Devi shrine and its endowments including the lands and buildings attached or apartment to the Shrine , beginning from Katra up to the holy Cave and the adjoining hill locks currently under the Dharmath Trust.

Section 3(b): "Endowment" means all the property movable or immovable belonging to, or given or endowment for the improvement, maintenance of the worship in the Shrine or for the performance of any service or charity connected there with and includes the idols install there in, the premises of the Shrine, the land, buildings attached and appurtenant there to, beginning from Katra up to the Holy Cave and the adjoining
Hill locks currently under the Dharmath Trust or property belonging to Baridar or baridar (s) association with in the area specified in the preamble of this Act

3. Uttar Pradesh Shri Badrinath [And Shri Kedarnath] Temples Act, 1932 (amended up to 2002)

Section 3(b): Endowment; means all property, movable or immovable belonging to, or given or endowed for the maintenance or improvement or additions to or worship in the Temple or for the performance of any service or charity connected there with and includes the idols is installed therein, the premises of the Temple and gifts of property made to anyone within the precincts of the Temple

Section 3 (c): 'Temple fund' means the Endowment and includes all sums received by or on behalf of, or for the time being held for the benefit of the Temple, and also include all the endowments which have been or may hereafter be made of the Temple or any other deity thereof in the name of any person or for the convenience, comfort or benefit of the pilgrims thereto, as well as all offerings made to, any of the deities comprised in the Temple;

Section 4: The ownership of the temple fund shall vest in the deity of Shri Badrinath of Shri Kedarnath as the case may be, and the committee shall be entitled to its possession.

4. The Uttar Pradesh Kashi Vishwanath Temples Act, 1983

Section 5: Vesting of the Temple and its Endowments

The ownership of the temple and its endowments will rest in the deity of Kashi Vishwanath

Section 13: Board to be in possession of the temple and its properties

(1) The Board shall be entitled to take and be in possession of all the movable and immovable properties, cash, valuables, jewelleries, records, document, material object or other asset, as aforesaid shall, subject to all just exceptions, produce and deliver the same, when required, under this Act to the Chief Executive Officer.

5. Tirumala Tirupati Devasthanams Act, 1932

The Temple was established as a result of Tirumala Tirupathi Devasthanam Act, 1932 (in short 'TTD Act'). The aforesaid Act was followed in 1933 by a special Act in 1951 whereby the administration of the Temple was handed over to the control of the Andhra Pradesh Government.

Since the enactment of the Hindu Charitable and Religious Institutions Act, 1989, the management and administration vests in the Board called "TTD Board" constituted under Section 96 of the aforesaid Act.The Andhra Pradesh Charitable and Hindu Religious Institution and Endowments Act (1969), sections 85 to 91, expanded the provisions of TTD. The A.P. Charitable & Hindu Religious Institutions & Endowments Act (1987) superseded the 1979 act.

6. The Bodh Gaya Temple Act, 1949 (amended in 2013 to allow entry to non-hindus)

Section 8. Limitations on Committee's Powers to alienate property:

(1) No movable property of a non-perish able nature appertaining to the temple shall be transferred without the previous sanction of the Committee, and, if the value of the property is more than one thousand rupees, without the previous approval of the [State] Government.
(2) No immovable property appertaining to the temple shall be leased for more than three years or mortgaged, sold or otherwise alienated except with the previous sanction of the committee and the [State] Government.

7. The Pandharpur Temples Act, 1973

Section 32(1) The Committee shall have power –

(d) to undertake any scheme or plan for the purpose od augmenting the revenues of the endowment and registered trust and execute them;
(e) to inquire into and to take steps to recover and take possession of the properties of the endowment and registered trusts, and execute them
(f) **to dispose of any property of the endowment or of the registered trusts**, and to borrow money with the previous sanction of the Charity Commissioner, subject to terms and conditions as maybe agreed to in this situation.

8. The Shree Sai Baba Sansthan Trust (Shirdi) Act, 2004

Section 3: *Reconstitution of Sansthan trust and transfer to and vesting of properties in that Trust.*

(1): On the appointed day, in place of the public trust registered under the *Bombay Public Trusts Act, 1950, by the name of "Shirdi Sansthan of Shri Sai Baba" at Shirdi, District Ahmednagar (hereinafter referred to as "the erstwhile trust"), a trust by the name of "the Shree Sai Baba Sansthan Trust (Shridi)", shall be deemed to be re-constituted under this Act.

(2) **On the appointed day, all the properties, whether movable or immovable (including all assets, rights, liabilities and obligations) of the erstwhile trust shall, by virtue of this Act, stand transferred to and vested in, the Sansthan Trust and the Executive Officer shall, on behalf of the Committee, be entitled to their possession and management from that day.**

Section 4: *Transfer of possession of properties to Sansthan Trust and transfer to and vesting of properties in that trust*

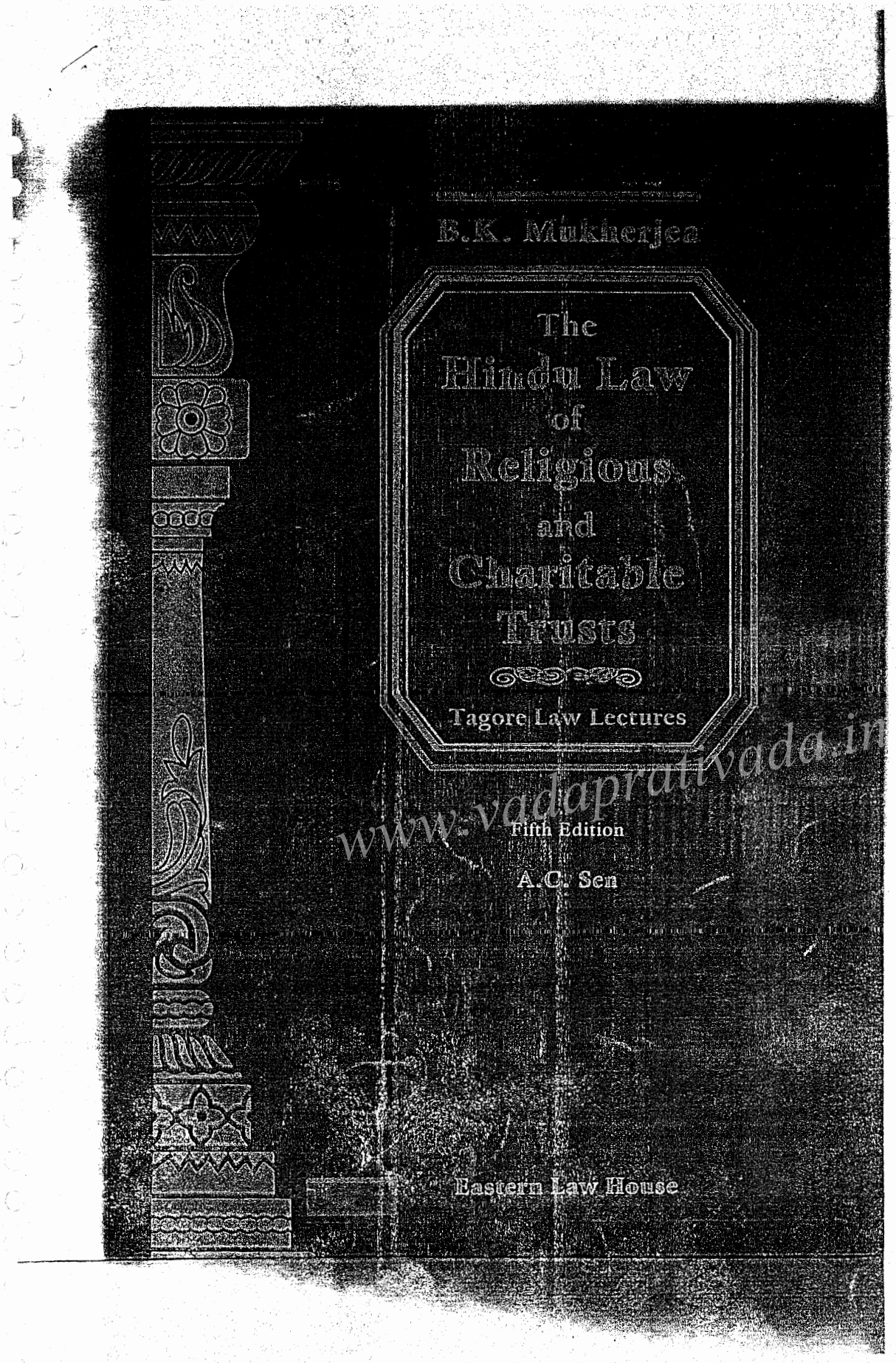
(1) The Board of Management of the erstwhile trust and every other person in possession of any immovable property of the erstwhile trust, which has vested under section 3 in the Sansthan Trust, shall hand over possession thereof, alongwith movable property thereon with a full inventory, to the Executive Officer on behalf of the Committee forthwith but in any case not later than one month or such longer period as may be allowed by the Committee, in writing.

(2) The Board of Management of the erstwhile trust and every other person in possession of the movable property of the erstwhile trust which is in the form of deposits in banks or investment in shares shall, within thirty days or such longer period not exceeding sixty days in the aggregate from the appointed day, as the Committee may allow, transfer or cause to be transferred, such property, with a full inventory, to the Executive Officer on behalf of the Committee.

(3) The Executive Officer shall prepare a list of the entire movable and immovable property vested under section 3 in the Sansthan Trust showing detailed description and approximate value of each property and submit a copy thereof to the Charity Commissioner and the Principal Secretary and Remembrancer of Legal Affairs, Law and Judiciary Department, within ninety days from the appointed day. The original list of the properties shall be preserved permanently in the office of the Sansthan Trust.

(4) Where any property is handed over or transferred as provided under subsection (1) or (2), the Executive Officer shall, after due verification of the inventory, pass a receipt in writing for the same to the transferor, and thereupon, the Executive Officer shall be responsible for safe custody of such property.

(5) The Board of Management of the erstwhile trust and every other person who has handed over or transferred any property of the erstwhile trust to the Executive Officer and obtained the receipt thereof under sub-section (4) shall, stand indemnified, released and discharged from all accounts, suits or other legal proceedings, claims and demands or liability in respect of that property.



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.

Lord the merchant, it is said, finished sixty dwelling houses in one day.[3] The story, as Kern points out, is obviously absurd, but it shows that residences of several kinds mentioned above were actually in occupation of Buddhist monks at the time when the Vinaya Pitaka was composed. The first instance of dedication of a dwelling place to the Buddhist Sangha was probably made by King Bimbisar, when Buddha, after the attainment of enlightenment, came to Rajgriha to preach his new doctrine. The dedication was made of a bamboo garden known as Venuban in the formal way, by pouring water over the hand of Buddha who accepted the gift as the representative and head of the congregation.[4]

1.21. Gifts by pouring water.—It is worthy of note that the practice of making a gift[5] by pouring water over the hands of the donee is a time-honoured custom, which has been recognised by all the Smriti writers, and is regarded as the proper method by the Hindus even at the present day. Another historical instance of the dedication of a Vihar to the Buddhist Sangha was the gift of the famous Jetvana Vihar by Anath Pindika, the most celebrated of Buddha's lay disciples. Anath Pindika had purchased the Jetvana Park at Sravasti and built a splendid monastery upon it, with a private chamber for Lord Buddha and separate cells for the monks. On the day when the Lord approached the city, he was received with great pomp, and on entering the precincts of the monastery he was asked by the merchant: "What, O Lord, shall I do with this Vihar?" The reply was: 'give it to the Sangha present and future'. And Anath Pindika, pouring water over the hands of Buddha, pronounced the solemn formula of donation. The Master accepted the gift with thanks and celebrated in stanzas the advantages of monastery.[5a]

With the spread of Buddhism over different parts of India the number of monasteries dedicated to the Sangha considerably increased and during the reign of Asoka, Buddhism occupied almost the same position as Christianity did under Emperor Constantine.

1.22. Buddhist Sangha.—Now the Buddhist Sangha was undoubtedly a juristic person and was capable of holding property in the same way as a private person could. As you have seen above, the ordinary formalities of gift were observed by the donor when he wanted to dedicate any property to the Buddhist congregation, and the gift was accepted on behalf of the Sangha by its head or representative. The property did not become the private property of the ostensible donee, nor could it be said to belong jointly to all the monks who were members of the congregation at that

3 Kern's *Manual of Buddhism*, page 81.
4 Kern's *Manual of Buddhism*, page 25.
5 Para 1.20, *supra*.
5a Kern's *Manual of Buddhism*, page 28.

particular time. It was the property of the congregation itself which could not but be deemed to be a separate entity for this purpose and which continued to exist if all its members died out or were replaced by other people. As a corporation the *Sangha* enjoyed a sort of immortality and was consequently fit to hold property forever. Whoever the ostensible donee might have been, the benefit of the endowment belonged to the entire fraternity of the Buddhist monks.

The *Vinaya Pitaka* contains elaborate rules regarding the conduct of business in a monastery. The members who were thought fit for particular kinds of work were generally entrusted with the same, and the appointment was made by the Sangha itself. As the Sangha became a huge organization in course of time, it appears that something like the institution of Parish was introduced in the Buddhist system. This institution owed its origin to the quarrelsome attitude taken by a batch of six monks who habitually raised difficulties in regard to various metres connected with the disciplinary rules of the monks. It was one of the injunctions of Buddha that the *Patimokkha* was to be recited by every monk, twice every month, on the *Uposoth* (sabbath) day in the presence of the community. What the six monks did was to recite the text in the presence of their own companions. The question was raised how far did the community extend? This was settled by a prescription that it would extend as far as one's place of living. Still the question arose as to how far did a place of living extend? This led to the demarcation of the boundary of each local community with reference to permanent landmarks like mountains, rivers etc. After the landmarks were determined, a monk had to bring the matter up formally before the Sangha and get them ratified.[6] It seems therefore that on the gift of a Vihar to the Buddhist congregation it was used and occupied by the monks who belonged to that particular Parish or locality, though the ownership vested in the entire *Sangha* whose directives were binding on the local authorities.

1.23. Charitable works for men and animals in Buddhist period.— Compassion to all living beings was an essential feature of the Buddhist religion, and as a result of that, various kinds of charitable institutions came into existence during the Buddhist period. The more popular forms of charity were the planting of trees for shade, the digging of wells at short intervals along the road and the establishment of hospitals for both men and beasts. In the Pillar Edict of Ashoka,[7] we have the following inscription: "On the roads too, banian trees have been plated by me to give shade to man and beast; mango gardens have been planted and wells dug at every half kos; rest houses too have been made here and there for the comfort of men and beasts." In the same Edict, we find mention of the

6 Kern's *Manual of Buddhism*, p. 82.

7 Vide *Ashoka's Rock Edict* No. 2. See also Dr. R.K. Mukherjee's *Ashoka*, p. 186.

appointment of officers to superintend charities and regulate the affairs of the Sangha and of other sects, and they had jurisdiction apart from the ordinary magistrates.

1.24. Image worship an indirect result of Buddhism.—The only other fact which I would ask you to note (in connexion with Buddhism) is that although, in the religion preached by Buddha, there was no place for the worship of God, yet the respect that the Buddhists paid to relics and sacred structures and later to the image of Buddha himself, ultimately—perhaps subconsciously—paved the way for image worship in India. Buddhism was absolutely silent on the existence of any Divine Being as the originator of the universe. The highest spiritual beings, according to Buddhists, were the Buddhas, many of whom have preceded Sakyamuni, and the devas or gods were given a very low position, for they were regarded as inferior to arhats or adepts, who were in the last stage of the path leading to Nirvana. There was no worship of gods in the early Buddhist religion, but there were relics of various kinds and sanctuaries which were regarded as objects of veneration and worship. Corporeal relics of Buddha were objects of the highest veneration and the celebrated tooth relic was seen by the Chinese traveller Fa Hien at Anuradhapore in Ceylon nearly a century after it was taken there. All objects which had served the purpose of Buddha, or were associated with his life or teachings in any way, attracted respect from the Buddhists, e.g., the alms bowl of Buddha, or the holy tree under which Buddha obtained salvation. According to Kern,[8] the general name for a sanctuary in Buddhist time was Chaitya, a term applicable not only to buildings but also to sacred trees, holy spots, monumental stones and religious inscriptions as well, whereas Stupa was a structure usually resembling a grave mound which was erected generally, though not always, on sacred relics.

There is no evidence of the worship of any Buddha image in the early period of Buddhism, nor even in the time of Asoka. It came into existence at about the first century B.C.[9]

Along with the representation of the Buddha, images of previous Buddhas who had lived before Sakyamuni were also gradually introduced. Then came a new phase in the Buddhist religion through the rise of Mahayanism (the great vehicle) which is described as the northern school of Buddhism. Mahayanism, though it existed from before, came into prominence at about the first century A.D. It preached the worship of Bodhisat was like Avalokiteswar and Manjusri, and introduced the images of five Dhyany Buddhas together with their consorts (who were described as Taras), and also a host of other gods. Both the Chinese pilgrims (Hieun T' Sang and Fa Hien) saw a large number of images of Bodhisatwas and Buddhist gods in various parts of India. It appears that side by side with the rise of Mahayanism

8 Kern, *Manual of Buddhism*, p. 91.
9 Kern, *Manual of Buddhism*, p. 95.

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 हिताथयि ब्रह्मणो 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.

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.—Dharmasalas, 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.

however, re-enacted the provisions of the earlier laws in a modified form. Under Part II of the Mortmain and Charitable Uses Act of 1888, an assurance of land (including tenements, hereditaments, corporeal and incorporeal or of whatever nature and any estate and interest in land) and of personal estate to be laid out in the purchase of lands, for any charitable purpose whatever, is void—unless the prescribed requirements are complied with. These requirements are that the assurance must take effect in possession for the charitable use intended, immediately on the making of it, and must be without any power of revocation, reservation, condition or provision for the benefit of the assurer.[4] As these requirements could not be satisfied when the disposition was by will, the result was that property of the kinds which came within the purview of the Act could not be given to charitable purpose by any testamentary document, subject to certain exceptions which were provided by the Act itself. The later Mortmain and Charitable Uses Act, 1891, expressly provides that land may be assured by will upon charitable trusts, but requires the land so assured to be sold within a year from the testator's death or such extended period as the court or the charity commissioners may allow.[5] The Mortmain Act have no application in India.[6]

3.2A. Restrictions in Hindu law.—So far as the Hindus are concerned, there is no restriction on their powers to create a charitable or religious trust by a will. Section 118 of the Indian Succession Act, 1925, which forbids a person having a nephew or niece or any nearer relation to bequeath any property, to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place as mentioned in the section, has no application to Hindus.

II. FORMALITIES—DEDICATION

3.3. Provision in the Trusts Act.—Section 5 of the Indian Trusts Act lays down that no trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered; or by the will of the author of the trust or the trustee. No trust in relation to immovable property is valid unless declared as aforesaid or unless the ownership of the property is transferred to the trustee. The Act is applicable to Hindus, but section 1 of the Act expressly saves from its operation all religious and charitable

4 See section 5, sub-sections (1), (2) and (3).
5 See Tudor on *Charities*, 5th Ed., pages 88, 89.
6 *Mayor of Lyons* v *East India Company*, IMIA 175, explained in *Sarkies* v *Prosonnamoye*, (1879) ILR 6 Cal 794.

and not as a deity in the Vedas, though many of the legendary stories attributed to him in the Purans are traceable to similar legends associated with *Indra* in the Vedic literature.

It is not necessary for our present purpose to pursue these discussions any further. Though the Puranas are by no means uniform, the legends associated with the various gods are fairly well known and have been the basis of a considerable mass of poetic literature in later times. One cardinal principle underlying idol worship you would always bear in mind— and this has some bearing on the law relating to gift of property to idols—that whichever god the devotee might choose for purposes of worship and whatever image he might set up and consecrate with that object, the image represents the Supreme God and none elxe. There is no superiority or inferiority amongst the different gods. Siva, Vishnu, Ganapati or Surya is extolled, each in its turn as the creator, preserver and supreme lord of the universe. The image simply gives a name and form to the formless God and the orthodox Hindu idea is that conception of form is only for the benefit of the worshipper and nothing else.[46]

II. TEMPLES

4.4. Building and consecration of temples.—Along with the establishment of idol worship, in Hindu religion, elaborate rites and ceremonies, it seems, were introduced by Brahminical writers in regard to building of temples and consecration and purification of idols. I will touch these matters very briefly. A temple is the house of the deity and many of the rules of construction of a temple are practically the same as are prescribed for construction of a dwelling house, the additional rules being laid down to ensure greater sanctity of the structure that is meant for the abode of a deity. One who wants to build a temple has got to select the proper time for building with reference to astrological calculations. There are detailed rules relating to selection of the site which include examination of the nature and colour of the soil, its odour, taste, solidity, etc. After the site is selected, it is ploughed up and seeds are sown in it. As soon as the seeds germinate, the crop is allowed to be grazed over by cows. The cardinal points are then to be ascertained for giving this structure an auspicious aspect and there are rules to be observed regarding the materials to be used and the location of doors, windows, etc. The important religious ceremony is the *Vastu Jaga* in honour of *Vstu Purusha* or *Vastu Debata* who presides over dwelling house, with oblations of milk, rice and sugar. This *Vastu Jaga* is a very ancient ceremony which dates from the Grihya Sutras of Aswalayan and Goville. The Puranas, however, contain a mythological

46 Vide observations of Chatterjee, J. in *Bhupati* v *Ramlal,* ILR 37 Cal 128.

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.